BOATING BRIEFS

Recreational Boating Committee of The Maritime Law Association of the United States

Frank P. DeGiulio, Chairman
Volume 17 Number 1

Spring/Summer 2008

This journal will summarize the latest cases and other developments which impact the recreational boating industry. We welcome any articles of interest or suggestions for upcoming issues.

- The Editorial Staff

In this Issue

Yacht Policy's Prohibition against Intentional Concealment or Misrepresentation Does Not Relieve Insured of Broader Duty under *Uberrimae Fidei*

New Hampshire Insurance Co. v. C'Est Moi, Inc., 2008 U.S. App. LEXIS 5836 (9th Cir. Mar. 20, 2008)

Lawrence O'Rourke purchased the 56-foot yacht C'EST MOI in 1986 for approximately $300,000 and insured it with Washington International Insurance. The yacht was destroyed by fire in 1992 and Washington International paid a total loss (the insured value of $450,000 less a $50,000 deductible). O'Rourke acquired the burnt-out hull at salvage and began restoring it.

The yacht remained uninsured until 2001, when O'Rourke sought insurance from New Hampshire Insurance Company (NHIC). In his answers to questions on the insurance application, O'Rourke stated that he had purchased the yacht in 1986 for "$450,000++" and that the yacht was presently insured with Washington International.

NHIC issued a policy that was renewed annually through 2004. The policy contained the following provision:

> CONCEALMENT OR MISREPRESENTATION: Any relevant coverage(s) shall be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, or your insurance application, before or after a loss.

After the yacht sank in calm water in 2004, NHIC filed a declaratory judgment action for rescission of the policy, claiming among other things that O'Rourke had misrepresented the purchase price and the existence of current insurance on his insurance application.

The district court granted summary judgment for NHIC, relying on *uberrimae fidei* and ruling that O'Rourke's misstatements as to purchase price and existing insurance were material and were grounds to rescind the policy whether made intentionally

or not. 406 F. Supp. 2d 1077 (C.D. Cal. 2005). Under the rule of *uberrimae fidei*, misrepresentation of a material fact in a marine insurance application may void a policy without regard to the insured's intent.

On appeal O'Rourke argued that the district court's reliance on *uberrimae fidei* was improper because the policy wording suggested that only an intentional misrepresentation would void coverage. As support O'Rourke cited *King v. Allstate Insurance Co.,* 906 F.2d 1537 (11th Cir. 1990), in which the Eleventh Circuit had considered similar facts and a nearly identical provision ("This policy is void if you intentionally conceal or misrepresent any material fact or circumstance, before or after loss") and concluded that such language displaced the rule of *uberrimae fidei* and allowed rescission of the policy only if the insured's misrepresentations were intentional.

The Ninth Circuit declined to follow *King*. Stating that uberrimae fidei "is a well-entrenched doctrine that protects not merely the insurer but the integrity of the risk pool," the court held that assuming it was possible to contract out of *uberrimae fidei*, "only an unambiguous statement in the policy, purporting to supersede the doctrine in express terms, would be sufficient to accomplish that purpose." Because the provision in the policy did not mention *uberrimae fidei* ("or its colloquial equivalent, the duty of utmost good faith") and did not expressly displace any rights or responsibilities imposed by operation of law, the rule of *uberrimae fidei* remained applicable.

The Ninth Circuit also agreed with the trial court that O'Rourke had made material misrepresentations in the insurance application. O'Rourke argued that listing "$450,000++" as the purchase price was acceptable because it reflected the improvements he had made to the yacht and better represented the yacht's value than did the actual purchase price 15 years earlier. The Ninth Circuit was unpersuaded, stating that an insured "is not free to substitute his own subjective evaluation of worth for what the insurance company sought to obtain, namely a purchase price that can be presumed to be objective because it was arrived at through arm's length negotiation."

Finally, O'Rourke contended that he had listed Washington International as the yacht's "present insurer" in the mistaken belief that the application was simply asking him to identify the most recent insurer. But because it was applying the doctrine of *uberrimae fidei*, the court noted that a lack of intent to deceive was irrelevant so long as the misrepresentation was material. "We can presume that, if NHIC had known that the yacht had been uninsured for about 9 years, this would have affected [its] decision to insure at all or at a particular premium." Accordingly, summary judgment for NHIC was affirmed. ■

Insurance

Insured Covered for Capsized Yacht

Federal Insurance Co. v. PGG Realty, LLC, 2008 U.S. Dist. LEXIS 19640 (S.D.N.Y. 2008)

The megayacht PRINCESS GIGI took on water, lost power, and capsized in heavy seas off the Bahamas, becoming a total loss. The insurer brought a declaratory judgment action claiming that the insured had breached the duty of utmost good faith and the implied warranties of seaworthiness and that the loss was not fortuitous. The yacht was insured for approximately $7 million under an all-risks policy, with additional coverage of $200,000 for personal effects.

