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

BOATING BRIEFS

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

Volume 12 Number 1 *Spring/Summer 2003*

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

Sprietsma V. Mercury Marine: U.S. Supreme Court Finds No Federal Preemption of State Law Propeller Guard Claims

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 a number of reported lower court decisions over the past decade.

In 2001, the Supreme Court of Illinois joined the ranks of the majority of other state and federal courts which had 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).

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

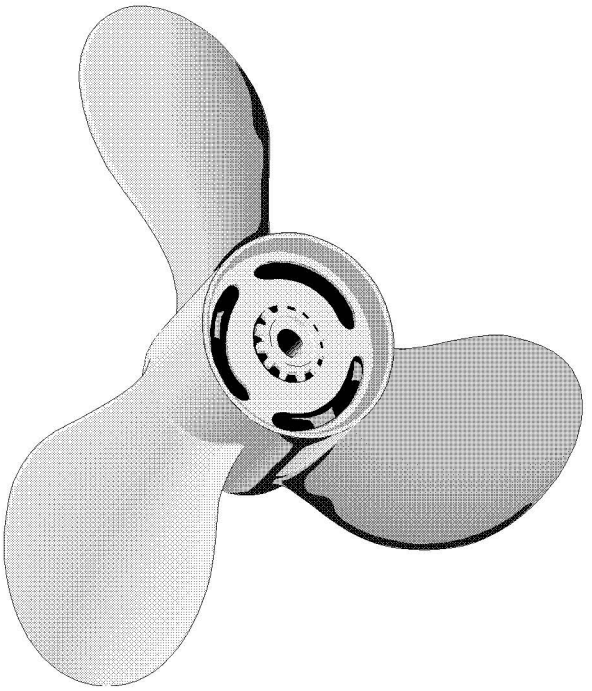
continued on page 2

continued from page 1

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 had held that the FBSA expressly preempted 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 prior consideration of the issue and its 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).

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." (See, 11 Boating Briefs No. 1 for detailed discussion of Illinois Supreme Court decision)

The plaintiffs in *Sprietsma* petitioned the U.S. Supreme Court for certiorari and 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 to the Supreme Court was whether state common law tort claims against the manufacturer based on a failure to install a propeller guard were either expressly preempted by the FBSA or impliedly preempted by Coast Guard regulatory action under the Act.

In December, 2002, the U.S. Supreme Court issued its opinion, holding that state common law tort claims based on an alleged failure to install a propeller guard on a pleasure craft are not preempted by federal law. *Sprietsma v. Mercury Marine,* 123 S.Ct. 518, 154 L.Ed.2d 466, 2003 AMC 1 (2002).

In writing for the Supreme Court, Justice Stevens addressed and then rejected three theories advanced by Mercury Marine as to why state common law propeller guard claims are preempted by federal law: (1) that by its own language the FBSA expressly preempts state common law claims; (2) that such claims

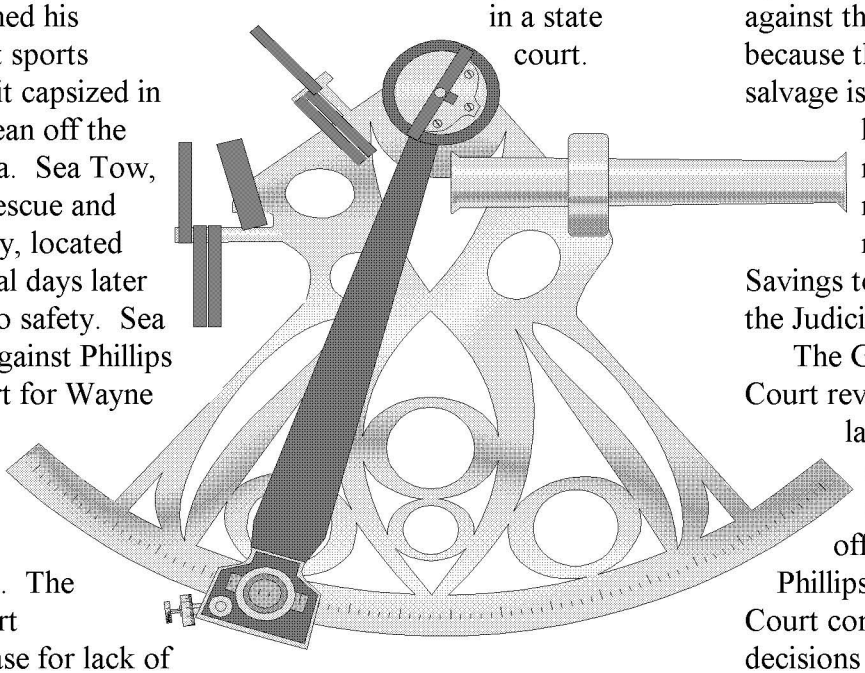
continued on page 5

Salvor Permitted to Pursue *Quantum Meruit* Claim in State Court

In *Phillips v. Sea Tow/Sea Spill of Savannah*, __S.E.2d __, 2003 WL 1442121 (Ga. 2003), the Supreme Court of Georgia held that although a salvor may only pursue a marine salvage claim in a federal court, the salvor may pursue a claim against a vessel owner for its services in a state court based on a theory of *quantum meruit.*

In May, 1998, Robert Phillips abandoned his twenty-five foot sports fisherman after it capsized in the Atlantic Ocean off the coast of Georgia. Sea Tow, a professional rescue and salvage company, located the vessel several days later and brought it to safety. Sea Tow filed suit against Phillips in the state court for Wayne County, Georgia, to recover $15,000 for salvage services. The county trial court dismissed the case for lack of jurisdiction based on a finding that a pure salvage claim is subject to exclusive federal jurisdiction and may only be pursued in a federal court. The decision was appealed to the intermediate Court of Appeals which reversed the trial court's decision and held that Sea Tow was entitled to pursue a salvage claim in state court. *Sea Tow/Sea Spill of Savannah v. Phillips,* 253 Ga.App. 842, 561 S.E.2d 827 (2002).

The decision was appealed to the Georgia Supreme Court. Both sides agreed that federal courts have exclusive jurisdiction over a salvage lien against a vessel *in rem* and that such a claim cannot under any circumstances be pursued in a state court.



However, Sea Tow argued that state courts have concurrent jurisdiction with the federal courts to hear salvage claims brought personally against the owner of a salved vessel. Sea Tow based its argument on the "Savings to Suitors" clause of the Judiciary Act of 1789. The Judiciary Act provides that the federal courts have jurisdiction over "all civil causes of admiralty and maritime jurisdiction...saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." See, 28 U.S.C. §1333.

Phillips argued that federal courts have exclusive jurisdiction over all salvage claims, whether brought against the vessel, *in rem*, or against the owner personally, because the concept of salvage is unique to admiralty law and therefore is not "a common law remedy" within the meaning of the Savings to Suitors clause of the Judiciary Act.

The Georgia Supreme Court reviewed prior case law and the opinions of legal commentators offered by both Phillips and Sea Tow. The Court concluded that the decisions and scholarly opinions reflected a disagreement among the courts and scholars as to whether it is permissible for a state court to hear and decide salvage claims brought against a vessel owner personally.

After finding that the authorities were in conflict

continued on page 4

continued from page 3

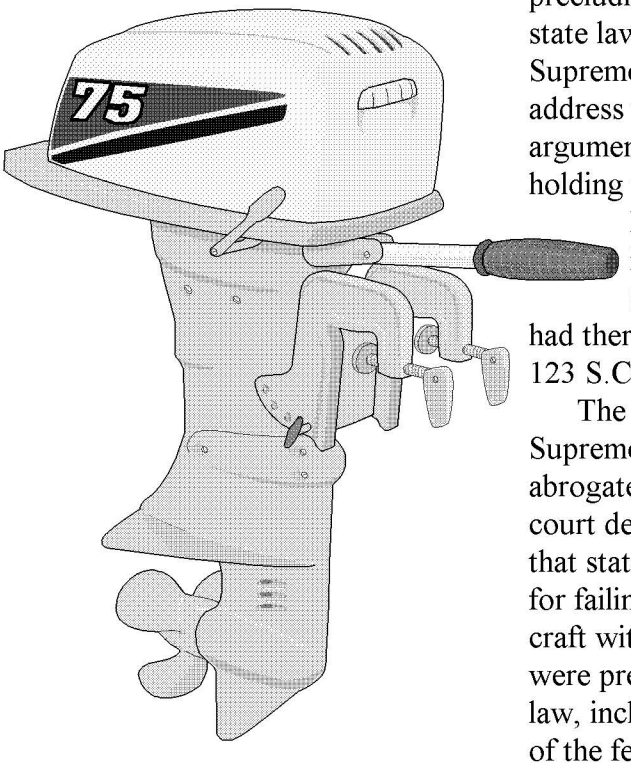
on the general issue of whether a state court may decide a a marine salvage claim, the Georgia Supreme Court turned to a specific consideration of Georgia state law. The Supreme Court held that salvage is not a remedy which exists under Georgia state law because no court had recognized such a remedy and the legislature had not created such a right. Accordingly, the Supreme Court concluded that it is impermissible for a salvor to pursue a salvage claim against a vessel owner in the courts of Georgia because marine salvage is not a recognized "common law remedy" within the meaning of the Judiciary Act. However, the Supreme Court then held that although there is no remedy available for salvage under Georgia law, claims based on the theory of *quantum meruit* are recognized. A Georgia statute provides for a claim based on *quantum meruit* as follows: "...[W]hen one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof." OCGA § 9-2-7.

