Resolved: Is 46 U.S.C. § 30501(a) a Jurisdictional Statute of Limitations or a Mandatory Claims Processing Rule?

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Table of Contents

I. The History of Marine Insurance and the Concept of Limited Liability 2

II. Legislative History of the American Limitation of Liability Act of 1851 4

III. Practice and Procedure Under the Modern Limitation of Liability Act 6

A. 28 U.S.C. § 1333(1) – The Saving to Suitors Clause 6

B. General Rules of Procedure Under the Act 7

C. What Constitutes "Written Notice?" 8

IV. Relevant Supreme Court Precedent 9

V. The Circuit Split 10

VI. Why Does this Circuit Split Matter? 12

A. Rule 12(b) 13

B. Rule 12(b)(1) Standard 13

C. Rule 12(b)(6) Standard 14

VII. Why a Jurisdictional "Hook" in 46 U.S.C. § 30501(a) is Unnecessary 15

A. If § 30501(a) is Non-Jurisdictional, Where Does that Leave Us Procedurally? 16

VIII. Conclusion 16

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I. The History of Marine Insurance and the Concept of Limited Liability

Since the age of sail, traveling by sea has been "an inherently risky business."[2] It is not surprising then that intrepid voyagers have sought to insure against marine risk for millennia. Marine insurance is at least as old as the Code of Hammurabi, which contained provisions on general average and "bottomry."[3] Other forms of primitive marine insurance can be found in Ancient Rome, where a contract known as the *foenus nauticum* was commonly used by jurisconsults and advocates. The *foenus nauticum*, like the contract of bottomry, "allowed lenders to contract for certain return on money lent on large projects, such as voyages."[4] Over time, the *foenus nauticum*, general average, and bottomry contracts gradually evolved into the modern marine policy forms commonly encountered today, the origins of which can be traced back to the Ordinance of Florence of 1523.[5]

The Ordinance of Florence codified a number of ancient customary Italian rules of insurance, which were themselves based on earlier Roman principles such as the *foenus nautilus*, which pegged the "total loss rate" on an insurance contract for an "unclassified sailing vessel" embarking on a Mediterranean expedition at 12%, with 6% being interest and 6% being the "risk premium."[6] The influence of the Ordinance of Florence cannot be understated. In fact, most modern marine policy forms and cargo policy forms in particular, can be traced back to the Ordinance of Florence since its language was used extensively by early English underwriters such as Edward Lloyd of London.[7]

In its most basic form, a marine insurance policy is a contract of indemnity, "since the amount recoverable is measured by the extent of the insured's pecuniary loss."[8] The distinction between marine contractual indemnity and non-nautical forms of indemnity is that most marine indemnity policies are "valued."[9] That is, the value of the subject matter insured under the policy is mutually ascertained and agreed upon in advance of the subject matter's departure on its maritime adventure.

Given the risk involved in early nautical ventures, the idea of limiting a shipowner's liability curiously did not arise until thousands of years after man first sailed the seas. Indeed, this concept is "entirely due to modern invention. No trace of it is to be found in the Digest of the Roman Law, nor in the maritime legislation of the Eastern Empire, nor in the compilation which goes under the name of the Rhodian Law." [10]

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[2] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, p. 343.
[3] *Id*. (citing D. McKellar, 16 V.U.W.L. Rev. 161, 161-162 (1986)).
[4] *Id*.; *See also* Usury, Economic History Association, http://eh.net/encyclopedia/usury/ (last visited Aug. 21, 2021).
[5] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, p. 343 (citing D. McKellar, 16 V.U.W.L. Rev. 161, 161-162 (1986)).
[6] *Id*.
[7] *Id*.
[8] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, p. 347.
[9] *Id*.
[10] The Rebecca, 20 F. Cas. 373, 378 (D. Me. 1831); *See also* The Main v. Williams, 152 U.S. 122, 126 (1894).

It is clear from extant records that limitation of liability, at least at it is understood today, was an unfamiliar concept to Roman jurisconsults. Under Roman law, "the owner or *exercitor*[11] [of a vessel] was personally bound for all the acts of the [ship]master, falling within the range of his authority as master."[12] The *exercitor* was thus responsible for all acts, be they *ex delicto* or *ex contractu*.[13] If there were "several *exercitors*, each was bound *in solido* for the full amount of the obligations of the master, arising *ex contractu*."[14] However, each *exercitor* was bound for obligations *ex delicto* "only for his part, that is, in proportion with the interest he had in the ship."[15]

Following the collapse of Rome and the piecemeal reemergence of maritime commerce in the Middle Ages and beyond, the Roman rules on maritime liability were harshly condemned as "inequitable and injurious to the interest of trade."[16] As Hugo Grotius explained in 1625, "[m]en would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent . . . [This would not] be conducive to the public good."[17]

While it is perhaps "impossible" to identify precisely "when and where" maritime law's concept of limitation of liability originated, references to it can be found "in the Consolato del Mare, which in two separate chapters, expressly limit[ed] the liability of the part owner [of a vessel] to the value of his share in the ship."[18] Arnold Vinnius, a Dutch jurist and commentator of law writing in the mid-17th century, wrote, "that by the law of the land the owners [of a vessel] were not chargeable beyond the value of the ship and the things that were in it."[19] Johannes Loccenius, a German-Swedish contemporary of Vinnius, identified a similar rule in his own work, *De Jure Maritimo & Navali*.[20] Thus, although its exact origins may be mysterious, it suffices to say that the Italians, Dutch, and Swedish were among the first to codify the limitation of shipowner liability.[21]

One of the earliest surviving records of the explicit codification of this concept can be found in the Maritime Code of Charles II, which stated, "that if the owners chose to abandon the ship, the creditor can demand nothing more, nor touch their property unless they have specially bound themselves."[22] A similar rule is found in an even earlier statue enacted by the sovereign city-state of Hamburg in 1603, indicating that this concept was likely in customary use long before

