2009-2010 U.S. Maritime Legislative Developments

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I

INTRODUCTION

Maritime legislation in the 111th U.S. Congress was dominated by two unforeseen events. In the first session, the piratical attacks on the U.S.-flag vessels *M/V Maersk Alabama* and the *M/V Liberty Sun* in April 2009 focused attention on international piracy. In the second session, the *Deepwater Horizon* incident in April 2010 focused Congressional attention on oil pollution liability requirements, general maritime liability laws and a variety of offshore regulatory issues both having to do with offshore energy production and other matters. As these incidents were coursing through Congressional maritime policy circles, the 111th Congress finally enacted authorizing legislation for the U.S. Coast Guard pending since 2007. Although the Coast Guard Authorization Act of 2010 (2010 Coast Guard Act or CGAA)† is in large measure focused on the Coast Guard, like all Coast Guard authorization acts, the 2010 Coast Guard Act contains a number of provisions of general interest to the worldwide maritime industry. The 2010 Coast Guard Act together with proposals dealing with piracy and offshore oil spills constitutes the bulk of our bi-annual summary below.

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II

LEGISLATIVE DEVELOPMENTS

A. Environment

1. Coast Guard Authorization Act of 2010

The 2010 Coast Guard Act enacted into law several environmental measures, some of which have been pending enactment for years. For example, in recent years, Senator Maria Cantwell of Washington, who served as the Chair of the Senate Subcommittee of the Commerce Committee with authorizing jurisdiction over the Coast Guard, pursued oil pollution prevention reform legislation. The 2010 Coast Guard Act provided a legislative vehicle for her to realize some of her goals and adopted other significant oil pollution prevention measures.²

a. Double Hull Protection for Vessel Bunker Tanks

For example, the 2010 Coast Guard Act provides a mandate for double-hull equivalent protection for vessel bunker tanks to avoid oil spills like the Cosco Busan incident in San Francisco.³ On November 7, 2007, this container ship struck a tower of the Oakland Bay Bridge in San Francisco Bay causing the discharge of approximately 54,000 gallons of heavy fuel oil into the sensitive waters and shoreline of the bay. The costs for removal of the oil and natural resources damages were estimated to approach $100 million, illustrating the enormous damage that could result from the fuel tanks of a large ship without double-hull protection, which is now required for the cargo tanks of a modern oil tank vessel.

The subsequent investigation and criminal convictions provided additional support for the importance of double-hull protection as structural insurance against the human errors which caused the incident. Therefore, the measure implements the requirements of Regulation 12A under Annex I to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, entitled “Oil Fuel Tank Protection.”⁴ Regulation 12A limits the size of fuel tanks to 2,500 cubic meters and requires either double-hull protection or satisfaction of the regulation’s alternative oil outflow performance standard. The provision applies

³CGAA § 612.
to vessels of the United States with aggregated capacity of 600 cubic meters or more of fuel oil constructed pursuant to a contract entered into after the date of enactment of the statute or that is delivered after January 1, 2011.

b. Cargo Owner Liability for Single Hull Tankers

The 2010 Coast Guard Act also includes an amendment to the liability provisions of the Oil Pollution Act of 1990 (OPA90) that for the first time extends OPA90 liability to cargo owners. The provision amends the OPA90 definition of the term “responsible party” to include “[i]n the case of a vessel... the owner of oil being transported in a tank vessel with a single hull after December 31, 2010.” The provision excepts until 2015 certain vessels unloading oil in bulk at a deepwater port or offloading in lightering activities within an established lightering zone more than 60 miles offshore. As a practical matter, the use of single hull tank vessels in the United States is limited. However, this provision represents a significant departure from the original political compromise that was struck in OPA90 which rejected cargo owner liability entirely. The practical implications of the provision on operators of the remaining single-hull vessels sailing in the United States remains unclear, but the provision establishes the precedent that OPA90 now extends liability to cargo owners in this limited circumstance.

c. Expanded Financial Responsibility

The cost of oil pollution removal and damages in the United States has skyrocketed over the intervening years since the enactment of OPA90. For example, a discharge of approximately 60,000 gallons of fuel oil in Boston harbor in the year 2000 cost about $6 million in removal costs and damages while a discharge of similar size in from the Cosco Busan in San Francisco Bay in 2007 cost more than $60 million in removal costs alone, greater than a ten-fold increase.

Even discharges of relatively small size from small vessels can result in large costs and damages to be incurred by the Oil Spill Liability Trust Fund (OSLTF) in the absence of an OPA90 responsible party with evidence of financial responsibility. In recent years, Congress has expressed concern about the financial burden on the OSLTF resulting from oil spills for which there is no OPA90 responsible party in circumstances where a responsible party limits liability under OPA90, and where the responsible party lacks financial capacity.

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5CGAA §713.
7Id.
The 2010 Coast Guard Act takes aim at the problem by guaranteeing cost recovery by the OSLTF through expansion of the scope of the statute’s financial responsibility requirements. The amendment to OPA90 expands its financial responsibility requirements to include “any tank vessel over 100 gross tons using any place subject to the jurisdiction of the United States.” Previously, this provision had only applied to vessels over 300 gross tons.

d. International Convention on Anti-Fouling

After almost twenty years of effort, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 entered into force on September 17, 2008. The 2010 Coast Guard Act represents the enabling legislation implementing the Anti-Fouling Convention in the United States.

The Anti-Fouling Convention bans the use of organitin compounds in anti-fouling coatings on vessel hulls. One of the most effective anti-fouling paints invented in the 1960s, employed the organitin compound tributylin (TBT) which also proved damaging to the marine environment because of its persistence. The Anti-Fouling Convention also establishes a process for considering additional controls on anti-fouling systems.

