AS A MARINE OPERATOR, WHAT DO YOU NEED TO DO WHEN NATURAL DISASTER STRIKES?

When a natural disaster strikes and the unexpected happens, the aftermath often leaves marine operators with two pressing questions. First, if the company suffers harms, what steps must be taken to pursue a claim for recovery of losses arising from the disaster? Second, if the company causes harm or damage to another person, what is the best means to protect its interests in future legal proceedings? These issues are often complicated, and as such, it is important to immediately bring in the company's attorney in order to make sure the company's and its insurer's interests are fully protected. Four main issues should be assessed and addressed to protect a company's interests following a natural disaster and are as follows: (1) Filing under the Shipowner's Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.*; (2) Invoking the "defense" of *force majeure* of Act of God; (3) Retaining experts and gathering information to support and/or defend your case; and (4) Use of the law of salvage.

I. THE "BIG FOUR" MUST BE ASSESSED AND ADDRESSED

To begin, one must evaluate whether or not one must file a limitation proceeding under the terms of the Shipowner's Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.* A vessel owner can do this through asserting the limitation of liability defense in his answer to a pending suit or by instituting a limitation proceeding. The Shipowner's Limitation of Liability Act provides a procedure in admiralty to enjoin all pending suits and to compel them to be filed in a special limitation proceeding, so that liability may be determined and limited to the value of the shipowner's vessel and freight pending. A limitation action may be filed by a shipowner, with the term, "owner" being broadly defined to include "a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement."[1]

In a similar vein, a company typically will assert the *force majeure*/Act of God "defense" if there is the possibility that it caused harm to any other person or entity. In making this assertion, the party seeks to minimize its liability due to an event which impact could not be foreseen and

[1] 46 U.S.C. § 30501.

which "effects could not have been avoided by the exercise of reasonable prudence, diligence and care."[2]

In addition, a company must obtain experts needed to prosecute or defend its claim and assist in obtaining and evaluating information relevant to the claim. The experts needed will depend on the type of incident that occurred, which will determine the expertise needed. In gathering information, the company and/or their legal counsel must establish an internal team and team leader to direct the collection of information in the possession of the company. It must also be determined whether or not Freedom of Information Act requests should be made of any Federal, State or local agencies with jurisdiction over any marine operators permits and licenses in the location in which the disaster struck.

Finally, the law of salvage typically becomes relevant during the aftermath of a natural disaster. The law of salvage permits a party to seek a salvage award for costs incurred for volunteer services rendered to save imperiled property on navigable waters. To establish a claim for a salvage award, the salvor must prove the following: "(1) a marine peril; (2) voluntary service rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or contribution to, the success of the operation."

II. WHAT IS A LIMITATION OF LIABILITY PROCEEDING AND HOW IS IT USED?

The Shipowner's Limitation of Liability Act ("Limitation Act"), 46 U.S.C. §§ 30501, *et seq.*, provides a procedure whereby a vessel owner may limit its liability for maritime casualties to the "value of the vessel and pending freight."[3] Most vessels are covered by the Limitation Act, as it "applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation."[4] Likewise most claims arising from the use of a vessel are covered by the Limitation Act, including "claims, debts, and liabilities . . . arising from . . . any loss, damage or injury by collision, or any act, matter or thing, done occasioned, or incurred, without the privity or knowledge of the owner."[5]

[2] Comeaux v. Stallion Oilfield Constr., 911 F. Supp. 2d 413, 424 (W.D. La. 2012).

[3] 46 U.S.C. § 30505(a).

[4] 46 U.S.C. § 30502.

[5] 46 U.S.C. § 30505(b).

And "owner" is broadly defined to include "a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement."[6]

"The [Limitation] Act provides shipowners two alternative legal channels to initiate their limitation of liability rights."[7] First, the vessel owner can assert his right to limitation as an affirmative defense in his answer to a specific lawsuit.[8] The benefits of this method are that it does not require the commencement of a separate action or compliance with the strict requirements for institution of a limitation proceeding under the Limitation Act. But, the primary drawback of this approach is that it does not allow for the consolidation of all potential claims in one proceeding, and the subsequent prohibition on any claims not brought in that limitation proceeding.

Alternatively, the owner can institute a "concursus" proceeding intended "to permit all actions against the shipowner to be consolidated into a single case so that all claims may be disposed of simultaneously."[9] "The court takes jurisdiction to entertain those claims without a jury and ensures that the shipowner who is entitled to limitation is not held to liability in excess of the amount ultimately fixed in the limitation suit (the limitation fund)."[10] There are numerous requirements to maintain the concursus proceeding, and the below will focus on all such requirements. The remaining portion of this section will focus on the limitation proceeding.

