No. 88-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In the Matter of:

The Complaint of Everett A. Sisson, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

—v.—

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. § 1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

3. Whether the Extension of Admiralty Act, 46 U.S.C. § 740, provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

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STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which he docked at Washington Park Marina in Michigan City, Indiana. On September 24, 1985, a fire erupted on board the yacht destroying the vessel and causing damage to the marina and several neighboring boats. It is believed that the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction of the ventilation system for the washer/dryer unit.

As a result of the fire, claimants asserted claims against Everett Sisson for amounts in excess of $275,000. The value of the ULTORIAN before she was nearly totally destroyed was approximately $600,000. After the fire her value was $800.

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Everett A. Sisson.

NATURE OF MLA'S INTEREST

MLA has a very strong interest in the disposition of this case. It is a nationwide bar association founded in 1899, having a membership of about 3700 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA'S attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, terminal operators, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for its discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-nine years of its existence, has sponsored a wide range of legislation dealing with maritime matters and has also cooperated with Congressional committees in the formulation of other maritime legisation.[1]

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1 E.g., Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted* in 6 Benedict on Admiralty, Doc.

MLA believes uniformity in maritime law is of great importance. This concern has been repeatedly expressed by its membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade Congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[2] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[3]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[4]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Seventh Circuit Court of Appeals has severely limited admiralty and maritime juris-

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No. 3-4 at 3-34.1-78.2 (7th ed. 1988), see 33 C.F.R. ch. 1, subch, D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073; Shipowner's Limitation of Liability Bill, H.R. 277, 99th Cong., 1st and 2nd Sess. (1985, 1986).

2 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

3 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

4 *Chick Kam Choo v. Exxon Corp.*, _____ U.S. _____, 56 L.W. 4436, 108 S.Ct. 1684, 100 L.Ed. 2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

diction in a way which seriously diverges from and conflicts with other circuits and too narrowly construes the decisions of this Court in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). It would also have the effect of denying a vessel owner his right to seek limitation of liability, which can properly be sought only in a federal district court. Both aspects of the *Sisson* decision would adversely affect uniform interpretation and application of the admiralty and maritime law.

SUMMARY OF ARGUMENT

In this case involving important issues of admiralty and maritime jurisdiction in tort (a fire on a moored yacht damaging other moored non-commercial vessels and the dock) in a limitation of liability proceeding:

1. The Seventh Circuit has misconstrued this Court's decisions on admiralty jurisdiction (*Executive Jet* and *Foremost*) far too narrowly by requiring either the involvement of commercial maritime activity or, as to non-commercial vessels, a showing of both (a) potentially disruptive impact on maritime commerce and (b) navigation as the only acceptable "traditional maritime activity."

2. As evidenced by disagreements within the Seventh Circuit Panel, its tests to determine jurisdiction would be extremely difficult and uncertain of application, contrary to the requirements of *Foremost*.

3. There is substantial conflict among the circuits on the question of admiralty and maritime jurisdiction over pleasure boat casualties which this Court should resolve (Rule 17.1(a)).

4. Even if a non-maritime tort were involved in this case, the Seventh Circuit erred in failing to follow the clearly applicable precedent of *Richardson v. Harmon*, 222 U.S. 96 (1911), which permitted a vessel owner to seek limitation of liability in admiralty with respect to a non-maritime tort. Thereby Sisson was deprived of his statutory right to seek such limitation.

ARGUMENT

A. In a Case Involving the Important Issue of the Extent of Admiralty and Maritime Jurisdiction over a Casualty Affecting Several Vessels on Navigable Water at a Marina, the Seventh Circuit Erroneously Construed *Executive Jet* and *Foremost* Too Narrowly, Thereby Unjustifiably Denying such Jurisdiction.

Prior to 1972 this case clearly would have been within admiralty jurisdiction inasmuch as the casualty occurred on navigable waters. *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866). However, in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), a case involving an airplane crash in Lake Erie, which bore "no relationship to traditional maritime activity," *id.* at 273, this Court held:

> [I]n the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.

Id. at 274. The Court noted that the Death on the High Seas Act might be "legislation to the contrary" in an appropriate case. *Id.* n.26.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving a collision of two pleasure boats on navigable waters, this Court recognized that the requirement that the wrong have a significant connection with traditional maritime activity is not limited to aviation and there is no requirement that the maritime activity be exclusively commercial. Because the "wrong" in *Foremost* involved negligent operation of a vessel on navigable waters, the court believed there was a significant nexus to traditional maritime activity to sustain admiralty jurisdiction. *Id.* at 674. It concluded:

> In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a

> jurisdictional test tied to the commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts.

Id. at 677.

