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

BOATING BRIEFS

Thomas A. Russell, Chairman **Frank P. De Giulio, Editor**

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

- The Editorial Staff

In This Issue

Propeller Guard Preemption Issue Goes Back to U.S. Supreme Court While Coast Guard Considers New Regulations

The issue of whether state common law claims based on the alleged failure to equip pleasure boat engines with propeller guards are preempted by federal law has been the subject of numerous lower court decisions over the past decade. It appears that the issue will now be resolved by the U.S. Supreme Court. In the meantime, the U.S. Coast Guard, which previously rejected the need for regulations imposing propeller guard requirements, is currently considering new regulations in the area.

In August, 2001, the Supreme Court of Illinois joined the ranks of the majority of other state and federal courts which have considered the issue in holding that state law personal injury claims based on the alleged failure to equip a recreational boat with a propeller guard are preempted by Coast Guard regulatory action taken under the authority of the Federal Boat Safety Act, 46 U.S.C. §§4301-4311 ("FBSA"). *Sprietsma v. Mercury Marine,* 757 N.E.2d 75, 197 Ill.2d 112 (Ill. S.Ct. 2001).

The plaintiffs in *Sprietsma* petitioned the U.S. Supreme Court for certiorari. The Supreme Court granted the petition in January, 2002. *Sprietsma v. Mercury Marine,* 122 S.Ct. 917, 151 L.Ed.2d 883 (2002). The question on appeal is whether state common law tort claims based on a failure

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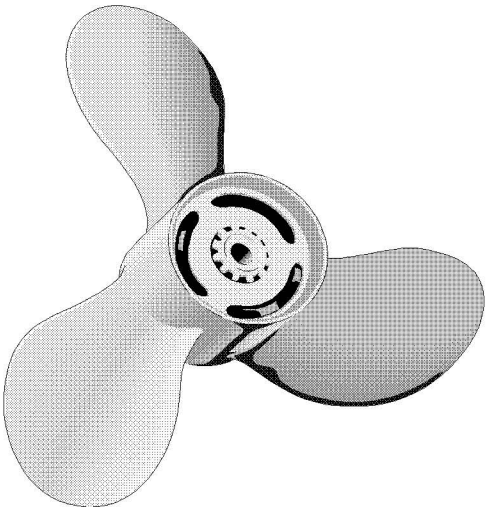
to install a propeller guard are either expressly preempted by the FBSA or impliedly preempted by Coast Guard regulatory action under the Act. The Solicitor General of the United States and the Trial Lawyers of America have filed Amicus Briefs in support of the plaintiff-petitioners. The Supreme Court brief filed by the plaintiffs-petitioners can be viewed at 2002 WL 500659; Amicus Briefs filed by the United States and the Trial Lawyers are available at 2002 WL 500643, 500650.

The Maritime Law Association of the United States is preparing to file an Amicus Brief urging the Court to affirm the holding of the Illinois Supreme Court in order to maintain national uniformity in this area of maritime law.

Jeanne Sprietsma died in 1995 from injuries suffered when she fell from a power boat and was struck by the propeller blades of a 115 horsepower outboard motor manufactured by Mercury Marine. A wrongful death action was commenced against the manufacturer under Illinois state law alleging that Ms. Spreitsma's death was caused by the failure to design and equip the boat with a propeller guard. In response to a motion to dismiss filed by Mercury Marine the trial court found that the plaintiffs' common law claims were expressly and impliedly preempted by federal law. On appeal the intermediate appellate court affirmed the result below on the grounds that the FBSA expressly preempted the plaintiffs' claims. *Sprietsma v. Mercury Marine,* 729 N.E.2d 45, 312 Ill.App.3d 1040 (Ct. App. 2000). The plaintiffs then appealed to the Illinois Supreme Court.

