No. 08- 08-745 DEC 8- 2008

Supreme Court of the United States

RON J. DUMONTIER, JOHN FUGLE, ANDREW HARVIE, DAVID D. HARVIE; DARREN HUGHSON, JOHN HARPER, TORY KJELSTRUP, TODD LOBREAU, ELBERT LOOMIS, ALLAN LUNGAL, WILLIAM L. ROBBINS, WILLIAM J. SCOFIELD, RON L. SMATHERS, and GERALD LAMB,

Petitioners,

v.

SCHLUMBERGER TECHNOLOGY CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's ruling that Plaintiffs failed to show "bodily injury" under 42 U.S.C. § 2014(q) of the Price-Anderson Act (the Act). Concluding that the Act has preempted Montana law defining "bodily injury," the Ninth Circuit substituted a new federal common law to define "bodily injury." The Ninth Circuit's decision directly conflicts with the holding of the Sixth Circuit and its preemption analysis is in strong tension with the Third and Seventh Circuits and this Court's decision in *Silkwood*.

1. Is the determination whether a member of the public has sustained a "bodily injury" under 42 U.S.C. § 2014(q) of the Price-Anderson Act a "substantive rule of decision"under 42 U.S.C. § 2014(hh) that must decided under the law of the state where the illegal radiation dose occurred when the Nuclear Regulatory Commission's public dose limit for members of the public was admittedly violated.

2. Whether the Price-Anderson Act preempts Plaintiffs' state law causes of action if their causes of action do not arise from a "nuclear incident" as defined under 42 U.S.C. § 2014(q) of the Price-Anderson Act.

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Opinion of the Ninth Circuit Court of Appeals, reported at *Dumontier v. Schlumberger Technology Corporation*, 543 F.3d 567 (9th Cir. 2008) (App. A). Order granting Defendant's Motion to Dismiss Plaintiffs' Strict Liability Cause of Action and Granting Defendant's Motion for Summary Judgment on Plaintiffs' Public Liability Cause of Action (App. B).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on September 11, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section II, United States Constitution

42 U.S.C. § 2012(i) (2005)
42 U.S.C. § 2014(q) (2005)
42 U.S.C. § 2014(w) (2005)
42 U.S.C. § 2014(hh) (2005)
42 U.S.C. § 2210(n)(1) (2005)
42 U.S.C. § 2210(n)(2) (2005)
42 U.S.C. § 2210(s) (2005)

Federal Regulations:

10 C.F.R. § 20.1301(a)(1)
10 C.F.R § 140.81(b)(1)
10 C.F.R § 140.81(4)
10 C.F.R § 140.83

As the foregoing statutory and regulatory provisions are voluminous, they are reproduced in the attached Appendix at C and D.

STATEMENT OF THE CASE

The Ninth Circuit holds that the Act preempts Montana law on bodily injury and that Plaintiffs have not sustained "bodily injury" under federal common law even though Schlumberger admitted that it illegally subjected all Plaintiffs to radiation doses in violation of the applicable federal dose limit.

On May 21, 2002, Respondent Schlumberger Technology Corporation (hereafter, "Schlumberger") conducted a well logging operation on a drilling rig in northern Montana. Schlumberger was a licensee of the Nuclear Regulatory Commission. When Schlumberger completed its well logging, it left an extremely dangerous radioactive byproduct material, Cesium 137, on the floor of the drilling rig. Schlumberger failed to conduct required radiation surveys. Schlumberger deliberately, falsely and maliciously certified records stating that it had conducted the required surveys when in fact it had not. Plaintiffs worked on and around the rig floor on

May 21, 2002. All Plaintiffs were members of the public. All Plaintiffs were exposed to Schlumberger's dangerous radioactive Cesium 137. All Plaintiffs received radiation doses in one day that exceeded the federal dose limits for members of the public *in one year* and there is important uncertainty as to the maximum illegal radiation doses that they received. All Plaintiffs received physical injuries because of their illegal radiation doses.

