BOATING BRIEFS

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Frank P. DeGiulio, Chairman
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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

Third Circuit Rules that *Uberrimae Fidei* is Entrenched; Insured's Misrepresentation of Purchase Price Voids Yacht Policy

AGF Marine Aviation & Transport v. Cassin, 2008 U.S. App. LEXIS 20919 (3d Cir. Sept. 29, 2008)

Applying the doctrine of *uberrimae fidei*, the U.S. Court of Appeals for the Third Circuit has held that an insured forfeited coverage by misstating the purchase price of his yacht on an insurance application. The ruling affirmed a grant of summary judgment for the insurer by the District Court for the Virgin Islands (previously reported at 16 Boating Briefs No. 1).

Richard Cassin purchased an 85-foot Formosa ketch in 1997. The yacht had been listed for sale for $450,000 but on his loan application Cassin stated that the purchase price was to be $600,000, which was also the figure shown on the purchase and sale agreement. As Cassin explained it to his lender, $400,000 (minus a brokerage fee) would be paid to the seller at closing, while the additional $200,000 represented a one-third interest in the yacht Cassin had previously acquired from the seller, who was Cassin's friend and business partner. (In the subsequent litigation, however, Cassin disavowed any prior dealings with the seller and suggested that the $200,000 was an "equity position" that the seller transferred to him as part of the sale transaction.) In any event, the lender ultimately extended Cassin a loan of $400,000 and at closing the seller received $400,000.

Over the next three years Cassin insured the yacht for approximately $600,000. As his 1999 policy came to an end, Cassin filled out a renewal application and in the space requesting "Purchase Price" he wrote $600,000. Cassin's broker notified him that the new policy would be written on a "TLD/4/COM" form and that a copy of the form was available to Cassin on request.

Cassin's application was presented to AGF, who agreed to insure the yacht. Cassin's broker provided him with a 3-page temporary binder which stated that the insurance was subject to the terms of "the policy(ies) in current use" by AGF and that the

binder would be cancelled when replaced by a policy. About four months later Cassin received his policy on the TLD/4/COM form. The policy included a choice of law provision stating that any dispute "shall be adjudicated according to established, entrenched principles of and precedents of substantive United States Federal Admiralty Law but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the state of New York." (The binder itself had contained no choice of law provision.)

Several weeks later, the yacht sank in deep water near Grenada after allegedly striking a semi-submerged shipping container. Cassin made a claim on the policy, and AGF sought a declaration from the district court that the policy was void due to Cassin's misrepresentation of the purchase price. The district court relied on *uberrimae fidei* and granted summary judgment to AGF.

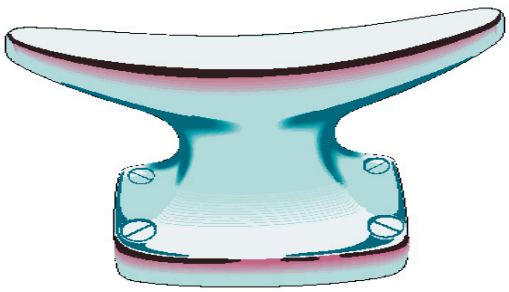
On appeal, Cassin and his lender (the loss payee) took the position that the policy's choice of law provision was inapplicable because, in their view, the binder, and not the policy, was in effect at the time of the loss. The Third Circuit rejected this argument because the binder stated that the insurance was governed by the terms of the policy forms in current use and the policy that was issued was on the same form specified in the renewal papers previously sent to Cassin.

Furthermore, the court noted, even if the policy's choice of law provision was not applicable as a matter of contract, the selection of entrenched admiralty precedents as the governing law was consistent with the rule in *Wilburn Boat*, which directs the court in the first instance to apply well established precedents of marine insurance law if they exist. Here, the Third Circuit concluded that the rule of *uberrimae fidei* is an entrenched part of U.S. admiralty law by virtue of its acceptance in the Second, Ninth and Eleventh Circuits. The court was cognizant of the view in the Fifth Circuit that *uberrimae fidei* is not entrenched but noted that the Fifth Circuit's position has been "criticized quite heavily" in both case law and legal commentary.

