

## COMMENTS

### THE 1851 SHIPOWNERS' LIMITATION OF LIABILITY ACT: A RECENT STATE COURT TREND TO EXERCISE JURISDICTION OVER LIMITATION RIGHTS

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#### TABLE OF CONTENTS

I.	INTRODUCTION .....	420
II.	ORIGINS AND HISTORY OF THE LIMITATION ACT .....	421
III.	THE LIMITATION ACT: STATUTORY CONSTRUCTION, PROCEDURE, AND JURISDICTION .....	424
	A. The Limitation Act's Statutory Construction . . . .	424
	B. Procedure to Obtain Limitation .....	425
	C. Jurisdiction .....	428
	1. Admiralty Jurisdiction Under 28 U.S.C. § 1333 .....	429
	2. Exclusive Jurisdiction Under 28 U.S.C. § 1333 .....	429
	3. Saving to Suitors: Concurrent Jurisdiction .....	431
	4. Jurisdictional Conflict: 28 U.S.C. § 1333	

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	vs. 46 U.S.C. § 185 . . . . .	432
D.	Framing the Issue: Limited Liability and the Conflict Between State and Federal Court Jurisdiction . . . . .	432
IV.	THE TREND: <i>MAPCO</i> AND <i>HOWELL</i> . . . . .	435
A.	The Trend Begins: <i>Mapco Petroleum v. Memphis Barge Line, Inc.</i> . . . . .	436
	1. The Facts and Holding in <i>Mapco</i> . . . . .	437
	2. The Court's Analysis Summarized . . . . .	438
	3. Critical Analysis: Did the <i>Mapco</i> Court Reach the Correct Conclusion? . . . . .	440
B.	<i>Howell v. American Casualty Co.</i> . . . . .	443
	1. The Facts and Holding in <i>Howell</i> . . . . .	443
	2. The <i>Howell</i> Court's Analysis . . . . .	444
V.	PROCEDURAL SUMMARY AND PRACTICAL SIGNIFICANCE . . . . .	445
A.	Hypothetical: Procedural Summary . . . . .	445
B.	Hypotheticals: Practical Significance . . . . .	446
	1. Hypothetical #1: The Attorney's Dilemma . . . . .	447
	2. Hypothetical #2: The Procedural Dilemma . . . . .	448
VI.	CONCLUSION . . . . .	450

### I. INTRODUCTION

Since Congress enacted the Shipowners' Limitation of Liability Act of 1851 (Limitation Act),<sup>1</sup> vessel owners have had the right to seek limitation of liability to the vessel's value plus pending freight as to claims arising out of maritime accidents involving their vessels.<sup>2</sup> When the first case under the Limitation Act worked its way through the courts in 1872,<sup>3</sup> the Supreme Court observed that the Limitation Act did not designate which courts had jurisdiction over limitation rights nor specify the procedure for vessel owners to avail themselves of the statutory limits on liability.<sup>4</sup> Upon consideration of the matter, the Court concluded there was little doubt that fed-

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1. Act of Mar. 3, 1851, ch. 43, § 3, 9 Stat. 635 (current version at 46 U.S.C. app. §§ 181-189 (1994)).

2. See 46 U.S.C. app. § 183 (1994).

3. See *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

4. See *id.* at 123.

eral district courts had the requisite jurisdiction to determine limitation rights and filled the procedural void by adding Rules 54 through 59 to the Admiralty Rules<sup>5</sup> which guided actions in the district courts.

For the next 121 years, only federal district courts considered limitation rights under the Limitation Act,<sup>6</sup> although other issues arising out of maritime incidents, including cases in which limitation was sought, were brought in state courts from time to time.<sup>7</sup> In 1993, the Tennessee Supreme Court held that Tennessee state courts were competent to determine limitation rights in *Mapco Petroleum v. Memphis Barge Line, Inc.*<sup>8</sup> In 1997, Louisiana's Fourth Circuit Court of Appeals adopted *Mapco's* reasoning and held that Louisiana state courts were similarly competent to determine limitation rights in *Howell v. American Casualty Co.*<sup>9</sup> This Comment focuses on the trend started by these two cases.<sup>10</sup>

This Comment begins with a look at the origins and history of the 1851 Shipowners' Limitation of Liability Act.<sup>11</sup> Next, the United States Constitution, statutes pertaining to limited liability, and influential Supreme Court decisions are examined to properly frame the jurisdictional issue presented to the *Mapco* and *Howell* courts.<sup>12</sup> Then, the *Mapco* and *Howell* decisions are examined and critically analyzed to determine whether the courts arrived at the correct conclusion.<sup>13</sup> Next, hypothetical scenarios summarize procedural implications and illustrate *Mapco's* and *Howell's* practical significance.<sup>14</sup> Finally, this Comment concludes that pursuant to the *Mapco* and *Howell* opinions, state courts should consider the real possibility that limitation under the Limitation Act is a proper and

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5. See *id.* at 125 (holding that to aid the parties and to facilitate proceedings in the district courts, "we have prepared some rules which will be announced at an early day").

6. See, e.g., *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir. 1987); *Cincinnati Gas & Elec. Co. v. Abel*, 533 F.2d 1001 (6th Cir. 1976).

7. See, e.g., *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992); *Lavergne v. Western Co. of N. Am.*, 371 So. 2d 807 (La. 1979).

8. 849 S.W.2d 312 (Tenn. 1993).

9. 691 So. 2d 715 (La. 4th Dist. Ct. App. 1997).

10. See *Howell*, 691 So. 2d at 732; *Mapco*, 849 S.W.2d at 318.

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

viable legal defense in state court actions.<sup>15</sup>

## II. ORIGINS AND HISTORY OF THE LIMITATION ACT

On March 3, 1851, Congress passed the original Limitation of Shipowners' Liability Act.<sup>16</sup> The primary impetus for enacting the Limitation Act was to promote American ship-building, commerce, and investment in the merchant marine industry, placing the United States shipping industry on a more competitive footing with those foreign countries already benefitting from forms of limitation.<sup>17</sup> Before comprehensive insurance protection, it was important for investors and owners to have the security that their liability would not exceed the value of their investment — namely the value of the vessel.<sup>18</sup> Thus, in its most basic form, the Limitation Act permitted vessel owners and bareboat charterers to limit their liability to the vessel's post-accident<sup>19</sup> value.<sup>20</sup> This value could be a very

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15. See *infra* Part VI.

16. See Act of Mar. 3, 1851, ch. 43, § 3, 9 Stat. 635 (current version at 46 U.S.C. app. §§ 181–189)). Historically, Massachusetts passed the first limitation act in 1818, and Maine later adopted it in 1821. See GRANT GILMORE & CHARLES L. BLACK JR., *THE LAW OF ADMIRALTY* 819 n.4 (2d ed. 1975). The federal Limitation Act under discussion here was derived from England's limitation act and the Maine statute. See *id.* at n.5.

17. See James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1002 (1979). In *Norwich & New York Trans. Co. v. Wright*, the Court found “[t]he great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry.” 80 U.S. (13 Wall.) 104, 121 (1871).

18. The Supreme Court determined that investors incurred a substantial risk on the seas by investing in ship-building and that the only practical means to encourage funding and ownership was to limit liability to the value of their investment. See *Wright*, 80 U.S. at 121. The Court reasoned that the shipping industry was analogous to any other industry that used corporate entities to protect investors and owners from extensive personal liability. See *id.*

19. Technically, the vessel's value is determined at the completion of the voyage. See GILMORE & BLACK, *supra* note 16, at 907. Thus, if several accidents occur during one voyage, the shipowner's interest in the vessel is the vessel's value after the last accident. See *id.* If the voyage is completed, the vessel's value for a single limitation fund is calculated at the conclusion of that voyage. See *id.* The term “post-accident value” will be used in this Comment for simplicity.

20. Section 183 of the Limitation Act provides the substantive statutory language to limit liability to the post-accident value. See 46 U.S.C. app. § 183(a). Section 183's language is reprinted in full and discussed more completely in Part III. Section 186, unamended since 1851, provides:

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relat-

small sum or even nothing if the vessel was a total loss.<sup>21</sup> The potential benefit to investors, vessel owners, and American commerce was obvious and most commentators felt the Limitation Act achieved its objective.<sup>22</sup>

The Limitation Act underwent minor changes in the years following its 1851 enactment,<sup>23</sup> but it was not until 1935 that it sustained its first substantive change. In 1935, Congress included a provision where, in cases of claims arising from loss of life or bodily injury and involving seagoing vessels, a minimum limitation fund of \$60 per ton was required.<sup>24</sup> Since 1935, Congress has increased that amount, and it is presently set at \$420 per ton.<sup>25</sup>

More recently, many have criticized the Limitation Act as an outdated and unnecessary tool in the modern insured maritime industry.<sup>26</sup> Courts,<sup>27</sup> lawmakers,<sup>28</sup> and environmentalists<sup>29</sup> alike have

ing to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

46 U.S.C. app. § 186 (1994).

According to § 186, vessel owners and bareboat or demise charterers may limit liability, but time charterers and masters may not benefit from the Limitation Act. *See generally* Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954). The Limitation Act expressly provides that “the master, officers, or seamen” are not entitled to limitation of liability. *See* 46 U.S.C. app. § 187 (1994).

21. *See* Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 493 (1886) (noting that the dollar value of a sunken vessel may be zero).

22. *See generally* GILMORE & BLACK, *supra* note 16, at 818–21.

23. The amendments during these times were described as minor changes in the statute's syntax and did not substantively alter the Limitation Act's scope or a vessel owner's liability. *See* Donovan, *supra* note 17, at 1019–20 & n.139.

24. *See* GILMORE & BLACK, *supra* note 16, at 821.

25. The relevant portion of § 183(b) provides:

In the case of any seagoing vessel, if the amount of the owner's liability . . . is insufficient to pay all losses in full, and the portion of such amount applicable to payment of losses in respect of loss of life or bodily injury is less than \$420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$420 per ton.

