

Recent Developments in the Shipowner's Limitation of Liability Act

By: Arthur A. Crais, Jr. *

Table of Contents

I.	Introduction	2
II.	Small Passenger Vessel Liability Fairness Act of 2021	2
III.	What constitutes “notice” to begin the six-month period to file for limitation/exoneration?	4
IV.	Stipulations to Stay Limitation Proceedings	6
A.	Personal Contracts and Limitation of Liability	6
B.	Adequacy of the Stipulations	8
V.	Miscellaneous Limitation Opinions of Interest.....	11
A.	The Flotilla Doctrine and Pure Tort Exception	11
B.	Compulsory Pilot Defense.....	12
C.	Statutory Imputation of Privity or Knowledge.....	13
D.	Direct Action and Insurer’s Right to Limitation of Liability	14
E.	Insufficient Security	15
F.	Plausibility Standard for Sufficiency of Limitation Complaint	16
G.	Timeliness of filing limitation complaint: A jurisdictional or claims processing rule? 18	
VI.	Conclusion	19

* Legal Counsel, Shell Oil Co. (Retired); Adjunct Professor of Admiralty and Maritime Law, Loyola University New Orleans College of Law.

I. Introduction

This article was prepared for the Loyola Maritime Law Journal's Symposium on the Shipowner's Limitation of Liability Act of 1851 held in February of 2022 at Loyola University New Orleans College of Law in New Orleans, Louisiana. The purpose of this piece is to review recent developments of note in this area of maritime law.

The Shipowner's Limitation of Liability Act has been in effect for 171 years since its enactment in 1851 and has changed little. It was ostensibly passed to afford American shipowners similar advantages that British and other European countries granted their vessel owners, and to stimulate investment in American shipping.¹ International Conventions² have largely normalized shipowners' limitation of liability on the international scene. However, the United States is currently not a party to these conventions. Whether the Act is an anachronism outliving its initial purpose or whether it should be amended to conform more to the international maritime conventions is beyond the scope of this article. The Act despite its 171 years of existence continues to generate proposed amendments, novel legal issues and jurisprudence.

II. Small Passenger Vessel Liability Fairness Act of 2021

On September 22, 2021, Senator Dianne Feinstein introduced a proposed amendment to the Shipowner's Limitation of Liability Act, entitled the Small Passenger Vessel Liability Fairness Act of 2021.³ H.R. 5329, which is the same as the Senate bill, was simultaneously introduced in the House of Representatives by Representative Salud Carbajal.⁴ The proposed legislation was introduced specifically in response to the tragic fire on the Dive Boat CONCEPTION on September 2, 2019, which resulted in the loss of 34 lives.⁵

Both pieces of legislation re-designate Sections 30503 through 30512 as Sections 30521 through 30530. Thus, § 30503, Declaration of nature and value of goods becomes § 30512; covered vessels under the act would be exempt from this provision. Section 30504, loss by fire is moved to §30513 and exempts the vessel owner from liability for merchandise on the vessel damaged by fire unless the owner has privity or knowledge. Small passenger vessels would still be included in this provision. Next, §30505 would become §30514 which limits the owner's liability to the value of the vessel including pending freight. In the event of multiple owners, the liability is apportioned

¹ See James J. Donovan, *The Origins and Development of Limitation of Shipowner's Liability*, 53 TUL. L. REV. 999 (1979); see also Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW 185-87 (6th ed. 2018).

² International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, Oct. 10, 1957; International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.

³ Small Passenger Vessel Liability Fairness Act of 2021, S. 2805, 117th Cong. (2021).

⁴ H.R. 5329, 117th Cong. (2021).

⁵ Carbajal, Feinstein Introduce Bill to Reform Liability Rules For Maritime Accident Compensation, (September 22, 2021)

<https://carbajal.house.gov/news/documentsingle.aspx?DocumentID=967>.

on a *pro-rata* basis. This would remain the same. Section 30506 establishes a minimum fund for personal injury and death claims, but this section applies only to seagoing vessels. Section (e) also statutorily imputes privity or knowledge of the master, superintendent or agent prior to the voyage on the owner. This would be moved to §30515. At present this provision applies only to “seagoing vessels.” However, because some small passenger vessels are presently exempt from this section, they may no longer be exempt if the proposed legislation is enacted.

Both bills intend to add an additional definition to 46 U.S.C. § 30501, “small passenger vessel” to include vessels under 100 gross tons as determined by 46 U.S.C. §14502 or an alternative method under either 46 U.S.C. § 14302 or § 14104 and which vessel carries no more than 49 passengers on overnight domestic voyages and not more than 150 passengers on any other voyage.⁶ Wooden vessels built prior to March 11, 1996, carrying passengers overnight are also included.⁷

One of the more likely controversial provisions in each is 46 U.S.C. § 30541, which authorizes the U.S. Coast Guard within 90 days after the bill’s enactment to promulgate regulations to provide “just compensation” in a claim against an owner if a covered small passenger vessel is found liable.⁸ The proposed legislation does not define “just compensation,” which is far too vague. The Death on the High Seas Act (“DOHSA”), for example, explicitly restricts recovery of damages to “pecuniary damages,”⁹ precluding punitive damages and such non-pecuniary damages as loss of society and loss of love and affection.¹⁰ Would this legislation authorize the Coast Guard to expand damages to include non-pecuniary and punitive damages though precluded by statute? Further, the U.S. Supreme Court has restricted the rights of action for maritime deaths under General Maritime Law and has held that survival actions are not cognizable under General Maritime Law, thus barring recovery for the decedent’s conscious pain and suffering prior to death.¹¹ Could the Coast Guard now create a new survivor’s right of action? One must question whether this is also an unconstitutional delegation of authority. Further, even if within its power, it is highly unlikely that the U.S. Coast Guard will take it upon itself to write regulations pertaining to damages that contravenes the established law.

46 U.S.C. § 30541 is added to impute the knowledge of “of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage” to the owner of a covered small passenger vessel. The present provision, § 30506(b), exempts “pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters, or nondescript vessels”¹² from the imputation of the knowledge of the superintendent or owner’s managing agent at the beginning of the voyage to the owner of the vessel. If enacted this would be a substantial change in the act as the present imputation of knowledge applies only to “seagoing vessels.” A seagoing vessel, based on the little jurisprudence

⁶ H.R. 5329; S. 2805.

⁷ *Id.*

⁸ *Id.*

⁹ 46 U.S.C. § 30303.

¹⁰ *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621 (1978).

¹¹ *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 117 (1998).

¹² 46 U.S.C. §30506(b). This provision at present only applies to “seagoing vessels.”

established, includes a vessel that is intended to navigate beyond the Boundary Line in its regular operations.¹³ The Boundary Line is 12 nautical miles from the coast.¹⁴

III. What constitutes “notice” to begin the six-month period to file for limitation/exoneration?

46 U.S.C. § 30511(a) requires the limitation claimant to file for limitation or exoneration from liability within six months of receiving written notice of a claim. *In re Eckstein Marine Service, L.L.C. v. Jackson (In re Eckstein Marine Service, L.L.C.)*,¹⁵ the U.S. Court of Appeals for the Fifth Circuit adopted the standard established by the Second Circuit in *Complaint of Morania Barge No. 190, Inc.*,¹⁶ that written notice must raise only a reasonable possibility the claim will exceed the value of the vessel to satisfy the written notice requirement. In *Brown v. Edwards & Richter, L.L.P. (In Re Brown)*,¹⁷ in which the value of the vessel was *de minimis*, \$2000, and the damage to the pilings of a dock of a marina was far in excess of that amount, the Fifth Circuit held that the notice was sufficient to inform the vessel owner that the damage claim would exceed the vessel’s value.