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[11] The term *exercitor*, like the French word *armateur*, denotes the maritime entrepreneur, "the person with the prime economic interest in the ship's operations, the man who gives orders to the captain." *See* Dig. 14.1.5 (Ulpian, *Ad Edictum*, 28) (Alan Watson trans., University of Pennsylvania Press, 1998) (emphasis added). http://nbls.soc.srcf.net/files/files/Civil%20II/Texts/Digest%20of%20Justinian,%20Volume%201%20(D.1-15).pdf.
[12] 20 F. Cas. at 375 (D. Me. 1831) (citing Dig. 14.1.5 (Ulpian, *Ad Edictum*, 14)).
[13] *Id*. (citing Inst. 4.5.3; Dig. 44.7.5.6) (emphasis added).
[14] *Id*. (citing Dig. 14.1.1.25; Dig. 14.1.2) (emphasis added).
[15] *Id*. (citing Dig. 4.9.7.5) (emphasis added).
[16] 20 F. Cas. at 376; *See also* The Norwich and New York Trans. Co. v. Wright, 80 U.S. 104 (1872); 1998 AMC 2061, 2067 (citing H. Grotius, *De Jure Belli et Pacis*, liv. 2, cap. 11, § 13).
[17] Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234, 235 (9th Cir. 1989) (citing H. Grotius, *De Jure Belli ac Pacis* 139 (1625) (Campbell transl. 1901), quoted in Eyer, *Shipowners' Limitation of Liability – New Directions for an Old Doctrine*, 16 Stan. L. Rev. 370, 371 (1964)).
[18] The Main v. Williams, 152 U.S. 122, 126 (1894).
[19] *Id*.
[20] *See* The Norwich & New York Trans. Co., 1998 AMC at *2067.
[21] 20 F. Cas. at 376; *See also* 152 U.S. at 126.
[22] *Id*. (citing Maritime Codes of Charles II, 1667, pt. 1, c. 16).

it was first evidenced in writing.[23] These Italian, Dutch, Swedish, and Hanseatic rules were consolidated and officially codified by France in 1681, whereby shipowners were given the right to discharge contractual and tort liability associated with a ship or its captain simply by abandoning the vessel and its freight.[24]

The English Parliament adopted the lion's share of France's 1681 codification, albeit with its own unique twist in 1734 by act of 7 Geo. 2, c. 15,[25] in which a shipowner's liability was limited to the value of his ship and her appurtenances and averaging any greater loss or damage that was incurred "among those who sustained it."[26] This law was subsequently revised by act of 26 Geo. 3 in 1786, and act of 53 Geo. 3 in 1813.[27] Statutes similar to these English laws were enacted by Massachusetts in 1818 and Maine in 1821. The early Massachusetts and Maine laws limited the liability of a shipowner to the value of the vessel and its freight. The Massachusetts and Maine rules also provided a remedy for losses in excess of the value of the ship and its cargo which could be enforced through a bill of equity.

II. Legislative History of the American Limitation of Liability Act of 1851

While a review of the application of the Massachusetts and Maine statutes reveals their robust use in those states,[28] "[t]here was no federal limitation statute" in the United States of America prior to 1851.[29] Instead, American vessels owners, like their land-based counterparts, were generally "liable without limit."[30] Concerted efforts to pass a federal statute on the limitation of liability arose in the wake of the Supreme Court's holding in *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, in which the Court imposed full liability on a vessel owner for a lost shipment of gold and silver specie despite a contractual provision limiting such liability.[31]

It is clear from legislative commentary that the primary influence of the Limitation of Liability Act of 1851 were the English laws originally passed by 7 Geo. 2. c. 15.[32] Republican Senator Hannibal Hamlin of Maine, Charmain of the Senate Committee on Commerce at the time, stated the following,

> I desire to call the attention of the Senate to a single point—this bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine. Senators who may be disposed to look into the provisions of

[23] *Id*. (citing Statute of 1603, tit. 18, art. 3; *Kurike in Jus Marit. Hans.*, tit. 6, art. 2, p. 766).
[24] The Norwich & New York Trans. Co., 1998 AMC at *2067.
[25] It is an interesting side note of history that the English adopted the concept of limited liability roughly ten years after the abrupt collapse of the South Sea Company and hundreds of other such speculative ventures in 1720. For a general discussion on the South Sea Bubble, *see* Thomas Levenson, *Money for Nothing: The Scientists, Fraudsters, and Corrupt Politicians Who Reinvented Money, Panicked a Nation, and Made the World Rich* (1st ed. 2020).
[26] The Norwich & New York Trans. Co., 1998 AMC at *2067.
[27] *Id*.
[28] In Re Transporter Marine, Inc., 217 F.3d 335 (5th Cir. 2000) (citing Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-8 at 317 (2d ed. 1994).
[29] 3 Benedict on Admiralty § 5.
[30] *Id*.
[31] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, p. 170, n. 4 (citing New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. 344 (1848)).
[32] 3 Benedict on Admiralty § 6.

> the English law, will find in the 9th, 6th, and 30th volumes of the English Statutes the very principles contained in this bill.[33]

Congressman John P. Hale of New Hampshire, then a Free-Soiler[34] who later become a Republican, agreed with Mr. Hamlin, but expressed his concerns with its scope announcing,

> I have looked at this bill and examined it, and it will be found that it cuts up the whole common law in regard to common carriers in this country. I will not say that it is not right; but I think a bill making such fundamental changes in the common law ought to have sanction of the Judicial Committee. I wish to make a single remark; though I do not wish to be understood as against the bill, I have examined it and the English statutes, and, as has been suggested, the bill is an abstract of the English law in regard to this subject.[35]

Senator Hamlin dismissed Mr. Hale's anxieties toward the bill and effusing the typical Republican sentiment of distrust towards bureaucrats and appointed officials, replied:

> I am inclined to believe that our intelligent merchants and commercial men in this country understand quite as well what are the true wants and interests of commerce as any judicial officer in this country. I would rely on those men who are practical merchants, and who are engaged practically in commerce, for better information on this point than you can get from any of your judicial tribunals. Besides, this bill conforms our commercial marine upon equal footing with [England]."[36]

After some horse-trading, the "bill passed the Senate by a vote of 28 to 21, and passed the House of Representatives without debate."[37]

In its original form, the Limitation of Liability Act of 1851 was not applicable to the "owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."[38] This was revised in 1886 when the "General Limit of Liability" was extended to all "seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters,"[39] limiting such vessel owners' liability for certain claims to the "value of the vessel" and "pending freight."[40]

In 1880, the Supreme Court held in *The Benefactor* that a vessel owner was permitted to delay filing a petition for limitation "until after final judgment or decree" had been "taken against

