Limitation of Liability: Should It Be Jettisoned After the Deepwater Horizon?

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I. INTRODUCTION

Following the Deepwater Horizon incident, there was a great deal of criticism of the Limitation of Shipowners Liability Act[1] and claims that the owner of the Deepwater Horizon was using a legal loophole to shortchange those injured and the survivors of those killed on the rig. For instance, Senator John Rockefeller IV, Chairman of the Senate Committee on Commerce, Science, and Transportation, said,

> It is my understanding today that Transocean, the owner of the Deepwater Horizon, is seeking to limit its liability for this loss in federal court under a legal loophole that is both unconscionable and outdated. Transocean's cold and calculated effort to avoid taking full responsibility for their actions—or inaction—shines a bright light on a serious problem: a lack of accountability and equal treatment under the law.[2]

A widow testifying at Senator Rockefeller's hearing stated, "I believe our damages should be considered under the same standards as if the deaths had occurred on land. Why would the damages to a family be different if a death occurs on the ocean as opposed to inland?"[3]

When the House passed H.R. 5503, Judiciary Chairman John Conyers, Jr. stated, "I am proud that my colleagues have agreed today to take off the books these unfair, outdated measures, so that we can ensure that BP and other corporations are held accountable under the law."[4] Senator Charles Schumer issued a press release, stating, "The Limitation Act is no longer necessary, serves no legitimate purpose

1. 46 U.S.C. §§ 30501-30512 (2006).
2. *Deepwater Horizon Tragedy: Holding Responsible Parties Accountable: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. (2010) (statement of John D. Rockefeller IV, Chairman, S. Comm. on Commerce, Sci. & Transp.).
3. *Id.* (statement of Shelly Anderson, wife of Jason Anderson).
4. Press Release, Congressman John Conyers, Jr., House Passes Conyers Oil Spill Liab. Bill; Ensures Justice for Disaster Victims (July 1, 2010) (on file with author).

and should be immediately repealed so that no company has the opportunity to walk away from its responsibility and leave taxpayers on the hook for their catastrophic mistakes."[5] The press release also stated, "Schumer is introducing a bill on Tuesday that would repeal the 1851 Limitation of Liability Act to ensure that all parties responsible for the disaster are held fully liable to the extent of their determined negligence."[6]

II. Our Jurisprudence Shields Certain Groups from Full Liability

While some would see the Limitation Act as an unconscionable loophole that shields a corporation from its full legal liability as determined by a jury, an argument can be made that the Limitation Act reflects our body of law that certain liabilities against certain parties should be limited for the better of our overall society or as a trade-off for some other more compelling need. There are many areas in our jurisprudence where juries and trials are bypassed, the amount of damages is limited for certain parties, or the jury's damage verdict is changed, all for the greater good of our society. Examples of this follow.

A. *State Workers' Compensation Laws*

If shielding corporations from the wrath of juries following injuries is unconscionable, then our entire workers' compensation system must be questioned. New York was the first state to pass a workers' compensation law in 1910; now these laws govern liability for employment injuries in all fifty states.[7] When the workers compensation laws were first introduced, there were many justifications given for them. The employer could pass costs of the injuries and the liability insurance to the consumers, and the community would not have to take care of injured workers. Another one was the savings in legal costs. Families and injured workers received money immediately, which enabled widows to keep their

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5. Press Release, Sen. Charles Schumer, In the Face of Devastating Damage Caused by Gulf Oil Spill: Schumer Calls for Repeal of Century-and-a-Half Old Law (June 2, 2010) (on file with author).

6. *Id.*

7. 2 Dan B. Dobbs, The Law of Torts 1098 (2001). The Jones Act, 46 U.S.C. § 30104, was enacted ten years later and has not been adopted or adapted by a single state to govern worker's injury claims.

families together.[8] Under these laws, the employer is strictly liable and cannot limit its liability but, in turn, it benefits from limited liability that does not include pain and suffering. In addition, the employer pays benefits starting immediately after the accident.[9]

The Louisiana workers' compensation statute is typical. The remedy is exclusive against the employer except for intentional acts.[10] Under the Louisiana law, the worker is entitled to two-thirds of his wages during his disability period.[11] Permanency awards for various body parts are set forth in the statute, e.g., loss of a foot, two-thirds of wages for 125 weeks; loss of an arm, two-thirds of wages for 200 weeks.[12] Damages for death are also set forth. If only a widow survives the worker, she is entitled to 32.5% of wages until she dies or remarries.[13] If the worker is survived by a widow and one child, they receive 46.25% of the worker's annual weekly wages until the child is eighteen or if a full time student, until the child is twenty-three.[14] The ability of land-based employers to avoid liability for pain and suffering puts them in a more favorable position than the ship owner whose liability is governed by the Jones Act, which allows recovery for pain and suffering. Thus, in response to the widow who testified before Senator Rockefeller, it may be said that the land-based employer has the benefit of this "loophole" while the marine employer does not.

