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## ARTICLES

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# AN ANALYSIS OF JURISDICTIONAL ISSUES PRESENTED WHEN STATE-EMPLOYED SEAMEN ARE INJURED AND SEEK REDRESS

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### I. INTRODUCTION

*State Department of Public Safety v. Brown*<sup>1</sup> appears to be the first published opinion expressly allowing injured state-employed seamen to sue a state under the Jones Act<sup>2</sup> in state court.<sup>3</sup> *Brown* held that neither the Alaska Workers' Compensation Act<sup>4</sup> nor the doctrine of sovereign immunity bars a state-employed seaman from asserting federal maritime claims against the State of Alaska in state court.<sup>5</sup> This article will explore the jurisdictional issues presented in such an action and will examine the possibility that the remedies presently available to injured state-employed seamen will be limited in the future.

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1. 794 P.2d 108 (Alaska 1990).

2. 46 U.S.C. app. § 688 (1988). The Jones Act provides a statutory remedy distinct from such common law maritime remedies as "maintenance and cure" to seamen injured in the course of their employment. See *infra* notes 26, 62 for text and summary description of the Jones Act.

3. The United States Supreme Court has not yet ruled on the issue of whether Congress intended to expose states to liability under the Jones Act. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 476 n.6 (1987); cf. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (allowing Jones Act suit where an interstate compact expressly permitted the bi-state corporation to sue and be sued). Subsequent to the Alaska Supreme Court's decision in *Brown* to allow Jones Act claims to be brought against the State of Alaska in superior court, the Supreme Judicial Court of Massachusetts ruled that the Commonwealth of Massachusetts has consented to be sued under the Jones Act in its superior court for claims not exceeding \$100,000. *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991). See *infra* pp. 218-19.

4. ALASKA STAT. §§ 23.30.005-.270 (1990).

5. *Brown*, 794 P.2d at 110-11.

Part II will provide a brief overview of the jurisdiction of state and federal courts to hear maritime and Jones Act claims. Part III will discuss sovereign immunity principles relevant to Jones Act suits against a state in both federal and state court. The tension between a Jones Act tort remedy and the exclusivity provisions of the Alaska Workers' Compensation Act will be described in Part IV, and Part V will analyze the Alaska Supreme Court's resolution of this tension in *State Department of Public Safety v. Brown*. Part VI will discuss legislative power to restrict seamen's remedies to workers' compensation, and will explore policy and constitutional considerations that militate against depriving state-employed seamen of Jones Act relief in state court.

## II. JURISDICTION OF STATE AND FEDERAL COURTS TO HEAR MARITIME AND JONES ACT CLAIMS

The Federal Judiciary Code bestows upon the district courts exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."<sup>6</sup> This clause, known as the "saving to suitors" clause, has been interpreted by the Supreme Court to reserve in the plaintiff the right to pursue any common law remedies he might have in any common law court able to hear his claim.<sup>7</sup>

Historically, admiralty claims have been categorized as either *in personam* or *in rem*.<sup>8</sup> This distinction becomes important in determining the jurisdiction of state and federal courts to hear maritime claims. *In personam* suits in admiralty, like *in personam* civil actions, are brought against a named person or corporation for personal liability.<sup>9</sup> *In rem* suits in admiralty, though, are based on the concept of the "maritime lien." A maritime lien is a right unique to admiralty law, "conceived of as a property interest in the tangible thing involved (usually but not always a ship)," arising "upon the occurrence of certain mishaps or the non-fulfillment of certain obligations arising out of contract or status."<sup>10</sup> Contemporary principles of admiralty law continue to recognize the distinction between *in personam* and *in rem* claims.

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6. 28 U.S.C. § 1333 (1988).

7. *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303 (1915); *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185 (1870).

8. GRANT GILMORE & CHARLES L. BLACK JR., *THE LAW OF ADMIRALTY* 35 (2d ed. 1975).

9. *Id.*

10. *Id.*

In the case of general maritime claims, the saving to suitors clause allows concurrent state and federal jurisdiction over *in personam* suits. *In personam* suits may be brought in federal court under admiralty jurisdiction and in state court under the saving to suitors clause on the theory that the remedy sought is a common law remedy that can be granted by a common law court.<sup>11</sup>

The saving to suitors clause does not, however, preserve the right to bring *in rem* proceedings in state court, as *in rem* proceedings in admiralty are based on the maritime lien and considered foreign to the common law.<sup>12</sup> *In rem* claims are only enforceable in admiralty, and can therefore be brought only in federal district court.<sup>13</sup>

Unlike the general admiralty claims discussed above, jurisdiction over Jones Act claims is governed by the language of the Act itself. The language of the Act seems to indicate that federal jurisdiction is exclusive: "[j]urisdiction . . . shall be under the court of the district in which the defendant employer resides or in which his principal office is located."<sup>14</sup> The Supreme Court, however, has construed the term "jurisdiction" in the second sentence of the Jones Act as actually meaning "venue," rather than the power of the court to hear a claim.<sup>15</sup> Based on this interpretation, the Court has held that state and federal courts have concurrent jurisdiction over Jones Act actions.<sup>16</sup>

### III. STATE SOVEREIGN IMMUNITY

#### A. State Sovereign Immunity Against Jones Act Claims in Federal Court

While federal law permits *in personam* maritime claims and Jones Act actions to be brought in state and federal court, a suit against a

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11. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *Madruga v. Superior Court*, 346 U.S. 556, 560-61 (1954); *Shannon v. City of Anchorage*, 478 P.2d 815, 818 (Alaska 1970).

12. GILMORE & BLACK, *supra* note 8, at 38.

13. *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 569-71 (1866); *Shannon v. City of Anchorage*, 478 P.2d 815, 818 (Alaska 1970). Since *in rem* admiralty claims can only be brought in federal court, state-employed seamen may not proceed *in rem* against state-owned vessels unless the state has explicitly waived its sovereign immunity against suit in federal court.

14. 46 U.S.C. app. § 688(a) (1988).

15. *Panama R.R. v. Johnson*, 264 U.S. 375 (1924).

16. *Engel v. Davenport*, 271 U.S. 33 (1926); *Panama R.R. v. Vasquez*, 271 U.S. 557 (1926). Two years later, the Supreme Court determined that the Jones Act provides only for *in personam* actions and does not provide for *in rem* liability. *Plamals v. The Pinar Del Rio*, 277 U.S. 151 (1928).

state is barred unless the state has waived its sovereign immunity as to tort claims brought against it.<sup>17</sup>

The Eleventh Amendment to the United States Constitution<sup>18</sup> forbids a citizen of one state from bringing a suit in law or equity against another state in federal court without the consent of that state. By its literal terms, the Eleventh Amendment does not forbid a citizen of one state from bringing suit in law or equity against his *own* state in federal court. Nonetheless, the Supreme Court in *Hans v. Louisiana*<sup>19</sup> gave effect to what it construed to be the spirit of the amendment, that states cannot be made unwilling defendants in federal court.<sup>20</sup> *Hans* prohibits a citizen from suing his own state in federal court, and has been the law of the land for over one hundred years.

