

**SUPREME COURT
OF THE UNITED STATES**

In the Matter of:)

CHICK KAM CHOO, ET AL,)

Petitioners,)

v.)

EXXON CORPORATION, ET AL.)

No. 87-505

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CHICK KAM CHOO, ET AL. x
4 Petitioner, x
5 v. x No.87-505
6 EXXON CORPORATION, ET AL. x

7 -----x
8 Washington, D.C.

9 Wednesday, March 30, 1988

10 The above-mentioned matter came on for oral argument
11 before the Supreme Court of the United States at 1:00 p.m.

12 BENTON MUSSLEWHITE, ESQ., Houston, Texas, on behalf of
13 the Petitioner.

14 JAMES PATRICK COONEY, ESQ., Houston, Texas, on behalf of the
15 Respondent.

C O N T E N T S

| | | |
|----|-------------------------------------|-------------|
| 1 | | |
| 2 | <u>ORAL ARGUMENT OF</u> | <u>PAGE</u> |
| 3 | BENTON MUSSLEWHITE, ESQ., | |
| 4 | On behalf of Petitioner | 3 |
| 5 | JAMES PATRICK COONEY, ESQ., | |
| 6 | On behalf of Respondent | 27 |
| 7 | BENTON MUSSLEWHITE, ESQ., | |
| 8 | On behalf of Petitioner -- Rebuttal | 51 |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear argument first
3 this afternoon in No.87-505, Chick Cam Choo v. Exxon
4 Corporation. Mr. Musslewhite, you may proceed whenever you're
5 ready.

6 ORAL ARGUMENT BY BENTON MUSSLEWHITE, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. MUSSLEWHITE: Thank you, Mr. Chief Justice and
9 may it please the court:

10 At the outset I would like to try to articulate what
11 I think is the crucial issue here, and that is where simply
12 stated a federal court has dismissed a case on grounds of forum
13 non conveniens and the Plaintiffs refiled in the state court;
14 whether or not that federal court can then enjoin the state
15 court despite the provisions of the anti-injunction statute?

16 Now having said that, I'd like to go into a little
17 detail about the procedural facts involved here, because I
18 think they're important. And particularly important for what
19 was not decided in the original federal court action in the
20 light of this Court's decision in Atlantic Railway.

21 After the case was dismissed on grounds of forum non
22 conveniens by the initial federal court and suit was filed in
23 the state court, the Respondents removed to the federal court;
24 the federal court, though, requested to do so by the
25 Petitioners, to remand the case; and refused to remand; and

1 again dismissed the case; and that was appealed; and the Fifth
2 Circuit reversed that decision and ordered that the case be
3 remanded.

4 Once the case was remanded to the state court, the
5 respondents then went to the federal court in a new suit and
6 got the permanent injunction, which is the basis of this
7 hearing here.

8 Now, in the mean time, that went up on appeal to the
9 Fifth Circuit; and while that was being done, there was another
10 case proceeding out on the West Coast in the Ninth Circuit,
11 called the Zipfel case, and the Fifth Circuit in this case, in
12 a split decision held, that the injunction was proper under the
13 relitigation exception, apparently -- that's the way I read the
14 decision -- because even though there was a difference between
15 the Texas forum non conveniens law and the federal forum non
16 conveniens law, the federal forum non conveniens doctrine pre-
17 empted the state doctrine; and therefore, there was the basis
18 for entering -- issuing, the injunction.

19 Judge Reavley dissented and held that on the basis of
20 Atlantic Coast Line and other Supreme Court decisions that that
21 was not a proper decision, and those matters should be left to
22 the state courts to decide; and that the injunction was not
23 proper.

24 His dissent agreed almost foursquare with the
25 unanimous decision of the Ninth Circuit in the Zipfel case

1 which held that in a similar situation -- also a maritime case,
2 the injunction was improper.

3 Having said that, I'd like to as I said a moment ago,
4 to point out what was not decided in the original federal court
5 action: it was not decided that, as contended by -- the
6 Respondents and some of the amici briefs, that the case could
7 not be tried anywhere in the United States; nor was it decided
8 that it had to be tried in Singapore.

9 What was simply decided was that federal court would
10 not accept a case on grounds of forum non conveniens; that that
11 federal court did not feel that it was a convenient forum for
12 the case[; and imposed conditions so that, if the Plaintiffs
13 wanted to, they could go to Singapore and have the case
14 adjudicated there.

15 QUESTION: It was decided that Singapore law would
16 apply, though wasn't it?

17 MR. MUSSLEWHITE: It was decided that American law
18 would not apply, and the court's discussion of that indicated
19 that it felt Singapore law should apply.

20 QUESTION: Wasn't there in the attempted state action
21 a claim under state law filed?

22 MR. MUSSLEWHITE: There was a contention under state
23 law, the state wrongful death act.

24 QUESTION: Do you concede that that, at least, could
25 be enjoined?

1 MR. MUSSLEWHITE: No, Your Honor, I don't because --
2 QUESTION: Why not? That was decided by the federal
3 court.

4 MR. MUSSLEWHITE: It was dismissed under forum non
5 conveniens, that state law.

6 QUESTION: But the necessary predicate of that forum
7 non conveniens decision was the determination that the
8 governing substantive law was not the law of the United States.

9 MR. MUSSLEWHITE: Was not that a federal maritime
10 law?

11 QUESTION: Just federal?

12 MR. MUSSLEWHITE: Just federal. There was no
13 decision that the state -- they dismissed the state law claims
14 on the grounds of forum non conveniens. They did not decide
15 that state law could not apply.

16 QUESTION: Didn't they say that Singapore law
17 governed?

18 MR. MUSSLEWHITE: The court indicated that American
19 federal maritime law did not apply, and in so-doing indicated
20 that it felt like the foreign law would apply. That was the
21 decision, but it did not --

22 QUESTION: It did say that foreign law applied?

23 MR. MUSSLEWHITE: That is the essence of the
24 decision.

25 QUESTION: If that's the essence of the decision, why

1 can't they enjoin the bringing of an action under the law of
2 any of the United States?

3 MR. MUSSLEWHITE: Well, because we're getting into
4 the forum non conveniens issue as it relates to choice of law,
5 and really what we have here is a forum non conveniens issue
6 and not choice of law.

7 Certainly the foreign law claims were not
8 adjudicated. That is, Texas has a statute, Justice Scalia,
9 which allows a plaintiff to adjudicate its rights under foreign
10 laws.

11 QUESTION: I'm not talking about that now. I'm just
12 talking about trying to bring an action saying after the
13 federal court said Singapore law applies; that's all been
14 fought out; it's been litigated; it's been decided; then you
15 try it again in state court, and we think state law should
16 govern.

17 Federal court just said no.

18 MR. MUSSLEWHITE: I would next concede that
19 Defendants, or the Respondents in the state court action
20 contend that that was collateral estoppel or directly estopped
21 by the determination by the federal court, the first federal
22 court, that Singapore law applied; and by implicitly rejecting
23 the state law claim.

24 QUESTION: And if that's so, the federal court could,
25 if the other requirements of the discretionary judgment are

1 met, could enjoin the bringing of that claim that is already
2 determined by the federal court?

3 MR. MUSSLEWHITE: No, Your Honor. I would have to
4 disagree on that. I do not believe that the anti-injunction
5 statute as construed by this Court in a number of cases,
6 beginning with Atlantic Coast Line to Vendo Co. v. Lektro-Vend,
7 and as recently as Parsons Steel. I do not believe that under
8 that doctrine a collateral estoppel or direct estoppel issue is
9 the subject of an injunction of a relitigation statute.

