GRANTED

No. 99-1331

In The

Supreme Court of the United States

JAMES LEWIS,

Petitioner,

v.

LEWIS & CLARK MARINE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this case are:

1. Does the district court abuse its discretion by dissolving the injunction against state court proceedings in a single claimant limitation of liability case (46 U.S.C.A. §181, *et seq.* (Supp.1998)) when the claimant has fully protected the shipowner's right to limitation?

2. If so, does the Saving To Suitors Clause of 28 U.S.C.A. §1333(2) (1993) mandate dissolution of the injunction to allow the claimant to proceed with his Jones Act, 46 U.S.C.A. §688 (Supp.1998) case in state court?

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CITATION OF OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the Eighth Circuit, No. 99-1346, is reported as *In the Matter of the Complaint of Lewis & Clark Marine, Inc.*, 196 F.3d 900 (8th Cir. 1999).

The order of the District Court, Case No. 4:98CV0503(MLM), is reported as *In the Matter of the Complaint of Lewis & Clark Marine, Inc.*, 31 F.Supp.2d 1164 (E.D.Mo. 1998).

STATEMENT OF JURISDICTION

The jurisdiction of the district court was properly based on 28 U.S.C.A. §1333(1) (1993). *See* Complaint, par. 1, J.A. 11 (designating cause as admiralty claim pursuant to Rule 9(h), Fed.R.Civ.P. The district court's order dissolving the injunction was entered on December 22, 1998. District Court Docket Sheet, J.A. 5-6. Lewis & Clark Marine's notice of appeal was timely filed on January 21, 1999. District Court Docket Sheet, J.A. 6. The jurisdiction of the Court of Appeals was founded on 28 U.S.C.A. §1292(a)(1) (1993). The United States Court of Appeals' opinion and judgment were entered on November 5, 1999. Eighth Circuit Docket Sheet, J.A. 10. Claimant James Lewis timely filed a Petition for Rehearing and/or for Rehearing en banc (J.A. 255) on November 19, 1999. Eighth Circuit Docket Sheet, J.A. 10. The Court of Appeals' order denying claimant James Lewis' Petition for Rehearing and Suggestions for Rehearing En Banc was entered on December 8, 1999. Appendix To Petition For *Certiorari*, 35. The petition for *certiorari* was timely filed on February 8, 2000 and granted on May 30, 2000.

Eighth Circuit Docket Sheet, J.A. 10. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1) (1993).

STATUTES AND RULES INVOLVED

The petition for *certiorari* contains the text of:

46 U.S.C. §§183(a), 185, and 688(a);

28 U.S.C. §§1333(1); 2072(a),(b);

Rule F, Fed.R.Civ.P., Supplemental Admiralty and Maritime Claims Rules, Limitation of Liability.

28 U.S.C.A. §1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C.A. §1292(a)(1)

"Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing

or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

Act of August 23, 1842, ch. 188, §6, 5 Stat. 516, 518

"The Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in a suit therein."

STATEMENT OF THE CASE

Respondent Lewis & Clark Marine, Inc. ("Lewis & Clark" or "the shipowner") filed a Complaint for Exoneration from or Limitation of Liability ("the complaint") in the United States District Court for the Eastern District of Missouri on March 24, 1998. Complaint, J.A. 11, *et seq.*

The complaint alleged that just one week earlier, petitioner James Lewis ("Lewis") was working as a deckhand aboard the M/V KAREN MICHELLE on or about March 17, 1998, and "was injured when he purportedly tripped over a wire and injured his back." Complaint, par. 6, J.A. 12. The complaint invoked Rule 9(h), Fed.R.Giv.P., Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, and the statutes providing for limitation of a vessel owner's liability, 46 U.S.C.A. §§181-195 (1993). Complaint, par. 1, J.A. 11. The complaint sought exoneration from liability but did not plead the limitation statutes as the source of that right. Complaint, par. 9, J.A. 13.

Respondent did not transfer the vessel to a trustee but instead attached to the complaint an affidavit of value from a marine surveyor attesting that the value of the KAREN MICHELLE on March 17, 1998, was $450,000.00. Affidavit of Value, J.A. 17. Respondent also filed security for value in the amount of $450,000.00 (J.A. 18) and moved for an order approving the security for value. Motion For Order Approving Stipulation For Costs and Security For Value, *etc.*, J.A. 28. On May 8, 1998, the district court entered an "Order Approving Stipulation for Costs and Security for Value and Directing the Issuance of Notice and Restraining Suits" that enjoined prosecution of claims outside of the limitation proceeding. J.A. 30-33. That order also set a claim deadline of June 12, 1998. J.A. 32. Lewis answered the complaint (J.A. 66-67) and filed the only claim in this proceeding. J.A. 68-69.

Unaware of the pending limitation proceeding, (*see* Motion To Dismiss or Transfer For Improper Venue, J.A. 34-35; Motion to Dissolve, par. 3, J.A. 70, 71), Lewis filed his complaint in the Circuit Court of Madison County, Illinois on April 2, 1998. *See Lewis v. Lewis & Clark Marine, Inc.*, No. 98-L-233, J.A. 41, *et seq.* ("the state court action"). Lewis sought relief in the state court under the Jones Act (46 U.S.C.A. §688 (Supp.1998)), and under the unseaworthiness and maintenance and cure doctrines. *Id.* Lewis did not demand a jury trial in state court. *Id.*

Lewis filed an initial claim in excess of the limitation fund. J.A. 69. Lewis moved to dissolve the injunction (Motion To Dissolve Restraining Order, J.A. 70-72) and stipulated:

1. that he waives any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in state court (J.A. 72, par. 8);
2. that he accedes to the shipowner's right to litigate issues relating to limitation of liability in the limitation proceeding (J.A. 72, par. 8); and
3. that he is the sole claimant (J.A. 72, par. 6).