Having ruled that *uberrimae fidei* should apply, the Third Circuit agreed with the district court that Cassin had misrepresented the purchase price and that the misrepresentation was material to the risk. Given Cassin's contradictory and "dubious" explanations of the $200,000 equity interest he supposedly had in the yacht, the Third Circuit stated that "no reasonable juror could conclude that the $200,000 equity was ever transferred to Cassin." The only logical conclusion was that the purchase price was $400,000.

As to materiality, the court agreed with the Ninth Circuit's assessment in *N.H. Ins. Co. v. C'Est Moi, Inc.*, 519 F.3d 937 (9th Cir. 2008) (reported at 17 Boating Briefs No. 1), that the purchase price of a vessel is unquestionably material because it can be presumed to be an objective measure of value. Therefore, when an insurance application asks the insured for the purchase price, the insured's failure to answer accurately amounts to a material misrepresentation and allows the policy to be rescinded.

Finally, Cassin's lender, who was named as the loss payee in the temporary binder, argued that it could recover notwithstanding Cassin's misrepresentations. Applying New York law pursuant to the policy's choice of law provision, the Third Circuit indicted that without a breach of warranty or mortgagee interest provision in the policy, a loss payee had no right to recover where the insured himself could not recover. Accordingly, the insured's misrepresentation barred any claim by the lender under the policy. ■



Insured's Breach of Promissory Warranty Precludes Coverage; Breach Need Not Contribute to Loss

Lloyd's of London v. Pagan-Sanchez, 539 F.3d 19 (1st Cir. 2008)

The U.S. Court of Appeals for the First Circuit has held that a yacht owner's breach of a promissory warranty requiring maintenance of fire extinguishing equipment barred coverage even though the breach did not contribute to the loss.

While off the coast of Puerto Rico, the yacht GABRIELLA took on water through its exhaust system and eventually flooded and sank. The owner made a claim on the policy for $150,000 for the loss of the vessel and $100,000 for salvage expenses. Underwriters sought declaratory relief in the federal district court in Puerto Rico, which concluded that the coverage dispute was governed by Puerto Rico law, the warranty clause in the policy was ambiguous, and the insured's breach of the warranty would not excuse payment of the claim unless the breach was related to the loss. The First Circuit reversed and directed that summary judgment be entered for underwriters.

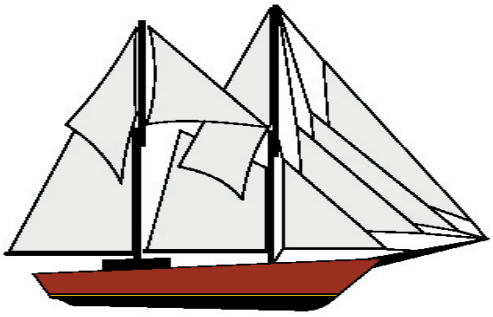
The warranty read as follows:

> If the scheduled vessel is fitted with fire extinguishing equipment, then it is warranted that such equipment is properly installed and is maintained in good working order. This includes the weighing of tanks once a year and recharging as necessary.

Noting that it a question of law whether policy language is ambiguous, the First Circuit concluded that the meaning of the warranty was clear: "The insured warrants upon entering into the policy that the tanks have been weighed once a year and, if necessary, recharged, as part of the insured's warranty of proper maintenance of fire extinguishing equipment." As the insured had not presented any facts countering the underwriters' evidence that the warranty had been breached, the only remaining issue was the effect of the breach.

Surveying the authorities, the court stated that "the prevailing view, under federal law and the law of most states, is that a breach of a promissory warranty in a maritime insurance contract excuses the insurer from coverage" even if the breach does not cause the loss.

With respect to the insured's argument that Puerto Rico law and not maritime law should apply, the First Circuit noted that the Puerto Rico Insurance Code expressly excluded maritime insurance contracts from the scope of its regulations. As there was nothing in the statutes of Puerto Rico or case law from the Puerto Rico Supreme Court to alter the prevailing rule, the insured's noncompliance with the warranty left him without coverage. ■



Escape Clause in Marine Policy Relieves Insurer of Liability

Aramark Leisure Services v. Kendrick, 523 F.3d 1169 (10th Cir. 2008)

A federal appellate court reversed a district court in a coverage dispute that arose in a limitation of liability proceeding. The decision protected a marine insurer from the efforts of a state insurance guaranty fund to shift liability away from an insolvent insurer.

