Other States Should "Get With the Program" and Follow Louisiana's Lead: An Examination of Louisiana's Direct Action Statute and Its Application in the Marine Insurance Industry

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I. INTRODUCTION

Louisiana has proven to be one of the most forward thinking states in the field of insurance. By enacting the Direct Action Statute (Statute), the Louisiana Legislature gave aggrieved third parties the right to proceed directly against an insurer in cases of tort or contract and to recover for losses. In the marine insurance industry, the Statute has unique implications because it displaces an aspect of the uniformity sought by the general maritime law. It is arguably a desirable displacement because it protects the interests of Louisiana citizens. Moreover, the United States Court of Appeals for the Fifth Circuit and Louisiana’s state courts have made provisions to keep uniformity while implementing the Statute. Accordingly, other states should follow Louisiana’s lead by enacting their own direct action statutes. The purpose of this Article, therefore, is to analyze the Statute, examine its impact on the maritime industry, and urge other states to “get with the program” and follow Louisiana’s lead.

II. COVERING THE BASICS: WHAT IS AN INSURANCE CONTRACT IN THE CONTEXT OF MARITIME LAW?

An insurance agreement is arguably a contract whereby the insurer is obliged to indemnify the insured against pecuniary loss. As such, the insurer is obligated to make the insured whole again after the insured suffers a loss. Arguably, in the most strictly construed terms, the insurance contract is limited to the relationship between the insurer and the insured. Formally defined, it is an agreement where

one party (the insurer), for a consideration that usually is paid in money, either in a lump sum or at different times during the continuance of the risk, promises to make a certain payment, usually of money, upon the destruction or injury of “something” in which the other party (the insured) has an interest.

In accordance with the narrowly construed definition of insurance, most United States jurisdictions do not recognize it as a third-party

2. See infra Part VI.
3. Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 1.6, at 1-11 (3d ed. 1997); see also Black’s Law Dictionary 802 (7th ed. 1999) (defining insurance as “[a]n agreement by which one party commits to do something of value for another party upon the occurrence of some specified contingency”).
agreement. Moreover, leading admiralty scholars have specifically defined marine insurance as an agreement with only two parties: the insured and the insurer. Louisiana, therefore, is on the cutting edge in recognizing a third party’s inherent loss resulting from an insured’s tortious conduct.

Under a marine insurance policy, the insured or “assured” is required to pay a premium to the insurer or “assurer.” In turn, the assurer agrees to pay for losses caused by the events in which the assured may be involved. Consequently, the assured, or party seeking marine insurance protection, is required to disclose any and all circumstances known by him that materially affect the risk; therefore, failure to do so may void the marine insurance policy.

The two most common types of marine insurance policies are “hull policies,” which insure the vessel, and protection and indemnity policies, or “P & I policies,” which insure the vessel’s owner against liability to others for damages caused by the vessel or its crew. A hull policy will specify the perils against which it insures. It typically protects against loss from accidents in navigation or loss caused by the extraordinary action of the sea, fire, theft or battery. As such, under a hull policy, the assured must warrant that he has an insurable interest in the vessel.

P & I policies, the more widely used and popular of the two, are arguably the result of an outgrowth in hull policies. P & I associations, commonly called P & I Clubs, insure ninety percent of the world’s

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7. Id.
8. Id.
9. See infra Part IV.A.
10. Commonly known as “the International Group,” the thirteen largest P & I clubs are: Assuranceforeningen GARD; Assuranceforeningen SKULD; Britannia Steam Ship Insurance Association Limited; London Steamship Owners’ Mutual Insurance Association Limited; North of England Protecting and Indemnity Association Limited; Standard Steamship Owners’ Protection and Indemnity Association Limited; Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Limited; Steamship Mutual Underwriting Association (Bermuda) Limited; Sveriges Angfartygs Assurans Forening (Swedish Club); United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited; West of England Ship Owners’ Mutual Insurance Association (Luxembourg); Japan Ship Owners’ Mutual Protection and Indemnity Association; and American Steamship Owners’ Mutual Protection and Indemnity Association, Inc. See generally Norman J. Ronneberg, Jr., An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide, 3 U.S.F. Mar. L.J. 1, 1 n.2 (1991).
merchant fleet against the inevitable risks that a ship faces when it carries cargo. Initially, hull insurers were not willing to extend full protection to vessel owners because insurers believed that fully insured owners would not take available safety precautions to preserve and adequately protect the vessel. “Thus, the hull policy provided the owner with limited public liability protection, including insurance against only three-fourths of the damage caused by ‘running down’ another vessel.” Accordingly, to meet their need for full coverage, vessel owners arguably joined together in P & I Clubs for mutual assistance against risks and losses outside the coverage of hull policies. Consequently, “[t]he primary purpose of modern P & I insurance is to provide public liability coverage to the shipowner by insuring him against claims for personal injury or wrongful death and claims for non-collision loss or damage to other vessels or property.”