10 Only cases as fully adjudicated upon the merits, as a
11 revisors notes say, can be the basis of the injunction under
12 2283, and that's what is the bottom line here, that there are
13 certain collateral estoppel issues that can probably be
14 successfully asserted in the state court action, which is where
15 this belongs now. But there are not issues, even though they
16 might amount to direct estoppel or collateral estoppel, which
17 could be the basis of an injunction under the relitigation
18 section.

19 QUESTION: I suppose you are saying that, if there is
20 an estoppel, that claim should be first made in the state
21 court?

22 MR. MUSSLEWHITE: That's one thing.

23 QUESTION: Wouldn't you think, if the issue has been
24 decided in the federal -- if Singapore law applies, certainly
25 Texas can't apply it's wrongful death statute?

1 MR. MUSSLEWHITE: That would be true.

2 QUESTION: All right, so when the federal claims were
3 dismissed in the state court, and you didn't complain about
4 that.

5 MR. MUSSLEWHITE: The federal claims were dismissed;
6 that was appealed but we lost.

7 QUESTION: So that just leaves the Texas claim.

8 MR. MUSSLEWHITE: And the foreign law claims, Your
9 Honor. Texas has a statute that allows the Plaintiffs to bring
10 the foreign law claims in the Texas courts and have those
11 adjudicated.

12 QUESTION: Well, in any event, the defendants in the
13 Texas courts could claim collateral estoppel?

14 MR. MUSSLEWHITE: I think there is no question they
15 could claim it.

16 QUESTION: Would they win?

17 MR. MUSSLEWHITE: I would have to say that on the
18 basis of the fact that the federal court, if the federal court
19 decision is that clear -- and I do not think it is that clear,
20 Justice Scalia -- there is no question there is intimations in
21 that federal court judgment to the effect that they believe
22 Singapore law should apply, and not American.

23 QUESTION: All right, so if the Texas courts rejected
24 that collateral estoppel claim, it would come on up through the
25 state courts and could get here?

1 MR. MUSSLEWHITE: That's right, Justice White. I
2 think that is --

3 QUESTION: You think the estoppel claim should win in
4 the state court, if it was made?

5 MR. MUSSLEWHITE: Knowing the background of this case
6 in this particular case, I do not think it should win because
7 the court did not directly address that issue, even though, as
8 I conceded to Justice Scalia, the first federal court did not
9 say "We're now going to decide whether Texas' wrongful death
10 statute will apply to these claims." It just simply said
11 federal maritime law doesn't apply, and the reason we don't
12 think federal maritime law applies is because it appears to us
13 that the federal law should apply.

14 QUESTION: But you say whether the collateral
15 estoppel claim would win or lose would not be the basis for an
16 injunction under the Anti-Injunction Act?

17 MR. MUSSLEWHITE: Exactly, Your Honor. In your
18 decision, in your opinion in Vendo v. Lectro-vend, you
19 indicated that we should look to the pre Toucey cases because
20 of the revisors notes refers to those cases when the 1948
21 amendment was enacted.

22 And in looking at those cases and I read every one of
23 them, there's not a single case that did not involve a complete
24 adjudication on the merits of the case.

25 As a matter of fact, Justice Read, in his dissent

1 referred to the complete adjudications.

2 QUESTION: Why didn't you object to the dismissal of
3 the federal claims?

4 MR. MUSSLEWHITE: Well, we did. We lost, Your Honor.

5 QUESTION: Well, I know. Weren't you -- was that
6 dismissal correct?

7 MR. MUSSLEWHITE: I don't agree with it, but it based
8 the law. It's the law of the case.

9 QUESTION: If the federal court dismissed them
10 because there wasn't any -- couldn't be a federal claim if
11 Singapore law applied?

12 MR. MUSSLEWHITE: That's true if federal --

13 QUESTION: It's like a motion -- you dismiss for
14 failure to state a cause of action.

15 MR. MUSSLEWHITE: That could be construed, under
16 Romero. Romero indicates that that's the way you construe
17 that, when you find that federal maritime law does not apply,
18 then it could properly be a dismissal for failure to state a
19 claim.

20 QUESTION: And you don't think that would be -- you
21 think you can retry that out in a state court?

22 MR. MUSSLEWHITE: Well, the reason it couldn't be a
23 complete -- they didn't solve all the problems, Justice, we had
24 the other claims there.

25 QUESTION: I know, but how about the federal claims?

1 Couldn't the federal court enjoin the retrial or attempted
2 retrial of the federal claims in the state court?

3 MR. MUSSLEWHITE: Your Honor, I submit that they
4 could not. I think that they would be successful, Justice
5 White, going into the state court, raising the collateral
6 estoppel or direct estoppel, as to the federal claims, I think
7 the Respondents would be successful. We concede.

8 QUESTION: Just like they would be on the state
9 claims?

10 MR. MUSSLEWHITE: Well, Your Honor, I would disagree
11 on the state claim, there is a considerably more serious
12 question there I concede because it was plead. But foreign law
13 was not plead in the original federal court claim, so I don't
14 think that there is any question that there is no estoppel,
15 direct, collateral, or any other kind of res judicata against
16 the foreign law claims being prosecuted in the state court.

17 QUESTION: Mr. Musslewhite, is it clear that the
18 federal decision was not a decision on the merits with regard
19 to the state claim and the federal law claim?

20 MR. MUSSLEWHITE: It was a decision on the merits
21 with regard to the federal law claim. They held that the Jones
22 Act -- that the plaintiff was not a seaman. That's a decision
23 on the merits.

24 QUESTION: Why isn't the decision that there is no
25 claim under Texas law, if they made that? I understand you can

1 test that whether that's clear, but why isn't that equivalently
2 a decision on the merits?

3 MR. MUSSLEWHITE: Because it's a decision on the
4 grounds of forum non conveniens. They dismissed the state law
5 claims and all other claims other than the federal maritime law
6 claims on the forum non conveniens, Your Honor, without
7 prejudice. The Order says "without prejudice." So it cannot
8 be a decision on the merits as I see it; and certainly it's not
9 the basis of an injunction under 2283. It does not constitute
10 that kind of an order that can be subject to a relitigation
11 exception injunction.

12 At any event, what else was not decided in the case
13 below was, and this is very important when we read Atlantic
14 Coast Line, that the pre-emption question was not raised or
15 decided in the federal court action.

16 Moreover, the state law forum non conveniens law,
17 that is, what law would apply and what is a state law and how
18 it would apply in this particular case, and whether or not the
19 case would be appropriately dismissed on the grounds of forum
20 non conveniens under state law was not raised or decided in the
21 federal court action, the first original federal court action.

22 So that, when you read Atlantic Coast Line, the
23 bottom line to all of it is, is that Atlantic Coast Line, as I
24 respectfully read it, says, that unless issues are actually
25 raised, cannot form the basis of the injunction on the basis of

1 the relitigation section. So these issues, not having been
2 raise, as occurred in Atlantic Coast Line, the pre-emption
3 question was not raised there; for the majority, the court held
4 that the injunction was not proper; and the same thing would
5 apply here.

6 And I think Atlantic Coast Line in that regard is
7 pretty well dispositive of that issue.

8 Even if pre-emption could be the basis, and I say
9 that even if a pre-emption had been raised, I don't think pre-
10 emption is the kind of thing when you read three decisions,
11 that would be Vendo, Atlantic Coast Line, and Amalgamated
12 Clothing Works. All three of those cases speak very strongly
13 about, and Chief Justice Rehnquist in his opinion in Vendo,
14 said that whenever you have the question of pre-emption, or
15 federal interest versus the Anti-Injunction statute, that
16 federal interest pre-emption question must give way. The Court
17 will not sit and balance those matters; they'll leave it to
18 Congress.