B. State Caps on Damages in Tort and Medical Malpractice Actions

The American Tort Reform Association reports that twenty-three states have modified their rules for awarding noneconomic damages.[15] Some states, such as Idaho[16] and Kansas,[17] limit damages in all

8. HARRY B. BRADBURY, BRADBURY'S WORKMEN'S COMPENSATION LAW 1-3 (3d ed. 1917).
9. DOBBS, *supra* note 7, at 1098.
10. LA. REV. STAT. ANN. § 23:1032 (2011).
11. *Id.* § 1221(1)(a).
12. *Id.* § 1221(4)(f)-(g).
13. *Id.* § 1232(1).
14. *Id.* §§ 1232(2), 1233.
15. AM. TORT REFORM ASS'N, TORT REFORM RECORD 32-39 (July 2010). The states include Alaska, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin.
16. IDAHO CODE ANN. § 6-1603 (2011) (providing a limitation of $250,000 for noneconomic damages).
17. KAN. STAT. ANN. § 60-19a01 (2009) (providing a limitation of $250,000 for pain and suffering).

personal injury actions while other states, such as North Dakota[18] and Montana,[19] have limitations for medical malpractice claims only. At least one state, Michigan, has a limitation on noneconomic damages for product liability cases.[20] According to the Tort Reform Record, thirteen states have caps for malpractice awards only, six states have caps for personal injury actions, and four states have different caps for personal injury actions and malpractice actions. These caps may be more beneficial to shipowners than any Limitation Act cap.[21]

C. *No-Fault Automobile Liability*

Currently, twelve states have some form of no-fault law for automobile accidents.[22] Most states have adopted a hybrid of no-fault and tort. The victim who suffers economic losses recovers no-fault benefits from his insurer up to a cap established by the no-fault program. Above the cap, the victim can recover further economic loss under the tort system. The injured victim cannot recover pain and suffering unless the injury exceeds a threshold.[23] These thresholds vary from state-to-state. In New York, the threshold is serious injury, which is defined as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture," or significant limitation of use of a body function or system or a medically determined injury or impairment that prevents the injured person from performing substantially all of his usual and customary daily activities.[24] Michigan

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18. N.D. CENT. CODE § 32-42-02 (2011) (providing a limitation of $500,000 for noneconomic damages in medical liability cases).

19. MONT. CODE ANN. § 25-9-411 (2010) (providing a limitation on awards for past and future damages for noneconomic loss of $250,000 in malpractice claims).

20. MICH. COMP. LAWS SERV. § 600.2946a(1) (LexisNexis 2010). The total damages in an action for product liability shall not exceed $280,000 "unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total damages for noneconomic loss shall not exceed $500,000." *Id.* Under MICH. COMP. LAWS SERV. § 600.1483 (LexisNexis 2010), the State Treasurer is to adjust the limitation to reflect the annual percentage change in the Consumer Price Index. For 2010, the limit was $408,200. Letter from Robert J. Kleine, State Treasurer, Mich. Dep't of Treasury, Limitation on Noneconomic Damages and Product Liability Determination (January 20, 2010) (on file with author), *available at* http://www.michigan.gov/treasury.

21. *See, e.g.*, McCoy v. Weeks Marine, Inc., No. 24-C-06-003079, 2009 WL 3275972, 2009 AMC 1862, 1882-83 (Md. Cir. Ct. July 8, 2009) (reducing a $7 million jury verdict for noneconomic loss to $620,000).

22. COMMONWEALTH OF FLA., COMM. OF BANKING & INS., FLA. MOTOR VEHICLE NO-FAULT LAW, S. 2006-102, at 7 (2005).

23. Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 617 (2000).

24. N.Y. INS. LAW § 5102(d) (McKinney 2010).

has a similar law requiring death or permanent serious disfigurement.[25] Other states use a dollar figure. For example, in Minnesota, the victim can recover pain and suffering damages in tort if healthcare expenses exceed $4000 and if the victim has incurred a permanent injury or a scar or a disability lasting sixty days or more.[26] In the no-fault states, the laws shield the insurer of the negligent motorist from pain and suffering damages in most nonserious auto accidents.

D. *National Childhood Vaccine Injury Act*[27]

In 1986, Congress enacted the National Childhood Vaccine Injury Act, which set up the National Vaccine Injury Compensation Program (NVIC). The Department of Health and Human Services states that the program

> was established to ensure an adequate supply of vaccines, stabilize vaccine costs, and establish and maintain an accessible and efficient forum for individuals found to be injured by certain vaccines. The [NVIC] is a no-fault alternative to the traditional tort system for resolving vaccine injury claims that provides compensation to people found to be injured by certain vaccines.[28]

Under the NVIC, a person seeking compensation must sue in the "Vaccine Court" that is part of the United States Court of Federal Claims.[29] Under the program, damages for death are limited to $250,000.[30] Pain and suffering damages are also capped at $250,000.[31] One may reject the award of the Federal Claims Court and file in state or federal court.[32] However, in such an action, the manufacturers' standard of responsibility is lowered. For instance, a vaccine will be presumed to be accompanied by proper directions and warnings if the manufacturer complied with federal law.[33] A manufacturer is not liable solely due to its failure to provide direct warnings to the injured party.[34]

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25. MICH. COMP. LAWS SERV. § 600.2946a(1) (2010).
26. MINN. STAT. § 65B.51(3) (2010).
27. 42 U.S.C. § 300aa-1 (2006).
28. *National Vaccine Injury Compensation Program*, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH RESOURCES & SERVS. ADMIN., http://hrsa.gov/vaccinecompensation/ (last visited Mar. 25, 2011).
29. 42 U.S.C. § 300aa-11; Bruesewitz v. Wyeth, Inc., 561 F.3d 233, 235 (3d Cir. 2009).
30. 42 U.S.C. § 300aa-15(a)(2).
31. *Id.* § 300aa-15(a)(4).
32. *Id.* § 300aa-21.
33. *Id.* § 300aa-22(b)(2).
34. *Id.* § 300aa-22(c). The Act prohibits states from establishing or enforcing a law contrary to the NVIC. *Id.* § 300aa-22(e).

This is another area where our law favors an industry with protection on liability and damages.