While P & I Clubs insure their members, they are not “typical” insurers. P & I Clubs differ from “typical” insurers in two ways: (1) they are mutual associations and for a member to obtain coverage, he must become and remain a member of the club, and (2) under English law, P & I coverage is based on the contract of indemnity. The nature of P & I Clubs as associations and not insurance providers would seem to prohibit third-party direct actions unless the club member paid out a claim. Nevertheless, the Statute ensures that an aggrieved third party can file a direct action.

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11. Id. at 1.
12. See MARAIST & GALLIGAN, supra note 6, at 118-19.
13. Id.
14. Id. at 119.
III. THE HISTORICAL DEVELOPMENT OF LOUISIANA’S DIRECT ACTION STATUTE

“Under the common law, only parties to the contract (insurance policy) were permitted to sue upon it and thus injured third parties might be left without a remedy when the insured was insolvent. Therefore, some state legislatures enacted direct action statutes to allow for a more equitable result.”

To date, only a limited number of U.S. jurisdictions and territories have direct action statutes. Some of them are: Louisiana, Puerto Rico, Rhode Island, Wisconsin, Guam and New York. Consequently, in the aforementioned jurisdictions, an injured third party can proceed directly against the insurer on a policy to which he is not the insured under circumstances dictated by the applicable statute. Choice of law questions remain regarding interpretation of marine insurance policies. However, it is well-settled that state law governs the question of a direct action against marine insurers, despite maritime law’s historical call for uniformity. “An agreement insuring maritime property or a maritime risk is a maritime contract, and ordinarily would [be] governed by maritime law.” The Louisiana Direct Action Statute, however, provides a direct right of action to an aggrieved third party in admiralty proceedings, even though there may be an inherent “conflict” in the desired uniformity of the maritime industry.

In pertinent part, Louisiana’s current Direct Action Statute provides:

25. 27 N.Y. INS. LAW § 3420 (McKinney 2000).
27. See generally Md. Cas. Co. v. Cushing, 347 U.S. 409, 1954 AMC 837 (1954) (determining that it was correct to apply Louisiana state law in an insurance proceeding but to the extent the Direct Action Statute and the general maritime law conflict, especially in limitation of liability proceedings, the plaintiff’s direct action should be stayed until after the limitation proceeding ran its course).
28. MARAIST & GALLIGAN, supra note 6, at 113.
29. See, e.g., Suydam v. Reed Stenhouse of Wash., Inc., 820 F.2d 1506, 1508, 1988 AMC 441, 442-43 (9th Cir. 1987) (applying Washington state law in a marine insurance proceeding on a P & I policy); see also Taylor v. Lloyds Underwriters of London, 972 F.2d 666, 668 (5th Cir. 1992) (granting an award of punitive damages and finding it appropriate to use Louisiana state law, rather than general maritime law, in a marine insurance action removed from state court on the basis of diversity jurisdiction).
A. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors, mentioned in Civil Code Art. 2315.1, or heirs against the insurer.

B. (1) The injured person or his survivors or heirs mentioned in Subsection A, at their option, shall have a right of direct action against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 only.30

Therefore, the right of an injured party to bring a “direct action” against an insurer is protected and upheld despite the potentially inherent inconsistency between state law and the need for uniformity in general maritime law.31

To understand fully the significance of Louisiana’s current Direct Action Statute in relation to the maritime industry, it is necessary to review the Statute’s former versions. The evolution of a direct action statute in Louisiana’s insurance law dates back to Louisiana Act 253 of the 1918 legislative session.32 At the turn of the century, when the concept of insurance was virtually new in most American jurisdictions, a third-party right of direct action was altogether unknown.33 Moreover, “[i]n keeping with the principle of indemnity, an insurance contract provided indemnification for loss by the insured rather than coverage of the liability of an insured to a third person.”34 Because the concept of insurance was so rigid, most insurers required a judgment against the insured before a creditor or aggrieved third party had a right to insurance

33. Id.
proceeds. Accordingly, many insurers included “no action” clauses in a large number of policies. Such clauses limited the policy to loss “actually sustained and paid” by the insured.\(^{35}\) The unfortunate result was that if the insured declared bankruptcy or insolvency, no “loss” was suffered and the aggrieved third party was left without judicial remedy.\(^{36}\) Because of the strong public policy concerns brought about by such results, the Louisiana Legislature enacted Louisiana Act 253 in its 1918 session.\(^{37}\)

