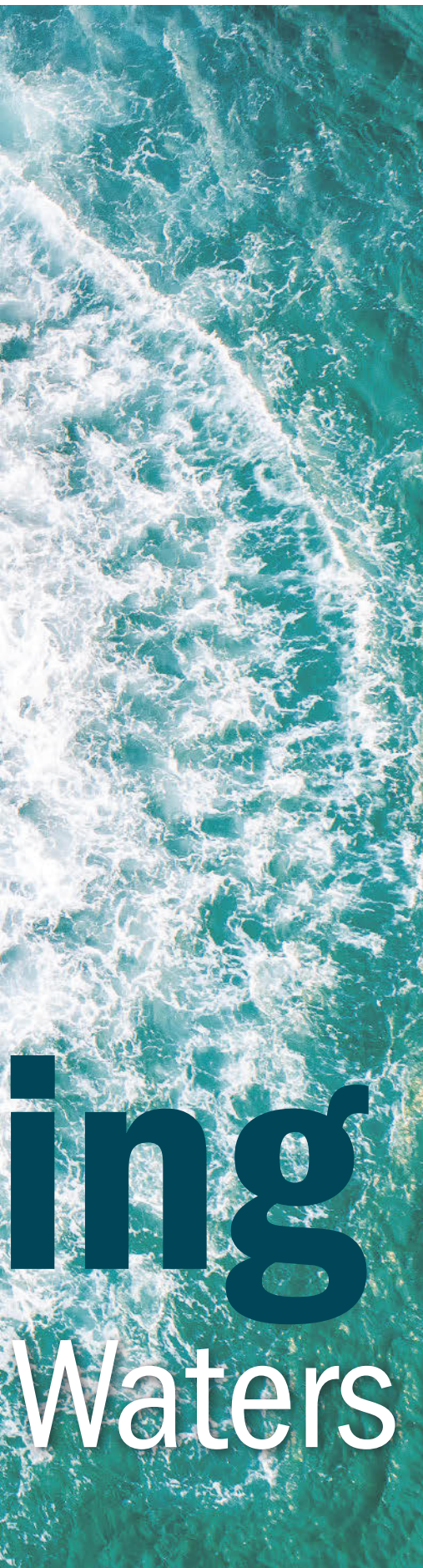




# Navigat Rough





The surge in recreational boating has led to more litigation on behalf of people injured or killed on the water. Be aware of federal maritime laws that can affect everything from jurisdiction to damages.

By || **IRA LEESFIELD AND ADAM T. ROSE**

**A**s COVID-19 brought the world to a standstill and most land-based activities shuttered, one industry in particular boomed: recreational boating. People rushed to the water in record numbers to socially distance and stay active. In 2020, new boat sales in the United States soared to \$47 billion, a 13-year high.<sup>1</sup> Small open motorboats—the kind used for water skiing—were a favorite, and sales increased by 20%.<sup>2</sup> Boat rentals also skyrocketed—the boat rental company GetMyBoat saw bookings grow by 3,900% during 2020, and 700% into 2021.<sup>3</sup>

With the waters more congested than ever, the number of boating incidents in 2020 increased by 26%.<sup>4</sup> The majority involved open motorboats and personal

watercraft such as jet skis.<sup>5</sup> Fatalities increased by 25%, with 767 reported.<sup>6</sup> Early data suggests that 2021's numbers will be even worse.<sup>7</sup> As boating cases continue to rise, you must be prepared to handle these cases and best serve your clients and communities.

Carefully calculate your plan for these cases from the start—begin by learning what laws apply. In most instances, it will be maritime law, which applies to boating incidents that arise on “navigable waters,” have a substantial relationship to traditional maritime activity, and have the potential to disrupt maritime commerce.<sup>8</sup> “Navigable waters” generally means any body of water used or capable of being used for commerce with other states or foreign countries<sup>9</sup> and can include oceans, great lakes, and major rivers, so long as no natural or artificial obstructions

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such as rapids or dams prevent potential trade.<sup>10</sup> And any injury occurring on a recreational vessel likely has the potential to impact the number of boats or watercraft that are purchased or rented, thereby affecting maritime commerce.<sup>11</sup>

If your case is bound by maritime law, pure joint and several liability applies, which is unique to maritime law and largely abandoned by the states.<sup>12</sup> Under the principles of joint and several liability, a plaintiff may collect an entire judgment from any and all joint tortfeasors without any consideration of percentage of fault.