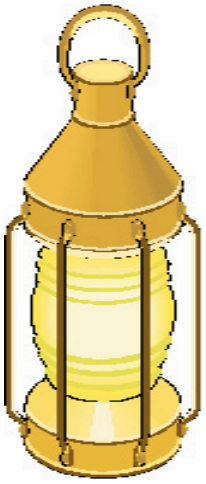
A pleasure craft was rented on Lake Powell, by Kendrick. He was operating the vessel when it collided with a cliff wall, injuring his girlfriend. She sued Kendrick in Utah state court. The boat rental company filed a limitation action in federal district court. Kendrick filed his claim in the limitation proceeding and impleaded the boat rental company's marine insurer for coverage as an additional insured under the rental agreement. The marine insurer moved for summary judgment on the basis that the "escape" clause in the marine insurer's policy took precedence over the "other insurance" clause in Kendrick's homeowner's policy and required Kendrick to look solely to his homeowner's policy for coverage.

The district court was prepared to rule in favor of the marine insurer when the homeowner's insurer became insolvent. The Utah Property and Casualty Insurance Guaranty Association stepped into the shoes of the insolvent insurer but refused to cover Kendrick, arguing that a Utah statute made the guaranty fund secondary to any other insurance coverage. The district court agreed with the Guaranty Association, and the marine insurer appealed. The U.S. Court of Appeals for the Tenth Circuit reversed, holding that the Guaranty Association was primary.

The marine insurer's escape clause provided that where the insured is covered or protected by other insurance against any loss "there shall be no contribution or participation" by the marine policy. The homeowner policy stated that it was to be "excess over other valid and collectible insurance."

The Tenth Circuit held that the marine policy's escape clause was valid and enforceable under Utah state law and relieved the marine insurer of any obligation to defend or indemnify Kendrick. This result was not changed by the subsequent insolvency of the homeowner's insurer because the effect of competing "other insurance" clauses is to be determined as of the date of the accident. The Utah statute simply required a claimant to first exhaust his claims against other insurers. Here, because the existence of the homeowner's policy on the date of the accident triggered the marine insurer's escape clause, Kendrick had no "claim" against the marine insurer that could be exhausted before the Guaranty Association would cover for the insolvent insurer. ■

The Editors thank Patrick J. Corbett, Esq. of Rubin, Fiorella & Friedman LLP for submitting this article.



Product Liability and Warranties

Yacht Buyer Unable to Recover from Manufacturer, Dealer or Part Supplier After Unexplained Fire

Fanok v. Carver Boat Corporation, LLC, 2008 U.S. Dist. LEXIS 76572 (E.D.N.Y. Sept. 16, 2008)

Jeffrey Fanok entered into a purchase agreement with Staten Island Yacht Sales (SIYS) for a 59-foot Marquis Yacht. The purchase price was $1,376,940. The yacht was built by Carver Boat Corporation and was equipped with a Kidde fire suppression system and Volvo Penta bow and stern thrusters.

SIYS completed final assembly of the yacht and tested it for proper operation and seaworthiness. As part of its contract with Fanok, SIYS also agreed to install some aftermarket items and make certain repairs, including repair of the stern thruster which at times was not functioning.

While the yacht was still being kept at SIYS' facility, Fanok, his wife, son and a friend took it out for a day-trip. They anchored for lunch and a swim. After the anchor was hauled back, the yacht drifted and grounded lightly on a sandbar. While Fanok attempted to maneuver off the sand bar using the thrusters, someone smelled something burning and smoke began to rise out of the port engine vent. Everyone (except a family dog) managed to escape unhurt but, despite the fire suppression system and the efforts of the Coast Guard, the yacht burned to the waterline. Subsequently, the yacht drifted and grounded hard on a rock pile.

That night the Coast Guard directed that Fanok place a $100,000 bond and remove the wreck. Fanok's insurer, Travelers, enlisted a marine surveyor to obtain bids for salvage. One option turned out to be for upwards of $300,000 for a full retrieval of the wreck. The other, for $52,000, was to remove the wreck in pieces. Travelers chose the lower-cost option, while acknowledging that this would jeopardize the fire investigation and subrogation potential.