On appeal to the Illinois Supreme Court, Mercury



Marine argued that state law claims based on the alleged failure to equip the motor with a propeller guard were subject to express preemption by the language by the FBSA itself and were impliedly preempted because the U.S. Coast Guard had considered and rejected the imposition of regulations requiring propeller guards pursuant to its authority under the Act. Although some state and federal courts have held that the FBSA expressly preempts such state law claims, the Illinois Supreme Court adopted the approach taken by the Fifth and Eleventh Circuit Courts of Appeal and held that the common law claims were impliedly preempted in light of the Coast Guard's consideration of the issue and determination that regulations requiring propeller guards were not warranted. See, *Lady v. Neal Glazer Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000) and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), previously reported at 6 Boating Briefs No. 1 (1996); 7 Boating Briefs No. 1 (1998); 9 Boating Briefs No. 2 (2000).

The Supreme Court granted certiorari in the Eleventh Circuit's prior decision in *Lewis v. Brunswick* in November, 1997. Briefs were filed and the case was argued before the Supreme Court. The United States filed an Amicus Brief supporting the plaintiff's appeal and urging the Court to hold that state law claims are not expressly or impliedly preempted by federal law or regulation. However, the parties settled the case and the appeal was dismissed before the Supreme Court issued its opinion. In the absence of

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Insurance Fraud Scheme Involving Sinking of Yacht Results In Federal Conviction of Los Angeles Man

A Los Angeles area lawyer is facing a maximum sentence of 80 years in federal prison after being convicted on federal charges relating to a marine insurance fraud scheme involving the intentional sinking of a yacht. Sixty-five year old Rex K. DeGeorge was found guilty by a jury in Los Angeles federal court on March 1, 2002 following a two-week trial. The jury found DeGeorge guilty of conspiracy, three counts of mail fraud, seven counts of wire fraud and five counts of perjury in connection with a separate civil lawsuit related to the sinking.

The government alleged that DeGeorge purchased the seventy-six foot motor yacht *Principe Di Pictor* in 1992, engaged in a series of sham transactions to drive up the "value" of the vessel to more than $3.6 million for insurance purposes and then intentionally sank the vessel to collect on the insurance policy. The hull underwriter, CIGNA Property and Casualty Insurance Company, previously obtained a civil judgment for recission of the policy against the insured, Polaris Pictures Corporation, based on the failure to disclose material facts in the insurance application. See, *Cigna Property and Casualty Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412 (9th Cir. 1998).

DeGeorge was the third defendant to be convicted in the scheme that led to the sinking of the yacht. Two other participants in the alleged scheme, Paul A. Ebeling and Gabriel Falco, previously pled guilty to various federal charges including conspiracy, mail fraud, wire fraud and perjury and are scheduled to be sentenced on April 29, 2002.

The evidence presented by the government in the criminal trial against DeGeorge showed that he originally purchased the motor yacht from Italy''s Azimut S.p.A for in 1992 for $1.9 million. DeGeorge and Ebeling then arranged a series of sham transactions to resell the yacht for ever-increasing prices to separate but related entities, allegedly because DeGeorge previously was involved in the loss of three other vessels -- which made it unlikely that an insurance would issue a policy on a boat he owned -- and because he wanted to artificially inflate the value of the yacht for insurance purposes.

According to the government the boat was ultimately sold to Polaris Pictures Corporation, a film company controlled by DeGeorge and Ebeling, for $3.675 million. Cigna agreed to insure the boat for $3.5 million.

DeGeorge, Ebeling and Falco claimed that they took delivery of the yacht on November 7, 1992 in Italy and hired a captain and crew to conduct sea trials. DeGeorge and his two companions were found in a skiff by the Italian Coast Guard the following day off the coast of Naples. They told the authorities that the captain and crew were Sicilian drug runners who held them at gunpoint and then intentionally sank the yacht using power tools to drill holes in the hull. The hired captain and crew allegedly fled the scene in a speed boat, leaving DeGeorge and his companions aboard the sinking yacht. The government alleged that the hired "crewmembers" were entirely fictitious and that DeGeorge and his companions were responsible for the sinking.

