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**THE SHIPOWNER'S LIMITATION
OF LIABILITY ACT:
PITFALLS FOR THE UNWARY**

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I. Overview

This paper will discuss the application of the Shipowner's Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.* ("Limitation Act"). The Limitation Act has been used by shipowners as a tool to stay actions, bring claims in concurus before a federal district court as well as exonerate or limit itself from liability stemming from a maritime casualty. Though it has many benefits, the Limitation Act also has many pitfalls for an unwary litigant. Many of these pitfalls are highlighted in this paper.

II. History of the Limitation Act

The Limitation Act was enacted in 1851 to promote the development of the American merchant marine and to put American shipowners on a footing equal to shipowners hailing from other commercial seafaring nations, particularly Great Britain.¹ With the Limitation Act, shipowners would have the opportunity to limit liability to the post loss value of their vessels for a marine casualty.² Throughout the past one hundred and fifty years, many shipowners have sought the protection of the Limitation Act. In fact, the sinking of the *TITANIC*, the 1947 Texas City explosions and the New Orleans River Walk Marketplace allision all spawned Limitation Act

¹ *Lake Tankers Corp. v. Henn*, 354 U.S. 147; 77 S. Ct. 1269; 1 L. Ed. 2d 1246 (1957).

² *Id.*

cases.³ While the Limitation Act has been criticized in recent years as being outdated, it has not been repealed by Congress, and courts therefore continue to apply it.⁴

III. Who is Protected under the Limitation Act

The Limitation Act applies to an “owner of any vessel, whether American or foreign.”⁵ The Limitation Act, however, does not define the word “owner”. Judicial interpretation has found the word “owner” to be “untechnical” and should be given broad construction to achieve Congress' purpose of encouraging investment in American shipping.⁶

1. Who Are and Are Not “Owners”

When determining whether a party is an “owner” within the meaning of the Limitation Act, a court must look beyond mere title ownership and assess whether the party exhibited domination or control over the vessel.⁷ Corporate shareholders, mortgagees, prior vendors, life tenants, trustees and government agencies in wartime have been found to be “owners” entitled to limit their liability. Part owners of a vessel

³ *The Titanic*, 204 F. 295 (S.D. N.Y. 1912); *Petition of Republic of France*, 171 F. Supp. 497 (S.D. Tex. 1959), reversed *sub nom*, *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961); *In re Complaint of Clearsky Shipping Corp.*, 1998 AMC 1981 (E.D. La. 1998).

⁴ *Hercules Carriers, Inc. v. Claimant State of Florida, Dep't of Transportation*, 768 F.2d 1558 (11th Cir. 1985).

⁵ 46 U.S.C. § 183(a).

⁶ *Flink v. Paladini*, 279 U.S. 59; 49 S. Ct. 255; 73 L. Ed. 613 (1929).

⁷ *Dick v. U.S.*, 671 F.2d 724 (2nd Cir. 1982); *Admiral Towing Co. v. Woolen*, 290 F.2d 641 (9th Cir. 1961).

may also limit their liability up to the value of their interest in the vessel.⁸ Also, owners of the vessel at the time of the subject voyage but who have sold the vessel by the time litigation commences are considered “owners” for the purposes of losses occurring during the time they owned the vessel.⁹ Though courts are to give broad construction to the word “owner”, mere possession of a vessel does not confer “ownership” for purposes of the Limitation Act.¹⁰ As such, agents of the vessel owner, though they may have responsibility for maintenance and operation of the vessel, are not deemed “owners” for purposes of the Limitation Act.¹¹

2. Charterers who are Protected Under the Limitation Act

The Limitation Act expressly provides protection for a charterer who actually “mans, victuals, and navigates the vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel.”¹² A charter is a contract between the vessel’s owner and a third party for the use of the vessel. Not every charterer is afforded protection under the Limitation Act. The Act has been interpreted to include demise and bareboat charterers but not time or voyage charterers.¹³ A

⁸ *Tomasson v. Whitwill*, 12 Fed. 891, *aff’d* 118 U.S. 520 (1892).

⁹ *In re Complaint of Sheen*, 709 F.Supp. 1123 (S.D. Fla. 1989).

¹⁰ *Stone v. Diamond Steamship Transportation Corp.*, 328 U.S. 853; 66 S.Ct. 1344; 90 L.Ed. 1626 (1946).

¹¹ *Amoco Cadiz Limitation Proceedings*, 1992 AMC 913 (7th Cir. 1992).

¹² 46 U.S.C. § 186.

¹³ *Diamond S.S. Transp. Corp. v. Peoples Saving Bank & Truct Co.*, 152 F.2d 916, 921 (4th Cir. 1945); *Jones & Laughlin Steel Corp. v. Vangi*, 73 F.2d 88 (3rd Cir. 1934), *cert. dismissed* 294 U.S.

demise charterer, however, may only take advantage of the Limitation Act if the charter relinquishes possession, command and navigation of the vessel.¹⁴ The charter must also expressly state that the owner grants the charterer the sole and exclusive possession and control of the vessel.¹⁵ Furthermore, the charterer, not the owner, must be required under the terms of the charter and actually procure the necessities and man the vessel. The recent case of *In re Am. Milling Co.* found that the towboat's crew's employer did not enjoy owner or owner *pro hac vice* status under the Limitation Act because its role under the crewing agreement was limited.¹⁶ Further, the employer's interest was kept in check by the towboat owner's retention of substantial control over decisions related to the operation and control of the vessel, selection of the crew, and maintenance of the vessel.¹⁷

IV. What is a "Vessel" for Purposes of the Limitation Act?

The Limitation Act applies to "seagoing vessels and... all vessels used on lakes and rivers or in inland navigation, including canal boats, barges, and lighters."¹⁸ Though not specifically defined by the Limitation Act, other federal statutes have defined the word "vessel" to include "every description of watercraft or other artificial

735, 55 S.Ct. 406, 79 L.Ed. 1263 (1935); *In re Complaint of Anheuser-Busch*, 742 F. Supp. 1143 (S.D. Fla. 1990).

¹⁴ *Guzman v. Pichirilo*, 369 U.S. 698 (1962); *In re Martell*, 742 F. Supp. 1147 (S.D. Fla. 1990).

¹⁵ *In re USNS Mission San Francisco*, 259 F.2d 608 (3d Cir. 1958).

¹⁶ *In re Am. Milling Co.*, 409 F.3d 1005 (8th Cir. 2005).

¹⁷ *Id.*

¹⁸ 46 U.S.C. § 186.

contrivance used, or capable of being used, as a means of transportation on water.”¹⁹ Courts interpreting the Limitation Act have used this definition to assist in their analysis as to whether an object is a “vessel.”²⁰ As such, the term “vessel” has been liberally construed.

The majority of jurisdictions hold that pleasure vessels as well as commercial vessels fall within the province of the Limitation Act.²¹ In fact, jet skis, a floating boarding house²², a fifteen-foot powerboat,²³ a barge²⁴ and a sixteen foot catamaran²⁵ have been held to constitute “vessels” within the meaning of the act. Despite the liberal construction, however, seaplanes,²⁶ oil rigs and fixed towers²⁷ are not vessels for purposes of the Limitation Act. Furthermore, ships being dismantled for scrap metal are no longer vessels and the owners are not protected by the Limitation Act for any claim occurring while the vessel is being dismantled.²⁸

V. What Claims are Subject to the Limitation Act?

¹⁹ 1 U.S.C. § 3.

²⁰ *In re Complaint of Boca Grande Club, Inc.*, 715 F. Supp. 341 (M.D Fla. 1989).

²¹ *In re Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990); *In the Matter of Guglielmo*, 897 F.2d 58 (2nd Cir. 1990); *In re Young*, 872 F.2d 176 (6th Cir. 1989); *In re Shaw*, 1989 AMC 116 (4th Cir. 1988); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975).

