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ARTICLES

Social-Welfare Implications of Liability Rules in Major Damages Cases

By Dr. Debra J. Aron and Dr. Francis X. Pampush

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. . . . The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.

Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 344 (N.Y. 1928).

We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. [...] [T]he problem of proximate cause is not to be solved by any one consideration. It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.

Palsgraf, 248 N.Y. at 352, 354–55 (Andrews, J., dissenting).

Background

On April 20, 2010, BP's Macondo oil well in the Gulf of Mexico incurred a catastrophic failure of its mechanical operations that resulted in a blowout that killed 11 men, injured more, and spilled an estimated 4–5 million barrels of crude oil into the gulf. *See, e.g., Ian Urbina, In Report on Gulf Spill, BP Sheds Some Light and Casts Much Blame*, N.Y. Times, Sept. 9, 2010 (late ed.). Aside from the tragic loss of life that occurred at the site of the blowout, the Macondo event has affected a variety of businesses in the gulf vicinity and beyond. The event will, therefore, inevitably raise the question of how far in the economic chain of production and conceptual chain of causation should liability extend.

The question of the extent of legal liability along the chain of causation in cases involving the boundaries of the effect of a negligent action was addressed by the Supreme Court in *Palsgraf v. Long Island Railroad Co.*, “perhaps the most famous case in the history of tort law,” from which

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we quoted above. G. Edward White, *Tort Law in America: An Intellectual History* 96–97(2003). That case pivoted on the question of the extent of liability resulting from a negligent act. The majority, in the decision written by Justice Benjamin N. Cardozo, found for the defendant on the theory that the plaintiff’s injury was not “within the range of apprehension.” The dissenting opinion concluded that the plaintiff should have prevailed because the negligent act was the “proximate cause” of her injuries, although her injuries might have been unforeseeable. While the majority and the dissent disagreed on the relevant theory of harm in the case, both the majority and the dissent appear to agree that the line that demarks the limits of liability is not subject to formulaic identification, and neither the majority nor the dissent appealed to guidance from general principles of social welfare as support for their analyses. In this article, we discuss how economic insights can provide some guidance as to the social-welfare implications of the demarcation of the limits of liability and the proximity of harm to a negligent act.

The Social-Welfare Implications of the Extent of Liability

From an economic standpoint, the extent to which economic actors should bear liability for the negative effects of their negligence has social-welfare implications because the extent of liability affects incentives for future behavior. Steven Shavell, *Liability for Accidents*, in 1 *Handbook of Law and Economics* ch. 2 (A.M. Polinsky & S. Shavell eds., 2007). The purpose of liability rules is not merely to punish negligence or make victims whole, but, from an economic standpoint, the social interest in liability rules is in encouraging diligence toward and investment in prevention of future harm. At the same time, imposing liability has social costs if and to the extent that the liability rules discourage economic agents from engaging in desirable market activities, or encourage investment in accident avoidance that is excessive relative to the social benefits. In the context of environmental liability, laws and regulations should encourage firms that engage in activities with high potential environmental risk—such as oil exploration and production, mining, farming, electricity generation, and heavy industry—to exhibit diligence in avoiding harmful environmental outcomes and in promoting safe operations, taking into account the costs to society of encouraging excessive risk avoidance. Our premise, and what we believe is a fundamental premise of the economic approach to liability analysis, is that liability rules and limitations should, to the extent possible, maximize expected social welfare by establishing incentives that optimally balance the costs to society of insufficient diligence against the costs to society of imposing excessive risk bearing.

Society has to be concerned generally about two opposing adverse effects of establishing improper liability rules. On one hand, if the rules tend to impose inadequate liability, companies will undertake inadequate efforts (i.e., will incur insufficient costs) to ensure that employees engage in safety-compliant behavior. If, on the other hand, the rules impose excessive risk of liability or penalty, companies will either engage in excessive efforts to ensure that employees engage in safety-complaint behavior, or they will shut down certain operations entirely, even if those operations are social-welfare enhancing despite the risk of environmental accidents.

The notion of socially optimal incentive creation derives from the economics literature on what is known as the “principal-agent problem.” Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, *Econometrica* 51 (Jan. 1983). The principal-agent problem is that of establishing incentives for an economic agent (the standard example in economics literature is the CEO of a firm) who is hired by the economic principal (the firm’s owners or shareholders) that maximize the welfare of the principal. This is done by aligning the agent’s incentives with those of the principal as closely as possible, taking into account that the agent’s actions cannot be perfectly observed, and the effects of an agent’s actions are inevitably influenced by factors that are outside the control of the agent. One efficient means of establishing incentives for appropriately diligent behavior is for the agent to bear financial consequences correlated with the effects of his behavior. This is why, for example, efficient compensation systems for CEOs of publicly traded companies typically involve the CEO holding the company’s stock (or options on it). The company’s owners know that tying the CEO’s compensation to the performance of the company encourages the CEO to manage the company with the diligence and care that the principals themselves would apply. *See id.*

In our context, the “agent” is the party, such as an oil company, electric utility, or other entity whose actions might cause environmental harm; whose behavior would presumably be influenced by standards of liability (or what we refer to in this article as “liability rules”); and the relevant “principal” is society as a whole. We assume that, as a matter of jurisprudence, one would want to establish liability rules that maximize society’s welfare.

As a first principle, one might think that the most efficient liability rules for encouraging socially beneficial behavior would be those that impose on the actor all consequences of his or her actions, no matter how indirect or distant in time or space. Indeed, in a world of perfect certainty and perfect information, in which all consequences were known and predictable, and in which an actor could be rewarded for all positive consequences as well as penalized for all negative consequences of his or her actions, this might be true. But from a social perspective, the lack of perfect information and perfect certainty generally would render imposition of unlimited liability on an economic actor suboptimal because of its chilling effect on economic activity, and liability rules that establish some level of limitation are not only more consistent with the intuitive notion of fairness, but are generally consistent with economically optimal incentive creation.

As implied by the foregoing discussion, optimal incentives must take into account two opposing forces—the harms of inadequate incentives for diligences that would result from insufficient liability, and the harms of excessive risk imposed on economic agents, and the associated costs to consumers that would result from excessive liability. This can be illustrated with reference to the example of the CEO and shareholders mentioned earlier. On one hand, a failure to punish and reward a CEO in accordance with his firm’s profitability would be likely to result in an inadequate level of managerial effort and diligence relative to that desired by the shareholders. Similarly, a company that bore no liability for harms to the environment or harms to non-

customers would be expected to provide inadequate incentives to establish protocols and procedures to protect against such harms.

The important and beneficial effects of rules that impose liability for harms caused are obvious and intuitive, and it is apparent that imposing insufficient liability for harmful events would have the undesirable effect of creating insufficient incentives to take due care. On the other hand, however, the harmful effects of excessive liability are equally implied by economic principles, though they are perhaps less obvious. For example, it is well understood as a matter of economics that an optimal compensation system for a CEO would typically not compensate him or her entirely on the basis of the stock value of the firm, because the latter is affected, both positively and negatively, by factors outside the CEO's control. Imposing on the CEO the risk of extreme outcomes that are beyond the CEO's control requires incurring additional costs to compensate the CEO for bearing that risk, and/or induces excessively risk-averse behavior by the CEO. *See Paul Milgrom & John Roberts, Economics, Organization and Management 206–247 (1992).*

Excessively risk-averse behavior might take the form, for example, of failure to engage in innovation or reduced introduction of promising new products, because the CEO recognizes that such projects may fail despite his or her diligent and skillful efforts. While undertaking these projects might be in the shareholders' interests, imposing excessive risk on a CEO (essentially, punishing the CEO for the failure of a project, say, despite the fact that the failure may have occurred despite his or her extraordinary skills and best efforts) might stifle risk taking at all. Similarly, imposing excessive liability on a company via overly extensive liability rules would be harmful to society by inducing excessive risk avoidance. Optimal liability rules balance the benefits of incentives for diligent behavior against the social harms of imposing excessive risk bearing. *See Shavell, supra.*

