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VESSEL OWNER’S LIABILITY TO THE STATES FOR OIL POLLUTION DAMAGE

By Eugene T. Kinder, Jr.*

INTRODUCTION

As a result of an increasing number of oil spills from tankers, causing extensive damage to state and private property, a number of states have recently enacted environmental protection legislation dealing specifically with the problem. Over 60% of the world’s oil is transported by sea and an effective way to minimize oil spill damage and to reimburse those suffering losses is a necessity. Because of the substantial state interest in protecting the local environment, and because the states have the primary responsibility for pollution control under the Environmental Quality Improvement Act, it would seem that the state’s initiative is proper and lawful. However, because these spills occur in the medium of navigable waters, which are under federal jurisdiction, the states may find that their ability to provide legislative remedies for oil pollution damage is severely limited by the existing maritime law. This is the conclusion reached by two recent decisions: In re Harbor Towing Corporation and American Waterway Operators Inc. v. Askew (hereinafter Harbor Towing and Askew).

MARITIME LAW AND ADMIRALTY JURISDICTION

Under Article 3, Section 2 of the United States Constitution, the federal judiciary has exclusive jurisdiction over cases in admiralty. In addition to this grant of exclusive jurisdiction, Congress has the power to regulate activities on navigable waters under the commerce clause. Thus it is generally accepted that the substantive maritime law consists of legislation enacted by Congress, and interpreted and applied by federal courts. Admiralty jurisdiction applies to all causes of action which arise on “all waters, salt or
fresh, with or without tides, which are in fact navigable in inter-
state or foreign commerce." Thus admiralty jurisdiction applies to
all navigable waters, whether they are considered state territory or
not.

In 1948, Congress extended admiralty jurisdiction to cover
damages to shore structures by vessels, by enacting the Extension
of Admiralty and Maritime Jurisdiction Act. This Act enabled
landowners, who suffered damage consummated on land caused by
a vessel on navigable waters, to take advantage of the jurisdic-
tion of the admiralty courts to seek recovery. Since damage to property
resulting from oil discharged on navigable waters has been recog-
nized as a maritime tort, recovery in admiralty is available to
landowners who can prove negligence of the crew or unseaworthi-
ness of the vessel. Unfortunately, a landowner's ability to recover
may be somewhat illusory. Shoreline damage resulting from an oil
spill is often remote in time and distance from the original spill.
This creates evidentiary problems which make proof of negligence
in oil spill cases difficult or impossible, even under the liberal
rules of evidence used in admiralty proceedings in federal courts.
Additionally, even where the injured landowner successfully proves
negligence, he may recover less than the amount of his loss.

In the Limitation of Vessel Owner's Liability Act (hereinafter
the Limited Liability Act) Congress established a procedure
whereby an owner of a vessel can limit his liability for damages
caused by that vessel to his interest in the value of the vessel and
its freight pending. In the case of an oil spill the difference between
the actual damage resulting from the spill and the value of the
vessel and the oil can be considerable.

The Limited Liability Act is the result of a Congressional effort
in 1851 to encourage ship building and commerce. Congress en-
acted the Limited Liability Act to limit the potentially great lia-
ability of a vessel owner. The Act provides in part:

The liability of the owner of any vessel, . . . for any loss, damage, or
injury by collision, or for any act, matter, or thing, loss, damage,
or forfeiture, done, occasioned, or incurred, without the privity or
knowledge of such owner or owners, shall not . . . exceed the amount
or value of the interest of such owner in such vessel, and her freight
then pending. (emphasis added)

