BOATING BRIEFS

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

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

Eleventh Circuit Rejects Insured's Demand for Jury in Declaratory Judgment Action, but Finds Ambiguity in "Manufacturer's Defect" Coverage

St. Paul Fire & Marine Insurance Co. v. Lago Canyon, Inc., 2009 U.S. App. LEXIS 5125 (11th Cir. Mar. 6, 2009)

The U.S. Court of Appeals for the Eleventh Circuit has ruled that a yacht owner does not have a right to a jury trial in a declaratory judgment action filed in admiralty by the yacht's insurer. The court also ruled that the insurance policy's grant of coverage for damages caused by "manufacturer's defect" was ambiguous because "manufacturer's defect" could mean either a defect in design or a defect in the manufacturing process.

St. Paul issued an all-risks policy to Lago Canyon, the owner of the yacht AQUA NOVIA. Among other things, the policy provided coverage (with no deductible) for losses caused by "a provable manufacturer's defect," but it excluded coverage for losses caused by corrosion.

While undergoing engine repairs dockside, the yacht took on water and sustained over $1.2 million in damages. Lago Canyon sought coverage under the policy, and St. Paul filed a complaint for declaratory judgment claiming the loss was not covered. St. Paul designated its claim for declaratory relief as "an admiralty or maritime claim" and expressly invoked Rule 9(h) of the Federal Rules of Civil Procedure. For a claim that is within the court's admiralty jurisdiction and also some other basis of federal juridiction, Rule 9(h) allows the pleader to designate the claim as an admiralty or maritime claim.

Lago Canyon filed a counterclaim for breach of the insurance policy, cited diversity of citizenship between the parties, and demanded a jury trial. The district court struck Lago Canyon's jury demand on the basis of *Harrison v. Flota Mercante Grancolumbia, S.A.*, 577 F.2d 968 (5th Cir. 1978), in which the old Fifth Circuit held that a plaintiff's Rule 9(h) designation prevents a defendant from obtaining a jury trial.

At trial the district court found that the water intrusion was caused by the failure of a brass hose barb that had become corroded. Because the policy excluded coverage for losses resulting from corrosion and the district court interpreted the policy's coverage for losses caused by "manufacturer's defect" to apply only to losses caused by a defect in the manufacturing process, the district court entered judgment for St. Paul, save for a $7,500 towing fee which St. Paul was directed to pay under the policy's commercial towing endorsement.

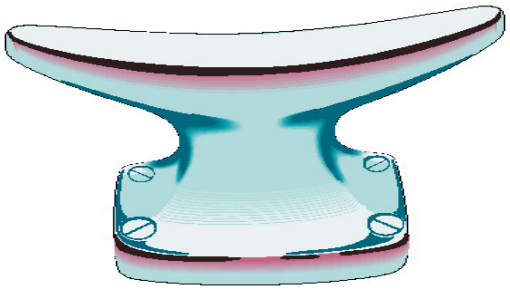
On appeal, the Eleventh Circuit agreed with the district court that Lago Canyon did not have the right to a jury trial on its counterclaim. Lago Canyon argued that the *Harrison* decision was inapplicable in the context of a declaratory judgment action because St. Paul was the plaintiff in name only and at bottom this was an action by an insured for money damages and should be triable to a jury. But the Eleventh Circuit decided that *Harrison* established a categorical rule and that a proper Rule 9(h) designation by a plaintiff bars a defendant from having its counterclaim tried to a jury, without regard to whether the plaintiff's complaint seeks damages or merely declaratory relief.

Lago Canyon's argument did find some appeal with one judge who, in a concurring opinion, said that but for the *Harrison* decision he would have followed the Fourth Circuit's ruling in *In Re Lockheed Martin Corp.*, 503 F.3d 351 (4th Cir. 2007). In that case the Fourth Circuit decided that an insured asserting a counterclaim in a marine insurer's declaratory judgment action has the right to a jury trial even if the marine insurer has designated its claim as an admiralty claim under Rule 9(h).