Additionally, the Eleventh Circuit in *Orion Marine Constr., Inc. v. Carroll*¹⁸ adopted the test that the written notice must raise a reasonable possibility that the claims will exceed the value of the vessel but was confronted with a host of other *res nova* issues. Orion was under contract with the Florida Department of Transportation to rebuild a bridge and utilized four barges to drive pilings into the sea floor.¹⁹ Due to the trembling, numerous homeowners maintained that their homes were damaged due to the construction work.²⁰ The court concentrated on nine complaints filed either with Orion, the Florida Department of Transportation or the third-party administrator of Orion, FARA Insurance. Each was filed six months before Orion filed for limitation of liability.²¹ Two early claimants filed a Motion to Dismiss the Limitation Act for lack of subject matter jurisdiction asserting that the limitation complaint was filed more than six months prior to written notice.²² The trial court permitted limited discovery which revealed a mix of various complaints formal and informal, both orally and in writing.²³ The appellate court grouped the complaints as follows: “(a) oral complaints that were (i) made to and memorialized in writing by Orion or (ii) made to and memorialized in writing by FARA or FDOT and then forwarded to Orion;

¹³ *In re Talbott Big Foot, Inc.*, 854 F.2d 758, 761 (5th Cir. 1988).

¹⁴ *Id.*

¹⁵ *In re Eckstein Marine Service, L.L.C.*, 672 F.3d 310 (5th Cir. 2012).

¹⁶ *In re Moriana Barge No, 190, Inc.*, 690 F.2d 32, 34 (2d Cir. 1982); *Doxsee Sea Clam Co., Inc., v. Brown*, 13 F.3d 550, 554 (2d Cir. 1994); *see also In re Complaint of Mccarthy Bros. Co./Clark Bridge*, 83 F.3d 821 (7th Cir. 1996) where the U.S. Court of Appeals for the Seventh Circuit also adopted the reasonable possibility test to satisfy the notice requirement.

¹⁷ *In re Brown.*, 766 Fed. Appx. 30 (5th Cir. 2019).

¹⁸ *Orion Marine Construction, Inc. v. Carroll*, 918 F.3d 1323 (11th Cir. 2019).

¹⁹ *Id.* at 1326.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1325.

²³ *Orion*, 918 F.3d at 1326.

and (b) written complaints that were (i) made to FARA and then forwarded to Orion or (ii) made to FDOT and then forwarded to Orion.”²⁴

First, the panel addressed the procedural issue of whether the six-month filing deadline of the Act is jurisdictional or procedural.²⁵ Referencing its own precedent in *Secretary v. Preston*,²⁶ in which another panel reviewed more recent Supreme Court jurisprudence regarding jurisdictional deadlines and claims processing rules, the Eleventh Circuit held that the six-month filing limitation in the Act is not jurisdictional and is to be considered as a Motion to Dismiss for failure to state a claim under Rule 12(b)(6).²⁷ That, however, was not the end of the inquiry as the panel then addressed the merits of the claim and whether the limitation action was untimely. In doing so the panel turned to the various groups of claims.

First, the court examined what written notice suffices to begin the time limitation for the vessel owner to file for limitation. The panel acknowledged that it was time for the appellate court to adopt one of two tests: (1) the *Doxsee* test “reasonable possibility test”²⁸ or (2) the *Moreira* test.²⁹ With the *Doxsee* test having been adopted by a majority of the circuits, the panel chose it because a “reasonable-possibility requirement serves the six-month limitation period’s purpose by encouraging shipowners to act promptly while at the same time eliminating consideration of small-value cases unlikely to benefit from the Act’s protection.”³⁰

Next, the panel addressed which notices satisfied this requirement. First, contrary to the trial court’s determination, the panel dismissed the idea that oral notices then memorialized by Orion satisfied the “written notice” requirement of the Act as these were not written notices by any claimants.³¹ Likewise, oral notices to the FDOT and to the third-party administrator, FARA, which were written later did not qualify as written notice from a claimant.³²

Additionally, written notices given to the FDOT and then forwarded to Orion also failed to qualify as written notice as the FDOT was not an agent of Orion and had no apparent authority from Orion to receive written notice on behalf of the vessel owner.³³ Turning next to the third-party administrator, FARA was the claims administrator for Orion and had either actual or apparent authority to act on behalf of Orion. Thus, any written notices by claimants to FARA constituted written notice to Orion.³⁴

²⁴ *Id.* at 1327.

²⁵ *Id.* at 1328.

²⁶ *Secretary v. Preston* 873 F.3d 877 (11th Cir. 2017).

²⁷ *Orion*, 918 F.3d at 1329-1330.

²⁸ *Doxsee Sea Clam Co.*, 13 F.3d 550 (2d Cir. 1994) (Holding the written notice must put the vessel owner on notice that there is reasonable possibility that the claim will exceed the value of the vessel).

²⁹ *See Moreira v. Lemay*, 659 F.Supp. 89 (S.D. Fla. 1987).

³⁰ *Orion*, 918 F.3d at 1331.

³¹ *Id.* at 1332.

³² *Id.*

³³ *Id.* at 1333-34.

³⁴ *Id.* at 1333.

Finally, the panel addressed another novel issue: When does the duty of the vessel owner to investigate arise? The trial court held that Orion had an immediate duty to investigate upon learning of any potential claims. The appellate court disagreed, holding that the vessel owner is under a duty to investigate when notice from a claimant raises the reasonable possibility the claim will exceed the value of the vessel.³⁵ In the end, the shipowner's limitation claim was not untimely.³⁶

Other district courts have also addressed the timely filing for limitation of liability. The district court in *In re Complaint of Staughton*³⁷ denied the motion to dismiss for untimely filing for limitation on the basis that the personal injury claimant's counsel sent letters to the vessel owner's insurer solely for medical benefits and failed to make any assertions that the assured was at fault or liable for the injury.³⁸ Similarly, the court in *All Underwriters v. Fishing Headquarters*³⁹ determined that the email was insufficient in failing to state the extent of the damages to the vessel in the collision or even raise the possibility that the damages could exceed the value of the vessel allegedly at fault.⁴⁰

IV. Stipulations to Stay Limitation Proceedings

A. Personal Contracts and Limitation of Liability

Courts have struggled to resolve the conflict of the exclusive jurisdiction of federal courts to adjudicate the right of vessel owners to seek exoneration from or limitation of liability and the equally valid right of a claimant to seek a "common law" remedy to redress a maritime claim in a state court pursuant to 28 U.S.C. §1333.⁴¹ The Supreme Court most recently addressed this issue in *Lewis v. Lewis & Clark Marine, Inc.*⁴² and reaffirmed that a single claimant or multiple claimants may proceed in state court if the claim or claims in aggregate do not exceed the value of the limitation fund. Claimants may proceed in state court as long as all claimants enter into certain stipulations protecting the vessel owner's right to limitation.⁴³

A conflict has developed between the circuits regarding whether claims for contribution or indemnity also require those claimants to enter into the stipulations or whether claims for

³⁵ *Orion*, 918 F.3d at 1337.