The Anti-Fouling Convention follows the model of most of the modern international environmental conventions regulating the maritime industry and comparable implementing measures in the United States such as the Act to Prevent Pollution from Ships. It prohibits certain conduct — here the use of organitin hull coatings — vests enforcement in both flag and port states, requires vessel operators to maintain certificates as evidence of compliance, permits inspections, and provides the full panoply of administrative, civil and criminal penalties to enforce the requirements of the Convention. Additionally, the 2010 Coast Guard Act empowers both the Coast Guard and the Administrator of the Environmental Protection Agency (EPA) to take enforcement action. Importantly, the EPA’s powers extend beyond vessels to also include manufacturers, sellers and users of substances subject to the Anti-Fouling Convention.

2. Deepwater Horizon Related Proposals

The Deepwater Horizon incident in the U.S. Gulf of Mexico, which commenced on April 20, 2010, rocked policy makers in Washington, D.C. and

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8 CGAA § 713.
10 CGAA §§ 1011–1048.
focused significant Congressional attention on virtually all aspects of off-shore drilling and marine environmental liability.\textsuperscript{13} The Obama Administration struggled in the early days of the incident to understand and cope with its magnitude and to manage the expectations of the public, particularly the communities along the Gulf of Mexico most directly affected by the incident.

\textit{a. Obama Administration Proposals}

As events unfolded, the Obama Administration and members of Congress proposed major revisions to OPA90, which ultimately were not enacted into law, but which likely represent a future legislative agenda for the proponents of OPA90 reform.

The White House specifically asked Congress to raise retroactively the cap on damages above $75 million provided for by OPA90, to increase the per incident cap on claims from $1 billion to $1.5 billion and the cap on natural resource damage claims from $500 million to $750 million.\textsuperscript{14} The Obama Administration also proposed to accelerate a statutory increase in the per barrel tax on oil funding the OSLTF.\textsuperscript{15} And as a practical matter, the Administration’s most important accomplishment regarding immediate liability issues was to persuade the responsible party to establish a $20 billion dollar special claims facility to provide for the payment of claims.\textsuperscript{16} Because of the responsible party’s pledge and the appointment of Kenneth R. Feinberg on June 16, 2010 to head the operation, the immediate political crisis passed, thereby removing an imperative for immediate legislative action.

\textit{b. Liability Cap Proposals}

However, other legislative proposals sparked controversy. For example, Senator Bob Menendez introduced The Big Oil Bailout Prevention Act of 2010\textsuperscript{17} to require responsible parties to pay the entire cost of the Deepwater Horizon pollution cleanup and compensate victims for damages without the benefit of any legal limitation of liability such as that provided by OPA90 or state law. Other lawmakers introduced similar measures and there was no shortage of proposals to hold the responsible party liable retroactively.\textsuperscript{18}

\footnote{\textsuperscript{13}See Lawrence I. Kiern, “Washington Insider: Deepwater Horizon Oil Spill Rocks Washington Policy Makers,” The Maritime Executive, 12-14 (May/June 2010).}

\footnote{\textsuperscript{14}“White House Asks Congress To Lift Cap on Oil Spill Liability,” \textit{CQ Today Online News} (May 12, 2010).}

\footnote{\textsuperscript{15}Kiern, “Oil Pollution Act: Legislative Changes, Amendments Set Agenda for New Congress,” 40.}

\footnote{\textsuperscript{16}http://www.thebpclaimsfund.com.}

\footnote{\textsuperscript{17}S. 3305, 111th Cong., 2d Sess. (2010).}

\footnote{\textsuperscript{18}See Bryant E. Gardner, Treading Deepwater, 8 Benedict’s Maritime Bulletin 186 (3rd Quarter 2010).}
These proposals to remove the liability cap retroactively and similar proposals to end the protection of limitation of liability for oil pollution removal costs and damages met fierce opposition from energy industry supporters. Senator Lamar Alexander decried the retroactive nature of the legislation arguing that, “We are not a banana republic.”\(^1\) He and others warned of unintended consequences of such measures, including driving oil drilling out of the Gulf of Mexico, thereby leaving the United States more dependent on foreign oil imports. On June 30, 2010, the Senate Environment Committee rejected these protests and approved Sen. Menendez’s proposal although it was ultimately not enacted into law.\(^2\)

Likewise, the House Transportation and Infrastructure Committee approved a companion measure, The Oil Spill Accountability and Environmental Protection Act of 2010,\(^3\) which would have eliminated the $75 million damages liability cap under OPA 90 for offshore facilities. In addition, the Transportation Committee measure included proposals to increase up to $1.5 billion the proof of financial responsibility required for such facilities under OPA 90.\(^4\)

To counter these proposals, energy industry supporters from key energy producing states offered reform alternatives. Senators Lisa Murkowski and Mark Begich proposed the Oil Spill Liability Trust Fund Improvement Act of 2010,\(^5\) to increase the size of the OSLTF to $10 billion financed by an increased tax on oil to ensure that there would be sufficient resources available to cover a catastrophic oil spill. Senator David Vitter introduced legislation — the Oil Spill Response and Assistance Act\(^6\) — to increase the cap on liability for economic damages resulting from oil spills. But, these limited proposals developed no political momentum in the Senate and they became ensnared in the fiercer debate surrounding other liability issues relating to personal injury and death which ultimately proved unsuited to compromise.

c. CLEAR Act

The Consolidated Land, Energy, and Aquatic Resources Act of 2010 (the CLEAR Act), which passed the House of Representatives on July 30, 2010

\(^1\)http://alexander.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=b002e813-9345-4e03-af13-1542a30ab59f&ContentType_id=778bce7e0-0d5a-42b2-9352-09ed63ccc4d66&Group_id=80db87631-7c25-4340-a97a-72ccedd8a658.
\(^4\)Id. at § 3.
\(^5\)S. 3309, 111th Cong., 2d Sess (2010).
and which dealt with a number of *Deepwater Horizon* matters, came closest to being enacted into law.\textsuperscript{25} The CLEAR Act was crafted under the guidance of the House leadership by the House committees sharing jurisdiction over these matters, particularly the Natural Resources, Transportation and Infrastructure, and Judiciary Committees. While it passed the House, by a vote of 209 – 193,\textsuperscript{26} the slim margin of victory reflected the delicate balance embodied in the measure and proved a harbinger for its fate in the Senate where only supermajorities have ruled.

