The Continued Vitality of the Shipowner's Limitation of Liability Act of 1851

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> *"SEC. 3. The liability of the owners of any ship or vessel, for any … act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."*[1]

These words written into federal statutory law by Congress on March 3, 1851, remain largely unchanged today, 171 years later. Although no case concerning the Limitation Act reached the United States Supreme Court until 20 years later in *Norwich Co. v. Wright*,[2] in recent decades not only the Supreme Court but maritime courts throughout the United States regularly grapple with the Limitation Act. Indeed, the Limitation Act remains more alive and well today than ever. Twenty-first century maritime disasters and accompanying Limitation Actions dominate the admiralty legal seascape. Deepwater Horizon (11 lives lost), El Faro (33 lives lost), Conception (34 lives lost), Seacor Power (13 lives lost) – the shipowner in each tragedy availed itself of this remarkable and recurrent feature of maritime law.

Not that long ago any law student who dreamed of becoming an admiralty lawyer read the standard admiralty treatise updated in the 1970s. Grant Gilmore and Charles Black, Jr., wrote "The Law of Admiralty" in 1957 and issued a revised edition in 1975. Gilmore and Black were the admiralty gurus of their time! Here is a quote from page 823 of the 1975 edition:

> The Limitation Act itself has so far managed to survive unscathed but its future prospects cannot be described as bright. One more large-scale maritime disaster, following which the shipowners petition to limit their liability to a fund of $50, should suffice to bring the whole structure tumbling down. If a third edition of this book is called for, the present chapter will in all probability be of no more than historical interest.[3]

Unfortunately, Messrs. Grant and Gilmore did not live long enough to collaborate on a third edition. Professor Black's obituary in the New York Times noted that the admiralty treatise "was widely regarded as the definitive text on the subject."[4] However authoritative, these authors did not see particularly well into the future when it comes to Limitation Actions, as this paper will demonstrate.

The unpredictable seas of the future instead brought the Limitation Action into the vanguard of maritime law. Although statistics from the Administrative Office of U. S. Courts are hard to come by, Westlaw searches on Limitation Actions reveal no diminishment in the number of Limitation Act filings by shipowners in recent years. Dozens upon dozens continue to be filed in federal district courts each year. The continued vitality of the Limitation Act, despite a bad press, is best demonstrated through examination of the major marine catastrophes of the past decade or so and the litigation course each disaster charted.

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[1] 9 Stat. 635; 46 U.S.C. § 186 (corresponding to 46 U.S.C. § 30505 – 30510 (current through P.L. 117-102)).
[2] 80 U.S. 104 (1871).
[3] Gilmore Grant & Charles Black, *The Law of Admiralty* 823 (Foundation Press, 2d ed. 1975).
[4] *Charles L. Black Jr., 85, Constitutional Law Expert Who Wrote on Impeachment, Dies*, N.Y. Times, May 8, 2001, at sec. B p. 10.

To the extent the lay public learns about the statute after any maritime casualty involving the death of multiple seafarers or passengers, the press consistently alludes to the sinking of the Titanic in 1912, after which White Star Line filed a Limitation Action in the Southern District of New York seeking to limit its liability to $92,000, the value of the 14 remaining lifeboats and freight money earned on the voyage.[5] After this requisite nod to the seemingly anachronistic Limitation Act, press reports at later dates after litigation or settlements rarely mention any salutary aspects of the Limitation Act. These features, unmentioned by legal reporters, include of course the required concursus of claims and the case management employed by the single federal judge, features that routinely propel the case to resolution. Perhaps the initial astonishment of reporters and readers at the possibility of a shipowner achieving limitation (or exoneration) fades away in time when it inevitably fails to happen. The paucity of actual limitation or exoneration conclusions perhaps explains the failure of attempts to repeal the Limitation Act.[6] Most recently, immediately after the burning and sinking of the Deepwater Horizon drilling vessel in April 2010, an attempt at repeal was made while crude oil still gushed from the broken riser pipe at the bottom of the Gulf of Mexico.[7] Despite the singular national focus on that tragedy and massive oil spill, the repeal bill never made it out of the Senate Committee on Commerce, Science, and Transportation.