Fanok filed suit (for himself and as subrogor of Travelers) to recover the purchase price and expenses related to the casualty. He alleged that the fire was caused by a defect in the stern thruster or some other component of the yacht, and that the fire suppression system failed to extinguish the fire because it was defectively designed or manufactured. A variety of product liability and warranty theories were advanced against Carver, Volvo Penta, and SIYS.

The court granted summary judgment to all defendants, concluding that Fanok had not produced any evidence of a defect that caused the fire.

Fanok attempted to survive summary judgment by arguing that (1) a plaintiff need not identify a specific defect when there has been a casualty that would ordinarily not occur in the absence of a product defect, and (2) expert testimony was not required to reach the jury.

As to the first argument, the court noted that the use of circumstantial evidence to create an inference of defect arose in the context of personal injury product liability cases. This case, however, involved only the destruction of the vessel, and any tort claims for the loss of the vessel and related expenses were barred by the economic loss rule in *East River v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986).

As to the second argument, the court found that plaintiff had produced no evidence, expert or otherwise, that the fire was caused a defect in the stern thruster or some other component of the yacht. Although there was some indication that the thruster did not function when Fanok attempted to use it to maneuver off the sandbar, this was insufficient to conclude that the thruster was the cause of the fire. Fanok also could not rule out other possible causes of the fire, and, the court stated, no reasonable jury would have been able to conclude that the fire suppression system was defective simply because the yacht burned. In these circumstances the court decided that allowing the case to go to a jury would be an "invitation to speculate" and all claims were dismissed. ■

Boat Manufacturer Waives Objection to Florida Venue by Authorizing Repairs There

Ocean Yachts, Inc. v. Tantillo, 988 So. 2d 722 (Fla. 4 DCA 2008)

Plaintiff purchased a boat in New York manufactured by Ocean Yachts. Initially some warranty repairs were done in New Jersey. Ocean Yachts then directed that further repairs be done at a boatyard in Palm Beach County, Florida.

When sued by plaintiff in Palm Beach County, Ocean Yachts sought dismissal on the basis of improper venue. It relied on a provision in its warranty which stated that "designated service representatives are not the agents of Ocean Yachts." Florida's venue statute, however, provides that suit against a foreign corporation may be brought in a Florida county in which the corporation has "an agent or other representative." Citing *Piper Aircraft Corp. v. Schwendemann*, 564 So. 2d 546 (Fla. 3 DCA 2003), which held that an authorized service center is a "representative" of the manufacturer for purposes of establishing venue even if the service center does not qualify as an agent, the court concluded that venue was proper in Palm Beach County. ■

Engine Manufacturer Not Liable to End User

Arthur Glick Leasing, Inc. v. William J. Petzoldt, Inc., 51 A.D. 3d 1114 (N.Y. App. 3d Dep't 2008)

Plaintiff purchased a 52-foot yacht through a dealer and selected, as an option, engines manufactured by Caterpillar. The yacht manufacturer's brochure advertised the Caterpillar engines as capable of delivering "exceptional power with excellent acceleration response." For its part, Caterpillar warranted that its engines would be "free from defects in material or workmanship."

When plaintiff experienced ongoing performance problems with the engines, he sued the dealer, the yacht manufacturer, and Caterpillar. The trial judge dismissed all claims against Caterpillar except those for breach of express and implied warranties and violation of the Magnuson-Moss Warranty Act.

The jury found that Caterpillar did not breach an express warranty but did breach the implied warranties of fitness and merchantability, and the jury awarded damages of $130,400. Thereafter, both sides moved to set aside the verdict. Caterpillar also moved to set aside the trial judge's award of $273,960 to plaintiff for fees, interest and costs.

On appeal, the court ruled that the jury could have reasonably concluded that the statements in the yacht manufacturer's brochure did not amount to an express warranty on the part of Caterpillar. As to the jury's verdict against Caterpillar on the implied warranty claims, the court held that the verdict had to be set aside because the lack of privity between Caterpillar and the plaintiff barred any implied warranty claim under New York law. There was no contract between Caterpillar and the plaintiff, and there were three other entities separating them in the transaction (Caterpillar's exclusive dealer, the yacht manufacturer, and the yacht dealer). Because there was no viable implied warranty claim under New York law, the Magnuson-Moss claim had to be set aside as well, together with the trial judge's award of fees and costs. ■

Torts

Owner Negligent for Allowing Passenger to Sit on Rigid Inflatable's Gunwale

Doyle v. Graske, 565 F. Supp. 2d 1069 (D. Neb. 2008)

The Doyles, Daniel and Anne, and the Graskes, Leland and Leslie, were longtime friends on vacation at the Graskes' condominium in the Cayman Islands. Daniel, Leland, and a third man left for a fishing trip in Leland's 14-foot rigid inflatable boat. Leland navigated his boat through a no-wake zone at idle speed, then announced to Daniel and the other man that the boat was about to accelerate, saying "Here we go."