Following a bench trial the district court ruled for the insured on all claims. In its 40-page opinion the court found among other things that the insured had met its disclosure duty by forwarding to the insurer's agent a copy of the detailed survey that had been prepared for the insured when he purchased the yacht. Moreover, the fact that the underwriters had bound coverage without reviewing the survey suggested to the court that the insurer did not view the facts in the survey as material to the risk.

With regard to the yacht's alleged unseaworthiness, the court concluded that the numerous design, structural and equipment deficiencies identified by the insurer were either trivial or had been sufficiently remedied by the time the policy took effect. Further, since the yacht had capsized in heavy weather no inference of unseaworthiness would be drawn.

As to the fortuity of the loss, because severity of the weather was unexpected and there was no satisfactory explanation for the loss of power and subsequent cap-

sizing, the court deemed the casualty to be fortuitous and thus covered by the all-risks policy.

Finally, the court interpreted the personal effects endorsement, which covered "your [the insured's] personal effects and those of your guests and crew while they are on board your yacht," to mean that the loss of guests' personal effects was covered even if the guests were not on the yacht. In other words, the term "they" in the endorsement referred to the personal effects and not to guests themselves, and therefore the loss of the effects belonging to the insured's family was covered even though the family was not onboard at the time of the casualty.

The insurer has appealed the district court's rulings in this case to the Second Circuit. ■

The Editors thank Lars Forsberg, Esq. of New York for calling their attention to this decision.

No Coverage Where Insured Unreasonably Delays Filing Claim

Digh v. Nationwide Mutual Fire Insurance Co., 654 S.E.2d 37 (N.C. App. 2007)

While operating his 25-foot Eliminator powerboat on Lake Norman, Barry Digh encountered a "rogue wave" that ejected him from the boat and damaged the boat's engine and hull. At first the damage appeared relatively minor and "to keep his insurance from going up" Digh did not file a claim with his insurer. Digh put the boat in storage and two years later paid $8300 to have the engine repaired. He subsequently discovered that the hull damage was more extensive than he initially realized and would cost $15,000 to $24,000 to repair.

At this point, nearly three years after the incident, Digh filed a claim with his insurer. The parties were unable to resolve the coverage dispute and Digh brought suit, asserting breach of contract and various other claims. The trial court granted summary judgment for the insurer on all claims.

The policy contained the following notice provision: "In case of a loss, you [the insured] must give notice to us [the insurer] or our agent, and in the case of theft also to the police as soon as possible."

On appeal Digh argued that the notice provision was ambiguous because the requirement to give notice "as soon as possible" could reasonably be interpreted to apply only to a case of theft and not to other types of losses. The appellate court agreed that the notice provision was indeed ambiguous and construed it in Digh's favor. Thus, Digh was not required to give notice "as soon as possible" but only within a reasonable time.

In ruling that Digh had not given notice within a reasonable time, the court observed that he had been aware of the loss since the day it occurred even though the full extent of the damage was not known. Further, he had purposefully and knowingly delayed notice to the insurer to avoid increases in his insurance premiums. The appellate court held that in such circumstances Digh's delay was not in good faith and the insurer therefore had no duty to cover the damage. ■

No Coverage Absent Timely Notice Required by Policy

DeGeorge v. Ace American Insurance Co., 2008 AMC 270 (S.D.N.Y. 2008)

The insured's girlfriend jumped off the back of the insured's anchored 36-foot Sea Ray and injured herself. The insured did not find out about it until later in the day when she complained of internal pain and bleeding. The insured terminated the voyage and drove her to the hospital, subsequently calling his broker to make sure his marine insurance policy was in effect and to advise the broker of the incident. Neither the insured nor the broker reported the incident to the insurer. The insured's first notice to the insurer was about seven months later, after the insurer had already been contacted by an attorney representing the girlfriend.

The policy required the insured to give the insurer notice "as soon as possible after the occurrence of any incident, loss, damage or expense that may be covered under this policy."

In granting summary judgment to the insurer on the basis of late notice, the court made several notable rulings:

1. The accident need not be witnessed by the insured to trigger the insured's duty to give notice of loss to the insurer.