[33] *Id*.
[34] The Free-Soil Party (1848-1854) was a coalition political party opposed to the expansion of slavery into the western territories that eventually merged with the Republican Party. The "ideological antecedent" of the Free-Soil Party was the failed Wilmot Proviso of 1846 which called for "the prohibition of slavery in the vast western lands that had been newly acquired from Mexico." Free-Soil Party | Definition, History, & Beliefs | Britannica; *See also* Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (1st ed. 1995); *See also* William Cooper, Jr., *Liberty and Slavery: Southern Politics to 1860* (1st ed. 2000).
[35] 3 Benedict on Admiralty § 6.
[36] *Id*.
[37] *Id*.
[38] 3 Benedict on Admiralty § 2, note 5 (citing 46 U.S.C. § 30502, originally 46 U.S.C. Appx. § 188).
[39] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, p. 179, (citing 46 U.S.C. § 30505(a)). *See also* 3 Benedict on Admiralty § 3 (originally enacted in 1851, as Section 3; amended in 1873, 1935, and 1936).
[40] *Id*.

him or the ship."[41] This holding resulted in a profligate waste of judicial resources[42] and ultimately subjected "the whole limitation scheme to scrutiny," nearly resulting in the repeal of the Limitation of Liability Act in its entirety.[43] The Act was saved however in 1936 when it was amended to declare that the limitation "action must be brought within 6 months after a claimant gives the owner written notice of a claim."[44]

III. Practice and Procedure Under the Modern Limitation of Liability Act

As it stands currently, the Limitation of Liability Act establishes a substantive right for vessel owners to limit their liability but it does not by itself create an independent basis for admiralty jurisdiction.[45] Hence, "[w]here admiralty jurisdiction fails . . . so does the reach of the Act."[46] However, this was not always the case, as the Supreme Court previously held otherwise in *Richardson v. Harmon* in 1911.[47] Nonetheless, under current precedent, a vessel owner must first establish general admiralty jurisdiction under 28 U.S.C. § 1333(1) before he can invoke the benefits of the Act.[48]

A. 28 U.S.C. § 1333(1) – The Saving to Suitors Clause

Article 3, Section 2 of the United States Constitution provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." This constitutional grant of authority was codified by Congress in 28 U.S.C. § 1333(1), which states,

> [t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

This statute has been the source of much anxiety and confusion due to the inherent tension between the exclusivity clause in the first half of the statute and the saving to suitors clause in the second half of the statute.[49]

Conflict between the two halves of this statute becomes even more evident when they are viewed alongside the language of the Limitation Act. While the saving to suitors clause "gives suitors the right to a choice of [state court] remedies," the Limitation of Liability Act "gives vessel

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[41] 3 Benedict on Admiralty § 5 (citing The Benefactor, 103 U.S. 239 (1880)).
[42] *See* Jung Hyun Sook v. Great Pac. Shipping Co., 632 F.2d 100 (9th Cir. 1980).
[43] *See* 347 U.S. 409 (1954).
[44] *See* Int'l Ship Repair & Marine Servs. V. Estate of Morales-Montalvo, 2010 U.S. Dist. LEXIS 2219 (M.D. Fla. 2010) (the purpose of the 6-month limit is to curb the abusive practice of shipowners waiting "until after the question of liability has been litigated and determined against" them to file the limitation action). *See also* Benedicts on Admiralty § 5; 46 U.S.C.S. 30511(a).
[45] 1 FL. Mar. Law & Prac. §13:8. *See also* In Re Southern Recycling, LLC v. Aguilar, 982 F.3d 374 (5th Cir. 2020); In re Fish N Dive, LLC, 2020 U.S. Dist. LEXIS 2017942 (D.C. Hi. 2020); Guillory v. Outboard Motor Corp., 956 F.2d 114 (5th Cir. 1992); In Re Carter, 743 F. Supp. 2d 103 (D. Conn. 2010); David Wright Charter Serv. v. Wright, 925 F.2d 783 (4th Cir. 1991); Three Buoys Houseboat Vacations U.S.A., Ltd. V. Morts, 921 F.2d 775 (8th Cir. 1990); Lewis Charters, Inc. v. Huckins Yacht Corp., 871 F.2d 1046 (11th Cir, 1989); In re Complaint of Sisson, 867 F.2d 341 (7th Cir. 1989), *reversed on other grounds*, *sub. nom.,* Sisson v. Ruby, 497 U.S. 358 (1990).
[46] Three Buoys Houseboat Vacations U.S.A., Ltd. V. Morts, 921 F.2d 775 (8th Cir. 1990).
[47] *See* Richardson v. Harmon, 222 U.S. 96 (1911) (Limitation Act can provide an independent basis for jurisdiction).
[48] 982 F.3d at 381.
[49] *See* In Re Petition of Germain, 824 F.3d 258 (2d Cir. 2016). (citing Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) ("What the drafters of the Judiciary Act intended in creating the saving to suitors clause is not entirely clear and has been the subject of some debate.")).

owners the right to seek limitation of liability in federal court."[50] To resolve this paradox, "the Courts of Appeals have generally permitted claimants to proceed with their claims in state court where there is only a single claimant . . . or where the total claims do not exceed the value of the limitation fund."[51] This practice, known as the single claimant exception, was established by the Supreme Court in *Lewis v. Lewis & Clark Marine, Inc.*, in which the Court explained,

> [t]he district courts have jurisdiction over actions arising under the Limitation Act, and they have discretion to stay or dismiss Limitation Act proceedings to allow a suitor to pursue his claims in state court. If the district court concludes that the vessel owner's right to limitation will not be adequately protected—where for example a group of claimants cannot agree on appropriate stipulations or there is uncertainty concerning the adequacy of the fund or the number of claims—the court may proceed to adjudicate the merits, deciding the issues of liability and limitation. But where . . . the District Court satisfies itself that a vessel owner's right to seek limitation will be protected, the decision to dissolve the injunction [staying the state court proceeding] is well within the court's discretion.[52]

