

# Marine

## News

JULY 2008

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# Homeland Security

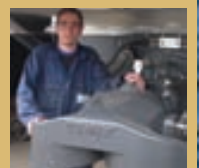
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## Limitation Of Liability - A Good Deal If You Can Get It



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Everyone knows that operating vessels can be a very risky business. Your vessels are being operated by crews that you can not directly supervise, in a constantly changing environment, under serious time constraints, and, if not operated correctly, could cause a great deal of destruction. Vessel owners have developed numerous strategies to try to minimize this risk. Various options include placing the ownership of each vessel in a separate corporate entity, having a vessel operator charter the vessel from the owner, and purchasing insurance.

Although these modern remedies do a lot to protect vessel owners from liability, maritime law includes a very valuable, but often misunderstood, limitation of liability. Specifically, congress has codified the Limitation of Liability of Shipowners Act in 46 USC §183 et seq. Under the Act, a vessel owner, upon an event that may present a liability situation, may ask the court to limit its liability to the value of the vessel, and the cargo on it, as of the end of that voyage. As one would expect, depending on the scope of the incident, the value of the vessel and her cargo, may be limited. Section 183(a) of the Act states as follows: "The liability of the owner of any vessel, whether American or foreign, for any embezzlement loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Although the Limitation Act includes numerous situational provisions, essentially, the statute allows a vessel owner to limit its liability for any incident to the value of the vessel, and its cargo, regardless of the amount of damages claimed or the vessel owners liability as long as there is no "privity or knowledge" by the vessel owner.

From our experience, most limitation of liability cases

hinge upon this "privity or knowledge" provision of the rule. In fact, the courts have expanded the scope of this definition to include many areas that were probably not within the simple definition as conceived by the drafters.

A review of the early United States cases, as well as its English precedent, show that early shipowners, prior to the development of current corporate and insurance laws, could easily take advantage of this limitation of liability. However, over the years, the courts have restricted the Act's applicability and been much more reluctant to allow a shipowner to avail itself of this privilege. The Courts have used the "privity" provision to chip away at the Act's usefulness by expanding the number of potential violations that will nullify a vessel owner's request to limit its liability. Courts have expanded this definition of privity to include incidents where a vessel owner allowed an undermanned or incompetently crewed vessel to operate a vessel, operated without adequate navigational equipment and/or charts, where management has notice of a potential hazard and does nothing to notify its crew of its existence, improper training of crew members, maintaining an unseaworthy vessel or the improper control of the vessel's crew. Unfortunately, this is a very fluid area of the law and the Court's have wide discretion in determining whether a certain fact, if proved, falls within the privity exclusion. Although the defense is available, it gets more difficult to use as time wears on.

In the event of an incident where limitation may play a significant factor, it is important to move quickly. In fact, the Act provides that a vessel owner must file its limitation action within six months of the incident. It is important to note that this time period is significantly shorter than those applied to other admiralty claims. Thus, if a vessel owner does not move quickly, he may not be able to insulate himself from excessive liability. Filing quickly also provides vessel owners with a single venue to litigate all claims related to an incident. Without the filing of a liability action, a vessel owner may subject itself to litigating several claims in different forums. In many cases, even if limitation is not granted, the consolidation of all claims in a single forum may be worth the cost of asserting the defense early. The process is started by the filing of a Limitation of Liability Complaint. This pleading will state that the vessel owner owns a vessel that was involved in an incident and that it intends to take advantage of the

Limitation Act. All potential claimants are invited to file claims within this limitation proceeding. Once all potential claimants have filed claims in the limitation proceeding, the court will then allow discovery and conduct a trial on whether the vessel owner is entitled to avail itself of the limitation defense. If the court finds that limitation is appropriate, all of the claimants will be limited to collectively recovering the value of the vessel and the freight pending at the end of the voyage. Payment of these claims is guaranteed by a bond that must be filed with the court upon the filing of limitation action. Once the limitation fund is gone, the vessel owner has no further liability. If the court finds that limitation does not apply, all of the claimants are free to pursue their claims as if the limitation proceeding was never filed. Thus, there will be no limitation on the amount that these plaintiffs can recover from the vessel owner. At that point, the vessel owner will have to rely upon its insurance and corporate formalities to insulate itself from liability for these claims. To understand the importance of asserting this limitation of liability defense, we can look at a simple, but very possible, event. Assume that you are operating a vessel in the Gulf of Mexico and, while underway, your vessel allides with an oil production well. After the allision, the well ruptures and begins spewing oil into the environment. As a result of the collision, the vessel is badly damaged and sinks. It would be appropriate to file a limitation proceeding arguing that the vessel owner's loss is limited to that of the value of the vessel at the end of its voyage. In this case, the potential damage for the personal injuries on the vessel, loss of oil product, lost production, damage to the well, damage to the oil company, clean up costs, civil and criminal penalties, etc. will likely far outweigh the value of most vessels operating in those waters. In fact, this is the type of claim that could easily put a company out of business. However, if the accident occurred without the "privity or knowl-

edge" of management, even if the accident is clearly caused by the negligence of the crew, a shipowner may be able to avail itself of the limitation of liability and save itself from significant damages. Thus, although the courts have become reluctant to allow vessel owners from taking advantage of the limitation defense, it is not dead yet and is something that every vessel owner and their attorney should look into in the event of a serious incident.



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