46 U.S.C. app. § 183(b).

26. One commentator noted that the Limitation Act “has been described as an anachronism, a principle which should be relegated to the era of wooden hulls.” Carter T. Gunn, *Limitation of Liability: United States and Convention Jurisdiction*, 8 MAR. LAW. 29, 29 (1983).

27. *See* Maryland Cas. Co., 347 U.S. at 409. In a frequently cited passage, the Court held that “[j]udicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail.” *Id.* at 437.

28. During the early 1960s, the American Maritime Law Association (MLA) consid-

echoed this sentiment. Despite the hostility and rhetoric to limit the Limitation Act's application, attempts to narrow its scope have been unsuccessful.<sup>30</sup> Indeed, the Limitation Act, as written today, bears a strong resemblance to the original statute enacted almost 150 years ago.<sup>31</sup>

### III. THE LIMITATION ACT: STATUTORY CONSTRUCTION, PROCEDURE, AND JURISDICTION

#### A. The Limitation Act's Statutory Construction

Section 183 forms the substantive portion of the Limitation Act,<sup>32</sup> which establishes the amount of liability when limitation is allowed. The most relevant portion, § 183(a), 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 privity or knowledge of such owner or owners, shall not, except in the case provided for in subsection (b) of

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ered adopting the 1957 Brussels Convention on the Limitation of the Liability of Shipowners of Seagoing Ships. *See* GILMORE & BLACK, *supra* note 16, at 823. The Brussels Convention provided for an increased limitation fund that was initially attractive to United States legislators. *See id.* Unlike the many foreign countries that adopted the Brussels Convention, the United States chose not to adopt it. *See id.*; Gunn, *supra* note 26, at 50–52.

29. *See* GILMORE & BLACK, *supra* note 16, at 823–34 (citing the Torrey Canyon disaster and resulting pollution control acts not subject to limited liability). The Torrey Canyon, a vessel stranded off England's coast, began leaking oil into the sea. *See id.* at 823. English bombers sank the vessel to limit pollution and the resulting American litigation established a limitation fund of \$50, the value of one salvaged lifeboat. *See id.* at 823 n.13e.

As a result of this disaster, Congress implemented several pollution control statutes, including: The Water Quality Improvement Act of 1970; The Federal Water Pollution Control Act Amendments of 1972; and The Clean Water Act of 1977. *See* Gunn, *supra* note 26, at 52.

30. *See, e.g.,* Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1230 (11th Cir. 1990) (holding that a jet ski is covered by the Limitation Act); M/V SUNSHINE, II v. Beavin, 808 F.2d 762 (11th Cir. 1987) (noting pleasure crafts are covered by the Limitation Act).

31. *See generally* Donovan, *supra* note 17, at 1028.

32. The entire Limitation Act consists of nine sections. *See* 46 U.S.C. app. §§ 181–189 (1994). The most relevant sections for this Comment, § 183 and § 185, are discussed further in the text. *See infra* notes 33–37 and accompanying text.

this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.<sup>33</sup>

In addition to § 183, § 185 is important because it provides a statutory procedure for limiting liability when limitation is allowed.<sup>34</sup> In 1936, Congress amended § 185 from its original version to codify the mandatory procedure established in the Admiralty Rules.<sup>35</sup> Section 185 provides:

The vessel owner, within six months after a claimant shall have given . . . written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability . . . and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor . . . or (b) at his option shall transfer, for the benefit of claimants, to a trustee . . . his interest in the vessel and freight . . . . Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.<sup>36</sup>

Unlike its substantive counterpart § 183, § 185 sets forth various procedural requirements for both the vessel owner and for those having claims.<sup>37</sup> The interaction between § 185's procedure and § 183 is critical in understanding the problem faced by the *Mapco* and *Howell* courts and requires a closer examination to achieve perspective.

## B. Procedure to Obtain Limitation

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33. 46 U.S.C. app. § 183(a). "Freight" in maritime law refers not to the cargo carried, but to the compensation received for carrying the cargo. See GILMORE & BLACK, *supra* note 16, at 245; see also *In re Meyer*, 74 F. 881, 897 (D. Cal. 1896) (holding pending freight includes fare for passengers); *infra* note 51 (discussing "pending freight" in a rental situation).

34. See 46 U.S.C. app. § 185 (1994) (outlining the procedure for vessel owners to follow to seek limitation in federal court).

35. See GILMORE & BLACK, *supra* note 16, at 838–39. In 1966, Rule F replaced the Former Rules of Practice in Admiralty and Maritime Cases Rule 51, established in 1920 by the Supreme Court. See SUPP. ADM. & MAR. CLAIMS R. F. Rule F incorporates the substance of the 1936 amendment to § 185. See *id.* advisory committee's note (1966 Adoption).

36. 46 U.S.C. app. § 185.

37. See *id.*

In 1872, the Supreme Court in *Norwich & New York Transportation Co. v. Wright*,<sup>38</sup> the first limitation case, recognized that the Limitation Act did not designate the court with jurisdiction to enforce the Act, nor did it establish a procedure for a vessel owner to follow, in any court, to seek limitation of liability.<sup>39</sup> In considering the matter, the Court stated that “[w]e have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations facilitating the course of proceeding.”<sup>40</sup>

Accordingly, the Court determined in its opinion the procedure for vessel owners to follow<sup>41</sup> and added Rules 54 through 59 to the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction to preserve the procedure for future cases.<sup>42</sup> These Admiralty Rules were revised and renumbered 51–55 in 1920.<sup>43</sup>

To unify civil and admiralty procedure, the Admiralty Rules were rescinded and superseded by the Supplemental Rules for Certain Admiralty and Maritime Claims Rules A through F, effective July 1, 1966.<sup>44</sup> Supplemental Rule F replaced Admiralty Rules 51–54, but remained substantially similar in substance to the former Admiralty Rules.<sup>45</sup> In addition, Rule F enhanced admiralty procedure because it mirrored its statutory counterpart, 28 U.S.C. § 185.<sup>46</sup>

Pursuant to these rules, vessel owners have consistently had two ways to assert their right to limited liability under § 183.<sup>47</sup> First, an owner could follow the procedure set out by Supplemental

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38. 80 U.S. (13 Wall.) 104 (1872).

39. *See id.* at 123 (recognizing that “[t]he act does not state what court shall be resorted to, nor what proceedings shall be taken”).

40. *Id.* at 124.

41. *See id.* at 125.

42. *See* 3 DAVID E.R. WOOLEY & ANTONIO J. RODRIGUEZ, *BENEDICT ON ADMIRALTY* § 5, at 1-36 (1996).

43. *See id.* at 1-38.

44. *See* SUPP. ADM. & MAR. CLAIMS *Introduction* (as provided in the Federal Rules of Civil Procedure).

45. *See* SUPP. ADM. & MAR. CLAIMS R. F advisory committee note; GILMORE & BLACK, *supra* note 16, at 847–50.

46. *Compare* 46 U.S.C. app. § 185, *with* SUPP. ADM. & MAR. CLAIMS R. F.

47. *See infra* note 49.



Rule F and § 185.<sup>48</sup> This procedure allows the vessel owner, acting as a plaintiff,<sup>49</sup> to file a complaint in a United States district court within six months of the owner's first receipt of a written notice of an intent to claim.<sup>50</sup> Next, the owner must establish the requisite limitation fund, which is normally done by posting a bond equal to the vessel's value and pending freight.<sup>51</sup> Once the complaint is filed and the fund is constituted, the court, *ex parte*, issues an injunction barring the prosecution of any claim against the vessel owner in personam or against the vessel in rem in any proceeding other than the limitation case.<sup>52</sup> Finally, the court clerk issues a monition di-

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48. See 46 U.S.C. app. § 185; SUPP. ADM. & MAR. CLAIMS R. F.

49. Limitation cases are commenced by the vessel owner, nominally designated as the "plaintiff," filing a "complaint." See SUPP. ADM. & MAR. CLAIMS R. F(1). Parties having claims against the vessel owner(s) then appear and file their claims as "claimants." See *id.* at F(4).

Notwithstanding that a vessel owner commences the action as the "plaintiff," a limitation proceeding is a defensive proceeding because the claimants are seeking damages from the vessel owner. The vessel owner, as a typical defendant, seeks damages from claimants only by counterclaims. See *British Transp. Comm'n v. United States*, 354 U.S. 129, 142 (1957); 3 BENEDICT ON ADMIRALTY, *supra* note 42, § 11, at 2-5. The burden of proof imposed on the parties confirms that the claimants are the actual plaintiffs, and the limitation plaintiff is the actual defendant. See *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F.2d 1558, 1564 (11th Cir. 1985). As in a conventional lawsuit, the claimants seeking damages have the initial burden of establishing fault, in the form of negligence or "unseaworthiness," that caused or contributed to the maritime accident. See *id.*

50. See 46 U.S.C. app. § 185. The Supreme Court has held that an owner choosing the complaint method under § 185 may file in advance of any suit having been brought against the shipowner in any court. See *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 493, 502 (1886); *The Scotland*, 105 U.S. 24, 34 (1881); *The H.F. Dimock*, 52 F. 598, 598-99 (S.D.N.Y. 1892). Accordingly, a vessel owner does not have to wait for first written notice, but may seek limitation before notice is received. *But see In re Putnam*, 55 F.2d 73, 74 (2d Cir. 1932) (finding that if only a single claim situation existed, the vessel owner must wait for the plaintiff to choose the forum).

51. See GILMORE & BLACK, *supra* note 16, at 853. In a rental arrangement, the rental cost would be "pending freight" and added to the vessel's post-accident value. See generally *Keys Jet Ski*, 893 F.2d at 1226; see also *The Main v. Williams*, 152 U.S. 122, 129-30 (1894) (holding passenger fares should be included in determining the limitation fund).