2. Giving notice of loss as required by the policy terms is a condition precedent to coverage.
3. Absent a valid excuse, the failure to give notice of loss "as soon as possible" as required by the policy precludes coverage.
4. New York's "no prejudice" rule is still good law in federal court despite some state courts shifting away from this insurer-favorable rule.
5. Notice to the insurer by the injured party does not constitute notice under the terms of the policy, and notice by the injured party does not excuse the insured's failure to give timely notice to his insurer.
6. Notice to the insured's broker is not sufficient to satisfy the requirement of notice to the insurer.
7. The New York State Insurance Law's requirement that the insurer "timely disclaim" coverage does not apply to insurance in connection with ocean-going vessels, and the 36-foot Sea Ray was an "ocean-going vessel" not because of its ocean going capabilities, but because the navigational warranty in the policy permitted Atlantic Coastwise travel. ■

Named Operator Warranty and Intra-Family Exclusion

Insurance Company of North America v. Zaglool, 526 F. Supp. 2d 361 (E.D.N.Y. 2007)

The named insured turned over the helm of his Sonic high performance vessel to a mechanic while underway and the vessel flipped over. The insured's daughter, a guest aboard the boat, was seriously injured in the casualty. The issues included breach of the *Named Operator Warranty* and enforceability of an *Intra-Family Exclusion* in the policy.

First, the court held that a marine insurer is not obligated to defend or indemnify the operator of a vessel when the operator is not specifically named in the policy's Named Operator Warranty and when the operator/mechanic was otherwise excluded by the policy's definition of "insured."

Next, the court agreed with the marine insurer that New York State Insurance law was not triggered because of its exemption for "ocean-going vessels." In a ruling of first impression, the federal court "predicted" what the New York State Court of Appeals would say about the enforceability of an intra-family exclusion, namely that an intra-family exclusion is not void as against public policy in a marine insurance policy involving an ocean-going vessel.

The test applied by the court for what qualifies as an ocean going vessel was not the vessel's capabilities but the terms of the insurance policy. In this regard, the policy contained an "*Atlantic Coast Navigation Warranty*" allowing ocean navigation and therefore qualified as an ocean-going vessel. Accordingly, the intra-family exclusion was valid and the owner of the boat was denied coverage in the liability suit against him by his daughter. ■

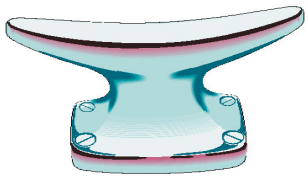
The Editors thank James E. Mercante, Esq. of New York for submitting the preceding two articles.

Maritime Contract Jurisdiction Over Watercraft Policies

Markel American Insurance Co. v. Unnerstall, 2008 AMC 254 (E.D. Mo. 2007)

Markel American Insurance Co. v. Watkins Co., 2008 U.S. Dist. LEXIS 16191 (W.D. Ark. 2008)

In both of these cases the federal court denied motions to dismiss an insurer's declaratory judgment action, holding that policies insuring watercraft are maritime contracts and therefore support federal maritime jurisdiction even if the incident giving rise to the coverage dispute occurred on non-navigable waters. ■



Sales and Warranties

Down Payment Refunded Where Dealer Failed to Adhere to Escrow Statute

Schweickert v. Venwest Yachts, Inc., 176 P.3d 577 (Wash. Ct. App. 2008)

Joyce Schweickert wrote a $150,000 check to Venwest Yachts as a down payment for a custom yacht, and Venwest deposited the check in its general bank account. Schweickert was simultaneously presented with a written purchase agreement specifying that the down payment was nonrefundable, but she did not sign the agreement. She later decided not to purchase the yacht and demanded that Venwest return the $150,000. Venwest refused on the basis that the deposit was nonrefundable.

Schweickert brought suit against Venwest, and the trial court granted summary judgment in her favor for breach of fiduciary duty and conversion, ruling that Venwest had violated a Washington state statute requiring boat dealers to place customers' deposits in a trust account. The trial court imposed a constructive trust and ordered Venwest to return the $150,000 plus interest.

Venwest appealed, asserting that the statute did not apply because the down payment was for a production slot for a custom-built yacht.

The Washington statute, RCW 88.02.220, states in part that a "vessel dealer who receives cash or a negotiable instrument of deposit in excess of one thousand dollars, or a deposit of any amount that will be held for more than fourteen calendar days, shall place the funds in a separate trust account." Unless the buyer agrees in writing to allow the dealer to remove the funds at an earlier time, the funds are to remain in the trust account until the vessel is delivered.

The appeals court found that Venwest was unequivocally a "vessel dealer" and that the statute made no distinction between deposits for vessels already in existence and deposits for vessels yet to be constructed. Under the terms of the statute, Venwest was required to keep Schweickert's down payment in a trust account unless it obtained her written consent to move the funds elsewhere. Because there was a violation of the statute, the trial court was correct in ordering Venwest to refund Schweickert's money with interest. ■

Seller Liable under Texas Deceptive Trade Practices Act for Unconscionable Conduct

Moench v. Notzon, 2008 Tex. App. LEXIS 1907 (Tex. App. 2008)

Dennis Notzon became interested in purchasing a 58-foot sailboat George Moench had listed for sale on the Internet. After a brief sea trial the parties began negotiations that culminated in a "talking paper" setting out the basic terms of sale, including a provision that the sale was contingent on a survey of the boat's structural condition. Notzon also placed a $15,000 deposit on the boat.

