# Death at Sea and the Right to Jury Trial

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## I. INTRODUCTION

On October 29, 2018, Lion Air Flight JT 610 crashed about eighteen nautical miles off the coast of Indonesia, shortly after takeoff, killing all on board.[1] The jet, a Boeing 737 Max 8, had a faulty flight-control system that overrode the pilots and attempted to turn the plane into several nosedives a few minutes before it crashed.[2] All but two of the 186 death claims were settled.[3] One of the two remaining plaintiffs, representing the family and representatives of Liu Chandra, sued Boeing and other

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1. *In re* Lion Air Flight JT 610 Crash, 2023 WL 3653218 at *1 (N.D. Ill. May 25, 2023) (amended memorandum opinion and order). The court's original memorandum and order appears at 2022 WL 17820965 (N.D. Ill. Dec. 20, 2022).

2. *Id.*

3. *Id.*

defendants[4] in Illinois state court, but the defendants removed the case to the Federal District Court for the Northern District of Illinois based on the Multiparty, Multiforum Trial Jurisdiction Act[5] and admiralty jurisdiction.[6] The other plaintiff, representing the family and administrator of Andrea Manfredi, sued the same defendants in the same federal court based on diversity jurisdiction.[7] These plaintiffs demanded a jury trial, to which Boeing and another defendant objected.[8] The district court determined that the two claims must be decided under the Death on the High Seas Act[9] (DOHSA) and that under that statute there was no right to a jury trial.[10] Subsequently, the court certified the jury trial issue for immediate interlocutory appeal, and the Seventh Circuit granted permission to appeal.[11]

This Article takes issue with the district court's decision to deny a jury trial. It argues that courts should interpret DOHSA with the goal of preserving the deeply held tradition enshrined in the saving-to-suitors clause[12] of allowing the plaintiff a choice of common law and admiralty forums. This tradition dates to the first Judiciary Act of 1789 in which Congress invested federal district courts with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it."[13] Under this grant of jurisdiction, federal district courts generally have exclusive jurisdiction

4. "Boeing" refers to The Boeing Company and various affiliated companies. The other defendants were Rosemount Aerospace, Inc. and Xtra Aerospace LLC.

5. 28 U.S.C. § 1369.

6. *In re Lion Air Flight JT 610 Crash*, 2023 WL 3653218 at *1.

7. *Id.* at *2.

8. *Id.* at *1-2. Rosemount Aerospace joined Boeing in opposing a jury trial. Xtra Aerospace took no position. *Id.* In the suit resulting from the death of Liu Chandra, Boeing had included a jury demand in its removal petition but subsequently moved to strike the jury demand. *Id.*

9. Death on the High Seas Act, 46 U.S.C. §§ 30301-08 (1920).

10. *In re Lion Air Flight JT 610 Crash*, 2023 WL 3653218 at *9. *See also* LaCourse v. PAE Worldwide Inc., 980 F.3d 1350, 2020 AMC 368 (11th Cir. 2020) (explaining that DOHSA applies to aircraft crashes on the high seas).

11. *In re Lion Air Flight JT 610 Crash*, 2023 WL 3653218 at *9.

12. 28 U.S.C. § 1333(1) (2018).

13. An act to establish the Judicial Courts of the United States, § 9, 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1333 (2018)). It provides in pertinent part, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The Supreme Court has said that the new wording made no change in the power of state courts to hear admiralty cases. Madruga v. Superior Court, 346 U.S. 556, 560 n. 12, 1954 AMC 405 (1954).

over *in rem* suits,[14] but plaintiffs wishing to sue in personam generally have a choice of three forums: federal court with a right of jury trial if there is diversity jurisdiction, federal court having admiralty jurisdiction and therefore no right to jury trial, or state court where the state law may provide a right of jury trial.[15] The Supreme Court has said the clause saves plaintiffs "all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."[16] Courts

14. The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866). State courts can exercise *in rem* jurisdiction in civil forfeiture cases. C. J. Hendry Co. v. Moore, 318 U.S. 133, 1943 AMC 156 (1943).

15. *See, e.g.*, Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359, 1962 AMC 565 (1962). *See also* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 445, 2001 AMC 913 (2001) (holding that state courts have concurrent jurisdiction); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 362, 1959 AMC 832 (1959) (recognizing that the saving-to-suitors clause allows state courts to have concurrent jurisdiction); *Madruga*, 346 U.S. 556 (holding that state courts can hear maritime claims brought in personam); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 1954 AMC 1 (1953) (holding that maritime law applies to cases brought in diversity); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 89, 1946 AMC 698 (1946) (same); Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259, 2009 AMC 1803 (1922) ("The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."); Am. Steamboat Co. v. Chase, 83 U.S. 522, 533 (1872); Leon v. Galceran, 78 U.S. 185, 188 (1870); The Belfast, 74 U.S. (7 Wall.) 624, 643–44, 2013 AMC 1789 (1868); New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 389-90, 2009 AMC 2320 (1848); Luera v. M/V Alberta, 635 F.3d 181, 2011 AMC 937 (5th Cir. 2011) (holding that the plaintiff could bring a maritime claim in personam based on diversity and another claim *in rem* against the vessel and that both claims would be tried together before a jury). When a federal court has both admiralty jurisdiction and some other basis of subject-matter jurisdiction over a claim, the party asserting that claim decides which rules of procedure apply to that claim. Fed. R. Civ. P. 9(h). *See generally*, GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 37-38 (2d. ed. 1975). 14A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3672 (4th ed. 2023).

Some suits can be brought only in admiralty. These are suits against the United States under the Suits in Admiralty Act, *see* 46 U.S.C. § 30903, or the Public Vessels Act, *see* 46 U.S.C. § 31102; suits to foreclose a preferred ship mortgage, *see* 46 U.S.C. § 31325; and petitions under the Limitation of Liability Act, *see* 46 U.S.C. § 30529. These statutes differ from DOHSA in that they lack a provision allowing for state court jurisdiction. Beyond that, they each have parallels outside of admiralty that do not allow for jury trial. When sovereign immunity is waived, suits are normally tried without juries. *See, e.g.*, 28 U.S.C. § 1491 (contract claims are brought in the Court of Federal Claims); 28 U.S.C. § 2402 (tort claims under the Federal Torts Claims Act). The Supreme Court decided that suits to limit liability belong in admiralty because they resemble cases where proceeds of a vessel or other funds are divided among competing maritime lienors and federal courts sitting in admiralty routinely handle those cases. Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. 104, 123, 1998 AMC 2061 (1871). In non-maritime cases, suits to foreclose a mortgage are tried in equity and therefore lack juries unless a statute or state constitution provides otherwise. 55 Am. Jur. 2d *Mortgages* § 588 (2023). By contrast, outside of admiralty, wrongful death cases are routinely tried before juries.

16. Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 124, 1924 AMC 418, 423 (1924).

are required to apply the same substantive law regardless of which forum the plaintiff choses.[17]

Congress adopted DOHSA in 1920 and recodified it in 2006.[18] The earlier statute contained four sections that are relevant to the issue of jury trial. Section 1 provided that "the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty," to recover for wrongful death.[19] Section 4 allowed suit to be brought "in admiralty in the courts of the United States" under a foreign state's wrongful death law.[20] Section 5 was a survival provision, allowing a decedent's personal representative to be substituted as a party if decedent died while maintaining a suit "in a court of admiralty of the United States."[21] Finally, Section 7 provided in part, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act."[22] These sections and their current versions are set forth in the margin.[23]

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17. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 1959 AMC 597 (1959).

18. This Article will cite the original statute because most authorities discussed in this article do so. The recodified statute makes no substantive change.

19. Pub. L. No. 66-165, 41 Stat. 537, § 1 (1920). Under the statute, the damages in most cases are limited to pecuniary losses. However, Congress added a new section, now codified at 46 U.S.C. § 30307 (1920), that allows damages for loss of care, comfort, and companionship if death results from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the United States.