The evidence presented at the criminal trial also showed that DeGeorge had collected insurance on three

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Challenge to Regulations Prohibiting PWC Use in National Parks Rejected by Federal Court

In April, 2000, the National Park Service implemented regulations designed to limit or eliminate the use of Personal Watercraft in certain national parks. The Final Rule, published in the Federal Register at 65 Fed. Reg. 15077 (March 21, 2000), became effective on April 20, 2000. The regulations carved out an exception for eleven parks, creating a two-year grace period during which PWC use could continue subject to local regulation. Under the regulations, PWC use would be prohibited following expiration of the grace period unless specifically authorized by the agency. Under the original regulations, PWC use in ten other parks where the primary use is recreational boating was permitted to continue indefinitely subject to local regulation.

In August, 2000, an environmental group filed suit against the National Park Service to enjoin enforcement of the regulations, arguing that PWC use in the National Parks violated the National Park Service's mandate to prevent impairment of park resources. *Bluewater Network v. Stanton*, C.A. No. 00-cv-2093 (D.D.C. 2000). The lawsuit was resolved by a settlement between Bluewater and the Park Service. Under the settlement the Park Service agreed to amend the original regulations to eliminate the exception for continued use of PWC's in ten parks subject to local regulation. These ten areas were also made subject to a two year grace period following which use of PWC's would be prohibited unless expressly authorized by the agency. See 9 Boating Briefs No. 1 (2000) and 10 Boating Briefs No. 1 (2001) for a discussion of the original regulations and the settlement in the Bluewater challenge.

The American Watercraft Association, the Personal Watercraft Association and individual PWC users recently filed suit in the U.S. District Court for the Southern District of Texas against the National Park

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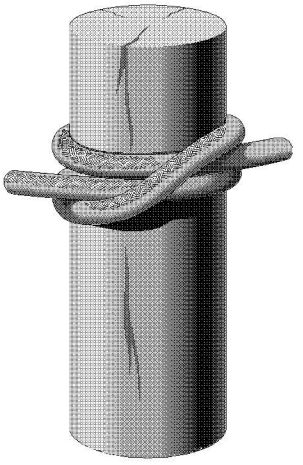
Service Director and the

Secretary of the Interior seeking a preliminary injunction against enforcement or implementation of the regulations relating to the 21 parks subject to the two-year grace period. *Roberts v. Mainella,* __WL _, C.A. No. V-02-22 (S.D.TX). The two-year grace period for thirteen parks was set to expire on April 22, 2002 and no action was taken by the agency to permit continued use. The grace period for the remaining eight parks will expire on September 15, 2002. A preliminary hearing was held on April 17, 2002 and District Judge Rainey released his written opinion denying the plaintiffs' request for a preliminary injunction on April 19, 2002. The plaintiffs in *Roberts* argued that the agency failed to comply with the requirements of the National Environmental Policies Act ("NEPA") and the Administrative Procedures Act by failing to conduct an environmental impact study or assessment before promulgating the regulations. The Court held that the National Park Service was entitled to rely on certain exclusions to the requirement for an environmental study or assessment contained in NEPA unless the plaintiffs could prove that the regulations would in fact result in an adverse environmental impact. The plaintiffs argued that the ban would cause PWC owners to use other waterways, thereby increasing congestion and environmental harm in those areas. However, the plaintiffs were apparently unable to offer any specific evidence to support their arguments. The court therefore held that the plaintiffs failed to meet the burden of proof required to overcome the agency's reliance on the exceptions contained in NEPA.

