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A Hard Line In the Sand

U.S. Supreme Court takes on the issue of waterfront property rights

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The takings case argued before the U.S Supreme Court on Dec. 2, 2009 could turn out to be about the same as a blind date – really fun and exciting, or a miserable waste of time. I'm betting on the former.

The case is simple; the underpinnings exceedingly complex. Here's the sound bite version: Is it a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution for the state of Florida to claim ownership under the public trust of any new beach area formed after the state restores and stabilizes the beach?

Florida loves its beaches and its tourist economy is utterly dependent on them. Impress your friends with these dandy facts: Florida has 1,197 miles of shoreline and 825 miles of sandy beaches (by way of sad comparison, Connecticut has a little less than 100 miles of shoreline). Of 62.3 million visitors in 2001, more than one-third said going to the beach was their principal activity during their stay. Those beach tourists pour sand out of their shoes and pour $24 billion into the state's economy each year.

So it is not surprising that more than 40 years ago, Florida enacted legislation giving the state the authority to protect and enhance beaches. The beaches are endangered. In 2008, there were 400 miles of critically eroding beach and almost 100 more miles of non-critically eroding beach. Sea level rise promises to worsen the loss.

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Now, you must suffer through a short law school lecture on the common law of land titles as they relate to shorelines. If you have a waterfront lot and the deed states, "bounded by the waters of Long Island Sound," then you need to go find the ordinary high-water mark or mean high-tide line. That's the extent of your land.

Beyond that you have riparian or – more correctly because we are on the ocean, not a lake or river – littoral rights.

If your land slowly erodes, you lose your land, physically and legally, as the mean high water moves inland. You don't have the right to rebuild that beach, as a general rule. I say "as a general rule" because there are circumstances with altered shorelines and structures where you do have the right to maintain, repair and rebuild.

On the other hand, should the sand gods look favorably on you and that beach in front of your coastal McMansion grows slowly through accretion, you've won the coastal lottery – you have more land and you can exercise dominion over it.

Now, for a different rule: If a hurricane wipes out your beach – this is called "avulsion" – you can re-nourish the beach back to where it was. You don't lose your title to that land. You get to pile the sand back on until you get back to where the mean high tide was the day before the storm.

Erosion Control Line

Property owners challenged the Florida law that permanently fixed the historic high-tide line—called the erosion control line—under the law. The state set that line because they are spending great sums re-nourishing eroded the beaches and don't want that dynamic line moving in and out with erosion and accretion.

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The property owners say the erosion control line takes away their right to gain new land through accretion and their littoral right of direct, physical access to the water, which would be interrupted by the state's new strip of land if there is accretion.

The Florida Supreme Court held for the state. No taking.

Justice John Paul Stevens, who owns a waterfront home in a Florida beach re-nourishment area, was a no-show at oral argument. It was eight justices. He didn't recuse himself and no one has challenged his participation.

The argument seemed to go for the state: "You didn't lose one inch," Justice Stephen Breyer said to the property owners' lawyer. "All you lost was the right to touch the water. But the court here says you in effect have that right because you can walk right over it and get to the water."

Even conservative Justice Antonin Scalia, assessing the value of the government beach re-nourishment program, said, "'I'm not sure it's a bad deal."

There is a remote chance Stevens could still vote, just as former Chief Justice William Rehnquist retained his right to do so when he was disabled by illness. Assuming Stevens decides not to vote – and assuming

he would have gone with the bare majority for the state while Chief Justice John Roberts dissents (the chief favored the property owners during the argument) – Stevens will have surrendered his right as the senior justice in the majority to pick who writes the opinion.

That leaves some serious potential NASCAR-like bump drafting between Scalia and Justice Anthony Kennedy. Scalia could go with the majority for the state and offer up a milquetoast opinion that even property owners could love. If Scalia dissents, and Kennedy becomes the senior justice in the majority for the state, then the opinion for the government is likely to be weaker than it would be if Stevens were overseeing it.

If there is a 4-4 tie, the Florida Supreme Court decision stands, the state wins, but there is no written decision and no precedent created. The pundits predict a clean win for the state, not a tie. The Court has a long and proud history of saving its divided opinions in takings cases until the very end of the term. ■

For more on this case, go to www.inversecondemnation.com and click on "beach takings case."