Three Principles of Welfare-Maximizing Liability Rules

We identify three principles of efficient liability rules relevant to the issue of causation and proximity in major environmental cases that are based on general economic insights about risk bearing and incentives deriving from the results of the principal-agent paradigm that we just outlined. Before doing so, however, it is important to recognize that establishing liability rules for companies, as opposed to individuals, involves an additional nuance that is sometimes forgotten in such discussions. In general, when a catastrophic environmental event occurs, such as a large oil spill, massive forest fire, massive flood, or other such occurrence, the event may be the result of the behavior of individuals, but the liable party may be their employer. Companies are not individuals, and they may be able to influence but cannot control behavior of their employees. Companies can and do influence employees' behavior by establishing rules, practices, procedures, protocols, incentives, penalties (including loss of job), monitoring, training, and reporting requirements; but they cannot fully control or determine what employees will or will not do. Hence, the meaning of negligence by a company is different from the meaning of negligence by an individual. An individual may be negligent by ignoring the

company's rules, while the company may have been fully diligent in establishing sound rules, procedures, and so forth. That is, failures can happen in at least two ways: (1) The company could have failed to establish rules, processes, incentives, and penalties that would be adequate reasonably to ensure compliant behavior by employees; and/or (2) even if a company did establish adequate rules, processes, incentives, and penalties, a given employee at a given time might not follow them and could still cause a failure.

If a company does not bear any liability for its employees' negligence, the company will generally have inadequate incentive to establish properly aggressive rules and procedures to protect against employee negligence. *See* A. Mitchell Polinsky, *An Introduction to Law and Economics* 125–34 (3rd ed. 2003). But a company with optimal rules will not be able to prevent all adverse events unless it refrains from doing business at all, and will not be able to enforce its rules 100 percent of the time even under the best circumstances. Hence, the optimal liability rules—how much liability a company should bear as a matter of principle—certainly vary as a matter of economics, depending on whether the company was negligent in establishing and enforcing its rules, or whether it established appropriate rules and enforced them reasonably, but the event occurred as a result of employee negligence despite the rules and other controls in place.

Aside from these considerations, we identify the following factors as relevant to determining a socially efficient (i.e., welfare maximizing) set of liability rules:

1. the principle of control
2. the principle of causation
3. the principle of balance

The Principle of Control

The principle of control is that to create efficient incentives, the extent of liability should be linked with the extent of control. The harm from any given failure can vary for reasons that are not predictable and are outside the control of the firm and its employees. Consider, for example, a power company whose equipment failure causes a forest fire. The extent of the fire and damage caused will depend on a variety of factors unrelated to the equipment failure itself, such as the weather conditions before, during, and after the failure, and the speed and proficiency of the fire-response personnel. The power company may, through its rules and procedures, be able to influence the probability that equipment fails and sparks a fire, but it may have much more limited control or no control at all over the spread of the fire once it occurs. In such a circumstance, imposing liability for extreme outcomes may impose costs upon the company (and, therefore, on consumers) that outweigh the risk of catastrophic fire that society is willing to bear, because the company's only ability to respond to full liability for catastrophic fires may be to decline to operate in certain fire-sensitive areas at all. Such an outcome may be contrary to the public interest.

One way to limit liability that is responsive to the principle of control (although not the only reasonable way) might be to limit the utility's liability only to damage incurred within a certain geographic proximity to the origin of the fire. The issue is not one of causation per se—if an equipment malfunction sparks a fire and a residential neighborhood 50 miles away from the origin burns down because unusually dry conditions and high winds spread the fire an exceptionally long distance, it is clear that the equipment failure was (in interaction with the weather conditions) a causal factor of the lost property. However, the extreme level of damages may not have been under the control of the utility beyond its efforts to minimize the probability of any fire at all. Hence, a limitation of liability based on geographic proximity to the origin is not based on the logic of causation but on the logic of control.

More generally, an implication of the principle of control is that when considering the proper extent of liability, the concept of “proximity” should be assessed with respect to proximity of control. The more proximate are the allegedly negligent party's levers of control to the outcome, the more likely it is that the efficient sphere of liability should include that outcome.

The Principle of Causation

The principle of causation is the obvious principle that parties should not be liable for outcomes that are not effects of their actions. For example, suppose that a resort on the Gulf Coast claims that it lost business due to an oil spill. Suppose, specifically, that its business was down 30 percent in the summer of the oil spill relative to the previous summer. If, however, 50 percent of that decline in business would have occurred without the spill due to an overall decline in tourism resulting from overall economic downturn, the oil company—if found negligent—should be relieved of liability for (at least) the half of the decline that the oil spill did not cause. The fact that an oil spill would reasonably cause a decline in profits at resorts on beaches polluted by the spilled oil, and the fact that a beach resort experienced a decline in profits, do not together imply that the entire decline in profits of that beach resort was the result of the oil spill. Indeed, more generally, the decline in profits caused by the spill could be more or less than the resort's observed decline in profits relative to the previous year. The damages caused by the spill are not the difference between the pre-spill and post-spill profitability, but rather the difference between the actual post-spill profitability and the profitability that would have been achieved in the but-for world in which the same conditions held except for the spill. This is well understood and we do not believe we are making any new or controversial point here. We do observe, however, that the practical challenges of identifying harm caused by an event are not only significant but are likely to be more significant as the proximity of the harmed party to the event decreases.

The Principle of Balance

The principle of balance relates to the extent to which liability rules may create an inherent bias that discourages risk taking. Consider again the scenario in which an oil spill in the Gulf of Mexico causes resorts on affected beaches to lose business. This may be considered a direct effect of the spill. In addition, suppose resorts on unaffected beaches in nearby East Coast states

also experience a decline in business because potential customers change their vacations plans based on the incorrect belief that those beaches also were affected. Further, suppose resorts in California experience an upturn in business, because travelers substitute California vacations for East Coast vacations. If the harm to East Coast resorts is \$x and the benefit from the increased business to California resorts is \$y, and if these were the only indirect effects of the spill, the net indirect harm would be $Z = \$x - \y . At best, the *socially optimal* liability that the oil company should face from an incentive standpoint for the indirect effects of the spill would be \$z, not \$x. Hence, requiring the oil company to bear the indirect liability \$x will be excessive from a social standpoint and cause the oil company to engage in excessive risk-shielding, because it is neither feasible nor consistent with general legal principles as we understand them to calculate the benefits to the California resort owners and offset them against the harms to the East Coast resort owners when calculating damages owed to the East Coast resort owners, let alone for the oil company to recover those benefits from the benefited parties.

The principle of balance, like the other principles, does not provide a bright-line test for identifying the socially efficient point of demarcation beyond which liability should not be applied. Indeed, it suggests, again, that the point of demarcation may not be best thought of as associated with the metaphor of “proximity.” It does suggest, however, that where the avenue of harm is such that the harmed parties may have suffered to the benefit of other parties, that avenue of harm may fall outside the efficient sphere of liability.

Conclusion

Determining the limits to the effects of a negligent action in a specific case can be informed by how the finding affects investment on a going-forward basis. Expansive liability rules that seek to compensate victims far and wide from a negligent action will have the effect of increasing investment in risk-reducing activities and reducing the investment in risk-embodiment activities. In contrast, narrow liability rules would be expected to result in less risk-reducing investment and more risk-embodiment investment. Neither type of investment has a monotonically positive or negative effect on social welfare, but instead would generally improve social welfare up to a point, after which incremental investment in risk-reducing activities or reduction in risk-taking activities reduces, rather than increases, social welfare. The principles of control, causation, and balance are aspects of limit setting that should be considered when determining where the boundary of liability should lie in a particular case. Reasonable application of these principles will help ensure that society’s resources are efficiently allocated so as to properly balance the social welfare interest in encouraging private entities to exercise care and diligence with the social welfare interest in encouraging private entities to undertake inherently risky productive activities.

