

SECURING PROTECTIONS FOR THE INJURED FROM  
LIMITATIONS ON LIABILITY ACT

—————  
JUNE 30, 2010.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed  
—————

Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 5503]

[Including Committee Cost Estimate]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5503) to revise laws regarding liability in certain civil actions arising from maritime incidents, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Securing Protections for the Injured from Limitations on Liability Act”.

**SEC. 2. AMENDMENTS TO DEATH ON THE HIGH SEAS ACT.**

The Death on the High Seas Act (chapter 303 of title 46, United States Code), is amended—

(1) in section 30302—

(A) by inserting “or law” after “admiralty”;

(B) by striking “3 nautical miles” and inserting “12 nautical miles”; and

(C) by striking the last sentence;

(2) in section 30303—

(A) by inserting “and nonpecuniary loss” after “pecuniary loss”;

(B) by striking “by” and all that follows through the end, and inserting “, plus a fair compensation for the decedent’s pain and suffering.”; and

(C) by adding at the end the following: “In this section, the term ‘non-pecuniary loss’ means loss of care, comfort, and companionship.”;

(3) in section 30305 by inserting “or law” after “admiralty”;

(4) in section 30306, by inserting “or law” after “admiralty”;

(5) by striking section 30307, and redesignating section 30308 as section 30307;

(6) in section 30307, as so redesignated, by amending subsection (b) to read as follows:

“(b) INTERNAL AND TERRITORIAL WATERS.—This chapter does not apply to the waters of the Great Lakes or waters within the territorial limits of a State that do not exceed 12 nautical miles from the shore of the United States. In such waters, the rules applicable under Federal, State, maritime, and other appropriate law shall apply.”; and

(7) in the table of sections at the beginning of such chapter, by striking the items relating to sections 30307 and 30308 and inserting the following:

“30307. Nonapplication.”.

**SEC. 3. AMENDMENTS TO JONES ACT.**

Title 46, United States Code, is amended—

(1) in section 30104, by adding at the end the following: “In addition to other amounts authorized under such laws, the recovery for a seaman who so dies shall include recovery for loss of care, comfort, and companionship.”; and

(2) by striking section 30105 and the item relating to that section in the table of sections at the beginning of chapter 301.

**SEC. 4. REPEAL OF LIMITATION OF LIABILITY ACT.**

Chapter 305 of title 46, United States Code, is amended by repealing sections 30505, 30506, 30507, 30511, and 30512 and the items relating to those sections in the table of sections at the beginning of chapter 305.

**SEC. 5. AMENDMENT TO CLASS ACTION FAIRNESS ACT.**

Title 28, United States Code, is amended—

(1) in section 1711(2), by inserting “, but does not include an action brought by a State or subdivision of a State on behalf of its citizens” before the period;

(2) in section 1332(d)(1)(B), by inserting “, but does not include an action brought by a State or subdivision of a State on behalf of its citizens” before the semicolon; and

(3) in section 1332(d)(11)(B)(ii)—

(A) by striking “or” at the end of subclause (III);

(B) by striking the period at the end of subclause (IV) and inserting “; or”; and

(C) by adding at the end the following:

“(V) the claims are made by a State or subdivision of a State on behalf of its citizens.”.

**SEC. 6. UNENFORCEABILITY OF CERTAIN SECRECY AGREEMENTS.**

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by adding at the end the following:

**“CHAPTER 181—UNENFORCEABILITY OF CERTAIN SECRECY AGREEMENTS**

“Sec.

“4101. Unenforceability of certain secrecy agreements.

**“§ 4101. Unenforceability of certain secrecy agreements**

“(a) IN GENERAL.—Subject to subsection (b), an agreement, promise, or directive to restrict the dissemination of information regarding the cause of a discharge into waters off the shore of the United States of a substance that contaminates a marine or coastal environment or endangers public health, regarding the nature or extent of such a discharge, regarding the damage caused or threatened by such a discharge, or regarding the efforts to remediate the effects of such a discharge, shall be void as against public policy and unenforceable in any legal proceeding.

“(b) EXCEPTION.—

“(1) GENERALLY.—Subsection (a) does not apply with respect to a directive contained in a court order, or issued by a Government agency with authority to enforce such a directive in a court, restricting dissemination of information as necessary to protect public health or safety.

“(2) PROCEDURE RELATING TO EXCEPTION.—

“(A) A court shall not grant judicial enforcement of a directive or order described in paragraph (1) unless the proponent of the directive or order proves by clear and convincing evidence that such enforcement is permitted under paragraph (1).

“(B) If a court grants judicial enforcement of any directive or order described in paragraph (1), the court shall state the court’s factual findings and conclusions of law relating to that enforcement on the record.”

(b) CLERICAL AMENDMENT.—The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following new item:

“181. Unenforceability of Certain Secrecy Agreements ..... 4101”.

**SEC. 7. AMENDMENTS TO TITLE 11 OF THE UNITED STATES CODE.**

(a) TREATMENT OF CERTAIN PROPERTY IN BANKRUPTCY.—

(1) LIMITATION ON SALE OR LEASE OF CERTAIN PROPERTY IN BANKRUPTCY.—Section 363 of title 11, United States Code, is amended by adding at the end the following:

“(q) Notwithstanding any other provision of this section, if the debtor is liable under any law for a claim arising from an incident (as defined in section 1001 of the Oil Pollution Act of 1990, and that gives rise to liability under such Act), the trustee may not sell or lease all or substantially all property of the estate of the debtor (or, to the extent that the court has or can obtain jurisdiction over any affiliate of the debtor, property of such affiliate) unless the entity that acquires such property (including any affiliate of such entity) assumes the obligation to pay the amount of allowed unsecured claims arising from such incident that is not paid by the debtor, or unless creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.”.

(2) LIMITATION ON TREATMENT OF CERTAIN PROPERTY UNDER A PLAN OF REORGANIZATION.—Section 1129(b)(2)(B) of title 11, United States Code, is amended—

(A) in clause (i) by striking “or” at the end;

(B) in clause (ii) by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(iii) that includes claims of the kind described in section 363(q), if the plan provides for a sale or lease of all or substantially all of property of the estate, the plan requires the entity that acquires such property (including any affiliate of such entity) to assume the obligation to pay the amount of allowed unsecured claims arising from an incident described in section 363(q) that is not paid by the debtor, or creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.”.

(b) CONFORMING AMENDMENT.—Section 303(f) of title 11, United States Code, is amended by adding at the end the following: “If the debtor is liable under any law for a claim arising from an incident (as defined in section 1001 of the Oil Pollution Act of 1990, and that gives rise to liability under such Act), the debtor may not sell or lease all or substantially all property of the debtor (or, to the extent that the court has or can obtain jurisdiction over any affiliate of the debtor, property of such affiliate) unless the entity that acquires such property (including any affiliate of such entity) assumes the obligation to pay the amount of allowed unsecured claims arising from such incident that is not paid by the debtor, or creditors holding at

least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.”.

**SEC. 8. EFFECTIVE DATE.**

This Act and the amendments made by this Act shall take effect on the date of enactment of this Act and shall apply to cases pending on or after such date.

PURPOSE AND SUMMARY

H.R. 5503, the Securing Protections for the Injured from Limitations on Liability Act, will revise outdated laws regarding liability in certain civil actions arising from maritime incidents, to ensure fair and just compensation to the injured and their families. It will also make supplemental changes in other laws to prevent companies with widespread liability from offshore oil disasters from using bankruptcy to remove significant assets from availability to pay victims, to restrict enforceability of secrecy agreements regarding the contamination or the cleanup efforts, and to clarify the authority of State attorneys general to pursue claims on behalf of their citizens.

BACKGROUND AND NEED FOR THE LEGISLATION

I. BACKGROUND

On April 20, 2010, there was an explosion on the Deepwater Horizon oil drilling platform that ultimately engulfed the vessel in flames, sank it, and caused a massive oil spill in the Gulf of Mexico that continues to spread throughout the Gulf Coast, and perhaps beyond. Of the 126 crew members, 11 men were killed, and at least 17 others were physically injured.<sup>1</sup>

The Deepwater Horizon (DWH) was owned by Transocean, Ltd., a leading offshore drilling contractor with more than 18,000 employees worldwide. British Petroleum (BP) is a global energy company (including BP America). It leased the DWH from Transocean, and was also the operator and principal developer of the oil field on which the Deepwater Horizon oil drilling platform was located. Halliburton, a global oil field services company with over 50,000 employees worldwide, was the cement contractor aboard the vessel. Cameron International is a global provider of pressure control, processing, flow control, and compression systems, and was the manufacturer of the blowout preventer (BOP) aboard the oil vessel.

BP's partners in the DWH drilling project were Anadarko Petroleum Corporation and Mitsui Oil Exploration. Anadarko was a non-operating investor with a 25% stake in the project, and had no employees stationed on the rig. Mitsui, which specializes in natural gas exploration and development, had a 10% investment in the well. There have been no published reports about whether Mitsui had any employees on board the rig on the day of the explosion.

M-I SWACO was subcontracted as the DWH's mud engineer. Weatherford International Ltd. was the casing subcontractor. Finally, Schlumberger Ltd. was contracted by BP to conduct wireline services. Schlumberger had a crew on board the DWH, but accord-

<sup>1</sup>The 126-member crew reportedly consisted of forty-one contract workers, including four Halliburton employees and five M-I SWACO employees; six or seven BP employees; and seventy-nine Transocean employees, including the rig commander, Captain Curt Kuchta. Of the eleven fatalities, nine of the men were employed by Transocean and two by M-I SWACO.

ing to company officials, they left the rig several hours before the fire and explosion.<sup>2</sup>

Each of these companies has been implicated in the events leading up to the explosion and the continuing oil spillage, and each may bear some legal responsibility for the resulting harm.<sup>3</sup>

Although the legal issues are complex and still taking shape, there are at least several general categories of responsibility arising out of the Gulf Coast oil disaster. First, there is the legal responsibility of the companies for the deaths and injuries of the workers that resulted from the April 20 explosion.<sup>4</sup> The current statutory regime governing this aspect of the legal liabilities is exceedingly complex and outdated, in some instances resting on laws written in the mid-19th century to protect American merchant sailing ship owners. In addition to general maritime law, at least two Federal statutes—the Death on the High Seas Act<sup>5</sup> (DOHSA) and the Jones Act<sup>6</sup>—will likely govern the extent to which injured workers and dependent family members of deceased or injured workers can recover damages.

In addition, for its part, Transocean filed suit in Houston, Texas, on May 13, 2010 under another statute that may be relevant to further proceedings. That statute, the Limitation of Liability Act<sup>7</sup> (LOLA), enacted in 1851, is designed to limit rather than facilitate recovery. It permits a vessel owner to limit its liability for all personal injury claims that may be brought against it to the value of the vessel and its cargo. With its “vessel” on the Gulf floor, Transocean has estimated that amount in this case to be approximately \$27 million.

Second, there is responsibility for the broader economic damages resulting from the spill, under the Oil Pollution Act of 1990<sup>8</sup> (OPA). Passed in the aftermath of the *Exxon Valdez* oil spill in Prince William Sound, OPA establishes a framework for those harmed by the offshore discharge of oil to recover for specified damages. Under OPA, the “responsible party” is strictly liable for all economic damages associated with a discharge of oil into the waters of the United States, as well as cleanup and removal costs. A “responsible party” may recoup some costs from third parties under certain circumstances.<sup>9</sup> Where an oil spill emanates from a vessel,

<sup>2</sup>Henry Fountain, “Documents Show Risky Decisions Before BP Blowout,” N.Y. Times, June 14, 2010.

