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NOTE

THE APPLICABILITY OF FLORIDA DIRECT ACTION IN THE LAW OF ADMIRALTY

In its landmark decision in *Shingleton v. Bussey*¹ the Supreme Court of Florida established the nation's first entirely judicially created right of direct action² and thus drastically altered established procedures in Florida insurance litigation.³ Although initially confined to cases involving automobile liability insurance, subsequent decisions, most notably *Beta Eta House Corp. v. Gregory*,⁴ have extended the rule announced in *Shingleton* to other forms of liability insurance.⁵ This note considers a question not yet faced by the courts—the applicability of the principles of *Shingleton* and *Beta Eta* to cases involving liability insurers of maritime risks.⁶ Special emphasis is accorded the treatment of the Louisiana direct action statute⁷ in cases arising within the admiralty jurisdiction of the federal courts.⁸

1. 223 So. 2d 713 (Fla. 1969). See Williams, *Shingleton v. Bussey Doctrine: To Join or not To Join—This is the Question*, 37 INS. COUNSEL J. 418 (1970); Note, *Shingleton v. Bussey: Joinder of an Insurance Company to an Action against the Insured Through the Court Rules of Civil Procedure*, 74 DICK. L. REV. 722 (1969); 6 GA. ST. B.J. 302 (1970); 21 MERCER L. REV. 351 (1969); 48 TEXAS L. REV. 242 (1969); 22 U. FLA. L. REV. 145 (1969); 23 U. MIAMI L. REV. 652 (1969); 38 U.M.K.C.L. REV. 138 (1969); 1970 UTAH L. REV. 468; Note, *Judicial Creation of Direct Action against Automobile Liability Insurers: Shingleton v. Bussey*, 23 VAND. L. REV. 631 (1970); 15 VILL. L. REV. 257 (1969).

2. The right of direct action, as employed in Florida, allows a plaintiff to join the defendant's liability insurer as a party defendant in an action in which the insurer may ultimately be obligated to pay. See *Conley v. State Farm Mut. Auto. Ins. Co.*, 342 F. Supp. 379 (M.D. Fla. 1972); *Godshall v. Unigard Ins. Co.*, 267 So. 2d 383 (Fla. 4th Dist. Ct. App. 1972).

3. See *Artille v. Davidson*, 170 So. 707 (Fla. 1936); *Thompson v. Safeco Ins. Co. of America*, 199 So. 2d 113 (Fla. 4th Dist. Ct. App. 1967).

4. 237 So. 2d 163 (Fla. 1970) (negligence in maintenance of fraternity house). The language of *Beta Eta* was, at one point, quite broad: "The principles announced in *Shingleton v. Bussey* . . . are applicable not only to automobile liability insurance but also to other forms of liability insurance." *Id.* at 165.

5. See, e.g., *Shipman v. Kinderman*, 232 So. 2d 21 (Fla. 1st Dist. Ct. App. 1970) (applicable to professional malpractice insurance); *Liberty Mut. Ins. Co. v. Roberts*, 231 So. 2d 235 (Fla. 3d Dist. Ct. App. 1970) (applicable to homeowner's insurance).

6. In *Quinones v. Coral Rock, Inc.*, 258 So. 2d 485 (Fla. 3d Dist. Ct. App. 1972), the court recognized the application of *Shingleton* and *Beta Eta* to a personal injury action brought on a maritime insurance policy in state court. The nature of that action, however, was inapposite to the maritime actions considered in this note. The action was not an admiralty proceeding and neither concursus nor the federal Limited Liability Act was involved.

7. LA. REV. STAT. ANN. tit. 22, § 655 (Supp. 1973).

8. Article III, § 2, of the Constitution extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction." 28 U.S.C. § 1333 (1970) provides in part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

It should be noted initially that while direct action is statutory in Louisiana and a product of judicial decision in Florida, the distinction is of little significance in view of the similar policy basis upon which they are founded—"that an insurance policy against liability to the public is not issued primarily for the protection of the insured, but for the protection of the general public."⁹ Similarly, the courts of both states have characterized direct action as a procedural rather than a substantive right.¹⁰

I. *Cushing* AND CONFLICTING STATE AND FEDERAL LAWS

In 1954 the Supreme Court decided *Maryland Casualty Co. v. Cushing*.¹¹ In what has been described as the riddle of the *Jane Smith*, and as the "Great Undecided Problem,"¹² the Court faced the question of whether the Louisiana direct action statute could apply in a case involving a maritime insurance contract without invading "an area of maritime jurisdiction withdrawn from the States,"¹³ as expressed in the Limited Liability Act.¹⁴ The towboat *Jane Smith* had