²² *Petition of Kansas City Bridge Co.*, 19 F. Supp. 419 (W.D. Mo. 1937).

²³ *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937).

²⁴ *In re P. Sanford Ross*, 196 F. 921 (E.D.N.Y. 1912).

²⁵ *In re Complaint of Boca Grande Club, Inc.*, 715 F. Supp. 341 (M.D Fla. 1989).

²⁶ *Hubschman v. Antilles Airboats, Inc.*, 440 F. Supp. 828 (D. V.I. 1977).

²⁷ *U.S. Air Force v. Texas Tower No. 4*, 203 F. Supp. 215 (S.D.N.Y. 1962).

²⁸ *In re Bayou Concession Scrap, Inc.*, 2005 U.S. Dist. LEXIS 6219, CIVIL ACTION NO: 04-2728 SECTION: "A" (2) (E.D. La. April 1, 2005); *In re Wepfer Marine, Inc.*, 344 F. Supp. 2d 1120 (W.D. Tenn. 2004).

A wide variety of claims are subject to the Limitation Act. In fact, nearly every claim that can be asserted against a vessel *in rem* and/or its owner *in personam* can be limited under the Limitation Act.

1. Claims that are Limitable

Claims arising from personal injuries, deaths,²⁹ fire, collisions/allisions,³⁰ sinking, salvage³¹ and lost cargo³² are all subject to the Limitation Act. Jurisprudence for such a wide effect derives from section 183(a) which allows limitation of any “act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred.”³³

2. Claims that are Not Subject to the Limitation Act

Despite the Limitation Act’s wide scope, some claims cannot be limited. The Limitation Act expressly exempts wages due to seamen.³⁴ Furthermore, a shipowner cannot use the Limitation Act to avoid its obligation to provide injured seamen maintenance and cure benefits.³⁵ Claims for cargo damage caused by improper deviation of the vessel have been deemed outside the Limitation Act’s scope.³⁶ Claims

²⁹ *The Albert Dumois*, 177 U.S. 240, 20 S. Ct. 595, 44 L. Ed. 751 (1900).

³⁰ *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 20 L. Ed. 585 (1871).

³¹ *Metropolitan Redwood Lumber Co. v. Doe*, 223 U.S. 365, 32 S. Ct. 275, 56 L.Ed. 473 (1912).

³² *Earle & Stoddart v. Ellerman’s Wilson Line*, 287 U.S. 420, 53 S. Ct. 200, 77 L.Ed. 403 (1932).

³³ 46 U.S.C. § 183(a).

³⁴ 46 U.S.C. § 189.

³⁵ *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991).

³⁶ *The Pelotas*, 66 F.2d 75 (5th Cir. 1933).

for the return of unearned freight paid in advance are not subject to limitation,³⁷ however, if the contract of affreightment provides that freight is deemed earned when the cargo is shipped it may be a part of the limitation fund.³⁸ Furthermore, environmental claims such as those arising under the Oil Pollution Act of 1990³⁹, Clean Water Act⁴⁰ and the Park System Restoration Act⁴¹ are not limitable.

3. Personal Contract Doctrine

Another important category of claims which are carved out of the Limitation Act protection, are those arising out of the personal contracts of the shipowner.⁴² The “Personal Contracts Doctrine” is an equitable doctrine based upon the logic that a shipowner should not be able to promise an undertaking or performance that is within his personal control and then turn around and limit liability when his performance is later deemed faulty. For example, limitation cannot be had for the sinking of a vessel due to an unseaworthy condition when the charter party expressly or impliedly warrants the vessel’s seaworthiness.⁴³ Further, a shipowner may not limit his

³⁷ *In re Liverpool & Great Western Steam Co.*, 3 Fed.168 (S.D.N.Y. 1880).

³⁸ *Linea Sud-Americana v. 7,295.40 Tons of Linseed*, 29 F. Supp. 210 (S.D.N.Y. 1939), *aff’d* 108 F.2d 755 (2d Cir. 1940).

³⁹ *In re Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1998).

⁴⁰ *Id.*

⁴¹ *In re Tug Allie-B, Inc.*, 114 F.Supp.2d 1391 (M.D. Fla.), *aff’d* 273 F.3d 936 (11th Cir. 2000).

⁴² *Richardson v. Harmon*, 222 U.S. 96, 32 S. Ct. 27, 56 L.Ed. 110 (1911).

⁴³ *Pendleton v. Benner Line*, 246 U.S. 353, 38 S. Ct. 330, 62 L.Ed. 770 (1918).

obligations under towage,⁴⁴ berthing, ship's mortgages,⁴⁵ vessel repairs and supplies contracts. Indemnity contracts have also been held personal contracts thereby excluding the application of the Limitation Act.⁴⁶

The test for determining whether a claim falls within the "personal contracts doctrine" is not whether the shipowner made the contract but is whether the shipowner is personally bound to perform. When a vessel is owned by a business, contracts are "personal" if they are executed by managerial employees acting within the scope of their discretion and authority.⁴⁷ On the other hand, the "personal contracts doctrine," does not extend to certain contractual obligations entered into by the master employed for the ship.

VI. Invoking the Protection of the Limitation Act

There are two (2) methods in which a shipowner can seek the protection of the Limitation Act. The first method is by bringing an action in federal district court. The second method is asserting the Limitation Act as an affirmative defense. Each method has its distinctions of which a litigant must be aware.

⁴⁴ *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11 (6th Cir. 1907).

⁴⁵ *In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970).

⁴⁶ *S & E Shipping Corp. v. Chesapeake & O Re. Co.*, 678 F.2d 636 (6th Cir. 1982); *Signal Oil & Gas Co. v. The Barge W-701*, 654 F.2d 1164 (5th Cir. Sept. 1981).

⁴⁷ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (6th Cir. 1993).

1. Bringing a Limitation Action in Federal District Court

i. Pleadings

The first step in bringing a limitation action is by a Petitioner filing a Complaint-in-Limitation. The complaint may be filed anytime with the six month statute of limitations (discussed below). Also of note is the commencement of a limitation proceeding is not subject to an automatic stay under the Bankruptcy Act should a potential claimant file for bankruptcy.⁴⁸

The complaint must “set forth the facts on the basis of which the right to limit liability is asserted.”⁴⁹ It is not enough for the complaint to state only general allegations related to the casualty.⁵⁰ Rather, the complaint must elaborate on the voyage on which the casualty arose from which the owner seeks limitation or exoneration or liability occurred, and state with particularity the facts or the casualty.⁵¹ In the recent case of *In re Lauritsen* the court dismissed a limitation action for vagueness wherein the complaint merely stated the location of the subject incident occurred on Lake Erie.⁵²

Besides specifying the location of the underlying incident, the complaint must also set out the date and place of the termination of the voyage on which the casualty

⁴⁸ *In re Corso*, 1995 AMC 570 (C.D. Cal. 1994).

⁴⁹ Fed.R.Civ.P. Supp. F(2).

⁵⁰ *The M/V Sunshine, II v. Beavin*, 808 F.2d 762 (11th Cir. 1987).

⁵¹ Fed.R.Civ.P. Supp. F(2).

