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federal common law

NO. 83-1169

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHARLES J. CONNOR, et al.,

Plaintiffs, Appellants

v.

AEROVOX, INC., et al.,

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF AMICUS CURIAE OF UNITED STATES, SUPPORTING REVERSAL

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STATEMENT OF THE ISSUE PRESENTED

Whether the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., or the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401, et seq. preclude maritime tort claims for damage caused by pollution.

STATEMENT OF INTEREST

Proper resolution of this issue is important to the United States since as a shoreside property owner and custodian of national resources it would be adversely affected by a ruling that maritime tort claims were precluded by these statutes.

STATEMENT OF THE CASE

This action for damages was brought by individual commercial shellfishermen and by a fishermen's association

against two corporations. The complaint alleges that the defendants deprived the plaintiffs of their trade by discharging toxic chemicals into the Acushnet River, New Bedford Harbor, and Buzzards Bay, contaminating the shellfish and causing those waters to be closed to commercial fishing.[1]

The district court granted defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss for plaintiffs' failure to state a claim in their complaint upon which relief could be granted. Citing Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981), the district court stated that:

> [The] FWPCA and MPRSA (1) provide no private right of action for damages, and (2) preempt the federal common law of nuisance in water pollution cases. Plaintiffs have framed their claims as maritime torts, thus seeking to avoid the precise holding of Sea Clammers. The Court in Sea Clammers based its decision on what it perceived to be the intent of Congress "to establish an all-encompassing program of water pollution regulation." Milwaukee v. Illinois, 451 U.S. 304, 318 (1981). There is no perceptable [sic] reason to distinguish between common law claims and maritime torts in construing the "all-encompassing" and preemptive effect of the statutes. Accordingly, defendants' motion to dismiss is ALLOWED.

TRUE - WHY ISN'T THIS ENOUGH? RIGHT OF U.S. GOV. IS A DISTINCT QUESTION

ARGUMENT

The district court erred in dismissing plaintiffs'

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[1] Nowhere in plaintiffs' complaint is negligence alleged. However, in defendants' Joint Motion for Dismissal and plaintiffs' Opposition to Joint Motion to Dismiss, the parties agreed that plaintiffs' claims sound in maritime tort. The district court agreed that plaintiffs had "framed their claims as maritime torts."

maritime tort claims for damages. The FWPCA specifically preserves private damage remedies and nothing in the language, legislative intent, or legislative history of either the FWPCA or MPRSA suggests that private maritime tort remedies have been extinguished. Furthermore, the district court construed too broadly the preemptive holdings in Milwaukee II [2] and Sea Clammers. Neither of those cases dealt with causes of action involving negligence. Both cases are also distinguishable on their facts and rationale.

1. The district court failed to follow the plain statutory language of the FWPCA.

Section 311(o)(1) of the FWPCA, 33 U.S.C. § 1321(o)(1), provides that:

> Nothing in this section shall affect or modify in any way the obligations of . . . any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance . . . .

It is difficult to read this language other than as stating the clear intention that existing private (and public) causes of action for pollution damages shall not be affected or modified in any way.[3] Plaintiffs' claims are

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[2] 451 U.S. 304 (1981), as distinguished from Milwaukee I, 406 U.S. 91 (1972).

[3] It is understandable that the district court overlooked this provision since neither party cited it in any brief or pleading filed with the court.

for pollution damage and neither party nor the district court dispute that such claims are cognizable as maritime torts (absent preemption).[4] Thus, the statutory language controls and the district court erred in dismissing the complaint.

2. Nothing in the language, legislative intent, or legislative history of either the FWPCA or MPRSA suggest that private maritime tort remedies have been extinguished.

a. The statutory language

There is no provision in either the FWPCA or the MPRSA stating that private maritime tort remedies have been pre-empted. In fact, as discussed above, with respect to the FWPCA the exact opposite is true; such remedies were expressly preserved.