20. Pub. L. No. 66-165, 41 Stat. 537, § 4 (1920).

21. Pub. L. No. 66-165, 41 Stat. 537, § 5 (1920).

22. Pub. L. No. 66-165, 41 Stat. 538, § 7 (1920).

23. As originally passed by Congress the statute read in pertinent part:

> [Section 1.] That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.
>
> . . .
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> Section 4. That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.
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> Section 5. That if a person die as the result of such wrongful act, neglect, or default as is mentioned in Section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect,

Early on, most courts and commentators read DOHSA as requiring that suit be brought exclusively in a federal court exercising admiralty jurisdiction with no right to a jury.[24] This changed in 1986 when the

> or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in Section 2.
>
> Section 7. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.
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> Pub. L. No. 66-165, 41 Stat. 537-38 (1920).
>
> As recodified in Title 46, the statute reads in pertinent part:
>
> § 30302. Cause of action
>
> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.
>
> § 30305 Death of a plaintiff in pending action
>
> If a civil action in admiralty is pending in a court of the United States to recover for personal injury caused by wrongful act, neglect, or default described in section 30302 of this title, and the individual dies during the action as a result of the wrongful act, neglect, or default, the personal representative of the decedent may be substituted as the plaintiff and the action may proceed under this chapter for the recovery authorized by this chapter.
>
> § 30306. Foreign cause of action
>
> When a cause of action exists under the law of a foreign country for death by wrongful act, neglect, or default on the high seas, a civil action in admiralty may be brought in a court of the United States based on the foreign cause of action, without abatement of the amount for which recovery is authorized.
>
> § 30308. Nonapplication
>
> *State law*.—This chapter does not affect the law of a State regulating the right to recover for death.
>
> *Internal waters*.—This chapter does not apply to the Great Lakes or waters within the territorial limits of a State.

Death on the High Seas Act, 46 U.S.C. §§ 30301-08 (1920).

24. See *infra* Part III. A jury is allowed for certain maritime tort claims arising on the Great Lakes and connecting navigable waters. *See* 28 U.S.C. § 1873. *See generally* Mark Barrett, *Verdict of Great Lakes Jury in Seaman's Personal Injury Action Not Merely Advisory*, 2 J. MAR. L. & COM. 672 (1971). At an earlier time, it was thought that the statute permitted only an advisory jury. Henry Billings Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9. COLUM. L. REV. 1, 4 (1909). This was thought necessary because of the power of the appellate court in admiralty

Supreme Court, in *Offshore Logistics, Inc. v. Tallentire*[25] said in dicta that Section 7 of DOHSA permits plaintiffs to sue in state court, presumably with a right to jury if allowed by state law, to recover the damages allowed by DOHSA.[26] The Court sought to preserve uniformity of substantive law[27] and the traditional relation between federal and state governments in regulating maritime issues.[28] Drawing a comparison to the saving-to-suitors clause, the *Tallentire* court interpreted Section 7 so that plaintiffs may choose a state forum for maritime death actions just as they can for non-fatal injury cases.[29]

Part II of this article describes the need for DOHSA and the statute's legislative history. As will be shown, although the legislative history was ambiguous, it contains support for having concurrent jurisdiction for DOHSA claims. Part III details the early interpretation of the statute and the growing uncertainty about DOHSA's meaning as courts struggled to apply it. Part IV describes the changed landscape created by the decision in *Offshore Logistics, Inc. v. Tallentire*. Part V shows how courts have used the saving-to-suitors clause to overcome greater challenges than the one presented by DOHSA. They have effectively rewritten other statutes, in particular the Jones Act,[30] the Limitation of Liability Act,[31] and the removal statute,[32] which appear on their face to foreclose the choice of forum or curtail access to a jury. Part VI, the conclusion, offers a summary of the Article.

## II. PRE-1920, THE NEED FOR REFORM, AND THE LEGISLATIVE HISTORY OF DOHSA

Actions for deaths at sea have raised difficult legal issues in the United States for nearly 200 years. Starting in 1825, a few judges held that the maritime law permitted a claim for wrongful death even though there was no statute creating the right.[33] The most famous of these cases

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cases at the time to review jury verdicts de novo. *See* Steven F. Friedell, *A Lump of Coal: Behind the Scenes of The Osceola*, 34 RUT. L. J. 637, 644 n. 54 (2003).

25. 477 U.S. 207, 1986 AMC 2113 (1986).
26. *See infra* text at notes 139-141.
27. Offshore Logistics v. Tallentire, 477 U.S. at 221, 230.
28. *Id.* at 222-23.
29. *Id.*
30. 46 U.S.C. § 30104 (2018).
31. 46 U.S.C. § 30501 (2018).
32. 28 U.S.C. § 1441 (2018).
33. Plummer v. Webb, 19 F. Cas. 894 (D. Me. 1825) (No. 11,234), *rev'd on other grounds*, 19 F. Cas. 891 (C.C.D. Me. 1827) (No. 11,233). *See also* The Columbia, 27 F. 704, 720 (S.D.N.Y. 1886), *rev'd sub nom*. The Alaska, 33 F. 107 (C.C.S.D.N.Y. 1887), *aff'd*, 130 U.S. 201

was *The Sea Gull*, where Chief Justice Chase sitting on Circuit wrote, "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[34]

Had this legal practice continued, courts would have been able to subject maritime death claims to the same procedural rules as other maritime claims for tort or breach of contract. Federal courts sitting in diversity and State courts would have concurrent jurisdiction for any claims brought in personam, and the parties would have been able to demand trial by jury in those forums.[35] However, the Supreme Court put an end to this in 1886 when it held in *The Harrisburg*[36] that there is no right to recover for wrongful death in the absence of a statute.[37]

In the wake of *The Harrisburg*, the Supreme Court allowed plaintiffs to recover under state wrongful death statutes or under foreign statutes where applicable.[38] In *The Hamilton*, for example, after a Delaware corporation filed suit to limit its liability following a collision on the high seas, representatives of those who had died in the collision were allowed to present their claims in the limitation proceeding based on the Delaware wrongful death statute.[39] This approach, however, was imperfect because a state's statute might not apply outside the state's territorial limits or might not apply to the parties.[40] Foreign statutes might have similar limitations.

In 1900, Congressman Boutell introduced a bill in Congress that would have allowed suit to recover for wrongful death with a right of jury trial in both the district courts in admiralty and the federal circuit courts.[41] A committee of the Maritime Law Association of the United States

(1889) (collecting cases); The Manhasset, 18 F. 918 (E.D. Va. 1884); Cutting v. Seabury, 6 F. Cas. 1083 (D. Mass. 1860) (No. 3,521); Crapo v. Allen, 6 F. Cas. 763 (D. Mass. 1849) (No. 3,360).

34. 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578).

35. *See* cases cited *supra* note 15 and accompanying text.

36. 119 U.S. 199 (1886).

37. The Supreme Court overruled *The Harrisburg* and cast doubt on whether *it* was correctly decided at the time. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 381-388, 1970 AMC 967 (1970).

38. The Hamilton, 207 U.S. 398 (1907) (applying state statute); La Bourgogne, 210 U.S. 95 (1908) (applying French statute); Am. Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872) (holding that Rhode Island court may apply its statute to death occurring in Rhode Island territorial waters).

39. 207 U.S. at 398.

40. The Aquitania, 1924 AMC 1440 (S.D.N.Y. 1924) (holding that Massachusetts statute did not apply to deaths caused by a British steamer); The Sagamore, 247 F. 743, 757 (1st Cir. 1917) (same).