19 And therefore, as stated in Atlantic Coast Line, pre-
20 emption is not one of the exceptions to the anti-injunction
21 statute, so that I think the Respondents are misplaced in
22 trying to contend, as was Judge Gee in the Fifth Circuit that,
23 on the basis of pre-emption, an injunction can issue. I think
24 it's clearly contrary to those three decisions.

25 QUESTION: What do you mean by "pre-emption?"

1 MR. MUSSLEWHITE: Well, the Respondents have
2 contended, Justice White, that they concede there is a
3 difference between the federal forum non conveniens law and the
4 state forum non conveniens law, but that the reason that an
5 injunction can issue is because the federal forum non
6 conveniens law, such as the maritime case, pre-empts the state
7 forum non conveniens law. And that therefore an injunction can
8 issue. And I'm saying that --

9 QUESTION: So you think that -- is that different
10 than talking about estoppel? Collateral estoppel, or res
11 judicata?

12 MR. MUSSLEWHITE: It's different, yes sir, it is. I
13 think that Chief Judge Brown of the Fifth Circuit says pre-
14 emption does not equal res judicata. It's just -- what I'm
15 saying is they can't bootstrap themselves into a res judicata
16 type of situation which would justify an injunction under the
17 relitigation section using the doctrine of pre-emption.

18 And that's stated very foursquare by this Court on
19 various occasions.

20 So I'm saying that, even if they had raised the issue
21 exemption, the issue of pre-emption being the focal point of
22 how they try to justify this injunction, this injunction must
23 fall.

24 Now even if they had -- if the pre-emption doctrine
25 could be the basis of an injunction in other cases, and it

1 could possibly have been in Atlantic Coast Line, it certainly
2 could not be in a forum non conveniens case. And there is a
3 reason for this:

4 The main reason is that the test laid down for both
5 the second and third exception to the Anti-Injunction statute,
6 being in the second, in aid of jurisdiction; and the third
7 being the relitigation exception, or to effectuate and preserve
8 a judgment -- is that the, in order for the injunction to be
9 justified, the action in the state court must in some way
10 interfere with the adjudication by the federal court? Must
11 "impair," as I believe the term was used, "impair the
12 adjudication" by the federal courts.

13 It's hard for me to see how the state court action in
14 this case could impair the federal court in adjudication of
15 this matter when the federal court says we don't want to
16 adjudicate it. We refuse to adjudicate it. We're dismissing
17 it on grounds of forum non conveniens, and by using the test
18 that was laid down, and I believe it was Chief Justice
19 Rehnquist in the Vendo case said that test applies to both the
20 second and third exception; and this was also discussed in
21 Atlantic Coast Line.

22 That being the test, I don't see how any injunction
23 could be justified in this case because there is nothing in the
24 state court action now that the federal court has said we don't
25 want to adjudicate this case; how it could be said that the

1 state court action could in any way impair the right of the
2 power of the federal court to adjudicate a case it doesn't want
3 to adjudicate?

4 So also, we believe that the doctrine itself, when
5 you look at the Supreme Court cases, this Court's cases on
6 forum non conveniens. And I'm speaking primarily of Missouri
7 v. Mayfield and Parsons v. Chesapeake.

8 Missouri v. Mayfield is a very important case, in my
9 opinion; the Respondents try to downplay it. And it was an
10 FELA case, not a maritime case; and it was not a 2283 case,
11 Anti-Injunction case.

12 But what this Court held in Missouri v. Mayfield was
13 that a state court has the right to have a doctrine of forum
14 non conveniens if it wants to; it has a right not to have a
15 doctrine of forum non conveniens if it wants to -- which may
16 very well be the Texas situation under its open forum statute;
17 or it may have one and its criteria may differ from the
18 federal criteria.

19 QUESTION: But don't you read Judge Gee's opinion --
20 which I realize you are challenging, as saying that in maritime
21 cases such as this, a state doesn't have the latitude that it
22 might have in an FELA case, to have its own forum non
23 conveniens doctrine?

24 MR. MUSSLEWHITE: Well Your Honor, I go right to
25 Justice O'Connor's opinion in Talentire, and you talk about the

1 savings to suitor clause, and I just do not believe and see
2 that there is any way that there can be a pre-emption under
3 uniformity or whatever, a reverse-Erie, of a forum non
4 conveniens determination.

5 The Supreme Court, in describing what a forum non
6 conveniens determination is in Missouri v. Mayfield and Parsons
7 v. Chesapeake, has indicated quite clearly that each court has
8 a right to decide what that doctrine is and decide it itself.

9 Now, all the cases I have read on the maritime pre-
10 emption, Your Honor, have dealt with substantive rights, and
11 Justice O'Connor has made that statement at least about four or
12 five times in that opinion in Talentire. And it seems to me
13 that what this Court held in Talentire was that the savings to
14 suitor clause is reserved to the state court's right the right
15 to proceed. The right to the jurisdiction; the concurrent
16 jurisdiction of handling maritime cases and admiralty cases.

17 And if you were to agree with the Respondents in this
18 case, the savings to suitor clause would be wholly nullified,
19 because Talentire said that the law, the law of the state, the
20 substantive law of the state, must give way to the substantive
21 law of the federal maritime law, and I can understand that.

22 But there's nothing in Talentire and there's nothing
23 in any of the uniformity and pre-emption cases that indicates
24 that a procedural doctrine like forum non conveniens can be the
25 subject of pre-emption or reverse-Erie or uniformity.

1 So particularly is that true when you look at how
2 the Supreme Court has described that doctrine in Missouri v.
3 Mayfield and Parsons v. Chesapeake. So that my answer is, that
4 I believe that it does not pre-empt.

5 But I go back to my point, Mr. Chief Justice, that
6 even if it did not pre-empt, it cannot be the subject of an
7 injunction under 2283.

8 QUESTION: Those are two both different points.

9 MR. MUSSLEWHITE: I understand.

10 Also, another reason that the forum non conveniens
11 doctrine is not the kind of a doctrine that can be either pre-
12 empted because it's not substantive, or is not the kind of a
13 doctrine that can be the basis of an injunction under the
14 relitigation exception is, if you read this Court's decisions
15 in Piper v. Reyno and Gulf Oil v. Gilbert, we concede that this
16 doctrine is a discretionary doctrine; is one that says,
17 presupposes, that this case can be tried somewhere.

18 QUESTION: But I thought that one of the elements in
19 forum non conveniens adjudication as Judge Gee said, is what
20 law applies?

21 MR. MUSSLEWHITE: It is a factor, and this Court
22 stated in Piper v. Reyno that it's a factor.

23 QUESTION: And accordingly, the federal court
24 certainly held that United States law didn't apply. That
25 Singapore laws apply. And that part of its adjudication, it

1 seems to me, I don't know why that is not conclusive on the
2 state court?

3 MR. MUSSLEWHITE: I think it probably will be,
4 Justice White. But it has to be asserted in the state court.
5 It cannot be done with the injunction route, because --

6 QUESTION: I know, but I'm talking to your claim that
7 forum non conveniens just isn't one of those doctrines that can
8 be a subject to pre-emption or preclusion or whatever you want
9 to call it. But if part of it is what law applies, and the
10 federal court is deciding what law applies, it seems to me it
11 is finding -- you can't relitigate that.

