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MARITIME LAW ASSOCIATION

Cruise Lines + Passenger Ships Committee Newsletter

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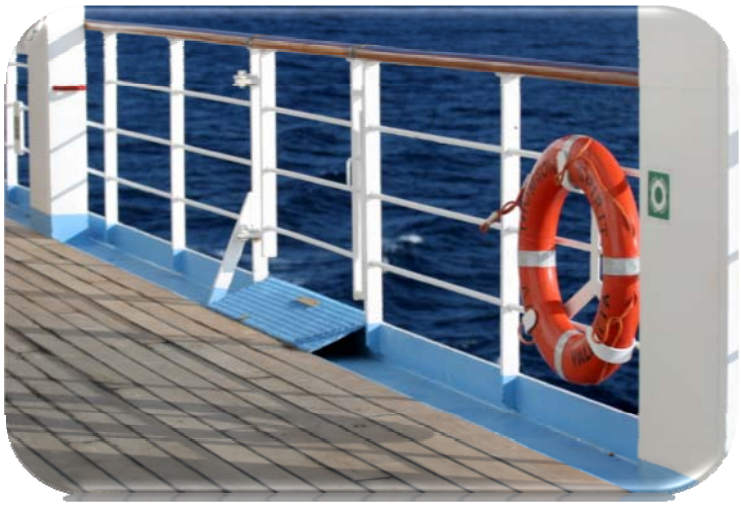


JOINT COMMITTEE MEETING CRUISE LINES AND PASSENGER SHIP COMMITTEE, MARITIME TORTS AND CASAULTY COMMITTEE, AND SALVAGE COMMITTEE

Date/Time:
Wednesday, May 3, 2016 @ 11:00 am – 1:00 pm

Location:
Midtown Hilton Hotel
1335 Ave of the Americas
New York, NY 10019
Telephone: (212) 586-7000
Sutton North and Center

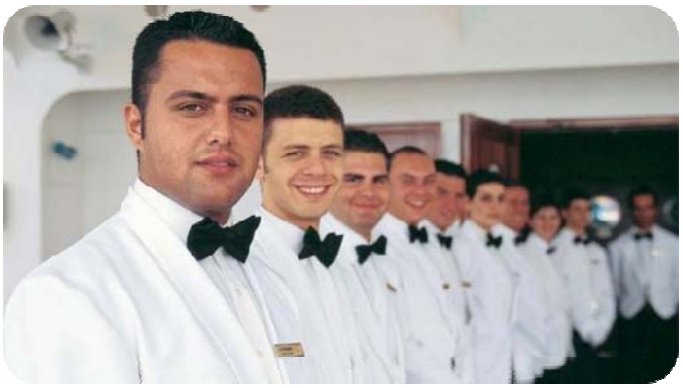
NAVIGATING THE UNITED STATES LIMITATION OF LIABILITY ACT

By: Carlos Felipe Llinas Negret, Esq., Lipcon, Margulies, Alsina & Winkleman, P.A., Miami, Fl

El Faro was a United States-flagged, cargo ship. On September 30, 2015 at 2:00 a.m., *El Faro* left Jacksonville, Florida for San Juan, Puerto Rico, carrying a cargo of 391 shipping containers, about 294 trailers and cars, and a crew of 33 people – 28 Americans and 5 Poles.[1]

At the time of the departure, Hurricane Joaquin was still a tropical storm, but meteorologists at the National Hurricane Center forecast that it would likely become a hurricane by the morning of October 1, on a southwest trajectory toward the Bahamas.[2] Joaquin became a hurricane by 8:00 a.m. on September 30, then rapidly intensified.[3] The storm reached Category 3 intensity by 11:00 p.m., packing maximum sustained winds of 115 mph.[4] *El Faro's* charted course took it within 175 nautical miles of the hurricane. 10 hours after departing Jacksonville, *El Faro* was steaming at full speed and deviating from its charted course, heading directly into the storm.[5] At around 7:30 a.m. on October 1, less than 30 hours after the ship sailed from Jacksonville, the United States Coast Guard received a satellite notification that the vessel had lost propulsion, taken on water, and had a 15-degree list.[6] The loss of propulsion doomed the ship as it was engulfed by high seas whipped up by Joaquin.[7] The *El Faro* and its 33 crewmembers disappeared on October 1. It was the worst disaster involving a U.S.-flagged vessel since 1983.[8]

On October 30, 2015, Sea Star Lines, LLC, d/b/a TOTE Maritime Puerto Rico, Owner pro hac vice of the S.S. El Faro, filed a Verified Complaint seeking exoneration from or limitation of liability, under the United States Limitation of Liability Act, 46 U.S.C. §§30505-30511 ("Limitation Act"). In the Verified Complaint, TOTE declared that the value of El Faro is zero. This proceeding, referred to as a



[1] *U.S.-Based Cargo Ship With Crew of 33 Sank in Storm*. The New York Times, October 10, 2015. http://www.nytimes.com/2015/10/06/us/el-faro-missing-ship-hurricane-joaquin.html

[2] Daniel P. Brown (September 30, 2015). Tropical Storm Joaquin Discussion Number 9 (Report). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[3] Jack L. Beven (September 30, 2015). Hurricane Joaquin Public Advisory Number 10-A (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[4] Daniel P. Brown and Stacy R. Stewart (September 30, 2015). Hurricane Joaquin Public Advisory Number 13 (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 10, 2015.

