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Federal Maritime Jurisdiction and State Marine Pollution Legislation: The Florida Act Not Preempted Per Se

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CASE COMMENT

FEDERAL MARITIME JURISDICTION AND STATE MARINE POLLUTION LEGISLATION: THE FLORIDA ACT NOT PREEMPTED PER SE

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Petitioners sought to enjoin the enforcement and operation of the Florida Oil Spill Prevention and Pollution Control Act.[1] A three-judge federal district court granted the injunction, declaring the Florida Act null and void as an intrusion into the exclusive federal domain of substantive maritime legislation, and hence violative of article III, section 2 of the Constitution.[2] In a unanimous decision, the United States Supreme Court on direct appeal, *held*, reversed: In the absence of federal preemption and any direct conflict between the Florida Act and the Federal Water Quality Improvement Act of 1970,[3] the exercise by the state of its police power over oil spillages meets no constitutional or statutory impediment. *Askew v. American Waterways Operators, Inc.*, 93 S. Ct. 1590 (1973).

The W.Q.I.A. provides, in part, that it shall not be construed to preempt a state "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State . . ." unless in conflict with those standards established in, or pursuant to, the W.Q.I.A.[4] Congress having thus expressed a lack of intent to reserve for itself exclusive control over the entire field of marine pollution, the Court first sought to determine whether the Florida Act came within this waiver of preemption. Concluding that the statutory scheme before it was not necessarily in conflict with either the W.Q.I.A. or any other federal statute or regulation, the Court proceeded to determine whether the waiver of preemption was in fact valid. Adopting a test of constitutionality first announced in *The City of Norwalk*,[5] it stated that Congress had the power to waive federal preemption in this field only as to state legislation which "does not contravene any acts of congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international

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1. FLA. STAT. ch. 376 (1973) [hereinafter referred to as the Florida Act].

2. American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1971).

3. 84 Stat. 91 (1970), *as amended* 33 U.S.C.A. §§ 1251-1376 (Supp. 1973) [hereinafter referred to as the W.Q.I.A. or the Federal Act] (this statute was originally codified at 33 U.S.C. §§ 1151-1175 (1970) and was so cited in *American Waterways Operators*).

4. 84 Stat. 97 (1970), *as amended* 33 U.S.C.A. § 1321(0)(2) (Supp. 1973).

5. 55 F. 98 (S.D.N.Y. 1893).

and interstate relations."[6] The Florida Act was found to be a permissible exercise of state power under this standard.

Defining the reach of the W.Q.I.A., the Court found that it neither touches the subject of the liability of a maritime oil polluter for injuries to property, nor contains any provision for the recovery by a state of costs it might incur in the abatement and cleanup of oil discharged into the navigable waters of the United States. The Court concluded that the liability provisions of the W.Q.I.A. are limited to the recovery of costs incurred by the federal government "if it does the cleaning up."[7] Thus, the Florida Act was found to be within the waiver of preemption insofar as it established liability for state cleanup costs and injuries to property within the state caused by an oil discharge within Florida boundaries.

In support of this conclusion, analogy was drawn to *Skiriotes v. Florida*,[8] where a federal statute regulating the size of sponges taken from Florida waters was examined for its effect on a Florida law governing equipment used in that undertaking. The *Skiriotes* Court allowed enforcement of the state regulation against a Florida citizen, noting that the congressional legislation had occupied only a limited field, that there was no direct conflict, and that the Florida law reflected strong local interests. It stated that in light of these factors, "the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired . . . [and the statute] so far as applied to conduct within the territorial waters of Florida . . . is within the police power of the State."[9] Emphasizing the applicability of *Skiriotes* to the present case, the Court in *American Waterways Operators* rather extensively noted the effects of oil pollution on state interests and the increase in incidents of pollution accompanying expanding maritime transportation of oil.

