RECENT DEVELOPMENTS IN LIMITATION OF LIABILITY

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I. INTRODUCTION

The purpose of this paper is to comment on a unique concept of the law that may have unusual and unforeseen results in the area of marine subrogation claims. When vessels on navigable waters collide, strand, or strike shoreside structures, the law that governs the rights and liabilities of the various parties involved in these incidents is Maritime Law. If the damage suffered by one of the vessels is great enough, it is possible for the vessel owner, who may have more than enough insurance to cover any damage, to limit its liability to any property or cargo owner to zero. This is due to the provisions of a federal statute that has had a long and somewhat less than respected existence.

II. BACKGROUND

In the mid-19th Century, Congress passed the original Limitation of Vessel Owner's Liability Act (the "Limitation Act") to encourage shipbuilding and investment in the industry. See Act of March 3, 1851, ch. 43, § 1, 9 Stat. 635 (current version at 46 U.S.C. § 181, et seq. (2000)); Beiswenger Enterprises Corp. v. Carletta, 86 F.3d 1032, 1033-34 (11th Cir. 1996).

46 U.S.C. §§ 183 et seq. provides in relevant part:

> The liability of the owner of any vessel, whether American or foreign, . . . for any loss, damage or injury by collision, or for any act, matter, thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and [the] freight then pending.

Thus, where the owner of a vessel lacks privity or knowledge of the negligence or unseaworthiness that resulted in the loss or damage, the owner's liability cannot exceed the value of its interest in the vessel, which is to be valued at the end of the voyage on which the loss or damage occurred. Carr v. PMS Fishing Corp., 191 F.3d 1, 4 (1st Cir. 1999).

The determination of whether the owner of a vessel is entitled to limitation of liability is a two-step analysis. Carr, 191 F.3d at 4 (limitation of liability proceedings "lend themselves to a bifurcated analysis"). "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." Carr, 191 F.3d at 4.

Once the claimant has proved negligence or unseaworthiness, the burden of proof shifts to the petitioner shipowner to prove lack of knowledge or privity. Carr, 191 F.3d at 4.

Over the years many legal commentators have predicted the demise of this limitation system. One of the most quoted was found in the second edition of a treatise entitled "The Law of Admiralty" which was published in 1975. The authors stated "If a third edition of this book is called for, the present chapter (which was entitled Limitation of Liability) will in all probability be of no more than historical interest." Gilmore & Black at page 823. Unfortunately, the prophecy of these authors has proven incorrect. Rather than being only historic, we have had to fight the rather draconian results of the applicability of this statute in a number of maritime subrogation claims over the past few years and recent case law clearly indicates the continued applicability of this act. In a

study done by the Maritime Law Association about 15 years ago it was noted that there was a trend for more courts to grant limitation than deny it.

Although modern versions of vessel owner's limitation of liability were proposed in international conventions in 1957 and 1976, neither of these conventions was adopted by the United States, which makes it one of the few nations that chose not to do so. The importance of the Limitation of Liability Act in determining whether or not to proceed with a subrogation claim or whether or not to settle such a claim is obvious. In addition, the filing of a limitation of liability complaint in a jurisdiction which may be far from convenient, could greatly add to the cost and expenses involved in prosecuting any claim. There is little that can be done to change the venue because of the establishment of a concursus that deprives any other court of jurisdiction and dictates that all claims must be litigated in one court. This also has the unfortunate result of lawyers representing personal injury and death claims being joined with those involved with property damage claims. Although each side may have its own method of dealing with litigation and each may have their favorite type of expert, they find themselves joined as unwilling allies in the claims against the vessel interests. Depositions can be unending unless the court severely limits the scope and number. The theory of liability espoused by one side can be quite damaging to the other. The joinder of attorneys who represent insurance clients that generally defend personal injury suits with attorneys who prosecute such claims can also be difficult for the insurance companies to understand.

This paper will discuss some of the newer cases that we have litigated in this area and also will mention the details of other recent decisions of the courts in this

field. It is hoped that you will learn something of interest that will help your decision making process in the future.