The continued vitality of the Limitation Act will be shown in this paper through examination of four maritime tragedies and ensuing limitation proceedings. In *Deepwater Horizon*, the Limitation Action filed by shipowner Transocean ultimately "failed" in that Transocean neither limited its liability nor was exonerated.[8] Similarly, Tote Maritime, the operator of the S/S EL FARO, settled the dozens of wrongful death suits and hundreds of cargo claims in short order following the filing of its Limitation Action.[9] More recently, the owner of the dive boat Conception filed a Limitation Action but the federal judge lifted the restraining order against the presumption of various state court actions once appropriate limitation-protection stipulations were reached by all claimants. Finally, in another ongoing limitation case, Seacor Liftboats and the claimants have begun discovery and settlement talks are underway.

I. DEEPWATER HORIZON

On the evening of April 20, 2010, while the Transocean drill crew was pulling out of the Macondo well, on the Outer Continental Shelf offshore Louisiana, a blowout, explosion, and fire occurred aboard the Deepwater Horizon.[10] Eleven Transocean crewmembers died.[11] The "blowout preventer" (BOP) failed to stem the ensuing gush of oil and ultimately millions of gallons of oil

[5] *THE TITANIC*, 209 F. 501, 502 (S.D.N.Y. 1913).
[6] Limitation and exoneration decisions do occur. Indeed, a study of reported Limitation Act cases from 1957 to 2019 reveals a 39%:61% failure:success rate that has remained remarkably consistent during that lengthy period. *See* "Statistical Analysis of Limitation of Liability Cases" by Elena Mihos (Spring 2021)(available from author upon request). I, myself, succeeded in a Limitation Action involving a major allision on the Illinois River involving barges striking a dam and allegedly causing extensive flooding in Marseilles, Illinois. *See In the Matter of the Complaint of Ingram Barge Company as Owner of the M/V DALE A. HELLER*, 194 F. Supp.3d 766 (N.D. Ill. 2016), *aff'd, Alexander v. Ingram Barge Co.,* 876 F.3d 269 (7th Cir. 2017).
[7] H.R. 5503, 111th Cong. (2010).
[8] *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 21 F. Supp. 3d 657 (E.D. La. 2010).
[9] Verified Complaint, *in re Sea Star Line, LLC*, No. 3:15-01297, 2016 WL 7374541 (M.D. Fla. Sept. 16, 2016).
[10] *Deepwater Horizon*, 21 F. Supp. 3d at 666-667.
[11] *Id.* at 667.

discharged into the Gulf of Mexico over the 87 days of the disaster before the well was sealed.[12] The Deepwater Horizon, owned and operated by Transocean, was a "MODU," a mobile offshore drilling unit – in short, indisputably a vessel.[13] Dynamically positioned rather than anchored to the seafloor, the Deepwater Horizon carried a marine crew (employed by Transocean) as well as a highly-experienced drill crew (also employed by Transocean).[14] Although the rig's value before the casualty was about $650 million, in the Limitation Action filed in the Southern District of Texas on May 13, 2010, about three weeks after the vessel capsized and sank to the seafloor, Transocean declared a value of $26,764,083.00.[15] This figure encompassed the "freight then pending" as per the Limitation Act, namely the dayrate owed by BP to Transocean for use of the MODU in drilling its Macondo well.[16]

District Judge Keith Ellison issued the usual Limitation Action restraining order, enjoining the filing of claims against Transocean and requiring the filing of all claims in the limitation proceeding. Pursuant to Federal Rule of Civil Procedure 14(c), Transocean impleaded other parties, including BP, Halliburton, and others; counterclaims and cross-claims were filed within the Limitation Action. Multiple claims between and amongst the shipowner (Transocean) and other parties potentially responsible for the disaster are adjudicated within the Limitation Action, as endorsed by the United States Supreme Court in *British Transport Commission v. United States*.[17] By August 2010, the United States Judicial Panel on Multidistrict Litigation transferred hundreds of individual cases to MDL 2179, assigning Judge Carl Barbier of the Eastern District of Louisiana to preside over the incredibly complex litigation.[18] Among the cases transferred to MDL 2179 was Transocean's Limitation Action.[19] By February 2013, less than three years after the disaster, thanks to an expedited discovery schedule that included multitracking depositions of hundreds of witnesses, Judge Barbier held a "Phase One" trial to determine fault for the disaster simultaneously with Transocean's claim of limitation or exoneration.[20] The unique nature of the Limitation Act proceeding, transferred to the MDL for "all purposes," not merely the pretrial matters as is the usual routine for MDL proceedings, allowed Judge Barbier to hold an "admiralty side" liability bench trial and thus adjudicate a binding fault allocation for all the litigants, claimants and defendants alike. This fault allocation, under admiralty law, could thus be divorced from damages issues and not run afoul of the Seventh Amendment prohibition of two juries for one matter. And Judge Barbier, using the ample resources available to a federal judge (including, particularly, the energetic Magistrate Judge Sally Shushan), managed this complex case to trial and a massive settlement in an astoundingly short time for what may be the biggest civil case ever. Transocean's Limitation Act filing placed the essential tools in Judge Barbier's toolbox to affix

