An aerial photograph of a river delta, showing a large reservoir on the left and a dam structure extending from the bottom right towards the center. The water is dark, and the surrounding land is a mix of green and brown, indicating a mix of forest and agricultural or developed areas. The text is overlaid on the image in a white, serif font.

# Government Liability for Failure to Prepare for Climate Change

JENNIFER KLEIN  
DECEMBER 1, 2015



SABIN CENTER FOR  
CLIMATE CHANGE LAW



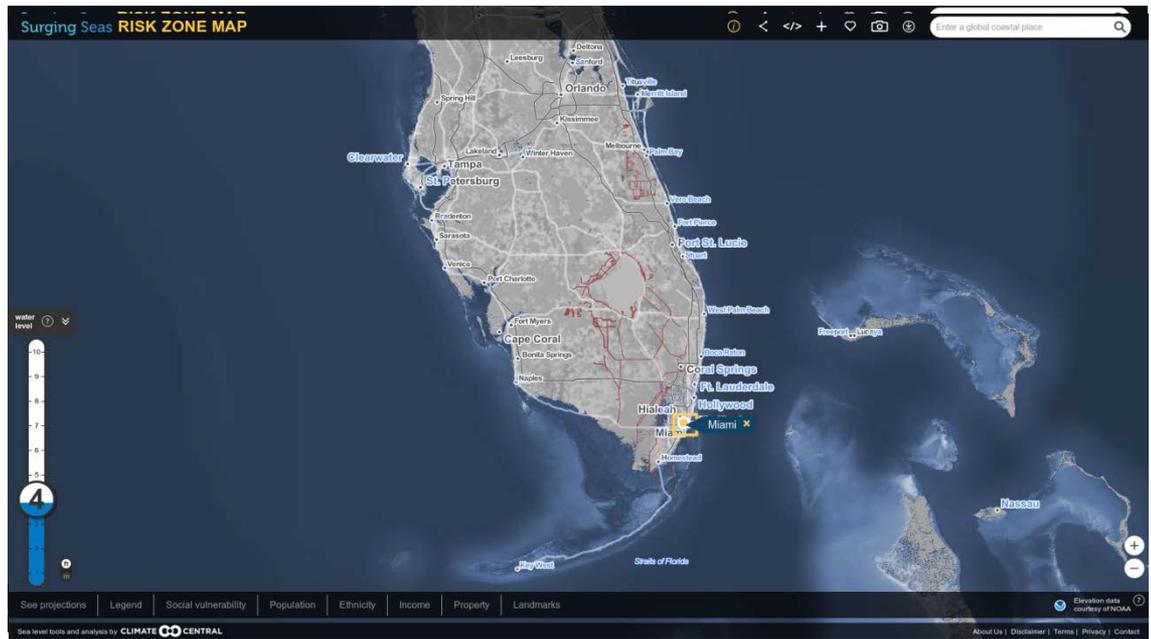
Michael Gerrard  
Faculty Director



Michael Burger  
Executive Director



Florida Governor Rick Scott





Florida Governor Rick Scott

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Alcatel-Lucent To take advantage of this compelling opportunity, you need to act now to exchange your Alcatel-Lucent shares and ADSs for Nokia shares or ADSs.  
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FLORIDA MARCH 8, 2015

## In Florida, officials ban term 'climate change'

### HIGHLIGHTS

State environmental officials ordered not to use the terms "climate change" or "global warming" in any government communications, emails, or reports.



1 of 3

In 2013, Jim Harper, a nature writer in Miami, had a contract to write a series of educational fact sheets about how to protect the coral reefs north of Miami. 'We were told not to use the term climate change,' he said. 'The employees were so skittish they wouldn't even talk about it.' **John Van Beekum** - For the Miami Herald



BY TRISTRAM KORTEN  
*Florida Center for Investigative Reporting*

The state of Florida is the region most susceptible to the effects of global warming in this country, according to scientists. Sea-level rise alone threatens 30 percent of the state's beaches over the next 85 years.

But you would not know that by talking to officials at the Florida Department of Environmental Protection, the state agency on the front lines of studying and planning for these changes.

art miami  
DECEMBER 1-6 | 2015  
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CONTEXT  
art miami  
TICKETS+INFO →