**Liability Cap.** With respect to OPA90, the CLEAR Act proposed to revise the core liability compromise of the statute which coupled strict liability for the responsible parties with statutory limits of liability. Because of the *Deepwater Horizon* incident, the CLEAR Act proposed elimination of the $75 million damages cap for all offshore facilities provided by OPA90 — but not the corresponding vessel limit — and would have also dramatically increased the evidence of financial responsibility requirements for offshore facilities, but not for vessels.\textsuperscript{27}

**Future Cap Changes.** Beyond the limitation of liability for damages applicable to offshore facilities, proponents of OPA90 reform advocated a statutory mechanism for the administrative increases of both limitations of liability and evidence of financial responsibility for vessels and facilities. Therefore, the CLEAR Act proposed providing for future administrative changes to the liability cap and Certificate of Financial Responsibility (COFR) guarantees applicable to vessels by requiring the President to review, at least once every three years, whether the cap is sufficient and to increase that cap by regulation “commensurate with the risk of discharge of oil presented by a particular category of vessel, facility, or port.”\textsuperscript{28}

**Responsible Party Definition.** The CLEAR Act would have also expanded the OPA90 definition of responsible party. First, it would have expanded the definition of responsible party for an onshore facility to include owners, lessors, and assignors of the underlying land or mineral interest.\textsuperscript{29} Second, it would have the definition of responsible party to include minority owners of the responsible party so long as they owned at least 25 percent of that entity (directly or indirectly) and the assets of the responsible party proved to be insufficient to pay claims.\textsuperscript{30} This amendment also would have been retroactive for any incident occurring on or after January 1, 2010 and therefore, was

\textsuperscript{26}http://www.marinelog.com/DOCS/NEWSMIX/2010aug00010.html.
\textsuperscript{27}CLEAR Act § 703.
\textsuperscript{28}Id. at § 702.
\textsuperscript{29}Id. at § 708.
\textsuperscript{30}Id. at § 731.
aimed directly at the Deepwater Horizon incident. The proposals would have dramatically altered a fundamental OPA90 concept. OPA90’s definition of “responsible party” with respect to a discharge aimed to provide certainty, particularly with respect to oil spill response and payment of claims. However, in order to expand the scope of potential responsible parties to provide adequate financial resources to pay for oil spill response and damages, the proposal would have complicated the admirable clarity currently provided by OPA90. Additionally, the proposal to extend OPA90 liability to these additional parties raised the possibility of unintended chilling effect on the willingness of investors to subject themselves to such potentially unlimited liabilities.

Scope of Permissible Damages. The CLEAR Act would have also expanded the scope of permissible damages recoverable from both vessel and facility responsible parties under OPA90. Currently, those damages consist of damages to natural resources, real or personal property, subsistence use, government revenues, profits and earning capacity, and public services. The CLEAR Act would have added a new category relating to damages to human health to include fatal injuries and mental health impacts. As with other proposed changes, the inclusion of human health damages would be retroactive, in this instance to April 19, 2010. While plainly aimed at the Deepwater Horizon incident, the potential impact of the provision would have been to expand dramatically the scope of OPA90 damages for oil spills generally. OPA90 does not govern personal injury claims which are left to other federal and state laws.

Government Damages Recovery. The CLEAR Act also proposed to facilitate recovery of government expenditures. OPA90 permits the OSLTF to recover through an action in federal court from a responsible party or other person liable for any compensation paid by the Fund for removal costs or damages. The CLEAR Act proposed that, “the Fund shall recover all costs and damages paid from the Fund unless the decision to make the payment is found to be arbitrary and capricious.” This proposal would have relieved the Fund of its existing burden to prove its underlying damages in a federal court proceeding and would have heightened the importance for a responsible party to challenge payments by the Fund during the administrative claims process. As a practical matter, the proposal would have further strengthened the government’s ability to require compensation from responsible parties.

32 Id. at 704.
33 33 U.S.C. § 2702(b)(2).
34 CLEAR Act § 706.
OPA90 also authorizes recovery from the responsible party of natural resource damages and such damages have been routinely recovered, most often through settlement agreements. Since 1990, the Department of Justice has published in the Federal Register over 50 consent decrees in the Federal Register involving OPA90 natural resource damage claims totaling many millions of dollars. The CLEAR Act would have eased the burden on the federal government in seeking recovery of natural resource damages by strengthening its hand in the process. It would have made any determination or assessment of a natural resource trustee subject only to the deferential standard of judicial review afforded to U.S. government agencies by the Administrative Procedure Act. This would potentially have further strengthened the already significant leverage natural resource trustees enjoy to secure settlements from responsible parties.

OPA90’s definition of “removal cost” includes the “containment and removal of oil...from water and shorelines” and other actions to “minimize or mitigate the damage...” However, the CLEAR Act proposed expanding the definition of “removal cost” payable by the responsible party to include the federal government’s cost of enforcing OPA90. Consequently, a responsible party would have been obligated to pay the cost of the federal government’s investigation and prosecution for violations of OPA90. Since oil discharges subject responsible parties to strict liability, the potential effect of the provision would have been to shift all the government’s investigation and enforcement costs directly to the responsible party.