III. RECENT DECISIONS

One of the most interesting recent cases uncovered during my research is that of the Matter of The Complaint of the National Shipping Company of Saudi Arabia, 147 F. Supp. 2d, 425 (E.D. Va. 2000), involving the collision of the U.S.S. Arthur W. Radford ("Radford") and the M/V Saudi Riyadh ("Saudi Riyadh") occurring approximately 17.5 miles east of Cape Henry, Virginia, in the Atlantic Ocean. The Radford is a Spruance class destroyer 563 feet in length with a displacement of approximately 8,400 tons. The Saudi Riyadh is a vessel of the Kingdom of Saudi Arabia, 656 feet in length.

On February 4, 1999, the Saudi Riyadh was headed southbound from New York along the east coast to arrive at Cape Henry, to pick up a Maryland pilot, and then proceed up the Chesapeake Bay to Baltimore. At the same time, the Radford was conducting electronic warfare equipment calibration, involving the ship steaming steadily in a circle at approximately 15 knots on a 1 mile radius from a Navy special purpose buoy located approximately 17 miles off the cost of Virginia.

Although the Saudi Riyadh was equipped with radar, the crew did not utilize its capability in depicting a predicted area of danger around a potential target. As the two vessels became progressively closer together, the third mate of the Saudi Riyadh, who had the bridge watch, attempted to reach the Radford via Channel 14, despite that Channel 16 is recognized as the international calling frequency. At no time did the Saudi Riyadh reduce her speed.

Despite that Radford's radar showed the Saudi Riyadh approaching its circle on a straight course at a steady speed, the watchstanders on duty did not appreciate the danger. The crew aboard the bridge of the Radford was preoccupied by the calibration maneuvers, and did not check the status board or visually observe the Saudi Riyadh's approach. The United States stipulated that the Radford's crew was not maintaining a proper lookout. A collision occurred causing substantial damage to both vessels.

Based on the foregoing facts, the court allocated fault among the parties at 65% fault on the part of Saudi Riyadh and 35% fault on the Radford. The owners of the Saudi Riyadh then sought limitation of liability for losses resulting from the collision pursuant to 46 U.S.C. § 183(a). The court phrased the issue as follows:

> Thus, if the collision resulted from navigational errors that the shipowner had no reason to believe were likely to occur, the shipowner is entitled to limit its liability for the negligence of its crew. See Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634, 638 (4th Cir. 1987). If, however, the collision occurred because the shipowner neglected its "duty to man the ship with a competent crew," staffing the ship with crewmembers that the shipowner knew, or should have known, were incompetent or inadequately trained, the shipowner must be held responsible for the full extent of the loss caused by its crew. Id. . . . A shipowner will not be charged with the negligence of third persons employed by the shipowner to put the vessel in seaworthy condition where the owner has, "in good faith exercised due diligence and care in the selection of such persons" to ensure that they are "trustworthy, experienced, and capable of performing the service, and of good reputation in the business." Pocomoke Guano Co. v. Eastern Transp. Co., 285 F. 7, 10 (4th Cir. 1922); see also Coryell v. Phipps, 317 U.S. 406, 412, 87 L. Ed. 363, 63 S. Ct. 291 (1943).

Saudi Arabia, 147 F. Supp. 2d at 445-46.

After examining the qualifications and experience of the crew of the Saudi Riyadh, the court held that the owners exercised due care in the selection of the crew and did not have reason to believe that they would commit the navigational errors that gave rise to the collision between the Saudi Riyadh and the Radford. Accordingly, the court granted the owners of the Saudi Riyadh limitation of liability for the negligence of its crew and limited its liability to the value of the vessel and her freight, pursuant to 46 U.S.C. § 183(a).