A. Procedure for Limitation Proceeding

To institute a limitation proceeding, the initiating party must file a complaint for exoneration from or limitation of liability in federal district court.[11] Venue is proper in "any district where the vessel in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim."[12]

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[6] 46 U.S.C. § 30501.

[7] Karim v. Finch Shipping Co., 265 F.3d 258, 263 (5th Cir. 2011).

[8] See El Paso Prod. GOM, Inc. v. Smith, 406 F. Sup. 2d 671, 675 (E.D. La. 2005) (citations omitted).

[9] Karim v. Finch Shipping Co., 265 F.3d 258, 264 (5th Cir. 2011).

[10] Magnolia Marine Transp. Co. v. Laplace Towing Corp., 964 F.2d 1571, 1575 (5th Cir. 1992) (internal citations omitted).

[11] 46 U.S.C. § 30511(a).

[12] Fed. R. Civ. P. Supp. F(9).

If suit has not yet been filed and the vessel has neither been attached nor arrested, venue is proper in the district where the vessel is physically located.[13]

The complaint for exoneration from or limitation of liability must be filed within six months after the owner received written notice of the claim.[14] After filing the complaint, the vessel owner must deposit with the court a sum equal to vessel owner's interest in the vessel and pending freight, as well as any additional security that the court may order.[15] Any claimant may by motion challenge the sufficiency of any such deposit and petition the court for an increase in security.[16]

Once the complaint has been filed and security has been posted, the court will then take a number of steps in establishing a concursus proceeding, which compels all claims arising out of the casualty to be filed and disposed of in a single proceeding. First, the court will issue an injunction staying all proceedings currently pending against the owner with respect to the incident that is the subject of the limitation action.[17] Next, the court will publish notice to all potential claimants in a newspaper or newspapers once a week for a period of four successive weeks.[18] The notice will set forth a period of time within which the claimant must file a claim in the limitation action, which shall not be less than 30 days from the issuance of the notice.[19] In addition, by the date of the second publication, the vessel owner must mail a copy of the published notice "to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose."[20]

Each claimant must file a claim on or before the date specified in the notice.[21] However, the court has broad discretion to allow late filed claims. "So long as the limitation proceeding is pending and undetermined, and the rights of the parties are not adversely affected, the court will

[13] Id.

[14] 46 U.S.C. § 30511(a); Fed. R. Civ. P. Supp. F(1).

[15] 46 U.S.C. § 30511(b); Fed. R. Civ. P. Supp. F(1).

[16] Fed. R. Civ. P. Supp. F(7).

[17] 46 U.S.C. § 30511(c); Fed. R. Civ. P. Supp. F(4).

[18] Fed. R. Civ. P. Supp. F(4).

[19] Id.

[20] Id.

[21] Supplemental Admiralty Rule F(5).

freely grant permission to file late claims … upon the showing of the reasons therefor."[22]

Despite the court's mandatory instruction to establish a concursus proceeding in a limitation action, there are two circumstances in which the court must allow the claimant to pursue his action outside the limitation proceeding in another forum. First, the court must dissolve the injunction against other proceedings where the value of the limitation fund exceeds the total value of all claims asserted against the vessel owner.[23] Second, the injunction must be dissolved when only one claim is asserted against the vessel owner.[24] However, even if either of these two circumstances exist, the federal court will still retain jurisdiction over all matters affecting the vessel owner's rights to limit its liability. Because of the federal court's continued jurisdiction over all limitation issues, the claimant must agree to certain stipulations in order for the case to be transferred out of the federal court, including stipulations that the value of the limitation fund is the value of the vessel and its freight, that the state court judgment will not be given *res judicata* effect, and that the federal district court has exclusive jurisdiction to determine all issues concerning the right of the shipowner to limit liability.[25]

B. Bifurcation of Liability and Damages

The unique characteristics of a limitation action, over which the federal court has exclusive jurisdiction, are difficult to reconcile with the "saving to suitors" clause, which provides state courts with concurrent jurisdiction over admiralty claims.[26] Claimants who file their claims in state court prior to the filing of the limitation action often seek to have their case, or at least the damages aspect of their case, sent back to state court where it was originally filed.

The process for determining whether or not a party is entitled to limit its liability must be conducted in federal court.[27] This determination of the availability of limitation of liability is a two-part process. First, the claimants in the limitation action have the burden of proving that the

[22] Texas Gulf Sulphur Co. v. Blue Stack Towing Co., 313 F.2d 359, 362-362 (5th Cir. 1963).

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

[24] Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931).