Conflict also arises when the Limitation Act is invoked by a vessel owner as an affirmative defense to a complaint filed in state court. This question was considered recently by the Supreme Court of Tennessee in *Mapco Petroleum, Inc. v. Memphis Barge Line, Inc*, and the Louisiana Fourth Circuit Court of Appeal.[53] The court in *Mapco* held that a state court is empowered to decide the applicability and merits of a limitation defense raised in answer to a complaint filed in state court "provided the vessel owner does not invoke the exclusive jurisdiction of the federal courts by filing" a concursus action.[54] Note that *Mapco*'s holding does not run afoul of *Vatican Shrimp Co. v. Solis*[55] or *Cincinnati Gas & Electric Co. v. Abel*,[56] although it may appear so at first blush. While it is true that *Vatican Shrimp* and *Cincinnati Gas* both contain dicta suggesting that only federal courts have jurisdiction over contested limitation proceedings, neither of those cases addressed the precise issue raised in *Mapco* or *Howell v. American Gas Co*.[57] Instead, *Vatican Shrimp* and *Cincinnati Gas* addressed the question of whether raising a limitation action as an affirmative defense in state court tolled the six-month filing deadline under the Act, which they concluded it did not.[58]

B. General Rules of Procedure Under the Act

Because the Limitation of Liability Act deals with the claims and concerns of vessels and their owners, the actual procedure of the Act is governed by both the Act itself and by Rule F of the Admiralty and Maritime Rules.[59] While a vessel owner may plead limitation as an affirmative defense, *see supra*, to fully invoke the benefits of the Act, a vessel owner must first file a petition

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[50] *Id*. at 263 (quoting Lewis, 531 U.S. at 438).
[51] *Id*. at 264 (quoting Lewis, 531 at 451).
[52] *Id*. (quoting Lewis, 531 U.S. at 454) (internal citations omitted).
[53] Mapco Petroleum, Inc. v. Memphis Barge Line, Inc., 849 S.W.2d 312 (Tenn.) cert denied, 510 U.S. 815 (1993); *Accord*, Howell v. American Cas*. Co.*, 96-0694, p. 41 (La. App. 4 Cir. 03/19/97); 691 So.2d 715, 731
[54] Mapco Petroleum, Inc., 849 S.W. 2d at 318.
[55] 820 F.2d 674 (5th Cir. 1987), cert. denied, 484 U.S. 953 (1987).
[56] 533 F.2d 1001 (6th Cir. 1976), cert. denied, 429 U.S. 858 (1976)
[57] Howell, 691 So. 2d at 731-32 (citing *Mapco*, 849 S.W. 2d at 317-18).
[58] *Id*. *See also* 820 F.2d at 677; 553 F.2d at 1006.
[59] 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-5, p. 180 (5th ed. 2011)

for limitation in federal court within six months of receipt of written notice of a claim.[60] Next, the shipowner must deposit into the court an "amount equal to the value" of his interest in the "vessel and pending freight, or approved security."[61] Upon compliance with these conditions, the court will effectuate a concursus proceeding, enjoining all related proceedings against the vessel and its owner and admonish aggrieved claimants to file their claims against the vessel and its owner within the monition period set by the court.[62]

The federal concursus provided by the Act extends "both *in personam* to the shipowner as well as *in rem*" to the vessel.[63] The Supreme Court explained the mechanics of such a concursus in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, stating,

> the court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owners, so far as the court may decree . . .
>
> If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute.[64]

The concursus is perhaps the most valuable benefit of the Act, even more so than the limitation of liability itself, because it empowers the vessel owner to choose his own venue in which the concursus shall be held and thereby prevents the vessel owner from being hailed into multiple courts in various jurisdictions in multi-claimant scenarios.[65]

C. What Constitutes "Written Notice?"

Despite Congress' infinite wisdom, for reasons unknown, the drafters of Act declined to define the meaning of the term "written notice." Consequently, courts have struggled for decades to ascertain when a particular writing is forceful enough to trigger the vessel owner's six month deadline to file a petition for limitation.[66] Clearly, "service of process of a complaint upon the vessel owner will trigger the six-month period, [but] not all written documents will constitute

[60] 46 U.S.C. § 305011.
[61] *Id*.
[62] Rule F.
[63] *Id*. (citing Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207 (1927)).
[64] Hartford Accident & Indemnity Co., 273 U.S. at 216.
[65] 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-5, p. 181 (5th ed. 2011) (Venue for the limitation petition is proper in any "district court where the vessel is present, or, if the vessel is not within any district (because it is lost or in a foreign country), the complaint may be filed in any district).
[66] *See* The Graselli Chem. Co., 20 F. Supp. 394 (S.D. N.Y. 1937); *In re Hutchinson*, 28 F. Supp. 519 (E.D. N.Y. 1938); In re Spearin, Preston & Burrows, Inc., 190 F.2d 684 (2d Cir. 1951); In re Capital Marine Supply, 1995 U.S. Dist. LEXIS 13558 (E.D. La. 1995); In re Complaint of McCarthy Bros. Co., 83 F.3d 821 (7th Cir. 1996); In re Specialty Marine Servs., Inc., 1999 U.S. Dist. LEXIS 3219 (E.D. La. 1999); Int'l Ship Repair & Marine Servs. v. Estate of Morales-Montalvo, 2010 U.S. Dist. LEXIS 2219 (M.D. Fla. 2010); RLB Contr. Inc. v. Butler, 773 F.3d 596 (5th Cir. 2014); In re Complaint of Franz, 7 F. Supp. 3d 238 (N.D. N.Y. 2014); In re Prosper Operators, Inc., 2017 U.S. Dist. LEXIS 129522 (W.D. La. 2017); In re United Marine Offshore LLC, 2019 U.S. Dist. LEXIS 85936 (W.D. La. 2019).

notice within the meaning of the statute."[67] Although it was settled "that letters sent by claimants to vessel owners may constitute notice of [a] claim," confusion arose as to *when* a letter was specific enough, and as to *who* qualified as a vessel owner.[68]

Over the years, three tests have been devised by the courts to ascertain whether a particular writing constitutes written notice under the Act.[69] Under the *Doxsee* standard, "notice will be sufficient if it informs the vessel owner of an actual or potential claim . . . which may exceed the value of the vessel . . . and is subject to limitation."[70] Under the *McCarthy* test, notice will be sufficient if it satisfies the *Doxsee* standard with the additional refinement that such notice *must* also reveal a 'reasonable possibility' that the claim is subject to limitation and will exceed the value of the vessel.[71] Under *Moreira*, notice is sufficient if it: 1) demands a right or a supposed right; 2) blames the vessel owner for damage or loss; and 3) calls upon the vessel owner for anything due.[72]