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[12] *Id.*
[13] *Id.* at 671.
[14] *Id.*
[15] *Little known law could work in Transocean's Favor*, http://www.cnn.com/2010/CRIME/06/10/oil.spill.transocean.lawsuits/index.html (last visited 04/06/22).
[16] *Id.*
[17] 354 U.S. 129, 216 (1957)("[the Limitation Action] is the administration of equity in an admiralty court …. It looks to a complete and just disposition of a many cornered controversy").
[18] *Deepwater Horizon*, 21 F. Supp. 3d at 667.
[19] Unlike a typical JPML transfer, the Limitation Action transfer to MDL 2179 occurred via 28 U.S.C. § 1404 and therefore was not guided by 28 U.S.C. § 1407 that restricts the MDL judge to adjudicate *pretrial proceedings only*, returning the now-mature MDL case to the original court for trial.
[20] *Deepwater Horizon*, 21 F. Supp. 3d at 668.

liability for all the parties and prevent piecemeal litigation of the liability issues in multiple jurisdictions.

In his denial of Transocean's bid for limitation of liability, and in finding Transocean 30% at fault for the catastrophe, Judge Barbier noted that the drill crew failed to divert the blowout's discharge overboard, failed to maintain the seafloor blow out preventer (BOP), and that the Deepwater Horizon's captain failed to activate the emergency disconnect system (EDS) from the bridge once the blowout became obvious.[21] Judge Barbier further found that each of these failures constituted either negligence or unseaworthiness (or both) and that Transocean's management contributed to the fault, thus finding the negligence and unseaworthiness to be within Transocean's "knowledge or privity."[22]

II. THE SINKING OF THE EL FARO

The S/S El Faro, owned by Tote Maritime's subsidiary Sea Star Lines, served as a Jones Act-compliant general cargo ship, shuttling cars and shipping containers between Jacksonville, Florida and San Juan, Puerto Rico. When it departed with its crew of 33 seamen from Jacksonville on September 29, 2015, a tropical storm named Joaquin threated in the Caribbean, but the National Hurricane Center predicted a track well east of the course planned by Captain Michael Davidson.[23] As we all know from bitter experience, storm predictions often turn out wrong. Despite updated storm tracking information, Cpt. Davidson continued to sail into what eventually became the center of a major Category 3 hurricane with winds in excess of 115 mph and waves up to 40 feet.[24] A harrowing day on September 30 turned into a horrific night and by early morning on October 1, with the ship foundering, the ship's voyage data recorder captured the last words of Captain Davidson, still on the bridge but urging crewmembers to get off the ship, "I'm not leavin' you, let's go!"

Within two weeks of the ship's sinking, families began suing Tote/Sea Star in state court. By the end of that month, Tote/Sea Star filed its Limitation Action in the United States District Court for the Middle District of Florida (Jacksonville Division).[25] Claiming that the El Faro left port in a seaworthy condition and that decisions about the course of the ship in anticipation of the storm's path were left solely to Cpt. Davidson, Tote/Sea Star disclaimed any negligence.[26] In the pleading asserting the $15 million valuation of the limitation fund, $2 million represented the "freight then pending," with another $13 million for the $420 per ton minimum fund for wrongful deaths aboard seagoing ships (46 U.S.C. § 30506).[27] The value of the ship itself, at the end of its fateful voyage, was $0. Of course, press accounts quoted claimants' attorneys vilifying this

