

# The Limitation of Liability Act & The Saving to Suitors Clause: A NEW TACK, BUT THE SAME COURSE

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## Introduction

The principle of limiting a shipowner's liability was first recognized in the United States when, in response to *The Lexington*,<sup>1</sup> Congress enacted the Limitation of Liability Act of 1851 ("the Act").<sup>2</sup> While essential to the maritime industry of the 19<sup>th</sup> century, the Act is now regarded by many as "a vestige of a time gone by."<sup>3</sup> Moreover, critics generally agree that the Act was inartfully drafted and subsequent amendments have done little to improve its clarity.<sup>4</sup>

In 2006, Congress endeavored to complete the codification of Title 46 in order to "conform to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections."<sup>5</sup> As part of this effort, Congress reorganized and restated the Act's provisions. Nevertheless, did the 2006 amendments to the Limitation of Liability Act in fact remove "ambiguities, contradictions, and other imperfections" as Congress intended?

One of the significant problems with the pre-amendment Act was that it conflicted with the saving to suitors clause in 28 U.S.C. 1333. This article seeks to determine whether this conflict was resolved by the 2006 amendments to the Act. First, the basic purpose and procedure of the Act is explained. Next, the 2006 amendments are discussed. The article then examines

the conflict with the saving to suitors clause, including a brief look at how courts have addressed the problem. Finally, the article concludes that the 2006 amendments failed to resolve the conflict between the Act and the saving to suitors clause and suggests how future amendments could address this problem.

## Purpose and Procedure

The Limitation of Liability Act "allows a vessel owner to limit liability [arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture], occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel."<sup>6</sup> Though the Act establishes the shipowner's affirmative right to seek limited liability, the procedure for a limitation action is set forth in Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.<sup>7</sup> The procedure is succinctly explained as follows:

The district court secures the value of the vessel [and pending freight] or owner's [proportionate ownership] interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims. In these proceedings, the court, sitting without a jury, adjudicates the claims. The court determines

whether the vessel owner is liable and whether the owner may limit liability. The court then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants.<sup>8</sup>

The trial of the limitation proceeding requires a bifurcated analysis.<sup>9</sup> First, the court must determine whether there was fault on the part of the shipowner which gives rise to liability for the claims of each claimant.<sup>10</sup> On this question, the claimants bear the burden of proof.<sup>11</sup> If fault is found, the court must then determine whether the shipowner was privy to or had knowledge of the causative agent.<sup>12</sup> "This is the 'privity or knowledge' question and, on this question, the shipowner bears the burden of proof."<sup>13</sup> Both burdens of proof are by a "fair preponderance of the evidence."<sup>14</sup>

The shipowner can only limit its liability if the accident was occasioned or incurred without his privity or knowledge.<sup>15</sup> "Privity or knowledge" implies some sort of complicity in the fault that caused the accident.<sup>16</sup> The privity or knowledge inquiry is fact intensive.<sup>17</sup>

"Privity or knowledge can be actual or constructive. '[A] corporate shipowner may be deemed to have constructive knowledge if the unseaworthy or negligent condition could have been discovered through the exercise of reasonable diligence.'"<sup>18</sup> "A corporate owner, therefore, must

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overcome a presumption not only that its officers and managers had actual knowledge, but also that they should have known of the unseaworthy or negligent condition that caused the injury.”<sup>19</sup>

In concluding the limitation proceedings, if the court finds that the shipowner is entitled to limitation, the court will distribute the limitation fund ratably.<sup>20</sup> If, however, the court denies limitation, the stay will be lifted and the parties permitted to proceed in the forum of their choice.<sup>21</sup>

2006 Amendments

On October 6, 2006, President Bush signed into law H.R. 1442.

The purpose of H.R. 1442 was “to complete the codification of Title 46, United States Code, ‘Shipping’, as positive law...by reorganizing and restating the laws currently in the appendix to [T]itle 46.”<sup>22</sup> The amendment was intended to codify existing law rather than creating new law.<sup>23</sup> Thus, the Limitation of Liability

Act, formerly contained in §§ 181-189 of the appendix to Title 46, now appears in chapter 305 of Title 46 at 46 U.S.C. 30501-30512.