Lewis & Clark objected to this motion on the separate grounds that Lewis had not demanded a jury trial in the state court action (J.A. 81, 83) and had failed to concede the sufficiency of the limitation fund. J.A. 112. Lewis filed a second stipulation that the value of his claim was "less than $400,000.00 and less than the value of the limitation fund filed by" the vessel owner. J.A. 102. Lewis also filed a reply memorandum in which he argued that the stipulation that his claim does not exceed the limitation fund "removes any federal interest in retaining jurisdiction because the end of the exercise of federal jurisdiction –

limitation of liability – has already been met." J.A. 101. The district court dissolved the injunction against the state court action on December 22, 1998. Memorandum and Order, J.A. 114, *et seq.* That court found that Lewis was the only claimant (J.A. 124 n.3) and that the adequate fund exception to exclusive federal jurisdiction applied to the case. J.A. 123. The district court expressly rejected the argument that the shipowner's claim for exoneration precluded dissolving the injunction. J.A. 124.

Lewis & Clark appealed to the United States Court of Appeals for the Eighth Circuit. J.A. 129. The Eighth Circuit, in a published opinion, reversed the district court's order dissolving the injunction. The Court of Appeals' decision was based on two analytical assumptions. First, the Court felt that "the determination of liability itself is part and parcel of the limitation proceeding." 196 F.3d at 908. The Court of Appeals concluded that the shipowner's right to have liability and damage issues determined by the federal court was therefore superior to the claimant's right to have his case heard in state court. Second, the Court was "not convinced that non-jury *in personam* judgments constitute a 'saved' remedy within the 'saving to suitors' clause." 196 F.3d at 910. This Court granted Lewis' petition for a writ of *certiorari* on May 30, 2000.

SUMMARY OF ARGUMENT

The district court properly dissolved the injunction in this single claim case because the claimant fully protected

the shipowner's right to seek limitation under the statute, 46 U.S.C.A. §§181, *et seq. See Langnes v. Green*, 282 U.S. 531, 540-541 (1930).

The Courts of Appeals have uniformly implemented *Langnes v. Green*, 282 U.S. 531 by requiring the district court to dissolve the injunction in a single claim case when the claimant's stipulations protect the owner's right to seek limited liability. *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436 (2nd Cir.), *cert. denied*, 331 U.S. 850 (1946); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960); *In the Matter of McCarthy Brothers Company/Clark Bridge*, 83 F.3d 821 (7th Cir. 1996); *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985).

Lewis' initial stipulations conceded the vessel owner's right to seek limited liability in the federal court and waived a state court judgment's *res judicata* effect on limitation. J.A. 102. These stipulations adequately protected Lewis & Clark's federal interest and met the single claimant test for dissolving the injunction. *See, e.g., Red Star Barge Line, Inc.*, 160 F.2d 436, 438.

Lewis also met the adequate fund exception when his second stipulation (J.A. 102) reduced the amount of his claim below the value of the fund. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150. This stipulation achieved the goal of limiting the owner's liability. There was therefore no justification to continue to enjoin state court litigation because the sole purpose of the injunction is to protect the shipowner's statutory right to seek limited liability in federal court. *Id.; Kreta Shipping S.A. v. Preussag International Steel Corp.*, 192 F.3d 41, 49 (2d Cir. 1999); *Universal*

Towing Co. v. Barrale, 595 F.2d 414, 420 (8th Cir. 1979); *and see The Aquitania*, 20 F.2d 457 (2d Cir. 1927).

The Eighth Circuit's decision was based on the erroneous assumption that the determination of liability is "part and parcel of the limitation proceeding." 196 F.3d at 908. This Court has held to the contrary: the Jones Act, 46 U.S.C.A. §688 (Supp.1998) "determines the extent of the seaman's substantive rights and the measure of damages," while the limitation statute determines "from what he shall collect those damages in certain exceptional cases, where those rights have been infringed." *In The Matter of Petition Of East River Towing Co., Inc.*, 266 U.S. 355, 367 (1924).

The limitation statute does not itself contain a mechanism allowing the owner to challenge its potential liability. *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239, 243 (1880). Former Admiralty Rule 56, authorizing exoneration, was adopted to "relieve ship-owners of the English rule of practice, which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision." *Id.* Thus, the statute forbids the owner to contest its fault. The vessel owner's right to seek exoneration is, therefore, entirely a creature of rule.

The current version of that rule is Rule F, Supplemental Rules For Certain Admiralty and Maritime Claims. Unlike the statute, Supplemental Rule F(2) authorizes the vessel owner to "demand exoneration from as well as limitation of liability." Supplemental Rule F(2). The Supplemental Rules were promulgated pursuant to the Rules Enabling Act, 28 U.S.C.A. §2072 (1994). Order of February

28, 1966, pars. 1 and 3, 383 U.S. 1031 (1966). The Rules Enabling Act authorizes the adoption of *procedural* rules which preempt contrary statutes (28 U.S.C.A. §2072(b), sentence two (1994)), but limits that authorization so that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. §2072(b), sentence one (1994); *and see Henderson v. United States*, 517 U.S. 654 (1996).

The *Henderson* case defined substantive provisions under the Rules Enabling Act as those which provide "who may sue, on what claims, for what relief, within what limitations period." *Henderson v. United States*, 517 U.S. 654, 671. This definition requires the conclusion that Supplemental Rule F impermissibly creates a substantive right to exoneration because it answers each of those questions. Supplemental Rule F(1) authorizes any vessel owner to sue. Supplemental Rule F(2) defines the claims on which suit may be brought and provides exoneration as the form of relief. Supplemental Rule F(1) provides a six-month limitations period in which to file the action for exoneration.