### VIDEOS



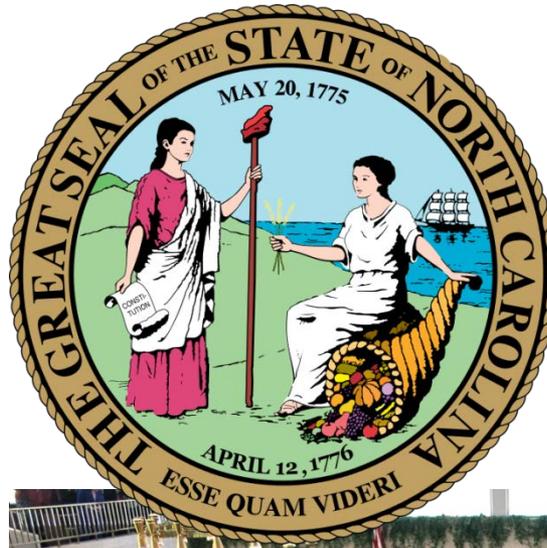
about 1 month ago  
**Video: News conference about poll involved shooting of Corey Jones**



about 1 month ago  
**Video: Neighbor speaks on case concerning Pradant**



Wisconsin Governor Scott Walker



North Carolina Legislature  
H.B. 819, 2012



# Outline



**Negligence**  
**Fraud**  
**Takings**

# Outline



**Negligence**

Fraud

Takings

# Negligence



- 2013 Chicago area rainstorms
- Insurance companies sued 100+ cities for negligence
- Cases never adjudicated on the merits



# Sovereign Immunity



- Extends to states and state officials acting in their official capacity
- Many states consent to be sued
  - e.g. RI State Tort Claims Act, R.I. Gen. Laws Ann. § 9-31-1
  - (a) ...RI and any political subdivision thereof, including all cities and towns, shall...be liable in all actions of tort in the same manner as a private individual or corporation...
  - But, “public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions...not ordinarily performed by private persons.” *Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992).
  - Also monetary limitations, statute of limitations, etc.

# Sovereign Immunity



- **Dangerous Conditions Exception**
  - e.g. Pennsylvania, 42 Pa. Cons. Stat. Ann. § 8542. A local entity may be liable for “the care, custody or control of real property in the possession of the local agency.”
  - Colorado, Colo. Rev. Stat. Ann. § 24-10-106. Sovereign immunity is waived for injuries resulting from a dangerous condition of any public property.
  - Michigan, Mich. Comp. Laws Ann. § 691.1406. Government agencies liable for injury resulting from dangerous condition of a public building if agency had knowledge of the defect and failed to remedy the condition or take reasonably necessary action to protect the public against the condition.

# Sovereign Immunity



- In Rhode Island, “egregious conduct exception,” to public duty doctrine precludes invocation of the immunity defense where the public defendant has failed to remedy a peril caused by its own conduct and of which it has knowledge. *Broccoli v. City of Cranston* (Superior Ct. 2005).
- E.g. plaintiff struck by car when she was forced to step off the sidewalk into the road because it was blocked by a large tree. City knew of the danger caused by the tree and did nothing to alleviate the risk. *Verity v. Danti*, 585 A.2d 65, 65-66 (R.I. 1991).

# Negligence Elements



**Duty**  
**Breach**  
**Harm**  
**Causation**

# Negligence Elements



**Duty**

Breach

Harm

Causation

# Duty



- **State statute**
  - E.g. dangerous condition waivers
- **Common Law**
  - “Compelling Policy Concerns”
    - ✦ Foreseeability of harm
    - ✦ Capacity of parties to bear loss
    - ✦ Consequences to the community of imposing a duty
- **How is climate change relevant?**
  - Impacts becoming more foreseeable

# Duty



- **Affirmative Duty to Act**
  - E.g. duty to build levee versus duty to properly maintain levee
  - More difficult to establish than duty to exercise due care
    - ✦ Differing degree of discretion
- **Creation of a dangerous condition not readily apparent**
  - Government must remedy or warn
    - ✦ E.g. *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1086 (Fla. 1982)
    - ✦ Three drowned in open storm drainage ditches. City not liable for overall drainage system plan, but had duty to correct dangerous condition.

# Negligence Elements



Duty

**Breach**

Harm

Causation

# Breach



- Complete protection not necessary
- Considerations:
  - Information available (e.g. accuracy of projections)
  - Resources available (technical and monetary)
  - Hand Formula
    - ✦ Breach if **likelihood of harm x magnitude of harm > cost of preventing harm**
    - ✦ E.g. chance of 100 year storm in a given time period x expected damages, compared to cost of infrastructure to prevent flooding
- How is climate change relevant?
  - Increased likelihood of certain weather events
  - Historical data not sufficient

# Breach



- 2010 in Nashville – 1000 year flooding
- \$2 billion in damage, 10 dead
- 2015 \$100 million flood-protection proposal rejected by Metro Council
- Hand Formula:
  - $1/1000 \times \$2 \text{ billion} = \$2 \text{ million}$ . Rejection justified?