The theory behind this legislation was that while a ship is at sea,
the owner has minimal control over it and should not be held
liable for damages beyond his interest in the vessel and its freight, unless such damage was caused by a condition of which, in the exercise of due diligence, he should have known. This exception to the application of the Limited Liability Act is most important to the injured party. The federal courts, in an attempt to balance the great advantage an owner has in being able to limit liability, have placed the burden of proof of establishing lack of knowledge on the owner. Though an owner can generally sustain this burden, he must show more than lack of knowledge. The test is not merely what the owner knows, but rather what the owner should reasonably have discovered in the exercise of due diligence. In other words, if the owner himself were negligent, as opposed to the negligence of one of his employees, he would not be entitled to limit his liability. Furthermore, in certain instances, the owner’s breach of a non-delegable statutory duty required by the Rules of Navigation may give rise to a conclusive presumption of privity or knowledge in the cause of loss, thus making the owner ineligible to limit his liability under the statute. Thus, where the loss is caused by the negligence of the master or crew, limitation will be allowed; where the owner’s negligence or breach of statutory duty is the proximate cause of the loss, limitation will not be allowed.

While admiralty jurisdiction is available to landowners suffering oil spill damage, the ability of an owner to limit liability means this remedy is feasible only in the small number of instances where either knowledge on the part of the owner can be shown, or where the total damage caused by the spill does not exceed the value of the vessel and its freight. In view of these inadequacies, several states have enacted legislation aimed at providing for full recovery for oil spill damage. Generally, these laws attempt to eliminate the two major obstacles to recovery presented by maritime law, by making the owner of a vessel which spills oil strictly liable without regard to fault, and by making the measure of recovery actual damages rather than the limited interest of the owner.

For example, California law provides in part that:

... any owner or operator of any vessel engaged in the transportation of petroleum or fuel oil shall be absolutely liable without regard to fault for any property damage incurred by the state or by any county, city or district, or by any person, ... and for any damage to the natural resources of the state, including marine and wildlife resources. ...
Similarly, the State of Washington provides in part that:

Any person owning oil or having control over the same which enters the waters of the state . . . shall be strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by such entry.21

Connecticut law contains the following provisions:

Any person . . . which directly or indirectly causes pollution and contamination of any land or waters of the state through the discharge . . . of oil or any petroleum or chemical liquid or product shall be liable for all costs and expenses incurred . . . in containing and removing such pollution. . . . 22

Since the transportation of petroleum is an ultra-hazardous business likely to cause damage to the public, some writers argue that the theory of strict liability is applicable.23 However, a real question exists as to whether states have the legislative authority to introduce unlimited, strict liability into the maritime law. As stated previously, the maritime law consists solely of federal legislation and federal judicial interpretation, and any state legislation in direct conflict with expressed federal objectives would be invalid by virtue of the Supremacy Clause.24

Furthermore, even in the absence of a direct conflict, state legislation may be pre-empted and therefore invalid because of the pervasiveness of the federal legislation in the maritime field and the overriding national interest in maintaining uniformity in the maritime law. This pre-emption question, or rather the extent to which state legislation on oil spill recovery is limited by the existing federal law, is dealt with in both Harbor Towing and Askew.

**Limitation of Liability: The Breach of Statutory Duty Role**

*Harbor Towing* was decided in 1971 by the U.S. District Court for the District of Maryland.25 While loading heavy fuel oil at a Humble Oil Terminal in Baltimore Harbor, a barge owned by the Harbor Towing Corp. negligently spilled 68,000 gallons of oil into the harbor. As a result of the spill, the Maryland Port Authority and the State Department of Natural Resources claimed $28,000 in damage for clean up costs. Humble Oil claimed $170,000 in additional clean up expenses. With additional private claims, the total claimed damages reached approximately $267,000.26 Har-
bor Towing then filed a petition to limit liability pursuant to the Limited Liability Act, and the court limited liability to $33,000 plus the value of the tugboat involved. The Limited Liability Act requires apportionment of the limitation fund to each of the claimants by their percentage of the total damage. The state, having a claim which represents approximately 10% of the total damage, would recover far less than the $28,000 it expended in the clean up operations.

