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WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Inside This Issue . . .

Citizen Suit May Proceed Against Alabama Coal Mines Under the Clean Water Act

***Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986 (11th Cir. 2008).**

Timothy M. Mulvaney, J.D.

In a case of statutory construction, the United States Court of Appeals for the Eleventh Circuit held that an environmental non-profit organization is entitled to proceed with a lawsuit against an Alabama coal mine operator under the Clean Water Act where the organization met the Act's notice and filing requirements.

Background

The Federal Water Pollution Control Act (also known the "Clean Water Act")[1] seeks to assure the cleanliness of the watercourses of the United States. The National Pollutant Discharge Elimination System ("NPDES") under the Act provides that an entity wishing to discharge pollutants into a U.S. watercourse must obtain an NPDES permit from the federal government's Environmental Protection Agency ("EPA") to do so.

The Clean Water Act also authorizes states to maintain their owner NPDES permitting systems, providing they meet the strictures of the Act and are approved by the EPA. The State of Alabama administers its own EPA-approved NPDES permit system.

Enforcement authority under the Clean Water Act is shared among the EPA, the states, and private citizens. The citizen suit provisions of the act are aimed at assisting governmental agencies in pollution control, and thus the Act generally precludes citizen suits where the government already has commenced and is diligently prosecuting a civil, criminal or administrative enforcement action against an alleged polluter.[2] Therefore, violation of an EPA-issued or state-issued NPDES permit can be subject to a civil action brought by a citizen only absent federal or state enforcement.

Procedural History

Cherokee Mining, LLC ("Cherokee"), owns and operates two surface coal mines in Alabama. On May 16, 2007, Black Warrior Riverkeeper, Inc. ("Black Warrior"), a non-profit organization supporting the enforcement of environ-

mental regulations to protect the Black Warrior River, notified Cherokee of its intent to file a citizen suit, alleging that Cherokee had violated the Clean Water Act and Alabama state law by discharging pollutants in violation of the limitations set forth in a NPDES permit issued by the State of Alabama.[3]

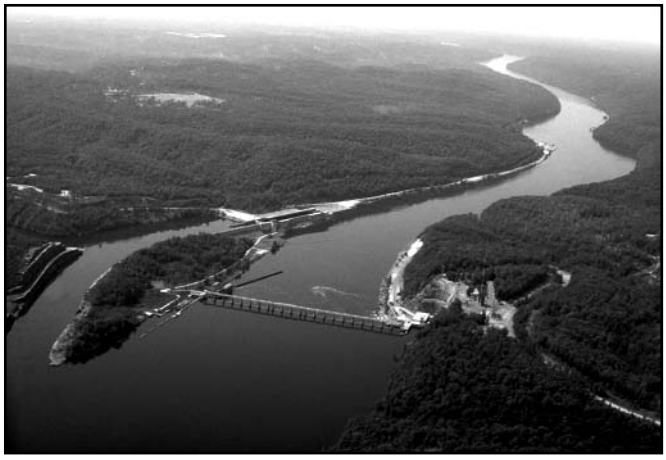
The State of Alabama instituted administrative enforcement proceedings on July 20, 2007.[4] Black Warrior ultimately filed its suit in the United States District Court for the Northern District of Alabama on July 27, 2007.[5]

Cherokee settled the matter with the State of Alabama by agreeing to pay a $15,000 fine for discharge activities at its mines.[6] Cherokee then filed a motion to dismiss Black Warrior's citizen suit, alleging that the court lacked subject matter jurisdiction. Subject matter jurisdiction refers to the authority of a particular court to hear a certain dispute.

Cherokee asserted that § 1319(g)(6)(A)(ii) of the Act precludes citizen civil penalty suits where a state already is engaged in an enforcement suit for an alleged violation of a NPDES permit. Cherokee argued that § 1319(g)(6)(B)(ii), which lifts the preclusion of citizen suit where notice of intent to sue is provided prior to the institution of governmental enforcement, applies only to federal-initiated, not state-initiated, administrative actions.

Black Warrior opposed that motion, contending that § 1319(g)(6)(B)(ii) lifts the preclusion of citizen suit where notice of intent to sue is provided prior to the institution of any governmental enforcement action and the timing requirements for filing suit are met.

Aerial photograph of Bankhead Lock and Dam on the Black Warrior River courtesy of the U.S. Army Corps of Engineers.



The District Court sided with Black Warrior in denying Cherokee's motion to dismiss, and Cherokee filed this interlocutory appeal of that ruling. The appeal required the court to analyze Congress's desires to recognize citizen suits as an important enforcement tool in light of finite government resources but also to avoid duplicate prosecutions of alleged polluters.

Appellate Court Affirms District Court's Denial of Motion to Dismiss

The Court of Appeals for the Eleventh Circuit affirmed the denial of Cherokee's motion to dismiss. The court described Cherokee's narrow reading of the limitation on citizen suits as "an extremely cramped and narrow reading of the ordinary and plain meaning of the relevant language."[7]

The appellate panel upheld the District Court's interpretation of the Clean Water Act, finding that the limitations against a citizen suit set forth in § 1319(g)(6)(A) are inapplicable so long as Black Warrior met the notice and filing requirements of § 1319(g)(6)(B)(ii).

The court concluded that the bar against citizen suits does not apply where *either* the federal government or a state initiated its enforcement action prior to plaintiff's filing so long as the plaintiff provided notice of its intent to sue prior to the state's action and ultimately did file the suit within the 120 day time period following that notice as mandated by the Act.

Endnotes:

1. 33 U.S.C.S. § 1251 et seq. (West 2008).
2. Federal Water Pollution Control Act Amendments § 505(b)(1)(B), 86 Stat. at 888-89; 33 U.S.C. § 1365(b)(1)(B); Water Quality Act § 314, 101 Stat. at 46-49; 33 U.S.C. § 1319(g).
3. Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC, 548 F.3d 986, 989 (11th Cir. 2008).
4. *Id.* at 989.
5. *Id.*
6. *Id.*
7. *Id.* at 991.