Conversely, in Birmingham Southeast v. M/V Merchant Patriot, 124 F.Supp.2d 1327 (S.D. Ga. 2000), the court denied the petitioner's request for exoneration from or limitation of liability pursuant to the Limitation of Liability Act at 46 U.S.C. §§ 183 et seq. Birmingham Southeast involved a massive vessel casualty occurring on December 30, 1997 causing the loss and damage to over $10 million worth of steel mill products owned by the claimants. The claimants filed various actions in the Southern District of Georgia and the Southern District of New York seeking recovery for the lost or damaged cargo. Those cases, and the petition for exoneration/limitation of liability, were consolidated in the foregoing decision. The court then bifurcated the action on the issues of liability and damages.

On December 19, 1997, the M/V Merchant Patriot departed Brazil en route to Georgia carrying a cargo of steel products. Ten days into the voyage, members of the crew discovered that seawater was flooding the engine room. A 150 millimeter pipe ruptured and was leaking seawater. Eventually, the seawater contaminated the oil sump for the main engine, causing the engine to shut down. Without power, the M/V Merchant Patriot was without control causing the cargo to shift.

Cenargo Navigation Limited ("Cenargo") owned the M/V Merchant Patriot. However, management of the ship was transferred to V Ships ("V Ships"). Both Cenargo and V Ships sought to limit their liability for the damages claimed pursuant to the Limitation of Liability Act at 46 U.S.C. §§ 183 et seq.

The court first addressed the issue of whether V Ships could attain the status of an owner or an owner pro hac vice necessary to seek the protections of the Limitation of Liability Act. In short, the court found that V Ships was not entitled to limitation of liability because the management agreement did not designate V Ships as the employer of the officers or crew for "all purposes." Birmingham Southeast, 124 F. Supp. 2d at 1338. The court relied on In re Oil Spill by the Amoco Cadiz, etc., 954 F.2d 1279, 1302 (7th Cir. 1992) (management service not entitled to the protections of limitation of liability where the management service "was brought in to assist and advise Transport with regard to the maintenance and operation of the ship. Ultimate authority for maintenance and operation of the Amoco Cadiz, however, remained with [the vessel owner] alone.")

The court then examined whether Cenargo, owner of the M/V Merchant Patriot, was entitled to the protections afforded by the Limitation of Liability Act. The owner of the M/V Merchant Patriot testified that the vessel was unseaworthy at the onset of the voyage. Similarly, the petitioners conceded that the failed pipe was at least partially responsible for damage to the claimants' cargo. Petitioners also conceded that the pipe was defective at the beginning of the voyage. Nonetheless, petitioners contended that they were without knowledge or privity because they were not aware of the defective pipe at the onset of the voyage. See, Hercules Carriers, Inc. v. Claimant

State of Florida, 768 F.2d 1558, 1563-64 (11th Cir. 1985) (shipowner entitled to limitation of liability if it can prove that the loss occurred without its privity or knowledge.)

The shipowner argued as its defense that their management systems should have enabled them to detect the problem. Because they had what they considered to be an effective management system in place, the petitioner argued that the Court should find that they did not have knowledge or privity of the loss. The Court rejected this contention and denied its request for a limitation of liability citing Hercules Carriers, Inc., 768 F.2d at 1564 (holding that "knowledge is not only what the shipowner knows but what he is charged with discovering in order to apprise himself of conditions likely to produce or contribute to a loss"); Suzuki of Orange Park, Inc. v. Shubert, 86 F.3d 1060, 1064 (11th Cir. 1996) (knowledge and privity include constructive knowledge or "what the vessel owner could have discovered through reasonable inquiry").

Because the petitioners admitted that the failed pipe was at least a contributing cause, if not the proximate cause, of the casualty the court found that the owner failed to meet its burden and denied limitation of liability.

In addition to the above cases, there have been a large number of other recently reported decisions in regard to vessel owners' limitations. Many of these decisions relate to attempts made by personal injury claimants to obtain a jury trial in state court despite the injunction that is normally entered preventing any claims from being brought in other than the federal court where the petition to limit liability is pending. One of these involved a recent decision of the United States Supreme Court that commenced with a plaintiff actually bringing a non-jury action in state court instead of a jury claim. James F. Lewis v. Lewis and Clark Marine, Inc., 531 U.S. 438 (2001).