In *Sisson*, in view of the many references to "navigation" or "operation" of a vessel in *Foremost*, the Seventh Circuit said there is a reasonable basis to conclude that this Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. 7a-8a.[5] It interpreted *Foremost* to confine admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation. 8a, 11a-12a. It concluded that part (1) of its test had been met in that a fire on a moored vessel could disrupt commercial navigation but, as navigation was not involved, there was no jurisdiction. 8a, 11a-12a.

The Seventh Circuit conceded that it applied a narrow reading to "traditional maritime activity" in limiting its application to cases involving navigation. It admitted that strong arguments exist for a broader interpretation and that, logically, fires aboard moored vessels are as much a traditional maritime concern as errors of navigation. 9a.

The Seventh Circuit also expressed puzzlement at *Foremost's* frequent use of the phrase "traditional maritime activity" in discussions dealing with navigation, but apparently concluded that "traditional maritime activity" is equated only to "maritime commerce," "navigation," or "operation of a vessel." 9a, 11a.

We respectfully submit that the Seventh Circuit relied too much on this Court's focus on "navigation" in *Foremost*

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5 The case is reported as *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989), but for convenience our page citations to the Seventh Circuit's opinion (and our later references to the limitation statutes) refer to the Petition's Appendix.

which, after all, as a collision case, was necessarily concerned with navigation as the obviously relevant traditional maritime activity. And we suggest that the Seventh Circuit gave excessive weight to only the first sentence of a *Foremost* footnote in determining ultimately to require "navigation" as a necessary "second *Foremost* criterion" requirement for jurisdiction. 8a, 9a. The full footnote from *Foremost* on which the Seventh Circuit relied reads as follows:

> Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet*, for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. *However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.*

457 U.S. at 675, n.5 (emphasis added). In context, the last sentence of the note makes it reasonably plain that "the navigation of the boats in this [*Foremost*] case" was merely the pertinent traditional maritime activity therein, rather than the only one that could possibly suffice, as the Seventh Circuit concluded.

Certainly, the natural meaning of "traditional maritime activity" is broader than the Seventh Circuit utilizes in *Sisson*, as that Court itself recognized. 9a. In the context of *Sisson* numerous traditional maritime activities or concerns, actual and potential, are involved, namely: mooring a vessel; seaworthiness—here involving preventing or detecting fire in a vessel; preventing fire from spreading internally; and preventing its spreading to other vessels or the dock, perhaps by moving the burning vessel or the nearby vessels (possibly arranging towage for such a move or, indeed, salvage services). All of these are clearly traditional maritime activities. Coupled with the Seventh Circuit's conclusion that the fire "could disrupt" commercial navigation [criterion (1)], we submit that any one,

or a combination, of the aforesaid traditional maritime activities should have sufficed to ground maritime jurisdiction under *Foremost*, unless the Seventh Circuit was correct when it inferred that "navigation" was a *sine qua non*.

We respectfully submit that, in so inferring, the Seventh Circuit erred. And we note that in that respect Judge Ripple would agree. 21a.[6]

B. The Seventh Circuit's Tests are Unsatisfactory in that They Would Be Difficult to Apply and Would Ground Jurisdiction Uncertainly on Fortuitous Circumstances.

The difficulties inherent in the Seventh Circuit's test are illustrated by the *Sisson* opinions themselves—the Panel apparently splitting 2–1 on two issues: (a) whether the fire had a potentially disruptive impact on maritime commerce and (b) whether navigation was the required traditional maritime activity.

Judge Ripple concluded the fire presented no harm to maritime commerce because it occurred in a marina dedicated exclusively to the wharfage of pleasure boats. 21a. But would his view have changed if some of those pleasure boats were regularly chartered out for hire (a commercial activity)? Or if a dock with commercial vessels had been immediately adjacent? Or 200 yards away? Would the size of the fire or the direction of wind or current be a factor in whether harm was presented?

Such questions (there could be more) illustrate the uncertainty of the *Sisson* tests and their dependence on fortuitous circumstances which could lead to inconsistent findings or denials of admiralty jurisdiction. *Foremost* wisely warned against such tests and declined to inject the uncertainty inherent in such line-drawing into maritime transportation. 457 U.S. at 675-676.

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6 Judge Ripple concurred in the result because he thought the fire presented no harm to maritime commerce, 21a, but, as the majority pointed out, *inter alia*, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic. 8a.

C. There Is Clear Divergence and Conflict Among the Circuits on This Question of Jurisdiction, and This is an Appropriate Case for the Court to Resolve such Conflict.

Sisson interprets *Foremost* as limiting admiralty's jurisdiction in non-commercial maritime tort cases to those where the wrong both (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.

In *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied* 416 U.S. 969 (1974), the Fifth Circuit established a four factor test for determining admiralty jurisdiction: (a) the functions and roles of the parties, (b) the types of vehicles and instrumentalities involved, (c) the causation and the type of injury, and (d) traditional concepts of the role of admiralty law. The Seventh Circuit in *Sisson* expressly refused to adopt the "four factor test" although acknowledging its use in the Fourth, Fifth, Ninth and Eleventh Circuits, as the Seventh Circuit did not find it helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*. 8a, n.2.

