BOATING BRIEFS

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No detention damages for a purely recreational vessel, much to the court's regret

Northern Assurance Co. v. Heard, 2011 AMC 258 (D. Mass. Dec. 14, 2010)

The federal district court in Massachusetts has held, albeit reluctantly, that owners who use their vessels only for recreation are categorically barred from recovering loss-of-use damages.

A married couple, the Heards, purchased a Vagabond 47 ketch and spent several years rebuilding it. After the work was done and just one day before they were to begin using it for a 10-week vacation, the ketch was struck by a runaway vessel. Repairs could not be completed until months later—too late to save the vacation. They considered bareboat chartering a comparable vessel, but the $5,000 weekly rate was more than they could afford. They sought damages for their inability to use the ketch.

The Conqueror, 166 U.S. 110 (1897), remains the leading case on claims for recreational loss of use. There the U.S. Supreme Court considered the case of Frederick Vanderbilt, whose schooner-rigged steam yacht had been seized by the federal government and detained for five months in a dispute over customs duties. Ultimately the Court held that no duties were owed, but it denied Vanderbilt recovery for the temporary deprivation of his yacht:

> It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure . . . . In other words, there must be a loss of profits in its commercial sense.

The Supreme Court's opinion was categorical, though the case could have been decided on narrower grounds since there was no indication that Vanderbilt had even planned to use the yacht during the period of detention. Also, his evidence on the measure of damages consisted only of conjectural opinions from witnesses who were "most friendly to the owner."

The Heards, by contrast, were unquestionably deprived of their planned vacation, and there was objective evidence of a charter rate for similar vessels. Nevertheless, after thoroughly considering all the authorities, the court concluded that the rule in *The Conqueror* admitted of no exceptions. But the judge was not without regret:

> I would be less than candid if I did not also register my sense that the categorical rule of *The Conqueror* finds its source in the resistance of the Supreme Court to enabling one of the richest men in late nineteenth century America to recover, on questionable evidence, for the "inconvenien[t]" loss of one of his many recreational diversions. That categorical rule has, however, a broad wake, depriving a working couple in this case recovery for a monetizable loss of the central recreational activity to which they have devoted considerable personal efforts over a number of years. In this, the categorical rule created for a Vanderbilt falls harshly on the Heards, calling to mind Anatole France's description of the "majestic equality of the laws, which forbid rich and poor alike to sleep upon the bridges . . . ." ■

This newsletter summarizes the latest cases and other legal developments affecting the recreational boating industry. Articles, case summaries, and suggestions for upcoming issues are welcome and should be addressed to the editor.

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Insurance

Policy void where applicant falsely claimed years of boating experience

Great Lakes Reinsurance (UK) PLC v. Morales, 2010 WL 5252851 (S.D. Fla. Dec. 9, 2010)

An application for hull insurance, signed by the insured and submitted by his broker, stated that the insured had "12+ years" of experience owning and operating boats. A policy was issued and renewed the following year based on a similar application. During the term of the second policy, the boat, while on a trailer, was stolen from an ungated residential driveway.

It developed that the insured, contrary to the statements in the insurance application, did not have any prior experience owning or operating boats. Moreover, the policy excluded coverage if the vessel was stolen "whilst on a trailer/boatlift/hoist dry storage rack unless the scheduled vessel is situate in a locked and fenced enclosure or marina and there is visible evidence of forcible entry . . . ."

The court concluded that the statements on the application concerning the insured's boating experience were clearly material to the risk and that the policy was therefore void under the doctrine of uberrimae fidei. Moreover, given the circumstances in which the vessel went missing, the theft exclusion would have precluded coverage in any event. ■

No "permissive use" coverage where user exceeded allowed use

New Hampshire Insurance Co. v. Carleton, 2010 WL 5174384 (E.D. Mich. Dec, 15, 2010)

After a regatta on the Detroit River, a dingy towed two sailboats back to the Bayview Yacht Club. The dinghy belonged to a crewmember on one of the sailboats; he agreed to take the other sailboat in tow as a courtesy but he did not know its owner, Carleton. Once at the yacht club, the three vessels were moored side-by-side, with the dinghy next to the dock, Carleton's sailboat in the middle, and the other sailboat on the end. There was testimony that the understanding among sailors when boats are rafted together in this fashion is that one may traverse the inshore boat in order to reach one's own boat, but one is not supposed to linger there.

That evening Carleton attended a party at the yacht club and met a woman. The two left to go to Carleton's sailboat but never made it that far. They stepped into the dinghy moored next to the dock and had sexual relations there. At some point while the two were still in the dinghy, the woman asked Carleton to leave, and he did so. Two days later the woman's body was found in the harbor; she had drowned.

Her estate sued Carleton, whose marine insurer denied coverage. Applying the law of Virginia—the state where Carleton resided, where the sailboat was based, and where the policy was issued—the court granted summary judgment for the insurer.

Carleton's policy insured him against, among other things, liability for bodily injury arising out of his "permissive use" of any private pleasure vessel not owned by him. Carleton admitted that he did not have permission from the dinghy owner to use the dinghy for a sexual encounter. At most, he had permission to traverse the dinghy in order to reach his own sailboat, consistent with the custom among sailors. Such permission did not extend to any other use of the dinghy. Since the woman's death did not arise out of Carleton's "permissive use" of the dinghy, there was no coverage under Carleton's policy. ■

Certificate of title, without more, satisfied policy's "ownership" requirement

Colley v. Reisert, 2011 WL 53102 (S.D. Ohio Jan. 6, 2011)

An umbrella policy defined the "insured" to include "any person using [a] watercraft [that] is owned by [the policyholder] and covered under this policy." The policyholder was the titled owner of a 29-foot Wellcraft Scarab, but she never used it, did not maintain it, and did not pay taxes on it. Rather, she held title as a favor to her son, who wished to protect the vessel from creditors. The son exercised all incidents of ownership apart from holding title.

