Legal Reporter for the National Sea Grant College Program

The SANDBAR

Volume 6:3, October, 2007

Property Owners Lack Standing to Sue Nestle

Michigan Citizens for Water Conservation v. Nestle Waters North America Inc., 2007 Mich. LEXIS 1626 (Mich. July 25, 2007).

Margaret Enfinger, 2L, University of Alabama School of Law

In a 4-3 decision, the Michigan Supreme Court decided that damages to an ecosystem from groundwater pumping did not amount to an injury to downstream property owners. Because of this lack of injury, the court ruled that the property owners had no right to sue in court for any legal remedy.

Background

Nestle Waters North America (Nestle) bought groundwater rights north of the Tri-Lakes region in Mecosta County, Michigan. The company subsequently started pumping out 400 gallons of well water per minute to sell as bottled spring water. This immense withdrawal reduced the flow and water levels in the surrounding lakes, streams, and wetlands. Property owners directly affected by the lower water levels sued under the Michigan Environmental Protection Act (MEPA) for Nestle to stop operations. Although the trial court granted this request, it only recognized the "ecological impacts" of the pumping activities on upstream areas.[1]

Later, the court of appeals agreed that the plaintiffs had the right to sue for the environmental damages of all affected areas. This included the wetlands areas over which the plaintiffs had no claim of ownership or of recreational or aesthetic use. This was due to the "complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources . . . and because of the . . . interrelationship between these natural resources."[2]

No Standing for a Harmed Environment

On appeal to the Michigan Supreme Court, Nestle conceded that the plaintiffs had standing for claims regarding the lakes and streams bordering plaintiffs' property.[3] However, the company argued that harm to the surrounding ecosystem does not harm the plaintiffs; therefore, the plaintiffs did not have standing to bring that claim. The Michigan Supreme Court agreed.

Michigan's state constitution requires the legislature to protect its natural resources. The legislature has complied by enacting MEPA, which allows any citizen the right to receive relief for any violation of this protection. The plaintiffs argued that MEPA and the state constitution excused them from meeting traditional standing requirements. However, the majority of the Michigan Supreme Court found that neither condition lightened the plaintiffs' burden of meeting the standing requirements.

In making its decision, the court applied the non-binding federal rules of standing to Michigan law. To ensure standing and that a genuine controversy is before the court, there must be an injury to the plaintiff. Because of the separation of powers, the plaintiff's injury must be different than the injury to the public at large. This prevents the judicial branch from

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taking a power of the legislative branch to rule upon matters that affect the public.

Additionally, the court found that a direct injury to the plaintiff is a necessary standing requirement no matter how pervasive the environmental damage in an ecosystem. To be a genuine controversy, the question is whether the plaintiff suffered injury—not whether the environment suffered injury. Quoting *Lujan v. Defenders of Wildlife*, the court held that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it."[4] Here, the plaintiffs had no claim of use of the surrounding ecosystem; therefore, they suffered no direct injury and had no standing to bring that claim.

Conclusion

As Michigan's constitution already declares the importance of its environmental and natural resources, it is doubtful that any change in Michigan law would open the right to sue for harms to a surrounding ecosystem. However, as three of the seven court members vehemently disagreed with the majority opinion, a slight change in the court might present this possibility.

Endnotes

1. *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 2007 Mich. LEXIS 1626 at *7 (Mich. July 25, 2007).
2. *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 709 N.W.2d 174, 225 (Mich. App. 2005).
3. Standing is the judicial doctrine of the right to pursue a claim in court.
4. 504 U.S. 555, 565 (1992).

The Basics of Copyright Protection

Will Wilkins is the director of Mississippi Law Research Institute at the University of Mississippi. This is the first part in a four-part series on copyright law.

Copyright protection can be summed up in one concise statement: copyright law provides protection for the creators of original works of authorship which have been placed in tangible form for a limited period of time. It is pretty simple, right? Of course, the devil is in the details, so, let's look at the details.

Copyright law provides protection to many of the creative works we produce such as books, movies, music, articles, photographs, and journals. However, not all creations are protected by copyright law. In fact, the law specifies the types of work which can be protected. These include literary, musical, dramatic, choreographic, pictorial, graphic, architectural, sculptural, and audiovisual works including motion pictures and sound recordings. In order for these works to be protected they must be "original," that is they must be the creator's own work and contain some minimal level of creativity. Also the work must be in "tangible form" which means it must exist somewhere other than in the creator's head such as on paper or a hard drive. This article, for instance, meets the threshold tests in that it is original and it is in tangible form (on my hard drive as I write). It is, therefore, copyrighted.

Nothing further is required for copyright protection. The copyright notices we have all seen, though quite helpful and recommended as a deterrent and to gain some legal advantages, are not required. Publication is not required. Registration is available through the Library of Congress; though it is a simple process and can be advantageous, registration is not required. Also, putting something on the internet, contrary to popular opinion, does not destroy copyright protection.

Generally speaking, the creator of a work is considered the owner. This default rule can be changed by contract or by operation of law. For example, an employee who creates a work within the course and scope of his employment is generally not the owner of the copyright but rather his employer is. Similarly, the laws provide that folks who hire independent contractors to create certain specific works (not all works are included) may own the copyright instead of the independent contractor when they enter into a written agreement stating that the work is to be a work for hire. All of this can get very complicated and often businesses choose to contract that the work is a work for hire but also specify that the creator agrees to transfer any copyright he may have, just to be sure.

. . . putting something on the internet, contrary to popular opinion, does not destroy copyright protection.

Why are we so preoccupied with who owns a copyright? The answer is that the copyright owner has a great deal of control over how the work can be used. The law provides that a copyright owner has the exclusive right to copy, reproduce, prepare derivative works

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from, display, perform, and distribute the work. This means that he can stop others from making unauthorized copies of his work. In other words, he controls the use of the work.

Keep in mind too that the actual work and the copyright in the work are separate interests and can be owned by different folks. For example, when you buy a book at a bookstore, you own that copy of the book. You do not, however, own copyright to the work: you cannot make copies of it and sell it at a flea market and you cannot have it made into a movie. You do have some rights to it: you can read it or not, you can put it on your shelf, you can sell it to someone else, and you can destroy it if it really annoyed you. These rights are known as the "first sale" rights.

There are other rights the general public has to use copyrighted works without the copyright owner's permission. The best known of these rights is the "fair use" doctrine which can allow such things as the use of short quotations of other's works in scholarly papers for the purpose of criticizing or discussing the quotation. In order for something to be "fair use" under the statute, it must meet a fairly onerous and extremely fact dependent four part balancing test which will be discussed in greater detail in future articles.

There are a myriad of other "use" rights non-owners have to copyrighted works but most are very situation specific. For example, there is an exemption for some classroom use of materials and another pertaining to library copying – not exceptions you might use every day but if you are a teacher or librarian, they are quite handy and can help avoid the agony of applying the fair use test.

. . . there is an exemption for some classroom use of materials . . .