<sup>3</sup>John Schwartz, “Liability Questions Loom for BP and Ex-Partners,” N.Y. Times, June 24, 2010.

<sup>4</sup>It is difficult to estimate the potential costs of the DWH disaster, but a 2005 explosion at a BP refinery in Texas, killing 15 and injuring scores more, reportedly resulted in a settlement totaling some \$1.6 billion, albeit under a different applicable liability scheme. Stephanie Mencimer, “Screwed if By Sea,” Slate, June 16, 2010.

<sup>5</sup>46 U.S.C. §§ 30301–30308.

<sup>6</sup>46 U.S.C. §§ 30104–30106. There are two maritime statutes, both enacted as part of the Merchant Marine Act of 1920, that are commonly known as the “Jones Act,” both named for the sponsor of the provisions, Senator Wesley Jones. Section 27 of the 1920 Act, now codified at 46 U.S.C. § 55102, is a cabotage law that requires that all waterborne shipping between points within the United States be carried out by vessels built in the United States, owned by U.S. citizens (at least 75%), and manned with U.S. citizen crews. The Act essentially bars foreign-built and -operated vessels from engaging in U.S. domestic commerce. The second, at issue here, is section 33 of the 1920 Act, now codified at 46 U.S.C. §§ 30104–30106. It governs liability for the personal injury or death of a seaman occurring during the course of employment.

<sup>7</sup>46 U.S.C. § 30501 et. seq.

<sup>8</sup>33 U.S.C. §§ 2701–2761.

<sup>9</sup>33 U.S.C. § 2702(d). “The responsible party is able to recover through subrogation from a third party solely at fault, but is not relieved of strict liability for the payment of claims up to the limitations provided by OPA. The sole fault third party, once complete fault has been

the “responsible party” is the owner or operator of the vessel from which the oil is discharged.<sup>10</sup> As the operator of the DWH, BP is responsible for the economic damages associated with the spill. As of June 22, 2010, BP estimated that it had paid out \$118,044,258 to Gulf Coast claimants, but the ultimate responsibility will be far more. For example, on June 2, 2010, Credit Suisse estimated that these economic damages could total \$14 billion.<sup>11</sup>

OPA sets liability limits, or caps, on what the responsible party pays beyond the cleanup costs, at \$75 million per incident (as defined by the Act). This liability cap does not apply if the responsible party or any of its contractors violated any Federal or State safety regulations or acted with gross negligence.<sup>12</sup> The damages expressly recoverable under OPA are limited to (1) property damage; (2) subsistence loss; (3) net lost government revenue; (4) net lost profits or earning capacity; (5) cost of increased public services; and (6) damage to natural resources. OPA does not apply to personal injury or wrongful death. However, BP representatives have testified that it would not seek to avail itself of the cap—that it would pay “all legitimate claims”—though it has not yet explained what it will consider legitimate, nor has it formally agreed to extend its liability beyond the OPA cap.<sup>13</sup>

The third category of legal responsibility is the broader responsibility for cleanup costs. Under OPA, the responsible party is obligated to reimburse all cleanup costs incurred by others, not only by a government entity, but also by a private party,<sup>14</sup> although it may seek contribution or subrogation from other companies.<sup>15</sup> As of June 21, 2010, BP had reportedly spent approximately \$2 billion in cleanup and containment efforts,<sup>16</sup> but a recent estimate by The New York Times estimated eventual cleanup costs of perhaps as high as \$14 billion.<sup>17</sup> If BP is unwilling or unable to pay all cleanup costs, the Oil Spill Liability Trust Fund (OSLTF) provides a backstop for relief. The OSLTF was established by Congress in 1986 to create a pool of readily available funds for oil spill response needs.<sup>18</sup> The Fund is primarily used to finance the costs incurred

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established, then steps into the shoes of the responsible party, thereby becoming subject to the liabilities, limitations and defenses of the Act. There is, however, no mention of the liabilities or defenses available to third parties only partially at fault.” Gregg L. McCurdy, Comment, An Overview of OPA 1990 and its Relationship to Other Laws, 5 U.S.F. Mar. L.J. 423, 426–27 (1993)(footnotes omitted).

<sup>10</sup> 33 U.S.C. § 2701(32).

<sup>11</sup> See “CS Sees Total BP Oil Spill Cost Up To \$37 Billion.” June 2, 2010. at <http://www.zerohedge.com/article/cs-sees-total-bp-oil-spill-cost-37-billion-eat-3-years-free-cash-flow-will-require-10-rise-g>.

<sup>12</sup> In addition, liability limits are unavailable if the violation of a Federal safety, construction, or operating requirement proximately caused the spill. Spillers must also report the incident and cooperate with response officials to take advantage of the liability caps. OPA Section 1004(c).

<sup>13</sup> See Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the House Committee on the Judiciary, 111th Cong. (2010) (testimony of Darryl Willis, Vice President, Resources, BP America). See also Jackie Calmes, “For Gulf Victims, Mediator With Deep Pockets and Broad Power,” N.Y. Times, June 22, 2010 (“‘All of the design, all of the implementation and all of the administration’ of the claims process ‘is basically a handshake between the Obama administration, BP and me,’ Mr. Feinberg said Tuesday.”).

<sup>14</sup> OPA Section 1002(b)(1).

<sup>15</sup> 33 U.S.C. § 2715.

<sup>16</sup> See, BP has spent \$2 billion on Oil Spill cleanup: Company Says it has paid out \$105 Million to Victims; Overall Cleanup Cost Expected to Continue Rising, June 21, 2010, <http://www.cbsnews.com/stories/2010/06/21/national/main6602994.shtml>

<sup>17</sup> Fiona Marharg-Bravo and Rolfe Winkler, “Could BP’s Money Stop Flowing?” N.Y. Times, June 18, 2010.

<sup>18</sup> See Omnibus Budget Reconciliation Act of 1986 (P.L. 99–509). However, Congress did not authorize its use or fund it until after the Exxon Valdez incident. In 1990, OPA provided the statutory authorization necessary to put the fund into effect. The OSLTF was initially funded

by Federal and State agencies for prompt oil spill removal and to reimburse Federal, State and Indian tribe trustees for recoverable costs associated with oil spills, including natural resource damages.<sup>19</sup> The OSLTF is presently estimated to contain roughly \$1.6 billion.<sup>20</sup> The maximum amount of money that may be withdrawn from the OSLTF is \$1 billion per incident (as defined by OPA).<sup>21</sup>

OPA was designed to encourage administrative resolution of claims directly with the responsible party. Therefore, a government claimant seeking reimbursement for removal or cleanup costs, or any claimant seeking economic damages, must first present the claim to the responsible party. If the responsible party denies the claim or does not settle the claim within 90 days, a claimant may seek funds from the OSLTF or initiate action in a court of law. To date, no money has been withdrawn from the Fund in connection with the Gulf spill cleanup.

In regard to these two broader categories of responsibility, BP announced that it will establish a \$20 billion escrow account—a claims fund—as urged by President Obama, which adds another layer of complexity to the evaluation and resolution of claims. This fund will be set aside as part of the “Independent Claims Facility” (ICF), which will be managed by Kenneth Feinberg. The fund will be built up over a three-and-a-half-year period and be available “to satisfy legitimate claims including natural resource damages and state and local response costs.”<sup>22</sup> The fund reportedly will not pay out fines or penalties, but will honor claims that are adjudicated, whether by the ICF or by a court, or as agreed to by BP. According to initial accounts, the fund is not intended to represent a cap on BP liabilities, and will proceed on parallel tracks with other efforts by claimants to obtain redress for harms caused by the spill. Although the contours of this fund, and of the overall claims process, are not entirely clear at this point, claimants apparently may choose to pursue their claims wherever they wish, and are not precluded from accessing multiple forums.

Many of the general areas of liability present overlapping and interrelated issues. As of June 11, 2010, more than 160 cases are going forward as class actions.<sup>23</sup> BP has already filed a motion to consolidate the cases before one multi-district litigation court, and the Judicial Panel for Multidistrict Litigation is scheduled to hold a hearing on July 29 in Boise, Idaho.<sup>24</sup> In addition, personal injury claims stemming from the spill and cleanup have been submitted to BP or are being pursued in the courts under various theories of relief. It is unclear to what extent these type claims are candidates for resolution by the ICF.

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by a five-cent-per-barrel tax on the oil industry. The Emergency Economic Stabilization Act of 2008 (P.L. 110-343) increased the tax rate to eight cents through 2016. In 2017, the rate will increase to nine cents, and the tax is scheduled to terminate at the end of 2017. See section 405 of P.L. 110-343. The fund is administered by the U.S. Coast Guard. Other revenue sources for the fund include interest earned on fund deposits, cost recovery from the parties responsible for spills, and any fines or civil penalties collected.

<sup>19</sup>“Could BP’s Money Stop Flowing,” N.Y. Times, June 18, 2010, B2.

<sup>20</sup>Matthew Wald, “Tax on Oil May Help Pay for Cleanup,” N.Y. Times, May 1, 2010.

<sup>21</sup>26 U.S.C. § 9509(c)(2)(A).

<sup>22</sup>Press Release, BP, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010) ([www.bp.com](http://www.bp.com)).

<sup>23</sup>Anna Fifield, “Lawyers file class action suits against BP,” Financial Times, FT.com. June 11, 2010.

<sup>24</sup>Marilyn Tennissen, “BP seeks MDL in Houston for Deepwater Horizon cases,” LegalNewline.com, May 19, 2010.

Finally, there are the fines due under the Clean Water Act<sup>25</sup> and related statutes. It has been estimated by some that the civil fines due under this statute could be as high as \$22 billion, and a private lawsuit has recently been filed seeking a similar amount.<sup>26</sup> It has also been asserted that BP will be responsible for royalties to the Federal Government for each barrel of oil lost, which could cost large additional amounts.<sup>27</sup> A further factor is the criminal probe that Attorney General Eric Holder announced on June 1, 2010, along with the Justice Department's civil investigation. The threshold for a criminal investigation has "certainly been passed," Attorney General Holder said, although he would not disclose the exact targets of the probe. Prosecutors are reportedly looking at possible violations of the Clean Water Act, the Migratory Bird Treaty Act, the Endangered Species Act, and the Oil Pollution Act.<sup>28</sup> In addition, lawsuits have been filed or are contemplated by the attorneys general of the affected States.<sup>29</sup>

## II. NEED FOR THE LEGISLATION

### A. Remedies for maritime death and injury due to negligence

Maritime law is a patchwork of Federal rules and principles emanating from judicial opinions, statutory enactments, and international treaties. In the wake of what is projected to be the largest oil spill in U.S. history, it is evident that raising the \$75 million cap provided by the Oil Pollution Act of 1990 (OPA) is not sufficient, now or in the future, to address the bodily harm to those caught in the explosion or those involved in cleanup of the resulting spill. The OPA cap applies to commercial loss; it does not reach the losses of those who suffered personal injuries or who died in the explosion, or those who may be harmed in the cleanup efforts.

The Death on the High Seas Act (DOHSA) is the primary statute applicable to wrongful deaths occurring on board vessels further than three nautical miles from U.S. shores and on commercial aircraft further than twelve nautical miles out. It allows for specified dependent relatives of the decedent to seek pecuniary damages for accidents at sea, and both pecuniary and non-pecuniary damages for certain aviation accidents.