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

9. *Lewis v. Manufacturers Cas. Ins. Co.*, 107 F. Supp. 465, 471 (W.D. La. 1952). The public protection rationale employed in Louisiana is consonant with the third party beneficiary approach of *Shingleton*. Referring to *Gothberg v. Nemerovski*, 208 N.E.2d 12 (Ill. 1st Dist. Ct. App. 1965), the *Shingleton* court stated:

We have quoted extensively from the Illinois Appellate Court opinion because its reasoning is enlightening in demonstrating that the third party beneficiary doctrine encompasses, substantively speaking, a cause of action against an insurer in favor of members of the public injured through acts of an insured.

223 So. 2d at 716.

10. See *Finn v. Employers' Liab. Assurance Corp.*, 141 So. 2d 852, 864 (La. 2d Cir. Ct. App. 1962); *Beta Eta House Corp. v. Gregory*, 230 So. 2d 495, 499 (Fla. 1st Dist. Ct. App.), modified, 237 So. 2d 163 (Fla. 1970); *Russell v. Orange County*, 237 So. 2d 192, 193 (Fla. 4th Dist. Ct. App. 1970).

Unlike the right created in *Shingleton*, the right created under the Louisiana statute has not enjoyed consistent interpretations, and this vacillation has been reflected in the efforts of the federal courts to ascertain Louisiana's perception of its right of direct action. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954); *Collins v. American Auto Ins. Co.*, 230 F.2d 416 (2d Cir. 1956); *Shapiro v. Aetna Cas. & Surety Co.*, 234 F. Supp. 41 (N.D. Ga. 1963), *aff'd*, 337 F.2d 237 (5th Cir. 1964). Wisconsin's direct action statute has been interpreted by a federal district court as conferring a substantive right. See *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544 (N.D. Ill. 1967); *Posner v. Travelers Ins. Co.*, 244 F. Supp. 865 (N.D. Ill. 1965).

11. 347 U.S. 409 (1954).

12. *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 900 (5th Cir. 1966).

13. 347 U.S. at 413.

14. 46 U.S.C. §§ 181-96 (1970). 46 U.S.C. § 183 (a) (1970) provides in part:

The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

struck a cement pier on the Atchafalaya River in Louisiana and capsized. The shipowner and charterer filed admiralty petitions in federal district court to limit their liability. Subsequently, in the same district court, the representatives of five seamen who were drowned in the mishap sued the liability insurers of the shipowner and charterer. Claimants relied upon the Louisiana direct action statute, basing jurisdiction on diversity of citizenship. On appeal from the direct action, the Supreme Court framed the question presented as whether the "application of the Louisiana statute . . . would violate ' . . . the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters.'"¹⁵ The Court then proceeded to split four-one-four in its decision.

In an opinion joined in by Justices Reed, Jackson and Burton, Justice Frankfurter found a complete conflict between the state and federal laws for four reasons. First, direct action was viewed as antagonistic to one purpose of the Limited Liability Act—that all claims against a shipowner be disposed of in a single proceeding.¹⁶ Because the several claimants could sue the liability insurer separately and independently of the limitation proceeding, the Court feared that "[t]he ship's company would be subject to call as witnesses in more than one proceeding, perhaps in diverse forums," that "[c]onflicting judgments might result," and that "[u]ltimate recoveries might vary from the proportions contemplated by the statute."¹⁷ Secondly, the Court noted that direct action was potentially harmful to injured claimants. *Concursus*, said the Court, is not for the exclusive benefit of the shipowner, but functions to assure all claimants an "equal footing" to extract a pro rata share of their damages.¹⁸ Permitting direct action would allow those claimants relying on direct action to "drain away part or all of the insurance proceeds" to the prejudice of those relying upon the limitation proceeding.¹⁹ Thirdly, the Court thought that the inability of insurers to rely upon the limited liability of their insured would force insurers to increase their premiums to the detriment of the shipowner—"the very class sought to be benefited by the [Limited Liability Act]."²⁰ The Court's fourth concern was that direct action would result in an obviation of the benefit of liability insurance to the shipowner. Were the claimants to recover more than the face amount of the policies, the insurers would be

15. 347 U.S. at 412.

16. *Id.* at 415.

17. *Id.* at 417.

