BOATING BRIEFS

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

Lars Forsberg, Chairman
Volume 19 Number 2

Fall/Winter 2010

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

- The Editorial Staff

Also in This Issue

Subrogation Action Dismissed Due to Claim Splitting

Federal Insurance Co. v. Cheoy Lee Shipyards, Ltd., 2010 WL 2557486 (S.D. Fla. June 23, 2010)

The Southern District of Florida dismissed a subrogated insurer's suit against a yacht builder and seller, holding that the insurer impermissibly split causes of action by not asserting its claims in an earlier suit brought by the insured against the same defendants.

In the earlier suit the yacht owner asserted breach of contract and warranty claims, alleging numerous deficiencies such as undersized rudders, problems with the paint, inadequate deck fittings, and substandard electrical equipment. The owner's complaint mentioned that the vessel's coach roof was damaged but expressly stated that the owner was not seeking recovery for that damage, no doubt because it was covered by his insurer. The owner's suit was eventually settled and dismissed with prejudice.

The insurer then brought a separate subrogation action based on the coach-roof damage, and the defendants moved for summary judgment on the theory that the insurer was impermissibly splitting claims.

Applying Florida law (this was a diversity case), the court ruled that although the coach-roof damage was not at issue in the earlier suit, the insurer's claims were essentially the same as the owner's in that they alleged the same kind of wrong: construction defects that caused damage to the yacht or diminished its value. The coach-roof incident occurred nine months before the owner filed his suit, the damage from that incident was known to the insurer and quantifiable, and hence the insurer should have asserted its subrogation claim by joining in the owner's suit. The court therefore entered judgment for the defendants. ■

Insurance

Named-Operator Warranty Needed No State Approval

Markel American Insurance Co. v. Bachmann, 2010 WL 3809832 (W.D. Wis. Sept. 24, 2010)

The Western District of Wisconsin held that a policy on a high performance boat was a policy of "ocean marine insurance" and not subject to a state law requiring that policy wording be approved by the state insurance commissioner. The policy's named-operator warranty was therefore enforceable, and the insured's breach of the warranty left him without coverage.

The vessel at issue was the subject of a prior coverage dispute that arose from an apparent collision with a submerged object (*Progressive Northern Insurance Co. v. Bachmann*, 2004 U.S. Dist. LEXIS 6823 (W.D. Wis. April 19, 2004) (reported in Boating Briefs Vol. 13:1)). In that case, the court applied Wisconsin law and held that the insured's breach of a maximum-horsepower warranty did not preclude coverage because the insurer did not give timely notice, required by Wisconsin law, that it was relying on the breach as a basis to deny coverage.

Several years later, the same vessel flipped over while being operated by someone other than the owner or his wife, who were the only people allowed to operate the boat as per the named-operator endorsement. Coverage litigation again ensued, this time with a different insurer.

After numerous rounds of motion practice, the court determined that the only issue in dispute was the applicability of Wisconsin Statutes § 631.20(1). The statute provides that—except in the case of "ocean marine insurance"—an insurer may only use policy wordings that have been approved by the state insurance commissioner. The named-operator endorsement did not have such approval.

The insured argued that the term "ocean marine insurance" applied only to vessels operating on oceans and not to recreational boats plying inland waterways.

Noting that the jurisdiction of the American admiralty court extends to all navigable waters, whether ocean or inland, the court held that the policy was indeed one of "ocean marine insurance" because it insured the vessel against traditional marine perils. This holding was buttressed by an informal opinion issued by the Wisconsin insurance commissioner (though the commissioner had originally taken the opposite view in response to an inquiry from the insured's counsel). Since the endorsement wording did not need to be approved by the insurance commissioner, and the insured had no other basis to overcome his breach of the endorsement, there was no coverage. ■

Proximate Cause vs. Concurrent Cause in Yacht Sinking

New Hampshire Insurance Co. v. Krilich, 2010 WL 2825574 (11th Cir. July 20, 2010) (unpublished)

A yacht developed a fracture in its fiberglass keel, allowing water to enter a sewage holding tank. The watertight cover of the holding tank was unsecured, and water began to enter the engine room. The sea-chest covers were not securely fastened, the engine room bilge pumps were either turned off or inoperable, and the bilge alarms did not function. As the water flowed in, the yacht partially sank at its berth. The weather was calm.