[25] Odeco Oil and Gas Co. Drilling Div. v. Bonnette, 4 F.3d 401 (5th Cir. 1993).

[26] Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 442 (2000).

[27] Beiswenger Enters. Corp. v. Carletta, 86 F.3d 1032, 1036 (11th Cir. 1996); Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10 (5th Cir. 1976).

vessel owner and/or vessel was negligent or unseaworthy and that the negligence and/or unseaworthiness caused their alleged injuries or damages.[28] If the claimants cannot meet this burden of proof, the vessel owner and/or vessel are not liable and are exonerated from all liability. If claimants can successfully establish causative liability on the part of the vessel and/or vessel owner, the burden of proof then shifts to the vessel owner to establish that he did not have privity or knowledge of the established negligent and/or unseaworthy condition.[29] If the vessel owner meets its burden of proving a lack of privity or knowledge, limitation of liability is granted and the entirety of the case remains in federal court in order for the court to distribute the fund amongst the claimants.[30]

Alternatively, if the vessel owner is unsuccessful in establishing that it had no privity or knowledge of the negligent and/or unseaworthy condition, limitation of liability will be denied and the federal district court then has the discretion to send the case back to state court for a determination of the remaining issues, including damages.[31] In exercising this discretion, courts look to whether separate trials would promote judicial economy, convenience, and the prevention of justice.[32]

C. Limitation Only Available if Act Was Caused by Condition Not Within the Privity or Knowledge of the Owner

The Limitation Act provides that the shipowner may limit liability only if he shows that the fault causing the loss occurred without his "privity or knowledge."[33] The burden of proving that the shipowner did not have privity or knowledge is on the shipowner.[34] In the context of a corporation, "privity and knowledge" means the privity and knowledge of a managing agent, officer, or supervising employee, including shoreside personnel.[35] Privity and knowledge exist where the owner has actual knowledge, or could have and should have obtained the necessary

[28] Beiswenger, 86 F.3d at 1036.

[29] Id.

[30] Id.

[31] Lewis, 531 U.S. at 454.

[32] In re Diamond B Marine Servs., Inc., No. 99-951, 2000 WL 37987, at *1-2 (E.D. La. Jan. 14, 2000).

[33] 46 U.S.C. § 30505.

[34] Beiswenger, 86 F.3d at 1036.

[35] Great Lake Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), aff'd, 513 U.S. 527 (1995).

information by reasonable inquiry or inspection.[36] The constructive knowledge aspect of the test for "privity and knowledge" is a reasonable man test. Where the shipowner and supervisory personnel are found to have acted reasonably, limitation will be granted.[37]

One of the primary reasons that courts deny limitation is management's failure to provide proper procedures for the maintenance of equipment, the training of the crew, or adequate checks to ensure the implementation of established maintenance and safety procedures.[38] Some courts have also denied limitation when the ship is unseaworthy due to equipment which was defective at the start of the voyage. The shipowner is charged with knowledge of the existence of such a condition.[39]

On the other hand, one of the easiest ways in which a shipowner can establish that it lacked privity or knowledge is to prove that the cause of the accident was solely a navigational error. This is because "errors in navigation or other negligence by master or crew are not attributable to [the shipowner] on *respondeat superior* for limitation purposes."[40]

III. WHAT IS A *FORCE MAJEURE* / ACT OF GOD – IS IT A DEFENSE?

"The term 'force majeure' means a superior or irresistible force."[41] And "[t]he concept of 'force majeure' is similar to the common law concept of an 'act of God,' which has been defined as a 'providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ.'"[42] However, *force majeure* or Act of God is not truly a defense, but rather legal principals by which

[36] Cupit v. McClanahan Contractors, Inc., 1 F.3d 346 (5th Cir. 1993).

[37] In re Hellenic, Inc., 252 F.3d 391 (5th Cir. 2001).

[38] See, e.g., Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465 (5th Cir. 1991) (limitation denied because of inadequate testing procedures and supervision).

[39] Villers Seafood Co. v. Vest, 813 F.2d 339 (11th Cir. 1987).

[40] Tittle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977).

[41] Beahm v. Groike, No. 98-1214, 1999 U.S. Dist. LEXIS 255, at *8 (E.D. La. Jan. 11 1999) (citing Black's Law Dictionary 645 (6th ed. 1990)).

[42] Beahm v. Groike, No. 98-1214, 1999 U.S. Dist. LEXIS 255, at *8 (E.D. La. Jan. 11 1999) (citing Saden v. Kirby, 660 So. 2d 423, 428 (La. 1995)).

one establishes that they are not at fault because they took any and every precaution that a reasonable person could take, yet the damage or harm was inflicted on the other person anyway.