In future articles, we will explore more specifics of copyright law and its application to education, research, and publishing. We will look at steps to take to protect your copyrights, copyright registration, using others' materials in your works, and fair use. If you have any other suggestions for future articles, please contact us.

City's Liability Waiver Invalid

City of Santa Barbara v. Superior Court, 41 Cal. 4th 747 (Cal. July 16, 2007).

Sara Wilkinson, 3L, University of Mississippi School of Law

The California Supreme Court recently held that waivers signed by participants in sports or recreational programs limiting liability for future gross negligence are void as a matter of public policy. The court reasoned that public policy bars enforcement of an agreement that would effectively remove any obligation to adhere to a minimum standard of care.

Background

The city of Santa Barbara runs Adventure Camp, a summer sports and recreation camp for developmentally disabled children. Camp activities include swimming, arts and crafts, group games, sports, and various field trips. In 2002, the Adventure Camp application included a form releasing the city and its employees from liability, including liability based on any negligent act. That same year, a camp participant, 14-year old Katie Janeway, drowned while attending the camp. Katie's mother, Maureen Janeway, had signed the release of liability, just as she had in the previous years that Katie had attended the camp.

Katie suffered from cerebal palsy, epilepsy, and other similar developmental disabilities. Before camp began, Maureen Janeway disclosed Katie's medical problems to the camp, relating that Katie was prone to seizures in and around water and that she would need supervision while swimming. The city was aware of Katie's medical problems, as she had suffered several seizures at Adventure Camp in past years.

Based on the information provided and Katie's history of seizures, the city assigned a camp counselor, Veronica Malong, to keep Katie under close observation during swimming sessions. Malong had witnessed Katie's seizures and had attended training sessions to help her respond to seizures and perform first aid.

Katie participated in the first swimming day without incident. On the second swimming day, Katie had a mild seizure while waiting to enter the locker room at the swimming pool. Malong sent someone to report the seizure to a supervisor, who later claimed not to have received the information. Malong observed Katie for 45 minutes and then concluded that it was safe for Katie to swim. Katie dove off the diving board, swam to the side of the pool and took a short break by the side of the pool. After Katie's second dive into the pool, she suffered

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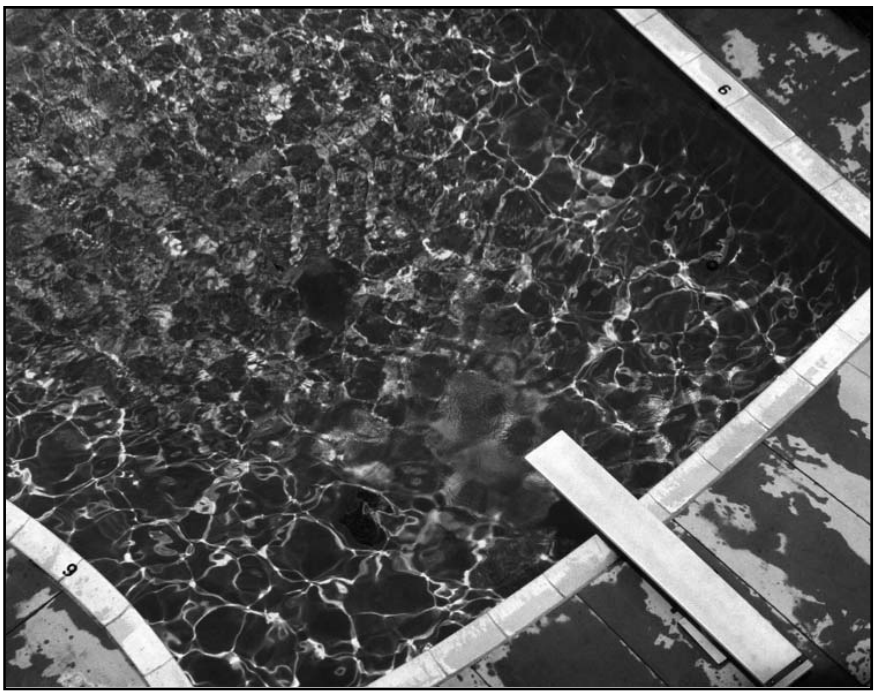
Photograph of pool courtesy of ©Nova Development Corporation.



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a seizure while swimming to the side of the pool and drowned.

Katie's parents filed a wrongful death action against the city of Santa Barbara alleging that the accident was caused by negligence on the part of the city and Malong. The city moved for summary judgment, relying primarily on the liability waiver. The city's motion for summary judgment was denied and the city appealed.

Waiver of Gross Negligence

In determining whether to uphold the lower court's decision, the California Supreme Court provided a lengthy discussion on gross negligence and public policy. The court noted that "[g]ross negligence long has been defined in California and other jurisdictions as either a want of even scant care or an extreme departure from the ordinary standard of conduct."[1] In this instance, the city had attempted to guard itself from liability for *any* negligent act, which means that the camp and city would not owe a minimal standard of care to the participants.

The court, using past precedent, held that an exculpatory clause, or clause limiting liability, is not enforceable if it affects the public interest. In previous cases, the court held that a valid release of liability is not available for transactions where the party seeking limited liability performs a public service of great importance, holds himself out as willing to perform the service for any member of the public, uses a standardized contract to limit liability resulting in greater bargaining power, and subjects the person or property to supreme control and therefore the risk of carelessness. The transaction between the city of Santa Barbara and the Janeways clearly falls within several of the above categories and was therefore considered a matter of public interest.

The court noted that the right of a party to agree to limit their future liability must be balanced against public policies that seek to encourage a reasonable standard of care while requiring wrongdoers to pay restitution to injured parties. In ruling on whether parties can limit their liability for future gross negligence, the California Supreme Court determined that gross or aggravated negligence should logically result in harsher legal consequences. As such, the court held that as a matter of public policy it was precluded from enforcing an agreement that failed to adhere to even a minimal standard of care.

The court addressed the defendant's concerns that a ruling of this nature would jeopardize similar programs, resulting in fewer and more expensive public recreational programs.

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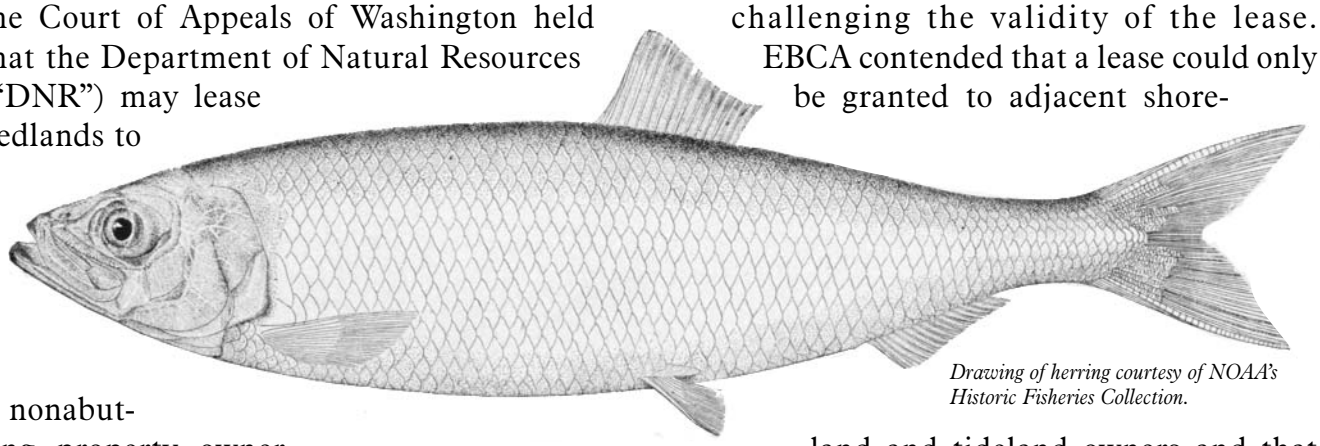
Photograph of children swimming courtesy of ©Nova Development Corporation.