Fifth Circuit Affirms Limitation of Liability in Oil Platform Collision

***In re Omega Protein, Inc.*, 548 F.3d 361 (5th Cir. 2008).**

Jonathan Proctor, 2010 J.D. Candidate, University of Mississippi School of Law

The U.S. Court of Appeals for the Fifth Circuit held that failure to properly train a captain on how to use electronic obstruction warning equipment did not necessarily make the vessel owner fully liable for the collision with another ship. Where there is insufficient evidence that the failure to train the captain caused the collision, the appellate court found that the vessel owner is not prevented from limiting its liability.

Background

In the dark early morning hours of October 4, 2004, a 396-ton vessel, *Gulf Shore*, owned by Omega Protein, Inc. ("Omega"), and captained by Luther Stewart, sailed towards the fishing grounds of Freshwater Bayou, Louisiana. The ship's chief engineer alerted Stewart to a malfunction in the refrigeration system. After a visual scan of the horizon revealed no obstructions, Stewart turned on the wheelhouse lights to examine the problem.

Ten to fifteen minutes later, while Stewart was on a mobile phone requesting a replacement part for the refrigeration system, the *Gulf Shore* collided with a stationary oil platform owned by Samson Contour Energy E & P LLC ("Samson"). An experienced fishing pilot and captain, Stewart had never been involved in an accident during his twenty year tenure at sea, prior to striking the Samson platform.[1] Litigation ensued with respect to liability for the damages incurred as a result of the collision.

The Trial Court

Subsequent observations by members of the *Gulf Shore* and another vessel owned by Omega indicated that the lights on the Samson platform were not functioning properly.[2] At trial, despite Samson witnesses testifying that the platform lights were operating at the time of the accident, the court determined that this evidence satisfactorily proved Samson's violation of the law requiring fixed structures to have operable lights.[3] In light of this finding, Samson bore the burden of proving that Omega acted negligently in order to alleviate or mitigate its own liability.

Samson alleged that, by turning on the wheelhouse lights to inspect the malfunctioning refrigeration part, Stewart created what is known as a "mirror effect," greatly decreasing his ability to detect unlit objects due to the reflection on the radar display. In addition, Samson contended that Stewart's speaking on a mobile phone at the time of the accident amounted to a failure to maintain a proper lookout. Additionally, according to Samson, Stewart did not use all available means to detect obstacles in that he failed to utilize the ship's navigational radar.

Omega sought to limit its liability for the collision by proving that it had no knowledge that these errors would occur when it hired Stewart to captain the *Gulf Shore*.

Focusing on Stewart's accident-free work history and his possession of all necessary captaincy licenses, the trial court found that Omega acted reasonably in hiring Stewart, thereby limiting Omega's liability. The court ultimately found the parties equally liable.

Proceedings before the Fifth Circuit Court of Appeals

On appeal, Samson challenged the trial court's holding regarding apportionment of fault and Omega's ability to limit its liability. To overturn the trial court's decision, the appellate court must find clear error in the ruling. The clear error standard limits the appellate court's discretion with regards to questions of fact. The trial court's decision may only be overturned if it interpreted the law incorrectly or if the court's factual findings were so implausible they were clearly erroneous.

Liability may be equally divided "when the parties are equally at fault or when it is not possible to fairly measure the comparative degree of their fault."[4] Vessel owners may reduce their liability by proving that they had no knowledge of the ship's un-seaworthiness, or were not negligently complicit in actions of the captain resulting in a maritime accident.[5] A ship may be found unseaworthy when its physical condition is unsafe or if the owner should have discovered its captain was incapable of effectively operating the vessel.

Therefore, if Omega exercised due diligence in maintaining the vessel and in selecting its captain, the company could limit its liability. Samson contended on appeal that the *Gulf Shore* was unseaworthy due to (1) Omega's failure to properly train Stewart on the radar's anti-collision warning system, and (2) the system's outdated electronic navigational charts, on which the Samson platform was absent.

Conclusion on Appeal

The Fifth Circuit rejected Samson's claim that the equal apportionment of fault was clearly erroneous. Based on the statutory violations of the parties and their collective failures in avoiding the collision, the appellate court held that the district court plausibly found that both Samson and Omega contributed equally to the accident. The appellate court noted that Samson did not offer an alternate allocation of damages, instead merely insisting that Omega bore sole responsibility.

Though Omega neglected to train Stewart on the ship's radar system, the Fifth Circuit upheld the trial court's finding that there were so many offshore rigs in this portion of the Gulf of Mexico that the captain would not have received an effective warning of the obstruction because the radar system's collision alarm would have been alerting too often. Therefore, Omega's failure to train Stewart on the radar system did not make Omega fully liable for the collision.

Additionally, the Fifth Circuit found that the district court plausibly determined that any charts referenced by Stewart would have included the platform. Samson's contentions offered no reason to find that the district court's ruling on this issue amounted to clear error.

Furthermore, the Fifth Circuit affirmed the trial court ruling that Omega acted reasonably when it hired Stewart, an experienced captain with no prior accidents. The court ruled that the collision was partially due to a mistake of navigation by Stewart and that, since the vessel was not rendered unseaworthy, Omega was entitled to limit its liability.

Endnotes:

1. *In re* Omega Protein, Inc., 548 F.3d 361 (5th Cir. 2008).
2. *Id.* at 366.
3. 33 C.F.R. §§ 67.01-1, 67.05-1 (2008).
4. *See In re Omega Protein, Inc.,* 548 F3d at 370 (citing United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975)).
5. *See In re Omega Protein, Inc.,* 548 F3d at 371.

Photograph of oil platform in the Gulf of Mexico courtesy of ©Wolcott Henry 2005/Marine Photobank.

Mississippi Tort Claims Act Does Not Supercede Emergency Management Act

***Parsons v. Miss. State Port Auth. at Gulfport,* 2008 Miss. App. LEXIS 705 (Miss. Ct. App. Nov. 25, 2008).**

Juliane D. Morris, J.D. December 2008, University of Mississippi School of Law

A Mississippi State Court of Appeals declared that the Mississippi Tort Claims Act does not supersede the Mississippi Emergency Management Law, finding that the statutes can be read in conjunction with one another.