The *Doxsee/McCarthy* test, also known as the reasonable possibility standard is the most widely accepted and authoritative standard for ascertaining written notice under the Act.[73] This standard has such broad appeal because its inclusion of an amount/value element encourages prompt action by the vessel owner while at the same time eliminating consideration of small value claims unlikely to benefit from the Act's protection.[74] The *Moreira* test on the other hand, "does not appear to have been adopted by any circuit court, and generally seems to have fallen into desuetude since *Doxsee* was decided."[75] Implicit within the debate over what constitutes written notice under the Act is the related question of whether the six-month filing deadline is a jurisdictional rule or a mandatory claim-processing rule. With respect to the Fifth and Eleventh Circuits, a conclusive answer has been reached, and for once in maritime law, it is no longer simply "turtles all the way down."[76]

IV. Relevant Supreme Court Precedent

Now is a good a time to briefly pause and examine recent pronouncements from the Supreme Court on how to properly determine whether a particular deadline is jurisdictional or not. Beginning in 2006, the Supreme Court set out to "impose some discipline on the previously slippery use of the term, jurisdictional."[77] In doing so, "the Court has emphasized – repeatedly – that statutory limitation periods and other filing deadlines ordinarily are not jurisdictional and that a particular time bar should be treated as jurisdictional only if Congress has clearly stated that it

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[67] In Re Complaint of Okeanos Research Foundation, Inc. 704 F.Supp. 412, 414 (S.D. N.Y. 1989) (citing In Re Bayview Charter Boats, Inc., 692 F.Supp. 1480 (E.D.N.Y. 1988)).
[68] Doxsee, 13 F.3d at 554.
[69] *See* 13 F.3d 550 (2d Cir. 1994); 83 F.3d 821 (7th Cir. 1996); Rodriguez Moreira v. Lemay, 659 F.Supp. 89, 91 (S.D. Fla. 1987).
[70] Orion Marine Constr. Inc. v. Carroll, 918 F.3d 1323, 1330 (11th Cir. 2019) (citing 13 F.3d 550, 554 (2d Cir. 1994)).
[71] *Id*. (citing 83 F.3d 821, 829) (emphasis added)).
[72] *Id*.
[73] *See* In re Eckstein, 672 F.3d 310 (5th Cir. 2012); *see also* Orion, 918 F.3d at 1331 (citing Paradise Divers Inc. v. Upmal, 402 F.3d 1087 (11th Cir. 2005).
[74] Orion, 918 F.3d at 1331.
[75] *Id*. at 1329. (citing Musacchio v. U.*S.*, 136 S. Ct. 709, 716-717 (2016)); *See also* U.S. v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015).
[76] *See* Rapanos v. United States, 547 U.S. 715, 754 n.14 (2006).
[77] Secretary v. Preston, 873 F.3d 877, 881 (11th Cir. 2017).

is."[78] This does not mean that Congress must "incant magic words," but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[79] Accordingly, a statute that "speaks only to a claim's timeliness, [and] not to a court's power" must be treated as non-jurisdictional.[80] "Statutory context" can also be a useful tool to determine whether a deadline is non-jurisdictional or not.[81] In other words, the location of a particular rule within the overall architecture of a statute can be indicative of whether Congress intended the rule to be jurisdictional or merely procedural.[82]

V. The Circuit Split

In 2019, in *Orion Marine Constr. Inc. v. Carroll*, the Eleventh Circuit held that the 6-month filing deadline in 46 U.S.C. §30511(a) was not jurisdictional but merely a "mandatory claim-processing rule."[83] At the time, this decision was at odds with the Fifth[84] and Sixth Circuits,[85] but it did conform with Supreme Court precedent "outlining the distinction between true jurisdictional limitations and non-jurisdictional claim-processing rules."[86] Curiously, the Ninth and Second Circuits, two circuits experienced in parsing arcane issues of admiralty and maritime law, have yet to announce their positions on this debate.

The Eleventh Circuit determined in *Orion* that 46 U.S.C. § 30511(a) was not jurisdictional based on its earlier analysis of a similar issue arising under ERISA's statute of repose.[87] The court of appeals determined that, "[i]n short, § 30511(a)'s text reveals a filing deadline of the sort that the Supreme Court has consistently called a quintessential claim-processing rule."[88] Not only did § 30511(a)'s "mandatory phrasing" – "the action must be brought within 6 months" – not reveal a Congressional intent to make that statute jurisdictional, but the location of the six month deadline within the framework of the Act also failed to show any semblance of "jurisdictional character."[89] Indeed, the Eleventh Circuit found it especially telling that Congress included the six month time bar in both § 30511(a) and also in Rule F(1).[90] "Congress, that is, didn't write the six-month bar into 28 U.S.C. § 1333(1), which gives federal district courts original jurisdiction over any civil case of admiralty or maritime jurisdiction."[91] Rather, "it placed the time limit in Chapter 305 of Title 46, which is titled 'Exoneration and Limitation of Liability' and which prescribes the mechanics of shipowner suits."[92] Considering all of this in light of the appropriate Supreme Court precedent, *see supra*, the *Orion* court correctly concluded that § 30511(a) "does nothing special,

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[78] *Id*. (citing Musacchio v. U.S., 136 S. Ct. 709, 716-717 (2016) (internal citations and quotations omitted)).
[79] *Id*. (citing U.S. v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) (internal citations omitted)).
[80] Arbaugh v. Y & H Corp., 546 U.S. 500, 502 (2006).
[81] Preston, 873 F.3d at 882 (citing *Kwai Fun Wong*, 135 S. Ct. at 1633).
[82] *Id*; *see also* Orion Marine Constr. Inc. v. Carroll, 918 F.3d 1323, 1329 (11th Cir. 2019).
[83] *Id*. (citing Musacchio 136 S. Ct. at 716-717; *See also* Kwai Fun Wong, 135 S. Ct. at 1632.
[84] *See* In Re Eckstein Marine Serv., LLC, 672 F.3d 310, 315 (5th Cir. 2012).
[85] *See* Cincinnati Gas & Electric Co. v. Abel, 553 F.2d 1001 (6th Cir. 1976).
[86] Orion, 918 F.3d at 1328 (citing Secretary, 873 F.3d 877 (internal quotations omitted)).
[87] *Id*.; *see* Secretary v. Preston, 873 F.3d 877 (11th Cir. 2017).
[88] Orion, 918 F.3d at 1328 (internal quotations and citations omitted).
[89] *Id*. at 1329.
[90] *Id*.
[91] *Id*. (internal quotations omitted).
[92] Orion, 918 F.3d at 1329.