Looking to specific provisions of the Florida Act, the Court was compelled to defer a determination of whether there was a conflict with any federal law or concerned a subject requiring uniform federal regulation.[10] Until such provisions had been construed by state courts and

6. *Id.* at 106.

7. 93 S. Ct. at 1596.

8. 313 U.S. 69 (1949) [hereinafter referred to as *Skiriotes*].

9. *Id.* at 75. Additional support for the power of a state to legislate with respect to activities taking place on its waters was found in Manchester v. Massachusetts, 139 U.S. 240 (1891) (regulation by a state of equipment used within its territory to catch certain species of fish). Recognizing the paramount power of the federal government over matters within the maritime jurisdiction, the Court there held that "as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State." *Id.* at 266. Where *Skiriotes* sustained the operation of a Florida statute against a citizen of the State, the local regulation in *Manchester* was found applicable to all persons within the territory of Massachusetts.

10. 93 S. Ct. at 1597-98. Specifically, the Court noted a potential conflict between Coast Guard regulations promulgated pursuant to the W.Q.I.A. and the state statutory provision

brought before the United States Supreme Court in a concrete dispute, an opinion as to their validity was regarded as premature. However, reference was made to *Huron Portland Cement Co. v. City of Detroit*,[11] as demonstrating the possible extent of concurrent and yet non-conflicting state and federal regulation. There, the application of a municipal smoke abatement ordinance to vessels was upheld on the ground that it superseded, but did not conflict with, federal regulations concerning the safety of the emission producing equipment.[12]

Thus, in order to sustain the provisions of the Florida Act against the allegation that they were inconsistent with federal law, the Court had only to find that the former were not necessarily in conflict with the latter. As a result, the section of the Florida Act requiring the licensing of terminal facilities[13] was upheld on the ground that it might be compatible with federal legislation regulating the issuance of permits to such facilities.[14] Here, the Court noted three factors. First, it recognized licensing as a traditional state function. Second, it observed that issuance of a permit to such installations under the W.Q.I.A. was dependent, in certain respects, on prior state certification of the facility involved.[15] Third, it noted that the Ports and Waterways Safety Act of 1972 waived preemption of state structural standards more stringent than those adopted pursuant to that Act.[16] On these bases, the Court reasoned that conflict between state and federal provisions was not inevitable.

Reconciliation was more difficult with regard to sections in the Florida Act concerning the manner and amount in which liability is to be imposed[17] and the way in which these subjects are treated in the W.Q.I.A.[18] and the Limitation of Vessel Owner's Liability Act.[19] In brief, the W.Q.I.A. places strict liability on owners or operators of offshore facilities, onshore facilities, and vessels for the cost to the federal government of cleaning up oil they have unlawfully discharged into or upon the navigable waters of the United States, the adjoining shoreline,

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for regulations requiring spill containment gear to be formulated by the Florida Department of Natural Resources.

11. 362 U.S. 440 (1960).

12. *Id.* at 441-46. There was no preemption of the Detroit standards, which were found to be directed toward the health of the community, because their "scope" did not "overlap" that of the federal requirements.

13. FLA. STAT. § 376.06 (1973). This requirement only extends to a vessel "in the event of a ship-to-ship transfer of oil, petroleum products or their by-products, and other pollutants, and only that vessel going to or coming from the place of transfer and the terminal facility." FLA. STAT. § 376.031(9) (1973).

14. See 33 U.S.C. §§ 401 *et seq.* (1970) for the primary federal legislation governing the issuance of permits to construct or operate a facility or carry on any other activity which may result in discharges into the navigable waters of the United States.

15. 84 Stat. 108 (1970), *as amended* 33 U.S.C.A. § 1341(a)(1) (Supp. 1973).

16. 33 U.S.C.A. § 1222(b) (Supp. 1973).

17. FLA. STAT. § 376.12 (1973).

18. 84 Stat. 94 (1970), *as amended* 33 U.S.C.A. §§ 1321(f) (Supp. 1973).