The plaintiffs also argued that the decision of the Park Service not to permit continued use of personal watercraft following the grace period was arbitrary and capricious in that the regulations target only PWC's rather than all types of recreational vessels. This argument had previously been raised and rejected by the court in *Personal Watercraft Industry Association v. Department of Commerce,* 48 F.3d 540 (D.C. Cir. 1995). Although the plaintiffs in *Roberts* presented evidence intended to show that advances in PWC design have made newer versions of the craft comparable to traditional motorboats in respect of noise levels, water pollution and potential damage to marine life, the court held that the agency's decision to single out PWC's was based on rational considerations and was not arbitrary or capricious.

Finally, the plaintiffs argued that PWC users and manufacturers would suffer irreparable harm as a result of the ban. Specifically they alleged that users would be endangered by being forced to use their PWC's in other congested waters used by larger vessels and that the ban unfairly deprived them of the pleasure of using the craft in the unique environments offered by National Parks. The court rejected these arguments on the grounds that the plaintiff users were responsible for making their own decisions regarding safety and when and where to use the craft and were merely being "inconvenienced" by the ban on use of PWC's in the specified parks.



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other boats that he claimed were accidentally lost at sea prior to the sinking of the *Principe di Pictor.* According to court documents, in 1970 DeGeorge reported that his 43-foot yacht, the *Tutania*, was stolen by Peruvian coffee merchants who were aboard the boat posing as interested purchasers. Hartford Insurance Company initially denied the claim but ultimately paid the hull policy limits of $43,000 to DeGeorge to avoid litigation.

With the proceeds of this first insurance settlement, DeGeorge purchased a 57-foot racing yacht called the *Epinicia.* In 1976 the boat allegedly struck an unidentified object in the water at night off the coast of Italy and sank. DeGeorge and Ebeling were the only persons aboard. The two men used a dinghy to motor ashore, and the lost boat was never reported to the police or maritime authorities. London underwriters who issued hull coverage on *Epinicia* initially declined coverage but ultimately paid the policy limits of $194,000 to DeGeorge after he filed a $5 million bad faith lawsuit against them.

In a third incident, DeGeorge collected policy limits on his 43-foot Gulfstar that allegedly sank off the California coast in 1983. DeGeorge alleged that he and his wife were aboard the vessel when a "suspicious looking" fishing boat circled the yacht. According to DeGeorge, a short time later a series of explosions occurred on the boat. He and his wife abandoned the boat and returned to Marina del Rey in a dinghy. Although he did not report the loss to the Coast Guard, he lodged a total loss claim with the hull underwriter, Fireman's Fund, who ultimately paid the policy limits of $245,000 after DeGeorge threatened legal action.

The U.S. Postal Inspection Service and the Federal Bureau of Investigation conducted the investigation which led to the convictions of DeGeorge and his companions. DeGeorge is scheduled to be sentenced on May 15, 2002.

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a settlement, it now appears that the Supreme Court will deliver an opinion on the issue in the *Sprietsma* case.

In reaching its decision in *Sprietsma*, the Illinois Supreme Court placed great emphasis on the need for uniformity of the law: "Uniformity is particularly important where, as here, the federal statute relates to a product that is inherently mobile and thus likely to move from state to state.... Boats also frequently navigate in lakes or rivers that mark the boundary between two states. Thus it is essential that a uniform body of law be developed."

Consistent with the holdings in *Lady* and *Lewis*, the *Sprietsma* court rejected Mercury Marine's argument that the FBSA itself expressly preempted the plaintiffs' common law claims in light of the "savings clause" contained in the Act. The Act's "savings clause" provides that evidence of compliance with the Act or regulations issued thereunder "does not relive a person from liability at common law or under state law." 46 U.S.C. §4311(g). Citing the U.S. Supreme Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913 (2000), an air-bag case, the Court held that the existence of the savings clause prevented a finding that the FBSA itself expressly preempted the plaintiffs' common law tort claims.

