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ADMIRALTY, FEDERALISM, AND THE NEW YORK DIRECT ACTION STATUTE: SEAMEN'S RIGHTS TO ENFORCE JONES ACT JUDGMENTS

*Richard Alexander**

Seamen injured or taken ill while in the service of a vessel have traditionally been entitled to wages for the duration of the voyage and medical care until they have recovered.[1] The general maritime law, however, precluded seamen from recovering for personal injuries caused by the negligence[2] of either the master of a vessel or a member of its crew.[3] This obstacle was overcome

* B.A., Ohio Wesleyan University, 1966; J.D., University of Chicago, 1969; Member, California and Michigan Bars; Diplomate, National Board of Trial Advocates; Partner, The Boccardo Law Firm, San Jose, California.

[1] The crew members of a vessel have a right to "maintenance" and "cure" from their employer when an illness or injury sustained aboard ship is treated ashore. *See* Vella v. Ford Motor Co., 421 U.S. 1, 3 (1975). "Maintenance," the cost of food and lodging, and "cure," the cost of medical care, *see* Mahnmras v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 172 (2d Cir. 1973), are substitutes for the care the seaman could have received aboard ship. Maintenance and cure are granted regardless of fault, *see* Vella v. Ford Motor Co., 421 U.S. 1, 4 (1975), and are payable until the seaman's illness or injury is diagnosed as permanent and incurable, *id.* at 3. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 253-79 (1957); Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046 (1981).

[2] Although negligence was unavailable as a theory of recovery, seaman could still obtain compensation under the admiralty doctrine of "unseaworthiness." This doctrine imposes a duty upon shipowners to provide safe working conditions, that is, a "seaworthy" vessel. *See* 2 M. MORRIS, THE LAW OF SEAMEN §§ 612-615 (3d ed. 1970). Any defective conditions of a ship that causes injury gives rise to an unseaworthiness claim; negligence need not be proven. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93 (1946).

The Supreme Court has greatly expanded the duty to provide a seaworthy vessel in recent years, *see, e.g.*, Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967) (unseaworthiness includes owner's failure to provide sufficient number of crewmen), and some members of the Court have criticized this expansion as essentially imposing strict liability on shipowners. *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 216 (1963) (Harlan, J., dissenting).

[3] The rights of injured seamen under the general maritime law were summarized in

in 1920 by the passage of the Jones Act.[4] Intended as a remedial statute to expand the admiralty's protection of its wards,[5] the Jones Act expressly authorizes recovery for personal injuries arising out of negligence occurring in the course of a seaman's employment.[6]

Although a seaman's right to recover for maritime torts is firmly established,[7] his ability to enforce a judgment obtained

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the famous four "propositions" set forth by the Supreme Court in The Osceola, 189 U.S. 158, 173 (1903). The first two propositions described the seaman's right to maintenance and cure benefits, and his right to a seaworthy vessel. *Id.* In the third proposition, however, the Court held that seamen were subject to the fellow servant rule, and thus were unable to recover for the negligence of crew members. *Id.* The fourth proposition expressly limited the seaman's recovery to maintenance and cure. *Id.*

In 1915, Congress first attempted to provide a right of recovery for negligence by simply abolishing the fellow servant rule. *See* Act of Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1164, 1185 (codified as amended at 46 U.S.C. § 688 (1976)). However, three years later, the Court held that Congress had misread *The Osceola* to mean that the fellow servant rule was the only impediment to recovery for negligence and that the Act of 1915 did not alter the fourth proposition of *The Osceola*, that the general maritime law prohibited recovery for the negligence of crew members. *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381 (1918). Congress enacted the Jones Act in order to overcome this holding. *See* G. GILMORE & C. BLACK, *supra* note 1, at 279-81.

[4] Merchant Marine Act of 1920, ch. 250, § 33, 41 Stat. 988, 1007 (codified at 46 U.S.C. § 688 (1976)). The Jones Act provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. § 688 (1976).

[5] *See, e.g.*, Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949) ("The Jones Act was welfare legislation that created new rights in seamen for damages . . . [and] is entitled to a liberal construction to accomplish its beneficent purposes."); Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942) ("[The Jones Act] is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards."); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939) (because seamen are the wards of admiralty, "remedial legislation for [their] benefit and protection . . . has been liberally construed"). *Accord* The Arizona v. Anelich, 298 U.S. 110, 123 (1936); United Continental Tuna Corp. v. United States, 550 F.2d 569, 573 (9th Cir. 1977).

[6] *See* note 4 *supra*. The Jones Act also provides a cause of action for wrongful death, *see* 46 U.S.C. § 688 (1976), which had previously been unavailable unless afforded by a state or foreign wrongful death act, *see* Edelman, *Recovery for Wrongful Death Under the General Maritime Law*, 55 TUL. L. REV. 1123, 1128 (1981).

[7] *See generally* G. GILMORE & C. BLACK, *supra* note 1, at 248-394.

under the Jones Act has not received commensurate federal protection.[8] The absence of a federal policy in this area has proven especially troublesome in New York, as the application of provisions of the New York Insurance Law effectively bars the enforcement of Jones Act judgments under certain conditions. Because New York is the home of numerous shipping companies and their maritime insurers, application of its Insurance Law at the expense of injured seamen substantially undermines the remedial policies of the Jones Act.

This article examines how the New York Insurance Law operates to undercut a seaman's Jones Act rights.[9] It explores the historical origin of the New York law, and addresses the validity of the reasons offered in its support.[10] Finally, it examines the basis for the federal courts' reluctance to interfere with state regulation of maritime insurance,[11] the underlying cause of a seaman's inability to vindicate fully his Jones Act rights under New York law.

I. The Problem: New York Insurance Law and the Exemption of a Direct Action Against Marine Insurers

An injured seaman's difficulty in collecting a Jones Act judgment stems from New York's irregular treatment of insurers. Section 167(1) of the New York Insurance Law[12] obligates insurers to include in their policies a clause providing that the insolvency of the insured will not release the insurer from liability under the policy.[13] It also requires the inclusion of a provision affording a right of direct action against the insurer in the event that a judgment against the insured remains unsatisfied for thirty days.[14] Seamen, however, have no such right of action against a marine insurer under the Insurance Law; a maze of statutory provisions specifically exempt marine insurers from the obligation to provide a right of direct action in their contracts. Section 167(4) of the New York Insurance Law is the

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[8] *See* notes 82-155 and accompanying text *infra*.
[9] *See* notes 12-36 and accompanying text *infra*.
[10] *See* notes 37-81 and accompanying text *infra*.
[11] *See* notes 82-155 and accompanying text *infra*.
[12] N.Y. Ins. Law § 167 (McKinney 1966 & Supp. 1982-1983).
[13] *Id.* § 167(1)(a).
[14] *Id.* § 167(1)(b).

source of this exemption.[15]

The New York courts have consistently recognized that section 167(4) precludes a judgment creditor from bringing a direct action against a marine insurer.[16] Although this preclusive effect is not limited to Jones Act plaintiffs, two recent federal decisions illustrate how seamen have suffered from the application of the statute. In *Ahmed v. American Steamship Owners Mutual Protection & Indemnity Association*,[17] injured seamen sought recovery in a California state court for personal injuries sustained while in the employ of three shipping companies, collectively known as Amercargo.[18] The seamen obtained default judgments, but the judgments went unsatisfied because of Amercargo's intervening bankruptcy.[19] After submitting their judg-

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[15] Section 167(4) provides that the provisions of § 167 generally, including the right of direct action, "shall not apply . . . to the kinds of insurances set forth in paragraph (c) of subsection two of section one hundred twelve." *Id.* § 167(4). Section 112(2)(c) describes "marine insurance of the following kind or kinds," *id.* § 112(2)(c), including "[i]nsurance in connection with ocean going vessels against any of the risks specified in paragraph twenty-one of section forty-six," *id.* § 112(2)(c)(2). In turn, § 46(21) specifies:

> '[m]arine protection and indemnity insurance,' meaning insurance against, or against all legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

Id.

[16] Meridian Trading Corp. v. National Auto. & Casualty Ins. Co., 45 Misc. 2d 847, 258 N.Y.S.2d 16 (Sup. Ct. N.Y. County 1964) is illustrative. In *Meridian*, the assignee of a first preferred mortgage sought reimbursement from the marine insurer of the vessel owner-mortgagor for funds paid in settlement of a claim against the vessel. *Id.* at 848, 258 N.Y.S.2d at 17. The morgagee alleged that the insurer's failure to pay the settlement constituted a breach of the insurance contract. *Id.* at 849, 258 N.Y.S.2d at 17. The court held that although § 167 allows certain parties to sue on insurance contracts, marine protection and indemnity insurance is specifically excluded. *Id.* at 849, 258 N.Y.S.2d at 18.