H.R. 1442 primarily altered the wording and organization of the Act, rather than effect substantive changes in law. The following table is a compilation of Revision Notes, arranged in order of the Act’s section numbers as they appeared in the appendix to Title 46.<sup>24</sup>

46 App. U.S.C. §	Revised 46 U.S.C. §	Revision Note
181	30503	<p>In subsection (a), the words “load” and “loading” are substituted for “lade” and “lading” to use more common terminology. The words “person receiving the item” are substituted for “master, clerk, agent, or owner of such vessel receiving the same” to eliminate unnecessary words. The words “thereof in any form or manner” and “and according to the character thereof so notified and” are omitted as unnecessary.</p> <p>In subsection (b), the words “precious metals” are substituted for “platina, gold, gold dust, silver, ... or other precious metals, ... gold or silver in a manufactured or unmanufactured state”, the words “precious stones” are substituted for “diamonds, or other precious stones”, the words “watches, clocks” are substituted for “watches, clocks, or timepieces of any description”, the words “coins, bills, securities” are substituted for “bullion, ... coins, ... bills of any bank or public body, ... orders, notes, or securities for the payment of money”, the word “papers” is substituted for “writings, title deeds”, and the word “silks” is substituted for “silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material”, to eliminate unnecessary words. The words “and similar items of high value and small size” are added to ensure that any of the items specifically named in the source but omitted in the revised section, or similar items, will be covered by this section.</p>
182	30504	<p>The words “liable for” are substituted for “liable to answer for or make good to any person”, the words “merchandise on the vessel” are substituted for “any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel”, and the words “caused by a fire on the vessel” are substituted for “by reason or by means of any fire happening to or on board the vessel”, to eliminate unnecessary words.</p>
183(a)	30505	<p>In subsection (a), the words “Except as provided in section 30506 of this title” are substituted for “except in the cases provided for in subsection (b) of this section” because 46 App. U.S.C. 183(b) is restated in section 30506 of the revised title. The words “whether American or foreign” are omitted as unnecessary because of section 30502 of the revised title. The words “shall not exceed the value of the vessel and pending freight” are substituted for “shall not...exceed the amount or value of...such vessel, and her freight then pending” in 46 App. U.S.C. 183(a)...for consistency and to eliminate unnecessary words. The last sentence is substituted for “the interest of such owner in” in 46 App. U.S.C. 183(a)... .</p>

183(b) (1 <sup>st</sup> sentence)	30506(b)	In subsection (b), the words “is such that the portion available to pay claims for personal injury or death” are substituted for “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” to eliminate unnecessary words.
183(b) (last sentence)	30507	This section is substituted for 46 App. U.S.C. 183(b) (last sentence)...for clarity and consistency and to eliminate unnecessary words. See G. Gilmore & C. Black, <i>The Law of Admiralty</i> , Sec. 10-8 (2d ed. 1975).
183(c) – (e)	30506	<p>In subsection (c), the words “self-propelled vessel” are substituted for “steam or motor vessel”, and the words “tonnage for documentation” are substituted for “registered tonnage”, for consistency in the revised title. The words “space for the use of seamen” are substituted for “space occupied by seamen or apprentices and appropriated to their use” to eliminate unnecessary words.</p> <p>In subsection (d), the words “Separate limits of liability apply” are substituted for “The owner... shall be liable...to the same extent as if no other loss of life or bodily injury had arisen” to eliminate unnecessary words.</p> <p>In subsection (e), the words “the privity or knowledge...is imputed to the owner” are substituted for “shall be deemed conclusively the privity or knowledge of the owner” for consistency and to eliminate unnecessary words.</p>
183(f) (related to 46 App. U.S.C. 183(b)-(e))	30506(a)	Subsection (a) is written as an application provision rather than as a definition to be more direct and to avoid having to repeat the word “seagoing” throughout the section. The words “fishing vessel, fish tender vessel” are substituted for “fishing vessels or their tenders” for clarity. The words “nondescript vessel” are substituted for “nondescript self-propelled vessels” and “nondescript non-self-propelled vessels” to eliminate unnecessary words. The words “self-propelled lighters” are omitted as covered by “lighter”. The words “even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this Appendix, as amended” are omitted as unnecessary. This provision is restated also at section 30508(a) of the revised title.
183(f) (related to 46 App. U.S.C. 183(b))	30508	For an explanation of subsection (a), see the revision notes for section 30506(a), where 46 App. U.S.C. 183(f) is also restated.
183(g)	30510	The words “civil action” are substituted for “suit” for consistency in the revised title. The words “is entitled to rely on any statutory” are substituted for “shall be entitled to rely upon any and all statutory” to eliminate unnecessary words.
183b	30508(b)-(d)	In subsection (b), before paragraph (1), the words “sea-going vessel (other than tugs, barges, fishing vessels and their tenders)” are omitted because of subsection (a) of this section. The word “merchandise” is omitted as covered by “property”. The words “between ports in the United States, or between a port in the United States and a port in a foreign country” are substituted for “from or between ports of the United States and foreign ports” for clarity and for consistency with section 30509(a)(1) of the revised title. See <i>Burstein v. United States Lines Co.</i> , 43 F. Supp. 226 (S.D.N.Y. 1942), rev’d on other grounds, 134 F.2d 89 (2d Cir. 1943). The word “rule” is omitted as covered by “regulation”. In paragraph (1), the words “after the date of the injury or death” are added for clarity and consistency with paragraph (2).

