

President's Corner



By Elizabeth M. McGeever, Esquire

It's raining outside. I feel good about water because I just finished reading the United States Supreme Court's recent opinion in *New Jersey v. Delaware*. Low water mark—riparian rights—subaqueous soil: most of us will never have a matter dealing with these legal issues. Water law is not a specialty practice area in Delaware. In contrast, in many other states, primarily in the West and in the Southwest, water law is a significant practice area.

According to a recent article in the National Law Journal, *A Deluge of Water Wars*, litigation over water rights is growing “from a trickle to a flood.” Much of the litigation centers on the scarcity of water in areas with growing populations or drought conditions or both. South Carolina is suing North Carolina for taking too much water from the Catawba, a river that originates in North Carolina's Blue Ridge Mountains and eventually winds its way more than 200 miles south into South Carolina. Montana is suing Wyoming for taking water from two interstate tributaries of the Yellowstone River, leaving Montana with little water to weather drought conditions.

The Delaware River has been the subject of its own recent water war, albeit one arising out of environmental concerns and not water siphoning. In 2004, British Petroleum sought permission from the Delaware Department of Natural Resources and Environmental Control (DNREC) to construct the Crown Landing Terminal in New Jersey. The proposal included a gasification plant, storage tanks, and a 2000 foot pier that would extend from the New Jersey shore into the Delaware River. DNREC refused the request because the project would violate Delaware's Coastal Zone Act. New Jersey then brought an original jurisdiction suit in the United States Supreme Court

claiming that a 1905 Compact between Delaware and New Jersey gave New Jersey exclusive jurisdiction “to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware.” Not surprisingly, Delaware interpreted the Compact differently, arguing that New Jersey did not have exclusive authority to “approve projects that encroach on Delaware's submerged lands without any say by Delaware.”

A Special Master appointed by the U. S. Supreme Court sided with Delaware concluding that the term “riparian jurisdiction” in Article VII of the Compact did not give New Jersey exclusive jurisdiction to regulate the proposed development. New Jersey filed exceptions to the Special Master's report and the case was argued in the Supreme Court in November 2007. In an opinion decided on March 31, 2008, the Supreme Court ruled in Delaware's favor. Justice Ginsburg wrote the majority opinion; Justice Stevens filed an opinion concurring in part and dissenting in part; and Justice Scalia filed a dissenting opinion in which Justice Alito joined.

The decision makes for interesting reading. First, it describes the interstate bitterness engendered by the dispute. The majority opinion notes that New Jersey threatened to withdraw state pension funds from Delaware banks while Delaware considered authorizing its National Guard to protect its borders from encroachment by New Jersey. One New Jersey legislator even looked into commissioning the *U.S.S. New Jersey*, a WWII battleship now docked at the Camden waterfront, in case of an armed invasion by Delaware!

Second, the legal analysis was strikingly straightforward. Unlike some Supreme

Court opinions, the case did not turn on a complicated regulatory scheme. Rather, like many a contract dispute, the issue was what the drafters of the Compact intended when they agreed in Article VII that each of Delaware and New Jersey could “on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature . . .” To resolve the question, the Supreme Court resorted to basic principles of construction and interpretation such as giving effect to the chosen words, comparing the disputed language with language used in another compact to which New Jersey was a party, and reviewing the parties' prior course of conduct.

Third, Justice Scalia's dissenting opinion cites the Bar Association's 1994 book, *The Delaware Bar in the Twentieth Century* (a/k/a as the “Bar History Book”), with attribution to its three editors, Anne Bookout and former DSBA Presidents, Helen Winslow (2005-06) and Pat Hannigan (2002-03). As Justice Holland noted in a letter of congratulations to the three editors, the book is now in the United States Supreme Court Library. This recognition is particularly timely as the DSBA's Bar History Committee, under the direction of Michael McTaggart, undertakes a supplementation of the book.

At this point, the rain has stopped, but I am not sure we have seen the end of the water wars over the Delaware River. As Justice Ginsburg notes in the opinion, disputes between New Jersey and Delaware over the Delaware River have persisted “almost from the beginning of statehood.” And, since the Supreme Court held that Delaware and New Jersey have overlapping authority to regulate riparian development

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of “extraordinary character extending outshore of New Jersey’s domain into territory over which Delaware is sovereign,” one would expect future disputes over the meaning of “extraordinary character.” For now, however, the most recent dispute is at an end. Fortunately, the *U.S.S. New Jersey* is not headed to our shores!

A final tie between this column and the DSBA. In November 2008, 50 members of the Bar will be admitted to the U.S. Supreme Court in a DSBA sponsored

event. Virginia Seitz, sister of C.J. Seitz who was counsel in *New Jersey v. Delaware*, has agreed to join the group for lunch and to talk about practice before the Supreme Court. Virginia is a partner at Sidley Austin LLP and has argued before the Supreme Court, as well as, most of the federal circuit courts. The admission ceremony generated a lot of interest, but it had to be limited to 50 due to Supreme Court procedures. Given the high level of interest, I am sure that the DSBA will sponsor another one in the future. ☞

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