Since Harbor Towing had not breached a statutory duty under the Rules of Navigation which would disallow limitation, the state, in order to gain full recovery, argued that breach of a statutory duty under Maryland law should make the defendant unable to limit liability. To be successful, the state's argument must convince the court that Harbor Towing's breach of the Maryland Water Resources Act by discharging oil is legally equivalent to a breach of a non-delegable maritime obligation, which would disallow limitation. The Maryland Water Resources Act provides:

... it shall be unlawful for any person to discharge or permit the discharge of oil in any manner into or upon the waters within the jurisdiction of the State of Maryland from any vessel ...

The State asserts that this statute is criminal in nature, and is therefore analogous to the federal Wreck Statute which provides in part that:

It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels . . . in navigable channels . . . in such manner as to obstruct . . . navigation. And whenever a vessel . . . is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it . . . and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful . . .

It has been held that violation of the Wreck Statute will make limitation of liability for a subsequent loss unavailable to the owner.

There are two rationales for the Wreck Statute exclusion to limitation of liability. The first rationale is that once a wreck occurs, the statute imposes an immediate and continuing non-delegable duty upon the owner to take steps to insure that the wreck of his ship will not cause damage to other vessels. Breach of this duty makes the owner unable to limit his liability for proximately resulting damage. This interpretation seems reasonable under the
language of the Limited Liability Act, since the owner has knowledge of a condition which proximately causes damage and thus limitation should not be allowed under the privity or knowledge exception. The second rationale is based on the statutory duty exception and maintains that the breach of the Wreck Statute negates the right of limitation because the statute is criminal in nature. In *The Snug Harbor*, the U.S District Court for the Eastern District of New York stated that “neglect alone predicated on the conduct of the owner does not preclude limitation of liability, but the violation of a statute criminal in nature does preclude limitation of liability.” However, this language was dicta, since the fact situation of the case supports the first rationale above. The court indicated that the major reason for not allowing limitation of liability was that the owner had knowledge that the wreck of his ship presented danger to navigation, but failed to comply with his duties under the Wreck Statute to protect other ships from subsequent damage. Thus the damage occurred with the knowledge of the owner, and under the Limited Liability Act limitation was not available.

The U.S. District Court for the Southern District of Ohio in *In re Midland Enterprises, Inc.* pointed out that the statutory duty exception to limitation may not be a unique exception because the authorities, which supposedly support this exception, arise out of fact situations in which the owner would be unable to limit his liability anyway under the privity or knowledge exception to the Limited Liability Act. Knowing breach of a criminal statute or of the Rules of Navigation seems to be equivalent to knowledge by the owner of the cause of loss and precludes limitation under the Limited Liability Act. In other words, under the *Midland* rationale, the major consideration in determining whether an owner has the right to limit, is not the breach of a duty in itself, but rather whether the breach necessarily indicates the knowledge of the owner of the cause of loss. When an owner knowingly fails to perform a duty required by statute, and that failure is the cause of a subsequent loss, the owner may not limit his liability because the loss was not “incurred without the privity or knowledge of such owner,” the prerequisite for limitation.

Though *In re Midland Enterprises, Inc.* indicates there are unanswered questions in this area, its reasoning implies that disallowance of limited liability requires more than a mere showing of a violation of a statute, unless that violation implicitly demonstrates
the owner's knowledge in the cause of loss. However, this does not necessarily void Maryland's argument that a breach of a state criminal statute should disallow limitation. In order to uphold the state's argument, within the scope of In re Midland Enterprises, Inc., the court would have to hold that the Maryland statute prohibiting oil discharges imposed the same non-delegable duty on vessel owners that are imposed by the Rules of Navigation. Though violation of a statute imposing a non-delegable duty, as for example the Wreck Statute, may demonstrate per se such knowledge on the part of the owner, the court in Harbor Towing properly points out that the Maryland statute does not impose the necessary affirmative duty to act once a loss occurs. Under the Wreck Statute an affirmative duty to mark the wreck arises as soon as the wreck occurs. However, the only duty required by the Maryland Statute is the duty not to spill oil, and no subsequent duty, analogous to the duty to mark under the Wreck Statute, comes into existence when the spill occurs. Therefore the discharge of oil resulting from negligence of the crew of the barge is particularly the type of loss for which limitation of the owner's liability is meant to be available.

