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Feature Article

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Limitation of Liability Actions for the Non-Admiralty Practitioner

Imagine you represent a railroad whose bridge is hit by a boat and the damage caused to the bridge may result in a derailment or other subsequent damage. Or, you represent a trucking company making deliveries to a dock when the dock is struck by a boat, resulting in injuries and damages. Or, imagine that you represent an individual, through subrogation or otherwise, on a Sea-doo struck by a boat.

In all of these situations, your first instinct regarding your client's claims for damages and in the defense of any claims against your client would be that the boat company is primarily responsible. However, the boat company has a "limitation of liability" defense available to it that may mean your client will not have a right to a trial by jury on its claim, and the boat company's damages may be capped.

Practitioners of admiralty and maritime law are familiar with this litigation device. However, practitioners in other areas of law may be surprised how the limitation works. This article provides an overview of a limitation of liability action. Practitioners must realize the nuances of this unique action and act accordingly from the beginning of litigation; or risk having a client's rights barred and exposed to a greater share of liability.

Limitation of Liability Act

The Limitation of Liability Act (the "Act"), 46 U.S.C.A. § 30505, allows a vessel owner to limit his or her liability to the value of the owner's interest in the vessel and its pending freight where an injury or loss occurs without the ship owner's privity or knowledge. 46 U.S.C.A. § 30505; *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979); *In re MO Barge Lines, Inc.*, 360 F.3d 885, 890 (8th Cir. 2004). The ship owner can also move for an exoneration from liability in which the owners claims it is not liable for any damages. Congress intended the Act to encourage investment in the shipping industry. *Norwich N.Y. Transport Co. v. Wright*, 80 U.S. 104, 105 (1871). However, as the United States Supreme Court has noted, the Act is not a model of clarity. *Lewis v. Lewis and Clark Marine*, 531 U.S. 438, 447 (2001).

The first step in assessing whether a limitation of liability scenario is at issue is to determine if jurisdiction would be proper. The Act does not provide an independent source of admiralty jurisdiction and jurisdiction must meet the usual test for admiralty tort jurisdiction. *See* Fed. R. Civ. P. Supp. AMC R. F. To establish admiralty jurisdiction, a ship owner must show that the tort occurred on navigable waters and bears a significant relationship to traditional maritime activity. *See Deep Sea Tankers Ltd. v. The Long Branch*, 258 F.2d 757, 770 (2d Cir. 1958). If a party cannot establish admiralty jurisdiction, then that party cannot obtain a limitation.

The Seventh Circuit Court of Appeals analyzed a case where a dredging company tasked with placing pile clusters along the Chicago River allegedly caused a crack in the foundation that caused flooding in Chicago's business district. *Great Lakes Dredging and Dock v. Chicago*, 3 F.3d 225 (7th Cir. 1993). The Seventh Circuit found the allegations constituted traditional maritime activity even though much of the damage occurred on land. *Great Lakes Dredging and Dock*, 3 F.3d at 228-30. In cases involving recreational boats, there are often issues as to whether the activity affects

interstate commerce. *Sisson v. Ruly*, 497 U.S. 358 (1990), involved a fire on a pleasure yacht docked at a recreational marina. The Supreme Court found admiralty jurisdiction exists if the incident creates a "potential hazard to maritime commerce." *Sisson*, 497 U.S. at 358.

When encountering a limitation action, always review Rule F of the Supplemental Rules of Federal Civil Procedure for Certain Admiralty and Maritime Claims that lays out the controlling rules for the action. An owner seeking to invoke the Act must petition the district court for limitation of liability and must deposit an amount equal to the value of the interest in the vessel and its freight with the court, or give security for such value. 46 U.S.C. § 30511; Fed. R. Civ. P. Supp. AMC R. F(1). Pursuant to Rule F(3), upon application of the owner, the court shall enjoin any action or proceeding against the boat owner or the boat owner's property with respect to any claim subject to the limitation. Fed. R. Civ. P. Supp. AMC R. F(3). Thus, numerous actions could be stayed where a boat is at the center of the litigation. The limitation of liability action may also be initiated or raised as an affirmative defense. FED. R. CIV. P. SUPP. AMC R. F(9). A limitation of liability action cannot be brought in, or raised as, an affirmative defense state court.