41. H.R. 9197, 56th Cong. (1900).

(MLA) approved of the bill's general purpose, including jurisdiction in federal courts at law or in admiralty, but objected to allowing jury trials in admiralty.[42] Congress entertained similar bills, many drafted by the MLA, in the ensuing years but none were enacted.[43]

In 1913, the MLA drafted a bill which, as amended, was passed by the House of Representatives.[44] The bill, H.R. 6143, as originally drafted, gave federal and state courts concurrent jurisdiction for deaths occurring in territorial waters but made suit in admiralty exclusive for deaths occurring on the high seas.[45] The bill's first section said, just as DOHSA would, that the plaintiff "may maintain a suit for damages in the district courts of the United States in admiralty."[46] The bill made that jurisdiction exclusive by providing that suits for deaths on the high seas "shall not be maintained in the courts of any State or Territory or in the court of the United States other than in admiralty."[47] From the MLA's perspective, exclusive jurisdiction in admiralty was a means of ensuring uniformity.[48]

Matters underwent a major change when the Judiciary Committee presented the bill to the House. The Judiciary Committee amended the saving provision to read in part, "but nothing in this act shall be construed to abridge the right of suitors in the courts of any State or Territory to a remedy given by the laws of any State or Territory in such cases."[49] The new clause was similar to one that would be included in DOHSA.[50]

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42. Maritime Law Association of the United States, Report of a Special Committee of the Maritime Law Association, Nov. 13, 1900 at 3, *available on* LLMC Digital. In the following years the MLA proposed several bills, some of which would have allowed suit in the circuit courts which exercised diversity jurisdiction. *E.g.*, Maritime Law Association of the United States, Minutes, Nov. 21, 1902, at 11-12, *available on* LLMC Digital. Others simply allowed suit *in rem* or in personam but placed no restriction on where suit might be filed. *E.g.*, Maritime Law Association of the United States, Minutes, Nov. 20, 1903 at 6-8, *available on* LLMC Digital.

43. For a history of the early efforts to adopt a federal statute, *see* Wilson v. Transocean Airlines, 121 F. Supp. 85, 89, 1954 AMC 1697 (N.D. Cal. 1954). For a summary of legislative efforts before 1914, see the report by Fitz-Henry Smith, Jr. in Maritime Law Association of the United States, Minutes, Oct. 19, 1914, at 14-24, *available on* LLMC Digital.

44. 52 Cong. Rec. 1077 (1915).

45. H.R. 6143, 63d Cong. (1st Sess. 1913). A similar bill had been introduced the year before having the same purpose. H.R. 24764, 62d Cong. (1912). *See Actions for Death on the High Seas and Suits for Damages Caused by Government Vessels, Hearing on H.R. 24764 and H.R. 24763 Before the H. Comm. on the Judiciary*, 62d Cong. 15 (1912) (statement of George Whitelock, representing the American Bar Association).

46. H.R. 6143 § 1.

47. H.R. 6143 § 7.

48. Fitz-Henry Smith, Jr., Maritime Law Association of the United States, Minutes of Oct. 19, 1914, at 23, available on LLMC Digital.

49. 52 Cong. Rec. 1065 (Jan. 6, 1915).

50. *See* cases cited *supra* note 15.

Congressman Webb, the committee's chairman, explained that for deaths resulting from wrongful acts on the high seas, the clause gave the plaintiff the option of suing in federal court based on either admiralty or diversity[51] or suing in state court where the case might remain or be tried in federal court if removed.[52] A non-jury trial would be mandated only if the plaintiff sued in admiralty, as would be the case if suit were brought *in rem*.[53]

Meanwhile, Congressman Graham proposed to amend the clause to read, "[b]ut nothing in this Act shall be construed to abridge the right to sue and pursue any remedy given by the laws of any State or Territory in such cases."[54] At first Webb said he thought Graham's motion merely restated the Committee's draft, but Graham responded that his amendment made it clear that it included "the transfer [meaning the removal] of a case to the United States court, and other incidental things." Webb replied that the committee did not intend to prevent suits based on diversity, and that the Committee bill "preserves all the rights of suitors."[55] Later, Webb and his committee accepted Graham's amendment,[56] and the House passed the bill in that form and sent it to the Senate.[57]

In a letter to the Senate, an MLA committee objected to the provision that Graham had introduced because it thought that the wording might allow a plaintiff two recoveries, one in state court and another in federal court. The MLA committee suggested the following:

> Section 6. That the right to recover damages for the death of a person caused by wrongful act, neglect or default, occurring on the high seas, the Great Lakes, or any navigable waters of the United States, wherever such death may occur, shall be governed exclusively by the provisions of this Act, which shall supersede all state statutes in

51. 52 Cong. Rec. 1065, 1068 (comments of Congressman Webb).

52. *Id.* at 1065, 1070 (comments of Congressman Webb).

53. *Id.* at 1067 (comment of Congressman Webb).

54. *Id.* at 1069.

55. *Id.* Just prior to these remarks, Congressman Webb, apparently quoting from an earlier version of H.R. 6143, said, "'[n]othing in this act shall be construed to abridge the rights of suitors in the courts of any State or Territory, or in the courts of the United States other than in admiralty, to a remedy given by the law of any State or Territory' [i]n such cases." *Id. See* H.R. 6143, § 8, 63d Cong., 2d Sess. (1913). In the earlier bill the provision applied only to deaths occurring on territorial waters. Webb apparently understood that the new bill allowed state courts and federal courts exercising diversity jurisdiction to hear all maritime death claims.

56. 52 Cong. Rec. 1065, 1074.

57. *See* H.R. 6143, 63d Cong., 3d. Sess. § 6 (Jan. 6, calendar day, Jan. 7, 1915) (Senate). After discussion, the committee accepted the version quoted in the text. 52 Cong. Rec. 1065, 1074.

> so far as they apply to causes of action for death arising on such waters. *But the right to sue under this Act in the courts of common law of appropriate jurisdiction, whether state or federal, is hereby expressly preserved.*[58]

It is noteworthy that the MLA had no objection to preserving the right to sue in a federal district court having diversity jurisdiction (the federal "common law" court) or in state court. The Senate failed to act on the bill.[59]

A few months later, after consulting its membership,[60] the MLA changed course and directed one of its committees to redraft the bill to provide a remedy for deaths outside state waters and "limit its application to the Admiralty Court."[61] In November 1915, the MLA adopted the committee's proposed bill,[62] which was introduced in Congress.[63] That bill retained the earlier language that said the plaintiff "may maintain" a suit "in admiralty"[64] and contained a saving provision in Section 7 that read, "[t]hat the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State."[65] This bill was intended to limit state courts to hearing claims arising in territorial waters. Neither house of Congress adopted the bill, and although it was reintroduced to the next Congress, no action was taken until after the First

58. Maritime Law Association of the United States, Document, April 20, 1915 at 4-5 (1915), *available at* LLMC Digital (emphasis added).

59. *Id.* at 5.

60. *See id.* (where the committee asked the Association to determine, among other things, "whether (1) [the bill] shall be restricted to the courts of admiralty, leaving the right to recover under state statutes unaffected, or whether (2) it shall attempt to supersede the state statutes in respect of any waters . . .").

61. Maritime Law Association of the United States, Minutes of May 7, 1915, at 3, *available on* LLMC Digital. *See* Harrington Putnam, *The Remedy for Death at Sea*, 22 CASE AND COMMENT 125, 128 (1915) (summarizing the MLA resolution).

62. Maritime Law Association of the United States, Minutes 1-4 (Nov. 23, 1915), *available on* LLMC Digital and *at* https://mlaus.org/wp-content/uploads/filebase/mla-historical-docs/Document_66.pdf.

63. S. 4288, 64th Cong. (1916). The bill as introduced made slight changes in punctuation and added a section that provided that the "Act shall not affect any pending suit, action, or proceeding." *Id.* § 7.

64. *Id.* § 1.

65. *Id.* § 6.

World War.[66] Finally, Congress adopted a modified version of this bill on March 30, 1920, and DOHSA was born.[67]

The most important modification for our purposes was Congressman Mann's amendment to the savings provision of Section 7 shortly before the House vote.[68] Mann's amendment struck out "as to causes of action accruing within the territorial limits of any State." Mann said that if his amendment were adopted,

> [T]he bill would not interfere in any way with rights now granted by any State statute whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had [a] cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court."[69]

With the adoption of Mann's amendment, the critical language of Section 7 now read, "[t]hat the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act." Although the amendment took DOHSA in a new direction, the wording was ambiguous as to whether state substantive law could supplement the damages allowed by DOHSA for deaths on the high seas or whether, as Mann maintained, that a plaintiff could sue in state court even if death occurred on the high seas.