52. See 46 U.S.C. app. § 185 (stating "[u]pon compliance with the requirements of this section all claims and proceedings against the owner with respect to this matter in question shall cease"). This injunction, although issued by a federal court, enjoins any claims in state courts as well. See *Parham v. Pelegrin*, 468 F.2d 719, 721 (8th Cir. 1972) (holding "any and all suits, . . . in any jurisdiction, . . . are[] restrained, stayed and enjoined"). If suit is filed in state court, the court will lift the injunction if: (1) only one claim exists, and thus, no concursus is needed, or (2) the limitation fund is sufficient to satisfy the aggregate of multiple claims. See Michael L. Bono, Comment, *Protective*

recting anyone having a claim to bring their claim before the court's deadline in the limitation proceeding.<sup>53</sup> This establishes a concursus of all claims arising out of a maritime accident in a single federal court proceeding.<sup>54</sup> The district court judge then decides the merits of each claim and the vessel owner's right to limit liability, and distributes the funds if limitation is allowed.<sup>55</sup>

Second, as an alternative to commencing a limitation case, an owner may assert entitlement to limitation under § 183 as an affirmative defense in a federal court suit.<sup>56</sup> By choosing this method, the owner avoids the six-month filing deadline required by Rule F and § 185, and does not have to establish a limitation fund.<sup>57</sup>

### C. Jurisdiction<sup>58</sup>

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*Stipulations and the Single Claimant Exception in Limitation of Liability Proceedings*, 17 TUL. MAR. L.J. 257, 260 (1993). By doing so, the courts strike a balance between the benefits of the Limitation Act to vessel owners and the rights of claimants to sue in state courts pursuant to 28 U.S.C. § 1333 (1997). *See id.* at 261; *see also infra* Part III.C.3. (discussing the Saving to Suitors Clause, 28 U.S.C. § 1333).

53. *See Langnes v. Green*, 282 U.S. 531, 533 (1931).

54. *See Norwich*, 80 U.S. (13 Wall.) at 123 (holding claimants are brought into federal district court by a motion to present and substantiate their claims); *Complaint of Caldas*, 350 F. Supp. 566, 575 (E.D. Pa. 1972) (holding once the concursus is formed, the district court resolves all claims simultaneously).

55. *See GILMORE & BLACK, supra* note 16, at 863. Because claims before the federal court sitting in admiralty are decided by a judge, many claimants choose to file in state court when possible. *See Bono, supra* note 52, at 257.

56. *See The Scotland*, 105 U.S. at 33–34 (holding that the rules “were not intended to prevent a defense by way of answer”). A vessel owner has two independent choices: first, an owner may seek limitation under § 183; second, an owner may discharge all claims under a § 185 proceeding by surrendering the ship or posting bond. *See id.* at 34. If they do not choose the second option, owners are still entitled to the benefit of the first § 183 limitation. *See id.*; 46 U.S.C. app. § 185 (stating that owners *may* petition a district court).

Interestingly, Congress required by § 185's language that the complaint be filed in a federal “district court.” 46 U.S.C. app. § 185. Section 183, however, omits such language, indicating that the limitation defense may be asserted in state court. *Compare* 46 U.S.C. § 185 (stating a vessel owner may petition a “district court of the United States”), *with* 46 U.S.C. § 183 (omitting any language requiring limitation to be brought solely in federal court). This distinction becomes a focal point in the *Mapco* and *Howell* decisions.

57. *See* 46 U.S.C. app. § 183 (noting no time-limit or limitation fund requirement).

58. Article III, section 2, of the United States Constitution grants United States courts power to administer maritime law. *See* U.S. CONST. art III, § 2, cl. 1. This jurisdiction was later codified in the Judiciary Act of 1789, 1 Stat. 73, 76–77, which Congress later re-codified as 28 U.S.C. § 1333.

Title 28 of the United States Code in § 1333 confers admiralty jurisdiction to federal courts.<sup>59</sup> This statute provides: “[t]he 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.”<sup>60</sup> Accordingly, § 1333(1) may be broken down into two clauses. The first clause grants exclusive federal court jurisdiction over a case qualifying as a “civil case in admiralty or maritime jurisdiction”<sup>61</sup> (admiralty jurisdiction). The second clause, commonly referred to as the “saving to suitors clause,” acts as an exception to exclusive federal court jurisdiction if the plaintiff is seeking a common law remedy.<sup>62</sup> In this instance, federal and state courts have concurrent jurisdiction over the suit.<sup>63</sup>

### 1. Admiralty Jurisdiction Under 28 U.S.C. § 1333

In any maritime tort<sup>64</sup> case, to satisfy the first clause of § 1333 pertaining to admiralty jurisdiction, the tort must (1) occur on navigable waters, and (2) bear a significant relationship to traditional maritime activity and have the potential to disrupt maritime commerce.<sup>65</sup> A body of water is “navigable” if it forms a highway for interstate or foreign maritime commerce, either by itself, or by connecting with other waters.<sup>66</sup> By definition, landlocked bodies of water within a single state are not “navigable” for purposes of admi-

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59. See 28 U.S.C. § 1333.

60. *Id.* § 1333(1).

61. *Id.* (referring to first clause only).

62. *Id.* (referring to second clause only).

63. See *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957); *In re M/V MISS ROBBIE*, 968 F. Supp. 305, 306 (E.D. La. 1997) (citing *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957); *Texaco, Inc. v. Williams*, 47 F.3d 765, 767 (5th Cir. 1995)).

64. This Comment focuses on maritime tort jurisdiction as opposed to contract jurisdiction. For a discussion on maritime contract jurisdiction, see David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 LA. L. REV. 685, 694 (1995).

65. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *Sisson v. Ruby*, 497 U.S. 358, 362–63 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673–74 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 261 (1972); see also *Leblanc v. Cleveland*, 979 F. Supp. 142, 144 (N.D.N.Y. 1997) (denoting jurisdiction prongs as “situs” and “status”); *Dee v. Sea Ray Boats, Inc.*, 702 So. 2d 1349, 1349 (Fla. 3d Dist. Ct. App. 1997) (denoting jurisdiction prongs as “locality” and “nexus”).

66. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

ralty jurisdiction.<sup>67</sup>

The “significant relationship” and “potential for disruption of commerce” elements, however, are not so clearly defined.<sup>68</sup> Indeed, commentators and courts have labeled the terms as “vague” and “so imprecise as to defy description by either formula or an objective standard.”<sup>69</sup> Suffice it to say, admiralty tort jurisdiction is typically established if the tort involved a vessel on navigable waters or if the tort itself occurred on navigable waters.<sup>70</sup> Once general admiralty tort jurisdiction is established, the next issue is whether federal court jurisdiction is exclusive or whether it is concurrent with state court jurisdiction.

## 2. *Exclusive Jurisdiction Under 28 U.S.C. § 1333*

Relatively few cases fall under § 1333's grant of exclusive admiralty jurisdiction.<sup>71</sup> With respect to § 1333, federal court jurisdiction is only exclusive if the case is one in which the plaintiff is not entitled to a common law remedy.<sup>72</sup> This effectively limits “exclusive” jurisdiction to in rem proceedings, which do not entitle a plaintiff to common law remedies.<sup>73</sup> Additionally, federal court jurisdiction is exclusive by statute if the plaintiff seeks to invoke Supplemental Rules A through F and the Limitation Act's § 185.<sup>74</sup>

To seek limitation under the Limitation Act, § 183 requires that (1) the negligence involved a vessel,<sup>75</sup> and (2) the negligence occurred

67. See *Marine Office of Am. v. Manion*, 241 F. Supp. 621, 621 (D. Mass. 1965) (finding a landlocked lake bordered by a single state non-navigable).

68. See *supra* note 65 and accompanying text.

69. Robertson, *supra* note 64, at 691 (quoting *Mollett v. Pendrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987)).

70. See *id.* at 691.

71. See *id.* at 699.

72. See 28 U.S.C. § 1333. The original statute read, “saving to suitors, in all cases, the right of a common law remedy . . .” Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77. Despite the wording change, the Supreme Court has held that the “common law remedy” meaning remained the same. See *Madruga v. Superior Court of Cal.*, 346 U.S. 556, 561 n.12 (1954).

73. See Robertson, *supra* note 64, at 698-99.

74. See 46 U.S.C. app. § 185 (requiring the petition be filed in a United States district court).

75. See 1 U.S.C. § 3 (1994) (defining vessel); *Keys Jet Ski, Inc.*, 893 F.2d at 1225 (holding a jet ski is considered a vessel for Limitation Act purposes); *M/V SUNSHINE, II*, 808 F.2d at 762 (applying the Limitation Act to a motor boat accident); *In re Dillahey*, 733 F. Supp. 874, 877-78 (D.N.J. 1990) (discussing the Limitation Act's appli-

without the “privity or knowledge”<sup>76</sup> of the owner.<sup>77</sup> Federal court jurisdiction under the Limitation Act's § 185 is exclusive because § 185 and Supplemental Rules A through F require the vessel owner to file the complaint in federal district court.<sup>78</sup> It is important to note, however, that the Limitation Act itself does not provide an independent basis for federal court jurisdiction.<sup>79</sup> That is, an independent basis for federal court jurisdiction does not exist if the case satisfies § 183's terms, but fails to satisfy the admiralty tort jurisdiction criteria under § 1333. As a result, limitation of liability would not be available if § 183's terms were satisfied, but the accident occurred on a landlocked lake bordered by a single state.<sup>80</sup> In instances where the circumstances satisfy the Limitation Act's terms, but fail § 1333's admiralty tort jurisdiction, one alternative may be to determine if another independent basis for federal jurisdiction exists.<sup>81</sup> However, even if diversity jurisdiction exists, the party may not proceed in federal court to assert limited liability unless admiralty tort jurisdiction is satisfied.<sup>82</sup>

### 3. *Saving to Suitors: Concurrent Jurisdiction*

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cation to pleasure boats and citing Supreme Court cases: *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Coryell v. Phipps*, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941); and *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502 (1932)); see also *Sisson*, 497 U.S. at 358 (discussing Limitation Act's jurisdiction with respect to pleasure boats and navigable waters). For a more detailed discussion of recreational vessel and the Limitation Act, see Michael B. McCauley, *Limitation of Liability and Recreational Vessels*, 16 TUL. MAR. L.J. 289 (1992).

76. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 205 (1967) (holding limitation is available only if damage occurred without owner's privity or knowledge); *Coryell v. Phipps*, 317 U.S. 406, 411 (1943) (stating that the facts determine whether privity and knowledge existed); *Deslions v. La Compagnie Transatlantique*, 210 U.S. 95, 122 (1908) (finding mere negligence does not necessarily establish privity or knowledge of the vessel owner).

77. See *In re Consolidated Coal Co.*, 123 F.3d 126, 132 (3d Cir. 1997) (stating that, to benefit from limitation of liability, the vessel owner must rebut proof of negligence or the vessel's “unseaworthiness” by showing lack of privity or knowledge).

78. See 46 U.S.C. app. § 185; SUPP. ADM. & MAR. CLAIMS R. F.

79. See *Leblanc*, 979 F. Supp. at 146.

80. See, e.g., *In re Builders Supply Co.*, 278 F. Supp. 254 (N.D. Iowa 1968); *Manion*, 241 F. Supp. at 621.

81. See FED. R. CIV. P. 9(h) (indicating an admiralty claim may be stated if jurisdiction is based on some other ground).

82. See *Leblanc*, 979 F. Supp. at 146 (holding “if the court lacks admiralty jurisdiction, it lacks jurisdiction under the [Limitation] Act as well”).

Unlike the few cases that fall under § 1333's exclusive federal court jurisdiction, most maritime cases are cases of concurrent jurisdiction.<sup>83</sup> With concurrent jurisdiction, the plaintiff may bring suit arising out of a maritime tort in state court or federal court.<sup>84</sup> To be brought in state court, the tort must still satisfy § 1333's admiralty tort jurisdiction criteria, but § 1333's second clause grants the plaintiff a broad exception to the federal court's exclusive admiralty jurisdiction.<sup>85</sup> Section 1333's second clause, the so-called "saving to suitors clause,"<sup>86</sup> allows most maritime claims to be brought in state court when the plaintiff seeks a common law remedy, such as personal damages.<sup>87</sup> Because virtually any in personam case entitles the plaintiff to common law remedies, the courts have consistently held that a plaintiff may bring an in personam case in state court or federal court.<sup>88</sup> By contrast, the relatively few actions providing remedies not known at common law, such as in rem proceedings, must be brought exclusively in federal court.<sup>89</sup>

#### 4. *Jurisdictional Conflict: 28 U.S.C. § 1333 vs. 46 U.S.C. § 185*

The jurisdiction discussion above reveals an inherent conflict between a plaintiff's right to sue in state court under the saving to suitors clause, 28 U.S.C. § 1333, and a vessel owner's right to seek limited liability in a federal district court under § 185 and Supplemental Rule F.<sup>90</sup> Courts have typically introduced this dilemma as a "recurring and inherent conflict' between the saving-to-suitors clause . . . with its 'presumption in favor of jury trials and common

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83. See Robertson, *supra* note 64, at 699.

84. See *Henn*, 354 U.S. at 150–54.

85. See *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1574 (5th Cir. 1992).

86. Codified, in somewhat altered form, as 28 U.S.C. § 1333. See also *Madruga v. Superior Court of Cal.*, 346 U.S. 556, 560 n.12 (1954) (noting the changes "in no way narrowed the jurisdiction of the state courts under the original 1789 Act").

87. See 28 U.S.C. § 1333 (stating "saving to suitors in all cases all other remedies to which they are otherwise entitled").

88. See *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306 (1915); *The Knapp, Stout, & Co. v. McCaffrey*, 177 U.S. 638, 640 (1900); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 190–91 (1870).

89. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 414–15 (1866); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 558 (1866) (holding that admiralty in rem proceedings cannot be saved to suitors because it is not a common law remedy).

90. Compare 46 U.S.C. app. § 185, with 28 U.S.C. § 1333.

law remedies,' and the 'apparent exclusive jurisdiction' vested in admiralty courts by the Act."<sup>91</sup> Therefore, when an injured plaintiff had hoped to obtain the benefit of a jury trial in state court, the vessel owner may still commence a limitation proceeding and force the plaintiff into a federal district court sitting in admiralty.<sup>92</sup> If the case is heard in federal court, the case is tried without a jury.<sup>93</sup> This conflict between state court and federal court jurisdiction is essential to the problem faced by the *Mapco* and *Howell* courts. Specifically, the courts had to decide whether state courts have independent subject-matter jurisdiction to decide § 183 limitation rights when there is no companion § 185 concursus proceeding.<sup>94</sup>

#### D. Framing the Issue: Limited Liability and the Conflict Between State and Federal Court Jurisdiction

Leading up to the Tennessee Supreme Court's decision in *Mapco*, courts and practitioners believed federal courts had exclusive jurisdiction over limitation of liability issues.<sup>95</sup> This belief was premised partly on the Supreme Court's 1871 decision in *Norwich & New York Transportation Co. v. Wright*, in which the Court recognized that the Limitation Act did not designate which courts had jurisdiction to enforce the Act.<sup>96</sup> Having already decided the procedure to follow to seek limitation,<sup>97</sup> the *Norwich* Court added its position on jurisdiction by holding that "we have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter . . ."<sup>98</sup> For 121 years after the *Norwich* decision, courts and practitioners thought that the United States district courts, sitting in admiralty, had *exclusive* jurisdiction to determine limitation rights.<sup>99</sup>

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91. *Magnolia*, 964 F.2d at 1574 (quoting *In re Dammers*, 836 F.2d 750, 754 (2d Cir. 1988)).

92. *See id.*

93. *See* FED. R. CIV. P. 38(e) (stating "[t]hese rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim").

94. *See Howell*, 691 So. 2d at 730; *Mapco*, 849 S.W.2d at 313.

95. *See, e.g., Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir. 1987); *Cincinnati Gas & Elec. Co. v. Abel*, 533 F.2d 1001 (6th Cir. 1976).

96. *See Norwich*, 80 U.S. (13 Wall.) at 123 (noting "[t]he act does not state what court shall be resorted to").

97. *See supra* text accompanying notes 32–36.

98. *Norwich*, 80 U.S. (13 Wall.) at 124.

99. *See, e.g., Vatican Shrimp Co.*, 820 F.2d at 678–79; *Cincinnati Gas & Elec. Co.*

This practice followed the Supreme Court's 1931 and 1932 decisions in a single-claim case brought pursuant to the saving to suitors clause.<sup>100</sup> In *Langnes v. Green*,<sup>101</sup> later re-decided and renamed *Ex Parte Green*,<sup>102</sup> Green, a seaman injured while working on board the fishing vessel ALOHA, sued his employer, Langnes, the vessel's owner, in state court under the saving to suitors clause.<sup>103</sup> Prior to trial, Langnes filed a petition (now a complaint)<sup>104</sup> in federal court under § 185, seeking to limit his liability to the ALOHA's \$5000 post-accident value.<sup>105</sup>

The federal court issued an injunction against the presentation of claims arising out of the accident in any forum, which enjoined the state court action.<sup>106</sup> Green moved to dissolve the injunction, arguing that the state court had jurisdiction, that a concursus was not necessary with a single claimant, and that the owner could obtain any limitation of liability benefit by properly pleading it in state court.<sup>107</sup> The district court denied Green's motion, tried the case on its merits, and found Langnes not liable to Green.<sup>108</sup>

Ultimately, Green asked the Supreme Court to consider the effect of a federal limitation petition on a single claim action brought in state court.<sup>109</sup> Green believed the district court's injunction should be lifted to allow the suit to proceed in state court.<sup>110</sup> Langnes, on the other hand, argued that the Limitation Act granted him the option to assert § 185 in federal district court, and therefore, the district court had exclusive jurisdiction to decide the merits of the case as well as any limitation of liability issues.<sup>111</sup>

The Supreme Court's decision in the *Green* cases delineated several stipulations, which if made by a claimant in a single-claim-

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v. Abel, 533 F.2d 1001, 1005 (6th Cir. 1976).

100. See *supra* notes 101-02 and accompanying text; see also Part III.C.

101. 282 U.S. 531 (1931).

102. 286 U.S. 437 (1932).

103. See *Langnes*, 282 U.S. at 532-33.

104. The term "petition" was changed to "complaint" in 1966. See SUPP. ADM. & MAR. CLAIMS R. F(2); GILMORE & BLACK, *supra* note 16, at 838 n.27.

105. See *Langnes*, 282 U.S. at 533.

106. See *id.*

107. See *id.* at 533-34.

108. See *id.* at 534.

109. See *id.* at 539-40.

110. See *id.* at 533-34.

111. See *Langnes*, 282 U.S. at 540-42.



ant case after a vessel owner commenced a § 185 proceeding, allowed the claimant to have liability and damage issues resolved in the state court action.<sup>112</sup> The claimant must stipulate: (1) that the federal admiralty court reserves exclusive jurisdiction over the vessel owner's right to limit liability;<sup>113</sup> (2) that no judgment that exceeds the limitation fund will be executed against the vessel owner;<sup>114</sup> and 3) that the claimant waives any res judicata claims relevant to limitation of liability issues.<sup>115</sup>

Following *Green*, when a vessel owner files a complaint for limitation in federal district court in a single claim case, the district court must stay the § 185 proceeding and lift the injunction when the stipulations have been made.<sup>116</sup> This allows the state court action on liability and damages to proceed while the limitation proceeding in the federal district court is held in abeyance.<sup>117</sup> This procedure allows the plaintiff the benefit of a jury trial in state court for liability and damages while also preserving the vessel owner's right to seek limitation of liability in a federal forum.<sup>118</sup>

The vessel owner's right is preserved because if the judgment from the state court exceeds the limitation fund, the limitation issue will be heard in federal court. The limitation issue will be heard in federal court because the claimant who wants to proceed in state court has already stipulated to the federal court's exclusive jurisdiction over the vessel owner's claim to limitation of liability.<sup>119</sup> The

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112. See *id.*; see also *Magnolia*, 964 F.2d at 1575; *In re M/V MISS ROBBIE*, 968 F. Supp. at 306.