		<p>In subsection (c), before paragraph (1), the words “When notice of a claim for personal injury or death is required by a contract, the failure to give the notice” are substituted for “Failure to give such notice, where lawfully prescribed in such contract” for clarity. In paragraph (1), the words “the court finds” are stated at the beginning rather than the middle to be more precise. The word “damage” is omitted as unnecessary. In paragraph (2), the words “the court finds there was a satisfactory reason” are substituted for “the court excuses such failure on the ground that for some satisfactory” reason to eliminate unnecessary words.</p> <p>In subsection (d), before paragraph (1), the word “claimant” is substituted for “person who is entitled to recover on any such claim” to eliminate unnecessary words. The word “lawful” is omitted as unnecessary. The words “is tolled until” are substituted for “shall not be applicable so long as” and “but shall be applicable from” for clarity and to eliminate unnecessary words.</p>
183c	30509	<p>In subsection (a)(1), before subparagraph (A), the words “may not” are substituted for “It shall be unlawful” for consistency in the revised title and with other titles of the United States Code. The words “rule” and “agreement” are omitted as covered by “regulation” and “contract”, respectively. The words “a provision limiting” are substituted for “any provision or limitation (1) purporting ... to relieve ..., or (2) purporting ... to lessen, weaken, or avoid” to eliminate unnecessary words. In subparagraph (A), the words “the owner’s employees or agents” are substituted for “his servants” for consistency in the revised title. In subparagraph (B), the words “on the question of liability for such loss or injury, or the measure of damages therefor” are omitted as unnecessary.</p> <p>Subsection (b)(2) is substituted for 46 App. U.S.C. 183c (last sentence) for consistency and to eliminate unnecessary words.</p>
184	30507	<p>This section is substituted for [46 App. U.S.C. 184] (words before semicolon) for clarity and consistency and to eliminate unnecessary words. The text of 46 App. U.S.C. 184 (words after semicolon) is omitted as unnecessary. See G. Gilmore &amp; C. Black, <i>The Law of Admiralty</i>, Sec. 10-8 (2d ed. 1975).</p>
185	30511	<p>In subsection (a), the words “bring a civil action ... in a district court of the United States” are substituted for “petition a district court of the United States” for consistency in the revised title and with other titles of the United States Code. See rule 2 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The words “of competent jurisdiction” are omitted as unnecessary.</p> <p>In subsection (b), the word “pending” before “freight” is added for consistency in the chapter. The words “to carry out this chapter” are substituted for “to carry out the provisions of section 183 of this Appendix” because of the reorganization of the source provisions.</p>
186	30501	<p>The words “In this chapter” are substituted for “within the meaning of the provisions of title 48 of the Revised Statutes relating to the limitation of the liability of the owners of vessels” because of the codification of title 46, United States Code. The word “supplies” is substituted for “victual” for clarity. The words “and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof” are omitted as unnecessary.</p>

