No. 09-1164

In The Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

MISENER MARINE CONSTRUCTION, INC. and TRAVELERS' CASUALTY AND SURETY COMPANY OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition ["Op. Cert."], Misener Marine Construction ("Misener") essentially argues that the lower court's decision is correct in all respects. Without anticipating any briefing on the merits (should the Court decide that this matter cannot be disposed of summarily), Petitioner takes issue with four points made by Respondent.

1. Misener makes light of the current split in authority on whether state-statutory awards of attorneys fees are impliedly preempted by the federal general maritime law. Respondent concedes, Op. Cert. 24, that a number of marine insurance cases have allowed state-law grants of attorneys' fees. See *Pace v. Insurance Co. of North America*, 838 F.2d 572, 578-79 (1st Cir. 1988); *INA of Texas v. Richard*, 800 F.2d 1379, 1381 (5th Cir. 1986); and *All Underwriters v. Weisberg*, 222 F.3d 1309, 1315 (11th Cir. 2000). But Misener argues that because marine insurance is regulated by state law, these authorities are inapposite. That is no different a situation as when a federal court is deciding a claim within diversity jurisdiction, as occurred here.

2. Misener thus asserts that it was incumbent on Norfolk to dispute its assertion of admiralty jurisdiction in the underlying case. Op. Cert. 3. In fact, Norfolk made clear that its counterclaim and third-party claim were brought under diversity jurisdiction. See Dist. Ct. Dckt.175, at 17 (proposed pre-trial order). Norfolk's counterclaim specifically invoked the Georgia Prompt Pay Act (GPPA), Ga. Code

Ann. § 13-11-1 *et seq.*; Pet. App. 34a.

Despite Misener's invocation of the significance of the Port of Savannah, see Op. Cert. 1-2, 26, such is not talismanic for a determination of admiralty jurisdiction. As this Court intimated in *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004), not all contracts involving water-based activities necessarily implicate "maritime service[s] or . . . . transactions." Likewise, courts have held that not all contracts for dredging services fall into admiralty jurisdiction. See *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349, 350-51 (5th Cir. 1980). All this belies Misener's assumption that federal admiralty jurisdiction went unchallenged here.

3. Inasmuch as Norfolk's counterclaim was cognizable within diversity jurisdiction, Respondent's lengthy discussion of the American Rule and this Court's ruling in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), is beside the point. As this Court made quite clear in *Alyeska*, in diversity cases, a state statute providing for award of attorneys' fees should be followed, absent conflict with a federal statute or court rule.[1] Id. at 259 n.31 ("A very

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[1] Misener's citation of 28 U.S.C. § 1923, Op. Cert. 13, 19, as an ostensibly contrary federal statute, is unavailing. This provision applies only to the reimbursement of "docket fees" in admiralty actions as "costs." Op. Cert. App. 1a. It has been held, by one court at least, as not having survived the introduction of the Federal Rules of Appellate Procedure. See *Waterman S.S. Co. v. Gay Cottons*, 419 F.2d 372 (9th Cir. 1969).

different situation is presented when a federal court sits in a diversity case.").

4. As Petitioner previously briefed, see Pet. 24, whether Norfolk's claims are properly characterized as within diversity jurisdiction turns on whether this Court's opinion in *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953), when read with the implied preemption doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), extends so far as to bar the award of state-statutory attorneys' fees for diverse counterclaims. As Misener concedes, see Op. Cert. 8, 17-18 & n.6, 27-28 n.9, 29-30 n.10, this depends on whether a losing party's avoidance of an award of attorneys' fees is truly a "substantial right[]." *Pope & Talbot*, 346 U.S. at 411.

While this Court indicated in *Alyeska* that federal courts are obliged, in diverse matters, to adopt those state fee-shifting statutes which reflect "a substantial policy of the state," 421 U.S. at 259 n.31, that is not the same as saying that an award of attorneys' fees is a substantive rule of decision. Indeed, this Court has spoken to the "procedural implications" of the American Rule. See *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933); see also *Boeing Co. v. Van Gemert*, 444 U.S. 472, 483 (1980) (Rehnquist, J., dissenting). And while the potential collection of attorneys' fees may create a liability imposed by statute, in all instances the receipt of attorneys' fees is ancillary to prevailing on a substantive claim of right.

Viewed in this way, Misener's characterization of the Eleventh Circuit's *Jensen* discussion, see Op. Cert. 31, essentially replicates the confusion in the decision below. The whole point of this Court's analysis

in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), was to cut through the metaphysical thicket of procedure/substance distinctions. In its place, the Court emphasized whether a certain rule affected primary conduct. See id. at 454-55. Under Respondent's treatment, virtually any rule would qualify as affecting "primary conduct," because lawyers will always seek *ex ante* the best results for their clients and thus will negotiate or contract around the possibility that attorneys' fees might be awarded.

But, as the Alaska Supreme Court explained in *Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 790-91 (Alaska 1997), this Court's concern with "primary conduct" went to the matter of "how [entities] . . . manage their business and what precautions to take." *American Dredging*, 510 U.S. at 454. In maritime law, such matters going to primary behavior would chiefly include principles of liability – adherence to the nautical Rules of the Road, 33 U.S.C. §§ 1601, 2001 et seq., for example. Even under this Court's analysis of "secondary conduct" – "in deciding, for example, where to sue or where one is subject to being sued," 510 U.S. at 455 – it is doubtful whether the possibility of being subject to a state fee-shifting statute, such as the GPPA, would really alter business behavior.

Put simply, if the court of appeals' analysis is left undisturbed, virtually any state-law rule would seem to qualify for implied preemption under *Jensen*. Not only would this Court's limiting calculus in *American Dredging* be fatally undermined, but the Pandora's Box of *Jensen*'s overweening implied preemption doctrine would, once again, be opened and allowed to subvert

fundamental principles of judicial federalism.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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