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I. LIMITATION OF LIABILITY

The legislative history of the maritime limitation of liability statutes, both in the United States and in England, is uncomplicated. The original sources are available, and in several important opinions, the Supreme Court of the United States has set forth the history of the limitation statutes.[1] Limitation of liability to the value of the owner's interest in the vessel and freight is a principle that springs solely from the general maritime law, and was not recognized either at common law or by the civil law.

A. *European History*

It is difficult, if not impossible, to say when and where the idea of limitation of liability originated.[2] At common law, as administered both in England and America, the personal liability of the owner of a vessel for damages by collision was the same as in other cases of negligence, and was limited only by the amount of the loss and by the owner's ability to respond.[3] The civil law as well made

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1. The author has relied greatly on these cases, particularly the expositions by Mr. Justice Brown in *The Main v. Williams*, 152 U.S. 122 (1894), and Mr. Justice Bradley in *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871). See also *Richardson v. Harmon*, 222 U.S. 96 (1911), in which Mr. Justice Lurton made his contribution to this branch of admiralty, and *The Rebecca*, 20 F. Cas. 373 (No. 11,619) (D. Me. 1831).

2. The Main v. Williams, 152 U.S. 122 (1894); EMERIGON, TRAITÉ DES ASSURANCES ET DES CONTRATS À LA GROSSE, ch. 4, par. 11 (1783). However, the *Consolato del Mare*, in two separate chapters, expressly limited the liability of the part-owner to the value of his share in the ship. Vinnius, an early continental writer, also stated that by the law of the land the owners were not chargeable beyond the value of the ship and things that were in it. In addition, the Hanseatic Ordianance of 1644 pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them.

3. The Wild Ranger, 167 Eng. Rep. 249, 256 (Adm. 1862); Cope v. Doherty, 70 Eng. Rep. 154, 158 (V.C. 1858); The Mellona, 166 Eng. Rep. 869, 879 (Adm.

no distinction in favor of ship owners, nor did the ancient laws of the merchant leagues of Oleron or Wisby or the Hanse towns suggest any restriction upon such liability.

By the end of the seventeenth century, limitation of liability had become firmly established among the leading maritime nations of Europe. The French Ordinance of 1681 served as a model for most of the modern maritime codes, and declared that the owners of the ship would be answerable for the acts of the master, but they would be discharged therefrom on relinquishing the ship and freight.[4] A similar provision in the Ordinance of Rotterdam of 1721 declared that the owners should not be answerable for any act of the master done without their order, beyond their interest in the ship; and by other articles of the same ordinance it was provided that each part-owner should be liable for the value of his own share.[5]

The earliest legislation in England upon the subject was passed in 1734, and provided that no shipowner should be responsible for loss or damage to goods on board the ship by embezzlement of the master or mariners, or for any damage occasioned by them without the privity or knowledge of such owner, further than the value of the ship and her appurtenances and the freight due or to grow due for the voyage. If greater damage did not occur it was to be averaged among those who sustained it.[6] By subsequent acts this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence, and to damage done by collision. Furthermore, there was an entire exemption of liability for loss or damage by fire or for loss of gold and jewelry, unless its nature and value were disclosed. In all these statutes the liability of the owner was limited to his interest in the ship and freight for the voyage.[7]

1848); The Aline, 166 Eng. Rep. 514 (Adm. 1839); The Dundee, 166 Eng. Rep. 39, 43 (Adm. 1823); Wilson v. Dickson, 106 Eng. Rep. 268 (K.B. 1818).

4. In addition to the cases set forth in note 3 *supra* see 2 PARSONS ON SHIPPING & ADMIRALTY 120 (1869). The French Ordinance of 1681 was carried, with slight change in phraseology, into the commercial code of France and all the other maritime nations whose jurisprudence is founded upon the civil law. Code de Commerce (French), art. 216; German Mar. Code, art. 452; Code of the Netherlands, art. 321; Belgian Code, art. 216; Italian Code, art. 311; Russian Code, art. 649; Spanish Code, arts. 621, 622; Portuguese Code, art. 1345; Brazilian Code, art. 494; Argentine Code, art. 1039; Chilean Code, art. 879; The Main v. Williams, 152 U.S. 122, 127 (1894).

5. 152 U.S. 122, 127 (1894).

6. 7 Geo. 2, c. 15 (1734).

7. 26 Geo. 3, c. 86 (1786); 53 Geo. 3, c. 159 (1813); 17 & 18 Vict., c. 104, § 503

In order to establish a more uniform and equitable method of limiting the liability of the owner, and to minimize some difficulties encountered in determining at what point of time the value of the ship should be taken, the provisions of the prior acts were extended to foreign as well as British ships, and to cases of loss of life or personal injury, and to damage or loss to the cargo. These revisions also provided that the owners should not be liable in damages in respect of loss of life or personal injury in any one set amount.[8] In 1786, limitation of liability was extended to robbery and to losses in which the master and mariners had no part.[9] By 1813, the liability limitation of shipowners had been further extended to cases of loss by negligence of the master or mariners and to damage done to other ships and their cargoes, including cases of collision.[10]

The first of these two English statutes provided that if the loss or damage fell on more than one party, either the parties injured or the shipowners could file a bill in equity in chancery to ascertain both the whole amount of the loss to the ship and its freight and the value of the offending vessel and her freight so as to have a proper distribution of the latter, *pro rata*, amongst those who sustained the damage. However, the second statute gave this remedy to the shipowners alone—it being for their benefit and intended to prevent a multiplicity of suits against them—although they were obliged to pay the value of the vessel and freight into court, or to give security for the amount and to acknowledge their liability, inasmuch as the Court of Chancery having no admiralty jurisdiction could not investigate the question of liability. That being done, owners were entitled to a stay of all suits brought against them for damages. The statutes, however, contained no provision for a surrender and assignment of the ship and freight, but only for paying their value into a Chancery court.

Under these statutes, the English courts, since 1813, have held that the value of the ship and freight was to be estimated as it stood immediately prior to the injury, so that were the ship lost by

et seq. (1854); 25 & 26 Vict., c. 63, § 54 *et seq.* (1861). In 1854, freight was deemed to include the value of the carriage of goods and passage money. Merchants Shipping Act of 1854, 16 & 17 Vict., cs. 131, 104.