Background

Arthur and Angela Parsons ("Plaintiffs") were among the many who suffered property damage as a result of Hurricane Katrina's landfall along the Gulf Coast in August of 2005. Plaintiffs alleged that the forces of Katrina carried a shipping cargo container onto their property, causing the total destruction of their house and other personal property.[1]

Plaintiffs brought suit against the Mississippi Port Authority ("MPA") and the Mississippi Development Authority ("MDA"), arguing that both entities were negligent in the preparation and performance of their duties before and during the storm.[2] Specifically, the complaint alleged that the MPA and the MDA failed to properly secure or remove any potential flying debris from the Port of Gulfport.[3]

The MPA and MDA filed a motion to dismiss the complaint, alleging that they were immune from negligence claims involving emergency preparedness, response, recovery and mitigation under the Mississippi Emergency Management Law.[4] The Plaintiffs countered that the more recent Mississippi Tort Claims Act superseded the Emergency Management Law, and provides waiver of immunity.[5]

The trial court granted the defendants' motion, concluding that the MPA and MDA were immune from suit under the Emergency Management Law. Plaintiffs brought this appeal.

On appeal, Plaintiffs argued that the Tort Claims Act is the exclusive avenue for pursuing claims against the state or any of its agencies.[6] As both parties agree that the MPA and MDA are governmental agencies, Plaintiffs asserted that the agencies cannot claim immunity under the Emergency Management Law.[7]

The Tort Claims Act reads, "Notwithstanding. . . the provisions of any other law to the contrary, the immunity of the state and its political subdivisions . . . is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions."[8] Plaintiffs claimed that the fact that the Tort Claims Act, enacted in 1984 and amended in 1992, was passed after the Emergency Management Law, enacted in 1952 with a most recent effective date of May 9, 1980, supported their argument that the legislature intended for the Tort Claims Act to supersede the Emergency Management Law.[9]

The appeal argued that the court should give effect to the "notwithstanding clause" quoted above, claiming that if the legislature had desired, it could have included language in the Tort Claims Act excluding the waiver of immunity for emergency activities.[10] The appellants relied upon the familiar rule of statutory interpretation whereby later expressions of the legislature, which here waives immunity after the specified dates, must prevail over the language of an older law, which here allows the state to claim immunity under certain emergency circumstances.[11]

Appellate Panel Upholds Dismissal

The appellate court upheld the dismissal of Plaintiffs' suit, declaring that the best evidence of the legislature's intent is the actual text of the statutes.[12] The court reiterated a principle recognized by

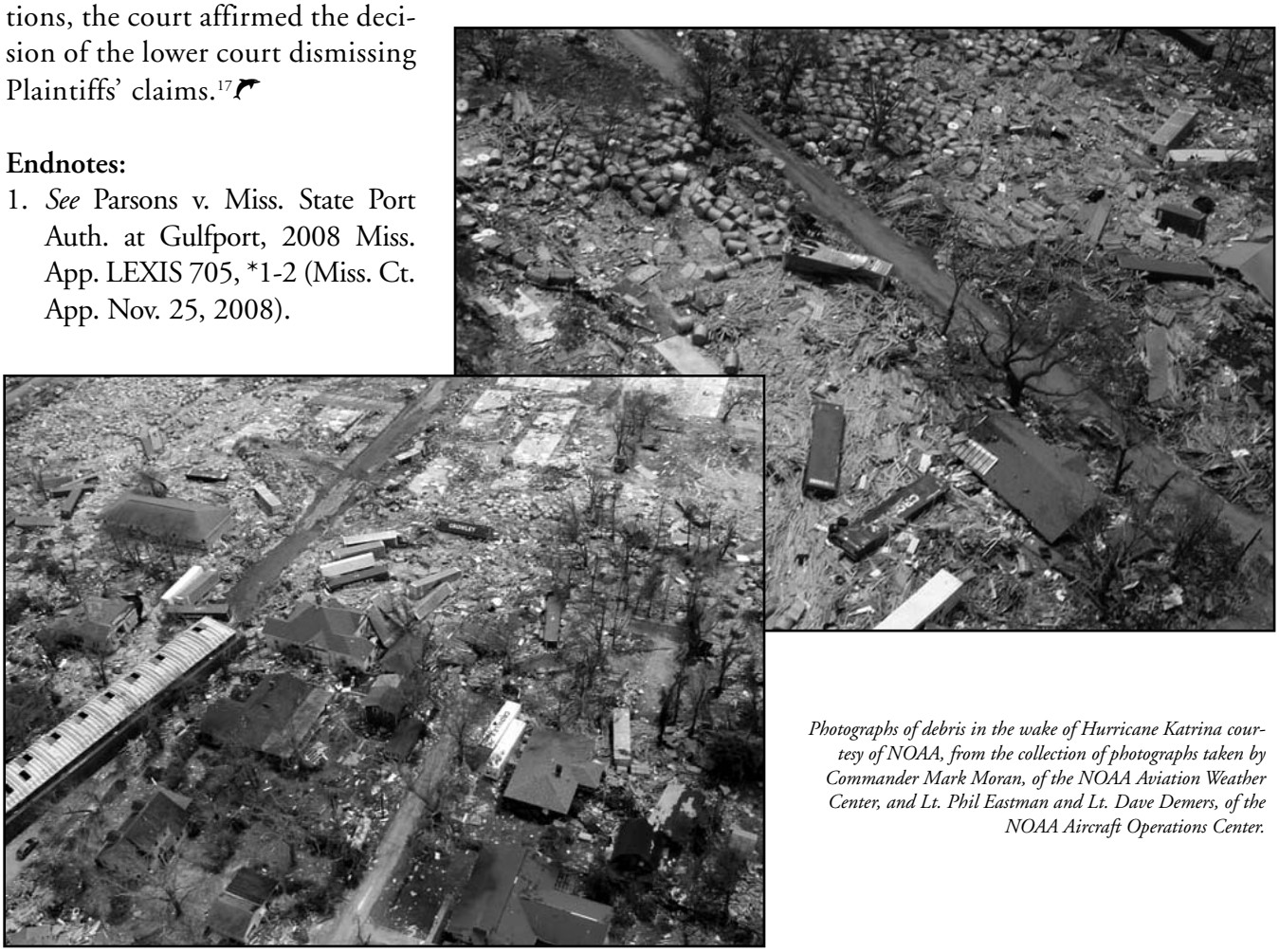
Mississippi's Supreme Court, which asserts that two statutes should be read in harmony with each other, if possible, so as to give effect to each.[13]