18. *Id.*

19. *Id.*

20. *Id.*

exonerated and the shipowner liable up to the value of the vessel without the benefit of his insurance.²¹

In his concurrence Justice Clark believed the conflict envisioned by the Frankfurter faction could be easily avoided by ordering the limitation proceeding to take place first.²² Justice Clark emphasized the purpose of the Limited Liability Act—"to encourage investment in American ships by placing a limitation upon the personal liability of the shipowner."²³ He felt that by allowing the shipowner to have the concursus held before the direct action, the shipowner would obtain the benefit of his insurance, and all that the Act was intended to protect would be protected.²⁴

Justice Black, writing for the remainder of the Court, saw no state-federal conflict. He read the Limited Liability Act to mean only that the shipowner's personal liability was to be limited to the amount of the vessel's value and that the limitation was not intended to apply to proceeds from liability insurance. To allow full exoneration of the insurer through direct action, followed by recovery from the shipowner to the extent permitted by the Act, was viewed as fully consistent with the purpose of the Act.²⁵

To avoid a deadlock the Frankfurter faction aligned with Justice Clark, and the case was remanded to be continued until the limitation proceeding was completed.²⁶ Commentators have experienced understandable difficulty in assessing the precise significance, if any, of *Cushing*, other than to speculate that it "presumably establishes a procedure to be followed by lower courts in handling similar cases until the Supreme Court further clarifies the issues."²⁷ From the viewpoint of the shipowner the immediate importance of *Cushing* was its recognition of his right to satisfy the claimants' judgments in the concursus from the proceeds of his liability insurance policy.²⁸ His

21. *Id.* at 417-18.

22. The owner's liability under the limitation proceeding would be discharged to the extent covered by the policy; thereafter direct actions could be instituted to reach the remaining coverage of the policy, if any. *Id.* at 425.

23. *Id.* at 423.

24. *Id.* at 425-27.

25. *Id.* at 432-37.

26. *Id.* at 423.

27. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 10-31, at 715 (1957).

28. *Cf.* *The City of Norwich*, 118 U.S. 468 (1886) (proceeds from hull insurance policy not part of owner's interest in ship for purposes of limitation proceeding). Justice Clark, in his *Cushing* concurrence, stated:

Though the holding in *The City of Norwich* does not control, I think that the reasoning of that case is pertinent; in other words, the owner of the ship has the same right to protect his investment in the ship by insurance against damage claims arising in its operation and which are chargeable to it as he has

right to indemnification was, in effect, procedurally guaranteed.²⁹ The interests of the injured parties were also served because a claimant's potential recovery was increased from the bare value of the damaged vessel, as determined in the limitation proceedings, to the policy limits of the insurance contract.³⁰

The logical implication of *Cushing*, despite its ambiguity, is that the application of a state right of direct action against a maritime liability insurer does not inevitably involve an exclusively maritime substantive concept.³¹

II. RECENT TREATMENT OF DIRECT ACTION IN THE FEDERAL COURTS

In 1969, in a case analogous to *Cushing* and involving essentially the same Louisiana statute,³² the Fifth Circuit found that "any conflict between the direct action statute and federal provision for a concursus of claims in admiralty is so minimal as to be insignificant."³³

to protect his investment from damage to the ship itself.

347 U.S. at 424 (footnote omitted).

29. In the conclusion of his opinion Justice Frankfurter summarized his perception of Justice Clark's proposal thusly:

For the reasons stated in his opinion, MR. JUSTICE CLARK agrees that the direct action suits should not be permitted to impair the shipowner's and charterer's right to indemnification, but he would allow the District Court to adjudicate the liability of the petitioners [insurers] to the respondents [direct action claimants] after the limitation proceeding has run its course.

347 U.S. at 422-23.

The implications of Justice Clark's concurrence were noted by District Judge Ellis in *Alcoa Steamship Co. v. Charles Ferran & Co.*, 251 F. Supp. 823, 828 (E.D. La. 1966):

In so stating his position, Mr. Justice Clark created two majority decisions in one case. On the one hand, by concluding *inter alia* that "limitation" and "direct action" could co-exist, he joined Chief Justice Warren and Justices Black, Douglas and Minton in holding that the Louisiana Direct Action Statute did not invariably or irreconcilably conflict with the federal limitation scheme—the *substantive* question. On the other hand, by expressly stating that the limitation proceeding should be concluded prior to a determination of the direct actions, . . . he was joined by Justices Frankfurter, Reed, Jackson and Burton in establishing the sequence in which the two would be determined—the *procedural* question.

30. No consensus was reached, however, on the actual liability of the insurer under the applicable Louisiana law. 347 U.S. at 425 (Clark, J., concurring).