Though the state is forced into the unsuccessful position of analogizing its statute to the Wreck Statute, its argument has some force in a different context. An oil spill presents the same problem that a wreck does. Once the original act occurs (the discharge of oil or the sinking of a vessel) there can be extensive subsequent damage if the spill or the wreck is left unattended. Furthermore, subsequent damage can be minimized or eliminated if proper steps are taken immediately to contain the oil or mark the wreck.

Thus, once an owner gains knowledge that oil has spilled from his ship, if he fails to take effective action to prevent subsequent loss, he should be considered in privity with the cause of that loss and thus not able to limit liability. For example, if an owner learns of an oil spill before the oil has reached shoreline property, he could perhaps limit his liability as to immediate damage to aquatic life, but if he neglects to take action to contain the oil, he should not be able to limit liability for the subsequent damage to shoreline property. This assumes that state legislation imposes a duty on an owner to contain or remove oil once he has learned of a spill. Such a statute would make the decision in Harbor Towing more difficult, but would not necessarily require a different result, since the authority of the states to impose duties on vessel owners not imposed by the federal law is dubious.
OIL SPILL LIABILITY

FEDERAL DOMINANCE IN THE MARITIME FIELD:
THE PRE-EMPTION ISSUE

Under federal law, there is no duty to remove or contain oil which would interfere with the right to limit liability. States have no authority to impose such a duty in maritime law if federal legislation is so pervasive and so dominant as to pre-empt state legislation. For example, in *Southern Pacific Co. v. Jensen*, where a stevedore was accidentally killed while unloading a ship, the United States Supreme Court held that the New York Workmen’s Compensation Act was unconstitutionally applied since Congress alone has the power to provide regulations in the maritime law. Though the states have been allowed to legislate on matters of predominantly local concern such as pilotage and harbor regulations, it is clear that such legislation may not interfere with the uniform federal law.

The doctrine of pre-emption has also arisen where the state is acting under its police power to protect local environmental interests. In *Lockheed Air Terminal v. The City of Burbank*, the U.S. Court of Appeals for the Ninth Circuit held that the state police power is generally not assumed to be superseded, but federal authority may arise by implication where: (1) federal regulation is pervasive; (2) the federal interest is dominant; and (3) federal objectives would be obstructed by the non-federal regulation. Here, the court decided that the federal interest in air traffic control pre-empted local legislation affecting air traffic in spite of the prerogative of local governments to promote local environmental interests under the Environmental Quality Improvement Act. Similarly, the constitutionally expressed federal interest in maintaining uniformity within the maritime law has led federal courts to the conclusion that it is federal law which determines a vessel owner’s liability and that the states are not free to act in this area.

For example, in *The Central States* the U.S. District Court for the Eastern District of New York dealt with New York’s right to impose the duty of removal of a sunken vessel on an owner, or in the alternative, to hold him fully liable for the removal costs incurred by the state. Here, a vessel came in contact with ice in the Erie Canal and sank, without negligence on the part of the owner or the crew. Under a state criminal statute, the owner was required to remove the wreck or be responsible for full removal expenses if the state was forced to perform his duty for him. However, under federal law, a non-negligent owner has the right to abandon a
wreck and limit his liability to the value of the vessel and its freight pending. Thus the court allowed limitation holding that the state statute was invalid as conflicting with express federal objectives of the maritime law.

It would seem that a state statute requiring one responsible for an oil spill to remove the oil or be subject to full liability for its removal might also be invalid as going beyond federal policy on oil pollution. However, federal law is silent on the removal of oil once spilled, whereas the owner of a wreck has the express right to abandon. Because the damage to state waters and property increases if the oil is allowed to remain and disperse in the water, the states arguably should have the right to require a vessel owner to remove or contain an oil spill; this should particularly be so where Congress has not acted either way on the subject.