The Mann amendment made the saving clause similar to the saving clauses proposed by the House Judiciary Committee and the one adopted by the House of Representatives in early 1915 with respect to H.R. 6143.[70] Congressman Webb had said of the earlier bill his committee introduced, that it "preserves all the rights of suitors."[71] If the Mann amendment permitted state courts to try DOHSA cases, it seems to follow that it also preserved all of a suitor's rights including the right to sue in federal court based on diversity.

Courts and others have bemoaned the confusing nature of DOHSA's legislative history. An MLA committee regretted that the House adopted the Mann amendment because it created the possibility that state substantive law might be applied to deaths on the high seas, defeating the

66. *See* Wilson v. Transocean Airlines, 121 F. Supp. 85, 89, 1954 AMC 1697 (N.D. Cal. 1954).
67. 41 Stat. 537 (1920).
68. 59 Cong. Rec. 4484 (March 17, 1920).
69. *Id.*
70. *See supra* text at notes 49-55.
71. *See supra* text at note 55.

goal of uniformity.[72] The committee expressed no regret that state courts might have concurrent jurisdiction or that there might be a right to jury trial, suggesting that those matters were of secondary importance.[73] The American Law Institute (ALI) said, "[t]he Congressional debates are hopelessly inconsistent,"[74] and the Supreme Court said the Congressional discussions of Section 7 "were exceedingly confused and ill informed."[75] One judge called the Mann amendment "ambiguous and ill-considered."[76]

The bill was ambiguous even without the Mann amendment. Several statements made before the adoption of the Mann amendment mention only admiralty as a possible forum. For example, the House report contained the following paragraph:

> The object of this measure is to permit the personal representatives of a deceased person who lost his life, due to wrongful acts or negligence on the high seas to maintain an action, exclusively for the benefit of a wife, husband, child, or other dependent relatives, in the district courts, *in admiralty*, against the vessel, person, or corporation which would have been liable in case death had not ensued.[77]

Also, the Senate and House reports included a letter from Judge Harrington Putnam written in 1913 that said, "The general purpose of the measure is to give a uniform right of action in the United States *admiralty courts* for death by negligent acts occurring on the high seas . . ."[78]

However, both reports also included a supporting letter, also written in 1913, from Fitz-Henry Smith, Jr. on behalf of the MLA that said that under the saving-to-suitors clause

> [A] common-law right of action may be maintained in our courts for a transitory cause, such as a tort, even though committed on the high seas.
>
> . . .

72. Maritime Law Association of the United States, Minutes, May 7, 1920, at 1063-64 (1920), *available at* LLMC Digital.

73. *See supra* text at note 48 (expressing the view that having exclusive jurisdiction in admiralty is a way of ensuring uniformity).

74. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 236 (1969).

75. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 225, 1986 AMC 2113 (1986).

76. Wilson v. Transocean Airlines, 121 F. Supp. 85, 91, 1954 AMC 1697 (N.D. Cal. 1954).

77. H.R. Rep. 674, at 1, 66th Cong. 2d Sess. (1920) (emphasis added).

78. S. Rep. 216, 66th Cong., 1st Sess. at 2; H.R. Rep. 674, at 2 (emphasis added).

> The maritime law of a country, so far as the high seas are concerned, may be described as the law of the forum . . . All that we seek to do in the bill relating to loss of life is to provide a law of the forum for American courts in that particular and a law of the flag for American vessels, just as a law now exists for injuries that are not fatal.[79]

Smith's reference to the saving-to-suitors clause reflects an awareness of torts plaintiffs' ability to sue in state court or in federal court based on diversity.[80] And by saying "American courts," instead of "admiralty courts" or "courts of the United States," Smith presumably meant both state and federal courts.

The floor debates of the final bill were also inconclusive. Early in the debate, Congressman Ricketts asked if the judge may "charge the jury" to consider contributory negligence in determining the amount of damage.[81] This prompted Congressman Igoe to remark, "[T]his proceeding will be in admiralty and that there will be no jury . . . That question was thrashed out and it was decided best not to incorporate into this bill a jury trial because of the difficulties in admiralty proceedings."[82] Slightly later Congressman Volstead, the bill's proponent, agreed that the bill's purpose "is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas."[83] Yet, when asked later if it were true that "proceedings under this act would never have recourse to a jury," he replied,

> "I do not think so. Perhaps for certain purposes, under the practice that prevails, they may have a jury, but ordinarily a jury is not allowed. However, I do not know much about admiralty practice."[84]

Congress was aware, however, that Congressman Mann intended his amendment to give state courts concurrent jurisdiction.[85]

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79. S. Rep. 216 at 1-2; H.R. Rep. 674 at 2.

80. *See supra* note 15 and accompanying text.

81. 59 Cong. Rec. 4482 (March 17, 1920).

82. *Id.* Congressman Igoe was probably referring to the frequent need to have testimony presented by deposition and the supposed difficulty that jurors would have deciding factual issues about nautical fault. *See* 52 Cong. Rec. 1068 (Jan. 6, 1915) (statement of Cong. Webb). Robert Hughes, representing committees of the MLA and the American Bar Association, expressed these ideas. Right of Action for Death on the High Seas Before the H. Comm. on the Judiciary, Subcomm. No. 2, Procedure, Jurisdiction, Etc., 64th Cong. at 4-5 (Feb. 4, 1916) (statement of Robert M. Hughes) at 16-17.

83. 59 Cong. Rec. 4483 (March 17, 1920).

84. *Id.* at 4485.

85. 59 Cong. Rec. 4484 (In addressing what would happen if a state law gave a cause of action for a death on the high seas, Mann responded "there would be concurrent jurisdiction." Congressman Igoe disagreed saying that if Congress "passed a law for admiralty jurisdiction in

## III. EARLY INTERPRETATIONS OF DOHSA

Early on several courts asserted without discussion that DOHSA made suit in admiralty the exclusive remedy. For example, in *Dall v. Cosulich Societa Triestina Di Navigazione*, the court simply wrote:

> The Federal statute (Act of March 30, 1920), of which of course this Court also takes judicial notice, is applicable to certain injuries inflicted on the high seas and causing death, but such damages are recoverable under that Act only in Admiralty. [86]

Other courts also gave the matter short shrift.[87] This view seemed to dominate for the first forty years of the statute's existence. Judge Goodman gave the strongest and most-sustained defense of this interpretation in *Wilson v. Transocean Airlines*.[88] The plaintiff in *Wilson* had sued in state court and the defendant had removed the action to federal court. The plaintiff sought a remand to state court and the defendant sought dismissal.[89] At the time, the federal court would have no jurisdiction on removal if the state court lacked jurisdiction.[90] After reviewing the statute's language, legislative history, and judicial interpretation, he concluded that suit under DOHSA "must be maintained in admiralty."[91] He therefore dismissed the action without prejudice to refiling in admiralty.[92] He sought to refute several arguments in favor of concurrent jurisdiction. The plaintiff contended that the expression "may maintain a suit . . . in admiralty" was intended to be permissive.[93] Judge Goodman replied that the word "may" instead grants a right of action.[94]

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the United States, it is exclusive in certain cases." *Id.* To which Mann replied, "If it is exclusive, then it does not affect this." *Id.* As the Supreme Court later recognized, Igoe was wrong, as he ignored the effect of the saving-to-suitors clause. *See infra* note 136. Later Mann said that under his amendment, "[T]he act will not take away any jurisdiction conferred now by the States." *Id.* at 4485.

86. 1928 WL 58314 at *1, 1936 AMC 359 (S.D.N.Y. 1928).

87. *See e.g.*, Birks v. United Fruit Co., 48 F.2d 656 (S.D.N.Y. 1930) (holding that the plaintiff's wrongful death claim cannot be sustained under DOHSA because the plaintiff sued "at law"); *In re* Rademaker's Estate, 2 N.Y.S.2d 309, 1938 AMC 396 (N.Y. Sur. Ct. 1938) ("Suit on such a claim is, under the express language of the statute, permissible only in 'the District Courts of the United States, in admiralty' . . .").

88. 121 F. Supp. 85, 1954 AMC 1697 (N.D. Cal. 1954).

89. *Id.* at 87.

90. Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377 (1922). This remained the law until 1986. Today the federal district court would have jurisdiction even if the state court from which the action was removed lacked jurisdiction. 28 U.S.C. § 1441(f).

91. 121 F. Supp. at 98.

92. *Id.*

93. *Id.* at 94.

94. *Id.*

He thought that any other construction would render the words "in admiralty" surplusage.[95] He also relied on survival provision in Section 5 of the Act, reasoning that Congress would have no reason for limiting this right of substitution to suits in admiralty if it had intended to allow DOHSA claims to be brought at law.[96]

Judge Goodman also said that the Committee reports and the debates on the floor of the House supported his position, but he cited no specific language.[97] He dismissed the Mann amendment, saying, "[a]n ambiguous and ill-considered amendment to the bill, which became the Act, is not sufficient justification for reaching a contrary conclusion at this late date."[98]

The following year the Ninth Circuit in *Higa v. Transocean Airlines* took a similar view. It affirmed the dismissal of a DOHSA claim brought in diversity for lack of jurisdiction. The plaintiff had demanded a jury trial.[99] The Ninth Circuit held that the word "may" was "used permissively but only as a permission to sue in admiralty."[100] The court rejected the plaintiff's reliance on the saving-to-suitors clause, saying that Congress had given the sole jurisdiction of DOHSA claims to the federal district courts in admiralty.[101] Furthermore, the court drew support from the survival provision of Section 5, saying that it would have been unnecessary if Congress had intended to allow suits to be brought at common law.[102] The court also rejected an argument based upon a case where the Supreme Court said,

> Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state government, there is no presumption that Congress intended to prevent state courts from exercising the *general jurisdiction already possessed by them*, and under which they had the power to hear and determine causes of action created by Federal statute.[103]

95. *Id.*
96. *Id.* at 95.
97. *Id.*
98. *Id.* at 91.
99. 230 F.2d 780, 781 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956).
100. *Id.* at 782.
101. *Id.* at 783.
102. *Id.* at 784.
103. *Id.* (quoting Robb v. Connolly, 111 U.S. 624, 627 (1884)) (emphasis added).

The court responded,

> As seen above, the High Seas Act in Section 7, as amended by the Mann proposal, recognized the jurisdiction 'already possessed' in New York (sic) to entertain suits for death on the high seas. Hence this case respecting a prior existing right in the state court expresses in its first sentence what we regard as the applicable law here.[104]

It is not clear what the court meant, but it seems to have assumed its conclusion that suit in admiralty was the exclusive remedy.

The plaintiff further argued, based on another Supreme Court case[105] "that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive."[106] The Ninth Circuit responded that DOHSA not only gives the federal court the power to enforce the act but "a particular jurisdiction of that court."[107]

Finally, the plaintiff relied on *Panama R.R. Co. v. Johnson*, where the Supreme Court held that Jones Act claims may be brought not only "at law" as provided for by the statute but in admiralty, too.[108] The *Higa* court distinguished that case saying that the Supreme Court in *Johnson* sought to avoid a constitutional question because the Jones Act created a new maritime tort that warranted suit in admiralty.[109]

In 1957, Professors Gilmore and Black agreed with the view that DOHSA claims could be brought only in federal district court in admiralty, citing the first section of the statute for support and elsewhere mentioning the holding in *Higa*.[110] Two years later Justice Frankfurter writing in *Romero v. International Operating Co*. asserted that DOHSA

104. *Id.* at 784-85.

105. United States v. Bank of New York, 296 U.S. 463 (1936).

106. *Higa*, 230 F.2d. at 785.

107. *Id.*

108. 264 U.S. 375, 390 (1924).

109. *Id.*

110. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6.30 at 304 (1957) (citing the first section of DOHSA). See also *Id.* at 36 n. 133 ("It has been held that a suit under the Death on the High Seas Act . . . must be brought on the admiralty side, and may not be brought under the 'saving clause.'") (citing *Higa*, 230 F.2d 780.). The authors' second edition drops the discussion from Section 6.30 but retained the footnote reference to *Higa*. GILMORE & BLACK, *supra* note 15, at 40 n. 133. *See also* Brainerd Curie, *The Silver Oar and All That: A Study of the* Romero Case, 27 U. CHI. L. REV. 1, 5 (1959) (asserting that DOHSA claims cannot be tried by juries).

claims could not be tried by a jury, citing part of the legislative history for support.[111] Several courts followed *Wilson* and *Higa*.[112]

Almost from the start, however, others took a different view. In *Powers v. Cunard S.S. Co*., the court allowed suit to be brought "at law" under Lord Campbell's Act against a British defendant.[113] It said that DOHSA "confers jurisdiction on the admiralty courts without affecting the jurisdiction of any other court."[114] Another court followed *Powers* in holding that suit under an Italian death statute may be brought "at law," because Section 4 of DOHSA that permits such suits to be brought "in a court of admiralty"[115] is "merely permissive."[116] In *Elliott v. Steinfeldt*, the New York Appellate Division upheld the state court's jurisdiction to hear cases under DOHSA.[117] It reasoned,

> Where the State courts have long enjoyed jurisdiction over the subject-matter of an action, jurisdiction is not withdrawn by Federal statute unless such an intention is distinctly manifested . . . No such intent is discernible here. Section 1 of the Federal . . . grants jurisdiction to the Federal district courts in admiralty, but does not purport to withdraw jurisdiction from any other court. Section 7 . . . is intended, as we view it, to protect the right of State courts to entertain actions founded on the Federal act.[118]

New York's highest court later approved this reasoning.[119] It said, "[t]he time-honored practice of concurrent jurisdiction allowed under the Judiciary Act of 1789 and perpetuated in the Federal Employer's Liability Act . . . and the Jones Act . . . should be applied, it would seem unless the intention of the Congress is clearly to the contrary."[120]

In *Choy v. Pan-American Airways Co.*, a federal district court upheld its jurisdiction over a DOHSA action brought as a common law action.[121]

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111. Romero v. Int'l Operating Co., 358 U.S. 354, 371, n. 28 (1959) (relying on some of the remarks of Congressman Igoe). *See supra* text at note 82.

112. *See e.g.*, Keegan v. Sterling, 610 F. Supp. 789, 790 (S.D. Fla. 1985); D'Aleman v. Pan Am. World Airways, Inc., 259 F.2d 493 (2d Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 680, 1957 AMC 1994 (2d Cir. 1957).

113. 32 F.2d 720, 1925 AMC 1047 (S.D.N.Y. 1925).

114. *Id.* at 720.

115. For the text of Section 4 *see supra* note 23.

116. The Saturnia, 1936 WL 64726, 1936 AMC 469 (S.D.N.Y. 1936).

117. 4 N.Y.S.2d 9, 1938 AMC 794 (1938).

118. *Id.* at 10.

119. Ledet v. United Aircraft Corp., 10 N.Y.2d 258 (1961).

120. *Id.* at 261.

121. 1941 WL 76457, 1941 AMC 483 (S.D.N.Y. 1941). It does not appear whether jurisdiction was based on federal question or diversity jurisdiction.

The court thought Congress provided that "one may maintain a suit . . . in admiralty" to prevent the argument that otherwise the statute would be an "unwarranted invasion of the admiralty jurisdiction."[122] It also thought that the House debates showed that the bill would not have been passed had it "given the admiralty court sole jurisdiction."[123]

In *Safir v. Compagne Generale Transatlantique*, the plaintiff sued in state court and the defendant had the suit removed to federal court as a diversity case.[124] The court held that removal was proper and that transfer to the "admiralty side"[125] or remand would be improper. It said, "nothing in the Death on the High Seas Act has a strength of intimation that can abridge a traditional jurisdiction of the state courts."[126] Other courts took the same view.[127]

Some commentators also thought that DOHSA plaintiffs should be able to sue in state courts or bring common law claims in federal court.[128] The ALI published a report in 1969 that argued that it was not necessary

122. *Id.* at *3.

123. *Id.*

124. 241 F. Supp. 501, 1965 AMC 2087 (E.D.N.Y. 1965).