31. As noted by Justice Clark in *Cushing*, "[i]n administering the Limited Liability Act the Court can easily avoid a clear conflict between it and the direct action statute." *Id.* at 423.

32. The Louisiana Insurance Code has undergone some minor revisions since 1954, none of which are pertinent to this discussion.

33. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). The court read *Cushing* as implicitly holding that "the policy underlying the concursus is not so strong or pervasive as to abrogate rights under the direct action statute." *Id.*

In consideration of the similar policy bases (previously noted) upon which the rights of direct action in Louisiana and Florida are founded, it seems reasonable to expect that a claimant seeking to avail himself of the Florida version in a maritime case will receive the same sympathetic hearing in the federal courts as have his Louisiana predecessors. Solicitude has, for example, already been displayed for the Puerto Rico direct action statute³⁴ in *Torres v. Interstate Fire & Cas. Co.*,³⁵ where the court relied upon the rationale contained in *Cushing* and subsequent decisions³⁶ to allow the claimant to proceed with his direct action against the insurer prior to any disposition in the limitation proceeding.

Such decisions reflect a tendency in maritime insurance litigation to determine policy liability upon state substantive rules unless the issues involve the application of a generally accepted admiralty rule.³⁷ This approach may have evolved from the Supreme Court's statement in *Romero v. International Terminal Operating Co.*,³⁸ regarding the concurrent jurisdiction of state courts over maritime causes of action:

Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the State and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law

34. P.R. LAWS ANN. tit. 26, § 2001 (1958).

35. 275 F. Supp. 784 (D.P.R. 1967). With regard to the similarity between the Louisiana and Puerto Rican statutes, the court stated:

A comparison of the decisions in Louisiana . . . with the decisions in Puerto Rico . . . persuades me that the legislative history of the Puerto Rico direct action statute . . . leaves no room for argument that the legislature . . . intended that its direct action statute be of any different force and effect whatsoever than the direct action statute of Louisiana.

Id. at 789.

36. *See, e.g.,* *Alcoa Steamship Co. v. Charles Ferran & Co.*, 251 F. Supp. 823 (E.D. La. 1966); *In re Independent Towing Co.*, 242 F. Supp. 950 (E.D. La. 1965). *See also* *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); 7 *HOUSTON L. REV.* 703, 706 (1970). In the text of the *Wilburn* opinion, the Court explained:

Congress has been exceedingly cautious about disturbing this system [referring to the generally diverse system of insurance], even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the states.

348 U.S. at 321 (footnote omitted).

37. *See* *Purofied Down Prods. Corp. v. Travelers Fire Ins. Co.*, 278 F.2d 439 (2d Cir. 1960); 5 *WILLAMETTE L.J.* 529 (1969). *Compare* *Beckham v. Reed*, 217 F. Supp. 749 (S.D. Tex. 1963), *with* *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir. 1964).

38. 358 U.S. 354 (1959).

when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.³⁹

Recognition of a claimant's right to join a shipowner and his liability insurer as codefendants pursuant to *Shingleton* and *Beta Eta* seems well within the scope of permissible state regulation in the maritime field. The treatment of the Louisiana direct action statute in the federal courts reflects the receptivity of those courts to the application of the right the statute creates and to the public policies it serves. One federal court has already assumed the same basic posture toward Florida's right of direct action in a case not involving a maritime claim. In *Barrios v. Dade County*,⁴⁰ the plaintiff accident victim sued the carrier of the Miami International Airport in New York federal district court. The court utilized two New York Court of Appeals decisions as its bases for permitting a direct action against the liability carrier: *Seider v. Roth*⁴¹ and *Oltarsh v. Aetna Ins. Co.*⁴²

Seider was a personal injury action arising out of an automobile accident occurring in Vermont. The insurer, a New York corporation, suffered an attachment, as a debt reachable by plaintiff, of its contractual obligation to defend and indemnify the defendant insured. The lower court allowed the action although no judgment of negligence or liability had been obtained against the insured. In permitting the action to proceed, the court of appeals observed:

It is said that by [affirming] we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because of a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured.⁴³

The *Barrios* court read *Seider* to indicate that the public policy of New York would not prohibit a direct action against a carrier although New York had no right of direct action.⁴⁴

39. *Id.* at 373. *But cf.* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (rejected the notion that state law must govern in the absence of a federal statute on a maritime rule regarding wrongful death); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (New York State Workmen's Compensation Statute could not be constitutionally applied where an accidental death occurred on a vessel afloat in navigable waters within New York's boundaries).

40. 310 F. Supp. 744 (S.D.N.Y. 1970).