Lago Canyon fared better, however, in its appeal on the merits. The district court had concluded that the policy's grant of coverage for losses caused by a "manufacturer's defect" extended only to losses caused by a defect in manufacturing as opposed to a defect in design. But the Eleventh Circuit agreed with Lago Canyon that a "manufacturer's defect" could mean either a manufacturing defect or a design defect:

> St. Paul's problem is that [the policy] uses the broad term "manufacturer's defect" and not "manufacturing defect" as focused on by the district court. Attempting to give the term "manufacturer's defect" its plain meaning and mindful of the settled rule that ambiguous provisions in an insurance policy are construed against the insurer, we conclude the term "manufacturer's defect" includes defects attributable to the manufacturer whether in the manufacturer's design or manufacturing of the product.

The case was therefore remanded for further proceedings in which the district court would determine whether the yacht manufacturer's decision to use a brass hose barb constituted a design defect, and if so "what impact this had on the multiple causation issues in the case and the court's other fact findings." The Eleventh Circuit suggested that the district court would also have an opportunity to reassess the interplay between the manufacturer's defect coverage and the corrosion exclusion. ■



Salvage

Court Rejects Salvor's Attempt to Base Salvage Award on Yacht's Insured Value

Peterson v. Marine Services & Assist Boatyard, 2009 U.S. Dist. LEXIS 19660 (W.D. Wash. Mar. 10, 2009)

Rick Peterson sent his 58-foot pleasure vessel, LOFOTEN SPIRIT, on a passage from Anacortes to Seattle with a crew of three. While in transit, the vessel grounded on a rock jetty. The vessel found herself high-centered on the jetty with a destroyed starboard transmission. She was taking on water, listing, and leaking oil into the engine compartment.

In response, the crew contacted the Coast Guard, who in turn contacted Marine Services for commercial assistance. Marine Services spoke directly with the LOFOTEN SPIRIT's crew to confirm that they wanted help. Because the crew determined that they would be unable to remove the vessel from the rock jetty on their own, they requested Marine Services' assistance.

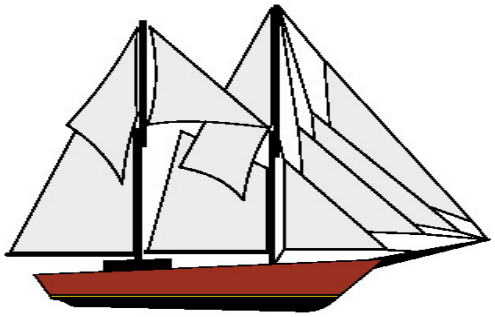
When Marine Services employees arrived in their fast response vessel, they confirmed that the LOFOTEN SPIRIT was indeed stranded and that she presented a salvage situation. They presented the captain with a form no-cure no-pay salvage agreement, which the captain refused to sign because it contained a provision that the "Owner shall pay Salvor 20 percent of the net salved value brought to safety." According to the agreement, "net salved value" would be determined by subtracting the costs of repairs from the higher of the insured value or the fair market value.

After Marine Services employees advised that the 20 percent figure was simply a cap on the cost of the salvage, and the crewmembers conferred with vessel owner Peterson over the phone, the salvage agreement was signed. In short order, the vessel was dewatered, a larger salvage vessel was brought on the scene, and the LOFOTEN SPIRIT was freed from the rocks and taken for emergency haul-out.

At the time of the grounding, the insured value of the LOFOTEN SPIRIT was $900,000 and its fair market value was $660,000. Repairs to the vessel totaled $81,815.26, making the post-casualty value of the salved vessel $578,184.74.

Peterson sought a declaratory judgment as to the amount of the salvage award to be paid to Marine Services. The court decided that calculating the salvage award based on LOFOTEN SPIRIT's insured value was unreasonable in light of the vessel's (much lower) fair market value. Enforcing the salvage agreement as written would produce a windfall for Marine Services, the court reasoned, because the award would be inconsistent with the actual value of the property that was salvaged.

