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## **Tort Law (Symposium: The Supreme Court and State and Local Government Law: The 1996-97 Term)**

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# TORT LAW

Honorable Leon D. Lazer

*Hon. Leon D. Lazer:*

I am going to discuss three cases this afternoon, *Metro North*,<sup>1</sup> *Saratoga*<sup>2</sup> and *Suitum*.<sup>3</sup> Let us turn to the first of these cases and see how the United States Supreme Court deals with the question of emotional or mental distress in a tort case. The state courts have dealt with this issue for many decades, and while the debate still continues, it has largely been resolved in most places.

*Metro North Commuter Railroad v. Buckley*<sup>4</sup> involved the Federal Employers Liability Act,<sup>5</sup> commonly known as FELA. FELA permits a railroad worker to recover for injury “resulting” from the “employer’s” negligence.<sup>6</sup> Over the years the statute has been very liberally interpreted.<sup>7</sup> Some people think it amounts to a worker’s compensation statute; others have indicated it is similar to insurance.<sup>8</sup> While the courts take a liberal approach towards FELA,<sup>9</sup> it is still necessary to establish negligence causation.

In *Metro North*, the plaintiff-employee Buckley, was a pipefitter,<sup>10</sup> who was exposed to asbestos for an hour a day over a period of three years.<sup>11</sup> At the end of the day he often found himself covered with insulation dust containing asbestos.<sup>12</sup> He

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<sup>1</sup> *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997).

<sup>2</sup> *Saratoga Fishing Co. v. Martinac & Co.*, 117 S. Ct. 1783 (1997).

<sup>3</sup> *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1659 (1997).

<sup>4</sup> *Metro-North*, 117 S. Ct. at 2115.

<sup>5</sup> 45 U.S.C. § 51 (1997).

<sup>6</sup> *Metro-North*, 117 S. Ct. at 2114 (quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1996)).

<sup>7</sup> *Id.* at 2117.

<sup>8</sup> *Id.* at 2116 (stating that the Act does not make the railroad an “insurer” for all employees injuries).

<sup>9</sup> *Id.* at 2117.

<sup>10</sup> *Id.* at 2116.

<sup>11</sup> *Id.* (stating that for 3 years 1985 – 1988 Buckley’s job exposed him to asbestos for about one hour per working day).

<sup>12</sup> *Id.*

was, in the terminology of the case, a "snowman." He attended asbestos-awareness class,<sup>13</sup> and feared he would develop cancer.<sup>14</sup> An expert testified that Buckley had a one in five chance of dying from cancer.<sup>15</sup> Up to the time of trial, periodical medical check-ups revealed no cancer, nor any asbestos-related disease.<sup>16</sup>

He brought an action under FELA to recover for his emotional distress (fear of the disease),<sup>17</sup> a concept well-known in the New York State courts.<sup>18</sup> He also sought the cost of future medical check-ups,<sup>19</sup> which, in the opinion, was referred to as medical monitoring. If asbestos or some other asbestos-related disease surfaced, he would want to catch it early. The railroad's position was that FELA does not permit any recovery for emotional distress without accompanying physical impact.<sup>20</sup>

The physical impact rule goes way back in New York<sup>21</sup> and other states' common law.<sup>22</sup> The rule is predicated on the contention that anyone can feign emotional distress and one way to assure, or at least have some evidence that emotional distress is legitimate, is if it accompanies some physical impact.<sup>23</sup> If there is a physical injury followed by emotional distress, there never has been, in our modern era, any reluctance to compensate for emotional distress following an accident.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (stating that two of Buckley's expert witnesses testified that, even after taking into account Buckley's now discarded 15 year one pack per day smoking habit, the exposure created an added risk of death due to cancer or other asbestos related diseases of anywhere from one percent to five percent (in view of one of plaintiff's expert or one percent to three percent in view of the other)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* See *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2117.

<sup>21</sup> *Id.* (citing *Metro-North Commuter R.R. Co. v. Buckley*, 79 F.3d 1337, 1344 (2d Cir. 1996), *rev'd*, 117 S. Ct. 379 (1997)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The problem arises when the emotional distress does not follow or result from that particular kind of injury. The state courts have struggled with this issue.<sup>24</sup> Some still require physical impact, some require some physical result from the emotional distress.<sup>25</sup> The jurisdictions are split on this issue.<sup>26</sup>

In this case, the district court dismissed the case<sup>27</sup> on the contention that there could not be a recovery for emotional distress without impact - fear of future disease was not enough.<sup>28</sup> The Second Circuit reversed,<sup>29</sup> holding that Buckley's contact with the dust was a physical impact.<sup>30</sup> The court stated that the case could go to the jury and Buckley could recover for both emotional distress and future medical monitoring costs.<sup>31</sup>

The case then went to the Supreme Court.<sup>32</sup> In an opinion written by Justice Breyer, the Court relied on common law principles.<sup>33</sup> Theoretically at least, with some exception, there is no federal common law dealing with a tort case like this. The

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<sup>24</sup> *Id.* at 2117 (stating that "common-law principles where not rejected in the text are entitled to great weight in interpreting the Act, and that those principles play a significant role in determining whether, or when, an employee can recover damages for negligent infliction of emotional distress.").