The rule abridges the claimant's right to have liability and damages determined by the state court under the Jones Act and saving to suitors clause. *See In The Matter of Petition Of East River Towing Co, Inc.*, 266 U.S. 355, 367 (1924). The rule also enlarges the shipowner's rights because the Limitation Statute contains no mechanism for exoneration but instead requires the owner to admit liability. *See The Benefactor Steamship Co. v. Mount*, 103 U.S. 239, 243. Supplemental Rule F therefore conflicts with the limitation statute, the Jones Act, and the saving to suitors clause.

The consequence of this conflict is that the Rule is of no effect. *See generally* 28 U.S.C.A. §2072(b); *Henderson v. United States*, 517 U.S. 654; *see also Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169. Because Supplemental Rule F is the only source of the owner's right to seek exoneration, that right does not exist.

Because the shipowner does not have a right to seek exoneration in federal court in this case, exoneration cannot form a basis to deprive Lewis of his statutory right to proceed in state court. *See* 28 U.S.C.A. §1333(1). Moreover, in the absence of a federal mechanism to value the claim, the state court action is the only vehicle available to reduce Lewis' claim to judgment. *See In The Matter of Petition Of East River Towing Co., Inc.*, 266 U.S. 355, 367.

A state court jury trial is not a prerequisite to dissolve the injunction in a limitation case because the saving to suitors clause embraces non-jury cases. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487 (5th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992); *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir. 1947). The claimant's interest in proceeding in state court is therefore guaranteed by the saving to suitors clause. *See* 28 U.S.C.A. §1333(1).

The shipowner has no federal interest sufficient to justify the injunction because Lewis' stipulations protected its limitation rights and because it has no exoneration right in this case. Because Lewis' right to proceed in state court is guaranteed by the saving to suitors clause, the Eighth Circuit erred in holding that the injunction should not be dissolved. Petitioner James F. Lewis

requests that this Court reverse the judgment of the Eighth Circuit and reinstate the district court's order dissolving the injunction.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISSOLVED THE INJUNCTION IN THIS SINGLE CLAIM CASE BECAUSE CLAIMANT FULLY PROTECTED THE SHIPOWNER'S RIGHTS UNDER THE ACT, 46 U.S.C. §§181, et seq.

The standard of review applicable to the district court's dissolution of the injunction is abuse of discretion. *Langnes v. Green*, 282 U.S. 531, 540-541 (1930). "[T]he question which arose was not one of jurisdiction, but, as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause." *Langnes*, 282 U.S. 531, 541. In a clear single claim case, such as that now before the Court, denial of the claimant's motion to dissolve the injunction is an abuse of discretion. *In the Matter of Helena Marine Service, Inc.*, 564 F.2d 15, 18 (8th Cir. 1977); *and see Langnes*, 282 U.S. 531, 540-541.

The burden is on the shipowner to demonstrate that dissolution of the injunction will prejudice its right to seek limitation. *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979); *see also Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir. 1985); *accord The Helen L*, 109 F.2d 884, 886 (9th Cir. 1940). Thus, when a claimant protects the vessel owner's right to seek

limitation of liability, the injunction against state court proceedings must be dissolved.

A. Claimant's Stipulations Fully Protected The Shipowner's Right To Seek Limitation In The Federal Court

Lewis stipulated to the shipowner's right to litigate limitation issues in the federal court and waived the *res judicata* bar which would result from a state court judgment in his favor. J.A. 72. Although these stipulations fully protected the shipowner's right to seek limitation, Lewis & Clark further objected to dissolving the injunction on the grounds that claimant had not conceded the sufficiency of the fund (J.A. 81, 83) and had not demanded a jury trial in the state court. J.A. 112. Lewis reduced his claim below the value of the fund (J.A. 102), thus mooting the former objection. *Compare* Supplemental Rule For Certain Admiralty and Maritime Claims F(7) (providing procedure to challenge interim stipulation for value) (hereinafter these rules will be referred to as Supplemental Rules). The district court properly dissolved the stay because Lewis' stipulations obviated the need to protect the owner's right to seek limited liability in the federal court.

1. The Purpose Of The Injunction Is To Protect The Shipowner's Right To Litigate Limitation Issues In The Federal Court

When a shipowner files its limitation complaint, the district court issues an *ex parte* injunction staying all related claims against the vessel owner pending in state

or federal courts. *See* Supplemental Rule F(3). The injunction has the narrow purpose of protecting the vessel owner's right to a federal adjudication of its claim of limited liability. *Kreta Shipping S.A. v. Preussag International Steel Corp.*, 192 F.3d 41, 49 (2d Cir. 1999); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979) *and see The Aquitania*, 20 F.2d 457 (2d Cir. 1927). The injunction cannot be maintained to allow the shipowner to shift the forum away from the claimant's choice. *Curtis Bay Towing v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2d Cir. 1947).

No injunction should be maintained when its purpose no longer exists. Because the purpose of the injunction in the cause *sub judice* is to protect the owner's right to seek limitation, the injunction no longer serves a legitimate purpose once that right has been protected. "The District Court must dissolve the injunction unless the owner can demonstrate that his right to limit liability would be prejudiced." *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979).

2. The Courts Of Appeals Have Uniformly Recognized That A District Court Must Dissolve The Injunction In A Single Claim Case When The Claimant's Stipulations Protect The Owner's Right To Seek Limited Liability

The vessel owner can suffer no legal prejudice when his right to seek limitation in federal court is fully protected and he is not subject to multiple claims that exceed the limitation fund. The courts have uniformly recognized that in either the single claim or the excess fund case the injunction must be dissolved. Lewis' stipulations

in the instant matter brought his case squarely within both exceptions.

When a single claimant files stipulations to protect the vessel owner's right to litigate limitation issues in the federal court, the injunction must be dissolved. *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436 (2nd Cir.), *cert. denied*, 331 U.S. 850 (1946); *Curtis Bay Towing v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2d Cir. 1947); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960); *In the Matter of McCarthy Brothers Company/Clark Bridge*, 83 F.3d 821 (7th Cir. 1996); *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985); *and see Langnes v. Green*, 282 U.S. 531 (1931).

