BOATING BRIEFS

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

Frank P. DeGiulio, Chairman
Volume 19 Number 1

Spring/Summer 2010

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

Also in this Issue

Yacht retains vessel status during overhaul

Crimson Yachts v. The Betty Lyn II, 2010 U.S. App. LEXIS 7447 (11th Cir. April 12, 2010)

The U.S. Court of Appeals for the Eleventh Circuit has held that a yacht undergoing extensive overhaul remained a vessel susceptible to a maritime lien for necessaries, because the yacht retained the ability to be towed through the water and the overhaul did not amount to new construction.

The vessel was a 132-foot yacht built in 1974. Its owner contracted with an Alabama shipyard to perform a refit, including extension of its decks and replacement of the engines, generators, electronics, plumbing, and wiring. The old equipment was removed and the yacht was towed to the shipyard, where it was hauled ashore and placed in a covered shed. Work continued for the next eighteen months, and although there were some payments made by the owner, the unpaid invoices allegedly exceeded $1.2 million.

The shipyard filed an action in rem against the vessel and in personam against the owner. An arrest warrant was issued, but later the district court held a hearing and determined that, given the extent of the work, the yacht was out of navigation and was no longer a vessel susceptible to a maritime lien. (We reported on the district court's decision in Boating Briefs Vol. 18:1.)

On interlocutory appeal, the Eleventh Circuit reversed. After a thorough discussion of the history and purpose of maritime liens and the Federal Maritime Lien Act, the court determined that the yacht remained a vessel throughout the overhaul period. The yacht "need merely be capable of transportation on water to be a vessel," and it was sufficient that the yacht could have been put in the water and placed under tow on 24 hours' notice at any point during the overhaul. The fact that the work was done on land did not deprive the yacht of vessel status. And, since the hull remained intact, the work did not qualify as new construction. The yacht was simply being rebuilt, not constructed anew.

The district court's dismissal for lack of in rem jurisdiction

was therefore erroneous, and the case was remanded for consideration of the shipyard's in rem claim on the merits. ■

Insurance

In New Jersey, uberrimae fidei displaced by policy provision

New Hampshire Ins. Co. v. Diller, 2009 U.S. Dist. LEXIS 120836 (D.N.J. Dec. 23, 2009)

The U.S. District Court for the District of New Jersey held that an insured has no uberrimae fidei disclosure duty when the policy contains a provision that reads: "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."

Two federal appellate courts have reached different conclusion when interpreting similar provisions: the Eleventh Circuit in *King v. Allstate Ins. Co.*, 906 F.2d 1537 (11th Cir. 1990), held that such a provision relieves the insured of the duty-to-disclose under uberrimae fidei, and the Ninth Circuit in *New Hampshire Ins. Co. v. C'est Moi, Inc.,* 519 F.3d 937 (9th Cir. 2008) (reported in Boating Briefs Vol. 17:1), held that it does not.

In view of the disagreement between these courts and the absence of a case directly on point from the Third Circuit, the court decided that there was no entrenched federal law on the subject and that the provision should be evaluated under New Jersey's rules of insurance-policy construction. Construed in that light, the clause would allow rescission only if there was intentional concealment or misrepresentation (i.e., the word "only" would effectively be read into the provision).

In view of this holding, the insurer was unable to obtain summary judgment because there were questions of fact as to whether the insured had intentionally concealed or misrepresented material facts relating to prior losses and engine horsepower, among other things.

The insured also sued his insurance broker on a variety of claims premised on the broker's alleged failure to properly procure insurance. The broker sought dismissal of these claims because the insured had not filed an "affidavit of merit" as required in New Jersey professional malpractice cases. The court determined that the claims against the broker did need to be supported by an affidavit of merit and therefore had to be dismissed. However, being as the broker waited until the later stages of the case before raising the insured's failure to supply an affidavit, the claims were dismissed without prejudice to the insured's right to re-file them with the necessary affidavit. ■

No coverage where insured concealed chartering activities

Axis Reinsurance Co. v. Henley, 2009 U.S. Dist. LEXIS 98718 (N.D. Fla. Oct. 22, 2009)

This was a declaratory-judgment action against an insured whose vessel, a 34-foot Fountain T-top, sank dockside following an offshore fishing trip. At trial the court found that the insured had intentionally concealed the fact that he advertised and used the vessel for charter fishing trips. There was uncontested evidence that charter use presents a greater risk than purely personal use and that the insurer did not write insurance for vessels in the charter business.