⁵² *In re Lauritsen*, 2004 U.S. Dist. LEXIS 18324, No. 04 C 3550 (N.D. Ill Sept. 14, 2004).

occurred, and state with particularity all known outstanding claims related to the voyage and their type.⁵³ Supplemental Rule F(2) requires that the complaint state with particularity the post loss value of the vessel and pending freight, if any, where the vessel currently is located and in whose possession the vessel may be found.⁵⁴

ii. Subject Matter Jurisdiction

The Limitation Act does not confer independent admiralty jurisdiction to a federal district court.⁵⁵ Therefore, in order for subject matter jurisdiction to lie the event for which limitation is sought must have occurred upon navigable waters and have a connection to a traditional maritime activity. The focus of this paper is not on the nuances of admiralty jurisdiction, however; the underlying loss must be subject to admiralty jurisdiction in order for the limitation act to apply. For example, a complaint-in-limitation was dismissed concerning an airboat accident occurring in a non-navigable area of the Florida Everglades.⁵⁶ Additionally, limitation actions stemming from a vessel fire occurring on land wherein the offending vessel was removed from navigation⁵⁷ as well as a casualty occurring on a landlocked lake⁵⁸ were

⁵³ Fed.R.Civ.P.Supp. F(2).

⁵⁴ Fed.R.Civ.P.Supp. F(2).

⁵⁵ *Lewis Charters, Inc. v. Hukins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114 (5th Cir. 1992); *David Wright Charters Serv. v. Wright*, 925 F.2d 783 (4th Cir. 1991); *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775 (8th Cir. 1990), *cert denied*, 502 U.S. 898; 112 S. Ct. 272; 116 L. Ed. 2d 224 (1991).

⁵⁶ *In re Bridges Enters.*, 2003 AMC 2811 (S.D. Fla. 2003).

⁵⁷ *In re Lavender*, 18 Fla. L. Weekly Fed. D 74 (S.D. Fla. 2004).

dismissed. In the recent case of *M/V Drema G. Woods v. Johnson*, the Fourth Circuit affirmed a dismissal of a limitation action for want of jurisdiction wherein the underlying incident concerned a car accident caused by an intoxicated seaman who received permission to leave the vessel to attend to personal matters.⁵⁹ However, an owner of a vessel floating upon navigable waters but tied to shore may seek the protections of the Limitation Act.⁶⁰

iii. No Right to a Jury Trial

As limitation proceedings are considered admiralty proceedings, there is no right to a jury trial.⁶¹ The court on motion may allow an advisory jury pursuant to Fed.R.Civ.P. 39(c). However, in situations where a claimant engages in third party practice against a joint tortfeasor and there exists either federal question or diversity jurisdiction, the third party tortfeasor may be entitled to a jury trial as to the claimants claim against it if demanded.

iv. Venue

Proper venue also has its pitfalls for the unwary litigant. Rule F(9), Supp. Adm. R. is specific as to proper venue for a limitation action. If venue is wrongly laid, the

⁵⁸ *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771 (9th Cir. 1995).

⁵⁹ *M/V Drema G. Woods v. Johnson*, 97 Fed. Appx. 449 (4th Cir. 2004).

⁶⁰ *In re Houseboat Starship II*, 2005 U.S. Dist. LEXIS 36237, NO. 2:05-0086 (M.D. Tenn. Dec. 12, 2005).

⁶¹ *Ex Parte Green*, 286 U.S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996).

district court shall either dismiss the action or transfer it to a district in which it could have been brought.⁶² Pursuant to the rule, a complaint-in-limitation *shall* be filed in any district in which the vessel has been attached or arrested; or, if the vessel has not been attached or arrested, in any district in which the owner has been sued with respect to such claim.⁶³ The word “district” means the geographical area that lies within boundaries of a federal district court.⁶⁴ Therefore, an owner sued in state court is required to file the limitation action in the federal district court whose jurisdictional boundaries encompass that of the state court in which the action is pending.⁶⁵

If the vessel has not been attached or arrested and a suit has not been commenced against the owner, proper venue lies in the district where the vessel can be found; but, if the vessel cannot be found in a district, then the complaint-in-limitation can be filed in any district.⁶⁶ In situations where the subject vessel was sold, the proceeds of the sale represent the vessel for venue purposes.⁶⁷

Though Rule F(9), Supp. Adm. R. requires that a limitation action be commenced in an appropriate district court, the rule further allows the district court to transfer a limitation action. If this limitation action is brought in an incorrect district,

⁶² Fed.R.Civ.P.Supp. F(9), Supp. Adm. R.

⁶³ *Id.*

⁶⁴ *In re American River Transp. Co.*, 864 F. Supp. 554 (E.D. La. 1994).

⁶⁵ *Id.*

⁶⁶ Fed.R.Civ.P.Supp F(9).

⁶⁷ *Id.*

the court has the option to dismiss or transfer the case to the appropriate district.⁶⁸ Should this happen, the preferred and customary practice is to transfer, rather than dismiss.⁶⁹ Furthermore, transfer of a limitation proceeding where venue is properly laid may occur and is at the discretion of the district court.⁷⁰ Factors the court should consider when transferring a limitation proceeding include: (1) ease of access to sources of proof; (2) the convenience of parties and witnesses; (3) the cost of obtaining the attendance of witnesses; (4) the availability of compulsory process; (5) possibility of a view; (6) the interest in having local controversies decided at home; and (7) the interests of justice.⁷¹

v. Statute of Limitations

A Complaint-in-Limitation must be filed within six months after the shipowner receives written notice of a claim.⁷² At its inception, the Limitation Act did not have a statute of limitations. Without being required to promptly file a limitation proceeding, a practice developed among shipowners of waiting to bring a limitation action until a final adjudication of the merits. As such, a shipowner would wait and see if a party would bring a lawsuit and if the trial exposed the shipowner to liability, he could then

⁶⁸ Fed.R.Civ.P.Supp. F(9).

⁶⁹ *Mike's Marine, Inc. v. Tinnon (In re Mike's, Inc.)*, 317 F.3d 894 (8th Cir. 2003).

⁷⁰ *In re Campbell Transp. Co.*, 368 F. Supp. 2d 553 (N.D. W. Va. 2005); *Campbell Transp. Co. v. Wilds*, 2005 AMC 786 (W.D. Pa. 2005).

⁷¹ *Id.*

⁷² 46 U.S.C. § 185.

petition a federal court for exoneration or limitation of liability and receive a second bite at the apple.⁷³

To discourage this practice, in 1936, Congress amended the Limitation Act to add a time bar provision that requires a vessel owner to file its petition in federal court within six months of receiving “written notice of claim.” This amendment reads:

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter...⁷⁴

The six month statute of limitation was added to avoid undue delay caused by shipowners waiting to file limitation actions until after a trial on the merits.⁷⁵

A. Written Notice

The Limitation Act is silent as to what constitutes proper notice of claim other than that it must be written. Courts have formulated two (2) tests as to what a writing must contain to give a shipowner notice of a potential claim. Under one test, notice is sufficient if it:

- (1) informs the vessel owner of an actual or potential claim;
- (2) which may exceed the value of the vessel; and,
- (3) the claim is subject to limitation.⁷⁶

⁷³ *The Deep Sea Tankers, Ltd. v. The Long Branch*, 258 F.2d 757 (2d Cir. 1958).

⁷⁴ 46 U.S.C. § 185.

⁷⁵ *In re Complaint of McCarthy Bros. Co.*, 83 F.3d 821 (7th Cir. 1996).

Under this test, the notice must reveal a reasonable possibility that the claim made is one subject to limitation.⁷⁷

The second test requires that the writing:

- (1) demands a right or supposed right;
- (2) blames the vessel owner for any damage or loss; and
- (3) calls upon the vessel owner for anything due to the claimant.⁷⁸

The elements in the above tests need not be in a single writing but can be demonstrated in a series of writings.⁷⁹ When faced with a series of letters, the shipowner must read each writing in their entirety and given their “whole tenor” determine whether sufficient notice was given.⁸⁰

At its inception, courts gave greater deference to the shipowner in determining whether a writing triggered the statute of limitations.⁸¹ However, the current temperament of the courts is to resolve any ambiguity in favor of permitting full recoveries and requiring strict adherence to the statutory requisites for limited liability.⁸²

⁷⁶ *Doxsee Sea Clam Co. v. Brown*, 13 F.3d 550 (2d Cir. 1994); *P.G. Charter Boats v. Soles*, 437 F.3d 1140 (11th Cir. 2006); *Paradise Divers, Inc. v. Upmal*, 402 F.3d 1087 (11th Cir. 2005).