Plaintiffs filed a Complaint seeking emotional distress and medical monitoring damages as well as punitive damages in federal district court on February 13, 2004. On September 22, 2005 the district court granted both Schlumberger's motion to replace Plaintiff's state law cause of action with a cause of action under the Act and Schlumberger's motion for summary judgment that the court did not have jurisdiction over Plaintiffs' claims under the Act and denied all other outstanding motions as moot. Plaintiffs timely appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals entered its decision on September 11, 2008.

The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

Question One

Introduction

The Ninth and Sixth Circuits are deeply divided on the question whether state tort law should be used to define bodily injury under the Act. The Third and Seventh Circuit's analyses of state law preemption under the Act differ importantly from that of the Ninth Circuit and serious disagreement among them is inevitable. The Ninth Circuit's conclusion regarding the preemption of state law under the Act is also in strong tension with this Court's decision in *Silkwood*. Whether persons subjected to illegal radiation doses can recover for their injuries under the law of the state where they received their doses is an important question involving the plain meaning of the Act, Congressional intent, and the ability of members of the public to recover for injuries from illegal radiation doses.

The Act expressly requires the use of state tort law unless it is inconsistent with the Act. Section 2210(n)(2) gives original jurisdiction to a district court in any "public liability action arising out of or resulting from a nuclear incident . . . ." 42 U.S.C. § 2210(n)(2) (2005). A public liability action "means any suit asserting public liability[;] [a] public liability action shall be deemed to be an action arising under section 2210 . . . ." 42 U.S.C. § 2014(hh) (2005). Public liability means "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . ." 42 U.S.C. § 2014(w) (2005).

The Act also defines nuclear incident:

> The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, *bodily injury*, *sickness*, *disease*, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

42 U.S.C. § 2014(q) (2005) (emphasis added).

The Nuclear Regulatory Commission's (NRC) regulations distinguish nuclear incidents from extraordinary nuclear occurrences and provide that

> *[t]he presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim.* In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation *for his injury or damage.* If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available

> to the defendant, *under the law applicable in the relevant jurisdiction.*

10 C.F.R. § 140.81(4) (emphasis added). The NRC regulations also state that *"[i]t should be clearly understood that the criteria [for extraordinary nuclear occurrences] in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place."* 10 C.F.R. § 140.81(b)(1) (emphasis added).

A. The Ninth Circuit Decision Directly Conflicts with the Sixth Circuit.

Allowance of the writ is appropriate because the Ninth Circuit's decision in *Dumontier* directly conflicts with the Sixth Circuit's decision in *Rainer v. Union Carbide Corp.*, 402 F.2d 608 (6th Cir. 2005).

The Ninth Circuit concluded "[t]he Act doesn't call for us to apply state law in its interpretation; only for the 'the substantive rules for decision'–i.e., the available causes of action." *Dumontier v. Schlumberger Technology Corporation, Inc.*, 543 F.3d 567, 570 (9th Cir. 2008). The Ninth Circuit determined that under the Act, plaintiffs can only bring claims for exposure to radioactive materials if two hurdles are met. The first is

> if the state where the exposure occurred provides a cause of action. That's what the Act means when referring to state "substantive rules for decision." For example, if a state doesn't provide a cause of action for emotional distress, a plaintiff wouldn't have a cause of

> action for emotional distress under the Act. Or, if state law provides a cause of action for negligence but not for strict liability, the Act would provide a cause of action only for negligence.

Dumontier, 543 F.3d at 570 (citation omitted).

The Ninth Circuit determined that the second hurdle is a showing of bodily injury that must be established under a new, federal common law that the court defined to mean "pain or interference with bodily functions." *Dumontier*, 543 F.3d at 571. The Ninth Circuit thereby determined that radiation doses are only actionable under the Act when they meet the NRC's regulations for extraordinary nuclear occurrences. *Dumontier*, 543 F.3d at 570-571. The Ninth Circuit reasoned that adopting Plaintiffs' "interpretation of bodily injury would render the term surplusage, as every exposure to radiation would perforce cause injury." *Dumontier*, 543 F.3d at 570. In *In Re Berg Litig.*, 293 F.3d 1127, 1129 (9th Cir. 2002) (citation omitted), however, the Ninth Circuit concluded that "there is no threshold harmful dosage level for radiation because it can cause harm at any level."