Even in a multiple claim case, the injunction will be dissolved if the limitation fund exceeds the value of all claims because the statutory purpose of limiting the vessel owner's liability has been achieved. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957); *In the Matter of the Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir. 1995); *Magnolia Marine Transport Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992).

These principles mandate dissolution of the injunction in the case at bar because both exceptions to the rule of exclusive federal jurisdiction have been met. Accordingly, the district court properly dissolved the injunction.

a. The Single Claim Doctrine

This Court recognized that the injunction should be dissolved in single claim cases. *Langnes v. Green*, 282 U.S. 531 (1931). The *Langnes* case required this Court to balance the vessel owner's right to an exclusive federal forum conferred by the limitation statute with the claimant's right to litigate in state court under the "saving to suitors" clause of the Judiciary Act of 1789, 28 U.S.C.A. §1333(1) (1993). *Langnes*, 282 U.S. 531, 541. This Court characterized the balancing of the competing statutory interests as "quite simple." *Id.* "To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course . . . ." *Id.*

The *Langnes* Court reasoned that "where there was only a single claim there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court . . . ." 282 U.S. 531, 542. It concluded that the district court "should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court . . . ." 282 U.S. at 542. This Court allowed the federal court to retain jurisdiction in case "the right of petitioner to a limited liability might be brought into question in the state court . . . ." *Id.*

After obtaining this Court's order to dissolve the injunction, claimant Green proceeded to put the vessel owner's privity with and knowledge of unseaworthy conditions into issue in the state court proceeding. *See Ex Parte Green*, 286 U.S. 437, 440 (1932); *compare In re Old Dominion Steamship Co.*, 115 F. 845, 850 (D.N.C.1902) (state court determination of negligence imputable to owner by *respondeat superior* is binding on admiralty court but does

not preclude subsequent federal litigation of privity or knowledge issue). A finding by the state court that the accident was within the vessel owner's privity or knowledge would have barred relitigation of that issue in the federal court. *The Benefactor,* 103 U.S. at 243; and see *Beiswenger Enterprises Corp. v. Carletta,* 46 F.Supp.2d 1294, 1296 (M.D.Fla.1999) (applying *Rooker-Feldman* analyis). The federal court's exclusive right to try limitation issues would be compromised absent an express waiver of the *res judicata* effect of the state court judgment. Therefore, the injunction was properly reinstated unless the claimant withdrew the limitation issues from the state court. *Ex Parte Green,* 286 U.S. 437, 440.

Significantly, the *Green* Court did not require the claimant to abandon his liability claims entirely, but only those that bore on the issue of limited liability. *See id.* The *Green* decision forced claimants to choose between a state court trial on less than all of the injured seaman's theories of recovery (to avoid the consequent preclusion of federal resolution of the limitation issues) and the entire loss of the seaman's right to proceed in state court.

The Second Circuit fashioned a pragmatic solution that allowed claims to proceed in the state courts while protecting the owners' right to seek limited liability in the federal courts. "As a precaution against that possible [*res judicata*] danger, we think it would be reasonable and fair to all parties to require the appellee to file in the district court a statement that she waives any claim of res judicata relevant to the issue of limited liability and based on any judgment she may obtain in the state court action." *Petition of Red Star Barge Line, Inc.,* 160 F.2d 436, 438 (2d Cir. 1947), *cert. denied,* 331 U.S. 850.

Every Circuit to consider the issue has adopted the *Red Star* analysis to permit a single claimant to pursue a state court action once the seaman stipulates that the federal court retains jurisdiction to decide limitation issues and that any claim of *res judicata* with regard to limitation issues is waived. *In the Matter of the Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,* 836 F.2d 750 (2d Cir. 1988); *Gorman v. Cerasia,* 2 F.3d 519, 524 (3d Cir. 1993); *In re Two "R" Drilling Co.,* 943 F.2d 576, 578 (5th Cir. 1991); *S & E Shipping Corp. v. Chesapeake & Ohio Ry.,* 678 F.2d 636, 643 n.13 (6th Cir. 1982); *In the Matter of McCarthy Brothers Company/Clark Bridge,* 83 F.3d 821 (7th Cir. 1996); *Universal Towing Co. v. Barrale,* 595 F.2d 414, 418-419 (8th Cir. 1979); *Newton v. Shipman,* 718 F.2d 959, 962 (9th Cir. 1983); *In re Beiswenger Enterprises Corp.,* 86 F.3d 1032, 1038-1039 (11th Cir. 1996) (permitting multiple claim case to be transformed into single claim case via stipulation). The rule of these cases is that in a single claim case, the state court action will not be enjoined if the seaman protects the vessel owner's right to litigate limitation issues in the federal court.

b. The Multiple Claim-Adequate Fund Doctrine

This Court has cautioned against broadening the scope of the statute when the right to seek limited liability is not threatened. "[T]o expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by

which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all the demands made upon it. The shipowner's right to limit liability is not so boundless." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152 (1957).

In an adequate fund case, "the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated." *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996). It necessarily follows that if the vessel owner's rights under the statute are not threatened, the owner cannot maintain an injunction whose sole purpose is to protect those statutory rights. *Kreta Shipping, S.A. v. Preussag International Steel Corp.*, 192 F.2d 41, 48-49 (2d Cir. 1999).

In *Kreta*, the Second Circuit interpreted *Lake Tankers* to mean that the injunction should be lifted without regard to the source of the claimants' right to sue so long as the shipowner's right to seek limitation was not implicated by the resulting litigation. *Kreta*, 192 F.2d 41, 48-49 (2d Cir. 1999). The Court began its analysis by examining the reason the injunction is issued in the first place.

Because the injunction serves only to protect the shipowner's right to seek limitation, the injunction cannot be maintained once that right is protected. The *Kreta* court reasoned that "once the shipowner's right of limitation was protected and there was no need to marshal assets or apportion an inadequate fund among many claimants, the concursus injunction no longer served a valid purpose." 192 F.2d at 49.