[21] *Deepwater Horizon*, 21 F. Supp. 3d at 757.
[22] *Id*.
[23] National Transportation Safety Board. 2017. *Sinking of US Cargo Vessel SS El Faro: Atlantic Ocean, Northeast of Acklins and Crooked Island, Bahamas, October 1, 2015.* Marine Accident Report NTSB/MAR-17/01. Washington, D.C. pg. 91.
[24] *Id.* at 1.
[25] *In the Matter of the Complaint SEA STAR LINE, LLC*, No. 3:15-cv-1297-HES-MCR, 2016 WL 7374541 (M.D.F.L. Sept. 26, 2016).
[26] *Id.*
[27] Complaint, *In the Matter of the Complaint SEA STAR LINE, LLC.,* No. 3:15-cv-1297-HES-MCR, 2016 WL 7374541 (M.D.F.L. Sept. 26, 2016) (No. 15CV01297).

shipowner for availing itself of the Limitation Act (never mentioning the fairly sizable fund in this particular case).

Ultimately, families of all 33 crewmembers filed claims and answers in the Limitation Action. In addition, several hundred claims were filed by cargo owners. By 2016, less than a year after the filing of the Limitation Action, Senior Judge Schlesinger set a trial date for April 4, 2018. Soon thereafter, mediations and formal settlement conferences with Magistrate Judge Monte Richardson prompted settlements on a rolling basis. By November 2017 (about two years after the sinking), the case terminated, with settlements of each and every claim. The lead attorney for Tote/Sea Star, Jerry Hamilton of Miami, observes in his firm bio: "[In the] worst maritime shipping disaster in over 35 years … [s]ettled all fatality lawsuits and over 600 cargo claims within 22 months." The reality here is not only was Tote/Sea Star's lawyer able to boast about his handling of a terrible tragedy, but the family members of the lost seamen were able to reap fair settlements in a prompt and efficient manner. The Limitation Act, in addition to the ample skills of the numerous maritime attorneys involved, prompted the highly successful resolution of a maritime disaster.

III. DIVING VESSEL CONCEPTION

During the night on September 2, 2019, fire broke out belowdecks on the dive boat Conception, a 75' vessel with 33 dive enthusiasts aboard, sleeping in the bunkroom following a night dive excursion at Santa Cruz Island, just offshore Los Angeles, California.[28] Five crewmembers, including the captain, had the good luck to be asleep in the above-deck quarters and survived the fast-moving fire by jumping overboard.[29] The 33 paying passengers and one crewmember died of smoke inhalation.[30] The boat had recently passed a Coast Guard inspection and complied with international regulations for fire-retardant construction materials.[31] The origin of the fire may have been multiple lithium batteries charging on overstressed power strip. The NTSB, however, concluded that however the fire started, the probable cause of the conflagration and consequent deaths was the absence of a night watchman posted on a roving patrol and further recommended upgraded regulations concerning emergency passageways for passenger vessels.[32] In another notable development, the United States Attorney brought 34 counts of Seaman's Manslaughter, 18 U.S.C. § 1115, against Captain Jerry Boylan. In September 2022, however, the federal district court dismissed the charges, finding that the Seaman's Manslaughter criminal statute required a showing of gross, not ordinary, negligence which the indictment failed to allege. The Department of Justice has stated that this dismissal will be interlocutorily appealed to the United States Court of Appeals for the Ninth Circuit.[33]

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[28] R. Winton, "Feds say captain saved himself as California boat fire killed 34. But prosecution hits a wall," Los Angeles Times September 3, 2022; www.latimes.com/california/story/2022-09-03/captain-conception-boat-fire-killed-34-people-prosecution-case (last visited September 14, 2022).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] R. Winton, "Feds say captain saved himself as California boat fire killed 34. But prosecution hits a wall." The statute itself refers only to "neglect" and "misconduct." The Fifth Circuit has suggested that ordinary negligence constitutes the criminal standard of conduct. *See United States v. Kaluza*, 780 F.3d 647 (5th Cir. 2015). For a recent and illuminating article on the Seaman's Manslaughter statute, see S. Skidmore, "An Argument for Returning to the

