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Casenotes: Admiralty — Environmental Law — Oil Spill Liability — Federal Water Pollution Control Act Does Not Preempt State Statutes Imposing Unlimited Strict Liability. Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979)

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ADMIRALTY — ENVIRONMENTAL LAW — OIL SPILL LIABILITY — FEDERAL WATER POLLUTION CONTROL ACT DOES NOT PREEMPT STATE STATUTES IMPOSING UNLIMITED STRICT LIABILITY. *STEUART TRANSPORTATION CO. v. ALLIED TOWING CORP.*, 596 F.2d 609 (4th Cir. 1979).

On February 2, 1976, an oil barge sank in the Chesapeake Bay, spilling oil over oyster beds and along the Virginia shoreline.[1] Although combined federal and state damages claimed for cleaning up the pollution barely exceeded one-half million dollars,[2] the spill resulted in the decision by the United States Court of Appeals for the Fourth Circuit in *Steuart Transportation Co. v. Allied Towing Corp.*[3] The court's decision is significant because it could have a direct bearing on what would happen were a supertanker disaster to occur off the Atlantic Coast and spread oil over the ecologically important marshlands or the economically important beach resorts of Maryland.[4]

In *Steuart,* the Fourth Circuit held that the unlimited strict liability provision of Virginia's oil pollution statute[5] was not preempted by the damage ceilings of the Federal Water Pollution Control Act (FWPCA).[6] Thus, Virginia was able to recover all its costs for cleaning up the oil, even though the federal government's recovery was limited to the amount permitted by the FWPCA.[7]

The decision resolves one of the two questions raised in dicta but not decided by the United States Supreme Court in *Askew v.*

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1. Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 612 (4th Cir. 1979), *aff'g In re* Steuart Transp. Co., 435 F. Supp. 798 (E.D. Va. 1977).
2. *Id.*
3. 596 F.2d 609 (4th Cir. 1979).
4. The financial impact of the pollution caused by an oil supertanker disaster was demonstrated when the Amoco Cadiz broke up off the coast of Brittany, France in 1978. More than one and a half million barrels of oil were spilled across hundreds of miles of coastline in the worst oil pollution incident in history. *See* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 27-1, at 694-95 (3d ed. 1979) [hereinafter cited as BAER]. Damage claims may exceed two billion dollars, and the disaster has spawned, according to a maritime law professor, "the admiralty case of the century." *See* Kiechel, *The Admiralty Case of the Century,* FORTUNE, April 23, 1979, at 78 [hereinafter cited as FORTUNE].
5. 1973 Va. Acts ch. 417 (formerly VA. CODE § 62.1-44.34:2). The act as passed in 1973 had no limitation or ceiling upon liability. The act has been amended since the incident at issue in *Steuart* and now imposes a limit of five million dollars on the liability of a shipowner for a single discharge of oil. *See* VA. CODE § 62.1-44.34:2(B) (Supp. 1979).
6. 33 U.S.C. §§ 1251, 1321(f)(1) (1976 & Supp. 1977). The first federal statute specifically dealing with oil pollution was the Oil Pollution Act of 1924. 33 U.S.C. §§ 431-437 (1964). Subsequently, Congress passed the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), and amended it creating the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. 1977). The FWPCA was subsequently amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).
7. 596 F.2d at 613.

American Waterways Operators, Inc.[8] The *Askew* decision left unanswered whether state statutes imposing strict liability for oil pollution damage would be subject to the FWPCA limitations on damage recovery. Also undecided was whether the Limitation of Liability Act[9] would protect shipowners from unlimited liability to a state.[10]

Maryland has a strict liability statute similar to Virginia's.[11] The holding of *Steuart* indicates that in the event of oil pollution in Maryland waters, the state could recover its total cost of cleaning up the oil. The question of the Limitation of Liability Act's effect upon state statutes remains unresolved because the shipowner in *Steuart* could not qualify for the benefit of the Act. Resolution of this issue will determine whether shipowners who qualify under the Act can nonetheless be held strictly liable for unlimited damages under state statutes. This casenote explores the background of the statutory confusion clarified in part by *Steuart,* and predicts that the Limitation of Liability Act *will limit recoveries* under state strict liability statutes.

I. THE LEGAL BACKGROUND

A. General Maritime Law

Admiralty jurisdiction in the United States is expressly granted by the Constitution to the federal courts,[12] and extends by statute to all navigable waters,[13] and to damage done to land by vessels.[14] The