E. Oil Pollution Act of 1990

A party responsible for a tanker spilling oil can limit its liability to $1900 per gross ton, provided that the act of the responsible party was not gross negligence, misconduct, or the violation of an applicable federal safety, construction, or operating regulation.[35] The debate in the Senate on the Oil Pollution Act of 1990 (OPA) indicates that this limitation was, in part, a trade-off for a continuation or an increase of a tax on each barrel of oil received at a United States refinery or entered into the United States to fund the Oil Spill Liability Trust Fund.[36] OPA mandates that a responsible party for a vessel establish financial responsibility sufficient to meet its limitation amount. The financial responsibility may be established by evidence of insurance, surety bonds, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility.[37] In setting the limitation amount, some in Congress recognized that the limitation amount had to be insurable or the smaller operators could not participate and the activity would be left to the oil majors.[38] The motion for unlimited liability in OPA was defeated in the Senate; instead, OPA 90 was enacted with a limitation of liability cap.[39]

F. Discrimination Cases

Congress has capped compensatory damages in workplace discrimination cases brought under the Civil Rights Act. When the employer has more than fourteen but fewer than 101 employees, the cap for compensatory damages, which includes future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and pecuniary damages, is $50,000. The cap is raised to $300,000 for an employer who has more than 500 employees during twenty weeks of the current or preceding calendar year.[40] In some cases the award is "insufficient

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35. 33 U.S.C. § 2704 (2006).

36. *See* 26 U.S.C. § 4611 (2006); 135 CONG. REC. 18,274-18,358 (1989) (including comments of Senator John Breaux, D-La.).

37. 33 U.S.C. § 2716.

38. 135 CONG. REC. 18,274-18,358 (including comments of Senator Hiram Johnston, D-La).

39. *Id.*

40. 42 U.S.C. § 1981a(b)(3) (2006).

to compensate plaintiff[s]."[41] These caps benefit discriminating employers faced with large verdicts.[42]

G. Railroads

Congress has established a limitation amount for rail passenger accidents. The aggregate award to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident cannot exceed $200,000,000.[43] This law was enacted in 1997 and to date, there have been no cases interpreting it.[44]

H. Limitation of Liability for Nuclear Plants

Just as the Shipping Limitation Act of 1851 was enacted to benefit U.S. shipowners,[45] the Atomic Energy Act of 1946 was enacted to foster the development of atomic energy by private enterprise.[46] By 1956, both industry and the Atomic Energy Commission saw that industry and private insurance were not sufficient to absorb the risk of a major nuclear accident causing extensive damage. Industry told Congress that it would be unable to continue in the field unless its liability was limited by legislation.[47] Congress responded with the Price-Anderson Act,[48] which was extended with changes in 1966, 1975, 1988, and 2002, and in 2005, it was extended through 2025. Under the original Act, liability for a nuclear accident was limited to

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41. Pollard v. E.I. Dupont de Nemours, Inc., 16 F. Supp. 2d 913, 924 n.19 (W.D. Tenn. 1998), *aff'd*, 213 F.3d 933 (6th Cir. 2000), *rev'd*, 532 U.S. 843 (2001).

42. Hudson v. Chertoff, 473 F. Supp. 2d 1286 (S.D. Fla. 2007) ($1.5 million verdict reduced to $300,000); Rosado Sostre v. Turabo Testing, 364 F. Supp. 2d 144 (D.P.R. 2005) ($2.5 million award reduced to approximately $50,000).

43. 49 U.S.C. § 28103(b) (2006).

44. One of the largest train wrecks in the U.S. history occurred on July 9, 1918, in Nashville, resulting in the death of 101 people and the injury of an additional 101 people. INTERSTATE COMMERCE COMMISSION FILE NO. 535, REPORT OF THE CHIEF OF THE BUREAU OF SAFETY COVERING THE INVESTIGATION OF AN ACCIDENT WHICH OCCURRED ON THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY AT NASHVILLE TENN. ON July 9, 1918, *available at* http://ntl1.specialcollection.net (follow "I.C.C. Historical Railroad Investigation Reports (1911-1966)" hyperlink; then follow "1918" hyperlink; then follow the second "Nashville, Chattanooga, & St. Louis Railway" hyperlink) (last visited Apr. 8, 2011).

45. For an excellent article written by a past MLA President, see James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1012-17 (1979).

46. 42 U.S.C. § 2011 (2006).

47. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 64 (1978).

48. The Act is named for Congressman Melvin Price (D-Ill.) and Senator Clinton Presba Anderson (D-N.M.), both of whom eventually chaired Congress's Joint Committee on Atomic Energy.

$500,000,000 plus the amount of liability insurance available on the private market. If damages exceeded the amount of the private insurance, the federal government would indemnify the licensee in an amount not to exceed $500,000,000. Therefore, "the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totaled $560[,000,000]."[49]

Later, provisions were added requiring each reactor in existence to contribute some amount to a fund to be used to compensate victims after a nuclear incident. The amount of financial protection required of a licensee is the amount of liability insurance available from private sources and the fund set up by industry.[50] The NRC will indemnify licensees from all public liability arising from a nuclear incident in excess of the level of financial protection required of the licensee.[51] Thus, in essence, the liability of those operating nuclear reactors is limited to the amount of insurance they can obtain on the private market and through the industry pool. This appears to be a modern version of the 1851 Limitation Act and recognizes the policy that the public good may trump the concept of fully compensating victims of a major disaster. There is also a concursus provision for nuclear incidents. The United States District Court of the area where the incident occurred is given original jurisdiction, and any action pending in any state court or other United States District Court shall be removed or transferred to it. This is another similarity to the 1851 Limitation Act.[52]

I. Remittitur

Courts often reduce excessive jury verdicts to amounts that correspond with past jury verdicts for similar injuries. The usual rule, where a jury's determination of liability was not the product of undue passion or prejudice, is that a court can order a remittitur to the maximum award the evidence can support.[53] In deciding to reduce an award, the court shields the defendant from excess damages and treats the defendant as other defendants were treated in similar cases. In