beyond setting an exception free deadline," and therefore held "that the provision is an ordinary non-jurisdictional claim-processing rule."[93]

Contrast this wholehearted analysis with the Fifth Circuit's tepid dissection of the same statute in *In re Eckstein Marine Services*, *Inc.* In *Eckstein*, the *en banc* panel of the Fifth Circuit perfunctorily concluded that "[w]hile many filing deadlines are not jurisdictional, we have long recognized that some are. The Limitation of Liability Act's six-month filing requirement is one of these."[94] The Fifth Circuit based it's holding on *In re FEMA Trailer Formaldehyde Prods.*,[95] where it concluded that the statute of limitations in the Federal Torts Claims Act was jurisdictional.[96] However, this holding was expressly overruled by the Supreme Court in *Kwai Fun Wong*, which held that the same statute of limitations was merely a non-jurisdictional claims processing rule.[97] The Fifth Circuit's cursory analysis in *Eckstein* of the distinction between jurisdictional and non-jurisdictional procedural deadlines was just the sort of "drive-by" jurisdictional ruling expressly denounced by the Supreme Court in *Arbaugh v. Y & H Corp.*[98]

Eckstein remained the law of the land in the Fifth Circuit for nine years, and "was cited for this particular rule of law in just two Fifth Circuit cases, *In re RLB Contracting Inc.*, 773 F.3d 596, 601 (5th Cir. 2014) (per curiam) ("A party who contends that a limitation action was not timely filed challenges the district court's subject matter jurisdiction"), and *In re Marquette Transportation Co.*, 524 F. App'x 989, 991 (5th Cir. 2013) (per curiam) ("We review de novo the district court[']s ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), including the determination as to whether the limitation action was timely filed.")[99] All of this changed on December 2, 2021 when the Fifth Circuit overruled *Eckstein* in *In re Bonvillian Marine Serv.*

Bonvillian arose out of an allision between the M/V MISS APRIL, owned by Bonvillian Marine Services, Inc., and the M/V MISS SADIE ELIZABETH, a crew boat owned by Baywater Drilling, LLC docked on the Mississippi River near Port Sulphur, Louisiana.[100] The allision caused damaged MISS SADIE ELIZABETH and also severely injured Joseph Pellegrin, a member of her crew.[101] Pellegrin filed suit against Bonvillian in Louisiana state court on August 23, 2019, roughly seven months after the allision.[102] Bonvillian filed a verified limitation complaint in the Eastern District of Louisiana on December 16, 2019.[103] Baywater Drilling, LLC, as owner of the MISS SADIE ELIZABETH and Pellegrin both "moved to dismiss Bonvillian's action for lack of subject matter jurisdiction."[104]

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[93] *Id*. (quoting *Kwai Fun Wong*, 135 S. Ct. at 1632) (internal quotations omitted).
[94] *Id*.
[95] In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 646 F.3d 185, 189 (5th Cir. 2011) ("[t]he FTCA's statute of limitations is jurisdictional, and a claimant is required to meet both filing deadlines") (internal citations omitted).
[96] Eckstein Marine Serv., 627 F.3d at 315 n.12.
[97] *See* Kwai Fun Wong, 135 S. Ct. at 1632.
[98] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) ("[w]e have defined such unrefined dispositions as drive-by jurisdictional rulings that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit") (internal citations omitted).
[99] *In re Bonvillian Marine Serv.*, 2021 U.S. Dist. LEXIS 3566, at *5 (5th Cir. 2021).
[100] *Id*. at *2.
[101] *Id*.
[102] *In re Bonvillian*, 2021 U.S. Dist. LEXIS at *2.
[103] *Id*.
[104] *Id*.

Baywater's argument for dismissal due to lack of subject matter jurisdiction was,

> straightforward: since Bonvillian filed its limitation action for dismissal more than six months after receiving written notice of a claim with reasonable probability of exceeding the value of its value of its vessel, its action was untimely under 46 U.S.C. § 30511(a)
>
> . . .
>
> and, because Bonvillian's action was untimely, the district court lacked subject matter jurisdiction under the Fifth Circuit rule announced in *In re Eckstein Marine Service LLC* . . .[105]

Bonvillian argued that the Supreme Court expressly abrogated *Eckstein* in *U.S. v. Kwai Fun Wong*, and, although the district court took note of this, Judge Vitter rightfully was bound by *Eckstein* in light of the fact that the Supreme Court "has not explicitly or implicitly rejected this Circuit's prior conclusion that the Limitation Act's six-month filing deadline is a jurisdictional requirement."[106]

On appeal, Bonvillian reiterated its argument that *Kwai Fun Wong* overruled the prior panel's decision in *Eckstein*, especially in light of the *Eckstein* court's reliance on *In re FEMA Trailer Formaldehyde Products Liability Litigation*, in which the Fifth Circuit held that the FTCA's filing deadline was jurisdictional, whereas the Supreme Court held in *Kwai Fun Wong* that the same deadline in was not.[107] The Fifth Circuit found this argument "particularly salient" and noted that "*FEMA Trailer* was indeed the logical linchpin of the *Eckstein* panel's decision."[108]

The court then glossed on the rules pertaining to overturning the decision of a prior panel, explaining that "[i]t is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court."[109] The Fifth Circuit concluded that *Kwai Fun Wong*'s opinion was "an intervening Supreme Court decision [that] fundamentally change[s] the focus of the relevant analysis," and thus it was compelled to overturn *Eckstein*.[110] In overturning *Eckstein*, the Fifth Circuit concluded that the Eleventh Circuit's decision in *Orion* was "correct."[111] "Consequently, the *Eckstein* rule clearly runs afoul of *Kwai Fun Wong* and its family of Supreme Court cases, and this panel is behooved to adjust our Circuit's stance accordingly."[112]