8. 411 U.S. 325 (1973).
9. 46 U.S.C. §§ 181-195 (1976).
10. In *Askew,* the Supreme Court was not faced with a governmental attempt to recover damages for oil pollution caused by a vessel. The Court, therefore, did not have a case or controversy before it that required the determination of these two issues. Justice Douglas posed the two questions in dicta. 411 U.S. 325, 332 (1973).
11. *Compare* MD. NAT. RES. CODE ANN. § 8-1401 to -1417 (Supp. 1979) *with* VA. CODE § 62.1-44.34:2 (Supp. 1979). Both the Maryland and the Virginia statutes are strict liability statutes.
12. "The judicial power shall extend to . . . all Cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2, cl. 1.
13. See De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776), the landmark case in which Justice Story established the broad range of maritime law in the United States and the jurisdiction of the federal courts in maritime matters. Specifically, *De Lovio* held that admiralty jurisdiction in tort extended to all navigable waters and in contract to all contracts relating to navigation. Furthermore, *De Lovio* held that when the United States Constitution was adopted, admiralty and maritime jurisdiction was not limited by English statutes that had narrowed its range in England. Consequently, admiralty and maritime jurisdiction in the United States was to be what it was prior to the Statutes of Richard II, 13 Rich. II 1, c.5 (1389); 15 Rich. II 2, c.3 (1391), providing jurisdiction over "all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea." 7 F. Cas. at 441. Justice Story's conclusion was subsequently adopted by the Supreme Court in Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870). *See also* N. HEALY & D. SHARPE, CASES AND MATERIALS ON ADMIRALTY 1-10 (2d ed. 1974).
14. Extension of Admiralty Act, 46 U.S.C. § 740 (1976). Historically, admiralty jurisdiction did not extend to damage caused by ships to the shore or to shore

United States has adopted the whole of the general maritime law, not solely that of Great Britain.[15] In addition, Congress may alter or supplement the nation's maritime law.[16] A major principle of maritime law is uniformity, the objective of which is to ensure that maritime commerce is not hampered by a myriad of conflicting local, state, and national laws.[17] In the United States, however, individual states are permitted to regulate certain maritime matters, usually when the concern is local and no general federal maritime law exists affecting the area.[18] There are questions as to how much of its admiralty power Congress may constitutionally delegate to the states.[19] In recent years, however, the Supreme Court has been less willing to find conflicts between state and federal laws and more willing to allow the states to exercise police powers in regard to maritime matters,[20] so long as no direct conflict with federal law arises.[21] Thus, state legislation and regulation in a narrow range of maritime matters has been permitted.

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facilities, but Congress extended the admiralty jurisdiction to include such cases by way of this statute. The statute has been upheld as constitutional. *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 209-11 (1971); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209-10 (1963).

15. *See* note 13 *supra.* Justice Story made repeated references to the uniformity and international character of maritime law and that these principles were adopted by the United States Constitution.
16. Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924) (holding that the Constitution empowered Congress to alter, qualify, or supplement the maritime rules).
17. *See* note 13 *supra. See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 1-1 to 1-19 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].
18. *See, e.g.,* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (holding that when no definition of "warranties" in marine insurance policies exists, federal courts should not create one, but should use state definitions instead).
19. *See* Southern Pacific Co. v. Jensen, 224 U.S. 205 (1917) (interpreting article three, section two of the Constitution to give Congress exclusive power over admiralty and maritime jurisdiction which the Congress should not delegate to the states). *Contra,* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (denying the contention that a Florida oil pollution statute was preempted by the Water Quality Improvement Act of 1970, and reversing a district court decision that quoted *Jensen* in supporting the contention). *See* American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1971). *See also,* Scherr, *Admiralty's Power in re Oil Pollution: The Ability of the State to Set More Stringent Penalties Than Those of the Federal Government,* 7 NAT. RES. LAW. 635 (1974).
20. *See, e.g.,* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (state statute regulating smoke emitted by vessel held to be valid exercise of state police power).
21. > Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility" . . . or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."
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> Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

B. The Limitation of Liability Act

In 1851, Congress enacted the Limitation of Liability Act[22] on behalf of American shipowners, who did not have the protection from *in personam* suits enjoyed by their British competitors.[23] British admiralty courts had only *in rem* jurisdiction and thus, under British law, a shipowner's liability for damages caused by his ship was limited to its value.[24] The theory was that a shipowner should not be held personally liable for the actions of his ship over which he had no control. The Act, therefore, allows a shipowner to limit his liability to the post-casualty value of the ship plus freight then pending if he can prove an absence of "privity or knowledge" concerning the negligence that led to the loss.[25] Although a potent weapon for shipowners desiring to avoid liability, the Act has drawn a barrage of criticism in recent years.[26] American courts in this century have been increasingly reluctant to allow shipowners the protection of the Act because, with the prevalence of corporate forms preventing personal liability and modern insurance protection, the protective objective of the Act seems obsolete.[27] Another reason for

22. 46 U.S.C. § 183 (1976).

23. GILMORE & BLACK, *supra* note 17, at § 10-2.

24. *Id. See also* 2 AM. JUR. 2d *Admiralty* § 1-2 (1962).

25. The liability of the owner of any vessel . . . for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner* or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (1976) (emphasis added).

As used in the statute, the meaning of the words *'privity or knowledge,'* evidently is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is to avail himself of a contemplated loss, without adopting appropriate means to prevent it.