49. *Duke Power*, 438 U.S. at 65.
50. 42 U.S.C. § 2210.
51. *Id.* § 2210(c).
52. *Id.* § 2210(n)(2).
53. Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1507 (11th Cir. 1985); Howell v. Marmpegaso Compania Naviera, 536 F.2d 1032, 1034 (5th Cir. 1976).

effect, the jury does not give the final word on damages; instead, the damages must fall within the range of prior cases.[54]

J. Punitive Damages

Prior to *Exxon Shipping Co. v. Baker*,[55] many states limited punitive damages by setting a ratio between the punitive damages that could be awarded and the compensatory damages that were awarded.[56] In *Exxon*, the district court judge had found that a $5 billion jury award was justified. The United States Court of Appeals for the Ninth Circuit reduced the award to $2.5 billion, which is five times greater than the compensatory damages. However, the United States Supreme Court set a ratio of 1:1 for maritime cases where there was no intentional or malicious conduct and the behavior was not driven primarily by desire for gain.[57] There, the compensatory damages of $507.5 million allowed punitive damages that were still substantial. Exxon was therefore able to limit its liability, not through the 1851 Act, but through an opinion of the Supreme Court.

K. Bankruptcy

This is another area of protection for certain individuals and corporations. Throughout the nineteenth century, Congress passed and then repealed bankruptcy laws.[58] The law that "stuck," the Bankruptcy Act of 1898,[59] initially did not include corporations, which were not permitted to file for bankruptcy until the 1910 Bankruptcy Act.[60] The crux of bankruptcy law is that a debtor surrenders all nonexempt assets to his creditors and hopes for a discharge of all his debts. The trustee collects the assets, sells them off, and distributes the proceeds pro rata

54. *See, e.g.*, Moore v. Angela MV, 353 F.3d 376, 385, 2004 AMC 59, 67-68 (5th Cir. 2003) (remitting a $750,000 award for loss of consortium to $399,000 after applying the maximum recovery rule and finding that the highest award in a factually similar Louisiana case was $300,000).

55. 554 U.S. 471, 2008 AMC 1521 (2008).

56. *See, e.g.*, ALA. CODE 6-11-21(j) (2011); COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 2010); DEL. CODE ANN. tit. 25 § 1401 (2011); OHIO REV. CODE ANN. § 2315.21 (D)(2)(a) (LexisNexis 2011).

57. *Exxon*, 554 U.S. at 513, 2008 AMC at 1550.

58. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 10, 20 Stat. 99.

59. Ch. 541, 30 Stat. 544 (1898).

60. Ch. 309, § 4, 36 Stat. 539 (1910).

to creditors.[61] Basically, an individual will be discharged for his debts if he is not guilty of fraud; has not concealed, destroyed, mutilated, or falsified records; or has not presented a false claim.[62] A corporation will not be discharged from its assets under Chapter 7,[63] but will be discharged in a corporate reorganization under Chapter 11 of the Bankruptcy Laws.[64] Because a corporation is a creature of the state, permitted to operate separate and apart from its owners, one has to examine whether remedies exist against the shareholders.

L. Corporate Form

All states have laws allowing individuals to shield some of their assets by forming corporations. The basic tenet of corporate law is that a corporation is a legal person in its own right, separate and distinct from the person or persons holding stock in the corporation.[65] A corporation and its shareholders are treated as separate entities in all but the most exceptional circumstances.[66] To hold a shareholder liable for the acts of the corporation, the corporate veil must be pierced. To do so, the claimant must prove that the corporate form was misused to achieve certain wrongful purposes, most notably, fraud on the shareholder's behalf.[67] Usually, there has to be a "patent abuse" of the corporate form in order to pierce the corporate veil.[68] While the use of corporations can be justified on many levels, certainly a major effect is that the law sanctions shielding an individual's assets from liability following an incident. This may be a far larger "loophole" than the Limitation Act.

III. SHOULD SHIPOWNERS CONTINUE TO BE A FAVORED GROUP?

Our society has made decisions to shield or limit the liability of certain groups or entities. While one may disagree that some of the entities, such as discriminating employers, nuclear reactor owners, employers who pay workers' compensation, medical malpractice insurers, doctors, tortfeasors, railroads, auto insurers, oil spillers,

61. DANIEL R. COWANS, COWAN'S BANKRUPTCY LAW AND PRACTICE 230 (7th ed. 1998).

62. 11 U.S.C. § 727 (2006).

63. *Id.* § 727(a)(1).

64. *Id.* § 1141(d)(3).

65. *See* Longhi v. Animal & Plant Health Inspection Serv., 165 F.3d 1057, 1061 (6th Cir. 1999).

66. Burnet v. Clark, 287 U.S. 410, 415 (1932).

67. United States v. Bestfoods, 524 U.S. 51, 62 (1998).

68. *Longhi*, 165 F.3d at 1061.

bankrupts, or persons setting up corporations should be allowed to limit their liability, one cannot deny that this concept is an integral part of our legal system. The question then becomes: Should this right to limit liability be taken away from shipowners or should shipowners be excluded from the favored groups that are afforded these special protections under our legal system? There are a number of arguments against this proposition.

A. *The Law Was Never Seriously Challenged Until the Deepwater Horizon Spill*

Although the Limitation Act was enacted in 1851, the concept of limitation goes back at least to the Crusades in the eleventh century.[69] In the 160 years since its enactment, Congress has looked at the law, but until recently, made no real effort to repeal it. In 1935 and 1936, Congress amended the Act by requiring a shipowner to establish a minimum limitation fund of $60 per ton for personal injury and death cases.[70] This was increased to $420 per ton in 1984.[71] In 1957, Senator Wayne Morse of Oregon introduced a bill that would have required a shipowner to contribute its insurance proceeds to the limitation fund. The bill never came up for a vote.[72] There was an attempt in 1965 to repeal the Limitation Act for personal injury and death claims but this bill was never reported out of committee.[73] There was no other congressional activity on the Limitation Act until the recent bills associated with the Deepwater Horizon Oil Spill.