In *Rainer*, the Sixth Circuit concluded that Kentucky *state law* would determine whether the plaintiffs in that case had sustained bodily injury under the Act:

> As this court has noted, the amendments to the Act "w[ere] not intended to alter the state law nature of the underlying tort claims. [The

> Act] provides that 'the substantive rules for decision in such action shall be derived from the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section.'" *Day*, 3 F.3d at 154 n. 1 (citations omitted); *see also Heinrich ex rel. Heinrich v. Sweet*, 62 F.Supp.2d 282, 296-97 (D. Mass. 1999) ("The [Price-Anderson] Act incorporates state law as the substantive rule of decision to govern the federal cause of action, so long as the state law is not inconsistent with the purposes of the Act.") Thus, the Act specifically calls for state law to provide the substantive foundations for a Price-Anderson claim. . . . *The key question before us, then, is whether Kentucky caselaw equates "subcellular damage" with "bodily injury."*

Rainer v. Union Carbide Corp., 402 F.2d 608, 617-618 (6th Cir. 2005) (emphasis added).

The Ninth and Sixth Circuits are split on whether to use state law to define "bodily injury" under the Act.

B. The Ninth Circuit Decision Conflicts with the Third and Seventh Circuits' Analysis of State Law Preemption under the Act and Disagreement Between Them Is Inevitable.

The Ninth Circuit's decision is in substantial tension with the Third Circuit's preemption analysis in *In Re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3rd Cir. 1991). Citing *In Re TMI II*, the Ninth Circuit held that § 2014(hh) of the Act means that a party can assert an action under the Act "only if the law of the applicable state provides a cause of action." *Dumontier*, 543 F.3d at 570. The Ninth Circuit and the Third Circuit, however, disagree substantively on the role of state law under the Act.

In *In Re TMI II*, the Third Circuit reversed the district court's decision that the Act violated Article III, section 2's requirement that actions brought under the Act arise under federal law because "the rules of decision for public liability actions filed in or removed to a federal court are, according to the Amendments Act, to be 'derived from the law of the State in which the nuclear incident . . . occurs." *In Re TMI II*, 940 F.2d at 851 (citation omitted).

The Third Circuit concluded, "we find that Congress intended to–and did–create *a federal cause of action* which will implicate substantive aspects of federal law." *Id.* at 854 (emphasis added). Rather than determine that the Act looks to state law merely for "causes of action," as did the Ninth Circuit, the Third Circuit concluded that "in the Amendments Act, *Congress relied upon state law as a foundation* and effectuated its purposes by creating an *overlay* of federal law." *Id.* at 855 (emphasis added).

Just as in *Rainer*, the Third Circuit determined that under the Act, state law provides substantive law:

> In this case, Congressional intent is not an issue. In explicitly providing that the "substantive rules for decision" in public liability actions "shall be derived from" the law of the state in which the nuclear incident occurred, we believe that Congress expressed its intention that *state law provides the content of and operates as federal law.*

Id. at 855 (emphasis added).

The Ninth Circuit's decision similarly cannot be reconciled with the Seventh Circuit's analysis of state law under the Act. In *O'Conner*, the Seventh Circuit also reviewed whether actions brought under the Act arose under federal law and determined:

> *Although the public liability cause of action is built around preexisting state law*, it contains some distinctively federal elements as well. The Amendments Act dictates the limitations period for a public liability cause of action, 42 U.S.C. § 2210(n)(1), provides for venue, § 2210(n)(2), limits the availability of punitive damages in an action arising out of an ENO, § 2210(s), and mandates that normally - available defenses be waived in the cases of ENOs, § 2210(n)(1). *The Amendments Act, therefore, forms the state-based cause of action into the federal mold.*

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1097 (7th Cir. 1994) (emphasis added).