³⁶ *Id.* at 1338.

³⁷ *In re Staughton*, 538 F.Supp.3d 1149 (W.D. Wa. 2021).

³⁸ *Id.* at 1156.

³⁹ *All Underwriters v. Fishing Headquarters, Inc.*, 2020 WL 10055364, 2020 U.S. Dist. LEXIS 256306 * (S.D. Fla. 2020).

⁴⁰ *Id.*

⁴¹ 28 U.S.C. §1333.

⁴² *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

⁴³ *Id.* at 452 (Holding that the claimant stipulated "that his claim did not exceed the limitation fund, petitioner's waiver of any defense res judicata with respect to limitation of liability, and the District Court's decision to stay the Limitation Act proceedings pending state court proceedings.").

contractual indemnity are personal to the vessel owner and not subject to limitation. Additionally, a conflict has developed in the circuits regarding whether claims for contribution or indemnity also require those claimants to enter into the stipulations or whether claims for contractual indemnity are personal to the vessel owner and not subject to limitation. The Second,⁴⁴ Third,⁴⁵ Fifth,⁴⁶ and Seventh⁴⁷ Circuits hold that claims for indemnity, contractual or otherwise, or contribution are subject to limitation and must agree to any stipulations. The Sixth Circuit⁴⁸ and Eighth Circuit⁴⁹ have held that contractual or implied indemnity claims are personal contracts and not subject to limitation. Recently, the U.S. Court of Appeals for the Eleventh Circuit joined the ranks of the Sixth and Eight Circuits and held that the contracts are not subject to limitation.⁵⁰ In *Freedom Unlimited*, a member of the crew of the vessel was injured while the vessel was in a shipyard for maintenance and repairs.⁵¹ After he sued in state court, the vessel owner filed for limitation of liability in federal court.⁵² The seaman filed a claim in the federal proceeding against the vessel owner and against the shipyard which asserted a claim for contribution from the vessel owner and implied indemnity as well as attorney's fees.⁵³

The seaman moved to lift the injunction against the state court action and stipulated that he would not execute any judgment against the vessel owner or any other party until the limitation action was decided.⁵⁴ The proposed stipulation also provided that once any limitation is decided, he would not seek to recover in any judgment more than the limitation fund.⁵⁵ The shipowner claimed that the stipulation was not sufficient and that any claim for attorney's fees were separate from the seaman's claims. Thus, it would be subject to liability in excess of the limitation fund.⁵⁶ The trial judge held that the stipulations were adequate to protect the vessel owner and that the contractual claims against it were personal contracts not subject to limitation.⁵⁷ The court lifted the stay of the state court proceedings.⁵⁸

⁴⁴ *In Re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988).

⁴⁵ *Gorman v. Cerasia*, 2 F.3d 519, 527 (3d Cir. 1993).

⁴⁶ *Odeco Oil & Gas Co., v. Bonnette*, 4 F.3d 401 (5th Cir. 1993); *see also* *Odeco Oil & Gas Co., v. Bonnette*, 74 F.3d 671 (5th Cir. 1996).

⁴⁷ *In re Holly Marine Towing, Inc.*, 270 F.3d 1086 (7th Cir. 2001).

⁴⁸ *In re S & E Shipping Corp.*, 678 F.2d 636 (6th Cir. 1982).

⁴⁹ *Universal Towing Co., v. Barrale*, 595 F.2d 414 (8th Cir. 1979).

⁵⁰ *Freedom Unlimited v. Taylor Lane Yacht & Ship, LLC*, 2021 U.S. App. LEXIS 24524, 2021 WL 3629904 (11th Cir. 2021).

⁵¹ *Id.* at *2.

⁵² *Id.* at *4.

⁵³ *Id.* at *4-5. Prior contracts between the shipyard and vessel owner contained a defense and indemnity provision requiring the vessel owner to indemnify the shipyard from any claims arising out of the use of the shipyard's facilities. The parties did not sign it for the work performed at the time of the incident. *Id.* at *2.

⁵⁴ *Id.* at *5

⁵⁵ *Freedom Unlimited*, 2021 U.S. App. LEXIS 24524 at *5.

⁵⁶ *Id.* at *6.

⁵⁷ *Id.*

⁵⁸ *Id.*

The Eleventh Circuit agreed relying on a footnote in *Orion Marine Construction, Inc. v. Carroll*,⁵⁹ in which the same court held indemnification contracts are personal and not subject to limitation. The panel reiterated that even implied contracts are personal and not subject to limitation and rejected the claim that there must be a personal breach of the contract for the personal contract rule to apply.⁶⁰ The court further held that the stipulations of the personal injury claimant mirrored those in a prior opinion⁶¹ and sufficiently protected the vessel owner's limitation rights.

B. Adequacy of the Stipulations

Whether the proposed stipulations are sufficient to protect the vessel owner's right to limitation are adequate is largely fact specific. The following is a brief review of selected cases.

In *D'onofio Gen. Contr. Corp. v. Safer (In Re D'onofio Gen. Contr. Corp.)*,⁶² the court not only held that the tort claim for indemnity and contribution had to be included in the stipulation but that the proposed stipulation limiting it to judgments of a state court was inadequate.⁶³ The trial court⁶⁴ denied the stay and lifting of the injunction of the state court action when the claimants, husband and wife, were represented by two different attorneys who failed to stipulate the requirements established by the Ninth Circuit.⁶⁵

The trial judge in *Devall Towing & Boat Serv. Of Hackberry, L.L.C. v. Lanclos*⁶⁶ admittedly attempted a novel approach to permit the claimant seaman to proceed in state court.⁶⁷ The two vessel owners in the incident both filed limitation actions with the employer of the seaman asserting claims for indemnity, contribution and reimbursement against the owner of the other vessel.⁶⁸ The seaman also sued both vessel owners in state court.⁶⁹ The employer, however, would not agree to the stipulation proposed by the seaman to lift the stay.⁷⁰ The trial court entered an order enjoining all parties from prosecuting claims but allowed the state court proceeding to

⁵⁹ *Orion*, 918 F.3d 1323, 1333, n. 3. (11th Cir. 2019). The panel also cited *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U.S. 82 (1933), in which the Supreme Court held that charterparties contain implied warranties of seaworthiness and are personal contracts not subject to limitation.

⁶⁰ *Freedom Unlimited*, 2021 U.S. App. LEXIS 24524 at *14.

⁶¹ *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996) (in which the court determined the stipulations were insufficient as they were limited to state court judgments only *Freedom Unlimited*, 2021 U.S. App. LEXIS 24524 at *16).

⁶² *In re D'Onofio Gen. Contr. Corp.*, 431 F.Supp.3d 95 (E.D. N.Y. 2019).

⁶³ *Id.* at **23.

⁶⁴ *In re Shoaf*, No. 16-6008 RJB, 2019 U.S. Dist. LEXIS 62698*, 2019 WL 1572376 (W.D. Wa. 2019).