12 MR. MUSSLEWHITE: You probably can't. You certainly
13 can't, and I concede, you could not relitigate whether federal
14 maritime law applied in the state court. You could not
15 relitigate it. But that would be a matter for the state court
16 to decide, and once they raise the issue of collateral estoppel
17 and do it now.

18 QUESTION: What is the state law claim, is it a
19 wrongful death claim?

20 MR. MUSSLEWHITE: The state law claim is the wrongful
21 death claim, Justice Brennan.

22 QUESTION: And if you could proceed with it, what law
23 would apply?

24 MR. MUSSLEWHITE: Well, if we could proceed with the
25 state law wrongful death claim, the Texas state law would

1 apply. If we could not, then foreign law would apply, and
2 under old Article 467871.031 --

3 QUESTION: Then you'd have to prove what laws?

4 MR. MUSSLEWHITE: Then we would come in and try the
5 case under Singapore law in the Texas state court, and the
6 statute persists --

7 QUESTION: Under the Texas wrongful death statute?

8 MR. MUSSLEWHITE: It's a statute adjunct to the law.

9 QUESTION: I know, but it wouldn't be -- your Texas
10 wrongful death claim would be kaput. It's a substantive claim.

11 MR. MUSSLEWHITE: Yes. But there is a part of that
12 statute, Your Honor, or subsequent to it, adjunct to it, which
13 talks about procedures, and it's the one that is the open
14 forum, Your Honor, which talks about -- it gives a right --

15 QUESTION: So you would try to make a wrongful death
16 claim under foreign law?

17 MR. MUSSLEWHITE: That's one thing we'd feel
18 comfortable --

19 QUESTION: You'd have to plead it, would you not?

20 MR. MUSSLEWHITE: Justice --

21 QUESTION: Would you not have to plead the wrongful
22 death under Singapore law?

23 MR. MUSSLEWHITE: We did plead it in state court.

24 QUESTION: Where did this accident take place and
25 where do the Plaintiffs reside?

1 MR. MUSSLEWHITE: The plaintiff is from Singapore and
2 the accident took place in the harbor of Singapore where an
3 American traditional blue-water vessel was there temporarily;
4 at least it was owned by an American company through another
5 company; and the Exxon Corporation; and it was there
6 temporarily for repairs and Plaintiff, the decedent, was on
7 this vessel to assist in repairs and was killed when a spindle
8 fell through the deck onto his head.

9 QUESTION: Texas really means what it says when it
10 says "open courts," then, doesn't it?

11 QUESTION: Your Honor, that's for the Texas
12 legislature to say and I'm not going to sit here and criticize
13 or not, but nevertheless, it has been, as Judge Gee states in
14 the opinion, it appears based on what the Supreme Court of
15 Texas commented in Katz v. Chevron that its intent is to allow
16 its in personam jurisdiction to allow the matter to proceed
17 through the Texas courts even though it may be on the basis of
18 foreign law.

19 QUESTION: Mr. Musslewhite, I'm trying to understand
20 what your contention with regard to the collateral estoppel
21 effect of the federal court determination, if assuming it was
22 made, and I understand you are not willing to concede it was,
23 but assuming the federal court in the course of determining
24 forum non conveniens, did decide that Singapore law applies;
25 Texas law does not apply.

1 As I understand you, you say you can't issue an
2 injunction against the bringing of a Texas law action, because
3 the federal decision was not a merits decision. Had the
4 federal decision been a merits decision, then you would be able
5 to enjoin?

6 MR. MUSSLEWHITE: Yes, sir.

7 QUESTION: Even though you're not seeking to overturn
8 the federal decision in the latter case; you're just trying to
9 relitigate one fact. Let's assume the federal decision was on
10 some tort action under federal law and it decided that A did
11 not hit B. And then you bring a suit and the federal claim is
12 dismissed -- then you bring a suit in a state court, a totally
13 different cause of action; a state cause of action; but it is
14 essential to prove your case to show that A hit B. Now, could
15 that state proceeding be enjoined?

16 MR. MUSSLEWHITE: That would, in my opinion, would
17 have been a decision on the merits of the case and it could be.

18 QUESTION: It could be. What difference -- well, in
19 both cases you're just protecting the collateral estoppel
20 effect of a matter that was fully litigated before federal
21 court. Why should you draw the line between the matter that
22 was fully litigated resulted in a merits dismissal or a non-
23 merits dismissal in order to determine whether you can prevent
24 the collateral estoppel?

25 MR. MUSSLEWHITE: But that's just it, Justice Scalia,

1 it was not fully litigated. The issues under foreign law; the
2 issues, I contend, under Texas law, weren't fully adjudicated.
3 The case was dismissed on grounds of forum non conveniens.
4 What was fully adjudicated, we concede, was the Jones Act
5 question, because the basis of that was the summary judgment on
6 the grounds that he was not a Jones Act seaman.

7 QUESTION: Whether Texas law applies was fully-
8 litigated. That issue was fully-litigated, wasn't it?

9 MR. MUSSLEWHITE: Assuming that is correct as you
10 stated, and I --

11 QUESTION: Yes, yes. I understand.

12 MR. MUSSLEWHITE: -- proceed in arguendo, then it
13 would have been fully litigated. But the foreign law claim is
14 not litigated, Your Honor and in Atlantic Coast Railway, within
15 the context of 2283, that's what this case is all about, not
16 what the Texas court ought to do if these issues are raised
17 before the Texas court, but whether or not the federal --

18 QUESTION: It would win on the foreign law claim
19 anyway in the Texas court no matter what.

20 MR. MUSSLEWHITE: I believe so, Your Honor, but I
21 concede that it was not an issue determined in the --

22 QUESTION: You concede that the state law claim would
23 probably couldn't go forward if the federal court decision was
24 pleaded in the state court?

25 MR. MUSSLEWHITE: The reason I have some problems

1 with an answer yes --

2 QUESTION: If it was pleaded in the --

3 MR. MUSSLEWHITE: -- state court, but our position
4 would be that the court did not directly address that issue.
5 The court, in order to have collateral estoppel, as I
6 understand the doctrine, or direct estoppel, as Judge Gee
7 described it, it must have been clearly adjudicated. What the
8 court really did is --

9 QUESTION: You would say, though, even if that issue
10 of the applicable law was clearly adjudicated, you would say
11 that no injunction could issue; that you would have to plead it
12 in the state court.

13 MR. MUSSLEWHITE: That is correct, that is correct.
14 That is what Atlantic Coast Line says. That's the way it
15 proceeds. That's why under the principles of federalism, that
16 you allow the state court to proceed and then after it proceeds
17 the appeal can come up to the supreme court through the normal
18 appellate processes. I reserve my time to close.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Musslewhite.
20 We'll hear now from you, Mr. Cooney.

21 ORAL ARGUMENT OF JAMES PATRICK COONEY, ESQ.

22 ON BEHALF OF RESPONDENTS

23 MR. COONEY: Thank you, Mr. Chief Justice, and may it
24 please the Court:

25 I think it would be useful at this time to focus in

1 on the situation in the state court as to exactly what law
2 applied in the state court as to exactly what law applied
3 following the federal dismissal, and then to consider what I
4 think is the real issue here and that is the res judicata
5 effect of the foreign non conveniens dismissal out of the
6 federal court. The federal court in dismissing the case held
7 as has been admitted, the Singapore law applied and dismissed
8 Jones Act Longshoremen and Harborworkers and OSHA, and
9 conditioned the dismissal on the defendant making itself
10 available in Singapore.

