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COMMENT

THE FLORIDA JOINDER RULE AND ITS EFFECT ON AN ADMIRALTY LIMITATION OF LIABILITY PROCEEDING

DEBRA J. KOSSOW* AND DENNIS J. LEWIS**

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I. INTRODUCTION

In 1969 the Supreme Court of Florida, in the case of *Shingleton v. Bussey*,¹ construed the Florida real party in interest rule² as allowing the joinder of an automobile liability insurer as a codefendant in a negligence action against the insured. The rule of *Shingleton* was soon expanded to apply not only to automobile insurers, but also to liability insurers in general,³ such as premises liability⁴ and professional liability insurers.⁵

The advent of the joinder rule of *Shingleton* raises some interesting questions with respect to its applicability in federal court proceedings in Florida. The purpose of this comment is to examine one such question: Whether a shipowner's protection and indemnity insurer can properly be joined with the insured in a federal court in Florida in an admiralty proceeding for limitation of liability under 46 U.S.C. section 183 *et seq.* (1970) and Federal Rule of Civil Procedure supplemental rule F.⁶ Limitation of liability is a right which is personal to the shipowner; consequently, his insurer, if joined in a limitation proceeding,⁷ might not be able to avail itself of the protection of limited liability and thus might be held liable to the limits of the policy.⁸

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1. 223 So. 2d 713 (Fla. 1969).

2. FLA. R. CIV. P. 1.210.

3. *Beta Eta House Corp. v. Gregory*, 230 So. 2d 495 (Fla. 1st Dist.) *aff'd*, 237 So. 2d 163 (Fla. 1970).

4. *Id.*; *Liberty Mutual Ins. Co. v. Roberts*, 231 So. 2d 235 (Fla. 3d Dist. 1970).

5. *Shipman v. Kinderman*, 232 So. 2d 21 (Fla. 1st Dist. 1970).

6. FED. R. CIV. P. supplemental rule F for certain admiralty and maritime claims.

7. See note 22 *infra* and accompanying text.

8. See *Olympic Towing Co. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); *In re Independent Towing Co.*, 242 F. Supp. 950 (E.D. La. 1965).

It has already been determined that such joinder is permissible in Louisiana⁹ and in Puerto Rico¹⁰ where the respective legislatures have enacted statutes¹¹ permitting direct actions against insurance companies without the necessity of filing suit against the insured. It has also been determined in certain admiralty courts that in the absence of a state direct action statute, joinder of a shipowner's protection and indemnity insurer is not permissible in a limitation of liability proceeding.¹²

Florida's judicially created joinder rule, which allows a direct action against an insurer when the insured is a party, is not as broad as the rule established by statutes in Louisiana and Puerto Rico where the insurer can be sued separately.¹³ Yet by allowing joinder of insurance companies, the Florida law departs substantially from the usual rule which precludes such joinder in the absence of a direct action statute. The availability of joinder of a protection and indemnity liability insurer in a limitation of liability proceeding is largely dependent upon state law with respect to direct actions,¹⁴ and the status of Florida law is somewhere between that of states having direct action statutes and states without such statutes. Therefore, the issue of whether a shipowner's insurer can be joined with the insured in an admiralty limitation of liability proceeding presents a close question involving many aspects of substantive law and procedure, as well as state, national, and international policy.

Generally, direct actions afford protection to an injured party by assuring him that in the event of the insured's being found liable, the insurance company will bear the burden of the loss up to the policy limits. If such a direct action were applicable in an admiralty limitation of liability proceeding, the liability of the insurer could exceed the limited liability of the insured. As a result, not only would the insured be affected by increased premiums, but the United States merchant marine might be put at a competitive economic disadvantage with European shipping. A brief summary of the origin and purpose of the Limitation of Liability Act will provide some insight into how competition can be affected by broadening the liability of the shipowner and his protection and indemnity insurers, which, in effect, is what a direct action would accomplish.

9. *Olympic Towing Co. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); *In re Sincere Navigation Corp.*, 317 F. Supp. 1 (E.D. La. 1970).

10. *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784 (D.P.R. 1967).

11. LA. REV. STAT. ANN. ch. 22, § 655 (1974); LAWS OF P.R. ANN. ch. 26, § 2003 (1974).

12. *Complaint of Harbor Towing Corp.*, 335 F. Supp. 1150 (D. Md. 1971); *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078 (W.D. Pa. 1971); *In re Pacific Inland Navigation Co.*, 263 F. Supp. 915 (D. Hawaii 1967).

13. See notes 9-11 *supra* and accompanying text.

14. See *The M/V "Tungus" v. Skovgaard*, 358 U.S. 588 (1959). "[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State." *Id.* at 593, *citing* *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942). This case dealt with the question of whether a federal court sitting in admiralty should apply a state wrongful death statute.

II. HISTORY AND PURPOSE OF THE LIMITATION OF LIABILITY ACT

In the early 19th century, various forms of limitation of liability statutes were being enacted in European countries, as a result of which the United States was put at a competitive disadvantage in maritime commerce.¹⁵ In England, for example, Parliament passed a limitation of liability statute which provided that, in the event of an accident at sea due to the negligence of the vessel's master or crew, the owner's liability would be limited to the value of the vessel and the freight due or to become due.¹⁶ Statutes of this nature provided some financial protection to shipowners, who, without a limitation statute, could have been held liable for the full amount of the damages resulting from a disaster at sea. Furthermore, freedom from the threat of such ruinous liability tended to encourage investment in the European shipping industry. To remedy this situation, the United States passed its first federal limitation of liability act in 1851,¹⁷ the underlying purpose of which was to encourage American shipbuilding and to prevent the United States shipping industry from being subject to severe economic losses that shipowners in England and the rest of Europe did not have to risk.¹⁸

When the statute was first enacted, American courts gave it a liberal construction in favor of the shipowner. For example, the English statute, after which the Limitation of Liability Act was patterned by the United States, provided that the fund be limited to the valuation of the ship before the accident.¹⁹ Since this construction would have defeated the primary purpose of the United States statute, the United States Supreme Court in *Norwich Co. v. Wright*²⁰ held that the fund be valued at the time suit is filed. If valued before, as in England, and the vessel were destroyed, the shipowner could be liable for an amount equal to the value of a ship which no longer existed. However, if valued after the loss, as in the United States statute, the shipowner would be protected financially against complete disasters.

The time of valuation was further construed by the Court to take place at the end of the voyage; therefore, if the ship sank, the time of the sinking would mark the voyage's termination.²¹ Under the previous rule, whereby the ship was valued at the time suit was filed, the vessel could be raised and repaired before any suit was commenced.

15. See E. BENEDICT, *THE LAW OF ADMIRALTY* (6th ed. 1940).

16. An Act to Limit the Responsibility of Ship Owners, in *Certain Cases*, 53 Geo. 3, c. 159 (1813).

17. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (codified at 46 U.S.C. §§ 181 *et seq.* (1970)). Maine and Massachusetts had already passed similar statutes. See *The Main v. Williams*, 152 U.S. 122 (1894).