If maritime law applies and the incident takes place within a state's territorial waters, then state and federal courts will have concurrent jurisdiction. In these cases, thanks to the Savings to Suitors Clause,<sup>13</sup> plaintiffs can sue in either court (although the case may be removed based on diversity jurisdiction).

Regardless of where you file, know what statute of limitations applies—which may not be uniform in all boating cases. First, check if your client has a ticket or contract that specifies the statute of limitations. For example, a rental agreement could lessen the statute of limitations to an agreed on period, such as one year.

If there is no contract, a personal injury or wrongful death action governed by maritime law will be subject to a three-year statute of limitations, regardless of whether it is filed in state or federal court or your state prescribes a longer statute of limitations.<sup>14</sup> However, if maritime law does not apply, then

comply with your state's personal injury or wrongful death statute of limitations, which may be shorter than three years.

### The Limitation of Liability Act

One of the first hurdles you may have to overcome is the vessel owner's efforts to invoke the protection of the Limitation of Liability Act (LOLA).<sup>15</sup> Originally enacted in 1851 to promote investment in the shipping industry, this act exempted shipowners from liability beyond the value of their vessel (known as the limitation fund).<sup>16</sup> A vessel owner ultimately will not be entitled to limitation if it fails to meet its burden of showing that the incident occurred without its privity and knowledge.<sup>17</sup>

When facing liability for a maritime incident, a vessel owner may file a petition in federal court seeking to limit its liability under LOLA. Once the vessel owner deposits the value of the vessel<sup>18</sup> with the court, the district court issues a stay for all related claims against the vessel owner pending in any other forum, including state court, and directs all potential claimants to file claims against the vessel owner in the district court within a specified period of time.<sup>19</sup> In a typical proceeding under LOLA, if the vessel owner is found liable and the limitation is granted, the district court distributes the limitation fund among the damage claimants in an equitable proceeding known as a "concursum."<sup>20</sup>

**Savings to Suitors Clause.** While federal courts have exclusive admiralty jurisdiction to determine whether the vessel owner is entitled to limited

liability,<sup>21</sup> the Savings to Suitors Clause "embodies a presumption in favor of jury trials and common law remedies in the forum of the claimant's choice."<sup>22</sup> Thus, an apparent conflict exists between LOLA and the Savings to Suitors Clause.<sup>23</sup> Federal courts have given effect to both by allowing claimants to litigate liability and damages issues in the forum of their choosing, so long as the vessel owners' right to pursue their limitation claim is protected.

The solutions differ depending on the number of claimants and the value of the claims. First, if the limitation fund exceeds the aggregate amount of all possible claims against the vessel owner,<sup>24</sup> claimants can pursue litigation in the forum of their choosing because the vessel owner is not exposed to liability beyond the limitation fund.<sup>25</sup>

Alternatively, a solo claimant can pursue the case in another forum by filing stipulations that protect the vessel owner's right to have the federal court ultimately adjudicate its claim to limited liability.<sup>26</sup> Specifically, the claimant must waive any claim of res judicata based on any state court judgment relevant to the issue of limited liability and concede the shipowner's right to litigate all issues relating to limitation in the federal proceeding.<sup>27</sup> If the vessel owner is found liable in state court and the damages exceed the limitation fund, the parties must then return to the federal court, which will decide whether the vessel owner is in fact entitled to an order limiting its liability.<sup>28</sup> If limitation is denied, the claimant may then enforce the state court judgment.

The third solution arises when multiple claimants enter adequate stipulations that “effectively guarantee that the vessel owner will not be exposed to competing judgments in excess of the limitation fund.”<sup>29</sup> When this happens, the claimants may litigate liability and damages in the forums they choose. Multiple claimants can stipulate to prioritize their claims, or they can stipulate to a pro rata distribution.<sup>30</sup> The following stipulations have been found to preserve a vessel owner’s rights and render a concursus unnecessary:

- Claimants will seek only their pro rata share of any judgment if there is a limitation.
- The district court shall have exclusive jurisdiction over all limitation issues.
- Claimants waive any claims of res judicata respecting any limitation issues.
- Claimants promise not to seek any amount in excess of the limitation fund if limitation is granted.
- The district court has exclusive jurisdiction to determine the value of the limitation fund.