The MPRSA is silent on this point, for good reason. It merely forbids ocean dumping, except under permit. It creates no remedies, but provides only for enforcement, 33 U.S.C. 1415, including enforcement by private injunction. 33 U.S.C. 1415(g). The Act does not provide for cleanup costs or damages, so there was no occasion to address either, or possible confusion between the two. While it might be germane to consider in a proper case, which this

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[4] In both defendants' Joint Motion for Dismissal and plaintiffs' Opposition to Joint Motion to Dismiss it is not disputed that such claims were cognizable before Milwaukee II, and Sea Clammers. See also Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973).

is not, whether Congress intended to create new private remedies by the MPRSA, it is not germane to consider in this case whether Congress intended the MPRSA to extinguish existing remedies. Accordingly, the court below erred in giving the MPRSA any effect at all upon this case, and certainly in giving it preclusive effect.[5]

b. The legislative intent

In enacting the FWPCA, Congress declared that its objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). It further stated that "it is the policy of the United States that there should be no discharges of oil or hazardous substances." 33 U.S.C. 1311(b)(1). A judicial ruling that private parties can no longer recover damages caused by the negligent discharge of oil or toxic chemicals is hardly consistent with the express desire of Congress to eliminate discharges.

Relieving a violator of the consequences of its negligence, as the court below would do, achieves a result "extraordinary in our jurisprudence." Wyandotte Co. v.

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[5] Thus it should not be necessary to consider whether the allegations of the complaint fall within the MPRSA's compass. That Act forbids the unpermitted transportation of "any material for the purpose of dumping it into ocean waters." 33 U.S.C. 1411(a). Ocean waters are the "waters of the open seas lying seaward of the base line from which the territorial sea is measured." 33 U.S.C. 1402(b). The complaint alleges not transportation but direct discharge, into waters landward, not seaward, of the baseline.

United States, 389 U.S. 191, 204 (1967); yet under the rule of this case dischargers no longer need be concerned with the damages that might result from their negligence. While they remain liable for penalties, 33 U.S.C. 1321(b)(6), and cleanup costs, 33 U.S.C. 1321(f), if any,[6] the incentive to use due care furnished by maritime tort damage awards has been removed. Such a result cannot be reconciled with the express congressional intent, and should be reversed.

c. The legislative history

"[H]owever clear the words may appear on 'superficial examination'," the legislative history should be examined. Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 10 (1976) (interpreting FWPCA, citations omitted). In any case of statutory construction the "key" factor is congressional intent. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, U.S. , 102 S. Ct. 1825, 1839 (1982), quoting Sea Clammers, above, 453 U.S. at 13. The best evidence of this intent, outside the specific language itself, is the legislative history.

The language of section 311 of the FWPCA, 33 U.S.C. § 1321 (1976), was originally enacted as section 11 of the Water Quality Improvement Act of 1970, P.L. 91-224, 84

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[6] Some spills, especially spills of toxic or hazardous substances, are impractical to clean up yet have the potential to cause substantial damage.

Stat. 91 (WQIA). The 1972 amendments merely reenacted the "existing" liability provisions of section 11 of the WQIA as section 311 of the FWPCA. The only substantive change was the addition of hazardous substances. The House report stated: "Section 311 is basically the same as existing law with respect to oil spills, but adds new provisions for hazardous substances." See 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., 316 (Comm. Print 1973). The conference report stated that the conference bill was "the same as the Senate bill and the House amendments" with additional changes not relevant to this case. Ibid.

Therefore, the legislative history of the 1970 amendments is controlling.[7] The conference report which accompanied the 1970 amendments stated with regard to damages:

> Paragraph (1) of Subsection (o) provides that nothing in this section will affect or modify the obligations of any owner or operator of a vessel or facility from which oil is discharged to any other person or agency under any provisions of law for damages resulting from that discharge or the removal of that oil. 116 Cong. Rec. 8987 (1970), reprinted at 1970 U.S. Code Cong. & Admin. News 2727.