The Eleventh Amendment does not grant the states absolute immunity. Important exceptions exist to the prohibition against a citizen suing his own state or another state in federal court. Where Congress has acted pursuant to its powers under the Fourteenth Amendment, it may abrogate the sovereign immunity of states.<sup>21</sup> The Supreme Court has also held in *Parden v. Terminal Railway*<sup>22</sup> that Congress can abrogate states' sovereign immunity pursuant to its powers under the Commerce Clause.<sup>23</sup> The Court reasoned that "[b]y empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."<sup>24</sup>

In addition to holding that Congress has the power to abrogate the states' Eleventh Amendment immunity under the Commerce Clause to the extent that the states are engaged in interstate commerce,<sup>25</sup> *Parden* held that a state's operation of a common carrier in

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17. *State Dep't of Pub. Safety v. Brown*, 794 P.2d 108, 109-10 (Alaska 1990); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 473 (1987); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 427 (Mass. 1991).

18. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

19. 134 U.S. 1 (1890).

20. *See also Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 291-92 (1973).

21. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

22. 377 U.S. 184 (1964).

23. *Id.* at 192.

24. *Id.*

25. *Id.*

interstate commerce after adoption of the Federal Employers' Liability Act ("FELA")<sup>26</sup> constitutes a constructive waiver of sovereign immunity.<sup>27</sup>

The text of the Eleventh Amendment is silent regarding suits brought in admiralty by a citizen against a state.<sup>28</sup> In the 1921 cases entitled *Ex Parte New York No. 1*<sup>29</sup> and *Ex Parte New York No. 2*,<sup>30</sup> however, the Supreme Court ruled that unconsenting states are immune from admiralty actions brought in federal court by citizens, irrespective of whether the action is brought *in personam*<sup>31</sup> or *in rem*.<sup>32</sup> While the continued viability of these holdings was cast into doubt by the implied waiver aspect of *Parden*, a deeply divided Supreme Court partially overruled *Parden* in *Welch v. Texas Department of Highways & Public Transportation*,<sup>33</sup> and reaffirmed the rules of *Hans* and *Ex*

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26. 45 U.S.C. §§ 51-60 (1988). The FELA is a federal workers' compensation act which protects employees of railroads engaged in interstate or foreign commerce. The Jones Act incorporates the substantive law of the FELA as follows:

Any Seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable*. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. app. § 688(a) (1988) (emphasis added).

27. *Parden*, 377 U.S. at 192.

28. The Eleventh Amendment prohibits construing the judicial power of the United States to extend to certain suits "in law or equity" commenced against one of the United States, but does not expressly prohibit suits that are brought in admiralty. See *supra* note 18 for the text of the Eleventh Amendment. The late Justice Story doubted whether the Eleventh Amendment extends to cases of admiralty jurisdiction because suits in admiralty are not technically suits "in law or equity." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 560-61 (1833). "Justice Story was noted for his expansive view of the admiralty jurisdiction of federal courts." *Welch*, 483 U.S. at 493 n.25. Indeed, "[i]t was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it." Note, *Extension of Federal Jurisdiction over State Canals*, 37 Am. L. Rev. 911, 916 (1903).

29. 256 U.S. 490 (1921).

30. 256 U.S. 503 (1921).

31. *Ex Parte New York No. 1*, 256 U.S. at 502.

32. *Ex Parte New York No. 2*, 256 U.S. at 511.

33. 483 U.S. 468 (1987). The Texas Department of Highways and Public Transportation operates an automobile and passenger ferry between Point Bolivar and Galveston, Texas. Jean Welch, a marine technician employed in the operation of the

*Parte New York No. 1*.<sup>34</sup> *Welch* overruled the constructive waiver portion of *Parden* by holding that "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language."<sup>35</sup> The Jones Act was found not to contain a clear expression of Congressional intent to abrogate the sovereign immunity of

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ferry, sustained injury when she was crushed between a mobile crane and the ferry dock. She filed a Jones Act suit against the department and the state in federal district court. *Id.* at 471.

34. *Id.* at 473, 489. Four dissenting justices, led by retired Justice Brennan, favored narrowing the scope of sovereign immunity by overruling *Hans* and *Ex Parte New York No. 1*. *Id.* at 499-503 (Brennan, J., dissenting). The forceful dissent in *Welch* argued that:

[T]he Eleventh Amendment does not bar the District Court's jurisdiction over the Jones Act suit by Jean Welch against the State of Texas . . . for four independent reasons. First, the Amendment does not limit federal jurisdiction over suits in admiralty. Second, the Amendment bars only actions against a State by citizens of another State or of a foreign nation. Third, the Amendment applies only to diversity suits. Fourth, even assuming the Eleventh Amendment were applicable to the present Case, Congress abrogated state immunity from suit under the Jones Act . . . .

*Id.* at 497.

The four dissenters were of the opinion that the Eleventh Amendment operates as a jurisdictional bar to suits against a state in federal court "only in 'Cases in Law and Equity,' and not in 'Cases of admiralty and maritime Jurisdiction.'" *Id.* at 498 (emphasis in original). "The distinction between admiralty cases and ordinary cases in law or equity was not a casual or technical one from the viewpoint of the Framers of the Constitution. Admiralty was a highly significant, perhaps the most important, subject-matter area for federal jurisdiction at the end of the 18th century." *Id.* at 501. The four Justices dissenting in the splintered *Welch* decision argued that the "Eleventh Amendment applies only to diversity suits and not to federal-question or admiralty suits." *Id.* at 509. According to the dissent, the doctrine of state sovereign immunity, "based on a notion of kingship, intrudes impermissibly on Congress' law-making power" because

the doctrine . . . is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope . . . . [T]he current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

*Id.* at 520-21 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting)).

The dissent therefore "adhere[d] to the view that a suit brought under a federal law against a State is not barred." *Id.* at 516.

35. *Id.* at 478; cf. *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) (holding that Congress did not abrogate Eleventh Amendment immunity of states by enacting section 106(c) of the Bankruptcy Code, 11 U.S.C. § 106(c), because it failed to make its intention "unmistakably clear in the language of the statute").

states operating common carriers in interstate commerce,<sup>36</sup> even though the statute extends liability to employers of "any seaman."<sup>37</sup>

The ruling by the United States Supreme Court that the Jones Act, in and of itself, does not abrogate properly asserted sovereign immunity of states against suit in federal court<sup>38</sup> effectively overturned the holdings of several published decisions of the United States District Court for the District of Alaska. Relying on the second prong of *Parden*, these cases had held that the State of Alaska could be sued in federal court under the Jones Act and the general maritime law.<sup>39</sup> After *Welch*, a Jones Act plaintiff can no longer rely on a theory of constructive waiver, but must show that the State of Alaska has expressly waived its sovereign immunity against suit in federal court.

