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Limited Liability in the *Workboat Industry*

About the Aurhot
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The owners of tugs and other workboats are entitled to limit their liability under the Shipowner's Limitation of Liability Act, 46 U.S.C. §30501 et seq. ("Limitation Act"), to the same extent as the owners of ocean-going ships. Thus, if a workboat is involved in a maritime casualty, the workboat's owner or bareboat charterer may be entitled to limit its liability to the value of the workboat after the incident, plus any towing charges, hire, or freight still owed for the job. This limitation right obviously can be a great benefit to a workboat's owner and insurers when the damages from a marine casualty are substantial. A vessel owner's limitation rights, however, are subject to several important qualifications, three of which have special significance in the unique circumstances of the workboat industry. Each is discussed below.

"PRIVITY OR KNOWLEDGE"

A vessel owner is only entitled to limit its liability if the fault that caused the casualty is not within the owner's "privity or knowledge." This is a term of art that has been judicially defined over decades of case consideration and does not lend itself to an easy definition when a corporate owner is involved. Obviously, if senior management is aware of the fault that caused the casualty, then the fault is deemed to be within the owner's privity or knowledge. The more difficult questions concern employees further down on the corporate ladder. For example, the knowledge of an operations manager, and even that of a fleet or port captain that reports to the operations manager, will likely be imputed to the owner, but the knowledge of a vessel's master or in-house repairman would most likely not be.

The above examples illustrate that it is not always easy to predict whether the knowledge of an individual will be imputed to the vessel's corporate owner, and most "privity or knowledge" questions can only be resolved on a case-by-case basis. In the workboat industry, these questions can be even more difficult given the closer involvement by management in the operation and maintenance of a fleet and the sheer proximity of the vessels to management control. **But as a very rough guide, casualties resulting from the operational negligence of the workboat's master or crew generally will not be considered within the owner's privity or knowledge and the workboat owner would be entitled to limit.** The result, however, may well be different if the owner was notified of the matter as it was happening and became involved in the decision-making process leading to the casualty.

It is an open question whether the knowledge of a dispatcher would be imputed to the owner, but given the purpose of the Limitation Act, persuasive arguments could be constructed that it should not be.

On the other hand, casualties resulting from a vessel's un-seaworthiness, or from negligent acts by masters or mates found to be incompetent or improperly trained, will likely be found to be within the privity and knowledge of the corporate owner. The implementation of proper procedures and appropriate delegation of functions bearing on these issues is the best way to preserve a workboat owner's limitation rights.

THE PERSONAL CONTRACT DOCTRINE

The second qualification on the right to limit—the Personal Contract Doctrine—has great significance in the workboat industry. This judicially crafted exception to the Limitation Act prohibits a vessel owner from limiting its liability for claims brought for breach of personal contractual obligations. The theory is that as a matter of policy, a vessel's owner (corporate or otherwise) should not be entitled to limit against a liability arising out of its own personal undertakings. Direct claims—even indemnity or contribution claims—can fall within the Personal Contract Doctrine and therefore would not be subject to limitation.

The doctrine can be confusing because not all contractual obligations in the shipping business are considered personal, and what is a personal contract is not always easy to identify. Almost all charters and contracts of affreightment in the workboat context, to the extent they contain warranties of seaworthiness, are personal obligations of the vessel owner, and claims for breach of those obligations are not limitable. Bills of lading, however, are not considered personal contracts. Towage contracts contain many personal obligations, such as the payment obligation, but not all breaches of a towage contract will be a breach of a personal obligation. Damages to the tow resulting from the negligence of a tug master, for example, may not be a breach of any personal obligation of the tug owner.

As the workboat industry is largely contract driven, the Personal Contract Doctrine can operate as a major restriction on the limitation rights of workboat owners. **Fortunately, a workboat owner can protect itself from application of the Personal Contract Doctrine by including in its contracts a clause stipulating that nothing in the contract is a personal obligation** and that the contracting parties agree that both are entitled to all the benefits of the Limitation Act. An experienced maritime lawyer can draft the appropriate wording if a workboat owner's form contracts do not contain such a provision.

A workboat owner also may attempt to contractually limit its liability by inserting a clause in its contracts providing that, in event of damage to the contracting party's property, the workboat owner's liability is limited to some monetary amount. These clauses have not been squarely

tested in court. But judicial decisions in analogous situations suggest that such clauses have a good likelihood of being enforced, as long as the limitation amount is not punitive and bears a reasonable relationship to the transaction. The calculation of the limitation amount is tricky, but it probably should at least be some multiple of the fee for the services provided under the contract.

THE LIMITATION FUND

The third area of limitation law having special significance to the workboat industry relates to the calculation of the "limitation fund", which is the amount to which a vessel owner may limit its liability. In the usual case, only one vessel of the limitation defendant is involved, so the limitation fund is calculated by taking the value of that vessel after the casualty and adding to it any hire or freight still owing on the voyage. In the workboat context, it is not uncommon for two or more vessels to be under the control of one tug when a casualty occurs. This raises the sometimes difficult question of the how the limitation fund is calculated.

The law historically has analyzed this question differently depending on whether the claims involved are for "tort" (negligence) or breach of contract. In tort cases brought by third parties to whom the vessel owner owes no contractual duty, the general rule has been that the limitation fund is calculated by the value of the vessel at fault. This normally is the tug, as barges usually make no decisions and take no actions on their own. The classic situation is where a tug lands a barge too hard and damages a dock, or where a barge in tow strikes and damages another vessel. In such cases, the value of the limitation fund will be the value of the tug. Albeit unusual, a barge nonetheless may bear some fault, such as where the barge is improperly lit or unseaworthy in some other respect that contributes to the casualty. In such cases, the barge's value may be included in the limitation fund.

The rule has been different in breach of contract cases. Assuming the personal contract doctrine discussed above does not prevent limitation, the limitation fund is calculated by the number of vessels in the flotilla under the same ownership. Thus, the limitation fund available for claims for damaged cargo carried on a barge, which is owned by the towing company, is not limited to the value of the tug, but also would include the value of the carrying barge. The value of any other property in the flotilla owned by the towing company, such as other barges, is also subject to inclusion in the limitation fund.

The above "tort/contract" distinction has been highly criticized. The law, therefore, is evolving toward a more modern rule that the value of all vessels in a flotilla must be included in the limitation fund—regardless of the basis of the claim—when the vessels are subject to common ownership, are engaged in a single enterprise, and are under common control at the time of the casualty.

The workboat industry presents unique circumstances. While workboat owners have the same limitation rights as the owners of ocean going vessels, the qualifications on their limitation rights are subject to, and must be understood in light of, these unique circumstances. Proper planning and the use of protective contractual provisions can assist in insuring, to the extent possible, that a workboat owner's limitation rights remain available.