On the issue of implied preemption the Illinois Supreme Court first noted that the U.S. Supreme Court has held that state laws may be subject to implied preemption even where the

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California Court of Appeal Holds That State Law Claims Against Boat Manufacturer Are Not Preempted by Federal Law

In 1998, eleven year old Daniel Laplante was injured when he was thrown from the bow of a pleasure boat and struck by the boat. Laplante filed suit against the designer, manufacturer and distributor of the boat in California state court asserting causes of action based on products liability, negligence and breach of warranty. Laplante's complaint alleged in the alternative that the defendants failed to design and install adequate hand-holds in the bow area, negligently installed defective hand-hold devices and failed to warn intended users of the dangers raised by the absence of such devices. The trial court granted summary judgment in favor of the defendants, holding that the plaintiff's common law tort claims were preempted by federal law.

Laplante appealed. The Court of Appeal reversed the trial court's decision, holding that the plaintiff's claims were not expressly preempted by the Federal Boat Safety Act ("FBSA") or impliedly preempted by the Coast Guard's failure to promulgate regulations governing hand-holds on recreational craft. *Laplante v. Wellcraft Marine Corp.*, 2002 AMC 130 (Cal. Ct. App. 2001).

The Court of Appeal identified and considered three potential bases of federal preemption of state law claims based on the failure to design and install hand-holds in the bow area of a recreational craft: (1) express preemption by the language of the FBSA; (2) field preemption if Congress intended that federal law should occupy the entire field of pleasure boat safety, and; (3) conflict preemption if the state and federal laws actually conflict or the state law is an obstacle to execution of Congressional objectives.

The Court first considered express preemption of state law tort claims by the language of the FBSA. Consistent with a number of other courts which have considered the issue, the Court of Appeal rejected the defendants' argument that the FBSA itself expressly preempted the plaintiffs' common law claims. A "savings clause" in the FSBA provides that evidence of compliance with the Act or regulations issued thereunder "does not relive a person from liability at common law or under state law." 46 U.S.C. §4311(g). Relying on the Eleventh Circuit's decision in *Lewis v. Brunswick*, 107 F.3d 1494, 1997 AMC 1921 (11th Cir. 1997), the Court held that in light of the "savings clause" the Act could not be interpreted as evidence of Congressional intent to expressly preempt state common law claims.

The *Laplante* Court then considered the defendants' argument that the plaintiff's state law claims were preempted under the doctrine of "field preemption" because Congress intended to occupy the entire field of recreational boat safety when it enacted the FBSA. The defendants based their field preemption argument on the U.S. Supreme Court's decision in *United States v. Locke*, 529 U.S. 89, 2000 AMC 913 (2000). In *Locke* the Supreme Court held that certain Washington State laws governing the design, construction, operation and manning of oil tankers were preempted under the federal Ports and Waterways Safety Act because Congress expressed a clear intent to preempt the entire field of law. The *Laplante* Court distinguished *Locke* in part because "...the FBSA involves the regulation of recreational vessels which

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have far less connection to national and international commerce than commercial oil tankers...[W]hile the federal government clearly has constitutional authority to regulate this area, its interest in regulating recreational boating is significantly different from that of regulating commercial oil tankers that affect international trade." The Court of Appeal then reviewed the language of the FBSA and held that the language of the Act itself and the fact that the U.S. Coast Guard had not created a comprehensive regulatory scheme governing all aspects of pleasure boat safety required a conclusion that Congress did not intend to preempt the entire field of recreational boating safety laws and regualtions.