<sup>25</sup> *Id.* (referring to an exposure that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time).

<sup>26</sup> *Id.* at 2118 (stating that "the common-law precedent does not favor the plaintiff. Common-law courts do permit a plaintiff who suffers from a disease to recover for emotional distress, and some courts permit a plaintiff who exhibits a physical symptom of exposure to recover.").

<sup>27</sup> *Id.* at 2116.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (stating that Buckley's evidence showed that his contact with the insulation dust containing asbestos was "massive, lengthy and tangible.").

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (stating that certiorari was granted to "review the Second Circuit's holdings in light of *Gottshall*.").

<sup>33</sup> *Id.* at 2115.

Court needed to resort to the judicial systems that had, over time, developed a jurisprudence in this area.<sup>34</sup>

Justice Breyer, in his opinion, referred to the concerns I mentioned - the validity of emotional distress claims in general and how the state courts have resolved these issues.<sup>35</sup> He referred to negligent infliction of emotional distress, the zone of danger cases.<sup>36</sup> For those of you who are not familiar with these cases, they involve claims of people who are close relatives of persons injured in an accident, where the plaintiff, although not injured, was in the zone of danger, close to where the occurrence took place.<sup>37</sup>

This is the New York rule.<sup>38</sup> The rule is very restrictive because, unless you are part of a nuclear family and in the same car,<sup>39</sup> or very close to the place where the injury occurred to the plaintiff,<sup>40</sup> you cannot recover for negligent infliction of emotional distress.<sup>41</sup> This is something that students learn in law school -- it is basic New York law.

Justice Breyer referred to this rule indicating that it is very restrictive and there is concern relative to the legitimacy of the

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<sup>34</sup> *Id.* at 2117. See also *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). The Court in *Gottshall* stated that a "Court's duty . . . in interpreting FELA . . . is to develop a federal common law of negligence." *Id.* at 558 (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568-70 (1987)).

<sup>35</sup> *Metro-North*, 117 S. Ct. at 2116-17.

<sup>36</sup> *Id.* at 2117 (quoting *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2117 (stating that the Second Circuit interpreted "physical impact" as including a simple physical contact with a substance that might cause a disease at a future time, so long as the contact was a kind that would "cause fear in a reasonable person.").

<sup>39</sup> *Id.* (referring to *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (en banc). Plaintiff brought an action against a motorist to recover for intentional infliction of emotional distress which he suffered when he witnessed an automobile collision in which his mother died. *Id.* at 668.

<sup>40</sup> *Id.* (referring to *Kimberley v. Howland*, 55 S.E.778 (1906) (noting that plaintiff suffered emotional distress from witnessing a rock which came from a nearby blasting that crashed through his home).

<sup>41</sup> *Metro North*, 117 S. Ct. at 2117. .

instant type of claim.<sup>42</sup> He explained that there is good reason for the concern and then gave some frightening figures.<sup>43</sup> I do not want to frighten you this Friday afternoon, but he says that some eleven to twenty-one million people have been exposed to asbestos in the work place,<sup>44</sup> three-million have been exposed to Benzene,<sup>45</sup> forty-three percent of United States children live in a home with a smoker,<sup>46</sup> and two-hundred thousand people will be dead of cancer caused by asbestos contact by the year two thousand.<sup>47</sup> Then he gives us the killer here, which I hesitate to tell you about. Half of all men in the United States will die of cancer,<sup>48</sup> and one-third of all women.<sup>49</sup>

Justice Breyer then discussed the *Gottshall* case,<sup>50</sup> which the Court decided a couple of years earlier. Justice Breyer explained that the term "physical impact" does not include simple contact with a substance that might cause injury a substantial time later.<sup>51</sup> He noted that physical impact does not encompass every form of physical contact.<sup>52</sup>

In particular, it does not include a contact that amounts to no more than an exposure,<sup>53</sup> such as the one before us, to a substance that poses some risk of future disease. Such contact

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<sup>42</sup> *Id.* at 2119 (stating special difficulties for judges and juries in separating valid, important claims from those that are invalid or "trivial.").

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citing American Cancer Society, *Cancer Facts & Figures* (1997)).