Congress enacted DOSHA in 1920<sup>30</sup> to create a cause of action for wrongful deaths occurring on the high seas beyond 3 nautical miles from U.S. shores, after a series of Supreme Court cases left the availability of damages for deaths at sea in confusion.<sup>31</sup> DOHSA allows the spouse, parents, child, or dependent relative of a seafarer or vessel passenger to seek recovery for pecuniary dam-

<sup>25</sup> 33 U.S.C. § 1251 et seq.

<sup>26</sup> Press Release, Center for Biological Diversity, *Lawsuit Seeks \$19 Billion in Clean Water Act Penalties From BP* (June 21, 2010).

<sup>27</sup> Jim Efstathiou Jr., "BP May Owe U.S. \$1 Million a Day in Royalties on Spilled Oil," *Bloomberg.com*, May 21, 2010.

<sup>28</sup> Helene Cooper and Peter Baker, "U.S. Opens Criminal Inquiry Into Oil Spill," *N.Y. Times*, June 1, 2010.

<sup>29</sup> See *Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the House Committee on the Judiciary, 111th Cong. (2010)* (testimony of Jim Hood, Attorney General, State of Mississippi) ("[M]y office has begun the process of reviewing all potential legal claims on behalf of the state arising out of the oil spill incident."). See also, "UPDATE 1-Florida could sue BP over any spill damage-governor," *Reuters*, May 4, 2010.

<sup>30</sup> Originally codified at 46 U.S.C. § 761, et seq, the statute is now found at 46 U.S.C. § 30301 through § 30308.

<sup>31</sup> See *The Harrisburg*, 119 U.S. 199 (1886); *The Alaska*, 130 U.S. 201 (1889); *La Bourgoyne*, 210 U.S. 95 (1908).



ages only. But DOHSA generally does not provide recovery for pre-death pain and suffering, or for non-pecuniary loss of care, comfort, and companionship. This means, for example, that when a child or retired worker is killed, the surviving family's recovery would essentially be limited to funeral expenses. Indeed, the fact that many of the passengers aboard TWA Flight 800 were children, who had no income on which to base pecuniary loss, was a significant driving factor in Congress's decision to amend DOHSA as to commercial aviation accidents.

The Jones Act, also passed in 1920, provides a cause of action for wrongful death or personal injury for "seamen" who die in the course of employment as the result of negligence. The Jones Act allows pecuniary damages from the employer for the negligence of the shipowner, the captain, or fellow members of the crew.

In the area of wrongful death, both the Jones Act and DOHSA generally confine recovery for negligent loss of life to pecuniary losses. Both statutes, however, have legislatively or judicially mandated exceptions that have produced irrational anomalies in the law. This legislation addresses those anomalies.

When Congress first considered and enacted DOHSA, overseas commercial aviation simply did not exist. Still, anyone who died as the result of a plane crash on the high seas was covered under the terms of the statute. Following the TWA Flight 800 crash in 1996, Congress amended DOHSA to provide for non-pecuniary damages—specifically, the loss of care, comfort and companionship—for victims of commercial aviation crashes that occur more than 12 nautical miles from the coast.<sup>32</sup> The change was made effective from the day before the TWA crash.

The Jones Act<sup>33</sup> provides protections for seamen on vessels, including benefits for injured seamen and a cause of action for injuries or death resulting from negligence on the part of their employer. Liability for the wrongful death of a Jones Act seaman may also be based on the unseaworthiness of the vessel under DOHSA.<sup>34</sup>

Only seamen can bring claims under the Jones Act, and then only against their employer. The test for seaman status is three-pronged: a worker must (1) be assigned to a vessel or identifiable fleet of vessels that is not permanently moored and is operating on a navigable waterway; (2) contribute to the mission of the vessel; and (3) spend a significant amount of time on board the vessel.<sup>35</sup> There is no doubt that the regular crew of the *Deepwater Horizon* were seamen under the Jones Act. The available damages are claims for injuries—in which case seamen are entitled to regular tort damages—and for wrongful death claims, in which case the damages are limited to pecuniary loss and pre-death pain and suf-

<sup>32</sup> 46 U.S.C. § 30307.

<sup>33</sup> There are two very different laws commonly referred to as the Jones Act. See *supra* note 6.

<sup>34</sup> See *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399–401 (1970) (discussing unseaworthiness remedy under DOHSA).

<sup>35</sup> "Seaman Status," website prepared and hosted by Arnold & Itkin LLP, available at: <http://www.jones-act-maritime-lawyer.com/jones-act/jones-act-seaman-status.php>.

fering.<sup>36</sup> Damages stemming from loss of society are not recoverable under either type of claim. The underlying cause of action for Jones Act claims is negligence on the part of the employer, although injured seamen also have the right to obtain maintenance and cure (generally a daily stipend as well as the payment of medical bills) for injuries that do not stem from negligence.

The bill corrects these shortcomings. It amends DOHSA to permit recovery for non-pecuniary loss and pre-death pain the suffering, to allow trial by jury, and to permit State law to govern which surviving family members are eligible to recover. It amends the Jones Act to permit recovery of non-pecuniary loss in cases of wrongful death, and to ensure that these protections apply to all offshore oil rig workers.

### *B. Limitation of Liability Act*

In addition to the restrictions on damages recoverable under DOHSA and the Jones Act, the Limitation of Liability Act (LOLA) is another Federal law that could operate to arbitrarily limit the liability owed to the dead and injured workers who were serving on the Deepwater Horizon. Passed in 1851, LOLA limits a vessel owner's liability to the post-accident value of the vessel and her pending freight. Like much of maritime law, U.S. law borrowed this principle of British maritime law. The British Parliament passed legislation in 1734 to limit the liability of shipowners to the value of the ship, in order to give the British shipping industry a competitive advantage over shipping companies based in continental Europe. The American shipping industry sought a similar limitation.<sup>37</sup>

When LOLA was enacted in 1851, the ship's master controlled and managed the ship and stood in place of the ship's owner—usually an individual, not the shipping conglomerates of today—during voyages that took months and often years. The absence of modern technology and communications equipment left shipowners vulnerable to the improper acts of the master, including embezzlement and other criminal acts. In 1848, the U.S. Supreme Court held steamboat owners responsible for the loss of gold and silver coins contained in a wooden crate after a fire destroyed the ship.<sup>38</sup> This decision prompted Congress to legislate for the protection of the American maritime industry.

Congress enacted the LOLA in 1851. The Act restricts the liability of shipowners to the value of the vessel and pending freight. Liability resulting from an employee's negligence or other bad act exists only if there was "privity or knowledge" of the owner. In 1934, Congress amended LOLA, after a fire on a ship caused 134 deaths, to require that a shipowner's liability for personal injury or death be based on a dollar amount—then \$60 per ton. That amount was raised to \$420 per ton in 1984.

LOLA does not provide for liability, but rather limits the liability of a shipowner for personal injury and property damage. A shipowner can initiate a limitation action by petitioning the Federal

<sup>36</sup> 46 U.S.C. 30104. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Supreme Court held that the Jones Act precludes recovery of non-pecuniary losses by the dependants of a deceased seaman.

<sup>37</sup> Thomas J. Schoenbaum, *Admiralty and Maritime Law* 805 (4th ed. 2004).

<sup>38</sup> *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*, 47 U.S. 344 (1848)

court within 6 months after receiving a notice that a suit has been filed. The petition stays proceedings elsewhere, and consolidates all State claims into Federal court.

In a filing in a Federal court in Texas, Transocean has invoked this antiquated law in an effort to have its liability “for all claims for any loss of life, injury, loss, destruction and damages arising out of or occurring on the voyage of the . . . Deepwater Horizon”<sup>39</sup> limited to the post-accident value of the Deepwater Horizon—essentially a \$26.7 million cap. All other proceedings against Transocean have been suspended pending a determination by the court whether the LOLA limitation applies.<sup>40</sup> For victims of the DWH disaster and their families, LOLA prolongs their grief, and threatens to limit severely their ability to provide economic stability for the future. If the court grants the limitation, multiple claimants—including the DWH survivors and the families of those who died—will be eligible for only a pro rata share of the limitation fund.

LOLA has clearly outlived any legitimate purpose it may once have served. Its original purpose—to promote American shipping interests—is now largely serving the interests of carriers incorporated in Third World countries and using foreign-flagged vessels in order to avoid having to pay U.S. taxes or follow U.S. health and safety regulations. Moreover, Congress could not possibly have envisioned in 1851 that movable industrial oil exploration and development platforms would qualify as “vessels” under LOLA and attempt to shield their liability in this type of disaster.

When LOLA was enacted, a shipowner could communicate with the captain and crew of a vessel away from home port only through documents transshipped on other vessels. LOLA was intended to protect those owners in light of that difficulty in staying in communication. Today’s communication technology allows shipowners to oversee their vessels as constantly as they wish, even when the vessel is on the other side of the world. Owners today have direct communication by radio, computers, and phone, and a ship can be positioned and monitored constantly using satellite systems. Continued use of LOLA simply removes healthy incentives for owners to properly oversee their ships.

Finally, there are better, more sophisticated alternatives for protecting shipowners than LOLA. Today, shipowners have a wide variety of legal tools available that better protect their financial interests. For example, insurance, contract, charter, mortgage, and the separate incorporation of vessels are alternative methods that offer more appropriate financial protection than LOLA.

In this current case, LOLA could even hamper BP from seeking reimbursement from Transocean for Transocean’s own negligence in the Deepwater Horizon explosion and resulting spill. Repealing LOLA will enable BP to hold Transocean accountable for any ap-

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<sup>39</sup> Complaint and Petition for Exoneration from or Limitation of Liability, In re the complaint and petition of Triton Asset Leasing GmbH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc., as owner, managing owners, owners pro-hoc vice, and/or Operators of the MODU Deepwater Horizon, in a Cause for Exoneration From or Limitation of Liability, Complaint and Petition No. 4:10-cv-01721 (S.D.Tex. May 13, 2010).

<sup>40</sup> Mary Flood, “Judge stays spill cases at Transocean’s request,” *Houston Chronicle*. May 13, 2010.

propriate share of responsibility under the Oil Pollution Act. This is yet another illustration of why LOLA should be repealed.

### C. Clarification of state enforcement authority

Congress enacted the Class Action Fairness Act of 2005 (CAFA) to facilitate the removal of “interstate cases of national significance” to Federal court under diversity jurisdiction, and to provide for greater regulation of class and mass actions.<sup>41</sup> Although the statutory definitions in CAFA of “class action” and “mass action” are phrased broadly,<sup>42</sup> the congressional debates in both the House<sup>43</sup> and Senate<sup>44</sup> indicate an intent to preserve the authority of a State government to bring and keep cases in its own State courts when the action involves its own citizens and its own laws. Nevertheless, the Fifth Circuit held in 2008 that an action brought by a State attorney general as a *parens patriae* action was subject to CAFA.<sup>45</sup>

During the Committee’s hearing on the legal liability issues stemming from the Gulf Coast oil spill, Mississippi Attorney General Jim Hood testified that CAFA impeded his ability to pursue claims on behalf of the State of Mississippi against parties responsible for violating State law.<sup>46</sup> H.R. 5503 will clarify that actions brought by a State attorney general in his official capacity under his State’s law, in its courts, on behalf of its citizens, are not subject to removal to Federal court under CAFA.<sup>47</sup>

### D. Protections against unwarranted secrecy regarding pollutant discharges

In the days following the DWH explosion and rescue efforts, reports emerged that BP had required unemployed fishermen, as a condition for assistance, employment, or access to the affected area,

<sup>41</sup> Class Action Fairness Act § 2, 28 U.S.C. 1332(d).

