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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. The District Court Properly Exercised Its Discretion In This Single Claimant Case Because Petitioner's Stipulations Extinguished The Purpose Of The Injunction

Respondent's argument that the injunction against the state court action should be maintained despite Petitioner's stipulations is flawed in three significant respects. (Respondent's Brief at p. 24). First, it completely ignores the purpose of the injunction under the Act which is to protect the shipowner's right to a determination of limited liability in the admiralty court. Second, Respondent then fails to recognize that the injunction should be dissolved, even in the absence of a saved remedy, when the vessel owner's limitation rights have been protected by stipulation. Third, Respondent unduly restricts the saving to suitors clause by ignoring the amendments to that statute and limiting "remedy" to a jury trial.

These flaws undermine the validity of Respondent's argument and will be discussed in turn.

A. Even Where A Saved Remedy Is Not Sought The Injunction Should Be Dissolved When The Right To Seek Limitation Has Been Protected By Stipulation

Respondent claims that the "first step of the analysis . . . is determining whether a statutory conflict exists" and then characterizes Petitioner's argument as "an unwarranted expansion of *Langnes v. Green*, 282 U.S. 531 (1931) . . . " (Respondent's Brief at pp. 13-14). This argument ignores the stipulation procedure developed by the Courts of Appeals over the last half century.

Although Petitioner filed stipulations protecting Respondent's right to seek limited liability in the admiralty court (J.A.72, pars. 6-8), Respondent insists on examining the instant case as though the stipulations had never been made. This crucial analytical error undermines the "not otherwise available" test proposed by Respondent: that a statutory conflict is a *sine qua non* to dissolution of the injunction.[1]

The stipulations approved by the Courts of Appeals protect the shipowner's right to seek limited liability in the federal forum. They eliminate the need to balance competing statutory interests because the purpose of the injunction (federal determination of limited liability) is retained while the claimant is permitted to proceed in state court.

The "first step" therefore is not whether a statutory conflict exists but whether the shipowner's right to seek a federal determination of limited liability has been protected by the claimant's stipulations. *Kreta Shipping, S.A. v. Preussag Intercontinental Steel Corp.*, 192 F.3d 41, 49 (2d Cir. 1999).

[1] The logical extreme of the "not otherwise available" test is that, even when the injured seaman demands a state court jury trial, the admiralty court can defeat the seaman's heretofore unquestioned right to proceed in state court by the simple expedient of impaneling a jury. See *In the Matter of Complaint of Riverway St. Louis Harbor Service*, No. 4:99CV0860 ERW (E.D.Mo. filed Dec. 29, 1999).

1. *Langnes* Focused On Statutory Conflict Because No Stipulations Protected The Shipowner's Right To Seek Limited Liability In The Admiralty Court

In *Langnes*, the injured claimant did not stipulate to waive *res judicata* effects of a state court judgment with regard to limited liability nor did he agree to the exclusive right of the admiralty court to determine issues of limited liability. Indeed, Langnes eventually put the vessel owner's privity and knowledge into issue in the state court suit and the injunction was reinstated. *See Ex Parte Green*, 286 U.S. 437, 440 (1932).

The *Langnes* balancing of competing concerns is unnecessary where the shipowner's federal right has been protected by stipulation because the claimant's right to proceed in state court cannot compromise the shipowner's interest in seeking limitation. *Kreta Shipping, S.A. v. Preussag Intercontinental Steel Corp.*, 192 F.3d 41, 49 (2d Cir. 1999).