Accordingly, the court declined to apply the salvage agreement and instead considered the salvage award under pure salvage principles. Applying the *Blackwall* factors, the court determined that Marine Services was entitled to a relatively high award because of the danger, the property value at risk, the value of property employed, the risks of salvage, the labor and materials expended, and the promptitude and skill of the salvors. Ultimately, the court awarded Marine Services 20 percent of the fair market value of the property after salvage, or $115,636.94 plus prejudgment interest. ■



Vessel Repair

Extensive Renovations Strip Yacht of "Vessel" Status

Crimson Yachts v. M/Y BETTY LIN II, 2009 U.S. Dist. LEXIS 15682 (S.D. Ala. Feb. 26, 2009)

In an action by a shipyard against a yacht and her owner for unpaid invoices exceeding $600,000, the U.S. District Court for the Southern District of Alabama held that the yacht was no longer "in navigation" and was therefore not subject to an in rem action.

Although the shipyard had rendered repairs that would otherwise constitute "necessaries" sufficient to establish a maritime lien, the court found that the extent of the renovations to the BETTY LIN took her out of navigation and disqualified her as a "vessel." Citing the Supreme Court's decision in *Stewart v. Dutra*, 543 U.S. 481 (2005), the district court held that a watercraft that is not "in navigation" is "not practically capable of being used as a means of transportation on water," and is therefore not a "vessel" susceptible to a maritime lien for necessaries.

The court noted that vessels undergoing repairs in drydock for a relatively short time will remain "in navigation," while vessels being transformed through major overhauls/renovations will not. In considering the extent of repairs in this case, the court noted that major structural repairs to the hull, propulsion, and vessel systems (in the absence of the crew) were contemplated and that, while the yacht could have floated, she could only have been moved by tugboat. That the repairs initially contemplated were predicted to amount to $4.5 million also factored into the court's analysis. Such a "major overhaul" was, in the court's view, inconsistent with yacht remaining "in navigation." The extent of repairs thus took the BETTY LIN out of navigation, and, in turn, out of vessel status, and, consequently, out of admiralty in rem jurisdiction. Therefore, the court concluded that a maritime lien could not arise and the complaint against the vessel was dismissed. ■

Party's Selection of State Law Permits Loss of Use Damages for Recreational Vessel

Zepsa Industries, Inc. v. Kimble, 2008 AMC 2885 (W.D.N.C. 2008)

In a pre-trial ruling, the U.S. District Court for the Western District of North Carolina considered the availability of loss of use damages for a recreational vessel. The dispute surrounded vessel repair contracts that included a North Carolina choice of law provision. Because its jurisdiction was grounded in admiralty, the court employed federal choice of law principles to determine what law to apply. The court noted that admiralty courts will generally enforce the parties' contractual choice of a particular state's law unless (1) that state has no substantial relationship to the parties or the transaction, or (2) that state's law conflicts with a fundamental feature of maritime law.

Because one of the agreements was executed in North Carolina, one of the parties was incorporated in North Carolina, and most of the repair work was performed in North Carolina, the court had little difficulty determining that the "substantial relationship" exception was not applicable.

The court then considered whether applying North Carolina law, which allows loss of use damages for recreational vessels, would violate a fundamental policy of maritime law. The court noted that the seminal case was *The Conqueror*, 166 U.S. 110 (1897), in which the Supreme Court held that damages for the loss of use of a yacht were not recoverable where the yacht had not been a source of profits to her owner. More recent precedent, the court noted, has generally interpreted *The Conqueror* as prohibiting loss of use damages in the recreational boating context. Nevertheless, because the court could find no statute or decision to indicate that the prohibition is a fundamental feature of maritime law, the court concluded that North Carolina law could be applied in keeping with the parties' contract and that loss of use damages could be considered as the case progressed. ■

Financing

Ship Mortgage Affords No Basis for Removing State Court Suit for Wrongful Repossession

Vincent v. Regions Bank, 2008 U.S. Dist. LEXIS 104145 (M.D. Fla. Dec. 15, 2008)

On plaintiff's motion, the U.S. District Court for the Middle District of Florida ordered this case remanded to state court for lack of federal jurisdiction.