Although this particular case dealt with a personal injury claim, there was nothing stated in the unanimous decision of the Court, which was written by Justice O'Connor, which indicated that the Limitation of Liability Act was not still good law. The holding of the Court was that the district court had properly exercised its discretion in dissolving the injunction that originally prevented petitioner from bringing his claims in state court. The vessel owner's rights were found to be protected by a stipulation that the claim did not exceed the value of the limitation fund, petitioner's waiver of any defense of res judicata with regard to limitation of liability, and the district court's decision to stay the limitation act proceedings pending state court proceedings. In reaching this result, the Court noted that there were two exceptions to exclusive federal jurisdiction under which a claimant may litigate his claim in state court. These involve a case where the limitation fund value exceeds the total value of all claims asserted against the vessel owner, and where there is a single claimant and nothing appears to suggest the possibility of another claim. In this eventuality, before the district court dissolves its injunction, a claimant must stipulate to the following: (1) the that value of the limitation fund equals the combined value of the vessel and its cargo; (2) waive the right to claim res judicata based on any judgment rendered against the vessel owner outside the limitation proceedings; and (3) accept the district court's exclusive jurisdiction to the term and limitation of liability issues.

IV. RECENT CASES

In the past few years, I have been involved with a number of other subrogation counsel including Miles Jellinek and Larry Bowman in representing a number of property insurers whose subrogation claims were litigated or are still pending

in Limitation of Liability actions in various parts of the United States. These include some who insured portions of the Riverwalk in New Orleans that was damaged as a result of a collision by a Chinese vessel known as the BRIGHT FIELD. We have also represented insurers of a Florida marina that involved an unmanned and uncontrolled yacht suddenly breaking free from its moorings and proceeding to wreak havoc on vessels and other parts of the docks. We also have represented the insurers of a pier on the Mississippi River near St. Louis that was struck by a number of barges. At the present time I am in Norfolk District Court representing a barge owner who suffered losses as a result of the capsize of the tug towing it in the C&D Canal near Philadelphia.

In all of these cases we were faced with the very real possibility that the vessel owner could have limited its liabilities to an amount significantly less than the damages we were claiming. In the tug incident, this value could be zero since the tug was arguably a constructive total loss after it was raised. In all of them, we found the procedure involved less than ideal and in some we found our forced association with other counsel difficult and in some cases unworkable.

In the cases noted, we faced very real difficulties in overcoming the effects of this act insofar as trying to recover our claims. In the Louisiana case a vessel had lost power and steerage due to the failure of a lube oil pump. The argument by the vessel owner in support of the granting of limitation was that the accident was caused solely by the failure of the engineering crew to move a lever from manual to automatic before leaving the dock on the day of the accident. If this had been done, a standby lube oil pump would have activated when the first pump stopped and the vessel's power and steerage would not have failed. If believed by the court, this would be the type of

operational negligence that was the focus of the Saudi Arabia case discussed above for which the Limitation of Liability Act was designed and we would have faced the recovery of less than 40% of the actual damages in this eventuality. Due to the evidence which we were able to obtain as a result of months of testimony in Louisiana and Hong Kong and the selection of competent maritime experts shortly after the incident to investigate the cause, we were able to convince counsel for the vessel owners that our chances of breaking limitation were quite good since the vessel owners had failed to supply the lube oil requested by the crew and the stopping of the first pump was most likely caused by the failure of the crew to properly clean the engine's sump after suffering numerous engine casualties on the voyage from Asia. As a result, we obtained a settlement that was quite close to the total amount of our claims. In obtaining this result, however, we had to deal with personal injury lawyers whose main objective to this day was not in defeating limitation of liability but only in persuading the court to allow them to try their claims in state court where they could expect large jury awards even though the vast amount of their claims involved special damages of less than $3,000.00.