[5] *Doomed cargo ship reportedly left normal course, sailed into the track of Hurricane Joaquin*. Fox News (Fox Entertainment Group). Associated Press. October 9, 2015.

[6] Update 2: Coast Guard Searching for Container Ship Caught in Hurricane Joaquin. Miami, Florida: United States Coast Guard. October 3, 2015.

[7] *El Faro reported 'hull breach' before sinking in hurricane*. Reuters, October 20, 2015. http://www.reuters.com/ article/us-ship-elfaro-idUSKCN0SE2UM20151020

[8] Id.

limitation action, seeks to limit a shipowner's liability to the value of the vessel after a maritime casualty. In the case of El Faro the limitation action seeks to limit TOTE's liability to zero. To understand whether TOTE will ultimately prevail in the limitation action, requires a close analysis of the origins, applications and exceptions to the Limitation Act.

Admiralty and maritime law includes a host of special rights, duties, rules and procedures. See, *e.g.*, 46 U.S.C. App. § 721 *et seq.*(wrecks and salvage); § 741 *et seq.* (suits in admiralty by or against vessels or cargoes of the United States); 46 U.S.C. § 10101 *et seq.*(merchant seamen protection and relief). Among these provisions is the Limitation Act, 46 U.S.C. §§30505-30511. The Limitation Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel. The central provision of the Act provides at §30505(a)-(b):

> **(a) In general.**--Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.
>
> **(b) Claims subject to limitation.**--Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Congress passed the Limitation Act in 1851 "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich & N.Y. Transp. Co. v. Wright,* 13 Wall. 104, 121 (1871). See also *British Transport Comm'n v. United States,* 354 U.S. 129, 133-135, (1957); *Just v. Chambers,* 312 U.S. 383, 385 (1941). The Act also had the purpose of "putting American shipping upon an equality with that of other maritime nations" that had their own limitation acts. *The Main v. Williams,* 152 U.S. 122, 128 (1894). See also *Norwich Co., supra,* at 116-119 (discussing history of limitation acts in England, France, and the States that led to the passage of the Limitation Act).

An example of the use of the Limitation Act is the sinking of the RMS *Titanic* in 1912. Upon her sinking the owners rushed into the federal court in New York to file a limitation of liability proceeding. After the *Titanic* sank, the only portions of the ship remaining were the 14 lifeboats, which had a collective value of

about $3,000. This was added to the "pending freight"—which means the ship's earnings from the trip from both passenger fares and freight charges[9]—to reach a total liability of about $91,000. The cost of a first-class, parlor suite ticket was over $4,350. The owners of the *Titanic* were successful in showing that the sinking occurred without their privity and knowledge, and therefore, the families of the deceased passengers, as well as the surviving passengers who lost their personal belongings, were entitled only to split the $91,000. Another example was when Transocean filed in the U.S. District Court for the Southern District of Texas in 2010 to limit its liability to just its interest in the *Deepwater Horizon* which it valued at $26,764,083. This was in the wake of billions of dollars in liabilities resulting from the Deepwater Horizon oil spill that followed the sinking.[10]

The Limitation Act is much criticized. The Supreme Court has observed that it is not a "model of clarity" *Lewis*, 531 U.S. at 447 (quoting to T. Schenbaum, Admiralty and Maritime Law, 299 (4th Ed. 2004)("This 1851 Act, badly drafted even by the standards of the time, continues in effect today"). Having created a right to seek limited liability, Congress did not provide procedures for determining the entitlement. It wasn't until 1872 (20 years after its passing) that the Supreme Court designed procedures for determining the entitlement to limitation. The Eleventh Circuit has described it as "hopelessly anachronistic and long ago due for a general overhaul." *See Lewis Charters Inc. v. Huckins Yatcht Corp.*, 871 F. 2d 1045, 1054 (11th Cir. 1989); see also, In Re: Esta Later Charters, Inc., 875 F. 2d 234 (9th Cir. 1989), (the Limitation Act is "a vestige of time gone by").