<sup>50</sup> *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). Plaintiff brought this action against his employer for injury he sustained when he observed his coworker suffer a heart attack. *Id.* at 536. In holding that *Gotshall* had satisfied the necessary elements under FILA, it applied the "zone of danger" test which limits recovery for emotional injury to those plaintiffs who either sustain a physical impact as a result of the defendant's negligence or are placed in immediate risk of physical impact by that negligence. *Id.* at 557.

<sup>51</sup> *Metro North*, 117 S. Ct. at 2116.

<sup>52</sup> *Id.* at 2118.

<sup>53</sup> *Id.*

causes emotional distress only because the worker learns that he or she may become ill after a substantial period of time.<sup>54</sup> Justice Breyer declared, "If we are going to recognize as a physical impact, simple contact with a substance, there is going to be a great deal of difficulty in separating valid claims from trivial claims."<sup>55</sup>

Buckley could have transferred.<sup>56</sup> He could have stopped smoking.<sup>57</sup> His doctor never even referred him to a psychologist.<sup>58</sup> Contact with carcinogens in our society is very common. Justice Breyer referred to the "flood of cases" that would overwhelm or certainly damage the system and diminish the resources the system does have to deal with other cases.<sup>59</sup> Therefore, this type of claim is not recognized, short of physical impact and short of developing the disease itself.

The Court also rejected Buckley's claim of \$950 a year, for thirty-six years, for medical monitoring.<sup>60</sup> In dealing with medical monitoring, Justice Breyer relied on some of the rationale he used in rejecting the fear of future disease itself, that is, how do you separate the trivial from the real.<sup>61</sup> How could you separate medical monitoring costs over a long period of time from the regular check-up costs the plaintiff would have had - what would be the effect on employers?<sup>62</sup> The claim as it was presented, in a lump sum, was rejected.<sup>63</sup>

Justice Ginsburg, in her dissenting opinion,<sup>64</sup> joined by Justice Stevens,<sup>65</sup> pointed out that future medical monitoring costs are

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2119.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2123.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2122.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2124.

<sup>65</sup> *Id.* (Ginsburg, Stevens, JJ., concurring and dissenting in part).

recognized in a number of states.<sup>66</sup> The whole concept has been gathering support.<sup>67</sup> She drew a very sympathetic picture of Buckley himself and, in somewhat assertive terms, referred to Justice Breyer's fear of the flood of litigation as overblown,<sup>68</sup> referring to his entire opinion as enigmatic.<sup>69</sup> She explained there may be some other way of handling these future costs — it doesn't necessarily have to be a lump sum.<sup>70</sup> The Court should not have been so quick to reject this idea.<sup>71</sup>

Perhaps future medical monitoring costs will become acceptable in some different form, but as far as collecting these costs in advance, the Court held it will not be presently allowed.<sup>72</sup> FELA cases are not that unusual.<sup>73</sup>

We will now discuss the *Suitum*<sup>74</sup> case, a case that deals with the question of land use and takings. The question of whether to go into state or federal court in the regulatory land cases is an interesting subject. There are many considerations involved.

Some years ago, I was representing a party who wanted to sue the Town of Hempstead. It was necessary for me to bring the

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<sup>66</sup>*Id.* at 2127 (Ginsburg, Stevens, JJ., concurring and dissenting in part). Justice Ginsburg wrote:

[T]he Third Circuit, interpreting Pennsylvania law, recognized a right to compensation for monitoring 'necessary in order to diagnose properly the warning signs of the disease.' Similarly, a number of Federal District Courts interpreting state laws, and several state courts of first and second instance, have sustained medical monitoring claims.

*Id.* (Ginsburg, Stevens, JJ., concurring and dissenting in part) (citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (stating that "the Court's anticipation of a "flood" of less important cases" and "unlimited and unpredictable liability" is overblown.").

<sup>69</sup> *Id.* (stating that "the Court's disposition of Buckley's constant and established course.").

<sup>70</sup> *Id.* at 2126.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2129.

<sup>73</sup> *Id.*

<sup>74</sup> *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997).



lawsuit in Nassau County.<sup>75</sup> At that time, the supervisor of the Town of Hempstead was also the county chairman of the Republican Party. Because the Second Department was two years behind, my client would have to wait a couple of years to have the appeal heard had the case been dismissed. I would have preferred to go into the federal court, but I was faced with *Williamson County Regional Planning Commission v. Hamilton Bank*.<sup>76</sup> *Williamson* held that in order to bring a takings claim in the federal court, the claim must be ripe.<sup>77</sup>

What does ripeness mean? It means that, as far as the state remedies are concerned, you must have gone all the way. If there are other things that could have been done under state law, for example obtaining variances, they must have done them prior to bringing the action in federal court. The state court would not be bound by the federal ripeness rule and a land use action could be brought in state court.

