

Stephanie Otts:

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Zachary Klein:

Hello. Welcome to season two of the National Sea Grant Law Center's Law on the Half Shell podcast. The National Sea Grant Law Center is a nonpartisan, non-advocacy oriented institution at the University of Mississippi School of Law that performs all sorts of legal research services for Sea Grant, a university-based network created by Congress as a resource for coastal stakeholders around the country. I'm one of the Law Center's Ocean and Coastal Law Fellows, Zachary Klein. And it's my pleasure to be hosting Law on the Half Shell this season. My colleagues and I at the National Sea Grant Law Center have lots of stories to unpack for you this season. But before we do, we thought it might be helpful to introduce ourselves and set the stage for what you can expect from Law on the Half Shell this season. From the pandemic's impact on cruise lines and fishing fleets to legal battles that were waged closer to shore over beach access. Come join us to find out exactly what it is about COVID that accentuated the resilience of the US's coastal communities in such an interesting way and the lessons that the pandemic has to teach us all about our past, our present, and our future.

Terra Bowling:

Hi, I'm Terra Bowling. I am a Research Counsel at the National Sea Grant Law Center.

Olivia Deans:

Hello, my name is Olivia Deans. I am an Ocean and Coastal Law Fellow.

Catherine Janasie:

I'm Cathy Janasie. I'm a Research Counsel at the Law Center.

Stephanie Otts:

I'm Stephanie Otts. I'm the Director of the National Sea Grant Law Center. I've been director for going on 15 years now. The National Sea Grant Law Center is a federally funded legal research program at the University of Mississippi School of Law. We are funded by NOAA, the National Oceanic and Atmospheric Administration, and we're part of a nationwide network of programs known as the Sea Grant College Program. Sea Grant is modeled after the Land Grant system, but instead of bringing university research and expertise to farmers and the agricultural community, we bring university expertise to coastal communities, whether that's commercial and recreational fishermen or mayors and city councils facing coastal erosion and other development issues, or just anyone that loves the coast and the beach, and wants to see those resources preserved and used in sustainable ways. This is the second season of the Law on the Half Shell podcast.

Stephanie Otts:

Our team decided to do a podcast last year that focused on one of our larger research projects on shellfish aquaculture. And we see this podcast as an opportunity to share interesting developing legal issues and information in a way that it's not normally done. Like the rest of world in early 2020, we were

here working at the Law Center and watching the news start to come in about the cases of the novel coronavirus. It didn't affect our work too much until it really became clear that this was going to be a global pandemic and things were really going to change in the coming months. When it became real for me, I was actually at a national meeting in Washington DC, and all of the participants started to leave early because the universities were starting to close down and restrict travel, and we all had to come back because of concerns over the pandemic.

Stephanie Otts:

And so the Law Center, our topics have ranged from fisheries to tourism to pretty much anything that happens in the coastal environment. And so our attorneys are always tracking developing issues and trying to stay in tuned with what's going on. But when Congress passed the CARES Act, the work for the National Sea Grant Law Center just exploded. So we had this huge legislative package coming out to address the financial and health impacts from COVID 19, and nobody knew the details, right? And many of the provisions actually applied to seafood or were trying to replace lost wages for workers that for our stakeholders would be in the seafood industry or the hotels and restaurants. And so we started to get lots of questions and eventually more and more lawsuits were filed over different programs, tons of regulations came out related to some of the new financial programs.

Stephanie Otts:

So we had to try to become not experts, but at least someone who could track and get people to the right place to follow these programs. So the podcast is a synthesis, I guess you could say, of what we were covering and watching and learning about throughout the course of the pandemic. And we hope that you'll find our journey as interesting as we did during the process. For lawyers, it's always fun to have something new to research and to really dig into, and that's what we did. Yeah. So maybe with a little bit of background. So the National Sea Grant Law Center provides a service to other Sea Grant programs across the country where we will do legal research for them upon request. And so we were already here and working with Sea Grant programs on different questions.