In 1975, Professors Gilmore and Black wrote:

> The Limitation Act itself has so far managed to survive unscathed but its future prospects cannot be described as bright. One more large-scale maritime disaster, following which the shipowners petition to limit their liability to a fund of $50, should suffice to bring the whole structure tumbling down. If a third edition of this book is called for, the present chapter will in all probability be of no more than historical interest.[74]

In the intervening thirty-five years there have been many maritime disasters but no calls for the repeal of the Limitation Act until

69. Donovan, *supra* note 45, at 1001.
70. 46 U.S.C. § 183(b)-(c) (1940).
71. *Id.* § 30506 (2006).
72. Note, *Shipowners' Limited Liability*, 3 COLUM. J.L. & SOC. PROBS. 105, 109 (1967).
73. *Id.* at 105.
74. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 823 (2d ed. 1975) (footnote omitted).

very recently. In fact, a study of the cases indicates that the Limitation Act has continued to be viable:

> For all reported cases since 1982 the results show that limitation was granted 17 times and denied 20 times. Although limitation is still frequently denied, the trend towards its viability as a defense seems to have continued since 1976. For the fifteen years prior to 1976, limitation was granted only 14 times and denied 43 times, but, starting in 1976, in the next five-year period 11 cases granted and 17 cases denied limitation. Thus, the long-term statistics appear to show that limitation of liability under our present law has not met the judicial demise which some commentators have predicted or desired.[75]

The activity in the last Congress shows that there is no widespread consensus that the Limitation Act be repealed. Although the repeal bill passed in the House,[76] the Senate bill never made it out of committee.[77] With the Deepwater Horizon out of the news and a new Congress with a Republican controlled House, it does not appear that Congress has an interest in changing limitation, at least until the next major maritime disaster.

B. *In the Competitive International Shipping Market, Why Put American Shipowners at a Disadvantage?*

If the Limitation Act provides an advantage to a shipowner, it is an advantage possessed by the great majority of shipowners in the world. Most, if not all, of the world's shipping nations have some sort of Limitation Act. For instance, sixty-one seagoing nations, including China, Cyprus, Denmark, France, Germany, Greece, Japan, and the United Kingdom have adopted the 1976 Limitation of Liability Convention.[78] Thirty-eight of these countries ratified the 1996 Protocols that increased the limitation amounts in the 1976 Convention.[79] An inability to limit liability for accidents in its own country puts a U.S. owner at a competitive disadvantage against

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75. MARITIME LAW ASSOCIATION, MLA REPORT 10527 (Gordon W. Paulsen et al. eds., 1997).

76. Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong. § 4 (2010).

77. Fairness in Admiralty and Maritime Law Act, S. 3600, 111th Cong. § 2 (2010).

78. Int'l Convention on Limitation of Liability for Maritime Claims, IMO No. 77.04E, Nov. 19, 1976, *in* 6 BENEDICT ON ADMIRALTY § 5-32.2-544.5 (2010) [hereinafter 1976 Convention].

79. Protocol of 1996 To Amend the Convention on Limitation of Liability for Maritime Claims, IMO No. 449F, May 2, 1996, *in* 6 BENEDICT ON ADMIRALTY, *supra* note 78, § 5-44.6 [hereinafter 1996 Protocol].

foreign shipowners who are able to limit liability for incidents occurring within their countries. However, there is also a corollary effect for accidents occurring on the high seas. If a U.S. shipowner is involved in an incident on the high seas and has the ability to choose a forum, it is unlikely the American shipowner would choose to litigate in the United States if the United States did not limit liability. Following incidents on the high seas or involving vessels flying different flags, choice-of-law issues may lead to a race or competition between courthouses in different countries. If the United States has no limitation law, there may be no reason for a U.S. shipowner to seek to litigate in the United States.

Justice Kennedy warned against the dangers to American companies if one of our domestic laws was interpreted to violate an international agreement. He stated, "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements."[80] The same argument can be used to caution against the repeal of a domestic law, such as the Limitation Act, when the large majority of our trading partners have laws limiting the liability of shipowners.

Throughout our history, the Supreme Court has recognized the importance of having one universal law applicable to multinational trade. Over 125 years ago, the Court stated, "[T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice."[81] The number of signatories to the 1976 Brussels Convention and 1996 Protocols shows that limitation of liability is such a uniform law throughout the world. In addition, the more modern or recent conventions contain some sort of limitation language.[82] A wholesale repeal of the Limitation Act would make

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80. Vimar Seguros v. M/V Sky Reefer, 515 U.S. 528, 539, 1995 AMC 1817, 1825-26 (1995).

81. The Lottawanna, 88 U.S. 558, 572, 1996 AMC 2372, 2377-78 (1874).

82. *See* Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, IMO No. 435A, Dec. 13, 1974, art. 7, *in* 6 BENEDICT ON ADMIRALTY, *supra* note 78, at § 2-2; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), IMO No. 479E, May 3, 1996, art. 9, *in* 6 BENEDICT ON ADMIRALTY, *supra* note 78, § 1-12; International Convention on Civil liability for Bunker Oil Pollution Damage, IMO No. 1490M, Mar. 23, 2001, art. 6, *in* 6a BENEDICT ON ADMIRALTY, *supra* note 78, § 6-36.

American law radically different from that of its trading partners and be contrary to modern international law.