Notzon encountered a great deal of difficulty with the seller-recommended surveyor. When the survey was finally conducted it revealed "wet wood" in more than one-half the thickness of the wood around the hatchway. Notzon was convinced that this damage constituted "structural damage" and under the terms of the talking paper he demanded his $15,000 deposit be returned. Moench refused to return the deposit.

Notzon filed suit against Moench, asserting a host of claims including violations of the Texas Deceptive Trade Practices Act. A jury found for Notzon on all counts, awarding him $20,500 as compensatory damages, $20,000 for mental anguish, $5,000 as exemplary damages, plus attorney's fees and interest.

The appeals court rejected Moench's argument that he was just acting according to the talking paper. In this regard the appellate court held that even if a party believes that it is acting pursuant to a contract, its conduct may still rise to the level of unconscionability. The appellate court found that Moench's insistence that the "wet wood" did not constitute structural damage, his undue influence over the surveyor, and his "hostile and demeaning" response to Notzon's request for a refund, were sufficient to establish unconscionability. Accordingly, the judgment in Notzon's favor was affirmed. ■

Buyer Actions Constitute Vessel Acceptance Before Delivery

First Nat'l Bank v. Miller, 939 A.2d 572 (Conn. 2008)

Linda Miller and Bruce Miller signed a purchase agreement with Norwest Marine for the purchase of a Donzi Z20 motorboat. The Millers obtained financing through First National Bank, and to that end the Millers and Norwest executed a retail installment contract and security agreement. When the Millers arrived to take delivery of the boat it did not perform correctly and a minor mechanical problem was revealed. Although the problem was subsequently repaired, the Millers never returned to the boatyard to claim the boat and sent Norwest a letter, with a copy to First National Bank, expressing dissatisfaction with the boat and purporting to refuse to accept delivery. The Millers also sent a letter to First National Bank stating that because they had not accepted delivery of the boat, they would not be making payments. The boat was then sold to another buyer for a lesser amount.

First National Bank filed an action against the Millers and Norwest to recover the money it had loaned to the Millers for the boat purchase. The trial court found that the Millers had accepted the boat, both by signing the purchase agreement and the retail installment contract (each of which contained representations that the Millers had accepted the boat), and by taking subsequent actions that were inconsistent with Norwest's ownership of the boat, such as contracting for alterations to the boat. The trial court ruled that having accepted the boat, the Millers were required to give Norwest a reasonable opportunity to repair the boat before revoking their acceptance. The appellate court reversed.

In reversing the appellate court and affirming the trial court, the Supreme Court of Connecticut held that the question of whether a buyer has accepted goods is a question of fact and therefore the appellate court should have applied a clearly erroneous standard to the trial court's decision and not plenary review. The Supreme Court further ruled that under the circumstances the trial court was entitled to find that the Millers had accepted the boat before taking delivery, as they had signed both the purchase agreement and the retail installment contract, had obtained a temporary certificate of registration for the boat, and had requested that the Norwest install a depth finder and a radio on it and paint the bottom. ■

Cracks in Gelcoat Finish Did Not Breach Express or Implied Warranties

Carey v. Chaparral Boats, Inc., 514 F. Supp. 2d 1152 (D. Minn. 2007)

Paul Carey purchased a Chaparral boat from a Chaparral authorized dealer, and was supplied with an express warranty against defects for one year subject to several limitations. After various repairs to his boat, Carey filed suit under the Magnuson Moss Warranty Act, 15 U.S.C. § 2310, claiming breach of express and implied warranties. In his complaint, Carey asserted that his boat had several defects including a loose windshield, electrical problems, and cracking of the gelcoat. Chaparral subsequently fixed all problems with the exception of the gelcoat finish cracks.

In granting summary judgment for Chaparral on the express warranty claim, the court found no facts in the record reflecting the amount of time it had taken to repair the windshield or electrical problems and thus there was no way to determine whether Chaparral had conducted those repairs in an unreasonable manner so as to deprive Carey of the benefit of his bargain. Furthermore, because the express warranty by its terms did not cover "defects in paint or gelcoat finishes including blisters below the waterline, cracking, crazing, or minor discoloration," the cracks in the gelcoat did not give rise to a claim for breach of express warranty.