This reasoning is rooted in sound precedent. "The statutory purpose is to exempt the investor from loss in excess of the investment in the vessel and freight." *Petition of Moran Transportation Co.*, 185 F.2d 386, 388-389 (2nd Cir. 1950). The *Moran Transportation* court noted that "the purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshaling of assets." 185 F.2d at 389. Where there is only one claim and the claim is less than the fund, the purpose of the limitation proceeding is entirely absent. In that circumstance, the state court litigation cannot prejudice the owner's right to limit liability.

The injunction is issued to protect that right rather than to filter saving clause claims from other types of claims. *See Kreta*, 192 F.2d at 49; *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273, 276 (2nd Cir. 1947). In deciding whether to dissolve the injunction, the initial question is therefore whether the shipowner's statutory right to seek limitation has been protected and not whether the claim is within the saving to suitors clause. *Id.* If the owner's right has been protected, the injunction must be dissolved whether or not the claim is within the saving to suitors clause. *Id.*

In contrast, the Eighth Circuit began its inquiry by examining whether the claimant would receive a different form of trial in the state as opposed to the federal court. This issue has nothing to do with the purpose of the injunction. *See Curtis Bay*, 159 F.2d 273, 276 (dissolving injunction in excess fund case to allow pursuit of non-jury case). The Eighth Circuit's disagreement with its sister circuit was justified only by a simple "but *cf.*" citation to *Kreta*; it offered no meaningful analysis. *Lewis*

& Clark, 196 F.3d at 906. By failing to reckon with the basis for the injunction in the first place, the Eighth Circuit's rationale was seriously flawed.

c. Lewis' Stipulations Adequately Protected The Shipowner

Lewis' first set of stipulations tracked the traditional formula for single claim cases: it conceded the vessel owner's right to seek limited liability in the federal court and waived a state court judgment's *res judicata* effect on limitation. This first set of stipulations adequately protected Lewis & Clark's federal interest. *Red Star Barge Line, Inc., supra*, 160 F.2d 436, 438; *and see* cases collected at p. 15; *see also Langnes*, 282 U.S. 531, 541. These stipulations alone required dissolution of the injunction.

Lewis & Clark objected to the motion to dissolve on the ground that Lewis had failed to concede the sufficiency of the limitation fund. J.A. at A59, *et seq.*; *but see* Supplemental Rule F(7). But Lewis' second stipulation reduced his claim below the value of the fund. App, 102. That stipulation guaranteed the sufficiency of the limitation fund as well as Lewis & Clark's limited liability.

Lewis therefore not only met the single claimant exception by his first stipulation but also met the adequate fund exception.[1] Consequently, there is no justification to continue to enjoin state court litigation. The Eighth Circuit's decision has no basis in the purpose or

[1] The adequate fund doctrine is analytically necessary only in a multiple claimant case. *See generally Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152.

the text of the limitation statute. Accordingly, it should be reversed and the district court order reinstated.

B. The Shipowner Has No Right To A Federal Determination of Liability

The Eighth Circuit's decision was based on the erroneous assumption that the limitation statute affords the vessel owner the right to have liability issues determined by the federal court. The Court of Appeals believed that "the determination of liability itself is part and parcel of the limitation proceeding." 196 F.3d 900, 908. The Court of Appeals wrongly concluded, without citation or analysis, that "the liability of the shipowner is by no means assumed by the Limitation Act." 196 F.3d 900, 908. This conclusion is directly contrary to decisions of this Court. *In The Matter of Petition of East River Towing Co., Inc.*, 266 U.S. 355, 367 (1924); *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239, 243 (1880).

A brief review of the limitation statute's history in this Court is necessary to place these holdings in proper context.

1. The History Of The Limitation Act Demonstrates The Eighth Circuit's Analytical Error

The Court of Appeals' decision is completely inconsistent with the legislative history of the limitation statute. *See generally* J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul.L.Rev. 999 (1979). The statute was intended to "conform[ ] to what is the English law . . . ." Remarks of Senator Hamlin,

January 25, 1851. Cong.Globe, 31st Cong., 2d Sess. 331 (1851). Significantly, the English law required the shipowner to admit liability in order to seek limitation. The "early legislation in England, Massachusetts and Maine . . . may be summarized as follows: . . . In order to obtain the benefit of the statute, the shipowner was forced to acknowledge his liability; there was no 'petition for exoneration from or limitation of' liability." 3 Benedict On Admiralty §4, 1-35. Like the English rule and the early State statutes, the limitation statute contains no mechanism to contest liability in this case.

The statute existed for over twenty years before this Court had the opportunity to review it. *See Norwich Company v. Wright*, 80 U.S. 104 (1871). The Court there acknowledged that the English rule required the vessel owner desiring limited liability to admit that liability. 80 U.S. at 124. Believing that the statute would be "incapable of execution" (80 U.S. at 123), this Court adopted rules that authorized the vessel owner to contest liability by seeking exoneration. *See* former Admiralty Rules 54-57, 80 U.S. xii-xiv.

In 1880, this Court addressed the preclusive effect of a prior judgment upon the vessel owner's right to seek exoneration under the predecessor to Supplemental Rule F. *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239 (1880). Although some portions of the limitation statute clearly derived from continental and not English law (*see Donovan*, 53 Tul.L.Rev. at 1017-1018), this Court made clear that the purpose of the "fifty-sixth rule was merely intended to relieve ship-owners of the English rule of practice, which requires them, when they seek the benefit

of the law of limited liability, to confess the ship to have been in fault in the collision." 103 U.S. at 243.