18. *Moore v. American Transp. Co.*, 65 U.S. 1, 39 (1860).

19. *Id.* at 40.

20. 80 U.S. 104 (1871).

21. *The City of Norwich v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886).

The limitation fund would then include the value of the repaired vessel, and thus the policy of the statute as expressed in the *Norwich* case would have been circumvented.

The Limitation of Liability Act provided that the liability of the vessel owner would be limited to an amount not in excess of "the value of the interest of such owner in such vessel, and her freight then pending."²² Although it had already been decided that the value of the owner's interest was to be determined at the end of the voyage, there was much confusion as to what constituted the "owner's interest." In *The City of Norwich*,²³ the United States Supreme Court held that hull insurance proceeds were not part of the fund, although the Court subsequently held that the value of the owner's claims against third parties was included.²⁴ The Court also defined "freight then pending" as the earnings of the voyage, which included passenger fares and freight charges, whether prepaid or collect on delivery.²⁵ No deduction was allowed for expenses.²⁶

Until 1935 the Limitation of Liability Act was not substantially amended,²⁷ and, as can be seen from the foregoing, the courts were construing the statute liberally in favor of shipowners. Then, in 1935, the disaster of the *Morro Castle*²⁸ prompted the passage of the Sirovich amendments.²⁹ This marked the beginning of a trend in the Congress³⁰ and the courts towards giving more consideration to the injured persons and property owners than had been accorded previously. When the Limitation Act was first passed in 1851, vessels were being used primarily to transport cargo, not persons. When oceanliners began carrying passengers across the Atlantic, with the ensuing disasters, the purposes of the Act paled in comparison to the amount of injury that was suffered. The legislature could no longer find shipbuilding more

22. 46 U.S.C. § 183(a) (1970) provides:

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity of knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

For the exception provided in subsection (b) see note 34 *infra*.

23. 118 U.S. 468 (1886). Hull insurance provides protection against loss of the ship (hull). This is distinguished from protection and indemnity insurance which protects the owner against liabilities specified in separate policies.

24. *O'Brien v. Miller*, 168 U.S. 287 (1897).

25. *The Main v. Williams*, 152 U.S. 122 (1894).

26. *In re W.E. Hedger Co.*, 59 F.2d 982 (2d Cir. 1932).

27. The statute had been amended in certain sections, e.g., Act of Feb. 28, 1871, ch. 100, § 69, 16 Stat. 458 (codified at 46 U.S.C. § 181 (1970)).

28. *New York & Cuba Mail S.S. Co. v. Continental Ins. Co.*, 32 F. Supp. 251 (S.D.N.Y. 1940), *rev'd*, 117 F.2d 404 (2d Cir.), *cert. denied*, 313 U.S. 580 (1941). In this case, the claims totaled \$13,500,000, while the owners sought to limit their liability to \$20,000.

29. Act of June 5, 1936, ch. 521 § 1 (codified at 46 U.S.C. § 183(b)-(f) (1970)).

30. Merchant Marine Act of June 29, 1936, ch. 858, § 101, 49 Stat. 1985, *as amended*, 46 U.S.C. §§ 1101 *et seq.* (1970).

important than compensating human suffering. Therefore, the Sirovich amendments³¹ and the Fire Bill³² were passed for the primary purpose of compensating personal injury and death claims.

The main section of the Sirovich amendments provides that when the owner's liability, as previously limited under the Act, is insufficient to pay all losses in full, the amount of the fund available for bodily injuries and loss of life claims should be increased to \$60 per ton.³³ Therefore, if a vessel is totally destroyed, a minimum fund is made available, but only for personal injury and death claims.³⁴ In addition, the original Act provided that the liability of the owner of a "seagoing vessel" for personal injury and death claims could be limited only if he were without privity or knowledge of the occurrence causing the injury. Through the expansion of the privity or knowledge concept, the amendments have restricted the shipowner's right of limited liability by imputing the privity or knowledge of the master, superintendent, or managing agent to the owner.³⁵ This is significant since shipowners could often claim that since they were not aboard the vessel at the time of injury, they had no privity or knowledge and hence their liability was limited.

The second law passed by the Congress was the Fire Bill,³⁶ which applied to any vessel which had berths or stateroom accommodations for fifty or more persons. Before embarking on any voyage, the owner was required to establish his financial responsibility,³⁷ the amount of

31. The amendments added sections (b) thru (f) to 46 U.S.C. § 183 (1970).

32. 46 U.S.C. § 817(d) (1970).

33. 46 U.S.C. § 183(c) (1970) provides:

For purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

34. 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 or 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.

If a ship's gross tonnage were 10,000 tons and valued at \$1,000,000 after a disaster, and the total claims are in excess of this fund, the Sirovich amendment would apply. Assume the cargo claims totaled \$700,000 and the bodily injury claims were \$700,000. Since the fund is proportionately divided among the respective claims, \$500,000 would be made available to the bodily injury claimants. Applying the amendment provisions, at \$60 per ton, the minimum fund available should be \$600,000; therefore, the excess of \$600,000 over the amount proportionately distributed to the personal injury claimants (\$500,000) would be \$100,000. The fund would then be \$1,100,000; \$500,000 for cargo and \$600,000 for personal injury claimants.

35. 46 U.S.C. § 183(a) (1970). In *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963), the court held:

[K]nowledge means not only personal cognizance but also the means of knowledge . . . of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.

Id. at 166.

36. 46 U.S.C. § 817(d) (1970).

37. *Id.* This could have been established by insurance, posting a bond, being self-insured, or any other means of proving financial security.

which was determined by a sliding scale based upon the vessel's accommodations.³⁸

Concurrent with the congressional reevaluation of the Limitation of Liability Act, the judicial branch was called upon to further interpret the statute's provisions. One issue concerned whether the Act restricted a shipowner's liability in a contract action. In *In re Wood*³⁹ an injured seaman based his claim on the fact that the owner breached his warranty that the vessel was seaworthy; because the action lay in contract, the court held that the limitation statute was not available to the owner. Courts also extended this theory—that a shipowner may not limit his liability in an action based upon contract—to the flotilla doctrine: When there is a contract requiring the use of more than one vessel, the value of all vessels necessary to the operation should be included in the fund, even though a fire or other disaster may have affected only one ship.⁴⁰ The contract theory was further applied to preclude the owner from limiting his liability against claims of injured seamen for maintenance and cure.⁴¹

Although limiting the types of claims that may be defended by the limitation statute, the courts have expanded the number of persons the statute was meant to protect. The courts have broadened the statute to include as "shipowners" such parties as shareholders, mortgagees, prior vendors, life tenants, trustees, and government agencies operating privately owned ships in wartime.⁴² This expansion is in addition to a broad provision within the statute itself which makes reference to "the owner of any vessel, whether American or foreign . . ."⁴³ Courts have recognized that the statute applies to both domestic and foreign vessels,⁴⁴ and have held that even where both parties to the suit are foreign, the United States may have jurisdiction to hear the case, provided there is no forum-selection clause to the contrary.⁴⁵

38. For example, if there were 2000 passengers, \$12,500 would be available for each one in the event of a disaster. This amount is obviously inadequate. 46 U.S.C. § 817(d)(a) (1970).

