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ADMIRALTY LAW

Expert Analysis

Admiralty's Arsenal: Limitation of Liability

By
James E. Mercante

Maritime law is truly a unique animal, or mammal, as the case may be. To be sure, it has its own set of federal rules in addition to the 'Rules of the Road'; special remedies (arresting a ship) and relief (maintenance and cure, unseaworthiness); a monetary reward for saving a vessel in peril (salvage); a special term for practitioners (proctor); its own 'parlance'; and mostly non-jury trials. Indeed, it is one of only two law specialties mentioned in the U.S. Constitution.[1]

One of the 'oldies but goodies' in the proctor's arsenal is the ability to limit the liability of a vessel owner to the post-casualty value of the vessel.

True to the phrase (and evidenced by this year's Super Bowl) "the best offense is a great defense," the vessel owner's Limitation of Liability Act is no exception. The Limitation Act, 46 U.S.C. 30501, et al., is premised on the notion that a vessel owner should not be liable beyond the value of the vessel for incidents that occur outside the owner's control in the inherently risky business of the sea.[2] The procedure surfaces in most maritime cases (or as one court described it, cases with "genuinely salty flavor") such as marine personal injury, collision, allision, sinking, stranding, marine insurance disputes, cargo loss and vessel fires.[3] The U.S. Supreme Court has been navigating the Limitation Act since 1871, when the first Limitation Action, as such actions under the act are known, *Norwich Co v. Wright*, 80 U.S. 104 (1871), made its way to the high court via the U.S. Court of Appeals for the Second Circuit.

The Limitation Act becomes household news in major cases such as the Staten Island Ferry crash, British Petroleum (BP) oil spill and the sinking of the EL FARO.[4]

The defense recently appeared on the general public's radar again when the ill-fated cargo ship EL FARO sank with all hands en route to Puerto Rico in October 2015. On Oct. 30, 2015, attorneys for Tote Maritime, owners of the EL FARO, filed a petition for exoneration from or limitation of liability in a Florida federal district court.

Best Offense

A vessel owner initiates a Limitation Act proceeding by petitioning a federal court under Rule 9(h) of the Federal Rules of Civil Procedure and Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. It may also be raised as an affirmative defense to a complaint filed in federal court. In doing so, the vessel owner seeks to limit its liability to the post-casualty value of the vessel, known as the "limitation fund," which amount must be deposited in the court. In a sinking or major fire onboard, this amount could be zero.

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As a result, in cases involving personal injury or death aboard a commercial vessel in which the limitation fund turns out to be insufficient to cover the losses, the Limitation Act requires a vessel owner to add $420 per gross ton to the fund—a rule that was added in 1936 following a tragedy onboard a cruise ship wherein the limitation fund was woefully inadequate.[5]

Even the Limitation Act's venue rules are interesting. Venue is appropriate in any district where the vessel is physically present pursuant to Supplemental Admiralty Rule F(9). If an action has already been commenced, venue is proper in any district in which the vessel has been attached or arrested, or where the owner has been sued. 'Folk-law' has it that after the TITANIC sank in international waters in 1912, a clever Manhattan maritime lawyer requested that one of its empty lifeboats be towed into New York Harbor so that an admiralty Limitation Action could be commenced here.

Due to the presence of the lifeboat, the owner of TITANIC, White Star Line, filed a Limitation Action in the Southern District of New York seeking to limit its liability to $92,000, the value of the 14 remaining lifeboats and freight money earned on the voyage. Eventually, the Second Circuit certified to the U.S. Supreme Court the issue of whether a foreign ship owner may benefit by this U.S. maritime defense. The defense was allowed.[6]

The Maiden Voyage

The Limitation Act was established in 1851 and is based on English limited liability laws involving vessel owners. Initially, the law was adopted primarily to place the United States on equal footing with other seafaring nations by limiting vessel owner liability, thereby encouraging investment in and development of an American merchant fleet. Today, nearly 50 countries including Australia, Great Britain and Canada have similar liability limiting statutes and are signatories of the 1976 Convention on Limitation of Liability for Maritime Claims, 1456 U.N.T.S. 221. The Limitation Act continues to play a key role in admiralty litigation. A significant goal in maritime law (and Limitation Act proceedings) is respecting uniformity of maritime laws across the nation and preventing conflicting decisions.