The ship owner must file its petition with the court within six months of the notice of claim and must do so in the proper venue *Karim v. Finch Shipping Co.*, 265 F.3d 258, 263 (5th Cir. 2001); Fed. R. Civ. P. Supp. AMC R. F(4)(5)-(6). Rule F(9) identifies the proper venue as any district in which the vessel has been attached or arrested. There has been dispute about the meaning of district under Rule F(9). *See* Ray C. Dripps & Courtney C. Stirrat, *The Works: Jurisdiction and the Limitation Act*, THE ST. LOUIS BAR JOURNAL, Winter 2016, at 22. Many Courts have found that "district" refers not just to a judicial district, but to a geographical district. *See id.* at 22 (citing *Matter of Am.River Transport*, 864 F. Supp. 554, 556 (E.D. La. 1994)).

Once the ship owner submits to the jurisdiction of the court by filing a limitation of liability petition, the ship owner must accept the burdens, not just the benefits, of being in federal court and will not be allowed to later obtain a voluntary dismissal of the petition. *Karim*, 265 F.3d at 265-66. The vessel owner has the burden of complying with the Act. If there is a failure to comply with any of the regulations discussed above, the limitation may be defeated. After the ship- owner files, a monitions period will be initiated. Any party with a damages claim against the ship-owner must file a claim within that period or risk that their claims barred. *Lloyd's Leasing LTD. v. Bates*, 902 F.2d 368, 370 (5th Cir. 1990). Therefore, if you represent a party that has a damages claim, you must act quickly to protect their rights.

There is no right to trial by jury when the case is in federal court pursuant to the court's admiralty jurisdiction. Federal Rule of Civil Procedure 38 does not create a right to a jury trial on issues in admiralty or maritime claims. However, the court, on motion or on its own, may allow an advisory jury to try any issue. FED. R. CIV. P. 39(c). A practitioner must be aware if a client's cause of action could be part of a limitation action because the lack of a jury may change the evaluation of the case.

Privity and Knowledge

The critical issue in many limitation actions is whether the ship owner has privity and knowledge of the negligence. Unlike common law actions, in a limitation of liability action, liability of the ship owner cannot be established by *respondeat superior*. In other words, showing that the pilot, an employee of the boat company, was negligent does not defeat the limitation of liability action. To determine an owner's entitlement to limit its damages, the court must employ a two-part analysis and determine (1) whether negligence or unseaworthiness caused the accident, and (2) whether the ship-owner was in privity to, or had knowledge of, the causative agent. 46 U.S.C.A. § 30505. Errors in navigation or

other negligence by master or crew are not attributable to the ship owner for limitation purposes. *Carr v. PMS Fishing Corp*., 191 F.3d 1, 4 (1st Cir. 1999); *Mac Towing, Inc. v. Am. Commercial Lines*, 670 F.2d 543, 548 (5th Cir. 1982). In a limitation of liability action, the burden is on the party opposing the limitation to show negligence and/or unseaworthiness. *Mac Towing*, 670 F.2d at 548. Once shown, the burden then shifts to the ship owner to show the ship-owner had no privity or knowledge of the alleged negligence. This burden-shifting framework can impact scheduling orders and issues related to expert disclosures.

Privity means some personal participation of the ship owner in the fault or negligence that caused or contributed to the loss or injury. *Coryell v. Phipps*, 317 U.S. 406, 411 (1943). Examples of when an owner has privity and knowledge include:

- A vessel outfitted with insufficient navigation equipment;
- The failure of the ship owner to use due diligence to make sure boat is seaworthy;
- The failure to provide a crew that is not properly trained or experienced; and
- The existence of unseaworthy conditions at the commencement of the voyage.