VI. Why Does this Circuit Split Matter?

If § 30511(a) is not jurisdictional, then the proper defense as to the timeliness of a limitation action is not through Rule 12(b)(1), but Rule 12(b)(6).[113] This is not a merely semantic distinction, as different standards for dismissal apply to both Rules. For instance, under Rule 12(b)(1) the plaintiff bears the burden of proof "while the burden of showing that a complaint fails to state a claim [under Rule 12(b)(6)] falls on the defendant."[114] Furthermore, "a defendant challenging

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[105] *In re Bonvillian*, 2021 U.S. Dist. LEXIS at *3.
[106] *In re Bonvillian Marine Serv.*, 502 F. Supp. 3d 1078, 1084 (E.D. La. Nov. 23, 2020).
[107] *In re Bonvillian*, 2021 U.S. Dist. LEXIS at *7.
[108] *Id.*
[109] *Id.* at *8 (quoting *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).
[110] *Id.* at *10 (quoting *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 742 (5th Cir. 2018).
[111] *In re Bonvillian*, 2021 U.S. Dist. LEXIS at *11.
[112] *Id.*
[113] *See* Orion, 918 F.3d at 1329.
[114] *See e.g.*, United States v. Sanofi-Aventis U.S. LLC (in re Plavix Mktg.), 974 F.3d 228, 231-232 (3d Cir. 2020).

subject-matter jurisdiction [under Rule 12(b)(1)] may sometimes submit evidence, while on Rule 12(b)(6) [a court] must take the complaint's well-pleaded allegations as true."[115] Moreover, "jurisdiction may be challenged at any time, even sua sponte by the court . . . [b]ut the failure-to-state-a-claim defense is waived if not raised before the close of trial."[116] Thus, this circuit split is important because a defendant shipowner's standard for surviving an attack on the timeliness of his limitation petition is much lower in the Eleventh Circuit under *Orion* and in the Fifth Circuit under *Bonvillian*, while the same shipowner in the Sixth Circuit will be held to much a higher pleading standard.

A. Rule 12(b)

To fully appreciate the significance of this circuit split a thorough examination of Rule 12 of the Federal Rules of Civil Procedure is necessary. Rule 12 provides "tools for narrowing and clarifying the scope of litigation before trial."[117] Rule 12(b) expressly allows a defendant to raise certain defenses before its answer, "but only one such motion is allowed."[118] If a party does file a pre-answer motion to dismiss, "all available objections must be included; the defendant may not raise some in the motion and some in the answer."[119] As demonstrated by the circuit split before us, confusion often arises under Rule 12(b) as to which standard applies when a claim is based on a federal statute. For instance, "[s]ubject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant is bound by the federal law as the predicate for relief – a merits-related determination."[120] Furthermore, judicial opinions "often obscure the issue by stating that the court is dismissing for lack of jurisdiction when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim."[121]

B. Rule 12(b)(1) Standard

Rule 12(b)(1) sets the standard for dismissing a complaint for lack of subject matter jurisdiction. Subject matter jurisdiction is defined as "the authority of [the court] to adjudicate the type of controversy involved in the action."[122] Since federal courts are courts of limited jurisdiction, subject matter jurisdiction may never be waived.[123] Accordingly, motions to dismiss for lack of subject matter jurisdiction may be raised at any time and at any level of the proceedings.[124] Further, the court must raise the issue of subject matter jurisdiction *sua sponte* if it becomes apparent that it lacks jurisdiction to hear the case.[125] For these reasons, Rule 12(b)(1) motions are generally considered by the court first, "since if it must dismiss the complaint for lack

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[115] *Id.*
[116] *Id.* (internal quotations and citations omitted).
[117] 2 *Moore's Federal Practice* – Civil § 12.02.
[118] *Id.*
[119] *Id.*
[120] Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting 2 *Moore's Federal Practice* § 12.30)).
[121] Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000).
[122] Restatement (Second) of Judgments § 11 (1982); *see also* 2 Moore's Federal Practice – Civil § 12.30.
[123] 2 Moore's Federal Practice – Civil § 12.02.
[124] *See* Carlisle v. United States, 517 U.S. 416, 434-435 (1996).
[125] Fed. R. Civ. P. 12(h)(3); *see also* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 132, n.1 (1995) ("[o]f course, every federal court, whether trial or appellate, is obliged to notice want of subject matter jurisdiction on its own motion").

of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined."[126]

Rule 12(b)(1) grants "the district court . . . the power to dismiss [a complaint] on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[127] Thus, "the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."[128]

Unlike Rule 12(b)(6), dismissal of a claim under Rule 12(b)(1) is not a judgment on the merits and therefore does not have the claim-preclusive or *res judicata* effect of dismissal under other standards.[129] Accordingly, if a district court judgment under Rule 12(b)(1) is erroneously entered with prejudice, the court of appeals may correct the error on its own motion since "such an error cannot be waived."[130]

Rule 12(b)(1) also differs from Rule 12(b)(6) in that the court may examine evidence outside of the pleadings and may even hold evidentiary hearings to determine if subject matter jurisdiction is present.[131] Thus, a pleading may be facially or factually challenged under Rule 12(b)(1). Facial attacks "question the sufficiency of the pleading" itself, while factual attacks expand the scope of review, allowing the court to hear evidence and "make findings of fact necessary to rule" on the jurisdictional question prior to trial.[132] In other words, if a defendant facially attacks a pleading under this Rule, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims."[133] This is perhaps the most significant difference between Rule 12(b)(1) and Rule 12(b)(6).