# Negligence Elements



Duty

Breach

**Harm**

Causation

# Damages



- **Similar to a traditional negligence cases**
- **Injury to person or property**
- **N.B. Some states impose statutory dollar limitations**

# Negligence Elements



Duty

Breach

Harm

**Causation**

# Causation



- Did government's failure to take reasonable measures to protect people from the natural disaster at issue cause the damage?
- Plaintiff must identify measures the government should have taken.
- How is climate change relevant?
  - It's not.
  - Comes into play in determination of breach and foreseeability instead

# Outline



**Negligence**

Fraud

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# Outline



Negligence

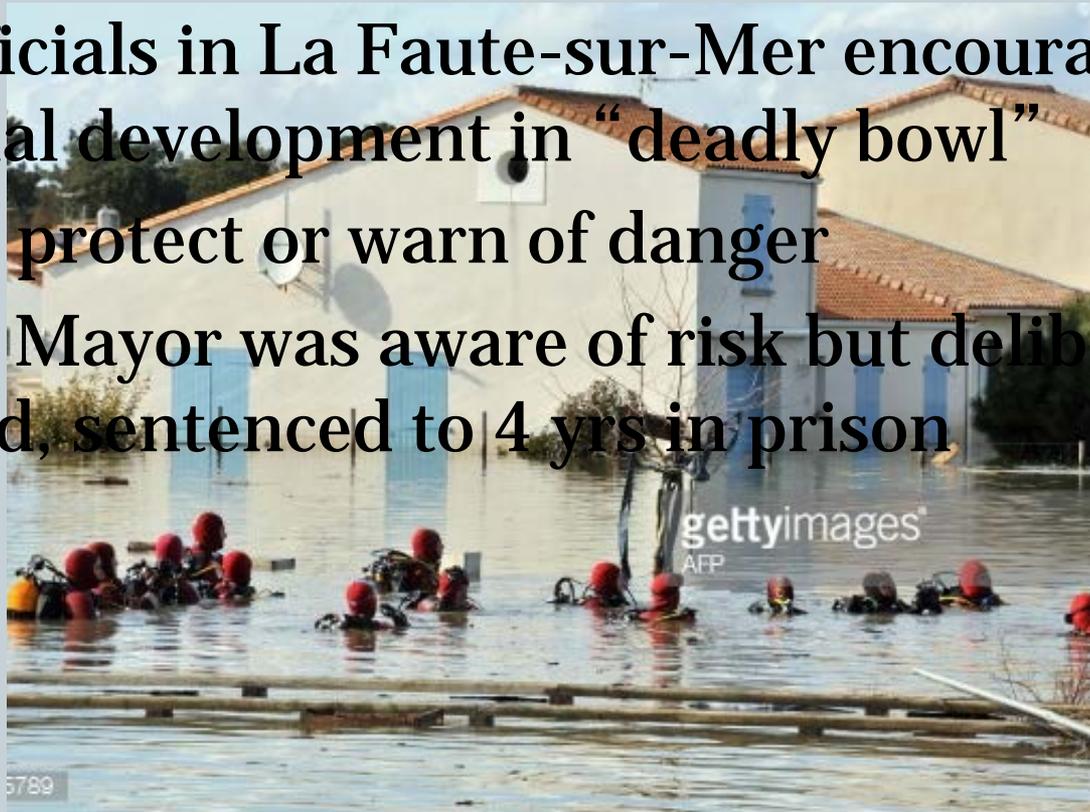
**Fraud**

Takings

# Fraud



- 2010 Cyclone Xynthia caused fatalities and \$1+ billion in damages in France
- Local officials in La Faute-sur-Mer encouraged residential development in “deadly bowl”
- Failed to protect or warn of danger
- Ct found Mayor was aware of risk but deliberately concealed, sentenced to 4 yrs in prison



# Sovereign Immunity



- **Many states retain immunity for fraud claims**
  - e.g. California, Cal. Gov' t Code § 818.8 – “A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.”
- **Even where immunity is incomplete, major hurdles**
  - e.g. Minnesota. Claims for negligent misrepresentation of fact against state and local officials available only if the official is the exclusive source of the information sought. *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 637 (Minn. Ct. App. 2002); *Home Town Mortgage, Inc. v. State*, No. A05-1443, 2006 WL 1073385, at \*6 (Minn. Ct. App. 2006).

# Fraud Elements



**False representation**  
**Intent to cause reliance**  
**Reasonable Reliance**  
**Damages**

# Fraud



- **Who made the misrepresentation?**
  - Case typically against person who made the statement
  - In some states, person who causes someone acting as his agent to commit fraud is subject to liability.
- **Was the misrepresentation made knowingly?**
  - Enough uncertainty in projections to provide cover?
  - Willful blindness
    - ✦ Def. cannot escape liability “by deliberately shielding [himself] from clear evidence of critical facts that are strongly suggested by the circumstances.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011).
    - ✦ Def. must 1) subjectively believe there is high probability fact exists, and 2) take deliberate action to avoid learning of that fact.