39. 230 F.2d 197 (2d Cir. 1956).

40. *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967); *In re United States Dredging Corp.*, 264 F.2d 339 (2d Cir. 1959).

41. *Murray v. New York Cent. R.R.*, 171 F. Supp. 80 (S.D.N.Y. 1959), *aff'd*, 287 F.2d 152 (2d Cir. 1961). Maintenance and cure was a remedy available to a seaman when the voyage terminated early. He was allowed to recover an amount equivalent to what he would have earned had the voyage not ended unexpectedly. His subsistence and lodging were also considered. Comment, *Maintenance and Cure, The Jones Act, and Land-Based Seamen*, 46 TUL. L. REV. 877 (1972).

42. Adler, *For Abolition or Liberalization of Present Limitation of Liability Statute*, ABA Section of Insurance, Negligence and Compensation Law Proceedings 409 (1968). *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968).

43. 46 U.S.C. § 183(a) (1970).

44. *The Scotland*, 105 U.S. 24 (1881).

45. *The Mandu*, 102 F.2d 459 (2d Cir. 1939). Problems arise when an accident occurs to a foreign ship in international waters, as a result of which the owner, being sued in an American court, is seeking to limit his liability under 46 U.S.C. §§ 181 *et seq.* (1970). An issue is raised whether procedural or substantive law governs as to the limit of liability. Generally, the substantive law of the country represented by the vessel's flag governs the issue of liability (*In re Chadade S.S. Co.*, 266 F. Supp. 517 (S.D. Fla. 1967)); while the forum's law applies to procedure. *Black Diamond S.S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386 (1949). When

In contrast to the liberal interpretation as to whom the defense of limitation of liability is available, the courts have provided procedural benefits to certain claimants against the limitation fund. Although generally the federal district court has exclusive jurisdiction in limitation of liability cases,⁴⁶ an exception is made where there is only one claim or where the aggregate of all claims will not exhaust the available limitation fund. In these situations, the federal district court will not enjoin the prosecution of claims in state courts;⁴⁷ whereas if there is a possibility that the claims will exceed the fund, the court is justified in staying other actions.⁴⁸

If the injured party seeks to prosecute in a state court, he must stipulate to the owner's right to seek limitation of liability in a federal district court. As part of that stipulation, plaintiff must agree not to

both the forum and the country whose substantive law is applicable have limitation statutes, it is necessary to determine whether the respective statutes are procedural or substantive. This determination was made in *Black Diamond*, where a United States ship collided with a British vessel in Belgian waters. The owner of the British ship sought to limit his liability to the amount established by the Brussels Convention of 1924, which had been adopted by Belgium and Britain. If the United States limitation statute were applied, the limit of the fund would be \$1,000,000, as compared to \$325,000 if the Brussels Convention were applicable. The issue was raised because the forum, the United States, has a procedural requirement that bond be posted by the shipowner in an amount equal to his potential liability. Although posting of the bond is procedural, the amount is determined by the applicable substantive law. Therefore, the Court in *Black Diamond* held that if the Brussels Convention were procedural, the forum's law would govern as to the amount of the bond. Alternatively, if the Brussels Convention were substantive, the law of the locus of the tort would apply.

Although the court in *In re Chadade S.S. Co.*, 266 F. Supp. 517 (S.D. Fla. 1967), found a distinction between the procedural limit of liability and the procedural means to obtain it, G. Gilmore and C. Black, *Law of Admiralty* (1975) at 939 state:

[O]n the theory that limitation law is procedural rather than substantive, so that, on received principles of the conflict of laws, the law of the forum should govern, it has been assumed that American Courts will apply American limitation law in any limitation proceedings properly before them.

The United States Supreme Court in the *Titanic-Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914), held that a limitation proceeding is procedural since it attaches to the remedy, not the right. Gilmore and Black do not feel that the *Titanic* and *Black Diamond* decisions are in conflict.

46. ADMIRALTY R. 54, now known as FED. R. CIV. P. supplemental rule F.

47. G. GILMORE & C. BLACK, *LAW OF ADMIRALTY* 864 (1975). The procedure for allowing limitation of liability requires the shipowner to file a petition or plead limitation as a defense to an action brought by an injured claimant. If the shipowner files a petition to limit his liability, it must be filed within six months of receipt of a written claim against the owner, or may be filed before any claim is received. The petitioner must post a bond or cash for the value of the vessel and pending freight or surrender the vessel and secure pending freight. He must also furnish bond for such additional amounts as the court may fix as necessary to carry out the provisions of the statute, as amended. Petitioner then files a complaint setting forth facts and a prayer for relief. Then, on application of petitioner, the court shall enjoin all other actions or proceedings against the petitioner or his property with respect to claims subject to limitation of liability. FED. R. CIV. P. supplemental rule F. *But see In re Marsuerte Compania Naviera, S.A.*, 252 F. Supp. 279 (S.D.N.Y. 1966) (attachment action allowed to proceed).

Petitioner must give notice to all known injured parties or claimants and publish notice as directed by the court. Then, claimants appear and file their claims. They may contest any issue of the owner's case or any issue of the claim of any other claimant. FED. R. CIV. P. supplemental rule F.

48. *See In re City of New York*, 1941 A.M.C. 569 (S.D.N.Y. 1941).

raise the defense of *res judicata*.⁴⁹ If a defense against such limitation is raised, the issue is contested in a federal court without a jury; then, the merits of the case are decided in the state court, where a jury trial is available.⁵⁰

III. GOVERNMENT AID TO SHIPPING—POLICY CONSIDERATIONS

Even though the courts and the legislature have attempted to ease the effect of the limitation statute with respect to claims for death and bodily injuries, the problem of inadequate compensation still remains. The original purposes of the statute—to promote shipbuilding and encourage competition—have been only partially satisfied by a combination of the Act's provisions and government subsidies.

Under the Merchant Marine Act of 1936,⁵¹ Congress established a construction differential subsidy (CDS) and an operating differential subsidy (ODS). CDS provides a subsidy to American shipyards to enable them to build more ships for United States flag registry and operation, at a cost to the prospective shipowner which is competitive with foreign-flag capital costs. ODS provides a direct operating cost differential subsidy to shipowners, which is designed to make the cost of operating an American-flag ship competitive with the cost of operating similar vessels under the registry of a foreign country.⁵²

In addition, further government assistance to shipbuilding was provided in cargo preference laws requiring that government owned or financed goods must be carried by United States flag ships. The Maritime Office of Market Development and the National Maritime Council have programs to actively promote cargo for United States flag carriers and to acquaint shippers with the advantages of American-flag services.⁵³ Further, the Merchant Marine Act was amended in 1970 to allow for a deferral of income tax on profits connected with shipping, if the money is put into a capital construction fund.⁵⁴

Notwithstanding the subsidies, preference laws, and the Limitation of Liability Act, American-flag ships carry less than seven percent of the United States import-export cargo; hence, the congressional policy of improving the competitive position of the United States in world shipping is not being achieved.⁵⁵ Additionally, the United States

49. *In re Red Star Barge Line*, 160 F.2d 436 (2d Cir. 1947).