113. See *Magnolia*, 964 F.2d at 1574.

114. See *id.*

115. See *In re M/V MISS ROBBIE*, 968 F. Supp. at 306.

116. See *In re Consolidated Coal Co.*, 123 F.3d 126 (3d Cir. 1997); *Magnolia*, 964 F.2d at 1571, 1575; *In re M/V MISS ROBBIE*, 968 F. Supp. at 306.

117. See *Langnes*, 282 U.S. at 543. If the judgment in the state court action is for the vessel owner or if the plaintiff obtains a judgment that is less than the limitation fund, no federal limitation proceeding is needed. See Bono, *supra* note 52, at 259–60. If the judgment for the plaintiff exceeds the limitation fund or if the vessel's value is not accepted as the limit of the owner's liability, the district court may proceed with the limitation proceeding to determine if limitation of liability is proper. See *Ex Parte Green*, 286 U.S. at 439–40 (holding “if the value of the vessel be not accepted as the limit of owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case”).

118. See *Langnes*, 282 U.S. at 541–42 (referring to and citing *The Lotta*, 150 F. 219, 222–23 (D.S.C. 1907)).

119. See *Henn*, 354 U.S. at 152–53 (holding the primary concern is to protect the vessel owner's right to limit liability to the Limitation Act's liability cap and to have

federal district court, acting without a jury, will then decide whether limitation is proper and what funds will be distributed.<sup>120</sup>

Because of the required stipulations derived from *Green* in the single claim case, admiralty courts and practitioners presumed that only federal courts had jurisdiction to consider limitation rights under § 183.<sup>121</sup> This seemed to leave the state courts with the power to decide only liability and damages issues.<sup>122</sup>

The question that naturally follows is: What about cases where a § 185 proceeding is not commenced, and thus, the *Green* stipulations are not required? In these instances, do state courts have independent subject-matter jurisdiction to consider § 183 affirmative defense limitation of liability issues when a § 185 complaint is not filed? The Tennessee Supreme Court and a Louisiana appeals court have now said yes.<sup>123</sup>

#### IV. THE TREND: MAPCO AND HOWELL

Beginning with the 1993 decision in *Mapco*, and most recently the 1997 decision in *Howell*, the Tennessee Supreme Court and Louisiana's Fourth Circuit Court of Appeals have unequivocally held that state courts have jurisdiction to decide limitation of liability issues.<sup>124</sup> Moreover, *Mapco's* and *Howell's* analyses reflect sound reasoning, and their clear, unified opinions make them particularly suitable for future courts to follow.<sup>125</sup>

##### A. The Trend Begins:

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that right adjudicated in a federal forum).

120. See *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993) (stating the claimants essentially stipulate to two trials — the state court trial on liability and damages followed by a federal limitation proceeding).

121. See generally *Vatican Shrimp Co.*, 820 F.2d at 674; *Cincinnati Gas*, 533 F.2d at 1001; *In re Double D Dredging Co.*, 467 F.2d 468 (5th Cir. 1972); *In re Red Star Barge Line*, 160 F.2d 436 (2d Cir. 1947).

122. See *Langnes*, 282 U.S. at 544.

123. See *Howell*, 691 So. 2d at 715; *Mapco*, 849 S.W.2d at 312.

124. See *Howell*, 691 So. 2d at 732; *Mapco*, 849 S.W.2d at 318.

125. See *Grindle v. Fun Charters, Inc.*, 962 F. Supp. 1284, 1287 (D. Haw. 1996) (citing *Mapco* and stating that state courts have jurisdiction over contested § 183 limitation defenses); *Carroll v. Choctaw Transp. Co.*, No. 92-154, 1995 WL 140818, at \*5 (Tenn. Ct. App. Mar. 31, 1995) (citing *Mapco* and recognizing a limitation defense may be heard in a state court).

*Mapco Petroleum v. Memphis Barge Line, Inc.*

On February 22, 1993, the Tennessee Supreme Court in *Mapco Petroleum v. Memphis Barge Line, Inc.*, firmly decided that state courts have subject matter jurisdiction to decide § 183 limitation of liability rights when no companion § 185 proceeding is commenced in federal court.<sup>126</sup> The court's decision in *Mapco* is significant for several reasons. First, it remedies the inherent confusion between federal and state court jurisdiction in limitation of liability matters.<sup>127</sup> Second, it paved the way for the 1997 decision in *Howell*.<sup>128</sup> Finally, and most significant to this Comment's focus, *Mapco*'s and *Howell*'s combined effect impacts more than a century of jurisprudential and practical understanding,<sup>129</sup> or misunderstanding as the case may be,<sup>130</sup> with respect to the jurisdiction of state and federal courts over limitation of liability rights. With this significance in mind, the remainder of this Comment explores the court's reasoning in *Mapco*,<sup>131</sup> outlines *Mapco*'s and *Howell*'s practical application in abbreviated form,<sup>132</sup> and then highlights with hypotheticals the potential practical implications the *Mapco* and *Howell* trend may have for admiralty practitioners.<sup>133</sup>

*1. The Facts and Holding in Mapco*

In December 1986, the M/V SEBRING, owned and operated by Memphis Barge Line, Inc., damaged Mapco's pier as it attempted to dock.<sup>134</sup> The parties stipulated that the damage to the pier was \$690,000.00, but the M/V SEBRING's value was only \$353,515.58,<sup>135</sup> making limited liability particularly significant to both parties.

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126. See *Mapco*, 849 S.W.2d at 318.

127. See Kenneth H. Volk, *Limitation of Liability and the Tennessee Supreme Court*, 27 J. MAR. L. & COM. 305, 309–10 (1996).

128. See *Howell*, 691 So. 2d at 715.

129. See *Norwich*, 80 U.S. (13 Wall.) at 121 (holding “[w]e have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter”); *supra* notes 45–47 and accompanying text; see also *Ex Parte Green*, 286 U.S. at 437; *Langnes*, 282 U.S. at 531.

130. See, e.g., *Vatican Shrimp Co.*, 820 F.2d at 674; *Cincinnati Gas*, 533 F.2d at 1001.

131. See *infra* Part IV.A.3.

132. See *infra* Part V. A-B.1-2.

133. See *infra* Part V.A-B.1-2.

134. See *Mapco*, 849 S.W.2d at 314.

135. See *id.*

When Mapco sued Memphis Barge in a Tennessee state court,<sup>136</sup> Memphis Barge included in its answer a defense claiming the right to limitation of liability under § 183 of the Limitation Act.<sup>137</sup> Memphis Barge never commenced a § 185 proceeding in federal court.<sup>138</sup> Mapco moved to strike the limitation defense on the grounds that the state court did not have subject matter jurisdiction over the § 183 limitation defense.<sup>139</sup> The trial court agreed and ultimately entered judgment in Mapco's favor for the damage to the pier, plus interest, for a total of \$905,915.02.<sup>140</sup>

On appeal, the Tennessee Court of Appeals affirmed and held that state courts lack jurisdiction to decide limitation of liability issues when the vessel owner's right to limited liability is challenged.<sup>141</sup> Both parties appealed to the Tennessee Supreme Court.<sup>142</sup> The Tennessee Supreme Court found that Mapco's limitation of liability defense was properly lodged in state court<sup>143</sup> and that State courts have subject matter jurisdiction to decide § 183 limitation of liability rights when asserted as a defense and when there is no companion § 185 proceeding.<sup>144</sup> Consequently, the court remanded the case to the trial court, preserving Mapco's right to challenge the limitation defense on its merits.<sup>145</sup>

## 2. *The Court's Analysis Summarized*

In analyzing the case, the *Mapco* court found conflict among the saving to suitors clause,<sup>146</sup> the Limitation Act's § 183 and § 185,<sup>147</sup> and case law addressing state courts' jurisdiction over limitation issues.<sup>148</sup> Initially, the court recognized that Mapco's suit seeking a

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136. See 28 U.S.C. § 1333. Suing in state court was a permissible option because Mapco sought common-law money damages.

137. See *Mapco*, 849 S.W.2d at 314; 46 U.S.C. app. § 183 (providing for limitation of liability).

138. See *Mapco*, 849 S.W.2d at 315.

139. See *id.* at 314.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See *Mapco*, 849 S.W.2d at 318.

145. See *id.*

146. See *id.* at 314.

147. See *id.* at 314–15.

148. Mapco cited *Vatican Shrimp*, 820 F.2d at 674, as well as *Cincinnati Gas*, 533

common law remedy, damages in personam, was proper in state court under the saving to suitors clause.<sup>149</sup> Then, after reciting the language in § 183<sup>150</sup> and § 185,<sup>151</sup> the court noted that § 183 and § 185 provide two independent vehicles to assert limited liability: one by way of the § 185 proceeding in federal court; the other by way of asserting limitation rights as an affirmative defense under § 183 in federal or state court.<sup>152</sup>

Finally, the court examined the *Vatican Shrimp Co. v. Solis* and *Cincinnati Gas & Electric Co. v. Abel* cases, which, taken together, added to the confusion about whether limitation of liability was exclusively a matter for the federal courts.<sup>153</sup> Mapco contended that *Vatican Shrimp* and *Cincinnati Gas* provided the necessary authority to deny state courts subject-matter jurisdiction over limitation of liability issues.<sup>154</sup> Mapco cited *Cincinnati Gas* as holding that “when the right to limited liability is contested it becomes impossible to dispose of all issues in a single proceeding in a state court”<sup>155</sup> and “[t]he state court lost jurisdiction of the limitation of liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue.”<sup>156</sup>

In the *Vatican Shrimp*, *Cincinnati Gas*, and *Green* cases, how-

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F.2d at 1001, and to a lesser extent *Langnes*, 282 U.S. at 531, as support for the proposition that state courts could not decide contested limitation issues. See *Mapco*, 849 S.W.2d at 315–16.