Stephanie Otts:

And so as they started getting questions from their stakeholders, whether they were recreational fishers or mayors of coastal communities or owners of coastal businesses, they would turn to us to try to figure out where can they find something, how can they find the actual text of a regulation. There were a lot of rumors that would circulate and so we would help to find the actual documents that people were looking for, financial applications. So those were in general the type of questions we got, but I think our biggest actual formal advisory requests were probably what Cathy worked on for Texas Sea Grant. And then I think Terra did a couple for New Jersey Sea Grant related to liability issues.

Zachary Klein:

That sounds right to me. So with that in mind, Cathy, would you mind picking up from there and telling us a little bit about the work that you did for Texas Sea Grant?

Catherine Janasie:

Yeah. So when the CARES Act got passed, as Stephanie mentioned, there was a lot of new and then modified programs that were in the legislation. And so as they started to get rolled out, the Small Business Administration was issuing tons of regulations all at once and it was hard even for us as lawyers to keep up with those. So the ones we really focused on were the economic injury disaster loan program

which was preexisting, but got changed a little bit with the CARES Act and then the Paycheck Protection Program or PPP that was created under the CARES Act. And so initially we did a lot of just general outreach on what the standards were in the CARES Act itself and then tried to keep up with as the new regulations were coming out, what those regulations were saying. And in particular with Texas, we got to work with Texas Sea Grant creating outreach materials on the Paycheck Protection Program in particular, to help the charter boat fishermen in that state apply for that program. And through that work, we know at least about 10 or so charter boat captains who actually got loans based on that work. So in that way, it was really satisfying I think for me and Stephanie to work with Texas Sea Grant on that issue in particular, just to note that our work was affecting people.

Stephanie Otts:

And I think another reason why there's so many questions is in an emergency like COVID or when you're trying to roll out programs quickly, it's really hard for anyone to anticipate all of the nuances or scenarios that may come into play in these type of financial or regulatory programs. And one thing that quickly emerged within the Sea Grant community was an issue surrounding independent contractors. And so most of the news coverage focused on Uber and Lyft drivers and whether they could receive compensation under, for instance, like a workers or unemployment compensation program. But fishing crews, are generally independent contractors, they're not employed by a company to fish on the vessel. And so there were all these questions about whether it was just the captain of a fishing vessel that could apply for say a Paycheck Protection, PPP loan, or whether a crew member could do that.

Stephanie Otts:

And would that impact their ability to apply separately for unemployment compensation? And anytime you're dealing with an industry that is not necessarily really set up in a traditional employer/employee relationship, you can get all of these questions. And of course I'm surprising the SBA and others working in DC trying to roll out these programs, maybe aren't that familiar with how fishing crews work and how they are set up. And so eventually Congress did enact some legislation that clarified how fishing crews and fishing vessels can qualify for these programs, but it took a while to figure that out.

Catherine Janasie:

It really was a learning process, not only for us at the Law Center and our stakeholders, but also for the Small Business Administration and everybody up there in DC as well.

Zachary Klein:

In the same vein, I remember that there was, I believe it was an advisory request that required us to look into whether or not fish count as cash, which might seem really preposterous to some members of our audience. But I was curious and anyone is free to pick up this thread, exactly what led us down that road and what the unique circumstances of the fishing industry are in terms of the dynamic of the captains and the crew and how they're paid that led us down that rabbit hole.

Catherine Janasie:

I think at least for me, that originated with the Paycheck Protection Program and this question of, okay, we have employees, and so the loan was based on what the salary was of your employees because the whole purpose, well, the main purpose of the program was to keep people employed during the COVID pandemic. And so as Zak mentioned, we had a lot of fishing boat captains come back to us and say, "Well, we pay our crew in fish shares. So we don't give them cash value, we give them a percentage of

the catch. And so how are we supposed to account for that in these complicated formulas under the Paycheck Protection Program?" And it was such a novel question that there really wasn't an answer so much when we went to look. There were some things that we could compare it to loosely, but we didn't have per se right answer to give those boat captains on how they were supposed to do the calculations.