11 I think there is a real question as to whether Texas
12 or any state claim that can still be in existence. The facts
13 of this case are very straightforward: a shipyard worker
14 resident in Singapore died while employed by a Singapore
15 shipyard working on a Liberian flag vessel which is admittedly
16 indirectly owned by Exxon.

17 QUESTION: What about the foreign law claim?

18 MR. COONEY: I think the foreign law claim -- it's
19 difficult to see how the foreign law claim comes up, and
20 certainly not in the context that Mr. Musslewhite suggests.

21 QUESTION: I know, but didn't they plead a claim
22 under foreign law in the state court?

23 MR. COONEY: They claim under foreign law in the
24 Texas wrongful death statute. The section that we're dealing
25 with provides for foreign law claims. And the reason I raise

1 the question, it may simply be a point of technicality, but as
2 I understand Talentire, if it stands for anything, it says that
3 state law cannot provide a wrongful death remedy, or even
4 cannot augment a wrongful death remedy in a maritime situation,
5 as a matter of a United States general maritime law, Singapore
6 law applies. That's the choice of law decision.

7 QUESTION: So you claim the foreign law claim was
8 just plead as a part of the Texas wrongful death?

9 MR. COONEY: It is part of a Texas wrongful death
10 claim, yes, Your Honor, because that was the statute that was
11 invoked here.

12 QUESTION: It didn't claim a right to recover under
13 Singapore law?

14 MR. COONEY: They claimed a right, but as I
15 understand it, the right claimed was a part of --

16 QUESTION: Let's assume it appeared in the complaint
17 as a separate count, as a claim for damages of some sort under
18 Singapore law. That could have gone forward, couldn't it?

19 MR. COONEY: That claim is alive, and that claim is
20 subject to be adjudicated --

21 QUESTION: And it was not foreclosed by the federal
22 --

23 MR. COONEY: Absolutely not. And that's the whole
24 point of the forum non conveniens dismissal, yes Your Honor.
25 To the extent that it's --

1 QUESTION: So it's alive?

2 MR. COONEY: Yes, Your Honor. To the extent that
3 it's alive -- it's not. To the extent that it's alive in
4 Singapore. To give some history: the 1980 --

5 QUESTION: I thought the injunction just forbade the
6 Texas court going ahead at all?

7 MR. COONEY: Going ahead at all. Here's the
8 procedural situation: in 1980 this case was dismissed as forum
9 non conveniens. No action was commenced in Singapore. Instead
10 an action was commenced in the courts of the State of Texas.
11 And we have taken the position here that the forum non
12 conveniens dismissal in a maritime situation under the
13 uniformity doctrine is binding on the state courts, and that
14 this particular type of forum non conveniens dismissal
15 constitutes more substantive determination, which essentially
16 decides that the courts of this country are going to decide
17 this issue because of international comity; because of the
18 contacts of a foreign state; because the fact that the foreign
19 state's law applies under our general maritime law, it would be
20 better to determine it in that fashion. And so the federal
21 court has decided to stay its hand.

22 QUESTION: Well, but did the federal court decide
23 that law you just described?

24 MR. COONEY: I believe that it did, Your Honor. You
25 know, it didn't come out and say in bold letters in the

1 judgment, 'This case shall be decided only in the courts of
2 Singapore."

3 But it did hold, number one, that the Singapore law
4 applied, and it conditioned the forum non conveniens dismissal

5 --

6 QUESTION: Well, it didn't even say that in so many
7 words, did it? The magistrate said that it was the conclusion
8 of the magistrate that the contacts do not warrant the
9 application of federal maritime law of the United States to
10 otherwise foreign transactions, that's all it said, isn't it?

11 MR. COONEY: I think it goes on to discuss, Your
12 Honor, the fact that it appears to be controlled by the law of
13 Singapore.

14 QUESTION: I don't find that.

15 MR. COONEY: I believe that it's in there, Your
16 Honor. And specifically it conditioned the dismissal --

17 QUESTION: It says there are remedies available in
18 the courts, in the Singapore courts.

19 MR. COONEY: Yes, and that was proved up in the
20 district courts.

21 QUESTION: What is the statute of limitations in
22 Singapore?

23 MR. COONEY: As it now stands, Your Honor, I am
24 advised -- I don't know for a fact, that they have expired,
25 principally because no litigation was commenced in Singapore in

1 1980 or 1981. They, I think, have a six-year statute. This
2 case -- this man died in 1977. The case began in 1978 and has
3 been going on a long time.

4 The narrow issue here, I think, is the propriety of
5 the injunction; and that raises the question whether under the
6 uniformity doctrine, a state court is bound to apply the same
7 forum non conveniens doctrine that has developed in the
8 maritime courts of this country following Gilbert and following
9 Reyno. I would suggest to the Court that this doctrine is
10 somewhat different from the Gulf v. Gilbert and the Reyno
11 decisions. Both of those are diversity cases. Gulf v. Gilbert
12 in the decision admitted that it was drawing from maritime
13 sources for the doctrine of forum non conveniens. But I think
14 the doctrine of forum non conveniens as it now stands in the
15 federal courts as a maritime doctrine, is different, and it's
16 different in this respect: it is a hybrid. It relies at least
17 in part on this Court's decisions in Lauritzen and Rhoditis,
18 and Romero, where the Court specifically addressed the choice
19 of law problem with regard to our Jones Act; with regard to our
20 general maritime law, and addressed the problems of
21 international comity. The accommodations that have to
22 restrain our courts and any court -- any maritime court, from
23 exercising its power to its fullest scope.

24 QUESTION: Federal court opinion didn't cite any of
25 these cases. It didn't get into this analysis, did it?

1 MR. COONEY: Your Honor, it did cite Lauritzen, and
2 Lauritzen was clearly briefed.

3 QUESTION: Did it decide this particular legal issue
4 that you are now asking us to decide?

5 MR. COONEY: I believe that it was at the genesis of
6 this development, Your Honor, and let me put it this way:
7 clearly the argument -- in fact, at this time, there were cases
8 on the books, and this determination in the district court can
9 be interpreted to mean simply that once you made the Lauritzen
10 - Rhoditis determination of choice of law, if it was not U.S.
11 law, forum non conveniens automatically followed.

12 In years subsequent, the doctrine has become somewhat
13 more developed, and is continuing to develop.

14 QUESTION: At this stage I am really less interested
15 in whether it really follows. It may follow as night the day;
16 then I am interested in whether the federal court concluded
17 that it followed. So that the federal court has already
18 decided this issue, we don't have to wait for the state court
19 to decide it first.

20 MR. COONEY: The issue was presented to the federal
21 court in that fashion. I think the briefs are in the Appendix;
22 it was argued as a Lauritzen - Rhoditis; and admittedly in 1980
23 the next step, and that is whether a full-blown Gilbert
24 analysis was necessary or whether simply a dismissal forum non
25 conveniens once the choice of law matter was determined, was up

1 in the air.

2 Admittedly the district court's order is a little
3 sketchy on this point, but I think when you look at the context
4 of how the case was argued and submitted to the court, yes,
5 indeed, Your Honor, I think that it was --

6 QUESTION: Mr. Cooney, to repeat, you say that you
7 argued to the district court that federal forum non conveniens
8 determinations pre-empted state forum non conveniens
9 determinations?