Herring Net Pen Permit Upheld for Aquaculture Use

Echo Bay Community Association v. Department of Natural Resources, 160 P.3d 1083 (Wash. Ct. App. 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

In an appeal from a superior court judgment, the Court of Appeals of Washington held that the Department of Natural Resources ("DNR") may lease bedlands to a nonabutting property owner for aquacultural purposes and that herring net pens constitute aquaculture "processing."



Drawing of herring courtesy of NOAA's Historic Fisheries Collection.

If the statutes conflict, preference must be given to the most specific statute.

Background

F/V Puget L.L.C. ("Puget") attempted to lease DNR bedlands[1] located in Echo Bay, Pierce County. Puget intended to use these bedlands for herring net pens in order to process the fish to make them more marketable. DNR would not lease the bedlands to Puget until it had obtained a shoreline substantial development permit from Pierce County. In August 2005, Pierce County determined that herring net pens were an aquaculture use, and the permit was granted subject to several conditions.

In October 2005, the Echo Bay Community Association ("EBCA"), whose members owned land adjacent to Echo Bay, filed an appeal challenging the validity of the lease. EBCA contended that a lease could only be granted to adjacent shoreland and tideland owners and that herring pens were not aquaculture. The superior court concluded that DNR had authority to lease bedlands to any person for aquaculture purposes and that "aquaculture" included herring net pens. EBCA timely appealed the superior court's ruling to the court of appeals.

Analysis

The court interpreted two statutes upon which the parties relied. EBCA contended that RCW 79.130.010, which states that "the department may lease [bedlands] to the abutting tidelands or shorelands owner or leasee,"[2] supports the position that DNR could only lease bedlands to abutting tideland or shoreland owners. DNR contended that RCW 79.135.110, which states: "The beds of all navigable tidal waters in the state lying below extreme low tide…shall be subject to lease for the purposes of planting and cultivating oyster beds…or clams or other

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edible shellfish, or for other aquaculture use….Nothing in this section shall prevent any person from leasing more than one parcel, as offered by the department,"[3] supports the position that DNR may lease bedlands for aquaculture purposes to any person, not just abutting tideland and shoreland owners.

The court stated that it gives substantial weight to agency interpretations of statutes and that it must first look to the plain language of the statutes. If the statutes conflict, preference must be given to the most specific statute. EBCA contended that the two statutes, RCW 79.135.110 and RCW 79.130.010, conflicted. The court disagreed by ascertaining that the statutes cover different lands and allow for different leases. The court stated that one statute allows for leases for any purpose to abutting shoreland and tideland owners, while the other only allows leases for the purpose of shellfish cultivation and aquacultural uses to anyone. The court also stated that the two statutes may overlap, but that overlapping does not equal a conflict. Furthermore, even if the two statutes did conflict, the court held that RCW 79.135.110 is the more specific and recent statute and it would control. The court held that the language of RCW 79.135.110 was unambiguous and allowed any person to apply to obtain a lease.

EBCA then argued that even if RCW 79.135.110 gave DNR authority to lease lands to any person for aquaculture purposes, Puget's lease was invalid because herring pens are not aquaculture. DNR responded by asking the court to defer to its interpretation of the statutes. The court stated that it would uphold an agency's interpretation if it reflected a plausible construction of the statutory language and was not contrary to legislative intent and purpose. Though RCW 79.135.110 does not define "other aquaculture use," DNR defined "aquaculture" in its regulations. Included in the regulations' definition of "aquaculture" is the "processing of aquatic plants or animals." The regulation did not include the definition of "processing;" therefore, the court consulted dictionaries. The court held that under any of the definitions of "processing," Puget's use of the herring net pens to process the fish qualified as processing an aquatic animal. The court therefore deferred to DNR's definition of "aquaculture" in RCW 79.135.110(1). EBCA also argued that the court should instead adopt the Department of Agriculture's definition of "aquaculture." The court disagreed for two reasons. First, the court stated that the statute is limited to a specific title of RCW, and second, herring net pens would still satisfy the definition under the statute. The court therefore held that DNR's interpretation was reasonable and that herring net pens constituted aquaculture for the purposes of RCW 79.135.110(1).

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Photograph of fish pen courtesy of NOAA's Fisheries Collection

Exxon Must Use State Law to Calculate Prejudgment Interest

Sea Hawk Seafoods v. Exxon Corp. (In re Exxon Valdez), 484 F.3d 1098 (9th Cir. Apr. 16, 2007).

Terra Bowling, J.D.

In a case regarding damages to a seafood company from the *Exxon Valdez* oil spill, the Ninth Circuit has ruled that the prejudgment interest rate should be calculated under state law. The decision reversed a district court order that calculated the prejudgment interest rate under federal law.

Photograph of Exxon Valdez clean-up courtesy of NOAA Photo Catalog.

Background

After the *Exxon Valdez* spill, Sea Hawk Seafoods filed suit to recover losses it sustained from the spill. The parties reached a settlement on all issues, except the issue of whether to apply state or federal law to calculate the prejudgment interest rate. The United States District Court for the District of Alaska decided that the rate should be calculated using federal law, which resulted in a rate of 4.11% for 1992 and 3.54% for 1993. Sea Hawk appealed the decision.

Erie Doctrine

On appeal, the Ninth Circuit first considered a U.S. Supreme Court case, *Erie Railroad Co. v. Tompkins*, which held that federal courts sitting in diversity jurisdiction must apply state substantive law and federal procedural law.[1] The court recognized that since courts view prejudgment interest as a substantive claim, it is appropriate to use state law unless federal law preempts state law.

The court noted that "[f]ederal admiralty law preempts state law only if the state law 'contravene[s] any acts of Congress … work[s] any prejudice to the characteristic features of the maritime law, or interfere[s] with its proper harmony and uniformity in its international and interstate relations.'"[2] In a prior order regarding the *Exxon Valdez* spill, the court concluded that federal law did not preempt state law claims for economic harm.[3]

Although Exxon argued that the court should depart from its normal rule of considering prejudgment interest as a substantive claim, the court disagreed. Exxon cited a case

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Photographer Aboard Ship is Not a Maritime Employee

Peru v. Sharpshooter Spectrum Venture LLC, 2007 U.S. App. LEXIS 15238 (9th Cir. June 27, 2007).