Lord v. Goodall, Nelson & Perkins S.S. Co., 15 F. Cas. 884, 887 (C.C. Cal. 1877) (No. 8,506) (emphasis added), *aff'd,* 102 U.S. (12 Otto) 541 (1881). *See also,* Daniels v. Trawler Sea-Rambler, 294 F. Supp. 228 (E.D. Va. 1968); 3 E. BENEDICT, ADMIRALTY §§ 41-47 (7th ed. 1975); GILMORE & BLACK, *supra* note 17, at §§ 10-1 to 10-49; Volk & Cobbs, *Limitation of Liability,* 51 TUL. L. REV. 953 (1977). The effect of the Limitation of Liability Act is to limit the vessel owner's liability by establishing a fund (or maximum liability ceiling) that represents the total amount of money against which claims can be made by creditors of the vessel or those damaged by the vessel's operation.

26. *See In re* Porter, 272 F. Supp. 282, 285 (S.D. Tex. 1967) (for a collection of works and commentaries criticizing the Act); GILMORE & BLACK, *supra* note 17, at 821-24.

27. The Supreme Court said in 1954 that "[m]any of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail." Maryland Casualty Co. v. Cushing, 347 U.S. 409, 437 (1954).

Such an attitude reflects, it is suggested, not so much hostility to the shipping industry as a recognition of the fact that the Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity insurance) were available, shows increasing signs of economic obsolescence.

GILMORE & BLACK, *supra* note 17, § 10-4, at 822.

this reluctance is the development of modern communications allowing a shipowner to have direct control over his ships much of the time.[28]

In application, the Act can result in absurd consequences, as it did in 1967 when the supertanker Torrey Canyon broke up off of Land's End, England, causing millions of dollars of damage to the beaches of England and France. The shipowner, in preliminary proceedings in a United States District Court, was able to obtain approval for a liability fund of fifty dollars, which represented the value of one salvaged lifeboat.[29] There was an eventual cash settlement of about three million British pounds, but much of the cost of the disaster was borne by England and France.[30]

In addition, the Act has been employed by yacht owners to limit their liability.[31] Commentators have pointed out the irony of the use of the statute, designed to encourage maritime commerce, by pleasure boat owners despite their ownership of substantial liability insurance.[32] Yacht owners wealthy enough to hire someone else to run their vessels can avoid either "privity or knowledge" and thus utilize the Act to avoid *in personam* liability. Such an owner enjoys a freedom from liability under the Act unrelated to any legitimate maritime purpose.[33]

C. *The Federal Water Pollution Control Act*

The Torrey Canyon disaster spawned an international effort to provide compensation for the cost of cleaning up oil spills. International conventions were drafted[34] and the shipping industry

28. *See In re* Den Norske Amerikalinje A/S, 276 F. Supp. 163 (N.D. Ohio 1967), *rev'd on other grounds sub nom.* United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) (shipowner held to a duty to wield operational control over vessel because of presence of radio equipment on the vessel). *Contra,* Volk & Cobbs, *Limitation of Liability,* 51 TUL. L. REV. 953, 960 (1977) (pointing out that a vessel owner capable of radio contact with his ship at sea is in the unenviable position of either attempting to exercise operational control of a ship at sea in an emergency situation via radio communications or sitting by and assuming liability for such failure).
29. *In re* Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968), *modified,* 406 F.2d 1013 (2d Cir. 1968).
30. GILMORE & BLACK, *supra* note 17, § 10-4(b), at 824 n.13*l*.
31. *See, e.g.,* Coryell v. Phipps, 317 U.S. 406 (1943); *In re* Guggenheim, 76 F. Supp. 50 (E.D.S.C. 1947).
32. *See* GILMORE & BLACK, *supra* note 17, at 883.
33. *See, e.g., In re* Porter, 272 F. Supp. 282 (S.D. Tex. 1967). *See also* Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 748 (4th Cir. 1975) (limitation in yacht cases "is in conflict with our senses of justice and appropriateness").
34. International efforts began shortly after the Torrey Canyon disaster to change international laws regarding the liability for such oil spills, and to provide for cooperation when one occurred. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was ratified by the United States Senate in September, 1971, see Pub. L. No. 93-248 (1974). Ratifying nations agreed that any one of them could take immediate steps when threatened by oil pollution from a ship belonging to another, within certain limits. *See* BAER, *supra* note 4, § 27-2, at 696-97.

established its own fund for dealing with oil pollution.[35] The United States Senate refused to ratify the most significant of these conventions, however, believing its limitations on recovery were too low.[36] Instead, Congress enacted the Water Quality Improvement Act of 1970 and amended it in 1972, creating what is now the FWPCA.[37] The Act authorizes the development of a federal plan to clean up oil spills and provides for recovery by the federal government of its cleanup costs.[38] With few exceptions, liability is absolute.[39] The Act, however, now limits the liability of inland barges for an oil spill to $125.00 per gross ton or $125,000.00, whichever is greater, and that of other vessels to $150.00 per gross ton or $250,000.00, whichever is greater, so long as the discharge was not willful.[40]

The FWPCA contains two ambiguous sections, which courts have had difficulty interpreting. One is section 1321(f)(1), which declares that the limits established by the section are effective against shipowners "notwithstanding any other provision of law." Some commentators believe that the Act thus supercedes the Limitation of Liability Act by creating new limits on liability and thus prevents a shipowner from limiting his liability by establishing

35. In 1969 tanker owners formed a compensation plan entitled Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution Damage (TOVALOP). This arrangement was superceded in 1975 by the Civil Liability Convention (CLC), an international treaty, under which shipowners have absolute liability for oil pollution. Liability limits were established, however, and were about $16.7 million at the time of the Amoco Cadiz sinking. A private agreement among companies shipping oil, Contract Regarding an Interim Supplement to Tanker Owner Liability for Oil Pollution (CRISTAL) could provide an additional $13.3 million.