50. *Id.* See also, *ex parte Green*, 286 U.S. 437 (1932).

51. 46 U.S.C. §§ 1101 *et seq.* (1970).

52. Kominers, *Federal Government Aids to Merchant Shipping*, 47 TUL. L. REV. 691 (1973).

53. *Id.*

54. Act of October 21, 1970, Pub. L. No. 91-469, 84 Stat. 1018, amending 46 U.S.C. §§ 1101 *et seq.* (1970).

55. Kier, *The Effect of Direct Action Statutes on P & I Insurance*, 43 TUL. L. REV. 638 n.116 (1969); 33 N.M.U. PILOT, No. 11, Nov. 1968 at 11, 25; *Hearings on H.R. 13940 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 2d Sess. 245 (1968).

fishing industry has been described as "nonexistent."⁵⁶ Clearly the United States merchant marine still requires aid.

On the other hand, persons suffering harm as a result of a catastrophe at sea have a right to an adequate recovery. Cargo owners, of course, are not greatly affected by the Limitation of Liability Act due to the passage of the Carriage of Goods by Sea Act (COGSA),⁵⁷ which imposes its own limit on the liability of the owner. Furthermore, insurance is generally available to protect the interests of cargo owners, and, therefore, can be reflected as part of the cost of shipping. Unlike the cargo owners, however, those suffering bodily harm or death have a strong case for the repeal of the Limitation Act.

Critics have attacked the statute on several grounds. First, it encourages forum shopping by allowing the shipowner either to choose the forum in which to file the petition or to have a friendly claimant file suit in the forum in which he desires to file his petition.⁵⁸ Second, except for the single claimant doctrine,⁵⁹ the right of trial by jury is denied to claimants.⁶⁰ Third, the limitation period within which claimants may file suit may be as short as thirty days, and it runs from the time notice is sent to potential claimants.⁶¹ Fourth, the courts have greatly expanded the meaning of the term "shipowners."⁶² Most importantly,

[i]t is claimed by opponents of limitation of liability that vessel owners seek to subsidize the shipping industry at the expense of the victims and claimants. It is further claimed that inasmuch as less and less cargo is being shipped in American bottoms, it is the foreign flag merchant marine that, in effect, will be subsidized by the plight of the victims and claimants.⁶³

This analysis presupposes, however, that there is only one alternative to the present system of limited recovery, i.e., recovery in full from the shipowner under traditional theories of negligence and respondeat superior. If it is the public policy of the United States to provide compensation for those injured in maritime disasters as well as to protect the shipping industry, there is no reason that Congress cannot effectuate this public policy by providing public funds to compensate the injured parties without further damaging an already ailing American merchant marine.

56. Adler, *supra* note 42, at 409; Roberts, *For Retention of Limitation of Liability for Shipowners*, ABA Section of Insurance, Negligence and Compensation Law Proceedings 415 (1968).

57. 46 U.S.C. §§ 1300 *et seq.* (1970).

58. 46 U.S.C. § 185 (1970); FED. R. CIV. P. supplemental rule F.

59. See notes 46-50 *supra* and accompanying text.

60. Adler, *supra* note 42.

61. FED. R. CIV. P. supplemental rule F (4).

62. See note 42 *supra* and accompanying text.

63. Adler, *supra* note 42, at 412.

Congress has already indicated that it is unwilling to alter further the Limitation of Liability Act. Bills have been introduced in Congress to abolish the Limitation Act,⁶⁴ to repeal limitation with respect to personal injury and death claims,⁶⁵ and to adopt the Brussels Convention.⁶⁶ None of these bills has been passed.

Proponents of the statute have asserted various reasons for retention of the Act. Among these are the desirability of worldwide uniformity of maritime law, the need to encourage shipping and investment where there is no subsidy, the benefit of having all proceedings tried in one action and in one court, the need to encourage investment in the ailing American fishing industry, the need to build maritime protection for national defense, and the prevention of prohibitive insurance rates.⁶⁷

The courts, however, in discussing the desirability of the Limitation Act and in weighing the needs of the shipping industry against those of injured persons, have said, in cases such as *In re Independent Towing Co.*,⁶⁸ that they cannot countenance, while administering equity in an admiralty court, the inequity of placing the financial burden of the injuries and losses upon the injured parties and their families.

An equitable solution to this problem is that compensation to those suffering bodily harm be provided either by the entire shipping industry as an added cost of doing business or by the general public in the form of an additional subsidy. In light of the financially troubled status of the United States shipping and fishing industries and a strong public policy to preserve them, a government subsidy provided by Congress might be the better solution.⁶⁹

64. S. 3251, 89th Cong., 2d Sess. (1966); H.R. 17254, 90th Cong., 2d Sess. (1968).

65. S. 3251, 89th Cong., 2d Sess. (1966); H.R. 17254, 90th Cong., 2d Sess. (1968).

66. Brussels Convention on Limitation of Liability, Oct. 1923. 4 *REVUE DE DROIT MARITIME COMPARÉ* 597 (1923). The Brussels Convention differs from the American Limitation of Liability Act considerably. Among the differences are that under the Brussels Convention, a maximum fund is established in which \$67 per ton is available for all claims and \$140 per ton is exclusively used for injury and death claims, there is no alternative provision with respect to the value of the vessel, and the shipowner may file his petition in the court of any member nation. In the event of a total disaster, the Brussels Convention would provide a larger fund (\$207 as compared to \$60) than would the American statute; but in ordinary collision cases or partial disasters, the Brussels Convention may be smaller since the prescribed amount for the fund represents the maximum recovery. If the Convention were adopted, an issue would be raised as to the effect, if any, of state laws in an action based upon the Brussels Convention. If the state provides for direct actions against insurers, would this be honored in a federal court applying the Brussels Convention? If so, what would prevent a foreign shipowner from bringing his petition in a state or nation where such an action exists, since he may petition to limit his liability in any court of any member nation? How would this affect America's position in world commerce?

67. Roberts, *supra* note 56.

68. 242 F. Supp. 950 (E.D. La. 1965).

69. Such a subsidy could take the form of an addition to the limitation fund, or be based on a percentage of individual harms suffered. In the latter case, the federal government might contribute an additional amount to the fund, which could be a fixed percent of the amount of personal injuries suffered.