19. 46 U.S.C. §§ 181 et seq. (1970) [hereinafter referred to as the Limitation Act].

or the contiguous zone.[20] Unless willful negligence or misconduct within the privity or knowledge of the owner is shown, the maximum liability of the owner or operator is that established in the W.Q.I.A.[21] If the exception is proven, he is fully liable. The Florida Act, in contrast, imposes absolute liability to the state upon any "licensee . . . including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within [Florida waters]."[22] Further, it provides that such persons "shall be liable to the state for all costs of cleanup or other damages incurred by the state and for damages resulting from injury to others."[23] The application of the Limitation Act is confined to damages arising from vessel-caused injuries, whether they occur on the navigable waters or, through the operation of the Admiralty Extension Act,[24] on the shoreline and appurtenances thereto. Consequently, any limitation on the recovery of state costs for the cleanup of a prohibited discharge by a terminal facility would have to be found in the W.Q.I.A.

As to vessels, the Court warned that the Florida Act, which "does not *in terms* provide for unlimited liability . . ."[25] would risk invalidation unless construed to allow recovery only for state cleanup costs within federal limits. It was found to be unnecessary to determine whether, in this respect, the limitation of vessel liability provisions in the W.Q.I.A. or the Limitation Act were controlling. Presumably, the state statute would stand if given "an interpretation *so far as vessels are concerned* which would be in harmony with the [W.Q.I.A.]."[26]

However, the opinion affords no basis for denying application of the Limitation Act in a claim against a vessel for "other damage incurred by the state and for damages resulting from injury to others" caused by a prohibited oil discharge.[27] To construe the Florida Act differently would be to risk its invalidation under the supremacy clause.

The Court found no federal legislation which would prohibit the imposition by Florida of unlimited liability upon terminal facilities for damages other than state removal costs, resulting from a prohibited discharge within the state. Thus, there is "no conflict between [the liability provisions] of the Florida Act and . . . the Federal Act when it comes to damages to property interests . . . ."[28]

In addition, it was stressed that the W.Q.I.A. only applies to federal cleanup costs and that there "need be no collision between the Federal Act and the Florida Act because . . . any federal limitation of liability

20. 84 Stat. 92, 94 (1970), *as amended* 33 U.S.C.A. §§ 1321(b), (f) (Supp. 1973).
21. 84 Stat. 94 (1970), *as amended* 33 U.S.C.A. §§ 1321(f) (Supp. 1973).
22. FLA. STAT. § 376.12 (1973).
23. *Id.*
24. 46 U.S.C. § 740 (1970).
25. 93 S. Ct. at 1595 (emphasis in original).
26. *Id.* (emphasis in original).
27. FLA. STAT. § 376.12 (1973).
28. 93 S. Ct. at 1595.

runs to 'vessels' not to shore 'facilities.' "[29] This statement, combined with the reference to the approval of supplementary state legislation in *Skiriotes*, gives rise to the inference that the specific limitation on liability of facilities in the W.Q.I.A. will not impact upon recovery by the states of their own cleanup costs.

This inference is given further support in the discussion by the Court of that section of the Florida Act which places absolute liability upon licensees, including vessels, for all state claims.[30] Where the W.Q.I.A. only imposes strict liability for cleanup costs,[31] the Florida Act provides that the state may recover such costs without having to "plead or prove negligence in any form or manner . . . ."[32] The Court speculated that the more liberal provisions of the Florida Act may be justified on the ground that the financial burden of a state in doing cleanup work might, under certain circumstances, be greater than that of the federal government in the same situation. For the present, it stated that this apparent conflict between federal and state regimes would be resolved when it actually arises. No impediment was found to the imposition by Florida of absolute liability for other damages to the state and for "damages resulting from injury to others . . . "[33] because the strict liability provisions of the W.Q.I.A. apply only to cleanup costs.