Act 253 of 1918 (Act 253) made it a misdemeanor for “any company to issue any policy against liability unless it contains a provision . . . that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy.”\(^{38}\) A Louisiana court first ruled upon Act 253 in Edwards v. Fidelity & Casualty Co. of New York,\(^{39}\) where it determined, inter alia, the legislature fully intended to create a cause of action for injured third parties directly against their tortfeasor’s insurer.\(^{40}\) During the 1930 legislative session, the Edwards decision was codified by Act 55.\(^{41}\) The direct action statute created by Act 55 established that, as long as the policy did not violate Louisiana law, “any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured.”\(^{42}\) After the 1930 session, there were no amendments to the Statute until 1948. Then, it was codified into the newly created Louisiana Insurance Code as Section 14.45.\(^{43}\) The Direct Action Statute remained unchanged, with the exception of modifying language that changed the opening to read as follows:

This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.\(^{44}\)

\(^{35}\) See McKENZIE & JOHNSON, supra note 32, § 22, at 22.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{38}\) Id. § 22, at 26 n.4 (quoting 1918 La. Acts 253 (amended 1930)).
\(^{39}\) 123 So. 162 (La. Ct. App. 1929).
\(^{40}\) Id. at 163.
\(^{43}\) Id. § 22, at 32.
\(^{44}\) Id. (quoting 1950 La. Acts 541 (amended 1956)).
With such modification, it was apparent the legislature’s intention to preserve an injured third party’s cause of action against the insurer was definite. After the 1950 legislative session, the Statute remained unchanged for the next six years. In 1956, the legislature again amended the Statute by creating a heritable right of action to the heirs of a victim and included them as survivors in article 2315 of the Louisiana Civil Code. In addition, the legislature added the insurer’s domicile or principal place of business as possible venues and extended protection to all insureds—those that were named in the policy as well as unnamed individuals protected by the policy’s omnibus clause.

In 1988, the legislature again amended the Statute, with Act 934. The 1988 amendments did not particularly change the substantive law. The amendments did, however, require that the insured be a named defendant in the plaintiff’s third-party recovery action, with the exception of five specific situations: (1) when the insured has been adjudged as bankrupt, or when such a proceeding has commenced; (2) when the insured is insolvent; (3) when the insured can not be served; (4) when the cause of action is for damages as a result of an offense or quasi-offense and it is between a child and his parent, or between married persons; and (5) when the insurer is an uninsured motorist carrier. Even in situations such as bankruptcy or insolvency, the courts have held that such will not excuse the valid debt that an insurer may owe a third party when the third party files an action pursuant to the Statute. “[T]hrough the direct action statute, Louisiana has afforded claimants a direct cause of action against insurers precisely so that claimants can collect despite the insolvency of the insured. If claimants had to wait ... they would effectively be barred from ever collecting from insurers of bankrupts.” Moreover, an insured’s failure to pay a claim, as possibly required by a policy, does not preclude a direct action against the insurer. Therefore, irrespective of whether or not the insured is a named party pursuant to a direct action claim, the insurer cannot escape the responsibility he owes an aggrieved third party. Consequently, Louisiana’s forthright thinking in passing the Statute has prompted admiralty scholars to term it as the most famous of all direct action statutes and the most all-encompassing.

45. L A. CIV. CODE ANN. art. 2315 (West 1997).
46. MCKENZIE & JOHNSON, supra note 32, § 22, at 29-30.
48. Id.
50. Id.
51. Id.
52. Houdlett, supra note 19, at 566.
IV. INSURABLE INTEREST AS A REQUISITE FOR RECOVERY

A. Insurable Interest Defined

Louisiana’s leading insurance law scholars have attempted to define insurable interest according to the statutory provisions previously articulated in the Louisiana Insurance Code and now codified in the Revised Statutes. Accordingly, with regard to personal property, or a vessel in the maritime context, “[o]ne can define insurable interest as an ‘economic interest’ in the property.” The codified definition maintains:

A. No contract of insurance on property or of any interest therein or arising therefrom shall be enforceable except for the benefit of persons having an insurable interest in the things insured.

B. “Insurable interest” as used in this Section means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage.

By definition, therefore, “insurable interest” requires the insured party have a vested economic interest in the property that is the subject of the insurance contract.

