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The ABA YLD Awards of Achievement program is up and running!
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NAVIGATING THE INITIAL CHANNEL MARKS IN A MARITIME LIMITATIONS ACT PROCEEDING
By: Christopher F. Hamilton*

Imagine you have a client, John Shipley, who is the owner of a 40-foot twin-engine recreational v-hull powerboat named “WRECKLESS,” which is valued and insured for $160,000. Shipley, being the responsible vessel owner that he is, registered the WRECKLESS with the U.S. Coast Guard’s National Vessel Documentation Center with his name as the listed owner. Further, Shipley is named as both an owner and operator on the WRECKLESS’ marine insurance policy.

On a bright and sunny Florida day, Shipley’s 18-year old son, Billy, asks his father to borrow the WRECKLESS to go out for a day of boating. Billy is a USCG licensed captain and has never had any incidents or accidents while operating the WRECKLESS, or any other vessel. Shipley, having no doubts about his son’s abilities operating the vessel, agrees to allow Billy to take WRECKLESS out for the day.

While operating WRECKLESS at about 30-knots of speed, Billy strikes another vessel causing the WRECKLESS to sustain serious damages. The other vessel, SLOWMOTION, which is owned by Freddy Banks, only sustains minor damage, but one of its passengers (Lauren) is injured with a fractured arm and sustains a concussion. Luckily, no one lost their life and everyone was quickly and safely rescued by the U.S. Coast Guard. A post-casualty marine survey is conducted and the WRECKLESS is valued at only $40,000 because the vessel is a constructive total loss due to the serious damage – in other words, the vessel is only worth scrap value.

If you are Shipley’s counsel, what should be some of your initial considerations? What courses of action can you take? Conversely, if you are Lauren’s or Banks’ counsel, what should you do? What things should you be thinking about? These are important questions when faced with the above set of facts.
I. **THE SHIPOWNER’S LIMITATION OF LIABILITY ACT**

This brief article will explore such a scenario and approach some initial considerations in the context of a piece of legislation that is called The Shipowner’s Limitation of Liability Act, 46 U.S.C. § 183 et seq. (the “Limitation Act”). In very simple terms, the Limitation Act is ages-old maritime law that provides a mechanism for vessel owners to either completely exonerate themselves from or limit their liability to the post-casualty value of the vessel if the “disaster at sea ... is occasioned without the privity or knowledge of the [vessel owner].”¹ If this sounds somewhat perplexing, it is because it can be to a practitioner experienced with this sort of proceeding. To that end, the Federal Rules of Civil Procedure even has its own section of rules dedicated to admiralty and maritime law – the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, with Rule F specifically addressing what is commonly referred to as “Limitation Proceedings.” Equally as important, each U.S. District Court has its own unique set of Local Rules, which contain specific provisions applicable to admiralty and maritime law claims such as a Limitation Proceeding, and must be followed in order to avoid dismissal or other potential repercussions. The Limitation Act, coupled with Supplemental Rule F, Local Rules and the federal general maritime law, provide maritime practitioners with a method for staying pending litigation filed by claimants/plaintiffs, gathering claims into one forum, and potentially limiting their value to an amount far below the aggregate amount of claims. As such, the Limitation Act has become a sword and shield for attorneys representing vessel owners and, given that, it is beneficial for young lawyers to understand initial considerations to think about and discuss should they find themselves representing clients like Shipley, Lauren or Banks.

**CAVEAT**

Because this limited piece will only address the Limitation Act and its Proceeding in highlights and broad strokes, I feel that I must caution up-front that there are many caveats, idiosyncrasies and potential pitfalls to the Limitation Act’s application. As such, unwary litigants

need to cautiously approach such a proceeding and truly evaluate whether handling a Limitation Proceeding is within their “wheelhouse.” This is not meant to be a treatise or guide-sheet by any stretch of the imagination, but rather an educational piece to inform young lawyers of the advantages and disadvantages of this unique maritime law. It is also worth pointing out that like most, if not all, other matters, the Limitation Act’s application will depend largely upon the provided facts in each case.