JAMES E. MERCANTE *is a partner, and heads the admiralty practice, at Rubin, Fiorella & Friedman. He is president of the Board of Commissioners of Pilots of the State of New York.* KRISTIN POLING, *an associate at the firm, assisted in the preparation of this article.*

Since its inception, general maritime law (case law) has succeeded in expanding the reach of the Limitation Act to "vessels" outside the realm of commercial shipping, such as yachts, pleasure craft and even jet skis.[7] This is due to the broad use of the term "vessel" in the Limitation Act and the generous definition of "vessel" in the Nautical Rules of the Road (Rule 3) to include "every description of water craft used or capable of being used as a means of transportation on water."

Claimants have tried to stem the effect of the Limitation Act by arguing for a greater limitation fund that includes the value of all vessels engaged in a single venture. Known as the 'flotilla doctrine,' this is an argument typically utilized by claimants in tug and barge operations. The flotilla doctrine applies when: (i) there is a contractual or consensual relationship between the injured party and the vessel; and (ii) two or more vessels are engaged in a common venture.[8] It is generally agreed, however, that the flotilla doctrine does not apply to non-commercial vessels such as yachts and pleasure craft.[9]

In the Court

Once a limitation of liability action has been commenced, the court will, after discovery, conduct a 'concursus' which is a limitation hearing. The entitlement to limitation involves a two-prong test. In the first prong, the claimant must prove by a preponderance of the evidence that a negligent act or the vessel's 'unseaworthiness' caused an injury or accident. If a claimant fails to prove negligence or unseaworthiness, the petitioner (vessel owner) is exonerated.

Only after the claimant has met its initial burden will the burden then pass to the petitioner to prove its lack of knowledge or privity as to the factors causing the accident (second prong).[10] The concept of "privity or knowledge is a term of art that connotes complicity in the fault that caused the accident."[11] The standard for determining a vessel owner's privity or knowledge was articulated by the Second Circuit in *Otal Invs. Ltd. v. M/V Clary*, explaining "privity or knowledge can be actual or constructive. Either way, the term usually implies some degree of culpable participation or neglected duty on the shipowner's part; that, for example, it committed a negligent act or through the exercise of reasonable diligence could have prevented the commission of the act." A vessel owner's mere presence onboard the vessel does not, without more, constitute privity or knowledge.[12] Only a federal judge (non-jury) is authorized to decide the owner's entitlement to 'limitation' in a bench trial.

A major benefit of a Limitation Act proceeding, besides securing a single forum, is that it provides for efficient disposal of multiple claims against a vessel owner. The action, like an interpleader, creates a monetary fund for claimants to pursue and restrains all other proceedings against the owner in personam and the vessel in rem. It also gives the owner a shot at complete exoneration. The 'restraining order' will also require claimants to file an Answer and a Claim in the Limitation Action by a date certain. This is especially beneficial in cases involving multiple claimants that hail from different states or countries and work or travel aboard a ship.

Criticism and Effort to Repeal

As a backlash from the public for the vessel owner's attempt to limit liability after the massive "BP oil spill" from the DEEPWATER HORIZON drill ship explosion in the Gulf of Mexico in April 2010, a bill titled "Fairness in Admiralty and Maritime Law Act" was introduced to the House of Representatives. Among other things, the legislation proposed to repeal the Limitation Act. It was considered by the Senate on July 15, 2010, before being sunk by the Committee on Commerce, Science, and Transportation later that year. The bill was supposed to be a response to oil spills and accountability, but was far reaching in attempting a total repeal of the Limitation Act without an adequate replacement.

Critics have described the Limitation Act as "a relic of the clipper ship era in which it was launched," and "an anachronism, a principle which should be relegated to the era of wooden hulls."[13] Ultimately, however, only Congress has the ability to alter the statute. Acknowledging this, especially as it applies to pleasure craft, a few courts have taken shots across its bow, pointing out that "contemporary thought…finds little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic—for the injured claimants—provisions of the Limitation Act. Nevertheless, the cases, as well as Congress, have spoken with a clear voice. And we must heed their words."[14] Thus, without any real deviation, vessel owner limitation of liability remains well-entrenched in maritime statutory and common law.