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Environmental Litigation

FROM THE SECTION OF LITIGATION ENVIRONMENTAL LITIGATION COMMITTEE

Fall 2011, Vol. 23, No. 1

Keywords: litigation, environmental litigation, BP, Macondo, gulf spill, principle of control, principle of causation, principle of balance, Palsgraf

For Young Lawyers: "Preservation" in the Constant Litigation Environment

By Meaghan G. Boyd

By now, environmental practitioners are familiar with the general concepts governing the preservation of documents and information, including electronic documents and information, in the context of threatened litigation. "Identifying the boundaries of the duty to preserve [evidence] involves two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (emphasis added). In essence, the duty to preserve evidence turns on case-specific, fact-intensive inquiries of "when" and "what."

When and What

Courts have consistently held that a party's duty to preserve attaches when that party has reason to anticipate litigation. *See Zubulake*, 220 F.R.D. at 216 ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."). *See also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."); *Griffin v. GMAC Commercial Finance, LLC*, 2007 WL 521097, at *3 (N.D. Ga. Feb. 15, 2007) (duty to preserve arises in "pending or *reasonably foreseeable litigation*") (emphasis added).

In other words, a party must preserve evidence when the party "has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation." *Griffin*, 2007 WL 521907, at *3. The notice required "does not have to be of actual litigation, but can concern 'potential' litigation."

The duty to preserve extends to evidence that a party knows or should know may be relevant to the litigation or anticipated litigation. *See Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009); *Cedar Petrochem., Inc. v. Dongbu Hannong Chem. Co.*, 2011 WL 182056, at *15 (S.D.N.Y. Jan. 14, 2011). Stated practically, when a party knows or should know that material may be relevant to current or future litigation, it should preserve it.

The court in *Frey v. Gainey Transportation Services, Inc.* held that the duty to preserve is not triggered where the evidence is merely "part of the puzzle." 2006 WL 24437871, at *8 (N.D. Ga. Aug. 22, 2006). In *Frey*, the plaintiff's attorney sent the defendant's safety director a detailed

letter demanding preservation of specified documents and asserting that any destruction would be considered spoliation. After receiving the plaintiff's pre-litigation letter but before the plaintiff actually filed suit, the defendant deleted potentially relevant electronic data in the normal course of business. Because the lost data was "not crucial" to the plaintiff's claims, the court held that the defendant had no duty to preserve it.

Whether a party has reason to anticipate litigation, or whether it should know that material may be relevant to current or future litigation, depends on the facts and circumstances of each individual case. *See Kates*, 981 A.2d at 1185. The well-worn standards that are easy to articulate in the abstract can sometimes be challenging to apply in the real world. While "[t]he broad contours of the duty to preserve are relatively clear," on a more specific level, "the duty cannot be defined with precision." *Zubulake*, 220 F.R.D. at 217; *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 523 (D. Md. 2010).

In environmental litigation, the preservation obligation is even more complicated. Clients with environmental issues operate in highly regulated, litigation-riddled environments. Whether it is the threat of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) actions, challenges to air, water, or waste permits or licenses by public interest groups, or even common-law nuisance claims, the anticipation of some sort of litigation is a common, even daily occurrence for companies in many diverse industries. Under the general duty-to-preserve standard, it could be argued that this near-constant risk requires the indeterminate retention of extraordinary amounts of data and information.

As a matter of practicality, however, this cannot be the case. Courts have held that there is no "general duty to preserve documents, things or information, whether electronically stored or otherwise." *Creative Pipe*, 269 F.R.D. at 522–23. A duty to preserve that effectively requires companies within heavily-regulated industries to preserve every document, forever, when there is even a suggestion of litigation arguably conflicts with this general principle. As Judge Shira Scheindlin stated "[m]ust a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, . . . The answer is clearly, 'no.'" *Zubulake*, 220 F.R.D. at 217.

An unlimited duty to preserve also contradicts the related doctrine of proportionality in discovery. *See Creative Pipe*, 269 F.R.D. at 522–23 (explaining the doctrine of proportionality by stating that "the scope of preservation should be proportional to the amount in controversy and the costs and burdens of preservation"); *Thompson v. U.S. Dept. of Housing & Urban Dev.*, 219 F.R.D. 93, 97–99 (D. Md. 2003) ("[C]ourts have acknowledged the need to employ the Rule 26(b)(2) cost-benefit balancing factors to determine just how much discovery of electronic records is appropriate in any given case, . . ."). *See also* Fed. R. Civ. P. 1 (explaining that the federal rules are intended to provide for "the just, speedy, and inexpensive determination of every action").

As the district court in *Victor Stanley, Inc. v. Creative Pipe, Inc.* explained, “whether preservation . . . is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case . . . the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.” 269 F.R.D. at 523 (emphasis in original). *See also The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010) (“The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.”).

Finally, an unbridled duty to preserve is inconsistent with the idea that only a specific, credible threat of litigation, not simply a general one, gives rise to the duty to preserve. In *Cache La Poudre Feeds LLC v. Land O’ Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2005), outside counsel for the plaintiff called the defendant’s general counsel almost two years prior to filing a lawsuit alleging trademark infringement. The plaintiff’s counsel subsequently wrote the defendant’s general counsel a letter to “put [defendant] on notice of our client’s trademark rights . . . and to determine whether this situation can be resolved without litigation.” *Id.* at 622. Because the plaintiff’s letter did not threaten “impending litigation,” but instead “implied that her client preferred and was willing to explore a negotiated resolution,” the court held that the defendant’s duty to preserve evidence was not triggered until the filing of the complaint. The court explained that “a party’s duty to preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent by the other party.” *See also The Sedona Conference Commentary on Legal Holds*, 11 Sedona Conf. J. 267, 269 (2010) (explaining that “[t]he duty to preserve requires a party to identify, locate, and maintain information and tangible evidence that is relevant to *specific and identifiable* litigation” and that “[a] reasonable anticipation of litigation,” which triggers the duty to preserve, “arises when an organization is on notice of a *credible probability* that it will become involved in litigation) (emphasis added).

Nevertheless, the seriousness with which courts view the duty to preserve and the sanctions levied against violators of that duty is enough to give many companies and their counsel pause: In a constant litigation environment, just when does litigation preservation begin or end?

Duty to Preserve in Environmental Litigation

The duty to preserve evidence—and the critical questions of when and what—has been evaluated in environmental litigation. It is clear that the general rules regarding preservation of evidence apply with equal force in these types of cases. *See Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 339–340 (D. Conn. 2009) (rejecting the plaintiff’s argument that a different preservation analysis applies in CERCLA litigation).

Moreover, as in other areas of the law, when the duty to preserve is triggered is a fact-intensive inquiry in each case. At least one court has held that engaging environmental consultants and

legal counsel triggered a duty to preserve relevant evidence. In *Innis Arden*, the plaintiff engaged an environmental consulting firm to provide a proposal for remediating the plaintiff's contaminated property. The engagement letter with the consulting firm "demonstrated that [plaintiff] contemplated the possibility of seeking recovery of its remediation costs from the responsible parties and that [the consultant] would tailor its sampling program to that end." *Id.* at 336. The plaintiff subsequently hired legal counsel to advise the company on cost-recovery efforts under CERCLA. The plaintiff's duty to preserve evidence was triggered by its engagement of its consultant and legal counsel: "The fact that [plaintiff] was working to identify the parties responsible for the PCB contamination and then to pursue recovery of costs establishes that litigation was reasonably anticipated from the very beginning of the investigation and remediation process." *Id.* at 340. Further, because the plaintiff "knew that [its consultant's] investigation sampling was a critical part of possible cost-recovery litigation," the duty to preserve this evidence attached, at the latest, when "counsel was actively involved in the investigation and analysis of the samples in preparation for legal action." *Id.*