As way of brief background, the Limitation Act was enacted in 1851 “primarily to encourage the development of American merchant shipping.” The Limitation Act has been, and continues to be, a very advantageous piece of legislation, especially for those defending vessel owners against damage and personal injury claims. However, in more recent years, the Limitation Act has come under criticism as being outdated, “hopelessly anachronistic,” and overly sympathetic to shipowners. Even still, the Limitation Act continues to be used daily to advance substantive, strategic, and procedural initiatives by maritime practitioners across the United States.

II. YOU’VE HEARD ABOUT THE ABOVE COLLISION — WHAT SHOULD YOU BE THINKING ABOUT AND CONSIDERING?

Turning back to our above facts, I first want to point out that in this situation, it is more likely than not that both WRECKLESS’ and SLOWMOTION’s counsel would file Limitation Act proceedings in federal court. Also likely, the Court would consolidate the two proceedings for judicial efficiency. That being said, given the brevity of this article, we will only focus on Shipley’s proceeding. Finally, I will only point out several considerations to think about and present some commonly asked questions because the “nuts and bolts” of a Limitation Proceeding can be protracted and complicated.

So, what are some of the things to consider if we are serving as Shipley’s counsel?

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2 Id.
3 Hercules Carriers, Inc. v. Claimant State of Florida, Dep’t of Transportation, 768 F. 2d 1558, 1564 (11th Cir. 1985).
a. **Have any lawsuits or claims been filed in any venue?**

Answering this question at the outset will help determine the appropriate venue under Supplemental Rule F(9); it may be appropriate in district court where a claim has been filed (either State or Federal). Further, once a Limitation Proceeding is filed, the Court will enter an Order (the timing of when that Order is entered varies) staying all pending litigation stemming from the incident and mandating any and all claims be brought within the Limitation Proceeding by a certain date (i.e. a “concursus of claims”). Accordingly, you must be aware of pending litigation – especially as the vessel owner’s counsel - so you can file the appropriate notice of stay in that litigation, be it State or Federal Court.

In some matters, there may be numerous claimants situated in various venues. For the vessel owner’s counsel, the most important part is providing the appropriate notice of the proceeding to all potential known claimants. Given the possibly broad dissemination of claims, the vessel owner may choose to file a Limitation Proceeding for no purposes other than gaining a “concursus of claims” with hopes of settling some claims and trying others, while avoiding defending litigation in multiple courts. This “concursus” may create headaches for a claimant’s counsel and present expenses not anticipated in state court or other litigation. Therefore, the filing of the Limitation Proceeding may be an offensive move by vessel owner’s counsel to discourage otherwise dubious claims, while also gathering claims under one Courthouse’s roof. This, *inter alia*, is why the Limitation Act can be considered a sword.

b. **Who is the vessel owner for purposes of the Limitation Act?**

The Limitation Act only provides possible relief for the vessel’s true owner and, in some cases, an owner *pro hac vice*. Several cases have addressed where a non-owner is allowed to limit liability as an owner *pro hac vice*. These cases generally explain “[t]he term ‘owner,’ as used in limitation of liability statutes, is an ‘untechnical’ word which should be interpreted in a ‘liberal way.’” In *Complaint for Exoneration of or Limitation of Liability of Shell Oil Company, et al.*

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4 Specifically, reference Supplemental Rule F(9) for where a limitation proceeding may be brought.
al., the E.D. Louisiana district court reasoned “[t]he term ‘owner’ does not require title, but rather, as a general rule, one who is subjected to a shipowner’s liability because of his exercise of dominion over [i.e., relationship to] a vessel should be able to limit his liability to that of an owner.”6 The Shell Oil Company Court continued that “[m]ore succinctly stated, the act is designed to cover one who is a ‘likely target’ for liability claims predicated on his status as the person perhaps ultimately responsible for the vessel’s maintenance and operation.”7 In Complaint of Nobles the court reasoned “[f]actors such as who pays for storage of the vessel and who skippers the vessel, as well who has possession and control of the vessel, must be taken into account in determining who is an owner for purposes of the Act.”8 The one seeking to invoke protection under the Act “bear[s] the burden of pleading facts establishing their entitlement to do so.”9

Therefore, it is clear in our case that Shipley will be a proper owner afforded protection under the Limitation Act, but we would need to evaluate whether Shipley’s son, Billy, will be considered an owner pro hac vice. This will directly impact whether Billy can be sued directly and is exposed to liability, which would also weigh on the merits of filing a Limitation Proceeding on his behalf.10