While the court agreed with Plaintiffs that the Tort Claims Act is the sole remedy against the state and its agencies, it stated that the act is inapplicable in this instance because § 11-49-9(1)(f) of the Act exempts from liability those claims that are barred by other provisions of law.[14] In addition to the "notwithstanding" clause cited by Plaintiffs, the Act states, "A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . which is limited or barred by the provisions of any other law."[15] According to the court, this section of the Tort Claims Act "clearly allows other immunities to remain in effect after its passage.[16]

Since § 33-15-21 of the Emergency Management Law provides immunity to the state and its agencies for liability occurring during emergency situations, the court affirmed the decision of the lower court dismissing Plaintiffs' claims.[17]

Endnotes:

1. *See* Parsons v. Miss. State Port Auth. at Gulfport, 2008 Miss. App. LEXIS 705, *1-2 (Miss. Ct. App. Nov. 25, 2008).
2. *Id.* at *2.
3. *Id.*
4. *Id.* at *2-3.
5. *Id.* at *3.
6. *Id.* at *4.
7. *Id.*
8. *Id.* at *6 (citing Miss. Code Ann. § 33-15-21(a) (Rev. 2002)).
9. *See Parsons*, 2008 Miss. App. LEXIS 705 at *6.
10. *Id.* at *9-10.
11. *Id.*
12. *Id.* at *10 (citing Pegram v. Bailey, 708 So. 2d 1307, 1314 (Miss. 1997)).
13. *See Parsons,* 2008 Miss. App. LEXIS 705 at *11 (citing Roberts v. Mississippi Republican Party State Executive Comm., 465 So. 2d 1050, 1052 (Miss. 1985)).
14. *See Parsons,* 2008 Miss. App. LEXIS 705 at *11.
15. *Id.* at *11.
16. *Id.* at *10.
17. *Id.* at *10-12.



Photographs of debris in the wake of Hurricane Katrina courtesy of NOAA, from the collection of photographs taken by Commander Mark Moran, of the NOAA Aviation Weather Center, and Lt. Phil Eastman and Lt. Dave Demers, of the NOAA Aircraft Operations Center.

Florida Court Eases Standing Requirements for Development Challenges

***Save the Homosassa River Alliance, Inc. v. Citrus County*, 2008 Fla. App. LEXIS 16449 (Fla. Dist. Ct. App. 5th Dist. Oct. 24, 2008).**

Moses R. DeWitt, 2010 J.D. Candidate, Florida State University School of Law

Florida's Fifth District Court of Appeals held that plaintiffs who have legitimate interest in the use and preservation of a specific property have standing to challenge development projects on that property, even when their interest does not differ from that of the community as a whole.

Background

The Homosassa River is a pristine waterway and unique habitat to both fresh and saltwater marine life. It also serves as a rehabilitation center and refuge for endangered manatees.[1] The Citrus County's Board of County commissioners ("Citrus County") granted permission to a Florida resort ("Resort") along the Homosassa River to redevelop and significantly expand its facilities. Currently, the resort consists of two buildings containing fifteen residential condominium units. The proposed expansion approved by Citrus County includes the development of four new four-story buildings containing 87 condominium dwelling units, retail space, amenities, and parking areas.

Photograph of the Homosassa River courtesy of the USGS Sirenia Project.

The Save the Homosassa River Alliance, Inc., a non-profit organization "committed to the preservation and conservation of environmentally sensitive lands and the wildlife in and around the Homosassa River and in Old Homosassa, Florida," and three local property owners (collectively, "Plaintiffs") filed suit against Citrus County.[2] They alleged that approval of the proposed expansion is inconsistent with the county's comprehensive land use plan, a statutorily mandated guide prepared by the local planning commission to control and direct the use and development of property. The Plaintiffs allege that the redevelopment plan exceeds the maximum density per twenty acres established by Citrus County's adopted plan.

Trial Court Interprets Standing Requirements Narrowly

Prior to the enactment of Florida Statute §163.3215 in 1985, "[A] party had to possess a legally recognized right that would be adversely affected by the decision or suffer special damages different in kind from that suffered by the community as a whole" to have standing to challenge development inconsistent with comprehensive plans.[3]

The Florida Legislature enacted §163.3215 to ensure standing for any person "that will suffer an adverse effect to an interest [that is] protected or furthered by the local government comprehensive plan."[4] Citrus County interpreted this statute to mean that the Plaintiffs directly must suffer an adverse effect from the redevelopment, or must demonstrate that the redevelopment will impact their interests to a greater degree than the community as a whole. Plaintiffs contended that Citrus County's narrow interpretation was outside the express meaning of the statute.

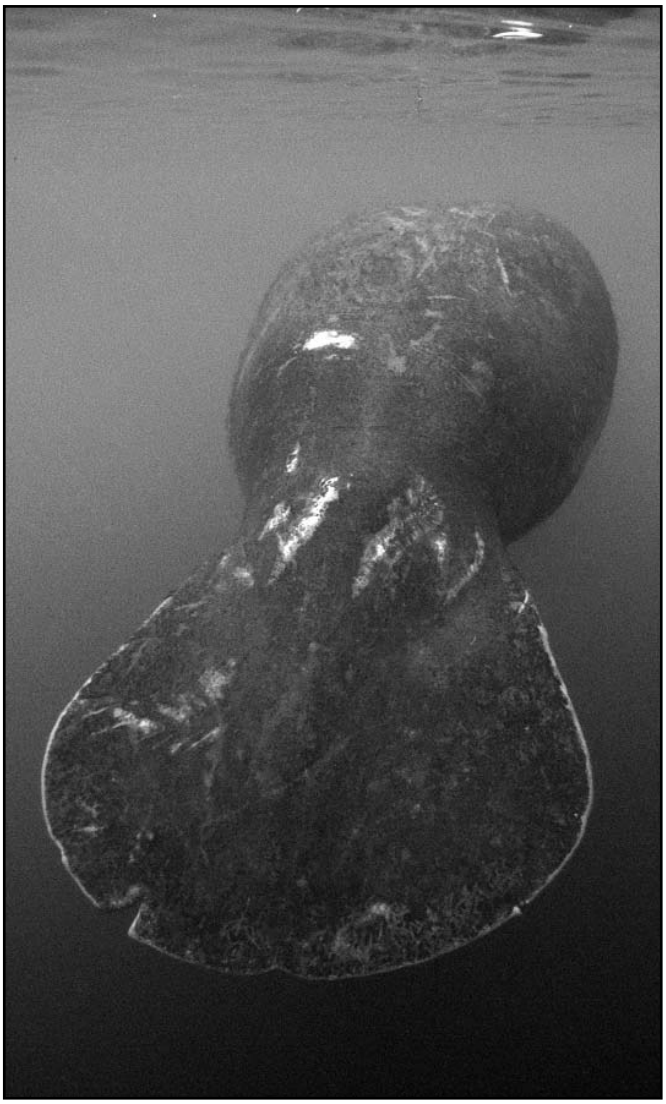
The trial court sided with Citrus County in holding that the Plaintiffs failed to establish standing under §163.3215. The court interpreted the statute to