⁷⁷ *In re Complaint of McCarthy Bros. Co.* 83 F.3d 821 (7th Cir. 1996).

⁷⁸ *Paradise Divers, Inc. v. Upmal*, 402 F.3d 1087 (11th Cir. 2005).

⁷⁹ *Doxsee Sea Clam Co. v. Brown*, 13 F.3d 550 (2d Cir. 1994).

⁸⁰ *Id.*

⁸¹ *The Chickie*, 141 F.2d 80 (3d Cir. 1944).

⁸² *Cincinnati Gas & Electric Co. v. Abel*, 533 F.2d 1001 (6th Cir. 1976).

Though courts now give claimants deference in assessing whether a writing or series of writings provide sufficient notice to trigger the six-month statute of limitations, claimants are still required to make their position to bring a claim against the shipowner clear. This concern is echoed by the Seventh Circuit in *In re: McCarthy Brothers, Co.*, wherein it stated, “[t]he real danger in failing to hold claimants to a fairly high level of specificity in letters is that the claimants may nullify a shipowner’s right to file a limitation action by sending a cryptic letter and then waiting more than six months to file a claim.”⁸³

This issue also concerned Judge Learned Hand where he, in a concurring opinion in the case of *In re Petition of Allen N. Spooner & Sons, Inc.*, formulated an equitable tolling measure to ensure that, on the one hand, six-month statute of limitation would be respected, and on the other hand, the vessel owner would not have to run to the court and file a limitation action each time he receives a letter mentioning an incident.⁸⁴ Under this principle, if a claimant delivers a vague or ambiguous letter, the duty would shift to the shipowner to compel the claimant to make his position clear as to whether he seeks to bring a claim and the statute of limitations would not be triggered until such time the claimant clarifies his position.⁸⁵ This equitable tolling

⁸³ *In re: McCarthy Brothers, Co.*, 83 F.3d 821 (7th Cir. 1996).

⁸⁴ *In re Petition of Allen N. Spooner & Sons, Inc.*, 253 F.2d 584 (2d Cir. 1958).

⁸⁵ *Id.*

measure has been applied to extend the statute of limitations for shipowners beyond that of the initial writing.⁸⁶

B. How is Written Notice Delivered to or Filed with an Owner

As with the writing requirement, the Limitation Act is silent as to a proper procedure of delivering or filing the writing with an owner. Judicial interpretation of the requirement holds that the writing need not be served upon the shipowner within the service of process requirements of the Federal Rules of Civil Procedure.⁸⁷ In fact, delivering the written notice *via* certified mail to the shipowner's business address has been held appropriate under the Limitation Act.⁸⁸ Additionally, at least one court has found that delivery of the writing to a shipowner's attorney is appropriate even if the attorney never communicated the notice to the shipowner.⁸⁹

Courts have also held that delivering the written notice to the shipowner's agent will satisfy the delivery requirement. In the case of *Diamond v. Beutel* the shipowner referred claims to his insurance agent. A claimant then filed a written notice of claim with the aforementioned insurance agent. The shipowner later argued that the notice was never "given to or filed with" him as required by the statute." The Fifth Circuit Court of Appeals noted that there is "nothing preventing a shipowner from appointing

⁸⁶ *In re Complaint of Morania Barge No. 190, Inc.*, 690 F.2d 32 (2d Cir. 1982).

⁸⁷ *In re Waterfront License Corp.*, 231 F.R.D. 693 (S.D. Fla. 2005).

⁸⁸ *Id.*

⁸⁹ *In re Kiewit Pac. Co.*, 1994 AMC 1537 (N.D. Cal 1994).

an agent to receive the notice, as he might do for the service of process.” The Court then held that “the written notice of claim given to or filed with the agent designated by the owner established the time from which the six months’ limitation period started to run.”

In the 2005 case of *In re Waterfront License Corp.*, written notice was mailed to the shipowner’s principal place of business and opened by an employee of the shipowner.⁹⁰ The shipowner argued that such delivery was insufficient as the writing was not delivered directly to the shipowner or a designated registered agent. This argument was rejected by the court which held that delivery of the notice to the shipowner’s principal place of business satisfied the delivery requirement even though the notice was opened by the shipowner’s employee.

vi. The Limitation Fund

A condition to maintaining a limitation action is that the shipowner has the option to deposit a sum equal to the amount or value of the owner’s interest in the vessel and pending freight for the benefit of the claimants or, transfer his interest and pending freight in the vessel to a court designated trustee.⁹¹ Posting of this security creates a fund in which successful claimants may later be paid pro rata.⁹² If the owner elects to give security, as opposed to transfer his interest to a trustee, and then he must

⁹⁰ *In re Waterfront License Corp.*, 231 F.R.D. 693 (S.D. Fla. 2005).

⁹¹ Fed.R.Civ.P.Supp. F(1).

⁹² *Id.*

provide interest at six percent *per annum* from the date of the security.⁹³ The owner must also give security for taxable court costs.⁹⁴ It is within the district court's discretion as to which form the security must be made.⁹⁵ Courts have approved cash,⁹⁶ bonds,⁹⁷ letters of undertaking issued by a vessel owner⁹⁸ as well as its insurers⁹⁹ and the vessel itself as security.¹⁰⁰ Though providing security is a condition to maintaining a limitation action, courts have determined that such a requirement is not jurisdictional.¹⁰¹ Therefore, the failure to provide security at the onset of the limitation action does not divest a district court of jurisdiction nor have effect upon the six month statute of limitations.¹⁰²

A person who files a claim in the limitation proceeding can move the court for an increase and an appraisal of the value of the owner's interest in the vessel. The shipowner may also move the court to reduce the limitation fund if it is found to be in

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *New York Marine Managers, Inc. v. Helena Marine Service*, 758 F.2d 313, 317 (8th Cir. 1985).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *In re A. & J. Towing*, 1997 U.S. Dist. LEXIS 7878, CIVIL ACTION NO 97-0548 SECTION "K" (E.D. La. June 2, 1997).

⁹⁹ *In re Petition of Slobodna Plovidba*, 1987 AMC 2209 (W.D. Mich. 1987).

¹⁰⁰ *In re Compania Naviera Marasia S. A.*, 466 F. Supp. 900, 901 (S.D.N.Y. 1979).

¹⁰¹ *Guey v. Gulf Ins. Co.*, 46 F.3d 478, 480-81 (5th Cir. 1995).

¹⁰² *Id.*

excess of post-loss value of the vessel.¹⁰³ The district court must then order an appraisal and may order an increase or reduction in the security.¹⁰⁴

A. The Value of the Vessel

First and foremost, the limitation fund must consist of the value of the offending vessel at the end of the voyage. The value of the vessel at the end of its voyage is the vessel's reasonable market value.¹⁰⁵ In cases where the underlying casualty renders the vessel a total loss, the limitation fund would be zero dollars.¹⁰⁶ Only one limitation fund is created regardless of the number of incidents per voyage.¹⁰⁷ On the other hand, if the vessel suffers casualties on multiple voyages, a limitation fund must be established for each voyage.

B. Flotilla Doctrine

In certain circumstances, there has been an exception to the “one vessel, one limitation fund” rule. The “flotilla doctrine” provides that “when vessels are engaged in a common transportation enterprise they should often be considered one vessel for limitation purposes.”¹⁰⁸ This doctrine applies mostly in tug and barge as well as dredge

¹⁰³ *Kristie Leigh Enters v. American Commercial Lines, Inc.*, 168 F.3d 206 (5th Cir. 1999).