Terra Bowling, J.D.

The United States Court of Appeals has ruled that a photographer injured while working aboard the *USS Missouri*, a World War II battleship moored at Pearl Harbor, may be excluded from receiving compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA).

Background

The *USS Missouri* is open to the public. A photography company, Sharpshooter Spectrum Venture (Sharpshooter), specializes in taking pictures of visitors aboard the ship and then offering the photos for sale on a nearby pier. Cheryl Peru, a photographer and assistant manager for Sharpshooter, was working aboard the ship when she hit her head while ascending a ladder. She sustained head and neck injures that prevented her from continuing in her job.

Peru applied for workers compensation benefits from Sharpshooter's insurance, but was denied by its claims adjuster. Peru then filed a claim under the LHWCA with the Department of Labor's Office of Workers' Compensation Programs. An administrative law judge denied her claim, citing a section of the LHWCA that excludes employees of a "museum." The judge noted that Peru would also fall within the LHWCA's exclusion of employees of "retail outlets."[1] Peru appealed to the Benefits Review Board (BRB), which agreed that Peru was excluded from LHWCA coverage as an employee of a retail outlet, since the company sold the photographs on the pier and Peru participated in the sales of the photographs.

Peru appealed the case to the Ninth Circuit, claiming that she was entitled to benefits under the LHWCA. The Ninth Circuit recognized that the LHWCA covers certain land-based maritime employees and employees that are not eligible under LHWCA are generally covered by state workers' compensation laws. According to the court, a worker applying for benefits under the LHWCA must establish both a "status" and a "situs" requirement. The "situs" requirement means that the worker must be on navigable waters or certain adjoining land areas. Peru met that requirement by being aboard the *Missouri*. The "status" requirement means that the employee must qualify as a certain type of employee to be covered by the Act. Some employees are specifically excluded.

Sharpshooter argued that Peru fell under the exclusion of "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet."

Sharpshooter argued that Peru fell under the exclusion of "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet."[2] To determine whether Peru fell under the exclusion, the Ninth Circuit examined the definition of

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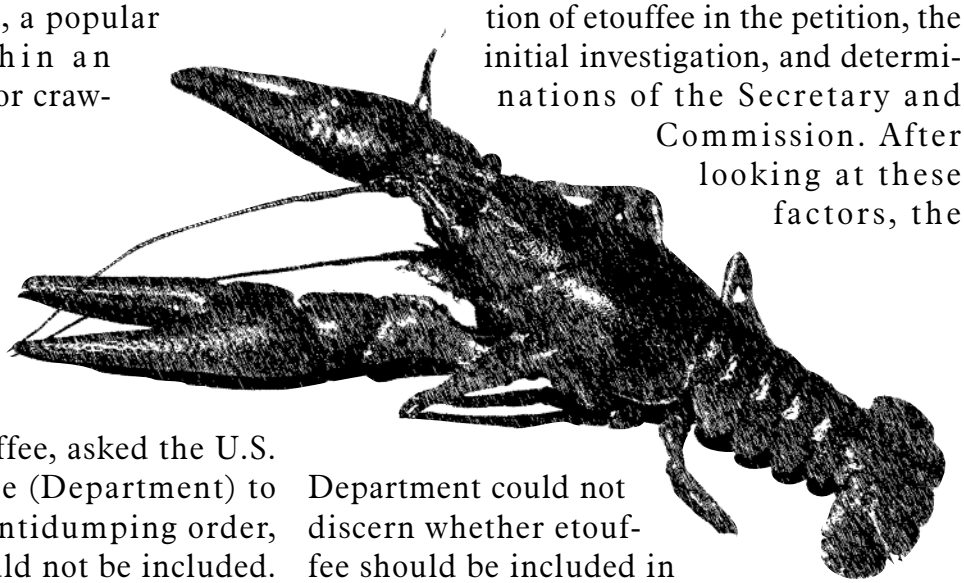
Crawfish Etouffee Not Subject to Antidumping Duty Order

Crawfish Processors Alliance v. United States, 483 F.3d 1358 (Fed. Cir. 2007).

Terra Bowling, J.D.

While debates about the authenticity and ingredients of traditional Creole cooking are common, court cases about the cuisine are not. However, the United States Court of Appeals for the Federal Circuit recently had to decide whether crawfish etouffee, a popular Creole dish, fell within an antidumping duty order for crawfish tail meat.



Background

Freshwater crawfish tail meat imported from China is subject to an antidumping duty order.[1] Coastal Foods, an importer of crawfish etouffee, asked the U.S. Department of Commerce (Department) to review the scope of the antidumping order, arguing that etouffee should not be included. Coastal Foods contended that the dish should be exempt, because crawfish tail meat is only one of the ingredients used in making its etouffee and the crawfish is blended with other ingredients in a way that it cannot be separated. The Crawfish Processors Alliance (Alliance), an organization representing domestic producers of crawfish tail meat, filed an opposing petition asking the Department to include etouffee within the scope of the antidumping duty order.[2]

A Different Product

Pursuant to the Department's regulations regarding scope reviews, the Department first had to consider the description of the merchandise in the petition and other initial findings. The Department first looked at the scope order, which says that covered products include "freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grade, and sizes; regardless of how it is packed, preserved, or prepared."[3] Because this does not specifically list etouffee, the Department considered factors in 19 C.F.R. § 351.255(k), including the description of etouffee in the petition, the initial investigation, and determinations of the Secretary and Commission. After looking at these factors, the Department could not discern whether etouffee should be included in the order, so it turned to additional factors set forth in 19 C.F.R.§ 351.255(k)(2).

The factors in 351.255(k)(2) include "physical characteristics of the product, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed."[4] When looking at the physical characteristics of etouffee, the Department found that the tail meat in the dish undergoes a significant transformation, because etouffee is cooked with many other ingredients over a long period of time. The

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Department determined that this cooking process turns the tail meat into a new and different product. Furthermore, the ultimate use of etouffee is different from crawfish tail meat because the tail meat must be cooked while the etouffee only needs to be heated. For these reasons, the Department concluded that etouffee should not be included within the scope of the antidumping duty order on freshwater crawfish tail meat. The Court of International Trade sustained the Department's ruling and the Alliance appealed.

Confirmed

On appeal, the Alliance argued that the Department should not have considered the

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Recipe

Crawfish Etouffee

Ingredients

2 pounds crawfish tail meat
½ cup chopped celery
1 chopped green bell pepper
1 tbsp cornstarch
1 tsp onion powder
1 tbsp paprika
Seasoned salt and cayenne pepper
2 tbsp tomato paste
1 stick butter
2 chopped onions
1 tbsp chopped garlic
1 tsp powdered garlic
1 cup cold water
½ cup parsley
3 tbsp olive oil

Season crawfish with seasoned salt and set aside. Melt ½ stick butter in a large deep walled frying pan. Two frying pans or one large deep cast iron or heavy aluminum pot can be used to cook the needed volume. Add the finely chopped onions, bell pepper, celery, and garlic. Cook over medium/high heat stirring constantly until soft. Sprinkle in onion and garlic powder to taste.