Plaintiff had filed a complaint in state court asserting various state law claims for breach of contract, conversion, civil theft, conspiracy and other tort theories arising from the defendant's repossession of plaintiff's yacht. Defendant removed the case to federal court and contended that the federal court had jurisdiction because the case related to the repossession of a vessel that was covered by a preferred ship mortgage.

But because the defendant had repossessed the vessel instead of having it arrested through an in rem proceeding in federal court, and the parties did not have diverse citizenship, the court determined that there was no federal jurisdiction over the plaintiff's claims and that the case had to be remanded to state court.

The case is a reminder that lenders who elect to repossess a mortgaged vessel will in general be subjecting themselves to state law, and may also find themselves litigating in state court if the borrower takes issue with the repossession. ■

Admiralty Tort Jurisdiction

Whitewater Rafting Not Subject to Maritime Law

River Riders, Inc. v. Christopher, 672 S.E.2d 376 (W. Va. 2008)

After signing release and assumption of risk forms, Plaintiffs embarked on a whitewater rafting trip on the Shenandoah River. Due to the remnants of a hurricane that had recently come through the area, the level of water on the river was 12.5 feet in areas where it was usually 2 to 4 feet. In the swift and rough river conditions, the plaintiffs were tossed from their rafts. One plaintiff drowned and thirteen others were injured. Plaintiffs sued the river guide service, River Riders, Inc., for negligence under the West Virginia Whitewater Responsibility Act and federal maritime law.

The lower court ruled that the Shenandoah River was a "navigable body of water," that the dispute was governed by general maritime law, and that the defendants were barred from relying on assumption of risk because maritime law does not permit such a defense.

On the defendants' application for a special writ, the Supreme Court of Appeals of West Virginia ruled that maritime law was inapplicable. The court questioned whether an area of the river filled with rapids could possibly qualify as a navigable waterway, but decided that regardless of the river's navigability, whitewater rafting had no substantial relationship to traditional maritime activity. The court noted that the incidents at issue did not involve "piloting, shipping, or navigational error, or other aspects of traditional maritime activity" and that "there is no existing federal or state precedent applying admiralty jurisdiction to the activity of whitewater rafting." In the absence of admiralty jurisdiction, maritime law did not operate to prevent the defendants from raising assumption of risk as a defense. ■

Swimmer Struck by Boat Unable to Rely on Admiralty Jurisdiction in Suit Against Resort

Campbell v. Starwood Hotels & Resorts Worldwide, Inc., 2008 U.S. Dist. LEXIS 81121 (S.D. Fla., Oct. 14, 2008)

Plaintiff was swimming in the ocean in front of the Westin Grand Bahama Resort and was struck by a boat owned and operated by a local watersports company. Plaintiff was not a registered guest of the resort, but was among a group of cruise ship passengers who were visiting the resort for its beachfront activities. Plaintiff sued the resort for negligence in federal court in Miami but he did not sue the boat owner/operator.

Plaintiff pled the applicability of U.S. maritime law. The resort argued that U.S. maritime law did not apply because the incident occurred outside the navigable waters of the United States. The court rejected the resort's argument and observed that most courts have held that federal maritime law can extend to torts that occur outside the territorial waters of the United States.