The Court held that a salvor may sue an owner of a vessel personally in a Georgia state court under a theory of *quantum meruit* based on events identical to those which would support a marine salvage claim in a federal court. Moreover, the Court held that although Sea Tow could not recover a "salvage award," the jury would be entitled to consider the peril of the service rendered by the company and the value of the service that the boat owner received in considering the appropriate amount of any judgment in favor of Sea Tow.

continued from page 2

are impliedly preempted either because in exercising its authority under the FBSA the Coast Guard had previously decided that a requirement for propeller guards on pleasure craft was not warranted or because in enacting the FBSA Congress intended to preempt the entire field of pleasure boat safety regulation, and; (3) that the FBSA's stated goal of providing national uniformity in regulations governing the pleasure boat manufacturing industry justified a finding that state common law claims were impliedly preempted by the Act.

In addressing the implied preemption issue, the Supreme Court rejected Mercury Marine's argument, and the basis of the Illinois Supreme Court's decision, that the Sprietsma's state law claims are preempted by the Coast Guard's decision not to impose a regulation requiring propeller guards for pleasure boats based on a study undertaken from 1988 to 1990. To the contrary, the Court held that "[i]t is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation," and that "...a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." 123 S.Ct. at 527-528. In connection with this aspect of the Court's holding it is of some significance that both the Coast Guard and the Solicitor General of the United States filed briefs in support of the Sprietsma plaintiffs in which they maintained that the Coast Guard had no intention of preempting state law when it



decided not to impose any federal requirement for propeller guards.

The Supreme Court summarily rejected Mercury's argument concerning the need for national uniformity in regulations governing the pleasure boat industry and held that "...the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the more prominent objective [of the FBSA], emphasized by its title, of promoting boating safety." 123 S.Ct. at 530.

In the Supreme Court Mercury Marine also argued that the Sprietsma's claims were subject to federal maritime law, thereby precluding the application of state law based claims. The Supreme Court did not address the merits of this argument in its decision, holding that the argument had not been raised in the Illinois Supreme Court and had therefore been waived. 123 S.Ct. at 523, n. 4.

The decision of the U.S. Supreme Court in *Sprietsma* abrogates a host of lower court decisions which held that state common law claims for failing to equip a pleasure craft with a propeller guard were preempted by federal law, including the decisions of the federal circuit courts in *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995)(express preemption); *Lady v. Neal Glazer Marine, Inc.*, 228 F3d 598 (5th Cir. 2000) (implied preemption),

continued on page 20

Court holds Marine Policy Voided by Insured's Failure to Disclose Defects in Yacht

We previously reported the decision of the U.S. District Court for the District of Massachusetts in *Reliance National Insurance Company (Europe) Ltd. v. Hanover*, 222 F. Supp. 2d 110 (D.Mass. 2002). In the 2002 decision the court denied Reliance National's motion for summary judgment to void a yacht policy based on alleged misrepresentations regarding the purchase price and the condition of the vessel by the insured. (See, 11 Boating Briefs No. 2 (2002)).

Following a bench trial in admiralty in February, 2003, the court entered judgment in favor of Reliance National, finding that the yacht policy was void and that no insurance coverage was owed due to the owner's breach of the policy's warranty of seaworthiness and his failure to disclose known defects in the yacht to the insurer. *Reliance National Insurance Company (Europe) Ltd. v. Hanover*, __ F. Supp. 2d __, 2003 WL 716533 (D.Mass. 2003).

In 1999, Alain Hanover saw an advertisement for *Stiarna*, a 1937 Camper & Nicholson yacht, on the website of Authentic Yacht Brokerage. The advertisement specified an "asking price" of $250,000. According to the website, $800,000 had been spent on refurbishment since the 1980s and she had been "carefully maintained" and was "85% of excellent." The yacht broker provided Hanover with a 1999 survey of the vessel which identified certain deficiencies in the hull, rigging and engine but concluded that most of the systems were in "very good" or "excellent" condition, including the mast and boom, engine, transmission, sails and electrical system.

The yacht was located in Trinidad and Hanover traveled there to personally inspect the yacht and to conduct sea trials in January, 2000. He also spoke to the boatwright who had maintained the yacht in Trinidad. Hanover admitted at trial that after his inspection he thought that the broker's representation that the yacht had been "carefully maintained" was an exaggeration. Hanover observed a number of problems with the engine during the sea trials and admitted that he thought the engine was not in acceptable condition. Based on his inspection, review of the 1999 survey and discussions with the boatwright, Hanover offered to pay $130,000 for *Stiarna* and the offer was accepted. At that time Hanover estimated that an expenditure of $250,000 would be required for initial refitting to replace the engine and to renew various steel structural members and hull timbers. He also estimated that an additional $450,000 would be required to refurbish the yacht's interior accommodations. Hanover made arrangements for the initial refitting work to be done at a shipyard on the neighboring island of Grenada.

Hanover submitted a copy of the 1999 survey and an application for insurance to a Canadian marine insurance broker to obtain insurance on *Stiarna*. The application form contained a notice advising the applicant that the information provided therein would be relied on by the insurer and that any misrepresentations could void coverage. This initial application, prepared by the broker, listed the purchase price as $130,000.

The Canadian broker forwarded the application, together with the 1999 survey and a copy of the

continued on page 7

continued from page 6

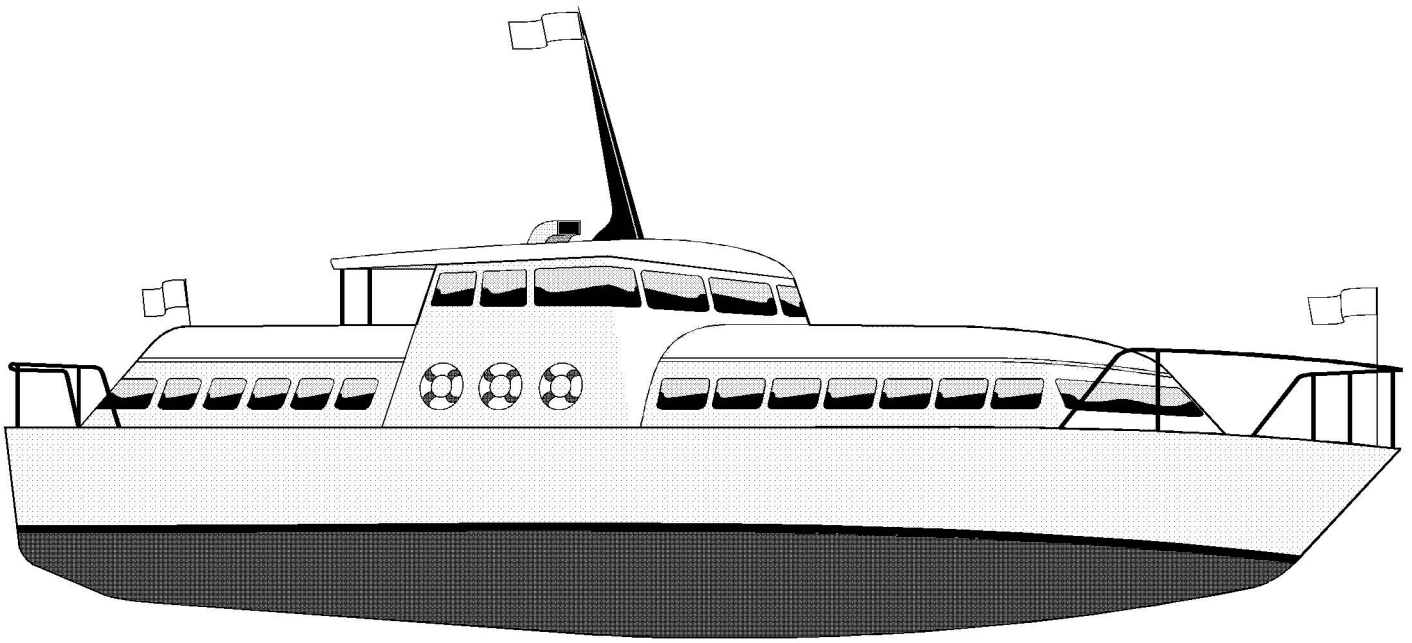
yacht broker's website listing, to underwriters acting for Reliance National in London. In a covering letter the Canadian broker also informed the underwriters of Hanover's intention to refit the vessel at a yard in Grenada and suggested that no additional survey should be required by the underwriter until after the contemplated work at Grenada had been completed.