10 MR. COONEY: No, Your Honor, I'm not suggesting that.
11 I don't think it was even necessary.

12 QUESTION: You didn't argue that; you just argued a
13 traditional forum non conveniens argument?

14 MR. COONEY: Under the maritime concept of forum non
15 conveniens as it was then developing.

16 QUESTION: So the pre-emption issue really hasn't
17 been litigated?

18 MR. COONEY: I believe that it has, Your Honor. I
19 think starting with Jensen, the pre-emption issue is really
20 the uniformity issue, and there is no pre-emption issue here.
21 It's a question of whether a forum non conveniens decision made
22 by a federal court in a maritime context is preclusive: does
23 it constitute a res judicata - collateral estoppel binding
24 effect on the state court, given the fact that the state courts
25 under the fact that the savings to suitors clause, are bound to

1 follow federal law. That's the whole essence of the uniformity
2 doctrine.

3 The pre-emption cases that counsel alludes to are
4 statutory pre-emption matters that are entirely different from
5 the situation we have here. Atlantic Coast Line, there was a
6 strike down in Florida, a railroad strike. That district court
7 enjoined that court under federal law. Subsequent to that
8 injunction, as I understand it, another case held that state
9 law under which an injunction had been obtained against the
10 strike, was pre-empted under federal law, and immediately the
11 parties went back to the federal district court and said, "Give
12 us an injunction to keep the state injunction from being
13 enforced." I think that's an entirely different situation.

14 QUESTION: You go back to Amalgamated Clothing
15 Workers v. Richmond, which Atlantic Coast Line reaffirms, and
16 you have a flat case where the claim was the state court has no
17 business in this area because these kinds of suits are pre-
18 empted by the NLRA, and this Court said, "that may be so, but
19 you can't enjoin it."

20 MR. COONEY: That's right, Your Honor. And
21 absolutely --

22 QUESTION: Then why is this case different?

23 MR. COONEY: A judgment: a judgment saying this case
24 should be dismissed for forum non conveniens, and that is the
25 very crux of the issue. Without the judgment, I will readily

1 admit a federal court could not issue an injunction to keep a
2 state court from hearing any case.

3 In this situation, we have a judgment of a federal
4 court saying that this case before us because of the contacts
5 it has with a foreign nation, cannot be tried by a state court.

6 QUESTION: You also said "without prejudice?"

7 QUESTION: That's a very broad reading of the state
8 law.

9 QUESTION: What do you think about "without
10 prejudice" now?

11 MR. COONEY: I think they had to say "without
12 prejudice," Your Honor, because without doing that there would
13 be nothing left to try in Singapore. Let me give you -- this
14 was addressed by the --

15 QUESTION: They could have said that. They said
16 "without prejudice."

17 MR. COONEY: Yes, Your Honor. And it had to be forum
18 non conveniens dismissal just as say, a dismissal under the act
19 of state doctrine is without prejudice.

20 QUESTION: Why would a federal court have any
21 business in a forum non conveniens motion before it saying that
22 a state court has no jurisdiction to try this?

23 MR. COONEY: Depending on what kind of forum non
24 conveniens determination we're making, Your Honor, following
25 Gulf v. Gilbert, Congress passed 1404A, so that virtually any

1 indigenous domestic forum non conveniens determination in the
2 federal courts is now made on the basis of the transfer
3 statute.

4 The only time forum non conveniens comes up in the
5 federal context is in Piper v. Reyno type situations, where the
6 question is should this federal court -- is this the convenient
7 forum, or is the convenient forum outside of the United States?

8 And I suggest to you that under the rubric of forum
9 non conveniens we now have essentially two different problems
10 that are being addressed and two different solutions. One we
11 have the ease in convenience problem -- why try this case in
12 Virginia when it's easier to try it in Washington because
13 that's where everyone is?

14 Versus the case, as in this case, as in the Kassapas
15 case, which decided an almost identical situation, but for
16 injunction, out of the courts of Louisiana.

17 QUESTION: Mr. Cooney, I don't think you're answering
18 the Chief Justice's question. I think he wanted to know why,
19 in order to make its decision about whether this federal court
20 was a convenient forum or not, that federal court would have
21 had to address the question of whether a state court could go
22 ahead. It's totally unnecessary to its decision -- unlike, I
23 might add, and I would wish you address more of your fire to
24 that -- unlike the decision of whether Texas law could apply --
25 that I can understand was necessary to its forum non

1 conveniens decision.

2 But I don't see how it's necessary for its decision
3 to determine whether the state court could entertain this suit
4 if it wanted to?

5 MR. COONEY: Your Honor, I think it depends on the
6 facts in the case and what we're trying to do with forum non
7 conveniens. I think that there is -- the federal court could
8 have said, "our dockets are crowded; it's not convenient to try
9 the case here; we frankly don't care you try it; try it
10 elsewhere."

11 On the other hand, the federal court could have said,
12 "This is not governed by federal law; it's governed by the law
13 of another nation. The contacts of that other nation are
14 predominant; we do not believe that any court in this country
15 should try the case; it should be tried in Singapore or in
16 Nigeria or in Great Britain, or wherever. And I think those
17 are two different things.

18 QUESTION: It might have said that. It could have
19 said it's going to rain tomorrow too. But it wouldn't be
20 necessary to its decision to dismiss the suit for federal forum
21 non conveniens in the case before it.

22 MR. COONEY: I think that it again depending upon
23 what policy the court was addressing, it is in fact necessary,
24 and perhaps logically necessary. If we're talking about an
25 accommodation of the international concerns that were addressed

1 in Lauritzen and Rhoditis, and to some extent in Piper v.
2 Reyno. To say that a court can sit down and decide that this
3 case should not properly or suitably be brought or tried in the
4 United States, and then refuse to give any meat to that
5 decision, and allow a state court six blocks down the street to
6 pick up the case completely nullifies what the doctrine is all
7 about. If we're speaking --

8 QUESTION: That suggests a forum non conveniens that
9 is kind of almost a constitutional type thing, not just a
10 doctrine of convenience as among federal courts.

11 MR. COONEY: Your Honor, I would suggest that we're
12 approaching that. I don't suggest that it is a constitutional
13 thing. I suggest, however, that it is in line with the
14 concerns with the Court in Lauritzen. It is a manner, or at
15 least it is a device, and I think it is used by the maritime
16 courts as a device to handle the accommodations that these
17 courts think are necessary when cases that have absolutely no
18 contact with the United States are brought here. All that --

19 QUESTION: Could I walk in -- could I, as a
20 defendant, walk into federal court and make a motion where the
21 plaintiffs have filed action saying "I want this dismissed for
22 forum non conveniens and I want a declaratory judgment that the
23 state court in Houston has no jurisdiction?" Would a federal
24 court entertain that sort of thing?

25 MR. COONEY: Well, in fact, in the Zipfel case, as I

1 understand it, that's about what happened, Your Honor, when
2 they got their forum non conveniens dismissal, because there
3 was already a state action pending in Texas. This was out of a
4 Ninth Circuit and Certiorari is pending in this case. They
5 requested the district court to enter an injunction at that
6 time, and the injunction was entered and it was vacated. And
7 in fact this was a case joined to this one as a matter of
8 conflict.

9 In that case, it was clear that an airplane accident
10 had occurred in Indonesia; the operator of the airplane was an
11 Indonesian, and as far as I can read that determination, the
12 district court was contemplating that this was the kind of case
13 that ought to be tried in Indonesia -- not simply "I am an
14 inconvenient forum, or it's going to be difficult for the
15 parties before me to prosecute this case." A much more
16 fundamental issue, Your Honor.

17 QUESTION: I just have great difficulty seeing
18 jurisdiction in the federal court decide what a state court can
19 do on forum non conveniens?