In granting summary judgment for Chaparral on the implied warranty of merchantability claim, the court noted that the implied warranty of merchantability requires goods to be fit for the ordinary purposes for which such goods are used. Because "the overwhelming evidence demonstrates that the cracks in the boat's finish are a cosmetic problem and in no way impact the boat's ordinary use," the court found no factual basis to support Carey's claim for breach of the implied warranty of merchantability. ■

Torts

Comparative Negligence and Products Liability

Mahon v. B.V. Unitron Mfg., 935 A.2d 1004 (Conn. 2007)

A man and his wife were killed and their two guests were seriously injured after the power on the man's boat suddenly failed, causing all of the lights to go out while the group was having dinner on the boat in the middle of a lake. Almost immediately after the power went out another boat crashed into their boat. Subsequent investigation revealed that the power failure was attributable to a defect in the main engine harness connector that conducts power to the boat's lights and electrical equipment. Following the accident, investigators recovered a flashlight and horn from the decedent's boat that subsequently were determined to be inoperable. In addition, several safety flares found on the boat were determined to be past their expiration dates.

The two injured guests and the decedents' survivors filed suit against Mercury Marine, the manufacturer of an allegedly defective socket in the engine harness connector. Mercury Marine raised the defense of comparative negligence on the grounds that the decedent husband had operated the boat negligently and did not have proper, working safety equipment aboard. After a jury trial, a verdict was returned in favor of the plaintiffs but the award for the decedents' estate was reduced by virtue of the jury finding the decedent husband 33 1/3 percent contributorily negligent.

On appeal, the plaintiffs argued that the trial court improperly failed to instruct the jury on the standard of care applicable to the decedent's conduct in connection with Mercury Marine's defense of comparative negligence, because the jury instructions contained no definition of negligence. The Supreme Court agreed:

> At no time . . . did the trial court explain that negligence is the failure to exercise the care that an ordinarily prudent person would use under the circumstances. Although the trial court directed the jury to ascertain the "comparative responsibility or fault" of the decedent, if any, the court provided no explanation to the jury as to how it was to determine whether the decedent bore any such responsibility or fault for the accident. Without an explanation by the court of the applicable legal standard--in this case, negligence--the jury essentially was left to evaluate the decedent's conduct by whatever standard it deemed appropriate. The trial court's instructions, therefore, were plainly inadequate to guide the jury in its deliberations on Mercury Marine's special defense of comparative negligence.

Accordingly, a new trial was ordered on both liability and damages, as is the general rule when reversing a jury verdict in the State of Connecticut. ■

Personal Watercraft and Assumption of Risk

Truong v. Nguyen, 156 Cal. App. 4th 865 (Ct. App. Cal. 2007)

Rachael Truong and Anthony Nguyen were riding on a 1995 Polaris SLX personal watercraft on Coyote Lake. Cu Van Nguyen was operating a Yamaha WaveRunner GP1300R on the same lake. The two watercraft collided, resulting in injuries to Anthony and killing Rachael.

Rachael's parent brought suit against Cu Van and his son, the owner of the WaveRunner, arguing that Cu Van was negligent and negligent per se, and that Cu Van's son had negligently entrusted the WaveRunner to his father. The trial court ruled in favor of Cu Van and his son and the appellate court affirmed, ruling that the primary assumption of risk doctrine barred Rachael's parents' negligence claims because riding on a personal watercraft, even as a passenger, involved assumption of risk. Since Rachael's parents did not allege the Cu Van had been reckless or intentional or outside the range of ordinary conduct involved in using personal watercraft, Cu Van was entitled to summary judgment.

The appellate court also affirmed the trial court's decision in favor of Cu Van's son, ruling that the negligent entrustment claim could not stand where the negligence claim against Cu Van had failed. Furthermore, there was evidence that Cu Van had experience and skill operating other personal watercraft and was a conscientious operator. ■

Tubing and Assumption of Risk

Aber v. Zurz, 2008 Ohio 778 (Ct. App. Ohio 2008)

Thomas Aber and Dan Charek were riding in a tube being towed by a boat operated by Richard Zurz. In a crowded water ski zone, Zurz was forced to make a sharp turn to avoid hitting other boats or people, as a result of which Aber and Charek were both thrown into the water. Charek sustained no injuries, but Aber's jaw was broken.

Aber sued Zurz in tort, alleging that Zurz had operated the boat in a negligent and reckless manner. Zurz argued that Aber's claim was barred by the doctrine of primary assumption of risk, in that there are risks inherent in tubing, Aber understood those risks and voluntary chose to go tubing, and any resulting harm could not be the fault of Zurz because, under the doctrine, Zurz owed Aber no duty. The trial court agreed with Zurz but the appellate court reversed.