Notably, the court declined to apply uberrimae fidei because the policy contained a clause prohibiting intentional concealment or misrepresentation, and in the Eleventh Circuit such a clause means that the policy cannot be rescinded unless the insured's concealment or misrepresentation was intentional. Even applying this heightened scienter requirement, however, the court determined that the insured had intentionally concealed his chartering activities from the insurer.

The court provided several alternative reasons why coverage was unavailable. First, the loss was not fortuitous inasmuch as it was caused by improper maintenance, namely, a missing starboard-side bilge pump, the absence of an anti-siphon loop, and an apparently inoperable port-side bilge pump.

Second, the policy excluded coverage for losses caused by wear and tear or mechanical breakdown, and the court determined that the exclusion applied here because the sinking was a result of wear and tear

on the bilge pumps and a breakdown of the port-side pump.

Third, the insured breached the negative implied warranty of seaworthiness inasmuch as he had left the vessel in the water following the charter trip, knowing that there was a significant amount of water in the bilge and that the bilge pump was not working correctly. Although rain subsequently compounded the vessel's problems, the court noted that rain would not have resulted in a capsizing had the vessel been looked after properly.

Finally, the court determined that, contrary to the insurer's argument, the insured did have an insurable interest in the vessel even though he was not the titled owner. The insured was acting in the capacity of a bailee and agent for the titled owners, and had the benefit of using the vessel. This was sufficient to vest him with an insurable interest. ■

Insurer denied summary judgment where materiality of misrepresentation was in dispute

Joseph v. Great Lakes Reinsurance (UK) PLC, 2010 U.S. Dist. LEXIS 24454 (N.D. Ohio March 16, 2010)

A high performance Baja Outlaw was allegedly stolen, and the marine insurer sought summary judgment on the basis that the person who applied for the insurance had, in filling out the insurance application, misrepresented himself as the vessel's "owner" and overstated the purchase price by a factor of two. Applying New York state law, the court denied the insurer's motion because there was an ambiguity in the insurance application and because the insurer did not conclusively establish the materiality of the applicant's misrepresentations. (Presumably New York law was applied due to a choice-of-law provision in the policy, but the opinion has no discussion on this point. Nor is there any indication why uberrimae fidei was not applied.)

The facts showed that the applicant was not the titled owner of the vessel but instead had paid $52,500 under a "partnership vessel agreement" that gave him custody and control of the vessel and responsibility for keeping it insured. The partnership agreement was the last in a chain of similar partnership or "conditional purchase agreements" by which the right to use the vessel had been successively conveyed to different people. In this manner, the titled owner was several layers removed from operational control of the vessel.

In reviewing New York insurance cases, the court stated that an answer to a question on an insurance application cannot be the basis for rescission under New York law if a reasonable person in the applicant's position could have interpreted the question as the applicant did. And, the court stated, the insurer's position on materiality should be corroborated by the insurer's own underwriting practices "such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application."

In this case, the application did not expressly require the applicant to identify the "owner" but simply asked for the name of the "insured." Further, the insurer's only factual support for the motion was an affidavit from an in-house senior underwriter, who stated that the policy would not have been issued had the applicant's "partnership" arrangement been disclosed. But the insurer did not offer any written guidelines to corroborate the underwriter's position or other evidence that applicants in a similar situation would not have obtained a policy from this insurer.

Secondly, the court determined that, at least for purposes of summary judgment, the insurer had not shown that the misrepresentation of the purchase price was material. The court indicated that the motion should have been supported by written underwriting guidelines or other evidence that the risk would have been rejected had the true purchase price been disclosed. ■

Intentional-acts exclusions bar coverage for alleged assault

Markel American Ins. Co. v. Staples, 2010 U.S. Dist. LEXIS 7148 (E.D. Va. Jan 28, 2010)

After an onboard altercation in which he allegedly assaulted a woman, a sailboat owner was sued for battery, false imprisonment, intentional infliction of emotional distress, negligent threats, negligent false imprisonment, and negligent infliction of distress. The owner sought coverage from his marine insurer and his homeowners insurer. Each insurer sought a declaratory judgment, claiming there was no coverage on account of their respective policies' intentional-acts exclusions and because there had been no "occurrence" as defined in the policies.

The court agreed that the intentional-acts exclusions applied, notwithstanding the "negligence" theories listed in the underlying complaint. The victim's suit was clearly premised on an intentional assault allegedly committed by the insured, and the mere recitation of negligence in the complaint did not overcome the exclusion.