2. Once The Vessel Owner's Right To A Federal Determination of Limited Liability Has Been Secured By Stipulation The Purpose of The Injunction Is Satisfied And Recourse To Statutory Conflict Is Obviated

Respondent claims that *Kreta* is inapplicable to the instant case "because the Second Circuit declined to decide whether the non-common law action that the insurer sought to institute abroad was saved under the saving to suitors clause." (Respondent's Brief at p. 30). This reflects a fundamental misunderstanding of *Kreta's* analysis. The Court of Appeals declined to consider whether the saving clause applied because "the result in this case would in either event be the same" (192 F.3d 41,

49 n.7): once the shipowner's limitation rights were protected by stipulation there was no basis to maintain the concursus injunction. *Kreta*, 192 F.3d 41, 49. Because petitioner in the instant case similarly stipulated to the Respondent's right to seek limitation, (J.A. 72, pars. 6-8; J.A. 102)[2], *Kreta's* analysis is fully applicable to this case.

Respondent then attacks *Kreta* as "wrongly decided" in failing to recognize that "the limitation forum will prevail, unless resort to another forum is necessary to secure a remedy not available in federal court." (Respondent's Brief at p. 30). *Kreta's* analysis is soundly grounded in this Court's holding that when "[t]he state court proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court . . . the provisions of the Act, therefore, do not control." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957). Petitioner's stipulations guarantee that the state court proceeding can have "no possible effect" on the Respondent's right to seek limited liability in the federal forum. As in *Lake Tankers*, the statute therefore does not control the outcome.

Kreta is not, therefore, "wrongly decided." Its analysis is based on the fundamental precept that once the vessel owner's right to seek limited liability in the federal forum has been protected by stipulation, in either the single claimant or the excess fund case, the injunction becomes an unjustifiable vestige.

[2] Notably, respondent does not contend that the stipulations are insufficient to protect its right to seek limitation.

B. The Amended Saving To Suitors Clause Saves All Remedies, Not Only Those Resulting From Jury Trials

Respondent remarkably fails to acknowledge that Congress amended the saving to suitors clause to replace the phrase "a common law remedy where the common law is competent to give it" with the phrase "in *all cases all other remedies* to which they are otherwise entitled." 28 U.S.C.A. § 1333(1) (emphasis added). This sweeping guarantee is not limited by any reference to jury trials. "[T]here is no bar in the 'saving to suitors' clause to a non-jury trial at law." *Linton v. Great Lakes Dock & Dredge Co.*, 964 F.2d 1480, 1490 (5th Cir. 1992). The embrace of the statute is universal: *all remedies* in *all* cases are protected. Respondent's reliance on judicial references to the former "common law" phrasing is therefore without basis in the current statute[3].

Respondent supposes that the absence of a jury trial changes a Jones Act case into something other than a proceeding "at law." However, "the Jones Act allows the injured seaman to elect a non-jury trial in an action 'at law' in a state court, and such election does not, without more, convert the action into one in admiralty." *Linton*, 964 F.2d 1480, 1490. This is consistent with this Court's holding that a remedy within the saving clause "include[s] *all means* other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved." *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (emphasis added). Thus, even

[3] *Madruga v. Superior Court*, 346 U.S. 556, 560 n.12 (1954) holds only that the amendments "in no way narrowed the jurisdiction of the state courts under the original 1789 Act."

under the former language of the saving clause Respondent's theory that a non-jury state court Jones Act case does not provide a "common law remedy" is simply wrong.

Respondent's attempt to distinguish *Linton* and *Red Cross* as not involving limitation (Respondent's Brief at pp. 28-29) misses the mark because the scope of the saving to suitors clause does not depend on whether the issue is raised in a limitation case, in the context of removal, or as an objection to the exercise of state court subject matter jurisdiction. Respondent's objection is therefore a distinction without a difference.

1. Respondent Unduly Narrows The Scope Of The Saving Clause

Respondent mistakenly equates the former "common law remedy" provision of the saving clause with a jury trial. *See* Respondent's Brief at pp. 24-25. This Court's decision in *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900) held that remedies within the saving clause are not limited to those obtainable through jury trial or even through suit. Such remedies include, among others, detention of possession by a bailee. 177 U.S. 638, 644. This Court noted that "[i]t was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common-law remedy; and a remedy does not necessarily imply an action."[4] *Id.*

[4] Just as a trial is not a remedy, a fishing trip is not dinner. "But a strike rolled in cracker crumbs and fried would be mighty poor eating for a hungry man." J. LUCAS, LUCAS ON BASS FISHING 44 (Dodd, Mead & Co. 1962).