Daniel was sitting on either the starboard side gunwale tube or on the seat in the bow area. Leland increased speed to put the boat on plane. The boat came up on plane, but when Leland began to adjust the trim, the steering linkage disengaged, causing the boat to turn hard to port. (The steering mechanism had been repaired by a local mechanic just a few days before.) Daniel was thrown overboard from the starboard side and was struck by the underside of the boat on the right side of his back and the right side of his head. His injuries ultimately led to permanent and total disability.

In its findings of fact and conclusions of law, the court observed that a vessel owner owes his passengers a duty of reasonable care under all the circumstances. Since Leland was the only defendant in the case, the court would apportion liability as between him and Daniel, with Leland free to seek indemnification or contribution separately from other potentially liable parties such as the boat manufacturer or the mechanic who worked on the steering mechanism.

The court found Leland to be 90% liable for allowing Daniel to remain seated on the gunwale tube or in the bow area, neither of which, according to the plaintiffs' experts, was a safe place to be sitting when the boat was coming up and running on plane. Daniel's comparative negligence was deemed to be 10%.

The court then assessed damages for Daniel's medical bills, lost wages, lost future wages, and future supportive care in the amount of $2,597,947, plus general damages for pain, suffering, and loss of life's enjoyment in the amount of $1,000,000. The court also granted Daniel' wife Anne $750,000 in damages for loss of consortium. Finally, the court reduced Daniel's, but not Anne's, damages by the 10% fault attributable to Daniel, and entered judgment in favor of Daniel for $3,238,153 and in favor of Anne for $750,000.

Leland later moved to amend the judgment on the grounds that loss of consortium is not recoverable under maritime law. The court rejected this argument, holding that the federal statutes that disallow consortium claims (the Jones Act and the Death on the High Seas Act) had no relevance here because Daniel was not a seaman and the case did not involve a death on the high seas. Likewise, the court rejected an argument that Anne's recovery should be reduced by 10%, finding that a reduction of her award would be proper only if she had been adjudged at fault. *Doyle v. Graske*, 2008 U.S. Dist. LEXIS 61180 (D. Neb. Aug. 11, 2008). ■

Issues of Fact in Drowning Case Preclude Summary Judgment for Houseboat Owners

Caguioa v. Fellman, 747 N.W.2d 623 (Neb. 2008)

Nicosio Caguioa, a guest aboard a houseboat owned by Thomas Fellman and Martin Meyers, drowned in Lake Powell in Utah after jumping off the boat to go for a swim. Caguioa entered the water without a life jacket or flotation device and Meyers allowed the houseboat to drift away for about the length of a football field before going back to get Caguioa. Meyers and others watched as Caguioa swam towards the boat, attempted to get climb onto the boat from the left side, which was not possible, and then swam to the right side of the boat before encountering trouble and sinking. The trial judge granted summary judgment for Fellman and Meyers.

The Supreme Court of Nebraska concluded that there were genuine issues of material fact as to whether Fellman and Meyers had breached the duty of reasonable care in the operation of their vessel. In particular, the court noted that they allowed the houseboat to drift away from Caguioa knowing he did not have a flotation device, and there was also some evidence that

the boat might have run over Caguioa. The grant of summary judgment was therefore reversed.

The court also ruled that the trial judge erred in excluding testimony from two retired Coast Guard officers whom the plaintiff had retained as experts. The experts had opined that Meyers was negligent in his operation of the vessel and that both Meyers and Fellman were negligent by failing to either be trained in rescue operations or to have someone on board who was trained in rescue operations. ■

Summary Judgment for Defendant in Jet Ski Negligent Entrustment Case

Russell v. Warshauer, 24 Mass. L. Rep. 228 (Mass. Super. 2008)

Paulo Da Silva loaned his jet ski to Trev Warshauer, his friend and business acquaintance of seven years. Warshauer was subsequently involved in an accident on Lake Quinsigamond which resulted in serious injury to Addison Russell. Russell's guardian brought suit against Da Silva for negligently entrusting the jet ski to Warshauer.