IV. DIRECT ACTION STATUTES

The federal courts in Louisiana and Puerto Rico have arrived at a different solution to this question without congressional action.⁷⁰ These courts have consolidated limitation of liability proceedings and direct actions against the shipowners' protection and indemnity insurers, thereby allowing the claimant to recover from the insurer up to the limits of the policy, regardless of the amount of the limitation fund. In order to place the decisions of these jurisdictions in proper perspective, it is necessary first to consider the case of *Maryland Casualty Co. v. Cushing*.⁷¹

In that case, a towboat, *The Jane Smith*, capsized and sank when it collided with a concrete railroad pier in the Atchafalaya River in Louisiana, resulting in the drowning of five crew members. The owner of the towboat filed a petition for limitation of liability in the United States District Court for the Eastern District of Louisiana. The personal representatives of five seamen brought a diversity action against the owner of the bridge and against the liability insurers of the boat owner, pursuant to the Louisiana direct action statute.⁷²

The district court granted a motion for summary judgment, dismissing the suit against the insurers on the ground that such application of the direct action statute would contravene the essential purpose of the Limitation of Liability Act and would materially prejudice the characteristic features of general maritime law.⁷³ The Fifth Circuit Court of Appeals reversed on the ground that the Louisiana direct action statute was not in conflict with substantive admiralty law or with any admiralty remedy.⁷⁴

The Supreme Court, in a 5-4 decision with three separate opinions, vacated the court of appeals decision and remanded the case, holding that the direct action could proceed only after the conclusion of the limitation proceeding.⁷⁵

Four Justices⁷⁶ were of the opinion that the Louisiana direct action statute was in conflict with and an intrusion upon the harmony and uniformity of maritime law. They reasoned that to allow the direct action to proceed would strip shipowners of the benefit of their insurance protection where the claims exceeded insurance policy limits; would reduce the availability and increase the shipowners' cost of

70. See notes 81-94 *infra* and accompanying text.

71. 347 U.S. 409 (1954).

72. LA. REV. STAT. ch. 22, § 655 (1974).

73. *Cushing v. Texas & Pac. Ry.*, 99 F. Supp. 681 (E.D. La. 1951), *rev'd sub nom.* *Cushing v. Maryland Cas. Co.*, 198 F.2d 536 (5th Cir. 1952), *vacated and remanded to district court*, 347 U.S. 409 (1954).

74. *Cushing v. Maryland Cas. Co.*, 198 F.2d 536 (5th Cir. 1952), *vacated and remanded to district court*, 347 U.S. 409 (1954).

75. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954), *vacating and remanding to district courts*, 198 F.2d 536 (5th Cir. 1952), *rev'g sub. nom.* *Cushing v. Texas & Pac. Ry.*, 99 F. Supp. 681 (E.D. La. 1951).

76. Justices Frankfurter, Reed, Jackson, and Burton.

insurance, thereby detracting from the benefit which Congress intended to bestow on the shipping industry; would detract from the benefit of a concursus,⁷⁷ forcing shipowners and crew to relitigate the same issues several times in several different forums, possibly resulting in conflicting court decisions; and would prejudice the rights of claimants who rely on the limitation proceeding to present their claims if one or two other claimants were permitted to drain away all of the insurance proceeds in direct actions.

The four dissenting Justices⁷⁸ saw no conflict between the Louisiana direct action statute and the maritime law. They said that the Limitation Act was not "intended to give shipowners additional special privileges with respect to liability insurance or to interfere with state regulation of any type of insurance."⁷⁹ The dissenters further stated that the intent of Congress was to reduce shipowners' obligations caused by wrecks, not to reduce their cost of doing business due to higher insurance premiums.

In a separate concurring opinion, Mr. Justice Clark stated that the conflict between the Louisiana direct action statute and the Limitation Act could be resolved without invalidating the state statute. He determined that by allowing the limitation action to proceed to a conclusion and subsequently permitting a direct action against the insurer, the shipowner could have the benefit of his insurance; there would be no depletion of insurance funds to the prejudice of some claimants; and the benefits of the concursus would be realized.

In order to break the 4-4 deadlock, the four justices who saw a conflict between state and admiralty law adopted the solution of Justice Clark and held that a direct action could be maintained only after the conclusion of the limitation proceeding. It is difficult to determine the precise effect of this decision.

Because of the Court's extraordinary division, it is impossible to say what the Cushing case stands for, beyond the fact that it presumably established a procedure to be followed by lower courts in handling similar cases until the Supreme Court further clarified the issues.⁸⁰

So far, the Supreme Court has declined to clarify these issues.

A similar situation came before a Louisiana district court in the case of *In re Independent Towing Co.*⁸¹ In that case a shipowner filed a petition for limitation of liability in the District Court for the Eastern District of Louisiana. The claimants then brought a direct action against the shipowner's insurer in the same court. The insurance

77. A concursus would result in the bringing together of all claims arising out of the occurrence in one forum and in one action.

78. Chief Justice Warren and Justices Black, Douglas, and Minton.

79. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 434 (1954).

80. G. GILMORE & C. BLACK, *supra* note 47, at 910.

81. 242 F. Supp. 950 (E.D. La. 1965).

underwriters moved to stay the direct action proceedings pending the outcome of the limitation proceeding. The court denied the motion and instead ordered that both actions be consolidated. The court reasoned that in this way the benefits of a concursus would be retained, and the shipowner would still get the benefit of his insurance.⁸²

Also, in that case, the court found that limitation of shipowners' liability is a defense which is personal to the shipowner. The court further determined that since under the Louisiana direct action statute the insurer may not avail itself of the personal defenses of the insured, an insurer may not avail itself of the defense of limitation of liability and therefore may be held liable up to the policy limits. Thus, from the claimant's point of view, in a limitation of liability action in a federal court sitting in Louisiana, the amount of the fund is in effect increased to the limits of the protection and indemnity policy; to the extent of any such increase, the Limitation Act can be circumvented.

In a similar case in Puerto Rico, *Torres v. Interstate Fire and Casualty Co.*,⁸³ where six direct actions against a shipowner's insurers were pending in the same court as the shipowner's petition for limitation of liability, the court allowed all of the actions to be consolidated and tried before a jury without waiting for a trial and entry of judgment in the limitation proceeding. In that case, the court examined Puerto Rico decisions and concluded that under the Puerto Rico direct action statute, an insurer could not avail itself of defenses personal to the insured. Therefore, the court concluded, as did the court in *Independent Towing*, that the insurers could not raise the personal defense of limitation of shipowner's liability.

In *Olympic Towing Corp. v. Nebel Towing Co.*,⁸⁴ a shipowner

82. The court outlined several alternatives to be followed, depending upon whether limitation of liability is granted and the amount of the claims established:

1. If the policy limits be sufficient to satisfy the claims established in the direct actions, there the matter ends, and the limitation proceeding as concerns the direct action claimants would become moot.

II. Should the insurance coverage be insufficient to satisfy all the claims in the direct action against the insurer, then the court would proceed with the limitation hearing. Naturally, no attempt could be made to prove additional damages beyond those established in the direct action proceeding. . . .

A. If the limitation is granted and the amount of the limitation fund exceeds the insurance coverage, then the fund would be credited with the insurance recovery, and the remainder would be distributed to the claimants in accordance with the amount and rank of the claims proven.

B. If limitation is granted, but the fund is less than the amount of insurance coverage, then the limitation fund is credited with the amount already recovered from the shipowner's insurer, and no further recovery would be allowed. In this way, the shipowner would be protected by his insurance to the same extent as he would be in any other jurisdiction, thus assuring uniformity of treatment of shipowners in all jurisdictions of the United States.