Zachary Klein:

Excellent. So with that now better understood, I was about to ask yes, if Terra wouldn't mind sharing some of the work that she had done earlier on for whether it was advisory requests, webinars. I know she was doing some really cool stuff at the very least with the folks from New Jersey.

Terra Bowling:

Yeah, that's right. So one of the questions, well actually a couple of the questions that we got related to liability and those came from New Jersey Sea Grant. So it wasn't a novel question like the one y'all were just talking about, but it was definitely one that a lot of people were having. They were wondering once things start to open back up, what is our liability if someone gets sick? What should we be doing to minimize that liability? So we wrote up an advisory memo related to that. And then they also had questions about hosting virtual programs for kids in K-12 schools. They do a lot of that and they were wondering there are all these privacy laws, how do we need to go about presenting these programs? Do we need waivers from all the parents? So we were able to provide them with some information. It was definitely outside of our area of expertise that we did find out some new things to us.

Zachary Klein:

It seems like after COVID or after COVID made headlines at least, that no matter what your field of work was or no matter what your specialty is that everyone became a COVID attorney or a COVID doctor or whatever it was after it became clear just how serious the threat the pandemic was. And Terra's example very clearly and helpfully illustrates that we were no different and we all adapted as best we could.

Stephanie Otts:

Zak, I wonder, I don't know if this would be relevant but I realized when we were introducing the Law Center, we didn't actually talk about our expertise. And I think we've hinted that this work was outside our expertise. The National Sea Grant Law Center conducts legal research on issues of ocean, coastal and Great Lakes law. And that generally is an umbrella term that we use for issues that come up in the fields of environmental, natural resources, coastal and ocean law. And we are all trained environmental attorneys. We specialized either through our schools or advanced degrees or work experience in environmental law, in an ocean and coastal environment. And so our primary focus is usually the traditional environmental law programs. So Clean Water Act, Safe Drinking Water Act, wetlands laws and regulations, Coastal Zone Management Act, offshore oil and gas development, those type of things.

Stephanie Otts:

And so we don't do traditional business law, corporate law, employment law, immigration law, but when the COVID pandemic hit and all of these businesses and individuals within the communities that we work within were having their restaurants shut down, or maybe they couldn't rent their beach condo on Airbnb anymore because nobody was coming, or they were not able to go out and fish. And now their fishing crews didn't have jobs. And they're trying to figure out how to deal with that. It really forced us to learn more about how the various insurance programs, employment programs,

unemployment programs interface with coastal businesses and coastal communities because that's what our stakeholders needed help with. So they weren't asking in March and April and May of 2020 about how a Clean Water Act permit was going to affect their aquaculture operation, they needed to know how they could get money to stay in business to survive the pandemic.

Zachary Klein:

Perfect. Well said and an excellent segue for the last thing that I wanted to cover. And that is some of the themes that emerged or that we expected to emerge while we were preparing the season and working through it, some themes that really dominate or maybe it would be better sets predominate these seasons. And there are some topics and themes that while important might otherwise be left unsaid. So I thought it might be helpful to cover some of them now. One of these themes is the tension between protecting public health in keeping key economic sectors open. This comes up a few times over the course of the season, and I was curious if anyone had any thoughts or particularly close experiences with that theme that they thought might be helpful for framing the season.

Stephanie Otts:

One thought I had. So I worked on the episode with Zak on cruise ships and cruise ships are a major economic driver in many coastal communities around the country, but legally cruise ships are fascinating to research and think about because most cruise ships are not U.S. Vessels, meaning they're not flagged and subject to U.S. Law. Many are flagged in Panama or Liberia. And so when you leave a U.S. Port on a cruise ship, even if you're a U.S. citizen, you're no longer subject to us law you're subject to Panamanian law or whatever other country. And there are always a lot of lawsuits about things that happen on cruise ships. Like people swim in murky pools and hit their head and sue, or they fall down ramps and try to sue for money. And so the Law Center has always just tracked cruise ship cases to see what's going on and just understand a little more about the rights of passengers.