Meridian was followed in Cucurillo v. American S.S. Owners Mut. Protection & Indemn. Assoc., 1969 A.M.C. 2334 (Sup. Ct. N.Y. County 1969), a case arising out of the bankruptcy of the A.H. Bull Steamship Co. Cucurillo had obtained a prior judgment against Bull and directly sued Bull's insurer for reimbursement. *Id.* at 2335. The court granted the insurer's motion for summary judgment on the ground that New York law prevented injured third parties from bringing direct actions against marine insurers. *Id.* at 2335-36. *See also* Cowan v. Continental Ins. Co., 86 A.D. 2d 646, 446 N.Y.S.2d 412 (2d Dep't 1982) (decedent's administratrix prevented from bringing direct action against marine insurer of tug boat on which decedent was crew member).

[17] 444 F. Supp. 569 (N.D. Cal. 1978), *aff'd*, 640 F.2d 993 (9th Cir. 1981).

[18] 640 F.2d at 994.

[19] *Id.*

ments in Amercargo's New York bankruptcy proceedings, they were still unable to recover.[20] Accordingly, the seamen began a direct action against Amercargo's insurer in a California federal court.[21] After determining that New York law applied to the controversy,[22] the court dismissed the case on the basis of section 167(4), noting that New York's direct action statute "is made expressly inapplicable to marine insurance contracts."[23]

Miller v. American Steamship Owners Mutual Protection & Indemnity Co.[24] also demonstrates the obstacle section 167(4) presents to injured seamen. In *Miller*, as in *Ahmed*, an injured seaman obtained a default judgment against his employer that went unsatisfied because of the employer's insolvency.[25] The seamen then brought a direct action against the insurer in the United States District Court for the Southern District of New York.[26] Judge Sofaer, persuaded by the reasoning in *Ahmed*, dismissed the suit on the ground that "no direct action is allowed on any marine insurance policy."[27]

Perhaps contributing to seamen's inability to recover against marine insurers is the distinction, recognized in New York, between indemnity and liability policies. Under a liability policy, the insurer is required to pay as soon as a judgment is obtained against the insured. In contrast, the insurer's obligation under an indemnity policy does not attach until the insured has actually paid the injured party.[28] Most marine insurance policies

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[20] *Id.*

[21] 444 F. Supp. 569 (N.D. Cal. 1978).

[22] *Id.* at 571-72. The court first determined that, as the question was one involving marine insurance, state law, not federal maritime law, governed the case. *Id.* at 571. *See* notes 99-137 and accompanying text *infra*. However, applying federal choice of law rules, *see* note 143 *infra*, the court concluded that New York law was applicable under the most significant relationship test. 444 F. Supp. at 572.

[23] 444 F. Supp. at 572. On appeal to the United States Court of Appeals for the Ninth Circuit, the plaintiffs contended that the marine insurance exemption violated the equal protection clause. 640 F.2d at 996. Despite the fact that this issue had not been raised at trial, the court remanded the case in order to permit its further development. *Id.* at 997. In so doing, the court was strongly influenced by the traditional judicial solicitude for the welfare of seamen. *See id.* at 996; note 120 *infra*.

[24] 509 F. Supp. 1047 (S.D.N.Y. 1981).

[25] *Id.* at 1048.

[26] *Id.*

[27] *Id.* at 1049.

[28] *See* 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4261 (1979); 11 G. COUCH, INSURANCE § 44:4 (2d ed. 1982).

covering third party liabilities[29] are contracts of indemnity[30] and, typically, provide that the insurer will pay only that amount "which the assured . . . shall have become legally liable to pay *and shall have paid.*"[31]

At common law, New York courts recognized the distinction between liability and indemnity policies, holding that an injured party could not sue the insurer on an indemnity policy when a judgment against the insured remained unsatisfied.[32] This distinction continued to be relied upon as a basis for denying relief against marine insurers in cases brought under the direct action statute.[33] This reliance would suggest that removing the statu-

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[29] Marine insurance covering third party liability was developed in England by the so-called protection and indemnity (P & I) clubs. Shipowners banded together in these clubs and contributed their proportionate share of any loss suffered by a member. *See* Libby, *Some Aspects of Protection and Indemnity Insurance*, 1952 INS. L.J. 684. This form of insurance spread rapidly to the United States during the interwar period, and was relied upon heavily by the government during World War II. *See id.* at 685.

[30] *See* Kierr, *The Effect of Direct Action Statutes on P & I Insurance, on Various Other Insurances of Maritime Liabilities, and on Limitations of Shipowners' Liability*, 43 TUL. L. REV. 666, 669 (1969).

[31] *Id.* at 669-70 (emphasis added).

[32] Prior to the enactment of the direct action statute, New York common law prohibited an action by an injured third party against an insurer when the insurance contract was one of indemnity. *See* Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 275, 160 N.E. 367, 369 (1928); Burke v. The London Guar. & Accident Co., 47 Misc. 171, 172, 93 N.Y.S. 652, 653 (Sup. Ct. Kings County 1905), *aff'd*, 126 A.D. 933, 110 N.Y.S. 1124 (2d Dep't 1908), *aff'd*, 199 N.Y. 557, 93 N.E. 1117 (1910). As a result, recovery by an injured third party could be defeated simply by interpreting the insurance contract as one of indemnity. *See* Jackson v. Citizens Cas. Co., 277 N.Y. 385, 389, 14 N.E.2d 446, 448 (1938).

Section 109 of the Insurance Law, the predecessor of § 167, was a remedial statute intended to eliminate this distinction. The effect of the statute was to provide an injured third party with a cause of action against the insurer in the event of the insured's insolvency. *See* Shenandoa Rayon Corp. v. Halifax Fire Ins. Co., 245 A.D. 279, 281, 281 N.Y.S. 193, 196 (4th Dep't 1935), *aff'd*, 272 N.Y. 457, 3 N.E.2d 867 (1936).

[33] For example, in Cucurillo v. American S.S. Owners Mut. Protection & Indemn. Assoc., 1969 A.M.C. 2334 (Sup. Ct. N.Y. County 1969), *see* note 16 *supra*, the court, after noting that § 167(4) exempted marine insurers from the direct action statute, indicated that the policy at issue was one of indemnity, and that this also barred recovery against the insurer. 1969 A.M.C. at 2335. In so doing, the court relied upon Burke v. The London Guar. & Accident Co., 47 Misc. 171, 93 N.Y.S. 652 (Sup. Ct. Kings County 1905), *aff'd*, 126 A.D. 933, 110 N.Y.S. 1124 (2d Dep't 1908), *aff'd*, 199 N.Y. 557, 93 N.E. 1117 (1910), a case decided *before* New York's direct action statute was enacted. The *Cucurillo* court completely ignored New York cases expressly holding that the distinction between liability and indemnity policies is irrelevant under the direct action statute. *See* notes 34-36 and accompanying text *infra*.

Although superficial and poorly-reasoned, *Cucurillo* has been relied upon by the federal courts in denying relief to injured third parties against marine insurers. *See* Ahmed

tory exception for marine insurers would not correct the problem, since they could escape liability purely as a matter of contract. However, as early as 1928, the New York Court of Appeals held that the direct action statute is generally applicable to indemnity policies.[34] Prior to the enactment of the marine insurer's exemption, this rule was applied to marine indemnity policies.[35] Accordingly, the real obstacle to seamen recovery under the New York direct action statute is section 167(4).[36]

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v. American Steamship Mut. Protection & Indemn. Assoc., 640 F.2d 993, 995 (9th Cir. 1981); Liman v. American S.S. Owners Mut. Protection & Indemn. Co., 299 F. Supp. 106, 107-08 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). Nonetheless, the courts in Miller v. American S.S. Owners Mut. Protection & Indem. Assoc., 509 F. Supp. 1047, 1049 (1969), and Ahmed v. American Steamship Mut. Protection & Indem. Assoc., 640 F.2d 993, 995 (1981), acknowledged that New York's direct action statute applied to both liability and indemnity policies.

[34] *See* Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 275, 160 N.E. 367, 369 (1928) ("The policy was one of indemnity against loss . . . [and] [t]he effect of the statute is to give the injured claimant a cause of action against the insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied."). *Accord* Brustein v. New Amsterdam Cas. Co., 255 N.Y. 137, 142, 174 N.E. 304, 305 (1931); Shenandoa Rayon Corp. v. Halifax Fire Ins. Co., 245 A.D. 279, 281, 281 N.Y.S. 193, 196 (4th Dep't 1935), *aff'd*, 272 N.Y. 457, 3 N.E.2d 867 (1936).

[35] *See, e.g.*, Hansen v. Continental Ins. Co., 262 N.Y. 136, 139, 186 N.E. 420, 421 (1933) ("That the traditional contract of marine insurance was one of indemnity for money actually paid or loss actually suffered, is no reason for exempting such policies from the operation of section 109 [predecessor of § 167], when the companies issuing marine insurance chose to insure against loss arising from personal injuries.").