On several occasions the Eleventh Circuit has criticized the Limitation Act as particularly illogical when applied to pleasure vessels, and has observed that insurance companies are the true beneficiaries of the Limitation Act. *See Keys Jet*, *In Re: Keys Jet Skis*, *Inc.*, *v. United States*, 893 F. 2d 1225, 1228 (11th Cir. 1990), *citing Lewis Charters Inc. v. Huckins Yatcht Corp.*, 871 F. 2d 1045, 1054 (11th Cir. 1989) ("owners of pleasure vessels may limit their liability under the Limitation Act [although] ... there is little reason for such a rule.").

The commentators agree that the statute is outdated and obsolete. *See Esta Later Charters, Inc., v. Ignacio*, 875 F. 2d 234 (9th Cir. 1989):

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in shipping industry which induced the

[9] Frederick B. Goldsmith (November 2011). *The Vessel Owners' Limitation of Liability Act: An Anachronism that Persists, For Now*." Legal. *Marine News*. p. 44. Retrieved 2014-06-12.

[10] Transoncean, Ltd. Press Release, May 13, 2010. http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle&ID=1426526&highlight=

> 1851 Congress to pass the Act no longer prevail … Commentators agree: "[T]he Limitation Act, passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity Insurance) were available, shows increasing signs of economic obsolescence.

Procedural Requirements

Rule F. The procedures for a limitation action are found in Supplemental Admiralty and Maritime Claims Rule F. Rule F sets forth the process for filing a complaint seeking exoneration from, or limitation of, liability. The district court secures the value of the vessel or owner's interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims. In these proceedings, the court, sitting without a jury, adjudicates the claims. The court determines whether the vessel owner is liable and whether the owner may limit liability. The court then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

A single forum is provided for determining (1) whether the vessel and its owner are liable at all; (2) whether the owner may in fact limit liability to the value of the vessel and pending freight; (3) the amount of just claims; and (4) how the fund should be distributed to the claimants. Limitation extends both *in personam* to the shipowner as well as *in rem.*[11]

The complaint (formerly petition) for exoneration or for limitation of liability must be filed in the federal district court in admiralty jurisdiction.[12] The shipowner may plead for exoneration or limitation in the alternative in a single complaint.[13] Venue is proper in any district where the vessel has been attached or arrested or, if there has been no attachment or arrest, in the district where the owner has been sued.[14] If suit has not yet been commenced against the owner, the limitation complaint may be filed in any district where the vessel is physically 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. Limitation may be invoked either as a defense to an action seeking damages or as an independent complaint in admiralty.[15]

Six-Month Statute of Limitation to File Claims. The complaint must be filed within six months after the owner has received written notice of a claim.[16] The six months notice requirement is strictly construed, and pleading limitation as a defense in an answer to a claimant's complaint will not extend or toll the time limit. If a shipowner files in the wrong

[11] T. Schoenbaum, Admiralty and Maritime Law, §15-5 (5th ed. 2015), citing *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927).

[12] The only court of competent jurisdiction is the district court in admiralty. The state courts accordingly do not have concurrent jurisdiction under the saving to suitors clause, 28 U.S.C. § 1333. This is based upon the fact that the remedy of limitation is not one at common law. T. Schoenbaum, Admiralty and Maritime Law, §15-5 (5th ed. 2015), citing *Norwich & New York Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

[13] *In re Tetra Applied Technologies LP*, 362 F.3d 338 (5th Cir. 2004).

[14] T. Schoenbaum, supra.

[15] T. Schoenbaum, supra.

[16] T. Schoenbaum, supra. 46 U.S.C. § 30511. *In re Oceanic Fleet, Inc.*, 807 F.Supp. 1261 (E.D.La.1992). *See also* Rule F(1). Notice of a claim is usually in the form of service of a summons and a complaint, but it may also be asserted by letter. For a discussion of the tests employed by courts to determine whether a writing contains all the information needed to constitute a "written notice of claim" under the Limitation of Liability Act, see *P.G. Charter Boats, Inc. v. Soles*, 437 F.3d 1140, 2006 AMC410 (11th Cir. 2006).

venue, and after the action is dismissed, files in the correct venue out of time, the court may reject equitable tolling if it finds the shipowner's oversight was not in good faith.

Limitation Fund. A limitation action cannot be maintained unless the shipowner deposits with the Court money, or as is usually done, a bond equal to the value of the vessel. *See* Fed. R. Civ. P. Supp. F(2). Posting of this security creates a limitation fund from which successful claimants in the action can be paid pro rata. Fed. R. Civ. P. Supp. F(1)(b).

If the limitation fund is insufficient to pay injury or death claims (e.g. the shipowner posts a bond of $1,000, when Claims amount to $20 million), under Fed. R. Civ. P. Supp. Rule F(7) a claimant can file a motion to compel the shipowner to increase the value of the limitation find. Pursuant to Supplemental Admiralty Rule F(7), "any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and … the court may similarly order that the deposit or security be increased or reduced."