During a high-speed maneuver, the son and another person were ejected from the vessel and killed, resulting in a suit against the son's estate. The mother's umbrella insurer argued that it had no duty to defend or indemnify the son's estate because the mother, though holding the title, was not the true "owner" and thus her son was not an "insured" as defined in the policy. In particular, the insurer relied on an Ohio Supreme Court case holding that a certificate of title is not determinative of ownership in the context of a vehicle sales transaction and that a court should look instead to the Uniform Commercial Code.

But in the court's view the UCC did not apply since this case did not involve a sales transaction. Rather, the case was governed by a provision of the Ohio watercraft-titling statute, ORC § 1548.04, which provides that "[n]o court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any watercraft or outboard motor sold

or disposed of, or mortgaged or encumbered" unless evidenced by a certificate of title or by an admission or stipulation of the parties. The certificate of title naming the mother as the owner therefore meant that she was the vessel's "owner" within the meaning of the umbrella policy, even though she did not purchase, operate, or maintain the vessel.

The umbrella insurer also argued that there was no coverage by virtue of the policy's exclusion for boats in excess of "25 horsepower if the outboard engine or motor is owned by an insured." Yet the exclusion did not make clear that the word "outboard" modified both "engine" and "motor." It was therefore ambiguous and would be construed to apply only to boats with an outboard engine and not to boats like the Scarab, which had inboard engines and outboard drives. ■

No coverage for boat not listed in policy

Contender Fishing Team, LLC v. Miami, 2010 WL 5095873 (11th Cir. Dec. 15, 2010) (unpublished)

A police boat owned by the City of Miami collided with a sportfishing vessel, resulting in a personal-injury suit against the city. The city had a marina operator's liability policy providing protection and indemnity coverage for watercraft operated by city employees "in conjunction with normal business operations." The city argued that coverage for the personal-injury claim was available under this section. The district court rejected the argument, and the Eleventh Circuit affirmed.

As an initial matter, the Eleventh Circuit held that it had jurisdiction to hear the appeal in accordance with the statute allowing interlocutory appeals in admiralty cases. But see *New Hampshire Insurance Co. v. Home S&L Co.*, 581 F.3d 420 (6th Cir. 2009) (holding that a yacht dealer/marina's liability policy was not a maritime contract).

Next, the overall nature of the city's policy suggested that it was meant to provide coverage to the city in its capacity as a marina operator and not coverage for all vessels owned by the city regardless of their use. More importantly, the protection and indemnity entry on the declarations page listed only "5 Work Boats," and the police boat was not among them. Therefore, according to the court, "the City's interpretation that this Policy includes all boats operated by a city employee acting in his or her capacity as a city employee for all city business is completely unreasonable." ■

Policy wording makes "efficient proximate cause" rule inapplicable

Goodman v. New Hampshire Insurance Co., 2010 WL 4281682 (W.D. Wash. Oct. 19, 2010)

A yacht's aluminum fuel tank leaked diesel fuel into the bilges, and from there the automatic bilge pumps sent the fuel overboard. The insurer's surveyor arranged for removal of the fuel tank and determined that it had become holed by corrosion as a result of seawater leaking through the cockpit hatches over a period of many years.

The insurer paid about $20,000 to cover the cost of cleaning up the fuel and repairing the damage done by the insurer's surveyor in removing the fuel tank, but it declined to pay anything else because the policy excluded coverage for losses arising from corrosion.

The insured contended that the intrusion of seawater was due to a hidden defect in the construction of the hatch covers—namely, the absence of drainage channels—and that since losses resulting from hidden defects were expressly covered, the insurer had to cover all expenses arising from the incident. In particular, the insured relied on Washington's "efficient proximate cause rule," which provides that if a covered peril sets into motion other causes that produce the loss in an unbroken sequence, the loss will be covered even if the other events in the chain of causation are excluded from coverage.

The court rejected the insured's argument for two reasons. First, the alleged defect in the hatch construction (the lack of drainage channels) was not "hidden" inasmuch as it was identified by the insured's expert by simply looking at photographs of the hatches. Moreover, because the corrosion exclusion was written broadly—coverage was excluded for "any loss or damage arising out of [corrosion]"—the efficient proximate cause rule did not operate. The term "arising out of" was broader than the concept of proximate cause, and the efficient proximate cause rule was therefore rendered inapplicable as a matter of contract. Nor could the insured claim that the corrosion itself was a covered "defect," since the policy clearly excluded coverage for damage arising out of corrosion.

The insurer also moved for summary judgment on the basis that the insured intentionally misrepresented the cost and scope of the repairs he undertook after the fuel leak. But in light of a declaration submitted by the insured denying any intentional misrepresentation or concealment, there was an issue of fact as to the insured's intent and hence summary judgment could not be granted.

The court did, however, grant summary judgment against the insured on his claims for bad faith and

violation of the Washington Consumer Protection Act. The insurer's decision to deny coverage was reasonable, as confirmed by the court's own reading of the policy and its ruling that the efficient proximate cause rule was inapplicable. The insurer did not delay unreasonably in investigating the claim and denying coverage, and the basis for the denial was reasonably communicated to the insured even though specific policy provisions were not recited in the denial notice. ■

Question of fact as to whether water intrusion was "sudden and accidental"

Acadia Insurance Co. v. Cunningham, 2011 WL 98914 (D. Mass. Jan. 10, 2011)

A Mainship 400 was laid up ashore for the winter and covered by a canopy that protected the flybridge and upper deck but left the aft deck open to the weather. The vessel was winterized in a fashion, but the bilge plug was not removed. Over the winter the owner periodically visited the vessel and everything appeared normal to him, though he did not go aboard. On one visit in late spring, he discovered that water had inundated the bilge and lower cabin.