Based on the 1999 survey, the insurance application, the Canadian broker's cover letter and the brokerage listing, the Reliance National underwriter testified that he was persuaded that the yacht was seaworthy. However, he noted that the insurance application had not been completely filled out and conditioned the placement of coverage on submission of a complete application. The underwriter accepted the Canadian broker's suggestion that no additional survey be required until after the completion of the work at Grenada.

On February 4, 2000, Reliance National issued a binder and cover note for hull and crew liability coverage for *Stiarna* for an agreed annual premium of $4,250 conditioned upon the requirement that an out of water survey be conducted after the refitting work in Grenada was completed. The underwriter forwarded the documents to the Canadian broker with a letter noting that the coverage was subject to the terms and conditions of the actual policy wording and submission of a complete insurance application by the insured.

The Canadian broker immediately forwarded the binder and cover note to Hanover together with a second blank insurance application. The actual policy wording was not yet available and the broker advised Hanover that the policy would be forwarded at a later date.

On February 12, 2000, Hanover received photographs from the Trinidad boatwright, Fred Thomas, which depicted a rotted area in the yacht's main mast. An accompanying report from Thomas indicated that he had found three rotted spots and two open scarfs in the mast and suggested that the planned movement of the yacht from Trinidad to Grenada might be unwise.



continued on page 8

continued from page 7

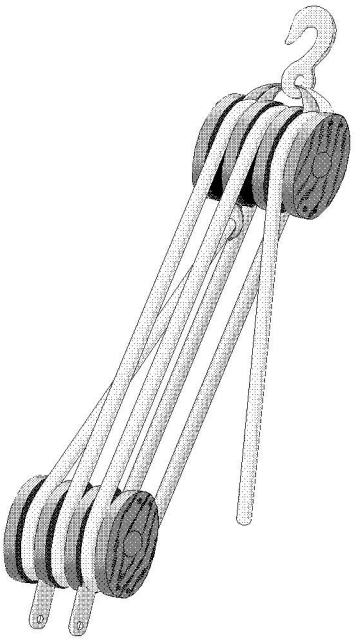
On February 14, 2000, Hanover completed the second insurance application and mailed it to the Canadian broker. In the second application Hanover listed the purchase price as $150,000, $20,000 in excess of the actual price. Hanover did not mention the rotting discovered in the mast or his own observations of problems with the engine in the second application.

The Hanovers hired a professional captain for the intended voyage from Trindad to Grenada. The captain recommended that the sails not be used during the voyage due to the problems with the mast and that the yacht should be motored to Grenada. The captain also recommended hiring a commercial power boat to accompany the yacht on the voyage so that *Stiarna* could be towed if the engine failed. When he hired the captain Hanover told him to make sure that the engine was in good working condition before the voyage. Following a sea trail the captain decided that the engine performed satisfactorily but gave no opinion to Hanover other than to inform him that the engine had successfully started.

Stirana departed Trinidad on February 23, 2003. An hour after

departure a fire broke out in the engine compartment. *Stirana* was abandoned and sank on the same date.

Following the loss Reliance hired a surveyor to investigate the sinking. In April, 2000, the surveyor advised Reliance of his opinion that the sinking was wholly fortuitous and not due to any fault of Hanover, that the only known unseaworthy condition, the rot in the mast, had no relationship to the cause of the loss and that



Hanover's plans to refit the vessel had been fully disclosed.

Hanover did not receive a copy of the insurance policy wording until March 1, 2000, a week after the loss of the vessel.

Despite its investigator's report, Reliance issued a recission of the policy and filed the declaratory judgment suit in the Massachusetts District Court seeking a declaration that no coverage was owed in connection with the loss due to the alleged unseaworthiness of *Stiarna* and Hanover's alleged misrepresentation of the purchase price.

In its opinion the District Court concluded that the fire and sinking of *Stiarna* was clearly an accident, attributing the loss to a "perfect storm of bad judgment" by Hanover and all others involved.

The court reviewed various case decisions and concluded that the doctrine of *uberirimae fidei* or utmost good faith requires an insured to "fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk...including those facts not directly inquired into by the insurer." Furthermore, the court found that after coverage has commenced, the doctrine of uptmost good faith "imposes a continuing obligation on the vessel owner to insure that the vessel will not, through either bad faith or neglect, knowingly be permitted to break ground in an unseaworthy condition."

Applying the legal principles to the evidence produced at trial, the court found that the Reliance policy was void and that no

continued on page 20

Wrongful Death Claim Arising From Jet Ski Accident on Wabash River Subject to Admiralty Jurisdiction

Tyler Ellsworth, a minor, was struck and killed by a jet ski on the Wabash River between Tippecanoe and Fountain Counties in the State of Indiana. A wrongful death action was filed against the owner and operator of the jet ski in Indiana state court. Lisa Strahle, the owner of the jet ski, subsequently filed a Petition for Exoneration from or Limitation of Liability in the U.S. District Court for the Northern District of Indiana pursuant to the Shipowners' Limitation of Liability Act, 46 U.S.C. § 181, et seq.

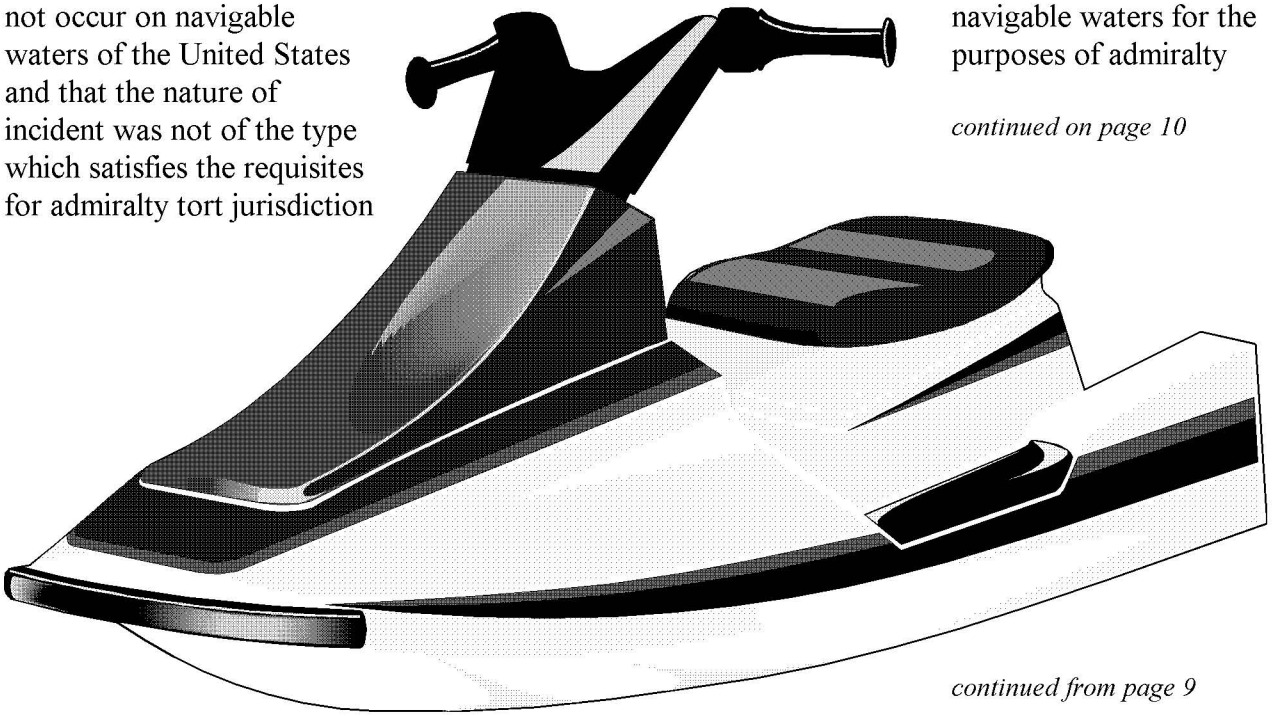
Tyler's guardian appeared in the Limitation of Liability action and filed a motion to dismiss for lack of admiralty jurisdiction on the grounds that the accident did not occur on navigable waters of the United States and that the nature of incident was not of the type which satisfies the requisites for admiralty tort jurisdiction under U.S. Supreme Court precedent.