What happened in *Suitum*,<sup>78</sup> is similar to what happened in the pine barrens area of this county. In *Suitum*, a regional compact between California and Nevada was approved by Congress.<sup>79</sup> The purpose of the compact was to try to prevent the Lake Tahoe area from becoming overdeveloped – to prevent its beauty from becoming irrevocably destroyed.<sup>80</sup> Thus, the Lake Tahoe Planning Agency was created with the power to restrict

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<sup>75</sup> This was necessary because one must sue the municipality in its own county.

<sup>76</sup> 473 U.S. 172 (1985). Petitioner, a successor in interest to developers, brought this action against the Planning Commission alleging a taking. *Id.* at 175. The Supreme Court held that the Fifth Amendment requires just compensation should be paid for a taking. *Id.* at 186. However, the Court noted that the Fifth Amendment “does not require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a ‘reasonable, certain and adequate provision for obtaining compensation’ exist at the time of the taking.” *Id.* at 194.

<sup>77</sup> *Id.* at 199 (holding that petitioner’s jury verdict awarding damages for temporary taking of property was premature because the developer’s application for the ordinance was not approved.)

<sup>78</sup> *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1659 (1997).

<sup>79</sup> *Id.* at 1662.

<sup>80</sup> *Id.*

development of the area.<sup>81</sup> Mrs. Suitum, who owned property in the Lake Tahoe area, sought a building permit.<sup>82</sup> She was rejected and told she was in a no-development area,<sup>83</sup> just like many pine barren property owners are told here.

The law under which the Lake Tahoe Agency operated<sup>84</sup> provided that, if a property owner's land was put in a no-development area, the property owner could receive TDRs (transfer of development rights).<sup>85</sup> For those of you who are not familiar with land use, let me briefly explain what TDRs are.

If the government says you can not develop your own land, that is confiscation.<sup>86</sup> The government may decide, rather than agree that they are confiscating your property, that they will give you the right to sell, in essence, what they have taken away from you, your development rights. You can not develop, but you have the right to sell the rights to some other owner who has property it can develop.

The other owner can now build a larger building or put more houses or improvements on its land. The proceeds of such a sale may save the government agency from a finding that its no-development rule was confiscatory.<sup>87</sup> This device was developed about twenty years ago.<sup>88</sup> Government agencies, such as

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1663.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1662 (citing Tahoe Reg'l Planning Agency Code of Ordinances (TRPA Code) ch. 37).

<sup>85</sup> *Id.* at 1663. An appraiser testified that if Suitum were to get a Residential Allocation and sell it with a Development Right, together they would bring in at least \$30,000. *Id.* at 1664.

<sup>86</sup> *Id.* at 1665. The Court explained that a regulation that "goes too far" results in a Fifth Amendment taking. *Id.* The Fifth Amendment states that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V.

<sup>87</sup> *Id.* at 1665. The *Suitum* Court quoted *Williamson County v. Hamilton Bank*, 473 U.S. 172, 195 (1985) which stated that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Suitum*, 117 S. Ct. at 1665.

<sup>88</sup> See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, New York City enacted a statute to preserve historic

municipalities, decided that they could restrict development and at the same time survive takings claims.<sup>89</sup>

Under the statute<sup>90</sup> Mrs. Suitum had the right to the TDRs.<sup>91</sup> There is no dispute in the case that she was entitled to them.<sup>92</sup> However, she never applied for them -- never tried to sell them.<sup>93</sup> When Suitum brought this action against the planning agency, its defense was *Williamson* -- you have not exhausted your remedy, or at least not gone as far you could go -- you did not even apply.

The *Suitum* case was dismissed.<sup>94</sup> The dismissal was affirmed in the Court of Appeals on the ground that there had been no final decision that would allow the action to proceed in a Section 1983 case.<sup>95</sup> Until the planning agency took action on Suitum's application for the TDRs, there could be no finality.<sup>96</sup>

The Supreme Court found finality,<sup>97</sup> but disagreed concerning what the TDRs meant and their actual significance in takings

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landmarks to protect well-known sites from destruction or abuse. *Id.* at 108-09. Justice Brennan, writing for the majority, noted that although designating a landmark restricted the owner's control of the land, it also enhanced his economic position. *Id.* at 113. Real property owners in New York City who had not developed their parcel to the extent allowed by city zoning laws could *transfer development rights* to consolidated parcels on the same block. *Id.* at 113-14 (emphasis added).

<sup>89</sup> *Id.* at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program . . . to promote the common good." *Id.* (citation omitted).

<sup>90</sup> *Suitum*, 117 S. Ct. at 1663 (citing TRPA Code §§ 20.3C, 34.0 to 34.3). The Court notes that TDRs are granted to property owners of parcels "eligible for construction." *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1664.