Start cooking rice. Add crawfish, the second half of butter, tomato paste, paprika, dash of cayenne pepper, and 1/2 cup of water. Cook over low heat for 30 minutes. Dissolve cornstarch in 1/2 cup of water and add to the pan along with parsley. Add 1/2 cup scallions (green onions may also be added.) Cook about 15 minutes longer to desired consistency. Serve over rice. Cut recipe in half for smaller pots or less servings.

Adapted from Donald J. Delcambre's recipe for shrimp etouffee, available at http://www.realcajunrecipes.com/ .

Illegal Lobster Importers Not Required to Pay Restitution

United States v. Bengis, 2007 U.S. Dist. LEXIS 35902 (D.N.Y. May 17, 2007).

Terra Bowling, J.D.

In 2004, three men were convicted of conspiracy and violations of United States law prohibiting the importation of illegally captured lobster from the coast of South Africa. After the conviction, the United States government (United States) argued that the men should pay restitution to the South African government; however, a United States magistrate judge disagreed.

Background

The men, Arnold Bengis, Jeffrey Noll, and David Bengis, were convicted of conspiracy and violations of the Lacey Act.[1] The men admitted to the illegal activity, which included catching large quantities of South African rock lobster in excess of their allowed quota, bribing South African officials to keep quiet regarding their violations, and making improper customs declarations when exporting the fish to the United States.[2] After the conviction, the district court deferred the issue of restitution to a United States Magistrate Judge.

The United States first requested that the men pay restitution under the Mandatory Victims Restitution Act (MVRA) for the harm that the defendants had caused to South Africa by taking its lobsters. The judge recommended that the men not pay restitution under the MVRA because the defendants' violations were regulatory in nature and not a crime against property.[3] Furthermore, the judge held that the men's regulatory violations did not cause South Africa a physical injury or pecuniary loss, another requirement under the MVRA. In January, the United States District Court for the Southern District of New York adopted a magistrate's report and recommendation to decline to order restitution from the defendants. The United States next asked the magistrate to require the defendants pay over $41 million under the Victim and Witness Protection Act (VWPA).

The VWPA

The judge noted that the VWPA could apply to the men based on their conspiracy pleas. Additionally, he noted that the VWPA is not limited to offenses against property, unlike the MVRA. Despite this, the judge recommended that the court reject the government's request, because the crimes that the men committed did not cause direct harm to the victim, as required by the VWPA. The men pled guilty to conspiracy and violations of the Lacey Act. The government argued that restitution was proper because the lobsters belonged to South Africa. However, the magistrate ultimately decided that the harm to South Africa is the overfishing of its lobsters and that the men did not plead guilty to crimes involving overfishing. Furthermore, the government did not show that South Africa incurred a loss that would make it a true and direct victim.

Photograph of lobster courtesy of NOAA Photo Catalog.

Endnotes

1. *United States v. Bengis*, 2004 U.S. Dist. LEXIS 16925 (D.N.Y. 2004).
2. *Id*.
3. *United States v. Bengis*, 2006 U.S. Dist. LEXIS 91089 (D.N.Y. Dec. 19, 2006).

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"retail outlet" for purposes of the LHWCA. After looking at the plain language of the statute, the court decided that a reasonable definition for "retail outlet" would be "any place where items are sold directly to consumers."[3] The court reasoned that this definition was consistent with the legislative history and policy of the LHWCA.

To determine whether Peru was an employee of a retail outlet, the court ascertained that it had to examine not only the identity of the employer, but also the employee's specific work environment and duties. Although the court agreed with the ALJ and the BRB that Peru falls within the retail outlet exclusion, a more extensive analysis was necessary because Peru's work duties and Sharpshooter's operations were not purely retail in nature. For instance, although Sharpshooter does sell photographs from a pier, it also shoots and processes photographs. Additionally, Peru's position of assistant manager meant that she had duties outside of selling pictures, such as shooting photographs and processing film. Although Peru did perform those duties, the court ultimately found that she was excluded under the LHWCA, because "neither SSV, as an employing entity, nor any of its employees, appear to engage in core traditional maritime activities."[4]

Conclusion

Although the Ninth Circuit found that Peru fell within the "retail outlet" exclusion, the court noted that she was not entirely excluded from collecting under the LHWCA. The LHWCA provides that the exclusion applies only if employees "are subject to coverage under a State workers' compensation law."[5] The court remanded the case to the BRB to determine whether Peru would be covered by

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Photograph of the USS Missouri Memorial in Pearl Harbor courtesy of NOAA's America's Coastlines Collection.

Tourist's Liability Waiver Upheld

Delponte v. Coral World V.I., Inc., 2007 U.S. App. LEXIS 11508 (3d Cir. May 16, 2007).

Amber Myers Robinson, 3L, University of Mississippi School of Law

The Third Circuit has affirmed an order granting summary judgment to Coral World, a local business offering entertainment to tourists. The summary judgment was based on a waiver signed by the plaintiff releasing Coral World from liability. The court agreed with the United States District Court of the Virgin Islands that the waiver was unambiguous, that it did not fall within the services contemplated by the Plain Language Act, and that the waiver was not void for public policy reasons.

Background

Coral World operates a tourist attraction in St. Thomas, Virgin Islands, known as Sea Trek. Sea Trek allows a tourist wearing a helmet and breathing tube to descend a ladder into the ocean and walk along the sea floor observing the natural habitat. While on a cruise ported in St. Thomas, Joseph Delmonte participated in the Sea Trek attraction. Delmonte signed a "Liability Release and Express Assumption of Risk" waiver releasing Coral World of all personal injury due to negligence. Delmonte signed the waiver and was present at a training session.

While descending the ladder into the ocean, Delmonte slipped on the ladder and broke his femur bone. Delmonte subsequently filed suit against Coral World alleging "negligent control, maintenance, and inspection of the ladder as well as failure to warn of a known danger."[1] Delmonte did not dispute that he understood and signed the waiver, but contended in district court that the waiver was ambiguous and unenforceable for public policy reasons.

In district court, Delmonte asserted that there were two ambiguities that made the waiver unenforceable. First, he contended that because the contract released claims based on negligence in one provision of the waiver and released breach of warranty in a separate provision that an ambiguity was created as to what type of liability was being released. Second, Delmonte contended that Coral World was liable for his injuries occurring on the ladder, because one provision in the waiver released liability for dangers associated with the helmet and breathing tube, but did not specifically include injuries from the ladder. The district court rejected both of Delmonte's arguments stating that the "plain meaning rule" required that if a waiver is unambiguous that the express language of the waiver would be used to determine the parties' intent. The district court determined that the waiver was unambiguous and that the intent of the parties was for Coral World to be released from future liability for negligence.