The insurer sought a declaratory judgment on the basis of a policy provision that excluded coverage for damage arising out of "lack of reasonable care or due diligence . . . in the operation or maintenance" of the yacht. After a five-day bench trial, the district court concluded that the proximate cause of the sinking was not the keel fracture but rather the insured's failure to properly secure the sewage tank and sea-chest covers. The district court noted that the experts on both sides agreed that the sinking would not have occurred in the manner it did had the sea-chest covers been secured. Accordingly, the district court found for the insurer.

On appeal, the insured argued that the district court should have applied Florida's "concurrent cause doctrine" rather than the maritime rule of proximate cause. In the insured's view, the keel failure was a concurrent cause of the sinking, and since there was no evidence that the keel failure was the product of poor maintenance, the claim should have been covered.

The Eleventh Circuit assumed for the sake of argument that state law could supply the causation stand-

ard in a marine insurance dispute, but decided that Florida's concurrent cause doctrine did not apply in any event because the keel fracture was not a "separate and distinct risk." Rather, the unsecured sea-chest covers were the last link in the unbroken chain of events connecting the keel fracture to the sinking. As the keel fracture was not an independent cause of the sinking, it did not serve as a basis for coverage under the policy. ■

Financing

Loan Guarantor Secures Jury Trial on Counterclaims against Mortgagee

Bank Meridian, N.A. v. M/Y "IT'S 5 O'CLOCK SOMEWHERE," 2010 WL 3169367 (D.S.C. Aug. 6, 2010)

A lender filed a mortgage-foreclosure action under Fed. R. Civ. P. 9(h), designating the claim as one in admiralty and electing a bench trial. One of the *in personam* defendants, a guarantor of the debt, counterclaimed for damages based on fraud, misrepresentation, conspiracy, and a host of other theories. He also demanded equitable relief in the form of rescission, accounting, and dissolution. He alleged that the lender had induced him to invest in the mortgaged yacht by making false representations about the borrowers' solvency. His counterclaims included a jury demand, which the lender moved to strike.

Applying the Fourth Circuit's decision in *In re Lockheed Martin Corp.* 503 F.3d 531 (4th Cir. 2007), the court held that notwithstanding the lender's designation under Rule 9(h), the guarantor was entitled to a jury on all of his counterclaims except those seeking equitable relief. The counterclaims were compulsory, and although there was no basis for federal jurisdiction apart from admiralty, the guarantor had the right under the Seventh Amendment to have his claims for money damages heard by a jury. The entire case would be tried simultaneously, with the mortgagee's admiralty claims and the guarantor's equitable claims tried to the judge, and the guarantor's money-damage claims tried to a jury. ■

Marinas

Yacht Club's Exculpatory Clause Upheld

Martin v. Metropolitan Yacht Club, 2010 WL 3044052 (1st Cir. Aug. 5, 2010) (unpublished)

In a decision authored by Justice Souter, the First Circuit upheld a "red letter" clause shielding a yacht club from liability.

Plaintiff brought a limitation action after his vessel caught fire and damaged nearby boats while in winter wet storage. The cause of the fire was faulty wiring beneath the dock adjacent to Plaintiff's vessel. There was no allegation that the yacht club was grossly negligent.

As proceedings ballooned in concursus, the yacht club moved for summary judgment that it was liable to nobody by virtue of a club by-law expressly absolving it of liability for, among other things, fire. The magistrate judge granted the motion, and Plaintiff and other boat owners and insurers brought this interlocutory appeal, arguing that the exculpatory clause was not bargained-for, and in any event not applicable to boats in winter storage. (Boat owners had to fill out a separate application before putting their boats in winter storage.)