The appellate court found that while tubing in its ordinary fashion does carry inherent risks including the risk of falling off the tube, Zurz had been operating the boat at a high speed in crowded waters, which took the tubing activity out of the doctrine of primary assumption of risk because Aber could not have reasonably foreseen that Zurz would operate the boat in this manner. ■

Bridge Allision and Prejudgment Interest

Northern Insurance Company of New York v. Chatham County, 2008 U.S. Dist. LEXIS 24380 (S.D. Ga. March 26, 2008)

On October 6, 2002, James Ludwig's yacht allided with the Causton Bluff Bridge, a drawbridge owned by Chatham County, Georgia. The allision occurred after Ludwig radioed the bridge operator and requested that he open the bridge. After the bridge opened and Ludwig began passing beneath it, the northwest span of the bridge began drifting back down, and the mast of the boat hit that part of the bridge.

Chatham County initially defeated Ludwig's claims on the grounds of sovereign immunity. Ludwig appealed that decision all the way to the U.S. Supreme Court, which ruled that the County was not entitled to sovereign immunity. (We reported on the Supreme Court's decision in Volume 15:1.)

On remand the trial court discredited the County's argument that Ludwig had failed to keep a listening watch at his radio and failed to steer clear of the falling bridge span, instead finding that Ludwig properly guided his yacht on his initial approach to the bridge, and that he was unable to avoid the bridge once it began to fall.

The County asked the court to deny or limit Ludwig's request for prejudgment interest given the protracted nature of the case. However, the court found that because the lengthy proceedings were the result of a legitimate dispute between the parties rather than any unnecessary delay by Ludwig, prejudgment interest was appropriate. The court awarded compensatory damages in the amount of $38,929.06, and interest in the amount of $10,122.09, over 25% of the value of the damages. ■

Salvage

Lowered Peril Means Lowered Salvage Award

Sea Tow Portland/Vancouver v. Yacht High Steaks, 2007 AMC 2705 (D. Ore. 2007)

Sea Tow brought a claim for salvage against the M/Y HIGH STEAKS for assistance rendered in towing the yacht away from a marina that was on fire. The captain of the Sea Tow boat, hearing about the fire on television, responded and acted under no contractual obligation. When the Sea Tow boat arrived a fire rescue boat had already moved the yacht from its moorage, but a lieutenant aboard the rescue boat told the captain of the Sea Tow boat to move the yacht to a safer area, after which the fire rescue boat disengaged from the yacht.

The court determined that a marine peril clearly existed when the Sea Two boat undertook to move the yacht because the yacht was exposed to actual danger that could have resulted in her destruction. Even though the Sea Tow boat took over towing operations after the yacht was away from the fire, the yacht was still in peril at that time because it was not under its own power, and as the fire was still raging there was a risk of additional explosions or the fire spreading. Moreover, the court noted, "actual danger of destruction is not required to establish a peril sufficient to sustain a salvage claim."

The pre-incident fair market value of the yacht was $2,160,000, fire and smoke damage was repaired for slightly more than $14,000, and thus the post-incident value of the vessel was approximately $2,146,000.

Applying the six factors laid down in *The Blackwall*, 77 U.S. 1, 14 (1870), the court rejected Sea Tow's requests for a salvage award of ten percent of the post-incident value. Based on the minimal risk to Sea Tow, the minimal labor expended, the exercise of some skill, and most importantly, the fact that the degree of danger from which the yacht was rescued by Sea Two was minimal, the court instead granted Sea Tow an award of $3000, or five times the *quantum meruit* amount suggested by the yacht owner. ■

Failure to Prove Marine Peril Means No Salvage Award

Cape Ann Towing v. M/Y Universal Lady, 2008 U.S. App. LEXIS 5237 (11th Cir. 2008)

Cape Ann Towing assisted in towing the M/Y UNIVERSAL LADY during a hurricane and then brought a claim for salvage, asserting that at the time it rendered assistance the yacht was in imminent danger because it was positioned next to and above broken concrete pilings. The district court denied Cape Ann Towing's claim for a salvage award in the amount of $487,500, instead granting an award of $2706.37 on the basis of *quantum meruit* for marine towing services.

In an unpublished opinion the Eleventh Circuit affirmed, finding that Cape Ann Towing failed to show the existence of a maritime peril from which the yacht could not have been saved without assistance. The determinative factors for the court were that (1) the weather had dramatically improved from the earlier hurricane conditions; (2) the yacht was located in a marina, afloat, and secured by a rope to another boat; and (3) Cape Ann Towing had presented no credible evidence that the concrete pilings had damaged or posed further risk of damage to the yacht's hull. ■

Salvage Contract Unconscionability and Undue Influence are Issues for Arbitrator

Lake Erie Towing v. Walter, 2007 U.S. Dist. LEXIS 73982 (N.D. Ohio 2007)

The M/V TRIPLE PLAY struck an open-water reef, Gull Island Shoal, in Lake Erie with its owner James Walter aboard. Lake Erie Towing vessels arrived and presented Walter with a two-page Salvage Agreement, which he signed. The agreement contained an arbitration clause stating that "any dispute, controversy, or claim, arising from or related to this salvage agreement shall be settled by binding domestic arbitration in accordance with the Rules of Procedure of the Boat U.S. Yacht Salvage Arbitration Plan."