This procedure protects the vessel owner’s rights under LOLA, while allowing the claimants to pursue their common law remedies consistent with the Savings to Suitors Clause.<sup>31</sup>

### Overcoming Waivers

After staying a limitation action, you can pursue the merits of your client’s case—and should turn to anticipating other defenses and issues that may arise. In boating and water sports activities, the public almost always is required to sign a waiver and release before participating. These exculpatory contracts purport to release the operator from any and all liability for negligence resulting in injury or worse. In litigation, operators use these waivers to argue that your


client expressly waived the right to sue and assumed the risk of the activity. If successful, these defenses can result in an outright win for the defendant—so overcoming them is a top priority.

One way to defeat a waiver is to prove negligence per se by showing a statutory violation that caused or contributed to your client’s damages.<sup>32</sup> Negligence per se is established when an operator violates a statute designed to prevent injury to a particular class of persons.<sup>33</sup>

In one case, for example, the failure of a company renting jet skis to comply with boating safety statutes requiring them to first provide instructions on safe handling resulted in the court finding its liability waiver unenforceable.<sup>34</sup> Additionally, liability waivers may be unenforceable if

what they are signing.<sup>36</sup> For example, a Florida state court found that a waiver was too ambiguous and narrow in scope when it used the word “activity” to refer to scuba diving, but the excursion involved advanced deep-water diving that created additional risks.<sup>37</sup>

Conflicting provisions in a release may create an ambiguity that renders the waiver invalid.<sup>38</sup> While the law may vary in different jurisdictions, some make it more difficult to enforce releases signed on a minor child’s behalf. For example, Florida permits parents to execute a release on their child’s behalf in favor of a commercial activity provider but only when the statute’s strict requirements are met, which they often are not.<sup>39</sup> But then New York, for example, does not bind



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the claimant can establish that the defendant’s misconduct constituted gross negligence.<sup>35</sup>

Ambiguity in a liability waiver also may render it unenforceable. Release language must be clear and unequivocal so that ordinary people can understand

minors to liability releases executed by their parents.<sup>40</sup> Additionally, federal law prohibits the owner of any vessel transporting passengers between U.S. ports, or between a U.S. port and a foreign port, from limiting its liability to its passengers.<sup>41</sup>



## Death on the High Seas Act


The Death on the High Seas Act (DOHSA) is an antiquated federal statute originally enacted in 1920 to provide a wrongful death remedy under maritime law. It provides a limited right to recovery for pecuniary losses<sup>42</sup>—in essence, medical and funeral expenses and lost earnings are recoverable under DOHSA but pain and suffering damages are not.

DOHSA generally applies when a wrongful death occurs beyond three nautical miles from the U.S. shore.<sup>43</sup> So while it won't apply in all recreational boat cases, it will apply in certain fishing boat or pleasure craft cases that occur sufficiently far from shore. Courts have interpreted DOHSA to refer to the location where the negligence occurred rather than the location of death.<sup>44</sup> However, maritime incidents occurring within the territorial waters of foreign countries, even if within three miles of U.S. land, fall under DOHSA.<sup>45</sup>

On the contrary, DOHSA “does not affect the law of a State regulating the right to recover for death,” and it does not apply to “waters within the territorial limits of a State.”<sup>46</sup> For example, because Florida's territorial waters extend beyond three miles in certain areas, a court found that DOHSA did not apply when a passenger's death occurred beyond three miles from shore but within those territorial limits.<sup>47</sup> Similarly, the territorial waters of Texas extend for three marine leagues.<sup>48</sup>

If DOHSA applies to your client's case, consider whether you can bring individual claims for intentional or negligent infliction of emotional distress to maximize a recovery beyond DOHSA's limited right to recovery. A claim for the intentional tort requires allegations that the defendant acted recklessly or intentionally and exhibited extreme and outrageous conduct that caused

the plaintiff to suffer severe emotional distress.<sup>49</sup> A claim for negligent infliction of emotional distress requires the plaintiff to demonstrate mental or emotional harm caused by the negligence of another that is not directly brought on by a physical injury but may manifest itself in physical symptoms.<sup>50</sup>

With the troubling increase in recreational boating incidents, we can expect to see more of these cases. Take the time to research the legal landscape before setting sail on the best possible course to a meaningful recovery for your client. 