To succeed in proving a *force majeure* or "Act of God", the party must show that the impact could not have been foreseen and "the effects could not have been avoided by the exercise of reasonable prudence, diligence and care."[43] The party raising the *force majeure* bears the burden of proving it at trial.[44] "The burden is on the party claiming force majeure to demonstrate that an act of God occurred or that the event was beyond the control of the party."[45]

While one would think that a hurricane would be the quintessential *force majeure*, the case law reveals that is not necessarily the case.[46] Instead, to qualify as a *force majeure*, the party must make the requisite showing for a *force majeure*: that the impact could not have been foreseen and "the effects could not have been avoided by the exercise of reasonable prudence, diligence and care."[47] For instance, a hurricane "with unprecedented wind velocity, tidal rise and upriver tidal surge, is a classic case of an act of God."[48]

IV. THE IMPORTANCE OF RETAINING EXPERTS AND GATHERING INFORMATION WITHOUT DELAY

A key component to recovering losses and defending against claims is quickly identifying and retaining the right expert or experts, and knowing what information to obtain and how it can be obtained. There is immediate concern that the expert or experts can examine the scene and all evidence as early as practicable as close in time as to when the event occurred – preservation of the scene until the expert(s) arrive is critical, if that can be done although not always practical. Which experts to retain hinges upon the type of natural disaster encountered. Nevertheless, a marine surveyor should typically be the first expert retained in every case, and the parties should

[43] Comeaux v. Stallion Oilfield Constr., 911 F. Supp. 2d 413, 424 (W.D. La. 2012).

[44] See Broussard v. TMR Co., No. 2:11-CV-1446, 2013 U.S. Dist. LEXIS 142331, at *10 (W.D. La. Sept. 17, 2013).

[45] R & B Falcon Drilling Co. v. Am. Exploration Co., 154 F. Supp. 2d 969, 973 (S.D.T.X. 2000) (citing Matador Drilling Co. v. Post, 662 F.2d 1190, 1198 (5th Cir. 1981); Sun Operating Ltd. v. Holt, 984 S.W.2d 277, 283 (Tex. App. – Amarillo 1998)).

[46] See Comeaux v. Stallion Oilfield Constr., 911 F. Supp. 2d 413 (W.D. La. 2012).

[47] Comeaux v. Stallion Oilfield Constr., 911 F. Supp. 2d 413, 424 (W.D. La. 2012).

[48] See Petition of United States, 300 F. Supp. 358, 366 (E.D. La. 1969).

work to conduct a joint survey as soon as possible. Additional experts needed range from experts in hydrology, geology, marine safety, salvagers, divers, etc. A company should hire any and all experts that it may need to opine on issues related to liability and causation for the harm suffered.

In addition to retaining knowledgeable experts, a company must begin gathering information in anticipation of litigation and for preparation of its insurance claim. Two types of information will be gathered. First, information held by private parties must be collected. Your counsel should set up a team within the company and identify a single individual who will be the gatekeeper for the collection of information within the company, and preparation of the claim. This usually is an in-house risk or claims manager, or company attorney. Second, information gathered from government sources must be accomplished through request under the Freedom of Information Act ("FOIA"). To institute a FOIA request, the company or its attorney must send a formal FOIA Request letter to any relevant State or Federal agencies, such as the United States Coast Guard, the U.S. Army Corps of Engineers, and any State and local port authorities that may have jurisdiction over the waterways, fleeting operation, and marine transportation in the area(s) in which the disaster struck. The request also must state that you will pay all reasonable fees and provide contact information for a point-of-contact. The initial documents requested under a FOIA request should include a certified/official copy of all historical operational or fleeting permits, as the case may be, and related documents for the potentially at-fault company for the area in which the alleged harm was suffered. This will allow you to determine whether that entity was operating inside of the terms of its permits at the time of the natural disaster and any subsequent incident.

V. THE LAW OF SALVAGE CAN BE IMPORTANT TO RECOVER COSTS INCURRED OR TO MITIGATE LOSSES

In addition to the forgoing, when companies encounter natural-disaster scenarios, the law of salvage typically becomes relevant to that company at some point during the course of the natural disaster and its aftermath, whether by a company seeking to recover a salvage award or by a company being asked to pay a salvage award. "The law of marine salvage is of ancient vintage. In contrast to the common law, which does not grant a volunteer who preserves or saves the

property of another any right to a reward, a salvor of imperiled property on navigable waters gains a right of compensation from the owner."[49]