[36] A recent New York Court of Appeals decision, 175 East 74th Corp. v. Hartford Accident & Indem. Co., 51 N.Y.2d 585, 416 N.E.2d 584, 435 N.Y.S.2d 584 (1980), appears to cast doubt on the applicability of § 167 to indemnity policies. In *Hartford*, the court held that a fidelity bond covering losses sustained through any illegal conduct of the insured's employees was not a "contract or policy insuring against liability," *see* N.Y. Ins. Law § 167(1) (McKinney 1966), so as to permit a direct action against the insurer upon the insured's insolvency. 51 N.Y. at 593, 416 N.E.2d at 587, 435 N.Y.S.2d at 587-88.

The court noted that "*if the policy is not one of liability*, section 167 does not operate in favor of a person who has suffered a loss through some act of the insured." *Id.* at 592, 416 N.E.2d at 587, 435 N.Y.S.2d at 587 (emphasis added). This suggests that indemnity policies are excluded from the direct action statute. However, it appears that the court meant nothing more than that the policy must cover legal liabilities to third parties or actual losses arising out of those liabilities. In *Hartford*, the fidelity policy merely covered losses sustained through the conduct of the employee, not losses related to the employee's legal liability to a third party. *See id.* at 592, 416 N.E.2d at 587, 435 N.Y.S.2d at 587.

II. Historical Perspective: The Obsolescence of Section 167(4)

Marine insurers were not always exempt from the operation of New York's direct action statute. Prior to 1940, New York courts recognized that the policy of fairness to injured plaintiffs underlying the statute applied with equal force to marine insurance contracts.[37] In that year, however, section 167(4) was amended to exclude marine insurance from the scope of the statute, largely due to efforts by the American Institute of Marine Underwriters (the Institute).[38]

The legislative history preceeding the amendment to section 167(4) is sparse. The only available materials are a memorandum from the Institute to New York's Superintendent of Insurance, outlining the Institute's reaons for the proposed amendment,[39] and a letter from the Superintendent to the governor of New York briefly describing the bill.[40] These materials reveal that the concerns supporting the marine insurers' exemption are both narrow and insubstantial.

In its memorandum, the Institute offered four major reasons in support of the exemption, none of which remain relevant. The first, and of primary concern to the Institute, was that the direct action statute put them at a competitive disadvantage with out-of-state marine insurers.[41] Although New York insurance brokers generally have access only to insurers authorized to do business in New York,[42] an exception exists for marine insurers.[43] Because the direct action statute only applies to policies issued

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[37] *See* note 35 and accompanying text *supra*.

[38] *See* 1940 N.Y. Laws ch. 507, § 1 (codified at N.Y. Ins Law § 167(4) (McKinney 1966)). A memorandum from Louis Pink, then New York's Superintendent of Insurance, to the Governor, indicates that the amendment "was introduced at the request of the American Institute of Marine Underwriters." Memorandum from Louis Pink, New York Superintendent of Insurance, to the Governor of New York (Apr. 11, 1940) [hereinafter cited as Pink Memo].

[39] Memorandum from Barry, Wainwright, Thatcher & Summers (attorneys for the Institute) to Louis H. Pink, New York Superintendent of Insurance (Apr. 8, 1940) [hereinafter cited as Institute Memo].

[40] Pink Memo, *supra* note 38.

[41] *See* Institute Memo *supra* note 39, at 1-3. The Institute stated that it was "primarily for this reason" that the proposed exemption from the direct action statute was limited to marine insurers. *Id.* at 3.

[42] N.Y. Ins. Law § 112(1) (McKinney 1966).

[43] *Id.* § 112(2)(c).

or delivered in New York,[44] it is unlikely that unauthorized marine insurers would be subject to it. Thus, the Institute argued, to the extent that such insurers are also not subject to direct action in their home jurisdictions, they would theoretically be able to offer cheaper rates than New York insurers.[45]

Although this may have been a legitimate concern in 1940, the situation has changed dramatically. Most of the important maritime jurisdictions have enacted direct action statutes, none of which exempt marine insurers.[46] Indeed, New York marine insurers may now enjoy a competitive advantage, assuming that a relationship exists between direct action and higher insurance premiums.

The Institute's second argument in support of the exemption was that the admiralty doctrine of liability *in rem* would furnish adequate security to claimants.[47] Under this doctrine, the plaintiff brings an action directly against the insured's vessel.[48] Upon receiving a favorable judgment, the plaintiff obtains a lien on the vessel that is "good against the world," including good faith purchasers without notice.[49] Unfortunately, the maritime lien is unavailable to Jones Act plaintiffs. In *Plamals v. "Pinar Del Rio,"*[50] the Supreme Court interpreted the venue section of the Jones Act as reflecting an intent to limit actions under the Act to *in personam* proceedings.[51] *Plamals* thus effec-

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[44] *Id.* § 167(1).

[45] The Institute did not attempt to demonstrate any relationship between higher insurance premiums and direct action statutes. *See* Institute Memo, *supra* note 39, at 1-3.

[46] *See* CAL. INS. CODE § 11580 (West Supp. 1982); CONN. GEN. STAT. ANN. § 38-175 (West 1969); ILL. ANN. STAT. ch. 73, § 1000 (Smith-Hurd 1965); LA. REV. STAT. ANN. § 22:655 (West 1978); ME. REV. STAT. ANN. tit. 24-A, §§ 2903-2904 (1974); MD. ANN. CODE ART. 48A, § 481 (1979); MICH. COMP. LAWS § 500.3006 (West 1983); N.J. STAT. ANN. § 17:28-2 (West 1970); OHIO REV. CODE ANN. §§ 3929.05 (Page 1971), 3929.06 (Page Supp. 1982); PA. STAT. ANN. tit. 40, § 117 (Purdon 1971); P.R. LAWS ANN. tit. 26, § 2001 (1977); R.I. GEN. LAWS § 27-7-1.2 (1979).

In 1969, Florida became the first state to establish a wholly judicially created right of direct action. *See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). The Florida courts have interpreted this right to apply to marine insurance policies. *See* Quinones v. Coral Rock, Inc., 258 So. 2d 485 (Fla. Dist. Ct. App. 1972).

[47] *See* Institute Memo, *supra* note 39, at 3-4.

[48] *See* G. GILMORE & C. BLACK, *supra* note 1, at 31-33.

[49] *See id.* at 492, 498-92.

[50] 277 U.S. 151 (1928).

[51] The Court noted that the Jones Act permits a seaman's employer to be sued only in the district where he resides or has his principal office. As *in rem* actions may be

tively subordinates a seaman's Jones Act claim to all other liens.[52]

Moreover, even assuming its availability, an *in rem* admiralty decree has severe disadvantages that lessen its value to a Jones Act plaintiff. Such a decree, following a judicial sale, executes all liens and releases the vessel from all claims, regardless of whether the lienors intervened or even received notice of the proceedings.[53] Because *in rem* admiralty decrees are internationally recognized,[54] a seaman may find that his lien has been executed in a foreign court in a proceeding of which he was unaware. Furthermore, the priority system among maritime liens may still prevent recovery. Claims arising out of maritime torts rank third in the priority hierarchy, behind claims for salvage and seamen's wages.[55] In addition, among claims of the same type, the inverse order rule gives priority to the most recent lien - the last in time is the first in right.[56]

The Institute also asserted that direct action would conflict with the traditional maritime practice under which claims are asserted only after the insured has defended an action and paid any judgment rendered.[57] That this practice amounts to a "tradition" among marine insurers hardly constitutes a substantial policy justification for maintaining it. Indeed, the Institute, in effect, merely restated the fact that marine insurance policies are typically indemnity contracts.[58] However, this rationale alone could not have been a valid reason for exempting marine insurers, as the direct action statute had been applied to indemnity policies both before and after section 167(4) was amended.[59]

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brought wherever the ship is located, the Court read the venue provision to negate any implication that seamen may bring *in rem* proceedings. *See id.* at 155.

[52] *See* G. GILMORE & C. BLACK, *supra* note 1, at 267.

[53] *See* Toy, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559 (1973).

[54] *See* G. GILMORE & C. BLACK, *supra* note 1, at 482.

[55] *See id.* at 596-97.

[56] *See id.* at 601.

[57] *See* Institute Memo, *supra* note 39, at 5 ("It is also the practice in admiralty matters for the assured to defend the litigation and to pay any final judgment that is rendered.").

[58] *See* note 30 and accompanying text *supra*.

[59] *See* notes 34-35 and accompanying text *supra*. The real purpose underlying the amendment was to remedy the perceived competitive disadvantage of New York marine insurers. In recommending its passage, the New York Superintendent of Insurance clearly regarded this to be the amendment's purpose, *see* Pink Memo, *supra* note 38, as did the Institute, *see* Institute Memo, *supra* note 39, at 3. *Accord* Miller v. American

While tradition provides little reason to maintain a rule under any circumstances, there is even less of a rationale when the policies underlying the rule have been abandoned. The marine insurers' exemption conflicts with major philosophical changes regarding the relationship between insurers and injured third parties. Injured third parties may sue insurers directly in a substantial number of jurisdictions unhindered by regressive privity of contract rules.[60] While various legal theories have been used to legitimize this practice,[61] they all express a basic concern

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S.S. Owners Mut. Protection & Indem. Co., 509 F. Supp. 1047, 1049 n.2 (S.D.N.Y. 1981).