C. If no limitation of liability is granted, then the shipowner would be credited with the amount of damages recovered from the insurer in the direct actions, and then stand liable for the entire amount by which the proven damages exceed the insurance coverage.

In re Independent Towing Co., 242 F. Supp. 950, 956 (E.D. La. 1965).

83. 275 F. Supp. 784 (D.P.R. 1967).

84. 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

filed a petition for limitation of liability and a claimant filed a diversity action against the shipowner's protection and indemnity insurer in the same federal court in Louisiana. The Fifth Circuit Court of Appeals held that the action could properly be consolidated since "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."⁸⁵

The court further reasoned in *Olympic Towing* that the Limitation of Liability Act was not intended to limit the amount of premiums paid by vessel owners on insurance; hence, the possibility of higher premiums was not a sufficient basis for permitting an insurer to limit its liability. Also, the court reaffirmed the proposition that limitation of liability is a personal defense⁸⁶ and that personal defenses are not available to insurers sued under the Louisiana direct action statute.⁸⁷

Thus, in the Fifth Circuit the rule has developed that where a direct action against a shipowner's insurer is pending in the federal court in which the shipowner has filed a petition for limitation of liability, the actions may be consolidated and the direct action need not be stayed until completion of the limitation proceeding. While this procedure apparently conflicts with the holding of *Maryland Casualty Co. v. Cushing*, the court reasoned in *Olympic Towing* that since the "reason for requiring the limitation proceeding to be completed first is to permit the vessel owner to receive the benefit of his insurance,"⁸⁸ a different procedure which serves this same policy is permissible.

The direct action and the limitation proceeding must be pending in the same federal court, otherwise the limitation action must be completed before the direct action may proceed. Thus, where a direct action against a shipowner's insurer was filed in a federal court in Louisiana and the shipowner's petition for limitation of liability was pending in a federal court in Texas, the Fifth Circuit Court of Appeals ordered the Louisiana direct action stayed until the completion of the limitation proceeding.⁸⁹ Likewise, where a shipowner filed his petition in a federal court in Louisiana and a claimant sued the shipowner's protection and indemnity insurer in a Louisiana state court, the Fifth Circuit Court of Appeals upheld an injunction prohibiting the state court action from continuing until after the completion of the limitation proceedings.⁹⁰

85. *Id.* at 235.

86. *Id.* at 238; see *Alcoa S.S. Co. v. Charles Ferran & Co.*, 251 F. Supp. 823 (E.D. La. 1966).

87. In *Olympic Towing*, six judges would have granted a rehearing en banc. Three judges joined in a dissenting opinion stating that the court's holding was contrary to the holding of the Supreme Court in *Maryland Casualty Co. v. Cushing*.

88. 419 F.2d 230, 235 n.17 (5th Cir. 1969), quoted in *In re Sincere Navigation Corp.*, 317 F. Supp. 1, 3 (E.D. La. 1970), where the court followed *Olympic Towing*.

89. *Tokio Marine & Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, 322 F.2d 113 (5th Cir. 1963).

90. *Guillot v. Cenac Towing Co.*, 366 F.2d 898 (5th Cir. 1966). See notes 47-50 *supra* and accompanying text.

In jurisdictions where there are no direct action statutes, the federal courts have consistently refused to allow joinder of an insurer with the insured petitioner in a limitation proceeding, or to increase the amount of the limitation fund to include insurance policy benefits.⁹¹ The courts have reasoned that it would be improper to alter judicially the express provisions of the Limitation of Liability Act solely on the basis of a desire to afford greater relief to injured claimants when Congress has had the opportunity to make such changes but has refused to do so.⁹²

Thus, the court in *Pettus v. Jones and Laughlin Steel Corp.*,⁹³ stated:

It may be that there is a need to re-examine and liberalize the owner-oriented rules in this field, but this can more safely and adequately be accomplished by legislation based on nation-wide and international studies of the problem, and with provision for prospective application sufficiently in advance not to cause major disturbances in the whole field of marine insurance, rather than by chipping away piece-meal at the problem by occasional court decisions on a case-by-case basis.⁹⁴

V. THE FLORIDA JOINDER RULE

The Louisiana and Puerto Rico cases, where direct actions against insurers and limitation proceedings were consolidated, contained two common elements which militate against the adoption of such a procedure in Florida. First, the direct actions were filed against the shipowner's insurer without joinder of the shipowner in the federal court where the limitation proceeding was pending. Second, the law of both Louisiana and Puerto Rico prohibited the insurer from availing itself of the personal defenses of the insured.

A plaintiff cannot maintain an action directly against a liability

91. *In re Harbor Towing Corp.*, 335 F. Supp. 1150 (D. Md. 1971); *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078 (W.D. Pa. 1971); *In re Pacific Navigation Co.*, 263 F. Supp. 915 (D. Hawaii 1967).

92. *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078 (W.D. Pa. 1971); *In re Pacific Inland Navigation Co.*, 263 F. Supp. 915 (D. Hawaii 1967).

In Pettus the court stated at 1081:

The doctrine of limitation of liability is centuries old and antedates the institution of liability insurance. The advent and widespread use of maritime liability insurance suggest that a re-examination of the doctrine of limited liability might be warranted. However, Congress codified the doctrine in 1851 and then reconsidered and amended the codification in 1935, well after the advent of the institution of liability insurance, without providing any exception to the applicability of the doctrine where liability insurance is carried by a shipowner.

Congress has more recently reconsidered this matter when bills to abolish limitation of liability in cases of personal injury were rejected by both the House and the Senate. S. 3251, 89th Cong., 2d Sess. (1966); H.R. 17254, 90th Cong., 2d Sess. (1968).

93. 322 F. Supp. 1078 (W.D. Pa. 1971).

94. *Id.* at 1081, quoting *In re Pacific Inland Navigation Co.*, 263 F. Supp. 915, 919 (D. Hawaii 1967).

insurer in either a state or federal court in Florida without joining the insured. In *Kephart v. Pickens*,⁹⁵ an injured plaintiff filed suit directly against the insurer of an allegedly negligent driver without joining the insured. The court upheld an order dismissing the complaint on the ground that *Shingleton*⁹⁶ created no new substantive right, but rather "merely created a *procedural innovation*,"⁹⁷ and therefore the plaintiff had no cause of action against the insurer.