**c. What is the WRECKLESS’ post-casualty value?**

In order to file a Limitation Proceeding, the vessel owner(s) must stipulate to the vessel’s post-casualty value and be prepared to deposit that amount in the Court’s registry, together with any pending freight amount and interest.11 In Shipley’s case, the WRECKLESS’ value is

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8 842 F. Supp. at 1437.
10 Also notable when considering ownership is that certain charters may be afforded the protections as an owner pro hac vice. E.g. Diamond S.S. Transp. Corp. v. Peoples Saving Bank & Trust 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. 735, 55 S.Ct. 406, 79 L.Ed. 1263 (1935); In re Complaint of Anheuser-Busch, 742 F. Supp. 1143(S.D. Fla. 1990).
11 See Supplemental Rule F(1).

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$40,000 because it is damaged and there was no pending freight within the meaning in the Limitation Act. As such, in the event the Court orders a deposit, we need caution our client as Shipley’s counsel that he could be required to deposit up to $40,000.00, plus interest, into the Court’s registry. Certainly, the vessel’s valuation is allowed to, and will likely, come under subsequent fire by possible claimants seeking to increase the “Limitation Fund.”

d. When do you file the Complaint for Exoneration from or Limitation of Liability?

As Shipley’s counsel, we generally want to err on filing sooner rather than later. Supplemental Rule F(9) provides a six-month statute of limitations on filing the proceeding from the time of written notice of a claim. This “written notice” and what qualifies is interpreted differently in each Circuit, so we will avoid an in-depth analysis here. Regardless, it is best to err on filing without much delay.

Shifting to serving as Lauren’s and Banks’ counsel, we must consider the following:

• Do we file suit in state or federal court before an expected Limitation Proceeding?

If the claimants’ counsel for Lauren and/or Banks has run across a Limitation Proceeding in the past or is a seasoned maritime plaintiffs’ attorney, they will likely know of the potential for a Limitation Proceeding. Therefore, they must consider whether to file suit before receiving notice of such a Limitation Proceeding, or wait and file a claim in that proceeding. One of the many advantages of the Limitation Proceeding is that there is no right to a jury because it is an admiralty proceeding. Given this advantage, many attorneys will file a state court claim in hopes of defeating the Limitation Proceeding and then proceeding before a jury on state court claims. There are many ways to defeat or stay the Limitation Proceeding, but we will not delve into those here in an interest of space. Suffice it to say, though, that savvy lawyering and appropriate Court submissions may provide relief from a Limitation Proceeding.

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• **Who are the claimants and are they minors?**

   In this case, Banks would be a claimant for the property damage sustained to his vessel and Lauren would be for the injuries she sustained. If any of the claimants are minors, you may need to appoint a guardian and file the claim on the minor's behalf. As for causes of action, a general negligence claim is the most common; although, some practitioners may assert varying claims depending on the recreational or commercial nature of the claim and other factors involved.

• **How many other claimants are likely? And, what is the possible hierarchy of claims?**

   Assuming the vessel owner is not afforded complete exoneration, but is provided the opportunity to limit their liability, there may only be a set “sum” of money available upon which to recover. In our case, let us assume Shipley and/or Billy are found to be liable to both claimants and their combined damages exceed $40,000. Lauren and Banks, therefore, would be forced to compete against each other, or find a middle ground and stipulate, in order to recover from the fund. As one can see, this can present a disheartening and frustrating outlook for potential claimants. Indeed, this is one of the many reasons the Limitation Act is considered a shield from liability for vessel owners.

   These are but a few of the questions that practitioners on both sides of the proceeding should be asking themselves when learning of a maritime incident involving their client – be it a vessel owner or possible claimant. As briefly touched upon above, the Limitation Act provides a sword and shield to vessel owners, but it is not completely watertight. A savvy litigator can - in certain instances - find ways to navigate around potential roadblocks.

