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OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES
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Good morning. Mr. Chairman and Members of the Committee, thank you for inviting me here today to discuss the Department of Transportation's views regarding shipowners and salvors liability as that subject relates to two bills. H.R. 277 and Chapter 311 of H.R. 3156.

H.R. 277, drafted initially by the Maritime Law Association of the United States, was patterned after the 1976 Convention on Limitation of Liability for Maritime Claims, which the United States did not sign. The bill retains the basic concept of a limitation of liability now available to shipowners under the Limitation of Liability Act. The Liability limitation in U.S. law dates from 1851, when it was needed to protect a fledgling maritime industry in the face of foreign competition and inadequate insurance. The bill's purpose is to eliminate the liability laws' present flaws while protecting shipowners and salvors from the rare ruinous disaster and providing for equitable distribution of a liability fund in a single forum.

H.R. 3156 is one of three bills recently introduced as part of the current effort by this Committee and the House Law Revision Counsel to revise and recodify Title 46. Chapter 311 of the bill provides the same property damage limits as H.R. 277, but the limitations for personal injury or death are higher.

Presumably, the testimony elicited by these two measures will suggest to the committee other approaches to the concept of

limited liability. When this subject was briefly addressed in oversight hearings at the end of the last session of Congress the general consensus was that the Limitation of Liability Act was not serving the interests of either shipowners or claimants because its \$60 per ton factor used to fix the shipowner's exposure under the limitation of liability concept was outdated and provided woefully inadequate relief. To correct for past inflation immediate action was taken to increase the \$60 factor to \$420 per ton for death and personal injury.

Rather than address H.R. 277 or H.R. 3156 in any great detail, I would like to use my time this morning to briefly outline the concerns the Department has in this area.

The Executive Branch has previously favored repeal of the limitation of shipowners' liability for personal injury and death because current law governing maritime accidents affords inadequate relief to people killed or injured in such accidents. Current U.S. statutes, as applied by the courts, enable shipowners to limit liability for loss of property to the value of the shipowner's interest in the vessel involved after the incident plus the freight charges earned on the voyage during which the incident occurred. 46 App. U.S.C. § 183; City of Norwich, 118 U.S. 468 (1886); Norwich v. N.Y. Transportation Co. v. Wright, 80 U.S. 104 (1871).

The vessel owner is not automatically entitled to assert limited liability. The owner must petition in Federal court to invoke the Limitation of Liability Act and demonstrate to the court that the casualty was not actually or constructively attributable to the owner's negligence in the maintenance or

operation of the vessel.

The major problem with the existing law is that if a ship is totally lost its value after the accident is either small or nil. The available compensation fund is thus lowest and least adequate when the need for compensation is greatest. The idea of limitation of the shipowner's liability to value of the ship after an accident applies to property and to personal injury. However, in an attempt to soften this result the Limitation of Liability Act requires that, if a vessel's value after the incident is less than \$420 per ton, the shipowner is required to set up a fund of a minimum of \$420 per ton to be available for payments respecting loss of life or bodily injury.

Consider the disaster that befell the MARINE ELECTRIC in 1983, in which the vessel was completely lost and thirty-one seamen died. Assume for current purposes that the owner is entitled to limit liability. Because the ship's tonnage was only 13,757 tons, the total statutory liability fund amounts to \$5,777,940 which, divided among thirty-one fatalities, would pay an average of \$186,385 to each seaman's estate. Courts are under great pressure to exceed the current limitation and use as a basis the shipowners' privity and knowledge of an unseaworthy vessel. This pressure is evidenced by the substantially higher settlements in the MARINE ELECTRIC case.

Carriers, of course, favor unbreakable liability limits of the kind illustrated by H.R. 277. However, labor unions and the Executive Branch have questioned the sufficiency of any statutory limits for personal injury and death of crew or passengers. As stated previously the Department of Transportation has in the past

opposed limitation of liability for maritime claims for personal injury and death. See, e.g. H.R. 17254 and S. 3600, 90th Cong. 2d Sess. (1968). We believe that the Committee should examine the need for preserving the application of limits for both personal and cargo claims to determine whether market forces could resolve the problem of compensation through private contracts, thereby removing any need for government intervention.

The Department is also concerned about the graduated approach to liability limitation adopted by H.R. 277. Section 7 of the bill establishes dollar limits of liability. Dispensing with the old method of establishing the fund available for compensation on the basis of the value of the vessel-plus-freight after the accident, this section defines the limitation fund by the size of the vessel. The limitation fund for death and personal injury is \$1 million for ships of 500 tons or less. This limit gradually increases for larger ships, beginning with \$2,000 for each additional ton between 500 and 1,000 tons and ending with \$100 for each ton in excess of 70,000 tons. In addition, under section 7(a)(1)(C), an additional amount of \$100,000 for each crewmember is available to each crewmember or his personal representative if the claim has not been fully satisfied by the fund established under the first limitation system. The total limit, however, may not exceed a ceiling of \$50 million.

By way of illustration, for the MARINE ELECTRIC, at 13,757 tons, the total death and personal injury limitation fund under H.R. 277 would be \$12,878,500. Divided by thirty-one crewmembers, the fund for death and personal injury would provide an average of

\$415,435 for each seaman's estate. However, had the vessel been only 500 tons with a crew of thirty-one, the available fund for each estate would be only \$32,250 which could be raised by an additional \$100,000 under section 7(a)(1)(C) to \$132,250, still an inadequate figure.