The California Supreme Court, relying on *Knapp*, reasoned that if the saving clause includes remedies obtainable without institution of suit, then the mode of trial does not dictate whether the remedy is within the statute. "The substance of these decisions seems to be that a common-law remedy as employed in the judiciary act means any remedy, *with or without action or jury*, which is a substitute for a suit at law, whereby a liability is imposed after due process of law." *North Pacific Steamship Co. v. Industrial Accident Commission of California*, 174 Cal. 346, 163 P. 199, 202 (1917) (emphasis added). Thus, petitioner's statutory Jones Act suit is not outside the saving clause simply because it will be tried to a judge rather than a jury.

C. Because The State Court Action Is Within The Saving To Suitors Clause The Statutory Conflict Resolved By *Langnes* Is Present

Respondent argues that unless petitioner exercises his right to a jury trial in state court there is no conflict between the saving clause and the limitation act. (Respondent's Brief at pp. 24-25). Although a statutory conflict is not required to dissolve the injunction (*Kreta*, 192 F.3d 41, 49), one is present in this case because the admiralty court's injunction forbids petitioner from pursuing a remedy guaranteed to him by statute. *Linton*, 964 F.2d 1480, 1490; *see generally Langnes v. Green*, 282 U.S. 531 (1930). Respondent's argument, predicated on the opposite assumption, should be rejected.

Moreover, contrary to Respondent's argument, Petitioner is guaranteed a choice of forum. "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." *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273, 276 (2d Cir. 1947). The limitation statute cannot be used as a forum-shifting device.

This is particularly true in this case because the Jones Act incorporates the Federal Employers Liability Act granting to injured employees the right to select a state court as forum. 45 U.S.C.A. § 56; and *see* 28 U.S.C.A. § 1445(a) (F.E.L.A. cases not removeable); *see also Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704 (1942) (noting legislative history of section 6 of the F.E.L.A. that purpose of section is to allow plaintiff to choose either federal or state court). That provision of the F.E.L.A., is part of Petitioner's statutory Jones Act remedy within the saving to suitors clause. Thus, Petitioner has a statutory right to select the forum.

Even the cases relied upon by Respondent state that the saving clause provides the claimant with the right to choose the forum. *Odeco Oil and Gas Co. v. Bonnette*, 4 F.3d 401, 404-405 (5th Cir. 1993), *cert. denied*, 511 U.S. 1004, 114 S.Ct. 1370 (1994) (claimants' interest in litigating in the forum of their choice is substantial); *Beiswenger Enterprise Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996) ("This 'saving to suitors' clause of § 1333 embodies a presumption in favor of jury trials and common law remedies in the forum of the claimant's choice.")

Accordingly, Respondent's claim that the absence of a jury trial in the state court places Petitioner's case outside the scope of the saving to suitors clause is incorrect and the statutory conflict is present.

II. RESPONDENT'S RIGHTS UNDER THE LIMITATION OF LIABILITY ACT IN THIS CASE ARE RESTRICTED TO LIMITATION

Respondent's argument presumes the source of its right to seek exoneration is the Limitation of Liability Act, yet fails to demonstrate any plausible basis for the presumption. Respondent admits that the source of the right to seek exoneration was the predecessor to current Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. (Respondent's Brief at p. 16). The adoption of the Rule does not imply a right exists in the statute when the statute itself says otherwise. Because a substantive right to exoneration has been created by a Rule in conflict with statutes, the Rules Enabling Act forbids execution of the Rule.