   Needless to say, this article only skims the surface of possible relief and procedural mechanisms available under the Limitation Act and its applicable admiralty proceedings. Again, this article is meant to be thought-provoking and educational as to the Limitation Act’s existence and its general nature. If you find yourself with a client that may qualify as a vessel owner afforded protection or a possible claimant seeking relief resulting from a maritime incident, it
may be prudent to consult with a practitioner experienced in admiralty and maritime law so as to avoid limiting your client’s possible protections or claims. In closing, remember that the Limitation Act can be leveraged in many ways by defense counsel. At the same time, depending on the facts, counsel can maneuver around the Limitation Act to avoid its sword and shield effect.

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DOES AN INSURANCE AGENT OWE A DUTY TO ADVISE HIS OR HER CLIENTS

By: Callie Waers*

Sometimes when coverage is denied, the litigation reaches beyond the insurer, and the insurance agent’s liability is questioned. A claim against an insurance agent is a professional negligence claim that is frequently covered by an agent’s errors and omissions insurance. Two of the common causes of actions brought against the insurance agent include: (1) failure to procure requested insurance coverage; and (2) failure to advise the client of appropriate coverages. A cause of action for failure to advise is predicated on the presence of a duty to advise, which varies with jurisdiction.

Generally, insurance agents owe their clients a duty of reasonable care and diligence, but they do not have a duty to advise their clients of appropriate coverages. There can be exceptions to that general principle, however. In some states, an insurance agent’s relationship with his or her client can give rise to a duty to advise. The jurisdictions that acknowledge this “special-relationship test” generally require that some combination of the following elements be present in order to give rise to the duty:

1. The insurance agent held him or herself out as an “expert” in the particular field in question and the client relied on that representation;
2. The nature and depth of the relationship between the insurance agent and the client is such that the client and agent both understood that the agent would provide advice and the agent appreciated that responsibility;
3. The insurance agent charged a fee (over and above commission) that was intended to compensate the agent for advice provided to the client; and
4. The existence of a contract, written or implied, between the agent and client that the agent is to provide advice regarding coverage.

The nature of the relationship is measured by its depth and the appreciation of the agent’s willingness to advise the client, and most courts have clarified that the length of the relationship is not a determining factor in that analysis. Therefore, the determination of whether
a legal duty to advise exists is a very factually-driven inquiry. More importantly, it tends to turn on witness testimony and statements, which can make the determination more difficult.

While some elements are easier than others to prove (e.g., whether the agent charged a fee or advertised that he or she is an expert in a particular field), the nature of the relationship is usually based on testimony of the parties. The question that courts then must address is whether, based on the facts presented, a subjective or objective appreciation of the duty to advise is necessary to give rise to the legal duty. Sometimes, however, the relationship is easier to prove because the agent has taken affirmative actions that amounted to “advising.” When failure to continue a particular advising action results in a client/insured’s loss, then proof of failure to continue the advising action will generally suffice to establish the duty. By way of example, a client falls behind on payments routinely and receives notices of pending cancelation from the insurer, but the agent also takes the initiative to call the client each time this happens to remind them that the policy will lapse. If the agent ceases to call one month, the policy is cancelled, and the insured incurs a loss that is then not covered by the policy due to the cancelation, most courts will find that the agent undertook the limited duty to advise the client of pending cancellation due to nonpayment. This sort of special circumstance may not amount to a “special relationship,” but it can create a duty to advise where one would not ordinarily exist.

While the special-relationship test is widely used, it does vary depending on the jurisdiction. Each jurisdiction has its own blend of factors, and the standard is more difficult to meet in some states as compared to others. However, not all states recognize a duty to advise predicated on a special relationship. Instead of requiring the existence of a special relationship, some states use a professional negligence standard. For example, in Arizona, an insurance agent owes his or her client a duty to exercise reasonable care, skill, and diligence in procuring insurance coverage, and that standard applies to the agent’s conduct while advising clients of coverages. In states that use a professional negligence standard, it is usually necessary to utilize expert testimony to assist the trier of fact.
There are several states that do not currently recognize a duty to advise for insurance agents at all. In those states, the agent only faces a duty to advise if they made some sort of misleading statement or action that they needed to correct and the client relied on that act, resulting in a loss. Generally, agents in states that do not recognize a duty to advise are only liable for failing to procure requested coverage.