His insurance policy covered "sudden and accidental" damage but excluded coverage for "any latent defect in the hull or machinery" and the results of wear and tear. The policy also required the insured to maintain the vessel "in good repair so that [it] cannot be damaged by ordinary weather or the rigors of normal use." In light of these provisions, the insurer denied coverage and sought declaratory relief.

The court denied the insurer's motion for summary judgment, deciding that a report prepared by the insured's testifying expert was sufficient to create an issue of fact as to whether the water intrusion was "sudden and accidental." (The report was submitted late, and only after the insurer moved for summary judgment. Citing a lack of prejudice to the insurer, however, the court declined to strike the report.)

The insured's expert opined that the water entered the vessel through a disconnected hose in the bilge area. (Apparently the hose was part of a drain line leading from the aft deck, but this is not clear from the opinion.) The expert characterized the infiltration as a "sudden burst of water," and in the court's view this was sufficient to create a question of fact as to whether the water intrusion was "sudden." Also, since the disconnected hose could be seen only by removing a deck plate, there was a question of fact as to whether the circumstances of the water intrusion were "accidental," i.e., unexpected and unforeseen.

The insurer proffered photographs of water marks seeming to show that the water had risen in stages over the winter. But in view of the "sudden burst" scenario posited by the insured's expert, the court could not treat the photographs as conclusive evidence that the water entered the vessel over a long period of time. Finally, because the disconnected hose was not in plain view, there was also a factual dispute as to whether the insured met his duty to maintain the vessel in good repair. ■

Michigan appeals court upholds criminal-acts exclusion

Auto Club Group Insurance Co. v. Smith, 2011 WL 222236 (Mich. App. Jan. 25, 2011)

A man operating his boat with his wife and children aboard collided with another vessel. He was charged with child endangerment and intoxicated boating, and pleaded no contest.

The owners of the other vessel sued the man and his wife for personal injuries and property damage caused by the collision. The man's insurer sought a declaratory judgment on the grounds that there was no coverage by reason of the policy's criminal-acts exclusion. The trial court agreed with the insurer, and the appellate court affirmed.

The policy excluded coverage for "bodily injury or property damage resulting from [a] criminal act or omission." In the immediately preceding paragraph, the policy also excluded coverage for "bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage."

The claimants argued that the placement of the criminal-acts exclusion immediately after the intentional-acts exclusion meant that a criminal act could bar coverage only if it was "intended" or "reasonably expected" to cause injury or damage. But the court held that the criminal-acts exclusion stood on its own and was not limited by the wording of the intentional-acts exclusion.

Next, the claimants argued that the criminal-acts exclusion was contrary to public policy since negligent boating was a crime under Michigan law and any boat accident caused by negligence could therefore deprive an insured of coverage. But the court rejected this argument because the language of the exclusion was clear, there was no evidence that the insured could not have obtained a policy without a criminal-acts exclusion from another insurer, and not all negligent boating was necessarily a crime in Michigan.

Finally, the claimants argued that the criminal-acts exclusion did not operate as to the boat operator's wife, who faced potential exposure under a Michigan statute imposing liability on the owner of a vessel if

someone else negligently causes an accident while using it with her consent. But the court read the criminal-acts exclusion to preclude coverage for any loss resulting from a criminal act, whether committed by the owner or her permissive user. Accordingly, there was no coverage for the wife either. ■

Boat owner's personal and business relationships with guests create issue of fact as to insurance coverage and vicarious liability

In re Antill Pipeline Construction Co., 2011 WL 577352 (E.D. La. Feb. 7, 2011)

A recreational vessel operated by a businessman allided with a moored barge, resulting in his death and the deaths of four of his passengers. The operator, Michael Carrere, was also one-third owner of Tarpon Rentals, which rented equipment to the oilfield industry. Tarpon had contributed $20,000 toward the purchase of the vessel, with the understanding that Carrere would use it to entertain business contacts. The four passengers killed in the allision were Carrere's friends in addition to business contacts.

Carrere insured the vessel with State Farm, whose policy excluded coverage for losses occurring while the vessel was being used for any business purpose. State Farm moved for summary judgment, claiming there was no coverage since Carrere had been entertaining Tarpon's current and potential clients at the time of the accident. Tarpon moved for summary judgment as well, claiming it could not be vicariously liable because Carrere was the sole owner of the boat and had been using it in his personal capacity.

At issue was whether Carrere was acting on behalf of Tarpon when the allision occurred. There was some evidence that the trip on the boat was part of a simple outing among friends. But there was also evidence that Tarpon considered hunting, fishing, and boating with clients to be an important part of Carrere's job and had in the past treated Carrere's boating expenses as legitimate business expenses.

The court stated that "the relevant questions are how Carrere used the boat in practice and what motivated Carrere in using his boat on the night in question." On the existing record, there were genuine issues of material fact, and both motions were therefore denied. ■

Finance

Where custodian allegedly discouraged bidders before Marshal's sale, vessel's value to be determined at trial

Wilmington Trust Co. v. M/V Miss B. Haven V, 2010 WL 5590563 (S.D.NY. Dec. 15, 2010)

The Southern District of New York has ruled that, for purposes of calculating a deficiency, the winning bid at a Marshal's sale was not conclusive of fair market value.