149. See *id.* at 314.

150. See *id.*

151. See *id.*; see also discussion Part II.B, *supra*.

152. See *Mapco*, 849 S.W.2d at 315 (citing as authority: *Langnes*, 282 U.S. at 540–41 (1931); *Signal Oil & Gas v. Barge W-701*, 654 F.2d 1164, 1173 (5th Cir. 1981); *The Chickie*, 141 F.2d 80, 84 (3d Cir. 1944)).

153. See *Mapco*, 849 S.W.2d at 315–16.

154. See *id.* at 315.

155. *Id.* at 317.

156. *Id.* *Cincinnati Gas* and *Vatican Shrimp*'s overextension of *Green* appears to be the source for much of the dilemma. Using *Green* as authority, the *Vatican Shrimp* court confused the issue by stating in dicta that a vessel owner sued in state court who fails to file a timely § 185 petition “will result in forfeiture of the right to limit liability should the claimant contest the limitation defense.” *Vatican Shrimp*, 820 F.2d at 678.

But note that in *Green*, this divestiture of the state's jurisdiction was proper because the vessel owner commenced a § 185 proceeding in federal district court. See *Langnes*, 282 U.S. at 532. Accordingly, the Supreme Court ruled that the federal court limitation proceeding should be stayed unless the plaintiff contested limitation of liability in the state court proceeding, at which time the district court would resume exclusive jurisdiction and dispense with the whole case. See *id.* at 543–44.

ever, the *Mapco* court pointed out that the vessel owner, at some point, commenced a § 185 proceeding in federal court, thereby divesting the state court of its jurisdiction over the limitation issue.<sup>157</sup> The *Mapco* court stated that in *Cincinnati Gas* and *Vatican Shrimp*, the narrow issue was the vessel owner's ultimate but untimely attempt to commence a § 185 proceeding after the statutory six-month time period elapsed.<sup>158</sup> In *Green*, the Court was concerned with a § 185 proceeding's effect on the accompanying state court action.<sup>159</sup> Nevertheless, in each case a § 185 proceeding had been commenced, which invoked the federal court's jurisdiction.

In *Mapco*, there was no § 185 proceeding that arguably divested the state court of its jurisdiction.<sup>160</sup> Consequently, the unique issue in *Mapco* was "whether a state court has jurisdiction to hear a Section 183 limitation defense when the vessel owner, instead of filing a Section 185 petition in federal court, elects to have the defense heard in state court by affirmatively pleading it."<sup>161</sup> Answering in the affirmative, the *Mapco* court held that "a state court is empowered to decide the applicability and merits of a Section 183 limitation defense when it is raised by way of answer and there is no companion Section 185 proceeding in federal court."<sup>162</sup>

Relying on the Supreme Court's language in *Green*, the *Mapco* court made clear that Tennessee state courts have jurisdiction to decide limitation of liability issues.<sup>163</sup> In remanding the case, the Tennessee Supreme Court also made sure to preserve *Mapco*'s right to challenge the limitation defense on its merits.<sup>164</sup>

### 3. Critical Analysis: Did the *Mapco* Court Reach

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157. See *Mapco*, 849 S.W.2d at 317.

158. See *id.*

159. See *Ex Parte Green*, 286 U.S. 437, 438-40 (1932).

160. See *Mapco*, 849 S.W.2d at 317.

161. *Id.*

162. *Id.* at 318.

163. See *id.*

164. See *id.* Challenging the merits includes contesting the vessel's value and its freight as well as challenging the vessel owner's privity and knowledge. See 46 U.S.C. app. § 183 (requiring lack of vessel owner's privity and knowledge to obtain § 183 limitation).

*the Correct Conclusion?*

Whether the *Mapco* decision is correct may very well depend on who is asked. Practitioners, typically believing that federal courts have exclusive jurisdiction, and Limitation Act opponents who believe the Act is long outdated, may firmly oppose *Mapco's* conclusion.<sup>165</sup> From a legal standpoint, however, the court appeared to reach the correct conclusion for at least four reasons.

First, § 1333's saving to suitors clause has always permitted a plaintiff to sue in state court when a common-law remedy is sought.<sup>166</sup> The Supreme Court in *Green* remedied the initial conflict between the saving to suitors clause and the Limitation Act.<sup>167</sup> Moreover, the facts in *Mapco* do not present another opportunity to question the holding set forth in *Green* because, unlike *Green*, *Memphis Barge* never commenced a § 185 proceeding in a federal district court.<sup>168</sup> Accordingly, case law that addresses instances where a vessel owner elects to commence a § 185 proceeding is rendered moot with respect to the precise issue before the *Mapco* court.

Second, *Cincinnati Gas* and *Vatican Shrimp* have been misunderstood as granting federal courts exclusive jurisdiction over limitation of liability issues.<sup>169</sup> This proposition, however, seems to be contradicted by substantial portions of both opinions.<sup>170</sup> Indeed, both the *Vatican Shrimp* and *Cincinnati Gas* opinions have substantial language that suggests just the opposite from what *Mapco* argued. Specifically, both cases repeatedly recognize that state courts have the necessary power to hear and decide limitation of liability defenses asserted in an answer in a state court suit.<sup>171</sup> Yet *Mapco*

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165. See, e.g., *Gunn*, *supra* note 26, at 29 (noting that some describe limitation of liability as “a principle which should be relegated to the era of wooden hulls”); Cory A. Birnberg, *1851 Law on Ship Liability Grows Outdated with Time* (visited Nov. 13, 1997) <<http://www.netwizards.com/~birnberg/liability.html>>.

166. See 28 U.S.C. § 1333.

167. See *Langnes*, 282 U.S. at 540–43 (citing *The Lotta*, 150 F. 219 (D.S.C. 1907)).

168. See *Mapco*, 849 S.W.2d at 317.

169. See *Volk*, *supra* note 127, at 308.

170. Reading both cases reveals that they extensively cite the Supreme Court's decision in *Green*, which held that state courts do have jurisdiction over limitation rights. *But see Vatican Shrimp*, 820 F.2d at 678 (stating in dicta that “failure to file a section 185 petition in federal district court within six months after receiving written notice of the claim will result in forfeiture of the right to limit liability should the claimant contest the limitation defense”).

171. See *Vatican Shrimp*, 820 F.2d at 677–78 (citing *Green* as holding that a limita-

chose to focus, at its peril, on language used in dicta that suggested federal courts have *exclusive* jurisdiction over limitation rights.<sup>172</sup> At least one commentator has noted that both the *Cincinnati Gas* and *Vatican Shrimp* courts imply that only an admiralty court has jurisdiction to hear contested limitation issues.<sup>173</sup> This proposition is sometimes true, but only in specific instances where a companion § 185 proceeding is pending in federal court.<sup>174</sup> In *Mapco*, there was no such § 185 proceeding. Thus, the state court's jurisdiction over the limitation of liability defense in *Mapco* was proper.<sup>175</sup>

Third, since 1932, *Green* should have been recognized for the proposition that in state court, limitation of liability may be asserted by pleading it as an affirmative defense.<sup>176</sup> A state court is therefore “competent to entertain a claim of the shipowner for limitation of liability and afford him appropriate relief under the statute dealing with the subject.”<sup>177</sup> Any confusion from the *Green* cases seems to stem from the often overlooked fact that Langnes contested Green's limited liability right in state court after the initial ruling that stayed the § 185 proceeding in federal court.<sup>178</sup> Contesting Green's limited liability in the state court action was the “unlikely event” the Supreme Court contemplated in the first *Green* opinion and ultimately provided the reason for removing the entire case to the federal district court.<sup>179</sup>

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tion defense may be asserted as a defense in state court); *Cincinnati Gas*, 533 F.2d at 1003–05 (citing *Green* and stating “a shipowner may obtain the advantage of Section 183(a) by proper pleading in a state court”).

172. See *Mapco*, 849 S.W.2d at 317 (quoting *Cincinnati Gas* as finding that only federal courts have jurisdiction to decide limitation of liability issues).

173. See Volk, *supra* note 127, at 306.

174. This was the holding the Supreme Court reached in *Langnes* and *Ex Parte Green*. See *Langnes*, 282 U.S. at 531; *Ex Parte Green*, 286 U.S. at 439–40; *Mapco*, 849 S.W.2d at 316; Volk, *supra* note 127, at 307–08.

175. See Volk, *supra* note 127, at 310 (agreeing with *Mapco*'s conclusion and stating “[a]bsent a pending § 185 proceeding in the admiralty court, a state court has the power to fully adjudicate a limitation defense”).

176. See *Langnes*, 282 U.S. at 540 (citing *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 260 (1922); *Steamboat Co. v. Chace*, 83 U.S. (16 Wall.) 522, 532–33 (1872); *The Lotta*, 150 F. at 222; *Delaware River Ferry Co. v. Amos*, 179 F. 756, 758 (E.D. Pa. 1910)).

177. See *Langnes*, 282 U.S. at 540.

178. See *Ex Parte Green*, 286 U.S. at 539–40.

179. See Volk, *supra* note 127, at 306–07. After *Green*, “contesting liability” in the state court action is no longer an issue because the claimant must stipulate that limitation of liability issues will be resolved in federal court if they wish to stay the federal



The critical difference between *Green* and *Mapco*, again, being that a § 185 proceeding had been commenced in *Green* but had been stayed pending the outcome of the state court action to determine whether a limitation proceeding would even be necessary.<sup>180</sup> In *Mapco*, Memphis Barge had a choice either to commence a § 185 proceeding in federal court or to assert § 183 as an affirmative defense in state court. Choosing to assert § 183 as an affirmative defense was a viable method to assert limited liability.<sup>181</sup>

Fourth, the *Mapco* court correctly realized that the language within the Limitation Act does not disallow a § 183 affirmative defense in either state or federal court.<sup>182</sup> Indeed, § 183's language is conspicuously void of a forum restriction.<sup>183</sup> Asserting limited liability by § 185, however, specifically requires the action to be commenced in "a district court."<sup>184</sup> Congress, which has not placed a similar restriction in § 183 in the almost 150 years since its enactment, appears to have intended to allow vessel owners the right to assert a limitation of liability defense in state courts. Were it otherwise, Congress could have easily placed a forum restriction as it did in § 185.<sup>185</sup> The likely rationale, as noted by the *Mapco* court, is that the benefit of asserting a limited liability defense in an answer should be available to vessel owners in single claimant cases where there is no threat of widespread litigation and thus no need for a § 185 concursus proceeding in federal court.<sup>186</sup>

With the criticism the Limitation Act has received, it may seem unlikely that any modern state court would follow the *Mapco* deci-

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court injunction and proceed in state court on liability and damages. *See In re Consolidated Coal Co.*, 123 F.3d 126, 132–33 (3d Cir. 1997) (holding "[t]he case law is clear that in a single claimant/inadequate fund situation . . . the claimant is entitled to proceed in state court after making the appropriate stipulations").