In denying the claimant's motion to dismiss, the court concluded that the waters of the Wabash River where the accident occurred are navigable waters of the United States and that the nature of the incident was of the type which falls within the admiralty jurisdiction of the federal courts. *In re Petition of Strahle*, __F.Supp.2d __, 2003 WL 1130258 (N.D. In. 2003).

The court began its jurisdictional analysis by referring to the 1993 decision of the Seventh Circuit Court of Appeals in *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993) as setting forth the necessary prerequisites for admiralty tort jurisdiction: (1) the incident occurred on the navigable waters of the United States; (2) the incident posed a potential hazard to maritime commerce, and; (3) the activity engaged in was substantially related to traditional maritime activity.

In its opinion the District Court discussed the legal principles governing the determination of "navigability" for purposes of admiralty jurisdiction and considered factual evidence submitted by the parties on the point. The parties submitted extensive factual evidence relevant to the issue of whether the waters of the Wabash River where the accident occurred are navigable waters for the purposes of admiralty

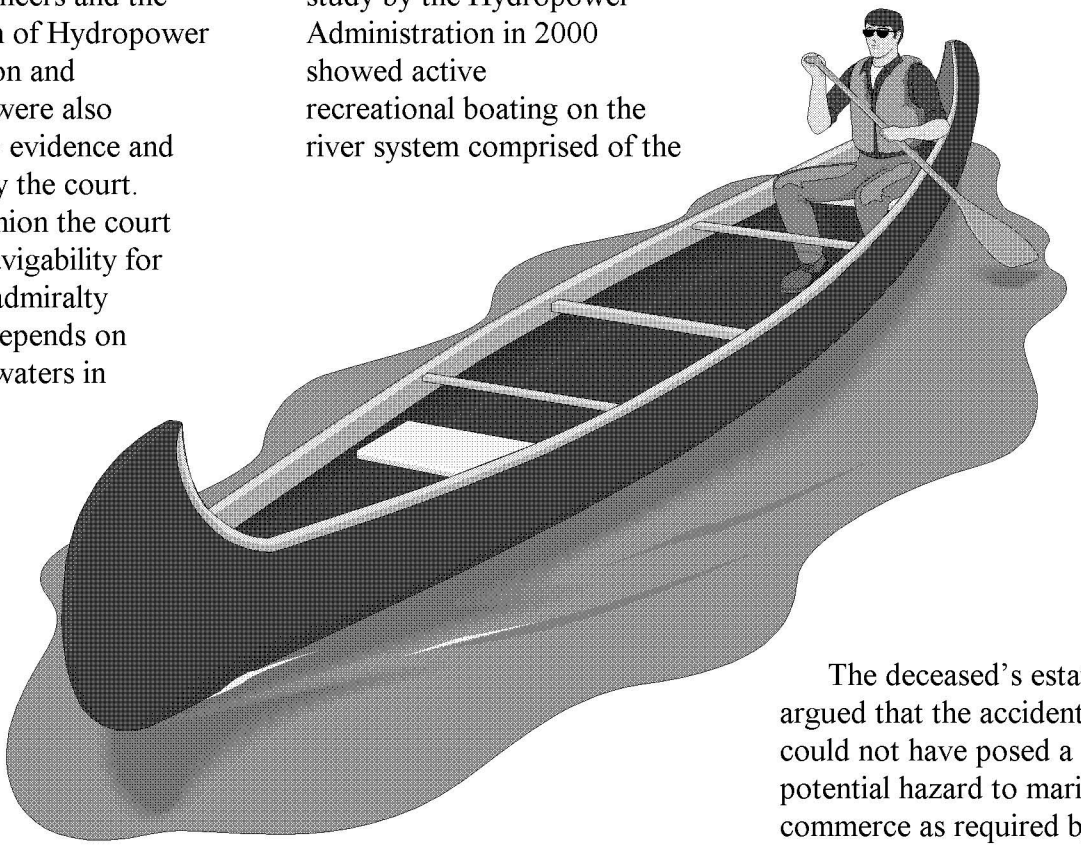
continued on page 10



continued from page 9

jurisdiction. The evidence included a detailed guide book to the river which declared the Wabash to be "the largest non-navigable river in the United States." Navigability studies by the Indiana Natural Resources Commission, the U.S. Army Corp of Engineers and the U.S. Division of Hydropower Administration and Compliance were also admitted into evidence and considered by the court.

In its opinion the court found that navigability for purposes of admiralty jurisdiction depends on whether the waters in question are presently capable of supporting interstate commercial maritime activity. In considering the evidence submitted by the parties the court noted that there are no dams or artificial obstructions on the Wabash between the location of the accident and the river's confluence with the Ohio River, thereby permitting vessels to traverse the river system downstream from the accident location to Illinois and beyond. None of the evidence submitted by the parties demonstrated the existence of any current interstate commercial activity on the Wabash. However, a study by the Hydropower Administration in 2000 showed active recreational boating on the river system comprised of the Tippecano, Wabash and Ohio Rivers. The court found that this evidence demonstrated that the river system is "suitable for the simpler forms of trade in interstate commerce." Based on the foregoing evidence the court concluded that the accident occurred on navigable waters of the United States.



The court then turned its attention to the remaining elements of the test for admiralty tort jurisdiction: (a) whether the type of incident giving rise to the claim posed a potential hazard to maritime commerce, and; (b) whether the activity which gave rise to the claim was substantially related to traditional maritime activity.

The deceased's estate argued that the accident could not have posed a potential hazard to maritime commerce as required by the jurisdictional test because there is no evidence of present commercial activity on the waters where the incident occurred. In response, the vessel owner argued that the accident had the potential to disrupt maritime commerce because numerous canoe rental establishments and beaches

continued on page 19

Salvage Awarded for Dewatering of Pleasure Boat at its Berth

In *New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc.*, 240 F. Supp.2d 101 (D. Mass 2003), the U.S. District Court of the District of Massachusetts concluded that the assistance rendered by individuals associated with the plaintiff salvage company to a recreational boat sinking at the dock constituted pure salvage and awarded the plaintiff $11,000.00 plus pre-judgment interest. The award constituted 18.3% of the salved value.

The plaintiff New Bedford Marine Rescue, Inc. ("plaintiff") sued the corporate owner of a custom Canyon 30 power boat known as *Memories* after the defendant owner of the vessel refused to pay a $13,000 salvage bill.

The Cast. Ralph Joseph is the owner of the plaintiff New Bedford Marine, a commercial rescue and salvage operation with multiple boats, specialized equipment, and professional captains. George Gray is a certified dive master who worked part time for the plaintiff on an "on-call" basis. Gray lived aboard a houseboat at the same marina where the *Memories* was docked. Martin Niemiec owns Niemeic Marine and Boat in New Bedford and was a mechanic who regularly worked on *Memories*. Shawn Keegan owns Cape Jewelers and was the principal operator of *Memories*.

The Event. Late in the afternoon of October 25, 2000, George Gray was informed by another boat owner at the marina that *Memories,* tied up at its usual berth, was low in the water . Gray found *Memories* with its stern down to the point that water was starting to lap at the scuppers. Gray returned to his boat and brought back an electric pump and absorbent pads. When Gray returned to *Memories*, he unplugged the shore power and began to pump out the boat. At this time, the base of the engine was submerged but the water had not reached the starters. Neither the forward nor aft bilge pumps were working. He placed absorbent pads around the engine compartment to soak up the oil.