125. Courts occasionally use the terms "law side" or "admiralty side," often without quotation marks, when describing the federal district court's subject matter jurisdiction. There is of course no side to a federal court. The terms should be used with care, but if one understands that they are only shorthand for a federal district court either exercising or not exercising admiralty jurisdiction, no harm should come. After 1966 transferring a case to the "admiralty side" should mean that the court proceeds without a jury and that the court applies the other special rules of procedure applicable to admiralty and maritime claims. *See* Fed. R. Civ. P. 9(h).

126. Safir v. Compagne Generale Transatlantique, 241 F. Supp. at 509.

127. *See e.g.*, Batkiewicz v. Seas Shipping Co., 53 F. Supp. 802, 1943 AMC 1218 (S.D.N.Y. 1943); *See also* Bugden v. Trawler Cambridge, Inc., 319 Mass. 315 (1946) (holding that it is enough that the court has jurisdiction under either the Jones Act or DOHSA).

128. GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 141-43 (1939) ("But whether the suitor who relies on the Federal Death Act for his substantive right is barred from the state forum is not so obvious . . . It is difficult to believe that Congress by merely providing that the cause of action shall survive has intended to cut off the choice of forum which was in the hands of the injured man if the injury did not kill him."); Calvert Magruder & Marshall Grout, *Wrongful Death within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 420 (1926) ("Section 1 is permissive with reference to suits in the federal admiralty courts . . . Therefore, presumably, the transitory personal action may be enforced in a state common law court under the general provision of the saving clause . . . Whether a common law action may be brought in the federal courts is not so clear, but the answer is probably in the affirmative.") (footnotes omitted); Robert Knauss, *Recent Decisions*, 55 MICH. L. REV. 711, 711-13 (1957) ("The pattern of maritime jurisdiction has been to provide plaintiffs with an opportunity to enforce maritime rights by common law damage remedies in law courts where a jury is available, as well as in admiralty courts . . . A court should not give [Section 1 of DOHSA] a meaning inconsistent with the over-all legislative pattern."). *See also* ARNOLD WHITMAN KNAUTH, BENEDICT ON ADMIRALTY 382 (6th ed. 1940) (noting the split of authorities).

to read DOHSA as giving exclusive jurisdiction to the federal court and that concurrent jurisdiction ought to be permitted, observing that state courts "are fully competent to entertain" wrongful death claims arising on the high seas.[129]

In 1969 the Ninth Circuit struck a compromise between the two interpretations of DOHSA when it allowed a DOHSA claim to be presented to a federal jury because it was joined with a Jones Act claim for which there was a jury trial right.[130] In doing so the court relied on *Fitzgerald v. United States Lines*, where the Supreme Court directed that a seaman's claims under the Jones Act, unseaworthiness and maintenance and cure ought to be tried together by a jury if so requested, even in the absence of diversity jurisdiction.[131] The Ninth Circuit reaffirmed its decision in *Higa* that a DOHSA claim, if brought alone, could be pursued only in admiralty.[132] However, the court said that nothing in DOHSA prohibited a trial by jury.[133]

## IV. LATER INTERPRETATIONS OF DOHSA

The Supreme Court signaled a change in *Moragne v. States Marine Lines*.[134] There the Court overruled *The Harrisburg* and created a judge-made remedy for wrongful death under the general maritime law. It concluded that DOHSA does not foreclose non-statutory federal remedies in situations not covered by the Act.[135] In a footnote the Court recognized that DOHSA claims could be brought in state court under the saving-to-suitors clause.[136]

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129. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 236-47 (1969).

130. Peace v. Fidalgo Island Packing Co., 419 F.2d 371, 1970 AMC 1580 (9th Cir. 1969).

131. 374 U.S. 16, 17, n. 3, 1963 AMC 1093 (1963).

132. 230 F.2d 780, 1956 AMC 122 (9th Cir. 1955), cert. dismissed, 352 U.S. 802 (1956). The court said that under the procedural rules then in effect a case like *Higa* would be transferred to the "admiralty side" of the court. *Id.* at 786.

133. 419 F.2d at 786. An earlier case had reached the same result. Gvirtsman v. Western King Co., 263 F. Supp. 633, 1970 AMC 657 (C.D. Cal. 1967).

134. 398 U.S. 375, 1970 AMC 967 (1970).

135. *Id.* at 400-402.

136. *Id.* at 400, n. 14. The Court said, in part,

> The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Representative Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law. 59 Cong. Rec. 4485. This erroneous view disregards the 'saving clause' in 28 U.S.C. § 1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause.

The Court reaffirmed this sixteen years later in *Offshore Logistics, Inc. v. Tallentire*.[137] The issue there was whether a plaintiff in a wrongful death action arising on the high seas could recover additional damages as directed by a state's wrongful death statute. The Fifth Circuit had ruled in the plaintiff's favor, based on the view that Section 7 of DOHSA authorized this.[138] The Supreme Court disagreed in a 5-4 opinion, holding that Section 7 preserved a plaintiff's right to sue in state court for recovery for deaths on the high seas, but that DOHSA provided the sole measure of damages in such actions.[139] The Court said that Section 7 was intended to "preserve the state courts' jurisdiction to provide remedies under state law for fatalities on territorial waters."[140] It read the Mann amendment as ensuring that state courts have concurrent jurisdiction to apply DOHSA.[141]

If DOHSA suits can be brought in state court, it seems to follow that those cases are subject to removal under the same rules applicable to any other maritime claim brought in state court. Under the removal statute, if a case could have been brought in the federal court due to diversity, the defendants can remove the case from state court to federal court provided that Congress has not "expressly" provided to the contrary and if none of the defendants are from the forum state.[142] DOHSA's grant to sue "in admiralty" hardly amounts to an express disapproval. Indeed, the *Wilson* court recognized that if the state courts have jurisdiction to hear DOHSA claims, federal courts upon removal would hear these cases "as a suit at law with right of trial by jury."[143] The Ninth Circuit further held that DOHSA does not prohibit jury trials in federal court.[144]

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One might be tempted to suggest that a plaintiff could sue under *Moragne* in a federal court exercising diversity jurisdiction and demand a jury trial, thus avoiding the issue of whether DOHSA allows such a course of action. The Supreme Court apparently foreclosed this possibility by holding in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) that courts are not free to supplement DOHSA in such a way as to make the statute meaningless. *Id*. at 625.

137. 477 U.S. 207, 1986 AMC 2113 (1986).

138. Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1986 AMC 23 (5th Cir. 1985). For the text of Section 7 and its recodification, see *supra* note 23.

139. *Tallentire*, 477 U.S. at 232.

140. *Id.* at 225.

141. *Id.* at 226-27.

142. 28 U.S.C. § 1441. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 363, 1959 AMC 832 (1959).

143. Wilson v. Transocean Airlines, 121 F. Supp. 85, 94, 1954 AMC 1697 (N.D. Cal. 1954). *But see* Rairigh v. Erlbeck, 488 F. Supp. 865, 1981 AMC 1246 (D. Md. 1980) (remanding DOHSA claims to state court).

144. *See supra* text at note 133.

Once it is recognized that federal courts can hear DOHSA action upon removal, it ought to follow that plaintiffs can initially sue in federal court based on diversity. As a federal district judge sitting in Puerto Rico observed,

> Had plaintiffs pursued their claims before the local courts, defendant could have removed the cases to this court invoking this court's jurisdiction on the basis of diversity of citizenship and jurisdictional amount, and on no other ground whatsoever.
>
> By filing their claims originally in this court, invoking its citizenship and jurisdictional amount, and on no other ground whatsoever, all that plaintiffs did was to avoid the delay and expense of imminent removal proceedings, without changing their position from what it would have been if the original filing had taken place in the local courts.[145]

Although the *Tallentire* court did not address the right to sue in diversity, it likened Section 7 to the saving-to-suitors clause,[146] which saves the plaintiff's right to sue in federal court based on diversity as well as the right to sue in state court.[147] A few courts have held that federal court sitting in diversity may hear DOHSA claims with a right to jury trial.[148] As one court explained, "a claimant may under the saving to suitors clause . . . assert an admiralty claim as a nonmaritime civil action."[149] Another court explained,

> I can find in DOHSA no command that trials must be without a jury. It does indeed provide that an appropriate plaintiff "may maintain a suit for damages in the district court . . . in admiralty . . ." Read literally, these words merely place such actions within the admiralty jurisdiction of the federal courts. They do not purport to nullify the

145. Sierra v. Pan Am. World Airways, 107 F. Supp. 519, 521, 1966 AMC 2212 (D. P.R. 1952).

146. 477 U.S. at 222.