The CLC convention was not ratified by the United States Senate because the Senate believed the limitation figures were too low. Damage estimates in the Amoco Cadiz disaster range as high as $2 *billion*, and thus the existing liability provisions are inadequate. Efforts are underway to increase the limits under the CLC and CRISTAL plans.

Making matters more complicated for all parties are limits on insurance policies shipowners can carry. The Amoco Cadiz was insured for only $50 million. These limits have since been raised to $100 million. It seems obvious, however, that presently there are no existing means of providing that the cost of such disasters be paid by those responsible. *See* 3 E. BENEDICT, ADMIRALTY, §§ 115-119 (7th ed. 1975); BAER, *supra* note 4, at 696-99; GILMORE & BLACK, *supra* note 17, § 10-4(b); Higgins, *Pollution: International Conventions, Federal and State Legislation*, 53 TUL. L. REV. 1328 (1979) (discussing proposed federal legislation to create a "superfund").

36. *See* 3 E. BENEDICT, ADMIRALTY §§ 115-119 (7th ed. 1975).

37. *See* note 6 *supra*.

38. 33 U.S.C. § 1321(i)(1) (1972).

39. There is no liability if the oil spill was caused by: (1) An act of God; (2) An act of war; (3) Negligence on the part of the United States government; or (4) An act or omission by a third party. *Id.* at § 1321(f).

40. If the conduct causing the spill is determined to be "willful" the vessel owner is subject to liability without limitation. *See* note 6 *supra*. *See also* Healy & Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970*, 1 J. MAR. LAW & COM. 537 (1970) (the definitive work on the background of the Act). *See generally* 3 E. BENEDICT, ADMIRALTY § 111 (7th ed. 1975); DOLGIN & GUILBERT, FEDERAL ENVIRONMENTAL LAW 682-771 (1974).

his lack of "privity or knowledge."[41] This question has not been litigated beyond the federal district court level and the decisions there are not definitive.[42]

The other controversial section of the FWPCA is 1321(*o*)(2), which states that Congress disclaims any intention to preempt state statutes "imposing any requirement or liability with respect to the discharge of oil." More than twenty states have statutes imposing liability in various forms for oil spills in their waters.[43] Many of these statutes, including Maryland's, impose strict liability with no limitation upon the amount a shipowner might have to pay a state for cleaning up an oil spill.[44] The question regarding this section is

41. GILMORE & BLACK, *supra* note 20, § 10-4(b); 3 E. BENEDICT, ADMIRALTY § 112 (7th ed. 1975).

42. *See In re* Oswego Barge Corp., 439 F. Supp. 312 (N.D.N.Y. 1977) (New York statute imposing strict liability for oil spills held to be subject to the Limitation of Liability Act in a case involving the grounding of an oil barge); *In re* Harbor Towing Corp., 335 F. Supp. 1150 (D. Md. 1971) (subjecting Maryland's strict liability statute to the Limitation of Liability Act). In *Harbor Towing,* however, Maryland brought its action under the state's strict liability statute and the Wreck Statute, 33 U.S.C. § 409 (1976), which requires the owner of a vessel sunk in a "navigable channel" to mark the sunken vessel and make diligent attempts to remove it. The possible impact upon the Wreck Statute of the FWPCA, which had just taken effect at the time of the *Harbor Towing* decision, was not considered except in an aside at the end of the opinion. The FWPCA's possible impact on the Limitation of Liability Act was not considered in either case. *Compare* United States v. Dixie Carriers, Inc., 462 F. Supp. 1126 (E.D. La. 1978) *with* United States v. M/V Big Sam, 454 F. Supp. 1144 (E.D. La. 1978). In both cases the issue was whether the FWPCA superceded the Rivers and Harbors Appropriation Act (The Refuse Act) of 1899. 33 U.S.C. §§ 407, 411-412 (1970). In *M/V Big Sam,* which involved a collision between a tug and a barge, the court held that there was no conflict between the statutes and that the FWPCA did not supercede the Refuse Act. In *Dixie Carriers,* which involved a similar factual scenario, the court held that under certain situations the FWPCA did supercede the Refuse Act. The *Dixie Carriers* court also determined that the FWPCA was the federal government's exclusive remedy for the recovery of costs of an oil spill cleanup; but that the Refuse Act could nonetheless be used to recover for damages to property arising from an oil spill. The court in *Steuart* adopted the reasoning of the court in *Dixie Carriers,* and held that the FWPCA was the federal government's exclusive remedy for its costs of cleaning up an oil spill. 596 F.2d at 615.