¹⁰⁴ Rule F(7), Supp. Adm. R.; *Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622 (11th Cir. 1984), amended 753 F.2d 948 (11th Cir. 1985).

¹⁰⁵ GILMORE & BLACK, *THE LAW OF ADMIRALTY*, note 1, § 10-1 (2d ed. 1975).

¹⁰⁶ *In re Caribbean Sea Transport, Ltd.*, 748 F.2d 622 (11th Cir.), *amended on reh.* 753 F.2d 948 (1984).

¹⁰⁷ *In re Complaint of Sheen*, 709 F. Supp 1123 (S.D. Fla. 1989).

¹⁰⁸ *Wirth, Ltd. v. S/S Acadia Forest*, 537 F.2d 1272 (5th Cir. 1976).

and supply boat casualties. Therefore, if two vessels are contractually engaged in an operation and either vessel injures a person (or causes damage to another vessel or property) who has some contractual relationship with the enterprise, the value of the vessel for purposes of establishing a limitation fund will be both the post loss value of the tug and barge. For example, the values of a dredging vessel and its supply vessel which are under common control will constitute the limitation fund for a case involving an injury to a crewmember on a dredger. It must be remembered that the flotilla doctrine *only* applies when there is some contractual relationship between the vessel owners and the injured party.¹⁰⁹ Only claimants actually in privity of contract, including employment contracts, are allowed to enlarge the limitation fund under the flotilla doctrine.¹¹⁰ In a situation where the injury is to a third person to whom the shipowner owes no contractual obligation, only the actively responsible vessel will be the vessel for limitation purposes.¹¹¹ This is commonly referred to as the “pure tort” rule.

¹⁰⁹ *In re Weeks Marine, Inc.*, 2001 AMC 574 (M.D. Fla. 2000).

¹¹⁰ *In re Waterman S.S.*, 794 F. Supp. 601 (E.D. La. 1992).

¹¹¹ *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed 663 (1927); *Liverpool, Brazil & River Plate Steam Nav Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48, 40 S.Ct. 66, 64 L.Ed. 130 (1919).

C. Insurance Proceeds

The vessel's hull insurance proceeds are not included in establishing the limitation fund.¹¹² Though hull insurance does not factor into setting the limitation fund, some courts have ordered protection and indemnity ("P&I") insurance proceeds to be included in the limitation fund.¹¹³ These cases have been widely criticized and the majority of jurisdictions hold that P&I insurance proceeds should not be factored into the limitation fund.¹¹⁴

D. Shipowner's Right to Damages from Third Parties

The petitioning shipowner's rights under tort law to damages against third parties for damage to the subject vessel arising out of the casualty are also to be included into the limitation fund.¹¹⁵

E. Seagoing Vessels

In situations where the claim is for personal injuries or death, section 183(b) provides for an increase of the limitation fund of \$420 per gross ton. This additional \$420 per ton only applies to "seagoing" vessels. A seagoing vessel for purposes of the

¹¹² *In re Paradise Holdings, Inc.*, 795 F.2d 756 (9th Cir. 1986); *In re Red Star Barge Line, Inc.*, 683 F.2d 42 (2d Cir. 1982).

¹¹³ *In re Hanjin Incheon*, 1988 AMC 1230 (W.D. Wa. 1987); *New York Marine Managers, Inc. v. Helena Marine Services*, 758 F.2d 313 (8th Cir. 1986).

¹¹⁴ *Guillot v. Cenac Towing Co., Inc.*, 366 F.2d 898 (5th Cir. 1966); *Pettus v. Jones & Laughlin Steel Co.*, 322 F.Supp. 1078 (W.D. Pa. 1971).

¹¹⁵ *O'Brien v. Miller*, 168 U.S. 287 (1897); *Guillot v. Cenac Towing Co.*, 366 F.2d 898 (5th Cir. 1966); *Phillips v. Clyde S.S. Co.*, 17 F.2d 250 (4th Cir. 1927).

limitation act does not include “pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, canal boat, scows, car floats, barges, lighters, or non-descript non-self-propelled vessels...”¹¹⁶ When faced with the inquiry to determine whether a particular vessel is "seagoing" under section 183(b) and not exempted by section 183(f) the court must determine whether the vessel does, or is intended to, navigate in the seas beyond the Boundary Line in the regular course of its operations.¹¹⁷ These operations may in fact proceed on either side of the Boundary Line;¹¹⁸ but the court must find that, considering the design, function, purpose, and capabilities of the vessel, it will be normally expected to engage in substantial operations beyond the nautical boundary.¹¹⁹

F. Pending Freight

The Limitation Act requires that the value of the vessel’s pending freight be included in the limitation fund.¹²⁰ Pending freight has been interpreted to mean the “freight for the voyage” on which the casualty for which limitation is sought.¹²¹ “Freight,” in the context of the limitation act, refers to the compensation paid to the vessel owner for the carriage or cargo or other service performed by the vessel.¹²²

¹¹⁶ 46 U.S.C. § 183(f).

¹¹⁷ *In re Talbott Big Foot, Inc.*, 854 F.2d 758 (5th Cir. 1988).

¹¹⁸ The Boundary Line is that line which divides the high seas from rivers, harbors, and inland waters. 33 U.S.C. § 151.

¹¹⁹ *Id.*

¹²⁰ 46 U.S.C. § 183(a).

¹²¹ *The Main v. Williams*, 152 U.S. 122 (1894).

¹²² *Id.*

With respect to vessels engaged in contracts of carriage and towing, this is limited to freight that can be earned only by the vessel or vessels completing the voyage. This includes freight prepaid if, under the terms of the contract of carriage, the freight is not to be returned even if the voyage is not completed.¹²³ In the case of other vessels employed in a contractual enterprise, courts have held that freight may include the entire value of the contract for the voyage at issue.¹²⁴

vii. Stay, Monition Period and Concursus

One of the most attractive benefits of bringing a limitation proceeding is the stay of all pending proceedings and monition to bring all claims arising from the underlying casualty in concursus before the federal district court. Once a limitation action is filed and security is deposited, the Federal District Court must enter an injunction on the further prosecution of claims brought against the shipowner arising from the subject casualty.¹²⁵ The court will also establish a “monition” period during which all claimants must file their respective claims in the limitation action under penalty of default. This “concursus” of claims allows all actions arising out of a marine casualty to be adjudicated in a single proceeding. Such a concursus provides a great benefit to the

¹²³ *Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622 (11th Cir. 1984), amended 753 F.2d 948 (11th Cir. 1985).

¹²⁴ *Brashier v. Union Dredging Co.*, 104 F.2d 762 (9th Cir. 1929); *Offshore Specialty Fabricators, Inc.*, 2002 AMC 2055 (E.D. La. 2002).

¹²⁵ Fed.R.Civ.P.Supp. Rule F(3); *Complaint of Paradise Holdings, Inc.*, 619 F.Supp. 21 (C.D. Cal. 1984) *aff'd*, 795 F.2d 756 (9th Cir. 1986).

shipowner by requiring all potential litigants in a singular federal forum as opposed to defending multiple claims in several jurisdictions.

A. Claims Subject to the Stay and Concursus

Claims subject to the concursus include all claims brought by individuals as well as claims brought by state governments which are limitable under the Act.¹²⁶ Though the stay and concursus order will stay any pending actions within the United States and require the filing of a claim in the limitation proceedings, it does not have effect outside the United States.¹²⁷ Further, claims subject to arbitration have been found to fall outside the concursus order. In *Mediterranean Shipping Co. v. POL-Atlantic*, the Second Circuit reversed a trial court's order that the Limitation Act required concursus of call claims against the vessel owner and demise charterer, including indemnity claims for breach of a vessel sharing agreement between the demise and slot charterer which provided for arbitration of any dispute arising from the contract.¹²⁸

B. Shipowner's Obligation to Provide Notice of the Monition Period

Once the stay and monition period have been ordered, the shipowner must provide notice of the stay and monition to all potential claimants of the casualty.¹²⁹ Notification is accomplished by publishing the stay and monition order in a newspaper

¹²⁶ *Bouchard Transport. Co., v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998). *Magnolia Marine Transp. Co. v. Oklahoma*, 366 F.3d 1153 (10th Cir. 2004).