During the House debate on the conference bill, Rep. Cramer, a member of the conference committee, sponsor, and

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[7] Milwaukee II dealt only with the effect of comprehensive 1972 amendments upon two other provisions unrelated to section 311.

floor manager of the bill explained:

> It should be borne in mind that this limitation of liability is solely for cleanup costs by the United States and does not proport [sic] to limit liability that might be imposed by state law or that exists under common law.
>
> * * * * *
>
> [I]f there are charges or damages due to third parties under admiralty law or common law, these would be in addition and would not be subject to our limitation of liability. 116 Cong. Rec. 9326-27 (1970) (In the context in which he was speaking "third parties" were the American public.)

Sections 17(i) of the House Bill, H.R. 4148, and 12(q) of the Senate Bill, S.7,[8] were essentially identical to that which became section 311(o)(1), in respect of preserving damage claims. There was never any confusion in either house on this issue. During the House debate on the House bill, a member quoted the language and specificlaly asked if he were correct that the bill did not address damage claims. Mr. Wright, a member of the Public Works Committee and the floor manager of the bill, responded:

> Mr. WRIGHT. The gentleman is entirely correct. The purpose of this section cited by the gentlemen from Florida is to protect the private right to recover damages exactly as it exists today.
>
> * * * * *
>
> [T]his bill does not seek to alter, modify, or change or diminish or enlarge in any respect the responsibilities that one individual or one firm may have under the law to some private individual damaged by his negligence. 115 Cong. Reg. 9286 (1969).

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[8] These Bills are set out at 115 Cong. Rec. 9260 and 28950 (1969), respectively.

Plainly, the FWPCA does not encompass damages as an element of recovery. Congress' sole concern, in the wake of the TORREY CANYON and the Santa Barbara discharges, was with ensuring prompt removal, and with funding and recovering the costs of removal. During the Senate hearing an insurance industry spokesman was explaining a voluntary industry scheme to cope with pollution.

> Senator Muskie. Now the dimensions of that scheme, as I understand it, are limited to the costs of clean-up.
>
> Mr. Miller. Which is the purpose of your bill, sir, yes.
>
> Sen. M. Yes; but our bill does not go as far as the problem extends. We are not talking in our bill about liability to third parties for damages from spills. We have not done it because we have not yet been able to solve the easier problem, that of cost of government clean-up. . . .
>
> Mr. M. Sir, the reason I have not mentioned that is, namely, this: The risk of a shipowner's legal liability to a third party for damages caused by oil pollution coming from a tanker is already covered both by international law and therefore by the insurance policies issued by the shipowners mutual insurance associates. The shipowners are already bearing their part of this risk. Water Pollution -- 1969: Hearings on S. 7 and S. 544 Before the Subcomm. on Air and Water Pollution of the Senate Public Works Comm., 91st Cong., 1st Sess., at 1369 (1969) (emphasis added).

From the above history it is abundantly clear that Congress did not intend or contemplate that the FWPCA would deal with, much less preempt, traditional maritime tort remedies.

3. The district court read the preemptive holdings in Milwaukee II and Sea Clammers too broadly

The court below erred in deferring unduly and inappositely to these two decisions of the Supreme Court.[9] The issues in the instant case are not the issues disposed of in Milwaukee II and in Sea Clammers, nor do these cases stand for the broad preemptive proposition often carelessly advanced in their names[10] notwithstanding the light shed on them by more recent, clarifying decisions of the Supreme Court.