Claims Process. OPA90 provides for a claims regime that relies principally on the responsible party with the OSLTF as an alternative. Over the past 20 years, however, congressional critics have repeatedly expressed dissatisfaction with the OPA90 claims process, particularly concerning delayed and inadequate payments to economically distressed fishermen and other small businesses which are hurt by oil spills and have little economic capability to sustain themselves during such events disrupting their businesses. Congress has amended OPA90 twice in the past to address these concerns, but the longstanding complaint resurfaced mightily after the Deepwater Horizon incident occurred.

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35 33 U.S.C. §§ 2702(b)(2)(A) and 2706.
36 CLEAR Act § 708.
37 Id.
39 CLEAR Act § 708.
The CLEAR Act proposed to amend certain OPA90 claims provisions.\textsuperscript{42} It would have prevented a responsible party from securing a meaningful release from a claimant without compensating the claimant for its OPA90 damages. Additionally, it would have enlarged the role of the federal government to require that it ensure that the processing of claims occurs locally for any spill of national significance and allowing the government to obtain information from any responsible party regarding the processing of claims such as average processing times, etc. Thus, the proposal envisioned increased federal oversight of responsible party claims processing.

However, the CLEAR Act proposals would not likely resolve this conundrum. The fundamental problem remains that many fishermen and other small businesses lacking complete records find it difficult to prove their lost income, e.g. through income tax returns, and absent proof of loss, no responsible party will pay the claimant, even when faced with withering public criticism. The problem of undeclared income for tax purposes will remain a problem that neither OPA90 nor the CLEAR Act solve.

Although similar proposed changes were the subject of consideration in the U.S. Senate, no bills were adopted by the Senate on the subject before the Senate recessed for the midterm election of November 2, 2010. After the election, Congress and the Obama Administration concentrated on other pressing priorities and the 111th Congress adjourned without enacting into law any of the major legislative proposals to OPA90 advocated following the Deepwater Horizon incident, including the CLEAR Act.

3. Oil Pollution Act of 1990 - Trust Fund Emergency Funding

The enormous scope and prolonged nature of the Deepwater Horizon incident quickly exhausted the $150 million in emergency funding annually available to the U.S. Coast Guard and other federal agencies through the OSLTF. Following a warning from the Coast Guard that it would soon exhaust its available funding, on June 15, 2010 Congress and the President increased emergency funding available from the OSLTF.\textsuperscript{43} The legislation amends OPA90 to allow additional emergency funding for the Coast Guard and other federal agencies up to $100 million for each advance, but only for the Deepwater Horizon incident and provided that Congress is notified “of the amount advanced and the facts and circumstances necessitating the advance.” However, this incident-specific amendment accomplished nothing to address the underlying problem with the statutory framework, which limits emergency funding to $150 million annu-

\textsuperscript{42}CLEAR Act §701 et seq.
ally. In light of the increasing costs of oil pollution removal operations, the same problem will likely recur in the next major oil spill incident.

B. Safety

I. Coast Guard Authorization Act of 2010

The 2010 Coast Guard Act also enacted into law several marine safety measures that also had been pending enactment for years. In recent years, key Members of Congress advocated particular marine safety reforms advanced by their constituents. The 2010 Coast Guard Act collected and enacted into law these marine safety measures.

a. Fishing Vessel Safety Regulation

The 2009 National Transportation Safety Board (NTSB) report on the sinking of the Alaska Ranger focused congressional attention on fishing vessel safety.44 And for the first time in many years, the 2010 Coast Guard Act enacted key fishing vessel safety reforms that were long overdue.45 The Act provides safety equipment and construction standards for uninspected commercial fishing vessels operating beyond three nautical miles off the coast of the United States. It requires fishing vessels of certain sizes and those that undergo substantial changes to comply with load line regulations. And it mandates periodic vessel examinations by the Coast Guard.

b. Commercial Vessel Safety Regulation

Other notable 2010 Coast Guard Act commercial vessel safety provisions include: (1) a study to ensure safe and secure shipping in the Arctic,46 (2) a requirement for inspected vessels to maintain official logbooks and log the service hours of seamen, their injuries, and their illnesses,47 (3) enhancement of Coast Guard authority to terminate the voyage of an inspected vessel for unsafe operations by removing its certificate of inspection and ordering it to a mooring,48 (4) a requirement for regulations governing "safety management systems” on certain passenger vessels, including ferries,49 and (5) an

45 CGAA § 604.
46 Id. at § 307.
47 Id. at § 607.
48 Id. at § 608.
49 Id. at § 610.
offshore supply vessel provision which removed tonnage limits, revised
manning requirements, and required oil fuel tank protection measures.50

c. Coast Guard Marine Safety Program

During the 111th Congress, the House Transportation and Infrastructure
Committee focused considerable attention on the Coast Guard’s marine safe-
ity function. Committee Chairman Oberstar argued that the marine safety func-
tion had deteriorated and that relations between the Coast Guard and the re-
gulated maritime industry had suffered since the focus of the Coast Guard on
security starting with 9/11.51 Increased Congressional scrutiny led the Coast
Guard to adopt many reform measures on its own. It remains unclear if the
Coast Guard’s decision to add new marine inspectors, investigators and other
marine safety personnel will fall prey to the current budget cutting climate.

The 2010 Coast Guard Act made further changes. For example, for the
first time in the service’s history, the Coast Guard Commandant must
appoint an “ombudsman” in each Coast Guard district to serve as “liaison
between ports, terminal operators, shipowners, labor representatives, and the
Coast Guard.”52 The ombudsman is responsible for improving communications,
resolving disputes and investigating complaints. This provision pro-
vides the maritime industry a formal institutionalized mechanism to address
its complaints. It remains to be seen if it will amount to much in practice
however, as the regulated community will surely remain reluctant to risk
angering its regulator directly.

