

## THE FREIGHT THEN PENDING DOCTRINE IN LIMITATION PROCEEDINGS

There are certain niche areas within maritime litigation practice which can have significant practice implications. One is the “freight then pending” doctrine in limitation proceedings.

The Limitation of Liability Act, 46 USC 181, et seq., was originally enacted to protect the shipping industry from large claims which would threaten its viability. It allows a ship owner to file for exoneration from and/or limitation of liability which, under certain circumstances, allows the ship owner to be relieved of liability or even if liable, limit its liability to the value of the vessel and its “freight then pending.” Traditionally, limitations have been filed where there were multiple claims with a limited fund available for payment.

In recent years, vessel owners have often utilized limitation proceedings when a potential or actual personal injury claim has manifested. This is frequently done in single claim cases.

Limitation proceedings are often filed in an attempt to control forum and to put pressure on claimants by creating additional obstacles which are fraught with procedural and substantive pitfalls. These include creating concern as to whether there will be sufficient funds to pay the full value of a claim.

Under the Limitation of Liability Act, the value of the vessel and its freight then pending constitute the value that a ship owner can limit its as it liability if granted limitation. When a limitation proceeding is filed, the ship owner must post security for the value of the limitation fund. Often only the vessel's value is listed and "freight then pending" is ignored.

This discussion will focus on the issue of "freight then pending" in offshore or inland drilling industry cases which utilize specialized vessels, including drilling ships, semi-submersible rigs, jack-up rigs, inland drill barges. These vessels conduct drilling or well workover activities for the oil and gas industry.

In the traditional context, freight then pending constituted the cargo of the vessel. However, since in offshore or inland drilling cases the vessel performs a service, there is no freight or cargo.

In these unique cases, courts have considered the "freight then pending" issue and have looked to the drilling contract in effect at the time of the accident .

*In the Matter of Falcon Inland Inc. and Falcon Services Co. Inc. of Delaware Petitioning for Exoneration from or Limitation of Liability*, 1998 W. L. 185222 (E.D. La.), the court held that in an inland drilling barge limitation proceeding, the entire value of a day work drilling contract should be considered as freight then pending. The limitation petitioner had argued that the freight then pending value should be limited to the contract value through the date of the accident. The court rejected this argument and held

the entire value the contract should be included. The court relied on the very early case of *The Main vs. Williams*, 152 U.S. 122, 14 S.Ct. 486, 38 L.Ed 381 (1894), where the court defined pending freight broadly, stating that it referred to “all reward, hire, or compensation, paid for the use of ships.” At 129. The court further stated that the pending freight doctrine should be broadly construed in favor of the injured party and should include the price paid for the voyage.

The additional amount of the gross value of the drilling contract can be considerable in single accident limitation proceedings. Today, many inland drilling barges do not have sufficient value to cover a serious personal injury claim.<sup>1</sup> The addition of the contract value can sometimes make up the difference. When a vessel owner files a stipulation of value and posts security in a limitation proceeding and does not include any value for freight then pending, a claimant should require that the stipulation of value and security be supplemented to include it. If the vessel owner will not voluntarily agree, this can be required by motion. The vessel owner should provide a copy of the contract in effect so its full value can be determined.

Freight then pending should always be considered in a limitation proceeding to maximize the value of the limitation fund. If a limitation proceeding is litigated, the documents and witnesses necessary to prove the value of freight then pending should be available and utilized.

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<sup>1</sup> This assumes that there is no independent insurance coverage for the loss. Some insurance coverages are limited to the value of the limitation fund. Insurance related issues are beyond the scope of this discussion.

