

BP OIL WATCH OUT THE SUITS ARE COMING

By Ted Babbitt

Unless you have been living in a cave for the last several months with no electricity and no access to the news, you have been bombarded by the results of the worst environmental disaster in the history of the world, the BP oil spill. It is no secret that commercial fisherman have suffered from Louisiana to Florida and inevitably into Texas as well. A recent opinion of the Florida Supreme Court in the case of Curd v. Mosaic Fertilizer, LLC, 35 Fla. L. Weekly S341 (June 18, 2010) could not be more timely. That case arose out of the Second District Court of Appeal opinion in Curd v. Mosaic Fertilizer, LLC, 993 So. 2d 1078 (Fla. 2nd DCA 2008) in which the Second District affirmed the dismissal of the lawsuit brought by commercial fisherman against a fertilizer company that had polluted the waters of Tampa Bay. The Supreme Court held that the fishermen's three count complaint for statutory liability under Fla. Stat. 376.313(3) for common law strict liability by Mosaic's use of its property for an ultra hazardous activity and for simple negligence all validly stated a cause of action. The parallel to the BP Oil spill is inescapable.

In this suit the facts were that Mosaic had a phosphate storage area on a creek which fed into Tampa Bay. The complaint alleged that Mosaic had been warned by the EPA that its storage pond dike was about to be breached and that even a few inches of rain would result in the dike giving way. On September 5, 2005, the dike was breached and the resultant pollutants escaped into Tampa Bay. Fisherman claimed that even though they owned no property on the Bay,

their livelihood was destroyed because the underwater plant life, fish, bait, and crabs and other marine life were damaged along with the reputation of the fishery products so that the fisherman were both unable to fish and were alternatively unable to sell their catch and had a resultant economic loss.

On the first count, the Supreme Court reviewed Fla. Stat. 376.313(3) which provides for a private cause of action for anyone damaged as a result of pollution. Interestingly, a predecessor to that act was entitled the “Oil Spill Prevention and Pollution Control Act.” The statute provides for a private cause of action for damages and attorney’s fees for polluting the waters surrounding the State. The Court pointed out that the statute permits recovery for damages to “natural resources including all living things,” that negligence need not be proven under this statute and that the only defenses are those enumerated in Fla. Stat. 376.308 which includes acts of war, acts by a governmental entity, acts of God or acts or omission of a third party. The lack of property ownership is not a defense and at 343 the Court holds:

“In sum, the Legislature has enacted a far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida’s waters and lands. To effectuate these purposes, the Legislature has provided for private causes of action to any person who can demonstrate damages as defined under the statute. There is nothing in these statutory provisions that would prevent commercial fisherman from bringing an action pursuant to chapter 376.”

The Supreme Court rejected the Second District’s conclusion that the economic loss rule precluded recovery in this case. The Court cites with

approval its opinion in Indemnity Insurance Co. v. American Aviation, Inc., 891 So.2d 532 (Fla. 2004) which held that the economic loss rule only applied where there was a claim for damages arising out of a breach of contract or where the defendant was the manufacturer or distributor of a defective product which had been itself damaged but had not caused any personal injury or damages to any other property. Since this case does not fall within the limited purview of those two situations, it did not preclude recovery in this case.

The Court also concluded that there was a common law cause of action for release of toxins as an ultra hazardous activity. The Court held that this case involved the obligation of a polluter to commercial fisherman that was different than to the public at large. While other Courts have held that there can be no recovery for purely economic loss when there is no bodily injury or property damage, the Florida Supreme Court concluded in this case that legal precept did not apply in this case. The Court's conclusion was that the reason behind that general rule is to preclude liability for remote and speculative injuries that the Defendant could not foresee. However, in this case the Court disagreed with the Second District's conclusion that the fishermen did not "own" the fish in question at the time of their destruction and, therefore, suffered no property damage. The Court concluded that licensed commercial fisherman did, indeed, have a foreseeable interest in the harvesting of fish within waters that the defendant ultimately polluted. The Court cited among other cases Louisiana ex rel. Guste v. The M/V Testbank, 254 F. Supp. 1170 (E.D. La. 1981) where the Louisiana

Court allowed a claim by commercial fisherman damaged when two ships collided resulting in pollution of the waters by chemical cargo.

The Court also held that a cause of action for common law negligence was sustainable in this case citing the classic four elements necessary to prove negligence including duty, a breach of that duty, proximate cause and damages. The duty in this case, the Court concluded, arises because the fishermen are encompassed within a foreseeable zone of risk damaged by the pollution in question. The Court thus concluded

“Here, the discharge of the pollutants constituted a tortious invasion that interfered with the special interest of the commercial fishermen to use those public waters to earn their livelihood. We find this breach of duty has given rise to a cause of action sounding in negligence. We note, however, that in order to be entitled to compensation for any loss of profits, the commercial fishermen must prove all of the elements of their causes of action, including damages.”

The probabilities are great that this case will form the bedrock of litigation against BP Oil as a result of the Gulf oil spill. It is hard to imagine a better template for that litigation.

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