After Gray began pumping out the boat, he telephoned Ralph Joseph for assistance because Gray knew that he could not salvage the boat by himself in the event that something went wrong. Gray then telephoned the marina's manager to obtain the owner's contact information. Joseph arrived on the scene in about 15 minutes and decided that Gray's pump was adequate for the job. Joseph plugged the scuppers with rags. Joseph assisted Gray in pumping out the bilge and placing absorbents to soak up excessive oil. The pump out took about an hour once Joseph arrived on scene.

During the pump out, the Marina manager approached Joseph with contact information for Shawn Keegan, the owner of *Memories*. Joseph contacted Keegan and according to Joseph informed him that his boat was taking on water, that it was a salvage situation, that they were pumping out the water, and that the boat was about to be stabilized.

Keegan claimed that he told Joseph to get off the boat, that he would call his own mechanic and that he did not want the boat hauled out. Joseph testified that he told Keegan that he would be happy to take the plugs out of the scuppers and remove the bilge pump and personnel, but that Keegan needed to call someone to repair the leak as the boat

continued on page 12

continued from page 11

was in peril. According to Joseph, Keegan's last comment was not to let the boat sink.

Keegan called his mechanic Niemiec who arrived at the boat in about 15 minutes. Niemiec brought only tools and no pumps or absorbents. Niemiec tightened the shaft stuffing boxes which were the source of the leak and phoned Keegan to let him know the problem had been fixed and the boat was not in danger of sinking. Joseph also spoke with Keegan, agreeing that the boat was no longer in peril. Joseph asked Keegan for insurance information. Keegan testified that Joseph never gave him an exact price but that Joseph explained to him how much it cost per foot to pump out. Joseph testified that he never spoke to Keegan about the cost of his services.

Niemeic made a temporary fix to the forward bilge pump by propping open the float switch with a plastic spoon. He asked Gray or Joseph to remove the spoon when the forward bilge was completely pumped out. Niemiec was aboard the boat for approximately 21 minutes and billed Keegan $41.25 for his services. Gray was on the boat for another hour.

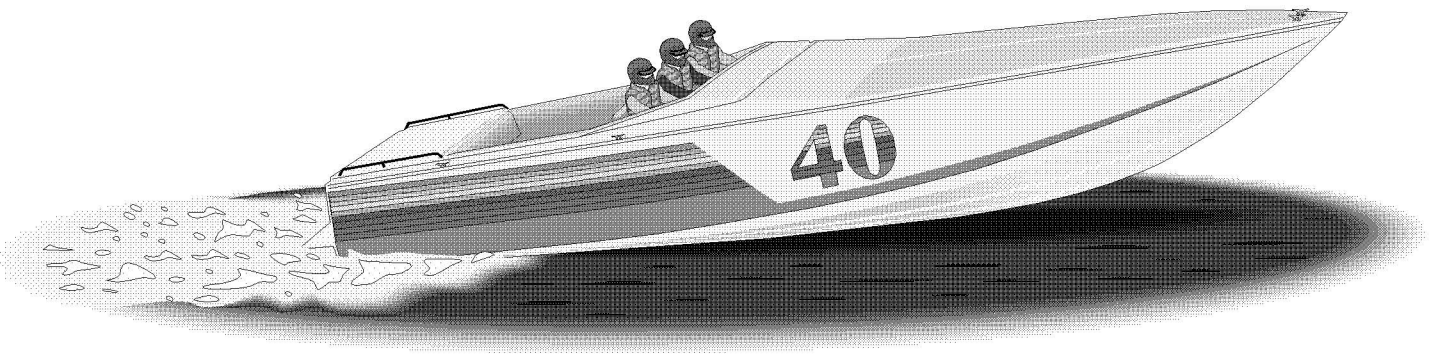
Damages. Following the incident, Joseph sent Keegan a bill for $13,750.00. His justification for this salvage bill was that it represented a fair percentage of the post casualty value of *Memories* plus a bonus for prevention of an oil spill. Keegan refused to pay.

Pure Salvage. The court analyzed the three elements of a pure salvage claim as follows:

Marine Peril. The Court found that the *Memories* was in peril because it was taking on water and was was in danger of being submerged. *Memories* has an aft freeboard of 3 feet. Based on evidence presented at the trial the court found that the water level in the berth at low tide was approximately 6 feet. Accordingly, further submersion would have resulted in total submersion of the engine compartment and below deck spaces.

Service Voluntarily Rendered. The Court found that Gray and Joseph had voluntarily rendered salvage services, that Keegan did not refuse Joseph's services, and that there was no contract between Joseph and Keegan because the conversations between Joseph and Keegan were insufficient to show that a contract existed.

Success in Whole or In Part. The boat was no longer in danger of sinking once it had been dewatered to the point that the mechanic could tighten the leaking stuffing boxes. After the salvage was complete, the boat did not need any significant repairs other than cleaning. Keegan testified that the value of the boat was the same before and after the incident. The Court found that the salvors were successful and that plaintiff had established a pure salvage claim.

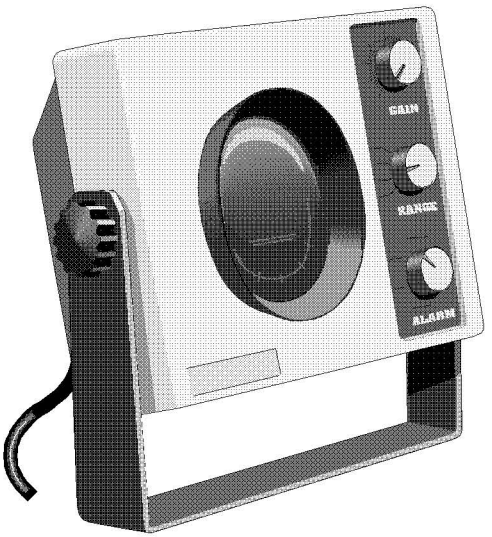


continued on page 15

Owner's Petition for Exonoration or Limitation of Liability Granted by Summary Judgment in Swimming Accident Case

Matthew Ginop suffered serious spinal injuries which rendered him a paraplegic when he dove from the bow of a 27 foot Bayliner into shallow waters in the Anchor Bay area of Lake St. Clair, Michigan. The boat was registered in name of James Jacobs but had been jointly purchased by Jacobs, Brian Hervey and Michael Hemby, all three of whom were aboard at the time of the accident. Both Ginop and Jacobs were generally familiar with the lake and were aware of water safety issues. The boat had a swim platform and a depth finder. None of the men had been out on the boat prior to that day. They all decided before launching that they would take the boat to the Anchor Bay area of Lake St. Clair where they could swim. Jacobs had never boated in the Anchor Bay area previously. Before departing the dock and while on the boat, Hemby told the men that the water in that area was quite shallow and approximately 4 feet deep in places.

When they arrived at Anchor Bay, Jacobs put the boat in neutral about 200 yards from shore and handed the controls to Hemby. There were a number of other boats in the area, the closest of which was approximately 50 yards away, and there were swimmers who were standing in chest deep water. Ginop did not inquire about the depth of the water nor did he inform any of the other occupants of his intention to dive off the boat. While Jacobs was lowering the anchor, Ginop dove head



first from the bow of the boat.

Matthew Ginop filed suit against Jacobs in the U.S. District Court for the Eastern District of Michigan, alleging that Jacobs was negligent in failing to warn him of the shallow water and the risk of injury. It appears that Jacobs, with leave of court, answered the Complaint by filing a Petition for Exoneration from or Limitation of Liability pursuant to the Shipowners' Limitation of Liability Act, 46 U.S.C. §181, et seq.

In *Ginop v. 1984 Bayliner 27' Cabin Cruiser*, 242 F.Supp.2d 482 (E.D. Mi. 2003), the District Court granted Jacob's Petition for Exoneration from or Limitation of Liability. The decision is somewhat unusual in that it appears from the opinion that the court treated Jacob's Petition as a motion for summary judgment and rendered a decision based on a hearing and oral argument rather than conducting a full bench trial.