The Ninth Circuit in Ahmed v. American S.S. Mut. Protection & Indem. Co., 640 F.2d 993 (9th Cir. 1981), suggested that the marine insurers' exemption was enacted because of uncertainty whether direct action statutes were applicable in maritime law, *id.* at 996 n.5. This "uncertainty" no longer exists, *see* notes 63-81 and accompanying text *infra*, and thus cannot be considered a justification for the statute.

[60] Quite apart from the jurisdictions that have specifically enacted direct action statutes, *see* note 46 *supra*, an even greater number of states have recognized a policy of granting to the injured plaintiff an interest in the wrongdoer's insurance coverage under certain circumstances. *See* Continental Auto Ins. v. Menuskin, 222 Ala. 370, 371-72, 132 So. 883, 884 (1931); Maryland Cas. Co. v. Waggoner, 193 Ark. 550, 555, 101 S.W.2d 451, 453-54 (1937); Morehouse v. Employer's Liab. Assurance Corp., 119 Conn. 416, 425, 177 A. 568, 573 (1936); Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 383-85, 208 N.E.2d 12, 19-20 (1965); Dunn v. Jones, 143 Kan. 218, 223, 53 P.2d 918, 921 (1936); U.S. Fidelity & Guar. Co. v. Williams, 148 Md. 289, 303-04, 129 A. 660, 664-65 (1925); Mathewson v. Colpitts, 284 Mass. 581, 585, 188 N.E. 601, 602 (1933); Powers v. Wilson, 139 Minn. 309, 311, 166 N.W. 401, 402 (1918); Commercial Cas. Ins. Co. v. Skinner, 190 Miss. 533, 542, 1 So. 2d 225, 226 (1941); Maryland Cas. Co. v. Martin, 88 N.H. 346, 348, 189 A. 162, 164 (1937); Beacon Lamp Co. v. Traveller's Ins. Co., 61 N.J. Eq. 59, 68, 47 A. 579, 582-83 (1900); Luntz v. Stern, 135 Ohio 225, 230, 20 N.E. 2d 241, 243-44 (1939); Aetna Cas. & Sur. Co. v. Gentry, 191 Okl. 659, 664-65, 132 P.2d 326, 331 (1942); Boocks v. Cochran, 347 Pa. 36, 39, 31 A.2d 541, 542 (1943); Southland Greyhound Lines Inc. v. Dennison, 62 S.W.2d 500, 501 (Tex. App. 1933); State Farm Mut. Auto. Ins. Co. v. Justis, 168 Va. 159, 168-69, 190 S.E. 163, 167 (1937); Nicktovich v. Olympic Motor Transit Co., 150 Wash. 278, 282-83, 272 P. 736, 738 (1928); Bro v. Standard & Accident Ins. Co., 194 Wis. 293, 296, 215 N.W. 431, 432 (1927).

[61] Perhaps the most common approach is to characterize the injured third party as a third party beneficiary, *see* RESTATEMENT (SECOND) OF CONTRACTS § 133(1) & comment b (1973), under the insurance contract. This position is illustrated by Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965), where the court held that the judgment creditors of an applicant for an automobile liability policy were entitled to sue the applicant's broker for failure to procure the policy. *Id.* at 384-85, 208 N.E.2d at 20-21. The broker argued that the creditors lacked standing to sue because of the absence of privity of contract. The court was unpersuaded. Because of the importance of liability insurance to injured parties, the court was unwilling to regard such persons as mere "incidental" beneficiaries of the insurance contract. *See id.* at 385, 208 N.E. 2d at 20. Accordingly, the court permitted a direct action against the broker.

California has also taken the position that an injured claimant is a third party beneficiary of the wrongdoer's insurance policy in both the motor vehicle, *see* Johnson v.

that an injured person should not suffer simply because the tortfeasor is unable to pay because of insolvency.[62] Invoking traditional practice thus does not afford a principled basis for distinguishing between marine insurance and other types of insurance.

The Institute lastly argued that applying New York's direct action statute to marine insurers conflicted with federal maritime law by undermining the doctrine of limited liability.[63] Under this doctrine, codified with the enactment of the Limited Liability Act,[64] a vessel owner's liability for injury caused by a collision or other maritime mishap is limited to the value of his interest in the vessel.[65] The Act facilitates limitation of liability by allowing a shipowner to institute a limitation proceeding under which all claims must be brought in a federal admiralty court.[66] The Institute asserted that marine insurers are entitled to the benefit of this doctrine.[67]

The case law on this issue is somewhat confusing, but it indicates that direct action is perfectly compatible with the policies underlying the limited liability principle. The confusion stems from the Supreme Court's decision in *Maryland Casualty Co. v. Cushing*,[68] where the Court was asked to determine whether Louisiana's direct action statute[69] conflicted with the Limited Liability Act.[70] The defendant insurer contended that

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Holmes Tuttle Lincoln-Mercury Inc., 160 Cal. App. 2d 290, 325 P.2d 193 (1958), and construction, *see* Woodhead Lumber Co. v. E.G. Niemann Invs., Inc., 99 Cal. App. 456, 278 P. 913 (1929), contexts. Moreover, one federal court has characterized the New York direct action statute as expressing a policy under which injured parties are "ultimate beneficiaries" of insurance contracts. *See* Liman v. American S.S. Owners Mut. Protection & Indem. Co., 299 F. Supp. 106, 109 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

[62] *See* Leigh, *Direct Actions Against Liability Insurers*, 1949 Ins. L.J. 633, 637-48.

[63] *See* Institute Memo, *supra* note 39, at 4.

[64] Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (codified as amended at 46 U.S.C. §§ 181-195 (1976)). Section 183(a) specifically codifies the limitation of liability principle. *See* 46 U.S.C. § 183(a) (1976).

[65] *See* G. Gilmore & C. Black, *supra* note 1, at 663.

[66] *See* 46 U.S.C. § 185 (1976). Once the court determines the vessel owner's liability, the owner deposits this sum with the court and is then shielded from liability above that amount. *See* G. Gilmore & C. Black, *supra* note 1.

[67] *See* Institute Memo, *supra* note 39, at 4.

[68] 347 U.S. 409 (1954).

[69] La. Rev. Stat. Ann. § 22:655 (West 1978).

[70] The plaintiffs were the representatives of five seamen who had drowned when their ship collided with a bridge. 347 U.S. at 410. The owner and charterer of the vessel

direct action would deny the shipowner the benefit of his insurance and would undermine the value of the limitation proceeding.[71] The Court, in a four-one-four decision, determined that a direct action was permitted, but only after the completion of the limitation proceeding.[72]

Justice Frankfurter, writing for the plurality, contended that a right of direct action interfered with the purposes of the federal scheme. His primary concern was that direct action would allow one claimant to diminish the insurance proceeds at the expense of other claimants.[73] The dissent, however, maintained that the Act was not intended to benefit insurance companies, but only to protect shipowners against catastrophic loss.[74] The dissent viewed the Act as limiting the amount recoverable from a shipowner's *personal* assets, once the face amount of his liability policy had been exhausted.[75]

Justice Clark's lone concurrence provided the basis for the case's disposition. In his view, any adverse effect upon the limitation proceeding could be avoided simply by postponing direct actions until after the conclusion of the proceeding.[76] In that way, the shipowner's total liability would first be determined, and direct action would then be allowed against the insurer on any remaining policy coverage.[77]

Despite the Court's splintered voting, certain principles emerge from the decision. First, a majority of the Court (Justice Clark and the dissenters) agreed that direct action and limited liability can coexist, at least in the context of Justice Clark's procedural chronology.[78] Second, the same majority agreed that

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had instituted limitation proceedings, but the plaintiffs brought a separate action directly against the insurer under the direct action statute. *Id.* at 410-11.

[71] *Id.* at 412.

[72] *Id.* at 423.

[73] *See id.* at 417. Justice Frankfurter also regarded the Limited Liability Act as intended to allow all claims against a shipowner to be heard in one proceeding. *Id.* at 416-17. In his view, direct action would thwart this purpose by allowing witnesses to be called in different forums and, ultimately, giving rise to conflicting judgments. *Id.* at 417. Moreover, Justice Frankfurter was fearful that direct action would increase insurance premiums to shipowners, the ostensible beneficiaries of limited liability. *Id.*

[74] *Id.* at 427 (Black, J., dissenting).

[75] *Id.* at 432-37.

[76] *Id.* at 425 (Clark, J., concurring).

[77] *Id.*

[78] *See id.* at 422-23 (plurality opinion); *id.* at 425-26 (Clark, J., concurring).

the Act was intended to benefit shipowners, not insurers.[79] In light of *Cushing*, therefore, the Institute's suggestion that marine insurers are entitled to the protection of limited liability is severely misplaced.[80] Direct action does not conflict with federal law.[81] Rather, it is the *absence* of a right of direct action that interferes with the right of recovery granted by the Jones Act.