A. Exoneration Is Not Statutory But Created By Rule And Cannot, Therefore, Defeat A Claimant's Right To Have The State Court Determine Liability And Damage Issues

Respondent admits that the source of its right to exoneration is the Supplemental Admiralty Rule: "In his Complaint, the vessel owner may seek exoneration from as well as limitation of liability." *See* Fed.R.Civ.P. Supplemental Admiralty & Maritime Claims Rule F(3) (hereinafter "Supp. AMC Rule"); *Texaco, Inc. v. Williams*, 47 F.3d 765, 769 n.19 (5th Cir. 1995)." (Respondent's Brief at p. 16.) This is a critical admission – the authority respondent cites for the vessel owner's right to seek exoneration is the rule rather than the statute. Even the cited case agrees that the source of the right to seek exoneration is the rule. "Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims provides that 'the complaint may

demand exoneration from as well as limitation of liability.' *Therefore,* Texaco may assert its exoneration claim along with its limitation claim." *Texaco, Inc.*, 47 F.3d 765, 769 n.19 (5th Cir. 1995) (emphasis added).

Despite this admission, Respondent asserts without citation to authority that "Congress must have intended for federal courts to first make such a determination when a vessel owner proceeds under the Limitation Act." (Respondent's Brief at p. 35). This assertion is fundamentally flawed and unsupportable because it conflicts with the statute's language and purpose, and because the Limitation Act has been judicially construed in exactly the opposite manner.

1. Section 182 Of The Act Expressly Provides For Exoneration In Cases Of Fire But All Other Sections Omit Similar Language Evidencing Congress' Intent Not To Authorize Exoneration In Any Case Except Fire.

Interpretation of a statute begins with the statute's language. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Although Respondent claims that "there is no provision in the Limitation Act expressly calling for a determination of liability separate from limitation," (Respondent's Brief at p. 35), Section 182 specifically authorizes exoneration in cases of fire. "The Fire Statute," 46 U.S.C.A. § 182 states:

> No owner of any vessel *shall be liable* to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.* 46 U.S.C.A. § 182 (emphasis added).

This section is not a limitation of liability; it is a specific exoneration provision. *Hoskyn & Co. v. Silver Line*, 63 F.Supp. 452 (D.C. N.Y. 1943). The phrase "[n]o owner of any vessel shall be liable . . . " unmistakeably creates a right to contest liability that is conspicuously absent from all other sections of the statute.

Section 183, in contrast, provides that the owner's liability *"shall not . . . exceed"* the value of the vessel and freight. 46 U.S.C.A. § 183. "Shall not exceed" is language of limitation and not of exoneration from liability. The right to exoneration was therefore specifically authorized by Congress in those cases covered by Section 182 involving loss by fire, and omitted from all other cases in Section 183.

Sections 182 and 183 are separate and distinct provisions. *Republic of France v. United States*, 290 F.3d 395 (5th Cir. 1961); *Petition of Skibs A/S Jolund*, 250 F.2d 777 (2d Cir. 1957). In this circumstance, the inclusion of exoneration in Section 182 and its absence from Section 183 must be taken as a conscious legislative choice.

Where Congress includes particular language in one section of a statute, "but omits it in another section of the same act, it is presumed that Congress intended to exclude the language and the language will not be implied where it has been excluded." *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), citing *Russello v. United States*, 464 U.S. 16, 23 (1983).

This Court distinguished Section 182 from what is now Section 183 in *Consumers Import Co. et al. v. Kabushiki Kaisha Kawasaki Zosenjo et al.*, 320 U.S. 249 (1943). Holding that Section 182 extinguished claims against the vessel as

well as claims against the owner, the Court stated that to hold otherwise would improperly convert the Fire Statute into a limitation of liability to the value of the ship. This Court noted that Congress had used different language in this section "because it had a different purpose to accomplish." 320 U.S. 249, 253.

Respondent also claims, again without citation to authority, that Section 184, the apportionment statute, provides a right to exoneration. But the "shall not be liable" language is also absent from Section 184. Section 184 provides that in a multiple-claimant inadequate fund case, the claimants "shall receive compensation from the owner of the vessel in proportion to their respective losses . . . . " 46 U.S.C.A. § 184. The mandatory "shall receive" comports with the requirement that the owner admit liability as noted by this Court in *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239, 243 (1880). Section 184 further provides that "for that purpose", *i.e.*, distribution of compensation, the owners or claimants may take "appropriate proceedings." This does not authorize exoneration.