⁶⁵ *Id.* at *4-5. (Citing *In re Ross Island Sand & Gravel*, 226 F.3d 1015, 1017 (9th Cir. 2000).

⁶⁶ *In re Devall Towing*, 827 Fed. Appx. 411, 413 (5th Cir. 2021).

⁶⁷ *Id.* at 412.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

continue.⁷¹ In addition, the order “enjoined the parties from enforcing any judgment rendered by the state court—either in federal or state court—and from asserting *res judicata* or issue preclusion.”⁷² On interlocutory appeal to the Fifth Circuit, the court reversed holding that the trial court abused its discretion by imposing stipulations by an injunction on all parties.⁷³

In *In Re Victory Chimes, Inc.*,⁷⁴ the court entered a default judgment against non-appearing claimants, leaving a single claimant who then entered into a stipulation that also protected the vessel owner’s right to limitation.⁷⁵ Judge Atlas in *In Re Complaint & Petition Of Subsea Responder*,⁷⁶ addressed the novel issue when the seaman first filed a claim in the limitation action and subsequently moved to lift the injunction against proceeding in state court so that he could file suit in state court.⁷⁷ The seaman submitted stipulations which the vessel owner admitted were sufficient.⁷⁸ It objected to lifting the stay on the basis that the suit had been filed prior to the limitation action.⁷⁹ Noting that it appeared to be *res nova* in the Fifth Circuit,⁸⁰ the judge rejected the argument on the bases that it was meritless and would result in a race to the courthouse.⁸¹

The court in *In re Callan Marine* lifted the stay when all claimants entered into extensive stipulations protecting the right of the vessel owner to limit liability.⁸² Objections that counsel signed the stipulations rather than the claimants themselves and a potential conflict of interest between claimants were insufficient to deny lifting the stay.⁸³

In Re Chesapeake Marine Tours, Inc. involved claims of a husband and wife against the vessel owner.⁸⁴ The parties stipulated that the federal court had exclusive jurisdiction over the limitation proceeding and any state or federal court judgment on limitation; they further agreed to waive any *res judicata* claims of any other state or federal court, not to enforce any other court judgment in excess of any limitation until that issue is adjudicated.⁸⁵ Additionally, the personal injury claimants also agreed that any claim for attorney’s fees by a co-liable party takes precedence and priority and that the claims of the husband took precedence over the wife’s claim.⁸⁶ The court

⁷¹ *In re Devall Towing*, 827 Fed. Appx. at 413.

⁷² *Id.* at 13.

⁷³ *Id.* at 414.

⁷⁴ *In re Victory Chimes, Inc.*, No. 1:20-cv-00259-JDL, 2021 U.S. Dist. LEXIS 82660*, 2021 WL 1725934 (D. Me. 2021).

⁷⁵ *Id.* at *8-9.

⁷⁶ *In re Subsea Responder*, 2020 U.S. Dist. Lexis 258090*, 2020 AMC 319 (S.D. Tx. 2020).

⁷⁷ 2020 U.S. Dist. Lexis 258090 at *2, 4.

⁷⁸ *Id.* at *7.

⁷⁹ *Id.*

⁸⁰ *Id.* at *9.

⁸¹ *Id.* at *12.

⁸² *In re Callan Marine*, 2021 U.S. Dist. LEXIS 176068 at *19, 2021 AMC 404 (E.D. Tex. 2021) order adopted, 2021 U.S. Dist. LEXIS 175937* (E.D. Tx. 2021).

⁸³ 2021 U.S. Dist. LEXIS 176068 at *15-16.

⁸⁴ *In re Chesapeake Marine Tours, Inc.*, 551 F. Supp. 3d 592 (D. Md. 2021).

⁸⁵ *Id.* at 597.

⁸⁶ *Id.* at 598.

noted that these stipulations were more extensive than others approved by other courts and lifted the stay.⁸⁷

Most recently, the Fifth Circuit in *In Re N&W Marine Towing*⁸⁸ confronted a multiparty claim in the limitation proceeding filed by the owner of M/V NICHOLAS.⁸⁹ Seaman Trey Wooley, employed by Turn Services, along with Royal Caribbean Cruises and Turn Services, filed answers, claims and counter-claims in the N&W limitation action.⁹⁰ The seaman also filed a suit in state court against the same parties and insurers.⁹¹ Royal Caribbean removed the suit against it on the basis of diversity jurisdiction.⁹² After Wooley and N&W settled with Royal Caribbean, Wooley filed a Motion to Stay the Limitation Proceeding and to lift the Injunction from proceeding in state court.⁹³ Wooley and Turn Services, which agreed to assign its claim to Wooley,⁹⁴ submitted stipulations resulting in the stay of the limitation action and lifting of the injunction on the state court suit.⁹⁵ N&W objected and appealed.⁹⁶

The court determined that the assignment by Turn Services to Wooley resulted in a single claimant case who entered into stipulations sufficient to protect the right of the vessel owner to limit liability, including any indemnification or contribution claims of third parties.⁹⁷ That the trial court also had not ruled on the Motion to Remand also was irrelevant to the question of whether the district court abused its discretion in lifting the stay of the state court action.⁹⁸

⁸⁷ *Id.*

⁸⁸ *In re N&W Marine Towing*, 31 F.4th 968 (5th Cir. 2022).

⁸⁹ *Id.* at 969.

⁹⁰ *Id.* at 969-70.

⁹¹ *Id.* at 970.

⁹² *Id.* The seaman filed a Motion to Remand which was pending in the district court at the time the Fifth Circuit released its opinion. *Id.*

⁹³ *In re N&W Marine Towing*, 31 F.4th at 970.

⁹⁴ *Id.* at 972.

⁹⁵ *Id.* At 970.

⁹⁶ *Id.*

⁹⁷ *Id.* at 972. The stipulation stated: In order to afford sufficient protection from excess liability arising out of third party claims where indemnification or contribution is or may be sought by other defendants pending the resolution of all claims in the limitation proceeding, in the event there is a judgment or recovery by claimant in any state court action or proceeding of any type in excess of the value of the Limitation Fund determined in accordance with 46 U.S.C.A. § 30511 and Supplemental Admiralty and Maritime Claims Rule F, in no event will Claimant seek to enforce such excess judgment or recover against N&W Marine Towing, L.L.C., insofar as such enforcement may expose N&W Marine Towing, L.L.C.'s liability in excess of the adjudicated total Limitation Fund value, until such time as there has been an adjudication of limitation by this Court, which has exclusive jurisdiction and authority to determine all issues relevant to N&W Marine Towing, L.L.C.'s claim for limitation of liability, and Plaintiff further agrees that any claim of res judicata based on judgment in any other Court, with respect to any issue of exoneration from and limitation of liability is reserved to this court, is hereby waived.

⁹⁸ *In re N&W Marine Towing*, 31 F.4th at 974.

