ORAL ARGUMENT — 9/9/98
96-1165
HANS-HENNING STIER V. READING & BATES

GREEN: Both sides agree that presented here is a narrow issue of whether or not 688(b) preempts a state court from hearing a state cause of action or a foreign cause of action with regard to a person who is an alien. This case is a particularly clean and uncluttered case or vehicle to make that decision, because in this case the petitioner is seeking only state causes of action and Trinidad causes of action. We are not seeking the Jones Act or Maritime causes of action.

It is also a particularly good case to decide the issue on because of the plaintiff's contacts with the state of Texas. Although Mr. Stier is a German citizen and a resident of the country of Brazil, he was hired out of Houston, he worked for 17 years for a Houston employer, the respondent. Although he was hurt in Trinidad, the respondent's report to the coast guard indicated that the fault for that emulates from the failures arising in Houston. He was hurt and treated by doctors in Houston. So the case is one in which the plaintiffs could survive a forum non conveniens argument and a choice of law argument making it a particularly good case to decide the issue before the court. There can be little doubt that the relationship of the parties is centered in Houston, Texas.

I will briefly discuss the *Camejo* case out of the 5th circuit, which I think is directly on point. I will then follow the outline of preemption analysis recognized by this court in *Moore* and *Hyundai*.

Camejo, (5th Cir. 1988). This case is right on point, because in that case there were three causes of actions that were being claimed. One, the Jones Act; two, General Maritime law; and three, Texas state law. The 5th circuit dismissed the Jones Act and the General Maritime Law case under 688(b); however, it did not dismiss the Texas state court claim. It held: Even if no federal admiralty claim remained, the DC could still retain jurisdiction over the state claims. The court then went through an analysis and finally dismissed the court claims based upon forum non conveniens. So that court was addressed with this same situation: three different kinds of causes of action, or whether or not the state cause of action would be preempted by 688(b), and it chose not to do it.

The outline of analysis for preemption found in *Moore* and *Hyundai* starts with the presumption against preemption. This court stated in *Moore* that the lessons of *Cipollone* are that the preemption defense will be applied narrowly, that preemption language of a statute will be interpreted strictly and that few state law damage claims would be preempted.

In *Hyundai,* this court stated that the SC has mandated that the courts are not to conclude that congress legislated the ouster of state law in the absence of an unambiguous congressional mandate to that effect. The statute has to be strictly construed. It has to be clear, and

unambiguous.

I will now address the possibility of express preemption before going on to implied.

The only possibility of express preemption under 688, comes in the language: No action under the Jones Act or under any other maritime law of the US. It doesn't say: Any state law of Texas. It doesn't say: Any law of any foreign country. We've seen in other cases where the congress has certainly had the ability to put in there a state common law. It chose not to do so in this case. General maritime law of the US does not encompass state law. As we see in the SC case of *Yamaha v. Calhoun,* it defines general maritime law as a species of judge-made federal law. That court held that even though general maritime law might apply, the state of Pennsylvania could enforce its own wrongful death statute.

Part of the congressional record, the committee report that is appendix B to the respondent's brief upon which they rely, has the following language: Since 1798, the federal government has recognized that the unique status of seaman and the special circumstances of their employment require additional protections not available to US citizens generally. They are talking about maritime law - a special law: the Jones Act, a special law of federal maritime law. They are not talking about the other law, the state law, that is available to all the citizens. And that's the cause of action that we're trying to put forward here. That cause of action is available to all the citizens, not the special law, the Jones Act, the liberal Jones act and maritime law. That's what congress' intent was to do is to prevent the misuse of that law, not state law.

HECHT: If you had a maritime claim, you would not have a state law claim, is that true?

GREEN: Under *Calhoun*, you could have a maritime claim and a state law claim. If you don't have a maritime claim because of 688(b), you would still have a state law claim.

With regard to implied preemption there are two ways to have that: Whether or not the congress has occupied the field; and, then, whether or not there is a actual conflict. Certainly congress has not occupied the field here. Congress has retreated from the field. They have said, that the Jones Act and the maritime law do not apply to this class of person. They are not occupying the field; therefore, their intent is not to protect that type of individual.