A preferred mortgage on the yacht *Miss B. Haven V* went into default, and the mortgagee obtained a default judgment *in rem* and bought the vessel at Marshal's sale for $180,000 (presumably on a credit bid). The mortgagee then sought an *in personam* deficiency judgment of approximately $280,000, representing the mortgage indebtedness less the $180,000.

The mortgagor challenged the adequacy of the $180,000 sale price, claiming the auction had been tainted by the mortgagee's substitute custodian. In particular, the mortgagor submitted an affidavit from a bidder attesting that the custodian refused to allow him to test the vessel's engines on the day of the auction. Without the opportunity to verify that the vessel's mechanical systems were working, this bidder was reluctant to outbid the mortgagee.

The mortgagee did not provide any of its own evidence as to what transpired before the auction. Instead, it argued that the mortgagor could not now challenge the sale price since he had failed to object to confirmation of the sale.

Agreeing with the mortgagor, the court held that the results of the Marshal's sale were not binding for purposes of determining the deficiency. Furthermore, the court said, it would have been "a minimal burden for the custodian simply to allow a bidder to start the vessel's motors." (It is unclear from the opinion whether the terms of the custodianship, the Marshal's practices, and the condition of the vessel would have allowed this to be done as a matter of course before the auction.) ■

"Stranger to the vessel" doctrine inapplicable to preferred mortgage

L&L Electronics, Inc. v. M/V Osprey, 2011 WL 570012 (D. Mass. Feb. 16, 2011)

The District of Massachusetts has held that absent fraud, unfair dealing, or other inequitable conduct, the mere fact that a mortgagee was the manager and 80-percent owner of the limited liability company that owned the vessel was insufficient to invalidate his

preferred mortgage or subordinate his mortgage lien to later-accrued necessaries liens. ■

Borrower in the dark not guilty of "permitting a lien"

Huntington Nat'l Bank v. Kelly, 2010 WL 4106693 (Mich. App. Oct. 19, 2010) (unpublished)

The Michigan Court of Appeals affirmed the dismissal of a bank's deficiency claim arising from an installment contract for the purchase of a boat, holding that the borrower had not even breached the contract.

The contract stated that the borrower would be in default if he "permit[ted] a lien to be placed on the [boat]." The borrower's brother had been storing the boat at a marina and did not pay the storage bill, thereby allowing the marina to obtain a lien. But there was no evidence that the borrower was aware of the lien, or that he even knew where his brother was keeping the boat.

Consulting the dictionary, the court noted that "[t]he pertinent definition of 'permit' includes 'to allow to do something,' 'to allow to be done or occur,' and 'to tolerate; consent to.' Applying that definition, the court wrote that "[o]ne who 'permits' an action is at the very least aware of the action." Since it did not appear that the borrower was aware of the situation at the marina, he had not "permit[ted]" the lien to be placed on the boat, and there was no basis to foreclose in the first place. ■

Limitation of Liability

Contribution claims mean that concursus will be maintained

In re Aramark Sports and Entertainment Services, LLC, 2010 WL 4791443 (D. Utah Nov. 18, 2010)

A rented 20-foot powerboat sank during a day trip on Lake Powell. Of the six people on board, only two were able to swim ashore; the other four drowned.

The rental company owning the boat filed a limitation action, which the decedents' estates moved to stay so that they could sue the rental company in state court. There were indications that they also intended to sue the boat's manufacturer and the two people who survived the sinking, all of whom had appeared in the limitation action and filed contingent claims for contribution or indemnity against the rental company.

In support of the motion to stay, the decedents' estates signed a stipulation by which they acknowledged the rental company's right to litigate the limitation issue in the federal court and agreed that the federal court would have exclusive jurisdiction to decide that issue. They also agreed to waive any preclusive effect that the decisions of another court might have on the limitation issue. They lastly agreed not to enforce any judgment against the rental company—or anyone else entitled to seek indemnity or contribution from the rental company—until after the federal court decided the limitation issue.

But the court deemed the stipulation deficient because it was not signed by the manufacturer and the two people who survived the sinking. Recognizing that there was disagreement among the appellate courts on this subject, the court ruled that parties asserting contribution claims must join in the stipulation before a limitation action may be stayed to allow state-court litigation. Since the manufacturer and the two people who survived the sinking had not agreed to the stipulation, there was a risk that they would rely on the preclusive effect of a state-court judgment and thereby undermine the vessel owner's attempt to limit liability with respect to all claims arising from the incident, including claims for contribution. The motion to stay was therefore denied. ■

In re RQM, LLC, 2011 WL 98472 (N.D. Ill. Jan. 12, 2011)

While attending an employer-sponsored outing on a yacht, a man fell from the top deck onto the well deck. He and his wife brought suit in state court against the yacht owner and the yacht manufacturer.

The yacht owner filed a limitation action in federal court, seeking to limit its liability to approximately $1.6 million—the proffered value of the yacht plus interest. The man and his wife appeared in the limitation action, asserted a claim of $50 million, and moved to lift the stay so that they could resume their state-court suit. The manufacturer also appeared in the limitation action and asserted contribution and indemnity claims against the owner.

The husband and wife argued that this was the equivalent of a "single claimant" case in light of their agreement to consolidate their individual claims and their stipulation that their claims against the yacht owner would be capped by any liability limitation the federal court might ultimately decree.