20 MR. COONEY: Well, Your Honor --

21 QUESTION: I don't think forum non conveniens can
22 apply to any but that court. Not only that, I don't think it
23 can decide if any other federal court -- they only say "for
24 this court." Is a forum non conveniens. That's all the court
25 -- any court -- can say.

1 MR. COONEY: I would respectfully disagree on that on
2 two grounds, Your Honor. First of all, at least in this
3 context --

4 QUESTION: Straighten me out.

5 MR. COONEY: -- in this context a state court
6 handling a maritime matter is acting pursuant to a savings to
7 suitors clause, and is therefore bound by what has been
8 referred to as the "reverse-Erie" doctrine or the 'uniformity"
9 doctrine.

10 The second thing is, I think what has developed in
11 Chiazor and Vaz Borralho and a number of cases in the Fifth
12 Circuit --

13 QUESTION: And this would be binding on the state
14 court?

15 MR. COONEY: That's right.

16 QUESTION: By what jurisdiction -- what statute --
17 does that happen on? Come on?

18 MR. COONEY: It happens in this sense, Your Honor,
19 and only in this sense: admittedly forum non conveniens is a
20 discretionary tool; the district judge does not have to grant
21 it.

22 QUESTION: To protect its jurisdiction -- and not
23 somebody else's? You want it to protect somebody else's too?

24 MR. COONEY: No, I'm not after protecting the
25 jurisdiction, Your Honor. I simply --

1 QUESTION: You want to protect the state court's
2 jurisdiction. You want the federal court to protect the state
3 court's jurisdiction.

4 MR. COONEY: All I can say, Your Honor, that if a
5 dismissal from a federal court contemplating further litigation
6 in a foreign country is not binding on the state courts, at
7 least in the maritime situation. It's a nullity. And it does
8 not accomplish the purpose that the courts were attempting to
9 reach.

10 QUESTION: It's a matter of necessity. That's your
11 theory?

12 MR. COONEY: Not completely that, because I think
13 there are good policy grounds for doing this.

14 QUESTION: That the state court can't protect itself?

15 MR. COONEY: The state court in this instance, Your
16 Honor, is a maritime court. It is bound to apply the same law
17 as the federal court. We believe that it is also bound to
18 apply the same forum non conveniens analysis that the federal
19 maritime court is bound to apply.

20 If that's the case; if that issue has already been
21 decided, it's a collateral estoppel, or a direct estoppel by
22 judgment -- that decision has been made, providing the
23 objective facts do not change, as was found in this case --
24 nothing changed. This was not a decision made on the basis of
25 overloaded docket or direct convenience to the parties.

1 And I think that the cases that have followed in the
2 Fifth Circuit and this is perhaps the broader issue that we
3 face here -- and in other circuits, have moved towards the idea
4 that once we decide U.S. law does not apply, that it is a
5 matter of international comity, that a line has to be drawn.

6 If the uniformity doctrine does not apply, that same
7 rule of decision to the state courts, so that the state courts
8 are bound once a federal court makes a decision, then literally
9 in a forum non conveniens context, of a foreign claim -- I'm
10 not talking about a U.S. claim here, but of a foreign claim,
11 that if a federal court says, "no, we won't hear it," the
12 plaintiffs are free to go from court to court until they find
13 someone who will take it.

14 QUESTION: May I ask, Mr. Cooney, supposing a federal
15 court had said there are a lot of factors that one looks at in
16 your forum non conveniens determination, one of which is the
17 law to apply. And it analyzed the law and found that Singapore
18 law and American maritime law were pretty much the same, and
19 says, "I'm really not certain about the law." It may well be
20 that American law would apply.

21 "But nevertheless, I'm going to dismiss the complaint
22 because all of the witnesses are in Singapore; the accident
23 took place there; the plaintiff lived there; a lot of other
24 reasons." And then dismissed on forum non conveniens grounds.
25 Would you make the same kind of argument here?

1 MR. COONEY: I doubt I would unless --

2 QUESTION: Your argument depends entirely on the fact
3 that there was a determination on the choice of law issue?

4 MR. COONEY: No. It relies on an important part on
5 that, but not entirely, Your Honor. I think that's an
6 important component on what I would suggest is the developing
7 hybrid concern.

8 The courts that the decisions that have gone in this
9 direction to say these cases belong in courts other than the
10 United States courts, rely on choice of law; the place of the
11 accident -- really a contacts analysis of what nation has the
12 primary interest, if you will, or primary contacts with this
13 particular piece of litigation. And that, you know, is the
14 situation here as a good example.

15 QUESTION: I'm still a little puzzled. What is your
16 answer to my question? You would or would not make the claim
17 that the federal court in the hypothesis I gave you could
18 enjoin the state proceeding?

19 MR. COONEY: If the federal court completely --

20 QUESTION: Say it says that American maritime law
21 applies, or it's the same as Singapore law, but all these other
22 factors support a determination that --

23 MR. COONEY: I don't think I have the same case, Your
24 Honor.

25 QUESTION: I know you wouldn't have the same case,

1 but would you have any case at all?

2 MR. COONEY: I don't think so. I think if we say --

3 QUESTION: So your case does, then, rest entirely on
4 the choice of law point?

5 MR. COONEY: I would disagree that it's entirely on
6 the choice of law point. I think it's that plus, you know, the
7 circumstances of the case. But certainly that, and I would
8 have to say that, if you took the choice of law, the
9 determination that foreign law applied, and said American law
10 applied, I do not have my case and I would not be making the
11 arguments that I'm making.

12 QUESTION: Why is it that you say a Texas court could
13 not say "we will -- the Texas legislature couldn't pass a
14 statute saying, we will entertain causes of action based on
15 Singapore law?"

16 MR. COONEY: Your Honor, I think that they can, and
17 that's another question. I think the narrow question here is
18 whether after they have passed that statute, they are free to
19 exercise that law given the federal determination.

20 QUESTION: The federal court determination is
21 controlling in the case.

22 MR. COONEY: It's binding. The argument here --

23 QUESTION: Well, then why can't Texas say, "We grant
24 the fact that we must apply Singapore law, but we're willing to
25 try the case and involve Singapore law?"

1 MR. COONEY: You see, I go one step further, Your
2 Honor, and say that the forum non conveniens dismissal, once it
3 has been made, is also binding on the state court because the
4 state court has a savings to suitors maritime court is bound to
5 apply the same law as the federal court.

6 QUESTION: Which is Singapore law. Why can't --

7 MR. COONEY: No, not the forum non conveniens law,
8 Your Honor. Excuse me, I think we're confusing the point.

9 QUESTION: You're saying that because it's a maritime
10 case the Texas court must apply precisely the same analysis
11 that the federal court does in its forum non conveniens
12 analysis?

13 MR. COONEY: It must frame the issues under federal
14 law as would be framed, and he must apply the same criteria --
15 clearly it's discretionary. If he were looking at it
16 initially, he perhaps could come to a -- a state judge could
17 perhaps come to a conclusion, but as in Pastewka, in the Third
18 Circuit, once that determination is made, once that discretion
19 has been exercise, an estoppel by judgment arises and that
20 issue has been decided. There is nothing left for the state
21 court to decide.

22 QUESTION: Is the question whether an estoppel by
23 judgment has arisen a question of federal law or a question of
24 state law?

25 MR. COONEY: In this instance it's a question of

1 federal law. It would be a question of federal maritime law as
2 to what effect a federal maritime court would give --

3 QUESTION: What is your authority for that?

4 MR. COONEY: I think generally, Your Honor, courts
5 have the power, and I think there is a case in my brief though
6 it does not come to mind immediately, that has the power to
7 determine the effect of their own judgment, and that's kind of
8 an inherent power of the court.