Judge deGravelles of the U.S. District Court for the Middle District of Louisiana took a practical approach when one wrongful death claimant moved to bifurcate the state court pretrial of the personal injury suit from the limitation proceeding to permit the personal injury suit to go to trial in the state court.⁹⁹

V. Miscellaneous Limitation Opinions of Interest

A. The Flotilla Doctrine and Pure Tort Exception

The flotilla doctrine was developed for limitation of liability purposes by Judge Learned Hand in *Standard Dredging Co. v. Kristiansen*.¹⁰⁰ In *Kristiansen*, the seaman, a member of the crew of a dredge, was injured on a barge under a bareboat charter to the owner of the dredge.¹⁰¹ The trial court ordered the surrender of both the dredge and barge though the seaman's injury occurred on the barge.¹⁰² On appeal, the Second Circuit affirmed holding that the value of all vessels must be included in the limitation fund if the relationship between the vessel owner and the injured party seeking damages is contractual, here the contract of employment.¹⁰³ If the claim is based exclusively in tort, then the flotilla doctrine does not apply and requires the vessel owner to surrender only the vessel to which a lien attaches *in rem*.¹⁰⁴ Thus, if there is a flotilla, the amount in the limitation fund can be increased to include any vessels engaged in the common venture.

A.B.K. Enterprises, Inc. and Tropical Breeze Casino Cruz, LLC respectively as owner and owner pro hac vice of M/V THE ISLAND LADY filed for limitation of liability in the United States District Court for the Middle District of Florida, Tampa Division.¹⁰⁵ The vessel was used to provide a water taxi service to transport fare-paying passengers¹⁰⁶ to a casino boat located in the Gulf of Mexico when a fire broke out resulting in the death of 1 and injuries to numerous passengers and the total loss of the vessel.¹⁰⁷ The vessel interests filed an *ad interim* stipulation for \$27,300 as the value of the vessel.¹⁰⁸ The claimants moved to increase the value of the fund to include the value of "all the vessels involved in the 'Tropical Breeze Casino' business, pending freight, and all appurtenances aboard the vessels, which should include the gambling machines."¹⁰⁹

⁹⁹ *In re Chester J. Marine, LLC*, 2021 U.S. Dist. LEXIS 121163*, 2021 WL 2661949 (M.D. La. 2021).

¹⁰⁰ *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548 (2d Cir. 1933).

¹⁰¹ *Id.* at 549.

¹⁰² *Id.*

¹⁰³ *Id.* at 550-551

¹⁰⁴ Shannon A. Thornhill, *The Flotilla Doctrine: Is Liverpool Simply Outdated or is it Time to Abandon Ship?*, 33 TUL. MAR. L.J. 261, 265 (2008); *see also*, Thomas J. Schoenbaum, Vol. 2 Admiralty and Maritime Law, 15:9, pp. 222-223, n. 12 (6th ed. 2018).

¹⁰⁵ *In re Complaint of A.B.K. Enters.*, 2019 U.S. Dist. LEXIS 117443* at *3, 2019 WL 3068786 (M.D. Fla. 2019).

¹⁰⁶ Of the 37 passengers, 15 paid \$5; nine paid a discounted fee, and the remaining 13 had complimentary passage. *Id.* at *4.

¹⁰⁷ *Id.* at *3-4.

¹⁰⁸ *Id.* at *4.

¹⁰⁹ *Id.* at *6-7. The casino boat was valued at \$750,000. *Id.* at *7.

Counsel for the passengers asserted that the payment of the fee constituted an implied contract in order to overcome the pure tort exception to the flotilla rule.¹¹⁰ The court held that under federal maritime law there is no implied contractual duty to carry the passengers ““with the highest degree of care.””¹¹¹ Furthermore, even if this were the case, this principle would still exclude a large portion of passengers who paid no fee.¹¹² Thus, as the claims arose purely out of tort, the court denied the motion to increase the limitation fund.¹¹³

Judge Summerhayes of the U.S. District Court for the Western District of Louisiana, Lafayette Division, also applied the tort exception of the flotilla doctrine to limit the value of the limitation fund to the fair market value of M/V RANDY ECKSTEIN plus pending freight.¹¹⁴ The vessel had 6 barges in tow when it allided with a structure owned by LAD Services of Louisiana which filed a claim for the property damage and for the maintenance and cure payments it made to one of its employees who additionally filed a claim in the limitation proceeding for personal injuries.¹¹⁵ Marquette filed a Motion for Partial Summary Judgment to limit the fund to the value of its vessel on the basis of the pure tort exception to the flotilla rule and on the basis that it was neither owner nor owner pro hac vice of the barges it had in tow.¹¹⁶ As no contractual or consensual relationship existed between Marquette, LAD or the personal injury claimant, the court held that as a pure tort case, the flotilla doctrine is inapplicable and granted Marquette’s motion.¹¹⁷

B. Compulsory Pilot Defense

A recent decision of the U.S. Court of Appeals for the Fifth Circuit highlighted the “compulsory pilot” defense. Three vessels, M/V LORETTA, M/V ELIZABETH and M/V ARIS T were involved in collision and allision with multiple other parties on the Mississippi River on January 31, 2016. All vessel owners filed for limitation of liability in the U.S. District Court for the Eastern District of Louisiana. After a full trial on the merits, the trial judge found all three vessels at fault and denied limitation to the owners of M/V LORETTA and M/V ELIZABETH but granted the owner of M/V ARIS T limitation based on the “compulsory pilot” defense.¹¹⁸ On appeal to the Fifth Circuit, the owners of M/V LORETTA and M/V ELIZABETH contested the allocation of fault, and denial of limitation of liability.¹¹⁹ In addition, these parties also appealed the limitation granted to ARIS T on the basis of the “compulsory pilot” defense.

¹¹⁰ 2019 U.S. Dist. LEXIS 117443* at *10-11.

¹¹¹ *Id.* at *12 (quoting *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1346 (S.D. Fla. 2001)).

¹¹² *Id.* at *13-14.

¹¹³ *In re ABK Enters.*, 2019 U.S. Dist. LEXIS 116176, at *3 (M.D. Fl. 2019).

¹¹⁴ *In re Marquette Transp. Co. Gulf Inland, LLC*, 2021 U.S. Dist. LEXIS 95620 at *3, 2021 WL 2005901 (W.D. La. 2021). The vessel owner posted \$2,684,000 bond in the registry of the court. 2021 U.S. Dist. LEXIS 95620 at *3.

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* at *3-4.

¹¹⁷ *Id.* at *7.

¹¹⁸ *SCF Waxler Marine LLC v. M/V Aris T*, 427 F. Supp. 3d 728 (E.D. La. 2019).

¹¹⁹ *SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 470 (5th Cir. 2022). The trial court found M/V LORETTA and M/V ELIZABETH each 45% at fault and ARIS T 10% at fault. *Id.* at 469.