41. 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

42. 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

43. 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

44. 310 F. Supp. at 747.

In *Oltarsh* the court of appeals permitted the maintenance in New York of a direct action brought under the Puerto Rico direct action statute by New York residents injured in Puerto Rico. The action was allowed, on the basis of the New York conflict of laws doctrine, to enforce a substantive right of the plaintiffs because Puerto Rico's direct action statute had been construed as creating a substantive right.⁴⁵ The *Barrios* court read *Oltarsh* as implying that not only would New York policy not be offended by direct action suits, but that such suits would probably be permitted in New York if allowed in the situs state. The court found *Oltarsh* broad enough to permit direct actions against carriers in New York if the situs state recognized such suits either by statute or judicial decision. *Barrios* is significant as indicative of the treatment the Florida right of direct action may receive in the federal courts and for possibly portending the federal courts' acceptance of *Shingleton* as establishing a substantive right despite its characterization by the Florida courts as creating a procedural right. The decision also underscores the practical insignificance of a statutory-case law distinction between the bases of direct action.⁴⁶

Cushing imposed a procedural restriction requiring that a final concursus determination be reached before any claimant may sue the insurer. Because concursus may consume a substantial period of time and thus delay a claimant's right to proceed against the insurer, the decision has been viewed as prejudicial to claimants.⁴⁷

Recent decisions in the Fifth Circuit have tracked the broad guidelines suggested by Justice Clark in *Cushing* and seem to vindicate the views of some commentators that the decision established a procedure to be followed absent clarification by the Supreme Court.⁴⁸ In several decisions the courts have grappled with the procedural chronology promulgated in *Cushing*. In 1957 the rule of concursus before direct

45. See *id.* at 748 n.15.

46. In *Barrios* the defendant insurer sought dismissal of the action on the ground that, *inter alia*, Florida had no direct action statute. 310 F. Supp. at 747. The court, rejecting defendant's argument, found "[t]hat [the fact that] the right was 'judicially' rather [than] 'legislatively' created does not detract from its force." *Id.* at 748.

47. See generally 19 ALBANY L. REV. 108 (1955); 68 HARV. L. REV. 157 (1954); 29 TUL. L. REV. 139 (1954); 22 U. CHI. L. REV. 550 (1955); 103 U. PA. L. REV. 263 (1954); 40 VA. L. REV. 621 (1954).

48. See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 10-31, at 715 (1957); *Mecom v. Shell Oil Co.*, 376 F.2d 31 (5th Cir. 1967); *Guillot v. Cenac Towing Co.*, 366 F.2d 898 (5th Cir. 1966); *Coleman v. Jahncke Serv., Inc.*, 341 F.2d 956 (5th Cir. 1965); *Ex parte Tokio Marine & Fire Ins. Co.* 322 F.2d 113 (5th Cir. 1963) (staying a direct action in federal district court in Louisiana pending a final determination in a Texas limitation proceeding); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960). Cf. *Lovless v. Employers' Liab. Assurance Corp.*, 218 F.2d 714 (5th Cir. 1955).

action was qualified in *Lake Tankers Corp. v. Henn*.⁴⁹ The Court relied upon *Cushing* in holding that a concursus or limitation proceeding is necessary only where the amount in the limitation fund may not be sufficient to discharge the claims pending against the vessel. The Court indicated that when the limitation fund might prove insufficient, the concursus is to be considered "vital" to the protection of the shipowner's statutory rights.⁵⁰ In *In re Independent Towing Co.*,⁵¹ the direct action and limitation proceeding were consolidated in federal district court. The direct action was not stayed, the court indicating that the evidence presented would be sufficient to determine the shipowner's right to limit his liability. The court proceeded on the assumption that if the total of all pending claims should be less than the policy limits of the insurance contract involved, then the limitation proceeding would be rendered moot. The court elaborated a number of guidelines intended to accord the shipowner the full protection of his insurance while allowing the claimants a means for full recovery of the insurance proceeds.⁵² Thus, the limitation-before-direct-action rule is no longer regarded as an absolute procedural right and will be invoked only where it appears that the shipowner's limitation rights will be threatened or if the direct action may otherwise unreasonably interfere with the limitation proceeding.⁵³ The result is the availability of a number of procedural alternatives to the claimant, depending upon each fact situation.

The Florida courts have not read *Shingleton* or *Beta Eta* as authorizing a plaintiff to pursue an insurer in a separate action. In contrast to the recognized Louisiana practice,⁵⁴ a plaintiff in Florida must

49. 354 U.S. 147 (1957). The Court affirmed the order of a federal court granting a motion to lift a restraining order entered in limitation proceedings, enabling the claimant to bring a separate action in state court in New York for the death of claimant's husband. The case did not involve application of any state right of direct action.