**Ira Leesfield**  
is the founder  
and managing  
partner of  
and **Adam T.**

**Rose** is an associate at Leesfield Scolaro in Miami. They can be reached at [leesfield@leesfield.com](mailto:leesfield@leesfield.com) and [rose@leesfield.com](mailto:rose@leesfield.com).

### NOTES

1. *U.S. Boat Sales Reached 13-Year High in 2020, Recreational Boating Boom to Continue Through 2021*, Nat'l Marine Mfrs. Assoc., Jan. 6, 2021, <https://www.nmma.org/press/article/23527>.
2. *Id.* Over 11.8 million recreational water vessels were registered in the United States in 2020, with many more vessels left unregistered due to pandemic-related challenges. U.S. Dep't Homeland Sec., *2020 Recreational Boating Statistics*, at 6, June 29, 2021, <https://uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2020.pdf>.
3. Brittany Chang, *Meet GetMyBoat, the 'Airbnb for Boats' That's Been Skyrocketing in Popularity Thanks to the Pandemic*, Business Insider, May 12, 2021, <https://www.businessinsider.com/getmyboat-boat-rental-airbnb-travel-popularity-covid-pandemic-summer-2021-5>.
4. *2020 Recreational Boating Statistics*, *supra* note 2, at 6.
5. *Id.*
6. *Id.*
7. Debra Kamin, *Booming Interest in Boating*

*Leads to More Deaths and Accidents*, N.Y. Times, Aug. 4, 2021, <https://www.nytimes.com/2021/08/04/travel/boating-accidents.html>.

8. *Sisson v. Ruby*, 497 U.S. 358, 363–64 (1990).
9. *The Daniel Ball*, 77 U.S. 557, 563 (1870).
10. *LeBlanc v. Cleveland*, 198 F.3d 353, 360 (2d Cir. 1999). Maritime law will not apply when there are not navigable waters, such as when the waters do not actually carry commerce nor are open to public traffic. *Weiszmann v. Dist. Eng'rs, U.S. Army Corps of Eng'rs*, 526 F.2d 1302, 1304 (5th Cir. 1976).
11. *See Fury Mgmt. v. Luviano*, 2018 WL 3884824, at \*3 (S.D. Fla. July 14, 2018); *Belik v. Carlson Travel Group Inc.*, 26 F. Supp. 3d 1258, 1265 (S.D. Fla. 2012).
12. For joint and several liability in maritime cases, *see Groff v. Chandris, Inc.*, 835 F. Supp. 1408 (S.D. Fla. 1993). For the states' approaches, *see* Lew R.C. Bricker, *Joint and Several Liability: A State-by-State Review*, US Law Compendium of Law, Fall 2018, <https://tinyurl.com/yckun78a>.
13. 28 U.S.C. §1333 (1949).
14. *Briggs v. Jupiter Hills Lighthouse Marina*, 9 So. 3d 29, 32 (Fla. Dist. Ct. App. 2009).
15. 46 U.S.C. §30501 (2006).
16. *Norwich Co. v. Wright*, 80 U.S. 104, 121 (1871).
17. *Matter of Lopez-Castro*, 2006 WL 8433274, at \*2 (S.D. Fla. Sept. 15, 2006).
18. The value of the vessel is often attested to by a marine surveyor or other similar expert.
19. Fed. R. Civ. P. Supp. R. for Admiralty or Maritime Claims and Asset Forfeiture Actions F(3)-(4).
20. *See S & E Shipping Corp. v. Chesapeake & OH Ry. Co.*, 678 F.2d 636, 643 (6th Cir. 1982).
21. *See Ex Parte Green*, 286 U.S. 437, 439–40 (1932).
22. *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1036, 1037 (11th Cir. 1996) (citing *Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 674 (5th Cir.1996)); *In re Dammers*, 836 F.2d 750, 754 (2d Cir. 1988).
23. *See Dammers*, 836 F.2d at 754; *Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir. 1985).
24. *Beiswenger Enters. Corp.*, 86 F.3d at 1037 (citing *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152–53 (1957)).
25. *Id.*; *see also S & E Shipping Corp.*, 678 F.2d at 643 (“This exception . . . protects the claimant's right to a jury trial in the forum of his choice without undermining the Limitation Act's policy of limiting the shipowner's liability to the value of the vessel.”).