According to the court, there was undisputed evidence that Warshauer was a competent operator of the jet ski and had ample boating experience, including knowledge of rules of the road, safety, and rescue from a series of scuba diving courses. The court also noted that Da Silva, who had purchased the jet ski only 5 days before the accident, went through start-up and basic jet ski operations with Warshauer, and prior to the accident had ridden as a passenger while Warshauer operated the jet ski. Because there was no evidence that Warshauer was incompetent or unfit to operate the jet ski, there was no basis for a claim of negligent entrustment. Furthermore, the court stated that Massachusetts law requires that a defendant in a negligent entrustment case have actual knowledge of the operator's incompetence or unfitness, and there was no evidence that Da Silva had any such knowledge in this case. ■

Salvage

Florida Wrecking License Statute Declared Unconstitutional

Towboat One, Inc. v. M/V WATERDOG, 2008 AMC 1730 (S.D. Fla. 2008)

The sportfishing vessel WATERDOG began taking on water off the coast of Florida because of a malfunctioning bilge-pumping system. The vessel's Master issued a distress call, and Towboat One responded with an offer of salvage assistance. The offer was accepted and Towboat One personnel successfully de-watered the vessel. The WATERDOG and its passengers and crew made it safely back to port.

Afterwards, a dispute arose as to Towboat One's salvage bill and Towboat One filed suit. WATERDOG argued that no salvage award was allowable because Towboat One did not have a license to salvage off the Florida coast as required by 46 U.S.C. § 80102. Towboat One responded that § 80102 was unconstitutional and therefore no license was necessary.

As originally drafted in 1828 (when Florida was still a territory), the statute required anyone regularly employed in the business of "wrecking" on the Florida coast to obtain a license from a federal judge. "Wrecking" was the term used to describe those engaged in salvage along the Florida Keys. The purpose of the license requirement was to combat the practice of those who would lure ships onto reefs for their own gain. According to the precedent that developed under the original statute, unlicensed wreckers forfeited their right to any award.

With the passage of time, the term "wrecker" fell into disuse and the practice of rescuing ships became known as "salvage," as it was elsewhere. Applications for wrecking licenses declined correspondingly. When Congress re-codified Title 46 (the shipping laws) in 2006, however, the term "salvaging" replaced "wrecking" in the statute and the federal courts in Florida experienced an increase in petitions for licenses.

The Southern District of Florida had previously considered the constitutionality of the licensing statute in *In re Beck*, 526 F. Supp. 2d 1291 (S.D. Fla. 2007). There the court dismissed an ex parte license petition after deciding that there was no "case or controversy" over

which a federal court would have jurisdiction consistent with Article III of the U.S. Constitution.

The *Towboat One* court incorporated the reasoning from the *Beck* case and declared § 80102 unconstitutional on the basis that issuing licenses was not within the judicial power of a federal court. Accordingly, Towboat One's lack of a salvage license afforded no basis for denial or reduction of a salvage award. ■

Arbitration Clause in Yacht Salvage Contract Enforced Despite Allegation of Fraud

McCaddin v. Southeastern Marine, Inc., 567 F. Supp. 2d 373 (E.D.N.Y. 2008)

Henry McCaddin and his wife were operating their 42-foot pleasure craft PANDONNA on Long Island Sound when the engines lost power and smoke began to emanate from the starboard engine. The vessel was soon enveloped in black smoke and the two were obliged to jump into the water. They were picked up by another boater and taken to a vessel belonging to a friend. Once the fire subsided, fire boat personnel deemed it safe for McCaddin to re-board PANDONNA to collect various belongings and documents. McCaddin was joined by a friend and the captain of one of defendant's vessels, David Henry. Henry asked McCaddin if he wanted PANDONNA towed. According to McCaddin, he agreed on the condition that the services would be considered a tow job and not salvage. Henry maintained that he informed McCaddin that the services were in the nature of salvage.