¹²⁷ *Kreta Shipping, S. A. v. Preussag Int'l Steel Corp.*, 192 F.3d 41 (2d Cir. 1999).

¹²⁸ *Mediterranean Shipping Co. v. POL-Atlantic*, 229 F.3d 397 (2d Cir. 2000).

¹²⁹ Fed.R.Civ.P. Supp. F(4).

of general circulation in the area where the action was filed.¹³⁰ The notice must appear in the publication once a week for four (4) consecutive weeks prior to the date fixed for the filing of the claims in the limitation proceedings.¹³¹ Further, the notice must be mailed to each person known to have made a claim against the vessel or owner arising from the subject voyage no later than the day of second publication.¹³² In the case of death, notice must be mailed to the decedent at the decedent's last known address and also to any person who is known to have made any claim on account of such death.¹³³

The practitioner should obtain an affidavit of publication from the newspaper and file a notice of publication with the court. Further, it is good practice to mail the notice *via* certified return receipt mail in order to maintain a record that the notice was mailed. The court may require these documents to support motions for default and judgment on default against all claimants who failed to join the limitation proceedings.

C. Claims Filed After the Monition Period

Courts have wide discretion in prolonging the monition period in order to allow late claims. The test for whether the court should allow a late claim is whether the limitation action is still pending and undetermined and the interests of the parties will

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

not be adversely affected by the late filing.¹³⁴ The lack of actual notice of the proceedings may also be sufficient for a claimant filing a late claim.¹³⁵ Furthermore, evidence that the claimant did not speak English or that they lived outside the area of publication will most likely provide cause for the district court to allow a late filing.¹³⁶ Even satisfactory notice could be grounds for leave to file a late claim if the district court, upon receiving an affidavit stating the reasons for the late filing, concludes that the balance of the equities favors the late claimant.¹³⁷ A motion to file a late claim should set out the reasons why the Claimant was not able to comply with the monition period and be supported by affidavit.¹³⁸ Should the late filing claimant fail to establish sufficient cause to enlarge the monition period, the claim will be defaulted without an adjudication on the merits.¹³⁹

D. Shipowner's Obligation to Provide Notice of All Claims

Within thirty (30) days after the expiration of the monition period the shipowner must mail a notice to each claimant who filed claims in the limitation proceedings advising them of: (1) the name of each claimant, (2) the name and address of the

¹³⁴ *Texas Gulf Sulphur Co. v. Blue Stack Towing, Co.*, 313 F.2d 359 (5th Cir. 1963); *Golnay Barge Co. v. M/T Shinoussa*, 980 F.2d 349 (5th Cir. 1963).

¹³⁵ *Lloyd's Leasing Ltd. v. Bates*, 902 F.2d 368 (5th Cir. 1990).

¹³⁶ *Id.*

¹³⁷ *Jappinen v. Canada S.S. Lines, Ltd.*, 417 F.2d 189 (6th Cir. 1969).

¹³⁸ *In re River City Towing Servs.*, 420 F.3d 385 (5th Cir. 2005).

¹³⁹ *Id.*; *Trace Marine, Inc. v. Fasone*, 2005 AMC 601 (5th Cir. 2004).

claimant's attorney (if the claimant has an attorney), (3) the nature of each claim brought in the proceedings, and (4) the amount of each claim.¹⁴⁰

viii. Challenging the Stay and Concursus

There are three instances where a district court will abstain from exercising jurisdiction over a limitation action. The first instance is where there are multiple claimants but the limitation fund is adequate to pay all damages even if the shipowner is entitled to limitation. The second situation is where the limitation fund is inadequate for the claim presented but there is only one claimant in the proceeding.¹⁴¹ This commonly is referred to as an "inadequate-fund single claimant" situation. As a general rule, the district court will lift the stay against a single claimant allowing that claimant to proceed in the forum of his own choosing, since there is no need for a concursus.¹⁴² The single claimant exception is narrowly construed. For example, a claim for loss of consortium by a spouse is considered a separate and independent cause of action that creates a multiple claimant situation.¹⁴³ The third is where the limitation fund has multiple claims but the limitation fund is inadequate to reimburse

¹⁴⁰ Fed.R.Civ.P.Supp. F(6).

¹⁴¹ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996); *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

¹⁴² *Id.*

¹⁴³ *Dammers & Vanderheide & Scheepvaart Maats Christina v. Corona*, 836 F.2d 750 (2d Cir. 1988).

all claimants for the full amount of their losses.¹⁴⁴ This is commonly referred to as an “adequate-fund multiple claimant” situation.¹⁴⁵

The purpose for the district court voluntarily relinquishing jurisdiction over a limitation claim stems from the tension between the shipowner’s right to have a district court adjudge limitation and the claimants’ right under the “savings to suitors” clause to proceed in a forum of their choice including state courts.¹⁴⁶ Accordingly, a claimant may proceed against a vessel owner in state court “if the necessary stipulations are provided to protect the rights of the shipowner under the Limitation Act.”¹⁴⁷

1. Multiple Claimants-Adequate-Fund

In a multiple claimants adequate fund situation, there is enough money to pay for all claimants when the shipowner’s liability is limited under the Act. As such, the concursus is unnecessary because the claimants need not compete among themselves for larger portions of the limitation fund. Thus, the shipowner is not exposed to liability in excess of the limitation fund and his rights under the Limitation Act are not

¹⁴⁴ *Id.*

¹⁴⁵ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996); *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

¹⁴⁶ *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S Ct. 993, 148 L. Ed. 931 (2000).

¹⁴⁷ *In re Tetra Applied Techs., L.P.*, 362 F.3d 338 (5th Cir. 2004) (citing *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401 (5th Cir. 1993)).

implicated.¹⁴⁸ Furthermore, the rights of the claimants to have a jury trial in the forum of their choosing will also be protected.¹⁴⁹

2. The Single-Claimant Inadequate Fund Exception

Because the purpose of a concursus is to resolve competing claims to a limitation fund, a single claimant may be able to try liability and damages in another forum by filing stipulations that protect the shipowner's right to have the admiralty court ultimately adjudicate its claim under the Limitation Act.¹⁵⁰ In a single claimant situation, the stipulation must fully protect the vessel owner's rights under the Limitation Act.¹⁵¹ To achieve this the claimant must stipulate to certain conditions before the district court may lift the stay. First, the stipulations must protect the vessel owner's right to litigate its claim to limited liability exclusively in the admiralty court.¹⁵² Therefore, the claimant must agree to (1) waive any *res judicata* and issue preclusion defenses with respect to all matters reserved exclusively for determination by the admiralty court, (2) stipulate that collection on the judgment will not commence

¹⁴⁸ *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996).