The Plain Meaning Rule

On appeal, the Third Circuit affirmed the district court's decision regarding the plain meaning rule, stating that although the word "negligence" is not present in each provision, the waiver clearly and unambiguously released Coral World from liability based on negligence. Also, the waiver clearly released Coral World from liability for all injuries sustained and not just injuries relating to the helmet and breathing tube, since other provisions in the waiver repeatedly stated that Coral World would be released from all physical injuries.

The Plain Language Act

Delmonte argued that he should be able to recover damages from Coral World because the waiver was ambiguous and therefore violated the Plain Language Act.[2] The Plain Language Act requires that consumer contracts "shall be

See Coral, page 16

written in clear, simple, understandable and easily readable language."[3] The repercussion for not complying with the Act is that the consumer can recover both actual and punitive damages from the seller. However, the court rejected the argument that the waiver violated the Act.

The court held that the waiver could not violate the Act, because the Act is not applicable to Coral World's waiver. The Act is only applicable to "consumer contracts" which are defined as "contracts for services, including professional services, for cash, or on credit; and the credit, money property or services are obtained for personal, family or household purposes."[4] The court ruled that entertainment was not a personal service and therefore was not covered under the Act. The court further reasoned that even if entertainment was considered services under the Act, Delmonte would still not be able to recover damages from Coral World. The Act only allows the waiver to be voided and damages recovered if enforcement would be unconscionable, which the court concluded was not the situation with Delmonte.

Public Policy

Finally, Delmonte contended that the waiver was void on public policy grounds, since Coral World made a wrongful effort to waive liability from itself. The court noted that "a term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if . . . the other party is similarly a member of a class protected against the class to which the first part belongs."[5] However, the court held that Delmonte was an invitee of a commercial establishment and as such does not fall within the definition of the protected class that the rule is meant to protect. The court held that Coral World's waiver exempting itself from liability was not void due to public policy reasons.

Photograph of divers looking at coral courtesy of ©Nova Development Corporation.

Conclusion

The Third Circuit agreed with the District Court of Virgin Islands and held that an unambiguous waiver will be enforced according to its plain meaning. The court ruled that entertainment is not within the meaning of the Plain Language Act and, therefore, waivers for this purpose cannot violate the Act. Also, the court ruled that commercial contracts that waive liability are not against public policy when the waiving party is an invitee.

Endnotes

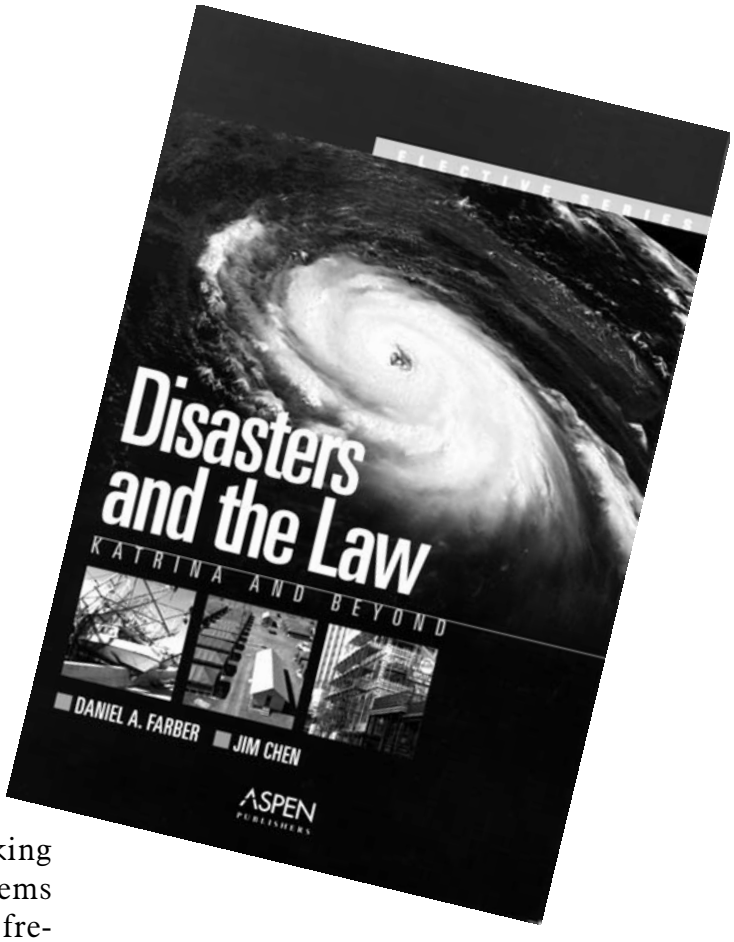
1. *Delponte v. Coral World V.I., Inc*, 2007 U.S. App. LEXIS 11508 at *3 (3d. Cir. May 16, 2007).
2. 12A V.I.C. § 251
3. *Id*. § 252.
4. *Id*. at § 251a.
5. *Delponte*, 2007 U.S. App. LEXIS 11508 at *6.

Book Review

Disasters and the Law: Katrina and Beyond

Daniel A. Farber and Jim Chen (Aspen Publishers 2006).

Reviewed by Stephanie Showalter



Hurricane Katrina unfortunately highlighted how ill-prepared the United States is to respond to disaster, be they natural or man-made. Once the initial danger passed and response efforts began, federal agencies, state governments, and ordinary citizens were confronted with complicated regulations, overlapping jurisdictions, and shocking gaps in the emergency management systems at all levels of governments. Despite the frequency of natural disasters and the potential for terrorist attacks, disaster law is not a well-developed area of legal scholarship or a focus of law school curriculum. After a large disaster, there always seems to be a flood of law review articles and commentaries, but scholarship tends to slow to a trickle as memory fades and new headlines emerge.

Two law professors would like to change the ebb and flow relationship the legal community has with disasters. In *Disasters and the Law: Katrina and Beyond*, Daniel Farber and Jim Chen provide an overview of the legal issues raised by Hurricane Katrina and the challenges which future disasters will pose to the legal system. Disasters and the Law is an excellent introductory text for any professor wishing to incorporate disaster law into an existing or new course. Farber and Chen explore a number of legal issues including the goals and limits of federal and military involvement, environmental regulation, health care, communications, evacuation, and the impact of climate change on disaster risk. The material is extremely accessible, current, and thought-provoking. While *Disasters and the Law* could easily serve as the primary text for a seminar on disaster law, individual chapters could also be used to explore issues of federalism, social justice, and compensation in traditional courses.

A companion website developed by Boalt Hall Law Library, http://128.32.29.133/disasters.php , serves as invaluable reference tool for scholars and practitioners. The site is a gateway to a wealth of information including articles, government and military reports, policy papers, opinion pieces, regulatory guidance, and statutory authority. *Disasters and the Law* is an important step towards addressing the problems that arose in the wake of Hurricane Katrina and confronting the difficult challenges that await the legal community in the future.

Horseshoe Crabs Up for Grabs

Bernie's Conchs, LLC v. State, Division of Natural Resources & Environmental Control, 2007 Del. Super. LEXIS 158 (Del. Super. Ct. June 8, 2007).

Terra Bowling, J.D.