B. Insurable Interest Interpreted

In accordance with the requisite economic interest, some Louisiana courts have construed the statutory definition in a very narrow manner. In Rube v. Pacific Insurance Co., for example, the court stressed the narrow construction of insurable interest by holding that “[i]f the loss or damage to the insured property does not expose the insured to either direct, immediate or potential loss or liability, the insured is without insurable interest therein.” A similar interpretation of insurable interest was evident in Giddens v. USAA Property & Casualty Insurance

53. See generally McKenzie & Johnson, supra note 32.
55. McKenzie & Johnson, supra note 32, § 312, at 582.
57. Id. § 22:614(B).
58. See, e.g., Wright v. Assurance Co. of Am., 728 So. 2d 974, 975 (La. Ct. App. 1999) (denying recovery against a home owner’s insurance policy after the property burned because it had recently been sold via sheriff’s sale; therefore, the plaintiff no longer had title or an “insurable interest”); see also Rube v. Pac. Ins. Co. of N.Y., 131 So. 2d 240, 242-43 (La. Ct. App. 1961) (finding that the plaintiff did not have the requisite economic interest to claim an insurable interest; therefore, the court denied recovery against an automobile policy because the car was purchased in the plaintiff’s older brother’s name while the insurance was issued in the plaintiff’s name).
59. 131 So. 2d at 240.
60. Id. at 243.
Similar to *Rube*, the *Giddens* case involved two siblings: one owned the property that was the subject of the insurance contract and the other insured the property. Michael Giddens was Brian Giddens’ older brother. In 1990, Brian purchased and owned a 1998 Chevrolet Blazer. Michael, however, insured the car against damage and theft with the defendant-appellant USAA Property & Casualty Insurance Company (USAA). After the car was stolen, USAA refused to pay Michael, pursuant to the insurance contract, because the vehicle was actually owned by Brian and not Michael. Accordingly, Michael filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge where he prevailed at trial. On appeal, USAA argued that Michael did not have an insurable interest under the policy because Brian owned and operated the vehicle. The court recognized that “ownership of property is not required to recover on an insurance policy covering the property, the insured [however] must have an insurable interest.” Nevertheless, the *Giddens* court found that Michael’s use of the vehicle was conditional because Brian was the vehicle’s owner. Moreover, Michael did not suffer any pecuniary loss when the vehicle was stolen. He only suffered an inconvenience because he had to loan Brian a car to use. Also, in citing *Brown v. State Farm Fire & Casualty Co.*, the court found that Michael lacked an insurable interest, just as the sister did in *Rube*. Therefore, the court found that only the owner possessed the requisite insurable interest. In reversing the trial court, the appellate court distinguished *Stokes v. Republic Underwriters Insurance Co.*, the principal case upon which the trial court relied. In *Stokes*, an aunt allowed her niece to use her house without charging rent. The house

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62. *Id.* at 828.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 829 (citing *Young v. State Farm Fire & Cas. Ins. Co.* of N.Y., 426 So. 2d 636 (La. Ct. App. 1982)).
69. *Id.* at 830.
70. *Id.*
71. *See id.*
73. *Giddens*, 644 So. 2d at 830.
74. *Id.*
75. 387 So. 2d 1261 (La. Ct. App. 1980).
76. *Giddens*, 644 So. 2d at 830.
77. *Stokes*, 387 So. 2d at 1262.
usage was for life and included permission for the niece to do whatever she wanted with the house. In distinguishing Stokes, the court held “[w]e determined that there was an insurable interest because the niece would necessarily be subject to a pecuniary loss if she were unable to live in the house for life, and because she had the rights of occupancy and control.” The court distinguished the cases because in Giddens the insured only had conditional control, subject to the wishes of the owner. In Stokes, however, the insured had absolute control, a characteristic of ownership. Therefore, it is logical that in the context of vessels, under marine insurance policies, an economic interest rather than ownership controls.

V. A LOUISIANA COURT MUST FIRST HAVE JURISDICTION TO ADJUDICATE A DIRECT ACTION CLAIM IN THE MARITIME INDUSTRY: CONCURRENT JURISDICTION BETWEEN STATE AND FEDERAL COURTS

The original grant of admiralty and maritime jurisdiction was given to the congressionally created federal courts through the United States Constitution. In relevant portion, the Constitution holds: “The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction.” Interpreting Article III’s grant, the United States Supreme Court has maintained that it actually contains three separate grants of power:

— it empowered Congress to confer admiralty and maritime jurisdiction on the “Tribunals inferior to the Supreme Court” which were authorized by Art. I., sect. 8, Cl. 9;
— it empowered the federal courts in their exercise of admiralty and maritime jurisdiction, to which had been conferred to them, to draw on the substantive law inherent in the admiralty and maritime jurisdiction and to continue the development of this law within constitutional limits; and
—it empowered Congress to revise and supplement the maritime law within the limits of the Constitution. 84