<sup>95</sup> *Id.* See *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359, 364 (9th Cir. 1996), *vacated*, 117 S. Ct. 1659 (1997).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1670.

jurisprudence.<sup>98</sup> There is an interesting disparity between the majority opinion and Justice Scalia's concurrence.<sup>99</sup>

Justice Souter, writing for the majority, stated that there was finality because there was no dispute -- Suitum was entitled to the TDRs.<sup>100</sup> This case, like any other takings case, should be tried.<sup>101</sup> At the trial, through the testimony of experts, the court would decide what the TDRs were worth, and then decide whether there has been a taking.<sup>102</sup> In other words, let the trial court decide whether there has been a confiscation.<sup>103</sup>

Justice Scalia, in his concurrence joined by Justices O'Connor and Thomas, disagreed rather vigorously.<sup>104</sup> He declared that if you regulate a piece of property, and declare to the owner that it cannot be developed, there has been a confiscation.<sup>105</sup> The TDR's are just a gimmick by the government to have some third-party pay for the compensation.<sup>106</sup> Therefore, there is nothing to

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<sup>98</sup> *Id.* at 1672-73 (Scalia, J., concurring).

<sup>99</sup> *Id.* at 1670-73 (Scalia, J., concurring).

<sup>100</sup> *Id.* at 1667.

<sup>101</sup> *Id.* at 1662 (stating "[t]he sole question here is whether the claim is ripe for adjudication ... We hold that it is.").

<sup>102</sup> *Id.* at 1668-69 (noting land values in a takings claim may be shown by opinion evidence). In *Suitum*, the Court noted that Mrs. Suitum's "only challenge to the TDRs raise[d] a question [concerning] their value not about the lawfulness of issuing them." *Id.* at 1670.

<sup>103</sup> *Id.* ("we vacate the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.").

<sup>104</sup> *Id.* at 1670-73 (Scalia, J., concurring).

<sup>105</sup> *Id.* at 1671 (Scalia, J., concurring). Justice Scalia argues that while the right to confer on another the right to use and develop one's land is valuable, "it is a *new* right conferred on the landowner in exchange for the taking, rather than a *reduction* of the taking." *Id.* (Scalia, J., concurring). He argued, by analogy, that a government cash payment would not be determinative of whether there was a taking, but whether the payment constituted adequate compensation for that taking. *Id.* (Scalia, J., concurring). Likewise, the TDR relates to compensation, not to taking, and has nothing to do with any "final decision" concerning the land. *Id.* (Scalia, J., concurring). With regard to takings, Justice Scalia argued that there is no "dispute over whether [it] has occurred." *Id.* at 1672-73 (Scalia, J., concurring).

<sup>106</sup> *Id.* at 1672 (Scalia, J., concurring).

argue about here -- there should only be a compensation trial.<sup>107</sup> Justice Scalia's opinion is in line with what the Court has done for the last ten years in restricting land regulation and protecting property rights.<sup>108</sup>

How does that fit into the pine barrens situation? The attorney for the plaintiff in the pine barrens litigation told me a couple of days ago that both he and the Pine Barrens Commission lawyers are arguing that *Suitum* helps them in some fashion.

In his concurrence, Justice Scalia referred to the famous *Penn Central* case<sup>109</sup> of the late '70's, sort of the apogee of regulatory power and support in the Supreme Court.

Penn Central Railroad wanted to put a fifty- five story building on top of a building they owned, which had been designated a landmark<sup>110</sup> The Railroad was not permitted to do so,<sup>111</sup> so it brought a confiscation action.<sup>112</sup> The Supreme Court, in a famous

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<sup>107</sup> *Id.* (Scalia, J., concurring). Justice Scalia notes that if the funds the landowners get are considered in the taking question instead of compensation, "the government can get away with paying much less. That is all that is going on here." *Id.* at 1671-72 (Scalia, J., concurring). He argued that the plan causes third parties, rather than the government, to furnish the payment, and the government reimburses them by varying from "otherwise applicable land-use restrictions." *Id.* at 1672 (Scalia, J., concurring).

<sup>108</sup> *Id.* at 1666. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>109</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>110</sup> *Id.* at 115-16.

<sup>111</sup> *Id.* at 117.

