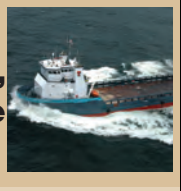
THE INFORMATION AUTHORITY FOR THE WORKBOAT • OFFSHORE • INLAND • COASTAL MARINE MARKETS

Marine News

NOVEMBER 2011
WWW.MARINELINK.COM

Workboat Annual



The Vessel Owners' Limitation of Liability Act

An Anachronism that Persists, For Now

By Frederick B. Goldsmith

In the wake of the April 20, 2010, DEEPWATER HORIZON catastrophe, the deaths and injuries it caused, and the oil spill (one of the worst worldwide, ever) that ensued, several bills have been introduced in the U.S. House and Senate to reduce or eliminate the protections afforded vessel owners under the federal Vessel Owners' Limitation of Liability Act ("the Act"), both for this specific incident, and in general. The Act generally does not limit liability for damages and removal costs under the federal Clean Water Act and the Oil Pollution Act of 1990, or similar state laws, but vessel owners often try to employ the Act's "concursus" mechanism, which requires all damage claimants to file their claims in one court, to help manage what can be far-flung litigation.

For example, Senate Bill 183, "The Deepwater Horizon Survivors' Fairness Act," sought to amend the Act to remove from its coverage "a claim for personal injury or wrongful death arising from the blowout and explosion of the mobile offshore drilling unit Deepwater Horizon…" H.R. 5503, entitled "Securing Protections for the Injured from Limitations on Liability Act," which also never became law, would have, among other things, repealed the Act. The Act was invoked by Transocean Ltd. and others as owners and/or operators of the DEEPWATER HORIZON when these entities filed a complaint under the Act in Houston federal court. They did so because, as a semi-submersible MODU (or mobile offshore drilling unit), the DEEPWATER HORIZON is considered under applicable law a "vessel," and thus subject to the protections of the Act.

During its existence, the Act has been the focus of countless published judicial decisions and scores of law review articles. It is highly controversial. It is regularly invoked by vessel owners as a defensive mechanism in personal injury and property damage litigation. This article is not intended to explain all the procedural permutations and substantive interpretations of the Act, but rather to provide a brief review of its history and to collect some of the numerous calls by jurists and legal commentators to reign-in or eliminate the Act, and why.

Goldsmith & Ogrodowski, LLC
River, Rail & Motorcycle Lawyers

In general terms, the Act entitles the owner of a commercial or recreational vessel whose vessel is involved in an accident to limit its "liability," or financial exposure, to the post-casualty value of the vessel, together with "pending freight," or the income owed the owner at the end of the voyage in question. The key exception to this liability-insulating statute is this: if the claimants against the vessel owner can prove the owner had "privity" to or "knowledge," that is, they knew or should have known, of the acts, events, or conditions of or involving the vessel which caused the accident, then the vessel owner may not take advantage of the Act to cap its liability.

If and when the Act is applied to cap the damages exposure of the vessel owner, the potential for legitimate claimants being left wholly uncompensated or inadequately compensated can arise whenever deaths, serious personal injuries, or significant property damage follow an accident, yet the vessel involved has relatively little value. Imagine, for example, when someone is killed in an accident involving a $5,000 Jet Ski, or a towboat deckhand is crippled or permanently disabled in an accident, yet the towboat is appraised at only $150,000. And these inequities can occur even if the vessel owner has millions of dollars of liability insurance coverage.

One of the most dramatic examples of the potential inequities the Act can occasion is the sinking of the TITANIC. After it sank, killing 1,517 people, Oceanic Steam Navigation Co., Ltd., the owner of the grand passenger liner, petitioned the federal district court in New York City to limit its liability to the post-casualty value of the vessel. This court's April 21, 1913, opinion, which in clinical terms describes the tragedy, identifying key facts relevant to the Act's potential protections for the vessel owner, reads in part:

"The petition alleges.that the petitioner.was the sole owner of the steamship Titanic, built in Belfast and launched in 1911; that on April 10, 1912, the Titanic,

with passengers and cargo on board, left Southampton on her maiden voyage, bound for New York; that on April 14, about 11:40 p.m., in midocean, in latitude 41 degrees 46' N. and longitude 50 degrees 14' W., the Titanic came into collision with an iceberg, as a result of which she sank about 2:20 a.m. on April 15, 1912; that 711 persons were saved in the boats; that her master, many of her officers and crew, and a large number of passengers, perished; that the vessel, her cargo, the personal effects of the passengers and crew, the mails, and everything connected with the vessel, except 14 lifeboats and their equipment, became a total loss; that the value of the lifeboats saved and of the pending freight and passage moneys did not exceed the sum of $91,805.54; and that the petitioner claimed exemption from liability. The petition prayed.that the court adjudge that the petitioner's liability be limited to the value of the petitioner's interest in the steamship at the end of the voyage."

In other words, since the TITANIC, itself, was a total loss, the "limitation fund" to which the survivors could lay claim in court consisted of only the dollar value of the remaining 14 lifeboats and "pending freight" together totaling less than $92,000. In their filing under the Act in Houston federal court in May 2010 after the DEEPWATER HORIZON calamity, the vessel's owners and operators sought to limit their liability to $26.7 million, the value of the rig's "operating dayrate," not the rig itself, which, like the TITANIC, had sunk and thus was a total loss. In fact, Transocean filed in court an affidavit from a marine surveyor attesting to the rig's post-casualty market value as "$0.00."

