

# TEXAS LAWYER

## IS THE LIMITATION OF LIABILITY DEFENSE SUNK?

*Assessing Privity or Knowledge of a Casualty-Causing Condition or Event*

by BRIAN BECKCOM

**T**he federal Limitation of Vessel Owner's Liability Act (LLA), 46 U.S.C. §181, is one of the most potent weapons in the maritime defense lawyer's arsenal in high-stakes maritime injury or collision cases. As the name suggests, the LLA allows a vessel owner to limit its liability to the value of the vessel, its cargo and the freight then pending on the date of the incident. It also allows a maritime defendant to forum-shop and to consolidate claims by multiple claimants into a single proceeding.

In situations in which the vessel owner faces significant potential exposure, the owner's lawyer usually invokes the LLA. Lawyers frequently litigate the LLA's provisions, which can have major effects on the outcome of high-exposure maritime cases.

The LLA's details and mechanics are complex, convoluted and beyond the scope of this article. Generally, however, vessel owners facing catastrophic injury or cargo claims can assert the provisions of the LLA offensively, by filing a complaint for exoneration from or limitation of liability in federal district court in one of several places: where the vessel has been arrested, attached or is currently located; where the allegedly harmed party has sued the vessel owner; or in any district, so long as no plaintiff has yet sued the owner. Alternatively, the vessel owner can assert provisions of the LLA defensively, by pleading it as a defense in federal or state court.

If the vessel owner files a limitation proceeding in federal court offensively — by filing the claim himself and not waiting for a plaintiff to file — the court will enjoin all claims against the vessel owner and require a claimant to file a claim in the limitation proceeding or risk losing the claim. However, an injured claimant may move to have that stay lifted and proceed with the underlying injury claim in state court by making certain stipulations that preserve and protect the vessel owner's right to have its limitation proceeding adjudicated in federal court.

Although the LLA remains a potent defense weapon

in high-stakes maritime litigation, the federal courts are eroding its efficacy by continuing to narrow the scope of the LLA's protections. To understand why, lawyers must understand the original purpose behind the LLA. Congress enacted the first version of the LLA in the mid-1800s to encourage those with limited assets to invest in the burgeoning U.S. maritime industry. Over the years, as the U.S. maritime industry expanded, the purpose of the LLA has faded. Starting in the early 20th century and continuing unabated to the present day, corporations own the majority of commercial vessels. The corporate shareholders are protected from personal liability and can spread the risk of ownership via insurance and other similar financial products.

At the time the U.S. Congress enacted the LLA, moreover, American shippers were at a competitive disadvantage in comparison with their European counterparts, who could avail themselves of a limitation proceeding. In response to this perceived competitive disadvantage, Congress enacted the original version of the LLA. Most developed maritime nations, however, have eliminated limitation proceedings, doing away with this rationale from the original justification of the LLA as well.

### Fading Away

Increasingly, federal courts around the country tend to view limitation proceedings with disfavor and give a claimant every opportunity to defeat the vessel owner's right to limit liability. This is particularly true when it comes to the issue of the vessel owner's privity or knowledge of a casualty-causing condition or event. Privity or knowledge generally means that the vessel owner was aware, or through exercise of reasonable diligence should have been aware, of an unseaworthy condition on the vessel or negligence on the part of the crew.

To obtain limited liability, a vessel owner must prove that the casualty occurred without its privity or knowledge, which often become the most hotly contested issue in a limitation proceeding. If the vessel owner can meet its burden of demonstrating that it did not have privity or knowledge of the loss-causing condition or event, then

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the vessel owner is entitled to limit liability.

Originally, when the admiralty courts created the privity or knowledge exception, it seemed unfair to find a vessel owner responsible for navigational errors made by a captain and crew who are hundreds or thousands of miles away in distant seas or ports. Vigilant vessel owners could equip their vessels properly, man them with competent, able-bodied seamen, and provide the best instructions and safety precautions available. But once the vessel left port, there often was no way to communicate with the vessel for weeks or months at a time. The captain and crew made all the significant decisions, and if the vessel was involved in an accident on distant seas that the vessel owner could not correct or did not know about, courts simply did not believe the vessel owner should be responsible.

This rationale no longer is consistent with the realities of modern technology in the vast majority of cases. A well-equipped vessel will have radios, global positioning systems, computers, e-mail capability, and any other number of communications and navigational aids. The diligent vessel owner will have constant, 24-hour contact with his vessel and her crew. He will be able to track the progress and activities of the vessel and crew and correct any deficiencies in real-time. He will be able to provide almost instant guidance and assistance to a troubled ship. As a practical matter, in these days of modern technology, the vigilant vessel owner usually will have more information about the conduct of crew and the activities of the vessel and thus have privity or knowledge of the condition, course and capability of his vessel and her crew, or a relatively easy and inexpensive way to obtain such privity or knowledge. And, if the vessel owner does not have privity or knowledge about his vessel, a strong argument can be made that he should have (which will usually be enough to lift the limitation cap) if a reasonable

vessel owner would be able to obtain such knowledge through the exercise of reasonable diligence.

The trend in recent years is to recognize (at least implicitly) that the original justifications for the LLA have faded away and that the use of modern technology creates more opportunities to fix problems before they cause catastrophic loss. Thus courts charge the vessel owner with privity or knowledge in many cases where it would not have been possible years ago. As result, courts are construing the LLA more narrowly and charging vessel owners with privity or knowledge in cases where courts would not have done so previously.

The ability to limit liability in high-stakes maritime litigation remains an enticing and effective tool in the maritime defense lawyer's arsenal. Lawyers continue to use the LLA in significant cases. The relevant issues (particularly what constitutes privity or knowledge) are hotly contested. But maritime practitioners, on the defense and plaintiffs side of the bar, must also recognize that the LLA is not as effective as it once was. And given the realities of modern technology and the fact that the original justifications for the LLA have faded away, this trend is likely to continue. 

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