

## H.R. 5503, The SPILL Act Set for Quick Action in the Senate Bill Has Major Implications for Fishing Businesses

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On July 1, 2010, the U.S. House of Representatives passed the H.R. 5503, the “Securing Protections for the Injured from Limitations on Liability Act” or SPILL Act, by voice vote. The bill has now moved to the Senate where it has been referred to the Commerce, Science, and Transportation Committee. **A markup of this bill in the Commerce Committee is scheduled for Wednesday, July 21, 2010.** Actions of this sort by this committee have a history of moving quickly through the Senate, often passed by unanimous consent.

While, as the name suggests, the primary motivator of the bill was the explosion of the Deepwater Horizon oil rig (and subsequent oil spill), which cost the life of eleven workers and injured seventeen others, this measure affects a much broader range of maritime interests. In the main, the bill modifies the liability schemes of the Jones Act, 46 U.S.C. §§ 30101-30106), the Death on the High Seas Act (46 U.S.C. §§ 30301-30308), and the Limitation of Liability Act. 46 U.S.C. §§ 30501-30512). The SPILL Act also contains provisions specific to maritime injuries or deaths occurring in connection with “incidents” under the Oil Pollution Act of 1990 (33 U.S.C. Chapt. 40), such as the Deepwater Horizon spill. Briefly, this provision prevents the sale or lease of “significant property” during bankruptcy unless there are assets sufficient to satisfy such claims. The effective date of the law is April 20, 2010, so as to bring the Gulf oil disaster within the new terms of the law.

Should the Senate adopt this bill, changes to the liability provisions under maritime law will impact fishermen, tug and tow operators, marine shippers, passenger vessel companies, and others covered by the Jones Act and the Death on the High Seas Act. These changes, discussed below, have the impact of generally broadening the types and amounts of damages plaintiffs may collect for maritime injuries and deaths. As such, this legislation could increase the costs, or even threaten the continued availability, of protection and indemnity insurance and otherwise threaten the viability of small marine operations, such as those in the fishing, tug and tow, and other fields

### I. Death on the High Seas Act (“DHSA”)

DHSA provides statutory wrongful death cause of action for incidents occurring beyond a state’s territorial waters. It covers deaths resulting from negligence or unseaworthiness of the vessel, a broad term encompassing physical fitness of the vessel, adequate safety systems, crew competence, and the like. Suits under the law can be brought by a decedent’s personal representative for the benefit of spouse, parents, children, or dependent relatives to recover damages for loss of support, inheritance, services, and other losses of a monetary nature. The law precludes recovery of non-economic damages, such as loss of consortium, pain and suffering, and emotional harm. Claims under the DHSA arise in admiralty, which precludes trial by jury.

The SPILL Act broadens DHSA liability in several ways. For one, it creates an action under law, meaning that wrongful death cases can be heard in civil courts with the option for jury trials. The law also explicitly provides for recovery “nonpecuniary loss,” defined as compensation for loss of “care, comfort, and companionship,” and a decedent’s pre-death pain and suffering. This change would provide recovery for the emotional distress and other intangible losses by each of a decedent’s survivors in addition to the other forms of recovery for economic losses.

## **II. The Jones Act**

The Merchant Marine Act of 1920, popularly known as the Jones Act, broadly regulates shipping activities in the waters of the United States. The SPILL Act affects Jones Act provisions dealing with the right of seamen to bring a cause of action for injuries at sea, or for the seaman’s personal representative to bring a claim in the event a seaman eventually dies from such injuries. The Jones Act provides a seaman a personal right to maintain a civil action, including the right to a jury trial, against an employer for damages resulting from injuries sustained in the course of employment. It, along with general maritime law, also provides a wrongful death claim, to the same extent as the DHSA, for fatalities occurring in state waters.

Damages allowable under the Jones Act currently include not only pecuniary losses, such as medical expenses, lost wages, and lost earning capacity, but also compensation for pain and suffering. The SPILL Act broadens the scope of damages in cases of deaths of Jones Act seamen in a manner equivalent to the changes explained above for DHSA by including compensation for the losses of “care, comfort, and companionship” to a survivor’s parents and dependents. Such intangible damages can greatly increase the amount of awards in Jones Act wrongful death cases.<sup>1</sup>

## **III. The Limitation of Liability Act (“LOLA”)**

LOLA was adopted in 1851 to limit liabilities of shipowners for “any claim, debt, or liability” to “the value of the vessel and pending freight.” It also establishes proportionate liability (as compared to joint and severally liability) for each owner of a vessel to the limit of such owner’s stake. This liability limit can be defeated if the owner is aware of, or should have been aware of, a negligent or unsafe condition leading to the damage, injury or death.

The SPILL Act would repeal LOLA in its entirety. The result is that vessel owners will be responsible for the full value of any damages awarded against a vessel for a maritime tort. Additionally, the SPILL Act also includes changes to the law that would make it very difficult to discharge wrongful death claims in bankruptcy by giving holders of such claims the power to block sales of company assets without assurances that their claims will be satisfied. Typically, such sales would protect only secured creditors, which wrongful death claimants are not.

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<sup>1</sup> The rationale for limiting this provision to incidences of death resulting from injuries appears to be a misperception that non-pecuniary losses are covered in the cases of injuries, but not deaths. Representative Conyers stated as much during the floor debate on H.R. 5503, “The Jones Act allows recovery for a family’s non-pecuniary loss if a seaman is injured but survives, but it denies the family that same recovery if he dies.” However, such relief has been specifically denied by courts. See, e.g., *Miles v. APEX Marine Corp.*, 498 U.S. 19 (1990); *Scarborough v. ClemcoInd.*, 391 F.3d 660 (5<sup>th</sup> Cir. 2004).

#### **IV. Discussion**

The SPILL Act passed with only token opposition from House Republicans. Some of the more contentious provisions, including those relating to confidentiality agreements signed by claimants following the BP oil spill, state class actions, and other liability changes had been struck from the bill through negotiations. As a result, there was no strong constituency to oppose the remaining changes, particularly as the issue was framed both in personal terms of providing relief to the families of the killed and injured Deep Water Horizon workers (many of whom testified and were present in the House for final passage) and of modernizing “antiquated” maritime laws that, it was argued, have outlived their original purpose.

As such, the SPILL Act likely has strong tailwinds as it is prepared for action in the Senate. Advocates include not only the highly sympathetic victims’ families, but also Jones Act lawyers and the trial lawyers’ trade group, the American Association for Justice. The only active opponents have been the cruise industry and the U.S. Chamber of Commerce. In short, the issue has largely been viewed through the prism of victims versus large oil, cruise, and other businesses.

According to Senate Commerce Committee staff, the prospects of passage are quite strong. However, there may be a brief window of opportunity to demonstrate the impacts on small business fishermen and others in marine industries that are struggling in the current economic and regulatory climate. Certainly the impacts on the cost or even availability of P&I insurance, already a significant cost, has not been fully vetted.

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