Without abandoning *Kelly v. Smith*, the Fifth Circuit has added three other indicia "divined from *Executive Jet* and *Foremost*" in determining jurisdiction: (1) impact of the event on maritime shipping and commerce, (2) desirability of a uniform national rule to apply to the matter, and (3) the need for admiralty "expertise." *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987).

The Eighth Circuit probably has given the broadest test of admiralty jurisdiction with respect to pleasure boat torts in *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8 Cir. 1974), *cert. denied*, 419 U.S. 884 (1974), where it stated:

> [T]he operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend.

Other courts have viewed *Foremost* as requiring consideration of a range of factors, including, but not limited to, navi-

gation. In *Complaint of Sheen*, 709 F. Supp. 1123, 1129 (S.D. Fla. 1989), the Court, in discussing the scope of admiralty jurisdiction, stated:

> Generally, a determination of maritime flavor requires a consideration of three issues: (1) the impact upon maritime shipping and commerce; (2) the desirability of a uniform national rule, and, (3) the need for one central admiralty authority.

The court cited *Foremost* for the foregoing and noted that courts after *Foremost* have found its directives too abstract and have generally followed the guidelines of *Kelly v. Smith*, *supra* 9. *Ibid.*

The Sixth Circuit has criticized *Sisson's* "indefensibly narrow reading of *Foremost*." *In re John Young*, 872 F.2d 176, 179, n.4 (6th Cir. 1989).

Finally, in *Sisson* itself, Judge Ripple, in his concurring opinion denying a rehearing and inviting further guidance, commented:

> Before this court revisits the area again, there is every probability that the Supreme Court will have an opportunity to supply further guidance with respect to its decision in *Foremost*.

23a.

We respectfully submit that it would be most appropriate for this Court to supply such guidance in this very case and thereby resolve the intercircuit conflict and uncertainty.

D. The Seventh Circuit also Erred in Denying Jurisdiction which is Based on Applicability of the Limitation of Liability Act.

Even if there were no admiralty and maritime jurisdiction under more general principles, there is jurisdiction by virtue of the action being brought under the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq.* Under § 183(a) the liability of the owner of any vessel may be limited to the amount specified in

the statute if the loss occurred without his privity or knowledge. 43a. Under § 185, the limitation proceeding is to be brought in a district court of the United States. 44a-45a.

Long before that part of § 185 was enacted this Court, in *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), pointed out that while the limitation act did not prescribe what court should be resorted to, no court was better adapted than a court of admiralty to administer such [limitation] relief, and went on to say:

> Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

Id. at 123-24. In thereafter describing the proper course for pleading a limitation action in the District Court so as to effectively bar other actions in state courts, the Court said:

> The Court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.

Id. at 125. Those rules were duly issued as part of the admiralty rules and their current successor, Fed.R. Civ. P. Supplemental Admiralty Rule F, remains in effect. Since *Norwich* the courts have consistently held that limitation of liability proceedings are to be filed in the District Court, in admiralty.

The law of limited liability, as this Court has said, was enacted by Congress as part of the maritime law of this country, and therefore it is co-extensive, in its operation with the whole territorial domain of that law. *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555 (1889). And, in *Executive Jet*, 409 U.S. at 270, this Court pointed out that the law of admiralty is concerned with, among other things, limitation of liability.

In *Richardson v. Harmon*, 222 U.S. 96 (1911), this Court held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of what is now 46 U.S.C. § 189. 46a. Accordingly, on the authority of *Richardson*, even if the claims against the ULTORIAN's owner are non-maritime torts, he is still entitled to seek limitation of liability, and the only court in which he may do so is the district court.

Sisson's reasoning, 17a-20a, concerning the changed circumstances due to the nexus requirement having later been added to the locality requirement is beside the point. *Richardson* plainly held that even though, but for the Limitation of Liability Act, there would have been no admiralty jurisdiction (the tort being non-maritime), the Act sufficed to put the case under district court jurisdiction in admiralty. The same principle is true today, even though the general test for admiralty and maritime jurisdiction has been modified.

In a sense, if there were no ordinary admiralty and maritime jurisdiction, the Limitation of Liability Act would be "legislation to the contrary" of the type referred to in *Executive Jet* quoted *supra* at 5, which would bring the case within such jurisdiction.[7] In any event, we respectfully submit that the vessel owner's right to seek to limit liability, an admiralty concern (*Executive Jet*, *supra*), combined with the traditional maritime activities here involved require the exercise of admiralty and maritime jurisdiction in this case.

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7 The same can be said of the Extension of Admiralty Act, 46 U.S.C. § 740 (Petition, 3-4).

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: July 12, 1989

Respectfully submitted,

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