Holding that the owners were not victims of the superior bargaining power of the yacht club, the First Circuit upheld the lower court's decision. There was no monopoly since there were other boat-storage facilities nearby, and the club by-laws formed a part of a compact that served members by limiting the cost of membership. Additionally, the exculpatory provision was open to revision by the club's membership.

The court also rejected the owners' contention that the by-laws did not apply to winter storage. The by-laws governed the relationship between the club and its members, and it was "simply not reasonable to assert that submission of [a winter storage] application proposed a contractual relationship wholly distinct from membership." The exculpatory clause was therefore operative. ■

No Liability for Breakaway Caused by Act of God

Simmons v. Lexington Ins. Co., 2010 WL 1254638 (E.D. La. 2010)

The Eastern District of Louisiana ruled that a Category 4 hurricane was an Act of God sufficient to bar a claim against an owner whose yacht broke away from a dock.

Plaintiff, a marina owner, brought suit after the yacht broke free of its slip and damaged marina facilities during Hurricane Katrina. Plaintiff alleged that the owner failed to heed warnings of the impending storm and failed to take appropriate measures to ensure that her vessel was adequately secured.

Defendant responded with a motion for summary judgment, arguing that she took all reasonable measures available and that the breakaway was due to an Act of God.

In support of her motion, Defendant introduced evidence that she had enlisted the services of a former Coast Guard officer with 40 years' maritime experience to ensure the vessel was prepared for the storm. The officer testified that he took every available measure to ensure that the moorings were sufficient to meet the impending storm.

Because the docks to which Defendant's vessel was attached were completely washed away by the storm, and all sailing vessels moored at the facility were swept free of their moorings during the storm, the court concluded that Defendant proved her Act of God defense. The loss was due to an extraordinary force of nature that proper skill and precaution could not guard against. ■

City Not Liable for Allowing Untrained Minor to Launch Jet Ski

Lynch v. Thorwart, 2010 WL 2696742 (N.J. Super. App. 2010)

John Lynch brought a survival action against the City of Ocean City, New Jersey, after his sixteen-year-old daughter died while operating a jet ski that she had launched from a municipal boat ramp. Plaintiff alleged that the city was liable for negligently supervising its recreational facilities and for failing to enforce a municipal ordinance that required jet-ski operators to have taken a safety course or passed a written exam. The trial court found the City immune because, under New Jersey's Tort Claims Act, a public entity has no liability for injuries caused by its failure to enforce a law. Additionally, the court ruled that the facts did not support a negligent-supervision claim.

On appeal, the lower court's ruling was affirmed. Although the municipal attendant working at the boat ramp did not ask Lynch whether she had appropriate training or competency to operate a jet ski, the attendant had no statutory duty to do so. Also, the City could not be held liable on the negligent-supervision claim because "Lynch was not injured by any object or condition related to the municipal ramp or in any proximity to the ramp," and the ramp attendant had no duty to supervise jet skiers once they left the area. ■

Limitation

Jet Ski Owner May Not Limit Liability for Negligent Entrustment

In re Hartman, 2010 WL 1529488, Civil Action No. 08-5562 (D.N.J. April 15, 2010)

Two men borrowed jet skis from Kimberly Hartman and operated them while she was at work. One man, Borquin, was an experienced boater who had taken a boating safety course. Hartman and Borquin knew that Forte, the other man, was inexperienced and had not completed a boating safety course.

When operating the jet skis, Borquin led the way and traveled at a high speed. As Forte followed Borquin, a wake from a nearby boat pushed Forte and his jet ski into a day marker. Forte's leg was broken, and he sued Borquin and Hartman for personal injury. He also sued Hartman's insurer for breach of contract and bad faith (apparently on the theory that he was an insured under Hartman's policy). Hartman filed a limitation action, and the underlying litigation was stayed.