Finally, the *Laplante* Court considered the defendants' argument that the plaintiffs' state law claims were preempted by the doctrine of "conflict preemption" sometimes referred to as "implied preemption." The Court stated that state laws are barred by conflict preemption if compliance with both state and federal law is impossible or the state law is found to create an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. Relying on decisions involving state law claims based on a failure to equip a vessel with a propeller guard, the defendants argued that the Coast Guard's failure to issue regulations governing hand-holds in the bow area of pleasure boats amounted to a determination that the subject matter should not be regulated. The Court of Appeal distinguished the propeller guard cases on the basis that the Coast Guard had specifically considered and rejected the need to impose regulations requiring propeller guards. The defendants submitted the declaration of a former Coast Guard officer who stated that the Coast Guard considered and chose not to issue any regulations under the FBSA with regard to hand-holds in the bow areas of recreational boats. The Court of Appeal sustained the trial court's finding that the declaration was inadmissible as hearsay and mere opinion. The Court therefore held that, in contrast to the propeller guard cases, there was no competent evidence to demonstrate that the Coast Guard conducted a thorough evaluation of the need for hand-hold regulations which resulted in a finding that such regulations were not warranted. Accordingly, the *Laplante* Court held that the plaintiff's state law claims were not barred by the doctrine of conflict preemption.

In addition to holding that the claims based on the defendants' alleged failure to install hand-holds were not preempted by federal law, the Court of Appeal also distinguished the plaintiff's separate and alternative claim for negligent installation of defective hand-holds, holding that such a negligence based claim for failure to properly equip a vessel was expressly permitted by the "savings clause" of the FBSA and could not be preempted under any theory of federal preemption.

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federal act in question contains a "savings clause" such as that found in the FBSA. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 121 S.Ct. 1012 (2001). The Court then reviewed a number of leading U.S. Supreme Court decisions on implied preemption relied on by the plaintiffs and by Mercury Marine. The Court distinguished a number of

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decisions involving regulatory inaction by a federal agency on the basis that the U.S. Coast Guard had specifically studied the need for regulations requiring propeller guards and made an affirmative decision not to require them in 1990. Citing the U.S. Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988 (1978), which considered preemption of Washington State laws regulating tankers in Puget Sound, the Court concluded that a finding of implied preemption is warranted where the failure of a federal agency to exercise its full authority "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." The *Sprietsma* court found that the Coast Guard's failure to promulgate a propeller guard requirement "equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA." Accordingly, the Court affirmed the decision of the appellate court and held that the plaintiffs' state law claims against Mercury Marine based on the failure to install a propeller guard were impliedly preempted by federal law.

As the *Sprietsma* case has worked its way through the appellate process towards a decision by the U.S. Supreme Court, there have been a number of recent developments in the U.S. Coast Guard's continuing consideration of proposed regulations to limit propeller strike injuries.

On December 10, 2001, the Coast Guard announced that it was withdrawing a notice of proposed rulemaking originally announced in 1995 which considered imposing requirements on owners and manufacturers to install approved "propeller injury avoidance methods" on certain categories of new and existing pleasure boats. 66 Fed. Reg. 63650. The rulemaking notice was withdrawn because of "(1) the lack of substantive information about the benefits to society of a requirement for manufacturers to prevent propeller strike injuries, and; (2) to simplify the development of a series of new regulatory projects initiated in response to the recent, broader NBSAC [National Boating Safety Advisory Committee] recommendations."

On the same date that the above rulemaking was withdrawn, the Coast Guard published a new notice of proposed rulemaking which would require "owners of non-planing recreational houseboats with propeller driven propulsion aft of the transom" to install certain propeller strike avoidance equipment. 66 Fed. Reg. 63645. The requirements which would be imposed by the proposed regulations differ slightly depending on whether the boat is used for rental purposes or for pleasure purposes by the owner. Owners of rental houseboats would be required to install either a propeller guard or a combination of three other measures: a swim ladder interlock, an aft visibility device and an emergency ignition cut-off switch. Owners of houseboats not for rent would be required to install either a propeller guard or a combination of two other measures: a swim ladder interlock and an aft visibility device. The current comment period for this proposal is open until May 11, 2002.