In the court's view, however, the stipulation was insufficient because the yacht manufacturer was a claimant in the limitation action and had not agreed to limit its claim against the owner for contribution or indemnity. The motion to lift the stay was therefore denied, but without prejudice—allowing for the possibility of another motion if circumstances changed. ■

"Owner pro hac vice" withstands motion to dismiss

In re Tourtellotte, 2010 WL 5140000 (D.N.J. Dec. 9, 2010)

A husband and wife, whose boat was involved in a collision while being operated by their son, filed a limitation action. The son was included as a limitation petitioner on the basis that he was an "owner pro hac vice" and therefore entitled to seek protection under the Limitation Act. A claimant in the limitation action moved to dismiss the petition as to the son, arguing that he was not an owner pro hac vice and that in any event he could not limit his liability since he was operating the boat at the time of the collision.

In denying the motion, the court wrote that "[t]itle ownership is not dispositive of the issue of who is an 'owner' for purposes of the Act." As alleged in the petition, the son "ensured the [v]essel was victualed," "communicated with the owners (his parents) on the status" of the vessel, and "interfaced" with the marina concerning launching, hauling, and maintenance and repair of the vessel. There was also evidence that the son had free reign "to operate [the vessel] at [his] discretion" and that other family members did not use the boat without him being present. Although he did not pay for insurance, repairs, or fuel, and he did not make "ultimate decision[s]" about the vessel, the son's claim to status as an owner pro hac vice could not be dismissed on the existing record.

Further, under the holding of *In re Cirigliano*, 708 F. Supp. 101 (D.N.J.1989), the fact that the son was operating the vessel at the time of the collision did not necessarily prevent him from seeking limitation, and hence the motion to dismiss could not be granted on that basis either. ■

D. Mass. has admiralty jurisdiction over rescue attempt at public beach but declines to hear "land-based" claims

In re Town of Chatham, 2011 WL 110351 (D. Mass. Jan. 13, 2011)

A family was visiting a beach in the town of Chatham on Cape Cod. The children entered the water in an area of the beach known as "The Point" and stood on a sandbar. One of the children was pulled from the sandbar by the current, and her father, standing on the shore and seeing the girl struggling, entered the water to rescue her. He too became trapped in the current. The local harbormaster attempted to rescue the man using the town's patrol boat but was unable to save him. Meanwhile, the girl was pulled from the water by a Good Samaritan and survived.

The man's beneficiaries made an administrative claim against the town under the Massachusetts Tort Claims Act, alleging that the harbormaster negligently performed his rescue attempt and also that the town had inadequate emergency-response capabilities and was negligent by not posting signs to warn swimmers of the danger. The town, as owner of the patrol boat, filed a limitation action, and the beneficiaries moved for dismissal on the basis that there was no admiralty jurisdiction.

The court held that the negligent-rescue claim was subject to admiralty jurisdiction because it involved the operation of a vessel on navigable waters. The rescue operation also had the potential to disrupt maritime commerce since it took the harbormaster away from his usual duties of patrolling the harbor and assisting boaters.

At the same time, however, the court ruled that the claims for inadequate emergency-response capabilities and signage were beyond the scope of admiralty jurisdiction since these were "land-based" claims with no substantial relationship to traditional maritime activity. While recognizing that there might be supplemental jurisdiction over these claims, the court declined to hear them: "The limitation proceeding appropriately will focus on the harbormaster's actions. Additional land-based tort claims against the Town for actions or omissions unrelated to the harbormaster are beyond the scope of the true maritime proceeding and more appropriately tried in state court." ■

D. Nev.: no admiralty jurisdiction over houseboat renter's death on navigable lake

In re Seven Resorts, Inc., 2011 WL 830107 (D. Nev. March 7, 2011)

A family rented a houseboat on Lake Mead. A few nights into their vacation, while the houseboat was moored to the shore, their son began playing on a raft tied to the back of the houseboat near a generator exhaust vent. The boy was later discovered floating face down in the water and could not be revived. An autopsy showed the primary cause of death to be carbon monoxide poisoning, most likely from the generator exhaust.

The owner of the houseboat filed a limitation action, which the family moved to dismiss for lack of admiralty jurisdiction and on the basis that it was untimely. (The limitation action was filed more than six months after the family's lawyer wrote to the houseboat owner's insurance adjuster advising of his representation and asking for insurance information.)

Without addressing the timeliness issue, the court ruled that admiralty jurisdiction was lacking. The court was bound by *H2O Houseboat Vacations Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996), in which the Ninth Circuit held that carbon monoxide poisoning aboard a houseboat tied to the shore of a navigable lake had no potential to disrupt maritime commerce and thus could not support admiralty jurisdiction. Although Lake Mead was a navigable waterway, the circumstances of this accident were virtually identical to those in the *H2O Houseboat* case, and hence the limitation action had to be dismissed for lack of jurisdiction. (Arguably the Ninth Circuit's more recent decision in *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124 (9th Cir. 2009), would have counseled a different result, but that decision was not mentioned.)

The court also noted that under Ninth Circuit precedent the Limitation Act does not confer federal jurisdiction; rather, the court can hear a limitation action only if the underlying casualty is within admiralty jurisdiction. ■

Torts

No liability in wheel-wash case

Edington v. Madison Coal & Supply Co., 2010 WL 3938370 (E.D. Ky. Oct. 5, 2010)

A tow of fourteen barges, three across and five long with one gap, was downbound in the middle of the navigation channel of the 1200-foot-wide Ohio River. A 17-foot pleasure craft approached from ahead. It was operated by Danny Edington, a novice boater who had not taken any boating safety courses. Three of his four passengers were seated in the bow section of the vessel, causing a "bow down" effect.