187	30512	This section is substituted for the source provision for consistency with the restatement of 46 App. U.S.C. 183(a) and 189 in section 30505 and to eliminate unnecessary words. The reference in the source to particular sections is extended to include the entire chapter to simplify the reference and to conform to the obvious original policy and intent of the source provision.
188	30502	None.
189	30505	The words “shall not exceed the value of the vessel and pending freight” are substituted for...“the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending” in 46 App. U.S.C. 189 for consistency and to eliminate unnecessary words. The last sentence is substituted for...“The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole” in 46 App. U.S.C. 189 for clarity and consistency. The words “Provided, That this provision shall not prevent any claimant from joining all the owners in one action” in 46 App. U.S.C. 189 are omitted as unnecessary.

### *The Tension Between the Act and the Saving to Suitors Clause*

Federal courts have exclusive admiralty jurisdiction of suits brought under the Limitation of Liability Act and, thus, there has long existed a conflict between this exclusive jurisdiction and the presumption in favor of jury trials and common law remedies embodied in the “saving to suitors clause.”<sup>25</sup> The judiciary has acted creatively to resolve this conflict, however, generally speaking, courts have taken one of two approaches in multi-claim cases.

First, if the claims total less than the value of the limitation fund, a court may lift the stay and allow the claims to proceed outside of the limitation action.<sup>26</sup> As the Supreme Court has held, to not allow state court actions where the fund is adequate to satisfy all claims, “would transform the Act from a protective instrument to an offensive weapon.”<sup>27</sup>

Second, in a practice that has become increasingly common, all claimants will stipulate (1) that the federal court retains exclusive jurisdiction over the limitation of

liability proceeding and (2) they will not seek to enforce a greater damage award until the limitation issues have been heard by the federal court.<sup>28</sup> Many stipulations also include a waiver of *res judicata* with respect to the effect of a state court’s findings, as they pertain to limitation of liability.<sup>29</sup> When all claimants enter into such a stipulation, a federal court will lift the stay and allow the liability issue to be tried to a jury in state or federal court. Once liability is adjudicated, the parties will return to federal court for a determination as to whether the owner is entitled to limit its liability.<sup>30</sup>

### *Did the Amendments Resolve the Conflict?*

The 2006 amendments presented Congress with a ripe opportunity to codify the various judicial approaches to reconciling the conflict between admiralty jurisdiction under the Act and the right to common law jury trials under the saving to suitors clause. As evidenced by the table and discussion above, though, Congress made no attempt to amend the Limitation of Liability Act substantively. This, of course, begs the question, what could Congress have done?


The most obvious amendment to the Act could have been one which allowed “other actions” to proceed where the aggregate amount of all claims is less than the value of the limitation fund. As noted, courts have allowed this practice on the theory that “the operation of the Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight.” Because the cessation of other actions is a substantive right under the Act, such an amendment would be within the purview of Congress.

Congress might also have terminated the right to stay other actions upon a finding that the shipowner is not entitled to limit liability. “As a general rule, the courts today seem to feel that all restraint of such other proceedings should cease upon such a finding, under the theory that the owner’s only benefit from the Act should be the limitation itself...”<sup>31</sup> Again, such a provision would be within the scope of the Act, as it concerns a substantive right, rather than a procedural matter.

In conclusion, as the stated purpose of the 2006 amendments to the Limitation of Liability Act

was to, in part, “remove ambiguities, contradictions, and other imperfections,” Congress should have taken steps to reconcile the Act with the

saving to suitors clause. Indeed, it need only have implemented already well-established judicial solutions. In its second century, the Act, now fully-

integrated in Title 46, is primed for future, *substantive* revisions. 

