

# IN THE SUPREME COURT OF TEXAS

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No. 96-1165

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HANS-HENNING STIER, PETITIONER

v.

READING & BATES CORPORATION AND READING & BATES DRILLING COMPANY,  
RESPONDENTS

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ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

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**Argued on September 9, 1998**

JUSTICE BAKER, joined by JUSTICE HANKINSON and JUSTICE GONZALES, dissenting.

Because the Court holds that the Jones Act preempts Stier's state law claims, I dissent.

## I. THE COURT'S OPINION

The Court holds that the Jones Act preempts Stier's state law claims. But section 688(b) only prohibits actions under section 688(a) of the Jones Act or any other maritime law of the United States. Section 688(b) does not say anything about state tort laws, state procedural laws, or the availability of state courts as a forum, even for foreign law claims.

Nevertheless, the Court reaches the result it wants by avoiding a plain reading of the statute. The Court relies instead on implied preemption and the United States Supreme Court's opinion in *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). To do so relies more on "sinking sand" than

“solid ground.” Even the Court that issued *Jensen* did not unanimously accept *Jensen*’s rationale -- witness Justice Holmes’ vigorous dissent. See *Jensen*, 244 U.S. at 218-233. And, *Jensen*’s efficacy has been downhill ever since, culminating in *American Dredging*. See *American Dredging*, 510 U.S. 443, 447 n.1 (1994); see also *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73 n.2 (1979); *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961)(Frankfurter, J., dissenting); *Maryland Cas. Co. v. Cushing*, 347 U. S. 409, 429 (1954)(Black, J., dissenting); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 516 (1947)(Black, J., dissenting). In *American Dredging*, the United States Supreme Court explained that it relied on *Jensen* only because the parties had done so, and that the Court did not want to overrule *Jensen* “in dictum, and without argument or even invitation.” *American Dredging*, 510 U.S. at 447 n.1. Here, neither Reading & Bates nor Stier so much as cite *Jensen* in their briefs. Moreover, the Court acknowledges that the principles delineated in *Yamaha v. Calhoun* control the disposition of Stier’s claims. See *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). Yet, *Yamaha*, the United States Supreme Court’s latest maritime federalism opinion, does not even cite *Jensen*. See *Yamaha Motor Corp. v. Calhoun*, 516 U.S. at 199. A noted commentator sums up *Jensen*’s worth:

In times like these it takes a particularly admirable kind of hard-headedness to claim . . . that *Jensen* is still our best guide to the applicability of state law in Maritime cases. In fact, *Jensen* has never been a good guide, and today is completely discredited. Anyone who places serious reliance on any of its teachings is as likely to be fooled as enlightened.

See Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L. J. 81, 89 (1996).

To bolster its implied-preemption analysis, the Court relies on legislative history. But section 688(b)’s legislative history is “sparse and confusing” and does not unequivocally support the Court’s

holding. *See Vaz Borrvalho v. Keydril Co.*, 710 F.2d 207, 210 (5<sup>th</sup> Cir. 1983); *see also* Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antitrust Injunctions*, 68 TEX. L. REV. 937, 947 n.56 (1990). Moreover, the Court's reliance on it to foreclose Stier's state claims but not his Trinidadian claims in state court is incongruous. As the Court admits, the legislative history that it cites to support preemption of state law claims would similarly support preemption of foreign law claims in U.S. courts. In addition, the cases the Court cites hold that 688(b) preempts foreign as well as state claims in U.S. courts. *See Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 526 (Tex. App.--Texarkana 1993, writ denied); *Coto v. J. Ray McDermott, S.A.*, 709 So.2d 1023, 1027 (La. App. 1998); *Bolan v. Tidewater, Inc.*, 709 So.2d 1059, 1061 (La. App. 1998).

## II. APPLICABLE LAW

Preemption is an affirmative defense. A party seeking summary judgment based on preemption has the burden to show preemption as a matter of law. *See Kiefer v. Continental Airlines, Inc.*, 882 S.W.2d 496, 497-98 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1994), *aff'd*, 920 S.W.2d 274 (Tex. 1996). Maritime preemption analysis is quite similar, if not identical, to general federal preemption analysis. *See Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 629 (3<sup>rd</sup> Cir. 1994), *aff'd*, 516 U.S. at 199. A federal law may expressly or impliedly preempt state law. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87 (1995); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973); *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 4 (Tex. 1998). In determining whether there is express preemption, we narrowly construe preemption clauses, and without an express claim-preemption provision, we presume that there is no preemption. *See Hyundai*, 974 S.W.2d at 5; *Moore*, 889 S.W.2d at 250. Federal maritime law impliedly preempts state law when

Congress intended that federal law occupy the field or when there is an actual conflict between state and federal law. *See Calhoun*, 40 F.3d at 629. Federal maritime law does not impliedly preempt state law in areas of the law in which there is no comprehensive Congressional scheme. *See Yamaha*, 516 U.S. at 215. Further, federal maritime claims preempt state remedies only when federal maritime law applies and is invoked. *See De La Lastra*, 852 S.W.2d at 916, 919.

### III. ANALYSIS

While section 688(b) precludes *federal claims* for certain foreign seamen like Stier, nothing in section 688(b) preempts state substantive tort law claims or prohibits state procedural law from allowing a state forum for foreign claims. Such claims do not fall within section 688(b)'s preclusion of section 688(a) claims or claims under "any other maritime law of the United States" by certain foreign seamen. *See Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1376 (5<sup>th</sup> Cir. 1988). Nor does section 688(b) impliedly preempt any state or foreign law claims Stier may have. If federal maritime law does not apply or is unavailable, federal maritime law cannot preempt whatever state law might apply. *See De La Lastra*, 852 S.W.2d at 919.

Reading & Bates mischaracterizes the Jones Act as a comprehensive Congressional scheme providing a limited remedy for foreign workers, apparently in an attempt to contrast the lack of a comprehensive Congressional scheme for "nonseafarers" noted in *Yamaha*. *See Yamaha*, 516 U.S. at 215. But the Jones Act does not prescribe a comprehensive tort recovery regime for foreign workers. Instead, it expressly contemplates that some foreign workers injured in foreign waters can still bring federal maritime claims, either because they are not employed by companies engaged in certain enterprises or because they lack a remedy under the law of other jurisdictions. *See* 46 U.S.C.

§ 688(b)(1)(A) & (b)(2). Thus, section 688(b) is not particularly concerned about ensuring uniformity or avoiding inconsistent results. Nor does section 688(b) evince any concern about the actual availability or convenience of other forums in which to assert alternative remedies.

#### **IV. CONCLUSION**

Because the Jones Act does not preempt state substantive and procedural law in this case, I would hold that Stier is free to pursue any state and foreign law claims in state court under state procedural law. Because such claims are not preempted as a matter of law, I would reverse the court of appeals' judgment and remand the cause to the trial court for further proceedings.

Because the Court holds to the contrary, I respectfully dissent.

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James A. Baker,  
Justice

OPINION DELIVERED: April 8, 1999.