As admiralty and maritime jurisdiction developed, Congress created what is appropriately termed “concurrent jurisdiction.” Pursuant to such, state and federal courts have the inherent subject matter jurisdiction required for adjudicating admiralty claims. Congress’s creation of concurrent jurisdiction was originally in concert with the creation of the federal courts. 85 It is now codified as a fundamental part of federal civil procedure. 86 Section 1333 maintains: “[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” 87 Consequently,

[i]f you can find a state court that entertains a case of a particular class, that suit may be brought in state court, notwithstanding the fact that the case is also within the scope of admiralty jurisdiction. For example, ordinary maritime tort and contract cases may be brought in state court. 88 Congress, therefore, legislatively empowered the “suitor,” through the “savings to suitors clause,” to pursue his remedy in state court, where the state court is competent. 89

Arguably, in the last ten years, an increasing amount of admiralty cases have been brought in Louisiana state courts. In most situations, because admiralty jurisdiction is concurrent, the plaintiff strategically decides in which system to bring the action. 90 In Louisiana, a potential claimant may take several factors into consideration, including:

(1) Louisiana state court judgments can be rendered on the basis of a 9-3

87. Id. (emphasis added).
88. FORCE & YIANNOPOULOS, supra note 84, I.E, at 1-123.
89. With the specific exception of actions in rem, in which a party proceeds directly against a vessel, state courts are deemed competent and have concurrent jurisdiction in admiralty actions. See, e.g., The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 569 (1866) (rejecting the assertion of state court jurisdiction in an in rem proceeding because only federal courts are deemed to be competent to have such jurisdiction).
90. See David W. Robertson, Admiralty and Maritime Litigation in State Court, 55 LA. L. REV. 685, 686-87 (1995); see also JO DESHA LUCAS, ADMIRALTY: CASES AND MATERIALS 176 (4th ed. 1996) (noting that actions brought pursuant to the savings to suitors clause are not removable, unless there is an independent basis for jurisdiction, e.g., diversity of citizenship).
jury verdict,\(^{91}\) as opposed to the requisite unanimous verdict in federal courts;\(^{92}\) (2) damage awards are usually greater in state courts than in federal courts,\(^{93}\) (3) many practitioners find state court to be more relaxed and informal, whereas federal courts are usually rule-intensive;\(^{94}\) and (4) the Code of Civil Procedure gives maritime plaintiffs the option of selecting either a bench or jury trial.\(^{95}\) As such, it is arguably more attractive for claimants to file maritime actions in state court.

In matters of marine insurance, unlike the unique feature of in rem actions, it is well-settled that state law can be applied, unless there are preemptive considerations requiring the application of federal maritime law. The United States Supreme Court initially addressed the issue of whether a U.S. district court could exercise admiralty jurisdiction over a marine insurance claim in *Insurance Co. v. Dunham*.\(^{96}\)

In *Dunham*, the Court determined that the nature of a marine insurance contract determines whether it is truly maritime.\(^{97}\) It noted that the district court did have jurisdiction over a marine insurance policy libel in personam because “the true [jurisdictional] criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.”\(^{98}\) “[As it relates to admiralty jurisdiction], the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself ‘maritime’ . . . .”\(^{99}\) Thus, “the contract of [marine] insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce.”\(^{100}\) Accordingly, because the subject matter of a marine insurance contract is inherently maritime in nature and 28 U.S.C. § 1333 gives the suitor the option to have maritime claims litigated in state court,

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\(^{91}\) Robertson, *supra* note 90, at 687 (citing *La. Code Civ. Proc.* art. 1797(B) (West 1994)).

\(^{92}\) *Id.* (citing Charles A. Wright, *Law of Federal Courts* 671 (5th ed. 1994)).


\(^{94}\) *Id.*

\(^{95}\) Hahn v. Nabors Offshore Corp., 820 So. 2d 1283, 1285 (La. Ct. App. 2002) (“[T]he legislature deleted former *La. Code Civ. Proc.* art. 1732(6). With this action, the legislature left nothing in Article 1732 that would prohibit a jury trial in a suit on an admiralty or general maritime claim.”).

\(^{96}\) 78 U.S. (11 Wall.) 1, 1997 AMC 2394 (1870).

\(^{97}\) *Id.* at 28-29, 1997 AMC at 2402-03.

\(^{98}\) *Id.* at 26, 1997 AMC at 2401.