In any case, McCaddin signed a contract entitled "STANDARD FORM YACHT SALVAGE CONTRACT," which provided for binding arbitration in the event of any dispute surrounding the contract. McCaddin later filed a complaint for declaratory relief seeking to invalidate the contract, and defendant filed a motion to dismiss or, in the alternative, to compel arbitration.

McCaddin argued that Henry's conduct amounted to fraud in the execution of the contract and that the court should therefore deem the contract and arbitration clause void. The court first noted that established Second Circuit precedent is that allegations of fraud in the execution of a contract must be addressed by the court in order determine if the matter can be arbitrated. However, the court concluded that McCaddin's allegations in this case should be treated as a claim of fraud in the inducement of the contract, which was an issue to be decided by the arbitrator and not the court.

The court explained the difference between the two types of fraud claims as follows. A claim of fraud in the execution of the contract is an allegation that there was never a meeting of the minds regarding the terms of the contract. This category of cases is appropriate for determination by the court because the evidence goes to whether the contract is void, and if it is void then the contract produces no legal obligation. By contrast, a claim of fraud in the inducement is an allegation that there was a misrepresentation about the subject matter underlying the agreement but there is no dispute that some sort of agreement was reached.

The court concluded that McCaddin's allegations were best considered as an example of the latter. Further, it noted that McCaddin had not made a threshold showing of "excusable ignorance of the contents of the writing," a requirement for a claim of fraud in the execution. Specifically, McCaddin's assertion that he had lost his glasses and was unable to read the contract was not supported by any evidence. Even if there had been such a showing, the fact that he had a friend present who could have read him the contract would have prevented him from establishing excusable ignorance. ■

Marinas

Eviction May Take Longer When Sailboats Become "Floating Homes"

Ramsum v. Woldridge, 192 P.3d 851 (Ore. App. 2008)

Eagle's Cove Marina served its tenants with 30-day eviction notices under Oregon Revised Statutes (ORS) chapter 91. The tenants lived on their sailboats on a fulltime basis and Eagle's Cove advertised itself as a live-aboard community. When the tenants refused to vacate the rented slips within 30 days, Eagle's Cove filed an action under ORS chapter 91 to evict them.

At trial the tenants argued that because their sailboats qualified as "floating homes" under Oregon's Residential Landlord and Tenant Act (RLTA), the provisions of ORS chapter 91 were inapplicable and Eagle's Cove had to give them 180 days notice of an eviction rather than just 30 days. The trial judge rejected this argument and found for Eagle's Cove.

The Oregon Court of Appeals reversed. Because none of the residents sailed their boats more than 15 days out of the year, the court held that the boats were properly considered "floating homes" rather than merely "boats" for the purposes of Oregon law, and therefore these floating homes were covered by the RLTA and its corresponding 180-day eviction notice provision. (The result may have been different had Eagle's Cove qualified as a "marina" under the RLTA, but this argument was not raised.) ■

Environmental

Enumerated Defenses Are Exclusive under National Marine Sanctuaries Act

United States v. M/V NON-COMPETE, 2008 U.S. Dist. LEXIS 68155 (S.D. Fla. Sept. 9, 2008)

In November of 2003, Stephen Barlow's 52-foot vessel, the M/V NON-COMPETE, ran aground in the Florida Keys National Marine Sanctuary. A response vessel from the Florida Keys Harbor Service pulled the NON-COMPETE afloat and marked the location with a PVC stake. The Harbor Service reported the grounding and the coordinates to the Florida Fish and Wildlife Conservation Commission, although it was unclear whether the coordinates were obtained from the response vessel's GPS, its tender, or the NON-COMPETE's call for assistance.

The day after the grounding a Fish and Wildlife officer went to the area and located a PVC pipe approximately 400 yards away from the coordinates reported by the Harbor Service. About 8 months later, a damage assessment team went to the location and mapped an area of disturbed sediment and seagrass but did not record the coordinates of the PVC stake.