8. The Main v. Williams, 152 U.S. 122, 127 (1894); The Merchants' Shipping Act Amendment of 1862, 25 & 26 Vict., c. 63, § 54. *See* note 61 *infra* and accompanying text.

9. 26 Geo. 3, c. 86 (1786).

10. 53 Geo. 3, c. 159 (1813).

the occurrence which caused the injury, or at any subsequent period before the completion of the voyage, the shipowners were still liable for that value. These decisions, it will be seen, create an important distinction between the English statutory law and the maritime law, viz., the time at which the value is to be ascertained.[11]

B. *American History*

The earliest American legislation upon this subject is a Massachusetts statute, taken substantially from the statute of George II, passed in 1818 and revised in 1836. It was followed by an act of the Maine legislature in 1821, copied from the statute of Massachusetts.[12] There was no congressional response to the necessity on a national scale for similar legislation, however, until 1848, when the Unites States Supreme Court decided *The Lexington.*[13] In that case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about 18,000 dollars in coin, which, *unknown* to the shipowner, had been shipped upon the steamer and lost. As a result of the uneasiness produced among shipowners by this decision, and for the purpose of putting American shipping on an equal footing with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act.[14]

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11. French admiralty law followed a similar course. In 1841, the law of France, which had followed the general maritime law, was amended so as to operate still further to the advantage of the shipowner by enabling him to obtain, by abandonment of ship and freight, a complete discharge not only from responsbility for the acts and defaults of the captain but also for his engagements and contracts relative to the ship and the voyage. Code de Commerce, art. 216.

12. The Main v. Williams, 152 U.S. 122, 128 (1894); Acts of 1818, ch. 122; MASS. GEN. LAWS, ch. 32, §§ 1-4; MAINE REV. STAT. ANN. tit. 14, §§ 8-10.

13. New Jersey Steam Navigation Co. v. Merchants' Bank (The Lexington), 47 U.S. (6 How.) 343 (1848).

14. The Limited Liability Act of 1851, ch. 43, 9 Stat. 635. The authority of Congress to enact the limitation of liability law was derived from the power to regulate commerce and from a clause in the Constitution extending the judicial power to all cases of admiralty and maritime jurisdiction. U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 2. *See* The Hamilton, 207 U.S. 398, 404 (1907). In 1880 and again in 1883, the law was held constitutional under the commerce clause. Lord v. Steamship Co., 102 U.S. 541, 545 (1880); Providence & N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 589 (1883). The Supreme Court later upheld the law independently of the commerce clause under the judiciary clause, which gave the law greater scope and made it co-extensive with general admiralty and maritime jurisdiction. *In re* Garnett, 141 U.S. 12 (1891); Bulter v. Boston & Savannah S.S.

The predominant characteristics of the early legislation in both England and America, down to the passage of the Act by Congress in 1851, may be summarized as follows:

(a) There was no right to surrender the ship; for a shipowner to limit his liability it was necessary that he pay the value of the ship into court in cash;

(b) In order to obtain the benefit of the statute, the shipowner was forced to acknowledge his liability; there was no "petition for exoneration from or limitation of" liability;

(c) The court held the shipowner to the value of his interest in the vessel prior to the disaster;

(d) No procedure was laid down except a bill in equity to enforce the limitation.

Both the American and the English limitation statutes were preceded by preambles declaring that they were passed for the purpose of encouraging shipping.[15] The first section of the 1851 statute exempted ship-owners from loss by fire unless caused by their own neglect; the second section exempted the shipowner from liability for loss or damage to jewelry, precious metals, or money, unless the character and value were disclosed in writing. The third section was the heart of the Act of 1851, is the heart of the present statutes, and remains the law, substantially unchanged, to the present day. This section relieved the owner from any loss of any property on board, caused by any person on board, by collision, "or for any act, matter, or thing, loss, damage, forfeiture, done, occassioned, or incurred without the privity or knowledge of such owner or owners" to the value of the interest of the owner in the vessel and her freight.[16] The fourth section provided for a division of a loss *pro rata* by several freighters. The fifth section granted a charterer the right to limit liability. The sixth section provided that the act was not to affect any remedy against the master and mariners. The

Co., 130 U.S. 527, 556-57 (1889). Such jurisdiction extends whereever public navigation extends—on the sea, on the great inland lakes, and on the navigable waters connecting them (130 U.S. at 557), including navigable rivers above tide water (141 U.S. at 15).

15. The English Shipping Act of 1734 recited that "it was of the greatest consequence to the Kingdom to promote the increase of the number of ships and to prevent any discouragement to merchants and others from being interested and concerned therein." 7 Geo. 2, c. 15 (1934).

16. The Limited Liability Act of 1851, ch. 43, § 3, 9 Stat. 635. The statute remains substantially unchanged. 46 U.S.C. § 183 (1970). In *The Scotland*, 105 U.S. 24 (1881), the Court decided that the owner's interest should be valued after the casualty.

seventh section exempted inland vessels from the Act.

There were minor amendments in 1871, 1875, and 1877, and a new section was added, by the Act of June 26, 1884, which extended the operation of the statutes by doing away with restrictions on the character of debts and liabilities against which limitation might be asserted. Under this provision, it was made possible to limit liability against all claims except seamen's wages, *i.e.*, the benefits of the act were extended to non-maritime torts and to claims arising either *ex contractu* or *ex delicto*.[17] Finally, in 1886, by the Act of June 19, 1886, the restrictions, excluding the application of the act to inland vessels, were removed and the limitation statutes were amended to apply expressly "to all sea-going vessels, and also to all vessels used on lakes and rivers or in inland navigation. . . ."[18]

Many attempts have been made to limit the application of the limitation statutes by contention that subsequent statutes have, by implication or otherwise, impliedly repealed the limitation statutes *pro tanto*. For example, the Supreme Court rejected an argument that claims under section 33 of the Merchant Marine Act of 1920 were not subject to limitation.[19] In *Butler v. Boston and Savannah Steamship Company*,[20] it was contended that the Act of February 28, 1871,[21] relating to better security of life on board vessels propelled by steam, superseded or displaced the proceeding for limited liability in cases arising under its provisions, but the Supreme Court rejected this contention by saying:

> We do not see the necessity of drawing any such conclusion. The act itself contains no provision of the kind. It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st section of the act, (Rev. Stat. sec. 4401), it is provided that all coast-wise seagoing steam-vessels, 'shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.'