Shortly after *Welch*, the Ninth Circuit Court of Appeals held in *Collins v. State*<sup>40</sup> that the Alaska Claims Against the State Act ("CATSA")<sup>41</sup> does not constitute an express waiver of Alaska's sovereign immunity from suit in federal court under the Jones Act or the general maritime law.<sup>42</sup> Thus, the State of Alaska has not waived its sovereign immunity so as to permit Jones Act suits to be brought against it in federal court.<sup>43</sup>

#### B. State Sovereign Immunity Against Jones Act Claims in State Court

The term "sovereign immunity" embraces two distinct concepts, "not merely *whether* [a state] may be sued, but *where* it may be sued."<sup>44</sup> A state may consent to be sued, but may nonetheless restrict

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36. *Welch*, 483 U.S. at 475.

37. 46 U.S.C. app. § 688 (1988). "[W]e hold today that the general language of the Jones Act does not authorize suits against the States in federal court." *Welch*, 483 U.S. at 476.

38. *Welch*, 483 U.S. at 475.

39. The cases that are no longer good law include *Cole v. State*, 621 F. Supp. 3 (D. Alaska 1984), which held that the State of Alaska could be sued in federal court for unseaworthiness, and *Cocherel v. State*, 246 F. Supp. 328 (D. Alaska 1965), which held that the State of Alaska could be sued in federal court under the Jones Act because it had waived Eleventh Amendment immunity by operating a ferry in interstate commerce on navigable waters.

40. 823 F.2d 329 (9th Cir. 1987).

41. ALASKA STAT. § 09.50.250 (1983 & Supp. 1990). The full text of the Claims Against the State Act appears *infra* note 48.

42. *Collins*, 823 F.2d at 332.

43. *Id.*

44. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original). As Justice Powell noted in *Welch*, "a state does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts." 483 U.S. at 473-74 (citing *Pennhurst*, 465 U.S. at 99 n.9).

to its own courts the forum in which suit may be brought.<sup>45</sup> The question of whether, and in what forum, state sovereign immunity has been waived involves an analysis of state law.<sup>46</sup> CATSA constitutes a partial waiver of the state's sovereign immunity from contract, quasi-contract and tort claims.<sup>47</sup> The Act waives sovereign immunity for these actions against the State of Alaska in state court, but does not authorize suit against the State in federal court.<sup>48</sup>

The Alaska Supreme Court has construed CATSA as constituting a waiver of the state's sovereign immunity from admiralty tort claims brought in state court.<sup>49</sup> The court has also recently interpreted the Act to constitute a waiver of the state's immunity from Jones Act claims brought in state court.<sup>50</sup> Thus, a suit against the State of Alaska seeking the federal remedy provided by the Jones Act is not available in federal court, but only in Alaska state court.

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45. See *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 426 (Mass. 1991) ("Although the Supreme Court never has addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars suit in Federal court, we think that, absent congressional command to the contrary, they may." (citation omitted)).

46. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464-65 (1945).

47. ALASKA STAT. § 09.50.250 (1983 & Supp. 1990).

48. *Id.* The complete text of CATSA reads:

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state *in the superior court*. A person who may present the claim under [Alaska Statutes section] 44.77 may not bring an action under this section except as set out in [Alaska Statutes section] 44.77.040(c). A person who may bring an action under [Alaska Statutes sections] 36.30.560-36.30.695 may not bring an action under this section except as set out in [Alaska Statutes section] 36.30.685. However, no action may be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(4) arises out of the use of an ignition interlock device certified under [Alaska Statutes section] 33.05.020(c).

*Id.* (emphasis added).

49. *State Dep't of Pub. Safety v. Brown*, 794 P.2d 108, 110 (Alaska 1990) (citing *State v. Stanley*, 506 P.2d 1284, 1290-91 & n.9 (Alaska 1973)).

50. *Id.* at 110-11. The rationale and holding of *Brown* are discussed *infra* part IV A-C.



#### IV. TENSION BETWEEN THE ALASKA WORKERS' COMPENSATION ACT AND THE JONES ACT

As discussed above, when a state has waived its sovereign immunity against suit in its own courts, a federal maritime claim may be asserted in state court. In such a proceeding, the state court applies federal substantive law.<sup>51</sup> This application of federal substantive law by state courts is sometimes referred to as the "reverse-*Erie*" doctrine because it is the reverse of the *Erie* doctrine dictating the application of state substantive law by federal courts exercising diversity jurisdiction.<sup>52</sup> Under the reverse-*Erie* doctrine in the maritime context, while "states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of [the United States Supreme Court]."<sup>53</sup> Thus, certain aspects of state law may be applied in a maritime action so long as that law does not deprive the plaintiff of a federal remedy.<sup>54</sup>

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51. *Weason v. Harville*, 706 P.2d 306, 308 (Alaska 1985); *Barber v. New England Fish Co.*, 510 P.2d 806, 808 (Alaska 1973); *Shannon v. City of Anchorage*, 478 P.2d 815, 818 (Alaska 1970).

52. See, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 424-25 (Mass. 1991). Regarding the doctrine of federal court application of state law, see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

53. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). *Pope & Talbot* held that a federal maritime remedy could not be restricted by a common law remedy recognized under state law. *Id.* at 409-10. The Supreme Court recognized comparative fault as a principle of the general maritime law, rejecting application of the stricter state contributory negligence regime and stating that "the harsh rule of the common law," which would have completely barred recovery of a general maritime law claim, "is completely incompatible with modern admiralty policy and practice." *Id.* at 408-09; see also *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir.) ("State law may of course supplement federal maritime law, as . . . in the provision of an additional maritime tort remedy; state law may not, however, conflict with federal maritime law . . ."), *cert. denied*, 454 U.S. 972 (1981).

54. GILMORE & BLACK, *supra* note 8, at 47-48. The analysis of whether state substantive law deprives the claimant of federal admiralty rights is one of federal law. *Pope & Talbot*, 346 U.S. at 409; see *Brown*, 794 P.2d at 110-11. For cases prohibiting state interference with federal maritime rights, see *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (admiralty action for wrongful death permitted despite state law prohibiting wrongful death action based on unseaworthiness claim); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (admiralty claim for maintenance and cure permitted despite state statute of frauds nullifying verbal agreements); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (Jones Act and unseaworthiness claims permitted despite state statute of limitations); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917) ("No [state statute] is valid if it . . . works material prejudice to the characteristic features of the general maritime law . . ."); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875) ("It certainly could not have been the intention [of the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States . . ."); *Rig Tenders v. Santa Fe Drilling Co.*, 536 P.2d 114 (Alaska