The court began its opinion by correctly noting that a determination of Jacob's right to limitation of liability required a two-step analysis; initially the court must determine if the owner was negligent or the vessel was unseaworthy and then determine if the negligence or unseaworthiness was within the "privity and knowledge" of the owner within the meaning of the Limitation Act. The court stated that the plaintiff Ginop had the initial burden of proof on the issue of

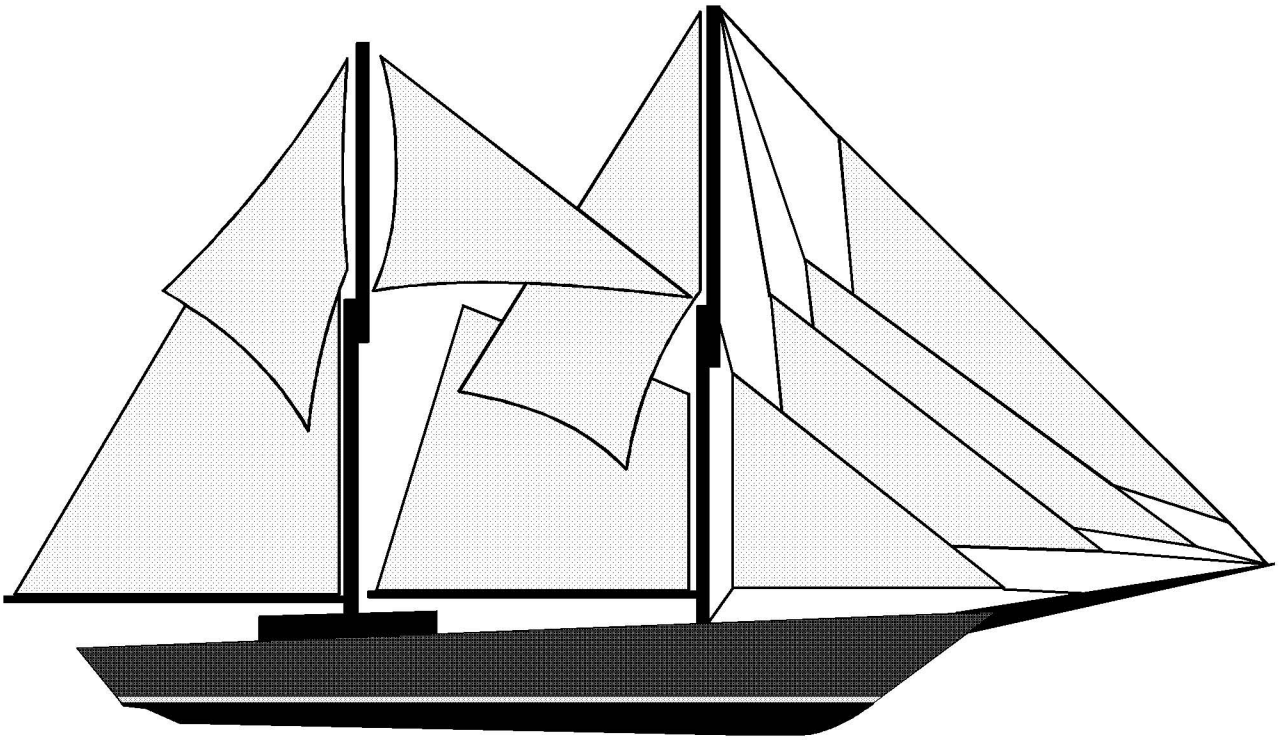
continued on page 14

continued from page 14

negligence or unseaworthiness.

According to the court's opinion, Ginop's counsel conceded that the boat was seaworthy. In considering Ginop's allegations that Jacobs was negligent by failing to warn him of the shallow water and the risk of injury the court found that Jacobs did not breach any duty of care owed to Ginop based on the evidence presented at oral argument. The court found that both Ginop and Jacobs were equally unfamiliar with the specific waters in question but that as an owner Jacobs provided Gino with sufficient information to apprize Ginop of the shallowness of the water.

The court noted that there was an operational depthfinder on the boat and that Ginop was present during the conversations wherein Hemby informed everyone aboard that the water in the area was shallow. The court also noted that Ginop dove into the water without warning while Jacobs was lowering the anchor, and before Jacobs had any opportunity to warn Ginop.



In considering proximate cause, the court found that Ginop's injuries were not proximately caused by any negligence of Jacobs but were solely attributable to Ginop's own negligent conduct. The court noted that Ginop dove from the bow of the boat instead of using the swim platform. In addition, Ginop dove into the water without warning and without inquiring about its depth despite the fact that other swimmers in the immediate vicinity were visible to all, standing in chest deep water. The court found that Ginop's failure to heed Hemby's warnings, his failure to consult the depth finder and his disregard of the significance of the appearance of nearby swimmers were the cause of Ginop's injury, not Jacob's behavior.

Having concluded that the vessel was seaworthy and that no negligence on the part of the owner Jacobs caused or contributed to Ginop's injuries, one would

continued on page 15

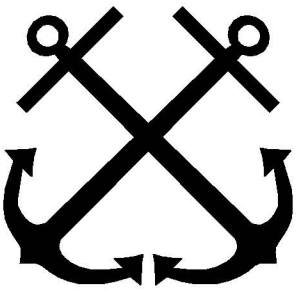
continued from page 14

expect the court to have simply ended its analysis with a finding that Jacobs was entitled to complete exoneration from liability. However, in another somewhat unusual aspect of the case, the court stated that it was required to also determine whether Jacobs was "in privity" within the meaning of the Limitation Act before ruling on Jacobs' Petition.

Ginop argued that Jacobs' mere presence aboard the vessel as owner automatically established his "privity" and precluded him limiting his liability to the value of the vessel for his own negligence (although none had been found) under the Limitation Act, citing the subsequently discredited case of *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969). The court rejected Ginop's argument, noting that the holding of the *Fecht* court had been rejected by the Sixth Circuit Court of Appeals in *Estate of Muer v. Karbel*, 146 F.3d 410 (6th Cir. 1998) in which it was held that the owner's mere presence aboard the vessel does not preclude limitation of liability in an appropriate case. The Court found that Jacobs had acted prudently in all respects and that the accident resulted solely from Ginop's imprudent behavoir.

Having concluded that neither negligence or privity on the part of Jacobs had been established, the court held that Jacobs was entitled to summary judgment in his favor on the Limitation of Liability Petition.

(The Editor wishes to thank Lyn Kagey, Esq. for contributing this article.)



continued from page 12

Calculating the Salvage Award. The Court used the *Blackwall* factors to determine the amount of the salvage award as follows:

Degree of Danger From Which the Ship Was Rescued. The court considered Gray's testimony that the vessel would have sank within a day to be credible. Had it sank, there would have been significant damage to the vessel. The Court found that the boat was in serious peril. *Post Casualty Value of the Property Saved.* The Court found the fair market value of the boat to be $60,000.00 based on Joseph's testimony and the testimony of Keegan regarding the trade-in value of the boat. It was also the amount for which the boat was insured. It was undisputed that the boat only required cleaning after the salvage.

Risk Incurred in Saving the Property From Impending Peril. Because the only risks were unplugging the shore power, coming into contact with petroleum products, and boarding an unstable boat, the Court found that the risks were minimal.

Promptitude, Skill and Energy Displayed in Rendering Salvage. The plaintiff is a professional salvage company ready at all times to render competent services. Gray arrived on scene as soon as he was informed that *Memories* was taking on water. He immediately returned with a pump and commenced to dewater the boat. Joseph arrived on scene within 15 minutes of being contacted by Gray. Joseph contacted the owner as soon as the marina manager provided the contact information. The skill involved included knowledge of boat

continued on page 16

continued from page 15

construction, pumps and dewatering a vessel, knowledge of power and wiring systems and awareness of an oil spill and its consequences. The court noted that the plaintiff's captains are all certified and that the plaintiff has equipment available at the marina and employs Gray to respond to distress calls when needed. The Court found that these factors weighed in favor of a liberal salvage award because the Plaintiff was exceptionally prompt and skillful.

Value of the Property Employed by the Salvors and Danger to Which They are Exposed. The Plaintiff arrived on the scene in one of his boats, but that boat was not used in the salvage efforts nor were any additional pumps. The equipment used in the salvage consisted of Gray's pump and absorbent pads. The Court found the value of the property employed by Plaintiff and the danger to which it was exposed to be minimal.