The Court of Appeals affirmed the allocation of fault and denial of limitation sought by M/V LORETTA and M/V ELIZABETH¹²⁰ and also affirmed the limitation claim of ARIS T. As noted by the appellate court, the master of the vessel could rely on the expertise of the compulsory pilot and the negligence of the vessel was solely that of the compulsory pilot.¹²¹ As such the vessel is only liable *in rem* and not *in personam*.¹²²

C. Statutory Imputation of Privity or Knowledge

Few cases address the statutory imputation provision of the limitation act and the vessels which are excluded from that imputation of privity or knowledge. 46 U.S.C. §30506 establishes a minimum fund for personal injury and death claims based on \$420 multiplied by the tonnage of the vessel. Section (e) imputes the privity or knowledge of the master, owner's superintendent or managing agent at the beginning of the voyage to the owner for personal injury and death claims. Section (a) lists the types of vessels excluded from the provision.¹²³ The court in *In re dredge BIG BEAR* addressed the imputation provision.¹²⁴ The owners of the dredge BIG BEAR filed for limitation of liability after the vessel was struck by M/V TREY PAUL as that vessel proceeded down the Mississippi River.¹²⁵ The pilot of BIG BEAR filed an answer and claim in the limitation proceeding and a third-party complaint against the owners of M/V TREY PAUL.¹²⁶ Likewise, the owners of that vessel, LA Carriers, LLC, (referred to as LAC)¹²⁷ filed a counterclaim against BIG BEAR and in its response to the personal injury claim raised a limitation of liability defense.¹²⁸ The pilot sought dismissal of LAC's limitation claim as untimely.¹²⁹ In addition, he sought summary judgment on the statutory imputation of privity or knowledge in 46 U.S.C. §30506(e).¹³⁰

Judge deGravelles first addressed the timeliness of the limitation claim of LAC and held that as limitation was raised as a defense to the pilot's third party personal injury claim the six-month deadline to file for limitation did not apply.¹³¹ He next addressed the imputation clause of the limitation act and held that the assertion to impute privity or knowledge pursuant to the statute was misplaced as the vessel, TREY PAUL, was a towing vessel operating on inland waters and

¹²⁰ *Id.* at 474.

¹²¹ *Id.* at 475.

¹²² *Id.*

¹²³ 46 U.S.C. § 30506(b) establishes a minimum fund for personal injury and death claims based on \$420 times the tonnage of the vessel.

¹²⁴ *See in re dredge BIG BEAR*, 525 F. Supp. 3d 731 (M.D. La. 2021).

¹²⁵ *Id.* at 734.

¹²⁶ *Id.* at 734-35.

¹²⁷ *Id.* at 735.

¹²⁸ *Id.*

¹²⁹ 525 F. Supp. 3d at 735.

¹³⁰ 46 U.S.C. §30506(e) Privity or knowledge. In a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner."

¹³¹ 525 F. Supp. 3d at 738.

not a “seagoing vessel.”¹³² The statute expressly excludes “tugs, towboats, towing vessels” as well as other vessels and thus statutory imputation was inapplicable.¹³³

D. Direct Action and Insurer’s Right to Limitation of Liability

Louisiana was the first state in the U.S. to enact a statute that created a direct action against a liability insurer in favor of an injured party on the theory that liability insurance is a *stipulation pour autri*, a third-party beneficiary contract for the benefit of the injured party.¹³⁴ The conflict of the insurer’s liability to injured parties and the potential of the vessel owner to limit its liability came into focus in *Maryland Casualty Co. v. Cushing*.¹³⁵ Justice Frankfurter and three other justices concluded that the state statute entered an area of maritime law withdrawn from the states as it deprived the vessel owner of limitation. Justice Black along with three other justices concluded that the Constitution does not deprive the states of power to enact regulations governing local maritime affairs; in addition, the McCarran Act expressly allowed states to regulate insurance. Justice Clark opined that the conflict could be avoided by permitting the limitation proceeding to conclude and settle the owner’s liability and the owner would then collect the insurance. If there is any excess, the claimants could then proceed directly against the insurer. Initially, the Fifth Circuit held that the right to seek limitation of liability is a defense personal to the vessel owner and could not be asserted by the insurer.¹³⁶ The Fifth Circuit reversed course in *Crown Zellerbach Corporation v. Ingram Industries*.¹³⁷ In that case, the policy of insurance contained a provision that the liability of the insurer is limited to the liability of the insured.¹³⁸ The court determined that this was a policy defense and a limitation of coverage.¹³⁹ Essentially, this afforded the insurer the benefit of any limitation granted to the vessel owner.

¹³² *Id.* at 739.

¹³³ *Id.* If the Small Passenger Vessel Liability Fairness Act of 2021 passes Congress, the present exclusion of the enumerate vessels in 46 U.S.C. §30506 (a) may no longer apply to those vessels defined in the proposed legislation as small passenger vessels. *See supra*. Sec. II.

¹³⁴ R.S. 22:1269(D) [A]ll liability policies within their terms and limits are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable; and, that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability the insured may have as or for a tortfeasor within the terms and limits of the policy.” rev. eff. Jan. 1, 2011.

¹³⁵ *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 410 (1954).

¹³⁶ *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 232 (5th Cir. 1969) *rev’d*, 397 U.S. 989 (1970).

¹³⁷ *Crown Zellerbach Corp. v. Ingram Industries, Inc.*, 783 F.2d 1296 (5th Cir. 1986) (en banc), *writ denied*, 479 U.S. 821; 17 S. Ct. 87 (1986).

¹³⁸ *Id.* at 1300.

¹³⁹ *Id.* at 1303. The Louisiana Direct Action Statute provides: “Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if such provisions are not in violation of the laws of this state.” LSA-R.S. 22:1269(B)(2) (West, 2022)

The U.S. District Court for the District of Puerto Rico confronted this conflict and the application of the precedent of *Crown Zellerbach* in *Amador v. Torres*.¹⁴⁰ The owner of M/V LA NENA II filed to limit its liability for damages stemming from a collision with M/V ANDREA GABRIELA off the coast of Puerto Rico in 2017.¹⁴¹ The liability insurer of M/V LA NENA II was also sued pursuant to the Direct Action Statute of Puerto Rico.¹⁴² The trial judge noted that under that statute, limitation of liability is a personal defense of the vessel owner and cannot be asserted by the insurer.¹⁴³ However, citing *Crown Zellberbach*, if the policy of insurance limits the liability of the insurer to the owner's declared liability then, the insurer's liability under the policy is equally limited.¹⁴⁴

The policy stated: "The limit of liability shown for Third Party Liability on the Coverage Section Page is our maximum limit of liability under this Section. This is the most we will pay, regardless of the number of insured persons, claims made, or watercraft involved in any one accident, or series of accidents arising out of the same event."¹⁴⁵ In contrast, the policy in *Crown Zellerbach* provided: "When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of the Class shall not exceed the amount of such limitation. . . ." ¹⁴⁶ The trial judge determined that the policy did not contain language which limited the insurer's liability to the adjudged liability of the vessel owner as in *Crown Zellerbach* but that it was liable only to the extent of the policy limits.¹⁴⁷

E. Insufficient Security

A party seeking exoneration from or limitation of liability must file its complaint with security representing the owner's interest in the vessel plus pending freight as well as a sum for costs and interest at the rate of 6% per annum from the date of the security.¹⁴⁸ This requirement is concurrent with the six-month notice requirement. In *Star & Crescent Boat Co. v. Sunsplash Marina LLC*,¹⁴⁹ the vessel owner stated in its complaint for limitation that the vessel was worth \$775,000. However, the letter of undertaking furnished by the underwriter was only for \$750,000, thus \$25,000 shy of the accepted appraised value of the vessel.¹⁵⁰ When confronted with this discrepancy and dilemma, the trial judge denied a stay and injunction of any state court

¹⁴⁰ *Amador v. Torres*, 2021 U.S. Dist. LEXIS 65975 at *57, 2021 AMC 154 (D. P.R. 2021).