In re Texaco, 570 F.Supp. 1272, 1291 (E.D. La. 1983) (insufficient navigation equipment); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 649 (9th Cir. 1961) (lack of due diligence); *In re Messina*, 574 F.3d 119, 127 (2d Cir. 2009) (improperly trained or inexperienced crew); *Dover Barge Co. v. Tug Crow*, 642 F. Supp.2d 266, 275 (S.D. N.Y. 2009) (unseaworthy conditions).

Analysis of case law regarding the application of the privity and knowledge standard shows how difficult it can be to assess the boat owner's responsibility. In a case arising out of an oil spill off the coast of Brittany, France, the Seventh Circuit found that even though employees of another company negligently maintained the boat and negligently trained the crew, the acts were within the privity and knowledge of the boat owners because the boat owner had a non-delegable duty to maintain the ship in seaworthy condition to control and supervise the crew. *Matter of Oil Spill by Cadiz off Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1304 (7th Cir. 1992).

However, in a case where a runaway barge struck the Admiral floating casino, the Eighth Circuit Court of Appeals reversed the district court's finding of privity and knowledge. *In re American Milling, Ltd*., 409 F.3d 1005 (8th Cir. 2005). The court found that the damage was the result of a "maneuvering error or some other mistake that was tantamount to momentary error" by the pilot. *In re America Milling*, 409 F.3d at 1019-20. The court found that the ship owner did not have privity and knowledge of this error and was entitled to limitation. *Id.* at 1018. Whether privity and knowledge can be established on part of the boat owner turns on the particular facts of each case and often does not fall into clear-cut categories.

Exceptions to the Limitation Act

The tension between a party's Seventh Amendment right to trial by jury and the absence of that right in a in a limitation action, has lead courts to recognize two exceptions that allow a party to proceed in another forum (with a jury if they desire). *Lewis v. Lewis and Clark Marine*, 531 U.S. 438 (2001). The first exception concerns cases where the limitation fund exceeds the total amount of all claims. *Universal Towing v. Barrale*, 595 F.2d 414, 418 (8th Cir. 1979). The second exception "exists if there is only one claim which exceeds the value of the fund." *Lewis*, 531 U.S. at 451;

Beiswenger Enters. Corp. v. Carletta, 86 F.3d 1032 (11th Cir. 1996); *Universal Towing*, 595 F.2d at 418-19. The so-called "single claim exception" applies in circumstances involving, obviously, a single claimant. *Universal Towing*, 595 F.2d at 414. It also applies in circumstances involving multiple claimants, who may litigate liability and damages issues in another forum as long as all claimants agree to file stipulations that protect the ship owner's right to have a federal court, sitting in admiralty ultimately adjudicate its claim to limited liability. *Universal Towing*, 595 F.2d at 414. Counsel will need to assess whether any of these exceptions apply and whether to proceed with these exceptions.

Lewis v. Lewis and Clark Marine, 531 U.S. 438 (2001) illustrates some of the issues that can arise under these exceptions. In *Lewis*, the plaintiff filed a Jones Act case in Madison County, Illinois without requesting a jury. The boat owner filed a limitation of liability action in federal court in Missouri. *Lewis*, 531 U.S. at 441. The plaintiff sought to dissolve the stay by filing a stipulation that the amount would not exceed the value of the boat. *Id.* The Supreme Court found that plaintiff was entitled to file his stipulation and proceed with his case in state court because the purpose of the limitation act was protected.