<sup>42</sup> Under CAFA, a “class action” is “any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.” 28 U.S.C. § 1711(2). “Mass action” is defined as “any civil action (except a civil action within the scope of section 1711(2) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).” 28 U.S.C. § 1332(d)(11)(B)(i).

<sup>43</sup> 151 Cong. Rec. 746 (2005) (statement of Rep. James F. Sensenbrenner) (“[W]hen State attorneys general sue on behalf of their citizens, those actions are almost always ‘parens patriae’ actions, and not class actions; and the former will be in no way affected by this bill.”).

<sup>44</sup> 151 Cong. Rec. 1161 (2005) (statement of Sen. Thomas R. Carper) (“For most attorneys general who wish to file a case on behalf of their citizens against some defendant, they have the opportunity to use *parens patriae*. For those who do not, in my judgment, they still have the opportunity to use the class action lawsuit.”); id. at 1162 (statement of Sen. John Cornyn) (“But clearly, when State law and the State Constitution specifically provide for the right of . . . a State attorney general, to sue on behalf of his State’s citizens, then this bill, when made a law, will not in any way impede that endeavor.”); id. at 1163 (statement of Sen. Chuck Grassley) (“because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they . . . will not be affected by this bill.”); id. at 1164 (statement of Sen. Pryor) (“I hope the courts will recognize the legislative history we developed today. The intention of this Senate and the conference is not to limit any existing rights or any existing abilities of the State attorneys general in pursuing cases they may deem appropriate to pursue.”).

<sup>45</sup> *In re Katrina Canal Breaches Litigation*, 524 F.3d 700, 706 (5th Cir. 2008); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

<sup>46</sup> Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary, 111th Cong. (2010) (testimony of Jim Hood, Attorney General of Mississippi).

<sup>47</sup> *Connecticut v. Moody’s Corp.*, 664 F. Supp. 2d 196, 200 (D. Conn. 2009) (citing *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 370–71 (D. Conn. 1979) (“[I]t has long been recognized that a state can act as *parens patriae* for a circumscribed group of its citizens.”)).

to sign an agreement not to provide information to the news media, investigators, or others regarding the oil spill, the clean-up and containment efforts, or the public health implications.<sup>48</sup> Indeed, in a lawsuit brought by the president of the United Commercial Fishermen Association in Louisiana, U.S. District Judge Helen G. Berrigan granted a restraining order against the agreements, finding them unconscionable. To prevent further abuses in this and future disasters, H.R. 5503 specifies that agreements or directives of this nature are unenforceable, as they interfere with the public's right to be informed. It provides an exception for court orders or government agency directives when there is a determination that the dissemination of information could endanger public health or safety.

#### *E. Protections in bankruptcy for maritime oil spill claimants*

Under section 363(f) of the Bankruptcy Code, assets of a company in a bankruptcy case may be sold “free and clear of any interest in such property” if certain conditions are met.<sup>49</sup> Unsecured creditors generally are entitled to share only in the unencumbered proceeds of the sale and in the remaining unencumbered assets. In actuality, the sale may generate proceeds sufficient only to satisfy the claims of secured creditors having an interest in the transferred property, thereby leaving little or no money for unsecured creditors.

The rights of future creditors may also be terminated. Successor liability is an equitable principle largely determined under applicable State law.<sup>50</sup> A number of courts have sought to protect purchasers of assets in bankruptcy, against possible claims to which they might otherwise be subject under principles of successor liability, by approving sales “free of all present or future claims against the debtor or the estate,”<sup>51</sup> although some courts have questioned

<sup>48</sup> See “Federal judge says BP can’t force local workers to sign waivers of liability,” at <http://thelensnola.org/2010/05/03/bp-worker-agreemen/>. There were also other reports of statements being signed under apparent duress. For example, in early May, National Public Radio (NPR) reported that DWH rig workers were required “to sign form letters about what they had seen and whether they had been injured” before being released to their families. This account was verified in testimony before the Committee by Stephen Stone, a roustabout employed by Transocean who was on the DWH on April 20. Mr. Stone testified that they “were told we had to give a written statement before we could leave the boat” and that it was “28 hours after the explosion” before he “was given access to a phone, and was allowed to call [his] wife” to let her know that he had survived.

<sup>49</sup> Section 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

<sup>51</sup> U.S.C. § 363(f).

<sup>50</sup> In general, successor liability will attach if: (1) the purchaser expressly or impliedly assumed the liability; (2) the transaction amounted to a merger or consolidation of the businesses; (3) the purchaser was merely a continuation of the seller; or (4) the transaction was entered into fraudulently in order to avoid liability for the obligations. Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy*, ¶ 363.06[7] (15th ed. rev'd 2007).

<sup>51</sup> *Id.*

the ability of a bankruptcy court to override principles of successor liability under section 363(f).<sup>52</sup>

A company in chapter 11 reorganization may also choose to dispose of all its assets under a reorganization plan.<sup>53</sup> While creditors have the right to object, a court can confirm a plan anyway if it finds that the plan is “fair and equitable” within the meaning of section 1129(b)(2).<sup>54</sup> A plan can satisfy this standard with respect to a class of unsecured claims even if it does not propose to pay them in full, as long as they receive as much as they would in liquidation, and as long as no claims junior to them receive any payment.<sup>55</sup>

A company in involuntary bankruptcy may also sell all or substantially all its assets if no order for relief has yet been entered. During the so-called “gap period” between the filing of the petition and the entry of the order for relief, the company may dispose of property “as if an involuntary case concerning the debtor had not been commenced,” notwithstanding section 363, unless the court orders otherwise.<sup>56</sup>

In a bankruptcy case where the debtor is liable under any law for claims arising from an Oil Pollution Act (OPA) incident,<sup>57</sup> section 7 of this bill makes several amendments to the Bankruptcy Code to protect the holders of such claims. First, the bill amends section 363 to condition the sale or lease of all or substantially all of the debtor’s assets in a bankruptcy case where the company is liable for such claims. The sale or lease may not occur unless either: (1) the acquirer (including any affiliate thereof) assumes the obligation to pay the amount of allowed unsecured claims arising from such incident not paid by the debtor; or (2) creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.

The amendment to 363 applies not only to property of the estate of the debtor, but also to property of any affiliate of the debtor to the extent the court has or can obtain jurisdiction over the affiliate. The Bankruptcy Code defines “affiliate,” in pertinent part, to include the parents and subsidiaries of corporate debtors who meet certain specified ownership criteria.<sup>58</sup> Thus, in a chapter 11 case filed by a subsidiary with few assets, this bill will also condition sales by the debtor’s parent if the court has jurisdiction over the parent.

The bill also amends Bankruptcy Code section 1129(b)(2)(B) to impose the same conditions on confirming a chapter 11 plan of reorganization. Thus, a plan of reorganization that proposes to sell or lease all or substantially all of the debtor’s assets must provide

<sup>52</sup> Id.; see, e.g., *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 51 (7th Cir. 1995) (noting that “it is not clear why an intervening bankruptcy proceeding, in particular, should have a per se preclusive effect on the creditor’s chances”).

<sup>53</sup> Under section 1123(a)(5)(D), a plan may be implemented through the “sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate.”

<sup>54</sup> 11 U.S.C. § 1129(b)(2).

<sup>55</sup> 11 U.S.C. §§ 1129(b)(2)(B), 1129(a)(7)(A)(ii).

<sup>56</sup> 11 U.S.C. § 303(f).

<sup>57</sup> 33 U.S.C. § 2701(14) (“incident” means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil”); 33 U.S.C. § 1321(7)(A) (establishing civil liability for entities responsible for an incident).

<sup>58</sup> 11 U.S.C. § 101(2).

that either the acquirer (including any affiliate) will assume the obligation to pay the claims arising from the OPA incident if not paid by the debtor, or creditors holding at least two-thirds in amount, and more than one-half in number, of such claims must consent to different treatment.

Finally, this bill amends Bankruptcy Code section 303(f) to ensure that creditors with claims arising from an incident under the OPA will be similarly protected during the period between an involuntary bankruptcy petition and an order for relief.

*F. Ensuring immediate applicability of improvements in the law*

Based on evidence gathered during the hearing on Liability Issues Surrounding the Gulf Coast Oil Disaster, the Committee determined that there were several reasons to apply this legislation to pending cases, including the gravity of the disaster on April 20, 2010, the antiquated and inconsistent nature of much of the legal framework in maritime law, and the need for comprehensive and uniform application of the new legislation.

It is long settled that as long as Congress has a rational purpose, it may elect to respond to an issue of public policy with legislation that is immediate in effect, without running afoul of the Constitution.<sup>59</sup> The 9th Circuit, in *Seariver Maritime Financial Holdings v. Mineta*,<sup>60</sup> held that legislation providing for immediate liability adjustments, even if it could apply to identifiable parties on the basis of “irreversible past actions,” is permissible so long as it furthers a “nonpunitive legislative purpose.”

Moreover, analysis by the non-partisan Congressional Research Service confirms that “because H.R. 5503 does not impose criminal penalties, it raises no constitutionality concerns under the Ex Post Facto Clause.”<sup>61</sup>

This provision is consistent with a number of statutory changes to liability law enacted in recent years, including laws partially immunizing gun sellers and manufacturers;<sup>62</sup> limiting liability of airlines and providing compensation for victims of the September 11, 2001 attack;<sup>63</sup> providing compensation to workers subjected to unlawful employment practices;<sup>64</sup> expanding recovery under State

<sup>59</sup>See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 265 (1994); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15–16 (1976); *U.S. v. Schooner Peggy*, 5 U.S. (Cranch 1) 103, 110 (1801) (“It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.”).

<sup>60</sup>309 F.3d 662, 674 (9th Cir. 2002).

<sup>61</sup>Robert Meltz and Kenneth Thomas, “Constitutional Issues Raised By Pending Bill to Expand Liability Under the Death on the High Seas Act and the Jones Act,” Congressional Research Service, June 28, 2010.

<sup>62</sup>H.R. 800, the Protection of Lawful Commerce in Arms Act, introduced by Rep. Stearns (R-FL) in the 109th Congress (Senate version, S. 397, became Pub. L. 109–124) (“A qualified civil liability action [against gun manufacturers or sellers] that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.”).

<sup>63</sup>H.R. 2926, Air Transportation Safety and System Stabilization Act, introduced by Rep. Young (R-AK) on September 21, 2001, and became Pub. L. 107–42 on September 22, 2001. (“SEC. 408. Limitation on Air Carrier Liability (a) In General.” Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”)

<sup>64</sup>S. 181, Lilly Ledbetter Fair Pay Act of 2009, introduced by Sen. Mikulski (D-MD) on January 8, 2009 in the 111th Congress, became Pub. L. 111–2 on January 29, 2009 (“This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all

law retroactively for cases stemming from the Minot, North Dakota train derailment;<sup>65</sup> and permitting non-pecuniary damages under DOSHA for aviation accidents on the high seas.<sup>66</sup> Relevant Supreme Court precedent, in cases such as *Usery v. Turner Elkhorn Mining Co.*,<sup>67</sup> have upheld immediate application of civil law changes of this nature.