The "may be liable" phrase relied upon by Respondent to establish a right to exoneration must be viewed in context with the rest of the statute. Under Section 182, the owner may be found liable;[5] under Section 183, the owner's liability may be limited to the value of the vessel. Section 184 simply provides a mechanism for *pro rata*

[5] Once liability has been established under section 182, there is no occasion to limit that liability since the same standard for § 182 liability (owner's "design or neglect") will preclude § 183 limitation ("knowledge or privity").

distribution of the owner's liability as determined pursuant to Section 182 or 183.

The purpose of Section 184 is not to afford a liability determination but to provide a *pro rata* distribution of a limited fund once liability has been determined. *Petition of Moran Transportation, Corp.*, 185 F.2d 386, 388-389 (2d Cir. 1950); *and see Norwich Co. v. Wright*, 80 U.S. 104, 126 (1871). The Second Circuit concluded that Section 184 does not compel a claimant "to liquidate the face amount of her claim in a forum she did not choose." *Petition of Moran*, 185 F.2d 386, 389.

Respondent fails even to mention Section 182. Instead, Respondent struggles to find an implied right to exoneration in the statute.

2. A Right To Exoneration Cannot Be Implied Because Such A Right Does Not Further The Purpose Of The Limitation Act Which Is To Encourage Investment In Shipping By Imposing A Cap On Recoverable Damages

Respondent's argument fails to explain how implication of a right to exoneration furthers the statutory purpose "to exempt the investor from loss in excess of the value of the investment in the vessel and freight." *Petition of Moran Transportation Corp.*, 185 F.2d 386, 388-389 (2d Cir. 1950). Once the vessel owner has succeeded in limiting its liability, the statutory purpose is fulfilled. *Id.*; *see The Aquitania*, 14 F.2d 456, 458 (S.D.N.Y. 1926); *see also Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992) (affirming dismissal of limitation suit where pleadings show owner's privity or knowledge); *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969) (reversing finding of exoneration as unauthorized where claim for limitation was voluntarily

dismissed). That purpose is not advanced by requiring liability issues to be determined in the admiralty, rather than the state, court because limitation presupposes a liability to be limited.

The purpose of the limitation statute does not include forum-shifting. "The privilege of limiting liability is not part of any doctrine of forum non conveniens; a shipowner, sued in several places by several persons, has no advantage over other persons in the same position. If he would consolidate the several suits against him, he must fulfill those conditions which govern the consolidation of actions; if he would move them for trial elsewhere, he must fulfill those which govern the removal of causes." *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273, 276 (2d Cir. 1947).

The right to exoneration urged by Respondent as implied by the statute is nothing more than an improper forum-shifting device that is without basis in the purpose of the statute. Such a right should not be implied under these circumstances.

3. Respondent's Conclusion That Norwich and *The Benefactor* Construed The Limitation Act To Include A Right Of Exoneration Is Based On A Reading That Is Strained and Unsupportable

Respondent's interpretation of this Court's decisions in *Norwich Co. v. Wright*, 80 U.S. 104 (1871) and *The Benefactor Steamship Co. v. Mount*, 103 U.S. 239 (1880) relies on isolated language from those cases in a strained and unsupportable effort to find a statutory basis for

exoneration. (*See* Respondent's Brief at pp. 38-40). Neither *Norwich* or *The Benefactor* have construed the Limitation of Liability Act as including a right to exoneration.

Respondent's misreading of *Norwich* is rooted in the failure to recognize that *Norwich* was not a limitation case but a libel for damages. The district court found the Norwich & New York Transportation Company (hereinafter "Norwich") liable for the collision; only afterward did Norwich seek to raise the limitation statute as a defense to the full amount of the judgment. *Wright v. Norwich & N.Y. Transp. Co.*, 30 F.Cas. 685, 685-686 (Conn.Cir. 1870).