mean that the Plaintiffs must sufficiently allege that their interests are adversely affected by the project in a way not experienced by the general population of the community.

The Appellate Court's Reversal

Florida's Fifth District Court of Appeal reversed the trial court decision by finding that §163.3215 speaks to "the quality of the interest of the person seeking standing" and does not require a unique harm not experienced by the general population.[5] The court asserted that the statute is designed to expand the class of individuals who can achieve standing, and interpreting the statute in a manner that requires a plaintiff to show harm different from that of the general population is inconsistent with the statute's purpose.[6] The court stated that a "unique harm" limitation "would make it impossible in most cases to establish standing and would leave counties free to ignore the [comprehensive] plan because each violation of the plan in isolation usually does not uniquely harm the individual plaintiff."[7]

Photograph of manatee on the Homosassa River courtesy of Jeff Haines/Marine Photobank.



In a 2-1 decision surely welcomed by a wide variety of environmental organizations, the majority concluded that Plaintiffs established a legitimate interest in the use and preservation of the Homosassa River that is of the kind contemplated by the statute.[8] The dissenting jurist suggested that such a broad view of the standing doctrine will allow citizen organizations to "vindicate their own value preferences through the judicial process," instead of through the legislative process.[9]

While the court interpreted the standing statue broadly, litigants still face significant challenges on the merits, as regulatory decisions by elected county boards often need not be strictly consistent with plans recommended by planning commissions.

Endnotes:

1. *See* Southwest Florida Water Management District, Watershed Excursion of the Spring Coast, Homosassa River, http://www.swfwmd.state.fl.us/ - education/interactive/springscoast/2.shtml (last visited Dec. 22, 2008).
2. Save the Homosassa River Alliance, Inc. v. Citrus County, 2008 Fla. App. LEXIS 16449 (Fla. Dist. Ct. App. 5th Dist. Oct. 24, 2008).
3. *Id.* at *15 (citing Citizens Growth Mgmt. Coal., Inc. v. City of W. Palm Beach, 450 So. 2d 204, 206-08 (Fla. 1984); Putnam County Envtl. Council, Inc. v. Bd. of County Comm'rs, 757 So. 2d 590, 592-93 (Fla. Dist. Ct. App. 5th Dist. 2000)).
4. FLA. STAT. §163.3215 (2008).
5. *Save the Homosassa River Alliance, Inc.,* 2008 Fla. App. LEXIS 16449, at *18.
6. *Id.* at *16 (internal citations omitted).
7. *Id.* at *28.
8. *Id.*
9. *Id.* at *35-36 (Pleus, J., dissenting) (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).

Florida Court Addresses Admiralty Jurisdiction and Choice of Law in Suit Involving Death on High Seas

***Smith v. Carnival Corp.*, 2008 U.S. Dist. LEXIS 87149 (S.D. Fla. Oct. 27, 2008).**

Juliane D. Morris, J.D. December 2008, University of Mississippi School of Law
Timothy M. Mulvaney, J.D.

The United States District Court for the Southern District of Florida found that a complaint supported U.S. admiralty jurisdiction in a case involving a fatality on a snorkeling excursion because the claims satisfied tests assessing the location of the incident and the connections of the Defendant's operatons to marine activity. Further, the court denied a motion to dismiss claims of misrepresentation and negligence asserted by the decedent's children.

Background

In December 2006, Lois Gales and her family went on a cruise operated by Carnival Cruise Lines ("Carnival"). On the vacation, the Gales family attended a conference hosted by Carnival, during which Carnival presented the Gales with materials describing a snorkeling excursion operated by Frank's Watersports Ltd. ("FWS"). According to a wrongful death and related claims suit filed by Lois Gales' children ("Plaintiffs") against Carnival and FWS (collectively, "Defendants"), Carnival indicated in these materials that it sold shore excursions in coordination with reputable tour operators.[1] Plaintiffs also alleged that Carnival promoted the FWS excursion as a safe activity on its website.[2]

On the day of the Gales' excursion with FWS, the complaint states that the weather proved ominous, and many other operators cancelled their snorkeling tours. FWS, however, decided to proceed with the planned excursion.

Plaintiffs contend that FWS failed to provide any safety or snorkeling instructions. Further, they allege that FWS incorrectly tied vests around the Gales and other guests' waists, instead of fitting them properly around the necks. Once in the water, Lois Gales floated a significant distance away from the other snorkelers. Plaintiffs assert that when FWS realized Gales' predicament, they attempted to drive the tour boat to her rescue, but were unable to start the motor. Plaintiffs further assert that FWS could not call for assistance because of a malfunction with the boat's radio.[3]

The complaint states that one of Lois Gales' daughters managed to bring her mother back to the boat, where other guests assisted in unsuccessful attempts at resuscitation. The Plaintiffs alleged that the FWS crew did not assist with these efforts, nor did they have any equipment onboard to aid with the rescue and attempted resuscitation.[4]

The complaint included three counts conceivably within the bounds of the Death on the High Seas Act ("DOHSA"): misrepresentation, negligence, and un-seaworthiness. Further, the complaint sought other relief under general maritime law and the laws of the Cayman Islands.

The Defendants filed a motion to dismiss the complaint. The court first addressed whether it maintained admiralty jurisdiction and then examined choice of law.