Smaller ships with large crews would tend to provide lower compensation than do larger ships. This leads some to argue--we think with merit--that it is unfair to provide low compensation merely because a crewmember joined a small rather than a large vessel. The counter argument would be that the large ships can better afford more insurance than the small ships. However, we are not convinced that it is infeasible for small vessels operators to obtain adequate insurance in the marketplace and afford considerable greater--and more nearly adequate--protection for crewmembers than that proposed in H.R. 277. This is particularly true of certain smaller vessels serving the oil drilling segment of the maritime industry.

Thus, we seriously question whether this "stepped" approach to liability limitation, favoring larger vessels, is appropriate in any circumstance.

I would like to turn now to what I believe has been the most controversial aspect of shipowners' limited liability under the Limitation of Liability Act--that of limitation of liability for passenger claims. The 1965 YARMOUTH CASTLE disaster vividly illustrates the hardship of limited liability for passengers. In that case, an old passenger ship burned and sank; eighty-eight passengers died and many more were severely injured. The YARMOUTH

CASTLE was a ship of about 4,000 tons that, multiplied by the then statutory \$60 per ton, provided a fund of \$240,000 that in turn, divided by the number of passengers, provided approximately \$3,000 per passenger. That level of compensation for casualties is grossly inadequate by any standard.

The limitation proposed in section 8 of H.R. 277 of \$100,000 for each passenger that a vessel is authorized to carry is also inadequate. This amount would fail to cover the vast majority of personal injury or death claims. Many monetary recoveries are in the half million dollar range, and a substantial number exceed \$1 million. Moreover, the proposed overall ceiling on passenger claims of \$50 million could produce an even lower level of compensation. A passenger liner authorized for 1,500 passengers would be limited to a total fund of \$50 million; each claimant would be limited to an average of \$33,333.

Considering that liability in other modes of domestic transportation is unlimited--and that these modes of passenger carriage are able to cover their unlimited risks by conventional insurance--we seriously question the continuing validity of the limitation of liability concept to passenger carriage. Air carriers routinely cover passenger liability for aircraft carrying 400 passengers. Their insurance cost is low. We make this recommendation fully recognizing that the market structure for maritime insurance may differ from other transportation insurance and that insurance capacity is not unlimited. However, we have no

indication that insurance coverage will be unavailable. Moreover, our recommendation increases shipowners' incentives to avoid loss.

With regard to the expansion of the number of parties who may limit liability under section 2 of H.R. 277, we would like to sound an additional note of caution. The bill would allow owners, managing operators, and charterers of ships to limit their liability. Furthermore, salvors--defined as any persons rendering service in connection with salvage operations--could also invoke a limitation of liability. We believe that, before such an expansion is made, there should be a full evaluation of the question of liability limitation respecting modern maritime activities--a process advanced by this hearing today. For example, factors pertaining to the question of whether charterers or managing operators should be allowed to limit their liability are different from those pertaining to salvors, i.e., consideration should be given to whether a salvor should not be entitled to limit liability, while the owner of the vessel being salvaged is so entitled, as in the case of an incident involving a response to an oil spill or a release of hazardous materials.

So far, I have discussed what I believe to be the most important aspects of liability raised by this legislation, but there are a number of further points I would like to briefly touch upon.

Claims Excepted

H.R. 277 would not apply to claims for spills of oils or hazardous substances to the extent governed by other U.S. laws or international conventions to which the United States is a party

and which contain a limitation of liability. This exception, under section 4 of H.R. 277 should relate to "releases," "threats of releases," "discharges," "threats of discharges," and to "pollutants and contaminants." This would exclude claims for costs of removal or response actions taken under the Federal Water Pollution Control Act and the Comprehensive Environmental Response, Compensation and Liability Act.

Conduct Barring Limitation

Section 5 of H.R. 277 states that a shipowner claiming limitation is entitled to limited liability only if the owner can prove that the loss did not result from the owner's intentional acts to cause the loss, or from such reckless acts of the owner that the owner knew that the loss would probably result. Even though this provision shifts the burden of proof from claimant to the party wishing to limit liability, it will result in a nearly unbreakable limit to liability., It is very difficult for claimants to establish that an owner acted recklessly, knowing that loss would probably occur or intending to cause the loss of the ship. This new, nearly unbreakable limit is the trade-off for the bill's higher--but in our view inadequate--liability limits.

Section 5 would replace the current legal duty of the owner to provide a seaworthy ship before being entitled to limit liability. The courts have been liberal in voiding owners' attempts to limit liability by finding that an owner provided an unseaworthy ship and the insurance market has been able to provide insurance and to meet those costs. We are concerned that that

elimination of the owner's duty to provide a seaworthy ship could result in unsafe shipping.

Inflation Erosion

Finally an inherent weakness of the legislative approach to liability limitation is its failure thus far to provide for adjustment of liability limits to compensate for erosion by inflation. Indeed, there may be no reliable indicator to which a liability limit could be indexed. That is another reason these matters are best left to the insurance marketplace. The current Limitation of Liability Act became obsolete due to erosion by inflation over the years.

CONCLUSION

To sum up, Mr. Chairman, the Department believes that the statutory limits on liability under current law may provide inadequate compensation for death or personal injury resulting from a maritime incident. In the past we have favored the repeal of the limitation of liability concept, particularly with respect to claims arising from the death or injury of passengers. We question seriously the approaches taken by H.R. 277 and H.R. 3156 because those bills would substitute new, virtually unbreakable albeit higher, statutory limits for the present inadequate system. Finally, we seriously question that the graduated approach to liability limits based on vessel size adopted by H.R. 277 would be appropriate in any circumstance.

I expect that the committee at the conclusion of these hearings will be in a better position to decide whether to

preserve, modify or eliminate the limitation of liability concept for claims filed in the United States.

Mr. Chairman, that concludes my prepared remarks. I would be happy to answer any questions that you or other Members of this Committee may have.