¹⁴⁹ *Id.*

¹⁵⁰ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996); *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

¹⁵¹ *Id.*

¹⁵² *Id.*

until the limitation proceedings are concluded, and (3) concede the limitation court's exclusive jurisdiction to determine issues relative to limitation of liability.¹⁵³

3. The Multiple-Claims-Inadequate-Fund Exception

Originally, courts did not allow multiple-claims-inadequate-fund situation to be tried outside the limitation proceedings because without the concursus, the claimants could secure judgments in the various courts which in aggregate could exceed the limitation fund.¹⁵⁴ In recent years, however, courts have allowed claimants to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single-fund claim case through appropriate stipulations.¹⁵⁵ Such stipulations must: (1) waive any *res judicata* and issue preclusion defenses with respect to all matters reserved exclusively for determination by the admiralty court, (2) forbear that collection on the judgment will commence until the limitation proceedings are concluded, (3) concede the limitation court's exclusive jurisdiction to determine issues relative to limitation of liability and (4) establish the priority of claims.¹⁵⁶ Furthermore, the stipulation must be signed by all potential claimants.¹⁵⁷

¹⁵³ *Id.*

¹⁵⁴ *Id.*; *Universal Towing Co. v. Barrale*, 595 F.2d 414 (8th Cir. 1979).

¹⁵⁵ *Id.*; *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571 (5th Cir. 1992); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636 (6th Cir. 1982); *Universal Towing Co. v. Barrale*, 595 F.2d 414 (8th Cir. 1979)

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Another way to dissolve the stay and concursus order in a multiple-claim-inadequate-fund situation is for the claimants to stipulate to the reduction of their claims to an amount less than the limitation fund.¹⁵⁸

viii. Establishing Exoneration or Limitation of Liability

1. Burden of Proof

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*, “[f]irst, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident.¹⁵⁹ Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness.”¹⁶⁰

A. The Initial Burden Lies with the Claimant

The claimant carries the initial burden to prove that an act of negligence or condition of unseaworthiness caused the accident.¹⁶¹

B. Exoneration from Liability Must be Given Should the Claimant not Prove an Unseaworthy Condition or Act of Negligence

If the claimant cannot prove that an act of negligence or an unseaworthy condition caused the loss, the shipowner must be exonerated from liability.¹⁶²

¹⁵⁸ *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

¹⁵⁹ *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976)

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See also, *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996)

C. Should the Claimant Prove Negligence or Unseaworthiness the burden then Shifts to the Petitioner to Prove Lack of Privity of Knowledge

Once the 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.¹⁶³

2. Privity and Knowledge

Section 183(a) provides that a shipowner is entitled to limit his liability for loss or damages which was incurred without his “privity or knowledge.”¹⁶⁴ As with many of its other sections, the Limitation Act does not define “privity or knowledge.” Judicial interpretation of this term has held that privity or knowledge means the shipowner’s personal participation in, or actual knowledge of, the specific acts of negligence or conditions or unseaworthiness which caused or contributed to the casualty.¹⁶⁵ Privity or knowledge has been applied in different ways depending upon whether the owner is an individual or corporation.¹⁶⁶

¹⁶² *The M/V Sunshine, II v. Beavin*, 808 F.2d 762, 764 (11th Cir. 1987); *Illinois Constructors Corp. v. Logan Transp.*, 715 F. Supp. 872, 880 (N.D. Ill. 1989).

¹⁶³ *Hercules Carriers, Inc. v. Claimant State of Florida, Dep’t of Transportation*, 768 F.2d 1558, 1564 (11th Cir. 1985); *Colman v. Jahncke Service, Inc.*, 341 F.2d 956, 958 (5th Cir. 1965) *cert. denied*. 382 U.S. 974 (1966).

¹⁶⁴ 46 U.S.C. § 183.

¹⁶⁵ *The M/V Sunshine, II v. Beavin*, 808 F.2d 762 (11th Cir. 1987).

¹⁶⁶ *Hammersley v. Branigar Org.*, 762 F.Supp. 950 (S.D. Ga. 1991).

A. Individual Owner

Privity or knowledge for an individual shipowner means the owner's personal participation in the fault or negligence which caused or contributed to the loss or injury.¹⁶⁷ However, the mere fact that an owner was at the helm of the vessel during a casualty does not necessarily mean that he was in privity or knowledge of the casual act or negligence or unseaworthy condition.¹⁶⁸ Individual owners have been consistently found without privity or knowledge of the negligence acts of their agents or servants.¹⁶⁹ However, if the individual shipowner breaches his duty to hire competent agents to operate his vessel, and this breach is the proximate cause of the loss, then he will not be able to obtain limitation.¹⁷⁰ Further, if the individual owner failed in his duty of reasonable inspection in order to apprise himself of the conditions likely to produce or contribute to a loss and such conditions caused the loss, then limitation will not be unavailable.¹⁷¹

B. Corporate Owner

When examining privity or knowledge in the corporate owner context, one must determine whether the person with knowledge of the negligence or unseaworthy

¹⁶⁷ *Id.*

¹⁶⁸ *The M/V Sunshine, II v. Beavin*, 808 F.2d 762 (11th Cir. 1987), *but see Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969).

¹⁶⁹ *In re Cirigliano*, 708 F.Supp. 101 (D.N.J. 1989).

¹⁷⁰ *In the Complaint of Sheen*, 709 F.Supp. 1123 (S.D. Fla. 1989).

¹⁷¹ *Id.*; *Hercules Carriers, Inc. v. Florida Dep't Transp.*, 768 F.2d 1558 (11th Cir. 1985).

condition ranks high enough in the corporate structure to make his awareness that of the corporation.¹⁷² For example shore-based corporate managers who oversee the vessel's operations usually have sufficient ranking in the corporation to create privity or knowledge.¹⁷³ Captains and crewmembers, on the other hand, generally do not have a high enough position within a corporation to impute privity or knowledge to the vessel owner.¹⁷⁴ However, if the vessel's master exerts almost exclusive control over the vessel's business activities, he would be of a sufficient rank in the corporation to impute his knowledge to the corporation.¹⁷⁵ Furthermore, if the negligent act is one due to an incompetent crew, as opposed to the negligence of an otherwise competent crew, corporate owners are generally held to be in privity or knowledge.¹⁷⁶

3. Examples where Privity and Knowledge Were Found.

A. Negligent Entrustment of the Vessel

If the shipowner entrusts his vessel to a person who is not qualified to operate the vessel, he will be found in privity and knowledge of the negligent acts of the unqualified operator.¹⁷⁷ However, if the owner is a corporation and the person who

¹⁷² *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983).

¹⁷³ *Patton-Tully Transp. Co. v. Ratliff*, 797 F.2d 212 (5th Cir. 1986).

¹⁷⁴ *Kristie Leigh Enters., Inc. v. American Commercial Lines, Inc.*, 72 F.3d 481 (5th Cir. 1996); *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964).

¹⁷⁵ *Cupit v. McClanahan Contractors, Inc.*, 1 F.3d 346 (5th Cir. 1983).

¹⁷⁶ *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908 (1st Cir. 1987).

¹⁷⁷ *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992).

entrusted the vessel to an unqualified operator was a non-managerial employee, the corporate owner may be held without privity or knowledge.¹⁷⁸

B. Vessel Outfitted with Insufficient Navigation Equipment

Several courts have determined that a shipowner has privity and knowledge of an unseaworthy condition by failing to provide the vessel with accurate charts and appropriate navigational equipment prior to the commencement of the voyage and the loss is attributed to a navigation error.¹⁷⁹

C. Inadequate Maintenance Procedures

Privity and knowledge of an unseaworthy condition has been found where the shipowner failed to establish and institute adequate maintenance and repair procedures to assure that the vessel's equipment was maintained in good operating condition.¹⁸⁰

D. Failing to Establish Procedures for Dealing with Adverse Weather Conditions

Privity and knowledge of a negligent act have been found where a shipowner failed to implement procedures for shutting down operations during strong weather conditions and fog.¹⁸¹

¹⁷⁸ *In re Norfolk Dredging Co.*, 2004 AMC 227 (E.D. N.C. 2003).

¹⁷⁹ *In the Matter of Texaco, Inc.*, 570 F. Supp. 1272 (E.D. La. 1983); *TT Boat Corp.*, 1999 AMC 2776 (E.D. La. 1999).