The court also agreed with the insurers that the alleged assault was not an "occurrence," which the policies defined as an "accident." Under Virginia law, an intentional act is neither an occurrence nor an accident, and the court again declined to allow unadorned assertions of negligence in the complaint to overshadow what was at bottom an allegation of intentional misconduct. Accordingly, both insurers were excused from any coverage obligation. ■

Powered-watercraft exclusion bars coverage for Kite Tube accident

Allstate Casualty Ins. Co. v. Warchol, 2010 U.S. Dist. LEXIS 2741 (N.D. Ohio Jan. 13, 2010)

An Allstate homeowners policy excluded coverage for injuries arising out of "loaning… watercraft… if the watercraft… is powered by one or more outboard motors with more than 25 total horsepower."

The insureds owned a Kite Tube, a circular inflatable that could skim across the water and become airborne when towed behind a powerboat. They loaned it to someone who began towing it behind a boat powered by a 120-horsepower engine. The person riding on the Kite Tube was injured and sued Allstate's insureds.

Allstate sought a declaration of no coverage based on the watercraft exclusion. The insureds conceded that the Kite Tube was a "watercraft" but argued that the exclusion did not apply because the Kite Tube itself was not "powered by one or more outboard motors with more than 25 total horsepower" but was simply being towed by a motorboat that was so powered.

The court rejected this argument and concluded that the Kite Tube was "powered by" the motor on the towing vessel. "In this case the Kite Tube would have been stationery unless the boat was pulling it. Under the plain and ordinary, and entirely unambiguous meaning of the term 'powered by,'" the exclusion applied, and hence there was no coverage for the underlying incident. ■

Salvage

Court dismisses salvor's unjust enrichment claim against insurer

Absolute Marine Towing & Salvage, Inc. v. S/V INIKI, 2010 U.S. Dist. LEXIS 11772 (M.D. Fla. Feb. 10, 2010)

A salvor brought suit against the salved vessel and later amended the complaint to include a claim against the salved vessel's insurer. Based on the principle of unjust enrichment, the theory was that the salvor's services had provided a direct benefit to the insurer by preventing oil pollution and more extensive damage to the vessel, which the insurer otherwise would have had to cover.

The insurer sought dismissal on the grounds that Florida's non-joinder statute, Section 627.4136, does not permit anyone other than an insured to bring suit against a liability insurer without first obtaining a settlement or verdict against the insured. The insurer also argued that the salvor failed to state a legally cognizable claim.

The court determined that the non-joinder statute did not bar the salvor's claim because the salvor was not attempting to recover under the insurance policy per se but was instead seeking compensation for a ben-

efit conferred on the insurer.

But the court agreed that the salvor's claim had to be dismissed. Although maritime law recognizes the theory of unjust enrichment, the salvor in this case did not allege that there was anything unjust or inequitable about the insurer's conduct. The court noted that the salvor "has not cited, and the Court's research has not uncovered, any case in which a party has been allowed to recover against an insurer for no other reason than because it did something that allowed the insurer to avoid having to pay out on its policy." ■

Res judicata precludes subsequent suit against underwriters

Blue Water Marine Services, Inc. v. All Underwriters Subscribing to Cover Note JY416008X, 2010 U.S. Dist. LEXIS 1521 (S.D. Fla. Jan. 8, 2010)

A yacht sailing off the coast of Florida, the *Natalita III*, struck a reef and grounded in shallow waters. The yacht sent out a distress call and requested the services of a specific towing company, but a towboat from Blue Water Marine Services ("Blue Water") arrived first and offered its services at a lower price. The *Natalita III* accepted Blue Water's offer. After Blue Water began towing the yacht, it demanded that the yacht's captain execute a contract purporting to entitle Blue Water to a pure salvage award, threatening to cut the *Natalita III* loose and adrift. The yacht's captain signed the contract.

Blue Water filed suit against the *Natalita III*, demanding a pure salvage award. Blue Water also sued Santam Insurance Co. Ltd. ("Santam"), an underwriter for the *Natalita III*, and Santam moved to dismiss for service reasons. The district court entered final judgment against Blue Water on the grounds that the contract was unenforceable and violated public policy. The Eleventh Circuit affirmed, remanding the case for Blue Water to pursue a pecuniary benefit claim against Santam. Rather than pursuing the claim against Santam in district court, Blue Water voluntarily dismissed Santam from the suit without prejudice and filed a new action in state court against Santam and Sagicor General Insurance Ltd. ("Sagicor"), another underwriter for the *Natalita III*. The underwriters removed the matter to the district court and moved for dismissal based on res judicata and collateral estoppel.

The district court dismissed the matter. The court determined that all elements for a claim to be barred under res judicata, and for an issue to be precluded under collateral estoppel, were satisfied.

Although neither Santam nor Sagicor were specifically involved with the original final judgment, the court found that the insurers and the vessel were in privity for these purposes, and their interests were aligned. With respect to claim preclusion, the court found that (1) there was a final judgment against Blue Water on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) since the insurers were in privity with the original defendants, the parties were effectively identical in both suits; and (4) the same cause of action was involved in both cases.