Forte argued that the limitation action should be dismissed because (1) the jet ski was not a "vessel"

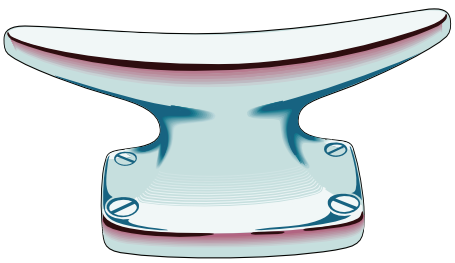
within the meaning of the Limitation Act, (2) the limitation action was untimely, (3) Hartman could not limit liability for negligently entrusting the jet ski to Forte, and (4) Hartman was vicariously liable for Borquin's alleged negligence.

As a threshold matter, Forte claimed that a jet ski was not a vessel, but the court noted that jet skis have long been treated as vessels for purposes of the Limitation Act (citing *Keys Jet Ski, Inc. v. Kays,* 893 F.2d 1225 (11th Cir. 1990), and *Gorman v. Cerasia,* 2 F.3d 519 (3d Cir. 1993)).

Forte further claimed that the limitation action was time-barred because he had given Hartman written notice of the claim more than six months before she filed the limitation action. However, Forte's letters were not sent to Hartman herself but rather to her insurer. Moreover, the letters did not indicate an intention to seek damages or make any allegation of negligence against Hartman, but instead simply requested payment of first-party medical benefits. In these circumstances the letters were insufficient to start the clock on the six-month limitation period.

Because the threshold issues were resolved against Forte, the court went on to consider the merits. As to the negligent-entrustment claim, the court observed that a vessel owner may limit liability only if she is without privity or knowledge of the negligence that caused the accident. Here, Hartman knew that Forte was inexperienced and had no safety training, and if it was negligent of her to entrust the jet ski to Forte and Forte's inexperience contributed to the accident, then necessarily she had personally participated in the underlying negligence. Thus, she could not limit her liability on the negligent-entrustment claim.

But as to Forte's claim that Hartman was vicariously liable for Borquin's alleged negligence, there was no evidence that Hartman had any reason to believe that Borquin would operate the vessel in an unsafe manner, as he was an experienced and certified boater. Therefore, Hartman could limit her liability on the vicarious-liability claim. ■



Torts

State Workers' Compensation Act Does Not Bar Employee's Maritime Negligence Claim Against Employer

Morrow v. MarineMax, Inc., 2010 WL 3236771 (D.N.J. Aug. 17, 2010)

This matter relates to an injury, a workers' compensation claim, and a federal claim for negligence under general maritime law. Plaintiff was paralyzed on a yacht during an employee-appreciation event sponsored by his employer, a boat dealer. At the time of the injury, the yacht was off the coast of New Jersey and those on board were waiting to watch an air show. Plaintiff was in the stern cockpit area when another passenger, who had been swimming, slipped in the flybridge area and fell on Plaintiff, fracturing his cervical vertebrae and causing paralysis. The parties stipulated that Plaintiff was acting within the scope of his employment. Plaintiff received New Jersey workers' compensation benefits but then filed an admiralty action against his employer, asserting negligence under general maritime law.

The sole issue for the court was whether the exclusive-remedy provision of the state workers' compensation statute barred the plaintiff's general maritime tort claim. The district court evaluated caselaw from other trial and appellate courts and noted that there are essentially two types of preemption analyses that other districts have followed: that developed by the Eleventh Circuit and that of the Fifth Circuit. The Eleventh Circuit analysis is a balancing test, where the court first determines whether admiralty jurisdiction exists, and then applies a balancing test similar to a standard conflicts-of-law test. *See Brockington v. Certified Electric, Inc.,* 903 F.2d 1523 (11th Cir. 1990). The Fifth Circuit simply asks whether admiralty jurisdiction exists, and if so, holds that the state law must give way to the federal maritime claim. *See Green v. Vermillion Corp.,* 144 F.3d 332 (5th Cir. 1998).

Here, the district court determined that the Fifth Circuit's test was the most appropriate and most likely to promote uniformity by ensuring that the applica-

tion of maritime law did not depend on the "ebbs and flows of state legislation." According to the court, the Eleventh Circuit's balancing test was somewhat redundant because evaluating admiralty jurisdiction itself provides the opportunity to ascertain whether there is a sufficient relationship to maritime activity.