However, admiralty jurisdiction was still lacking in the court's view because Plaintiff had not sued the boat owner/operator. The court stated that the pertinent activity for admiralty jurisdiction purposes was not the operation of a vessel but rather the resort's conduct within the hotel industry, e.g., the adequacy of the warnings it gave to visitors going for a swim. According to the court, the conduct relevant to Plaintiff's claim against the resort had an insufficient relationship with traditional maritime activity, and therefore admiralty jurisdiction was defeated and the resort's liability would be determined under Bahamian law. ■

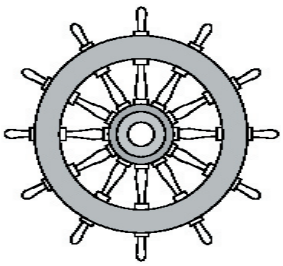
Livery on the Loxahatchee

Briggs v. Jupiter Hills Lighthouse Marina, 2009 Fla. App. LEXIS 1868 (Ct. App. Fla. Mar. 4, 2009)

Plaintiff's son rented a boat from the Jupiter Hills Lighthouse Marina and embarked on a trip on the Loxahatchee River with his mother (the Plaintiff) and his father as passengers. Plaintiff was injured aboard the vessel when it hit a wake from a larger boat. Nearly four years after the incident, Plaintiff filed suit against her son, the marina, and the manufacturer of the boat. Defendants moved for summary judgment, arguing that the dispute was subject to admiralty jurisdiction and that the claim was barred by the 3-year statute of limitation on maritime personal injury claims.

Stating that the incident clearly bore a substantial relationship to traditional maritime activity, the court turned to whether the Loxahatchee River was "navigable" for purposes of admiralty jurisdiction. Relying on Plaintiff's own statements that on the day of the incident there were numerous large vessels on the waterway, and noting that the river links up to the Intracoastal Waterway and the Atlantic Ocean, the court concluded that the waterway was indeed navigable and that the tort claims were therefore time-barred under the maritime statute of limitation.

Plaintiff's case was not completely dismissed, however. The court stated that her claim against the marina for alleged violations of Florida's "livery" (boat rental) statute was independent of tort theories, and was therefore not subject to the maritime statute of limitations. ■



California's Primary Assumption of Risk Doctrine and Boating

Kindrich v. Long Beach Yacht Club, 167 Cal. App. 4th 1252 (Ct. App. Cal. 2008)

Plaintiff was injured while disembarking from a boat after a ceremony in which he had cast his father's ashes into the sea. In an attempt to assist in tying up the boat, Plaintiff tried to jump from the boat to the dock. As he began his jump the boat was hit by the wake of another vessel and Plaintiff fell to the deck and broke his leg.

Plaintiff sued the boat's captain and the Long Beach Yacht Club, which owned the boat and the dock, claiming they were negligent in failing to have someone assist Plaintiff off the boat or have portable steps in place for passengers to use when leaving the vessel. The Yacht Club had provided the boat and the captain to Plaintiff at no charge for use during the burial ceremony, as Plaintiff's father had been a member of the Yacht Club and the captain was a close friend of the father.

The trial court granted the defendants' motion for summary judgment based on California's "primary assumption of risk" doctrine. The court reasoned that the doctrine applied to the plaintiff's decision to jump off the boat onto the dock.

On appeal, the ruling was overturned in a 2-1 decision. The majority decided that the trial court had defined the activity giving rise to Plaintiff's injury – "jumping" – too narrowly. Rather, the proper description of the activity was "boating," an activity to which the doctrine of primary assumption of risk generally did not apply. To the extent Plaintiff made an unreasonable decision to jump off the vessel, this could be considered by the factfinder as comparative negligence but it did not necessarily bar all recovery as a matter of law. ■

Apportionment of Fault For Injury During Race

Evans v. Nantucket Community Sailing, Inc., 582 F. Supp. 2d 121 (D. Mass. 2008)

Plaintiff was a guest aboard a sailboat participating in a sailboat race off Jetties Beach in Nantucket. She was injured when the captain of another sailboat in the race jibed his boat while very close to the boat on which Plaintiff was riding, and the tip of that boat's boom hit Plaintiff in the back of the head. As a result of the injury, Plaintiff alleged that she lost her sense of taste and sense of smell, and she sued the captains of both boats as well as Nantucket Community Sailing, Inc., where both captains served as instructors.