In *Harbor Towing*, the court decided only that the Maryland Statute would not disallow limitation since it could not be brought within the objectives of the federal policy of disallowing limitation in instances of breach of statutory duty. In other words, the Maryland statute does not impose the affirmative, non-delegable duty required by maritime law to disallow limitation. The court did not deal with the question of whether the state law could effectively disallow limitation if the state statute did create a duty analogous to that imposed by the Wreck Statute. However, the suggestion was made that the Supremacy Clause would be a major obstacle.


Though *Harbor Towing* leaves some unanswered questions as to the effect, if any, of state legislation on the operation of federal statutes within the maritime law, *American Waterway Operators, Inc. v. Askew*, decided one month later in the U.S. District Court for the Middle District of Florida, demonstrates that the states may be even more limited in their power to legislate appropriate remedies for oil spill victims than *Harbor Towing* indicated.

In *Askew*, the plaintiffs, a group of shippers, insurers, and oil companies, challenged the validity of the Florida Oil Pollution Control Act on the grounds that it was an attempt by the state to legislate within the federal domain of the substantive maritime law. The Florida statute, which imposes unlimited liability without regard to fault, provides:
... any licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge ... to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit ... it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel.51

The plaintiffs claimed that this statute was pre-empted by the Water Quality Improvement Act (hereinafter the W.Q.I.A.) which states in part:

Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) and act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent ... such owner or operator of any vessel from which oil is discharged in violation ... of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under ... this section ... in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show ... the privity and knowledge of the owner, such owner ... shall be liable to the United States Government for the full amount of such costs.52

The W.Q.I.A. sets up a National Contingency Plan for the removal of oil from navigable waters following an oil spill.53 It provides for federal intervention in clean up operations when the government concludes that the responsible party will not remove the oil.

The Florida statute is clearly much broader in scope than the W.Q.I.A. The Florida Statute provides for strict liability without exception. The W.Q.I.A. imposes limited liability for clean up costs, but the Florida statute provides for unlimited liability for clean up costs and for private property damage. The State argued, however, that to the extent that its legislation goes beyond the W.Q.I.A. it is merely supplemental where the federal law is silent, and that it is not inconsistent with federal objectives.

Essentially, the state's argument asserts that, liability for an oil spill situation, previously determined by the Limited Liability Act under the general maritime law, has been modified by the W.Q.I.A. Congress, by enacting the W.Q.I.A., has impliedly decided that the Limited Liability Act should not apply to oil
spill situations and has formulated new law for oil spill liability. The state argued that since this legislation refers only to claims by the federal government for clean up costs and is silent as to remedies for state claims, the states should have the right to protect state waters and property through their own legislative remedies. In fact, the W.Q.I.A. expressly denies its pre-emption of the states' right to impose liability on those responsible for oil spills:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirements or liability with respect to the discharge of oil into any waters within such State.\(^{54}\)

Under this section, the states are apparently free to provide requirements similar or additional to those provided by the W.Q.I.A. However, in *Askew*, the court stated that an attempt by Congress to delegate to the states the power to assess oil spill liability would be an unconstitutional delegation of legislative power.\(^ {55}\) In *Knick erbocker Ice Co. v. Stewart*, the United States Supreme Court held that the Constitution took all power from the states to interfere with the maritime policy of uniformity in international and inter-state relations.\(^ {56}\) Here Congress had attempted to allow the states to legislate employer's liability for maritime workers. The Court reasoned that since the principle of maintaining uniformity in the maritime law is founded in the Constitution neither the states nor Congress itself may pass legislation which conflicts with that principle.\(^ {57}\)

On the other hand, in *The Wilburn Boat Co. v. Fireman's Ins. Co.*,\(^ {58}\) the United States Supreme Court held that even though contracts for maritime insurance are definitely within the federal admiralty jurisdiction, the fact that Congress has the power to regulate does not preclude state regulation where Congress is silent. This decision was subsequently clarified in *Kossick v. United Fruit Co.*,\(^ {59}\) which held that where federal law is silent, and where there is no interest in promoting uniformity and the subject matter is peculiarly of state and local concern, then state law may apply. Arguably oil pollution damage to state property is sufficiently local in nature to allow the application of state law where Congress is silent.