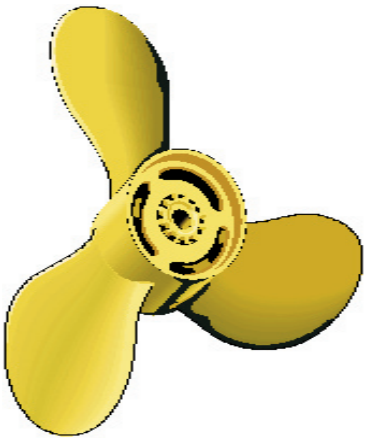
Two weeks later the federal government filed suit against Barlow and the NON-COMPETE pursuant to the National Marine Sanctuaries Act, claiming damages of $94,145 allegedly caused by the grounding. A follow-up assessment in December 2007 revealed that the damaged area had expanded since the initial assessment, and the government then increased its claim to $507,915. Defendants moved for summary judgment as to liability and damages.

With respect to defendants' argument that the government had not proved that the grounding occurred in the same location as the seabed damage, the court found that the issue was a question of fact to be determined by the jury. Specifically, the court noted that possible errors in the various GPS reports as to the location of the grounding were subject to interpretation.

Defendants also argued that the government's claim was time-barred. A complaint under the Marine Sanctuaries Act must be filed within 3 years after

the government "completes a damage assessment and restoration plan." Defendants contended that literal application of the statute would allow the government an indefinite time to bring suit so long as the government delayed completion of an assessment and restoration plan. The court, however, found no intent by Congress to limit the amount of time available to the government to complete a damage assessment and restoration plan and therefore held that the complaint was timely.

Finally, defendants argued that any recovery by the government should be confined to the damage found on the initial assessment because the additional damage was due to acts of God or the government's failure to mitigate damages. But because the government's failure to mitigate damages was not among the defenses enumerated in the Marine Sanctuaries Act, the court determined that this defense was not available. The court likewise decided that the "act of God" defense was not available because the statute recognized this defense only if the damage was caused *solely* by an act of God *and* the defendant had acted with due care. In this case Barlow had not shown that the damage was due entirely to an act of God and that he was acting with due care at the time of the grounding. ■



Legislative

Clean Boating Act of 2008 Passes; Performance Standards and Regulations to Follow

On July 29, 2008, the President signed into law the "Clean Boating Act of 2008" (Pub. L. No. 110-288). The Act exempts discharges incidental to the normal operation of a recreational vessel from the permitting requirements in section 402 of the Clean Water Act (33 U.S.C. § 1342).

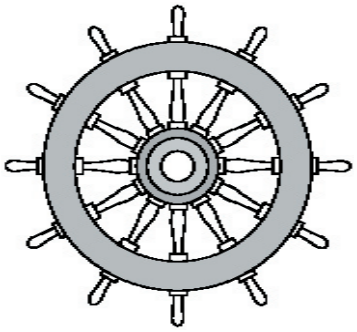
The Act was a response to a 2006 decision of the federal district court in San Francisco, affirmed by the Ninth Circuit in *Northwest Environmental Advocates v. United States Environmental Protection Agency*, 537 F.3d 1006 (9th Cir. 2008), which held that the EPA had exceeded its authority in exempting certain discharges incidental to normal vessel operations from the Clean Water Act's permitting requirements. (Although the statute moots the ruling's effect on recreational vessels, the ruling will still be implemented as to most commercial vessels on December 19, 2008. The EPA expects to finalize a general permit for commercial vessels by that date. See 2008 U.S. Dist. LEXIS 66738 (N.D. Cal. Sept 2, 2008).)

Under the new law, no Clean Water Act permit will be required "for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel." The term "recreational vessel" is defined to mean any vessel "manufactured or used primarily for pleasure" or "leased, rented, or chartered to a person for the pleasure of that person." The term does not include a vessel subject to U.S. Coast Guard inspection that is "engaged in commercial use" or that "carries paying passengers."

The new law requires the EPA to determine within one year "the discharges incidental to the normal operation of a recreational vessel for which it is reasonable and practicable to develop management practices to mitigate adverse impacts on the waters of the United States." The EPA must then develop management practices where warranted, to be followed by performance

standards promulgated in consultation with the Coast Guard.

The performance standards will then be implemented by the Coast Guard through "regulations governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet the standards of performance." Once the Coast Guard regulations take effect, recreational vessels operating in the waters of the United States or the continuous zone (generally out to 24 miles) will be required to use "any applicable management practice meeting [the performance] standards." According to the timeline in the statute, the regulations are to come into effect within three years unless the Coast Guard determines that more time is needed. ■



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