Actual conflict - two ways for that to be and 1) is the impossibility to comply with both the federal law and the state law, that simply doesn't exist here. There is no way that you cannot comply with those. And 2), the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress. Nothing in the statute reaches or suggests that it was a purpose of congress to prevent state law from being applied. Nothing in the legislature history.

There are two different interests involved. What congress is clearly interested in is the misuse of the special federal law. The interest of this case is the interest of protecting the employer/employee relationship and a man hurt under those relationships. Those are different interests. They do not compete.

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RESPONDENT

LAWYER: In 1982, Congress passed §688(b). The legislative history of the statute makes it perfectly clear that congress was addressing three problems. One, was the economic disadvantage to American companies engaged in the offshore and drilling business because of the abilities of foreign plaintiffs to come and sue in the US. The second was, forum shopping. The third was, the sector of American lawyers descending upon foreign venues after an accident to solicit cases. Those are the three issues.

The principal issue, I would submit, is the economic disadvantage. 688(b) does not take Mr. Stier out of the Jones Act. When you read the statute it says: Gentlemen in the position of Mr. Stier had a Jones Act claim provided they can carry the burden of proving they have no relief in their home country or the country of the accident.

My learned opponent seeks to say that 688(b) all of a sudden made Mr. Stier no longer a seaman. The man is essentially the chief engineer aboard a vessel.

SPECTOR: He's an employee, am I correct?

LAWYER: He is an employee.

SPECTOR: I mean, this is not a third-party injured by an accident?

LAWYER: No. He is an employee, by the allegations, injured by the acts of his employer, which under state law would put him in workman's comp. It was a problem here, because the Jones Act and maritime law has always had a separate body of law to deal with that. The Jones act in effect is, you could call it a maritime ordinance comp statute. If it comes out of the Jones act, he doesn't have worker's comp. That's a separate issue. But the fact is, he doesn't come out of the Jones act. He doesn't stop being a seaman. Chief Engineer, is the third highest officer on a vessel. There is no doubt that he's a seaman. And they pled that in their initial cause of action before the Jones act cases were set aside.

ENOCH: Would this gentleman have had a cause of action in Texas prior to the Jones act?

LAWYER; Where they seek to create a Texas cause of action and bring it into the courts

of the state of Texas is to say: He's got an employment contract that has a clause that says it should be governed by and interpreted by Texas law. And as a part of that employment contract is a duty to provide a safe workplace. While I submit that that's a negligence duty anyway even under Texas law, since 1902, a duty to provide a safe place to work has been recognized as a maritime tort. And I'm referring to Norris, *The Law of Seaman* 4th Edition, Section 30...

ENOCH: And so if the general maritime law in federal court applied it preempted state claims?

LAWYER: Absolutely. There's no question about that. And so his argument that there is a Texas cause of action because the violation of duties, a safe place to work jumps right back into the maritime law even if you ignore the Jones act.

ENOCH: And so maritime excludes simply because maritime is the only law that could apply even if it doesn't apply?

LAWYER: I'm with you all the way to even if it doesn't apply.

ENOCH: Well the argument is that the Jones Act does not cover this gentleman because it excludes this gentlemen. But your argument is that it applies to him even to the point of excluding him?

LAWYER: The Jones act is only one portion of maritime law. If you go back, seamen from time of law had special status and special laws that govern them, and it moved forward. The problem with it was somewhat similar to the Shoreside Development, the seamen were entitled initially only to maintenance and cure(?). Essentially a comp. type benefit. They were not entitled to indemnity or compensatory damages. That is in the old law all the way up until about 1917. Then the maritime law developed that they could have a negligence cause of action, an unseaworthiness cause of action, which would entitle them to compensatory damages. Flip- flopping back between congress and the courts over what the defenses were and, then, finally I think in 1920, the originally Jones act came in, which struck down the fellow servant defense and several other defenses and basically gave seamen a unseaworthiness claim in which they didn't have to prove lack of due care, I think.