Milwaukee II and Sea Clammers involved, respectively, effluent discharges and sewage, not oil or hazardous substances, and nuisance theories of liability, not negligence. In both, the plaintiffs had sought by judicial means to abate the very discharges the abatement, control, and permitting of which Congress had entrusted to the executive branch under statutory guidelines reflecting a political solution. Neither suggests that one private

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[9] The court below is not alone. Recently one district court stated that, in light of Milwaukee II, the federal common law "is presumed to vanish when Congress addresses the issue or speaks directly to the question." United States v. Outboard Marine Corp., 549 F. Supp. 1036, 1040 (N.D. Ill. 1982). Whatever the nature of federal common law or more important, federal maritime law, it cannot lightly be seen as so insubstantial as simply to dissolve whenever Congress merely addresses or speaks to an issue.

[10] In re Oswego Barge Corp., 664 F.2d 327 (2d Cir. 1981) (FWPCA held to be the government's exclusive remedy for recovery of its cleanup costs). See also United States v. Dixie Carriers, 627 F.2d 736 (5th Cir. 1980); Steuart Transp. Corp. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1969). But see United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982), cert. pending.

party may damage another with impunity when the damage is caused by conduct otherwise regulated, and perhaps violative, under statute. Thus, by both their subject matter and their theory of liability, these cases do not bear upon the present case.

Milwaukee II simply held that in the face of a comprehensive scheme regulating effluent discharges the Court would not permit more stringent standards fashioned from any federal common law of nuisance. In evaluating the "comprehensiveness" of Milwaukee II it must be kept in mind that it was a common law equity case, not an admiralty maritime tort case; that it dealt with the somewhat unsettled area of common law nuisance[11], not the well-established doctrines of maritime torts; and that its subject matter was the heavily regulated area of effluent discharges rather than dischargers' liability to third parties which, as shown above, was not covered by the FWPCA.

In Sea Clammers the Court was principally concerned with the issue whether "Congress intended to create a private right of action" under the FWPCA or MPRSA. 453

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[11] In fact, Milwaukee II was premised on the absence of any federal common law of public nuisance when Congress enacted the 1972 amendments. 451 U.S. at 327, n.19. Its presumption of preemption of common law should be limited to situations where Congress occupies a vacant field, thereby precluding the judiciary from creating new remedies. Otherwise, it conflicts with the longstanding doctrine that statutes should not be construed in derogation of the common law.

NO!!

U.S. at 13. When that case spoke to the preemption of common law remedies it limited itself to the Milwaukee II preemption of common law nuisance claims. It did not address other common law remedies.

Most importantly, the Milwaukee II presumption of preemption must be limited to the creation of new remedies. See California ex rel. State Lands Comm. v. United States, U.S , 102 S. Ct. 2432, 2459 (1982): "Moreover, this is not a case in which federal common law must be created." (emphasis in original). Unless the intent to repeal is clear, preexisting rights and remedies should remain available. This limited preemptive scope of both Milwaukee II and Sea Clammers is made clear by more recent pronouncements of the Supreme Court that comprehensive legislation does not necessarily preempt existing remedies. Weinberger v. Romero-Barcelo, U.S. , 102 S. Ct. 1798 (1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, above.

This is a maritime tort case. The Supreme Court in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271 (1979), quoting Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 278-79 (1977), rejected the suggestion that congress in enacting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act intended to abrogate the existing maritime law negligence liability of a shipowner, as a joint-tortfeasor, to pay all of an injured shoreworker's damages. The Court noted:

> Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act. . . '.

In like manner this Court should reverse the district court's novel holding that maritime tort claims are pre-empted by the "'all-encompassing' and preemptive effect" of the FWPCA and MPRSA. The theory that Congress intended to release polluters from the consequences of their own negligence for causing damage nowhere appears in the statutes, was never mentioned by Congress, and does not comport with these remedial statutes. This Court has said in wholly analogous circumstances that "we do not believe that the statute was intended to revoke the principles of maritime torts." Burgess v. M/V Tamano, 564 F.2d 964, 983 (1st Cir. 1977). cert. denied 435 U.S. 941 (1978).

CONCLUSION

For the foregoing reasons, the dismissal below should be reversed and the action remanded for further proceedings on the merits.

Respectfully submitted,

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