C. Rule 12(b)(6) Standard

Rule 12(b)(6) on the other hand, is the procedural tool for dismissing a pleading for "failure to state a claim upon which relief can be granted." Unlike Rule 12(b)(1), the burden of persuasion for showing that no claim has been asserted rests with the party moving for dismissal.[134] The party opposing such a dismissal is provided an opportunity to respond, however, it bears "no obligation to do so."[135] Instead, once a 12(b)(6) motion to dismiss has been filed, the opposing party "may

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[126] Rhulen Agency Inc. v. Alabama Ins. Guaranty Ass'n, 896 F.2d 6784 (2d Cir. 1990) (quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1350, p. 548 (1969)).
[127] Southern Recycling, L.L.C. v. Aguilar, 982 F.3d 374, 379 (5th Cir. 2020) (quoting Barrera-Montenegro v. USA & DEA, 74 F.3d 657, 659 (5th Cir. 1996). Under this rule, the party asserting jurisdiction bears the burden of proof. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam).
[128] *Id*. (quoting Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980).
[129] 2 *Moore's Federal Practice* – Civil § 12.30
[130] *Id*.; *See also* Campos v. United States, 888 F.3d 724, 738 (5th Cir. 2018).
[131] *Id*. *See also* Gonzalez v. U.S., 284 F.3d 287-288 (1st Cir. 2002); Montez v. Dep't of Navy, 392 F.3d 147, 149 (5th Cir. 2004); In re Eckstein Marine Serv*., L.L.C.*, 672 F.3d 310, 319-320 (5th Cir. 2012); Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011); Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).
[132] 2 *Moore's Federal Practice – Civil* § 12.30.
[133] *Id*. *See also* Harris v. Kellogg Brown & Root Servs., 724 F.3d 458, 464 (3d Cir. 2013).
[134] *Id*. at § 12.34; *See also* Marcure v. Lynn, 992 F.3d 625, 631 (7th Cir. 2021) ("[w]hile the text does not discuss the burden of proof, every circuit court to address this issue . . . has interpreted Rule 12(b)(6) as requiring the movant to show entitlement to dismissal").
[135] *Id*.

stand on the pleadings, and the court must examine the complaint and determine whether it states a claim as a matter of law."[136]

Under Rule 12(b)(6), the court's review of the sufficiency of the complaint is limited to facts contained on the "face" of the pleading itself. Thus, the court "may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice."[137] Following the Supreme Court's recent holding in *Twombly*,[138] a plaintiff must simply plead enough facts to state a claim for relief that is plausible on its face, and that raises a right to relief above a speculative level, assuming all other allegations in the complaint to be true.[139] Accordingly, the standard for surviving an attack under Rule 12(b)6) is substantially lower than the standard under Rule 12(b)(1).

VII. Why a Jurisdictional "Hook" in 46 U.S.C. § 30501(a) is Unnecessary

Having examined the substantive differences between motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6), it now bears mentioning why there is no need to impose jurisdictional consequences onto the six-month statute of limitations contained in § 30501(a) of the Limitation of Liability Act. First, federal courts have multiple independent sources of subject matter jurisdiction to hear claims arising under the Limitation of Liability Act. Courts are imbued with authority to adjudicate such claims by 28 U.S.C. § 1333(1), which grants the district courts the power to hear "any civil case in admiralty or maritime jurisdiction," and 28 U.S.C. § 1331, which provides district courts with "original jurisdiction [over] all civil actions arising under the Constitution, laws, or treaties of the United States." Since the Limitation of Liability Act is a federal law that arises only in cases within admiralty or maritime jurisdiction, a federal court will always have at least two independent sources of subject matter jurisdiction when adjudicating the timeliness of a petition for exoneration from or limitation of liability. Consequently, the imposition of a jurisdictional requirement on the six-month statute of limitations within the Limitation of Liability Act is not only redundant, it may also impede judicial economy and result in an inefficient use of scarce judicial resources.

Suppose for example a situation in which a defendant shipowner filed a petition for exoneration from or limitation of liability. The court accepted the petition and the *ad interim* stipulation as to the value of the vessel, and stayed the state court proceedings from which the limitation petition arose. Months pass and a judgment is issued by the district court, but the timeliness of the petition was never raised by the defendant-in-limitation nor the district court. On appeal, the court of appeals subsequently discovers that the shipowner filed the petition for limitation six months and one day after receiving notice of the claim. If the six-month statute of limitations were jurisdictional, the appellate court would be forced to dismiss the petition *sua sponte* under Rule 12(b)(1), since the district court and appellate court would have "lacked" jurisdiction to adjudicate the issue, thus wasting all the resources spent on the limitation petition

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[136] 2 *Moore's Federal Practice – Civil* § 12.34; *see also* Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 804 (5th Cir. 2012) ("Rule 12 does not by its terms require an opposition; failure to oppose [such] a motion is not in itself grounds for granting the motion. Rather, a court assesses the legal sufficiency of the complaint").

[137] *Id*. *See also* Gines v. D. R. Horton, Inc., 699 F.3d 812, 820 (5th Cir. 2012) (a district court may not go outside of the complaint and documents attached to the complaint in deciding whether to grant a motion to dismiss for failure to state a claim).

[138] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[139] *Id*.; *see also* In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007).

up to that point. However, if such a time bar was non-jurisdictional and merely a claims-processing rule and such a defect was not discovered until *after* a judgment was issued, the defendant-in-limitation would have no recourse and the issue of timeliness would be considered as having been waived by the party opposing the limitation action.

A. If § 30501(a) is Non-Jurisdictional, Where Does that Leave Us Procedurally?

If the Supreme Court ever addresses this Circuit Split, and (rightfully) concludes that the statute of limitation in the Limitation of Liability Act is not jurisdictional, then attacks on the timeliness of petitions for exoneration or limitation of liability under that Act would be properly resolved under Rule 12(b)(6) on the face of the petition itself, or else be converted into summary judgment-like proceedings if materials outside of the pleadings were considered.[140] This would allow parties to conduct discovery on the issue of timeliness and also allow the court to hold evidentiary hearings on the matter. Given the fact-intensive nature of the definition of "notice" under the Limitation of Liability Act (*see supra* "What Constitutes "Written Notice?"), treating this issue as a failure to state a claim as opposed to a lack of subject matter jurisdiction would be a breath of fresh air to many courts and litigants by encouraging more fact-based opinions for granting and denying motions to dismiss limitation petitions for untimeliness.

VIII. Conclusion

Considering the Supreme Court's recent holdings reigning in the errant imposition of jurisdictional status on otherwise non-jurisdictional statutes of limitations in federal statutes, the Eleventh Circuit's holding in *Orion Marine Construction, Inc. v. Carroll* and the Fifth Circuit's holding in *In re Bonvillian*, and Sixth Circuit's rule in *Cincinnati Gas & Elec. Co.* is clearly inapposite. Whether or not this split will be resolved has yet to be seen, but for the time being at least, owner's of errant or faulty vessels and their aggrieved claimants can rest assured that the law on this issue is settled in the Gulf Coast of the United States.

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140 *See* Orion, 918 F.3d at 1329