ENOCH: But Mr. Green's argument under *Camejo*, the 5th circuit acknowledged that there were state law claims independent of maritime and Jones act. And you're arguing there is no such thing as a state law claim independent of maritime _____?

LAWYER: If one reads *Camejo*, which is a forum non conveniens case, the statement is: Even if there were, the court made no finding that there were. The case does not stand for the proposition that there are. Now admittedly, there are in certain circumstances, not to this circumstance, there can be nonmaritime claim or state court claims. But this particular accident

you've got a distinct congressional statute that says, and the express purpose of this: We do not want our courts burdened with these cases or corporations put at an economic disadvantage in competing. Now they didn't take the foreign seaman and say: You're out of here. They said: Look if you can't get relief at home, we'll hear you, but you must exhaust your rights at home.

ENOCH: You said they said that for each state in this country as opposed to the federal courts?

LAWYER: They said that for every court in this country. The maritime law, the preemption of the maritime law under the US Constitution puts it over in its field, over any law of any state.

OWEN: I want to ask you about the claims based on Trinidad law. I understand what you're saying about the history of the statute. But if you look at the statute itself, where in the textural statute does it say that you cannot bring the claims under Trinidad law in state courts?

LAWYER: It does not specially say you can't bring your foreign law claim in the state courts. If you examine the legislative history, however, they are saying - one of the issues they were directly addressing...

OWEN: There seems to be some disannex between the history of the act and what congress thought it was doing and what they actually said in the statute. Would you agree with me on that point?

LAWYER: I would agree with you that there's no specific statement in here. But I think when you read the statute and you read 688(b) at a ______ it's saying that, you should proceed at home, you should take your remedies at home or in the place of the accident if you have it.

OWEN: But it's talking about choice of law, not choice of forum isn't it?

LAWYER: I think the only way to get into Texas courts is the Open Forum Act, and I think this statute overrides the Open Forum Act. And the maritime law in general overrides the open forum act. Texas law encompasses the maritime law, and the maritime law is part of Texas law insofar in dealing with seaman, and the maritime law clearly says: You shouldn't be here. But as a practical purpose, I think bringing the foreign law claim here defeats the intent of the statute because you now again have our courts burdened with these cases. They have to apply foreign law presumably with foreign measure of damages. What you've done if you allow them to come with a foreign law claims into the state of Texas, you burden the courts of the state of Texas, you will have not only a straight negligence action, you've got a court trying to interpret a law of Romania, or Trinidad, or...

OWEN: Well those may be reasons why Texas courts wouldn't accept the case under

forum non conveniens. But I am having trouble seeing where in the text of the statute, this statute deals with courts and forums as opposed to choice of law.

LAWYER: My only answer to you is if you take the statute as a whole, and particularly the congressional intent, the express congressional intent, it's saying that they shouldn't be used. I guess as a secondary argument what you do now is you bring all these cases back in, which create all the problems they tried to get rid of, and the Texas courts have to deal with a forum non conveniens motion in every one of these cases, and then if they maintain it after that, they've got to deal with foreign law. It's the camel's nose under the tent, if you will, because then you're going to get arguments eventually down the line: Well the measure of damage shouldn't be _________. It should be our measure of damages.

SPECTOR: What is the measure of damages in Trinidad?

LAWYER: I don't know. And the history of the statute is that that's where they live, that's where they had their cause of action, that's the measure of damages that it should be. I submit it's not relevant as to whether the quantum of damages they can get in the foreign forum is the same as the quantum of damages in the US. I can only presume it's not, because as you go through the legislative history what they are saying is: Everybody is coming here because they know our measure of damages is much higher. And that's going to be throughout most of the world because we don't have a social structure of medical, etc., etc., which the rest of the world has. And, so, our measure of damages is always going to be different. In Germany, you get lifetime health care, etc., etc. through your social systems, so your measure of damages and compensation in a German court is very small.

HANKINSON: If I understand your arguments correctly, you're saying that in addition to this statute preempting the underlying substantive claims, there's also a preemption procedurally of the Texas Open Forum's Act?