#### SUPPORTERS OF H.R. 5503

The following individuals and organizations have written in support of H.R. 5503:

- Survivors of workers killed in the Deepwater Horizon explosion, including Michelle, Keith, and Chris Jones, the widow, father, and brother of Gordon Jones; Natalie Roshto and Denise Arnold, widow and mother of Shane Roshto; Rhonda Burkeen, widow of Aaron Dale Burkeen; and Jacqueline Duncan, sister of Wyatt Kemp
- David Erickson, father of Christopher Blair Erickson, killed by electrocution while working aboard the oil tanker S/R Wilmington, owned by a subsidiary of Exxon-Mobile
- Lynda Sanford, who was injured in a cruise ship accident that killed her mother and two other women and injured 13 other passengers
- Mississippi Attorney General Jim Hood
- The International Cruise Victims Association
- The National Center for Victims of Crime
- The National Organization of Parents of Murdered Children
- Public Citizen
- Alliance for Justice
- National Consumers League
- ConsumerWatchdog
- Center for Justice & Democracy
- Center for Biological Diversity
- Friends of the Earth
- U.S. Action

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claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.”)

<sup>65</sup>Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110–53 (2007) (legislation contains a retroactivity provision, which clarifies that 49 U.S.C. §20106 applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota train derailment).

<sup>66</sup>H.R. 1000, The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, introduced by Rep. Shuster (R-PA) on March 3, 1999 in response to the Continental Express Flight 2574 in 1991 (became Pub. L. 106–181 on April 4, 2000) (“The amendments [to DOHSA] made by subsections (a) and (b) shall apply to any death occurring after July 16, 1996”).

<sup>67</sup>428 U.S. 1 (1976). In *Turner Elkhorn Mining Co.*, the Court upheld a statute which required mine operators to provide compensation for a former employee’s death or disability due to pneumoconiosis who terminated before the act’s passage and was challenged as a violation of the Due Process Clause of the Fifth Amendment. The Court held that immediate application of such civil liability statutes will be upheld as constitutional so long as there is a rational governmental purpose.



HEARINGS

The full Committee on the Judiciary held 1 day of hearings on May 27, 2010, to examine the liability issues stemming from the explosion on the Deepwater Horizon and the resulting oil spill. The witnesses who testified before the Committee were Keith D. Jones, Esq., father of Gordon Jones, who died while working on the Deepwater Horizon; Douglas Harold Brown, a Transocean, Ltd. employee and survivor of the Deepwater Horizon explosion; Stephen Stone, a Transocean, Ltd. employee and survivor of the Deepwater Horizon explosion; Bryan Encalade, President, Louisiana Oysters Association; Jim Hood, Attorney General for the State of Mississippi; Darryl Willis, Vice President, Resources, BP America; Rachel Clingman, Acting General Counsel, Transocean, Ltd.; James W. Ferguson, Vice President and Deputy General Counsel, Halliburton; William C. Lemmer, General Counsel, Cameron International Corporation; Vincent J. Foley, Partner, Holland & Knight; and Thomas C. Galligan, Jr., President and Professor, Colby-Sawyer College.

COMMITTEE CONSIDERATION

On June 23, 2010, the Committee met in open session to mark up the bill H.R. 5503, and ordered the bill, as amended, favorably reported by a rollcall vote of 16 to 11, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 5503.

1. An amendment offered by Mr. Smith to limit the bill's coverage to claims arising out of an oil spill. Defeated 19 to 14.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman .....		X	
Mr. Berman .....		X	
Mr. Boucher .....			
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....			
Mr. Delahunt .....			
Mr. Cohen .....		X	
Mr. Johnson .....		X	
Mr. Pierluisi .....		X	
Mr. Quigley .....		X	
Ms. Chu .....		X	
Mr. Deutch .....		X	
Mr. Gutierrez .....			
Ms. Baldwin .....		X	
Mr. Gonzalez .....		X	
Mr. Weiner .....		X	
Mr. Schiff .....		X	
Ms. Sánchez .....		X	
Mr. Maffei .....		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Polis .....			
Mr. Smith, Ranking Member .....	X		
Mr. Sensenbrenner, Jr. ....	X		
Mr. Coble .....	X		
Mr. Gallegly .....	X		
Mr. Goodlatte .....	X		
Mr. Lungren .....			
Mr. Issa .....	X		
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Franks .....	X		
Mr. Gohmert .....			
Mr. Jordan .....	X		
Mr. Poe .....	X		
Mr. Chaffetz .....	X		
Mr. Rooney .....	X		
Mr. Harper .....	X		
Total .....	14	19	

2. An amendment offered by Mr. Goodlatte to limit the Class Action Fairness Act amendment to class actions arising out of an oil spill. Defeated 16 to 12.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman .....		X	
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....		X	
Mr. Delahunt .....			
Mr. Cohen .....		X	
Mr. Johnson .....		X	
Mr. Pierluisi .....		X	
Mr. Quigley .....			
Ms. Chu .....		X	
Mr. Deutch .....		X	
Mr. Gutierrez .....			
Ms. Baldwin .....		X	
Mr. Gonzalez .....			
Mr. Weiner .....		X	
Mr. Schiff .....		X	
Ms. Sánchez .....			
Mr. Maffei .....		X	
Mr. Polis .....			
Mr. Smith, Ranking Member .....	X		
Mr. Sensenbrenner, Jr. ....			
Mr. Coble .....			
Mr. Gallegly .....	X		
Mr. Goodlatte .....	X		
Mr. Lungren .....	X		
Mr. Issa .....			
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Franks .....	X		
Mr. Gohmert .....			
Mr. Jordan .....	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Poe .....	X		
Mr. Chaffetz .....	X		
Mr. Rooney .....	X		
Mr. Harper .....	X		
Total .....	12	16	

3. Motion to order the bill favorably reported, as amended. Approved 16–11.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman .....	X		
Mr. Berman .....			
Mr. Boucher .....	X		
Mr. Nadler .....			
Mr. Scott .....	X		
Mr. Watt .....			
Ms. Lofgren .....	X		
Ms. Jackson Lee .....			
Ms. Waters .....			
Mr. Delahunt .....			
Mr. Cohen .....			
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Mr. Gutierrez .....			
Ms. Baldwin .....	X		
Mr. Gonzalez .....			
Mr. Weiner .....			
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Maffei .....	X		
Mr. Polis .....	X		
Mr. Smith, Ranking Member .....		X	
Mr. Sensenbrenner, Jr. ....			
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....		X	
Mr. Lungren .....	X		
Mr. Issa .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Rooney .....	X		
Mr. Harper .....			
Total .....	16	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

representatives, are incorporated in the descriptive portions of this report.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### COMMITTEE COST ESTIMATE

The Congressional Budget Office (CBO) estimate of the costs of implementing H.R. 5503 was not available as the time of filing this report. When the CBO letter setting forth its official cost estimate becomes available, it will be printed in the Congressional Record. In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates the costs as follows:

The Committee does not anticipate that the bill will have any significant effect on the Federal budget, nor that it will result in any unfunded mandate or any significant new costs to the U.S. economy. The bill amends various existing laws governing private and State government actions for recovery of damages for tortious conduct, conditions the sale of certain assets in bankruptcy under certain conditions, and adds a new restriction on the enforcement of secrecy agreements unless necessary to protect public health or safety.

#### PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5503 amends the Death on the High Seas Act, the Jones Act, the Class Action Fairness Act, and the Bankruptcy Code, repeals the Limitations on Liability Act, and limits the enforceability of secrecy agreements regarding the discharge of dangerous materials into waters off the shore of the United States. This will improve the relief available for death or injury on the high seas, help ensure accountability of companies responsible for environmental and physical disasters at sea, hold polluting entities accountable to a high level of transparency, and secure the right of State attorneys general to bring court actions on behalf of citizens of their State, under the law of their State, in their State courts.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds authority for this legislation in article I, section 8, clauses 4 and 18 of the Constitution.

#### ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5503 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in such clause 9.

## SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short Title.* Section 1 sets forth the short title of the bill as the “Securing Protection for the Injured from Limitations on Liability Act.”

*Sec. 2. Amendments to Death on the High Seas Act.* Section 2 makes various amendments to the Death on the High Seas Act (DOHSA). Section 2(1) amends 46 U.S.C. § 30302 to allow the personal representative to bring suit under law as well as admiralty, thus permitting a jury trial; to standardize the threshold for DOHSA’s applicability at beyond 12 nautical miles from the U.S. shore; and to permit State law to govern who is eligible to receive compensation, by deleting language that confines those eligible to the decedent’s spouse, parent, child, or dependent relative.

Section 2(2) amends 46 U.S.C. § 30303 to permit recovery for non-pecuniary loss (defined as the survivors’ loss of the care, comfort, and companionship provided by the decedent), as well as for the pain and suffering endured by the decedent prior to death.

Sections 2(3) and 2(4) make conforming changes to other sections of DOHSA to ensure that actions can be brought in law as well as in admiralty.

Section 2(5) strikes 46 U.S.C. § 30307, which provides special rules governing commercial aviation. As the bill now essentially makes these special rules applicable universally, this section is unnecessary.

Section 2(6) revises the clarifications, in what is now 46 U.S.C. § 30308, and will become redesignated as 46 U.S.C. § 30307, as to what law applies on the Great Lakes and in waters within the 12-mile limit. It confirms that the rules applicable under Federal, State, maritime, and other appropriate law shall apply.

Section 2(7) makes a conforming change to the table of sections in chapter 303 of 46 U.S.C.

*Sec. 3. Amendments to Jones Act.* Section 3 makes two amendments to the Jones Act. Section 3(1) amends 46 U.S.C. 30104 to add non-pecuniary loss to the recovery permitted by the survivors of a seaman who is killed in the course of employment. Section 3(2) strikes 46 U.S.C. § 30105, which currently bars recovery by a worker who is not a U.S. citizen or permanent resident, or the worker’s survivors, against mineral or energy companies for personal injury or death occurring in the territorial waters or continental shelf of a foreign state, unless neither the law of that foreign state nor the law of the worker’s country of citizenship or residence makes any remedy available.

*Sec. 4. Repeal of Limitation of Liability Act.* Section 4 repeals the Limitation of Liability Act, now found in 46 U.S.C. §§ 30505, 30506, 30507, 30511, and 30512.

*Sec. 5. Amendment to Class Action Fairness Act.* Section 5 amends the Class Action Fairness Act to clarify that the right to remove class actions and mass actions to Federal court does not apply to an action brought by a State (or subdivision of a State) in its own State court on behalf of citizens of that State. Substantively equivalent clarifications are made to 28 U.S.C. §§ 1711(2), 1332(d)(1)(B), and 1332(d)(11)(B)(ii).

*Sec. 6. Unenforceability of Certain Secrecy Agreements.* Section 6 adds a new section 4101 to 28 U.S.C., to make unenforceable in any legal proceeding secrecy agreements or directives regarding the cause of a discharge of contaminants into the waters off the shore of the United States or regarding the cleanup efforts. There is an exception for directives in court orders or by a government agency determination that the restriction is necessary to protect public health or safety. Any court order enforcing a restriction on this basis must be based on clear and convincing evidence, and must be accompanied by findings of fact and conclusions of law supporting it.