<sup>112</sup> *Id.* at 119. Penn Central had entered into a lease with the U.S. subsidiary of a British corporation, Union General Properties, Ltd. [hereinafter UGP] *Id.* at 116. UGP was to build a multistory office building above Grand Central Terminal under the lease, and both parties applied to the city Landmarks Preservations Commission for permission to build it. *Id.* The Commission had designated Grand Central Terminal as an historic landmark, according to a city law that protected certain pieces of real estate for historical significance. *Id.* at 115. This "landmark law" noted that the city's standing as a worldwide center of business and culture would be threatened if some of these historic landmarks were not protected and that the law was enacted to "safeguard desirable pieces of the existing urban fabric." *Id.* at 109. Because the plans included stripping off some of the Terminal's outer features, the Commission denied them a certificate. *Id.* at 117. The Commission stated that, "To

decision written by Justice Brennan, upheld the restriction, finding no confiscation.<sup>113</sup> Penn Central still had both the railroad and the station and was still in business.<sup>114</sup> The fact that they could not put a fifty-five story tower on top of the station did not amount to a confiscation.<sup>115</sup>

Justice Brennan noted, towards the end of the opinion, that Penn Central had been given some TDRs to sell or transfer for their air rights.<sup>116</sup> How does Justice Scalia deal with this? He says perhaps there are other reasons for upholding *Penn Central's* taking, but if those other reasons are not good enough, *Penn Central's* precedential effect is largely gone.<sup>117</sup>

Today's last case returns us to tort law. *Saratoga Fishing Company v. Martinac*<sup>118</sup> is a design defect case in which a

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protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." *Id.*

<sup>113</sup> *Id.* at 138. The Court held that even though the Landmarks Law has a harsher impact on some owners of real estate than on others, it is not a taking. *Id.*

<sup>114</sup> *Id.* at 136.

<sup>115</sup> *Id.* The Court explained "[a] taking is more easily found when the element of "interference with property" is a "physical invasion by government," rather than a public program that benefits economic life. *Id.* at 124. The argument, that Penn Central now could not exploit a property interest that they had previously believed was available, was not accepted as constituting a "taking." *Id.* at 130. The Court held that the law did not interfere with Penn Central's uses of their Terminal, and that in fact the designation of the station as a landmark would allow Penn to continue using the property as a railroad station the same way that they always had. *Id.* at 136. Therefore, the law was held not to interfere with Penn Central's primary purpose for using and exploiting the property. *Id.*

<sup>116</sup> *Id.* at 137. Justice Brennan stated that Penn Central had not been denied *all* of their air rights, they had only been made transferable to any of the other parcels in the vicinity, which had also been designated as landmarks under the city law. *Id.* These TDR's were held to "mitigate whatever financial burdens the law has imposed on" Penn Central, and would be factored into the impact the law had on Penn. *Id.*

<sup>117</sup> *Id.* at 1672 (Scalia, J., concurring). Justice Scalia distinguished *Penn Central* from *Suitum* in that the regulation was applied to owners of eight adjacent parcels near the Terminal, and the aggregation of that land coupled with that use, had not been diminished. *Id.* (Scalia, J., concurring).

<sup>118</sup> 117 S. Ct. 1783 (1997).

company (Martinac) built a fishing ship and sold it to a person by the name of Madruga.<sup>119</sup> Madruga added a net, a skiff, and some electronic equipment to the ship, and then sold it to Saratoga Fishing.<sup>120</sup> Twelve years later, the ship went down because the hydraulic system failed - there was a total loss.<sup>121</sup> The action was brought by Saratoga Fishing against the original ship builder for product liability, claiming that there was a design defect in the ship.<sup>122</sup>

It is a basic concept of product liability law, and perhaps negligence law as well, that there can be no recovery for pure economic loss.<sup>123</sup> If you are injured and you cannot work or operate your business or profession anymore, that is not considered pure economic loss. It is economic loss that results from personal injury. Economic loss not accompanied by property damage or personal injury is not recoverable.<sup>124</sup>

Under tort product liability law, the concept is: if the product malfunctions due to a design or manufacturing defect in the product that destroys the product itself and there is economic loss, the product owner cannot recover either for the loss of the product or economic loss. However, if the product malfunctions and destroys some other property, the owner can recover in tort.

*Cayuga Harvester, Inc. v Allis-Chalmers Corp.*<sup>125</sup> is a good analogue. *Cayuga Harvester* is a products liability case brought because the harvesters did not work and the plaintiff lost the crop.<sup>126</sup> The Court considered that as pure economic loss.<sup>127</sup> If

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<sup>119</sup> *Id.* at 1785.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> “[T]ort law . . . does *not* permit recovery for purely economic losses (such as) lost profits.” *Id.* at 1786 (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6, Comment *d* (Proposed Final Draft, Preliminary Version, 1996)).

<sup>124</sup> *Saratoga*, 117 S. Ct. at 1786. “Given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better.” *Id.* A product that destroys itself is very similar to a product that does not work, or works improperly. *Id.*

<sup>125</sup> 95 A.D.2d 5, 465 N.Y.S.2d 606 (4th Dep’t 1983).