III. The Conflict Between the Marine Insurers' Exemption and the Jones Act

Federal courts have traditionally regarded seamen as deserving of special protection because of the dangers of their occupation.[82] This policy finds expression in numerous references to seamen as "wards" of the admiralty,[83] and it has been applied by the Supreme Court to give a liberal construction to the Jones Act.[84] Application of section 167(4) undercuts this policy and nullifies the remedial purposes of the Act. The statute thus

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[79] *See id.* at 423 (Clark, J., concurring); *id.* at 427 (Black, J., dissenting). Even Justice Frankfurter seemed to recognize that shipowners, not insurers, were the intended beneficiaries of the Limited Liability Act. *See id.* at 420-21 (plurality opinion) ("Further support for [the view that direct action should be allowed] may reasonably be found in the fact that it is the insurers rather than the shipowner and charterer who are here seeking to rely on the . . . Act . . . . ").

[80] *Cushing* was followed by the United States Court of Appeals for the Fifth Circuit in Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). The court held that a direct action could be maintained against a marine insurer under the Louisiana statute, noting that the *Cushing* procedure rendered any conflict between federal law and direct action "so minimal as to be insignificant." *Id.* at 235.

[81] The Institute also asserted that a conflict exists because § 167 permits a judgment creditor to sue an insurer if the judgment remains unsatisfied for 30 days, *see* N.Y. Ins. Law § 167(1)(b) (McKinney 1966), while federal law, *see* 28 U.S.C. § 2107 (1976), provides a full three months within which to appeal an adverse admiralty decree. *See* Institute Memo, *supra* note 39, at 4. This argument is meritless. The time within which to appeal and the parties against whom relief may be sought are completely unrelated.

[82] *See* American Export Lines, Inc. v. Alvez, 446 U.S. 274, 285-86 (1980); Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970); note 5 *supra*.

[83] *See, e.g.*, Garrett v. Moore-McCormack Co., 317 U.S. 239, 247-48 (1942); Stephenson v. Star-Kist Caribe, Inc., 440 F. Supp. 232, 236 (D.C.P.R. 1976). *But see* Corchado v. Puerto Rico Marine Mgmt. Inc., 665 F.2d 410, 414 (1st Cir. 1981) (seaman's complaint dismissed because of attorney's dilatory tactics not withstanding "ward of the admiralty" doctrine). *See generally* 1 M. Norris, The Law of Seamen §§ 502-503 (3d ed. 1970).

[84] *See, e.g.*, Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) (uniform application of Jones Act requires that parties relying upon seaman's release prove that it was freely executed).

presents a clear example of a state law interfering with the essential purposes of national legislation.[85]

This conflict is well within the competence of the federal courts to remedy. The admiralty clause,[86] unlike the grant of diversity jurisdiction, has been interpreted to give the federal courts the power to develop substantive maritime law.[87] The need for uniformity in maritime affairs was a primary reason why admiralty jurisdiction was vested in the federal courts.[88] Accordingly, uniformity has been the touchstone of numerous Supreme Court decisions pronouncing the federal admiralty law.[89]

The need for uniformity in maritime affairs, however, has not resulted in the complete exclusion of state law.[90] The issue of whether to apply state law most frequently rises when there is no federal maritime rule governing a particular situation.[91] A

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[85] *See* notes 149-52 and accompanying text *infra*.

[86] Article III of the United States Constitution extends the judicial power to "all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. The congressional implementation of this jurisdictional grant gives the federal courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (1976).

[87] *See* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 158-65; Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 132-34 (1925).

[88] *See* Currie, *supra* note 87, at 163. When the Constitution was adopted, maritime law had already developed as a relatively uniform body of law on an international scale. The international character of the shipping trade "established contracts between men of different nations, and maritime customs or law, following the trader, brought about like legal consequences from these contracts." Wright, *supra* note 87, at 127. Although little was said on the subject, the framers appear to have viewed the admiralty grant as necessary to preserve the uniform, international character of maritime law. *See id.* at 128-30. Moreover, early judicial opinions reveal an awareness that the admiralty jurisdiction was vested in the federal courts in order to ensure its coherent development as part of an international commercial system. *See, e.g.*, De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

[89] *See, e.g.*, Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) (federal maritime law is exclusive source of superior officer's duties toward seaman in an action brought by seaman to recover for injuries caused by negligent orders); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (need for uniform federal maritime law rendered unconstitutional application of state worker's compensation legislation to stevedore injured on shipboard).

[90] *See* Currie, *supra* note 87, at 164. Even during the height of the popularity of the uniformity principle, federal courts would apply state law in admiralty cases where the interest in uniformity was weak and the state's interest was strong. This became known as the "maritime-but-local" doctrine. *See id.* at 178; G. GILMORE & C. BLACK, *supra* note 1, at 347.

[91] Where a federal admiralty rule exists, it is consistently held that an inconsistent state law may not be applied. *See* Currie, *supra* note 87, at 180-85.

question exists because the admiralty clause has been recognized as pre-empting state law in a manner similar to the "dormant" commerce clause.[92] The extent of this pre-emptive effect, however, is uncertain. Relevant Supreme Court decisions have been plagued with inconsistency, both in theory and in result.[93]

Ultimately, the proper adjudication of these cases requires a balancing of the relevant state and federal interests.[94] Where no federal maritime rule exists, state law does not automatically apply, although some members of the Supreme Court have suggested that it does.[95] Rather, courts should ascertain whether the application of state law would undermine the federal interests embodied in the admiralty grant, particularly the need for maritime uniformity.[96] This determination is admittedly difficult, as the absence of an applicable maritime rule renders the inquiry into the relevant federal interests speculative.[97] State law may also conflict with the federal interest in advancing a particular maritime rule.[98] Where this is the case, the court must weight the specific interest as well as the more generalized need for uniformity.

Thus, the authority exists for the federal courts to ignore section 167(4) and fashion a uniform right of direct action against marine insurers for injured seamen. Unfortunately, the courts have thus far refused to exercise this authority. The reasons underlying this refusal will now be examined.

A. *Deference to State Regulation of Maritime Insurance:* Wilburn Boat *and* Miller

The Supreme Court has often been active in fashioning federal maritime law, particularly to benefit injured maritime workers.[99] However, it has been reluctant to exercise this power

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[92] *See id.* at 166.

[93] *See id.* at 164.

[94] *See id.* at 168-69, 220-21.

[95] *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316 (1955).

[96] *See* Currie, *supra* note 87, at 168-69.

[97] Professor Currie notes that "[i]t is difficult to demonstrate by legal reasoning that the interest of a state in its wrongful death legislation is greater than its interest in its rules of contract, or that uniformity is more important than either." *Id.* at 179-80.

[98] *See id.* at 173.

[99] *See, e.g.*, American Export Lines v. Alvez, 446 U.S. 274 (1980) (granting right to wife of injured longshoreman to recover for loss of consortium resulting from her husband's injuries); Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974) (dependents of

where interference with state regulation of marine insurance may result. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[100] is the seminal case in this area, and lower federal courts have relied upon it in refusing to invalidate section 167(4).[101]

Wilburn Boat did not address the applicability of state direct action statutes. Rather, the question was whether, in the absence of an explicit federal maritime rule, state law or federal maritime custom should govern the effect of an express warranty in a maritime insurance policy. In *Wilburn Boat*, the plaintiff sought to recover on a fire insurance policy covering the loss of his houseboat.[102] The insurance contract provided that consent must be obtained before the boat could be sold or used for commercial purposes.[103] The plaintiff had breached both provisions and the insurer pleaded noncompliance as a defense, relying on federal maritime custom that required strict compliance with or literal performance of the terms of a marine insurance contract.[104] The state law of Texas, however, did not recognize breach of warranty as a defense unless the breach materially contributed to the loss.[105] The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment for the defendant insurance company, holding that the general maritime law governed the case.[106]

The Supreme Court reversed in an opinion written by Justice Black. The Court first rejected the lower court's historical conclusion that "literal performance" had been adopted as part

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longshoreman not prevented from bringing a separate wrongful death action where decedent already received judgment for pre-death injuries); Moragne v. States Marine Lines Inc., 398 U.S. 375 (1970) (creating right of action for wrongful death based on unseaworthiness under federal maritime law).

It is well-recognized that the maritime law, as a whole, is largely of judicial origin. *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955); MacChesney, *Marine Insurance and the Substantive Admiralty Law*, 57 MICH. L. REV. 555, 556 (1959).

[100] 348 U.S. 310 (1955).

[101] *See* Ahmed v. American S.S. Mut. Protection & Indem. Assoc., 640 F.2d 993, 996 (9th Cir. 1981); Miller v. American S.S. Owners Mut. Protection & Indem. Co., 509 F. Supp. 1047, 1050-51 (S.D.N.Y. 1981).

[102] 348 U.S. at 311.

[103] *Id.*

[104] *Id.* at 312.

[105] *Id.* at 312 n.2.