The marine safety reform measures also institutionalize provisions to
improve marine safety expertise.53 The law mandates career tracks, mini-
imum qualifications for marine safety personnel, development of a long-term
strategy for improving vessel safety, reports to Congress on efforts to recruit
and retain civilian marine inspectors and investigators, and establishment of
centers of expertise for marine safety.

2. General Maritime Liability

Following the Deepwater Horizon incident, Congress has also focused on
several laws that have long governed liabilities of vessel owners to potential
claimants such the Death on the High Seas Act (DOSHA),54 the Shipowners’
Limitation of Liability Act (Limitation Act)\(^{55}\) and the “Jones Act” governing worker’s compensation claims.\(^{56}\) Using the powerful example of the highly sympathetic victims and survivors of the Deepwater Horizon incident to garner support, advocates of reform proposed repealing or amending these provisions.

On July 1, 2010, the U.S. House of Representatives passed a measure that would have repealed the Limitation Act and significantly expanded available damages under the DOSHA and the Jones Act without limiting those changes to the Deepwater Horizon incident.\(^{57}\) The repeal and expansions would likely have had significant positive implications for victims and negative financial implications for vessel owners had they been enacted into law.

DOSHA, enacted in 1920, provides for liability for wrongful deaths occurring outside U.S. territorial waters. Although DOSHA was an enabling statute at the time, it has come under severe criticism. During the 111th Congress, particularly in the connection with the Deepwater Horizon incident, critics argued that it unduly limits recovery to pecuniary damages only and does not provide for recovery of pre-death pain and suffering or for non-pecuniary loss of care, comfort and companionship (which critics argue as would be generally available for a wrongful death occurring within U.S. territory).\(^{58}\)

Similarly, section 33 of the Merchant Marine Act, 1920, referred to as the “Jones Act” (and not to be confused with section 27 of that act governing cabotage which is also referred to as the “Jones Act”) grants merchant mariners a right of action which critics complain is likewise unduly limited to pecuniary damages.\(^{59}\) The House-passed measure would have permitted the recovery of non-pecuniary losses including “fair compensation for the decedent’s pain and suffering,” “loss of care, comfort, and companionship” under DOSHA. It would also have amended the Jones Act to permit “recovery for loss of care, comfort, and companionship.”

The Limitation Act, enacted in 1851, limits a vessel owner’s liability to the post-accident value of the vessel and her pending freight.\(^{60}\) It also provides a very important procedural method – referred to as “concursus” – that grants the ship owner the right to require all claims against the vessel (other than OPA 90 claims) to be brought within a single jurisdiction of the vessel

\(^{55}\) 46 U.S.C. § 30511.
\(^{56}\) 46 U.S.C. § 30104 et seq.
\(^{59}\) 46 U.S.C. § 30104 et seq.
\(^{60}\) 46 U.S.C. § 30511.
owner’s choosing (given jurisdiction and venue requirements) within a limited period of time as set by the court. For example, Transocean, Ltd., the owner of the Deepwater Horizon, sought to consolidate all state and federal claims as permitted under the statute in a single federal court in Texas after the incident. The House-passed measure sought to repeal the Limitation Act because, as critics argued, it had outlived its usefulness in a modern age when insurance is readily available and other procedural mechanisms are available to consolidate litigation proceedings.

Companion measures were also introduced in the Senate and advanced by key supporters, including Senator Harry Reid (D-NV), the Senate Majority Leader, and Senator John D. Rockefeller IV (D-WV), Chairman of the Senate Committee on Commerce Science and Transportation. However, they encountered a phalanx of maritime industry opposition in the Senate which enjoyed the support of a united Senate minority. Ultimately, they were not taken up by the Senate before the end of the 111th Congress and their advocates will have to start their reform effort anew in another Congress.

C. Security

1. Piracy

Although world-wide piracy against commercial vessels has been a modern scourge for years, it was not until the U.S.-flag vessel M/V Maersk Alabama was attacked in April 2009 off the coast of Somalia that public interest piqued and Congress became interested. The attack on the Maersk Alabama was followed a few days later with another violent attack on the U.S.-flag vessel M/V Liberty Sun. These two attacks led to a flurry of action by the U.S. Government including the issuance of a series of Port Security Advisories by the U.S. Coast Guard and the issuance of an anti-ransom Executive Order by President Obama on April 12, 2010.

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61 Id. at § 30511(b).
68 Executive Order 13536 (April 12, 2010).
In Congressional hearings following the U.S.-flag vessel attacks, vessel owners and labor union representatives advocated for U.S. Government protection of U.S.-flag vessels transporting U.S. Government cargoes (both the Maersk Alabama and the Liberty Sun were carrying such cargoes). Witnesses also pointed out that U.S. liability laws applicable to vessel self-defense were outdated and there are various other impediments to armed vessel self-protection relating in particular to U.S. arms trafficking regulations and port state restrictions on commercial vessels with arms onboard.

Several legislative measures on piracy were introduced and enacted in the 111th Congress.

The first measure, contained in the National Defense Authorization Act for Fiscal Year 2010 (2010 Defense Authorization Act), required that a report be submitted to Congress within 60 days after enactment from the Secretary of Defense and the Secretary of State. The report was required to set forth what actions the Departments have taken to — (1) “eliminate or reduce restrictions under any regulation or provision of law on the carriage of arms and use of armed security teams on United States-flagged commercial vessels for purpose of self-defense;” (2) “negotiate bilateral agreements” to permit U.S.-flag vessels to enter foreign ports while carrying fire arms for self protection; and (3) “establish common standards” for “the training and professional qualifications of armed security teams.”

The foregoing report requirement was included in lieu of an amendment passed by the House of Representatives offered by Rep. Elijah Cummings of Maryland that would have required the Department of Defense to “embark military personnel on board a United States-flag vessel carrying Government-impelled cargoes” which is determined to be at risk of pirate attack.