180. *See Langnes*, 282 U.S. at 543–44 (holding that the petition is stayed except that if it should "appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question"). If the vessel owner is not liable, or if damages are less than the limitation fund, limitation is moot. *See id.*

181. *See Langnes*, 282 U.S. at 543; Volk, *supra* note 127, at 310 (commenting that a "shipowner has the absolute right to assert a limitation as a defense under § 183 in any state court proceeding").

182. *See Mapco*, 849 S.W.2d at 318.

183. *See* 46 U.S.C. app. § 183 (noting no forum restriction).

184. *Id.* § 185.

185. *See* Volk, *supra* note 127, at 309.

186. *See Mapco*, 849 S.W.2d at 318.

sion. In 1997, however, Louisiana's Fourth Circuit Court of Appeals in *Howell v. American Casualty Co.* did just that.<sup>187</sup>

### B. *Howell v. American Casualty Co.*

Presented with a similar jurisdictional issue as the *Mapco* court, Louisiana's Fourth Circuit Court of Appeals extended the trend by adopting the *Mapco* holding as its own.<sup>188</sup>

#### 1. *The Facts and Holding in Howell*

The relevant facts in *Howell* are fairly simple. The defendant, Tilden J. Elliott Contractors, Inc., employed the plaintiff, Finley Howell, as a crane operator aboard the barge M/V BIG JIM.<sup>189</sup> Chevron owned BIG JIM for purposes of working on Chevron oil and gas platforms.<sup>190</sup> Howell, while working on the barge, injured his back as he placed a hatch cover on a Chevron platform.<sup>191</sup> Some time later, Howell sued his employer and Chevron for his injuries in state court.<sup>192</sup> Chevron asserted § 183 limitation of liability as an affirmative defense in the state court action, but did not commence a companion § 185 proceeding in federal court.<sup>193</sup>

The trial court ruled that it “was without jurisdiction to consider Chevron's limitation of liability defense.”<sup>194</sup> Chevron appealed, seeking to limit liability to \$125,000.00, BIG JIM's uncontested post-accident value.<sup>195</sup> Howell, citing *Vatican Shrimp*, argued that the Limitation Act does not provide an available defense unless asserted in federal court within six months of receiving written notice of claim.<sup>196</sup> The Fourth Circuit cited *Mapco* as persuasive authority and held that the limitation defense was properly brought in state court and that the “trial court did have jurisdiction over Chevron's

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187. See *Howell*, 691 So. 2d at 730.

188. See *id.*

189. See *id.* at 719.

190. See *id.*

191. See *id.*

192. See *id.* at 720.

193. See *Howell*, 691 So. 2d at 720. The same situation was present in *Mapco*. See *Mapco*, 849 S.W.2d at 314.

194. *Howell*, 691 So. 2d at 720.

195. See *id.* at 720, 730.

196. See *id.* at 730 (citing *Vatican Shrimp*, 820 F.2d at 674).

defense under the Limitation Statute.”<sup>197</sup>

## 2. *The Howell Court's Analysis*

Relying on *Mapco* as persuasive authority, the *Howell* court's opinion adds little to the reasoning already offered by *Mapco*. Upon examining the limitation issue, the court recognized that the Tennessee Supreme Court had already considered virtually the same issue in *Mapco*.<sup>198</sup> A party opposed the courts' jurisdiction over the limitation defense citing *Vatican Shrimp* as support.<sup>199</sup>

Conceding that *Mapco* had addressed the issue previously, the *Howell* court adopted the *Mapco* opinion as its own.<sup>200</sup> Indeed, the substance of the *Howell* court's opinion on the limitation issue was a direct quote from *Mapco*.<sup>201</sup> The court began by quoting the entire *Mapco* text and case citations relating to § 183 and § 185, omitting only the footnotes.<sup>202</sup> The *Howell* court then shifted its focus to distinguishing *Vatican Shrimp* and *Cincinnati Gas*, which it again accomplished by quoting *Mapco*.<sup>203</sup> Having adopted virtually the entire *Mapco* opinion verbatim, the court naturally arrived at the same conclusion:<sup>204</sup> State courts have jurisdiction over a § 183 limitation of liability defense.<sup>205</sup>

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197. *Id.* at 732.

198. In both *Howell* and *Mapco*, a § 183 limitation defense was asserted as an affirmative defense and both vessel owners elected not to commence a § 185 proceeding in federal court. *See Howell*, 691 So. 2d at 730; *Mapco*, 849 S.W.2d at 317.

199. *See Howell*, 691 So. 2d at 730 (noting *Howell* relied on *Vatican Shrimp* for its argument that state courts do not have jurisdiction to adjudicate a limitation defense).

200. *See id.* (referring to the *Mapco* decision as a “persuasive opinion whose reasoning we adopt as our own”).

201. *Compare id.* at 731 (quoting *Mapco*), *with Mapco*, 849 S.W.2d at 314–15 (providing the language quoted in *Howell*).

202. *Compare Howell*, 691 So. 2d at 731 (beginning by analyzing § 183 and ending with supporting case citations), *with Mapco*, 849 S.W.2d at 314–15 (providing the language quoted in *Howell*).

203. *Compare Howell*, 691 So. 2d at 731 (quoting *Mapco*), *with Mapco*, 849 S.W.2d at 317–18 (distinguishing *Vatican Shrimp* and *Cincinnati Gas*).

204. *See Howell*, 691 So. 2d at 732. It is noteworthy that early in the limitation opinion the *Howell* court interpreted *Mapco* as holding that “the Limitation Statute may be raised as a defense in a state court action *regardless* of whether the vessel owner brings a limitation concursus proceeding in federal court,” *id.* at 730 (emphasis added); while the *Mapco* opinion indicated that state courts have the power to hear a limitation defense when raised by way of answer “and there is *no* companion Section 185 proceeding in federal court,” *Mapco*, 849 S.W.2d at 318 (emphasis added).

205. *See Howell*, 691 So. 2d at 732. Chevron's liability was subsequently limited to

## V. PROCEDURAL SUMMARY AND PRACTICAL SIGNIFICANCE

For some, the new procedural and practical possibilities gleaned from *Mapco* and *Howell* confuse the time-honored methods for asserting limited liability since it was first asserted in *Norwich*. With this in mind, the following hypothetical illustrates the well known procedure for asserting limited liability, while focusing on the new dimension added by *Mapco* and *Howell*. Following this procedural summary, several more hypotheticals illustrate the practical significance these cases could have for admiralty practitioners and their clients if other state courts choose to follow *Mapco* and *Howell*.

### A. Hypothetical: Procedural Summary

A commercial vessel was underway on the high seas. Rough weather tossed the vessel and crew around violently. A seaman sustained head injuries and was placed on light duty for the remainder of the cruise. When the ship returned to port, the seaman took a leave of absence. During his leave, a physician examined the seaman and determined the seaman suffered some head trauma, but the extent of the damage at the time was unknown. The seaman sought counsel from a maritime attorney and decided to sue his employer for damages. The employer is also the vessel's owner.

The seaman, as plaintiff and master of his own suit, has the initial forum choice. The plaintiff may bring an admiralty action in federal court,<sup>206</sup> or, because he is seeking damages in personam, a common-law remedy, he may sue in state court under the saving to suitors clause.<sup>207</sup>

If the seaman sues the vessel owner in federal court, the vessel owner has several options. First, the owner could assert § 183 limitation of liability as an affirmative defense in the answer to the complaint.<sup>208</sup> In this instance, the entire case would be heard by a judge

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\$125,000.00, which was BIG JIM's uncontested post-accident value. *See id.*

206. Assuming all the elements for admiralty jurisdiction are satisfied. *See discussion supra* Part III.C.

207. *See* 28 U.S.C. § 1333. Some plaintiffs prefer state court because it may be quicker to get to trial and a jury may be more sympathetic than a federal judge sitting in admiralty. *See generally* *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460-61 (1847).

208. *See* 46 U.S.C. app. § 183; *see also The Scotland*, 105 U.S. at 34 (holding that

in federal court, including the limitation of liability defense.<sup>209</sup> Second, assuming six months have not passed since the vessel owner's first receipt of a written notice of an intent to claim, the owner could choose to commence a § 185 proceeding in federal court and post the requisite bond.<sup>210</sup> However, this may encourage other seamen, who may have received more subtle injuries, to sue because Rule F requires the owner to send notice to all potential claimants.<sup>211</sup>

If the seaman chooses to sue in state court under the saving to suitors clause, the vessel owner now has three options in order to assert limited liability. First, if diversity and the requisite jurisdictional amount are satisfied, the owner may simply remove the case to federal court and assert § 183 as an affirmative defense.<sup>212</sup> Second, the owner could file a timely § 185 complaint in the district court in the district in which the state action was brought and post the appropriate bond.<sup>213</sup> If the federal district court determines there is but a single claim, or that the aggregate of multiple claims does not exceed the limitation fund, the federal proceeding will be stayed on motion from the seaman and the suit will be allowed to proceed in state court in accordance with the Supreme Court's decision in *Green*.<sup>214</sup>

Finally, according to *Mapco* and *Howell*, the owner has a third option. The vessel owner may assert § 183 as an affirmative defense in its answer to the state court complaint.<sup>215</sup> No bond is required and the state court would decide the entire case.<sup>216</sup> If this option is chosen, the plaintiff is permitted to contest limited liability by challenging its merits.<sup>217</sup>

## B. Hypotheticals: Practical Significance

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the shipowner could invoke the limitation defense in any court).