<sup>126</sup> *Id.* at 7, 465 N.Y.S.2d at 609.

there is to be any recovery for the product itself, it has to be brought under contract law or warranty, not under tort law.<sup>128</sup>

Let me add one further aspect to this analogue. If the harvester in *Cayuga Harvester* had exploded, the owner would be able to recover if the explosion resulted in a fire that destroyed the crop. That would be destruction of other property. The key word is other property. So if the product malfunctions in some way, and you can not resort to warranty law, you can resort to contract law. You cannot recover for the economic loss of the product in tort. You can only recover in tort if the malfunction damages some of your other products.

How does this relate to *Saratoga Fishing*, in which the ship builder was sued many years later? After the defendant in *Saratoga* sold the fishing vessel to Madruga, Madruga added other property to it: a net, electronic equipment and a skiff, and sold it to Saratoga Fishing.<sup>129</sup> Saratoga Fishing knew it could not recover for the ship itself<sup>130</sup>, but believed it was entitled to recover for the other property that was on the ship when Saratoga Fishing bought it from Madruga.<sup>131</sup>

Justice Breyer, writing a seven to two decision, concluded that the net, the electronic equipment, and the skiff was "other property."<sup>132</sup> Since one of the rationales for product liability is to make manufacturers conscious of their liability, holding the manufacturer in this case would help to accomplish that goal.<sup>133</sup>

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<sup>127</sup> *Id.* at 27, 465 N.Y.S.2d at 621.

<sup>128</sup> *Id.*

<sup>129</sup> *Saratoga*, 117 S. Ct. at 1789. The Court held that equipment added after sale of a product by a manufacturer to an initial user is "not part of the product that itself caused physical harm," but "other property." *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1787.

<sup>133</sup> *Id.* The Court stated:

One important purpose of defective product tort law is to encourage the manufacture of safer products. The various tort rules that determine which foreseeable losses are recoverable aim . . . to provide appropriate safe-product incentives. [A] liability rule that diminishes liability simply because of resale . . . diminishes the basis incentive. That



The manufacturer should not be in a situation where it is free from responsibility for a manufacturing or design defect.<sup>134</sup>

Justice Scalia's dissenting opinion<sup>135</sup> makes an interesting confession. He says that the Court is not the proper place to decide the instant issue; the state court is much better suited for the job.<sup>136</sup> He notes that the Court is treading in waters where it does not belong and disagrees with what the majority has done.<sup>137</sup> What can we learn from this? *Saratoga* should be considered by state courts when they consider what is "other property" and what the manufacturer's liability should be for a design defect when additions have been made to the product years after the original sale.

There are two other cases that I would like to discuss briefly, *Adams v. Robertson*<sup>138</sup> and *Amchem Products v. Windsor*,<sup>139</sup> both of which are class action cases.

In *Adams*, the Supreme Court granted certiorari and then dismissed the case.<sup>140</sup> The issue in *Adams* was whether the Alabama Supreme Court's approval of a class action settlement, where the class members were not given the right to opt out of the class, violated due process.<sup>141</sup> The Court noted that this issue was not properly raised in the state court.<sup>142</sup> When the case came

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circumstance requires a justification. [W]hy should a series of resales, after replacement and additions of . . . physical items, progressively immunize a manufacturer to an ever greater extent from the liability for foreseeable physical damage that would otherwise fall upon it?

*Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1789-92 (Scalia, J., dissenting).

<sup>136</sup> *Id.* at 1789 (Scalia, J., dissenting).

<sup>137</sup> *Id.* at 1789 (Scalia, J., dissenting). Justice Scalia states that "[w]ith this disclaimer, and with the admission that I am only modestly more confident of my resolution of this case than I am of the Court's, I proceed (reluctantly) to discussion of the merits." *Id.* (Scalia, J., dissenting).

<sup>138</sup> *Adams v. Robertson*, 117 S. Ct. 1028 (1997).

<sup>139</sup> *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997).

<sup>140</sup> *Adams*, 117 S. Ct. at 1032.

<sup>141</sup> *Id.* at 1030.

<sup>142</sup> *Id.*

before the Alabama Supreme Court, the issue was noted in a point heading of the appellant's brief, but never actually discussed.<sup>143</sup>

*Amchem Products v. Windsor*<sup>144</sup> is a case concerning a global asbestos settlement, where representatives of the plaintiff class got together with the manufacturers and said-let's agree.<sup>145</sup> The Supreme Court rejected the settlement.<sup>146</sup> Justice Ginsburg, writing for the Court, stated that there was such an enormous disparity between people who are making asbestos related claims that the class representatives were not representative enough and thus it could not be said that common questions predominated.<sup>147</sup>

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<sup>143</sup> *Id.* Petitioners argued that they raised the federal claim in their brief when arguing in the Alabama Supreme Court. *Id.* The brief contains discussion of a related case, *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), but the case was mentioned in an argument relating to the state constitution, rather than federal due process. *Id.* The Court held that discussing a federal case in "an unrelated argument" cannot put the state court on notice that it is presented with a federal claim. *Id.*

<sup>144</sup> 117 S. Ct. 2231 (1997).