Admiralty Jurisdiction

Although both parties agreed that admiralty law applied, the court has an independent duty to ensure that admiralty jurisdiction exists prior to applying admiralty law.[5] Two conditions are required to invoke federal admiralty jurisdiction over a tort claim, the first relating to the location of the incident and the second relating to the connection of the Defendant's operations to marine activity.

The court held that the location requirement is satisfied because the decedent drowned in navigable waters, and the alleged conduct of FWS and misrepresentations of Carnival also occurred on navigable waters.[6]

Further, the court found a sufficient connection to maritime activity because Carnival's cruise operations "epitomizes maritime commerce" and FWS's tours are closely related thereto.[7]

Choice of Law

The standard of review on such a motion "merely tests the sufficiency of the [counts in the] complaint; it does not decide the merits of the case."[8] The court examined the sufficiency of Plaintiffs' claims under the law of the Cayman Islands and those under the law of the U.S. separately.

Claims under Cayman Islands Law

Ordinarily, the court will apply federal admiralty law when the claims support admiralty jurisdiction. However, admiralty jurisdiction requires application of the admiralty choice of law rules where there is an issue as to whether U.S. or foreign law (here, that of the Cayman Islands) applies.[9]

The parties agree that DOHSA, a U.S. admiralty law, applies, at least in part, to the case. However, the parties did not address the choice of law in their respective briefs. Plaintiffs contend that they may supplement their DOHSA claims with additional claims under both U.S. general maritime law and the law of the Cayman Islands, while Defendants argue that DOHSA precludes any supplementary claims.

While the court did not rule on whether the law of the Cayman Islands applies, it noted that litigants generally may not supplement claims brought under U.S. law with foreign law claims.`[10] However, the court also noted that plaintiffs could allege the applicability of multiple sources of law at the pleading stage, in the form of alternative arguments.[11]

As the court did not yet rule on whether Cayman Islands law controls, it declared it "premature to dismiss Plaintiffs' claims for relief" under the laws of the Cayman Islands.[12]

Claims under United States Law

The court then addressed Plaintiffs four other claims under U.S. law, assuming, but not deciding, that U.S. admiralty law applied.

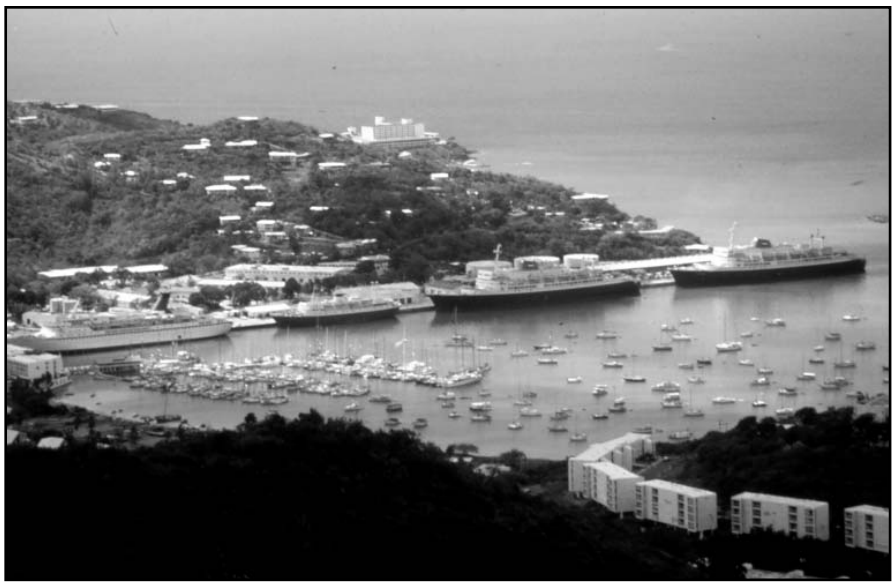
Plaintiffs presented the first three of these claims as DOHSA claims. DOHSA applies to wrongful death claims that are "caused by act, neglect, or default occurring on the high seas" beyond three nautical miles from the shore of the United States.[13]

First, the Plaintiffs based their misrepresentation claim on the fact that Carnival made representations concerning the safety of FWS's snorkel excursions.[14] According to the district court, although admiralty law does not provide a specific cause of action for misrepresentation, a court sitting in admiralty may look to state law in certain situations.[15]

Here, the court applied Florida state law to the Gales' misrepresentation claim. The court denied the Defendant's motion to dismiss this count by declaring that Plaintiffs had provided sufficient notice of the misrepresentation claim in accord with the elements required by Florida law.[16]

Second, the complaint alleged that FWS was negligent in causing the death of Lois Gales. While Defendants apparently conceded that a negligence count is proper under DOHSA, they sought dismissal based on the contention that the

Photograph of cruise ships courtesy of the U.S. Army Corps of Engineers.



complaint did not state the applicable standard of care.

The Court found that notice pleading does not require that the complaint allege the specific standard of care, provided that it notifies the defendant of the nature of the claim against him.[17] Therefore, the court denied the motion to dismiss on this count by finding that FWS is on general notice of the claims against them.

Third, Plaintiffs based their un-seaworthiness claim against FWS on the fact that the boat's motor was inoperable while Gales was drowning. The court dismissed this claim with prejudice because un-seaworthiness claims are only meant to protect cargo and seamen, not passengers.

Finally, the children of the decedent each brought personal claims under general maritime law for negligent infliction of emotional distress for their having witnessed the drowning of their mother due to the negligence of FWS. Although the court noted that DOHSA does not forbid such a claim (indeed, the court noted, a death is not even required to bring such a claim), the court stated that the complaint must sufficiently support the allegation.[18]