Other Issues in Limitation of Liability Actions

Boat Ownership

Another issue to consider is the identity of the ship owner. Only the ship owner can obtain a limitation. If the party does not own the ship, it cannot take advantage of the limitation of liability action. Courts have expanded the definition of owner or charterer to include parties in analogous situations who exercise dominion and control over a vessel and are therefore owners *pro hac vice* even if not technically charterers. *See In re American Milling*, 409 F.3d at 1014 (citing *Petition of the United States*, 259 F.2d 608, 609 (3d Cir. 1958)); *see also In re Complaint for Exoneration From Limitation of Liability of Shell Oil Co.*, 780 F. Supp. 1086, 1089-90 (E.D. La. 1991).

The question in general, then, is whether a party who claims the status of owner exercised sufficient dominion and control over the vessel to be an owner *pro hac vice* even though neither technically is a title-holding owner nor a charterer. *In re American Milling*, 409 F.3d at 1014. Thus, determining who qualifies as an owner may be fact dependent.

Value of the Fund

One of the first issues to consider in a limitation action is what is included in the limitation fund. Limitation funds cannot support the limitation of liability action if the ship owner has not deposited a sum equal to the amount of the value of the owner's interest in the vessel and pending freight for the benefit of claimants or transfer's interest in pending freight and the vessel to a court designated trustee. FED. R. CIV. P. SUPP. AMC R. F(1); 46 U.S.C.A. § 30505.

Generally, insurance proceeds are not included in the limitation fund. *In re Paradise Holdings, Inc.*, 795 F.2d 756 (9th Cir. 1986). In situations where there are claims for personal injury or death, there will be an increase in limitation funds to $420 per gross ton. 46 U.S.C.A. § 30506. That amount may be used only to pay for claims of personal injury or death. *In re Paradise Holdings*, 795 F.2d 756 (1986). In short, if you have a serious injury and/or serious property damage, it is unlikely that the fund will have sufficient funds.

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Damages

Generally, admiralty damages follow the common law for damages. However, if there is no physical damage to a party's property then economic damages cannot be recovered. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-309 (1927). Thus, you could be in a situation where damages such as labor costs, delay costs, and lost profits that would ordinarily be recoverable in tort law, are not recoverable in admiralty.

On the other hand, the Second, Fourth, Sixth, Seventh, and Ninth Circuits have stated that *Robins Dry Dock & Repair Co. v. Flint,* allows recovery for economic damages absent a physical injury to proprietary interests if such damages are sufficiently direct and foreseeable. *See* Michael P. Sullivan, *Annotation, Robins Dry Dock Doctrine limiting recovery for economic losses due to unintended maritime torts*, 88 A.L.R. Fed. 295 (1988). Rejecting the bright line test, courts have adopted the position that a party may recover for damages for economic losses resulting from property damage that was caused by an unintentional maritime tort, despite not having a proprietary interest in the property damaged, if the losses were not remote or unforeseeable. *Petitions of Kinsman Transit Co*., 388 F.2d 821, 824 (2d Cir. 1968); *see also Venore Transp. Co. v. M/V Struma* 583 F.2d 708, 711 (4th Cir. 1978); *In re Complaint of Marine Navigation Sulphur Carriers, Inc*., 507 F. Supp. 205, 210 (E.D. Va. 1980); *In re Complaint of Bethlehem Steel Corp*., 631 F.2d 441, 448 (6th Cir. 1980).

The court in *In re Complaint of Bethlehem Steel* held that there is no absolute rule in the United States that forbids recovery of economic losses where the claimant has suffered no physical injury to a proprietary interest in cases of unintentional maritime tort. The court further stated that American law allows recovery of economic damages which are direct and foreseeable. *In re Bethlehem Steel*, 631 F.2d at 448. If you have a case under admiralty jurisdiction, be mindful that damages may not be as clear-cut as they would be in a general tort course.

Conclusion

The article is intended to provide the practitioner with an overview but not a complete examination of the issues involved in a limitation of liability action. Every decision an attorney makes from the moment of filing for limitation must take into account the unique challenges that arise under this scenario. Failure to act quickly may have serious repercussions for your client, both in defending claims and in prosecuting claims for your client's damages.

About the Author

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