The pleasure craft left the tow to port at a distance of about 150 feet, but then unexpectedly turned into the wheel wash behind the towboat. Likely as a result of the wash combined with the "bow down" position of the vessel, two waves crashed over the bow, and the pleasure craft capsized. The towboat's crew rendered assistance, and everyone was rescued except for Edington, whose body was recovered the following day.

The surviving passengers were Edington's widow, children, and second cousin by marriage, all of whom filed a negligence suit against the towboat owner. The court determined that the tow's speed of approximately 7.5 miles per hour was prudent in the circumstances and that the bow wake and wheel wash did not present an unreasonable risk to the pleasure craft. Although the towboat did not sound any whistle signals, there was evidence of a "custom and practice of tow boats not to sound a horn or whistle when encountering pleasure craft on the Ohio River, so long as there is no apparent danger in passage." The legal cause of Edington's death was determined to be his own negligence in turning into the wheel wash. Judgment was entered for the defendant.

Owner of boat ripped from mooring during Hurricane Katrina acted reasonably; Act of God caused loss

Simmons v. Berglin, 2010 WL 4561402 (5th Cir. Nov. 12, 2010)

After Hurricane Katrina, property owners Sandra and Jack Simmons found a 47-foot sailboat in their backyard. They claimed that the boat damaged their pier, seawall, cabana, pool, fences, and sidewalks, and they filed suit against the sailboat owner. The sailboat's owner, Judy Berglin, had asked two very experienced mariners to make sure her boat was ready for the storm. The mariners determined that the seven ¾-inch lines tying the boat to the pilings were already "overkill," but they added two extra lines on the bowsprit and one extra spring line from the bowsprit to an aft piling. They also gave the lines six inches of slack.

Hurricane Katrina devastated the marina where the sailboat was moored, destroying the docks and ripping every boat from the moorings (apart from one vessel that was dismasted, cut in two, and sunk during the onslaught). This devastation was far in excess of that experienced in prior hurricanes. The court determined that Berglin had acted reasonably and that the Simmons' property damage was the result of an Act of God. The district court's grant of summary judgment for the defendant was affirmed. ■

D.N.J.: Expert not needed to prove causation in jet-ski accident

Dinenno v. Lucky Fin Water Sports, LLC, 2011 WL 689584 (D.N.J. Feb. 17, 2011)

Where a reasonable lay juror could find that a rental company's instructions were inadequate and contributed to a jet-ski accident, the claim against the company survived a motion for summary judgment.

A collision between two jet skis off the coast of New Jersey resulted in a negligent-entrustment claim against the jet-ski rental company. New Jersey law requires that jet-ski rental companies instruct customers on, among other things, safe speed and distance as well as the rules for meeting, crossing, and overtaking. The plaintiff claimed that the defendant rental company had provided instructions lasting only "30 seconds or so," presumably insufficient time to impart the information required by New Jersey law.

An experienced owner of a different jet-ski rental company provided an expert report on the plaintiff's behalf, opining that the defendant's instructions, riding area, and supervision were inadequate. The defendant claimed that the plaintiff failed to make out a prima facie case because the expert report did not address the issue of causation, i.e., it did not state that the accident would have been avoided if the instruction, riding area, and supervision had been different.

The court noted that the expert report was addressing the standard of care in the jet-ski rental business, not watercraft collisions and their causes. The facts were not so complicated that the issue of causation would be beyond the understanding of a lay person, and the defendant's motion was therefore denied. ■

Product Liability

East River (again) bars product-liability claims where yacht damaged only itself

Hunter v. Marlow Yachts Ltd., 2011 WL 973356 (M.D. Fla. March 18, 2011)

A Marlow Explorer yacht caught fire and was severely damaged. Its owners and insurer brought suit against the seller, the builder, and other defendants on a variety of product-liability, negligence, and contract claims. The defendants moved for dismissal.

The court granted the motion in part, agreeing that the negligence and product-liability claims were barred by the economic-loss rule made applicable to admiralty cases by *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). Since the fire had damaged nothing but the vessel itself, the only potential avenue of recovery was through contract. (The court noted that the result would have been the same under the economic-loss rule as applied in Florida and Washington, the two states that had a connection to the underlying sale transaction.) The fact that the contract claims might be barred by warranty disclaimers was insufficient to overcome *East River*.

As to the contract claims, the court decided that there was significant doubt as to their viability but that the allegations in the complaint were sufficient to survive a motion to dismiss. ■

In Colorado, design of steering cable to be judged by risk-benefit test, not consumer expectation

Kokins v. Teleflex, Inc., 621 F.3d 1290 (10th Cir. 2010)

While patrolling a Colorado lake by boat, a park ranger was thrown overboard due to the sudden failure of the steering cable, caused by rust in the cable's inner core. She sued the manufacturer of the steering cable, claiming it should have had grease fittings or O-rings to prevent water from entering the cable, and that it should have been made of stainless steel rather than carbon steel so as to minimize corrosion.

The manufacturer argued that the cable was incorrectly installed and maintained, and that carbon steel was preferable to stainless because it is stronger and also because it expands when it rusts, causing the cable to stiffen, making the boat difficult to steer, and thus alerting the operator that the cable needs replacing.

At trial the jury was instructed on Colorado's "risk-benefit" test, under which a product is deemed defective if the plaintiff proves that the benefits of its design are outweighed by the risks. The jury was also instructed that under Colorado law there is a rebuttable presumption that a product is not defective if it has been on the market for at least ten years. The jury found for the manufacturer.