This Court's first holding in *Norwich* was that the evidence sustained the liability findings of the Connecticut federal court. 80 U.S. 104, 115. Respondent's analysis omits this crucial fact. The Court's subsequent reference to "apportionment" is not, therefore, authority that apportionment is a statutory liability proceeding.

> This is made clear by the Court's analysis:
> "The difficulty with the respondents in this case is, that they have not taken the proper steps, in the proper court, to enable them to avail themselves of the benefit of the act. . . . If proceedings are still pending in the Eastern District of New York it is not yet too late to initiate proper proceedings there for making an apportionment in the case." 80 U.S. 104, 126.

This strongly suggests that determining liability is different from apportionment. The Court made that express conclusion in the next sentence. "Meantime *the decree already made must be allowed to stand* at least for the purpose of showing the respondents' liability to the libellants, and the actual amount of damage which the latter have sustained, *as the basis of an apportionment.*" 80 U.S. 104, 126 (emphases added). Thus, apportionment is a

pro rata distribution of the limitation fund among the damage claimants and not, as Respondent claims, a determination of the vessel owner's liability.

Respondent's analysis of *The Benefactor, supra,* 103 U.S. 239, is likewise flawed by its failure to acknowledge the Court's actual language. Instead, Respondent baldly denies "that the right to exoneration was based entirely on the Fifty-Sixth admiralty rule." (Respondent's Brief at p. 39). This ignores the Court's statement that the rule was intended to relieve shipowners from the English rule requiring them to admit liability in seeking limitation. 103 U.S. 239, 243.

Even more significantly, Justice Bradley's opinion for the Court[6] explicitly stated that the Court perceived requiring the vessel owner to admit liability to be too onerous. "Hence, this court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever." 103 U.S. 239, 243. This is not a statement of statutory construction as claimed by Respondent, but a substantive policy determination in the form of a rule that, regardless of its nineteenth century validity, is forbidden by the modern Rules Enabling Act. *See* discussion *infra* at Section B.

Subsequent decisions of this Court have noted that the source of the shipowner's right to contest liability is the rule. *White v. Island Transportation Co.*, 233 U.S. 346, 348 (1914) ("The petition, while insisting upon the right

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[6] Justice Bradley authored the opinions of the Court in both *Norwich* and *The Benefactor;* thus, *The Benefactor*'s recounting of the purpose for the development of the rules should be given great weight.

of the owner, under admiralty rule 56. . . . "); *and see Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.* 336 U.S. 386, 400-401 (1949) (Jackson, J., dissenting) (Rule is source of right to contest liability); *see also In re Great Lakes Transit Corp.*, 63 F.2d 849, 850-851 (6th Cir. 1933) ("Under Admiralty Rule 53, it was still open to the respondents 'to contest the right of the owner or owners of said ship or vessel, either to an exemption from liability or to a limitation of liability.' ")

A proper reading of *Norwich* and *The Benefactor* establishes that exoneration is not a creation of statute but of rule.

4. Characterizing The Limitation Trial As A "Two-Step" Proceeding Fails To Identify The Source Of A Shipowner's Right To A Federal Liability Determination

Although Respondent relies heavily on judicial characterization of the limitation trial as a "two-step proceeding" (Respondent's Brief at pp. 32-33), that description begs the question. Other than the opinion of the Eighth Circuit below, none of the cases cited by Respondent even alludes to the source of the right to seek exoneration, much less holds that the right inheres in the statute. *See Universal Towing Co. v. Barrale,* 595 F.2d 414, 417 (8th Cir. 1979); *In re Port Arthur Towing Co.*, 42 F.3d 312, 317 (5th Cir. 1995); *see also Providence and N.Y. Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578, 595 (1883).