17. The Shipping Act of 1884, ch. 121, 23 Stat. 53.

18. Act of June 19, 1886, ch. 421, § 4, 24 Stat. 80.

19. *In re* East River Towing Co., 266 U.S. 355 (1924). A successful contention of this kind was made in *The Vestris*, 1931 A.M.C. 1553 (S.D.N.Y. 1931), in which Judge Goddard held that claims under the Death on the High Seas Act, 46 U.S.C. §§ 761, 768, are not subject to limitations if such right of action is granted by the law of a foreign country.

20. 130 U.S. 527 (1889).

21. Ch. 100, 16 Stat. 440.

> By the 43d section (Rev. Stat. sec. 4493) it is declared that whenever damage is sustained by a passenger or his baggage, the master and owner, or either of them, and the vessel, shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. But it does not alter the course of proceeding if the claim of limited liability is set up by the owner. If, in those proceedings, it should appear that the disaster did happen with his privity or knowledge, or, perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability; that is all.[22]

In *Hines v. Butler*[23] the court said:

> Interpreting the provisions of the act of 1851 with those of the act of 1871, or sections 4282, 4283 and 4493, together, the construction would appear to be that as they are statutes upon the same subject, that the earlier one creates a general rule of limitation of liability as then existing and the later statute proceeds to make exceptions for the better security and in favor of passengers.[24]

The Supreme Court, in *Norwich Co. v. Wright*,[25] viewed the administration of relief under the act of 1851, as "no court is better adapted than a court of admiralty to administer precisely such relief."[26] In that case the Court outlined the procedure for limitation proceedings and on May 6, 1872, promulgated Admiralty Rules 54-57 prescribing the practice in such proceedings.[27] These rules, with slight amendments, were carried over into Admiralty Rules 51-54, promulgated December 6, 1920.[28]

These rules provide that a shipowner may claim benefit of the

22. 130 U.S. at 533.

23. 278 F. 877 (4th Cir. 1921), *cert. denied*, 257 U.S. 659 (1922).

24. 278 F. at 881.

25. 80 U.S. (13 Wall.) 104 (1871).

26. 80 U.S. (13 Wall.) at 123.

27. 80 U.S. (13 Wall.) xii-xiv (1871). In *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883), the Court upheld its power to make these rules on the ground that the subject was "one preeminently of admiralty jurisdiction." 109 U.S. at 593.

28. 254 U.S. 24, 25-28 (1920). For a full discussion of procedure in limitation proceedings see 3 A. KNAUTH & C. KNAUTH, BENEDICT ON ADMIRALTY chapter VI (7th ed. 1969) [hereinafter cited as BENEDICT ON ADMIRALTY]. The Admiralty rules have now been consolidated with the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. *Supp. R.F.*

limitation statutes by filing in a United States district court in admiralty a petition for exemption from or limitation of liability, in which proceeding he must either transfer his interest in the ship and freight to a trustee for the benefit of claimants or he must pay into court the appraised value thereof or file a stipulation (or bond) in the amount of such value.[29] In such proceeding all persons having claims against the shipowner or the ship are brought into concourse by monition and enjoined from suing the owner or the ship on such claims in any other court.[30] The petition for limitation must be filed in the district wherein the ship has been sued *in rem*, or, if the ship has not been sued *in rem*, in the district wherein the ship or her remnants or proceeds may be, or wherein the shipowner had been sued.[31]

In *Hartford Accident Co. v. Southern Pacific Co.*,[32] the Court, referring to a limitation proceeding, said: "It is the administration of equity in an admiralty court . . . . The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill."[33] In that case the district court denied the petitioner's prayer for limitation of liability, but kept the limitation proceeding alive for the purpose of furnishing claimants therein a complete remedy, which procedure was upheld by the Supreme Court.[34] In *Spencer Kellogg & Sons v. Hicks*,[35] wherein limitation was also denied, the Supreme Court said that "the admiralty court, having taken jurisdiction and brought all claimants into concourse, should have given complete relief."[36]

Thus, admiralty has exclusive jurisdiction if the shipowner's right to limit liability is questioned.[37] The owner may set up such right in his answer when sued, and prior to 1936 could even contest

29. The City of Norwich, 118 U.S. 468, 493, 502 (1886); Thommessan v. Whitwill, 118 U.S. 520, 525-26 (1886); The Scotland, 105 U.S. 24, 34 (1881).

30. Hartford Accident Co. v. Southern Pac. Co., 273 U.S. 207, 214-15 (1927).

31. *In re* Morrison, 147 U.S. 14, 33 (1893); City of Norwich, 118 U.S. 468, 470 (1886); *Ex parte* Slayton, 105 U.S. 451, 452-53 (1881); Gleason v. Duffy, 116 F. 298, 301 (7th Cir. 1902). *See* FED. R. CIV. P. *Supp. R.F.*

32. 273 U.S. 207 (1927).

33. 273 U.S. at 216.

34. 273 U.S. at 217-18, 220.

35. 285 U.S. 502 (1932).

36. 285 U.S. at 512.

37. *Ex parte* Green, 286 U.S. 437, 439-40 (1932); *In re* Great Lakes Transit Corp., 63 F.2d 849, 851 (6th Cir. 1933).

liability and, if defeated, then assert in admiralty his right to limit liability.[38]

C. *Some Foreign Systems and International Conventions of Limitation*

In *The Main v. Williams*, Mr. Justice Brown, as discussed earlier, outlined the development of the legal principle limiting a shipowner's liability to his interest in the vessel. M. Ripert, a leading scholar in this field, points out that the laws of all countries recognize the principle that the shipowner's liability is limited to his "*fortune de mer*" and that this unanimity is evidence that the rule is a fundamental one in maritime law.[39] Although there is complete agreement as to the general principle, there is, however, wide diversity in its practical application.[40]

1. *French System.*—The French system has been adopted in Holland, Italy, Rumania, Spain, Portugal, Egypt, and Mexico and in most of Central and South America.[41] Ripert points out that the law in the United States is not quite similar to the French law since in the United States the value of the vessel and freight is fixed as of the termination of the voyage. Under French law, on the other hand, the freight abandoned is the freight with respect to the voyage preceding the abandonment, although this may be several voyages after that on which liability accrued.[42] As regards the ship, she must be handed over "*en nature*" to the creditors.