Implicit in any relief from the English rule is that such relief was required; *i.e.*, that the English rule requiring the owner to admit liability prevailed under the American statute as written. Thus, the limitation act not only "assume[s] the liability of the shipowner," the statute forbids the owner to contest its liability. *The Benefactor*, 103 U.S. at 243; *compare Lewis & Clark*, 196 F.3d at 908. That statutory policy cannot be overridden by rule. 28 U.S.C.A. §2072.

2. By Creating A Substantive Right To Exoneration Supplemental Rule F Violates The Rules Enabling Act

This Court's decisions in *Norwich Co. v. Wright*, 80 U.S. 104 (1871) and in *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239 (1880) established two, related propositions. First, the limitation statutes do not allow the vessel owner to contest liability. *Norwich*, 80 U.S. at 124. Second, the vessel owner's. right to seek exoneration is a creation of rule. *The Benefactor*, 103 U.S. at 243. The district court in the instant case correctly noted that the limitation statute contains no language authorizing exoneration in the instant case. 31 F.Supp.2d 1164, 1169. The Supplemental Rules, and not the statute, therefore are the source of the vessel owner's right to sue for exoneration.

The Supplemental Rules were promulgated pursuant to the Rules Enabling Act, 28 U.S.C.A. §2072. Order of February 28, 1966, pars. 1 and 3, 383 U.S. 1031 (1966). The Rules Enabling Act authorizes the adoption of *procedural*

rules which preempt contrary statutes (28 U.S.C.A. §2072(b), sentence two), but limits that authorization so that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. §2072(b), sentence one; *and see Henderson v. United States*, 517 U.S. 654 (1996); *see also Jefferson Barracks Marine Service, Inc. v. Casey* , 763 F.2d 1007, 1011 at n.2 (8th Cir. 1985). Unlike the statute, Supplemental Rule F(2) authorizes the vessel owner to "demand exoneration from as well as limitation of liability," Supplemental Rule F(2). This grant creates a substantive right by rule that is expressly forbidden by the Rules Enabling Act, 28 U.S.C.A. §2072.

a. Supplemental Rule F Is Improperly "Substantive" Under *Henderson*

The Eighth Circuit's opinion declared exoneration to be "more than just a procedural adjunct to limitation" (196 F.3d 900, 908) and the equivalent of a "substantive right" (196 F.3d 900, 909 n.4)[2] that provides "an independent basis for its presence in federal court". 196 F.3d 900, 909 n.6. The Court of Appeals' conclusion that exoneration is a substantive right finds support in this Court's decision in *Henderson v. United States*, 517 U.S. 654 (1996). The consequence of that conclusion, however, is that the Rules Enabling Act, 28 U.S.C.A. §2072, renders Supplemental Rule F void.

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[2] This Court has held that federal jurisdiction cannot be created by rule. *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635-636 (1924).

This Court has recently defined substantive provisions in the context of the Rules Enabling Act as those that provide "who may sue, on what claims, for what relief, within what limitations period." *Henderson v. United States*, 517 U.S. 654, 671 (footnotes omitted). Applying this definition to the cause *sub judice* requires the conclusion that Supplemental Rule F impermissibly creates a substantive right to exoneration because it answers the questions:

a) who may sue ("any vessel owner may file a complaint"), Supplemental Rule F(1);

b) on what claims ("the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon"), Supplemental Rule F(2);

c) for what relief ("exoneration from . . . liability"), Supplemental Rule F(2);

d) within what limitations period ("Not later than six months after receipt of a claim in writing. . . . "), Supplemental Rule F(1).

By creating a cause of action for exoneration, and even providing a limitations period for that cause of action, Supplemental Rule F improperly exceeds the scope of rule-making authority conferred by the Rules Enabling Act and is therefore void. 28 U.S.C.A. §2072(b); *Henderson*, 517 U.S. 654, 671; *see also Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir. 1985); *Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C.App.1977).

b. Neither The Validity Of The Former Admiralty Rules Nor The Prior Authority For Their Adoption Control Disposition Of This Case

Although this Court has referred to the predecessor to Supplemental Rule F as "procedural" (*The Benefactor*, 103 U.S. at 243), the subsequent adoption of the Rules Enabling Act by Congress undermines that notion. The Supplemental Rules were adopted under authority of the Rules Enabling Act and the former Admiralty Rules were rescinded. *See* Order of February 28, 1966, pars. 1 and 3, 383 U.S. 1031 (1966); 3 Benedict On Admiralty, §2, 1-24 at n.51. Thus, the authority for the existence of the Supplemental Rules is the Rules Enabling Act.

When this Court decided *The Benefactor* the governing statute was the Act of August 23, 1842, ch. 188, §6, 5 Stat. 516, 518, which contained neither the preemption nor abridgement clause of the present Rules Enabling Act. *The Benefactor* Court's reference to former Admiralty Rule 56 as "procedural" (103 U.S. 239, 243) was therefore not a determination that Supplemental Rule F is procedural within the present Rules Enabling Act because the controlling portion of the enabling legislation, *i.e.*, the abridgement clause, did not then exist.

In 1934 the original Rules Enabling Act was adopted. Act of June 19, 1934, ch. 651, §§1, 2, 48 Stat. 1064. Section One of the statute provided for the first time that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Act of June 19, 1934, ch. 651, §1. The 1948 statute authorizing the adoption of admiralty rules (28 U.S.C.A. §2073, Act of June 25, 1948, ch. 646, 62 Stat. 961, as amended by act of May 24, 1949, ch. 139, §104, 63 Stat. 104; Act of May 10, 1950, ch. 174, §3, 64 Stat. 158), was repealed by Pub.L. No. 89-773, §2, Nov. 6, 1966, 80 Stat. 1323. The Act of November 6, 1966 provided in pertinent part that the prior rules should remain in effect "until superseded by rules prescribed under the authority of former section 2072 of this title as amended by Pub. L. 89-773." Historical and Statutory Notes to 28 U.S.C.A. §2073 (1994).