The tort remedy the Jones Act affords injured seamen who bring suit in Alaska state court conflicts with the exclusivity provisions of the Alaska Workers' Compensation Act ("WCA").<sup>55</sup> The WCA states that "[t]he [compensation] liability of an employer . . . is *exclusive* and in place of all other liability . . . to the employee . . . in law or in admiralty . . . ."<sup>56</sup> The Jones Act, on the other hand, allows an injured seaman to sue his employer in tort, and is thus at odds with the WCA's restriction of an injured employee to a compensation claim against his employer.<sup>57</sup> The issue of whether an employer can constitutionally restrict a seaman to a workers' compensation remedy was recently addressed by the Alaska Supreme Court in *State Department of Public Safety v. Brown*.<sup>58</sup>

#### V. *STATE DEPARTMENT OF PUBLIC SAFETY V. BROWN*

##### A. Background of *State Department of Public Safety v. Brown*

On June 18, 1985, the *Vigilant*, an Alaska Public Safety Patrol Vessel, was on patrol for suspected fishing violators in Bristol Bay

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1975) (admiralty claim for implied warranty of workmanlike performance under federal law permitted although state law does not recognize the warranty); *Barber v. New England Fish Co.*, 510 P.2d 806 (Alaska 1973) (admiralty claim for unseaworthiness permitted despite worker's previous acceptance of benefits under the Alaska Workers' Compensation Act).

55. ALASKA STAT. § 23.30.055 (1990). The complete text of the exclusivity provision of the WCA reads:

The liability of an employer prescribed in [Alaska Statutes section] 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or the fellow employee at law or in admiralty on account of the injury or death. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee.

*Id.*

56. *Id.* (emphasis added).

57. Compare 46 U.S.C. app. § 688 (1988) with ALASKA STAT. § 23.30.055 (1990). Additional tension between the Jones Act and the WCA is caused by the so-called *Jensen* rule. That rule is based upon the time-honored case *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917), which held that states are constitutionally barred from applying their compensation regimes to maritime injuries because to do so would interfere with the overriding federal policy of uniformity in maritime law. See *infra* p. 222.

58. 794 P.2d 108 (Alaska 1990).

when Robert Brown, the *Vigilant's* state-employed First Mate, sustained an injury as he boarded a fishing vessel for an inspection.<sup>59</sup> Brown contends that he was ordered by his superior to board the *F/V Halo* by jumping from the deck of the *Vigilant* onto the deck of the *Halo*. He allegedly obeyed the command, and was injured by the force of landing on the *Halo*.<sup>60</sup>

Robert Brown initially accepted workers' compensation benefits, then sued the State of Alaska, among other individuals,<sup>61</sup> in tort. The state's liability was allegedly based on the Jones Act<sup>62</sup> and the general maritime doctrine of unseaworthiness.<sup>63</sup> Since neither the Jones Act nor CATSA effectuates a waiver of Alaska's sovereign immunity against suit in federal court,<sup>64</sup> Robert Brown filed his claims in state superior court.

The State of Alaska moved for summary judgment, contending that the exclusive remedy provision of the WCA<sup>65</sup> restricted Brown's remedy to compensation.<sup>66</sup> The State also argued that it was protected from suit in state court under the Jones Act by the doctrine of sovereign immunity.<sup>67</sup>

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59. *Id.* at 109.

60. Affidavit of Robert Brown paras. 5-7 (Dec. 16, 1987), *Brown v. State*, No. 3AN-87-5394-Civ. (Alaska Super. Ct. 1988) (on file with Alaska Law Review).

61. Raising general maritime law negligence claims, Brown also sued Lieutenant Tom Schwantes, his superior who allegedly gave the order to board in an unsafe manner; Sherburne H. Smith, the skipper of the *Halo* who allegedly operated the fishing vessel in a negligent manner during the boarding; and, under an agency theory, Smith Lighterage, Inc., the owner of the *Halo*. Complaint paras. 4, 8-10, *Brown v. State*, No. 3AN-87-5394-Civ. (Alaska Super. Ct. filed June 11, 1987) (on file with Alaska Law Review).

62. 46 U.S.C. app. § 688 (1988). The Jones Act, unlike state workers' compensation statutes, permits an injured seaman to recover in tort against his employer. The Jones Act allows for a jury trial, *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957), requires only a "featherweight" showing of causation in order to trigger liability, *id.* at 523, and provides for *in personam* liability of an employer as opposed to *in rem* liability of the vessel, *Plamals v. The Pinar Del Rio*, 277 U.S. 151, 155 (1928).

63. The doctrine of unseaworthiness imposes a form of absolute liability where a vessel or her appurtenances are not reasonably fit for their intended purpose and cause injury. "The ship is not freed from liability by mere due diligence to render her seaworthy . . . [T]here is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by a breach of the obligation." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548 (1960) (quoting *The H.A. Scandrett*, 87 F.2d 708, 711 (2d Cir. 1937)); *Manich v. Southern S.S. Co.*, 321 U.S. 96, 99 (1944); *The Osceola*, 189 U.S. 158, 175 (1920).

64. See *supra* part II.

65. ALASKA STAT. § 23.30.055 (1990); see *supra* part III.

66. *Brown*, 794 P.2d at 109.

67. *Id.*

The court was faced first with the state-law issue of whether Alaska had waived its sovereign immunity, and secondly with the federal issue of whether the WCA exclusivity provision impermissibly restricted or deprived Brown of substantial admiralty rights as defined by the Jones Act and the general maritime law.

The superior court allowed Robert Brown's state-court Jones Act suit to be maintained.<sup>68</sup> The court held that the State of Alaska had waived its sovereign immunity as to Jones Act and general maritime law claims brought in state court, and that application of the exclusivity provision of the WCA would deprive Brown of substantial admiralty rights.<sup>69</sup>

The Alaska Supreme Court granted a petition for review on the issue of whether Brown's admiralty claims were barred by sovereign immunity.<sup>70</sup>

## B. The Holding of the Alaska Supreme Court

The Alaska Supreme Court affirmed the decision of the superior court and held that (1) the State of Alaska has waived its sovereign immunity as to Jones Act and general maritime law claims brought in state court; (2) the exclusive remedy provision of the WCA cannot deprive an injured state seaman of his federal Jones Act remedy; and (3) previous acceptance of workers' compensation does not prohibit subsequent maintenance of a Jones Act tort suit, although double recovery is prohibited.<sup>71</sup>

The supreme court first rejected the State's theory that Alaska had never waived its sovereign immunity against claims by state employees arising out of injuries sustained during the course and scope of their employment on navigable waters.<sup>72</sup> The court noted that CATSA<sup>73</sup> had been construed as a waiver of sovereign immunity as to admiralty tort claims brought in superior court<sup>74</sup> and emphasized CATSA's broad language that "[a] person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court."<sup>75</sup> The court observed that, subject to certain statutory exceptions, the intent of CATSA was to put the state on equal footing with private persons who are sued in

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 110-11.

72. *Id.* at 111.

73. ALASKA STAT. § 09.50.250 (1983 & Supp. 1990); *see supra* note 48.

74. *Brown*, 794 P.2d at 110 (citing *State v. Stanley*, 506 P.2d 1284, 1290-91 & n.9 (Alaska 1973)).