Similarly, the court found that collateral estoppel applied to the suit in question, as (1) the issue at stake was identical to that of the prior litigation; (2) the issue was actually litigated; (3) the determination of the issue was a critical and necessary part of the judgment in the prior litigation; and (4) Blue Water had a full and fair opportunity to litigate the issue in the first proceeding. ■

Salvage award for freeing vessels from sinking dock

O'Hagan v. M&T Marine Group, LLC, 2010 U.S. Dist. LEXIS 31154 (S.D. Fla. March 31, 2010)

As Hurricane Wilma came ashore in South Florida, two marine electricians whose apartments were adjacent to a marina noticed three brand-new vessels taking on water. The reason was that the vessels were moored to a floating dock which was itself on the verge of sinking. The two electricians headed out into the storm, cut the mooring lines, relocated the vessels to a sea wall a few yards away, and then took cover during the height of the hurricane. (The dock sank after the mooring lines were cut.) Once the weather subsided, they returned to the vessels to pump out the water. The total time expended was about three hours, and a portion of the work was done during hurricane force winds with debris flying through the air.

Taking into account the usual factors, the court granted a salvage award of 15 percent of the post-casualty value. Since the vessels had a combined value of approximately $1.9 million, this amounted to an award of nearly $300,000, divided equally between the two salvors.

Salvage ends once immediate danger has passed

Lewis v. JPI Corp., 2009 U.S. Dist. LEXIS 104922 (S.D. Fla. Nov. 9, 2009)

Mr. and Mrs. Lewis, a married couple living in a condominium complex with a private marina, happened upon a docked vessel listing to its port side, with its swim platform under water and attached personal watercraft partially submerged. Mr. Lewis boarded the vessel and discovered several inches of water in the engine room, which he determined to be the result of a detached air conditioner hose. Mr. Lewis used his own screwdriver to reattach the hose, which took about ten minutes.

The following day, the couple spent $100 to have the water pumped out of the vessel. They subsequently recorded a $156,000 lien on the vessel, which was originally purchased for $1,445,000.

The district court determined that the couple satisfied their burden of demonstrating (1) a maritime peril from which the vessel would not have been rescued without their assistance; (2) a voluntary act by the couple without a pre-existing duty to render assistance; and (3) success in saving at least part of the property at risk.

However, the court ultimately determined that the vessel was no longer in peril once Mr. Lewis reattached the air conditioning hose, and the salvage therefore ended at that point. The pump-out and additional work was not considered when calculating the salvage to determine the couple's award.

The court evaluated the *Blackwall* factors to determine the amount of the award, finding that (1) the labor expended was minimal, and could have been less had Mr. Lewis simply unplugged the vessel from shore power and thereby shut down the air conditioner; (2) the couple was prompt and demonstrated a layperson's skill and energy; (3) Mr. Lewis employed only a screwdriver and thus the value of his property put at risk was nominal; (4) the risk incurred by Mr. Lewis personally was minimal and would have been less had he unplugged the vessel from shore power; (5) the value of the property saved was $434,000, the final purchase price of the vessel after the incident; and (6) the vessel was saved from a low to medium degree of danger, as the vessel was steadily but slowly taking on water in a shallow marina.

Mr. and Mrs. Lewis recovered a salvage award of 5% of the vessel's value—$21,700, plus prejudgment interest. ■

Jurisdiction and Procedure

Eleventh Circuit reverses forum non conveniens dismissal

Wilson v. Island Sea Investments, Ltd., 590 F.3d 1264 (11th Cir. 2009)

While vacationing at the Island Palm Resort in the Bahamas with her daughter, sister, and two cousins, Daisy Emory embarked on a banana boat ride operated by Paradise Watersports, LLC. She informed the Paradise Watersports employee charged with operating the boat that she and another in her party were unable to swim. During the course of the excursion, the banana boat capsized and Emory fell into the water and died.

Emory's daughter filed suit in the Southern District of Florida against several entities connected with the Island Palm Resort, but not against Paradise Watersports or the employee who operated the banana boat. Defendants collectively filed a motion to dismiss, arguing the case should be heard in the Bahamas. The district court agreed and dismissed the case on forum non conveniens grounds.

The Eleventh Circuit reversed and remanded for a more thorough forum non conveniens analysis. Specifically, the Southern District had erred by not considering the parties' contacts with the Middle District of Florida, where many of the witnesses and documents were located (and where plaintiff conceded the suit

should have been filed in the first place). The appeals court reiterated a prior holding that "the relevant forum for purposes of federal forum non conveniens analysis is the United States as a whole." On remand the Southern District would also be free to consider transferring the case to the Middle District.