This Court in fact adopted superseding rules. Order of February 28, 1966, pars. 1 and 3, 383 U.S. 1031 (1966). "General Admiralty Rules 51-54 were rescinded in 1966 by the merger of civil and admiralty rules. Current practice under the Limitation of Liability Act is governed by Supplemental Admiralty Rule F." 3 Benedict On Admiralty, §2, 1-24 at n.51. Thus, neither the authority for the adoption of the prior admiralty rules nor notions of the vitality of those rules under prior law control disposition of this case. The current rules are promulgated under the authority of the Rules Enabling Act and must be tested by the restrictions of that statute.

c. Rules Which Create Substantive Rights Are *Ultra Vires* Of The Rules Enabling Act And Are Therefore Void

The limitation on rule-making power set forth in the first sentence of 28 U.S.C.A. §2072(b) is rooted in constitutional concerns. While the courts are free to exercise Article III powers by adopting rules which relate to court procedures and administration, courts may not exercise

Article I powers that the Constitution reserves to Congress. "Under the Rules Enabling Act, the Court need only report such changes to Congress in the form of a rule, which would acquire the force of law without Congress ever casting a single vote. To say the least, such a power would strain the Constitution's limits on the exercise of the legislative power." *Jackson v. Stinnett*, 102 F.3d 132, 135 n.3 (5th Cir. 1996).

This concern engendered a Rules Enabling Act analysis which distinguishes between "substantive" provisions (properly the subject only of legislative enactment) and "procedural" provisions (properly the subject of rule). *See generally Henderson v. United States*, 517 U.S. 654 (1996). If a rule creates substantive rights, it is *ultra vires* of the Rules Enabling Act. "If the rule subsequently found to be *ultra vires* the Act of which it is a creature, it is void. Otherwise Congress might by such a layover provision circumvent the veto power of the President, a course of dubious constitutional validity." *Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C.App.1977).

This general principle applies to admiralty cases:

> But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred.

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635-636 (1924).

As applied to this case, therefore, the Supplemental Rules cannot "enlarge or modify" any substantive right conferred on the shipowner by the Limitation Act nor can they "abridge or modify" any right afforded the claimant by the Jones Act (46 U.S.C.A. §688(a)) or the saving to suitors clause. 28 U.S.C.A. §2072(b); *see Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir. 1985). Any substantive right conferred by rule is ultra vires of the authority by which the rules are promulgated and is therefore void. *Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C.App.1977).

Lewis & Clark Marine's Complaint invoked Rule F (Complaint, par. 1, J.A. 11), claimed exoneration from liability (Complaint, pars. 3, 9, J.A. 1213) and prayed that "the Court adjudge the Plaintiff, the M/V KAREN MICHELLE, not liable for any damages, demands or claims whatsoever. . . . " Complaint, Prayer (E), J.A. 15. The vessel owner's Complaint thus claimed a substantive right to exoneration, rendering Supplemental Rule F(2) as invoked in this case *ultra vires* of the Rules Enabling Act.

d. Because Supplemental Rule F Violates The Rules Enabling Act, The Rule Is Void

"The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment." *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635, 68 L.Ed. 480, 44 S.Ct. 220 (1924). The injunction entered in the present

proceeding prohibits claimant from prosecuting his claim to judgment and thereby infringes his substantive rights under the Jones Act and the saving to suitors clause.

The Court of Appeals' decision to reverse dissolution of the injunction presumed that the parties' rights would be determined in an exoneration proceeding. "Before a federal admiralty court can even address the limitation question in a Limitation Act proceeding, the court must first determine whether the shipowner is entitled to complete exoneration based on the shipowner's lack of negligence." *Lewis & Clark Marine*, 196 F.3d 900, 907. This ruling abridges claimant's right to have liability and damages determined by the state court under the Jones Act and saving to suitors clause. *See In The Matter of Petition Of East River Towing Co., Inc.*, 266 U.S. 355, 367 (1924). Exoneration is therefore squarely within the zone forbidden by the Rules Enabling Act.

When a seaman sues for personal injuries, the Jones Act "determines the extent of the seaman's substantive rights and the measure of damages," while the limitation statute determines "from what he shall collect those damages in certain exceptional cases, where those rights have been infringed." *In The Matter of Petition Of East River Towing Co., Inc.*, 266 U.S. 355, 367 (1924).[3] Thus, the Jones

[3] Although the limitation statute authorizes the vessel owner to choose between surrendering the ship and posting security for value in lieu of surrender (46 U.S.C. §§185(a) and (b)), the Court explained that those "exceptional cases" were when the ship was actually surrendered. 266 U.S. at 367. "If there is no surrender of the ship, the limited liability statutes play no part." *Id.* Although this language casts doubt on the

Act confers on the seaman a substantive right in both the measure of liability and damages. Supplemental Rule F's creation of a substantive right to exoneration inexorably conflicts with the seaman's statutory rights under the Jones Act.

The consequence of this conflict is that the Rule is void. *See generally Henderson v. United States*, 517 U.S. 654 (1996); *see also Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C.App.1977). The vessel owner cannot, therefore, seek exoneration in federal court.

The Limitation Statute contains no mechanism for exoneration. *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239, 243 (1880). By creating a right to exoneration, Rule F(2) impermissibly "enlarges" the shipowner's rights under the Limitation Act by conferring an additional substantive right – exoneration – lacking in that statute. *See* 28 U.S.C.A. §2072(b); *Henderson v. United States*, 517 U.S. 654 (1996); *see also Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir. 1985).

Because Lewis & Clark has no right to seek exoneration under the statute and because the rule authorizing exoneration is unenforceable, the state court action must be allowed to proceed in order to liquidate the claim. The claimant's right to proceed in state court is not only a practical necessity but it is also guaranteed by the saving to suitors clause. 28 U.S.C.A. §1333(1).

shipowner's right to maintain the limitation action in this case at all due to the failure to surrender the vessel, claimant's second stipulation (J.A. 102) conceded limitation of liability, rendering this issue academic.