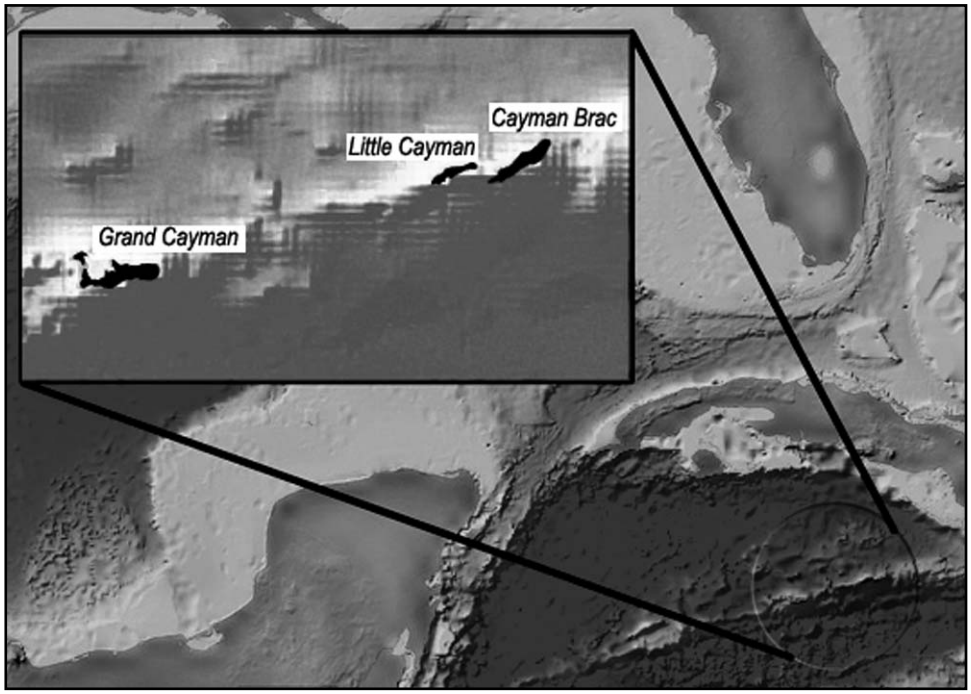
Here, the court rejected Plaintiffs' allegation that this count is governed by Florida law, which follows the minority rule that relative bystanders may recover under a negligent infliction of emotional distress theory. Rather, citing the need for uniformity in the application of general maritime law, the court declared the more restrictive "zone of danger" test applicable.[19]

The court found that the complaint did not allege the Gales children were within the zone of danger, which would enable them to seek recovery for their alleged emotional distress.[20] Therefore, the court dismissed the emotional distress claim, though it did so without prejudice, allowing the Plaintiffs the opportunity to re-file their complaint in an effort to fulfill the zone of danger test requirements before the matter proceeds.

Endnotes:

1. Smith v. Carnival Corp., 2008 U.S. Dist. LEXIS 87149 (S.D. Fla. Oct. 27, 2008).
2. *Id.* at *2.
3. *Id.* at *3.
4. *Id.*
5. *Id.* at *6-7.
6. *Id.* at *7-8.
7. *Id.* at *8.
8. *Id.* at *5.
9. *Id.*
10. *Id.* at *13-14.
11. *Id.* at *15.
12. *Id.*
13. *Id.*
14. *Id.* at *19.
15. *Id.* at *19-20.
16. *Id.* at *21.
17. *Id.* at *23.
18. *Id.* at *26.
19. *Id.* at *27-31.
20. *Id.* at *31.

Aerial photograph showing the Cayman Islands and the southeastern tip of the United States courtesy of NOAA.



Court Grants Standing to File Suit in Light of Flood-Zone Surveyor's Erroneous Decision

***Paul v. Landsafe Flood Determination, Inc.*, 2008 U.S. App. LEXIS 25297 (5th Cir. Dec. 5, 2008).**

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The United States Court of Appeals for the Fifth Circuit held that a homeowner has standing to file suit against a land surveyor who erroneously determined that the homeowner's property was not located in a flood zone because the homeowner is statutorily mandated by the National Flood Insurance Act to rely upon that determination when purchasing flood insurance.

Background

Mary Dobsa financed her home in Biloxi, Mississippi, in which she lived with Neil Paul, through Countrywide Home Loans ("Countrywide"). Countrywide is required to abide by the National Flood Insurance Act because the Federal Deposit Insurance Corporation provides backing to Countrywide.

Photograph courtesy of NOAA.

Countrywide selected Landsafe Flood Determination, Inc. ("Landsafe"), to survey Dobsa's home, and Landsafe determined the home was not located in a flood zone. Dobsa relied on these findings when electing not to purchase flood insurance through the National Flood Insurance Program.

On August 29, 2005, Hurricane Katrina struck the Gulf Coast and caused significant flood damage to Dobsa's home. It was then learned that Dobsa's home actually was located in a flood-hazard area.[1]

Litigation Ensues

The Federal Emergency Management Agency is required to designate flood-prone areas.[2] The National Flood Insurance Act of 1968 requires that a federally regulated lender, such as Countrywide, making a loan secured by improved real estate in a designated flood-prone area, must require the purchase of insurance through the National Flood Insurance Program as a condition of making that loan.[3] Under the Act, the lending institution is responsible for determining whether a particular piece of property is located within a designated flood prone area.[4]

The lender may designate this responsibility to a third party, provided the information's accuracy is guaranteed.[5] Dobsa and Paul ("Plaintiffs") filed an action against Landsafe in the United States Southern District Court of Mississippi, alleging that

Landsafe negligently surveyed Dobsa's home and erroneously determined that it was not located in a flood zone.

In a motion for summary judgment, Landsafe asserted that there was no genuine issue as to any material fact, whereby they are entitled to judgment as a matter of law because they were not in contractual privity with the Plaintiffs. Landsafe asserted that Countrywide, not Plaintiffs, hired Landsafe to survey the property, and thus, according to the motion, Plaintiffs have no standing to file suit against Landsafe.[6]

The District Court granted Landsafe's motion, and Plaintiffs here contested that ruling before the United States Court of Appeals for the Fifth Circuit. The Circuit Court must reverse the District Court's summary judgment ruling if it is determined that a reasonable jury could return a verdict in favor of the Plaintiffs.[7]

The Appellate Court's Ruling

The court explained that the National Flood Insurance Act does not create a private right of action against the third-party surveyor.[8] Further, the Act does not create a standard for a state negligence *per se* suit.[9]

However, Dobsa asserts that her claim arises solely under Mississippi tort law. Landsafe alleged that Dobsa's negligence claims must fail because Mississippi law does not impose a duty on Landsafe to provide Dobsa with a correct determination. Rather, Landsafe claims that its only duty was to provide a flood-area determination to Countrywide, who had selected them to perform the survey.[10]