Japanese law, also, appears to be derived from French sources. Article 544 of the Japanese Commercial Code provides:

> A shipowner may relieve himself of his liability for any act done by the master within the scope of his legal authority, or for any damage done to another person by the master or by any other mariner in the performance of his duties, by abandoning to the claimant at the end of the voyage the ship, the freight, the passage money, and any claim which he may have for damages or for remuneration in connection with the ship: Provided that there has been no negligence on the part of the shipowner.
>
> The provisions of the preceding paragraph shall not apply to the

38. Larsen v. Northland Transp. Co., 292 U.S. 20 (1934); Steamship Co. v. Mount, 103 U.S. 239, 243 (1880). But the right to limit liability could not first be claimed on request for a charge to the jury.

39. M. RIPERT, DROIT MARITIME 878 (1913).

40. *Id.* at 878.

41. *Id.* at 890.

42. *Id.* at 945.

rights of any mariner which may have arisen out of the contract of service.

2. *English System.*—Under English laws[43] the owners of a ship "British or foreign" are entitled to limit their liability for losses occurring "without their actual fault or privity" for (1) loss of life, personal injury, or damage to goods, etc., on board the ship and, also, for (2) loss of life, personal injury, or damage to goods, etc., on another vessel and damage to another vessel "by reason of the improper navigation of the ship." The amount to be surrendered is "in respect of loss of life or personal injury . . . an aggregate amount not exceeding fifteen pounds" per ton; in respect of damage to vessels, goods, etc., an aggregate amount not to exceed eight pounds per ton.[44] The tonnage referred to in the statute is, of course, registered tonnage and not dead-weight or displacement. If a foreign ship has not been, and cannot be, measured, under British law, particulars as to the ship's dimensions may be furnished to the surveyor general, who shall issue a certificate as to the tonnage.

3. *German System.*—With reference to the German law, it is interesting to quote from *The German Law of Carriage of Goods by Sea*, by Dr. Alfred Sieveking:

> In order to understand the system of the German law with regard to the limitation of shipowner's liability, it is well to make this broad and general statement, viz. that the laws of all commercial countries concur in alleviating somehow or other the heavy burden of responsibility lying on shipowners' shoulders. This exception to the general rule of *respondent superior* is not based on any principle, but on equity, or rather, forms part of the commercial policy of a maritime country. Shipowners' business and, consequently, friendly intercourse between maritime nations, would soon come to an end if the law should either bind by too many restrictions individual freedom with regard to contractual stipulations, or should make the shipowner liable indiscriminately and without restriction for any slight fault of his servants toward third parties with whom he is not in contractual nexus. Considering the immense value of modern

43. *E.g.*, Merchant Shipping Act of 1894, § 503, *reproduced in* TEMPERLEY'S MERCHANT SHIPPING ACTS 311 (3d ed. 1961); 1 CARVER ON CARRIAGE BY SEA § 26 (12th ed. 1971).

44. While an examination of the antiquity of the rule might be of interest, it is beyond the scope of the present inquiry. For discussion see The Scotland, 105 U.S. 24, 28 (1881); The China, 74 U.S. (7 Wall.) 53, 68 (1868); M. MUELLER, LAST ESSAYS, FIRST SERIES, 214. A careful survey of the whole subject is contained in 5 M. RIPERT, DROIT MARITIME 876-976 (1913).

ships and modern cargoes, to destroy which a slight error or petty negligence committed by master or crew of either the carrying or the colliding vessel would suffice, shipowners would face ruin if the law did not come to their aid. Therefore, not in order to encourage, but to enable shipowners to carry on their business, their liability must be a limited one. This is a point of national interest and protection.

The manner in which this limitation is practically to be applied is a matter of mere convenience and of legal method. Two considerations must be kept well apart from one another: the limit of liability and the cases in which the limitation applies. With regard to the limit of liability the system of the German Code springs from historical ground; the descendants found no reason for altering the work of their forefathers. With regard to the application of the rule of limited liability to certain defined cases, the Maritime Code started from the idea, already mentioned, that in equity the shipowner cannot be made liable for the faults of persons over whom he has no control. The system of limited liability, as laid down in our Maritime Code, is founded on convenience and legal method.

Centuries past, the system of limiting shipowner's liability to ship and freight, relieving him from personal liability, became largely the custom and the law regulating European commerce. But whereas in France and adjoining countries the idea of the Roman *noxae datio* led to the system of abandonment now in force, Germany adhered to the views and ideas of German law in establishing from the outset the rule that the thing itself, and not the owner, is liable for any damage done by it, that is to say, that the owner is in no way personally liable, but is bound to hand over the ship and her freight to meet the claims of his creditors, or rather of the creditors of the ship.[45]

4. *International Conventions*

(a) *Brussels Convention, 1924.*—In October, 1922, a conference was held at Brussels to formulate rules as to limitation of liability. At this conference twenty-four governments were represented by delegates.[46] After discussion, the delegates unanimously agreed to recommend to their respective governments a "Draft International Convention for the Unification of Certain Rules of Law Relating to the Limitations of Liability of Owners of Seagoing Vessels."[47]

45. As quoted in 9 M. RIPERT, DROIT MARITIME 85-86 (1913).

46. Argentina, Belgium, Chile, Cuba, Denmark, Estonia, Finland, France, Germany, Great Britain, Holland, Hungary, Italy, Japan, Latvia, Norway, Poland, Portugal, Rumania, Serbia, Spain, the United States, and Uruguay.