In addition, the Southern District had erred by not considering the difficulties the plaintiff would face in prosecuting the case in the Bahamas, including the unavailability of contingency-fee arrangements, the high hourly rates of Bahamian attorneys, and the risk of fee-shifting under Bahamian law if the plaintiff lost the case. These and other similar "private interest factors" should have been taken into account in deciding whether to dismiss for forum non conveniens. ■

No admiralty jurisdiction over fall on floating-dock ramp

In re MLC Fishing, Inc., 2010 U.S. Dist. LEXIS 13030 (E.D.N.Y Feb. 16, 2010)

Julio Angel Velez was allegedly injured at Captain Mike's Marina in Howard Beach, New York, when, intending to board the "CAPT MIKE" to go on a fishing expedition, he fell due to an alleged "slippery, slick, greasy, oily, trap-like, dangerous and hazardous condition" of the "premises and ramp." To board the CAPT MIKE, Velez was required to descend a metal ramp that was neither attached permanently to the land nor to the CAPT MIKE. The ramp led to a floating dock, which itself had to be traversed to access the steps to the CAPT MIKE.

Velez filed an action in the Supreme Court of Queens County against the owner of the CAPT MIKE. The owner subsequently filed a limitation action, invoking subject matter jurisdiction in admiralty.

Velez moved to dismiss the action for lack of subject matter jurisdiction. Specifically, Velez argued that admiralty jurisdiction did not exist because accident did not occur aboard the CAPT MIKE. The owner in turn argued that the injury did not occur upon land but upon an appurtenance of the vessel because the ramp and floating dock served as the vessel's only means of ingress and egress, and was thus the equivalent of the vessel's gangway.

The Eastern District of New York determined that no admiralty tort jurisdiction existed to support the limitation action. The court drew a distinction between a gangway, which may be considered part of the vessel, and a case such as this, in which the ramp leads to floating docks, and cannot thus be considered an extension of the vessel for the purpose of establishing admiralty jurisdiction. ■

Torts

Indemnity between owner and bareboat charterer for passenger injury

Wills v. One Off, Inc., 2010 U.S. Dist. LEXIS 34922 (D. Mass. April 8, 2010)

While attempting to board a yacht, a passenger (who was a guest of the charterer) fell from the gangplank into the water. Dislodged from its position, the gangplank then fell into the water and struck her. She sued the yacht owner, the charterer, and the captain, and the owner sought indemnification from the charterer.

Under the charter agreement, the yacht was "chartered on a demise basis," and the charterer was obliged to indemnify the owner against "any and all liability to third parties for loss or damage attributable to Charterer's acts or omissions." The agreement also specified that "during the charter term, Charterer shall have full authority regarding the operation and management of the Yacht and is solely responsible for retaining a master and crew."

The court determined that the agreement was clearly a demise charter because the owner had relinquished possession and command to the charterer. In this case the charterer had also engaged the captain pursuant to a services agreement that required the captain to follow the charterer's orders. Provisions in the charter party that constrained the charterer's use of the vessel—such as a provision restricting the use of the vessel to pleasure purposes and a limitation on the number of guests who could stay aboard—were typical in demise yacht chartering and did not invest the owner with operational responsibility.

Accordingly, the charterer would have to indemnify the owner to the extent the gangway incident was attributable to the acts or omissions of the charterer or his retained captain and crew. However, to the extent the incident was caused by a defect in the vessel that preexisted the commencement of the charter, the owner would not have a right of indemnification. ■

Owner denied summary judgment on injury claim resulting from encounter with another's wake

Reeves v. Coopchik, 2009 U.S. Dist. LEXIS 99920 (D. Conn. Oct. 27, 2009)

Nina Reeves suffered a spinal injury while a passenger aboard a boat owned by Scott Coopchik. At the time of the incident, Coopchik was a 57-year-old retired businessman who had spent approximately 100 hours navigating the Rinker Cuddy Cabin Motorboat upon which the incident occurred. He was an experienced boater, having owned and navigated several boats in the Long Island Sound and Caribbean since the 1970s.

Coopchik navigated the boat slowly through Norwalk Harbor at about 5 miles per hour. The boat then entered a 200-feet-wide channel and Coopchik brought the boat to a planing speed of 16-18 miles per hour. Shortly after the vessel accelerated, the boat crossed the wake of a 30-35 foot fishing vessel traveling "swiftly" in the opposite direction. Reeves stated that the boat went airborne and came down with a crash upon the water, at which point she screamed that she hurt her back.