The court had little difficulty finding that both captains had violated statutory (COLREGS) and general duties of care, and that they were therefore negligent. However, the court also found Plaintiff to be at fault. The court noted that Plaintiff, as either a passenger or a non-seaman member of the crew, had a duty to exercise reasonable care for her own safety. The court found that by her own admission Plaintiff completely ignored what was transpiring between the two vessels as they neared one another, and had she been paying attention she could have ducked out of the way and avoided injury. Based on this finding, the court decided that the defendants were 60% at fault while the Plaintiff was 40% at fault, and her award was reduced accordingly. ■

Environmental

Court Finds for Vessel Owner in Government Suit for Sea Grass Damage

United States v. M/V NON-COMPETE, 2008 U.S. Dist. LEXIS 102228 (S.D. Fla. Dec. 8, 2008)

The U.S. Government sued Stephen Barlow and his vessel, the M/V NON-COMPETE in rem, for damage to sea grass that allegedly occurred when the NON-COMPETE ran aground in the Florida Keys National Marine Sanctuary. Barlow admitted that the grounding had occurred but he denied that the grounding had caused sea grass scars that were discovered by the Government's damage assessment teams. Barlow insisted that he had grounded only in sand. Given the factual discrepancies in the record, the court denied Barlow's motion for summary judgment (reported in 17 Boating Briefs No. 2) and the case proceeded to bench trial.

Although the practice in the Florida Keys National Marine Sanctuary is to mark grounding sites with a white PVC stake, there is nothing to distinguish a stake marking one grounding site from another. Presented with inconclusive GPS latitude/longitude coordinates for the locations of the sea grass damage and the grounding, the court compared the physical characteristics of the scar to the dimensions of the NON-COMPETE in order to determine whether her grounding caused the damage. The distance between the centers of the propeller scars in the sea grass matched the spacing of the NON-COMPETE's propeller shafts almost perfectly. Nevertheless, the court determined that the scar could not have been caused by the NON-COMPETE because (1) the size of the propeller scars was too small to be consistent with a grounding by the NON-COMPETE, (2) the water depth at the location of the sea grass scar was too shallow to be consistent with a grounding by the NON-COMPETE, and (3) the hull and propellers of the NON-COMPETE did not show the type of damage that would be consistent with having gone aground at the location of the scar.

Accordingly, the court determined that the Government had not shown by a preponderance of the evidence that the grounding of the NON-COMPETE had caused the sea grass damage, and judgment was entered in favor of Barlow and his vessel. ■

Spoliation Issues

Expert Spoliates Evidence and then Fails *Daubert* Challenge

Maldonado v. Baja Marine Corp., 2009 U.S. App. LEXIS 1986 (11th Cir. Feb. 2, 2009) (unpublished)

Michael Maldonado died in a high speed boating accident. His survivors filed a product liability action against the manufacturer of the boat and the manufacturer of the boat's gimbal housing, claiming the accident was attributable to a defect in the gimbal housing that caused the housing to fracture and the boat to spin out of control.

Plaintiffs engaged a metallurgy expert and arranged for the removal of the boat's gimbal housing and the performance of destructive tensile testing, all without notifying the manufacturers. The district court determined that the testing had unquestionably destroyed crucial physical evidence and that an appropriate sanction was to exclude the test results from evidence. The Eleventh Circuit agreed.

The district court also excluded the expert's testimony. In his report the expert stated that the gimbal housing lacked ductility because of a high concentration of beta phase in the aluminum. However, the expert's testimony showed that he had initially arrived at a different conclusion as to why the housing lacked ductility. Because he lacked experience with aluminum, he sent his initial finding to an aluminum expert who corrected his finding. On this basis, the district court found that the plaintiffs' expert was unqualified to testify as to beta phase and, therefore, his testimony was without sufficiently reliable foundation.