*Sec. 7. Amendments to Title 11 of the United States Code.* Section 7 amends the Bankruptcy Code to place conditions on the sale or lease of all or substantially all property of a company in bankruptcy that is liable under any law for claims arising from an incident covered under the Oil Pollution Act. Related amendments are made to 11 U.S.C. §§ 363, 1129(b)(2)(B), and 303(f). No such sale or lease is permitted unless (1) the entity that acquires the property (including all the entity's affiliates, if any) assumes the obligation to pay whatever amount of those claims is not paid by the company in bankruptcy, or (2) more than one-half the claimants, holding at least two-thirds the dollar aggregate amount of the claims, consent to different treatment.

*Sec. 8. Effective Date.* Section 8 provides that the bill and the amendments made by it take effect immediately on the date of enactment and apply to all pending and future cases.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### TITLE 46, UNITED STATES CODE

\* \* \* \* \*

#### Subtitle III—Maritime Liability

\* \* \* \* \*

#### CHAPTER 301—GENERAL LIABILITY PROVISIONS

Sec.

30101. Extension of jurisdiction to cases of damage or injury on land.

\* \* \* \* \*

**[30105. Restriction on recovery by non-citizens and non-resident aliens for incidents in waters of other countries.]**

\* \* \* \* \*

#### § 30104. Personal injury to or death of seamen

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating

recovery for personal injury to, or death of, a railway employee apply to an action under this section. *In addition to other amounts authorized under such laws, the recovery for a seaman who so dies shall include recovery for loss of care, comfort, and companionship.*

**【§ 30105. Restriction on recovery by non-citizens and non-resident aliens for incidents in waters of other countries**

【(a) DEFINITION.—In this section, the term “continental shelf” has the meaning given that term in article I of the 1958 Convention on the Continental Shelf.

【(b) RESTRICTION.—Except as provided in subsection (c), a civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if—

【(1) the individual suffering the injury or death was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action;

【(2) the incident occurred in the territorial waters or waters overlaying the continental shelf of a country other than the United States; and

【(3) the individual suffering the injury or death was employed at the time of the incident by a person engaged in the exploration, development, or production of offshore mineral or energy resources, including drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment, or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces.

【(c) NONAPPLICATION.—Subsection (b) does not apply if the individual bringing the action establishes that a remedy is not available under the laws of—

【(1) the country asserting jurisdiction over the area in which the incident occurred; or

【(2) the country in which the individual suffering the injury or death maintained citizenship or residency at the time of the incident.】

\* \* \* \* \*

**CHAPTER 303—DEATH ON THE HIGH SEAS**

Sec.

30301. Short title.

\* \* \* \* \*

【30307. Commercial aviation accidents.

【30308. Nonapplication.】

*30307. Nonapplication.*

**§ 30301. Short title**

This chapter may be cited as the “Death on the High Seas Act”.

**§ 30302. Cause of action**

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 【3 nautical miles】 *12 nautical miles* from the shore of the United States, the personal representative of the decedent may bring a civil action in

admiralty *or law* against the person or vessel responsible. [The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.]

**§ 30303. Amount and apportionment of recovery**

The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss *and nonpecuniary loss* sustained [by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.], *plus a fair compensation for the decedent's pain and suffering. In this section, the term "nonpecuniary loss" means loss of care, comfort, and companionship.*

\* \* \* \* \*

**§ 30305. Death of plaintiff in pending action**

If a civil action in admiralty *or law* is pending in a court of the United States to recover for personal injury caused by wrongful act, neglect, or default described in section 30302 of this title, and the individual dies during the action as a result of the wrongful act, neglect, or default, the personal representative of the decedent may be substituted as the plaintiff and the action may proceed under this chapter for the recovery authorized by this chapter.

**§ 30306. Foreign cause of action**

When a cause of action exists under the law of a foreign country for death by wrongful act, neglect, or default on the high seas, a civil action in admiralty *or law* may be brought in a court of the United States based on the foreign cause of action, without abatement of the amount for which recovery is authorized.

**§ 30307. Commercial aviation accidents**

[(a) DEFINITION.—In this section, the term “nonpecuniary damages” means damages for loss of care, comfort, and companionship.

[(b) BEYOND 12 NAUTICAL MILES.—In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.

[(c) WITHIN 12 NAUTICAL MILES.—This chapter does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.]

**§ [30308.] 30307. Nonapplication**

(a) \* \* \*

[(b) INTERNAL WATERS.—This chapter does not apply to the Great Lakes or waters within the territorial limits of a State.]

(b) *INTERNAL AND TERRITORIAL WATERS.—This chapter does not apply to the waters of the Great Lakes or waters within the territorial limits of a State that do not exceed 12 nautical miles from the shore of the United States. In such waters, the rules applicable under Federal, State, maritime, and other appropriate law shall apply.*



**CHAPTER 305—EXONERATION AND LIMITATION OF  
LIABILITY**

Sec.	Definition.						
30501.	Definition.	*	*	*	*	*	*
[30505.	General limit of liability.						
[30506.	Limit of liability for personal injury or death.						
[30507.	Apportionment of losses.]						
		*	*	*	*	*	*
[30511.	Action by owner for limitation.						
[30512.	Liability as master, officer, or seaman not affected.]						
		*	*	*	*	*	*

**§ 30505. General limit of liability**

[(a) IN GENERAL.—Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

[(b) CLAIMS SUBJECT TO LIMITATION.—Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those 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, done, occasioned, or incurred, without the privity or knowledge of the owner.

[(c) WAGES.—Subsection (a) does not apply to a claim for wages.

**§ 30506. Limit of liability for personal injury or death**

[(a) APPLICATION.—This section applies only to seagoing vessels, but does not apply to pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters, or nondescript vessels.

[(b) MINIMUM LIABILITY.—If the amount of the vessel owner's liability determined under section 30505 of this title is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than \$420 times the tonnage of the vessel, that portion shall be increased to \$420 times the tonnage of the vessel. That portion may be used only to pay claims for personal injury or death.

[(c) CALCULATION OF TONNAGE.—Under subsection (b), the tonnage of a self-propelled vessel is the gross tonnage without deduction for engine room, and the tonnage of a sailing vessel is the tonnage for documentation. However, space for the use of seamen is excluded.

[(d) CLAIMS ARISING ON DISTINCT OCCASIONS.—Separate limits of liability apply to claims for personal injury or death arising on distinct occasions.

[(e) PRIVACY OR KNOWLEDGE.—In a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner.

**【§ 30507. Apportionment of losses**

【If the amounts determined under sections 30505 and 30506 of this title are insufficient to pay all claims—

【(1) all claimants shall be paid in proportion to their respective losses out of the amount determined under section 30505 of this title; and

【(2) personal injury and death claimants, if any, shall be paid an additional amount in proportion to their respective losses out of the additional amount determined under section 30506(b) of this title.】

\* \* \* \* \*

**【§ 30511. Action by owner for limitation**

【(a) IN GENERAL.—The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter. The action must be brought within 6 months after a claimant gives the owner written notice of a claim.

【(b) CREATION OF FUND.—When the action is brought, the owner (at the owner’s option) shall—

【(1) deposit with the court, for the benefit of claimants—

【(A) an amount equal to the value of the owner’s interest in the vessel and pending freight, or approved security; and

【(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter; or

【(2) transfer to a trustee appointed by the court, for the benefit of claimants—

【(A) the owner’s interest in the vessel and pending freight; and

【(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter.

【(c) CESSATION OF OTHER ACTIONS.—When an action has been brought under this section and the owner has complied with subsection (b), all claims and proceedings against the owner related to the matter in question shall cease.

**【§ 30512. Liability as master, officer, or seaman not affected**

【This chapter does not affect the liability of an individual as a master, officer, or seaman, even though the individual is also an owner of the vessel.】

\* \* \* \* \*

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**TITLE 28, UNITED STATES CODE**

\* \* \* \* \*

**PART IV—JURISDICTION AND VENUE**

\* \* \* \* \*

**CHAPTER 85—DISTRICT COURTS; JURISDICTION**

\* \* \* \* \*

**§ 1332. Diversity of citizenship; amount in controversy; costs**

(a) \* \* \*

\* \* \* \* \*

(d)(1) In this subsection—

(A) \* \* \*

(B) the term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action, *but does not include an action brought by a State or subdivision of a State on behalf of its citizens;*

\* \* \* \* \*

(11)(A) \* \* \*

(B)(i) \* \* \*

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which—

(I) \* \* \*

\* \* \* \* \*

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; **[or]**

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings~~[,]~~; *or*

(V) *the claims are made by a State or subdivision of a State on behalf of its citizens.*

\* \* \* \* \*

**PART V—PROCEDURE**

\* \* \* \* \*

**CHAPTER 114—CLASS ACTIONS**

\* \* \* \* \*

**§ 1711. Definitions**

In this chapter:

(1) \* \* \*

(2) **CLASS ACTION.**—The term “class action” means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action, *but does not include an action brought by a State or subdivision of a State on behalf of its citizens.*

\* \* \* \* \*

**PART VI—PARTICULAR PROCEEDINGS**

CHAP.		Sec.
<b>151.</b>	<b>Declaratory Judgments .....</b>	<b>2201</b>
	* * * * *	
<b>181.</b>	<b>Unenforceability of Certain Secrecy Agreements .....</b>	<b>4101</b>
	* * * * *	

**CHAPTER 181—UNENFORCEABILITY OF CERTAIN  
SECRECY AGREEMENTS**

Sec.  
4101. *Unenforceability of certain secrecy agreements.*

**§ 4101. Unenforceability of certain secrecy agreements**

(a) *IN GENERAL.*—Subject to subsection (b), an agreement, promise, or directive to restrict the dissemination of information regarding the cause of a discharge into waters off the shore of the United States of a substance that contaminates a marine or coastal environment or endangers public health, regarding the nature or extent of such a discharge, regarding the damage caused or threatened by such a discharge, or regarding the efforts to remediate the effects of such a discharge, shall be void as against public policy and unenforceable in any legal proceeding.

(b) *EXCEPTION.*—

(1) *GENERALLY.*—Subsection (a) does not apply with respect to a directive contained in a court order, or issued by a Government agency with authority to enforce such a directive in a court, restricting dissemination of information as necessary to protect public health or safety.

(2) *PROCEDURE RELATING TO EXCEPTION.*—

(A) A court shall not grant judicial enforcement of a directive or order described in paragraph (1) unless the proponent of the directive or order proves by clear and convincing evidence that such enforcement is permitted under paragraph (1).

(B) If a court grants judicial enforcement of any directive or order described in paragraph (1), the court shall state the court's factual findings and conclusions of law relating to that enforcement on the record.