The Seventh Circuit concluded:

> Congress did not adopt in wholesale fashion state law. State law serves as the basis for the cause of action only as long as state law is consistent with the other parts of the Act. Congress desired that state law provide the content for and operate as federal law; however, *Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law.* This recognition is explicit in the Amendments Act's legislative history. In discussing the need for reauthorizing the Price-Anderson Act, the Senate Committee on Environment and Public Works reported:
>
> The Price-Anderson system, including the waiver of defenses provisions, the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law.
>
> S.Rep. No. 218 at 4. Thus, although the basis for a public liability cause of action is state law, the applicable law is only "derived" from state law. The Price-Anderson system, by design, alters state tort law to forward the goals of that act: to "protect the public and

> . . . encourage the development of the atomic energy industry." *http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.11&ifm=NotSet&fn=_top&sv=Split&tc=-1&docname=42USCAS2012&ordoc=1994023977&findtype=L&db=1000546&utid=1&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Montana* 42 U.S.C. § 2012[i].

O'Conner, 13 F.3d at 1100 (emphasis added).

Both the Third and Seventh Circuits examined Congress' intent in the Act and concluded that public liability actions are *built* upon state law.

C. The Ninth Circuit Is Also in Friction with this Court's Decision in Silkwood.

The Ninth Circuit has disregarded this Court's decision in *Silkwood* construing Congressional intent in the Act.

In *Silkwood* the Court construed the Act, in its pre-1988 amendments form, in deciding whether a "state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is preempted . . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241 (1984).

After reviewing Congressional intent, the Court concluded

> Congress assumed that traditional principles of state law would apply with full force unless

> they were expressly supplanted. . . . *No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based upon its own law of liability*. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.

Silkwood, 464 U.S. at 255-256 (emphasis added). The tension to which the Court referred is absent in the present case, because Plaintiffs agreed below that the applicable federal safety regulation, which Schlumberger violated, is the standard of care. *See* 10 C.F.R. § 20.1301(a)(1) (federal public dose limit).

Although the Act was amended in 1988, the 1988 amendments have not diminished the substantive role that state law plays in public liability actions. *See O'Conner* and *In Re TMI II*, *supra* (construing the Act *after* its amendments in 1988).

Question two.

Introduction.

The Ninth Circuit held that the Act has absolutely preempted any conceivable state law claim that a person, illegally subjected to radiation in excess of the federal dose limit, could bring if his claim is not cognizable as "bodily injury" under the Ninth Circuit's federal

common law definition of bodily injury. *Dumontier*, 543 F.3d at 571. Whether a person should be stripped of all conceivable recourse for his illegal radiation injuries is an important question with a national scope that reflects the wide breadth of nuclear operations in the United States. On this issue the Ninth Circuit conflicts with the preemption analyses of the Third and Seventh Circuits and disagreement among them is likely. The Ninth Circuit's conclusion is also inconsistent with this Court's preemption analysis in *Silkwood*.

The Act grants federal district courts original jurisdiction over *nuclear incidents*, not *any* incident in which radioactive material is involved. Section 2210(n)(2) provides in pertinent part

> (2) With respect to any public liability action *arising out of or resulting from a nuclear incident*, the United States district court in the district where the nuclear incident takes place ... shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant ... any such action pending in any State court ... shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2) (2005) (emphasis added).

The Act states that a federal court has original jurisdiction in the event of a "nuclear incident." If there is no nuclear incident, then a federal district court does not have original jurisdiction under the Act and the removal provision of 42 U.S.C. § 2210(n)(2) (2005) does not apply.

In *In re TMI II*, the Third Circuit recognized that state law causes of action in radiation cases could be brought *outside* the Act:

> Under the terms of the Amendments Act, the "public liability action" encompasses *"any* legal liability" of any "person who *may* be liable" *on account of a nuclear incident.* Given the breadth of this definition, the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price-Anderson Act is that he has no such claim at all. After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all. *Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be one based on "any legal liability" of "any person who may be liable on account of a nuclear incident."* It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme.

In re TMI II, 940 F.2d at 854-855 (citation omitted) (emphasis added).