Damage to property was not an issue in *Steuart. But see In re* Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979). In *Allied Towing* the United States District Court for the Eastern District of Virginia held that Virginia could impose liability upon Allied for the loss of waterfowl destroyed when another of Allied's barges sank in the Chesapeake Bay. The court stated that "the Clean Water Act of 1977 amendments to the FWPCA did not preempt state created liability for oil spills, and that no part of Virginia's claim under state law for damage to its natural resources" was satisfied by Allied's settlement with the federal government and Allied's subsequent discharge from liability under the FWPCA. 478 F. Supp. at 404.

43. MD. NAT. RES. CODE ANN. §§ 8-1401 to -1417 (1974 & Supp. 1979). *See also* note 71 *infra.*

44. The Maryland Port Administration and the department shall charge and collect a compensatory fee from the person responsible for any oil spillage. This fee shall cover the cost of labor, equipment operation, and material necessary to eliminate the residue of oil spillage, and the cost of restoring the area damaged by the spillage to its original condition.

MD. NAT. RES. CODE ANN. § 8-1408 (1974).

whether by declining to preempt state statutes Congress was protecting those statutes from the Limitation of Liability Act. This question has never been decided by any court.

D. The Askew *Decision*

Florida was one of the first states to enact strict liability legislation governing oil spills,[45] and the statute was quickly challenged.[46] The federal district court declared in *American Waterways Operators, Inc. v. Askew* that the state act was unconstitutional,[47] relying on the landmark case of *Southern Pacific Co. v. Jensen*[48] to hold that the Florida statute conflicted with the supremacy of federal maritime law. The court went on to note that to allow states to regulate shipping through such statutes would destroy the principle of uniformity.[49] In addition, the district court observed that even if the state law were authorized by the FWPCA, such authorization would be an impermissable delegation of power by Congress.[50]

The United States Supreme Court reversed the district court in an unanimous decision,[51] holding that the statute was a valid exercise of Florida's police power in an area not preempted by federal law. The Court specifically declined to decide both whether the state's costs would have to be included within the limitation of the FWPCA and whether a shipowner could escape liability under a state statute through use of the Limitation of Liability Act.[52] Indeed,

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45. The Oil Spill Prevention and Pollution Control Act, ch. 70-244 § 12, 1970 Fla. Laws 740 (current version at FLA. STAT. ANN. § 376.12 (West Supp. 1979)). For a comprehensive study of the Florida legislation and changes that occurred subsequent to the *Askew* decision when maritime interests began pulling out of Florida (limitations on liability were eventually adopted) *see* Barrett & Warren, *History of Florida Oil Spill Legislation,* 5 FLA. ST. L. REV. 310 (1977). *See also* Maloof, *Oil Pollution: Cleaning Up the Legal Mess,* 43 INS. COUNSEL J. 605 (1976).

46. American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1971). The only other state pollution statute challenged in court prior to *Steuart* was The Maine Coastal Conveyance of Oil Act, ME. REV. STAT. tit. 38, §§ 541-557 (Supp. 1977). For a thorough discussion of the Maine act, see Comment, *Liability for Maritime Oil Pollution, A Comparison of the Maine Coastal Conveyance Act with Federal Liability Provisions,* 29 ME. L. REV. 47 (1977). The Maine statute was upheld by the Maine Supreme Court, and the United States Supreme Court refused to hear the case on appeal. *See* Portland Pipeline Corp. v. Environmental Improvement Comm., 307 A.2d 1 (Me. 1973), *appeal dismissed,* 414 U.S. 1035 (1973).

47. 335 F. Supp. at 1250-51.

48. 244 U.S. 205 (1917).

49. 335 F. Supp. at 1248.

50. *Id.* at 1249.

51. Askewv v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

52. *Id.* at 332.

the court could not have decided these issues because *Askew* did not present a factual scenario in which a state was proceeding against the owner of a vessel to recover damages for the cost of cleaning up a spill. In *Askew,* the plaintiff organization represented the interests of licensees of oil terminal facilities. This organization requested the federal court to enjoin the enforcement of the Florida statute, alleging that the FWPCA preempted the Florida requirement that all licensees of such terminal facilities carry insurance or post bonds to show their ability to pay state damage claims in the event of an oil spill.[53]

The *Askew* Court considered the Solicitor General's argument that the Limitation of Liability Act preempts the Florida statute "so far as vessels are concerned," but reasoned that because the state statute dealt with the regulation of terminal "facilities," not vessels, it thus did not conflict with the Limitation of Liability Act.[54] The decision did not mention *In re Harbor Towing Corp.*,[55] the one lower court decision that dealt with the effect of the Limitation of Liability Act upon state oil pollution statutes. In *Harbor Towing,* Chief Judge Northrop of the United States District Court for the District of Maryland held that the Limitation of Liability Act preempted Maryland's strict liability oil pollution statute,[56] and allowed the owner of a barge that spilled oil into the Baltimore harbor to limit his liability to $33,000.00, despite the $500,000.00 in damages caused by the spill.[57] But the question of whether the FWPCA preempted the Limitation of Liability Act and permitted the state full recovery was not considered in *Harbor Towing* because the FWPCA had just been enacted at the time of the decision.