Regulations mandating a two-year moratorium on horseshoe crab harvesting are invalid, according to a Delaware superior court.

Background

The Department of Natural Resources and Environmental Control (Department) adopted the contested regulations to comply with an addendum from the Atlantic States Marine Fisheries Commission outlining the minimum level of restriction necessary for horseshoe crab harvesting regulations. The Department held a public hearing and presented two options that would comply with the addendum. The first option was to institute a limited harvest and the second option was a complete moratorium. The Department ultimately adopted the moratorium. Bernie's Conchs and Charles Auman (Bernie's), who harvest horseshoe crabs in the Delaware Bay, filed suit under the Delaware Administrative Procedures Act (APA) to have the regulations declared invalid.

Substantial Evidence

First, the court established the appropriate standard of review under the APA. The Department contended that the court should examine whether there was *any* reason to support the moratorium, but the court disagreed. The court agreed with Bernie's that the correct standard was the substantial evidence test, which required the court to ensure that the Department's findings were supported by substantial evidence and reasonable legal conclusions.

Using the substantial evidence test, the court first found that the Department offered no scientific studies to show that a limited harvest of male horseshoe crabs would be excessive. The court noted that testimony at the public hearing and reports presented to the Department supported a conclusion that a male-only limited harvest of 100,000 crabs would have a minimal effect on the population. The court further concluded that the Department did not explain or provide a rational basis to prefer the moratorium over a limited harvest.

The court also determined that there was no reasonable basis to support the finding that egg availability would improve through a

Photographs of horseshoe crabs courtesy of NOAA's Photo Gallery.

moratorium, rather than a limited, male-only harvest. The court reasoned that if a limited harvest of the crabs would have a minimal effect on the population, then the impact on egg availability would be minimal, as well.

The Department argued that the red knot, a shorebird that depends on the availability of horseshoe crab eggs during migration, would be harmed by a limited harvest. Although the court recognized that the red knot population depends heavily on the eggs to fuel their migration, it noted that despite the increase in the horseshoe crab population and presumably the increase in eggs, the red knot population has continued to decline. The court felt that since the Department could not offer evidence about the impact of the limited harvest on the red knot population, its decision to implement a moratorium was speculative.

The court also considered the economic impact of a moratorium. In deciding to enact the moratorium, the Department found that the harm to the horseshoe crab and the red knot population outweighed the economic harm to the fishermen who harvest the crabs. The court also rejected this argument, finding, again, that the Department's decision was not supported by substantial evidence.

Conclusion

Because the court found that the regulations did not have a rational basis in fact, it held that the regulations were invalid. The regulations were vacated.

Liability Waiver, from page 6

The court did not find any evidence in support of the defendant's predictions. The court pointed to Washington, Massachusetts, and Nebraska where similar cases have barred the release of liability for gross negligence but have not jeopardized public recreation programs.

Conclusion

The California Supreme Court did not speak to a party's ability to contractually limit future liability from ordinary negligence. However, it did determine that where sports and recreation programs are concerned, parties may not limit future liability for gross negligence as a matter of public policy. Allowing a party to limit liability for gross negligence would effectively provide little incentive to act with at least a minimal standard of care, which, as the court pointed out, is in violation of public policy.

Endnotes

1. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 752 (Cal. July 16, 2007).

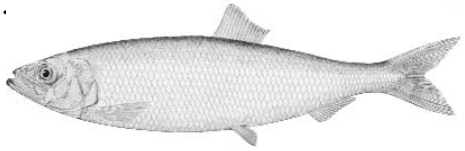
Aquaculture, from page 8

Conclusion

The court held that RCW 79.135.110 was unambiguous and granted authority to DNR to lease tidelands to any person for purposes of aquaculture. Furthermore, the court deferred to DNR's interpretation of "aquaculture" and held that Puget's processing of herring in the herring net pens constituted aquaculture. For these reasons, the court affirmed the superior court's holding and stated that the lease granted by DNR to Puget was valid.

Endnotes

1. Bedlands are "lands lying waterward…and below the…extreme low tide mark in navigable tidal waters." *Echo Bay Cmty. Ass'n v. Dep't of Natural Res.*, 160 P.3d 1083, 1084 (Wash. Ct. App. 2007) (citing RCW 79.105.060(2)).
2. *Id.* at 1085.
3. *Id.*



Crawfish, from page 12

factors in § 351.255(k)(2), because the terms "preserved" and "prepared" in the order include etouffee, since the dish contains preserved and prepared crawfish. The United States Court of Appeals for the Federal Circuit held that it was appropriate for the Department to consider the factors under § 351.255(k)(2), because the Department's regulations require them to look at § 351.255(k)(2) when other factors are not instructive.

The court upheld the Court of International Trade's ruling, agreeing that the essential character of the crawfish tail meat in etouffee was altered or "substantially transformed" by its preparation process and was not included in the scope of the order. The court held that the Department looked at the appropriate factors when making its scope inquiry and that the evidence supported the Department's decision that the crawfish tail meat "is fundamentally changed when it becomes etouffee."[5]

Endnotes

1. "'Dumping' occurs when a foreign producer sells a product in the United States that is below that producer's sales price in its home market, or at a price that is lower than the cost of production." If the Department of Commerce finds that such a product is "dumped" and that a US industry producing a like product is materially injured or threatened by the dumping, an antidumping order will be issued. http://www.usitc.gov/trade_remedy/731_ad_701_cvd/index.htm .
2. As an industry affected by a violation of the antidumping duty order, the Alliance stood to share in any collected antidumping duties for expenditures incurred.
3. *Processors Alliance v. United States*, 483 F.3d 1358, 1360 (Fed. Cir. 2007).
4. *Id*. at 1360-61.
5. *Id*. at 1361.

Exxon Valdez, from page 9

in which the Ninth Circuit held that prejudgment interest should be calculated using federal law, but the court found that that case was exempt from the normal rule because the court applied federal law to *all* of the substantive claims in that case.

Conclusion

The court reversed and remanded the case to the district court. The district court will calculate the prejudgment interest rate pursuant to Alaskan law, which will be 10.5%.

Endnotes

1. 304 U.S. 64 (1938).
2. *Sea Hawk Seafoods v. Exxon Corp. (In re Exxon Valdez)*, 484 F.3d 1098, 1101 (9th Cir. Apr. 16, 2007).
3. *In re Exxon Valdez*, 270 F.3d 1215, 1253 (9th Cir. 2001).

Photograph of Exxon Valdez spill containment effort courtesy of NOAA's America's Coastlines Collection.

Litigation Update

United States v. Massachusetts, 493 F.3d 1 (1st Cir. 2007).

Terra Bowling, J.D.

After the Buzzards Bay oil spill in 2003, Massachusetts passed the Oil Spill Prevention Act (OSPA), which imposed several operational requirements on tank vessels operating in state waters. Last year, the U.S. District Court for the District of Massachusetts permanently enjoined the state from enforcement of OSPA, holding that several provisions of the law were preempted by the Ports and Waterways Safety Act (PWSA). On appeal, the US Court of Appeals for the First Circuit held that the injunction was premature. The First Circuit reasoned that there was not enough evidence to determine whether the enforcement of the state laws would conflict with the PWSA. The case was remanded to the district court for further proceedings.