C. *Unlimited Liability Is Not Insurable*

It is axiomatic that no insurer will underwrite unlimited liability.[83] Even if insurers were willing to do so, the insurance market could not withstand unlimited exposure. It was estimated that the available limit of third-party liability coverage for the entire offshore energy market was approximately $1 billion with perhaps as much as $1.2 billion or $1.5 billion available under some circumstances.[84] This is reflected in the limits of cover available for vessels entered in P&I Clubs that are members of the International Group. For these vessels, there is an overall Club cover limit of $1 billion for pollution claims, and $3 billion per incident per vessel for passenger and seaman's liabilities, with a sub limit of $2 billion for passenger liabilities.[85]

Marine policies are written with the understanding that shipowners will have the right to limit their liability. A number of years ago it was estimated that liability insurance premiums would increase by 25-30% if the right to limit liability was taken away from shipowners.[86] If this is accepted, any repeal of the Limitation Act not only would create a new class of liability that is uninsurable but would also cause a substantial increase in insurance premiums for shipowners.

D. *A Limitation Action Provides the Benefit of Concursus to the Shipowner and our Legal System*

Once the owner has filed a limitation petition, all claims against it outside of the limitation court cease and the limitation court will issue an injunction to enjoin the further prosecution of any such action.[87] The court will also establish a monition period during which all

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83. *Hearing Before the H. Comm. on Transp. & Infrastructure*, 111th Cong. 9 (2010) (testimony of Charles B. Anderson, Skuld North America, Inc. on Behalf of the International Group of P&I Clubs).

84. *Liability and Financial Responsibility for Oil Spills Under the Oil Pollution Act of 1990: Hearing Before H. Comm. on Transp. & Infrastructure*, 111th Cong. 12 (2010) (testimony of Robert Hartwig, Ph.D., President & Economist, Insurance Information Institute).

85. West of England P&I Club Circular No. 30 2010/2011 (Jan. 2011) (on file with author).

86. Leslie J. Buglass, *Limitation of Liability from a Marine Insurance Viewpoint*, 53 TUL. L. REV. 1364, 1364 & n.1 (1979).

87. FED. R. CIV. P. Supp. (F)(3).

claimants must file their claims in the limitation action under pain of default.[88] Courts generally use liberal rules of joinder to allow all claims and cross-claims arising from a single maritime disaster to be adjudicated together.[89]

Other devices in federal law are not as effective as the limitation concursus. The rules on federal multidistrict litigation[90] and transferring venue[91] apply to cases already pending in federal court. These statutes do not apply to cases pending in state court. A shipowner may be able to remove some claims from state court to federal court. But in maritime casualty cases, this may prove problematic for some American owners because Jones Act cases are not removable.[92] Thus, if the Limitation Act was repealed, shipowners would not have the benefit of concursus and would likely be litigating property and some personal injury claims in federal court, and Jones Act cases in state court—should the claimants file in those fora. Besides submitting a shipowner to multiple litigations, this also subjects our legal system to duplicitous litigation with state and federal court judges considering the same issues.

E. *Limitation Promotes the Shipping Business*

Although this theory may have been the basis for the enactment of the Limitation Act, it may not continue to be the main reason for limitation. Perhaps the high point was reached in 1872 when Justice Bradley quoted Grotius, stating, "[M]en would be deterred from investing in ships if they thereby incurred the apprehension of being rendered liable to an indefinite amount by the acts of the master."[93] Judge David Steel cited five reasons for granting the shipping business this special benefit:

1. Shipping is a comparatively low investment industry and individual ships could be purchased within the reach of personal finance;

88. FED. R. CIV. P. Supp. (F)(4).

89. *See, e.g.*, British Transp. Comm'n v. United States, 354 U.S. 129, 1957 AMC 1151 (1957).

90. 28 U.S.C. § 1407 (2006).

91. *Id.* § 1404.

92. The Jones Act provides that any seaman who suffered personal injury in the course of his employment may maintain an action for damages against his employer and that in such an action, the laws of the United States regulating recovery for personal injury to or death of railway workers apply. 46 U.S.C. § 30104 (2006). The Federal Employees Liability Act (FELA) is one such statute regulating recovery for personal injury or death of railroad employees. *See* 45 U.S.C. § 51 (2006). FELA actions brought in state court may not be removed to any federal court. 28 U.S.C. § 1445(a).

93. Norwich Co. v. Wright, 80 U.S. 104, 116, 1998 AMC 2061, 2066-67 (1871).

2. Maintenance and crew costs are low;
3. The market is in freight rather than passengers and therefore safety considerations are less of a premium;
4. Competition is intense and not restricted by bi-lateral treaties in terms of price or route;
5. The industry is largely unsubsidized.[94]

While limitation may or may not promote domestic business, it is a factor in determining where shipowners will base their operations. With a mobile work force and advanced communication systems, a shipowner would have to consider basing its operations in a locale with favorable laws. The growth of flags of convenience and the expansion of management companies in places like Cyprus accent the fact that vessels can be operated offshore in a country with favorable laws.

F. *The Alternative Is Not Attractive*

If vessel owners are unable to limit liability and cannot insure their risks, one can predict how they will react. In order to protect the assets of the larger enterprise, there will be more single ship corporations with limited assets, mainly the vessel. There will be an increase in flags of convenience as owners seek to take advantage of countries with favorable laws. Operations will be moved to nations with favorable laws. As owners will have to assume more risk, there will be an increase of self-insurance or even no insurance. To reward this risk, freight rates will have to increase. The increased risk could also affect investment in new equipment and vessels. If a vessel owner is able to segregate his assets into single corporations, there would be the temptation not to upgrade but to allow the older vessels to continue trading as long as possible. This would have an adverse effect on safety.