47. Text in full at 6A BENEDICT ON ADMIRALTY 625.

The American delegates,[48] in their report to the President of the United States dated December 20, 1922, summarized the proposed convention as follows:

> The results of this proposed treaty, from the viewpoints of shipowner, cargo owners, and other claimants, we may summarize as follows:
>
> The shipowner benefits because:
>
> 1. His liability is limited in any event to £8 per ton with respect to claims other than those for personal injury and loss of life, and an additional £8 per ton with respect to the latter class of claims.
> 2. A limitation proceeding in one country is given recognition in all other countries parties to the convention.
>
> All claimants benefit because,
>
> 1. Even if the vessel is a total loss, and although there was no pending freight, a limitation fund is provided equal to 10 per cent of the value of the vessel at the commencement of the voyage.
> 2. The limitation fund also receives any compensation for material damage sustained by the vessel since the beginning of the voyage and not repaired, and any general average contributions with respect to the same.
> 3. In the event of more than one accident on the same voyage the diminution of value so caused is not taken into account in considering claims connected with previous accidents.
> 4. The shipowner is not permitted to secure exoneration by the surrender of his vessel, but is compelled to prove its value.
> 5. A separate fund for personal injury and loss of life claimants of £8 per ton in every case.
>
> The outstanding features of the changes proposed in existing American law are:
>
> 1. The limitation of the shipowner's liability to £8 per ton, in respect of claimants other than personal injury or loss of life claimants.
> 2. The creation of a fund of 10 per cent of the value of the ship at the commencement of the voyage, even in cases of total loss.
> 3. The abolition of the right to surrender the ship.
> 4. The creation of a fund of £8 per ton to pay personal injury and loss of life claims. This not only insures compensation to such claimants, but benefits other claimants by decreasing the number of claimants with whom they must share the limitation fund available to them.

48. The United States was represented by the Honorable Charles M. Hough and Mr. Norman B. Beecher. Judge Hough is a distinguished and well known member of the admiralty bar and district and circuit court judge, while Mr. Beecher has had great experience in admiralty matters.

5. The establishment of a uniform system of limitation of liability to be internationally recognized and respected.

We recognize the difficulties that may arise in the practical administration of this convention, particularly in cases where claims are asserted in the courts of different nations; but we believe that these difficulties are not insurmountable, and may properly be left to be remedied as they arise, by subsequent conference.[49]

The final text of the convention was signed by several obligations during August, 1924, but no United States delegate signed. This convention was finally ratified by fourteen countries,[50] but not by the United States.

(b) *Brussels Convention, 1957.*—At the Tenth Diplomatic Conference on Private Maritime Law, held at Brussels from September 30 through October 10, 1957, an International Convention Relating to the Limitation of the Liability of Seagoing Ships[51] was drawn up and signed by several delegations. No member of the United States delegation, comprised of the Honorable Clarence G. Morse (Maritime Administrator and Chairman of the Federal Maritime Board), John W. Mann (State Department), Oscar Houston, Esq., and E. Robert Seaver, Esq., signed the convention.[52] Forty nations had either ratified or adhered to the 1957 Brussels Convention by 1967.[53]

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49. 6A BENEDICT ON ADMIRALTY 625.

50. The Netherlands (not specifically but through harmonization of Dutch law), Belgium (1930), Brazil (1931), Denmark (1930), Finland (1934), France (1935), France for Algeria (1936), Hungary (1930), Iceland (1930), Monaco (1931), Norway (1933), Poland (1936), Portugal (1930), Spain (1930), Sweden (1938), and Turkey (1955).

51. Text in full at 6A BENEDICT ON ADMIRALTY 636-41.

52. 6A BENEDICT ON ADMIRALTY 634-36. The text of the 1957 Convention is also fully reported. *Id.*, at 635-41.

53. Great Britain and Northern Ireland ratification February 18, 1959; France ratification July 7, 1959; Spain ratification July 16, 1959; Isle of Man adherence November 18, 1960; Ghana adherence July 26, 1961; Singapore adherence April 17, 1963; Sweden ratification June 4, 1964; Algeria adherence August 18, 1964; Finland ratification August 19, 1964; Bahamas adherence August 21, 1964; Bermuda adherence August 21, 1964; British Antarctica adherence August 21, 1964; British Honduras adherence August 21, 1964; British Solomon and Falkland Islands adherence August 21, 1964; Fiji Islands adherence August 21, 1964; Gibralter adherence August 21, 1964; Gilbert and Ellice Islands adherence August 21, 1964; Hong Kong adherence August 21, 1964; Mauritius adherence August 21, 1964; Seychelles adherence August 21, 1964; British Virgin Islands adherence August 21, 1964; Guernsey and Jersey Islands adherence October 21, 1964; Norway ratification March 1, 1965; Denmark ratification March 1, 1965; Malagasy Republic adherence July 13, 1965; Cayman Islands adherence August 4, 1965;

D. *Limitation of Liability in the United States as it Exists Today*

The core of the present limitation statute is found in Title 46 United States Code, Section 183, which provides "The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel and her freight then pending." The term "owner" includes owners of shares in the vessel, foreign owners,[54] and a bareboat charterer "in case he shall man, victual and navigate the vessel at his own expense or by his own procurement."[55] A time charterer is not entitled to limit liability.[56] In addition, the right to limitation of liability has been extended to the owners of "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters" providing the casualty happened on navigable waters of the United States.[57]

The essential ingredient for claiming limitation of liability is that the cause of the casualty not be within the "privity or knowledge" of the owner. "Privity or knowledge" is a term of art mean-

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Dominica adherence August 4, 1965; Grenada adherence August 4, 1964; Montserrat adherence August 4, 1965; St. Lucia adherence August 4, 1965; St. Vincent adherence August 4, 1965; Turks and Caicos Islands adherence August 4, 1965; United Arab Republic adherence September 7, 1965; the Netherlands ratification December 10, 1965; Switzerland ratification January 21, 1966; Guiana adherence March 25, 1966; Iran adherence April 26, 1966; New Hebrides (French-British condominium) adherence December 8, 1966; Congo (Democratic Republic) adherence July 16, 1967; and Israel ratification November 30, 1967.