<sup>145</sup> *Id.* at 2239-41. "Untold numbers of individuals may fall within this description." *Id.* at 2239-40. A complaint and settlement stipulation filed in the District Court for the Eastern District of Pennsylvania described the class as:

[A]ll persons who had not filed an asbestos-related lawsuit against a CCR [Center for Claims Resolution], defendant [Amchem] as of the date the class action commenced, but who (1) had been exposed . . . to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed.

*Id.* at 2239.

<sup>146</sup> *Id.* at 2246.

<sup>147</sup> *Id.* at 2250 (citing Fed. R. Civ. P. 23 (b) (3)). The Court explains that Rule 23 (b) (3) requires that common questions must predominate over any claim "affecting only individual members," and class resolution must be "superior to other available methods of . . . adjudication . . . ." *Id.* at 2246. The commonality requirement was not met. *Id.* at 2249. Even though Rule 23(a)'s commonality requirement may be met by the fact that all class members were exposed to asbestos, the predominance requirement has a higher threshold. *Id.* at 2250. Since there were more questions concerning the different categories of these class members, which may be uncommon, "any overarching dispute about the health consequences of asbestos exposure

Justice Breyer concurred,<sup>148</sup> writing that the majority should not have decided the case.<sup>149</sup> It should have been sent back to the district court.<sup>150</sup>

The last case I will mention this afternoon is *Bennett v. Spear*.<sup>151</sup> In *Bennett*, a couple of water districts and ranchers attacked a holding of the Fish and Wildlife Agency which provided that certain lakes' levels needed to be reduced in order to save certain fish which had been designated as endangered species.<sup>152</sup>

The plaintiffs brought an action attacking the ruling of the Fish and Wildlife Agency and the Secretary of the Interior.<sup>153</sup> The question presented was whether they had the standing to bring the lawsuit.<sup>154</sup> The Supreme Court, in a unanimous opinion, held that

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cannot satisfy the Rule 23(b)(3) predominance standard." *Id.* at 2250. As the Third Circuit held, the class members were exposed to different products containing asbestos, "for different amounts of time, in different ways, and over different periods." *Id.* (quoting *Georgine v. Amchem Prods.*, 83 F.3d 610, 626 (3d Cir. 1996)). The Court notes that "[n]o settlement class called to our attention is as sprawling as this one." *Amchem*, 117 S. Ct. at 2250.

<sup>148</sup> *Id.* at 2253 (Breyer, J., concurring).

<sup>149</sup> *Id.* (Breyer, J., concurring).

<sup>150</sup> *Id.* (Breyer, J., concurring). Justice Breyer stated:

I do not believe that we should . . . set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has broad discretion . . . with respect to matters involving the certification.

*Id.* (citations omitted).

<sup>151</sup> 117 S. Ct. 1154 (1997).

<sup>152</sup> *Id.* at 1159. A federal reclamation plan known as the Klamath Project, is a series of rivers, lakes, and dams in California and Oregon, administered by the Secretary of the Interior, pursuant to his authority under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* In 1992, the Bureau of Reclamation notified the Fish & Wildlife Service that the project might affect the survival of the Lost River Sucker and Shortnose Sucker. *Id.* The service issued an opinion holding that the project could endanger those fish, and offered alternatives, which the Bureau elected to follow. *Id.*

<sup>153</sup> *Id.* Two Oregon water districts and two ranch operators that receive Klamath Project water then sued the Service director and the Secretary of the Interior. *Id.*

<sup>154</sup> *Id.*

they did because the statute itself says that any citizen may sue.<sup>155</sup> The case is somewhat more complex but, since it is late, we need to conclude.

I would like to thank everyone for their attendance. I would also like to thank all the program participants for making this a stimulating and thought-provoking symposium.

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<sup>155</sup> *Id.* at 1665. The statute provides that any individual may sue the Secretary of the Interior “where there is alleged a failure of the Secretary to perform any act or duty under Section 1553 of this title which is not discretionary . . . .” 16 U.S.C. § 1540(g)(1). *Id.* The petitioners claimed that the Service’s Biological opinion did not comply with the statutory mandate that the Secretary of the Interior take economic impact into consideration when singling out any area as critical habitat. *Id.* The Court held this claim came within the citizen-suit provision. *Id.*