147. *See supra* note 15 and accompanying text.

148. *In re* Korean Air Lines Disaster of Sept. 1, 1983, 704 F. Supp. 1135, 1157, 1989 AMC 249 (D.D.C. 1988) (holding that in aviation cases "[t]here is no reason why a diversity plaintiff in federal court should be treated any different [from a plaintiff in state court]"); Favaloro v. S/S Golden Gate, 687 F. Supp. 475, 481, 1988 AMC 818 (N.D. Cal. 1987); Tozer v. LTV Corp., 1983 WL 705, 1984 AMC 2750 (D. Md. 1983). In *Tozer* the plaintiff also asserted a general maritime law remedy under *Moragne*. The court did not suggest that it could only exercise diversity jurisdiction to try the DOHSA claim because there was diversity jurisdiction to try the *Moragne* claim. Instead, it said "this court is sitting as a court exercising diversity jurisdiction to hear plaintiffs' in personam maritime claims. Plaintiffs are therefore entitled to a jury trial." *Id.* at 2759.

149. Tozer v. LTV Corp., 1983 WL 705 at *6.

> saving-to-suitors clause where diversity of citizenship would confer another basis of jurisdiction. They do not purport to prevent state courts from exercising jurisdiction over DOHSA claims. And although juries were conventionally not employed in admiralty suits, the words of the statute express no intention to forbid the use of juries either in diversity cases or in the admiralty.[150]

Courts should pattern their reading of DOHSA on the interpretation long given to the grant of admiralty jurisdiction now found in 28 U.S.C. § 1333. Courts have resolved the tension inherent in § 1333 ("exclusive" jurisdiction but "saving to suitors" all other remedies), by giving the "admiralty side" exclusive jurisdiction over *in rem* cases but giving concurrent jurisdiction to state and federal courts, including federal courts sitting in diversity, for suits brought in personam.[151] One can resolve DOHSA's inherent tension in the same way. Since DOHSA's first section allows suits against property, those suits can be brought *in rem* only on the "admiralty side." But courts should read Section 7 as authorizing federal courts exercising diversity jurisdiction and state courts to try DOHSA claims brought in personam, and state suits would be removable like any other case brought in state court.[152]

As the *Tallentire* court recognized, DOHSA claims do not require the expertise of an admiralty court.[153] It said, "DOHSA actions are clearly within the competence of state courts to adjudicate."[154] They are also within the competence of a federal district court when these cases are removed or brought in diversity.

## V. THE TRADITION OF CONCURRENT COMMON LAW AND ADMIRALTY JURISDICTION

*Lion Air* raised the question whether DOHSA should be read to allow suit to be brought only in admiralty (as permitted by Section 1) and in state court (as permitted by Section 7) or whether it also permits suit in federal court based on diversity. There is no policy advanced by the more

150. Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367, 374-75, 1983 AMC 305, 316 (S.D.N.Y. 1982) (footnote omitted) (holding that a DOHSA claim combined with a Jones Act claim should be tried to a jury). *Accord* ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 12:4, (5th ed. 2004).

151. *See supra* note 15 and accompanying text.

152. This conforms to Congressman Webb's understanding of the effect of the similar saving clause included in the 1915 bill, H.R. 6143. *See supra* text at notes 51 to 53.

153. 477 U.S. 207, 232, 1986 AMC 2113 (1986) (noting that the ALI had come to this conclusion). *See supra* note 129.

154. *Id.*

restrictive approach and it flies in the face of an entrenched practice of allowing plaintiffs a choice of forums in which to present their maritime claims.[155] Congress was aware of this in the years before it adopted DOHSA[156] and more recent cases continue to reinforce this fundamental doctrine.[157]

This practice is so deeply rooted that courts have upheld it in the face of other statutes that could have been read to depart from it. For example, the courts have long interpreted the removal statute as allowing removal of a maritime claim to federal court only if the federal court has some basis of jurisdiction in addition to admiralty.[158] Had the courts read the statute literally, they would have deprived the plaintiff of a jury trial if the federal court's only basis for original jurisdiction were admiralty. The 2011 amendments to the removal statute created uncertainty about this.[159] Initially, a few courts allowed removal where the federal court's only basis of original jurisdiction was admiralty,[160] but the courts have since rejected this view.[161] They have preserved the plaintiff's choice of forum and choice of having a jury trial.

Cases applying the Limitation of Liability Act[162] provide another useful example. A shipowner that has been sued or that anticipates being sued, may institute a suit in a federal court having admiralty jurisdiction[163] to force all claims to be litigated in that forum.[164] If applied without

155. *See supra* note 15 and accompanying text.

156. *See supra* text at notes 51-52, 55, and 78. Robert Hughes, testifying on behalf of the MLA and a committee of the American Bar Association also drew attention to these options explaining that only the *in rem* remedy is exclusive in a federal court having admiralty jurisdiction. *See* Hearings, *supra* note 82 at 7-8.

157. As discussed earlier, some courts prior to *Tallentire* recognized this tradition in the context of state court jurisdiction. *See supra* text at notes 119 to 127.

158. *See e.g.*, Oklahoma v. Magnolia Marine Transp. Co., 359 F.3d 1237, 1241, 2004 AMC 491 (10th Cir. 2004); U.S. Express Lines v. Higgins, 281 F.3d 383, 390, 2002 AMC 823 (3d Cir. 2002); Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068-69, 2001 AMC 804 (9th Cir. 2001).

159. Federal Courts Jurisdiction and Venue Clarification Act of 2011 § 103, codified at 28 U.S.C. 1441.

160. The first decision to do so was Ryan v. Hercules Offshore, Inc., 945 F. Supp. 2d 772 (S.D. Tex. 2013).

161. The judge who decided *Ryan*, *supra* note 160, has since adopted the general rule. *See* Sanders v. Cambrian Consultants (CC) Am., Inc., 132 F. Supp. 3d 853, 857-58 (S.D. Tex. 2015). *See generally*, 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 132 (7th ed. 2022); Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court*, 46 J. MAR. L. & COM. 105 (2015).

162. 46 U.S.C. §§ 30501-30502, 30521-30530.

163. 46 U.S.C. § 30529. *See* Norwich Co. v. Wright, 80 U.S. 104, 1998 AMC 2061 (1871).

164. 46 U.S.C. § 30529(c) provides that upon bringing a limitation action, "all claims and proceedings against the owner related to the matter in question shall cease." Supplemental Rule F

restraint, the shipowner could deprive claimants of a jury trial. To prevent this, the courts have relied on the saving-to-suitors clause to create two exceptions. The federal court will stay the limitation action and allow suit to proceed in state court or on the "law side" of a federal court when there is only one possible claimant.[165] Similarly, the federal court will stay the limitation proceeding when multiple claimants have claims that will not exceed the amount of the limitation fund.[166]

The Jones Act jurisprudence provides another example where courts have effectively rewritten a statute to conform to traditional practice authorized by the saving-to-suitors clause. As written in 1920, the Jones Act appears to require injured seamen to make a choice of either suing under the prior maritime remedy of unseaworthiness or of suing for negligence "at law" and that if the plaintiff choses the later alternative, "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[167] Nonetheless, the Supreme Court decided in *Panama R.R. v. Johnson* that the seaman can sue his employer for negligence in federal court, either at law or in admiralty,[168] and that by using the word "jurisdiction," Congress meant venue.[169] The Court claimed that it interpreted the statute this way to avoid a "grave" constitutional question regarding the statute's validity because the statute seemed to encroach on the admiralty jurisdiction by excluding seamen's claims for negligence from that jurisdiction. In a later case the Court held that state courts also have jurisdiction to hear Jones Act cases.[170] It explained,

> We think [the jurisdiction provision] falls short of that certainty which naturally would be manifested in making an intended departure from the long-prevailing policy evidenced by the saving clause . . . and that the more reasonable view is that it is intended to

(3) authorizes the federal court to enjoin the further prosecution of "any claim against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action."