The Supreme Court could not address the effect of the liability ceilings of the FWPCA upon Florida's strict liability statute, because in *Askew* there were no damages being claimed as the result of an oil spill. Thus, there was no conflict between state claims for damages and the federal ceilings of the FWPCA. *Askew* simply held that a state could pass legislation imposing liability upon those polluting its waters.[58]

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53. *Id.* at 331. *See also* The Oil Spill Prevention and Pollution Control Act, *supra* note 45, at § 14.
54. *Id.* at 331. The Court distinguished the Limitation of Liability Act's exclusive control over damage caused by "vessels" from the Florida statute's regulation of "facilities."
55. 335 F. Supp. 1150 (D. Md. 1971).
56. MD. NAT. RES. CODE ANN. §§ 8-1401 to -1417 (1974 & Supp. 1979).
57. 335 F. Supp. at 1152.
58. The *Askew* case has been the subject of extensive commentary and criticism. The Court could not address the major issues and had to leave unanswered a number of questions clearly likely to cause further litigation, which they did. *See* GILMORE & BLACK, *supra* note 17, at § 10-4(b); 3 E. BENEDICT, ADMIRALTY § 113 (7th ed. 1975); Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations,* 28 U. MIAMI L. REV. 524, 543-46 (1974); Sisson, *Oil Pollution Law and the Limitation of Liability Act: A Murky Sea for Claimants*

II. THE *STEUART* CASE

Steuart Transportation Company's oil tank barge STC-101, loaded with 19,700 gallons of oil[59] and in tow of Allied's tug Falcon, sank four miles south of the Smith Point light on February 2, 1976, causing an oil spill over miles of Chesapeake Bay oyster beds and Virginia shoreline. Steuart sought to limit its liability by qualifying under the Limitation of Liability Act. The trial court found, however, that Steuart's managers and superintendents were negligent in their inspection of the barge, and that the barge sank because of various defective conditions that adequate inspection would have revealed.[60] Thus, the trial court held that Steuart could not establish a lack of privity or knowledge and therefore could not limit its liability.

Steuart sought, in the alternative, the protection of the limitation levels of the FWPCA, which at that time would have established liability at $122,300.00, computed at $100.00 per gross ton of the barge.[61] Steuart also asked the court to combine the federal and state cleanup costs in order to subject Virginia's, as well as the federal government's, costs to the limits of the FWPCA. Had Steuart been successful, the Commonwealth of Virginia would have recovered only a pro rata portion of its expenses, because the combined costs of $521,000.00 substantially exceeded the FWPCA limit. The trial and appellate courts held both that Steuart's liability to the federal government was subject to the limits of the FWPCA,[62] and more importantly that Virginia's claims were outside the FWPCA and thus not subject to the FWPCA limits.

Steuart argued that the state statute imposing unlimited strict liability conflicted with the liability limitation of the FWPCA, thus raising one of the questions left unanswered by *Askew*.[63] The Fourth Circuit, however, relying upon the recent Supreme Court case of *Ray v. Atlantic Richfield Co.*,[64] applied the principle that "[f]ederal legislation does not supercede a state statute based on the police powers unless Congress has manifested a clear intention to preempt the field or the state statute actually conflicts with the federal law."[65] The court then discussed the legislative intent behind Section 1321(*o*)(2) of the FWPCA, which the court determined disclaims any

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Against Vessels, 9 J. MAR. LAW & COM. 285, 303-15 (1978; Swan, *Challenges to Federalism: State Legislation Concerning Marine Oil Pollution*, 2 ECOLOGY L.Q. 437 (1972).

59. 435 F. Supp. at 800.
60. *Id.* at 803. A worn ventilator cowling broke loose flooding the stern pump room, and unremoved scupper plugs caused cargo hatch spill rails to retain water.
61. 33 U.S.C. § 1321(f)(1) (1976). The current limit is $125.00 per gross ton for inland barges.
62. Thus ruling against the federal government's contention that Steuart's negligence was willful. *See* note 40 *supra*.
63. 411 U.S. 325 (1973).
64. 435 U.S. 151, 157-58 (1978).
65. 596 F.2d at 620.

attempt by Congress to restrict state legislation regarding oil spill liability.[66] It also dismissed as "too attenuated" Steuart's claim that the limit of the FWPCA was imposed by Congress in order that shipowners could obtain the insurance coverage required by the Act.[67] The court then concluded that Virginia could recover its cleanup costs directly from Steuart, independent of the FWPCA limitations.