Stephanie Otts:

There's also a lot of controversy around the rights of crew members on cruise ships that they don't have a lot of the same type of employment rights that you might think for people who are working on land in the United States. And so that was something that was just always in the Law Center's wheel house, but also cruise ships who are really the first business impacted by the pandemic because in early March there were outbreaks on a number of cruise ships. Cruise ships were prevented from coming to port in many countries leaving passengers and crews stranded. And so almost immediately there were legal questions being raised about the rights of passengers and crew members on cruise ships, which made it really interesting to look into.

Zachary Klein:

That's a great starting point for the intersection of a different theme or a different motif that recurred quite a bit over the course of the second season of the podcast. This one being the limits of authority, the conflicts, or when they conflict the superiority per se of federal law versus state law, state law versus local law. And more generally the difference between what private actors can do and what public actors can do. Not to put you on the spot, Cathy, but as our resident professor this semester, would you briefly explain, say what the police power is and just give a very basic bird's eye overview of some of the differences in terms of authority between the different actors mentioned?

Catherine Janasie:

Yeah, sure. So we touch on this a little bit in the beach episode, this tension really with the police power of the governments. And in that episode, we specifically talk about how the different authorities are clashing with each other, as well as how the public trust doctrine comes into play. But with the police power traditionally in the government that the ability to regulate for public health, safety, and welfare falls to the state government through, that's how the constitution is set up so that the federal government has very specific powers that they're allowed to do and what they can regulate. And then that police power falls to the states. And then the states choose how they want to delegate that power to either county or local governments. So depending on if they're what we call home rule jurisdiction, local governments will have more power than they will say in what we call a Dillon's Rule jurisdiction, which is going to hold more that power in this state.

Catherine Janasie:

And so Terra and I, when we covered the hodgepodge episode, took a quick snapshot about how that's playing out in particular with mask mandates. So how what the state saying you can or cannot have a mask mandate versus the local government trying to put one in place. And so far, what we've seen from the courts is really this split about where that power is lying, at least with mass mandates, to say who's ruling the game. And a lot of that can be based in how the state is interpreting the power to either keep it in that more state centralized government, or to pass it off to the local jurisdictions.

Zachary Klein:

What makes coastal communities unique? Getting hit by a flying umbrella is not a problem you're going to have just anywhere. That is definitely something that's only going to happen on the shore. So as you think about what you expected from the season, as you think about the work that you've done on your particular episodes, what stood out to you in terms of whether it's who lives there year round, who doesn't live there year round, who's working there, et cetera. What do you think makes coastal community so unique, especially when it comes to the microcosm that coastal communities were for the impact of COVID more generally?

Stephanie Otts:

Although you may see this in other places like national parks, where there is seasonal activity, but there's a lot of influx in and out of coastal communities based on the season. So reliance on seasonal workers for both the tourism and hospitality sector during summer months. But also if you think about Alaska during fishing season, people travel from all over the country to Alaska to both fish for king crab and other species. But also they need hundreds of people to come in to work in the seafood processing plants, because all of that seafood is coming in at one time during the harvest season. And so when COVID travel restrictions came into play across the country, it really affected the ability of people who make their living on the water during these different commercial harvest seasons, but also in the hospitality sector, because they don't necessarily live where their seasonal jobs are and they were prevented from being able to get to those locations to do those jobs. Or if they could, there was uncertainty about quarantine requirements. And of course this was way before vaccines were available. And so I think that, I don't know if influx is the way, but just the way that the populations of coastal communities grow and shrink with the seasons and the various activities that are happening along the coast.

Zachary Klein:

Absolutely. When so much work is seasonal, a quarantine time of say two weeks suddenly makes a big difference if you're only in a place for say a couple of months.