The December 10, 2001 Notice indicates that it is the first of several contemplated rulemaking notices relating to propeller strike avoidance measures. Proposed requirements which will be the subject of future notices include: (1) require owners of all propeller driven vessels 12 feet in length and longer with propellers aft of the transom to display propeller warning labels and to employ an emergency cut-

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off switch where installed;

(2) require manufacturers and importers of new planing vessels 12 feet to 26 feet in length with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods; (3) require manufacturers and importers of new non-planing vessels 12 feet in length and longer with propellers aft of the transom to select and install one of several factory installed propeller avoidance methods.

It remains to be seen whether these recent regulatory actions will impact the Supreme Court's decision in the *Sprietsma* case. [See related article in this issue on the decision in *Laplante v. Wellcraft Marine Corp.*, also involving the issue of preemption under the FBSA].

Regulatory Developments And Other Recent Cases of Interest

Personal Floatation Devices for Children. On February 27, 2002, the Coast Guard published a Final Rule amending 33 C.F.R. §175 to require all children under 13 to wear personal floatation devices ("PFD's") when above deck on a pleasure boat underway. The amendments provided that any different age limits in existing state laws requiring children to wear PFD's would apply rather than the federal age limit within that state's boundaries. The Rule was to take effect on March 29, 2002. 67 Fed. Reg. 8881. On March 27, 2002, the Coast Guard published a Notice withdrawing the Final Rule. 67 Fed. Reg. 14645. The Rule was withdrawn when the Coast Guard discovered that certain state laws governing PFD's for children apply only to certain types of recreational vessels, a factor that was not previously taken into account.

Reporting of Pleasure Boat Accidents. On March 27, 2002, the Coast Guard published a Final Rule amending 33 C.F.R. §173 which specifies the circumstances in which pleasure boat accidents must be reported to the Coast Guard. 67 Fed. Reg. 14643. Under the Final Rule which become effective on March 27, 2002, a report must be made in connection with any pleasure boat accident where the "Damage to vessels and other property total's $2,000 or more or there is a complete loss of any vessel." The Final Rule raised the reporting threshold from $500 to $2,000 and also eliminated a separate requirement for reporting any collision of two or more vessels regardless of the amount of property damage.

***Hurd v. United States,* __F.3d __, 2002 WL 730284 (4th Cir., No. 01-1680, April 25, 2002).** In a lengthy unpublished opinion a three judge panel of the Fourth Circuit Court of Appeals affirmed the decision of the district court in *Hurd v. United States,* 134 F.Supp. 745, 2001 AMC 1555 (D.S.C. 2001), in which the United States was held liable for the deaths of three teenage pleasure boaters based on a finding that the Coast Guard acted recklessly and wantonly in connection with search and rescue efforts which were initiated but subsequently aborted. One judge wrote a dissenting opinion.

***In re Salty Sons Sports Fishing, Inc.*, __ F.Supp. __, 2002 WL 449459 (D.MD., March 19, 2002).** Personal injury claimant moved to dismiss boat owner's complaint for limitation of liability alleging that the complaint was barred under the six-

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month limitations period contained in the Limitation Act, 46 U.S.C. App. §183, et seq. The incident giving rise to the complaint occurred on July 30, 1999. The complaint was filed on October 22, 2001. The district court denied the claimant's motion to dismiss, holding that written communications sent to the boat owner's insurance company more than six months before the complaint was filed did not constitute "written notice" of a claim sufficient to trigger the six-month limitations period in the Act.

***Fahnestock v. Reeder*, __ F.Supp. __, 2002 WL 531540 (E.D.PA., April 5, 2002).** Suit involving personal injuries arising from a pleasure boat collision on the Susquehanna River in Pennsylvania between the Holtwood and Safe Harbor dams dismissed for lack of admiralty subject matter jurisdiction. The district court, distinguishing caselaw construing the term "navigability" for purposes of Congressional authority under the Commerce Clause, held that the area of the river in question (although historically navigable) was not "navigable" for purposes of conferring admiralty jurisdiction because the body of water between the dams did not and could not support interstate or foreign commerce today without modification from its current state.