[106] 201 F.2d 833 (5th Cir. 1953).

of the federal maritime law.[107] Because Congress had not acted in this area, the Court determined that state law must govern unless the Court was willing to fashion a uniform federal admiralty rule defining the effect of non-material breaches of warranty.[108] This it refused to do. The Court noted that control over the insurance field had generally been left to the states,[109] and that Congress itself had indicated such an intention by passing the McCarran Act.[110] In the Court's view, insurance regulation was the province of Congress, not the courts.[111] It determined that the complexity of the insurance business, and the necessarily piecemeal regulation that would accompany judicial inter-

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[107] 348 U.S. at 314-16. Although the Court noted that it had never approved a "literal performance" rule, *see id.*, its conclusion that such a rule was nonexistent was nonetheless historically suspect. *See* H. BARR, ADMIRALTY LAW OF THE SUPREME COURT 275 n.46 (2d ed. 1969); Houdlett, *Direct Action Statutes and Marine P&I Insurance*, 3 J. MAR. L. COMM. 559, 563 (1972).

[108] 348 U.S. at 316.

[109] *Id.* at 316-18.

[110] *Id.* at 319. The McCarran-Ferguson Insurance Regulation Act of 1945, 15 U.S.C. §§ 1011-1015 (1976) [hereinafter referred to as McCarran Act] was enacted in response to the Court's decision in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), which held that the insurance business is subject to regulation by Congress under the commerce clause. Concerned that this decision would undermine the tradition of state insurance regulation, Congress passed the McCarran Act, *see* Note, *State Regulation Under the McCarran Act*, 47 TUL. L. REV. 1069, 1071-72 (1973), which amounts, in essence, to a declaration of congressional policy in favor of state regulation, *see* 15 U.S.C. §§ 1011-1012 (1976).

Justice Black's reliance on the McCarran Act is somewhat strained. *South-Eastern Underwriters* did not address whether any particular state regulation of insurance interfered with the federal maritime law. As the McCarran Act was only intended to nullify *South-Eastern Underwriters*, *see* Maryland Cas. Co. v. Cushing, 347 U.S. 409, 413 (1954), one cannot infer that Congress also intended to prevent the federal courts from acting in the field of *marine* insurance pursuant to the admiralty clause. *See* Yancey, *State Regulation of Marine Insurance*, 23 INS. COUNS. J. 143, 146 (1956).

[111] 348 U.S. at 319-20. The argument that Congress alone should regulate marine insurance, both to further the policy of the McCarran Act and because of a perceived judicial incompetence in the area, was first relied upon by Justice Black in support of the application of state direct action statutes notwithstanding the Limited Liability Act. *See* Maryland Cas. Co. v. Cushing, 347 U.S. 409, 430-31, 436-37 (1954) (Black, J., dissenting); notes 63-81 and accompanying text *supra*.

Although the *Cushing* Court held that direct action and limited liability are compatible, it did not do so on the basis of any "presumption" in favor of state insurance generally. Rather, the Court was concerned with the potential conflict between state law and the federal limited liability principle. It was only because the limitation proceeding would occur first that direct action was found to be compatible with it. Thus, the McCarran Act cannot be read as an absolute prohibition of federal intervention in the area of marine insurance. Had the Court found that direct action would undermine the limited liability principle, state law would not have been given effect.

vention, counseled against developing a uniform rule.[112]

Justice Frankfurter, concurring only in the result, was disturbed by the broad scope of the majority's reasoning. Because *Wilburn Boat* involved an insurance policy covering a houseboat on a small artificial inland lake, the dispute was essentially of local concern[113] and Justice Frankfurter concluded that he was willing to apply state law. However, where "shipping in its national and international aspects"[114] was involved, Justice Frankfurter determined that the demands of uniformity were much more compelling.[115] Accordingly, Justice Frankfurter could not accept the majority's implication[116] that federal law could never be applied in any context, simply because marine insurance was involved.[117]

Despite the local context in which it arose, *Wilburn Boat* presents a serious obstacle to federal judicial intervention in the area of marine insurance, as it has dissuaded the courts from examining the relevant interests when state law is sought to be applied.[118] This effect is nowhere more evident than in *Miller v.*

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[112] 348 U.S. at 319-20. The Court stressed the numerous approaches taken by the states in defining the consequences of breaches of insurance warranties, *see id.* at 320, and concluded that under this system "the insurance business has become one of the greatest enterprises of the Nation," *id.* at 320-21. One may question whether the Court would have deferred to state law had the states been applying the "literal performance" rule, which would have denied recovery. *See* notes 145-46 and accompanying text *infra*. It is interesting that the Court expressly refused to adopt the rule as part of the general maritime law on the ground that it was "harsh." 348 U.S. at 320.

In any event, reliance on the superior wisdom of Congress is not persuasive, particularly in view of the numerous cases in which the Court has fashioned a uniform rule, both before and after *Wilburn Boat*. *See* MacChesney, *supra* note 99, at 566-66.

[113] 348 U.S. at 322-23 (Frankfurter, J., concurring).

[114] *Id.* at 322.

[115] Justice Frankfurter was concerned that the majority's reasoning would subject a vessel such as the *Queen Mary* to varying liabilities depending upon the states in which it docked. *Id.* at 323. In this context, the federal interest in uniformity and commercial predictability outweighed any particular state's interest in regulating insurance.

[116] *See id.* at 316-21 (majority opinion).

[117] Justice Reed's dissent went even further than Justice Frankfurter's opinion in condemning the majority's deference to state law. Justice Reed viewed marine insurance as particularly in need of uniformity, and would not have applied state law even in the localized context of *Wilburn Boat*. *See id.* at 333 (Reed, J., dissenting). Since he regarded the "literal performance" rule as well-established in federal admiralty law, *see id.* at 325, Justice Reed believed that uniformity required its application unless the Court was willing to fashion a more liberal rule on its own. *See id.* at 326.

[118] *See, e.g.*, Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 461 (5th Cir. 1982) (refusing to apply *Wilburn Boat* because state and federal law did not differ); Walter v. Marine Office of Am., 537 F.2d 89, 94 (5th Cir. 1976) (state law governs construction of

American Steamship Owners Mutual Protection & Indemnity Co.,[119] the one case that directly addressed the conflict between section 167(4) and federal maritime law.[120]

In *Miller*, the District Court for the Southern District of New York relied on section 167(4) to preclude an injured seaman from directly suing his employee's marine insurer.[121] The court was also asked to interpret federal statutory law[122] as affording a direct action remedy, notwithstanding section 167(4). Applying the *Wilburn Boat* approach, the court noted that federal maritime law did not expressly provide a right of direct action against marine insurers.[123] The question therefore became whether the court would fashion such a right on its own.

In answering this question in the negative, the court first noted that insurance is properly the object of state regulation.[124]

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marine insurance policy absent federal maritime rule, particularly where state interests are strong); Navegacion Goya, S.A. v. Mutual Boiler & Mach. Ins. Co., 411 F. Supp. 929, 934 (S.D.N.Y. 1976) (state law applies where marine insurance is involved). *But see* Irwin v. Eagle Star Ins. Co., 455 F.2d 827 (5th Cir.) (balancing of state and federal interests required that state law be applied to determine whether there was "latent effect" under marine insurance policy), *cert. denied*, 409 U.S. 852 (1972).

Thankfully, *Wilburn Boat* has at least been limited to the area of marine insurance. *See* A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir.), *appeal dismissed*, 358 U.S. 801 (1958).

[119] 509 F. Supp. 1047 (S.D.N.Y. 1981).

[120] The court in Ahmed v. American S.S. Mut. Protection & Indem. Assoc., 640 F.2d 993 (9th Cir. 1981), abruptly dismissed this issue, concluding that state law must be applied under the *Wilburn Boat* rationale. *Id.* at 996. However, the court did consider an equal protection challenge to § 167(4) and remanded the case to allow further development of the argument. *Id.* at 996-97. The court expressed doubt that earlier uncertainty over the applicability of state law to maritime cases provided a rational basis for the statute, intimating that such a challenge might be successful. *See id.* at 996 n.5.

The *Miller* court also addressed an equal protection argument, but with much less sympathy. In the court's view, New York's exclusion of marine insurers was not "suspect" merely because it effects only seamen. The court reasoned that seamen are not an "insular and disadvantaged" group, and in any event, § 167(4) is not limited to insurance for personal injuries. 509 F. Supp. at 1050. Moreover, the court held that the need to redress the perceived competitive disadvantage of New York marine insurers provided a rational basis for the statute. *See id.*

[121] *See* notes 24-27 and accompanying text *supra*.

[122] It appears that the plaintiff did not specify *which* federal law was being relied upon. *See* 509 F. Supp. at 1050. Moreover, although the plaintiff was a seamen, there is no specific reference to the Jones Act as providing his theory of recovery. *See id.* at 1048.

[123] *Id.* at 1050. *Accord* Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 460 (5th Cir. 1982).