Despite a meaningful analysis of the preemption issue, the court's opinion offered little discussion of why admiralty jurisdiction should apply to the facts at hand. Noting that the plaintiff was not covered by the Jones Act or the Longshore and Harbor Workers' Compensation Act, the court seemed to assume that since the plaintiff was injured aboard a vessel in navigable waters, the claim was necessarily subject to admiralty jurisdiction. The court cited other cases in which a person with land-based employment was injured on navigable waters (with some of those courts finding that admiralty jurisdiction existed and others finding that it did not), but there was no discussion of whether the incident in this case had the potential to disrupt maritime commerce or whether the activity giving rise to the incident was substantially related to traditional maritime activity.

In any event, the court concluded that the New Jersey workers' compensation statute, notwithstanding its exclusivity provision, could not deprive Plaintiff of his substantive admiralty right to bring a cause of action for negligence. ■

No Duty to Act As Lifeguard for Adult Passengers Taking a Swim

Binno v. Binno, Docket No. 291437, 2010 WL 2384966 (Mich. App. June 15, 2010) (unpublished)

This case arose from a tragic drowning. Several friends and family members took a pontoon boat out on a Michigan lake. The boat was operated by either Frederick Binno or Jeffrey Dabish. Two of their passengers wanted to go for a swim, so Frederick or Jeffrey stopped the boat and turned the engine off, without anchoring the boat. The passengers finished swimming and climbed back onto the boat. Weather conditions appeared normal. After some time passed, five more people decided to go for a swim, including Frederick and decedent Ryan Binno.

The weather changed dramatically after the group entered the water: the wind increased, the waves became bigger, and swimming became more difficult. Ryan did not show obvious signs of distress. Either Frederick, who was able to return to the boat, or Jeffrey, who had not gone swimming, moved the boat closer and threw life jackets to the swimmers. Ryan was the only swimmer who did not return to the boat; he drowned some distance away.

His personal representative filed suit against Frederick and Jeffrey and another person who may have owned the boat but who was not on board. The allegations included negligence, willful and wanton misconduct, and gross negligence. The trial court granted summary judgment for the defendants.

Plaintiff appealed, asserting that the defendants breached duties imposed by Michigan's Marine Safety Act. Specifically, Plaintiff argued that the defendants had a duty to anchor the boat, to ensure that the boat remained near the swimmers, to maintain a careful lookout and ensure the swimmers' safety, to require the swimmers to wear life jackets, and to pay attention to wind and weather conditions. Defendants argued that the statute was inapplicable because at the time of the drowning the boat was not navigating through the water and hence was not "operating" as that term is used in the statute. They also denied that they breached any duty to the decedent.

The source of Plaintiff's proposed duties appears to have been Michigan Compiled Laws § 324.80145, which provides that anyone "operating or propelling" a vessel on state waters must do so "in a careful and prudent manner" and at a speed that will not unreasonably endanger anyone's life or property. The statute defines "operating" as being "in control of a vessel while the vessel is under way and is not secured in some manner such as being docked or at anchor." Similarly, an "operator" is defined as "the person who is in control or in charge of a vessel while that vessel is under way." The court was therefore left to determine the meaning of the term "under way." The court concluded that, although the pontoon boat was not being moved forward deliberately, it was in motion and not anchored and was therefore "under way." Accordingly, the defendants *did* owe a duty to their passengers to operate the boat in a careful and prudent manner.

Nevertheless, the court held that there was no liability because the manner in which the defendants oper-

ated the pontoon boat was in no way involved with Ryan's death. Plaintiff's argument that a boat operator should effectively act as a lifeguard and insurer of the safety of adult passengers was deemed to have no basis in statutory or common law. To hold the defendants liable would be to create a duty to ensure safety that did not exist in the statute or at common law, and would effectively relieve an experienced adult swimmer of his duty to exercise reasonable care for his own safety. Therefore, the trial court's judgment for the defendants was affirmed. ■

Verdict for Plaintiff in Texas Propeller-Guard Case

Brochtrup v. Mercury Marine, No. 07-cv-643 (W.D. Tex.)