IV. PROPOSED NEW LIMITATION OF LIABILITY LAW

While Congress was considering repealing the Limitation Act during the summer of 2010, the Maritime Law Association of the United States (MLA) wrote two letters to Congress requesting that they further study the Limitation Act before making such traumatic changes to the maritime law.[95] The president of the MLA appointed a

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94. David Steel, *Ships Are Different: The Case for Limitation of Liability*, 1995 L.M.C.L.Q. 77, 81 (1995).

95. Letter from Patrick J. Bonner, President, Maritime Law Association, to Senators John D. Rockefeller and Kay Bailey Hutchison (July 20, 2010), *available at* http://www.mlaus.org (follow Library hyperlink; then follow Position Papers hyperlink); Letter from

special committee of experienced admiralty lawyers[96] to study the bills that were introduced and recommend a position the MLA should take on the Limitation Act. The Committee issued a majority and minority report dated September 25, 2010.[97] The majority report recommended that the MLA ask Congress to consider adopting the 1976 Convention on Limitation of Liability for Maritime Claims with the 1996 Protocol Amendments. A resolution to this effect was voted by the general membership and passed at the fall meeting in Houston in November 2010.[98]

The following is a short explanation of the 1976 Convention and 1996 Protocols and their major differences with the 1851 Act:

A. *Who May Limit*

Under the 1976 Convention, shipowners and salvers may limit liability. Shipowner is defined broadly to include the owner, charterer, manager, and operator of a seagoing ship.[99] In addition, any person for whose act, neglect, or default the shipowner or salvor is responsible is entitled to limit.[100] Also, an insurer of liability is entitled to the benefit of the Convention to the same extent as the insured.[101] This is different from the 1851 Act. Under the 1851 Act, only an owner or owner, *pro hac vice*, may petition the court to limit.[102]

B. *Vessels*

The 1976 Convention applies to seagoing vessels and excludes air cushion vessels and floating platforms constructed for the purpose of exploring the natural resources of the seabed, or the sub soil

Patrick J. Bonner, President, Maritime Law Association, to Senators Harry Reid and Mitch McConnell (July 26, 2010), *available at* http://www.mlaus.org (follow Library hyperlink; then follow Position Papers hyperlink).

96. Raymond Hayden of New York, Chester Hooper of Boston, Gordon Schreck of Charleston, Professor Thomas Schoenbaum of Washington D.C., Paul Sterbcow of New Orleans, and Kent Roberts of Portland, Oregon.

97. *Report of the Advisory Comm. on the Limitation of Liab. Act*, MAR. LAW ASS'N, http://www.mlaus.org (follow Library hyperlink; then follow Committee Reports hyperlink; then follow Special Committee on Limitation of Liability hyperlink) (last visited Mar. 24, 2011).

98. *Resolution on Limitation of Liability Act*, MAR. LAW ASS'N, http://www.mlaus.org (follow Library hyperlink; then follow Resolutions hyperlink; then follow Resolution on Limitation of Liability Act hyperlink) (last visited Mar. 23, 2011).

99. *See* 1976 Convention, *supra* note 78, art. 1(2).

100. *Id.* art. 1(4).

101. *Id.* art. 1(6).

102. 46 U.S.C. § 30511 (2006).

thereof.[103] Member states may exclude vessels under 300 tons from being governed by the Convention.[104] The 1851 Act applies to seagoing vessels and vessels used on lakes and rivers or in inland navigation, including canal boats, barges, and lighters.[105] The 1851 Act applies to pleasure craft also.[106]

C. *Claims*

The 1976 Convention applies to the whole gamut of claims including personal injury, death, property damage, delay, wreck removal, cargo claims, passenger claims, and luggage claims.[107] Certain claims are excluded, however: salvage or contribution in general average; pollution damage within Civil Liability Convention; claims subject to any international convention or national legislation on nuclear damage; and claims against a shipowner of a nuclear ship for nuclear damage.[108] In addition, if national law prohibits a shipowner or salvor from limiting claims by servants then the Convention is inapplicable.[109] Under the current U.S. law, a shipowner may not limit damages arising under the Oil Pollution Act of 1990,[110] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[111] or the Wreck Act.[112] The major difference between the Convention and U.S. law appears to be that shipowners can limit liability for wreck removal damages under the Convention but not under the 1851 Act. In addition, the shipowner may not limit liability for wage claims under U.S. law.[113]

D. *Breaking Limitation*

Under the 1976 Convention, a person shall not be entitled to limit if it is proved that "the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."[114] Thus, the burden

103. 1976 Convention, *supra* note 78, arts. 1(2), 15(5).
104. *Id.* art. 15.
105. 46 U.S.C. § 30502.
106. *See* Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1990 AMC 609 (11th Cir. 1990).
107. 1976 Convention, *supra* note 78, art. 2.
108. *Id.* art. 3.
109. *Id.*
110. 33 U.S.C. § 2702(a) (2006).
111. 42 U.S.C. § 9606(h) (2006).
112. 33 U.S.C. § 409; Univ. of Tex. v. United States, 557 F.2d 438 (5th Cir. 1977).
113. 46 U.S.C. § 30505 (2006).
114. 1976 Convention, *supra* note 78, art. 4.

of proof is on the party trying to avoid limitation. Under the 1851 Act, the vessel owner is entitled to limit for losses and damages "incurred[] without the privity or knowledge of the owner."[115] Thus, the shipowner in an American Limitation Act case bears the burden of proving that the casualty occurred without its privity and knowledge.[116] The shipowner has to prove a negative proposition. It appears to be much harder to escape limitation under the 1976 Convention, where one must prove either intent, or knowledge that the loss would result from reckless conduct. The standard is lighter under the 1851 Act—it is therefore likely that there would be less litigation trying to break limitation if the United States adopted the 1976 Convention.