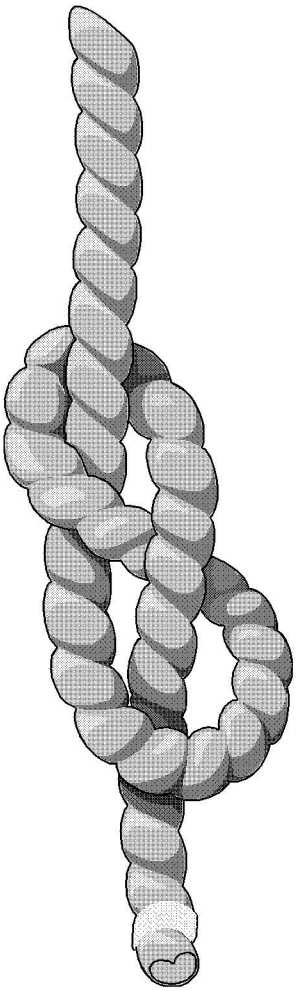
Labor and Materials Expended By the Salvors. The materials used in the salvage consisted of 33 absorbent pads at one dollar each. The labor expended consisted of Gray's labor for 2-3 hours and Joseph's labor for 1 ½ - 2 hours. While on scene, their only labor consisted of setting up one pump and moving it around to remove water. They also continuously placed absorbent pads to soak up oil. The Court found the labor and materials expended to be minimal.

The court also addressed an additional factor of "preventing or minimizing environmental damage." The Court held that although prevention of environmental damage cannot be used to justify a salvage award, if the elements of a salvage claim have already been established, prevention of environmental damage may be considered in calculating the award. The court found that Joseph and Gray averted some environmental damage because they soaked up oil with absorbents. The Court found that the environmental damage was minimal and did not have a significant impact on the salvage award.

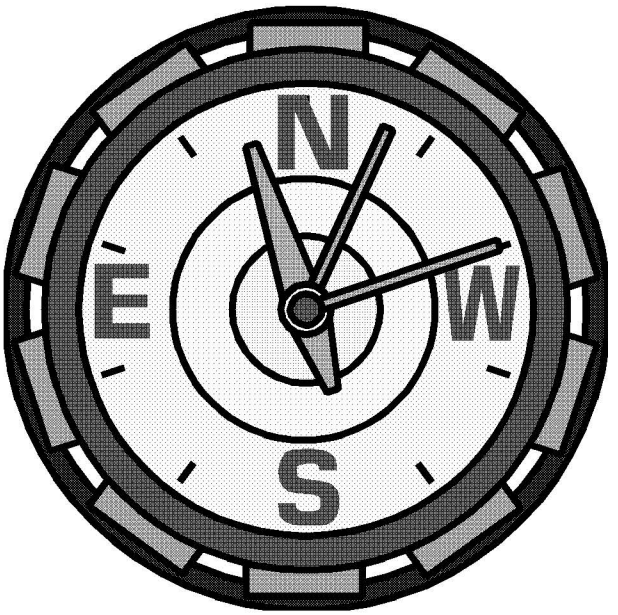
The Court also agreed with the plaintiff's argument that professional salvors are entitled to an incentive bonus or additional compensation because it induces them to maintain a professional salvaging business. Joseph maintained equipment in three places to accommodate the need to respond quickly to distress calls. He employed nine captains who are trained in salvage services. The Court found that plaintiff was a professional salvage service and therefore entitled to a more liberal salvage award.

The Court found in favor of the plaintiff salvor and awarded $11,000.00 for the salvage or the equivalent of 18.3% of the fair market value of $60,000.

(The Editor wishes to thank Lyn Kagey, Esq. for contributing this article.)



Other Recent Cases of Interest



Solar v. Kawasaki Motor Corp. USA, 221 F.Supp.2d 967 (E.D.WI 2002). District court granted summary judgment in favor of defendant Kawasaki in wrongful death/product liability action filed on behalf of minor who drowned in Lake Michigan while using his family's Jet Ski. There were no witnesses to the incident. The Jet Ski was found several weeks after the minor's body was recovered. When recovered, a bolt which secured the steering cable to the steering nozzle was detached and the evidence indicated that the bolt had failed. Plaintiffs alleged that the PWC was defectively designed or manufactured and that the failure of the steering system caused or contributed to the minor's death. Expert reports and testimony were submitted by the plaintiff and the defendant. The plaintiff's own experts were unable to conclusively determine whether the bolt failure occurred before or after the incident. Although causation in a product liability case is ordinarily an issue for determination by a jury, the court concluded that the plaintiff's theory of causation against the product distributor was purely speculative. The Court held that evidence of a "mere possibility" of causation was insufficient to allow the issue to go to the jury.

Lewis v. Sea Ray Boats, Inc., 65 P.3d 245 (S.Ct. Nev. 2003). The Supreme Court of Nevada reversed a defense verdict and judgment in favor of the manufacturer following a jury trial. The claim arose from one death and several personal injuries to individuals while sleeping aboard a Sea Ray power boat allegedly as a result of exposure to carbon monoxide from the vessel's generator. The incident occurred on Lake Mead. The plaintiffs alleged that the manufacturer failed to provide adequate warnings concerning the risks of carbon monoxide exposure. At the trial the judge rejected the plaintiffs' proposed jury instruction on the issue of the adequacy of warnings, adopting a more general instruction based on reasonableness. The judge refused to amend or supplement the warnings instruction despite two specific requests for clarification by the jury during their deliberations. In vacating the judgment the Supreme Court held that the jury instruction was improper because it failed to give adequate guidance to the jury on the standards governing the adequacy of product warnings. In addition, the plaintiffs challenged the trial court's application of maritime law rather than Nevada state law. The Supreme Court held that although the waters of Lake Mead are "navigable waters" for the purposes of admiralty jurisdiction, the nature of the incident in question (injuries & death from carbon monoxide on a moored pleasure craft) did not in its view have a potential to disrupt maritime commerce as required to satisfy the test for admiralty tort jurisdiction.