II. THE SAVING TO SUITORS CLAUSE GUARANTEES LEWIS' RIGHT TO SUE IN STATE COURT EVEN WITHOUT A JURY TRIAL

The statute that confers exclusive federal jurisdiction of admiralty cases does so "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. §1333(1). Although the Eighth Circuit in the instant case held that a state court non-jury Jones Act case does not present a remedy within the "saving to suitors" clause, this Court has held that saved remedies are not limited to those resulting from jury trials. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924). This Court there reversed the finding below that the state court lacked jurisdiction, and found that statutory remedies and *in personam* judgments resulting from non-jury trials are "other common law remedies" within the meaning of the saving to suitors clause.

> By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. [citations] The 'right of a common law remedy', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the States in the substantive admiralty law, but it does include all other means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at common law; remedies in equity, as well as those enforceable in a court of law.

264 U.S. 109, 124.

Of course, there was typically no right to jury trial in equitable matters. Thus, there is no basis to assert that non-jury cases are outside the saving clause simply because they are non-jury cases.

The Second Circuit specifically held in *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir. 1947) that a state court jury trial is **not** a prerequisite to dissolving the injunction in a limitation case. In *Curtis Bay*, Judge Learned Hand reviewed the history and purpose of the Limited Liability Act as applied to the dissolution of an injunction against proceeding outside the limitation case. The value of the limitation fund in that case was $209,000; the total claims were $17,000. The Second Circuit held that:

> We can see no justification in the case at bar for enjoining suits in Pennsylvania. The chance that the amount of the claims filed will ever be more than $209,000 is so remote, that it should not count, and the right to limit is not challenged. It is true that an injunction does not deny to any claimant 'the right of a common-law remedy where the common law is competent to give it;' for the claimants are suing in the admiralty anyway. *However, every claimant has a legally protected interest in choosing his forum, even though the method of trial be not changed if he is moved elsewhere.*

159 F.2d 273, 276 (emphasis added); *see also In re Chimenti*, 79 F.3d 534, 538 (6th Cir. 1996) (purpose of saving clause is to permit claimants to choose forum).

More recently, the Second Circuit has held that the saving clause protects even proceedings in foreign courts. *Kreta Shipping S.A. v. Preussag International Steel Corp.*, 192 F.3d 41, 49 (2d Cir. 1999). The *Kreta* court noted that once the vessel owner's right to seek limitation was protected, the owner no longer had a protectible interest in an exclusive federal forum. The Second Circuit concluded that when "for that reason, the injunction is vacated, it does not matter whether a claimant takes advantage of its freedom from the injunction by bringing suit in a state court pursuant to the saving-to-suitors clause, or a foreign court – or elsewhere for that matter." *Id.*

Of even greater significance in this Jones Act (46 U.S.C.A. §688) case is the observation that "judicial remedies created by statute" are within the saving to suitors clause. *Red Cross Line*, 264 U.S. 109, 124. The Eighth Circuit inexplicably distinguished the Fifth Circuit's holding in *Lipton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487 (5th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992) as "a non-jury matter pursuant to a Louisiana statute. That statutory election fell within *Red Cross Line*'s special category of 'judicial remedies conferred by statute,' which are 'saved remedies' under the 'saving to suitors' clause." *Lewis & Clark Marine*, 196 F.2d at 910. Yet, claimant's state court case was based on a federal statute, the Jones Act. Complaint, Count I, par. 3, J.A. 42. The Eighth Circuit's analysis completely failed to recognize this significant fact. Because Lewis' state court claim was

based on a federal statute the Eighth Circuit erred in holding that it was outside the saving clause.

This conclusion is reenforced by the 1949 amendment to the saving clause, which substituted the words "any other remedy to which he is otherwise entitled" for the phrase "a common law remedy where the common law is competent to give it." 63 Stat. 101 (1949). "The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." Reviser's Note, H.R. Rep. No. 308, 80th Cong., 1st Sess., p.A118 (1949). The reference to the abolition of the distinction between law and equity provides strong support that the substitution of "any other remedy" for "a common law remedy" includes within the amended saving clause *in personam* judgments resulting from non-jury trials. Claimant's election to seek a non-jury trial in state court does not, therefore, take his case outside the protective scope of the saving clause.

Because claimant seeks in the state court a statutory remedy, *viz.*, an *in personam* judgment against the shipowner, his right to proceed in state court is fully protected by the saving clause. *Linton*, 964 F.2d 1480, 1486-1487 (5th Cir. 1992).

Linton involved a Jones Act defendant's attempt to remove a state court suit based on the plaintiff's election to proceed as a non jury matter. The district court had refused to remand the case, reasoning that the plaintiff's election to proceed as a non-jury matter in state court sought "a remedy in admiralty which the common law is

not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign." 964 F.2d 1480, 1485. The Fifth Circuit reversed, holding that

> particularly in view of the revised wording of the 'saving to suitors' clause, the Supreme Court cases do not require a jury trial as an element of a 'saving to suitors' remedy. Stated differently, a maritime non-jury action is not necessarily outside the scope of the 'saving to suitors' clause and within the exclusive admiralty jurisdiction of the federal courts.

964 F.2d 1480, 1487.

Thus, the failure to demand a jury in the state court action does not authorize denying the motion to dissolve because the saving to suitors clause is still applicable.

In the cause *sub judice*, the shipowner has no right to insist on a federal forum because claimant's right to proceed in state court is guaranteed by the saving to suitors clause of 28 U.S.C.A. §1333(1), even though no jury is sought in the state court. Accordingly, the district court properly dissolved the injunction.

CONCLUSION

Wherefore, claimant-appellee James Lewis respectfully prays that this Honorable Court reverse the judgment of the Court of Appeals and reinstate the order of the district court.

Respectfully submitted,

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