Olivia Deans:

I think we talked about that a little bit when we talked about the Magnuson–Stevens Act. And I was really surprised. I didn't know that fishermen would travel across the country during certain parts of the year. So I found that really interesting. But I think it also with COVID it made it so the agencies had to adapt really fast just to protect these communities and these jobs. And I don't know if I've seen that as much in other areas of the law. So I thought that was really interesting.

Zachary Klein:

Totally agree.

Stephanie Otts:

Yeah. And I think what Terra was getting at too, is some communities are isolated along the coast. Some are island communities that maybe are served by ferries or there's even a situation there is a community or town in the United States, but it surrounded all sides by Canada. And so they were actually not able to leave their town because they would've had to cross international borders no matter how they leave. And so, as Terra mentioned, there are many people who have second homes along the coast or condos, and seemed like a perfect opportunity, right? If your job shuts down or you are able to work remotely and you live in a city, of course you want to go to your beach house and just spend your time there. But there were travel restrictions and coastal communities didn't want people coming in that might be carriers for the virus. And so people were not able to access their second homes in certain communities which was a separate issue from someone trying to come in to work as well.

Catherine Janasie:

Well, one, I love coastal communities because I'm from one, but I think something that comes up a little later is I think everyone's doing a really good job of talking about the communities. We're being safe and trying to keep people out. Zak and I talk about in the seafood episode a little bit about the isolated communities that have seafood processing plants how they became a hotspot for infection rates just because of the need to have the workers come there. But then we had these situations in other places like Florida who didn't necessarily shut down. And so then the local governments are being faced with as Stephanie is saying this influx of people. And so even though they're outside of the beach, how do we handle all these tourists coming when we're in a pandemic?

Catherine Janasie:

And I think that's a continuing legal issue we're seeing as the cruise ships come back online or as the beaches reopened this past summer, we see saw a spike through the south. And so that really balancing of wanting to be open for economic reasons because that's what makes a lot of coastal communities really unique is their reliance on either tourism for their main economic booms or fishing, other seafood related things and then while balancing that with the need to be safe, I think it put a lot of communities in a hard position.

Stephanie Otts:



Yeah. And I think it also highlighted what Olivia was talking about the need for government agencies on all levels to be responsive. So one of the things that really hit coastal communities hard during the pandemic was the closure of restaurants. And so oyster aquaculture has been really growing in the United States in addition to just wild harvest of oysters and during harvest season and that is the oyster aquaculture goes a lot to the half shell market. It's a high value market. It's a very important money source for individuals in the sector, but all of the oyster bars and restaurants across the country closed at one time. And there was really a scramble to figure out what we do with this. So this is aquaculture, it's a crop, you can't really leave the oysters in the water for another year.

Stephanie Otts:

They'll get too big for the market that they're going for. And so you don't want to waste it. And there was an awful lot of either pressure or some places were able to adapt faster to help oyster aquaculture farmers move their product in different supply chains. So maybe sell it through farmers markets or direct to consumers or maybe enable it to be bought and then used for restoration purposes. So not food, which is not a traditional way that you're allowed to sell oysters. And so I think the pandemic really highlighted the need for more adaptive, legal frameworks so that they can respond to emergencies no matter what they are, whether it's a storm, a pandemic or something that we haven't foreseen yet.

Zachary Klein:

Thanks for joining us for the first episode of this second season of the National Sea Grant Law Center's Law on the Half Shell podcast. The next week's episode, Stephanie will take the helm and lead us on a voyage around the various legal issues that COVID has created for the U.S. Cruise industry in particular. Along the way, we'll be joined by Chris Robinette, professor at Southwestern Law School, who will share his insights into COVID-related lawsuits that passengers have brought against cruise operators. You can be automatically notified when that episode is ready by subscribing to Law on the Half Shell on Apple Podcasts, Spotify, or wherever you listen to podcasts. Also, give us a like or follow us on Facebook, Twitter, and LinkedIn in order to keep up with all the latest at the National Sea Grant Law Center. Thanks again. Until next week.