In addition, the Fourth Circuit held that Steuart could not qualify under the Limitation of Liability Act.[68] Therefore, the Fourth Circuit did not decide whether, had Steuart qualified, the Act would have limited Virginia's recovery under its statute, although the court appeared to assume that it would.[69] In contrast, the trial court had observed in a footnote that the language "notwithstanding any other provision of law" in the FWPCA might preclude application of the Limitation of Liability Act to all claims for oil spill cleanup costs.[70] The question remains unresolved by the courts.

III. THE MARYLAND STRICT LIABILITY STATUTE

The holding in *Steuart* indicates that, notwithstanding the FWPCA, Maryland's strict liability statute could allow the state to recover all the costs it incurs in cleaning up oil spilled in Maryland waters, because the key provisions of the Maryland statute are similar to the Virginia statute construed by the *Steuart* court.[71] The statute provides in part that the Maryland Port Administration and the Department of Natural Resources,

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66. In 33 U.S.C. § 1321(*o*)(2), Congress expressly disclaimed any intention to preempt the states "from imposing any requirement or liability with respect to the discharge of oil." Congress recognized the states' primary responsibility to eliminate pollution, and it directed the President to prepare a national contingency plan for the removal of oil spills that would coordinate the efforts of federal and state agencies. Having acknowledged the importance of state efforts in this area, Congress did not hobble the states by subjecting their claims for removal costs to the limitation in the [Federal Water] Pollution [Control] Act. The House conference report, commenting on § 1321(*o*)(2)'s antecedent in the Water [Quality Improvement] Act, explained that a state could impose "additional requirements and penalties" for the discharge of oil into the waters of the state.
596 F.2d at 620 (citations omitted). See note 82 *infra*.

67. There are some commentators who believe this is not an attenuated argument. *See, e.g.*, Maloof, *supra* note 45 (present limits on insurance of oil tankers are woefully inadequate for the potential damage an oil spill can cause).

68. *See* text accompanying note 60 *supra*.

69. 596 F.2d at 615-16.

70. 435 F. Supp. at 806 n.8. This conflicts with the argument and assumption of the Solicitor General commented upon by the United States Supreme Court in *Askew*. *See* text accompanying note 54 *supra*.

71. MD. NAT. RES. CODE ANN. §§ 8-1401 to -1417 (1974 & Supp. 1979). More than twenty states have similar legislation. The statutes are collected at 3 E. BENEDICT, ADMIRALTY § 113 (7th ed. 1975).

> shall charge and collect a compensatory fee from the person responsible for any oil spillage. This fee shall cover the cost of labor, equipment operation, and material necessary to eliminate the residue of oil spillage and the cost of restoring the area damaged by the spillage to its original condition.[72]

Other sections of the statute provide for a contingency fund for cleanup expenses,[73] bonds,[74] and with certain exceptions, criminal penalties.[75] The statute imposes strict civil liability on any party responsible for an oil spill in Maryland waters and requires that party to compensate the state in full for the state's cleanup costs.

More recently, *In re Allied Towing Corp.*[76] takes *Steuart* one step further and indicates that the restoration clause of the Maryland statute probably will allow the state to collect damages for injury to its natural resources resulting from an oil spill. The shadow of *In re Harbor Towing Corp.*,[77] however, casts doubts upon the Maryland statute's ability to reach beyond the potentially small fund that could be established by a vessel owner under the Limitation of Liability Act. Thus, the effect of the Limitation of Liability Act upon state statutes, left undecided by *Askew,* remains an important undecided question following *Steuart.*

IV. THE REMAINING QUESTION

In *Steuart,* the Fourth Circuit found that Congress' intent in enacting the FWPCA was to provide the federal government a remedy for oil spill damage without preempting state statutes.[78] As a result, there are now two areas of potential liability for the owner of a vessel responsible for an oil spill. If the federal government incurs expense, the shipowner will be liable for the government's costs up to the FWPCA limits. *Steuart* implies that the "notwithstanding any other provision of law" language of the FWPCA and its accompanying legislative history[79] effectively supersedes the Limitation of

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72. MD. NAT. RES. CODE ANN. § 8-1408 (1974).
73. *Id.* at § 8-1411. The $1,000,000.00 limit, in light of the enormous potential of damage carried by a major spill, may be too low if supertankers begin coming closer to Maryland waters.
74. Except for a vessel carrying or receiving 25 barrels or less of oil, any vessel, whether or not self-propelled, in or entering upon the waters of the state to discharge or receive a cargo of any bulk oil in the state shall post a bond of $100 per gross ton of vessel with either the Maryland Port Administration or the department.
Id. at § 8-1407(a).
75. *Id.* at § 8-1410. This section provides exceptions in cases of "emergency imperiling life or property, unavoidable accident, collision, or stranding."
76. 478 F. Supp. 398 (E.D. Va. 1979). *See* note 42 *supra.*
77. 335 F. Supp. 1150 (D. Md. 1971).
78. 596 F.2d at 620. *See also,* H.R. REP. NO. 91-940, 91st Cong., 2d Sess. 42, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 2712, 2727.
79. 596 F.2d at 615. *See also,* H.R. REP. NO. 91-127, 91st Cong., 1st Sess. 11, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 2691, 2702.