In the case involving the dock damage in the Mississippi River near St. Louis, we were faced with a defense of inevitable accident and discovered that a local judge in the same circuit where our case would be tried had recently found in favor of a tug company on the basis of this defense. The defense allegation was that the tug and its flotilla of barges was proceeding in the center of the river in an area where there should not have been any hindrance to navigation when the tug's rudder was jammed by partially sunken debris created by unusual flooding that had occurred at this time. This caused the tug to lose steerage and eventually strike our dock. In an effort to overcome

the effects of the Limitation of Liability Act, which would have severely decreased our award, we were able to discover that the vessel owner had lost a section of a wire rope which was part of the rudder system that was damaged as a result of this accident. We subsequently filed a motion concerning spoliation of evidence due to the loss of this rope and we asked the court to prevent their metallurgical expert from testifying concerning his examination of this wire. As a result of these and other arguments concerning the maintenance of the tug and its equipment, we were able to obtain almost a 100% recovery at a mediation held before trial.

In regard to the yacht that ran amuck in Florida, the owner, which was actually a trust, argued that limitation should be granted since the owner had left the maintenance of the yacht in the hands of a captain who was highly qualified to properly maintain it. This was especially so since this was the same master who had taken the yacht from the shipyard in Europe where it was constructed and had been its master for many years up until the time of the incident. In addition, the vessel owner was also claiming exoneration from liability on the allegation that the yacht must have been started up by a person who was trying to steal it from an area of the dock that was under the control of our client as it was being prepared for painting.

Our most difficult problem in this case was to try and find a defect in the vessel which was causative to the accident. This was made even more difficult by the fact that the attorney who represented the marina before we were even contacted by the insurer had an expert report prepared and given to counsel for the vessel owner which listed as a possible cause a bird landing on the starter button. We were able to successfully rebut these claims by producing expert testimony to show that the most

likely cause of this accident was the rusting of a starter switch and the failure of the tug captain to properly shut down the vessel prior to leaving it in the yard. If he had properly maintained the starter, there would have been no possibility for the engines to spontaneously start up. In addition, we presented evidence to show that no reasonably competent master would have left the engines in a ready-to-start mode with the throttles in the full ahead position when leaving a vessel at a dock for an extended period.

In our most recent case, we are faced with a vessel master whose improper setting of the length of a towing line caused the tug to trip while making a turn in the confined waters of a canal. This is, again, a difficult case to overcome limitation, since it involves an apparent operational error on the part of a master who had a good record of prior operations including the successful towage of the very same barge involved in this incident. At the present time we are still in the earliest stages of litigation and we have not had the opportunity to review the vessel's maintenance records or depose its crew. It is hoped that we will be able to find some method of obtaining a fair result for our client despite the fact that the limitation being claimed in this case is zero.

V. CONCLUSION

The reason why the above scenarios were described was not to indicate our successes in this area. It is to demonstrate that there are many real problems that face maritime lawyers in the marine subrogation area, not the least of which being the fact that a vessel owner could limit its liability to significantly less than the amount of damages involved. The way in which we can assist you in trying to overcome problems is to make sure that we are contacted promptly in the event that any potential claim is reported to you. We can obtain information concerning a loss while a vessel is still in port. We can

immediately retain experts and also obtain records and documents and testimony from foreign crew members that would otherwise be impossible or quite expensive to obtain. As with any subrogation matter, the evidence that is obtained shortly after the incident and prior to any attempts on the part of the vessel owner or its crew to change the area of the loss can be of utmost benefit in trying to overcome the vessel's efforts to limit its liability. In addition, in many vessel casualties there will be a Coast Guard hearing into the disaster that will give us an opportunity to obtain evidence that otherwise would be very difficult and expensive to obtain and may even allow us to shape questions for the investigators to ask that will help in our determination of a method to overcome the provisions of the Limitation of Liability Act.

It is hoped that you have enjoyed this talk and that you will keep us in mind in regard to any problems you may have in this area in the future.

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