50. *Id.* at 154.

51. 242 F. Supp. 950 (E.D. La. 1965).

52. *Id.* at 956.

53. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 235 n.17 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). See *Guillot v. Cenac Towing Co.*, 366 F.2d 898 (5th Cir. 1966); *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113 (5th Cir. 1963); *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784 (D.P.R. 1967); *Alcoa Steamship Co. v. Charles Ferran & Co.*, 251 F. Supp. 823 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968). Cf. *Humble Oil & Ref. Co. v. M/V John E. Coon*, 207 F. Supp. 45 (E.D. La. 1962) (Louisiana direct action suits allowed to continue during pendency of limitation proceeding in Texas).

54. See *Bue, Cushing Revealed—The Grisly Spectre Is Precariously Defined as to Size and Shape*, 37 *INS. COUNSEL J.* 401, 406 (1970):

Louisiana has, perhaps, the broadest of such statutes, although various other states employ the same basic principles. . . . The aggrieved party may sue the

join the insured and his liability insurer as party defendants, the substantive liability of the latter being dependent upon that of the former.⁵⁵ But a Florida claimant retains the option of proceeding against the shipowner and his insurer in either federal or state court. Under *Lake Tankers Corp. v. Henn*,⁵⁶ a claimant could proceed in state court with a direct action, provided the aggregate of claims against the vessel did not exceed the limitation fund.⁵⁷ If all claims were consolidated in federal district court and their total found not to exceed the policy limits of the insurance contract, the direct actions could be prosecuted to judgment without incurring delay to allow a prior consursus proceeding. This procedure, first utilized by a federal district court in *In re Independent Towing Co.*,⁵⁸ has been criticized on the ground that the admiralty court cannot adequately protect the statutory rights of the shipowner where claimants are also proceeding in separate actions in the state courts. This question was apparently resolved, however, in *Olympic Towing Corp. v. Nebel Towing Co.*,⁵⁹ where the Fifth Circuit acknowledged the injunctive power of the federal courts to prevent claimants from proceeding with direct actions

insurer alone without making the assured a party defendant "whether the policy of insurance . . . was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana."

The internal quote is taken from LA. REV. STAT. ANN. tit. 22, § 655 (1958).

55. See *Russell v. Orange County*, 237 So. 2d 192 (Fla. 4th Dist. Ct. App. 1970). But cf. *Maxwell v. Southern Am. Fire Ins. Co.*, 235 So. 2d 768 (Fla. 3d Dist. Ct. App. 1970), where the injured party was permitted to sue the insurer in contract as a third party beneficiary. The court permitted the action on the separate, contractual medical coverage section of the homeowner's policy. The court did not decide whether such a procedure could be invoked when suit is brought under the liability section of an insurance policy:

The distinction between [*Shingleton and Beta Eta*] . . . and this case is that plaintiff here is not attempting to recover for the alleged negligence of the insured under the liability portion of the policy but is attempting a direct action solely against the insurer as a third party beneficiary under the contract provisions of the medical coverage portion of the insurance policy.

Id. at 770.

56. 354 U.S. 147 (1957).

57. Justice Clark, writing for the Court in *Lake Tankers Corp. v. Henn*, observed: It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus or railroad company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions.

354 U.S. at 153.

58. 242 F. Supp. 950 (E.D. La. 1965).

59. 419 F.2d 230 (5th Cir. 1969), cert. denied, 397 U.S. 989 (1970).

in state courts where necessary "to protect rights under both the state and federal statutes."⁶⁰

In 1964 Congress limited the jurisdiction of the federal courts to hear direct action suits by providing that an insurer defendant in a direct action assumes the citizenship of its insured.⁶¹ Thus, if the citizenship of the plaintiff coincides with that of the insured or any of those of the insurer, a federal court would be precluded from entertaining the action where diversity is urged as the ground for jurisdiction. For the time being this jurisdictional provision will probably have no effect upon a potential direct action in Florida since the provision by its own terms does not apply when the action is brought against both the insurer and the insured. This is not the case, however, in Louisiana, where a claimant may proceed independently against the liability insurer. In *Olympic Towing* this diversity problem was avoided because the action was filed prior to the effective date of the code amendment. The restriction on diversity jurisdiction in section 1332 (c) is no impediment to the claimant who institutes an action against a shipowner and insurer jointly, or who pursues his remedy in state court. In addition, an action on a marine insurance policy can, of course, always be maintained in federal court under section 1333, regardless of diversity, as an action upon a maritime contract, although by so proceeding the plaintiff necessarily foregoes the right to a jury trial available under section 1332.⁶²

60. *Id.* at 235. 28 U.S.C. § 2283 (1970) provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

61. 28 U.S.C. § 1332 (c) (1970) provides in part:

[I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

62. 28 U.S.C. § 1333 (1970) provides a grant of exclusive, original jurisdiction of admiralty claims to the federal district courts without regard to diversity of citizenship or amount in controversy.