\(^{100}\) *Dunham*, 78 U.S. at 30, 1997 AMC at 2404.
an aggrieved third party is well-advised to use Louisiana’s Direct Action Statute in a state court proceeding.101

VI. STATE LAW CAN ONLY SUPPLEMENT MARITIME LAW; IT CANNOT SUPPLANT IT

The United States Supreme Court has expressly recognized the often confusing intermix of substantive state law and the general maritime law.102 To the extent, however, there is any potential conflict between the two, maritime law is preemptive.103 The Court has nevertheless recognized the frequent need for state courts, exercising their concurrent admiralty jurisdiction, to supplement federal maritime law, provided the state law does not disturb maritime law.104

Moreover, the Court has recognized that when a federal court hears an admiralty case, in the absence of a controlling federal maritime interest, it may apply state law to supplement a maritime claim.105 In Green v. Industrial Helicopters, Inc.,106 the Louisiana Supreme Court squarely addressed its role in supplementing federal maritime law when exercising admiralty jurisdiction pursuant to 28 U.S.C. § 1333. The court held that “a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law.”107 Generally speaking, “[a] maritime claim brought in the . . . state courts . . . is governed by the same principles as govern actions brought


104. See, e.g., Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446-47, 1960 AMC 1549, 1564-64A (1960) (allowing the application of the city of Detroit’s smoke control regulations on maritime vessels coming into the city, even though the vessel owners were in accord with federal law); see also Just v. Chambers, 312 U.S. 383, 391 (1941) (allowing the application of a state tort law survival action to supplement maritime law).


107. Id. at 638, 1992 AMC at 1431 (applying Louisiana’s strict liability law to a maritime tort action which occurred in navigable waterways 150 miles off Louisiana’s shoreline).
at admiralty, i.e., by federal maritime law. Thus, as long as there is not a conflict between the general application of federal maritime law and substantive state law, state law may be used to supplement maritime law when state courts exercise concurrent jurisdiction.

As the United States Court of Appeals for the Fifth Circuit has made clear, with regard to the mesh of federal maritime law and substantive state law, “[a]lthough state law may supplement maritime law where maritime law is silent, or where a local matter is at issue, state law may not be applied where it would conflict with maritime law.” The Fifth Circuit also enumerated an illustrative list of factors that a court should take into consideration when determining when federal maritime law preempts state law. State law should not be preempted when (1) it contains a detailed scheme to fill maritime law, or (2) the law regulates behavior in which the state has an especially strong interest. It should, however, be preempted when (3) a uniform rule will facilitate maritime commerce, or when nonuniformity will work a material disadvantage to commercial actors, or (4) the state law impinges on international or interstate relations. Finally, in a manner of indiscriminate selection, the plaintiff should win personal injury or death maritime tort claims. Accordingly, it is apparent that as long as state law does not disturb federal maritime law, state law may be used to supplement, where federal maritime law is not in conflict.

VII. LIMITATIONS ON LIABILITY IN THE MARINE INSURANCE CONTRACT AND THE INJURED THIRD PARTY’S RIGHT TO SUE UNDER THE LOUISIANA DIRECT ACTION STATUTE

The Fifth Circuit handles a great deal of admiralty litigation because of the high volume of maritime activity in Louisiana. As discussed, Louisiana law allows an aggrieved third party to maintain a direct right of action against a tortfeasor’s insurer. As also discussed, Louisiana law may be applied in admiralty proceedings only to the extent

109. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233, 1986 AMC 2113, 2134 (1986) (rejecting the application of Louisiana’s wrongful death statute and holding that widowed survivors, in a wrongful death action, could rely only upon the Death on the High Seas and Outer Continental Shelf Lands Acts because they were the exclusive remedies available to the widows).
112. See, e.g., MARAIST & GALLIGAN, supra note 6, at 339.
that it does not conflict with federal maritime law.\textsuperscript{114} In the marine insurance context, however, the Statute is in contrast to the general provisions of maritime law and the well-recognized “limitation of liability” action that vessel owners often invoke to protect their assets.\textsuperscript{115} Thus, the Statute may create an inherent inconsistency with the federal uniformity of maritime law.

In general terms, limitation of liability is an admiralty proceeding whereby the owner of a seagoing vessel or a vessel used on lakes, rivers, or in inland navigation\textsuperscript{116} is allowed to limit his liability to the value of the vessel and pending freight at the conclusion of the voyage.\textsuperscript{117} Limitation of liability was part of the admiralty law of many nations. Consequently, it was adopted by the United States in the mid-nineteenth century.\textsuperscript{118} The limitation of liability proceeding, therefore, may be in inherent conflict with Louisiana’s Direct Action Statute because the owner or operator of a vessel entitled to limitation surrenders only the vessel or its value after the occurrence.\textsuperscript{119} If, as is frequently the case, the vessel is sunk or heavily damaged, the limitation fund available to the claimants may be insignificant.