On appeal the first issue was whether the jury should have been instructed not just on the risk-benefit test but also on the "consumer-expectation" test. Under the latter test, a product is deemed defective if the plaintiff proves that it is more dangerous than would be contemplated by an ordinary consumer who purchases it. The Tenth Circuit agreed with the trial court that in a design-defect case involving complex technical and scientific information, the proper test under Colorado law is the risk-benefit test, not the consumer-expectation test.

The second issue was whether the jury should have been instructed on Colorado statute (C.R.S. § 13-21-403(3)), under which a product is rebuttably presumed to be free of defects if ten years have passed since it was brought to market. Here again, the Tenth Circuit approved the trial court's instruction. Recently the Colorado legislature had amended the statute to mandate that juries be instructed on the presumption as long as the predicate facts are established. Since this was a diversity case governed by substantive Colorado law, the trial court had properly given the instruction. ■

Salvage

6% award for dockside pump-out, temporary fix, and tow to repair yard

Port Everglades Launch Service, Inc. v. M/Y SITUATIONS, 2011 WL 1196017 (S.D. Fla. March 29, 2011)

A 20-year-old, 100-foot Broward motor yacht began taking on water while docked on the canal behind its owner's house. Both the owner and his captain were out of state. A passerby noticed the problem and called the police, who arrived and decided that the yacht needed immediate assistance. The police telephoned a marine salvor, who came to the scene promptly, employed high-capacity pumps to dewater the yacht, and fashioned a temporary plug to stop the inflow of water from the air conditioner's raw-water pump, which was the source of the problem. The salvor's towboats then towed the yacht to a repair yard. From start to finish the operation lasted approximately five hours. The weather was calm and no air bags were required, though the salvor did have a diver on the scene ready to enter the water if needed.

The court found that this was relatively "low order" salvage in light of testimony from the owner's expert that the vessel would not have gone under for another 27 hours. Also, there was other testimony that a broker who was listing the vessel for sale would have probably visited the vessel and summoned help in time to prevent a total sinking. The court declined to adjust the salvage award to account for the salvor's efforts at oil containment; there was conflicting evidence as to whether the salvor's oil booms were effective, and it was unclear whether any oil even entered the canal.

Weighing the testimony of each side's valuation expert, the court concluded that the yacht was worth approximately $700,000 before the incident and approximately $460,000 after it. Having considered all the circumstances, the court rendered a salvage award of approximately $27,500, or roughly five percent of the salved value plus a one-percent uplift for the plaintiff's status as a professional salvor. Prejudgment interest was allowed at the prime rate. ■

10% award for extracting vessel hard aground

Reliable Salvage and Towing, Inc. v. 35-Foot Sea Ray, 2011 WL 1058863 (M.D. Fla. March 21, 2011)

A 35-foot Sea Ray ran aground on a sandy shoal near Boca Grande, Florida. The owner hailed a passing boat operated by the plaintiff, a local salvage company, who assessed the situation and decided that two additional boats would be needed to pull the Sea Ray off the shoal. By this time the Sea Ray was in about ten inches of water and heeled over at a 30-degree angle.

In the salvor's view, it would not have been prudent to simply wait for a higher tide because bad weather was predicted and tides for the next few days were expected to be lower than normal. In addition, it was Easter weekend and the Sea Ray would have been at greater risk of being hit by another boat due to the increased traffic on the water.

Before summoning its two other boats, the salvor presented the Sea Ray owner with a form of salvage agreement. Rates and costs were not discussed and were not filled in on the form. The owner signed the form but later professed not to have read its preprinted terms.

The two other salvage boats were then called, and using their propeller wash they cleared a trench to allow the Sea Ray to be towed to deeper water. There was testimony that using the engines in this fashion causes significant wear and tear. During the course of the extraction the Sea Ray also lost a bow cleat. The entire operation took several hours, and the Sea Ray departed under its own power.

The salvor calculated its bill based on the rate-per-foot approved by BoatUS, plus running time. The Sea Ray owner did not dispute the reasonableness of the charges but still neglected to pay them (he had also allowed his insurance to lapse).

The court determined that the case presented a "pure salvage" situation inasmuch as there was no agreement—either oral or written—as to the terms of the salvor's compensation. Taking into account all the circumstances, the court awarded $14,000, or ten percent of the Sea Ray's value. This was slightly less than twice the amount the salvor had originally billed the Sea Ray owner.

Since the litigation was necessitated by the Sea Ray owner's failure to pay what was indisputably a reasonable bill, the court also awarded the salvor its attorneys fees and costs. ■

Marinas

Court will not enforce ambiguous exculpatory clause

Albrecht v. Marinas Int'l Consolidated, LP, 2010 WL 4866289 (Ohio App. Nov. 24, 2010)

A boater entered into a winter storage agreement with a marina and was allegedly assured by a marina employee that the boat would be fully winterized for a

fixed price. When the boat was launched in the spring, it took on water because bolts on an intake strainer had frozen and broken during the winter. The boater's insurer paid the damage claim, and the marina was sued for negligence, breach of bailment, fraud, and violation of the Ohio Consumer Sales Practices Act (CSPA). The trial court granted summary judgment to the marina, but the Ohio Court of Appeals reversed.

The storage agreement stated in fine print that the marina would

> not be responsible for or have any liability whatsoever for any loss, damage, personal injury or loss of life or property within the control of the Marina, its employees or its agents in connection with (1) the company's premises or the use of its storage space, (2) the owners [sic] vessel, motor, cradle, accessories, including outboard motors, dock box, fenders, tools, and associated equipment; (3) any loss due to fire, theft, vandalism, collision, marina equipment failure, windstorm, rain, tornado, or any other casualty loss. Owner agrees to cover the aforesaid risks by appropriate insurance coverage without subrogation against [the Marina]."