The countries and the system employed in each are listed as follows: Argentina, French; Australia, English; Belgium, Brussels Convention; Brazil, Brussels Convention; Canada, English; Chile, French; Colombia, French; Cuba, French; Denmark, Brussels Convention; Egypt, French; Finland, Brussels Convention; France, French; Germany, German; Great Britain, English; Greece, French; India, British; Italy, French; Japan, French; Mexico, French; Netherlands, Brussels Convention; New Zealand, English; Nicaragua, French; Norway, Brussels Convention; Paraguay, French; Portugal, Brussels Convention; Rumania, French; South Africa, English; Spain, Brussels Convention; Sweden, Brussels Convention; Uruguay, French; Venezuela, French. *Id.* at 635-36.

54. *See, e.g.*, The Scotland, 105 U.S. 24 (1882); Pennell v. Read, 309 F.2d 455 (5th Cir. 1962).

55. *See, e.g.*, Admiral Towing Co. v. Wodlen, 290 F.2d 641 (9th Cir. 1961) (possession and control alone not sufficient); Dupont v. Bentley, 19 F.2d 354 (2d Cir. 1927).

56. *In re* Barracuda Tanker Corp., 409 F.2d 1013 (2d Cir. 1969).

57. *In re* Madsen, 187 F. Supp. 411 (N.D.N.Y. 1960); *In re* Keller, 149 F. Supp. 513 (D.C. Minn. 1956).

ing "complicity in the fault that caused the accident."[58] Many courts have defined "privity or knowledge," but one of the clearest definitions was by Judge Ainsworth, who said "Privity means personal cognizance or participation in the fault or negligence which causes the accident [citing cases] . . . . The term knowledge as used in the statute has been held to mean not only personal cognizance but also the means of knowledge of which a party must avail himself in order to prevent a condition likely to produce or contribute to a loss [citing cases] . . . ."[59] Hence an individual owner must personally participate in the fault or negligence which causes the injury. In particular, if the individual owner delegates authority to a competent man, he may not be charged with constructive privity or knowledge.[60]

1. *The Limitation Fund.*—If no deaths or injuries are involved, the limitation fund consists of the value of the vessel at the end of the voyage plus the earning or "pending freight" of that voyage.[61] It may be curious to speak of freights already earned as still "pending," but that was the effect of the decision in *The Main v. Williams.*[62] There, the fares of passengers had been prepaid in advance, but were nevertheless treated as pending freight for, as Mr. Justice Brown observed, the phrase is used as an equivalent of the "earnings of the voyage."[63]

58. Blackler v. Jacobus, 243 F.2d 733, 735 (2d Cir. 1957).

59. Greater New Orleans Expressway v. The Clairbel, 222 F. Supp. 521, 524 (E.D. La 1963), *aff'd sub nom.* Coleman v. Jahncke, 341 F.2d 956 (6th Cir. 1965). *See also* 3 BENEDICT ON ADMIRALTY §§ 41 (individual owners), and 42 (corporate owners) (7th ed. 1969), for additional cases and definitions. Recent cases defining corporate privity and knowledge are essentially in accordance with Judge Ainsworth. *See* Smith Voyager, 439 F.2d 109, 114 (2d Cir. 1971); China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 787 (5th Cir. 1966); Slaten v. Hopemount Shipping Co., 345 F.2d 451 (5th Cir. 1965); Avera v. Florida Towing Corp., 322 F.2d 155, 166 (5th Cir. 1963); Donegan Hills, 282 F.2d 120, 123 (2d Cir. 1960).

60. Coryell v. Phipps, 317 U.S. 406 (1943).

61. 46 U.S.C. § 183(b) (1970) provides:

> In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

62. 152 U.S. 122 (1894).

63. *Cf.* The San Simeon, 63 F.2d 798 (2d Cir. 1933).

Should the vessel whose owner seeks limitation make a recovery for collision damages, this recovery becomes part of her limitation fund, although the owner's insurance proceeds are not considered part of the fund.[64] It is this latter situation that, at least partially, has instigated the passing of direct action statutes, which will be considered subsequently in this article.

In the case of a tug and tow owned by the same party, the law is not so clear as to whether the tow must also be included in the limitation fund. On the one hand, it has been affirmatively held that should a tug bring an *innocent* tow into collision with another vessel, the tow being only "the passive instrument of harm," the tow should not be included in the limitation fund.[65] On the other hand, in the event that there is a contractual relationship and more than one vessel is being used to carry out the contract, then both the tug and tow are required to be surrendered.[66]

2. *The Limitation Complaint.*—If an owner wishes to bring into concourse all the claims from a given casualty, he must, pursuant to 46 U.S.C. § 185, file a complaint seeking exoneration and limitation of liability within six months from receipt of the first written notice of claim. A careful attorney will generally take the date of the casualty so as to be sure that he is within the six month period. The procedure for filing the complaint is outlined in Supplemental Rule F of the Federal Rules of Civil Procedure. The six-month deadline does not apply if limitation is claimed in an answer. However, it will only be limitation as to that suit, and would have the same effect as if there were only one claim.[67]

3. *The Burden of Proof.*—In seeking exoneration from or limitation of liability, [plaintiffs] are required to establish that the vessel was seaworthy when she broke ground . . . and to bring out the facts known to them which might have a bearing on the cause of disaster."[68] The same thought was expressed by Judge Learned Hand in the *S.S. Hewitt*:

64. O'Brien v. Miller, 148 U.S. 287, 305 (1892); The City of Norwich, 118 U.S. 468 (1886).

65. Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal, 251 U.S. 48 (1919); *but see* Lake Tankers Corp. v. Henn 352 U.S. 914 (1956) *aff'g* Petition of Lake Tankers Corp., 232 F.2d 573 (2d Cir. 1956).

66. Sacramento v. Salz, 273 U.S. 326, 322 (1926); Standard Dredging Co. v. Kristiansen, 67 F.2d 548 (2d Cir. 1933). *See also In re* Drill Barge No. 2, 454 F.2d 408 (5th Cir. 1972) (the court apparently relied on the fact that "all three vessels contributed to the collision").

67. *See, e.g.*, Deep Sea Tankers v. The Long Brush, 258 F.2d 757, 772 (2d Cir. 1958); The Checkie, 141 F.2d 80, 84-85 (3d Cir. 1944).