Coopchik filed a motion for summary judgment, arguing that there were no material issues of fact to preclude the court from finding that he was not negligent as a matter of law in the operation of his vessel. Relying upon predictably conflicting reports from the experts for both sides, the court had no problem determining that a material issue of fact did exist as to whether Coopchick had navigated over the wake in a reasonably safe manner. ■

In Ky. collision case, jury needed no instruction on the Rules of the Road

Kelley v. Poore, 2009 Ky. App. LEXIS 251 (Dec. 18, 2009)

Nineteen-year-old Kendra Kelley was injured when the personal watercraft(PWC) she was operating collided with a fishing boat owned by John S. Poore. The collision occurred on Kentucky's Lake Herrington, where Kelley was operating her boyfriend's PWC. After only a few minutes on the PWC, she became concerned for her safety. Kelley testified that she was near the middle of the lake in very choppy water when she decided to head for the shoreline. She indicated that she had been travelling parallel to the shore for approximately two to three minutes when she looked over her left shoulder; she was immediately struck by Poore's fishing boat. Kelley testified that Poore collided with her PWC on the left side and that she suffered a severe fracture of her lower right leg. Kelley denied that Poore's boat was trying to overtake the PWC at the time of the collision.

At trial, Kelley proposed jury instructions which set out the respective duties of vessels based on their relative bearings and on an overtaking vessel's intention to overtake. The trial court rejected the proposed instructions, instead instructing the jury on the general duty to exercise ordinary care for one's safety the safety of others. The jury returned a verdict against Kelley, and on appeal, the Court of Appeals of Kentucky affirmed. The Court of Appeals stated that it was unnecessary for the trial judge to accept Kelley's "complex and technical proposed instruction defining Poore's duties," in light of Kentucky's policy that "there should not be an abundance of factual detail in jury instructions; instead, the instruction should provide only the 'bare bones' of the question for the jury."■

Financing

Interest on deficiency judgment to be calculated at statutory rate

Comerica Bank v. Stewart, 2009 U.S. Dist. LEXIS 114237 (E.D. Mich. Dec. 8, 2009)

In a ship-mortgage foreclosure action, the court declined to use the promissory note's "default interest rate" as the basis for post-judgment interest. Instead, post-judgment interest was to be based on the (lower) statutory rate.

The borrowers had executed a promissory note and preferred ship mortgage in connection with their purchase of a Sea Ray yacht. They subsequently defaulted, and the lender brought an action for possession in Michigan state court.

Relying on the preferred ship mortgage, the borrowers removed the case to federal court. The parties then agreed to sell the vessel to a third party, with the proceeds paid to the lender and the resulting deficiency reduced to a judgment entered by the federal court.

The parties could not, however, agree on the rate at which interest would accrue on the deficiency judgment. The lender argued that the "default interest rate" in the promissory note should apply. The borrowers contended that post-judgment interest should be based on 28 U.S.C. § 1961(a) because the action arose under federal law and the judgment was sought in federal court.

The court ruled that the statutory rate would apply. While some courts have allowed for the possibility of contracting around the federal post-judgment rate, in this case the promissory note's provision for "default interest" did not explicitly extend to post-judgment interest.

Thus, if a ship mortgagee wishes to have post-judgment interest calculated at a contractual rate, at a minimum the loan documents will need to explicitly provide for this. ■

Products Liability and Warranties

Corporate owner, not beneficial owner, has standing to assert defect claims in La.

Kelly v. Porter, Inc., 2010 U.S. Dist. LEXIS 5600 (E.D. La. Jan. 22, 2010)

To avoid Louisiana sales tax, John Kelly formed a Delaware limited liability company to purchase and hold title to a 2007 Formula powerboat. While performing the pre-departure check in preparation for a cruise with some friends, Kelly discovered that a number of the instruments and equipment that relied on batteries were not functioning. He nevertheless took the vessel out on the cruise and returned without incident. Noticing that the air conditioning system had also shut down and believing it was related to a dirty sea-strainer, he cleaned the strainer but failed to close the seacock to prevent water from entering the vessel. Kelly left the vessel for the evening, only to receive a call later that the vessel was taking on water. He returned and discovered that water had filled the engine compartment. Kelly filed a claim for several hundred thousand dollars for repairs with his insurer, Great Lakes, who paid the claim.

Kelly and Great Lakes then brought suit against the vessel manufacturer, the battery charger manufacturer, and the dealer who sold the vessel. Kelly asserted claims for loss of use and emotional damages, and Great Lakes sought recovery in subrogation for its payment to Kelly, as well as the civil-law remedy of redhibition. Kelly later amended his complaint to include his LLC as a plaintiff.