Courts have allowed state direct action statutes against the insurer of a shipowner to circumvent the Limited Liability Act, at least to the limits of the insurance policy.\(^ {60}\) The theory applied
here is that the Limited Liability Act was enacted for the sole purpose of protecting the shipping industry and should not apply to insurers. Since the states have the right to regulate maritime insurance contracts, they should be able to allow recovery directly against the insurer. The U.S. Court of Appeals for the Fifth Circuit held in Olympic Towing Corp. v. Nebel Towing Co. that the conflict between a state law granting the right of direct action and the federal maritime law permitting limited liability is so minimal as to be insignificant. However, it should be pointed out that the status of direct action statutes is unclear. The United States Supreme Court has held that an owner’s insurance is not an interest to be included in the limitation fund. In addition, the Congressional hearings preceding the enactment of the W.Q.I.A. demonstrated that Congress is concerned with maintaining the insurability of the shipping industry. The argument that direct action statutes will be responsible for driving up insurance premiums for shipowners may carry more weight as the limit of insurability is approached.

Another case allowing state legislation to enter the field of maritime law is Huron Portland Cement Co. v. Detroit. Here the United States Supreme Court upheld a municipal smoke emission statute, containing criminal sanctions, even though it was enforced against boiler equipment licensed under federal maritime legislation. The defendant cement company argued that such local legislation is pre-empted by the dominant federal interest in uniformity. The Court, however, held that the ordinance was properly within the local police power to prevent pollution and did not unreasonably obstruct the fire safety objectives of the federal legislation.

The preceding cases show the three ways in which state legislation may be allowed to supplement the existing federal maritime law. In Wilburn, the Court ruled that Congress was silent and apparently had determined that the government had no interest in establishing uniformity in the area of insurance contracts. Thus state legislation in that area did not conflict with federal law. In Olympic Towing, the court held that although direct action statutes do conflict with the federal policy of limitation of liability, the statutes affect only the insurance industry, and thus the conflict with the maritime law is insignificant. In Huron Portland Cement, the Court felt that since the state objective was pollution control and the federal objective was fire control, there was no
overlap between the laws, and compliance with one should not exempt a ship from compliance with the other.

In *Askew*, Florida argued that since the W.Q. I. A. is silent as to states' rights of recovery, and since it expressly states that it should not be construed as pre-empting the states from imposing liability, then states should be able to provide a remedy for themselves. However, the *Askew* court rejected this argument in view of the recent decision in *Moragne v. State Marine Lines*. Here, a longshoreman was killed while working aboard a vessel on navigable waters in Florida. His widow brought an action for wrongful death, alleging unseaworthiness or a violation of maritime duties as a basis of recovery. However, the Florida Wrongful Death Statute did not allow recovery for unseaworthiness, and the federal death statutes, the Death on the High Seas Act and the Jones Act, could not apply since the death occurred in state territorial waters. The Supreme Court noted that formerly Congress had allowed state remedies to apply to deaths within state territorial waters because Congress felt such remedies were adequate to effectuate the duties imposed by the general maritime law. However, the Court held that the maritime law should no longer rely on state remedies for wrongful death. The Court reasoned that the refusal of the general maritime law to provide a remedy for wrongful death is unsound and should be judicially reconsidered in the light of the general public policy of allowing recovery for wrongful death.