In April 2010 a federal jury in Austin found Mercury Marine liable for manufacturing a sterndrive system without a propeller guard.

The plaintiff, a recent high-school graduate, was boating with a group of friends on a 17-foot Sea Ray. He entered the water to retrieve a tow rope and the boat's operator, apparently not realizing plaintiff was in the water, backed the boat over him. The boat's spinning propeller caused severe lacerations to the plaintiff's upper leg, and the leg had to be amputated. Plaintiff brought suit on the basis that the sterndrive was defectively designed due to the absence of a propeller guard.

In the lead-up to trial, the plaintiff's experts developed a shield mechanism as a proposed safer alternative to the unguarded propeller. The mechanism was mounted to the sterndrive below the waterline and surrounded the propeller. A metal shield, hinged at the top, was suspended behind the propeller. The shield was kept in the open position by the thrust of the propeller when the engine was operating ahead, but would fall into place when the engine was stopped or put in reverse. Field tests were performed, but the parties disagreed about the extent to which the mechanism impaired the boat's stability and maneuverability. Mercury Marine also argued that the mechanism was very susceptible to fouling.

The case was tried three times, the first two trials ending with a deadlocked jury and the third resulting in a $3.9 million gross verdict for plaintiff, with 66% of the liability allocated against Mercury Marine, 17% against the boat operator, and 17% against plaintiff himself.

Mercury Marine has appealed, arguing that the plaintiff failed to show that the unguarded propeller was unreasonably dangerous under the risk-utility test used in Texas product-liability cases, that the plaintiff failed to prove that his alternative design was economically feasible, and that the jury instructions were erroneous. The Fifth Circuit case number is 10-50534.

Thanks to Gavin O'Hare of CED Investigative Technologies, Inc. for alerting us to this case. ■

Legislation

Regulations Implementing LHWCA Amendment

As reported in Boating Briefs Vol. 18:1, the 2009 federal stimulus package made the Longshore and Harbor Workers' Compensation Act (LHWCA) inapplicable to workers employed to repair recreational vessels. The Department of Labor has now proposed regulations to expressly define the term "recreational vessel" and to clarify the types of work that take an employee out of LHWCA coverage. Comments on the proposed regulations should be submitted to the Department of Labor by November 17, 2010. Details can be found in the Federal Register, 75 FR 63425 (available at http://edocket.access.gpo.gov/2010/pdf/2010-25895.pdf). ■

Summary of State Boating Law Changes in 2010

Arizona has instituted a temporary 1% sales tax increase, bringing the state rate to 6.6%. This increase is set to expire on May 31, 2013.

California raised its mandatory lifejacket age; now all children under age 13 are required to wear life preservers while aboard. (Cal. Harb. & Nav. Code § 658.3.)

Florida placed an $18,000 cap on sales tax from the sale of a boat. (F.S. § 212.05.)

Kansas raised the state sales tax 1%, to 6.3%.

Louisiana passed legislation requiring anyone born after January 1, 1984 to complete a NASBLA-approved course in order to operate a motorboat with more than 10 horsepower. (La. R.S. 34:851.36.)

Maryland now requires everyone under the age of 16 to have a certificate of boating safety education. (MD Code, Natural Resources, § 8-712.2.) The state also raised the mandatory lifejacket age from 7 to 13 years of age, for children on boats less than 21 feet. (MD Code, Natural Resources, § 8-743.)

North Carolina now mandates that everyone under 26 years of age must complete a NASBLA-approved course to operate a motorboat with more than 10 horsepower. (N.C.G.S. § 75A-16.2.)

Vermont now requires its boater safety classes to educate boaters on the problems caused by invasive species, and how to prevent those problems by cleaning boats and trailers after use. (23 V.S. § 3305b)

Submitted by Todd Lochner, Esq., Chair of the Subcommittee on State Legislation, with research assistance from Joshua S. Parks. ■

BOATING BRIEFS

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

Cite as 19 Boating Briefs No. 2 (Mar. L. Ass'n) (Daniel H. Wooster Ed. 2010).

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