¹⁸⁰ *In re Amoco Cadiz*, 1984 AMC 2133 (N.D. Ill. 1984).

¹⁸¹ *Furka v. Great Lakes Dredge & Dock Co.*, 1984 AMC 349 (D. Md. 1983); *Penzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465 (5th Cir. 1991); *Hogge v. S.S. Yorkmar*, 434 F. Supp. 715 (D. Md. 1977).

E. Failure to Provide a Competent Crew

A shipowner's failure to provide a competent crew has also been found to impute privity and knowledge to an unseaworthy condition.¹⁸² Further, shipowners are obligated to establish procedures for various functions of their vessels.¹⁸³ However, shipowners need not establish procedures for every function of their vessels in order to have privity or knowledge of an unseaworthy condition.¹⁸⁴

F. Unseaworthy Condition at the Commencement of the Voyage

Owners have been found within privity and knowledge of unseaworthy conditions which existed at the commencement of the voyage.¹⁸⁵

ix. Distributing the Limitation Fund

If the act of negligence or unseaworthy condition which caused the underlying loss was not within the shipowner's privity or knowledge, the court must distribute the limitation fund to the affected claimant. If the claims together exceed the limitation fund, the court must provide for the distribution of the funds "pro rata subject to all relevant provisions of law, among the several claimants in proportion to the amounts of

¹⁸² *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558 (11th Cir. 1985); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir. 1968).

¹⁸³ *Spencer Kellogg & Son v. Hicks*, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903 (1932).

¹⁸⁴ *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976).

¹⁸⁵ *Villers Seafood Co., Inc. v. Vest*, 813 F.2d 339 (11th Cir. 1987).

their respective claims, duly proved, saving, however, to all parties any priorities to which they may be legally entitled.”¹⁸⁶

The pro rata distribution includes all claims subject to limitation whether they be for personal injuries, death or property damage.¹⁸⁷ This is achieved simply by pro rating the value of each claim to the amount of the limitation fund.¹⁸⁸

Since admiralty courts are courts of equity, distribution of the limitation fund may be modified by the court.¹⁸⁹ There exist two methods used by the Courts to determine the pro rata distribution of the limitation fund: maritime lien priorities and equitable distribution.

The first method is to rank and disburse the funds as a court would dispose any *in rem* claims against a libeled vessel.¹⁹⁰ This method calls for the payment of certain claims first and the pro ration of the remaining claims until the fund is exhausted. Other courts take an equitable subordination approach wherein the offending shipowner and subrogated insurer only participate in the disbursement of the limitation fund after the innocent personal injury and property damage claimants were paid.¹⁹¹

¹⁸⁶ Fed.R.Civ.P.Supp. F(8).

¹⁸⁷ *Butler v. Boston & S. S.S. Co.* 130 U.S. 527, 9 S.Ct. 612, 32 L.Ed. 1017 (1889).

¹⁸⁸ *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907); *Oliver J. Olson & Co. v. American S.S. Marine Leopard*, 356 F.2d 728 (9th Cir. 1966).

¹⁸⁹ *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 47 S.Ct. 357, 71 L.Ed. 612 (1927).

¹⁹⁰ *American Cyanamid Co. v. China Union Lines, Ltd.*, 306 F.2d 135 (5th Cir. 1962).

¹⁹¹ *In re A.C. Dodge, Inc.*, 282 F.2d 86 2d Cir. 1960).

Settlement of individual claims prior to trial should be debited against the limitation fund.¹⁹² Debiting the settlement amount from the limitation fund affirms the spirit of the Limitation Act which purpose is to shield shipowners from liability greater than his post-loss interest in the vessel.¹⁹³ It is good practice, however, for the litigant to receive court approval of the settlement to insure that he will not pay more than the value of the vessel should he be entitled to limit his liability.

x. Pleading the Limitation Act as an Affirmative Defense

Besides bringing an action in federal district court, a shipowner may plead the Limitation Act as an affirmative defense.¹⁹⁴ This may be accomplished if the underlying action was brought by the injured party in district or state court. It is important to note that the six month statute of limitations prescribed in section 185 does not apply in situations where the Limitation Act has been pled as an affirmative defense. Therefore, a shipowner may assert the Limitation Act as an affirmative defense to a claim at any time.¹⁹⁵

The assertion of the Limitation Act as an affirmative defense, however, does not vest the district court with jurisdiction to hear limitation issues nor does it toll the time

¹⁹² *Kristie Leigh Enters. v. American Commercial Lines, Inc.*, 168 F.3d 206 (5th Cir. 1999).

¹⁹³ *Id.*

¹⁹⁴ *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931).

¹⁹⁵ *Sana v. Hawaiian Cruises Ltd.*, 181 F.3d 1041 (9th Cir. 1999); *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981).

for which a shipowner must bring an action pursuant to section 185.¹⁹⁶ Furthermore, the recent case of *El Paso Prod. GOM, Inc. v. Smith* held that pleading the Limitation Act as a defense to an *in rem* claim does not itself create a concursus of claims or operate to stay other actions pending against the vessel owner.¹⁹⁷ Instead, in order to receive these benefits the owner must comply with the requirements set forth in section 185.¹⁹⁸

More importantly, a split of authorities has developed concerning whether a state court or federal court sitting in diversity has jurisdiction to decide issues relative to limitation where the right to limit is raised by a defense and a section 185 as not timely filed. At least two (2) jurisdictions determined that a state court lacks jurisdiction to decide issues relative to limitation where the right to limit is raised by a defense and a section 185 has not been timely filed.¹⁹⁹ The Tennessee Supreme Court in *Mapco Petroleum, Inc. v. Memphis Barge Line, Inc.*, on the other hand, held that the substantive right to limit can be determined by any court where shipowner elects to assert the Limitation Act as an affirmative defense as opposed to bringing a limitation

¹⁹⁶ *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir. 1987).

¹⁹⁷ *El Paso Prod. GOM, Inc. v. Smith*, 406 F. Supp. 2d 671 (E.D. La. 2005).

¹⁹⁸ *Id.*

¹⁹⁹ *Complaint of Bay View Charter Boats, Inc.*, 692 F. Supp. 1480 (E.D.N.Y. 1988); *Hellweg v. Baja Boats, Inc.*, 818 F. Supp. 1022 (E.D. Mich. 1992).

proceeding pursuant to section 185.²⁰⁰ The *Mapco* ruling appears better reasoned and has been followed by the majority of jurisdictions.²⁰¹ As this is still an unsettled area of law, however, the prudent course for the litigator is to file a complaint-in-limitation in federal district court within six months after receiving written notice.

VII. Conclusion

Throughout the past one hundred and fifty years the Limitation Act has been invoked tens of thousands of times by shipowners attempting to exonerate themselves or limit their liability for marine casualties. Given its great benefits, the Limitation Act has come under attack in recent years. Most courts now apply the Act strictly against the shipowner in preference of an injured party receiving full recovery of his damages. Though strictly applied, the Limitation Act remains a vital tool in the maritime litigator's arsenal when defending a shipowner. If proper steps are taken and pitfalls avoided, the Limitation Act will, given the circumstances, exonerate or limit a vessel owner's liability.

²⁰⁰ *Mapco Petroleum, Inc. v. Memphis Barge Line, Inc.*, 849 SW 2d 312 (Tn. 1993) cert. denied. 510 U.S. 815, 114 S. Ct. 64, 126 L. Ed. 2d 33 (1993).

²⁰¹ *Howell v. American Casualty Co.*, 691 So. 2d 715 (La.App. 4 Cir. 03/19/97); *Grindle v. Fun Charters, Inc.*, 962 F.Supp. 1284 (D. Haw. 1996); *In re Complaint of North Lubec Mfg. & Canning Co.*, 640 F. Supp. 636 (D. Me. 1986).