E. *Concursus*

The 1976 Convention provides for a concursus, and if a limitation fund has been constituted, a claimant may only bring the claim against the fund.[117]

F. *Size of the Fund*

Under American law, the limitation fund equals the value of the vessel after the casualty plus pending freight.[118] If the vessel is a total loss, the fund may be equal to the pending freight only. Hull insurance proceeds are not included in the limitation fund.[119] If the limitation fund is insufficient to pay all claims in full and the portion available to pay claims for personal injury or death is less than $420 per ton, the limitation fund will be increased to $420 a ton and this portion will be used to pay claims for personal injury or death only.[120] This section does not solve the problem of an insufficient fund when a small vessel is lost and there are multiple deaths involved.

The 1976 Convention provides for bands of tonnage with different limitation amounts for each. There is a substantial minimum tonnage and a graded sliding scale, thus ensuring that the limitation fund of smaller ships is relatively higher than that of larger ships. This change is based on the practical reasoning that the size of a ship does not directly relate to its capacity for doing damage.

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115. 46 U.S.C. § 30505.

116. M/V Sunshine v. Beavin, 808 F.2d 762 (11th Cir. 1987).

117. 1976 Convention, *supra* note 78, art. 11. There is a similar provision in U.S. law. *See* discussion *supra* Part III.D.

118. 46 U.S.C. § 30505(a).

119. Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468 (1886).

120. 46 U.S.C. § 30506.

Loss of Life and Personal Injury Claims:

Tonnage not exceeding 500 tons	333,000 Units of Account (Units)[121] (666 per ton)
For each ton 501 - 3000	500 Units per ton
For each ton 3001 - 30,000	333 Units per ton
For each ton 30,001 - 70,000	250 Units per ton
For each ton 70,001 - upwards	167 Units per ton[122]

For loss of life or injury to a passenger on a ship, the Limitation Fund is $46,666 SDR's per passenger that the ship is authorized to carry.[123]

Other Noninjury or Death Claims:

Tonnage not exceeding 500 tons	167,000 Units (334 Units per ton)
For each ton 501 - 30,000	167 Units per ton
For each ton 30,001 - 70,000	125 Units per ton
For each ton 70,001 - upwards	83 Units per ton

G. *1996 LLMC Protocol*

The 1996 Protocols modified the limits contained in the 1976 Convention as follows:

> Article 6, paragraph 1 of the 1976 Convention is replaced by the following text:
> 1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:
> (a) in respect of claims for loss of life or personal injury,
> (i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
> (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
> for each ton from 2,001 to 30,000 tons, 800 Units . . .; for each ton from 30,001 to 70,000 tons, 600 Units . . .; and for each ton in excess of 70,000 tons, 400 Units . . .,
> (b) in respect of any other claims,
> (i) 1 million Units . . . for a ship with a tonnage not exceeding 2,000 tons,
> (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
> for each ton from 2,001 to 30,000 tons, 400 Units . . . ;
> for each ton from 30,001 to 70,000 tons, 300 Units . . . ; and
> for each ton in excess of 70,000 tons, 200 Units . . . .[124]

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121. The Unit of Account is defined by the International Monetary Fund and then translated into national currency. *See* 1976 Convention, *supra* note 78, art. 8.

122. *Id.* art. 6.

123. *Id.* art. 7.

The limits for passengers are in Article 7:

> [In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be] an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.[125]

Currently, the exchange rate is $1.56 for each SDR. For a small vessel of 500 tons, the special fund for personal injuries and death cases would be $210,000 under U.S. law. Under the 1976 Convention, the fund for this vessel would be $519,480. Under the 1996 Protocols, the fund would be $3.1 million. Under the 1996 Protocols, the $3.1 million figure applies to all vessels with tonnage not exceeding 2000 tons. Unless the United States decided to opt out, there would be a substantial fund in all cases, including recreational boating cases. For passenger vessels, the amount is $175,000 SDR's or $273,000 per passenger which the ship is authorized to carry under the ship's certificate. For a vessel such as the Staten Island Ferry M/V ANDREW J. BARBERI, which could carry up to 6000 passengers,[126] the Limitation Fund would exceed $1 billion. This is far in excess of the fund of $14.4 million posted in that case.[127]

H. Australian Proposal

Australia has proposed to the IMO Legal Committee that the limits in the 1996 Protocol be increased to the following amounts for noninjury or death claims: "$2,279,011 SDR, for the first 2,000 tons; for each ton from 2,001 to 30,000 tons, 910 SDR; for each ton from 30,001 to 70,000 tons, 682 SDR; and for each ton in excess of 70,000 tons, 455 SDR."[128]

V. CONCLUSION

If the Limitation Act is a loophole, it is one of many loopholes that permeate our legal system providing benefits to select groups. There are historical reasons for limitation and these reasons continue to be valid today. The main complaints about limitation primarily

124. 1996 Protocol, *supra* note 79, art. 6.

125. *Id.* art. 7.

126. *In re* City of New York, 522 F.3d 279, 280, 2008 AMC 1389, 1390 (2d Cir. 2008).

127. *In re* City of New York, 475 F. Supp. 2d 235, 2007 AMC 702 (E.D.N.Y. 2007).

128. International Maritime Organization [IMO], *Consideration of a Protocol To Amend the Limits of Liability of the Protocol of 1996*, Australia submission LEG 97/8/1 2 (Sept. 30, 2010).

relate to the size of the fund in cases involving smaller vessels where there are injuries and deaths. No one regime is perfect, but the 1976 Limitation Convention with the increased limits contained in the 1996 Protocols has been adopted by many shipping nations throughout the world and would provide an answer to many of the complaints being made about the 1851 Limitation Act.