In most states, a liability insurer is required to pay only the damages which the insured becomes legally obligated to pay to third persons; since limitation of liability reduces the legal obligation of the insured, the beneficiary of the remedy usually is an insurer which has been compensated for underwriting the particular risk which has occurred.\textsuperscript{120} After Congress adopted the original limitation of liability proceeding, the value of the limitation fund included only the value of the vessel and pending freight at the conclusion of the voyage.\textsuperscript{121} However, after a 1934 maritime disaster claimed 135 lives, Congress enacted the “Loss of Life Amendments” (Amendments).\textsuperscript{122} In relevant portion, the Amendments define a “seagoing vessel” and maintain that if a seagoing vessel owner is entitled to limit his liability, and there are claims for personal injury or death, the owner’s limitation fund must provide a total

\begin{footnotes}
\footnotetext[114]{See supra Part V.}
\footnotetext[116]{See generally 46 U.S.C.A. § 188 (1994).}
\footnotetext[117]{See \textit{Maraist & Galligan}, supra note 6, at 339.}
\footnotetext[118]{Id.}
\footnotetext[119]{See \textit{In re} Talbott Big Foot, Inc., 854 F.2d 758, 760, 1989 AMC 1004, 1006 (5th Cir. 1988).}
\footnotetext[120]{See \textit{Maraist & Galligan}, supra note 6, at 339.}
\footnotetext[121]{Id.}
\footnotetext[122]{See 46 U.S.C. § 183(b)-(f) (1994).}
\end{footnotes}
minimum payment of $420.00 per ton of such vessel’s tonnage on each distinct occasion in which loss of life or bodily injury occurs.123

Arguably, under normal conditions, claimants in a maritime catastrophe will proceed against the shipowner and not join his insurer, since the shipowner’s liability policy likely contains a “no action” clause precluding a third-party claimant from filing suit against the insurer until a judgment has been rendered against the insured. The exception to the norm exists in very few states; however, Louisiana is one of them.124 Consequently, Louisiana has proven to be a pioneer in recognizing the logical direct right an aggrieved third party should enjoy.125

In the Fifth Circuit, where federal maritime law may arguably conflict with the Statute, the “court has instructed its lower courts to permit the ‘direct action,’ but to devise effective procedures, such as stay or consolidation, to assure that the owner is not deprived of the benefit of his insurance.”126 Moreover, “Louisiana courts have . . . consistently annulled ‘no action’ clauses—clauses that require the victim to obtain a judgment against the insured before suing the insurer—although these clauses are unquestionably a ‘term’ or ‘condition’ of the policy.”127 Accordingly, to the extent there is any “conflict” between the Statute and the general maritime law’s limitation of liability, the aggrieved third party has the right to proceed directly against the insurer, and the insurer is only responsible to the extent that the insured is liable. Therefore, when the insured appropriately limits his liability, the insurer is only responsible to the extent of the limitation.128

In Louisiana, when third parties sue under the Statute, an issue presents itself as to whether the limitation of liability defense is personal to the insured shipowner or if the insurer may use it as well. The Statute is silent on the issue. As such, the answer has been left to the courts.129 In resolving the issue, the Fifth Circuit initially held that the defense is personal to the insured; however, under Louisiana state law, the Fifth Circuit later limited an underwriter’s liability to the dollar amount for

123. See generally id. § 183(d).
124. See supra Part III.
125. Id.
126. MARAIST & GALLIGAN, supra note 6, at 339.
128. See generally Rogers v. Texaco, Inc., 638 So. 2d 347 (La. Ct. App. 1994) (acknowledging the “tension” between Louisiana’s Direct Action Statute and the limitation proceeding; but, holding that the two can coexist because the insurer is only responsible for the amount the insured owes after its liability is limited).
129. Johnson, supra note 34, at 1490.
which the shipowner-assured was liable after successfully maintaining
the right to limit liability.130 It is now well-settled that “[a] shipowner may . . .
try to limit its dollar liability for damages to the value of the vessel
under [46 U.S.C.A. app. § 183]. The court, not a jury, must determine
whether the shipowner merits relief under this provision.”131

VIII. OTHER JURISDICTIONS AND THEIR DIRECT ACTION STATUTES

Louisiana is a pioneer in that very few states have enacted direct action statutes.132 Louisiana’s example should cause more state legislatures to follow suit and more state courts to nudge their legislatures to act.133 Absent another state’s creation of a direct action statute, a foreign plaintiff may find it attractive to attempt to use Louisiana’s Direct Action Statute in his home forum under a conflict of laws issue. Aggrieved third parties will almost always prefer suing an insurer directly and compelling the insurer to defend the case before a jury. “Thus, a claimant [may] understandably seek to emphasize whatever relationship his cause of action may have with Louisiana in an effort to induce the forum state to give the statute extra-territorial effect.”134

Various other states have adopted direct action statutes.135 Although the focus of this work is not to extensively elaborate upon the laws of other states, a brief examination of some other jurisdictional laws may be beneficial in fully explaining the significance of Louisiana’s Direct Action Statute.