In deciding whether Kelly could bring an action in his own right, the court noted that ownership of the vessel was governed by Louisiana state law. Although the vessel's registration in the name of the LLC did not conclusively establish ownership, the court determined that under Louisiana law Kelly could not maintain an action for damages to the vessel. The LLC was a "separate juridical entity" that had the sole interest in the vessel and the exclusive right to sue for damages sustained in respect to the vessel. Kelly's claims were

therefore dismissed. And, since the vessel was not operated for profit and the LLC, as an artificial entity, was incapable of suffering non-pecuniary loss, the LLC's claims for loss of use and emotional damages had to be dismissed as well.

Turning to Great Lakes' claims, the court noted that there were numerous questions of fact as to Kelly's understanding of the vessel's systems, their state of repair, and the existence of potential defects. One of the key questions was whether the vessel should have come equipped with a back-up battery charger. Thus, the defendants' were denied summary judgment on these claims. Nor did Great Lakes' status as a subrogee preclude it from asserting a claim for redhibition under Louisiana law.

Finally, the court dismissed Great Lakes' claim for punitive damages because, even assuming such a claim could theoretically be asserted in the case like this, there was no allegation that the manufacturers had acted willfully or wantonly. ■

Robins Dry Dock bars charterer's claims against marina

Green Turtle Bay, Inc. v. Zsido, 2010 U.S. Dist. LEXIS 18710 (W.D. Ky. March 3, 2010)

In an action arising from a dispute over modifications to a Carver 506 motor yacht, the district court for the Western District of Kentucky reaffirmed the continuing applicability of the *Robins Dry Dock* rule; held that claims for tortious interference with a maritime contract require proof of intent; and found that charter hire is appropriately considered as evidence of loss-of-use damages.

The Zsidos contracted with a marina to make modifications to their vessel. The Zsidos were dissatisfied with the work and a disagreement arose as to the marina's efforts to remedy the problem. The Zsidos hired another facility to make repairs and refused to pay the marina.

Consequently, the marina asserted a maritime lien on the vessel and had it arrested. The marina also filed in personam claims against the Zsidos. Various companies owned by the Zsidos intervened, claiming they had planned to use the vessel at boat shows to model a prototype "command chair" developed by Mr. Zsido. The Zsido companies cross-claimed for anticipated profit lost as a result of not having use of the vessel.

The marina moved for summary judgment on the Zsido companies' claims for breach of contract and tortious interference with contract, and to exclude evidence regarding charter hire as a measure of damages.

Finding that the Zsido companies' charter agreement with the Zsidos did not amount to a bareboat charter, the court concluded that the claims for economic damages had to be dismissed under *Robins Dry Dock* because the Zsido companies did not have a proprietary interest in the vessel. In addition, the Zsido companies' tortious interference claims were dismissed because there was no evidence that the marina had intentionally interfered with the charter arrangement. To the contrary, the marina was not even aware of it.

Finally, the court ruled that lost charter hire could be used as a measure of the Zsidos' personal (non-corporate) claims for loss of use. Although Mr. Zsido had executed the charter agreement both as owner of the vessel and as president of the chartering company, there was no showing that the chartering company was simply his alter ego. ■

Claim for inadequate warning dismissed where multiple existing warnings were not heeded

Smith v. The Coleman Co., 2010 U.S. Dist. LEXIS 9664 (M.D. Ala. Feb. 4, 2010)

In a product-liability action arising under Alabama law, brought by a plaintiff who was injured by a polypropylene utility line that parted while being used to tow her son on an inner tube, the District Court for the Middle District of Alabama granted summary judgment for defendants.

The operator of the vessel had failed to read the warning on the packaging insert, which stated that the working load limit of the rope was only 175 pounds. In addition, a cautionary message advising against placing knots in the line was either not read or not heeded by the operator. Similarly, the inner tube had a warning label recommending the use of a tow rope with a working load of at least 1500 pounds, and this too was

either not read or not heeded.

Given the existing warnings that went unheeded, the court determined that there was insufficient evidence that any other warning would have been followed, and therefore the plaintiff's claim of inadequate warning failed under Alabama law. The express and implied warranty claims were also dismissed as a matter of law. ■

Repairer solely at fault for heater fire

Oswalt v. Resolute Industries, Inc., 2010 U.S. Dist. LEXIS 9383 (W.D. Wash. Feb. 4, 2010)

Plaintiff Oswalt smelled coolant coming from his onboard heater and contacted defendant Resolute Industries to repair the heater. Resolute's employee removed the defective heater and shut off the breaker to the heater before receiving a call to assist elsewhere. While the employee was away, the heater unit set fire to flammable materials onboard.