Photograph of tanker piers of downtown Boston courtesy of NOAA's America's Coastlines Collection.

SandBar Scramble!

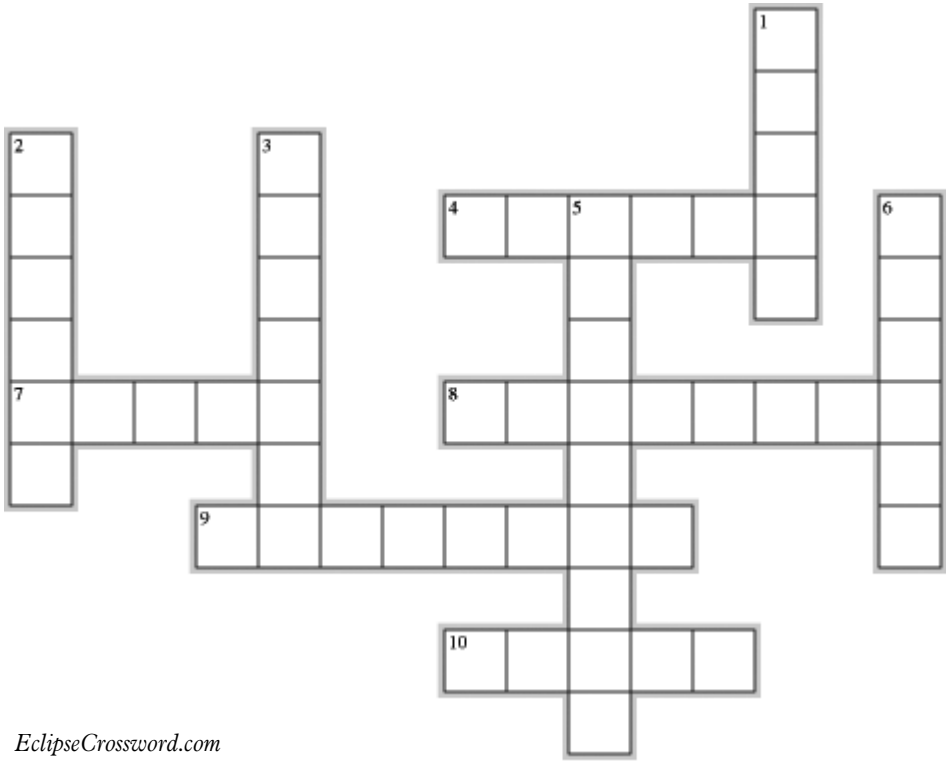
Across

4. This company's well-water pumping affected surrounding lakes, streams, and wetlands.
7. A seafood company sought damages for this company's oil spill.
8. To receive copyright protection, a work must be in _____ form.
9. Traditional Creole dish
10. A California court said parties may not limit future liability for this type of negligence as a matter of public policy.

Down

1. After being caught illegally importing lobsters from South Africa, three men were convicted of the _____ Act.
2. A tourist injured while participating in an underwater activity was prevented from recovering damages because he signed this.
3. A shorebird that depends on the availability of horseshoe crab eggs during migration.
5. This cartoon character saved a vessel from sinking.
6. An employee of a _____ may be excluded from recovering damages under the Longshore and Harbor Workers' Compensation Act.

Answers can be found at http://www.olemiss.edu/orgs/SGLC/National/crossword.pdf



EclipseCrossword.com

Photographer, from page 14

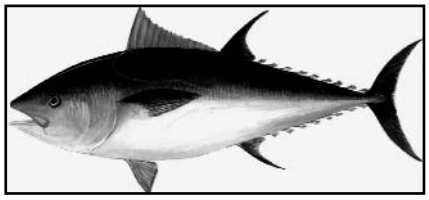
state workers' compensation. If the BRB determines that she is ineligible for those benefits, Peru will be eligible for benefits under the LHWCA.

Endnotes

1. 33 U.S.C. § 902(3)(B).
2. *Id*.
3. *Peru v. Sharpshooter Spectrum Venture LLC*, 2007 U.S. App. LEXIS 15238 *12 (9th Cir. 2007).
4. *Id*. at *20.
5. 33 U.S.C. § 902(3).

Coast to Coast
And Everything In-Between

A lifeguard recently rescued a two-foot sand shark from a group of Coney Island beachgoers. The lifeguard, Marisu Mironescu, reported seeing 75 to 100 people circling the shark. When Mironescu noticed people hitting the shark, he picked up the shark and swam out to sea. According to Mironescu, the shark played dead and eventually wriggled away and tried to bite him.



Drawing of bluefin tuna courtesy of NOAA's Fisheries Collection.

When a bluefin tuna was found dead at the Monterey Bay Aquarium, aquarium officials reviewed their digital video system to see what happened. The video showed the 229-pound tuna swimming alongside other fish when it suddenly turned and smacked head-first into a window in the tank. An aquarium spokesperson acknowledged that this is not the first time that an aquarium tuna has died from swimming into a window, noting that aquarium experts and researchers have been working for years to determine how to prevent these types of accidents.

A Lake Michigan surfer, Matt Smolenski, had noticed a dog on a pier barking at the waves and jumping back when a wave washed up on the pier. An especially large wave caught the mixed-breed dog off guard and he was swept into the lake. Smolenski paddled out to rescue the dog, who was struggling to stay afloat. Just as the dog stopped paddling, Smolenski grabbed the dog by his collar and brought him safely to shore on his surfboard.

SpongeBob SquarePants has helped save a sinking fishing vessel off the coast of Gloucester, Massachusetts. When a 25-foot boat, Clam Juice, developed a large crack in an exhaust pipe and began to sink, one of the crew members used a SpongeBob Nerf football to plug the leak. The Coast Guard was then able to safely tow the boat in for repairs.

The Hawaii Superferry, which would provide residents an alternative way of moving among the islands, is at the center of a heated battle between residents, environmentalists, and government officials. Opponents claim that the ferry will harm whales and other marine species. On one of its first voyages, the ferry was stopped by protesters in kayaks and on surfboards. Several groups filed lawsuits, claiming that the ferry should have had an environmental assessment before it was allowed to start its services. The state supreme court ordered an assessment, but the ferry would have been allowed to continue services under a circuit judge's ruling. Superferry officials have cancelled their plans to resume service for the immediate future.

Photograph of southern end of Hawaii courtesy of NOAA's America's Coastlines Collection.

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: the Sea Grant Law Center, Kinard Hall, Wing E, Room 262, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu . We welcome suggestions for topics you would like to see covered in *THE SANDBAR*. All photographs and graphics are credited except those generated by staff or from Nova Development Corporation illustrations.

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THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA16RG2258, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. This newsletter was prepared by the Sea Grant Law Center under award NA06OAR4170078 from NOAA, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Sea Grant Law Center or the U.S. Department of Commerce.

MASGP 07-004-03 *October, 2007*

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