***Ayers v. United States*, 277 F.3d 821 (6th Cir. 2002).** Plaintiff's decedent was drowned while swimming in the Kentucky River downstream of Lock No. 2 maintained by the Army Corp of Engineers. The plaintiff administratrix alleged that the drowning occurred due to a sudden release of water from the lock when two pleasure craft were "locked through" and that the lockmaster failed to warn the decedent before opening the lock. The complaint against the United States was brought under the Suits in Admiralty Act, 46 U.S.C. §741 et seq., ("SAA") and the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. ("FTCA"). The United States moved to dismiss on the grounds that the complaint was time-barred by the two-year statute of limitations in the SAA. The Sixth Circuit held that no claim could be maintained under the FTCA if the claim was an admiralty claim which could be asserted under the SAA. The Court held that the claim was cognizable in admiralty, concluding that the drowning occurred on navigable waters and that the "connection test" for admiralty jurisdiction was satisfied because the accident involved the operation of a lock for the passage of pleasure craft and there was a potential effect on maritime commerce due to the need to conduct search and rescue operations for the decedent immediately downstream from the lock. As a result, the Sixth Circuit held that the plaintiffs' complaint was time-barred under the SAA. [This is one of the few cases in which a court has held that admiralty jurisdiction exists in connection with a swimmer's death or injury that is not directly related to the operation of a vessel.]

***AXA Global Risks (UK) Ltd. v. Pierre*, 2002 AMC 228 (S.D.FL. 2001).** Insurer commenced a declaratory judgment action to void a policy issued on a pleasure fishing boat. The named assured, Frank Pierre, had reported the vessel stolen and filed a claim for a total loss. Underwriters alleged that the Frank Pierre failed to disclose and misrepresented material facts when applying for the coverage and that he did not have an insurable interest in the boat which was titled solely in the name of his wife Yola. Underwriters also alleged that the wife had no standing to sue for coverage under the policy since she was not an

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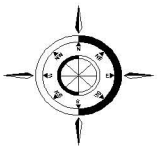
assured. Underwriters moved for summary judgment. The district court granted the underwriters' motion with regard to the wife's lack of standing to sue for coverage, holding that the insurance contract could not be reformed to named her as an insured and that there was no evidence that she was an intended third party beneficiary. However, the court held that the assured husband had an insurable interest in the boat and was entitled to claim coverage because spouses may have pecuniary interests in each other's property and the husband used the boat for pleasure fishing from which he could derive a pecuniary benefit. Underwriters alleged in the alternative that the policy should be voided and they were entitled to summary judgment because Frank Pierre misrepresented or failed to disclose material facts relating to the ownership of the vessel, the storage location, the use of crew, prior insurance claims and non-renewal of a prior policy on the boat. AXA submitted an affidavit from the underwriter who issued the policy which stated that he would not have issued the policy if he had been aware of the misrepresentations or omissions. After reviewing the evidence as to each alleged misrepresentation or omission, the court held that underwriters were not entitled to summary judgment in part because certain questions on the application were ambiguous and in part because the underwriter's affidavit contained no evidence as to the underlying reasons why the alleged misrepresentations and omissions were material to his evaluation of the risk.

***St. Paul Fire & Marine Ins. Co. v. Gulfside Casino Partnership*, 2002 AMC 143 (S.D.MS. 2001).** The plaintiff St. Paul issued a protection and indemnity policy and a hull policy covering a permanently moored "casino" vessel. The casino was a former ocean-going vessel but was incapable of self-propulsion at the time of the loss. St. Paul filed a declaratory judgment action pursuant to admiralty jurisdiction in connection with claims under the policies. The defendant assured moved to dismiss for lack of admiralty subject matter jurisdiction. In granting the defendant's motion to dismiss, the court held that although the policies clearly covered maritime risks, they were not marine insurance contracts for the purpose of admiralty jurisdiction because the casino was not a "vessel."

BOATING BRIEFS



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