When Walter refused to respond to Lake Erie Tow-

ing's salvage claim, Lake Erie Towing filed a motion to compel arbitration. Walter opposed the motion to compel, asserting that the arbitration provision was unconscionable and/or that he had signed the agreement under Lake Erie Towing's undue influence. The court rejected Walter's substantive unconscionability claim, holding that the arbitration provision was clear and thereby provided adequate notice that arbitration would be the dispute resolution forum for claims arising from the agreement.

The court also rejected Walter's procedural unconscionability claim, as it sought to challenge the conscionablity of the entire contract, which, the court explained, is an argument that would need to be presented to the arbitrator and not the court. Walter's undue influence claim was rejected on similar reasoning, and therefore the district court granted Lake Erie Towing's motion to compel arbitration. ■

Salvor May Aid Vessel in Distress without Prior Assent of Absentee Owner

Boat Raising & Reclamation v. Victory, 2007 U.S. Dist. LEXIS 92154 (M.D. Fla. 2007)

Boat Raising & Reclamation (BRR) filed a claim for salvage against the M/V VICTORY and its owner Patterson. The VICTORY broke free of its moorings behind Patterson's Marco Island residence during Hurricane Charley, damaging other vessels, docks and state property. The Marco Island Police Department informed BRR of the loose vessel and a representative of BRR contacted Patterson, who informed BRR that he would get them his insurance information. Based on this conversation and the belief that the salvage job belonged to BRR, BRR employees were mobilized and began the work of removing the vessel from the end of the Marco Island canal, although Patterson later argued that he merely asked for the vessel to be secured and not moved.

At trial, the court was convinced that a maritime peril existed as evidence and eyewitness testimony placed the vessel hard aground at the end of the canal, listing badly and with a sheen of oil and gas on its deck. The court further held that the salvage work was voluntary and rejected Patterson's claim that he had not authorized BRR's salvage services, stating that when a ship is in distress and has no crew, anyone can attempt salvage without the prior assent of the ship's owner or master. The salvage operation was also unquestionably successful.

Based upon the standard six criteria for determining a salvage award amount, the court granted an award of $16,500, ten percent of the post-incident value of the vessel. Moreover, since the vessel's insurance policy did not cover salvage, Patterson, and not his insurer, was responsible for payment of the award. ■

Fishing Rights

No Right to Fish on Private Property below Mean High Water Mark

Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007)

Plaintiffs, recreational fishermen, brought a claim under 42 U.S.C. § 1983 against East Carroll Parish Sheriff Mark Shumate alleging that they were falsely arrested for trespassing when they refused to cease fishing during the Mississippi River flood season on waters covering ordinarily dry land, which was private property owned by Walker Cottonwood Farms, LLC. Plaintiffs argued that Sheriff Shumate lacked probable cause to arrest them for fishing on the property because the public has a federal and state right to fish on the property when it is submerged under the Mississippi River. The district court granted summary judgment to Sheriff Shumate. (We reported in Volume 15:2 on that decision.)

The Fifth Circuit affirmed, rejecting plaintiffs' argument that the federal navigational servitude arising under the Commerce Clause gave them a right to fish on property below the mean high water mark. The court, citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482-84 (1988), explained that the law of real property is left to the individual States to develop and administer, and therefore the right to fish on public trust lands was governed by Louisiana state law. Under Louisiana statute the "banks of navigable rivers are private things that are subject to public use." The public use, however,

is limited to use for navigational purposes. Therefore, the plaintiffs had no federal or state right to be fishing on the LLC's private property. ■

Criminal Law

District Court May Impose Sanctions for Criminal Contempt in Arrest Proceeding Despite Lack of Maritime Jurisdiction

United States v. Straub, 508 F.3d 1003 (11th Cir. 2007)

Glenn Straub, president of Broward Yachts, appealed his conviction of criminal contempt for violating a court order that prohibited his presence on the premises of Broward Yachts while an unfinished hull that belonged to Seagrove Trading, Inc. was removed from the premises.

Broward Yachts had filed an in rem action against the hull to recover unpaid fees. The district court ordered the release of the hull in return for a bond posted by Seagrove; this order also stated that Straub was not to be present at Broward Yachts when Seagrove's representatives removed the hull. In violation of the order and despite warnings from the U.S. Marshal, Straub remained at Broward Yachts during the removal and was arrested for doing so. The district court later dismissed the in rem action for lack of subject matter jurisdiction because the unfinished hull did not qualify as a vessel for the purpose of invoking maritime jurisdiction.