In his concurring opinion, Judge Scirica agreed that under the Act, "a finding that a particular claim does not fall within the definition of *'public liability' does not preclude the plaintiff from pursuing that claim in state court under a different name.*" *Id.* at 863 (Scirica, J., concurring) (emphasis added).

In *O'Conner*, the Seventh Circuit also did not determine that the Act's 1988 amendments embraced *any* cause of action involving radiation injuries. Rather, the Seventh Circuit determined that the 1988 amendments to the Act broadened the Act's reach "to provide for removal of, and original jurisdiction over, claims arising from any '*nuclear incident*,' instead of actions arising only from ENOs [extraordinary nuclear occurrences]." *O'Conner*, 13 F.3d at 1096 (citation omitted) (emphasis added).

Absent a "nuclear incident" under the Act, moreover, *Silkwood* does not preempt Plaintiffs' state law causes of action for their illegal radiation injuries. In *Silkwood*, the Court ruled that

> state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both federal and state law, or where the state law stands as an obstacle to

> the accomplishment of the full purposes and objectives of Congress.

Silkwood, 464 U.S. 238, 248 (citations omitted).

In the present case, the predicates for preemption in *Silkwood* are conspicuously absent. There is no conflict between state and federal standards of care, because the federal dose limit for members of the public is the applicable standard of care. It is certainly possible for a *responsible* nuclear actor to comply with both Montana law on bodily injury and federal law on dose limits. The second part of *Silkwood's* preemption test also does not apply. The use of Montana law to define "bodily injury" would not frustrate the purposes of the Act. "Congress enacted the Price-Anderson Act 'to protect the public and to encourage the development of the atomic energy industry.'" *In Re TMI*, 67 F.3d 1103, 1107 (3rd Cir. 1995) (citation omitted).

If Plaintiffs have failed to demonstrate "bodily injury" under the Ninth Circuit's novel federal common law definition of "bodily injury," then the subject incident was not a nuclear incident and the Act has not preempted Plaintiffs' Montana cause of action. By its express terms, the Act only preempts claims involving nuclear incidents.

CONCLUSION

The Ninth Circuit has clearly erred in holding that the Act preempts Montana state law defining bodily injury. The agreed standard of care is the *federal* public dose limit for members of the public. Plaintiffs were in Montana when Schlumberger caused them bodily injury with illegal radiation doses. The Act requires that Montana law provide the substantive rules of decision unless it is inconsistent with the Act. The Ninth Circuit has identified no inconsistency between Montana law defining bodily injury and the Act. Instead, the Ninth Circuit has speculated that allowing state law to define bodily injury could lead to increased litigation of claims and a "strict liability" cause of action. *See Dumontier*, 543 F.3d at 570-571.

The Ninth Circuit has also clearly erred in substituting a federal common law for Montana law on bodily injury, which federal common law it took from the NRC's regulations for extraordinary nuclear occurrences. The Ninth Circuit determined that any incident falling short of the NRC's threshold for an extraordinary nuclear occurrence is not bodily injury under the Act.

Again, however, the NRC's regulations emphasize that the threshold for bodily injury is *not* the threshold for extraordinary nuclear occurrences, concluding that "[i]f there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, *under the law applicable*

in the relevant jurisdiction. 10 C.F.R. § 140.81(4) (emphasis added). The Ninth Circuit's rejection of the federal dose limit for members of the public is error.

Moreover, the Act provides for concurrent jurisdiction, strong evidence of Congress' intent that state law define bodily injury absent an inconsistency with the Act that the Ninth Circuit failed to identify. *See* 42 U.S.C. § 2210(n)(2) (2005) (providing concurrent jurisdiction).

On Question one, the Ninth Circuit directly conflicts with the Sixth Circuit and on both Questions one and two, the Ninth Circuit is in strong tension with the Third and Seventh Circuits. The Ninth Circuit also conflicts with this Court's interpretation of Congressional intent in *Silkwood* regarding the role of state law under the Act.

For all the reasons set forth above, allowance of Plaintiffs' writ is appropriate.

Respectfully submitted,

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