The court declared that where there is no direct state precedent, a federal court must make its "best determination of what the state's highest court would decide."[11]

The Fifth Circuit cited to the case of *Touche Ross & Co. v. Commercial Union Ins. Co.*, where the Mississippi Supreme Court held that "an independent auditor is liable to reasonable foreseeable users of the audit… who…detrimentally rely…[on the audit] [and] suffer a loss proximately caused by the auditor's negligence."[12] In *Hosford v. McKissack*, the Court clarified *Touche Ross* in holding that liability is "'to reasonably foreseeable users,' not just to those who request the work."[13]

In light of the decision in *Hosford*, the Fifth Circuit declared here that the proper inquiry did not surround privity of contract but rather the broad reach of the term "foreseeable users" under the law of Mississippi. In defining "foreseeable users," Mississippi law departs from the majority view, espoused by the Louisiana Supreme Court opinion cited by Landsafe that affords standing only to a limited group of persons for whose benefit a given third-party determination was intended.[14]

. . . statutorily-mandated purchasers . . . are foreseeable recipients of notice as to whether or not a flood hazard is present under Mississippi Law.

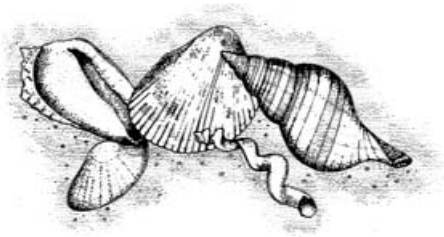
Here, the Fifth Circuit concluded that statutorily-mandated purchasers such as Dobsa are foreseeable recipients of notice as to whether or not a flood hazard is present under Mississippi law. Accordingly, the court reversed the issuance of summary judgment to Landsafe by holding that there is a genuine issue of material fact as to whether Plaintiffs justifiably and detrimentally relied upon the erroneous flood-zone determination, whereby Plaintiffs have standing to pursue this cause of action against Landsafe in the trial court.

Among other issues for the trial court to address on remand is the validity and applicability of a disclaimer clause in the flood-zone determination that seeks to limit the land surveyor's liability.

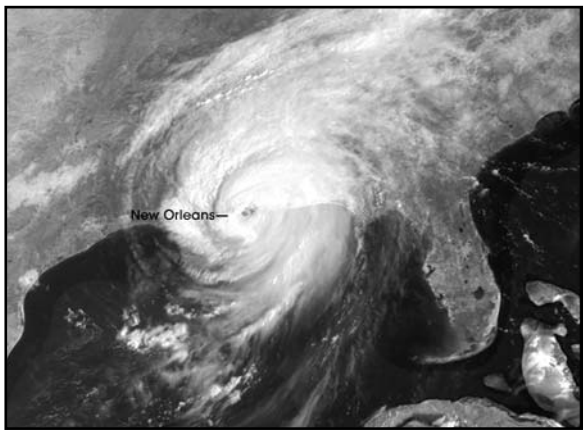
Endnotes:

1. Paul v. Landsafe Flood Determination, Inc., 2008 U.S. App. LEXIS 25297 (5th Cir. Miss. Dec. 2, 2008).
2. *See* 42 U.S.C. § 4101(a).
3. *Id.* at § 4012a(b)1.
4. *Id.* at § 4104b(d).
5. *Id.*
6. *Paul,* 2008 U.S. App. LEXIS 25297, at *3 (citing Fed. R. Civ. P. 56(c)).
7. *Paul,* 2008 U.S. App. LEXIS 25297, at *3 (citing Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395, 399 (5th Cir. 2008)).
8. *Paul,* 2008 U.S. App. LEXIS 25297, at *5 (citing Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F2d 152, 161 (5th Cir. 1981)).
9. *Paul,* 2008 U.S. App. LEXIS 25297, at *11.
10. *Id.* at *10-11.
11. *Id.* at *10.
12. *Paul,* 2008 U.S. App. LEXIS 25297, at *11 (citing Touch Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 318 (Miss. 1987)).
13. *Paul,* 2008 U.S. App. LEXIS 25297, at *12 (citing Hosford v. McKissack, 589 So. 2d 108 (Miss. 1991)).
14. *Paul,* 2008 U.S. App. LEXIS 25297, at *1 (citing Barrie v. V.P. Exterminators, Inc., 625 So. 2d 1007 (La. 1993)).

Interesting Items



Around the Gulf…



Satellite photograph of Hurricane Katrina courtesy of the NASA Ocean Observatory.

After Hurricane Katrina pushed sand onto roads and private property in Gulf Shores, Alabama, in August of 2005, the Federal Emergency Management Agency ("FEMA") asserted that it would fund $5.5 million of a $6 million project to return the sand to the beaches. However, the project cost nearly $9 million, and the city council recently hired the former chief counsel for FEMA during the Clinton administration, Ernest Abbott, to represent Gulf Shores in litigation that seeks reimbursement for these additional costs.

In a decision reported in detail in the most recent edition of SANDBAR (Vol. 7:4), a publication of the National Sea Grant Law Center, the Florida Supreme Court, in a 5-2 decision, rejected a constitutional takings claim based on the Florida Beach and Shore Preservation Act, which authorizes the state to engage in beach replenishment projects and assert public ownership of the re-created beach area. The Court held that the Act did not interfere with oceanfront property owner's common law rights to use and access the water.

Photograph of beach renourishment courtesy of the U.S. Army Corps of Engineers.

Photograph of wetlands courtesy of NOAA's National Geodetic Survey.

In December of 2008, the United States Environmental Protection Agency and the Department of the Army issued revised guidance to ensure wetlands, streams and other waters in Mississippi, Alabama and beyond are better protected under the Clean Water Act. The guidance clarifies the geographic scope of jurisdiction under the Clean Water Act in accord with the 2006 U.S. Supreme Court decision in *Rapanos v. United States.* The memorandum is available at http://www.epa.-gov/owow/wetlands/guidance/CWAwaters.html.

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To subscribe to WATER LOG free of charge, contact us by mail at Mississippi-Alabama Sea Grant Legal Program, 258 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, by phone: (662) 915-7697, or by e-mail at: **waurene@olemiss.edu**. We welcome suggestions for topics you would like to see covered in WATER LOG.

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