Likewise, relevancy continues to be the key inquiry in the "what evidence" analysis in environmental litigation. In a case involving the migration of PCE-contaminated groundwater from property owned by the defendant onto property owned by the plaintiff, the plaintiff sought sanctions against the defendant for allegedly intentional destruction of evidence. *AmeriPride Servs., Inc. v. Valley Industrial Serv., Inc.*, 2006 WL 2308442, (E.D. Cal. Aug. 9, 2006). After the commencement of litigation, the plaintiff served a Rule 34 notice requesting an on-site inspection of the defendant's facility to examine certain areas where the plaintiff alleged releases of hazardous substances had occurred. The requested inspection was scheduled to occur one day after construction of a new government-ordered groundwater-treatment system commenced. The defendant objected to the inspection, which did not occur as requested, and construction began on the new groundwater-treatment system. During construction of the system, two wastewater pipes were broken and approximately 110 tons of soils were removed from the construction area. No samples were taken of the materials inside the pipes prior to their disposal. The soil was randomly sampled to determine whether it needed to be disposed of as a hazardous waste. During construction, the plaintiff's counsel sent several letters to counsel for the defendant, advising the defendant of its spoliation concerns. The plaintiff subsequently served revised Rule 34 requests to inspect the defendant's facility and ultimately inspected the facility almost four months after the construction of the new groundwater system was completed.

The court held that the defendant's duty to preserve evidence had been triggered:

[The defendant] was well aware of the nature of [the plaintiff's] claim and should have known that evidence removed from the facility was relevant to the pending action. To compound the matter, [the defendant] was explicitly given notice that [the plaintiff] sought to inspect the very evidence that was removed and discarded.



Id. at *5. Because “one of the key issues in the pending case is whether [the defendant] discharged PCE into the soil” and the “removed evidence would have either revealed that there were no leaks and thus, no on-going contamination . . . or that there were leaks and that there was on-going contamination . . . the removed soil and pipes were clearly relevant to the pending action.” *Id.* at *6. Although the defendant should have known of the relevance of this evidence, the letters and notices from the plaintiff put the defendant on actual notice that the “evidence was important” to the plaintiff. As a sanction, the court held that it would instruct the jury that the removed pipes leaked PCE into the soil and groundwater and that this contamination caused the contamination on the plaintiff’s property. The court prohibited the defendant from presenting any evidence to rebut the instruction.

Still, the question remains and appears not to have been directly addressed in the context of environmental litigation: What of the companies whose daily business involves a threat of litigation? If the general rules are not more carefully refined—and actions such as the engagement of environmental consultants and legal counsel trigger a duty to preserve—courts are imposing, in practice, an obligation that, in theory, they reject. Only time will tell whether a more nuanced understanding of the realities faced by these companies will prevail.

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Keywords: litigation, environmental litigation, young lawyers, Zubulake, duty to preserve



Mediating Environmental Property Matters

By Doug Simpson

Mediating environmental property lawsuits matters presents some unique challenges. Environmental matters often are exceedingly complex scientifically or technically—challenging parties, attorneys, and mediators. Environmental mediation frequently is not a one-time event, but a process designed to most efficiently and cost-effectively resolve complex environmental issues.

Context: A Typical Environmental Property Case

Environmental property cases typically arise from soil, groundwater, air, or watercourse contamination, or a combination of these. Often the litigants themselves might care little about the contamination, but an administrative body has ordered a litigant to clean up the contamination. Often the person or entity ordered to clean up the site is not the person or entity that caused the contamination and might not have the financial resources to do the cleanup. Yet the regulatory entity might be threatening to impose thousands of dollars of daily penalties for noncompliance with various orders.

Often not just one but several regulatory entities are involved. For example, a regulatory entity with responsibility for ensuring water quality in the process of inspecting storm drains might notice that erosion has occurred, exposing what appears to be trash. Investigation might reveal that unbeknownst to the current owner, the property was once a dumpsite or that grading nearby moved trash to its current location. In such circumstances, the water-quality regulatory entity might order the site owner to investigate whether the trash is affecting water quality. The water-quality regulatory entity might itself notify other regulatory entities, such as agencies responsible for waste management or cities responsible for ensuring that federal Clean Water Act storm-water-quality objectives are met. Because a stream is involved, the initial regulatory entity might also report the contamination to an agency having responsibility for flora and fauna, such as a department of fish and game, or to a regulatory entity having responsibility for navigable streams and their tributaries, such as the Army Corps of Engineers. Even if the initial regulatory entity does not make such reports to other regulatory entities, the site owner might have an independent duty to make such reports. Environmental matters thus can have a number of regulatory entities involved, apart from the litigants. And the regulatory entities might each have the power to order persons to perform certain investigative and cleanup duties, each with onerous penalties.

Investigative and reporting obligations can be lengthy and expensive. In a situation where groundwater contamination is suspected, for example, typically a study will need to be done to characterize the impacted aquifers, the quality of the upgradient water to establish a background level, the nature and extent of the contamination (constituents of potential concern and vertical



and horizontal extent thereof), and the downgradient water quality. But before the study is performed, qualified experts must propose the investigative plan and get it approved. This can be a months-long iterative process, compounded by involvement of multiple regulatory entities and multiple litigants. Often an important consideration for the litigants is to cooperate so as to avoid creating the perception that the problem is more severe than the agencies initially believed. Because liability under most environmental laws is joint and several, pointing fingers at others tends to increase liability against oneself.

Once the investigative plan is prepared, a remedial plan needs to be prepared and approved before cleanup can be performed. Often there is significant debate about what cleanup level needs to be achieved—about “how clean is clean?” This remedial-plan process also is often a months-long process. Once the remedial plan is designed, approved, and the remedial work is performed, typically the regulatory entity demands a report confirming that the intended cleanup levels have been achieved. In the case of groundwater, this often requires four consecutive quarters or more of good findings. If the findings are not good enough, the cycle might begin anew, with the regulators requiring additional investigation, additional remedial planning, and additional confirmation reporting. In some cases, such as landfills, there could be a specific regulatory reporting obligation for the next 30 years—or more.

Despite what can be a complicated critical path to success, an effective mediator can help guide the parties to a cost-effective resolution by helping the parties build on common interests and work cooperatively to avoid exacerbating an already expensive problem. Environmental lawyers likewise can help steer the process to a cost-effective end.

Critical Players and Critical Path to Success

Because environmental property cases often involve not only the litigants but also a layer of regulators, often the regulators’ decisions or the required regulatory path are of primary importance. Often litigants and even regulators do not or cannot predict the decision tree of possible regulatory paths. Regulatory outcomes frequently will impact damages or other relief that will be sought in the lawsuit.

But regulators are often susceptible to persuasion, and environmental litigants can and should work to persuade regulators early and often to adopt cost-effective solutions, whether informally or formally as part of a due-process hearing. Parties in a case, for example, might be successful in persuading the regulator that a certain contaminant need not be cleaned up to a standard of one part per billion, but instead needs only to be cleaned up to one part per million. Or a party might be able to demonstrate that the contaminant is degrading naturally and, over time, will resolve itself. In either of these circumstances, there could be a dramatic cost savings that accrues to the benefit of all parties.

Persuading regulators is an issue of timing, method, money, and often of personalities. The parties need to be equipped with scientific evidence that can persuade the regulators. To get the

evidence, knowledgeable experts armed with evidence gathered via proper and properly documented efforts should be gathered and presented. The lawyers need to be able to understand and to articulate how those findings fit within the regulatory scheme. This can be an expensive and long process.

Parties working together in harmony often are more persuasive with regulators than those who are at cross-purposes. Regulatory staff generally do not want to arbitrate, mediate, or adjudicate disputes between parties—they simply want to determine whether evidence establishes that somebody has cleaned up an environmental problem. Generally, parties pointing fingers at each other in the presence of regulators can create additional regulatory problems by giving rise to additional concerns that a regulator might not have previously addressed, waking the sleeping dog, potentially increasing costs and thus making resolution more difficult. Admittedly, at other times, regulators need to know that there are genuine scientific issues of disagreement or significant areas of disagreement about the regulatory scheme, such as whether a particular guidance document or order applies to one party or another.