When the "first step" is taken in federal court, it is only done under authority of the rule. *See White v. Island Transportation Co.*, 233 U.S. 346, 348; *Texaco, Inc. v. Williams,* 47 F.3d 765, 769 n.19. Similarly, *Larsen v. Northland Transportation Co.*, 292 U.S. 20 (1934), cited by Respondent

(Respondent's Brief at p. 20), establishes that the "first step" may be a liability determination in state court. *See also The Benefactor*, 103 U.S. 239. If the "first step" may be taken in the state court, the nature of the "two-step proceeding" hardly supports Respondent's proposition that exoneration inheres in the statute.

5. A Right To Exoneration Is Not Established By The Repeal Of The Language In The Former Version Of Section 185 Claimed To Create Such A Right

Respondent's contention that language in the original version of Section 185 of the Limitation Act supports its contention that Congress intended exoneration to be included is puzzling, as well as erroneous. Respondent asserts that by providing in Section 4 of the original Act that "it shall be deemed sufficient compliance . . . if he or they shall transfer his or their interest to a trustee to act as such trustee for person or persons *who may prove to be legally entitled thereto,*" Congress was expressing an intent that the proceedings include a liability phase. However, the italicized language was repealed in subsequent amendments and does not appear in the current version of Section 185 of the Act. The deletion by amendment favors a construction completely opposite to that suggested by respondent, *i.e.*, that no right of exoneration is included within the Act, except with respect to the Fire Statute, Section 182.

6. *Langnes* Impliedly Rejected Exoneration As A Basis To Deny Dissolution Of The Injunction

When this Court decided *Langnes v. Green*, 282 U.S. 531 (1931), the rule of *res judicata* established by *The Benefactor, supra*, 103 U.S. at 249, was settled law.[7] The district court in *Langnes* had refused to dissolve the injunction and had exonerated the vessel owner. *Petition of Langnes*, 32 F.2d 284 (W.D.Wash. 1929); and *see The Aloha (Green v. Langnes)*, 35 F.2d 447 (9th Cir. 1929). This Court permitted the claimant to proceed in state court so long as the vessel owner's limitation – *not exoneration* – rights were protected.

Had the Court in *Langnes* considered exoneration to be a statutory right that precluded dissolution of the injunction, it could simply have relied on the district court's exoneration finding to affirm the refusal to dissolve the injunction. Instead, the Court allowed the claimant to proceed in state court knowing that any judgment favorable to the claimant would bar the vessel owner's claim for exoneration. *See The Benefactor, supra*, 103 U.S. at 249. The *Langnes* case therefore impliedly rejected exoneration as a basis to deprive the claimant of his right to proceed in state court under the Saving To Suitors Clause. The Eighth Circuit erred in holding to the contrary.

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[7] On rehearing, the Court clarified that a prior judgment "would have the effect of res judicata on the question of the liability of the steamship, and as to the amount of damage sustained by the libellants; and that the amount of the decrees would stand as the basis for determining the pro rata share of the libellants in the common fund to be distributed on the termination of the limited liability proceedings." 103 U.S. 239, 249.

B. Respondent Has Failed To Contest The Proposition That Rule F Is Invalid Under the Rules Enabling Act If The Rule Is The Source Of Respondent's Right To Seek Exoneration

Respondent's Brief is devoid of any reference to this Court's controlling decision in *Henderson v. United States*, 517 U.S. 654 (1996) and the majority of Respondent's Rules Enabling Act analysis stands unchallenged. Respondent makes a vague assertion that this Court may by rule or decision establish a right to exoneration. (Respondent's Brief at pp. 42-43). But neither decision nor rule may properly contravene a statute on matters of substance. As indicated above, the Limitation Act contains one grant of exoneration, limited to cases of fire. 46 U.S.C.A. § 182. The absence of any similar grant in the remainder of the statute is a conscious legislative decision that precludes establishment of exoneration by rule or decision.

CONCLUSION

Wherefore, Petitioner 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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