209. See FED. R. CIV. P. 38(e) (providing no right for a jury trial in an admiralty action).

210. See 46 U.S.C. app. § 185; SUPP. ADM. & MAR. CLAIMS R. F.

211. See SUPP. ADM. & MAR. CLAIMS R. F(4).

212. See 46 U.S.C. app. § 183; 28 U.S.C. § 1332 (1997).

213. See 46 U.S.C. app. § 185.

214. See *Ex Parte Green*, 286 U.S. at 439–40.

215. See *Howell*, 691 So. 2d at 732; *Mapco*, 849 S.W.2d at 318.

216. See 46 U.S.C. app. § 183 (having no requirement for vessel owners to establish a limitation fund).

217. See *Mapco*, 849 S.W.2d at 318.

The following hypotheticals illustrate the potential practical implications the *Mapco* and *Howell* decisions could have for clients and admiralty practitioners.

1. *Hypothetical #1: The Attorney's Dilemma*

A man owns a vessel and decides to go out on the ocean one sunny afternoon, taking along his wife and two children. He also invites his brother, his sister-in-law, and their two children to go along. As the vessel is returning from an enjoyable day on the water, the vessel owner's young niece falls overboard and gets caught between the boat and the dock. The niece is tossed against a barnacle-encrusted dock piling, resulting in severe pain and permanent scarring.

The next day the owner contacts his insurance company to report the incident. The insurance adjuster assigned to the case contacts a maritime attorney to determine the insured's rights. How should the attorney respond?

The attorney advises that the owner could commence a limitation proceeding in federal court under § 185 within six months of his first receipt of written notice of intent to claim, but this would require the owner (or insurer) to post a bond equivalent to the value of the vessel,<sup>218</sup> which is rather expensive. In addition, Supplemental Rule F requires that notice be sent to any potential claimants to bring their claims in the limitation proceeding or suffer default.<sup>219</sup> On one hand, the insurance adjuster is hesitant to “invite” a lawsuit between family members. On the other hand, the adjuster is leery of placing the insurance company in a bad faith situation. The adjuster recognizes that if a limitation proceeding is not commenced within six months and judgment is ultimately entered against the owner in excess of policy limits, the insurer could be required to pay the judgment because the insurer failed to take advantage of a § 185 limitation proceeding.

In a *Mapco* and *Howell* jurisdiction, however, the vessel owner, adjuster, and maritime attorney's dilemma is solved. If it is possible to assert limitation in a state court action, the adjuster can sit back and wait to see if a suit is actually commenced without worrying

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218. See 46 U.S.C. app. § 185; SUPP. ADM. & MAR. CLAIMS R. F.

219. See SUPP. ADM. & MAR. CLAIMS R. F(4).

about the six-month deadline under § 185. There is no need to make arrangements for a potentially expensive bond and no Supplemental Rule F notice is required.<sup>220</sup> If a suit actually does commence in state court after the six-month deadline to file a § 185 complaint, the owner can still assert limitation of liability under § 183 as an affirmative defense.

## 2. Hypothetical #2: The Procedural Dilemma

A man in Georgia boards his 100-foot, Georgia-registered yacht and heads south along the Atlantic coast into the St. John's River. A paid captain, who is at the controls,<sup>221</sup> fails to maintain an adequate lookout and runs over a small fishing boat, killing a family of three. The decedents lived in Jacksonville and were clearly Florida residents. The vessel owner provides prompt notice to his insurance carrier, as required by the policy. Several months later, the vessel owner is served with a summons and complaint in a lawsuit commenced in Florida Circuit Court in Jacksonville. The owner sends a copy to the insurance adjuster handling the claim. Next, the insurance adjuster calls a maritime attorney who points out a dilemma. It will cost a lot of money to commence a § 185 limitation proceeding because of the requirement of posting a bond equal to the post-accident value of the vessel, which in this case is \$5 million. The adjuster asks for the attorney's legal advice on how to proceed. What legal advice should the attorney offer?

Because there appears to be diversity of citizenship,<sup>222</sup> the attorney could advise the owner to remove the suit from Florida circuit court to the United States District Court for the Middle District of Florida sitting in Jacksonville.<sup>223</sup> The attorney explains that the owner could then assert § 183 as an affirmative defense without posting a bond. The attorney explains, however, that there is a risk that a petition for remand to state court might be filed on some legitimate basis.<sup>224</sup> For example, the court could determine that there

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220. Compare 46 U.S.C. app. § 183 (providing no bond or notice procedure), with 46 U.S.C. app. § 185 and SUPP. ADM. & MAR. CLAIMS R. F(1), (4).

221. This poses an interesting question about whether the vessel owner has "privity or knowledge" of the captain's negligence. For a detailed discussion concerning the privity and knowledge concepts, see McCauley, *supra* note 75, at 304–12.

222. See 28 U.S.C. § 1332.

223. See 28 U.S.C. §§ 1441, 1446 (1997) (providing procedure for removal).

224. See generally 28 U.S.C. § 1447 (1997) (discussing procedure after removal and

is no true diversity of citizenship because the vessel owner is actually a Florida resident, and only registered the vessel in Georgia to avoid paying Florida sales tax. If the petition for remand should be granted after six months has run from the date of the service of the summons and complaint, which here constitutes first receipt of an intent to claim, the owner may have lost the opportunity to assert limited liability.<sup>225</sup> Unless the Florida court follows *Mapco* and *Howell*, any defense based on § 183 will be unavailable. If the Florida court follows *Mapco* and *Howell* and allows the vessel owner to assert § 183 limitation of liability as an affirmative defense, the vessel owner's and, more to the point, the insurer's dilemma is solved.

Clearly the biggest advantage for vessel owners under *Mapco* and *Howell* is that the rulings provide the vessel owner yet another option to assert limited liability. With the many variables that could result in any given maritime accident,<sup>226</sup> the owner could rest assured that, if necessary, the right to seek limited liability in state court by affirmatively pleading it is a viable legal option. Thus, the importance for vessel owners and maritime attorneys to be aware of the current state of the law in their state courts cannot be overstated.<sup>227</sup> On the down side, vessel owners should keep in mind that by

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remand).

225. See SUPP. ADM. & MAR. CLAIMS R. F(1) (requiring the complaint to be filed "[n]ot later than six months after receipt of a[n] [intent to] claim in writing").

226. Variables such as the plaintiff's forum choice, the citizenship of the parties involved, the number of potential claimants, the vessel and freight's value after the accident, the cost to establish a limitation fund, time considerations and whether § 185 is still available, and the potential amount in claims are all important in deciding when and in what manner to assert limited liability.

227. Other than *Mapco* and *Howell*, the following state and federal courts have at least implicitly indicated state courts have jurisdiction over a vessel owner's limitation rights:

*State courts:*

Mississippi: *Fishboats Inc. v. Welzbacher*, 413 So. 2d 710 (Miss. 1982); New York: *De Pinto v. O'Donnell Transp. Co.*, 40 N.Y.S.2d 218 (N.Y. Sup. Ct. 1943); North Carolina: *Brinson & Kramer v. Norfolk S.R. Co.*, 169 N.C. 425 (N.C. 1915); Pennsylvania: *Loughin v. McCaulley*, 40 A. 1020 (1898); Rhode Island: *The Golden Touch*, 1967 A.M.C. 353 (R.I. Sup. Ct. 1966)(cited in *Howell*, 691 So. 2d at 731); see also *Mapco*, 849 S.W.2d at 318 (citing many of the state court cases listed here).

*Federal courts:*

Supreme Court: *Ex Parte Green*, 286 U.S. 437 (1932); *Langnes v. Green*, 282 U.S. 531 (1931); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922); *The Scotland*, 105 U.S. 24 (1881). Circuit Courts: *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981); *The Chickie*, 141 F.2d 80 (3d Cir. 1944). District Courts: *Grindle v. Fun*



asserting limitation of liability in state court they lose the option to have the case heard in a federal court sitting in admiralty and the potential benefit of a non-jury trial.<sup>228</sup>

## VI. CONCLUSION

In a time when some believe the Limitation Act should be completely abolished, *Mapco* and *Howell* have expanded vessel owners' rights to assert limited liability. By sound legal reasoning, and by distinguishing contrary case law, the courts correctly concluded that state courts have jurisdiction to decide § 183 limitation of liability rights asserted by a vessel owner as an affirmative defense. Accordingly, state courts today should recognize a vessel owner's right to assert limited liability as consistent with the decisions rendered in *Mapco* and *Howell*. As one authority stated, "[t]hose who would deny the right to the shipowner do so without support in the law or in the limitation statute itself."<sup>229</sup>

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Charters, Inc., 962 F. Supp. 1284, 1287 (D. Haw. 1996); *In re Caldas*, 350 F. Supp. 566 (E.D. Pa. 1972); *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932 (E.D.N.Y. 1932); *The Norco*, 1 F. Supp. 932 (W.D. Wash. 1932); *The Hoffmans*, 171 F. 455 (S.D.N.Y. 1909); *The Eureka*, 108 F. 672 (S.D.N.Y. 1901); *The Rosa*, 53 F. 132 (S.D.N.Y. 1892); see also Russell G. Donaldson, Annotation, *Shipowner's Assertion in State Court of Limitation of Liability Under 46 U.S.C.A. §§ 183 Et Seq.*, 45 A.L.R. FED. 890 (1979) (referencing many of the federal cases cited here). *But see* *The Lotta*, 150 F. 219 (D.S.C. 1907) (finding federal courts must determine limitation of liability in a state court action for wrongful death).

228. See FED. R. CIV. P. 38(e).

229. Volk, *supra* note 127, at 310.