Having found no specific federal preemption of the Florida Act and no fatal conflict between it and the W.Q.I.A., the Court next considered whether a state may constitutionally exercise its police power respecting maritime activities, particularly ship-to-shore torts, concurrently with the federal government. The prescriptive competence of the states in this area had often been limited on the theory "that the Constitutional grant of admiralty jurisdiction [to the federal courts] requires a nationally uniform system of law."[34]

The Court acknowledged its application in *Southern Pacific Co. v. Jensen*[35] and *Knickerbocker Ice Co. v. Stewart*,[36] of the principle that the competence to prescribe a remedy for injuries seaward of the gangplank of a ship is exclusively federal. However, in *American Waterway Operators*, an apparent retreat from this "national uniformity" position

29. *Id.* at 1597.

30. FLA. STAT. § 376.12 (1973). Authority for the power of a state to impose absolute liability for damages to both public and private property was found in St. Louis & San Francisco Ry. Co. v. Mathews, 165 U.S. 1 (1897), where state legislation was upheld which placed absolute liability upon railroads for all property destroyed by fires resulting from sparks thrown off by locomotive engines.

31. 84 Stat. 94 (1970), *as amended* 33 U.S.C.A. § 1321(f) (Supp. 1973).

32. FLA. STAT. § 376.12 (1973).

33. *Id.*

34. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 9-24 (1957).

35. 244 U.S. 205 (1917) [hereinafter referred to as *Jensen*] (New York found to be powerless to extend a compensatory remedy to a longshoreman injured on the gangplank between ship and pier).

36. 253 U.S. 149 (1920) (federal legislation extending state remedies "beyond the pier" was struck down as an unconstitutional delegation of congressional power).

was noted. Quoting from *Romero v. International Terminal Operating Co.*,[37] the Court stated that "*Jensen* and its progeny mark isolated instances where 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system.' "[38] In addition, *Just v. Chambers*[39] was cited with approval where it was contended, to no avail, that

> the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, *requires* harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law.[40]

The Court gave further approval to that part of the opinion in *Just v. Chambers* which repeated the three-pronged test[41] announced first in *The City of Norwalk*[42] and subsequently in *Jensen*. These criteria must be applied and met on a case by case basis. That maritime law is not exclusively within the federal domain is shown by the third element of this test where the power of a state to establish rules applicable on the waters within its boundaries is recognized, provided there is no interference with the "proper harmony and uniformity [of the maritime law] in its international and interstate relations."[43] The Court did not go so far in *American Waterways Operators* as to examine the Florida Act under these criteria. Its determination that the Constitution does not prohibit state action in the maritime area was deemed sufficient to reverse the lower court on this broad point.

The next issue reached was whether a state may constitutionally legislate with respect to damages or injuries caused by a vessel on navigable waters, but consummated on land. Congress, through the enactment of the Admiralty Extension Act,[44] expressly placed these matters within the admiralty and maritime jurisdiction of the United States. The validity of both the Florida Act and the waiver of preemption in the W.Q.I.A. were dependent upon whether the jurisdiction thus conferred was found to be exclusively federal. If so, the states would be constitutionally barred from imposing liability for ship-to-shore torts.

The Court began its discussion of this question by noting the absence of any clear indication in the history[45] of the Extension Act that

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37. 358 U.S. 354, 373 (1959).
38. 93 S. Ct. at 1598.
39. 312 U.S. 383 (1941).
40. *Id.* at 389 (emphasis added).
41. See text corresponding to note 6 *supra*.
42. 55 F. 98 (S.D.N.Y. 1893).
43. *Id.* at 106.
44. 46 U.S.C. § 740 (1970) [hereinafter referred to as the Extension Act].
45. H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948); S. REP. No. 1593, 80th Cong., 2d Sess. (1948).