\* \* \* \* \*

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**TITLE 11, UNITED STATES CODE**

\* \* \* \* \*

**CHAPTER 3—CASE ADMINISTRATION**

\* \* \* \* \*

**SUBCHAPTER I—COMMENCEMENT OF A CASE**

\* \* \* \* \*

**§ 303. Involuntary cases**

(a) \* \* \*

\* \* \* \* \*

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced. *If the debtor is liable under any law for a claim arising from an incident (as defined in section 1001 of the Oil Pollution Act of 1990, and that gives rise to liability under such Act), the debtor may not sell or lease all or substantially all property of the debtor (or, to the extent that the court has or can obtain jurisdiction over any affiliate of the debtor, property of such affiliate) unless the entity that acquires such property (including any affiliate of such entity) assumes the obligation to pay the amount of allowed unsecured claims arising from such incident that is not paid by the debtor, or creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.*

\* \* \* \* \*

**SUBCHAPTER IV—ADMINISTRATIVE POWERS**

\* \* \* \* \*

**§ 363. Use, sale, or lease of property**

(a) \* \* \*

\* \* \* \* \*

(q) *Notwithstanding any other provision of this section, if the debtor is liable under any law for a claim arising from an incident (as defined in section 1001 of the Oil Pollution Act of 1990, and that gives rise to liability under such Act), the trustee may not sell or lease all or substantially all property of the estate of the debtor (or, to the extent that the court has or can obtain jurisdiction over any affiliate of the debtor, property of such affiliate) unless the entity that acquires such property (including any affiliate of such entity) assumes the obligation to pay the amount of allowed unsecured claims arising from such incident that is not paid by the debtor, or unless creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.*

\* \* \* \* \*

**CHAPTER 11—REORGANIZATION**

\* \* \* \* \*

**SUBCHAPTER II—THE PLAN**

\* \* \* \* \*

**§ 1129. Confirmation of plan**

(a) \* \* \*

(b)(1) \* \* \*

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) \* \* \*

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; **[or]**

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section**[.1]**; or

*(iii) that includes claims of the kind described in section 363(q), if the plan provides for a sale or lease of all or substantially all of property of the estate, the plan requires the entity that acquires such property (including any affiliate of such entity) to assume the obligation to pay the amount of allowed unsecured claims arising from an incident described in section 363(q) that is not paid by the debtor, or creditors holding at least two-thirds in amount, and more than one-half in number, of such claims consent to different treatment.*

## ADDITIONAL VIEWS

No one wants to see BP, Transocean, or any other party responsible for the Gulf coast oil disaster let off the hook for the tremendous amount of damage they have caused to the Gulf of Mexico and surrounding coastal states or for the lives lost in the fire and explosion aboard the *Deepwater Horizon*. Those responsible for this tragedy, and the economic damage, personal injury, and death it has caused, must be held fully accountable.

H.R. 5503, the “Securing Protections for the Injured from Limitations on Liability Act,” was introduced in response to liability questions that have arisen in the wake of the Gulf oil spill. Certainly, the intent underlying this legislation is good. However, H.R. 5503 is a very broad bill with only two major provisions directed solely at oil-spill related issues. The bill will likely have unintended consequences that reach well beyond the Gulf oil spill. Despite the fact that the bill is not emergency legislation aimed directly at the ongoing spill and that the bill applies retroactively, obviating the need for immediate, expedited consideration, the Committee did not hold a single legislative hearing on any of the bill’s provisions to help understand their full impact.

Nonetheless, without the benefit of even a single legislative hearing, H.R. 5503 virtually re-writes U.S. maritime law, making portions of it out-of-step with the maritime-liability laws of nearly every other seagoing nation; eliminates important provisions of the Class Action Fairness Act, a statute passed just 5 years ago, with strong bi-partisan support, to ensure that class actions are decided in a neutral, fair forum—the Federal courts; and makes significant amendments to provisions of the Bankruptcy Code for debtors with oil-spill liability. Given the sweeping nature of the changes in this bill and the lack of committee process to create a record so members could understand its full effects, we were unable to support this legislation.

## BACKGROUND

### A. *Death on the High Seas Act*

Before the enactment of the Death on the High Seas Act (DOHSA), general maritime law did not permit the survivors of a person killed on the high seas to bring an action for wrongful death.<sup>1</sup> In 1920, Congress enacted DOHSA to remedy this harsh consequence of general maritime law and create a cause of action in admiralty for wrongful deaths occurring more than three miles

<sup>1</sup>*The Harrisburg*, 119 U.S. 199 (1886) (holding that admiralty afforded no remedy for wrongful death in the absence of an applicable state or Federal statute). In 1970, the Supreme Court reversed its decision in *The Harrisburg* and provided for a general maritime cause of action for wrongful death. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). The general maritime cause of action is not applicable in cases in which other Federal statutory law (e.g., the Jones Act or DOHSA) applies.

from shore, outside the territorial waters of the states. DOHSA limits the class of beneficiaries to the decedent's "spouse, parent, child, or dependent relative,"<sup>2</sup> establishes a 3-year period of limitations,<sup>3</sup> allows suits filed by the victim to continue as wrongful-death actions if the victim dies of his injuries while the action is pending,<sup>4</sup> and provides that contributory negligence will not bar recovery.<sup>5</sup> With respect to damages, the statute provides that the "recovery . . . shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought."<sup>6</sup> Liability may be based on intentional acts, negligence, or unseaworthiness. DOHSA preempts all state wrongful death statutes<sup>7</sup> and actions under general maritime law.<sup>8</sup>

### B. Jones Act

In 1920, Congress enacted the Jones Act to remove the maritime law's bar to a seaman's suit for negligence. Under the Jones Act, which makes applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act,<sup>9</sup> employees have a right of recovery for injuries resulting from the negligence of the shipowner, the operator, the captain, or fellow members of the crew. The Jones Act does not allow for the recovery of non-pecuniary damages. An action under the Act may be brought either in Federal court or state court, and a seaman is entitled to a jury trial (a right which is not afforded by general maritime law). In order to be considered a "Jones Act seaman," a worker must have (1) an employment-related connection, which is substantial in both nature and duration,<sup>10</sup> (2) to a vessel in navigation.

The Jones Act is best thought of as an analog to land-based workers' compensation laws, which do not apply to seamen working on U.S.-flagged vessels. Proof of negligence under the Jones Act does not require as high a burden of proof as is required for the general common law tort of negligence. Under the Jones Act, an injured seaman only needs to prove that his employer's negligence is "a" cause of his injuries. Thus, an employer is liable under the Jones Act if the employer's actions "played any part, no matter how small, in bringing about the injury or damage."<sup>11</sup> Courts have described the seaman's burden of proving Jones Act negligence as "featherweight."<sup>12</sup>

### C. Limitation of Liability Act

Congress enacted the Limitation of Liability Act (Liability Act) to encourage shipbuilding and to induce investment in the maritime industry by limiting the liability of vessel owners to the value of the vessel involved, together with its freight then pending. Claims

<sup>2</sup> 46 U.S.C. § 30302.

<sup>3</sup> 46 U.S.C. § 30106.

<sup>4</sup> 46 U.S.C. § 30305.

<sup>5</sup> 46 U.S.C. § 30304.

<sup>6</sup> 46 U.S.C. § 30303.

<sup>7</sup> *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 209 (1986).

<sup>8</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998).

<sup>9</sup> 45 U.S.C. §§ 51–60.

<sup>10</sup> To be considered a substantial connection with a vessel, the worker must spend at least 30 percent of his time in the service of a vessel on navigable waters. *Chandris, Inc., v. Latsis*, 515 U.S. 347 (1995).

<sup>11</sup> See Ninth Circuit Model Civil Jury Instructions No. 9.4.

<sup>12</sup> *Comeaux v. T.L. James & Co., Inc.*, 702 F.2d 1023 (5th Cir. 1983).



for personal injury and death have higher limits of liability over and above the value of the vessel and its freight. Additionally, certain other claims, including those for breach of contract, wages and environmental damage, are not subject to any limitation. A shipowner may invoke the protection of the Liability Act in two ways: (1) by asserting limitation of liability as a defense to a lawsuit; and (2) by filing a petition in Federal court seeking either exoneration from or limitation of liability and requiring all parties to bring their claims into that court. For purposes of H.R. 5503 and the Gulf oil spill, the two most important features of the Liability Act are the provisions concerning personal injury and death and the concursus provision that requires all claims to be filed before one Federal court.

It is important to note that liability for oil spill and pollution related claims under the Oil Pollution Act are not covered by the Liability Act. The Oil Pollution Act has been interpreted to apply exclusively to such claims notwithstanding the Liability Act.

#### *D. Class Action Fairness Act*

Prior to enactment of the Class Action Fairness Act, most class actions were adjudicated in state courts, where the governing rules were applied inconsistently and often in a way that violated basic fairness and due process, and where there was often inadequate supervision over litigation procedures and proposed settlements. The Act corrected those flaws in the diversity jurisdiction statute<sup>13</sup> that prevented most interstate class actions from being adjudicated in Federal courts. Thus, it furthered one of the primary historical reasons for diversity jurisdiction, which “is the reassurance of fairness and competence that a Federal court can supply to an out-of-state defendant facing suit in state court.”<sup>14</sup>

As relevant to H.R. 5503, the Class Action Fairness Act (CAFA) amended 28 U.S.C. § 1332 to provide Federal district courts with original jurisdiction of class actions if there are 100 or more class members, the aggregate amount in controversy exceeds \$5,000,000, and: (A) any class member is a citizen of a state different from any defendant; (B) any member of the plaintiff class is a foreign state, or a citizen or subject of a foreign state, and any defendant is a citizen of a state; or (C) any member of the plaintiff class is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. This change was a stark contrast to prior law, which required diversity of citizenship between every class representative and also required that every plaintiff seek damages in excess of \$75,000. The pre-CAFA system easily allowed plaintiffs to avoid removal to Federal court by including a single non-diverse class representative, or by limiting an individual plaintiff’s claims to under \$75,000.

#### DISCUSSION

In general, we opposed H.R. 5503 in committee for two main reasons. First, although H.R. 5503 is being pushed as a response to liability issues that have arisen in the wake of the Gulf oil spill (in-

<sup>13</sup> 28 U.S.C. § 1332.

<sup>14</sup> *Davis v. Carl Cannon Chevrolet-Olds, Inc.* 182 F.3d 792, 797 (11th Cir. 1999).

deed the acronym for the bill is the “SPILL Act”), the provisions in the bill are not limited to either the Gulf oil spill or oil spills generally. Rather, the bill’s provisions make major changes to, among other things, U.S. maritime liability laws, the Class Action Fairness Act, and the Bankruptcy Code. In other words, the bill affects a wide range of interests that not only have no association with the Gulf oil spill, but are not even associated with the oil industry.

Second, the bill is making these changes without even the benefit of one legislative hearing. Without a legislative hearing, we have no clear understanding of the full impact of the bill’s provisions. Understandably, sometimes legislation must move on an expedited basis to respond to emergencies; however, by its own terms H.R. 5503 applies retroactively, providing the committee with a window of time in which to conduct the hearings required to ensure that the changes made by the bill are necessary and that the unintended consequences are limited.

Beyond these two overarching concerns with H.R. 5503, we have several specific concerns with the bill’s provisions:

**Non-pecuniary damages.** H.R. 5503 provides for non-pecuniary damages under both the Death on the High Seas Act and the Jones Act. While it is understandable that in the wake of this tragedy, and in the name of holding the responsible parties fully accountable, there would be a push to provide decedents with the ability to claim additional damages, the non-pecuniary damages provisions apply to all cases brought under both acts and thus will have broad impact. It is unclear how significantly this change will affect U.S. maritime interests. However, we do know that in general awards of non-pecuniary damages are unpredictable, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries place on such losses.

Additionally, with regard to allowing such damages under the Jones Act in particular, the change made by H.R. 5503 may create inequities for other American workers versus Jones Act seamen. The Jones Act, like the Federal Employer Liability Act (FELA) and the Longshore and Harbor Workers Compensation Act (LHWCA), is best thought of as an analog to state workers’ compensation statutes, not state tort law. But state workers’ compensation schemes, FELA, and LHWCA do not generally provide for the award of non-economic damages. Combined with the fact that the negligence standard under the Jones Act has been characterized as “featherweight,” the provision of non-pecuniary damages under the Jones Act may be highly problematic.