¹⁴¹ *Id.* at *12-13.

¹⁴² *Id.* at *39.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Amador*, 2021 U.S. Dist. LEXIS 65975, at *39.

¹⁴⁶ 783 F.2D at 1300.

¹⁴⁷ *Amador*, 2021 U.S. Dist. LEXIS 65975, at *61, 67.

¹⁴⁸ FED. R. CIV. P. XIII. Supplemental Rules For Admiralty Or Maritime Claims And Asset Forfeiture Actions, Rule F(1); *see also* 46 U.S.C. § 30511(b). Alternatively, under Rule F and the statute, the complainant for limitation may also transfer to a trustee its interest in the vessel for the benefit of the claimants.

¹⁴⁹ *Star & Crescent Boat Co. v. Sunsplash Marina LLC*, 519 F. Supp. 3d 752, 756 (S.D. Cal. 2021).

¹⁵⁰ *Id.* at 759.

proceedings without prejudice and gave the vessel owner an opportunity to resubmit a stipulation and letter of undertaking in conformity with the appraised value of the vessel or to explain the discrepancy.¹⁵¹ The vessel owner subsequently filed an amended ad interim stipulation and letter of undertaking attesting to a typographical error in the initial letter of undertaking.¹⁵² Interestingly, the injured party who brought suit initially in state court challenged the timeliness of the limitation complaint but not due to insufficient security.¹⁵³ The trial judge noted that the personal injury claimant did not dispute the adequacy of the security¹⁵⁴ and held that the amended *ad interim* stipulation and letter of undertaking were adequate and issued the monition and injunction.¹⁵⁵

F. Plausibility Standard for Sufficiency of Limitation Complaint

More recently, trial courts have been confronted with the issue of whether the allegations in a Complaint for Exoneration from or Limitation of Liability satisfy the tightened requirements for pleading under the Federal Rules of Civil Procedure under both *Bell Atlantic Corp. v. Twombly*¹⁵⁶ and *Ashcroft v. Iqbal*.¹⁵⁷ Judge Cecilia M. Altonaga of the U.S. District Court for the Southern District of Florida dismissed a complaint for limitation noting that under either Rule 8(a) of the Federal Rules of Civil Procedure or Supplemental Rule F(2) the allegations in the limitation complaint were insufficient as they were conclusions.¹⁵⁸ The complaint failed to make a plausible claim that the limitation complaint was free from fault and had no privity or knowledge.¹⁵⁹ The court dismissed the complaint without prejudice but gave the vessel owner only 11 days to file an amended complaint.¹⁶⁰

The U.S. Court of Appeals for the Second Circuit in *Bensch v. Estate of Umar* has now stated explicitly what may have been implicit in the *Twombly/Iqbal* jurisprudence that the plausibility standard of these opinions unequivocally applies to complaints for exoneration from or limitation of liability.¹⁶¹ The case arose out of a collision on the Niagara River in New York between a pleasure craft and a jet ski resulting in the death of the operator of a jet ski.¹⁶² The owner

¹⁵¹ *Id.* at 760.

¹⁵² *Star & Crescent Boat Co. v. Sunsplash Marina LLC*, No. 3:21-cv-00169-BEN-JLB, 2021 U.S. Dist. LEXIS 74534, at *41, 2021 WL 1526601 (S.D. Cal. 2021).

¹⁵³ *Id.* at *30-31 (The claimant asserted that correspondence and meetings prior to filing suit in state court place the vessel owner on notice of a claim to begin the six-month deadline to file for limitation).

¹⁵⁴ *Id.* at *41.

¹⁵⁵ *Id.* at *44.

¹⁵⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵⁷ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁵⁸ *In re Garcia*, No. 20-21859-CIV-ALTONAGA/Goodman, 2020 U.S. Dist. LEXIS 121603, at *7-8, 2020 WL 3892416 (S.D. Fl. 2020).

¹⁵⁹ *Id.* at *11.

¹⁶⁰ *Id.* at *13; *See also All Underwriters v. Fishing Headquarters*, 2020 U.S. Dist. LEXIS 256306 (S.D. Fla. 2020) (wherein the magistrate denied a motion to dismiss the limitation complaint for failure to state a claim).

¹⁶¹ *Bensch v. Estate of Umar*, 2 F.4th 70, 72 (2d Cir. 2021).

¹⁶² *Id.* at 73.

of the pleasure craft filed for limitation of liability after the widow of the decedent filed suit in New York State court against the vessel owner as well as the company which rented the jet ski to the decedent.¹⁶³ The appellate court stated that the initial complaint was short on its description of the accident containing only two paragraphs and that other allegations were conclusions not statements of fact.¹⁶⁴ The magistrate granted the motion to dismiss for failure to state a claim though the limitation complainant filed an opposition with a slightly amended version of the complaint and a proposed amended complaint and further denied a motion to amend stating it was futile.¹⁶⁵ Despite other attempts to amend the complaint with further facts, the magistrate denied them based on bad faith.¹⁶⁶ The trial judge adopted the magistrate's report with some amendments.¹⁶⁷ The vessel owner appealed the decision denying the second motion to amend the complaint.¹⁶⁸

Bensch first maintained that the plausibility standard of Rule 8(a) of the Federal Rules of Civil Procedure does not apply to maritime exoneration/limitation of liability complaints.¹⁶⁹ Initially, Judge Lynch addressed this by analyzing the development and history of the Federal Rules of Civil Procedure and their relationship to the special maritime rules, particularly those relating to exoneration from or limitation of liability.¹⁷⁰ In 1937, the Civil Rules of Procedure unified the federal rules of equity and rules for cases at law but left the special admiralty rules separate.¹⁷¹ This again changed in 1966 with the merger of the procedural rules for cases at law, equity or admiralty.¹⁷² Though there are supplemental rules for certain admiralty remedies, nonetheless, even these rules state that the general rules of civil procedure apply unless inconsistent with the special admiralty rules.¹⁷³ In this case, Admiralty Rule F (2) also specifically provides that the complaint must state facts to establish a basis that the complainant is entitled to limit liability.¹⁷⁴ A complaint for exoneration or limitation of liability must state facts that are sufficient to render the claim of lack of privity or knowledge plausible as defined in *Iqbal*.¹⁷⁵ In applying that standard to the proposed Second Amended Complaint, the court stated the allegations were sufficient to satisfy the plausibility standard.¹⁷⁶ Finally, the court addressed the finding that the complainant was in bad faith. The Second Circuit determined that counsel advanced a position in good faith based on decisions of several district courts.¹⁷⁷ The court reversed the trial court's denial

¹⁶³ *Id.* at 74.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Bensch*, 2 F.4th at 76.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 75-76.

¹⁷⁰ *Bensch*, 2 F.4th at 76.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 76-77.

¹⁷⁵ *Bensch*, 2 F.4th at 79.

¹⁷⁶ *Id.* at 80.

¹⁷⁷ *Id.* at 81.

of the Second Motion to Amend the Complaint; the case was remanded back to the district court.¹⁷⁸ Other federal circuit courts will likely adopt this precedent.