A salvage award is the compensation allowed to the volunteer whose services on navigable waters have aided distressed property in whole or in part. "In order properly to induce the salvor (and salvee) to act, however, the law must provide for a proper and reasonable salvage award, one that gives neither the salvor too little incentive to do the salvage properly, nor the salvee too little reason to care if his property is saved. By definition, this 'efficient' fee is the one that would have been reached by the parties through voluntary negotiation in an open and competitive market, and its value will depend on a number of factual considerations."[50]

To establish a claim for a salvage award, the salvor must prove the following: "(1) a marine peril; (2) voluntary service rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or contribution to, the success of the operation."[51] The peril does not need to be either imminent or absolute.[52] Instead, the property must be in danger that is "either presently or reasonably to be apprehended."[53] Next, the salvor must prove that its efforts were voluntary and "not pursuant to some other obligation or duty."[54] Finally, the salvor must prove that it succeeded in saving the property from the "presently or reasonably to be apprehended" peril.[55]

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[49] 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-1 (5th ed. 2015) (footnote omitted)

[50] Margate Shipping Co. v. M/V JA Orgeron, 143 F.3d 976, 986 (5th Cir. 1998)).

[51] Smith v. Abandoned Vessel, 610 F. Supp. 2d 739, 756 (S.D. Tex. 2009) (citing The Sabine, 101 U.S. 384, 384 (1879); United States v. Ex-USS Cabot/Dedalo, 297 F.3d 378, 381 (5th Cir. 2002); Margate Shipping Co. v. M/V JA Orgeron, 143 F.3d 976, 984 (5th Cir. 1998)).

[52] See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 569 F.2d 330, 337 n.13 (5th Cir. 1978) (quoting NORRIS, THE LAW OF SALVAGE § 185 (1958)).

[53] Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 569 F.2d 330, 337 n.13 (5th Cir. 1978) (quoting NORRIS, THE LAW OF SALVAGE § 185 (1958)).

[54] Smith, 610 F. Supp. 2d at 757 (citing Legnos v. M/V Olga Jacob, 498 F.2d 666, 672 (5th Cir. 1974); Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982)).

[55] Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 569 F.2d 330, 337 n.13 (5th Cir. 1978) (quoting NORRIS, THE LAW OF SALVAGE § 185 (1958)); Smith, 610 F. Supp. 2d at 757 (citing The Blackwall, 77 U.S. 1, 12 (1869); W. Coast Shipping Brokers Corp. v. The Ferry "Chuchequero," 582 F.2d 959, 960 (5th Cir. 1978); The Sabine, 101 U.S. 384, 384 (1879)).

"The appropriate salvage award in a particular case is highly circumstantial and generally 'should not be based upon fixed percentages of the value of the salved property or upon comparisons to percentages from previous awards.'"[56] "In fixing the amount of a salvage award, the Court, in its sound discretion, must take into consideration all of the facts and circumstances of the salvage operation, weigh and consider them, stress some and discount others, and ultimately arrive at a final figure."[57] "Under the general maritime law, courts have long utilized a six-factor test laid out by the Supreme Court in *The Blackwall*, wherein courts consider:

- The labor expended by the salvors in rendering the salvage service.
- The promptitude, skill, and energy displayed in rendering the service and saving the property.
- The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.
- The risk incurred by the salvors in securing the property from the impending peril.
- The value of the property saved.
- The degree of danger from which the property was rescued.[58]

"The Fifth Circuit has advised courts to use the first, second, third, fourth, and sixth factor to arrive at a percentage to be applied to the fifth factor."[59] "In setting the percentage, some care should of course be taken to stay within the bounds of historical practice, . . . and to account for all of the relevant circumstances of the specific salvage at issue. The predominant consideration, however,

[56] Sunglory Mar., Ltd. v. PHI, Inc., 212 F. Supp. 3d 618, 652 (E.D. La. 2016) (quoting Jones v. Sea Tow Servs. Freeport N.Y. Inc., 30 F.3d 360, 364 (2d Cir. 1994)).

[57] Id. (citing The Connemara, 108 U.S. 352, 359 (1883); 3A-XX Benedict on Admiralty § 237).

[58] *Id.* (citing *The Blackwall*, 77 U.S. 1, 10 (1869).

[59] *Id.* (citing *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 989 (5th Cir. 1998)).

should always be to arrive at an award that reasonably reflects the price upon which the parties would have agreed."[60]

CONCLUSION

Depending on the circumstances of each case, all of the above may not apply. What is important is that the company move quickly and deliberately to protect its interests. This will require the company, its lawyers, is insurers, and its experts to work collectively and collaborate closely to ensure that everyone's interests are protected and the Big Four are properly addressed.

[60] Margate Shipping Co. v. M/V JA Orgeron, 143 F.3d 976, 989 (5th Cir. 1998).