Although the United States Supreme Court maintained that the former rule occasioned problems of federal-state accommodation, this is far from observing, as the court in *Askew* puts it, "that admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts." The Supreme Court recognized that the principle of uniformity will be served by the Court's alteration of the general maritime law, but to read this as indicating that states may not provide a remedy where federal law is silent is a narrow reading and ignores existing authority. An equally defensible interpretation of *Moragne* is that the United States Supreme Court recognized the discrepancy between remedies for deaths covered by the Death on the High Seas Act and for deaths which happen in state territorial waters and determined, not that the state remedies were invalid, but that in the interests of fairness, clarity, and uniformity, the general maritime law should be reinterpreted to provide a remedy where previously only state remedies existed.
The right of the states to supplement the maritime law has not been obliterated by the *Moragne* decision. However, the most important factor in determining the legitimacy of state legislation where Congress is silent is whether the state legislation frustrates federal policy objectives. Though a state clearly has a strong interest in protecting its property from oil pollution damage, the imposition by states of unlimited liability on shipowners without regard to fault appears to frustrate the federal objectives of maintaining a uniform standard of liability. Thus, the *Askew* court found that the Florida statute is invalid because of the changes which it would make in the substantive maritime law.\(^2\)

**Impact Of The *Askew* Decision**

The Congress has, through the W.Q.I.A., made the policy decision that in order to facilitate the clean up of oil spills, those responsible should be strictly liable for clean up costs up to $14,000,000 or $100 per gross ton, rather than only up to the value of vessel and freight under the Limited Liability Act. Congress has obviously re-evaluated the amount of liability protection which the shipping industry requires, and the re-evaluated limit, as well as the strict liability standard, should also apply to state claims for clean up costs. Unless the liability for state and federal claims is the same, we are led to the following anomalous situation when an oil spill occurs.

1. If the United States elects to become involved in the removal of oil pursuant to the W.Q.I.A. (33 U.S.C. §1161(c)(1)), the limit of the vessel owner's liability will be $14,000,000 or $100 per gross ton, and recovery will not depend on proof of negligence unless the owner can show the existence of one of the four exceptions under the W.Q.I.A. (33 U.S.C. §1161(f)(1)).

2. If the United States elects not to become involved and a state incurs expenses in the clean up operation, a *Harbor Towing* situation occurs where the state must prove negligence and will only get a percentage of the limitation fund, which is limited to the value of the vessel and its freight.

3. If both federal and state governments claim for clean up expenses apparently two separate funds would be set up,\(^2\) one for the federal government with its $14,000,000 limit, and one for the state government (and other claimants) with its limit, the value of the vessel and its freight. Needless to say, if both funds were exhausted, the federal policy of protecting the
shipping industry by limiting liability would actually be subjecting the owner to more liability than either statute would impose standing alone.

The *Askew* court pointed out that the W.Q.I.A. does not mention property damage and thus the former standards of proof of negligence and limitation of liability should apply to claims for shoreline pollution damage. However, such a policy would lead to a result similar to (3) above. If an oil spill occurs, and if the federal government removes the oil, a fund with the limit of $14,000,000 is set up to cover the removal costs. Supposedly this is the limit which the shipping industry can afford. But if state and private property owners bring claims for property damage for maritime tort, another fund with the limit of the value of the vessel and its freight must be set up to satisfy the property damage claims. Again, if both funds are exhausted, the shipowner is subjected to a liability which Congress has determined that the industry cannot bear.74

This points out that the limit and proof of liability should not depend on by whom the action is brought, the federal or state government, or on what type of claim is brought, clean up expenses or property damage. If the shipping industry does indeed require protection from unlimited liability, and Congress has apparently determined that it does, that limit should apply to all claims and all claimants.

**Conclusion**

If we accept the conclusion of *Askew* that state law, even where it involves a strong local interest, cannot interfere with express federal policy objectives, we must determine what those objectives are for oil pollution liability. Interpreting the W.Q.I.A. in light of the Limited Liability Act it is clear that, right or wrong, Congress has reiterated the policy of protecting the shipping industry from unlimited liability. However, the W.Q.I.A. indicates that because of the extensive damage caused by oil pollution, Congress has determined that a vessel owner should be subject to strict liability up to $14,000,000 for an oil spill. This represents the federal objective in dealing with oil spills, and state legislation consistent with the limitations on strict liability, and monetary liability as presented in the W.Q.I.A., is consistent with that objective. Therefore, although the states cannot legislate full recovery for oil pollution damage by vessels, they should be allowed to legislate
recovery up to the limits of the W.Q.I.A. without conflicting with federal policy.