The Claimant can do this in two ways. The Claimant can petition the court to require the shipowner to increase the limitation fund to include the value of all the vessels in its flotilla. Under this mechanism, known as the 'flotilla doctrine' and developed by Judge Learned Hand in *Standard Dredging v. Co. v. Kristiansen,* 67 F. 2d 548 (2d Cir. 1933), if the shipowner operates more than one vessel, the court can order the shipowner to post a bond for the value of all of the vessels in its fleet. *See Foret v. Transocean Offshore (USA), Inc.,* 2011 U.S. Dist. LEXIS 96679 (E.D. La. 2011):

> Procedurally, courts have permitted [claimants] to invoke the flotilla doctrine in a variety of ways. Where a limitation fund already exists, Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims permits Plaintiffs to file a Motion to Increase the Limitation Fund, when the amount tendered is less than the value of the [combined group of] vessel(s).

Courts determine whether vessels together constitute a flotilla by applying the "single venture test." Id. For a group of vessels to be considered a flotilla, the single venture test sets forth three requirements: they must (1) be owned by the same person, (2) be engaged in a common enterprise, and (3) be under single command. Id.; *See also Complaint of Tom Quin Co.*, Inc., 806 F. Supp. 945 (M.D. Fla. 1993), citing *Patton–Tully Transportation Co. v. Ratliff*, 715 F. 2d 219, 222 (5th Cir.1983)("the limitation fund liability of a defendant ship-owner may be increased to include his interest in the value of all vessels engaged in a common enterprise or venture with the vessel aboard which the loss of or injury was sustained").

Personal injury claimants can also challenge the limitation fund by filing a motion to increase the fund under 46 U.S.C. § 30506(b). To increase the fund under § 30506(b), two requirements must be met: (1) the amount of the fund must be insufficient to pay all claims in full; and (2) the portion of the fund available to pay personal injury and death claims must be less than $420 times the tonnage of the subject vessel. 46 U.S.C. § 30506(b); *Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622 (11th Cir. 1984); *In Re Pan Oceanic Tankers Corp.*, 332 F.Supp. 313 (S.D.N.Y. 1971); *In Re Alva Steamship Co.*, 262 F.Supp. 328 (S.D.N.Y. 1966).

Privity or Knowledge

The Limitation Act provides that the owner may limit liability only if it shows that the fault causing the loss occurred without its "privity or knowledge." See 46 U.S.C. §183(a); *Moeller v. Mulvey*, 959 F. Supp. 1102 (D. Minn. 1996); *Carr v. PMS Fishing Corp.*, 191 F. 3d 1 (1st Cir. 1999); *Keller v. Jennette*, 940 F. Supp. 35 (D. Mass. 1996). The privity and knowledge issue is the favored method claimants use to deny shipowners the benefits of the Limitation Act. *See* T. Schenbaum, Admiralty and Maritime Law, 820 (4th Ed. 2004).

Privity and knowledge under the statute "have been construed to mean that a shipowner knew or should have known that a certain condition existed." *Potomac Transport, Inc., v. Ogden Marine, Inc.*, 909 F. 2d 42, 46 (2d Cir. 1990). The determination of whether a shipowner may limit liability involves a two-step analysis: (1) a determination of what acts of negligence or unseaworthiness caused the casualty and (2) whether the shipowner had knowledge or privity of these acts. The burden of proving negligence or unseaworthiness is on the claimant; then the burden shifts to the shipowner to prove lack of privity or knowledge. *Hercules Carriers, Inc. v. Claimant State of Florida, Dep. of Transp.*, 768 F. 2d 1558 (11th Cir. 1985):

> Under this statute, Hercules is liable beyond the value of the ship if it had privity and knowledge before the start of the voyage of acts of negligence or conditions of unseaworthiness that caused the accident. Moreover, Hercules is not entitled to limitation if the ship was unseaworthy due to an incompetent crew or faulty equipment. Therefore, a determination of whether a shipowner is entitled to limit his liability involves a two-step analysis. As stated in *Farrell Lines, Inc. v. Jones,* 530 F.2d 7 (5th Cir.1976): "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." 530 F.2d at 10. Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

Lack of actual knowledge by the shipowner is not sufficient to invoke the protections of the Limitation Act. As the Eleventh Circuit explained in *Hercules Carriers*, the shipowner's "burden is not met by simply by proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining knowledge exist, or where reasonable inspection would have led to the requisite knowledge." *Hercules Carriers, Inc.*, 768 F. 2d 1558, 1564 (11th Cir. 1985). "Thus, knowledge is not only what the shipowner knows but what he is charged with discovering in order to appraise himself of conditions likely to produce or contribute to a loss." Id.