68. The Smith Voyager, 203 F. Supp. 172, *aff'd*, 409 F.2d 109 (2d Cir. 1971).

> In undertaking to prove that the loss did not occur without his privity, the owner must necessarily show either just how the loss did occur, or, if he cannot, he must exhaust all of the possibilities and show that as to each he was without privity.[69]

Accordingly, it is necessary for the plaintiff, in a limitation proceeding, to produce all the evidence that is possible, and show that he was without privity or knowledge of the casualty.

II. Direct Action Statutes and Avoidance of the Limitation Statutes

The limitation statutes discussed in the foregoing section are all premised on the principle that an *owner* of a ship may limit his liability by surrendering a sum of money or the ship, or both, providing the casualty occurred without his fault, knowledge, or privity. The statutes do not refer to insurers or underwriters, and until about 1950 it was thought that the liability of insurers was limited as is the owner's. The principal vehicle used to accomplish this result was to word the insurance contract as an indemnity contract so the insurance company did not have to pay until the assured paid, and its liability was thus measured and limited by the amount paid by the assured.

However, in 1950, Louisiana codified its insurance law and included a provision that: "The injured person or his heirs, at their option, shall have a right of direct action against the insurers within the terms and limits of the policy . . . and said action may be brought against the insurer alone or against both the insured and insurer jointly . . . ."[70]

This was the development from legislation, not unlike that in most states, that prohibited issuance of insurance policies that barred recovery from insurers if the insured tortfeasor became bankrupt. In 1930 the scope of this legislation was broadened to allow direct action against either the tortfeasor, or insurer, or both, jointly and in *solido*, if the accident or injury occurred in Louisiana.[71]

Thereafter, the initial consensus of authorities was, not illogically, that this statute did not apply to marine policies of insur-

69. S.S. Hewitt, 284 F. 911, 912 (S.D.N.Y. 1922). The same language is used and the same idea expressed in *Terracciano v. McAlinded*, 485 F.2d 304 (2d Cir. 1973). Also see *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941), for a discussion of the burden of going forward with the evidence.

70. 22 La. Rev. Stat. § 655 (1959).

71. No. 55, [1930] La. Acts.

ance.[72] The Louisiana Insurance Code defined "Liability Insurance" as well as "Ocean Marine and Foreign Trade Insurance" and distinguished between the two.[73] In addition, the code exempted ocean and marine insurance from the application of direct action.[74]

One would have thought that this ended the matter, but the Fifth Circuit, in *Cushing v. Maryland Casualty Co.*,[75] said: "The Louisiana legislature did not intend to deny the right of direct action to persons covered by marine policies, while extending it to others."[76] On certiorari, the United States Supreme Court in *Maryland Casualty Co. v. Cushing*[77] divided 4-4-1, four justices believing the direct action statute conflicted with the limitation of liability statutes, four justices seeing no conflict, and a single justice taking the best of both worlds, and removing any conflict by staying suits brought under the Direct Action Statute until after trial of limitation of liability. To break the deadlock, the four justices who found the direct action statute in conflict with the limitation of liability statutes adopted this solution.[78] Thus, the Supreme Court avoided the question whether the direct action statute was in conflict with the limitation statutes.

In response to *Cushing*, the Louisiana Legislature amended the Direct Action Statute in 1962 to declare the legislative intent of the statute to be "that all liability policies within their term and limits are executed for the benefit of all injured persons . . . to whom the insured is liable . . . ."[79]

72. *See* Cushing v. Texas & P.R.R., 99 F. Supp. 681, 683 (E.D. La. 1951) (opinion by Wright, J.).

73. Section 6(4) of Insurance Code defined "liability insurance" as "[i]nsurance against liability of insured for death or disability or employee or other person, and against the liability of the insured for damage to or destruction of another's property." In contrast, section 6(13) defined Ocean Marine Insurance as "insurance against legal liability of the assured for loss, damage or expense arising out of the ownership . . . of any vessel . . . including the liability of the insured for personal injury or death, or for loss of or damage to property of another person."

74. 22 LA. REV. STAT. § 611 (1959).

75. Cushing v. Maryland Cas. Co., 198 F.2d 536 (5th Cir. 1952).

76. 198 F.2d at 538.

77. 347 U.S. 409 (1954).

78. Justice Frankfurter and three of his associates would have reinstated the district court dismissal. Justice Black and three others would have affirmed. Justice Clark, in a concurring opinion, actually wrote the opinion of the court, because the Frankfurter group acquiesced in his opinion as the judgment of the Court.

79. 22 LA. REV. STAT. § 655(2) (1959), *as amended by* No. 471, [1962] La. Acts § 1.

Thereafter, the question arose again in *In Re Independent Towing Co.*,[80] in which Judge Ellis held that limitation of liability was a defense personal to the shipowner and was not available to the insurance company. It was not long until the same question was faced in *Olympic Towing Corporation v. Nebel Towing Company*.[81] Although the panel divided seven to six, the Fifth Circuit, *en banc*, after upholding the right of a claimant to file a direct action against the insurance companies, denied a petition for rehearing, holding:

> We hold that any conflict between the direct action statute and the federal provision for a concursus of claims in admiralty is so minimal as to be insignificant.
>
> Regarding the matter of higher premiums, even if this question had not been implicitly disposed of by *Cushing*, we would reject the contention. To begin with, since in the vast majority of cases, limitation is denied for one reason or another, *it may well be questioned how significantly the possibility of limitation figures into the actuarial computation of premiums.*[82] (Emphasis supplied).

The six dissenting judges and particularly Chief Judge John R. Brown, were not inclined to dismiss so casually the possibility of limitation of liability:

> Thus the Court errs in proceeding as though the Supreme Court had resolved either the construction, application and interpretation of Louisiana statute, or, equally important, the extent to which its impact upon the underwriter can amount to a direct burden on the shipowner in excess of that which Congress has determined he shall bear when entitled to his liability under the Statute . . . .
>
> The Statute was not intended to create a new liability against the insurer. It was intended merely to afford a direct, non-circuitous means of satisfaction of a claim judicially determined to be owing by the assured and which is within the limits and terms of the coverage afforded by the insurance policy. This is the plain language of the Act itself . . . .[83]

The dissenters continued:

> As long as the Direct Action Statute subjects the insurer to no greater liability than the assured would have, it fulfills the Louis-

80. 272 F. Supp. 950 (E.D. La. 1965). The case was settled without appeal and therefore we are without the benefit of comment by an appellate court.