Within five days of the disaster, the owner of Conception, Truth Aquatics, filed its Limitation Action. Here, the limitation fund was set at $0, the burned hull having a negative value. Apparently, the shipowner here elected not to include in the limitation fund the per-ton minimum in 46 U.S.C. § 30506 as, at least arguably, the Conception was not a "seagoing vessel" for purposes of valuing the fund. With the judge-issued monition deadline of July 2020, all of the decedents' families had filed their claims and answers in the proceeding, and District Judge Percy Anderson held an initial status conference. In this particular Limitation Action, unlike that in the ones involving the Deepwater Horizon, Seacor Power, and El Faro, all the claimants indicated the likelihood that a stipulation could be unanimously agreed upon, and the stipulation was entered in early 2021. All the claimants proposed to honor the Limitation Action while pursuing their "saving to suitors" actions in state court, withholding any execution of judgment against Truth Aquatics until after the federal court had adjudicated its right to limitation. In an apparent effort to maintain unanimity, all claimants agreed to a term beyond that required in *Lewis v. Lewis & Clark Marine*, 531 U.S. 438 (2001) – they agreed to file a single action in the Superior Court in Los Angeles and have all the claims heard by a single judge and jury. No doubt the claimants' attorneys themselves recognized the procedural benefits of the concursus mandated in a Limitation Action and therefore availed themselves voluntarily of this advantage. Discovery and depositions are ongoing in the consolidated Superior Court action.[34]

Perhaps faced with not only the Limitation Act's potential restriction on ultimate liability, but also the limited insurance and insolvency of the shipowner defendants, the claimants filed a separate federal admiralty action pursuant to the Suits in Admiralty Act against the United States Coast Guard for its alleged failures in vessel inspections of the dive vessel.[35] Discovery has not yet begun. The Department of Justice attorneys are no doubt preparing a summary judgment motion based on the Discretionary Function exception to the waiver of sovereign immunity related to activities considered discretionary conduct and "policy-based" activities of government employees.[36]

IV. SEACOR POWER

Thirteen men died on April 13, 2021, when the liftboat Seacor Power capsized during a violent thunderstorm just offshore Port Fourchon, Louisiana. On June 2, 2021, the Seacor parties filed their Limitation Act proceeding in the Eastern District of Louisiana, in a case assigned to Judge Jane Triche Milazzo. Although Seacor's valued the sunken vessel itself at $0, the "freight then pending" for the vessel's hire was $4,072,500. Seacor included an additional $955,920 for the minimum fund requirement of Section 30506 (at $420 per ton) personal injury and wrongful death claims as well as $650,000 for the scrap value of the liftboat when salvaged. A week after the filing, Judge Milazzo held a status conference, illustrating the case management thrust often employed by federal judges to move cases to resolution. Claims and answers having been filed by

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Commerce Clause Definition of Navigability: The Seaman's Manslaughter Statute and Its Applicability in State Waters," 21 Loy.Mar.L.J.83 (Summer 2022).

[34] See the litigants' "Joint Semi-Annual Status Report" dated August 1, 2022, Document 183 in 2-19CV07693. In granting the claimants' motion to lift the Limitation Action stay, the Limitation Court retained jurisdiction and required the parties to keep it apprised of all activity ongoing in the Superior Court action.

[35] *See* First Amended Complaint, *Fiedler et al. v. United States*, Case No. 2:21-cv-07065, United States District Court for the Central District of California (filed February 9, 2022).

[36] *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315 (1991); *In re Complaint of Ingram Barge Co.*, 194 F. Supp. 3d 766 (N.D. Ill. 2016).

all parties with a short "monition period" of three months, and written discovery completed, deposition discovery is well underway.[37] In contrast to the Conception Limitation Action, where all claimants were sufficiently aligned to reach stipulations regarding the primacy of the limitation court's prerogative to decide limitation/knowledge or privity questions, such alignment could not occur among the claimants in Seacor Power's Limitation Action. Non-personal injury/wrongful death claims also exist, namely claims for contractual indemnification between Talos Energy, for whom the liftboat was working, and the owner/operator of the Seacor Power. No unanimity can be reached and thus no lifting of the limitation stay is likely to occur.