[124] The court noted that "*Wilburn Boat* remains the starting point for any effort to determine whether the federal courts should establish an admiralty rule governing aspects of maritime insurance." 509 F. Supp. at 1050.

Moreover, the court invoked the maxim, articulated by the Supreme Court in *Just v. Chambers*,[125] that state law will be permitted to operate except in cases involving "the essential features of an exclusive federal jurisdiction."[126] The court then held that the plaintiff had failed to show that the need for direct action met this strict legal standard.[127]

However, the court did not slavishly adhere to *Wilburn Boat*. The court recognized that federal maritime law was largely of judicial origin,[128] and that the Supreme Court had frequently refused to apply state law where inconsistent federal law existed.[129] It also noted, however, the occasions where the Supreme Court had taken the opposite approach.[130] The court did not attempt to analyze these cases on the basis of the competing state and federal interests involved. Rather, from the standpoint of pure federalism concerns, the court appeared to view them as essentially arbitrary determinations. The court did recognize,

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[125] 312 U.S. 383, 391 (1941).

[126] 509 F. Supp. at 1051 (quoting Maryland Cas. Co. v. Cushing, 347 U.S. 409, 430 (1954) (Black, J., dissenting) (quoting Just v. Chambers, 312 U.S. 383, 391 (1941)).

[127] The court's reliance on the formulation of the applicable standard in *Just v. Chambers* was somewhat disingenuous. Requiring that state law be applied except where it would interfere with "essential" attributes of the federal admiralty jurisdiction seemingly amounts to a virtual per se proscription against fashioning uniform maritime rules where none already exist. Such a rule obviously ignores important federal interests in many cases, and denigrates the necessity of balancing. In fact, the Supreme Court has not taken such an approach, *see, e.g.*, Moragne v. States Marine Lines, 398 U.S. 375 (1970), and the *Miller* court's reliance on the restrictive language of *Just v. Chambers* was nothing more than an avoidance mechanism.

Moreover, the *Just v. Chambers* standard is itself a misleading distillation of the more generous standard articulated in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). In declining to apply New York's worker's compensation law to a maritime occurrence, the Court held that "no [state] . . . legislation is valid *if it contravenes the essential purpose expressed by an act of Congress* or works material prejudice to the characteristic features of the general maritime law *or interferes with the proper harmony and uniformity of that law in its international and interstate relations.*" *Id.* at 216 (emphasis added). This formulation is much more consistent with the need for balancing, as it does not require that state law interfere with "essential" aspects of the maritime law. Moreover, the standard requires that the court consider the *purposes* of relevant federal statutes. Thus, even if no federal statute directly conflicts with state law, state law may still undermine the *purposes* of other federal maritime schemes. Greater appreciation of these considerations may have led to a different result in *Miller*.

[128] 509 F. Supp. at 1051 (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)). *Accord* MacChesney, *supra* note 99, at 566.

[129] 509 F. Supp. at 1051.

[130] *Id.*

however, as have several commentators,[131] that the common thread tying together all of these cases was that they "involved plaintiffs seeking damages for personal injury or death, and . . . all of them . . . resulted in victory for plaintiffs."[132] Moreover, in the court's view, this result was not unprincipled, as it simply reflected consistent legislative and judicial solicitude toward injured seamen.[133]

Nonetheless, the *Miller* court refused to rely on this policy as a basis for overriding section 167(4). To reach such a conclusion, the court reasoned, would have necessitated a determination that a right of direct action is a required aspect of marine insurance and that states with direct action statutes must extend them to include marine insurers.[134] Although it expressed a preference for a uniform rule,[135] the court was reluctant to impose such a rule, which it clearly viewed as a major innovation. Because of the widespread use of indemnity insurance policies in maritime affairs, the court required that more guidance be provided regarding the practical consequences of any new rule on the use of such insurance.[136] However, the court indicated that even if more information were available, development of a new

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[131] *See* G. GILMORE & C. BLACK, *supra* note 1, at 384; Cervone, *The Manner in Which State Law Affects Federal Maritime Law*, 8 J. MAR. L. COMM. 455, 483-84 (1977); Currie, *supra* note 87, at 218-20.

[132] 509 F. Supp. at 1051.

[133] *Id. See* notes 5, 99 and accompanying text *supra;* notes 145-46 and accompanying text *infra.*

[134] 509 F. Supp. at 1052. The court was obviously disturbed at the prospect of effectively having to impose a right of direct action against marine insurers upon states lacking this remedy. Yet the prevalence of direct action statutes among the maritime jurisdictions, *see* note 46 and accompanying text *supra*, greatly minimizes the intrusive effect any new rule would have upon the states.

[135] 509 F. Supp. at 1052.

[136] *Id.* Although the court expressed approval of direct action for seamen absent a "conflicting policy," *id.*, it purported to find a conflicting policy in the limited liability principle, citing the *Cushing* decision. *Id.* As discussed earlier, *see* notes 63-81 and accompanying text *supra*, limited liability is perfectly compatible with direct action so long as insurance coverage is not diluted by letting direct actions proceed first.

Possibly the court was reluctant to permit a direct action in *Miller* because the shipowner had not instituted a limitation proceeding. *See* 509 F. Supp. at 1048. Under these circumstances, the limited liability principle and direct action arguably conflict. However, the Limited Liability Act requies the shipowner to bring a limitation proceeding within six months after he receives a notice of claim, 46 U.S.C. § 185 (1976). The federal policy favoring limited liability thus "expires" after six months. As the plaintiff in *Miller* first brought suit in 1971, 509 F. Supp. at 1048, the court was hardly justified in perceiving a federal-state conflict, at least in the context of the immediate dispute.

rule should be undertaken by Congress or by higher federal courts.[137]

B. *The Need for a Federal Right of Direct Action:* Wilbur Boat *and* Miller *Reconsidered*

The *Miller* court recognized that the conflict between section 167(4) and federal law could not be reconciled under *Wilburn Boat* alone. Yet the court was unwilling to vigorously balance the need for the uniform enforceability of seamen's Jones Act rights against the policies underlying section 167(4). Instead, the court relied on the existence of conflicting Supreme Court decisions and its perceived institutional incompetence to support its refusal to develop a new rule. Under these circumstances, the influence of *Wilburn Boat* undoubtedly played an overly significant role in the court's decision.[138]

The result in *Miller* might have been different had the court forthrightly examined the relevant federal and state interests. Such an inquiry would have exposed the relative unimportance of *Wilburn Boat*, which must be read in light of the narrow context in which it arose — whether federal law should govern the terms of a marine insurance policy covering a houseboat on a small lake.[139] Most commentators agree that no real federal interest was involved and that the policy favoring state regulation of marine insurance should be limited accordingly.[140]

Marine insurance is almost universally regarded as an area of maritime law particularly in need of uniformity.[141] Apart from any affirmative federal policy to protect injured seamen, leaving

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[137] 509 F. Supp. at 1052.

[138] Although *Wilburn Boat* was not relied upon as the *basis* for the court's decision, it provided a convenient device of escape given the court's other, more practical, concerns.

[139] 348 U.S. 310, 322 (1955) (Frankfurter, J., dissenting).

[140] See H. Baer, *supra* note 107, at 280; G. Gilmore & C. Black, *supra* note 1, at 44; D. Robertson, Admiralty and Federalism 267 (1970); Note, *Admiralty — Uniformity of Maritime Law — State Law Determines Effect of Breach of Warranty in Policy of Marine Insurance*, 50 Nw. U.L. Rev. 677, 682-83 (1955); Note, 29 So. Cal. L. Rev. 359, 362 (1956) [hereinafter cited as *Cal. Note*].

[141] *See* G. Gilmore & C. Black, *supra* note 1, at 44 ("Marine insurance is the worldwide maritime subject *par excellence*."); Wilburn Boat Co. v. Firemen's Fund Ins. Co., 348 U.S. 310, 333 (1955) (Reed, J., dissenting) ("If uniformity is needed anywhere, it is needed in marine insurance."). *Accord* Currie, *supra* note 87, at 218; Houdlett, *supra* note 107, at 564; Yancey, *supra* note 110, at 147; *Cal. Note*, *supra* note 140, at 361.

marine insurance to the vagaries of state regulation unduly burdens the shipping industry.[142] Were *Wilburn Boat* applied to all marine insurance policies, insurers would be unable to predict when express warranties will be given effect, and seamen would be just as uncertain of recovery. Moreover, inconsistent state choice of law rules would exacerbate this confusion.[143] It was precisely this type of commercial anarchy that the admiralty grant was intended to prevent.[144]

Wilburn Boat should also be viewed as expressing the Supreme Court's policy to promote recovery by favored litigants. The Court has frequently disregarded the interest in uniformity in order to afford recovery under state law.[145] Read in this light, *Wilburn Boat* does not support Justice Black's assertion that state law automatically applies whenever marine insurance is involved. To the contrary, *Wilburn Boat* may be viewed as part of

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[142] *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 333-34 (1955) (Reed, J., dissenting) ("For a state to require policies to be issued under its authority or to require extra-state policies to be interpreted by its laws burdens maritime operations unduly.").