In the landmark decision of *DeLovio v. Boit*, [7 F. Cas. 418, (No. 3776) (D. Mass.),] decided in 1815, Justice Story made clear that marine insurance policies were maritime contracts and, therefore, within the admiralty jurisdiction. . . .

....

The principle espoused by Justice Story has never been seriously challenged, and it is settled today that insurance coverage on a vessel engaged in navigation or commerce is clearly within the scope of admiralty jurisdiction and that, consequently, claims for damages arising out of such contracts, whether relating to loss or to actions for recovery of premiums, are maritime in nature.

7A MOORE, FEDERAL PRACTICE ¶ .255[1], at 3021 (2d ed. 1971) (footnotes omitted). See

Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870); Insurance Co. of North America v. Langan Constr. Co., 327 F. Supp. 567 (S.D. Ala. 1971); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 2-1, at 48 (1957). Thus it would seem that the exclusive grant of jurisdiction in 28 U.S.C. § 1333 (1970) would confer upon federal courts the authority to fashion a maritime insurance law. However, in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), the Court held that state substantive law applied in an action for recovery under a maritime insurance policy. Although jurisdiction was based on diversity, the Court stated:

Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. . . . But it does not follow, as the courts below seem to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule.

Id. at 313. The Court stressed the power of the states to regulate insurance, absent Congressional regulations to the contrary. *Id.* at 313-14, 319. Finding no established federal admiralty rule governing the questions involved in the case, the Court chose not to fashion a judicial remedy but instead to leave the regulation of maritime insurance with the states. *Id.* at 320-21. *Accord*, *Liman v. American S.S. Owners Mut. Protection & Indem. Ass'n*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969).

Applying the *Wilburn* rationale it would appear that state substantive law would continue to be applicable in maritime insurance actions even if jurisdiction were based on 28 U.S.C. § 1333 (1970), provided there were no contrary congressional regulations. Indeed, federal forums for direct actions would be more easily obtainable than at present, since the restriction imposed by 28 U.S.C. § 1332(c) (1970) would be obviated.

The Constitution neither forbids nor requires a jury trial in cases within the admiralty jurisdiction, and Congress has not created such a statutory right for proceedings brought under § 1333. The only exception to this rule is contained in 28 U.S.C. § 1873 (1970), which grants a jury trial upon demand of either party in actions sounding in tort or in contract involving vessels weighing over twenty tons operating on the Great Lakes. *See* 7A MOORE, FEDERAL PRACTICE ¶ .59[3], at 417 (2d ed. 1971).

Federal Rule of Civil Procedure subsection 9(h), added in 1966, allows a claimant bringing suit on an *in personam* claim cognizable under either federal diversity jurisdiction (28 U.S.C. § 1332) or under admiralty jurisdiction (28 U.S.C. § 1333) to elect to have his action treated as one in admiralty. If he elects to proceed in admiralty, Rule 38(e) makes it clear that a jury trial is not available, except as provided by statute. If no election is made, there is a right to a jury trial. *See* *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Green v. Ross*, 338 F. Supp. 365 (S.D. Fla. 1972); *Johnson v. Venezuelan Line S.S. Co.*, 314 F. Supp. 1404 (E.D. La. 1970); *Sanderlin v. Old Dominion Stevedoring Co.*, 281 F. Supp. 1015 (E.D. Va. 1968); *Doughty v. Nebel Towing Co.*, 270 F. Supp. 957 (E.D. La. 1967).

The election is, of course, only available when dual jurisdictional grounds are present. Rule 9(h) expressly provides that "[i]f the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not," and Rule 38(e) provides that "[t]hese rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." *See* *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972); *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666 (9th Cir. 1972).