G. Timeliness of filing limitation complaint: A jurisdictional or claims processing rule?

A debate has been simmering for years about whether the Shipowner's Limitation of Liability Act is in itself a basis for a federal court's jurisdiction or whether the underlying tort must fall within the federal court's admiralty jurisdiction. The 1911 decision of the U.S. Supreme Court, *Richardson v. Harmon*¹⁷⁹ has been cited and criticized as the basis that the Limitation of Liability Act is a jurisdictional statute.¹⁸⁰ Though several U.S. Courts of Appeals have held to the contrary,¹⁸¹ the Supreme Court dodged the issue in *Sisson v. Ruby*¹⁸² and in *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*¹⁸³

Further support for the proposition that the Limitation Act is not an independent basis for federal court jurisdiction is found in the recent opinions of the U.S. Court of Appeals for the Eleventh Circuit in *Orion Marine Constr., Inc. V. Carroll*.¹⁸⁴ In *Orion*, the Eleventh Circuit referenced its earlier opinion *Secretary v. Preston*,¹⁸⁵ in which it analyzed Supreme Court's precedent distinguishing between actual jurisdictional limitations and non-jurisdictional claims-processing rules. Most importantly, the appellate panel determined that the statute itself does not

¹⁷⁸ *Id.* at 81-82.

¹⁷⁹ 222 U.S. 96 (1911).

¹⁸⁰ See 1-XIV Benedict on Admiralty § 225 (2017), Matthew Bender & Company, Inc., a member of the LexisNexis Group, n. 1 Michael B. McCauley, *Limitation Of Liability And Recreational Vessels*, 16 TUL. MAR. L. J. 289 (1992); Thomas C. Galligan, Jr., *Of Incidents, Activities, And Maritime Jurisdiction: A Jurisprudential Exegesis*, 56 LA. L. REV. 519 (1996); Thomas C. Galligan, Jr., *The Admiralty Extension Act At Fifty*, 29 J. MAR. L. & COM. 495 (1998); David W. Robertson, "Summertime Sailing: Cruise Ships, Pleasure Boats, and the Law": Fourth Session: Federal-State Relations: Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court," 29 J. MAR. L. & COM. 275 (1998); Graydon S. Staring, *Commerce And Tradition As Gatekeepers Of Admiralty: Falsity And Futility*, 44 J. MAR. L. & COM. 323 (2013); Arthur A. Crais, Jr. *The Limitation Of Shipowner's Liability Act As An Independent Basis For Federal Jurisdiction?*, 17 LOY. MAR. L.J. 205 (2018); Amie L. Medley, Note: *A Sea Of Confusion: The Shipowner's Limitation Of Liability Act As An Independent Basis For Admiralty Jurisdiction*, 108 MICH. L. REV. 229 (2009).

¹⁸¹ *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771 (9th Cir. 1995); *Sea Vessel, Inc. v. Reyes*, 23 F.3d 345 (11th Cir. 1994); *David Wright Charter Serv. of N. Carolina, Inc. v. Wright*, 925 F.2d 783 (4th Cir. 1991); *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775 (8th Cir. 1990); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114 (5th Cir. 1992).

¹⁸² *Sisson v. Ruby*, 110 S. Ct. 2892 (1990).

¹⁸³ *Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

¹⁸⁴ *Orion Marine Constr., Inc. V. Carroll*, 918 F.3d 1323, 1328 (11th Cir. 2019).

¹⁸⁵ *Sec'y, United States DOL v. Preston*, 873 F.3d 877 (11th Cir. 2017).

speak in jurisdictional terms and that the time prescription for filing a limitation action is within “provisions that describe the standards and procedures that govern”¹⁸⁶ the claim.

The U.S. Court of Appeals for the Fifth Circuit then followed suit reversing its precedent in *Bonvillian Marine Serv. v. Pellegrin*¹⁸⁷ As a result, at least in the Fifth Circuit, failing to file for limitation within the six-month deadline from notice of a claim in writing does not deprive the court of jurisdiction. This begs the question: where does that leave the vessel owner and any parties filing claims in the federal suit? The implications of this development are addressed by my colleague, Gregory Burts in his article in this publication.¹⁸⁸

VI. Conclusion

Since its enactment by Congress in 1851, the Shipowner’s Limitation of Liability Act has been the subject of controversy and has come under attack as an anachronism in the modern world in which vessel owners have insurance for their losses.¹⁸⁹ Despite these protestations, it is an internationally recognized concept. The 1976 International Convention on Limitation of Liability for Maritime Claims¹⁹⁰ went into effect in 1986 and affords a broader category of parties the right to limit including not only “owner, charterer, manager and operator”¹⁹¹ but also a salvor.¹⁹² In addition, the insurers may claim the benefits of the Convention.¹⁹³ The Oil Pollution Act of 1990 limits the liability of the Responsible Party depending on its status.¹⁹⁴ The U.S. Limitation of Liability Act has been amended only a few times with the latest in 1984 which raised the per tonnage amount for personal injury and death claims from \$60 to \$420 per ton for seagoing vessels.¹⁹⁵ The amendments proposed by Senator Feinstein¹⁹⁶ and Congressman Carbajal¹⁹⁷ in

¹⁸⁶ *Orion Marine*, 918 F.3d at 1329.

¹⁸⁷ *Bonvillian Marine Serv. V. Pellegrin*, 19 F.4th 787 (2021).

¹⁸⁸ Gregory Burts, “RESOLVED: IS 46 U.S.C. § 30501(a) A JURISDICTIONAL STATUTE OF LIMITATION OR A MANDATORY CLAIMS PROCESSING RULE?” 21 LMLJ (2022).

¹⁸⁹ See Dennis J. Stone. “The Limitation Of Liability Act: Time To Abandon Ship?,” 32 J. MAR. L. & COM. 317 (2001); Mark A. White. “The 1851 Shipowners' Limitation Of Liability Act: Should The Courts Deliver The Final Blow?,” 24 N. ILL. U. L. REV. 821 (2004); Patrick J. Bonner, “Symposium: Maritime Catastrophes: Marine Investigation And Mass Claims Practice: Limitation Of Liability: Should It Be Jettisoned After The Deepwater Horizon?,” 85 TUL. L. REV. 1183 (2011).

¹⁹⁰ International Convention on Limitation of Liability for Maritime Claims. 1976, Vol. 1456-I-24635. U.N.T.S. (amended 1996).

¹⁹¹ *Id.* at Art. 1, para. 2

¹⁹² *Id.* at Art. 1, para. 1.

¹⁹³ *Id.* at Art. 1, para. 6.

¹⁹⁴ 33 U.S.C. § 2704 (1997).

¹⁹⁵ See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Vol. 2. 15:9, p. 223, n. 13, Thomas Reuters, 6th Ed. 2018.

¹⁹⁶ Small Passenger Vessel Liability Fairness Act of 2021, H.R. 5329, 117th Cong.(2021-2022).

¹⁹⁷ *Id.*

2021 are stalled in committees. As the demisemiseptcentennial¹⁹⁸ of the Act approaches and despite its continued critiques, it remains alive, and well and continues to generate new jurisprudence.

¹⁹⁸ One hundred seventy-fifth anniversary. Peter Donohue, *175th Anniversary* (2017), https://www1.villanova.edu/villanova/president/university_events/175.html.