75. ALASKA STAT. § 09.50.250 (1983 & Supp. 1990).

tort.<sup>76</sup> Regarding Jones Act claims specifically, the majority stressed that as far back as 1963 former Attorney General Hayes had expressed in a formal opinion that CATSA constitutes a waiver of immunity under which "the State may be sued for negligent torts which arise under the Jones Act."<sup>77</sup>

Turning to the exclusivity of liability provisions of the WCA, the court agreed with the State that recovery against the state under a state common law cause of action was barred by the Act.<sup>78</sup> The court stated:

The Workers' Compensation Act, to which the state is subject to the same extent as private employers, provides in part that "[t]he liability of an employer [under the . . . Act] is exclusive and *in place of all other liability of the employer . . .*"<sup>79</sup>

This provision would effectively bar any suit by Brown for damages under state common law. A Jones Act claim, however, is not a state law cause of action even when it is brought in state court. Under the reverse-*Erie* doctrine, state courts apply federal law in adjudicating Jones Act claims, and cannot restrict the federal remedy.<sup>80</sup> The court in *Brown* therefore held that workers' compensation exclusivity cannot bar a federal Jones Act claim brought in state court. Although the exclusive remedy defense is "fully applicable to all claims against the state brought under state law . . . the defense does not apply to federal remedies."<sup>81</sup>

The court explained its rationale by analogizing to several cases where unseaworthiness claims were permitted against private employers notwithstanding exclusive remedy provisions of workers' compensation acts.<sup>82</sup> The majority was, however, unable to cite a single case

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76. *Id.*

77. *Brown*, 794 P.2d at 110 (quoting 28 Op. Att'y Gen. 12 (1963)).

78. *Id.*

79. *Id.* (citation omitted) (emphasis added).

80. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 424-25 (Mass. 1991). See *supra* note 54 and accompanying text.

81. *Brown*, 794 P.2d at 111. In support of its proposition that a state court cannot deprive a seaman of substantial rights under the Jones Act or the general maritime law, the court cited *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953), see *supra* note 53, and *Panama R.R. v. Johnson*, 264 U.S. 375, 386 (1924). The court found that "[t]hese precedents compel the conclusion that the exclusive remedy provisions of the Alaska Workers' Compensation Act cannot deprive Brown of his federal Jones Act claim against the state." *Brown*, 794 P.2d at 111.

82. *Brown*, 794 P.2d at 110-11. Cases cited and discussed by the court included *Barber v. New England Fish Co.*, 510 P.2d 806 (Alaska 1973) (longshoreman injured aboard employer's barge was allowed a federal maritime law claim for unseaworthiness notwithstanding the exclusive remedy provision of WCA); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 847 (5th Cir. 1978) ("[A]n exclusive remedy provision in

directly holding that an injured state maritime employee is entitled to sue in state court under the Jones Act.<sup>83</sup>

Finally, the *Brown* court held that acceptance of workers' compensation benefits does not deprive an injured seaman of the right to sue in tort under the Jones Act.<sup>84</sup> If the seaman succeeds in his suit, however, the employer may deduct from the judgment monies it has already paid.<sup>85</sup> The court's ruling that Brown's acceptance of benefits under the Alaska Workers' Compensation Act does not bar his Jones Act claim is consistent with previous Alaska case law on the non-preclusive effect of accepting compensation benefits.<sup>86</sup>

### C. The Dissent's Statutory Construction Theory

The dissenting opinion of Justice Compton supported the statutory construction approach advocated by the State in reaching the conclusion that the WCA limits Brown's recovery to compensation. Justice Compton focused his analysis upon the statutory construction principle that repeal by implication is not favored, and repeal of a specific statutory provision by a later-enacted, more general statutory provision is extraordinary.<sup>87</sup>

Under Justice Compton's formulation, the earliest versions of the WCA accomplished a specific, limited waiver of sovereign immunity that predated the more general waiver in CATSA.<sup>88</sup> The remedy of an injured state-employed seaman is limited to compensation, in Justice

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a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law."), *cert. denied*, 442 U.S. 909 (1979).

83. The United States Supreme Court has never ruled on the issue of whether the Jones Act affords a remedy against a state employer. "The Court expressly stops short of addressing the issue whether the Jones Act affords a remedy to seamen employed by the States." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 495 (White, J., concurring); *cf. Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 282 (1959) (Jones Act claims allowed where interstate compact expressly permitted bi-state corporation to sue and be sued). Subsequent to the Alaska Supreme Court's ruling on the matter, however, at least one other court has found that the Jones Act does afford a remedy to injured state seamen. *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991). See discussion *infra* part V A.

84. *Brown*, 794 P.2d at 110.

85. *Id.* at 110 n.1. In the event that compensation is paid by one insurance company and a tort judgment becomes payable by another, the compensation carrier is entitled to reimbursement. See *Barber*, 510 P.2d at 813 n.39.

86. In *Barber*, the court concluded that "prohibiting the plaintiff from pursuing his unseaworthiness claim because he took advantage of Alaska's Workmen's Compensation Act would materially prejudice the characteristic features of federal law and interfere with the uniformity of that law." 510 P.2d at 811.

87. *Brown*, 794 P.2d at 113 (Compton, J., dissenting).

88. *Id.* at 112-13.

Compton's view, because the State, as employer, has waived its sovereign immunity only for workers' compensation claims, not for tort claims.<sup>89</sup> Justice Compton would have the court construe CATSA so as not to repeal by implication the earlier-enacted, limited waiver of sovereign immunity applicable exclusively to workers' compensation liability.<sup>90</sup>

The majority rejected Justice Compton's statutory construction theory, quoting the trial judge's earlier rejection of the argument:

"[t]he workers' compensation law is construed as simply a limitation regarding all employer-employee relations. It has nothing to do with limiting the waiver of sovereign immunity. In the case of admiralty law, workers' compensation principles are superseded by federal law for all employees, state workers constituting no exception."<sup>91</sup>

The majority of the supreme court thus agreed with the trial court in rejecting the State's contention that the exclusive liability provisions of the Alaska Workers' Compensation Act operate as a limitation on the state's waiver of sovereign immunity.<sup>92</sup>

#### D. Analysis of *State Department of Public Safety v. Brown*

1. *Statutory Analysis* The Claims Against the State Act enumerates several exceptions to the waiver of sovereign immunity.<sup>93</sup> An exception for maritime tort claims is not among those listed. If the legislature had intended to retain sovereign immunity as against maritime tort claims, an exception could have been included in CATSA along with the other enumerated exceptions.<sup>94</sup>

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89. *Id.* at 112. Justice Compton also believes that Congress never intended to expose states to liability under the Jones Act because its intention to do so has not been made "unmistakably clear in the language of the statute." *Id.* at 113 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).

90. *Id.*

91. *Id.* at 109.

92. *Id.* at 109-11.