Therefore, in Florida, in order to sue the insurer of a shipowner in the same federal court in which the petition for limitation of liability is pending, or any other court, it would be necessary to join the shipowner as a party defendant. However, once a shipowner files his petition for limitation of liability, the admiralty court, upon application of the petitioner, must enjoin all claims and proceedings against the shipowner.⁹⁸

Thus, by command of a federal statute no other state or federal action against the shipowner with respect to the matter in question may continue once the petition for limitation of liability is filed and proper security given. Therefore, a claimant could not institute an action against the shipowner and its insurer in a federal court in which a limitation proceeding already was pending. Likewise, if the action against the shipowner and the insurer were filed first, that action would cease upon the filing of the petition for limitation. Consequently, the situation presented in Florida will be significantly different from that of Louisiana or Puerto Rico where two independent actions pending in the same court were consolidated.⁹⁹

In the *Independent Towing* and *Torres* cases, the courts relied on state law which held that in a direct action, an insurer could be held liable notwithstanding the personal defenses of the insured, and concluded that the insurer could not avail itself of the personal defense of

95. 271 So. 2d 163 (Fla. 4th Dist. 1973).

96. See notes 1-5 *supra* and accompanying text.

97. 271 So. 2d at 164.

98. 46 U.S.C. § 185 (1970) states: "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." And Federal Rule of Civil Procedure supplemental rule F(3) provides: "On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action."

99. The United States Supreme Court has held that a claimant may pursue his cause of action against a shipowner in a state court, where the claims against the shipowner do not exceed the amount of the limitation fund. *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957). In *Henn* the Court reasoned that "where the fund created pursuant to the Act is inadequate to cover all damages and the owner has sought the protection of the Act the issues arising from the disaster could be litigated within the limitation proceeding." *Id.* at 151. But "where the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concurrence." *Id.* at 152.

Thus, a Florida claimant could probably effect joinder of a shipowner's insurer in an action in a Florida state court where the amount of the claim does not exceed the amount of the limitation fund. But the objective of joinder of an insurer has been to obtain a judgment against the insurer for an amount in excess of the limitation fund. If such joinder can be effected only when the amount recoverable is less than the amount of the limitation fund, that objective will not be realized.

limitation of liability. The district court in Louisiana noted that under state law, an insurer could not assert such defenses as infancy, coverage, charitable immunity, governmental immunity, lunacy, or bankruptcy.¹⁰⁰

In Florida, however, under the *Shingleton* rule such defenses may operate to preclude recovery from the insurer. In *Russell v. Orange County*¹⁰¹ a plaintiff injured in an automobile accident sued Orange County and its liability insurer alleging negligence in maintaining the county road on which he was injured. Orange County asserted the defense of governmental immunity and the action against it was dismissed. Thereafter, the action against the insurer was dismissed for lack of an indispensable party—the insured, Orange County—notwithstanding the plaintiff's argument that the insurance company should be estopped from asserting the defense of governmental immunity.

Although the court in *Russell* did not squarely rule on the issue of whether an insurance company may raise the personal defenses of the insured, by the nature of the Florida joinder rule, such defenses inure to the benefit of the insurer. Therefore, the law of Florida, unlike that of Louisiana or Puerto Rico, provides no compelling reason to prevent the defense of limitation of liability from likewise inuring to the benefit of the insurer.

Further, significant conceptual differences between the Florida joinder rule and the Louisiana and Puerto Rico direct action statutes lead to the conclusion that the defense of limitation of liability would be available to an insurer joined with an insured in Florida. Under the Florida rule the liability of the insurer is dependent upon that of the insured,¹⁰² and although the insured may be joined as a party defendant, no cause of action exists against the insurer until judgment has been entered against the insured.¹⁰³

In *Davis v. Williams*¹⁰⁴ a wrongful death action was instituted against the insured. Over two years later, the plaintiff compelled the joinder of the insurer as a party defendant. The insurer raised the defense of the two-year statute of limitation for wrongful death.¹⁰⁵ The court held that the insurer was properly joined in that the statute of limitations had not yet commenced to run since no cause of action had yet accrued against the insurer. The court stated that the cause of action against the insurer "does not accrue until after [the plaintiff] has secured a judgment against the alleged defendant tort-feasor to whom [the insurer] issued its policy of professional liability insurance."¹⁰⁶

Thus, in Florida the liability of the insurer is wholly dependent

100. *Alcoa S.S. Co. v. Charles Ferran & Co.*, 251 F. Supp. 823 (E.D. La. 1966).

101. 237 So. 2d 192 (Fla. 4th Dist. 1970).

102. *Id.*

103. *Davis v. Williams*, 239 So. 2d 593 (Fla. 1st Dist. 1970).

104. *Id.*

105. FLA. STAT. § 95.11(6) (1973).

106. *Davis v. Williams*, 239 So. 2d 593, 595 (Fla. 1st Dist. 1970).

upon the judgment against the insured. The purpose of the joinder rule is not to increase the liability of insurers, but rather to assure the prevailing plaintiff that technicalities in the insurance policy would not bar his recovery.¹⁰⁷ It would be inconsistent with the theory and policy of the joinder rule to render a judgment against the insured and then render a judgment for a greater amount against his insurer.

The issue will most likely arise, however, in a federal admiralty action where the Florida joinder procedure may not be at all applicable. In the Louisiana and Puerto Rico cases, the claimants had obtained jurisdiction over the insurers on grounds independent of the admiralty proceedings for limitation of liability. Since the admiralty proceedings and the actions against the insurers were pending in the same court, the cases were consolidated to avoid two trials of the same issues of fact and law.¹⁰⁸

In Florida, however, independent jurisdiction over an insurer in the same federal court as the admiralty court limitation proceeding is unlikely since joinder of the insured shipowner is necessary in order to maintain an action against the insurer, and any such joinder will be enjoined by the admiralty court. Therefore, any joinder of the shipowner's insurer would have to be effectuated as a matter of admiralty law in an admiralty court.

In the *Olympic Towing* case, the Fifth Circuit Court of Appeals expressly declined to rule upon the issue of whether a direct action against an insurance company could be maintained under principles of admiralty law.¹⁰⁹ In three other cases, however, courts have held that such a direct action cannot be maintained under admiralty law.¹¹⁰ Therefore, since no joinder of an insurance company could be accomplished under general principles of admiralty law, it could not be effectuated in a Florida limitation of liability proceeding unless the *Shingleton* joinder rule were held to be applicable in an admiralty proceeding.

As a general rule, state substantive law may be applied in an admiralty proceeding where it does not conflict with a congressional act or affect the uniformity of admiralty law.¹¹¹ However, state remedies and procedure may not be enforced in admiralty.¹¹²

107. In *Shingleton v. Bussey*, 223 So. 2d 713, 719 (Fla. 1969), the Supreme Court of Florida explained this policy:

Delays of the insured in filing proof of claim, claims of excess of other insurance, claims of misrepresentation, failure to seek early arbitration, and a variety of other defenses growing out of policy provisions can be asserted vis-à-vis the liability of the insurer against the insured which may operate, and often do, to defeat recovery by the injured third party beneficiary.

108. *E.g.*, *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969).

109. The Court further stated: "Neither do we decide whether suit could be filed directly against the insurance company under principles of maritime law under allegations that the insurance policy is a maritime contract." *Id.* at 236.

110. *See* note 91 *supra*.

111. *Tungus v. Skovgaard*, 358 U.S. 591 (1959); *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

112. *Tungus v. Skovgaard*, 358 U.S. 591 (1959); *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924). *See* 2 AM. JUR. 2d *Admiralty* §§ 92, 137 (1962).

