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Duck Boat Owners Avoid Seeking Limitation, Ducking Potential Exposure to Punitive Damages

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“Sisson [the vessel owner] has also argued throughout this litigation that the [Limitation Act] provides an independent basis for federal jurisdiction. Respondents contend that the Act does not create jurisdiction, but instead may be invoked only in cases otherwise within the maritime jurisdiction of [28 U.S.C.] § 1333(1). We need not decide which party is correct, for even were we to agree that the [Limitation Act] does not independently provide a basis for this action, § 1333(1) is sufficient to confer jurisdiction.”

Sisson v. Ruby, 497 U.S. 358, 359 n.1 (1990).

Whether to seek to apply general maritime law to an incident is not always obvious and the consequences can be even less apparent. For example, when confirming arrangements for a hearing in the King County Superior Court in Seattle, Washington, on an unrelated tour bus case, I learned a verdict was about to be read in a nearby courtroom after a months-long trial had ended in February. The case, brought on behalf of Phuong Dinh and 42 other victims of a crash that killed five and injured more than 60 people, arose from a 2015 collision by a “Ride the Ducks” vehicle into a tour bus on the Aurora Bridge in Seattle. Many of the cases had settled. For those that had not, I watched as the jurors awarded \$123 million to the plaintiffs, some receiving as much as \$25 million, splitting liability between the duck boat owner and the company that had refurbished the WWII era vehicles for use for public tours. As a maritime lawyer, I wondered if the owners had considered filing a Limitation Action, and if they had, what led to their decision not to do so.

THE LIMITATION ACT

Many jurisdictions, including the United States, have long granted vessel owners the ability to bring an action to limit liability to the value of the vessel after a marine casualty, provided the owner can prove it lacked knowledge of the problem beforehand. In some cases, the value of the vessel would be little, such as in the action filed following the sinking of the RMS Titanic. More recently, the value could be substantially more, although much less than potential liability for the loss and punitive damages, as in the case following the Deepwater Horizon oil spill where limitation was sought but the court ultimately found certain acts of the crew were within the owners’ knowledge so as to decline limitation. Even so, the limitation action, in that case, provided the procedural advantages of concursus, bringing together all claims in a single forum while staying all other proceedings.

The U.S. version of the Limitation of Liability Act (Act) is found at Title 46 of the United States Code, starting at Section 30501. Enacted in 1851, the same year Moby Dick was published, the Act was intended to promote the American merchant marine and investment in shipping. Since then, the Act’s scope has adjusted to cover all kinds of vessels and circumstances.

WHAT IS A VESSEL?

A preliminary question when seeking to apply the Act is what constitutes a “vessel.” Section 3 of Title 1 of the U.S. Code defines it this way: “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” Accordingly, limitation has been invoked to apply to jet skis and watercraft smaller than may typically be expected. In fact, currently, before the United



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States Court of Appeals for the Ninth Circuit is a case on whether a paddleboard meets the definition.

The U.S. Supreme Court's most recent case relevant to defining a vessel attempts to create a more practical approach in articulating a "reasonable observer" test in "borderline cases where 'capacity' to transport over water is in doubt." *Lozman v. Riviera Beach*, 568 U.S. 115, 129 (2013). The basic difference as to when a watercraft is or is not a vessel is determined by whether it was regularly but not primarily used (and designed in part to be used) for persons to go over water, while others are not designed (to any practical degree) to serve a transportation function and did not do so.

FEDERAL COURT JURISDICTION

"The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter...."

46 U.S.C. § 30511.

Relative to this issue, a federal court may hear a limitation case. Section 30511 provides that a vessel owner may bring a civil action for limitation in a U.S. district court. Generally invoking a federal court's admiralty tort jurisdiction is often satisfied in limitation proceedings where an incident involving a vessel would potentially adversely impact maritime commerce and have a substantial relationship to traditional maritime activity. However, in some cases, it may be difficult to satisfy the test for such admiralty jurisdiction in order to file in federal court; for example, where the incident does not occur on navigable waters.

In this circumstance, the Supreme Court's "most recent" decision on the issue from 1911 supports that the Act, as now stated in § 30511, provides an independent basis for federal jurisdiction without having to meet the test for maritime torts, including being on a navigable body of water. See *Richardson v. Harman*, 22 U.S. 96 (1911). However, subsequent cases, including in the Ninth Circuit Court of Appeals in *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 773 (9th Cir. 1995) (collecting cases), hold this may no longer be generally accepted even though the Supreme Court has not overruled *Richardson*.

As for the duck boat cases in Seattle, if the owners had filed for limitation they would have had to demonstrate that the "vehicle" was a "vessel" in that it was capable of being used for water transportation. As the crash occurred over water on a bridge, the owners also would have had to argue that the Act provided an independent basis for federal jurisdiction, as the case may not have qualified as an admiralty tort, or found another vehicle for jurisdiction into federal court, such as diversity jurisdiction. \

UNINTENDED CONSEQUENCES

While limitation may have given them the opportunity to have the cases tried to the federal court without a jury, the owners may have thought that doing so would constitute a significant disadvantage by exposing them to punitive damages, which have been recognized under general maritime law in some cases. For example, a recent federal case in Seattle allowed punitive damages by an injured passenger to go to a jury; other courts have not permitted punitive damages to be awarded in maritime cases even under general maritime law where such awards are not available in state court. Washington generally does not permit punitive damage awards under state law, and none were awarded in the duck boat case. Rather than take the chance, staying in state court immunized the owners from any punitive damage award.

SEEK EXPERIENCED ADVICE

As in many cases involving potential maritime issues, this area of law has been recognized by courts and attorneys alike not to be "waters for the inexperienced." Making an informed decision not only involves knowing all the facts but also requires evaluating the potential consequences of decisions made early on in a case that could be determinative on the outcome. While limitation offers an opportunity to limit liability, filing an action that applies general maritime law in federal court could create greater exposure. Evaluating the risks of both takes experience and know-how.

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