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Sail On

Limitation Actions started out on a slow bell, but now are full speed ahead and quite common in the maritime world. In the most recent notable filing, Tote Maritime effectively restrained multiple lawsuits from being filed across several states and countries. Indeed, a contingent of the EL FARO claimants includes the estates of Polish citizens who were hired aboard as independent contractors but are now required to litigate in the vessel owner's chosen forum of Jacksonville, Fla.

Although the EL FARO is a total loss (with zero value), the limitation fund filed by its owner is $15,309,003—a figure comprised of $2,072,703 for 'pending freight' (as the statute requires) and the aforementioned $420 per gross ton to increase the fund in respect to injury or death claims. Nonetheless, Tote appears to be operating in good faith by settling claims out of court, having already settled 10 or more claims. Such settlements do not diminish the limitation fund the owner files with the court.

Conclusion

As one of the oldest maritime laws in the books, the Limitation Act has played a prominent role in nearly every one of America's high-profile marine casualties, not to mention almost all marine cases involving a vessel. The Limitation Act remains viable and valuable and, despite some temporary headwinds, continues to be an effective law of the sea.

1. U.S. Const. Art. III, §2, Cl. 2.
2. 2 THOMAS SHOENBAUM, ADMIRALTY AND MARITIME LAW, 298-299 (2d Ed. 1995).
3. Second Circuit's reference to a marine insurance policy as having 'genuinely salty flavor,' see *Folksamerica Reinsurance Co. v. Clean Water of N.Y.*, 413 F.3d 307, at 311 (2d Cir. 2005). (The author represented the insurer in this case.)
4. See *In re City of New York*, 475 F.Supp.2d 235 (E.D.N.Y. 2007); *In re Oil Spill*, 21 F.Supp.3d 657 (E.D.La. 2014); *In the Matter of the Complaint of Sea Star Lines, LLC d/b/a TOTE Maritime Puerto Rico*, No. 15-cv-01297 (Oct. 30, 2015, M.D. Fla.).
5. See *New York and Cuba Mail S.S. Co. v. Continental Ins. Co.*, 117 F.2d 404 (2d Cir. 1941); 46 U.S.C. §30506.
6. James E. Mercante, "In the Wake of 'The TITANIC': An Unsinkable Law," 249 N.Y.L.J. 70 (2012); *Ocean Steam Navigation Co. v. Mellor*, 233 U.S. 718, 34 S.Ct. 754, 58 L. Ed. 117 1914).
7. *Keys Jet Ski v. Kays*, 893 F.2d 1225 (11th Cir. 1990).
8. Complaint of Tom Quinn Co., Inc., 806 F.Supp. 945 (M.D. Fla. 1992).
9. See *In Re Man of Steel*, No. 15-60179, slip op. (S.D. Fla. Feb. 28, 2014) (The author represented the vessel owner in this case.)
10. *Otal Investments Ltd. M/V Clary*, 673 F.3d 108 (2d Cir. 2012).
11. *In re Treanor*, 2015 U.S. Dist. LEXIS 153954 (E.D.N.Y. 2015) (The author represented the vessel owner in this case.)
12. *Cornfield v. Cornfield*, 156 Fed. Appx. 343 (2d Cir. 2005) (exonerating an owner who was operating his vessel at the time of the accident) (The author represented the vessel owner in this case.); *In re Messina*, 574 F.3d 119 at 128 (2d Cir. 2009).
13. Craig H. Allen, "The Future of Maritime Law in the Federal Courts: A Faculty Colloquium," 31 J. Mar. L. & Com. 263, 263 (2000); Mark A. White, "The 1851 Shipowners' Limitation of Liability Act: Should the Courts Deliver the Final Blow?" 24 N. Ill. U.L. Rev. 821 (2004) (quoting Carter T. Gunn, "Limitation of Liability: United States and Convention Jurisdictions," 8 Mar. 29, 29 (1983)).
14. *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975).