Footnotes

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1 Council on Environmental Quality, ENVIRONMENTAL QUALITY 1970, 101 (1970). According to this study, 1728 oil spills were reported in the waters of the United States in 1968 and 1969; 879 of these incidents involved vessels.

2 Baldwin, Public Policy on Oil—An Ecological Perspective, 1 ECOLOGY LAW QUARTERLY 245, 265 (Spring 1971).


6 United States Constitution, Article 1, Section 8.

7 Gilmore and Black, THE LAW OF ADMIRALTY, 18 (1957).

8 Id. at 29.


11 Petition of New Jersey Barging Corp., supra note 10, at 932.


16 Avera v. Florida Towing Corp., 322 F.2d 155 (5th Cir. 1963).

17 The Rules of Navigation are contained in Title 33 of the U.S. Code, Navigation and Navigable Waters.

18 Gilmore and Black, supra note 7, at 407, 702.

19 For a cross section of such legislation see:


23 The theory of strict liability, originally stated in Rylands v.
Fletcher, L.R. 1 H.L. 330 (1868), provided that where one conducting a business, which by the nature of the business, is ultrahazardous and subjects the public to an extreme risk of loss, the risk, regardless of fault, must be borne by the business and not by the individuals who are injured. Several writers have argued that this theory should be applied to place the risk of loss either on the shipping industry or the petroleum industry rather than on the public. See, McCoy, Oil Spill Pollution Control, The Conflict between State and Maritime Law, 40 George Wash. L. Rev. 97 (1971); Avins, Absolute Liability for Oil Spillage, 36 Brooklyn L. Rev. 359 (1970).

24 United States Constitution, Article 6.
26 Id. at 1152.
28 For a discussion of the costs involved in oil spill clean up, see Liability for Oil Pollution Clean Up, 55 Cornell L. Rev. 973 (1970). It is important to note that though the State of Maryland stands to lose approximately $20,000 in the Harbor Towing incident, only a small spill was involved. The 68,000 gallons represents approximately 250 tons of oil (figuring 240 to 300 gallons to the ton depending on the density of the oil). Today there are a number of tankers which can carry in excess of 300,000 tons of oil.
30 Id. §29(a).
33 Berwind-White Coal Mining Co. v. Pitney, 187 F.2d 665 (2nd Cir. 1951).
34 The Snug Harbor, supra note 32, at 411, 412.
36 Id. at 1365.
38 Harbor Towing, supra note 25, at 1154.
39 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
41 The Margaret J. Sanford, 203 F. 331 (D.C. Va. 1913).
42 Gilmore and Black, supra note 7, at 45 (1957).
43 Lockheed Air Terminal v. City of Burbank, 457 F.2d 667 (9th Cir. 1972).
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48 Harbor Towing, supra note 25, at 1155.
49 Id.

53 Id. §1161 (1971).
54 Id. §1161(0)(2) (1971).
55 Askew, supra note 50, at 1249.
56 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
57 Id. at 164.
61 Id.
68 Morange v. States Marine Lines, supra note 65, at 399.
69 Id. at 408.
70 Askew, supra note 50, at 1249.
72 Askew, supra note 50, at 1240.
74 Liability for Oil Pollution Clean Up, 55 CORNELL L. REV. 973, 978 (1970). There is no question that the limits of liability presented by the W.Q.I.A. are inadequate to cover the clean up costs of an oil spill. Estimates on clean up costs range from $270 to $450 per gross ton of oil and are dependent on a number of variables. Thus the $100 per gross ton set by the W.Q.I.A. is inadequate to fully reimburse an injured party.