# Fraud



- **Intent**

- Like the Mayor in La Faute-sur-Mer, motivated by development interests?
- Sponsor of North Carolina bill's biggest campaign contributors were developers

- **Reliance**

- Governments have access to information individuals do not, especially relating to infrastructure.

- **Damages**

- Injury to person and property

# Outline



Negligence

**Fraud**

Takings

# Outline



Negligence

Fraud

**Takings**

# Sovereign Immunity



- **No problem! States generally not immune from takings claims brought in state court.**

# Rhode Island Takings Clause



**Section 16.** Compensation for taking of private property for public use -- Regulation of fishery rights and shore privileges not public taking. -- **Private property shall not be taken for public uses, without just compensation.** The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.

# Takings



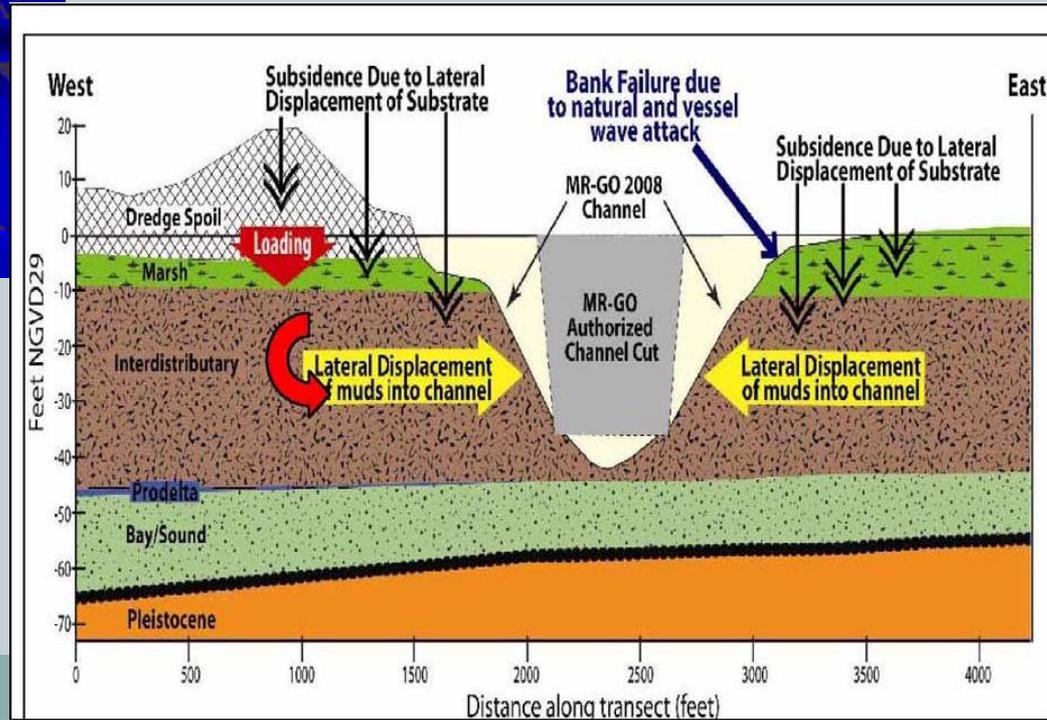
- **Some states more protective**
  - E.g. Arizona, Ariz. Const. art. II, § 17 – “No private property shall be taken **or damaged** for public or private use without just compensation having first been made....”

# Takings



- Army Corp of Engineers built in 1950s
- Eroded to 3x width

- Gov. immune from tort claims, but takings claim successful in trial court



# St. Bernard Parish Gov. v. U.S.



- Finding: Corp' s negligent design and failure to maintain MRGO exacerbated Katrina flooding
- Flooding constituted temporary taking of property
- Case expands liability to include flooding caused by government *inaction*, at least where existing government owned property increased damage

# St. Bernard Parish Gov. v. U.S.



- **Plaintiffs must establish:**
  - 1) protectable property interest
    - ✦ Regular ownership interest
  - 2) reasonable investment backed expectations
    - ✦ Although Pl.s “had experienced flooding in the past,” that flooding was not “comparable” to Katrina flooding.
  - 3) foreseeability
    - ✦ Increased flooding foreseeable from MRGO erosion
  - 4) causation
    - ✦ Corps’ inaction caused erosion and other exacerbating factors
  - 5) substantiality
    - ✦ Property owners lost access for a few weeks to a few months – court found this to be a sufficiently severe economic impact

# Recap



	<b>Negligence</b>	<b>Fraud</b>	<b>Takings</b>
<b>Sovereign Immunity Not a Bar</b>	<b>✓</b>	<b>X</b>	<b>✓</b>
<b>Good Precedent Exists</b>	<b>X</b>	<b>X</b>	<b>✓</b>
<b>No Need for Novel Legal Theory</b>	<b>✓</b>	<b>X</b>	<b>X</b>



**Thank you!**