Oswalt's insurer paid the claim, and then filed this subrogated claim against Resolute. Resolute, in turn, filed a third-party action against the Webasto Products, the heater's manufacturer, alleging negligence and breach of contract or warranty. Webasto moved for summary judgment on all claims against it.

Resolute set forth two theories against Webasto: (1) its repair instructions were deficient and (2) the heater should have had an automatic current cutoff.

Because Webasto was able to demonstrate that Resolute's employee had never attended manufacturer-sponsored training, the court found that Resolute's claims asserting inadequate instruction were unsupportable; there was no evidence that the employee had reviewed any of Webasto's repair instructions before the fire. Accordingly, summary judgment was granted on that theory.

The court also found that Resolute's expert was unable to establish his expertise as to the defective-design claim; there was no evidence that other manufacturers employed an automatic cutoff as suggested by the expert, and no evidence that such a device would be feasible. Therefore, court granted summary judgment as to the negligent design claims, characterizing the expert opinion as mere speculation.

Finally, the court turned to Resolute's breach of contract and warranty claims against Webasto. Webasto's sole defense was that Resolute, as a third-party claimant, was not entitled to maintain such claims because it was not in privity with Webasco. The court denied Webasto's motion for summary judgment on this point, noting that a third-party plaintiff in an admiralty suit is permitted to assert the original plaintiff's claims in addition to its own.

In a later ruling following trial (2010 U.S. Dist. LEXIS 22218), the court concluded that the oral contract for repair between Oswalt and Resolute was an enforceable maritime contract and included an implied warranty of workmanlike performance. This warranty was breached by Resolute's employee, who was solely at fault for the fire because he failed to verify that the power to the heater was secured and that the unit was safely positioned before leaving it.

The court also ruled that comparative fault is not available as a defense in a breach of contract case and that Oswalt was entitled to recover the expenses of alternate living arrangements while the fire damage was being repaired. The rule in admiralty barring loss-of-use claims for pleasure craft was inapplicable since Oswalt used the vessel as his home rather than purely for pleasure. ■

Propeller-guard claim against builder dismissed where boat did not come equipped with propeller

Regan v. Star Craft Marine, LLC, 2010 U.S. Dist. LEXIS 25045 (W.D. La. March 17, 2010)

In a product-liability action involving leg injuries caused by an unguarded outboard-motor propeller, the District Court for the Western District of Louisiana granted partial summary judgment for the defendant pontoon boat manufacturer, finding that the manufacturer had no obligation to give warnings or instructions about the advisability of installing a propeller guard.

Critical to the finding was the fact that the vessel manufacturer supplied the vessel with outboard motor installed, but without a propeller attached. The contract called for the purchaser to supply the propel-

ler. Because the purchaser was so obligated, the court determined that the purchaser was in the best position to decide whether to install a propeller guard.

No tort claims for paperwork mix-up

Adcock v. South Austin Marine, Inc., 2009 U.S. Dist. LEXIS 104264 (S.D. Miss. Oct. 30, 2009)

In a case involving economic loss claims by the buyer of a recreational vessel against the seller of the vessel, the court ruled that tort claims against a seller for purely economic damage (without property damage or personal injury) are precluded by Mississippi law.

Adcock and South Austin Marine (SAM) discussed the sale of two very similar vessels and signed a sales contract as to one of them. SAM mistakenly delivered the wrong vessel, which Adcock accepted. Several months later, SAM was attempting to sell the other vessel when it realized that it had passed the incorrect title paperwork to the buyer of the first vessel sold.

Adcock initially agreed to exchange the mistaken paperwork with SAM for the correct paperwork, but subsequently disavowed this willingness and demanded either return of the sales price or reimbursement for the sales tax that he had paid, because he would have to pay sales tax on the "new" vessel because of the new paperwork. Ultimately, Adcock filed suit alleging fraud and negligence and seeking damages amounting to the vessel's purchase price, the sales tax and insurance paid, as well as loss of use damages.

In deciding plaintiff's claim for these alleged economic losses, the court found that Mississippi law would not permit recovery of economic loss damages in tort (absent personal injury or property damage claims) and that recovery for economic damages would only be allowed under Mississippi's enactment of the UCC. Because Adcock pled no cause of action based on contract theories or the UCC, summary judgment was granted in SAM's favor. ■

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

Graphic Design and Layout
Cindy Kang
cindusmaximus@gmail.com

Contributors to This Issue
Asher B. Chancey
Jesse L. Kenworthy
Joseph F. Kulesa

Cite as 19 Boating Briefs No. 1 (Mar. L. Ass'n) (Daniel H. Wooster Ed. 2010).

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