9 I don't think that it's for the state court as a
10 maritime court applying maritime law -- it's going to have to
11 apply federal law also to determine what law applies.

12 QUESTION: I understand the determining the effect of
13 its own judgment, but that freely is analytically different
14 from the second court determining whether or not that judgment
15 must be given res judicata or collateral estoppel affecting its
16 court, and that's what --

17 MR. COONEY: That becomes the uniformity question,
18 Your Honor, and that gets, I guess to the nub of this case, and
19 that is whether the federal forum non conveniens law as a rule
20 of decision is binding upon the state courts under the
21 uniformity doctrine? I don't believe that that analysis
22 involves pre-emption, as I have tried to make clear. I think
23 the pre-emption cases involve an entirely different
24 circumstance. This is a uniformity case and it's a res
25 judicata case.

1 QUESTION: I still can't get through my mind why you
2 think the claim stated in the state court based on Singapore
3 law would not go forward in that court?

4 MR. COONEY: Absent the forum non conveniens
5 determination?

6 QUESTION: No, no. With it.

7 MR. COONEY: Okay, well then, my answer simply is
8 that the forum non conveniens determination is binding on the
9 state court, and it is not --

10 QUESTION: Why is it binding on the state court?

11 MR. COONEY: Because its maritime law is binding on
12 the state court.

13 QUESTION: So that's a pre-emption?

14 QUESTION: It's really a pre-emption

15 MR. COONEY: No, it's a uniformity question, Your
16 Honor. I think there is a difference in determining what the
17 res judicata effect or binding effect of a law --

18 QUESTION: So you're saying that it's just a reverse
19 Erie? Yes, sir. It's a reverse-Erie question.

20 QUESTION: It's a reverse-Erie question, so it's a
21 ruling on the merits?

22 MR. COONEY: Yes, and I think --

23 QUESTION: And it's a substantive rule under maritime
24 law?

25 MR. COONEY: It's a substantive -- yes, Your Honor,

1 because if my analysis of what maritime forum non conveniens
2 is, it fully adjudicates the case in the United States, subject
3 to the conditional retention of the case, should it not go
4 forward in the foreign forum.

5 QUESTION: Yes, but now you're arguing that the
6 determination on the choice of law issue isn't all that
7 important, and you gave me the exact opposite answer earlier.

8 MR. COONEY: The choice of law argument, Your Honor,
9 is a constituent -- it's a difficult situation. Let me back up
10 and try to give some background: up until very recently, at
11 least in the Fifth Circuit, and in many of the circuits, the
12 analysis for forum non conveniens was initially a two-step
13 analysis, and first was doesn't U.S. law apply under Lauritzen
14 and Roditis? If the answer to that is no, then you proceed to
15 step two, which is the Gilbert v. Gulf.

16 QUESTION: Judge Clark thought that this was a pre-
17 emption issue. He said, "I agree with Judge Gee that, if I
18 have to follow his course, I agree with him that maritime law
19 pre-empts."

20 MR. COONEY: I think that both Judge Gee and Judge
21 Clark's use of the word, "pre-emption" has been very
22 unfortunate, and I regret it.

23 QUESTION: I would think so.

24 MR. COONEY: It has given everyone an opportunity to
25 focus on pre-emption, because --

1 QUESTION: And to rely on Atlantic Coast Lines.

2 MR. COONEY: And I don't think this is a pre-emption
3 case. This is a reverse-Erie case. This is a res judicata
4 case.

5 QUESTION: Counsel, if you do not prevail in your
6 argument and these cases can routinely proceed in Texas courts,
7 would federal district courts change their forum non conveniens
8 determinations -- and should they?

9 MR. COONEY: Certainly they can. I think what you
10 would do is you would take the meat out of the forum non
11 conveniens laws that now exist, in federal maritime courts.
12 And we're having a lot of these cases. This is not an isolated
13 problem. There are many of these cases coming up.

14 If we don't win here, we go forward in state court,
15 which means that the battle has been won in the federal courts.
16 The reason that the focus is now in the state courts is that
17 the federal courts have accepted this doctrine; they are
18 dismissing cases for trial overseas; they are issuing
19 injunctions -- this is not the only injunction.

20 QUESTION: But there is a new federal statute
21 affecting it, isn't there?

22 MR. COONEY: I'm not aware of the new statute, Your
23 Honor.

24 QUESTION: I thought one of the amicus briefs talked
25 about a new federal statute?

1 MR. COONEY: Oh, I think that it's supportive of the
2 policy behind this. It does not directly solve this case.

3 QUESTION: Well, it doesn't apply to this one. It
4 was enacted later.

5 MR. COONEY: And this was in response to this problem
6 of foreign maritime workers coming to this country. An
7 amendment was passed to the Jones Act to specifically deprive
8 them of Jones Act general maritime law remedies, again
9 conditioning it upon the availability of the national or
10 foreign forum, the non-U.S. forum.

11 I would suggest to the Court that that pronouncement
12 from Congress supports the policy underlying what has been
13 developing in the non-oil worker cases -- these are all
14 offshore -- this Amendment is specific to offshore oil workers.

15 Thank you, Your Honor.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooney.

17 Mr. Musslewhite, you have two minutes remaining.

18 ORAL ARGUMENT BY BENTON MUSSLEWHITE, ESQ.

19 ON BEHALF OF PETITIONERS -- REBUTTAL

20 MR. MUSSLEWHITE: Thank you, Mr. Chief Justice. I
21 will try to be very brief.

22 QUESTION: You don't have much choice.

23 MR. MUSSLEWHITE: I go to the question asked by
24 Justice O'Connor that I think was answered very clearly,
25 Justice O'Connor. The pre-emption nor the state forum non

1 conveniens issue, they were not raised in the federal court --
2 the original federal court, and they were not decided.

3 Secondly, 688(b), I think is a good -- not that you
4 raised that point, is a good point to close on. That was a
5 comprehensive examination of this whole situation by Congress.
6 They did not provide for an injunction against state court
7 proceedings in that law; no injunction is provided for in the
8 "savings to suitors" clause; there's no injunction that
9 specifically covers this situation in the Anti-injunction Act,
10 so I say it's clear, we respectfully submit, that Congress did
11 not intend to allow an injunction to be used in this kind of
12 situation. If there are no further questions?

13 QUESTION: Yes, I just have one question. The
14 magistrate's recommendation was that your opponent waive any
15 statute of limitations if the case was dismissed. Did they do
16 that?

17 MR. MUSSLEWHITE: We never pursued our remedies in
18 Singapore. My client has instructed me to try to pursue the
19 remedies in the state court, so we did not file suit in
20 Singapore, so I cannot tell you whether they did or did not.

21 QUESTION: And you're filing in the Texas court was
22 within the limitations period, I take it, I gather?

23 MR. MUSSLEWHITE: Yes, Your Honor. We have a statute
24 that says you can file within a certain number of days after it
25 is dismissed out of federal court. If not any further

1 questions --

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Musslewhite.

3 The case is submitted.

4 (Whereupon at 2:00 p.m. the case was submitted.)

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REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-505 ~~KAM CHOO V. UNION CORP.~~
CASE TITLE: CHICK KAM CHOO V. EXXON CORP.
HEARING DATE: March 30, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
SUPREME COURT OF THE UNITED STATES.

Date: March 30, 1988

Margaret Daly

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