93. ALASKA STAT. § 09.50.250 (1983 & Supp. 1990). Examples of some of the claims to which the state has not consented to be sued include claims for damages caused by the imposition of a quarantine, and claims arising out of assault, battery, false imprisonment, false arrest or malicious prosecution. *Id.*; see *supra* note 48.

94. Justice Compton accuses the majority of fashioning a "requirement that retentions of sovereign immunity must necessarily be explicit . . ." *Brown*, 794 P.2d at 112-13 (Compton, J., dissenting). CATSA, however, contains a general waiver of sovereign immunity, followed by particular enumerated exceptions. Under principles of statutory construction recognized by the supreme court, additional exceptions from a general statute should not be implied. "Especially where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated." *Libby v. City of Dillingham*, 612 P.2d 33, 40-41 & n.25 (Alaska 1980) (citing 2A C. DALLAS SANDS,

The majority opinion in *Brown* follows the correct analysis of first determining whether, under state law, there has been a waiver of sovereign immunity, and then addressing the federal issue of whether the state workers' compensation act impermissibly interferes with substantive rights under federal maritime law.<sup>95</sup> Though a sovereign is under no obligation to waive its immunity as to maritime suits, once it has done so, the sovereign cannot adversely modify the rights of injured state seamen who bring suit against it in its own courts.

A similar analysis produced a different, but consistent result in *Morris v. Massachusetts Maritime Academy*.<sup>96</sup> In *Morris*, the estates of two deceased Massachusetts Maritime Academy cadets brought Jones Act and general maritime law claims in Massachusetts Superior Court against the Commonwealth of Massachusetts and the Academy.<sup>97</sup> The court found that the Commonwealth of Massachusetts was entitled to assert sovereign immunity against the Jones Act and general maritime law claims, but that the Commonwealth had partially waived its sovereign immunity by consenting to be sued for liability up to \$100,000.<sup>98</sup> Unlike the workers' compensation exclusivity provision struck down in *Brown* as an invalid infringement on federal law, the \$100,000 liability limitation in *Morris* was upheld.<sup>99</sup>

The differing outcomes in *Morris* and *Brown* can be explained by the proximity of the statutory language limiting liability to the waiver of sovereign immunity. While the workers' compensation limitation in Alaska law appears in a statute other than CATSA,<sup>100</sup> the \$100,000 liability limitation in Massachusetts law appears in the very statute that waives sovereign immunity. The *Morris* court noted:

The plaintiff's argument, however, divorces the liability limitation from the jurisdictional context in which it arises. The limitation is contained in the same sentence in which sovereign immunity is waived. It is clear, therefore, that the Legislature intended to waive immunity only up to the \$100,000 limit. The cap is one term of the

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SUTHERLAND STATUTORY CONSTRUCTION § 47.11 (Norman T. Singer ed., rev. ed. 1984)). Thus, the exceptions to CATSA should be limited to those explicitly enumerated.

95. *Brown*, 794 P.2d at 110-11.

96. 565 N.E.2d 422 (Mass. 1991).

97. *Id.* at 424. Claims had first been filed against the Commonwealth in federal district court; however, the federal court dismissed for lack of subject matter jurisdiction. *Id.* at 424 n.4.

98. *Id.* at 427-28 (discussing MASS. GEN. L. ch. 258, § 2 (1988)).

99. *Id.* at 428.

100. The workers' compensation exclusivity provision is found in Alaska Statutes section 23.30.055; the waiver of sovereign immunity is found in Alaska Statutes section 09.50.250.



waiver. Because of our holding . . . that, absent consent, the Commonwealth would be entitled to complete immunity, it follows that the Commonwealth may partially waive its immunity.<sup>101</sup>

The Alaska Supreme Court would likely agree with the outcome in *Morris* because the limitation on the Jones Act remedy appears in the Massachusetts statute that waives sovereign immunity. Recognizing the importance of the proximity of the limitation to the waiver, *Brown* states:

[T]he waiver of immunity contained in the Alaska Claims Against the State Act is not conditioned on preserving the defense in question here — the exclusive remedy provision . . . . [T]he legislature could make the exclusive remedy defense applicable to federal maritime claims by referring to the defense in the sovereign immunity waiver contained in the Claims Act. However, the legislature has not chosen to do so.<sup>102</sup>

**2. Policy Considerations** The first paragraph in Justice Compton's dissent sets forth his perception of an inequity that flows from the majority's ruling:

Assuming the court's conclusion is correct, state employed maritime workers stand to recover more than state employed land-based workers who suffer the same injury in a virtually identical accident. If the court is wrong, then state employed maritime workers stand to recover less than their privately employed counterparts. Thus, under either result, inequities are inevitable. However, traditional methods of statutory analysis lead to the conclusion that sovereign immunity was retained as to Jones Act suits.<sup>103</sup>

Justice Compton is correct in observing that state-employed seamen who sue the state in tort under the Jones Act may be able "to recover more than state employed land-based workers who suffer the same injury."<sup>104</sup> The result is not necessarily inequitable, though, because seamen are exposed to many hazards and risks that their shore-based counterparts never face. Because of the unique hazards that seamen face, courts have afforded them special status and protections.<sup>105</sup> Recognizing this, the United States Congress has seen fit to

101. *Morris*, 565 N.E.2d at 428 (citation omitted).

102. *State Dep't of Pub. Safety v. Brown*, 794 P.2d 108, 111 (Alaska 1990).

103. *Brown*, 794 P.2d at 111-12 (Compton, J., dissenting).

104. *Id.* at 112.

105. Seamen are "wards of admiralty" and are protected by the courts from overreaching by a ship's owner, master or employer. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047). This special status is afforded seamen due to the unique hazards they face:

From the earliest times, maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly

grant seamen the right to sue their employers in tort.<sup>106</sup> Stripping state-employed seamen of their tort remedy appears to the state, and to Justice Compton, to offer a fair and balanced approach because land-based workers and seamen would all be restricted to the same compensation remedy; however, such a scheme fails to address adequately the hazards unique to employment aboard a vessel in navigation.

The second prong of Justice Compton's "inequities" analysis compares the rights of state-employed seamen with those of private seamen. The dissenting Justice observed that "[i]f the court is wrong, then state employed maritime workers stand to recover less than their privately employed counterparts."<sup>107</sup> Justice Compton is correct in pointing out that if state-employed seamen were precluded from suing their employers in tort under the Jones Act, then "state employed maritime workers stand to recover less than their privately employed counterparts" who could sue their private employers in tort under the Jones Act. This scenario would present a genuine inequity. Had the majority accepted the approach advocated by the State of Alaska, state-employed seamen would be restricted to compensation while private seamen would still have a Jones Act remedy. The majority opinion avoided this outcome by allowing state-employed seamen to retain the same Jones Act remedy enjoyed by private seamen.