Congress, in expanding the historic boundaries of maritime law, had intended that "sea-to-shore injuries be exclusively triable in the federal courts."[46] Were this assumed, by implication the competence to prescribe rules in this area might also be found to be exclusively federal.[47] However, the Court exercised caution in its construction of the Extension Act since the enlarged jurisdiction authorized therein may "intrude on an area [previously] reserved for state law . . . ."[48] As a result, the mere constitutionality of the extension[49] was found not to be a sufficient basis for inferring an exclusive federal competence to prescribe or apply remedies for ship-to-shore torts.

The Court stated that, absent a clear conflict with federal law, no impediment, per se, existed to concurrent state action in this area. Its reasoning was based on past decisions which had upheld state laws affecting activities clearly within the traditional maritime jurisdiction, despite the existence of federal action concerning the same subjects. In *Kelly v. Washington*,[50] requirements of a state vessel inspection code, not in conflict with a federal system, were upheld. The state regulation was found to be "plainly essential" to the purposes of the police power. It was approved against the contention that a uniform rule was required, on the ground that a state "may protect its people without waiting for federal action . . . ."[51] The Court in *American Waterways Operators* also referred to *Huron Portland Cement Co. v. City of Detroit*[52] as demonstrating the possible validity of state legislation concerning a maritime activity which not only supplemented, but had the effect of superseding federal law pertaining to the same matter. From these cases, state power over an area as traditionally within their competence as sea-to-shore pollution was found, a fortiori, not to have been silently taken away by the Extension Act.[53] As a result, the Florida Act, not being in obvious or necessary conflict with any federal law, was found to be valid as against the contention that it had been preempted by the mere existence of the Extension Act.

Finally, the Court examined whether the principle of uniformity developed in *Jensen* and its progeny was applicable in situations involving shoreside injuries by ships on navigable waters. It concluded that

46. 93 S. Ct. at 1600.

47. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). The paramount power of Congress to "fix" maritime law was found to be a consequence of the necessary and proper clause and the constitutional grant to the United States of judicial power over cases of admiralty and maritime jurisdiction. Upon this reasoning, if Congress provided for exclusive federal judicial power over a maritime activity or occurrence, a similar exclusive legislative power might be inferred.

48. Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971).

49. *See* United States v. Matson Navigation Co., 201 F.2d 610, 614 (9th Cir. 1953); Fematt v. City of Los Angeles, 196 F. Supp. 89, 93 (S.D. Cal. 1961).

50. 302 U.S. 1 (1937).

51. *Id.* at 15.

52. 362 U.S. 440 (1960).

53. 93 S. Ct. at 1601.

three factors rendered such an application inappropriate. First, the Court observed that *Jensen* and *Knickerbocker Ice Co. v. Stewart*[54] had been confined to fact situations involving the relationship of vessels to their crews.[55] Second, notice was, in effect, taken that the *Jensen* "national uniformity" rule had heretofore only applied to injuries occurring on the seaward side of the shore or its extensions. In a *Jensen* situation, a state law would be considered a maritime rule and risk invalidation if applied beyond that point.[56] The Court, citing *Davis v. Department of Labor*,[57] noted that difficulties in drawing this line had resulted in the "twilight zone," wherein certain injuries may be characterized as occurring on either the land or vessel side. In such cases, state law will be inapplicable only if a federal agency both conducts a hearing and concludes that the injury is on the vessel side or otherwise within the federal jurisdiction.[58]

Thirdly, the Court declared the Extension Act inapplicable for the purpose of moving the *Jensen* requirement of uniformity shoreward of the "twilight zone." *Nacirema Operating Co. v. Johnson*,[59] cited by the Court as consistent with this holding, stated that the "Extension Act may have the effect of permitting [crew members injured on land by the gear of their vessels] to maintain an otherwise unavailable libel in admiralty."[60] *American Waterways Operators* makes it clear that *Jensen* would not be applied to make this federal remedy exclusive, and that the choice to proceed in a federal court under such circumstances would belong to the injured crewman. Thus, the Extension Act does not, by its own force and effect or in conjunction with *Jensen*, "oust state law from any situations involving shoreside injuries by ships on navigable waters."[61]