The Court of Appeals held that the waiver of subrogation in the last sentence did not necessarily apply since the term "aforesaid risks" could be read as encompassing only "fire, theft, vandalism," etc.—that is, the risks identified in the immediately preceding clause. Further, the exculpation for damage "in connection with . . . the owners [sic] vessel . . . and associated equipment" was "poorly drafted and confusing," did not clearly apply to the circumstances of this case, and in any event was not explicit enough to insulate the marina from the consequences of its own negligence as alleged in the complaint.

According to the appellate court, the trial judge also erred by invoking the economic-loss rule to dismiss the fraud and negligence claims, since the marina had not raised that argument in its motion papers. In addition, a genuine issue of material fact existed as to whether the marina exercised ordinary care in accordance with the duty of a bailee. Finally, since the written agreement contained no integration clause, the trial court should not have excluded parol evidence supporting the CSPA claim.

Summary judgment for the marina was therefore unwarranted, and the case was returned to the trial court for further proceedings. ■

Boatyard not liable for brazen theft

Williams v. MarineMax of Central Florida, LLC, 2011 WL 744141 (N.D. Fla. Feb. 23, 2011)

A boat was stolen overnight from a boatyard enclosed by a 7-foot-high chain-link fence with barbed wire on top. The theft was discovered the next morning when a boatyard manager saw that a section of the fence had been either cut open or entered by force, as if the thieves had driven a vehicle through the fence. There was no evidence of any prior thefts from the boatyard or of significant criminal activity in the area. In these circumstances, the court granted summary judgment for the boatyard on the boat owner's negligence claim. ■

Criminal Liability

New York prosecutes yacht captain for having handgun in onboard safe

State of New York v. Guisti, 2011 WL 709467 (N.Y. City Crim. Ct. Feb. 28, 2011)

The New York City Criminal Court has declined to dismiss a gun-possession charge against the captain of a yacht operating in New York Harbor.

Flagged in the British Virgin Islands but based in Florida, the yacht was making a summer cruise along the East coast with the captain, owner, and several guests aboard. In the waters near the Statue of Liberty, the yacht was boarded by the U.S. Coast Guard—apparently as part of a routine check—and was directed to steer east in order to stay clear of traffic. When asked by the Coast Guard whether there were weapons on board, the captain advised that there was an unloaded handgun in the forward cabin. The Coast Guard located the unloaded handgun in its safe and accompanied the vessel to Jersey City, where New Jersey police investigated and declined to prosecute. NYPD harbor patrol officers were then called; they arrested the captain in New Jersey and took him to Manhattan for prosecution. There were no extradition proceedings.

The captain argued that he was immune from prosecution by virtue of the federal McClure-Volkmer Act, which provides that anyone not otherwise prohibited from doing so under federal firearms law may "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is

readily accessible." The yacht was based on Florida, and there was no indication that the captain, a Florida resident, was in violation of Florida law. Nevertheless, the court concluded that the federal statute did not apply because the yacht was not traveling from Florida to another state in which possession of the handgun was legal; instead it was making a "round-trip foray with a gun into states [where] the defendant is not entitled to possess a gun. The plain language of the statute mandates application only if the defendant was transporting the gun from one state to a different state."

The captain also argued that New York law was inapplicable since the yacht was in New Jersey waters when the Coast Guard located the handgun. But the prosecution alleged that the yacht had ventured into the waters "opposite of one 1 South Street, in the County and State of New York," and the court decided that the location of the vessel was a question of fact to be resolved at trial.

Next, the court declined to dismiss the case on account of the NYPD's having arrested the captain in New Jersey. While recognizing that generally "police officers from New York have no power to make arrests outside their geographic jurisdiction" and that the arrest was not aided by New Jersey police, the court stated that "the conduct of the NYPD, even if it violated New Jersey law, does not shock the conscious." In other words, regardless of whether the arrest was lawful where it occurred, the court held that the captain could still be prosecuted in New York.

Finally, the court declined to exercise its discretion to dismiss the case, noting that years ago the captain had three brushes with the law and that he presented no evidence supporting his argument that a conviction in this case could lead to the loss of his U.S. Coast Guard license and thereby end his career. ■

Regulatory Developments

Coast Guard proposes to mandate engine kill switches

As part of its unified agenda published in December 2010, the U.S. Coast Guard is proposing to require engine cut-offs (i.e., man-overboard kill switches) on recreational boats less than 26 feet in length and to require their operators to use them. The proposal is now under review by the Office of Management and Budget. No proposed regulations have yet been released. Docket information may be found at http://www.reginfo.gov (RIN: 1625-AB34). ■

EPA seeking input on Clean Boating Act standards

Under the Clean Boating Act passed in 2008, the Environmental Protection Agency is charged with developing management practices and performance standards for discharges incidental to the normal operation of recreational vessels (bilgewater, gray water, etc.). The rulemaking process is still at the early stage, and the EPA is accepting comments that will help it in developing management practices. Written comments should be delivered to the EPA by June 2, 2011. A public webinar is also scheduled for May 10, 2011. Further information is available at: http://water.epa.gov/lawsregs/lawsguidance/cwa/vessel/CBA/ ■

Recreational boating taken off NTSB's "most wanted list"

Noting the proliferation of state laws mandating life jackets for children and training and licensing of recreational boaters, the National Transportation Safety Board has dropped recreational boating from its "most wanted list" of safety initiatives directed to state governments. The NTSB will, however, "continue to push for action" in those states that have yet to enact life jacket and training requirements. ■

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