The second measure affects U.S.-flag vessels enrolled in the Maritime Security Fleet Program (MSP). The provision requires such MSP-enrolled vessels, beginning with Emergency Preparedness Agreements which first take effect after enactment, to be “equipped with, at a minimum, appropriate non-lethal defense measures” to protect against piracy, as determined by the Secretary of Defense and the U.S. Coast Guard.

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69 See, e.g. Hearing on Piracy Against U.S.-Flagged Vessels: Lessons Learned held before the House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation (May 20, 2009).
70 E.g. id. (Statement of Philip J. Shapiro, President and Chief Executive Officer, Liberty Maritime Corporation).
Finally, the 2010 Coast Guard Authorization, in a provision originally sponsored by Rep. Frank LoBiondo of New Jersey, provides that anyone connected with the vessel who uses force “to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force . . . if such force was in accordance with standard rules of self-defense.”\(^{74}\) Those “standard rules” must be prescribed by the Secretary of Homeland Security (read Coast Guard) and as of the writing of this article were in process.\(^{75}\)

The 2010 Coast Guard Authorization also recognizes that foreign standards may apply where foreign nationals are involved. The provision directs the Secretary of Homeland Security to work with the International Maritime Organization and affected nations to promote a coordinated response to piracy including the development of common limitation on liability principles.

The 2010 Coast Guard Authorization further defines “piracy,” for purposes of the self-defense standards to be promulgated by the Coast Guard, as “any act of aggression, search, restraint, depredation, or seizure attempted against a vessel of the United States” by an unauthorized person.\(^{76}\) The current criminal statute on piracy with general applicability, dating from the beginning of the republic, criminalizes “the crime of piracy as defined by the law of nations.”\(^{77}\) Conflicting decisions in federal district court have illuminated potential problems with that standard.\(^{78}\) The 2010 Coast Guard Authorization standard may be a harbinger of a revision to that standard in the future.

2. Cruise Vessel Security and Safety Act of 2010

At the urging of the International Cruise Victims Association, Inc. (ICV), congressional hearings first considered the subject of the safety and security of American citizens sailing as passengers to and from the United States on large cruise vessels in 2005 and 2006. Then, in January 2007 the *Los Angeles Times* published an important article reporting on sexual assault incidents aboard one prominent cruise line.\(^{79}\) More hearings followed in

\(^{74}\)CGAA § 912.


\(^{76}\)CGAA § 912(c).

\(^{77}\)18 U.S.C. § 1651.


which assault victims testified and representatives of the cruise line industry highlighted the steps the industry had taken to address the problems.\textsuperscript{80}

The legislative effort received a major boost in June 2008 with the co-sponsorship of a comprehensive proposal advanced by the ICV and introduced by Sen. John Kerry of Massachusetts and Rep. Doris Matsui of California.\textsuperscript{81} The House passed an amended version of cruise vessel crime legislation again in the Coast Guard Authorization legislation in October 2009,\textsuperscript{82} and the ICV’s a stand-alone version of the legislation passed the House by an overwhelmingly bipartisan vote in November 2009.\textsuperscript{83}

But, the legislation languished in the U.S. Senate even though it was reported out of the Senate Commerce Committee unanimously in September 2009.\textsuperscript{84} Successive holds were placed on the legislation by senators and new questions posed about its potential cost and the potential burden on the U.S. Coast Guard to implement it. The process of dealing with these belated objections in the Senate took almost a year to resolve.

In the end, Congress passed the legislation and President Obama signed the Cruise Vessel Security and Safety Act of 2010 (2010 Cruise Safety Act) into law on July 27, 2010.\textsuperscript{85} When the law passed, the cruise industry’s leading trade organization, Cruise Lines International Association (CLIA), praised the new law for bringing “greater consistency and clarity of security laws and regulations” to the industry.\textsuperscript{86}

The 2010 Cruise Safety Act, among other things — requires cruise vessels to develop policies to restrict crewmember access to passenger cabins, mandates that cruise vessels adopt several other basic security measures familiar to American resort tourists, including security peepholes to be fitted on passenger cabin doors, security cameras, and equipping new cruise vessels with time sensitive locks and latches, requires cruise vessels to improve safety with 42 inch high guard rails and to distribute a safety guide to each passenger with information about how to contact the proper authorities, and American consulates, everywhere the ship sails, requires cruise ships to report to the Federal Bureau of Investigation and keep a record of all serious crimes and thefts of over $1000 and then to make this record available to the FBI, the Coast Guard, and other law enforcement officials and requires the

\textsuperscript{80} E.g. Hearing before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation and the Merchant Marine, Cruise Ship Safety: Examining Potential Steps for Keeping Americans Safe at Sea, June 19, 2008.
\textsuperscript{82} H.R. 3619, 111th Cong., 1st Sess. (2009), §§ 901-904.
\textsuperscript{86} [MISSING CITE]
on-board medical personnel on cruise vessels to meet enhanced qualifications and standards, undergo sexual assault response training, and carry the proper anti-retroviral medications.87

D. Jones Act, Short Sea Shipping

1. Jones Act Enforcement

The U.S. coastwise trade is governed by several laws restricting the carriage of merchandise, passengers and other activities to qualified U.S.-flag vessels popularly referred to as the “Jones Act.”88 Certain private interests have complained that the Jones Act is inadequately enforced particularly in the U.S. Gulf of Mexico.89 Jones Act enforcement generally rests with Customs and Border Protection, an agency within the U.S. Department of Homeland Security. The Coast Guard Authorization Act of 2008, which passed the U.S. House of Representatives, but did not become law, directed the U.S. Coast Guard also to enforce the Jones Act.90 That proposal, which was included in the 2010 Coast Guard Act almost verbatim, directs the Coast Guard to “establish a program” to enforce the Jones Act and to submit a report to Congress within a year of enactment “on the enforcement strategies and enforcement actions taken to enforce the coastwise trade laws.”91

2. Proposed Jurisdiction Extension for Offshore Alternative Energy

Federal law was extended to offshore activities beyond U.S. territorial waters via the Outer Continental Shelf Lands Act of 1953 or OCSLA.92 OCSLA was originally written primarily to facilitate offshore oil and gas production and is written in terms of such activities. As the offshore development of alternative energy sources such as wind power has progressed in the United States, issues have been raised about the application of OCSLA to such activities. In particular, the Jones Act may have uncertain application beyond the territorial waters of the United States based on current law.93 The CLEAR Act if enacted would have addressed this issue by amending the...
jurisdictional section in OCSLA to encompass not only exploration, development and production of oil and gas, but also such activities with respect to “energy from sources other than oil and gas.”