- 26. *Beiswenger Enters. Corp.*, 86 F.3d at 1037 (citing *Ex Parte Green*, 286 U.S. at 438–40).
- 27. *Id.* (citing *Gorman v. Cerasia*, 2 F.3d 519, 524 (3d Cir. 1993)); see also *In re Mucho K, Inc.*, 578 F.2d 1156, 1158 (5th Cir. 1978) (quoting *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 550 (5th Cir. 1960) (“the claimant in a single claim situation

after appropriate protective stipulations may proceed elsewhere reserving exclusive final determination of the right to limitation to the admiralty court”).

- 28. See *Texaco, Inc. v. Williams*, 47 F.3d 765, 767 (5th Cir. 1995); *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992).

- 29. *Beiswenger Enters. Corp.*, 86 F.3d at 1038. The court notes that “without such competition for the limitation fund, a *concursum* is unnecessary, just as in a true single claimant case, and the claimants may litigate liability and damages issues in their chosen fora.”; see also *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152–54 (1957) (When a *concursum* is not necessary, the Savings to Suitors Clause prevents shipowners from forcing claimants to litigate their claims in the admiralty court.).

- 30. *In re Illinois Marine Towing*, 498 F.3d 645, 652 (7th Cir. 2007) (“[C]laimants’ stipulation to seek only their respective pro rata shares of any judgment obtained in state court (provided limitation is deemed appropriate) accomplishes the same thing as prioritization. In the event of a judgment against [the owner], all [the owner] will have to do is write a check. It is of no interest to [the owner] how that money is subsequently apportioned.”).

- 31. *Beiswenger Enters. Corp.*, 86 F.3d at 1039.
- 32. *DeJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198, 201 (Fla. 1973).

- 33. *Id.*
- 34. *Tassinari v. Key West Water Tours, L.C.*, 2007 WL 1879172, at \*5 (S.D. Fla. June 27, 2007).

- 35. *Royal Ins. Co. of Am. v. SW Marine*, 194 F.3d 1009, 1016 (9th Cir. 1999).

- 36. *Sunny Isles Marina, Inc. v. Adulami*, 706 So. 2d 920, 922 (Fla. Dist. Ct. App. 1998).

- 37. *Diodato v. Islamorada Asset Mgmt., Inc.*, 138 So. 3d 513, 519 (Fla. Dist. Ct. App. 2014).

- 38. *Alack v. Vic Tanny Int’l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996).

- 39. Fla. Stat. §744.301(b) (2015).
- 40. *Santangelo v. City of N.Y.*, 66 A.D.2d 880, 88 (1978).

- 41. 46 U.S.C. §30509(a)(1) (2006); *Ginsberg v. Silversea Cruises Ltd.*, 2005 WL 5654644 (S.D. Fla. 2005).

- 42. 46 U.S.C. §30303 (2006).

- 43. 46 U.S.C. §30302 (2006)
- 44. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987).

- 45. *Moyer v. Rederi*, 645 F. Supp. 620, 624 (S.D. Fla. 1986).

- 46. 46 U.S.C. §30308 (2006).

- 47. *Kipp v. Amy Slate’s Amoray Dive Center, Inc.*, 251 So. 3d 941, 945 (Fla. Dist. Ct. App. 2018).

- 48. *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805, 811 (S.D. Tex. 1996); *Blome v. Aerospatiale Helicop*, 114 F.3d 1184 (5th Cir. 1997).

- 49. *Eisenman v. Carnival Corp.*, 424 F. Supp. 3d 1303, 1308 (S.D. Fla. 2019).

- 50. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337–38 (11th Cir. 2012).



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