[143] *See* Currie, *supra* note 87, at 218. The inconsistencies among state choice of law rules as applied by the state courts to marine insurance contracts are well-documented. *See* Griese, *Marine Insurance Contracts in the Conflict of Laws: A Comparative Study of the Case Law*, 6 U.C.L.A. L. Rev. 55, 62-83 (1959). This problem also encompasses the application of direct action statutes. *See* Note, *Constitutionality of Direct Action Laws in a Multistate Context: Governmental Interest and the Conflict of Laws*, 64 Yale L.J. 940, 942-43 (1955).

While the courts have universally held that federal choice of law rules will apply in determining which state law governs the terms of a marine insurance contract, *see, e.g.*, Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977); Navegacion Goya, S.A. v. Mutual Boiler & Mach. Ins. Co., 1972 A.M.C. 650, 653 (1972), this merely shifts the problem to a new arena, as the courts themselves disagree as to the appropriate choice of law principles. *Compare* Navegacion Goya, S.A. v. Mutual Boiler & Mach. Ins. Co., 1972 A.M.C. 650, 653-54 (applying "most significant relationship" test) *with* Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 540 F.2d 1257, 1261 (applying law of the state where contract is made). Some courts, *see, e.g.*, A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir.), *appeal dismissed*, 358 U.S. 801 (1958), erroneously concluded that *Wilburn Boat* decided that the law of the place where the contract was made would apply. In fact, the Court simply instructed the trial court to determine the applicable state law on remand. 348 U.S. at 313 n.6.

[144] *See* note 88 and accompanying text *supra*.

[145] *See, e.g.*, Hess v. United States, 361 U.S. 314 (1960) (applying state law which imposed on employers a stricter duty of care toward seamen than federal law); Just v. Chambers, 312 U.S. 383 (1941) (borrowing state statute providing for survival claims against tortfeasor's estate).

an affirmative judicial policy to promote recovery,[146] and should not be regarded as an obstacle to fashioning a uniform right of direct action to vindicate seamen's Jones Act rights.

Moreover, the relative strength of the federal interests weighing against the application of section 167(4) is much greater than those involved in *Wilburn Boat*.[147] In *Wilburn Boat*, the question was whether state law should be applied when there was presumably no conflicting federal rule. The only relevant federal concern was a generalized interest in maritime uniformity, and the Court has held that state law should be defeated only if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law."[148] Because Congress or the courts had not established any rule relevant to the issue in *Wilburn Boat*, the federal interests are difficult to apprehend.

Section 167(4), however, directly conflicts with an established federal policy to afford recovery to injured seamen and their dependents.[149] Under these circumstances, federal concerns should be given greater weight in the balancing process.[150] The Supreme Court has acknowledged this principle, having consist-

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[146] *See* notes 131-32 and accompanying text *supra*. As Professor Currie notes, in no case between the years 1940 and 1960 did the Supreme Court deny the application of state law when it would have been unfavorable to the plaintiff. *See* Currie, *supra* note 87, at 219-20. The Court has adhered to this pattern since that time. *See* Sun Ship Inc., v. Pennsylvania, 447 U.S. 715 (1980) (extension of Longshoremen's and Harbor Worker's Workmen's Compensation Act to area covered by state worker's compensation acts did not pre-empt state law but merely supplemented it); Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) (Outer Continental Shelf Lands Act construed to incorporate state wrongful death remedies only if not inconsistent with federal laws law). *But see* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) (unseaworthiness action unavailable to longshoremen injured on pier by forklift owned by stevedore employer because not within admiralty jurisdiction).

[147] As Professor Currie has observed, a proper balancing of federal and state interests requires that the courts consider both the interest in uniformity and the interest in furthering the policies underlying a specific maritime rule. *See* Currie, *supra* note 87, at 172-73. Presumably it makes no difference whether the rule originates from Congress or the Court.

[148] Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917).

[149] *See* notes 12-36 and accompanying text *supra*.

[150] Courts should also give consideration to the prevalence of direct action statutes among the states. *See* notes 46, 60-61 and accompanying text *supra*. In fashioning a maritime wrongful death remedy, the Supreme Court in Moragne v. States Marine Lines, 398 U.S. 375 (1970), strongly emphasized the fact that all of the states had enacted wrongful death statutes. *Id.* at 390.

ently held that state law should not be applied to defeat or diminish a right of recovery given by maritime law. In *Pope & Talbot, Inc. v. Hawn*,[151] the Court held that the state law of contributory negligence could not be applied to prevent an injured carpenter's right to recover for negligence and unseaworthiness. Similarly, in *Garrett v. Moore-McCormack Co.*,[152] the Court held that a state could not require a Jones Act seaman to prove fraud in the inducement of a release of liability. New York's refusal to provide a right of direct action against marine insurers is no less disruptive of federal policy than the state laws at issue in *Garrett* and *Pope & Talbot*. The *Miller* court's refusal to override section 167(4) plainly runs afoul of the principle that state law may not derogate a maritime right of recovery.

Not only is the federal interest particularly strong in this context, but New York's interest is especially weak. The marine insurers' exemption, is a classic example of a special interest statute.[153] Whatever policy support it may have had in 1940 is now completely absent. The exemption was largely intended to remove a perceived competitive disadvantage,[154] but the proliferation of direct action statutes has abrogated even this rationale. Thus, it is questionable whether section 167(4) expresses any state policy. In fact, contrary to the limitations of section

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[151] 346 U.S. 406 (1953).

[152] 317 U.S. 239 (1942). *See also* Kermarec v. Compagnie Generale Trans-Atlantique, 358 U.S. 625 (1959) (reversing judgment freeing shipowner from liability under state law for negligent injury of visitor on ground that maritime law did not recognize state's distinction between licensee and invitee); J. Ray McDermott & Co. v. The Vessel Morning Star, 457 F.2d 815 (5th Cir.) (state law requiring appraisal of vessel's value prior to judicial sale inapplicable to sale under federal ship mortgage act), *cert. denied*, 409 U.S. 948 (1972); Mastan Co. v. Steinberg, 418 F.2d 177 (3d Cir. 1969) (state's presumption of fraud where insolvent mortgagor transfers property interest to mortgagee inapplicable where it would negate mortgagee's priority under Ship Mortgage Act), *cert. denied*, 397 U.S. 1009 (1970).

[153] *See* notes 37-81 and accompanying text *supra*. The *Miller* court refused to give this consideration any weight, holding that the "special interests" aspects of § 167(4) establishes "only that the challenged law shares a characteristic common of most laws passed by all American legislatures." 500 F. Supp. at 1050. True enough. But in dismissing the political origin of the statute, the court misperceived the nature of its inquiry. A balancing of federal and state interests requires that the court ascertain the scope and legitimacy of those interests. *See* Currie, *supra* note 87, at 171. The mere fact that a state enacts a law does not mean that its interests are significant. Certainly the fact that relatively narrow concerns gave rise to § 167(4) is relevant in determining the extent of New York's interest.

[154] *See* notes 41-46 and accompanying text *supra*.

167(4), New York's policy generally *favors* recovery against insurance companies in order to protect injured third parties.[155]

All of these considerations were ignored by the district court in *Miller*. Although several factors were involved in denying relief, the court's reluctance to interfere with state regulation of the insurance industry obviously contributed to that result. As this attitude is unlikely to change in the near future, seamen would be ill-advised to look to the federal judiciary to create a uniform right of direct action.

IV. The Need for Congressional Action

The Supreme Court's reluctance to intervene in the marine insurance field is based in part on its belief that Congress is better equipped to handle the complexities of insurance regulation. Whether this is true, Congress undisputably possesses the constitutional power to establish a uniform right of direct action for Jones Act plaintiffs.[156] The vital need for such legislation is apparent. New York's exemption for marine insurers both subverts the clear policy of the Jones Act to protect injured seamen and improperly imposes local regulation over an area of national concern.

The policy that favors direct action against insurers of nonmaritime risks should apply to marine insurers as well. The insolvency of the insured should not prevent recovery by those whose welfare is expressly a matter of federal concern. Moreover, a right of direct action would advance the federal interest in maritime uniformity. Not only would seamen be assured that their Jones Act rights are consistently enforceable, but insurers would not be confronted with the possibility of varying liabilities in different jurisdictions.

Absent judicial intervention, Congress must enact legislation allowing seamen to enforce judgments against marine insurers when the insured is bankrupt, or allowing joinder as part of the underlying suit. Either alternative gives injured seamen an

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[155] *See* notes 33-35 and accompanying text *supra*.

[156] While the admiralty clause by its terms does nothing more than confer subject matter jurisdiction over maritime cases with the federal courts, *see* note 86 *supra*, it has been interpreted to give Congress the power to alter or supplement the general maritime law. *See* Panama R.R. Co. v. Johnson, 264 U.S. 375, 386 (1924).

equitable remedy, and advances a respectable tradition of federal protection of their interests.