In many cases, either in mediation or outside that setting, the litigants might formalize their united approach, taking great strides toward litigation resolution and cost savings in the process. The parties might, for example, be able to create a shared-expert agreement, agreeing on a joint expert (or joint team of experts) to perform a joint site investigation, on joint reporting, and on a joint technical expert for meeting with regulators. Just in case gaps are not bridged and to otherwise be prepared should dispute resolution fail, the parties might retain their own consultants who can review and comment on the joint expert's data and analysis, affecting the joint expert's approach, while being prepared for litigation, without each party having their own experts fully involved.

Parties generally fare better by working out key differences together in advance of regulatory meetings, thus appearing more in harmony about how regulatory objectives can and should be met. In all events, mediators need to understand either through experience or through the lawyers' briefing the environmental regulatory setting, including the critical players and decision makers, and the likely critical regulatory path to success. Lawyers can and arguably should begin mediation early, with the initial objective being an effort to structure a united approach to persuading regulators.

Timing Issues

Litigation, even lengthy litigation, often travels more quickly than the environmental-cleanup regulatory process. If the matter is on track to proceed to trial in advance of the environmental cleanup, there often is a significant difference of opinion in the ultimate cost of cleanup and as to damages available in the lawsuit. The plaintiffs' experts might deal with the uncertainty by padding numbers either via scope of work or unit costs. By contrast, the defense experts might understate the requirements. Thus, the plaintiffs in the face of uncertainty might suggest that regulators will require soil and groundwater investigation requiring 10 boreholes and 10



monitoring wells with 30 years of monitoring, whereas the defendants might suggest only three boreholes and three monitoring wells with one year of monitoring. The defense will assert that damages are speculative, whereas the plaintiffs will assert that the defense's Band-Aid approach would never pass regulatory muster.

The long regulatory critical path as compared to the short litigation path often is a settlement impediment because of the uncertainty. Consequently, methods to reduce the impact of the timing issue can help achieve resolution and decrease costs. Environmental cases often are not judges' favorite cases, and courts often can be persuaded to put such cases on the back burner or on the slow track to trial. The parties might also be agreeable to a tolling or a stand-still agreement so that the regulatory process can proceed and decrease the uncertainty, narrowing the divide between the parties while putting off litigation. The parties can then resolve the case more easily in the mediation context or through other settlement discussions. If a tolling or stand-still agreement is a possibility, the parties might address the issue of whether one or more significant issues need to be addressed by the court before the agreement goes into effect, to reduce the uncertainty of the outcome of an important motion.

Legal Theories and Nuances

As in any case, understanding the key liability, causation, damages, and apportionment theories is key to resolving the dispute. Environmental lawyers ought to take care to explain or brief their mediator on the significance of such technical environmental-law issues. The parties themselves should be familiarized with the significance of such issues as well.

For example, depending on the theories pleaded, a party might be limited to injunctive relief. Some other theories might award a party attorney fees. Some environmental legal theories might allow response costs, but the awardable response costs might bear little resemblance to typical consequential damages. As for response costs, there could be a number of hurdles such as compliance with the National Contingency Plan, which is an expensive process often not taken by litigants, even those claiming recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Similarly, attorney fees might have a nuance, such as under CERCLA, in which fees are awardable for the effort to identify responsible parties but are not generally available otherwise.

Ensuring that all players know the field of play and whether a party can or cannot obtain certain relief is, of course, crucial to successful mediation. Environmental lawyers should take care to explain the key legal theories to mediators, to clients, and to opposing parties.

Scientific and Technical Issues

Also as in other cases, understanding the critical factual issues is important to helping the parties resolve their dispute. In environmental cases, critical facts often are very technical or scientific in nature, involving issues that lawyers, mediators, and decision-making clients might not fully understand. Often the key issues are set forth in detail in regulatory reports, which might not be



understandable to the average person. But experts (joint experts or individual-party consultants) can assist parties, lawyers, and mediators in understanding the key issues of consequence.

Scientific experts generally used the scientific method to come up with their conclusions and ought to be able to describe the solidity of their positions in detail. But they too are subject to persuasion. Often a meeting of experts, as can occur in the mediation setting, will help one side persuade the other in a confidential, candid discussion. Or perhaps both sides will persuade the other on one issue or another, narrowing the gap of disagreement. In the event of a joint expert along with individual-party consultants, the mediation context likewise can be used for candid confidential discussions in which the experts can work toward convincing one another.

Because environmental issues often are very complicated or difficult for humans to understand, good data, good interpretation, and especially good explanatory graphics such as demonstrative exhibits are very helpful. Often these exhibits, or the bases for such exhibits, have been contained in reports given to regulators, so little extra effort or cost is involved in preparing them for mediation.

For example, one expert might have suggested to his or her side's attorney and client the need for a Visqueen curtain wall in conjunction with several groundwater extraction wells to inhibit the migration of contamination. The work might require significant trenching and backfilling, and maybe some construction demolition and later rebuilding—a lot of construction work at great expense. On the other hand, another party or consultant might assert that because of the characteristics of clay layers within the soil, the Visqueen curtain wall will be unnecessary, saving all the parties costs by decreasing overall damages.

Having a mediation session where the experts can talk to one another can be very helpful. Depending on the attorneys, parties, and objectives, the experts might be able to meet in the confidential mediation context either alone or with the mediator to have a completely open discussion of issues of consequence, without grandstanding for attorneys or for clients. Such a process could help narrow the gap of scientific disagreement. Or the experts might be able to crystallize an issue of consequence that a regulator will need to address before the remedy (scope and cost to repair it) can be determined.

In any event, understanding the key scientific and technical issues of consequence—the key facts in controversy—is very important to the successful mediation. Lawyers should arm their mediator with such key information, and should be sure that clients and opposing parties are able to understand it as well.

Sources of Money

Understanding possible sources of money or other relief is one of the keys to a successful environmental mediation. As in other lawsuits, insurance is a possible source of money. Today's insurance policies often have exclusions, exceptions, conditions, or limitations that might apply



and preclude or limit available insurance coverage. But unlike many other kinds of lawsuits, in the environmental context, liability can be founded on decades-old events without statutes of limitation barring relief, potentially triggering decades-old insurance policies that do not have relatively recent pollution exclusions, conditions, or limitations. And a defendant's cross-complaint against the plaintiff might trigger additional coverage.

Often an identification of the parties' available insurance, particularly where governmental entities such as cities and counties are involved, will lead to the identification of insurance carriers that insure more than one party in the case, leading the insurance carrier to the conclusion that resolving the case might be more cost-effective than funding the parties' ongoing debate. This is quite common in the wake of many insurance-carrier mergers and acquisitions over the past few decades.

Effective environmental mediation requires an early identification of all available insurance to help fund lawsuit resolution, including insurance policies that might be decades old, together with the early and ongoing involvement of insurance carrier representatives and/or coverage counsel. Of course, additional parties might be added not only because they are potentially responsible parties but also because they bring more insurance coverage to the table, increasing the size of the settlement pie. Key coverage issues should be identified so that the case is postured accordingly.

Another important source of money that environmental litigants often miss is grant money or money that might exist within special governmental funds. This is a key issue in part because litigants are required to mitigate damages—and the failure to obtain available grant money arguably is a failure to mitigate damages.