## Endnotes

1. *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*, 47 U.S. 344 (1848).
2. See Walter W. Eyer, *Shipowners' Limitation of Liability-New Directions for an Old Doctrine*, 16 *Stan.L.Rev.* 370, 372 (1964); see also Thomas J. Schoenbaum, 2 *Admiralty & Mar. Law* § 15-1 (4th ed.).
3. *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 235 (9<sup>th</sup> Cir. 1989) (Kozinski, J.).
4. *Id.* at 235-36 (“No one who has had occasion to study the Limitation of Liability Act has been struck by its lucidity. As noted by one commentator, “[i]n seven ill-worded sections designed to conform to English law, the Thirty-first Congress laid the foundations of the American system of limitation that exists today.”(quoting Eyer, *supra* note 2, at 372)). In a footnote, Judge Kozinski quotes: “The provisions of this act are of paramount importance to the mercantile community, though the main object of the act has been frustrated by the neglect on the part of its framers to embody this intent in intelligible language.” 2 Parsons, *Shipping & Admiralty* 120 (1869), quoted in G. Gilmore & C. Black, *The Law of Admiralty* § 10-2, at 819 n. 6. (2d ed. 1975).
5. Pub. L. No. 109-304, § 2, 120 Stat. 1485 (2006).
6. See *In re Omega Protein, Inc.*, 2007 WL 803934, \*1 (W.D. La. 2007) (quoting *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446, 121 S.Ct. 993, 1000 (U.S. 2001)).
7. *Id.* (citing *Lewis*, 531 U.S. at 448, 121 S.Ct. at 1001).
8. *Id.*
9. Charles M. Davis, *Maritime Law Deskbook XVII.E* (2005 ed.) (citing *Carr v. PMS Fishing Corp.*, 191 F.3d 1 (1<sup>st</sup> Cir. 1999)).
10. *Id.*; *In re Omega Protein*, 2007 WL 803934, at \*1 (citing *Farrell Lines Inc. v. Jones*, 530 F.2d 7, 10 (5<sup>th</sup> Cir.1976)).
11. *Id.*
12. Davis, *supra* note 9, at XVII.E (citing *Carr*, 191 F.3d 1).
13. *In re Omega Protein*, 2007 WL 803934, at \*2 (citing *Farrell Lines*, 530 F.2d at 10).
14. Davis, *supra* note 9, at XVII.E (citing *Carr*, 191 F.3d 1).
15. See 46 U.S.C. 3050(b).
16. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 355 (5<sup>th</sup> Cir. 1991) (citing *Nuccio v. Royal Indem. Co.*, 415 F.2d 228, 229 (5<sup>th</sup> Cir.1969)) (internal quotations omitted).
17. *Id.* at 355-356 (“The question of ‘privity or knowledge must turn on the facts of the individual case.’”) (quoting *Giboney v. Wright*, 517 F.2d 1054, 1057 (5<sup>th</sup> Cir. 1975)).
18. *In re Omega Protein*, 2007 WL 803934, at \*3 (quoting *Brister*, 946 F.2d at 356) (internal citations omitted).
19. *Id.* (quoting *Brister*, 946 F.2d at 356).
20. Fed. R. Civ. P. Supp. F(8)
21. See *Wheeler v. Marine Navigation Sulphur Carriers, Inc.*, 764 F.2d 1008, 1011 (4<sup>th</sup> Cir. 1985) (citations omitted).
22. H.R. Rep. No. 109-170, at 2 (2005).
23. *Id.*
24. See *id.*, Disposition Tables at 10 & Section-by-Section Explanation at 43 (organized by revised section number).
25. See 28 U.S.C. 1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*”) (emphasis added); see also *Complaint of Port Arthur Towing Co. on Behalf of M/V Miss Carolyn*, 42 F.3d 312, 315-316 (5<sup>th</sup> Cir. 1995) (discussing the “recurring and inherent conflict” between the Act and the saving to suitors clause).
26. See, e.g., *Lewis*, 531 U.S. at 450, 121 S.Ct. at 1002.
27. *Id.* at 450-51, 121 S.Ct. at 1002 (quoting *Lake Tankers Corp. V. Henn*, 354 U.S. 147, 152-53, 77 S.Ct. 1269 (1957)).
28. *Complaint of Port Arthur Towing Co.*, 42 F.3d at 316 (citations and internal quotations omitted).
29. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. at 451-52, 121 S.Ct. at 1003.
30. Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in a Nutshell* 361 (5<sup>th</sup> ed.).
31. Russell G. Donaldson, *Effect on Other Proceedings of Shipowner's Petition in Admiralty for Limitation of Liability Under 46 U.S.C.A. § 183 et seq.*, 47 A.L.R. Fed. 490, at §2[a] (1980).