LAWYER: That's correct.

HANKINSON: Would you please apply the preemption analysis to the procedural preemption argument?

LAWYER: The statute is intended in the clear express intent of congress...

HANKINSON: So you're claiming express preemption?

LAWYER: Yes, express preemption given the legislative history, legislative background of this statute.

HECHT: I don't follow you though, because you argue that these cases will burden

Texas courts, but that's not usually the concern of the congress too much. And in any event, it's not one of the three problems that you said was being addressed. Why wouldn't it ease economic disadvantage to American drillers to be sued in American courts under Trinidad law rather than Trinidad courts under Trinidad law? Why wouldn't they rather be home?

LAWYER: Because you have an American court now applying foreign law, and you have yourself being subjected to the argument that the foreign measure of damages shouldn't apply either because it's against the public policy in the state of Texas to deny people these things.

HECHT: If the Texas court really did apply Trinidad law, the defendant might be perfectly happy here. But he's afraid that they won't.

LAWYER: I think history justifies that ______.

BAKER: Your position is, that Mr. Stier is not precluded by 688(b)(1) to bring a Jones act case, or was your motion for summary judgment based on exactly the opposite, that it did preclude him? And then secondly, that even if precluded for suing under either Jones or other maritime law, the preemption theory causes those acts to basically be a preemptive umbrella over any other claim even if it doesn't apply?

LAWYER: The motion is that 688(b) precludes him from bringing an action under the Jones act or general maritime law. Now as to actions other than that, there are no causes of action he has that fall outside the general maritime law. Everything comes under the general maritime law. You have to understand, the Jones act is this much of general maritime law. So if you take the Jones act out of the picture, he can't sue under the Jones act. That's why congress said under the Jones act for general maritime law: What's his cause of action outside the general maritime law? The only one the plaintiffs have been able to come up with is this argument that they've got a cause of action based upon the contract of employment for failure to provide a safe place to work. And failure to provide a safe place to work has been a maritime cause of action since at least 1902, well before the Jones act. So he has no common law nonmaritime cause of action.

BAKER: Unless it's a Texas state cause of action for negligence, or a Trinidad claim?

LAWYER: He couldn't have a Texas state cause of action for negligence failure to provide a safe place to work, because that is and always has been a maritime claim under the general maritime law of the US, and 688(b) says: He can't bring one. That's how it progresses.

HECHT: But if the congress wanted to it could say: Well, we don't restrict him to his maritime claims anymore, he will have to file whatever claim he can file under whatever jurisdiction's law he can invoke?

LAWYER: I don't believe they could. I think that would be an unconstitutional

pronouncement by congress.

HECHT: Why is that?

LAWYER: Because under the constitution, the admiralty law is the province of the federal government.

HECHT: Well congress is the federal government.

LAWYER: But the congress is restrained by the constitution.

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REBUTTAL

GREEN: If we assume for the moment that this accident had happened in a warehouse in Trinidad rather than on a boat, I think it's clear that Mr. Stier would have a cause of action.

The fact traditionally that it happened on a boat gives him more benefit, because then, he can sue under the Jones Act, and he can sue under the general maritime law. What 688(b) does, and all it does, is takes away that additional benefit. He still can sue out of the State of Texas laws as just an ordinary citizen as shown in the committee report.

HECHT: Let me understand. But for 688, you say, he could sue on a state claim and it wouldn't be preempted by maritime law?

GREEN: No, if 688(b) did not exist and the prior common law which it codified did not exist, then he would have an argument that he would be a Jones act seaman and he could sue under the Jones Act and maritime law.

HECHT: He could not sue under state law?

GREEN: If he could sue under the Jones act, you're correct, that would preempt him. Texas has no general maritime law. As we've seen, that's a term of art, which means federal law. Any general maritime law that Texas would apply would be federal law.

With regard to the procedural analysis, this statute does not even prevent a federal court from hearing a state claim. As in *Camejo*, the federal court heard a state claim despite 688(b) applying to knock out the Jones Act, and applying to knock out the general maritime law.