Both states and the federal government often have grant programs or special funds that a litigant can use to help fund the case's resolution. Sometimes grants are hundreds of thousands of dollars—too big to be ignored, and often capable of bridging or at least narrowing settlement gaps. Grant money is free money, and environmental lawyers ought to seek it out. Often the regulatory entities involved will provide guidance in creating a grant request, because they have the money in the budget and need to give it away. Finding the grants can often be difficult; it is a process of working with available regulatory entities and their websites, as well as keeping abreast of current legislation. Obtaining grants often presents another timing issue—there might be only certain funding periods with certain deadlines, and funding might be available only to the first applicants. Cooperation between the parties is important. Sometimes only the property owner can apply for or qualify for the grant or fund, but another party might have key information necessary to the application. Examples of grants and special funds are many: stream-bed-restoration grants, park-creation grants, rubber-tire-recycling grants (used for artificial-turf field construction), underground-storage-tank grants or funds, landfill-reconstruction grants, storm-water-related grants, and other clean-water grants. Sometimes non-governmental



organizations have grant money available as well, and they should not be ignored as a helpful source.

Litigants should be united in the purpose of finding all available grants—the plaintiff to avoid the failure-to-mitigate claim and a possible unfunded orphan share of sorts, and the defendants to decrease the overall damages. Pursuing grant money should occur early in the life of a case. Mediators, litigants, clients, and opposing parties should be aware that obtaining grant money is often a possibility.

Creating a Process

Because of their complexities and often large size, environmental cases lend themselves to the early-resolution-of-disputes process, potentially involving a mediator. The first objective ought to be decreasing the size of the pie that needs to be swallowed—decreasing overall damages, costs, and fees. Litigants should consider meeting early on to consider both common interests and a possible structure for resolution—presenting a united front to regulators—in an effort to decrease overall damages as much as possible. A mediator can help by working with a joint expert or with individual experts to have them develop an approach to timely meeting regulators' demands. The mediator can help structure an expert-sharing, quasi-joint-defense agreement that will help decrease overall costs during the regulatory life of the case. And grant-fund availability should be investigated and pursued early because if grants are available, they will decrease overall damages.

The parties should exchange information, and discovery costs should be minimized to the extent possible. The parties might, for example, agree to share non-privileged discoverable documents and information per Rule 26 of the Federal Rules of Civil Procedure, which encourages disclosure of information—even if the matter is not in federal court. Clients likely would prefer that their resources be spent on remediating the site or on resolving the litigation than on discovery debates.

The next step—dividing the pie among the litigants and the carriers—is more difficult. Of course, dividing the settlement pie is easier the smaller the damages pie to be divided, and the more parties and insurers there are to take a piece.

With the parties' consent, the mediator can begin early communications with insurance carriers and their coverage counsel, in an attempt to build a coalition of entities united in purpose. All parties want their piece of damages to be as small as possible. Some carriers might help get other carriers involved, especially where some might be aware of inconsistent positions taken by carriers in other similar matters. All carriers want to keep overall costs down.

The mediator should structure one or more mediation sessions early in the life of the case to begin the process of resolution, armed with the knowledge provided by able counsel. Mediation hearings should be keyed into the significant regulatory events—for example, once the remedial



Environmental Litigation

FROM THE SECTION OF LITIGATION ENVIRONMENTAL LITIGATION COMMITTEE

Fall 2011, Vol. 23, No. 1

work plan has been approved, how much will it cost, is there grant money or insurance money available, who pays what shares, can the parties reach agreement, and what happens if things go wrong? Settlement agreements tend to be complicated, and crafting them requires quite a bit of forethought. Often the parties will remain joined at the hip for years, resulting in a complicated, ongoing agreement, not a simple release-and-walk-away settlement.

But early preparation, early cooperation and information sharing, and early mediation make early resolution of a complicated environmental case a distinct possibility—and often each regulatory event will decrease the uncertainty that the parties face, narrowing the settlement gap even further. Effective mediators empowered by able counsel can help parties achieve cost-effective dispute resolution.

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Keywords: litigation, environmental litigation, regulation, liability, causation, damages, apportionment, cooperation

Justice Scalia Takes "Foreign Sources" to Support Judicial Takings

By Joseph Z. Fleming

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151, 130 S. Ct. 2592 (2010), Justice Scalia stated at the outset that “We consider a claim that the decision of a State’s court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth . . .” 130 S. Ct. at 2597. While that issue was raised by the petitioners, the Supreme Court concluded that the state had not engaged in a taking as contended. This was because the petitioners, based on an analysis of the Florida law, including common-law rulings, failed to establish ownership of property allegedly taken and the “Florida Supreme Court’s decision did not contravene the established property rights of petitioners.” *Id.* at 2613. The Court concluded the claim of the petitioners as members of an organization of beachfront, or littoral, owners contesting a state program, which would expand eroded beachfront (by “renourishment,” or depositing sand in restoration and then maintaining it in “nourishment”), did not eliminate the owners’ property rights as to their existing property; the extended beachfront that would occur thereafter (and only through natural slow deposit, or “accretion”); or their beachfront “access” to the water. As a result, the Court affirmed the decision of the Supreme Court of Florida, which had concluded that the statute enabling the restoration of the eroded beaches (and then maintenance for nourishment), was not an unconstitutional taking. The Florida Supreme Court had set aside an appellate court order concluding to the contrary (and ruling in favor of the petitioners’ organization, which represented many beachfront owners).

The facts of the case are intriguing at a time when beaches are being eroded and there are concerns about rising tides. From a water law point of view, the Court’s analysis that state law would control whether the petitioners had property taken is extremely important. In terms of the public-policy implications, the potential for erosion of the shorelines to continue, and concepts of restoration and nourishment, which expand the shoreline and therefore are of direct concern to both property owners and the public, are also important. In terms of property rights, all land use and environmental-law regulation may involve “taking” questions.

The approach of evaluating a judicial taking also may impact many other areas of the law. Federal and state courts’ decisions could be subject to scrutiny in various matters involving and impacting private property. For example, in *Morton v. Zuckerman-Vernon Corp.*, 290 So.2d 141, 145 (Fla. 3rd D.C.A. 1974), a Florida appellate court found that if a judicial ruling improperly impairs and abrogates obligations of contract by judicial action, it is a taking of property without due process in violation of state and federal constitutional prohibitions. See also *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), which set aside a large verdict as a violation of due

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process by taking property because of a desire to punish for harming persons not before the Court.

The points discussed in *Stop the Beach Renourishment* also are of extreme importance. For illustrations and detailed articles regarding the decision, *see, e.g.*, Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 Syracuse L. Rev. 201 (2011); D. Benjamin Barron, *The Complexities of Judicial Takings*, 45 U. Richmond L. Rev. 903 (2011); Michael B. Kent, Jr., *More Questions Than Answers: Situating Judicial Takings Within Existing Regulation Takings Doctrine*, 29 Virginia Env'tl. L.J. 143 (2011); Robert H. Thomas, Mark M. Murakami & Fred R. Eyerly, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 Vermont L. Rev. 437 (2010).

This article focuses on Justice Scalia's conclusion, which discussed fashioning a new standard for the concept of a judicial taking—although he and all eight of the Supreme Court justices involved in the decision (Justice Stevens took no part in the decision of the case) voted to affirm the Supreme Court of Florida and to reject the petitioners' request for relief, because they did not have a property interest under Florida law. While the Court was unanimous in concluding that there was no unconstitutional taking of property in the case, there were concurring opinions by Justice Kennedy (joined by Justice Sotomayor) and Justice Breyer (joined by Justice Ginsburg), which disagreed with the plurality conclusion that federal courts may review the private-property-law decisions of state courts to determine whether their decisions unconstitutionally take "private property" for "public use without just compensation."

Because none of the justices disagreeing with the concept of a judicial taking concluded that there could *never* be judicial takings but rather, maintained that it was not necessary to accept that approach in this case, in addition to the plurality opinion, an important judicial approach with constitutional dimensions has been established, whether or not there is agreement by those analyzing it. Therefore, it becomes important to analyze the plurality opinion, in which Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, concluded there could be a judicial taking.