From a risk management standpoint, it is important for insurance agents to have an appreciation of the law in the jurisdiction in which they are licensed. To defend a duty to advise claim in a state where the special-relationship test is used, it can be helpful to document what coverages were offered to a client and have the client sign the document. Agents should be cautious of advertising their “expertise” or anything that implies they will advise clients in a jurisdiction where a special relationship can establish a duty to advise. Additionally, helpful services such as reminders, follow-ups, and suggestions should come with a disclaimer, and if they are discontinued, the client should be instructed that such practices will no longer be continued.

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NEWS AND ANNOUNCEMENTS

2016 YLD Spring Conference

The 2016 Spring Conference will be held May 5-7, 2016 in St. Louis, MO. Don’t miss out on this chance to network with other young lawyers, gather CLE credits, and hear from well-known speakers. It’s important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope can be part of that discussion.

The ABA YLD provides limited number of scholarships for affiliate leaders to attend its Spring Conference. We have $200 scholarships available for up to three members of an affiliate—four if the fourth member is diverse or a government, solo/small practice, or public sector attorney. Young lawyers who received a scholarship to attend the Fall Conference in Little Rock are not eligible. Applications (just an e-mail expressing interest) must be sent to me (logan.murphy@hwhlaw.com) no later than 7 days before the Conference.

The ABA YLD also provides one full scholarship (up to $570) for attendance by a leader from a New or Formerly Inactive Affiliate. Please contact me (logan.murphy@hwhlaw.com) if you believe you qualify.

2016 ABA YLD Annual Meeting

We hope you can join us at the 2016 ABA Annual Meeting from August 4-9, 2016. This year's ABA Annual Meeting will take place in San Francisco, the cultural, commercial, and financial center of Northern California. You can register for the meeting here.

2016 Affiliate Leadership Training

Each Spring, the ABA YLD hosts a collaborative training session for current and incoming bar leaders. This year’s will be held from 12:00 p.m. to 2:00 p.m. on Thursday, May 5, 2016, as part of the 2016 Spring Conference in St. Louis. The program will include speakers, roundtable discussion, and topics of interest to young lawyer leaders, including encouraging accountability, getting the most out of finances and sponsorship, and succession planning. Please contact
Jenna Overmann (jovermann@dofamilylaw.com) and Alia Graham (alia.graham@americanbar.org) if you plan to attend.

2016 Spring Affiliate Showcase

The 2016 Spring Affiliate Showcase will take place at the Spring Conference on Saturday May 7, 2016, from 8:30 a.m. to 9:30 a.m. (with breakfast included). This is a great opportunity to showcase your affiliate and preview programs from other affiliates that you can apply back home. Our format in the Fall was really well received, so we’re going to do it again: A TEDx format where each affiliate is given 90 seconds to present on any topic they like (the affiliate, a particular project, a series of projects, etc.) using 1-3 slides. If you would like to see sample slides, I can send you the full set from Fall.

If you or your affiliate is interested in participating, please send me logan.murphy@hwhlaw.com an email no later than 7 days before the Conference.

Awards of Achievement

The ABA YLD Awards of Achievement program is up and running! Applications are available now and information can be found here. This program is an opportunity for young lawyer organizations to submit their best projects for evaluation and recognition by a jury of their peers. Categories for awards include (1) Public Service Projects; (2) Bar Service Projects; (3) Diversity Projects; (4) Comprehensive Programming; and (5) Outstanding Newsletter.

Information about the winners will be disseminated widely and the winners will be recognized during the YLD Assembly at the ABA Annual Meeting in San Francisco! The deadline to submit your application is Wednesday, June 15, 2016. Please send any questions to me (logan.murphy@hwhlaw.com) and Tara Blasingame (tara.blasingame@hwhlaw.com).

ABA YLD Scholars Program

The YLD Scholarship Program is designed to encourage the participation of minority, solo/small firm, government, public sector, and military service attorneys in the ABA Young Lawyers Division. The
program consists of funding to attend the ABA YLD Fall Conference, the ABA Midyear Meeting, and the ABA YLD Spring Conference, as well as appointment to and active participation in one of the YLD Boards or Teams. Information is here, and the application is here. Please contact the ABA YLD Diversity Director, Collin Cooper (l.collincooper@gmail.com) with any questions.