## VI. LEGISLATIVE ACTION

### A. Power to Amend CATSA

The Alaska Legislature has the power to restrict the state's waiver of sovereign immunity and thereby overturn *Brown*.<sup>108</sup> This could be accomplished through an amendment to CATSA:

If it is the desire of the State to limit its tort liability to the workmen's compensation act, it may do so by legislative enactment of an

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occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds to the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life.

*Aguilar*, 318 U.S. at 727 (footnote omitted).

106. 46 U.S.C. app. § 688 (1988).

107. *Brown*, 794 P.2d at 112 (Compton, J., dissenting).

108. "[T]he legislature could make the exclusive remedy defense applicable to federal maritime claims by referring to the defense in the sovereign immunity waiver contained in the Claims Act. However, the legislature has not chosen to do so." *Id.* at 111.

exception to the waiver of sovereign immunity section contained in [Alaska Statutes section] 09.50.250.<sup>109</sup>

The restriction presently found in the WCA has been determined to be an impermissible infringement on federal maritime rights, rather than a permissible retention of sovereign immunity.<sup>110</sup> If the legislature determines that state-employed seamen should not be allowed to sue the State of Alaska under the Jones Act, then it can modify CATSA to specify that the state is not waiving sovereign immunity as to maritime claims brought by its employees.<sup>111</sup>

An amendment to CATSA may be the only vehicle that could bar maritime tort claims by state-employed seamen. The Alaska Supreme Court recently struck down as "completely invalid" a clause in a Marine Engineer's Beneficial Association union contract with the State of Alaska that purported to substitute a compensation remedy for remedies available under the Jones Act and the doctrines of unseaworthiness and maintenance and cure.<sup>112</sup> The court, relying on federal law, held that a sailor's right to maintenance and cure, unseaworthiness benefits and Jones Act relief "cannot be abrogated by contract."<sup>113</sup> The pre-injury release of federal maritime rights in the contract was struck down as inconsistent with the controlling principles of maritime law.<sup>114</sup> The majority reiterated its support for the first *Brown* decision by declaring "the state is subject to suit [in superior court] under the Jones Act and the admiralty doctrines of maintenance and cure and unseaworthiness."<sup>115</sup>

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109. *Id.* at 110 (quoting 28 Op. Att'y Gen. 13 (1963)).

110. *Id.*

111. *Id.* at 110-11.

112. *Dale C. Brown v. State*, No. S-3811, slip op. at 17, n.5 (Alaska Aug. 30, 1991). This second major admiralty opinion involved another state employee whose last name, coincidentally, was Brown.

113. *Id.* at 10-11. In support of its holding that Jones Act remedies cannot be abrogated by a union contract, the Alaska Supreme Court relied upon section 5 of the FELA, which is incorporated into the Jones Act and prohibits "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter." 45 U.S.C. § 55 (1988). The court relied on *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932); *Gardiner v. Sea-Land Service, Inc.*, 738 F.2d 943, 946 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986) and *Barnes v. Andover Co.*, 900 F.2d 630, 637 (3d Cir. 1990) in striking down the abrogation of the right to maintenance and cure, and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946) and *Reed v. Steamship Yaka*, 373 U.S. 410, 414-15 (1963) in striking the abrogation of unseaworthiness benefits. *Dale C. Brown*, slip op. at 10-17.

114. *Dale C. Brown*, slip op. at 10-11. Justice Compton again dissented, accusing the majority of "an even greater willingness to sacrifice state sovereignty to federal supremacy without a clear federal constitutional requirement." *Id.* at 19 (Compton, J., dissenting).

115. *Id.* at 4 n.1.

## B. Constitutional Considerations

Before making a decision to restrict the waiver of sovereign immunity in CATSA, the legislature should consider whether it would be unconstitutional to extend the Alaska workers' compensation regime to seamen such as Robert Brown. The United States Supreme Court held in *Southern Pacific Co. v. Jensen*<sup>116</sup> that the application of a state's workers' compensation statute to maritime injuries "conflicts with the general maritime law, which constitutes an integral part of the federal law under Art. III, § 2, of the Constitution, and to that extent is invalid."<sup>117</sup> Under the *Jensen* rule,<sup>118</sup> states are constitutionally barred from applying their compensation regimes to maritime injuries because to do so would interfere with the overriding federal policy of uniformity in maritime law.<sup>119</sup> While an exception to this rule exists for those whose work is maritime yet local in character,<sup>120</sup> state employees such as Brown who are "blue-water seamen" working aboard vessels on actual navigable waters do not fall within the exception.<sup>121</sup>

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116. 244 U.S. 205 (1917).

117. *Id.* at 212. The Workmen's Compensation Commission of New York in *Jensen* ordered Southern Pacific Company to pay compensation to the widow of Christen Jensen, a maritime employee who died while unloading cargo from the steamship *El Oriente*. *Id.* at 208-09. The steamship company objected to the award on the grounds that the state compensation act did "not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the courts of the United States." *Id.* at 210. The United States Supreme Court found the state compensation act, which imposed penalties on employers who refused to pay into a state fund, to be abhorrent to the uniformity of the maritime law:

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

*Id.* at 217.

118. Neither the trial court nor the Alaska Supreme Court addressed the *Jensen* issue of the unconstitutionality of the application of a state workers' compensation regime to Robert Brown's maritime employment. The lack of discussion of *Jensen* by the supreme court may be explained either by the limited scope of the petition for review, or by the court's resolution of the sovereign immunity issue negating the necessity of reaching the *Jensen* constitutional issue.

119. *Jensen*, 244 U.S. at 217-18.

120. *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980).

121. *Anderson v. Alaska Packers Ass'n*, 635 P.2d 1182, 1185 (Alaska 1981); *Alaska Indus. Bd. v. Alaska Packers Ass'n*, 186 F.2d 1015, 1017 (9th Cir. 1951).

The United States Supreme Court's decision in *Welch v. Texas Department of Highways & Public Transportation*<sup>122</sup> has, perhaps unintentionally, drawn into question the continued viability of *Jensen*. In an attempt to demonstrate that denial of a federal forum would not leave the petitioner Jean Welch without a remedy, the Court noted that she could file a workers' compensation claim against the State under the Texas Tort Claims Act.<sup>123</sup> Allowing the State of Texas to apply its compensation regime to a blue-water seaman appears to be inconsistent with *Jensen*.

It is unclear whether *Welch* has overruled *Jensen* sub silentio, or whether the footnote was merely dicta whose ramifications were not fully considered by the Court.<sup>124</sup> If the holding of *Jensen* is still good law, then it appears that it may be unconstitutional for Alaska to extend its compensation regime to blue-water seamen such as Robert Brown. If, on the other hand, *Welch* overruled *Jensen*, then the *Jensen* progeny in Alaska, *Anderson v. Alaska Packers Ass'n*,<sup>125</sup> is no longer good law. The legislature would then be free to apply its compensation regime to seamen such as Robert Brown.<sup>126</sup>

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122. 483 U.S. 480 (1987).

123. *Id.* at 488 n.19.