If the validity of the liability provisions of the Florida Act is questioned in future disputes, the Court in *American Waterways Operators* has indicated that their constitutionality must be resolved according to the criteria first set out in *The City of Norwalk*.[62] The effect of this decision is to require that each state provision be examined on a case by case basis, in light of the construction it has been given by the Florida courts. There is no exclusive federal maritime jurisdiction, per se, with respect to the field of marine oil pollution liability. In addition, *American Waterways Operators* supports the erosion of this supposedly exclusive competence in other areas of maritime activity.

54. 253 U.S. 149 (1920).
55. 93 S. Ct. at 1601.
56. *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114, 117 (1962).
57. 317 U.S. 249, 252 (1942).
58. *Id.* at 256.
59. 396 U.S. 212 (1969).
60. *Id.* at 222.
61. 93 S. Ct. at 1601.
62. 55 F. 98 (S.D.N.Y. 1893). See text corresponding to note 6 *supra*.

A question which might arise in the future concerning the Florida Act, or similar state statutes, involves the effect on the Limitation Act of the limited liability provisions of the W.Q.I.A.[63] Although Congress clearly re-evaluated the Limitation Act insofar as vessel owner liability for oil discharges is concerned, the extent to which these limits were superseded by the W.Q.I.A. is uncertain. For example, if the former is now generally inapplicable to damages resulting from prohibited discharges, there would be no limit to recovery in a private action, pursuant to statute or for a maritime tort, for property damages. However, if the W.Q.I.A. only provides an exception to the Limitation Act for cleanup costs, the range of permissible state legislation respecting the limits of vessel owner liability would be substantially unchanged from that prior to the W.Q.I.A. Certainly, if the maximum limits in the W.Q.I.A. were not found to be equally applicable to both state and federal claims for cleanup costs, clearly an anomalous situation would arise.

A second major area of uncertainty surrounding state oil pollution laws involves that element of the test in *The City of Norwalk*[64] that prohibits state legislation which prejudices the characteristic feature of maritime law. Due to the special admiralty rules applicable to determinations of fault and damages in vessel collisions,[65] this risk would be particularly acute with regard to discharges arising from such occurrences. On these grounds, the absolute liability provisions of the Florida Act, assuming their ambiguities are clarified, will be susceptible to challenge.[66]

Questions concerning the reach of state oil pollution liability laws might also be expected to arise. The Florida Act may be read to impose liability upon a licensee, "including vessels destined for or leaving a licensee's terminal facility," for a discharge occurring beyond the territorial sea, on the ground that he thereby permitted a "polluting condition to take place within state boundaries . . . ."[67] A determination of liability for injuries to a state, or its citizens, on the basis of whether the spill occurred on one side or the other of an imaginary line three miles into the ocean would appear arbitrary. Yet the problems of a state in enforcing its laws beyond its boundaries against persons other than its own citizens might result in such a limitation de facto, if it is not expressed de jure. Moreover, the power of a state to provide for the extraterritorial operation of this type of law would encounter objections based on the commerce clause. Such an attempted application would also risk

63. 84 Stat. 94 (1970), *as amended* 33 U.S.C.A. §§ 1321(f) (Supp. 1973).

64. 55 F. 98 (S.D.N.Y. 1893).

65. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 7-1 *et seq.* (1957).

66. McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law*, 40 GEO. WASH. L. REV. 97, 107 (1971).

67. FLA. STAT. § 376.12 (1973).

invalidation under the doctrine of preemption, in view of the ratification by the United States of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil[68] and its signatory status under the 1969 International Convention on Civil Liability for Oil Pollution Damage.[69]

68. Sept. 9, 1966, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109.
69. 9 INT'L. LEG. MAT. 45 (1970).