Unfortunately, just as with the other provisions in this bill, we did not have a hearing on these non-pecuniary damages provisions to understand how they will affect the U.S. maritime industry, which by most accounts is already in significant decline. Overturning long-settled expectations and possibly adding significant new costs could weaken the industry even further and lead to domestic job losses. We should not run that risk without a legislative record.

**Limitation of Liability Act.** Section 4 of H.R. 5503 repeals the Liability Act without adopting any replacement legislation to fill the void in the United States for purposes of limitation of liability

for vessel-related incidents. However, the Liability Act is an important feature of U.S. maritime law addressing the liability of a vessel owner in the aftermath of a marine casualty, usually involving numerous parties with competing damage claims, loss of life or personal injury, and several potential jurisdictions in which claims may be filed. Repeal of the Liability Act without a suitable replacement mechanism will introduce uncertainty and in many cases may result in inadequate funds to compensate non-Oil Pollution Act claimants for personal injury and property damage resulting from a vessel casualty.

The Liability Act provides a procedure in admiralty to enjoin all pending suits, and requires a concursus to compel all claims to be filed in a special limitation proceeding so that liability may be determined in one Federal forum. This procedure promotes judicial efficiency because it requires all claims from one incident to be litigated before a single Federal judge instead of multiple different forums with potentially conflicting or competing judgments. While limitation of liability promotes consistency and reliability for commercial interests involved in the shipping industry, the Act also benefits claimants because it requires the vessel owner to create a compensation fund to pay claimants. The vessel owner is required to file a “stipulation for value” in the form of a bond or other acceptable security for payment of claims arising out of the incident. The Act also requires the owner to create a personal injury fund (\$420 per gross ton of the vessel’s weight) to compensate personal injury or death claimants apart from property damage or other claims. By repealing the Act, this compensation fund will not be available to secure the claims of parties.

The principle of global limitation of liability is vital to the international shipping industry. In particular, a large number of jurisdictions worldwide (52 nations as of May 31, 2010, including Canada, Mexico, United Kingdom, France, Germany, Spain, Italy, Japan, South Africa, and Korea) have adopted the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC). The Protocol of 1996 amended the LLMC to provide for enhanced compensation and to provide a simplified procedure for updating the limitation amounts.

If Congress wants to update or modernize the Liability Act, the answer is not simply to repeal the Act as is done in H.R. 5503. The LLMC and the Protocol of 1996 provide a useful example of a consensus among the international shipping nations for a workable compensation scheme that addresses modern concepts of insurance and liability with respect to claims against an owner and also creates a larger compensation fund based on the gross tonnage of the vessel involved.

**Class Action Fairness Act.** The proposed amendments to the Class Action Fairness Act (CAFA) in H.R. 5503 are unnecessary and run counter to the very purpose of CAFA. CAFA was intended to ensure that actions involving minimal diversity (that is, cases brought by plaintiffs of one state against defendants of another state) are decided in a neutral, fair forum—the Federal courts. The alternative—permitting such actions to be tried in local courts, often with elected trial court judges, who favor local plaintiffs over out-of-state businesses—leads to unjust results.

H.R. 5503 amends CAFA by providing that the CAFA minimal diversity provisions do not apply to “an action brought by a State or a subdivision of a State on behalf of its citizens.” However, this change is entirely unnecessary as courts appear uniformly to agree that CAFA does not provide Federal jurisdiction over enforcement actions brought by states on behalf of their citizens.<sup>15</sup> Thus, the only real effect of the CAFA provisions in H.R. 5503 is to create a loophole that would keep legitimate class actions and mass actions from being removed to Federal court.

This loophole would encourage enterprising attorneys to avoid Federal jurisdiction by finding state attorneys general to join their class action lawsuits. Rather than promote justice, such a result would promote questionable collaborations between private attorneys and public officials, in which the attorneys seek the state attorney general’s signature in order to avoid Federal jurisdiction. As Senator Hatch noted in floor debate on CAFA of an amendment with similar language to the language in H.R. 5503,

this amendment is not only unnecessary, it actually creates opportunities for gaming. If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs’ lawyers to figure out that all they need to do to avoid the impact of S. 5 is to persuade a State attorney general to simply lend the name of his or her office to a private class action. In other words, plaintiffs’ lawyers will try to keep interstate class actions in State court by simply naming that State’s attorney general at the end of complaint as a co-counsel or of-counsel.<sup>16</sup>

In effect, the amendments to CAFA contained in H.R. 5503 circumvent the law by creating a situation in which state attorneys general could partner with personal injury lawyers and bring private class actions for tort or contract damages that must stay in state courts. In other words, including a state attorney general as a co-plaintiff on a private class action might be enough to nullify CAFA, raising serious conflict of interest, legal ethics, and constitutional issues.

**Enforceability of Secrecy Agreements.** Section 6 of H.R. 5503 would make court orders restricting the dissemination of broad categories of information related to oil spills void and unenforceable in any legal proceeding, with very limited exception. The Judicial Conference of the United States has expressed serious concerns regarding this provision. According to the Conference, “[n]ot only does Section 6 circumvent the process for amending the Federal Rules of Civil Procedure that Congress established in the Rules Enabling Act, it threatens litigants’ rights and interests and creates an unworkable procedure for the cases covered by H.R. 5503.”<sup>17</sup>

<sup>15</sup>For instance, a state may bring an enforcement action for violation of the state’s unfair and deceptive trade practices statute to enjoin a deceptive practice and/or seeking civil penalties and other remedies authorized by the state statute. See, e.g., *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 946–47 (E.D. Mo. 2010); *Connecticut v. Moody’s Corp.*, 664 F. Supp. 2d 196, 202 (D. Conn. 2009).

<sup>16</sup>151 Cong. Rec. S 1157 (Feb. 9, 2005).

<sup>17</sup>Letter from the Judicial Conference of the United States, Committee on Rules of Practice and Procedure, to the Hon. Lamar Smith, Ranking Member, House Judiciary Committee (June 28, 2010) (internal citations omitted).

The Judicial Conference explains that the “provisions in Section 6 would prohibit a court from enforcing a protective or confidentiality order that is necessary to protect vital privacy rights.”<sup>18</sup> Moreover, the Conference notes that section 6 “is unnecessary to achieve the bill’s purposes and has the potential to do great harm to those already struggling with the effects of the oil spill.”<sup>19</sup> Furthermore, according to the Conference, section 6 “provides an unworkable procedure that would delay and complicate discovery in the very cases that should be handled with expedition and efficiency to provide needed relief to those affected by the spill.”<sup>20</sup> Ultimately, the Judicial Conference concludes that section 6 should be removed from the legislation.

**Bankruptcy Protections.** The impact of the bankruptcy provisions in H.R. 5503 is particularly difficult to understand fully without a legislative hearing. Certainly, no one wants BP or any other company with oil spill liability to file an opportunistic chapter 11 bankruptcy to avoid its liability under the Oil Pollution Act and related laws. However, the bill’s proposed changes to the Bankruptcy Code are substantively questionable.

The bill effectively gives oil spill liability claimants a veto over any asset sale unless they are paid in full and does not allow for confirmation of a chapter 11 plan that provides for the sale of assets unless oil spill claimants are either paid in full or consent to the sale. But, property cannot be sold for more than its value. Thus, if there is insufficient unencumbered value left in any property proposed to be sold in bankruptcy to compensate fully oil spill claimants, the oil spill claimants will have to agree to the sale or the sale will be blocked.

The bankruptcy provisions in this bill, therefore, appear designed to give oil spill claimants leverage over secured claimholders by blocking sales of their collateral unless someone pays them off even before the secured claim is paid off. Accordingly, the bankruptcy provisions raise constitutional questions under the Fifth Amendment because they undermine the value of the collateral of the secured claimholders. In addition to the constitutional concerns, if property needs to be sold, it creates a stalemate between the debtor’s secured claimholders and other unsecured claimholders on the one hand, and the oil spill claimants on the other. Normally, if Congress wants to give claimants an advantage in bankruptcy, it gives some or all their claims (up to whatever amount Congress determines) priority status under 11 U.S.C. § 507(a).

Giving veto power, leverage, and quasi priorities to oil spill claimants may sound good, but the flipside is that it demotes all other secured and unsecured claims. Why are these oil pollution claims more entitled to payment than other claims? What about personal injury bankruptcy claimants, should their claims be given less bankruptcy protection? Or, secured claimants, which in many cases include pension funds that have invested people’s retirement savings in what would otherwise be relatively safe investment vehicles, should their claims be put behind oil spill claimants?

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Perhaps oil spill claimants should be given additional bankruptcy protections. But the exact nature of these protections and their impact needs to be examined through the normal legislative process of conducting hearings. BP is not on the verge of bankruptcy, as is demonstrated by its willingness to set up a \$20 billion escrow fund, backed by BP assets. Ironically, the impact of this reform may be to make it harder for smaller firms to obtain financing, ultimately benefiting BP (and other large oil companies) by driving out potential competitors from off-shore drilling. The committee has the time to conduct a legislative hearing to ascertain the correct level and form of any needed bankruptcy protection for oil spill claimants.

#### REPUBLICAN AMENDMENTS

**Limit the bill's provisions to claims arising out of oil spills.** Ranking Member Smith offered an amendment to limit H.R. 5503 to claims arising out of oil spills. The amendment was rejected on a party-line vote.

**Remove the Class Action Fairness Act provisions from the bill.** Mr. Goodlatte offered an amendment to strike section 5 of the bill, which contains provisions amending the Class Action Fairness Act. The amendment was defeated on a voice vote.

**Limit the bill's Class Action Fairness Act provisions to claims arising out of oil spills.** Mr. Goodlatte also offered an amendment to limit the bill's Class Action Fairness Act provisions to cases arising out of oil spills. The amendment was withdrawn.

**Waiver of the Jones Act restrictions on the operation of foreign vessels in U.S. waters.** Mr. Lungren offered an amendment to waive the Jones Act provisions that restrict foreign vessels from aiding in the cleanup efforts in the Gulf of Mexico. The amendment was ruled non-germane.

#### CONCLUSION

Those responsible for the Gulf coast oil disaster must be held fully liable, and Congress must ensure that U.S. liability laws are sufficient to ensure that result. However, without having held a legislative hearing to understand the full impact of H.R. 5503, we should not have moved this bill through committee on such an expedited basis. The extensive changes to U.S. maritime liability law in H.R. 5503, which apply well beyond oil spills, threaten to increase dramatically the cost of shipping goods—an increase that will be borne by all American consumers, and may put American jobs at risk. Additionally, the legislation unnecessarily amends the Class Action Fairness Act, opening up the very realistic possibility of enterprising trial attorneys gaming the system and circumventing Federal law to keep class actions out of Federal court. Finally, the bill essentially gives Oil Pollution Act claimants veto power over essential aspects of the bankruptcy process, seriously curtailing the rights of other bankruptcy claimants.

Because this bill applies retroactively, there is no reason to rush this bill through committee, recommending that the full House adopt it, without having taken the time to conduct a single legislative hearing on its sweeping provisions. As Congress considers

amending the law to ensure that BP is held accountable for the Gulf oil spill, it should avoid harming, rather than advancing, the national interest. Without proper consideration of these proposed changes to the law, however, Congress risks harming the nation in order to punish BP.

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