124. The Court later referenced its statement that a compensation remedy is available to Welch, commenting that "as for the view that it would be 'pernicious' to protect States from liability for their 'unlawful conduct,' we have noted above that an aggrieved citizen such as petitioner in fact has a bundle of possible remedies." *Id.* at 495 n.28 (citation omitted). The "bundle" of remedies the court suggested are available to an injured state employee include suits against state officials rather than the state itself; injunctive or prospective relief against the state; suit against a municipality or other local government agency under 42 U.S.C. section 1983; and state workers' compensation. *Id.* at 488.

125. 635 P.2d 1182 (Alaska 1981). *Anderson* held that application of Alaska's Workers' Compensation Act to blue-water seamen violates Article III, Section 2 of the United States Constitution. *Id.* at 1185.

126. The *Jensen* doctrine has survived many predictions of its early demise. As the Alaska Supreme Court noted in *Anderson*:

While it has been suggested several times since the *Jensen* case was decided that the Court had abandoned the principles stated there . . . the case instead "has a tenacity which refuses to acquiesce in occasional contemporary reports of its final rejection. . . ." We hold here that *Anderson's* case comes within the Court's description of *Jensen's* applicability.

*Anderson*, 635 P.2d at 1185 n.2 (citation omitted). Finding that the "maritime yet local" exception did not apply to a commercial fisherman injured while fishing on navigable waters approximately one mile offshore, the Alaska Supreme Court held that the state compensation regime could not be applied, stating:

We find it unnecessary to determine whether there is a twilight zone between the seamen's remedies and the workers' compensation system because we find *Anderson's* employment "on his vessel in navigable waters is in 'clear daylight' . . . ." Where the facts . . . show a claimant engaged in wholly maritime work, the courts have declined to lengthen the shadow of the twilight zone, and have remitted the claimants to their federal remedies.

### C. Possible Consequences of Legislative Overruling of *Brown*

Restricting the waiver of sovereign immunity in the Claims Against the State Act could leave injured state-employed seamen without a remedy. *Welch v. Texas Department of Highways & Public Transportation*<sup>127</sup> and *Collins v. State*<sup>128</sup> demonstrate that state-employed seamen cannot bring Jones Act suits against Alaska in federal court. If the Alaska Legislature withdraws the state's consent to be sued under the Jones Act in its own courts, injured state employees would be prohibited from suing the state in tort in any court. Application of the constitutional prohibition against extension of state compensation regimes to maritime injuries found in *Anderson v. Alaska Packers Ass'n*<sup>129</sup> and *Southern Pacific Co. v. Jensen*<sup>130</sup> would further result in the denial of all compensation benefits to injured state seamen.<sup>131</sup> In such a scenario, the injured seamen would likely agree with the four dissenting justices in *Welch* that the *Hans-Welch* rule prohibiting a citizen from suing his own state in federal court "is pernicious" and "intrudes on the ideal of liberty under law by protecting the States from consequences of their . . . conduct."<sup>132</sup>

### D. Possible Congressional Response to *Welch*

The prong of *Parden v. Terminal Railway*<sup>133</sup> which apparently survives the *Welch* decision indicates that Congress retains the power under the Commerce Clause to abrogate state sovereign immunity from suit in federal court where a state engages in interstate commerce.<sup>134</sup> Congress has, however, failed to "express its intention to

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*Id.* at 1185-86 (citation omitted).

127. 483 U.S. 480 (1987).

128. 823 F.2d 329 (9th Cir. 1987).

129. 635 P.2d 1182 (Alaska 1981). See *supra* part VI B.

130. 244 U.S. 205 (1917). See *supra* part VI B.

131. Nor could relief be had under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1988). LHWCA excludes from its coverage members of the crew of vessels, *id.* § 902(3)(G), such as Robert Brown.

132. *Welch*, 483 U.S. at 520 (Brennan, J., dissenting) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting)).

133. 377 U.S. 184 (1964). See *supra* notes 22-24 and accompanying text.

134. *Id.* at 192. Justice Brennan's majority opinion in *Parden* held that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." *Id.* at 191. The Court noted that "the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)). The Court also relied upon *United States v. California*, which held that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution . . . . [T]here is no such limitation upon the plenary power to regulate

abrogate the Eleventh Amendment in unmistakable language" in the current version of the Jones Act.<sup>135</sup>

Congress could amend the Jones Act to express in unmistakable language that the statute authorizes suit against state employers as well as private employers. If the Jones Act were so amended, state-employed seamen who sustain injury could bring Jones Act claims in federal court against a state even if the state had not statutorily waived its sovereign immunity. A challenge by a state to such a suit could test the continued vitality of *Parden*. If the congressional power to subject states to suits in federal court under the Jones Act were upheld, state limitations upon such suits would likely be struck down irrespective of whether the limitation appears in a state's sovereign immunity statute or its workers' compensation statute.

## VII. CONCLUSION

So long as Congress leaves the Jones Act in its present form, that is, without specifying its intent that the Act apply to state as well as private employers, the states are free to assert sovereign immunity against Jones Act suits brought by state employees. In this environment, restrictions on state-employees' Jones Act remedy will likely survive if the restriction appears in and as a part of a limited waiver of sovereign immunity. Where a restriction on the remedy of seamen appears elsewhere than in a statute waiving sovereign immunity, it will likely be struck down as an invalid infringement of federal maritime rights.

State-employed seamen can presently sue under the Jones Act in Alaska state court. The Alaska Supreme Court has ruled that neither sovereign immunity nor the exclusivity provisions of the Workers' Compensation Act bars a Jones Act suit against the State of Alaska in state court. Although seamen retain a tort remedy not shared by land workers, the majority opinion in *Brown* avoided an inequity that could have resulted had state-employed seamen been deprived of the Jones Act remedy afforded private seamen.

Whether the Claims Against the State Act should be modified to restrict the remedy of the injured state-employed seaman is a policy question that can be determined by the legislature. In making its determination, the legislature should consider the issue, not addressed in *Brown*, of the unconstitutionality of applying Alaska's workers compensation regime to blue-water seamen. It may be that *Welch* has overruled the *Jensen* prohibition against states applying their workers'

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commerce." *Id.* (quoting *United States v. California*, 297 U.S. 175, 184-85 (1936)); see also *Welch*, 483 U.S. at 478 n.8.

135. *Welch*, 483 U.S. at 474 (quoting *Atascadero*, 473 U.S. at 243).

compensation regimes to maritime workers. If this is the case, then the legislature may choose to restrict state seamen to a compensation remedy. On the other hand, if the loose language in *Welch* is not construed as overruling *Jensen*, then the *Anderson v. Alaska Packers Ass'n* prohibition against Alaska applying its compensation regime to maritime workers remains viable. Amending the Claims Against the State Act so as to retain sovereign immunity against Jones Act claims in state court could therefore leave injured state seamen with neither a Jones Act remedy nor a workers' compensation remedy.