Straub was subsequently tried and convicted of criminal contempt in a bench trial before a magistrate judge. On appeal of his conviction, the Eleventh Circuit held that notwithstanding the ultimate dismissal of the underlying case for lack of maritime jurisdiction, the district court had jurisdiction over the charge of criminal contempt.

Citing *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), which permitted the imposition of Rule 11 sanctions in a case over which the district court lacked subject matter jurisdiction, the Eleventh Circuit reasoned that the criminal contempt proceeding did not require an assessment of the legal merits of the underlying case, and therefore the district court was not adjudicating a controversy over which it lacked jurisdiction. The Eleventh Circuit noted that a district court's authority to impose sanctions for Rule 11 violations or criminal contempt is to be distinguished from its authority to impose sanctions for civil contempt, because the latter does require that the court have subject matter jurisdiction over the underlying controversy. ■

Government Liability

Boat Manufacturer's FTCA Claim against the United States Allowed to Proceed

Regan v. Starcraft Marine LLC, 2008 U.S. App. LEXIS 7833 (5th Cir. 2008)

Staff Sergeant Regan met his friend Staff Sergeant Vandergriff at the Army's Toledo Bend Morale, Welfare, and Recreation (MWR) facility, from whom Vandergriff had chartered a pontoon boat for the day. While they were aboard the pontoon boat on a public reservoir, Regan stood up from his seat in the bow of the boat. Vandergriff reduced the speed of the boat, causing Regan to stumble forward. Regan grabbed the front gate in an effort to regain his balance and prevent him from falling overboard. The gate ripped from its post, causing Regan to fall off the front of the boat. The boat's propeller struck Regan's right leg, causing serious injuries and ultimately leading to the leg's amputation.

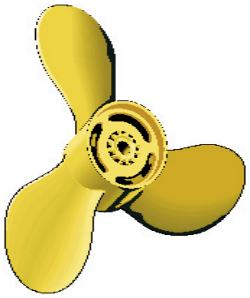
Regan sued the boat's manufacturer, Starcraft, alleging defective design, manufacture, and marketing of the pontoon boat. Starcraft filed a third-party complaint against the United States, seeking indemnity and alleging claims under the Federal Tort Claims Act (FTCA). The third-party complaint alleged that the United States was negligent in (1) renting the boat to Vandergriff when it was in disrepair; (2) renting the boat to Vandergriff to use in a manner inconsistent with the intended function of the boat; (3) failing to ascertain how Vandergriff and his boating party intended to use the boat; (4) failing to provide adequate instructions to Vandergriff and his boating party regarding the proper use of the boat; and (5) failing to maintain and repair the boat properly. The trial court accepted the government's argument that the third-party com-

plaint was barred by the *Feres* doctrine, which generally holds that the government cannot be sued in tort for injuries to servicemen arising out of activities incident to military service.

The Fifth Circuit, in reversing the district court's dismissal of Starcraft's FTCA claim, held that a suit against the government for damages related to an off-duty injury incurred outside a military installation was allowed under the FTCA. The court reasoned that when a service member is neither on duty nor on a military base and the relationship with the military is largely coincidental and unnecessary to the time, location, and manner of the activity that caused the injury, the argument that an activity is incident to service is at its weakest. Therefore, because the court determined that Regan's activity was not incident to service, Starcraft's third-party complaint was allowed proceed. ■

NBSAC Vacancies

The Coast Guard is accepting applications for seven positions on the National Boating Safety Advisory Council. The Coast Guard seeks three representatives of State boating safety programs, two representatives of boat and associated equipment manufacturers, and two representatives from the general public or from national boating organizations. Further information is published in the Federal Register for April 8, 2008 (Volume 73, Number 68, p. 19085), and application forms are available at http://www.uscgboating.org/nbsac/applications.htm. Applications should be submitted by June 27, 2008.



BOATING BRIEFS

is a publication of the Recreational Boating Committee of The Maritime Law Association of the United States.

Committee Chairman
Frank P. DeGiulio
Palmer Biezup & Henderson
620 Chestnut Street
956 Public Ledger Building
Philadelphia, PA 19106-3409
Tel: (215) 625-9900
Email: fpd@pbh.com

Founding Editor
Thomas A. Russell

Editor
Todd D. Lochner
Lochner and Schwenk
tlochner@lochnerandschwenk.com

Associate Editor
Daniel H. Wooster
Palmer Biezup & Henderson
dwooster@pbh.com

Graphic Design and Layout
Cindy Kang
cindyysk@gmail.com

Contributors to This Issue
Asher Chancey
Jeff Vogel

Cite as 17 Boating Briefs No. 1 (Mar. L. Ass'n) (Todd D. Lochner Ed. 2008).

If you wish to receive copies by mail, please contact the Committee Chairman.