Also, an election under Rule 9(h) is not necessarily final. The rule provides that the "amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15." Rule 15, authorizing liberal amendment to pleadings, provides in part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend . . . only by leave of court or by written consent of the adverse party; and leave shall be freely

One other issue not yet resolved is the availability to the insurer of a personal defense of the insured when proceeded against in a Florida direct action. In *Cushing* Justice Frankfurter addressed the issue in the admiralty context indicating that limitation of liability, "used as a term of art," is not available as a defense to a liability underwriter.⁶³ Applicable statutory language in Louisiana specifically provides that a codebtor "can not plead such exceptions defenses as are merely personal to some of the other codebtors."⁶⁴ The admiralty courts have reaffirmed Justice Frankfurter's opinion that the limited liability act is a defense solely intended for, and thus strictly personal to, the shipowner (and therefore unavailable to his liability insurer in a Louisiana direct action).⁶⁵ Further clarification appeared in *Alcoa Steamship Co. v. Charles Ferran & Co.*,⁶⁶ where the court explained that, although an insurer cannot avail himself of any personal defense of the insured (*e.g.*, limited liability), he can benefit from the contractual defenses of the insured.⁶⁷ The statement leaves at least one possible avenue of limited liability open to the insurer. In *Olympic Towing* the same court dealt with the long-standing shipowners' criticism that allowing direct actions against their liability underwriters would eventually result in higher premiums. The court concluded that "the possibility of higher premiums is an insufficient basis for permitting an insurer to limit its liability."⁶⁸

III. CONCLUSION

The implications of the application of the Florida right of direct action to maritime cases are great. Central to the holding in *Shingleton* was a recognition of the strong public interest in providing adequate remedies to persons injured in automobile mishaps. That concept was extended in *Beta Eta* to promote expeditious relief for the injured in other activities covered by liability insurance. The needs

given when justice so requires. . . .

For a good, recent discussion of many of these points, see *Williams v. Shipping Corp. of India*, 354 F. Supp. 626 (S.D. Ga. 1973).

63. 347 U.S. at 421-22.

64. LA. CIV. CODE art. 2098 (1870). See *Bue*, *supra* note 54, at 410.

65. See *In re Independent Towing Co.*, 242 F. Supp. 850 (E.D. La. 1965) (opinion traces historical development, and concludes that limited liability is unavailable as defense to shipowner's liability insurer); *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784 (D.P.R. 1967) (for purposes of the Puerto Rican direct action statute limitation is a personal defense).

66. 383 F.2d 46 (5th Cir. 1967).

67. The contract in *Alcoa* included a customary \$300,000 limit on the ship repair contractor's liability. The court notes no objection to the use by an insurer of a limitation of liability "agreed to by parties in relatively equal bargaining positions." *Id.* at 56.

68. 419 F.2d at 236.

that those decisions recognized and sought to alleviate are no less present in cases involving maritime misfortunes. It is time for the courts to refashion the right created in *Shingleton* to more fully satisfy public needs. It has been persuasively suggested that the insured be considered a necessary rather than an indispensable party in Florida direct actions.⁶⁹ The proposal is valuable because such a change would permit the claimant to proceed with an action in the absence of the insured, thereby improving his opportunity for recovery. As a practical matter, an injured party may be more successful in obtaining jurisdiction over a marine insurer, who is usually present in several jurisdictions for purposes of service of process, than over the vessel involved, which may not remain in Florida waters.⁷⁰ Similar logic might be invoked to create a remedy when a ship deposits pollutants in Florida waters and then returns to the open sea.⁷¹

It is most important to recognize that considerations of public policy are highly appropriate to a determination of the questions and issues presented herein. It must, of course, be conceded that conflicting policies underlie the Limited Liability Act and the right of direct action. The former serves the express purpose of protecting the American shipping industry from unreasonably burdensome liabilities, while the latter serves to promote and protect the interests of an injured party. It has been persuasively suggested that, given the modern financially sophisticated shipping industry, the objectives sought to be achieved through direct action should now be considered primary.⁷²

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69. 22 U. FLA. L. REV. 145, 146-48 (1969).

70. Cf. Note, *Judicial Creation of Direct Actions against Automobile Liability Insurers: Shingleton v. Bussey*, 23 VAND. L. REV. 631, 643 (1970).

71. Compare *Taylor v. Fishing Tools, Inc.*, 274 F. Supp. 666 (E.D. La. 1967) (Louisiana direct action statute found applicable in injury case arising on off-shore drilling platform), with *American Waterway Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971), *rev'd*, 93 S. Ct. 1590 (1973) (upholding the Florida Oil Spill Prevention and Pollution Control Act).

72. See Kiert, *The Effect of Direct Action Statutes on P & I Insurance, on Various Other Insurances of Maritime Liabilities, and on Limitation of Shipowners' Liability*, 43 TUL. L. REV. 639 (1969).