A. Puerto Rico

Puerto Rico’s Direct Action Statute is almost identical to Louisiana’s.136 Like Louisiana’s, Puerto Rico’s statute allows suits in contract and tort and does not require the insured be insolvent.137 In enacting the provision, Puerto Rico’s articulated policy was to “allow
rights against the insurer generally co-extensive with a third-party’s rights against the insured.”

Just as the Fifth Circuit and the Louisiana Supreme Court have interpreted Louisiana’s statute, the United States District Court for the District of Puerto Rico has also held that Puerto Rico’s Direct Action Statute becomes a part of every policy enforceable in its Commonwealth. Also similar to Louisiana, the insurer may not assert defenses that are personal to the insured. The only notable contrast between the two statutes is that Puerto Rico does not require a stay in limitation of liability proceedings so the direct action and suit against the insured may be brought together.

B. Wisconsin

The Wisconsin Direct Action Statute is very similar to Louisiana’s in that its history shows vacillating support and a general distrust of third parties maintaining direct actions against insurers. Wisconsin courts have allowed “no-action” clauses under their statute. However, they have sometimes allowed third parties to join the insurer in direct action lawsuits. Wisconsin courts have also allowed third parties to join the insurer, despite a policy’s “no-action” clause.

Wisconsin’s statute provides that an insurer may be directly sued by a third party in two specific situations: (1) where the policy is issued in Wisconsin and (2) when the accident that is the subject matter of the litigation occurred in Wisconsin. Therefore, with both statutes’ substantive statutory language considered, Wisconsin’s statute is arguably more tempered than Louisiana’s.

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138. Id. at 278 n.106 (quoting Ramos v. Continental Ins. Co., 493 F.2d 329, 332, 1974 AMC 2155 (1st Cir. 1974) (AMC reporter summarizing case)).


140. See Foster, supra note 136, at 278.

141. Id. at 279 n.117 (citing Bergstein v. Popkin, 233 N.W. 572, 575 (Wis. 1930); Burkhart v. Burkhart, 229 N.W. 34, 35 (Wis. 1930); Fanslau v. Ragan, 215 N.W. 589, 590 (Wis. 1927); Glatz v. Kroeger Bros., 183 N.W. 683, 685 (Wis. 1921); Ehlers v. Gold, 164 N.W. 845, 846 (Wis. 1917)).

142. See, e.g., Lang v. Baumann, 251 N.W. 461, 464 (Wis. 1933).

143. WIS. STAT. ANN. § 632.24 (West 2000).

144. See Foster, supra note 136, at 279.
C. New York

In contrast to Louisiana, the New York Direct Action Statute\(^{147}\) does not necessarily create a separate and distinct cause of action. The New York statute requires that all policies issued and delivered in the state of New York contain a provision permitting suit against an insurer, provided certain enumerated conditions are satisfied.\(^{148}\) Similar to Louisiana, the New York statute provides that even if the insured is determined to be bankrupt, the insurer remains liable for any judgment against the insured, within policy limits.\(^{149}\) New York’s statute, therefore, has addressed the validity of “no-action” clauses by prohibiting the issuance of policies that absolve the insurer of liability in cases where the insured is bankrupt.\(^{150}\) Nevertheless, because the scope of New York’s statute is much narrower than Louisiana’s, at least two marine insurance scholars opine that the New York statute is much more restrictive and conservative.\(^{151}\)

IX. Conclusion

The Louisiana Legislature set an example for other states to follow. The Louisiana Direct Action Statute serves an important state interest because it affords Louisiana citizens the opportunity to proceed directly against an insurer to recover for damages caused by the insured. Moreover, to the extent there was conflict between the general maritime law and Louisiana state law, the conflict was resolved by both the Fifth Circuit and the Louisiana Supreme Court. The Statute plays an important role in supplementing, not supplanting, general maritime law. Other states, therefore, should “get with the program” and follow Louisiana’s lead.

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\(^{147}\) 27 McKINNEY’S N.Y. INS. LAW § 3420 (West 2000).
\(^{148}\) Id. § 3420(a)(1)-(4).
\(^{149}\) See Bean v. Allstate Ins. Co., 403 A.2d 793, 796 (Md. 1979).
\(^{150}\) See 27 McKINNEY’S N.Y. INS. LAW § 3420 (a)(1).
\(^{151}\) See Foster, supra note 136, at 281; see also Houdlett, supra note 19, at 570.