The opinion of Justice Scalia included references to "foreign sources," in the process that Justice Scalia used to conclude that to answer the petitioners' question of whether the Florida Supreme Court engaged in a taking, it was necessary to evaluate the principles of taking law and whether the Takings Clause was only addressed to a "specific branch, or branches." 130 S. Ct. at 2601. Justice Scalia reasoned that to avoid that necessity while ruling on the petitioners' request was comparable to the "perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?" This judicial taking issue had to be addressed and "[o]ur precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary." *Id.* at 2603. He reached that conclusion by relying on the following decisions:



1. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the California Supreme Court had overruled its prior decision holding that the California Constitution’s guarantees of the freedom of speech and of the press, and of the right to petition the government, did not require the owner of private property to accord those rights on his premises. The owners of a shopping center had, as a result of the judicial change imposing such freedoms on their property, contested this new judicial decision impacting their property and contended that their private property rights could not “be denied by invocation of a state constitutional provision *or by judicial reconstruction of a State’s laws of private property*. . . .” 130 S. Ct. at 2602.

2. Justice Scalia noted that the decision in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–165 (1980), was “even closer in point” and supported the proposition that there could be a judicial taking. 130 S. Ct. at 2602. In *Webb*, a purchaser of an insolvent corporation interpleaded the corporation’s creditors, placing the purchase price in an interest-bearing account in the registry of the circuit court, to be distributed in satisfaction approved by the receiver. The Florida Supreme Court had construed an applicable statute to mean that the interest on the account belonged to the county because the account was considered public money. Justice Scalia concluded that the Takings Clause “bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.”

None of the four justices, in the separate concurring opinions (dissenting from the plurality opinion that there could be a judicial taking), distinguished, no less mentioned, the foregoing Supreme Court decisions relied on by Justice Scalia. Justice Kennedy noted that, as Justice Breyer had observed, the case did not require the Court to determine whether or when a judicial decision determining the rights of property owners can violate the Takings Clause. Justice Kennedy maintained that there were other alternatives preferable to resolving all of the issues raised by Justice Scalia’s opinion on judicial takings. He felt that: “These difficult issues are some of the reasons why the Court should not reach beyond the necessities of the case to recognize a judicial takings doctrine.” Justice Breyer also disagreed with “the plurality” because its opinion “unnecessarily addresses the questions of constitutional law that are better left for another day.” Justice Breyer was not interested in evaluating a matter that did not have to be evaluated in the case. After giving his various reasons, he opined that: “In the past, Members of this Court have warned us that, when faced with difficult constitutional questions, we should ‘confine ourselves to deciding only what is necessary to the disposition of the immediate case.’” Justice Breyer also quoted Justice Brandeis, who had suggested, in *Ashwander v. TVA*, 297 U.S. 288, 346–347 (1936):

The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

130 S. Ct. at 2619. Justice Breyer concluded, “I heed this advice here. There is no need now to decide more than what the Court decides in Parts IV and V, namely, that the Florida Supreme Court’s decision in this case did not amount to a ‘judicial taking.’”

Justice Scalia addressed the concurring opinions of Justice Kennedy and Justice Breyer, which dissented from the conclusion that there could be a judicial taking. And Justice Scalia used “foreign sources,” in the sense that they were non-legal sources and authorities to examine the arguments that the Court did not have to address the question of whether there would, or could, be a judicial taking.

The Perplexing Woodchuck Question

The first non-judicial, or foreign, source that Justice Scalia evaluated was whether a decision had to be made as to the judicial taking. This involved the woodchuck question. Justice Scalia said:

One cannot know whether a takings claim is invalid without knowing what standard it has failed to meet. Which means that Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the ‘unnecessary’ constitutional question whether there is such a thing as a judicial taking.

Id. at 2603.

Justice Scalia said that it was not true that deciding a constitutional question contradicted settled practice. He indicated that the Court often recognized the existence of a constitutional right or established test for the violation of such a right, and then went on to find why that claim at issue failed, or not.

The Queen of Hearts Approach

Justice Scalia then addressed the next “foreign source,” which was his conclusion that “Justice Breyer cannot decide that the Petitioners’ claim fails without first deciding what a valid claim would consist of.” Justice Scalia asserted that Justice Breyer “must either agree with the standard or craft one of his own.” He said that Justice Breyer’s position was paramount to “embracing a standard while being coy about the right,” which Justice Scalia characterized as “odd.” Justice Scalia concluded that “deciding this case while addressing neither the standard *nor* the right is quite impossible” (emphasis in original). He stated that Justice Breyer’s response that he “simply advocates resolving this case without establishing ‘the precise standard under which a party wins or loses,’” *id.*, meant that Justice Breyer relied upon no standard at all. Justice Scalia then referenced the second foreign source, the Queen of Hearts, stating that by relying on no standard at all, precise or imprecise, Justice Breyer

simply pronounces that this is not a judicial taking, if there is such a thing as a judicial taking. The cases he cites to support this Queen of Hearts approach provide no precedent. In each of them, the existence of the right in question was settled, and we faced a choice between *competing* standards that had been applied by the courts. We simply held that the right in question had not been infringed under *any* of them. There is no established right here, and no competing standards.

Id.(emphasis in original).

It may be presumptuous to assume that the Queen of Hearts reference is a “foreign source,” because Justice Scalia did not explain the reference. Generally, the reference used in legal discussions is to Lewis Carroll’s *Alice in Wonderland* and involves the trial of Alice and the pronouncement by the Queen of Hearts: “First the verdict, then the trial.” Perhaps Justice Scalia had something else in mind, but the reference is still “foreign” in that it was not a citation to a legal provision, or a judicial opinion, or even a common-law principle. But, it was a reference to a “foreign source” to suggest that Justice Breyer had no right to affirm the Florida Supreme Court decision and deny the relief sought by the petitioners, who were members of an organization of beachfront owners, without giving a reason in addition to the failure of the owners to actually have a property right.

The Orwellian Explanation

Justice Scalia then analyzed Justice Kennedy’s conclusion that “the Florida Supreme Court’s action here does not meet the standard for a judicial taking, while purporting not to determine what is the standard for judicial taking, or indeed whether such a thing as a judicial taking even exists.” Justice Scalia focused on Justice Kennedy’s statement that “we need not take what he considers the bold and risky step of holding that the Takings Clause applies to judicial action, because the Due Process Clause ‘would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat.’”

Justice Scalia concluded that Justice Kennedy invoked the Due Process Clause “in both its substantive and procedural aspects,” although “not specifying which of his arguments relates to which.” At this point, Justice Scalia rejected the concept that either procedural or substantive due-process law would be a substitute to “do the job.”

Justice Scalia felt that in trying to avoid what Justice Kennedy called “the bold and risky step of holding the Takings Clause applies to judicial action,” Justice Kennedy would have the Court use procedural due process to impose judicially crafted separation-of-powers limitations on the states, and the concept that courts cannot be used to perform the governmental function of expropriation under that theory because legislative and executive branches were accountable for takings. Justice Scalia concluded these reasons might have a lot to do with “sound separation-of-powers principles that ought to govern a democratic society,” but had nothing to do with

“protection of individual rights” that is the objective of the Due Process Clause. Justice Scalia stated that the Court had no ability to reach a conclusion where “the citizen whose property has been judicially redefined to belong to the State would presumably be given the Orwellian explanation: ‘The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property.’” (This additional “foreign source” was, it can be assumed, a reference to George Orwell’s *1984*).

After discussing additional concerns about procedural due process, Justice Scalia concluded that substantive due process was not to be used to do the work of a Takings Clause, because “‘Where a particular Amendment provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’” *Id.* at 2606.

Justice Scalia also noted that “we have held for many years (logically or not) that the ‘liberties’ protected by Substantive Due Process do not include economic liberties.” Justice Scalia stated that Justice Kennedy’s language—that if a judicial decision eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law—was incorrect. It “propels us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’ See *Lochner v. New York*, 198 U. S. 45, 56–58 (1905). That is a step of much greater novelty, and much more unpredictable effect, than merely applying the Takings Clause to judicial action.” 130 S. Ct. at 2606.