Again, the Eleventh Circuit agreed. Without the test results or the expert's testimony, the plaintiffs were unable to muster enough evidence of a manufacturing defect and the district court's grant of summary judgment for the manufacturers was affirmed. ■

Court Denies Fire Claimants' Request for Spoliation Sanctions

Complaint of Marvin Kessler, Owner of M/V NOTEWORTHY, E.D.N.Y. No. 05-cv-6056 (SJS) (AKT)

In a limitation action stemming from a yacht fire that spread to a marina and nearby vessels, the court declined to impose a sanction for spoliation against the yacht owner whose marine insurer, following joint inspections by the parties' experts, had turned the burnt-out wreck over to an independent salvage company with instructions to hold it. Months later, one of the salvage company's employees, unaware of the hold order, authorized the destruction of the wreck. Given that the salvage company had not received instructions from the insurer or anyone else to destroy the wreck, the destruction took place when discovery was nearly over (16 months after the fire), and all concerned parties had previously inspected the wreck, the court decided that no sanctions were warranted. ■

The Editors thank James Mercante of New York for calling their attention to this decision.

Sport of Sailing

U.S. Olympic Committee Faults US Sailing's Hearing Procedures

Hall v. US Sailing Association, U.S. Olympic Committee (Feb. 20, 2009)

In a case that could have repercussions beyond the selection process for Olympic sailor athletes, the U.S. Olympic Committee has ruled that certain protest and redress procedures followed by the US Sailing Association ("US Sailing") did not comport with the due process provisions of the Olympic and Amateur Sports Act. US Sailing is the national governing body for the sport of sailing in the United States.

The dispute arose during the sixteenth and final race of the women's windsurfing selection regatta for the Beijing Olympics. The regatta came down to the final race in which Farrah Hall crossed the finish line in first while Nancy Rios finished in fourth.

At the start of the race, however, there was a near collision between Hall and another competitor and an alleged collision between Rios and the same competitor. Just after the race ended, Rios requested redress from the US Sailing protest committee, claiming that her sail was torn as a result of a foul committed by the other competitor and that she was prevented from sailing properly. Hall was not notified of Rios' request for redress. After hearing the redress, the protest committee adjusted the scores and Rios was given 4 additional points, which put her in the top spot for the regatta and qualified her, instead of Hall, for the Beijing Olympics.

After speaking to an advisor, Hall filed her own request for redress. However, because her request for redress was not filed within the time frame set by the Racing Rules of Sailing, it was denied. Possibly in response to a parallel complaint filed with the U.S. Olympic Committee, which was heading to arbitration, US Sailing reopened Rios' redress proceeding and allowed Hall to file her own request for redress. Eventually, after additional hearings, the protest committee denied Hall's request for redress and confirmed that Rios would be the U.S. representative at the Beijing Olympics.

In its 23-page ruling, the U.S. Olympic Committee explained that the Olympic and Amateur Sports Act requires US Sailing, as the national governing body for the sport of sailing, to "provide fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to compete." The statute also requires that the national governing body "provide procedures for the prompt and equitable resolution of grievances of its members." In addition, the statute requires 20 percent athlete representation on panels that hear grievances. To provide guidance in the implementation of the statute, the U.S. Olympic Committee had previously developed a "due process checklist" for use in eligibility proceedings. Among other things, the checklist recommended that the aggrieved athlete be afforded a right to counsel, a right to confront and cross-examine witnesses, and the right to have a record made of any hearing.

US Sailing's argument that it was merely applying the rules of the International Sailing Federation was rejected because the Federation's rules could not be permitted to take precedence over the federal statute, the U.S. Olympic Committee ruled. US Sailing was given six months to bring its procedures into compliance with the statute.

The ruling may have broader implications because there is little case law addressing whether the decisions of a protest committee should be accorded weight in a lawsuit arising from a racing incident. But given the fact that the U.S. Olympic Committee has determined that US Sailing's existing procedures did not afford due process, practitioners would have a strong argument that in a case stemming from an incident during a race, a court should not rely on any of the facts or evidence established during a protest hearing.