81. 419 F.2d 230 (5th Cir. 1969).

82. 419 F.2d at 235.

83. *Id.* at 240.

> iana policy of public protection and avoids troublesome questions of conflict between state and federal maritime law. The court's reading rewrites the contract, imposes liability beyond that of the assured and ignores substantive limitations on liability under maritime principles. The essential uniformity of the admiralty is at an end when for a like casualty across the line in Texas the 'liability' of the shipowner is less—by the amount of total damages and the policy limits—than it is in Louisiana.[84]

That the limitation of liability statute is not yet dead is apparent from examining *Wilbur-Ellis Co. v. M/V Catayannis S*,[85] involving a vessel patently unseaworthy with respect to her radio, which prevented the master from raising the pilot station, resulting in the vessel being stranded. After carefully considering the facts, the court held that the proximate cause of the accident was the negligence of the master, and not the unseaworthiness of the vessel. The court further stated that limitation of liability for negligent navigation is not conditioned on unseaworthiness, or even on a showing that due diligence had been exercised.[86]

It would seem, therefore, that the *majority* of the *en banc* Fifth Circuit was too quick to bury the limitation statute. However, undeniably, insofar as the Fifth Circuit is concerned, the law is as stated in *Olympic Towing*.

Louisiana is not the only state to pass a direct action statute. Such statutes have been enacted in Puerto Rico, Wisconsin, and Rhode Island. Thus far the direct action statute has come into conflict with the limitation statutes only in Puerto Rico. In *Torres v. Interstate Fire & Casualty Company*,[87] the court reviewed the history of the direct action statute and accepted a statement by the Supreme Court of Puerto Rico that the Puerto Rican statutes were amended in 1958 to bring the direct action statute "completely in line with the Louisiana Direct Action Statute."[88]

The Puerto Rico statute provides:

> The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury, death, or damage to property of a third person, shall become absolutely liable whenever a loss covered by the policy occurs, and payment of such loss by the insurer to the extent of his liability therefore under the

84. *Id.* at 246.
85. 305 F. Supp. 866 (D. Ore. 1969).
86. 306 F. Supp. at 871.
87. 275 F. Supp. 784 (D. P.R. 1967).
88. 275 F. Supp. at 788.

policy shall not depend upon payment by the insured of or any final judgment against him arising out of such occurrence.[89]

Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer and the insured jointly. The direct action against the insurer may only be exercised in Puerto Rico. The liability of the insurer shall not exceed that provided for in the policy and the Court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section may be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured . . . .[90]

If the plaintiff in such an action brings suit against the insured alone, such shall not be deemed to deprive him of the right, by subrogation, to the rights of the insured under the policy, to maintain action against the recovery from the insurer after securing final judgment against the insured.[91]

The trial judge in *Torres v. Interstate Fire & Casualty Company*, facing the question whether a direct action against the insurance company could be enjoined, relied heavily on the views of Judge Ellis in *Independent Towing*, in allowing the direct action to proceed to trial without waiting for a trial on entry of judgment in the limitation of liability proceeding, as the amount of insurance available exceeded the claimed damages.[92] It may be that if the insurance is insufficient to pay the claims then the limitation of liability proceeding would be tried first.

Both Louisiana and Puerto Rico have a civil law background as a basis of their contrast to the common law background of the remainder of the United States, and this may, to some extent, explain the views of the courts in those jurisdictions. In at least two other jurisdictions, however, courts have created rights of direct action against the insurer. The Florida Supreme Court created a right of direct action in *Shingleton v. Bussey*,[93] and the New York Court of Appeals created a similar right in *Seider v. Roth*.[94] However, no case has been found in which the right of action created in these decisions has been used to escape limitation of liability procedures.

89. 26 LAWS PUERTO RICO ANN. § 2001 (1958).
90. 26 LAWS PUERTO RICO ANN. § 2003(1) (1958).
91. 26 LAWS PUERTO RICO ANN. § 2003(2) (1958).
92. *See* text accompanying note 81 *supra*.
93. 223 So. 2d 713 (Fla. 1969).
94. 216 N.E.2d 312 (N.Y. 1966).

III. CONCLUSION

The limitation of liability statutes are in full force and effect, and with the exception of the State of Louisiana and the Commonwealth of Puerto Rico, the courts freely grant limitation. There is no right to proceed against insurance companies directly in an avoidance or evasion of the statutes except in jurisdictions with direct action statutes.

In Louisiana and Puerto Rico, the state direct action statute has been used to avoid the effect of federal limitation statutes. However, the matter is not yet settled, for this interpretation of the direct action statute rests upon *Maryland Casualty Co. v. Cushing*, in which the Supreme Court reached no decision, and on *Olympic Towing Corporation v. Nebel Towing Company*, in which the *en banc* Fifth Circuit divided on the proper application of the direct action statute of Louisiana. Therefore, in the future, particularly if Congress modernizes the limitation statutes, there may be still an opportunity to invoke the limitation statutes in Louisiana and Puerto Rico in spite of the direct action statutes.[95]

The application of the direct action statutes, which purport to give to plaintiffs a new procedure and not a new cause of action, appears to be a strained interpretation. After all, most things are insured these days, and this is true of maritime matters. Therefore, to require the maritime insurers to pay more than their insured may be required to pay is to avoid the purpose of the limitation statutes, which is to encourage shipping by allowing shipowners to fix their exposure to liability to the value of their interest in a particular venture. It is pure sophistry to say the underwriters pay, and not the shipowner, because the underwriters receive their money from premiums charged to the shipowner, and if the underwriter pays, the shipowner will eventually pay through higher premiums or the disappearance of the insurance market. Either result would be adverse to the shipping industry and would effectively negate the purpose behind the limitation of liability statutes.

95. With regard to Rhode Island, Wisconsin, and Arkansas, no decisions have become available to determine the impact of the direct action statutes of those states in admiralty proceedings.