165. Langnes v. Green, 282 U.S. 531, 1931 AMC 511 (1931) (allowing claims to be tried in state court); *In re* Mucho K, Inc., 578 F.2d 1136 (5th Cir. 1978) (allowing Jones Act and state wrongful death claims to be tried on the "law side"); *In re* Norfolk Dredging Co., 2003 WL 23335933, 2004 AMC 227 (E.D.N.C. 2003) (allowing claims based on diversity of citizenship to be tried on the "law side"). The federal court sitting in admiralty retains jurisdiction in case further proceedings are warranted.

166. Lake Tankers Corp. v. Henn, 354 U.S. 147, 1957 AMC 1165 (1957).

167. Pub. L. 66-261, 41 Stat. 1007 (1920).

168. 264 U.S. 375, 390-91, 1924 AMC 551 (1924).

169. *Id.* at 385.

170. Panama R.R. Co. v. Vasquez, 271 U.S. 557, 1926 AMC 984 (1926).

regulate venue and not to deal with jurisdiction as between federal and state courts.[171]

On its face, the Jones Act allows for a right to jury trial only on the "law side" of a small set of federal courts. Yet the Court preserved the traditional practice of allowing the plaintiff a wider choice: state court with a potential for jury trial, a federal court with a right to jury trial, or a federal court exercising admiralty jurisdiction without a jury. Despite the Court's assertion, there was no constitutional issue at stake as there is no constitutional right to a non-jury trial in admiralty. As Professors Gilmore and Black said of the Court's interpretation in *Johnson*, "[a]ll this was, as the Court hardly tried to conceal, the purest judicial invention."[172] The Court apparently resorted to this novel interpretation to preserve the well-established practice of giving the maritime plaintiff a choice of forums. DOHSA presents a more compelling case for interpretation as the trial by jury— "a time-honored institution in our jurisprudence"[173]—ought to be protected when possible. As others have noted, nothing in DOHSA forbids a jury trial or indicates with certainty that plaintiffs cannot sue based on diversity.[174] Congress knew how to draft such prohibitions.[175] That it did not do so is telling.[176] The established practice protected by the

171. *Id.* at 561-62 (1926).

172. GILMORE & BLACK (2d ed.), *supra* note 15, at 340. *See also* Curie, *supra* note 110 at 5, n. 19 (calling this a "strange argument").

173. Fitzgerald v. U.S. Lines, 374 U.S. 16, 21, 1963 AMC 1093 (1963).

174. *See supra* text accompanying notes 133 and 150.

175. For example, Congressman Dewalt who would have added to the end of Section 1 of DOHSA the following: "And in such cases the district court of the United States shall have exclusive jurisdiction." 59 Cong. Rec. 4485. Dewalt's proposal did not come for a vote once the House approved the Mann amendment. An earlier bill contained a broader prohibition. It provided, "[W]here the death has been caused by wrongful act, neglect, or default occurring on the high seas suit for damages shall not be maintained in the courts of any State or Territory or in the courts of the United States other than in admiralty." H.R. 6143, 63d Cong., § 7 (1913).

176. Moreover, as the district court in *Lion Air* recognized, some courts have allowed DOHSA claims to be heard by federal juries in two instances: (1) where the plaintiff asserts a non-preempted claim in addition to the DOHSA claim that carries a right to a jury trial; or (2) where, "in addition to asserting a DOHSA claim, a plaintiff also asserts another claim that does not necessarily entitle her to a jury trial, but that invokes the court's diversity jurisdiction." *In re* Lion Air Flight JT 610 Crash, 2023 WL 3653218 at *1 (N.D. Ill. May 25, 2023) (quoting Lasky v. Royal Caribbean Cruises, 850 F. Supp. 2d 1309, 2012 AMC 1630 (S.D. Fla. 2012) (collecting cases)). Had Congress intended to preclude federal juries from hearing DOHSA claims, neither of these exceptions would have been allowed.

*Lasky*, in turn, relied on Mayer v. Cornell University, Inc., 909 F. Supp. 81 (N.D.N.Y. 1995), for the proposition that a plaintiff bringing a DOHSA claim and another maritime claim is not entitled to a jury trial despite the presence of diversity jurisdiction. 850 F. Supp. 2d at 1314. *Mayer* reasoned that this must be so because "both [claims] are based on admiralty law" and "jury trials

saving-to-suitors clause ought not to be uprooted without a clear command.

## VI. CONCLUSION

DOHSA has been a source of many difficulties[177] of which the question of jury trial in federal court is but one. Although some in Congress and the MLA may have thought that the bill they drafted would give federal courts sitting in admiralty exclusive jurisdiction without a right to jury trial,[178] the matter has been contested from the start.[179] The bill that became DOHSA lacked the clear exclusive language that predecessor bills had possessed.[180] Others in Congress and the MLA understood that the saving-to-suitors clause preserves the plaintiff's right to sue in diversity and deprives the defendant of the power to remove state cases to federal court if doing so will deny the plaintiff a right to jury trial.[181] The Mann amendment created ambiguity about what Section 7 meant to leave undisturbed. Although most early cases and commentators thought that only federal courts sitting without juries could hear DOHSA cases, others reasoned differently, and as one judge observed, "[t]he persuasiveness of legal analysis does not depend on the number of cases."[182] The Supreme Court provided clarity when it held that DOHSA does not save state substantive rights but rather the remedy of suing in

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are not available in admiralty actions." The *Mayer* court seems to have confused subject-matter jurisdiction with choice of law and the special procedural rules applicable to admiralty and maritime claims. Courts apply the same substantive law to a maritime claim regardless of whether the claim is brought in state court or federal court, and if in federal court, whether jurisdiction is based on admiralty, diversity, or some other ground. *See supra* text at note 17. The procedures vary. State courts apply state procedures. Am. Dredging Co. v. Miller, 510 U.S. 443, 1994 AMC 913 (1994). In federal court the plaintiffs determine by their pleading whether the court will apply the usual rules of civil procedure or supplement those rules with the special rules of procedure applicable to admiralty and maritime claims. *See* FED. R. CIV. P. 9(h). *See supra* note 136, where the Supreme Court discussed a similar error made on the House floor about whether federal courts would have exclusive jurisdiction of DOHSA claims.

177. Questions have included whether the statute applies to aircraft accidents occurring on or above the high seas, whether a survival action for antemortem damages is possible, conflicts with the Jones Act over the list of beneficiaries when a seaman dies, and conflict with the *Moragne* action for wrongful death.

178. *See supra* text accompanying note 61 (MLA) and text accompanying notes 77-78 (Congress).

179. *See supra* text accompanying notes 79, 84,113-129.

180. *See supra* note 45 and accompanying text.

181. *See supra* text accompanying notes 51-52 and 79-80.

182. Rairigh v. Eribeck, 488 F. Supp. 865, 868, 1981 AMC 1246 (D. Md. 1980).

state court and compared DOHSA's saving clause to the saving-to-suitors clause.[183]

A few courts, like *Lion Air*, have favored a halfway measure, allowing DOHSA claims to be heard by federal juries if these claims are joined with another claim that has a right to jury trial.[184] As these courts at least implicitly recognize, nothing in DOHSA is hostile to a federal jury hearing the claim.[185] That recognition combined with an appreciation of the deeply held tradition, based on the saving-to-suitors clause, of allowing maritime plaintiffs a choice of forums ought to suffice to convince a skeptical court that a plaintiff ought to be allowed to demand a jury when a DOHSA case is removed to federal court or when there is diversity jurisdiction. Courts have used the saving-to-suitors clause to overcome more substantial barriers.[186]

183. *See supra* text accompanying notes 140-141.
184. *See supra* text accompanying note 130 and note 176.
185. *See supra* text accompanying note 133.
186. *See supra* text accompanying notes 158-171.