Liability Act in the area of liability to the federal government. *Steuart,* however, leaves undecided whether, were the same oil spill to cause a state to incur expense, liability to the state would be governed by state unlimited strict liability statutes, or whether the shipowner would be able to limit liability by qualifying under the Limitation of Liability Act. This question is critical because, without the protection of the Limitation of Liability Act, shipowners could face massive liability were a major oil spill to occur. With continued reliance upon foreign oil shipped to the United States by tanker, the likelihood of a major spill remains high. A major spill that spread over the waters of the Chesapeake Bay, or along the Atlantic Coast, could cause immeasurable damage to natural resources. A Torrey Canyon or Amoco Cadiz supertanker disaster off Cape Hatteras, for example, where many other ships have sunk, could create liability that no shipowner could bear.

Although both *Steuart* and *Allied Towing* held that the states could avoid the limits of the FWPCA and proceed against the vessel owners for all the damages the states incurred, in neither case was it settled whether the Limitation of Liability Act might limit a state's recovery, because neither vessel owner could qualify under that Act. Similarly, the FWPCA had only been recently enacted when Judge Northrop found in *Harbor Towing* that Maryland could not recover more than the damage ceiling imposed by the Limitation of Liability Act. Therefore, Judge Northrop did not consider whether the FWPCA renders the Limitation of Liability Act inapplicable to situations in which a state sues the vessel owner.[80]

On one hand, the Limitation of Liability Act's declining popularity among courts and commentators supports a prediction that it will be found not to preempt state unlimited strict liability statutes. Indeed, in recent years shipowners have found it increasingly difficult to establish the lack of "privity or knowledge" that is the prerequisite to limitation of liability.[81] On the other hand, an even stronger argument can be made that the Limitation of Liability Act will check the unlimited liability imposed by some state oil spill statutes. Analysis of the *Steuart* decision and the FWPCA's provisions suggests the Act will limit recovery under state statutes. *Steuart* held that state recoveries for oil spill damages are not limited by the FWPCA because that Act applies only to recovery by the federal government. Inasmuch as the FWPCA provides the federal government's sole remedy for oil spills, the *Steuart* court reasoned that it necessarily must be solely a limitation on a shipowner's federal liability. Thus, if the FWPCA applies only to the federal government, then it logically follows that the FWPCA superceded the Limitation of Liability Act only with respect to liability to the federal government.

80. *See* note 42 *supra.*
81. *See* note 27 *supra.*

Similarly, the Congressional intent manifest in section 1321(o)(2) indicates that the FWPCA does not preempt state oil spill legislation.[82] Other language in the Act justifies the inference that it supercedes the Limitation of Liability Act only with respect to federal liability. Section 1321(f)(1) establishes the federal government's right to collect damages and limits the amount of recovery. In addition, section 1321(f)(1) stipulates that it is effective "notwithstanding any other provision of law." This language can refer only to the federal right and its limits. If the states are protected from the limits of the FWPCA because its limits apply only to the federal government, then whether the FWPCA supercedes the Limitation of Liability Act as to the federal government has no relevance to the application of the Limitation of Liability Act to state statutes.

V. CONCLUSION

Although there has been a great deal of commentary since *Askew,* until *Steuart* no case had resolved the questions that decision left unanswered: (1) whether the limits of the FWPCA apply to the states, and (2) whether state recoveries may be limited by the Limitation of Liability Act. The Fourth Circuit decided, in a well-reasoned opinion, that state recoveries are not limited by the FWPCA. The result, at least in the Fourth Circuit, will be that shipowners whose vessels spill oil into the waters of states that impose strict and unlimited liability for such spills will have to pay those states' full cleanup costs. In addition, as a result of *Allied Towing,* shipowners will be responsible for damage to natural resources, unless they are able to use the Limitation of Liability Act to establish a fund limited to the remaining value of the vessel.

Although the federal government's recovery of its costs is limited, and Virginia has amended its statute to provide for a limit on liability, the Maryland statute continues to impose unlimited liability. Consequently, in the future, Maryland may well engage in a major legal battle to resolve whether the Limitation of Liability Act limits state damages in oil spill cases. The *Steuart* decision provides a framework for analysis of that inevitable conflict. Such analysis leads to the conclusion that the Limitation of Liability Act retains vitality when state strict liability statutes are applied against shipowners. Thus, when a vessel owner has neither "privity or knowledge," a state's recovery under its strict liability statute, no matter how extensive the damage, might be limited to the value of a

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82. *See* text accompanying note 66 *supra.* The statute provides in pertinent part as follows: "Nothing in this section shall be construed as preempting any State . . . from imposing . . . liability with respect to the discharge of oil . . . into any waters in such State." 33 U.S.C. § 1321(o)(2) (1976).

single lifeboat, as in the Torrey Canyon disaster, under the provisions of the 129-year old Limitation of Liability Act.

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