While it is true that, if substantive rights are created by a state statute, a federal court may enforce these even if it must depart in minor particulars from some of the rules of procedure outlined in the statute [citations omitted], it is not within the power of the state to regulate the procedure and practice of a federal court of admiralty.¹¹³

The *Shingleton* joinder rule has repeatedly and emphatically been characterized by the Florida courts as a mere "procedural innovation"¹¹⁴ which was not meant to and did not change substantive law of this state.¹¹⁵ Although one federal court in New York has characterized the *Shingleton* rule as a substantive right for conflicts of law purposes,¹¹⁶ it seems apparent in light of later clarification in Florida decisions that the court in New York had misconstrued the *Shingleton* decision.¹¹⁷ Since the Florida joinder rule is a procedural device, it may well be held not to apply in an admiralty court.

Further, the *Shingleton* decision was based upon a construction of the Florida procedure rule relating to real parties in interest.¹¹⁸ This rule differs significantly from the applicable rule in admiralty, rule 17(a) of the Federal Rules of Civil Procedure.¹¹⁹ As a matter of federal law, it has been held that an insurer may not be joined as real party in interest to an action against an insured.¹²⁰ Thus, not only is the

113. *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319, 323 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

114. *Beta Eta House Corp. v. Gregory*, 230 So. 2d 495, 499 (Fla. 1st Dist. 1970), *aff'd*, 237 So. 2d 163 (Fla. 1970).

115. *Durrett v. Davidson*, 239 So. 2d 46, 48 (Fla. 2d Dist. 1970). *See* *Kephart v. Pickens*, 271 So. 2d 163 (Fla. 4th Dist. 1973); *Davis v. Williams*, 239 So. 2d 593 (Fla. 1st. Dist. 1970).

116. *Barrios v. Dade County*, 310 F. Supp. 744 (S.D.N.Y. 1970).

117. When the *Barrios* case was decided on Jan. 7, 1970, the only enunciation of the Florida joinder rule for insurers was the *Shingleton* decision. The court in *Barrios* stated that *Shingleton* recognizes a substantive right in an injured person as a third-party beneficiary of the insurance policy to recover directly from the liability insurer of the tortfeasor. Florida, no less than Puerto Rico, created "a separate and distinct right of action against the insured where no such right had previously existed"

Id. at 748. While such an interpretation of *Shingleton* was not wholly unreasonable when the *Barrios* case was decided, subsequent decisions by the Florida courts clearly indicate that *Shingleton* was intended only to provide for joinder of an insurer as a matter of procedural convenience and definitely did not create any new right of action or any other substantive right.

118. FLA. R. CIV. P. 1.210 (1973).

119. While the language of the Florida and federal rules is similar, the Florida rule adds the sentence:

All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff.* (Emphasis added.)

This sentence, which is not a part of the federal rule, was stressed in the *Shingleton* opinion as a basis for the decision.

120. *See, e.g., Tubize Chatillon Corp. v. White Transp. Co.*, 11 F. Supp. 91 (D. Md. 1935), wherein the court stated:

In the field of insurance of property, whether against fire or marine risks, it is the well-established law that no person may sue on the contract unless specifically named therein, or unless the policy contains general language inclusive of the party to be benefited.

"The injured person has no right of action against the insurer except where it is given by the terms of the policy or by statute."

Id. at 98-99.

Florida joinder rule inapplicable because it is procedural, but it also appears to conflict with the applicable admiralty procedure.

Even if the Florida joinder rule were held to embody a substantive right, it is likely that the rule would still be inapplicable in a limitation of liability proceeding as it conflicts with the Limitation of Liability Act and with the uniformity of admiralty law. The issue presented would be similar to that of the *Maryland Casualty Co. v. Cushing* case.¹²¹

In *Cushing*, however, the issue involved the validity of a state statute authorizing direct actions against a shipowner's insurer in a collateral proceeding. In Florida the issue would involve the applicability of a state joinder rule to alter directly the limitation of liability proceeding.

VI. CONCLUSION

In recent years the courts have demonstrated a significant hostility toward the application of the Limitation of Liability Act in personal injury cases. The development of the flotilla doctrine, single claimant rule, and the inapplicability of the Limitation Act to contract actions and maintenance and cure actions are examples of this trend. In this same vein the United States Court of Appeals for the Fifth Circuit has decided in favor of permitting direct actions against insurers in the *Cushing* and *Olympic Towing* cases. Therefore, the Fifth Circuit might look favorably upon an attempt to join an insurer under Florida's joinder rule.

The Limitation of Liability Act was passed in 1851, however, for the purpose of placing the United States shipping industry on an equal footing with that of the great trading nations of the world. Since that time, generous subsidies have been provided by Congress to further effect that purpose. The present depressed state of the American shipping industry, however, demonstrates that Congress' purpose has not yet been achieved. Furthermore, Congress itself has refused to alter the Limitation Act to provide greater recovery for injured persons.

In addition to these policy considerations, the technical case militates strongly against joinder of an insurer in a Florida limitation of liability proceeding. First, the Florida joinder rule is procedural and inapplicable in an admiralty proceeding. Second, even if the Florida rule were applicable, it does not recognize liability of an insurer greater than that of an insured. It would be an anomalous result if Florida law could be applied in an admiralty court to reach a decision at which no court in Florida would arrive in interpreting the same law. Third, the joinder rule is clearly in conflict with admiralty law as stated in the Limitation Act and Supplemental rule F of the Federal

121. 347 U.S. 409 (1954).

Rules of Civil Procedure. Thus, a court which wished as a matter of policy to join the insurer would have to overcome these technical obstacles as well as countervailing policy considerations.¹²²

Further, such a court ruling might have the effect of causing greater hardship to injured claimants rather than relieving their burden. As this ruling would clearly disrupt the uniformity of admiralty law, the liability of a shipowner and his insurer would be greater in Florida than it would be in an admiralty court of another state. With the ease of forum shopping under the Limitation Act,¹²³ petitioners wishing to avoid the Florida rule would probably file for limitation of liability in distant forums, thereby increasing the difficulty of recovery for injured claimants.

Thus, the appropriate forum for resolution of this issue is the United States Congress. So far Congress has been reluctant to disturb the Limitation Act due to the ailing United States merchant marine. In order to achieve both national policy goals of promoting the shipping industry and compensating those suffering bodily harm, Congress should provide a public fund out of which such claimants could be made whole.

122. In a court order dated July 16, 1975, United States District Judge for the Southern District of Florida C. Clyde Atkins consolidated *Zambrana v. Tugboat Mary B*, Case No. 75-470-Civ-CA and *In re Dock and Marine Construction Co.*, Case No. 75-1131-Civ-CA (a limitation of liability proceeding brought by the owners of the tugboat *Mary B*) and allowed the plaintiff Zambrana's motion to file an amended complaint joining the defendant's insurer. The case was subsequently settled out of court, however, so there was no further consideration of issues raised by this comment.

123. See note 59 *supra* and accompanying text.