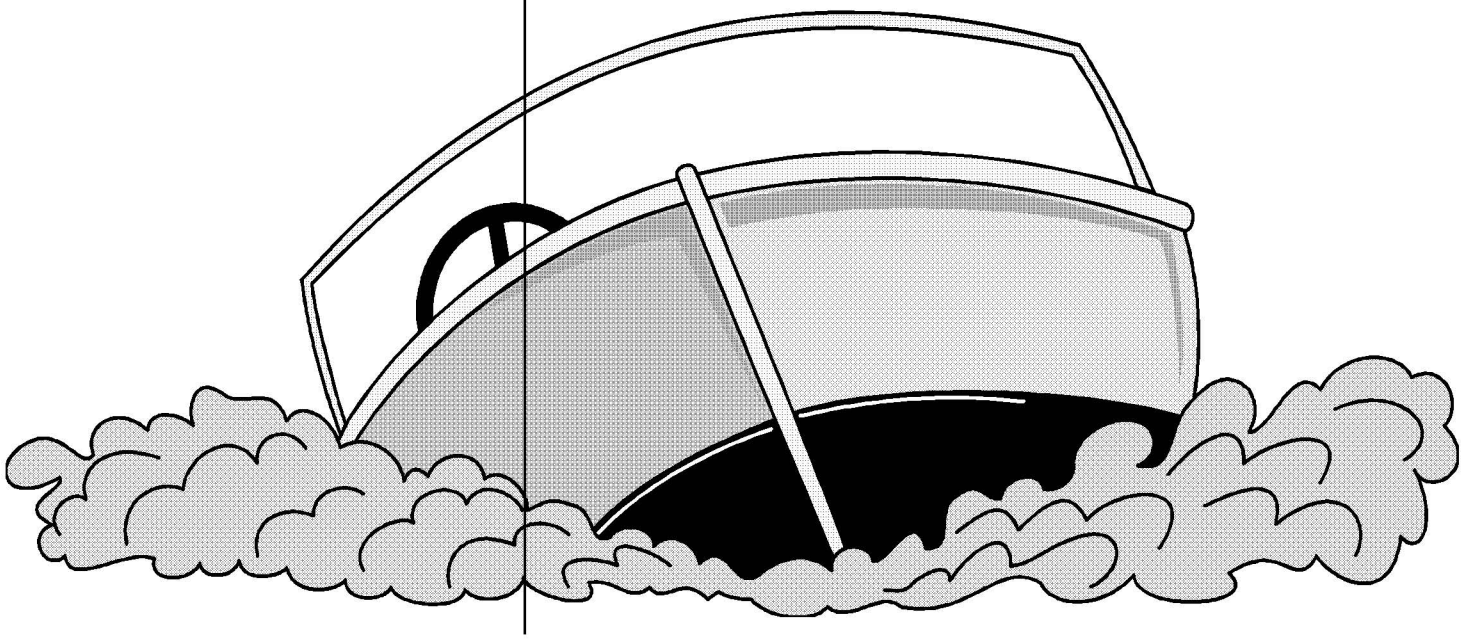
continued on page 18

National Ben-Franklin

Ins. Co. v. Levernier, C.A. No. 01-C-1166 (E.D.Wi., March 28, 2003). Declaratory judgment action relating to the availability of insurance coverage for claims made against a passenger on a 37 foot Sea Ray power boat (Edward Levernier) alleging that the passenger was operating the Sea Ray at the time it collided with another boat resulting in one death and several injuries to the occupants. The Sea Ray was owed by Lawrence Hoffman. Although the evidence showed that Levernier was seated near the helm next to the operator's chair prior to the collision, the Court found that the owner and primary operator Hoffman did not delegate any duties to Levernier. Levernier maintained a marine policy on his own boat which provided liability coverage to the named insured when operating other boats. Levernier's insurer, National Ben-Franklin, argued that there was no coverage under its policy because the evidence showed that Levernier was not operating the Sea Ray at the time of the collision. Based on the evidence submitted by the parties the district court agreed that Levernier was not operating the Sea Ray and that therefore National Ben-Franklin did not owe a duty to defend or indemnify Levernier in connection with the claims. Hoffman, the owner of the Sea Ray, was insured by Northern Insurance which argued that the claims against Levernier were not covered under its policy on identical grounds, i.e., that Levernier was not operating the Sea Ray within the meaning of the policy. The district court agreed and held that the claims against Levernier were not covered under Northern's policy. Finally, Levernier maintained a homeowner's policy with General Casualty of Illinois which excluded coverage for liabilities arising from the ownership, maintenance or use of certain water craft as defined in the General Casualty policy. The district court found that the General Casualty policy did not exclude liability coverage for bodily injury claims involving a vessel with engines exceeding 50 horsepower if the vessel was not owned or rented by the insured. As a result the district court found that General Casualty owed a duty to defend and indemnify Levernier under the homeowner's policy.

continued on page 19

Swords v. Bucher, 57 Pa.D & C.4th 258 (2002).



Trial court granted defendant boat owner's motion for summary judgment on plaintiff's claim for personal injuries sustained in "tube riding" accident based on the doctrine of assumption of the risk under Pennsylvania law.

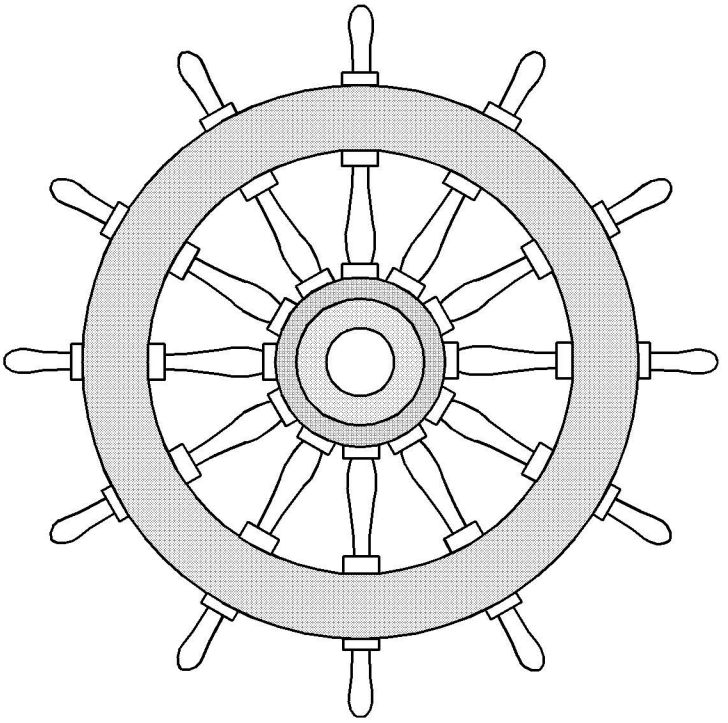
Raskin v. Allison, 57 P.3d 30 (Ks. Ct. App. 2002). Suit was filed in Kansas state court on behalf of two minors for personal injuries sustained in collision between their watercraft and a watercraft operated by the defendant in the Pacific Ocean off Cabo San Lucas, Mexico. The plaintiffs and the defendants were all Kansas residents. On appeal the Kansas Court of Appeals affirmed the trial court's finding that Mexican substantive law governed the plaintiffs' claims under the doctrine of *lex loci delicti* notwithstanding the fact that all of the parties were Kansas residents, the fact that contributory negligence is a complete bar to recovery under Mexican law and the fact that Mexican limitations on recoverable damages would substantially reduce any potential recovery by the plaintiffs.

continued from page 10

were located in the area. In considering the owner's argument the court observed that "[c]ertainly the news of such an accident would cause worry and concern amongst potential customers." The court concluded that the incident in question, the striking of a person by a jet ski on navigable waters, has sufficient potential to disrupt commercial maritime activity as required by the test.

Finally, the court found that the alleged negligent operation of a personal watercraft on a navigable waterway is an activity which bears a sufficient relationship to traditional maritime activity so as to satisfy the final prong of the test for admiralty tort jurisdiction.

Finding that all prerequisites for admiralty tort jurisdiction were satisfied, the court denied the estate's motion to dismiss the owner's Limitation of Liability action.



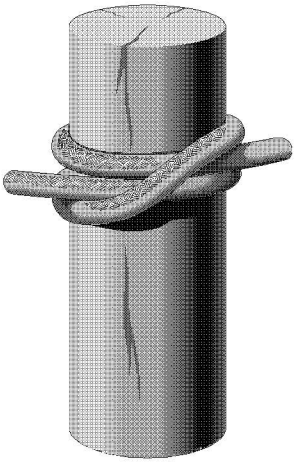
continued from page 5

and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997)(implied preemption).

The implications of the Supreme Court's decision may be far reaching. Following the decision it is clear that parties sustaining injuries from pleasure craft propellers are free to pursue state law product liability claims against marine manufacturers alleging negligent design for failing to equip marine engines with propeller guards. It remains to be seen whether plaintiffs can succeed on such a theory. Moreover, in the absence of affirmative regulatory action by the Coast Guard under the FBSA, it appears that states are free to enact statutes and regulations requiring marine engines to be equipped with propeller guards if they chose to do so. This opens the possibility of inconsistent requirements among the states, subjecting manufacturers and perhaps boat owners to differing requirements depending on the waters in which a boat is operated.

continued from page 8

coverage was owed to Hanover because (a) the *Stiarna* was by definition unseaworthy at the inception of the policy because the sails could not be safely used and the operators could not rely on its engine; (b) Hanover knew or should have know that the engine was unfit for service prior to submitting the first application but failed to disclose the defect; (c) Hanover knew of the rot in the mast before submitting the second application but failed to disclose the defect; d) Hanover's failure to repair the defects in the engine and mast before departing from Trinidad constituted a breach of the policy's warranty of seaworthiness; (e) Hanover's failure to disclose the defects in the mast and the engine to the underwriters was a breach of his duty of utmost good faith, and; (f) the evidence established that Reliance would not have issued the policy if its underwriter had been aware of the defects.



BOATING BRIEFS

is a journal published by the Recreational Boating Committee of The Maritime Law Association of the United States.

Editor

Frank P. De Giulio
Palmer Biezup & Henderson
620 Chestnut Street
956 Public Ledger Building
Philadelphia, PA 19106-3409
Tel: (215) 625-9900
Email: fpd@pbh.com

Committee Chairman and Founding Editor

Thomas A. Russell
Russell & Associates
One World Trade Center
Suite 800
Long Beach, CA 90831-0800
Tel: (562) 495-6000
Email: trussell@ra-law.com

Graphic Design and Layout

Helle Richards

Contributors to This Issue

Lyn Kagey, Esq.

Cite as 12 Boating Briefs No. 1 (Mar. L. Ass'n) (Frank P. De Giulio Ed. 2003).

If you wish to receive copies by mail, please send an email request to pbh1@pbh.com.