Background of the Act

The Act is codified at title 46 United States Code sections 30501 to 30512. The key provisions of the Act, alluded to above, appear in Section 30505(a) and (b), which state:

§ 30505. General limit of liability

(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.

As noted above, the phrase "privity or knowledge" in the Act has been defined broadly by the courts and generally encompasses not only acts, events, or conditions of which the individual or corporate vessel owner knew, but also those of which the owner should have known. With respect to a corporate owner, "privity or knowledge" generally means the privity or knowledge of managerial employees. The "value" of the vessel is its post casualty value. "Pending freight" means the total earnings of the vessel for the voyage, whether for carriage of passengers or goods.

Criticism of the Act

The Act became law in 1851 and was later amended to broaden its coverage to all, not just commercial, vessels. It was re-codified and re-worded in 2006, but the substance of the Act remains the same. The Act became law when the corporate form of doing business was common, and before the use of liability insurance was widespread. It was passed to encourage American shipbuilding and maritime industry investment. In the intervening 160 years, the corporate form of doing business has become commonplace, and liability insurance protecting vessel owners and operators is widely available.

Understandably, well before the recent Congressional calls to reign-in or revoke the Act in response to the DEEPWATER HORIZON catastrophe, and for several decades now, courts and legal commentators have criticized and questioned the continued need and justification for the Act, including its applicability to recreational, as well as commercial, vessels. A sampling follows:

- "**Judicial expansion of the Limited** Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons. If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost." (U.S. Supreme Court Justice Hugo LaFayette Black dissenting in Maryland Casualty Co. v. Cushing, 347 U.S. 409 (U.S. 1954))
- "**[I]t is at least doubtful whether** the motives that originally lay behind the limitation are not now obsolete…". (U.S. Circuit Judge Learned Hand writing in In re Petition of United States Dredging Corp., 264 F.2d 339 (2d Cir. N.Y. 1959))
- "**The developments of the past** twenty years suggest that, although the Limitation Act may never come in for a 'general overhaul,' its most likely fate, if it is not repealed outright, is that it will be judicially nibbled to death. Ours is neither the first nor, doubtless, the last bite." (G. Gilmore & C. Black, The Law of Admiralty 677 (2d ed. 1975))
- "**hopelessly anachronistic**" (U.S. Circuit Judge Irving L. Goldberg writing in University of Texas Medical Branch v. United States, 557 F.2d 438 (5th Cir. 1977))
- "**In any event, shipowners are in a** poor position to rely on equitable principles in seeking an expansive interpretation of the statute. The Liability Act provides shipowners a generous measure of protection not available to any other enterprise in our society. Many have suggested that the Act, a relic of an earlier era, provides protections that are neither warranted nor consistent with current reality…With the availability of incorporation, insurance and other devices to protect shipowners against major disasters, the Liability Act seems oddly out of place in the modern economy; its application could well lead to wholly unexpected and harsh results…Congress might be well advised to examine other approaches or to consider whether the rationale underlying the Liability Act continues to have vitality as we enter the last decade of the twentieth century." (U.S. Circuit Judge Alex Kozinski writing in Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234 (9th Cir. 1989))
- "**Relic of another time, and a very** different American economy, the Limitation of Liability Act is today well past its prime. It served its purpose once, but now clutters the legal landscape…It sets us apart from the international community of maritime states. Its retirement is overdue. (Stone, Dennis J., "The Limitation of Liability Act: Time to Abandon Ship?," 32 J. Mar. L. & Com. 317 (April 2001))
- "**The Limitation Act served its pur**pose once, but protections avail-

able to the modern shipping industry are far greater today, thus eliminating any reason for allowing the Act to remain part of American admiralty law at the expense of innocent victims. It is time for the courts to strike it down." (White, Mark A., "The 1851 Shipowners' Limitation of Liability Act: Should the Courts Deliver the Final Blow?," 24 N. Ill. U. L. Rev. 821) (Summer 2004))

- "…**owners of pleasure vessels may** limit their liability under the Limitation Act. there is little reason for such a rule." (Senior U.S. Circuit Judge Elbert P. Tuttle writing in Lewis Charters, Inc. v. Huckins Yacht Corp., 871 F.2d 1046 (11th Cir. 1989))
- "**While we might agree in this case** with the district court that extension of the Limitation Act to pleasure craft such as jet skis is inconsistent with the historical purposes of the Act, restriction of its applicability requires congressional action." (U.S. Circuit Judge Joseph W. Hatchett writing in Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11th Cir. 1990))

Often, it is a notorious event, with dramatic and seemingly inequitable results, that moves legislatures and executive branches, on both state and federal levels, to act. It may be the Deepwater Horizon will be the catalyst to cause the Congress to repeal or water-down the Vessel Owners' Limitation of Liability Act. But, 19 months after the rig burned and sank, the Act persists.

Fred Goldsmith, licensed to practice law in Pennsylvania, West Virginia, and Ohio, focuses on admiralty & maritime, railroad, oilfield, personal injury and death, motorcycle, and insurance coverage litigation with Pittsburgh-based Goldsmith & Ogrodowski, LLC.

Email: fbg@golawllc.com
Tel: (877) 404-6529