V. CONCLUSIONS

These four Limitation Act cases involving the biggest maritime disasters of the past 12 years[38] serve to illustrate and emphasize the continued robustness of the Shipowner's Limitation of Liability Act of 1851. Despite the hoariness of the statute, despite the predictions of maritime law scholars, despite the occasional attempts to scuttle the Act by Congress – it lives on, stronger than ever.

The four cases also illuminate the flexibility and adaptability of the Limitation Action. Although the statutory wording and the accompanying rules of procedure found in Rule F of the Supplemental Rules for Admiralty or Maritime Claims have changed little in a century, federal judges and litigants use the structure to resolve massive, difficult cases. In the Deepwater Horizon limitation, Judge Barbier fashioned a unique mechanism to streamline and make efficient both the discovery and trial of the limitation liability issues in a truly "many cornered controversy." Similarly, in the El Faro limitation proceeding, the federal judge spurred the parties all gathered in one giant case to settle the entire matter in record time. Using the procedure set forth in the Supreme Court's *Lewis v. Lewis & Clark Marine*, the litigants in the Conception Limitation Action fashioned a proper stipulation both to protect the supremacy of the Limitation Act itself while preserving the "saving to suitors" framework to allow a state court jury trial. And finally, the most recent maritime tragedy sees the litigants in the Seacor Power Limitation Action forming committees that enhance the likelihood of efficiently and effectively moving toward an early trial date and resolution, only possible because of firm case management employed in our home federal court, the Eastern District of Louisiana.

So you can see I came to this topic not to bury the Limitation Action but to praise it. What accounts for its continued vitality? Obviously, the primary advantage offered to shipowners but not to any other category of tort defendants is the *concursus*. The framework offered by a single proceeding involving multiple claimants and defendants including the shipowner allows the federal judge to construct a path to resolution. Although claimants' lawyers decry the statute and question the shipowner's motives for filing a limitation petition in the immediate wake of a disaster, always at the ready to offer a quote to the press upon the filing, those same lawyers then

[37] News reports indicate some settlements have been reached. See J. Simerman, "Owner of toppled Seacor lift boat settles with crew, families, while contractors fight on," www.nola.com (September 11, 2022) www.nola.com/news/courts/article_590d24b4-3088-11ed-b2de-a7e6f4ef1a29.html (last visited September 14, 2022).

[38] In a terrible marine accident where 17 people died on an excursion boat in July 2018, although the owner filed a Limitation Action and the U.S. Attorney's office filed seaman's manslaughter charges against the captain and company managers, the federal court in Missouri dismissed both actions as outside federal admiralty subject matter jurisdiction. Table Rock Lake, the site of the accident, is not navigable in interstate commerce.

band together. Rather than split up into competing state court camps, the claimants form a powerful united front.

This group – usually in the form of a steering committee (with subcommittees for written and deposition discovery, e-discovery, expert vetting and preparation, trial preparation) – presents in essence a formidable national "biglaw" firm arrayed against the shipowner. The shipowner and claimants in a limitation case operate on at least equal footing. Pooling resources by the claimants' group is a huge benefit that arises because of the concursus. (Perhaps this is why the claimants' committee in the Conception disaster stipulated to a single state court action in Los Angeles, a stipulation that went above and beyond the requirements of *Lewis v. Lewis & Clark Marine*). No strategy by the shipowner of "divide and conquer" exists in a Limitation Act proceeding as contrasted to fractured actions in multiple fora. And perhaps most importantly, a united front by the claimants can facilitate a beneficial settlement for each family or other claimants, for example the cargo claims in El Faro.

My thesis is that although a claimant's attorney in today's Limitation Actions will never publicly praise the Shipowner's Limitation of Liability Act of 1851, in private he or she must acknowledge the statute's continued usefulness in achieving a just result for their clients. In the Deepwater Horizon and El Faro maritime disasters, the ensuing Limitation Actions resulted in top dollar settlements for all the seamen's families in a comparatively short period of time after the fateful voyages. A prediction that the same will be true in the Conception and Seacor Power tragedies is not far fetched. The Limitation Act thrives in 2022 as a result of the beneficial features offered to both claimants and shipowners.