It will also be interesting to see whether aggrieved race participants will now attempt to insist on a right to counsel and a right to confront and cross-examine witnesses in protest proceedings, given the relaxed self-monitoring of the rules that has traditionally prevailed in this Corinthian sport. ■

The Editors thank Charles W. McCammon of Philadelphia for submitting this article.

Court of Appeals of New York Decides Eligibility of America's Cup Challengers

Golden Gate Yacht Club v. Société Nautique de Genève, 2009 N.Y.LEXIS 134 (N.Y. Apr. 2, 2009)

In a contest over the interpretation of George Schuyler's deed of gift, the Court of Appeals of New York ruled that Golden Gate Yacht Club, host of the BMW Oracle racing team, was the proper challenger of record for the 33rd America's Cup. The decision went against Club Náutico Español de Vela (CNEV) and the Société Nautique de Genève (SNG), the current defender of the Cup and host of the Alinghi sailing team.

Mr. Schulyer's deed of gift sets forth eligibility requirements that a challenger for the Cup must meet. In particular, the challenger must be "incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course."

In July 2007, immediately after the 32nd America's Cup race in which SNG had successfully defended the Cup, the newly created Spanish club CNEV submitted a notice of challenge, which SNG accepted. Golden Gate later submitted its own challenge, which SNG rejected on the ground that there was already an eligible challenger of record.

Golden Gate brought suit in New York state court, claiming SNG had accepted a challenge from an ineligible club. The trial court agreed with Golden Gate that CNEV was not a valid challenger because it had never held a regatta before it submitted its challenge, and the trial court ruled that Golden Gate, rather than CNEV, was the proper challenger of record.

SNG appealed and in a split decision the intermediate appellate court determined that the language in the deed ("having for its annual regatta") was ambiguous because it did not specify whether it was necessary for a club to have actually held a regatta before submitting a challenge. Therefore, in the appellate court's view SNG had not breached the deed by accepting CNEV's challenge.

Golden Gate in turn appealed to the Court of Appeals of New York, which saw no ambiguity in the "annual regatta" provision and reinstated the trial court's decision:

> By using the word "annual," [Mr. Schuyler] suggested an event that has already occurred at least once and will occur regularly in the future. Taken as a whole, we conclude that [Mr. Schuyler] intended to link the annual regatta requirement to the other eligibility requirements in that the challenging yacht club has in the past and will continue in the future "having" an annual regatta on the sea . . . .
>
> [F]or a challenging yacht club to be within the eligibility requirements, it must have held at least one qualifying annual regatta before it submits its notice of challenge to a defender and demonstrate that it will continue to have qualifying annual regattas on an ongoing basis.

It was irrelevant that CNEV had held two annual regattas after its challenge was accepted, the court said, because the deed requires the challenger to meet the eligibility requirements at the time the challenge is submitted.

As a result, SNG was obliged to accept Golden Gate's challenge in place of CNEV's. ■

Legislation

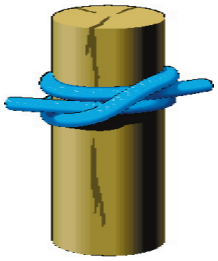
Stimulus Bill Expands LHWCA Carve-Out for Repairers of Recreational Vessels

The American Recovery and Reinvestment Act of 2009, the federal stimulus bill that became law in February, included an amendment to the Longshore and Harbor Workers Compensation Act (LHWCA) that makes the LHWCA inapplicable to workers employed in repairing recreational vessels.

Before the amendment, the LHWCA excluded from its coverage any worker "employed to build, repair or dismantle any recreational vessel under sixty-five feet in length," so long as the worker was covered by a state workers' compensation law. 33 U.S.C. § 902(3)(F).

As amended, the LHWCA now excludes from its coverage any worker "employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of the vessel." The worker must still be covered by a state workers' compensation law for the exclusion to operate.

The effect of the amendment is that the LHWCA will continue to apply to workers building recreational vessels at least 65 feet in length, but workers repairing recreational vessels, regardless of the vessels' length, will no longer be covered. ■



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