Justice Scalia’s references to “a step of much greater novelty” and “much more unpredictable effect than merely applying the Takings Clause to judicial action” should not go unnoticed. It may be that Justice Scalia has reserved that “step” for another time. Also there may be many more such issues (steps) in the future.

Justice Scalia then went on to discuss other perceived deficiencies in the analysis of Justice Kennedy. Justice Scalia concluded that Justice Kennedy’s concern—that allowing the courts to determine whether there was a taking might empower the courts and encourage their expropriation of private property—was incorrect. Justice Scalia used this as a way of expanding on his concept of what a taking by the judiciary could mean. He stated that state-court justices could not enter new rules adjusting rights of property owners “comfortable in the knowledge that their innovations will be preserved upon payment by the State,” under the takings concept, which Justice Scalia proposed, because that was impossible. He stated if the Court were to hold that “the Florida Supreme Court had effected an uncompensated taking,” there would not be an invalidation of the taking by ordering Florida to pay compensation. As a result, Justice Scalia was not going to conclude that the state judges, or the state legislature, would have to pay for the taking, if it were found, but only that the matter would then be referred to the state legislature, to determine whether or not the taking would be upheld, or would be one that would be compensated for by funding. Justice Scalia concluded that the only realistic incentive that



subjecting judges to the Takings Clause might provide would be the incentive to get reversed, “which in our experience few judges value.”

Conclusions about What Could Be Future Chucking

The plurality opinion—consisting of four justices concluding that there could be a judicial taking—was not opposed by the remaining four justices (concurring as to the affirming of the Florida Supreme Court decision that there was no taking, but not agreeing that the judicial-taking theory should be considered). These dissents from the opinion of Justice Scalia did not contend a judicial taking was prohibited by law, but rather contended it invoked an unnecessary decision. In addition, none of the four justices, refusing to find judicial taking, concluded that could never occur. This decision also raises some interesting issues.

Justice Scalia was propounding the arguments in favor of the concept of a judicial taking, and as noted, no one concluded that there could *never* be such a taking. The arguments for restraint and the use of alternatives were not argued to be prohibitive of a judicial taking. Thus, the plurality approach was not followed, but was not opposed as being totally precluded. This could mean that the plurality opinion is a foundation for a series of new options.

Justice Scalia previously (before joining the Court) wrote about narrowing standing. He might have concluded that, once petitioners were found not to have the property they claimed was taken, they had no standing to raise the question of whether there had been a taking. *See Antonio Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983). If Justice Scalia wanted to use Article III concepts he has written about, which relate to standing, he could have concluded that the so-called property owners owned property adjacent to an area that would be filled, which was already owned by the state under Florida law, and therefore should not be before the Court. He could have also contended there were no Article III “cases” or “controversies.” Justice Scalia also could have contended that if those who actually owned property, and have an arguably greater potential to be injured, do not have standing in such a situation, then groups that are arguably less affected, such as environmentalists and conservation groups, definitely would not have standing in an analogous situation. He chose not to do that, and opted for the judicial taking approach. Perhaps Justice Scalia did not have to, and did not want to, use a narrowed standing argument, something he has advanced before. Perhaps those dissenting from the judicial taking approach also did not want to raise a standing issue, which could later reduce standing further. However, if the judicial taking approach is available, it could be used to diminish, dissuade, or chill environmental protection and/or other types of claims by those seeking enforcement of regulatory results allegedly impacting various types of private-property interests.

The Constitution does provide for prohibitions against “private property” being “taken for public use, without just compensation,” and the Court’s decisions have concluded that, in addition to inverse condemnation, there can be regulatory takings. Justice Scalia has now presented an approach that may justify either a possible claim, or a defense. If you were seeking to invalidate



Environmental Litigation

FROM THE SECTION OF LITIGATION ENVIRONMENTAL LITIGATION COMMITTEE

Fall 2011, Vol. 23, No. 1

a taking of property, you could assert that there was a constitutional basis for challenge of judicial taking, by using the plurality opinion. If you were being regulated and you wanted to argue that the regulation would amount to a taking, and the imposition of that by the judiciary would be a judicial taking, you could assert that as an affirmative defense. You could even raise such issues as to federal court rulings and also do so as to regulatory matters other than in land-use and environmental cases.

The “foreign sources” relied upon by Justice Scalia, such as the woodchuck, or the Queen of Hearts, and even the Orwellian references, are not cases. But they do show that Justice Scalia created a dialogue in his plurality opinion by raising references to frame analysis, which now could be the basis for future debates. The importance of this for those involved in litigating issues, which relate to not only water law but broader concepts of land-use and environmental law and also many other regulatory areas, is unique. All sides now have additional legal issues and arguments to contend with; what kind of approaches could be taken if the judicial approach could be taken to challenge judicial taking is a “perplexing question” indeed. We could look forward to seeing what kind of ideas would, and could, be chucked as a result.

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Keywords: litigation, environmental litigation, Scalia, Woodchuck, Queen of Hearts, Orwell, due process, stop the beach renourishment



NEWS & DEVELOPMENTS

Arizona Ruling Affects Joint Defense Groups

A recent attorney disqualification [opinion](#) from the District Court of Arizona may have important impacts on attorneys involved in joint defense groups, particularly relating to CERCLA cost recovery cases.

The case, *Roosevelt Irrigation District v. Salt River Project*, 10-290. D. Az., started out as a CERCLA cost-recovery action that included common-law claims by the Irrigation District against various potentially responsible parties (PRPs) for cleanup costs associated with wells in Phoenix, Arizona. The Irrigation District was represented by Gallagher & Kennedy (G&K), who became the subject of two sets of disqualification motions. The first noted that two G&K attorneys had previously represented the PRPs now being sued by G&K, and although those attorneys had been walled off from this case, there was still a conflict of interest that was imputed to the entire firm. The judge, basing his decision on an Arizona ethical rule about imputed conflicts of interest, found that this indeed created a conflict that could only be waived with informed consent in writing.

The second set of disqualification issues focused on joint-defense-group issues. Other attorneys in the G&K firm had previously been a part of a joint defense group also involved in a contamination cleanup lawsuit; parties that had been codefendants with G&K's clients in the previous joint defense group were now defendants in the Irrigation District case. Those former codefendants now argued that there was a kind of attorney-client privilege created between themselves and G&K based on their shared involvement in the joint defense group, even though G&K represented another defendant in the group. The judge agreed, focusing on the language of the Joint Defense Agreement and determining that:

[J]oint defense agreements do give rise to an implied attorney-client relationship, which may include a duty of confidentiality. This relationship can lead to a disqualifying conflict of interest where information gained in confidence by an attorney "becomes an issue" -- specifically when the former representation was "the same or substantially related" to the current litigation and when the current client's interests are "materially adverse" to the interests of the party asserting the conflict of interest. . . .

[Further,] conflicts of interest arising from joint defense agreements, and participation in joint defense groups, can be imputed to an entire law firm in accordance with the applicable ethical rules.

The case may be appealed but for the time being stands as an important reminder to counsel involved in joint defense groups that courts may impute disqualifying conflicts of interests to

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them that could eliminate potential clients or could affect joint information sharing and strategy development between codefendants in a joint defense group.

— [*Lisa A. Decker*](#), *Snell & Wilmer, LLP, Denver, CO*

GAO Issues Report on EPA Litigation

In August 2011, the Government Accounting Office (GAO) issued a [report](#) to Congress on its review of data involving environmental litigation in which the Environmental Protection Agency (EPA) was a party. The GAO's objectives were to examine (1) trends, if any, in environmental lawsuits against the EPA from 1995 through 2010, including stakeholder comments on the factors affecting any trends, and (2) the Department of Justice's recent costs for representing the EPA in defensive environmental lawsuits and the federal government's recent payments to plaintiffs.

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