3. Proposed Americanization of EEZ

One of the issues that arose during Deepwater Horizon hearings and which caused consternation among certain Members of Congress was the fact that the Deepwater Horizon was documented in the Marshall Islands although it was operating in U.S. waters. Concerns were raised as to whether U.S. safety regimes fully applied when such a circumstance and whether the lack of U.S. registration may have contributed to the incident.

Congress also received testimony from one industry group that safety would be improved if the U.S. Gulf of Mexico was “Americanized.” Specifically, the group requested that Congress consider requiring that all vessels engaged in U.S. Gulf of Mexico oil and gas related activities be required to be documented in the United States.

Under present law, a number of activities – such as the act of drilling – can be accomplished with a foreign vessel within the U.S. exclusive economic zone (EEZ). Other activities, such as the movement of supplies from U.S. ports to drill rigs attached to the U.S. outer continental shelf, must be undertaken with the use of a Jones Act-qualified vessel. A Jones Act-qualified vessel is one that was built in the United States, documented in the United States and owned by a Jones Act qualified U.S. citizen (which requires 75 percent U.S. citizen beneficial ownership and U.S. management).

The CLEAR Act would have extended Jones Act-like restrictions to non-Jones Act activities in connection with the “support of exploration, development, or production or resources in, on, above, or below the exclusive economic zone.” Specifically, the bill would have required such activities to be undertaken by a U.S.-flag vessel owned by a Jones Act citizen which requires, among other things, 75 percent U.S. citizen beneficial ownership, but would have permitted such vessels to be built abroad. The Americanization amendment if enacted would taken effect “only with
respect to exploration, development, production, and support activities that commence on or after July 1, 2011.”

4. Short Sea Transportation Grants

The coastwise marine transportation of goods around the United States, often referred to as “short sea shipping,” has been frequently cited as one solution for current and future highway and rail congestion.\(^\text{100}\) Congress mandated the creation of a short sea program in the Energy Independence and Security Act of 2007 (2007 Energy Act) signed by President Bush into law on December 19, 2007.\(^\text{101}\) In accordance with that mandate, the Secretary of Transportation acting through the U.S. Maritime Administration (MARAD) has been developing a Marine Highway Program under that authority.\(^\text{102}\) On August 11, 2010, the Secretary designated 18 Marine Highway Corridors and eight Marine Highway Projects to operate on these corridors and be eligible for federal support.\(^\text{103}\)

In a significant change to the 2007 Energy Act, the National Defense Authorization Act for Fiscal Year 2010 made it clear that the federal support can include grants. That Act limits such grants to 80 percent of the cost of a project with a minimum of 20 percent being funded by the grant applicant.\(^\text{104}\) The Secretary of Transportation has already taken advantage of that authority to make grants of $7 million on September 20, 2010 to three Marine Highway Projects.\(^\text{105}\)

5. Proposed Modifications to the Harbor Maintenance Tax

The federal government imposes a harbor maintenance tax (HMT) of 0.125 percent of vessel passenger tickets and the declared value of commercial cargo entering U.S. ports whether from a foreign or domestic destination.\(^\text{106}\) The Harbor Maintenance Trust Fund, authorized by the Harbor Maintenance Revenue Act of 1986,\(^\text{107}\) is the repository of HMT as well as Saint Lawrence Seaway tolls and investment interest. The Harbor

\(^\text{100}\)See Maritime Admin., U.S. Dep’t of Transportation, America’s Marine Highway – Report to Congress (April 2011).
\(^\text{103}\)News Release, “U.S. Transportation Secretary LaHood Announces Corridors, Projects and Initiatives Eligible for Funding as Part of America’s Marine Highway (Aug. 11, 2010).
\(^\text{105}\)News Release, “U.S. Transportation Secretary LaHood Announces $7 Million in Grants to Jumpstart America’s Marine Highway Initiative” (Sept. 20, 2010).
\(^\text{106}\)26 U.S.C. § 4461.
Maintenance Revenue Act authorized expenditures from the Trust Fund for Army Corps of Engineers harbor operation and maintenance costs, including Great Lakes navigation projects and Saint Lawrence Seaway operating and maintenance costs. Although HMT provides a dedicated source of funding for harbor maintenance, fund collected are only spent if appropriated by Congress. Since 2003, HMT collections have substantially exceeded HMT funds appropriations, and the unspent balance in the fund as of October 1, 2009 was approximately $5 billion.

Industry groups have advocated changes to the way HMT works in two respects. Some groups, such as the American Association of Port Authorities (AAPA), have argued that the HMT funds should be used for their intended purpose and not accumulated. President Obama’s fiscal year 2012 budget estimated receipts from HMT of approximately $1.5 billion in fiscal year 2012 but only requested approximately $800 million in appropriations from the Trust Fund, leaving approximately an additional $700 million to accumulate in the Fund.

Several proposals were introduced in the 111th Congress to require that receipts be utilized fully for harbor maintenance programs as authorized by the Harbor Maintenance Revenue Act. None were enacted by the 111th Congress.

Other groups advocated that domestic cargo movements be exempted from HMT to avoid the multiple application of HMT (for each port entry). It has been argued that the application of HMT to domestic cargo movements disadvantages short sea shipping vis-a-vis land side movements of imported cargo (which only pay the HMT once). As with the other HMT proposals, none of the domestic cargo exemption measures were enacted into law by the 111th Congress.

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110 E.g. AAPA, Harbor Maintenance Tax, Government Relations Priorities (March 2010).
113 E.g. Hearing on Status of U.S.-flagged Vessels in U.S.-Foreign Trade held before House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Marine Transportation (July 20, 2010) (Statement of American Maritime Officers, International Organization of Masters, Mates & Pilots, Marine Engineers’ Beneficial Association and the Seafarers International Union).
E. Shipyards

1. MARAD Title XI Guarantee Financing Program

Title XI of the Merchant Marine Act, 1936 is a guarantee financing program administered by MARAD under which the U.S. Government provides a full faith and credit guarantee for the financing of the construction or reconstruction of vessels in U.S. shipyards.\textsuperscript{115} The program has been constrained since 2003 when a number of financial controls were adopted in the National Defense Authorization Act for Fiscal Year 2004.\textsuperscript{116} Many critics have alleged that the constraints are so severe as to make the program largely ineffective. According to MARAD’s web site, MARAD has approved only three applications in fiscal years 2009 and 2010, and an application approved on April 22, 2011 took more than two years to process.\textsuperscript{117}

In connection with its consideration of transportation appropriations for fiscal year 2010, the Senate Committee on Appropriations weighed in by reporting that the “affordable financing opportunities” that Title XI provides “are critical to ensuring that small and medium shipyards can build ships in the United States” and that the Committee expected MARAD to “move quickly to approve the loan guarantees, which are critical to our domestic shipbuilding industry.”\textsuperscript{118}

The National Defense Authorization Act for Fiscal Year 2010 adds support to Title XI by making certain findings. Specifically, that Act finds that Title XI “has a long and successful history,” “strengthens our Nation’s industrial base,” “enhances the commercial sealift capability of the Department of Defense,” and that “a revitalized and effective Maritime Loan Guarantee Program would result in construction of a more modern and larger fleet of commercial vessels.”\textsuperscript{119}

2. Proposed US Build Requirement

In addition to its Americanization proposal in the U.S. EEZ, the CLEAR Act would also have required that “offshore facilities” utilized in the U.S. Gulf of Mexico be U.S. built.\textsuperscript{120} Notably the provision would not have applied to vessels. The provision was subject to the issuance of a waiver for facilities already under contract at the time of enactment, if a U.S. built structure would

\textsuperscript{115}46 U.S.C. § 53701 et seq.
\textsuperscript{117}MARAD Press Release April 22, 2011.
\textsuperscript{119}2010 Defense Authorization Act § 3504.
\textsuperscript{120}CLEAR Act § 725.
not have been available within a reasonable time or in an emergency. This provision, like the remainder of the CLEAR Act, was not enacted.

3. Small Shipyard Financial Assistance

A Small Shipyards Grant Program was authorized by the National Defense Authorization Act for Fiscal Year 2006\(^{121}\) under which $14.7 million in grants were made to 17 U.S. shipyards on April 15, 2010.\(^{122}\) The purpose of the program, administered by MARAD, is to assist small shipyards (generally with fewer than 600 employees) in making capital improvements and in investing in maritime training programs.\(^{123}\) The program is a matching program whereby MARAD ordinarily will not fund more than 75 percent of the total cost of any project. The American Recovery and Reinvestment Act of 2009 (popularly known as the “stimulus bill”) increased the funding for the Grant Program to $100 million.\(^{124}\)

4. Vessel Construction Policy of the United States

Section 101 of the Merchant Marine Act, 1936 expresses in statute the national maritime policy of the United States.\(^{125}\) Among other things, it is the policy of the United States to maintain a merchant marine “sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States.” When section 101 was codified by Congress in 2006 as part of Title 46 of the U.S. Code the policy goal of having a merchant marine comprised of vessels “constructed in the United States” was left out of the law.\(^{126}\) The National Defense Authorization Act for Fiscal Year 2010 added those words back into the U.S. Code.\(^{127}\)

F. Taxes

1. Proposed Amendment to Capital Construction Fund

The Capital Construction Fund program, jointly administered by MARAD and the Internal Revenue Service, authorizes persons to establish

\(^{125}\)46 U.S.C. app. § 1101 (prior to the 2006 codification).
tax deferred accounts so long as the account funds are invested in qualified U.S.-flag investments. Under current law, all deposited funds must be utilized to construct or reconstruct vessels in the United States, and vessels constructed with the benefit of tax deferred funds are generally restricted to the U.S.-foreign trade or the U.S. non-contiguous trade (e.g. between the mainland and Hawaii). The Energy Independence and Security Act of 2007 also added as a permitted use, the expenditure of CCF funds on certain short sea transportation routes. A proposal was advanced in the 111th Congress to expand the capital construction fund further. Specifically, it was proposed to expand CCF qualified uses to include paying for maintenance and repairs done to a CCF qualified U.S.-flag vessel in the United States. This measure did not pass either chamber of Congress.

2. Tonnage Tax Revision

The American Jobs Creation Act of 2004 included a tonnage tax option for U.S.-flag vessel owners engaged in foreign commerce. The option permits U.S.-flag vessel owners to choose to pay a tonnage tax rather than income tax for certain qualifying shipping activities. Owners with vessels engaged in mixed domestic and foreign voyages have sought to have the law modified to permit the election of the tonnage tax for foreign voyage activities on mixed trade services. Measures were introduced in each chamber to accomplish this goal but neither advanced beyond committee consideration.  

\[128\] See 46 U.S.C. ch. 537.  