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

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Federal Court Applies State Law to Insurer's Misrepresentation Claims

A federal district court has refused to apply the federal maritime law doctrine of utmost good faith or *uberrimae fidei,* finding that state law should govern a marine insurer's claim for rescission of a yacht policy based on alleged misrepresentations by the insured. *Progressive Northern Insurance Co. v. Bachmann*, No. 03-0566, 2004 U.S. Dist. LEXIS 6823 (W.D. Wis. April 19, 2004).

Fred Bachmann purchased a 1998 34-foot Wellcraft Scarab in 2000 and obtained hull and machinery coverage through an insurance broker. The declaration page of the policy indicated that the boat was equipped with two 415-horsepower engines.

Several years later, acting through the same broker, Mr. Bachmann applied to Progressive Northern Insurance Company for a replacement policy. The broker filled out an application for the replacement policy, inserting the same 415-horsepower figure from the previous policy. Mr. Bachmann signed the application, which represented that the boat was not capable of obtaining a speed over 75 m.p.h. and, that to the best of his knowledge, every statement in the application was true.

Shortly after the new policy was issued, the boat's drive units suffered damage while the boat was being operated on an inland lake in Wisconsin. Mr. Bachmann took the boat to a mechanic, who concluded that the boat had likely struck a submerged object. A Progressive Northern claims representative also inspected the damage and discussed the required repairs with the

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mechanic. During his inspection the claims representative noted that the vessel was equipped with two "HP 500" Mercruiser engines.

When the repairs to the outdrives were nearly complete, a second claims representative inspected the vessel. Based on his examination he concluded that the damage was caused by a mechanical failure rather than by a collision with a submerged object.

Two weeks later, Progressive Northern notified Mr. Bachmann that the policy was being rescinded because he had allegedly misrepresented the vessel's top speed in his insurance application. In addition and in the alternative, the insurer took the position that the loss was in any event not covered because the policy excluded coverage for damage resulting from mechanical breakdowns or internal defects, which, Progressive Northern contended, was the cause of the damage to the drive units.

Progressive Northern filed a declaratory judgment action in the U.S. District Court for the Western District of Wisconsin, seeking a declaration that it was entitled to rescission of the policy based on alleged misrepresentations by the insured. In addition to alleging that the insured misrepresented the vessel's top speed, the insurer also alleged that the vessel's horsepower was misrepresented on the insurance application. In the alternative, the insurer sought a declaration that the loss in question was the result of mechanical failure and was therefore not covered under the terms of the policy in any event.

Progressive Northern moved filed a motion for summary judgment in its favor. In considering the insurer's motion the district court held that Wisconsin state law, rather than general maritime law, would apply to determine Progressive Northern's right to rescind the policy based on Mr. Bachmann's alleged misrepresentations regarding the engine horsepower and top speed. The court recognized the existence of the established marine insurance rule of *uberrimae fidei* (utmost good faith), which requires an insured seeking coverage to disclose all facts which, if revealed to the insurer, would affect the insurer's decision to issue the policy or would affect the premium. However, in the district court's view, the maritime law doctrine of utmost good faith should be limited to the commercial or international insurance setting, where the insurance market still depends on a uniform rule of complete disclosure.

According to the district court a recreational craft insurance policy is not all that different from an automobile or homeowner's policy. The court observed that although the Wisconsin insurance code contains provisions expressly applicable to "ocean marine insurance," it does not contain any provisions which specifically address insurance on recreational boats.

The district court found that the language of the policy supported its conclusion that state law should govern the insurer's misrepresentation claims. The policy provided that the insurer would be entitled to void the policy if the insured "knowingly concealed or misrepresented any material fact." The court noted that the reference to a "knowing" misrepresentation was more consistent with the applicable standard of misrepresentation under Wisconsin law than the traditional marine insurance rule of utmost good faith, which may permit rescission even if the insured's misrepresentation was unintentional.

Wisconsin law requires an insurer seeking to rescind a policy to notify the insured of its intention to rescind

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within sixty days after the insurer learns of facts that

would support rescission. In this case Progressive Northern did not raise the alleged misrepresentation of the vessel's horsepower until it filed its declaratory judgment action against Mr. Bachmann, some four months after its claims representative had noted the "HP 500" printed on the vessel's engines. The court accepted Mr. Bachmann's contention that the insurer's pre-suit notification letter, referencing the alleged misrepresentation of the vessel's top speed, was insufficient to provide notice of any alleged misrepresentation regarding horsepower.

Having concluded that Wisconsin law rather than the doctrine of *uberrimae fidei* governed Progressive Northern's claim for rescission, the court found that the insurer had failed to give notice to Mr. Bachmann of its intention to rely on the alleged misrepresentation of the vessel's horsepower within the time required by Wisconsin statutory law and was, therefore, barred from relying on this alleged basis of misrepresentation as a basis for rescission.

In addition, the district court concluded that

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Lack of Notice of Judicial Sale No Bar to Deficiency Judgment Against Guarantor

In *Knauss v. Dwek,* 2004 A.M.C. 479 (D.N.J. 2003), the district court held that a foreclosing mortgagee's failure to provide notice of a pending judicial sale to a mortgage guarantor does not bar the mortgagee's claim for a deficiency judgment against the guarantor.

Plaintiff Winston Knauss was the holder of a First Preferred Ship's Mortgage on a casino vessel securing a $950,000 promissory note. Defendant Solomon Dwek executed the mortgage both as vice president of the registered owner, Camelot Casino Cruises, and as "personal guarantor." Camelot subsequently declared bankruptcy and the vessel was sold to Bernie Weintraub, with the permission of the bankruptcy court. Weintraub assumed Camelot's obligations under the First Preferred Ship's Mortgage. Following the sale, Knauss refused to release Dwek from his personal liability as guarantor of the mortgage. Weintraub then defaulted on the mortgage and Knauss filed an *in rem* foreclosure action in the United States District Court for the Southern District of Florida. The vessel was sold to a third party by the U.S. Marshal at public auction for $645,000. Dwek maintained that he was never notified of the pending Marshal's sale. Dwek filed a post-sale motion objecting to the sale on the grounds that the sale price was grossly inadequate. The Florida district court denied Dwek's motion and confirmed the sale.

Knauss then commenced the action in the New Jersey district court against Dwek personally, as guarantor of the mortgage, to recover the difference between the sale price and the original loan amount. Knauss moved for summary judgment on his claim. Dwek opposed the motion and filed a cross-motion for summary judgment in his favor on the grounds that Knauss' failure to notify him of the pending Florida judicial sale barred Knauss' claim.

The mortgage contained a "Redemption" clause which required the mortgagee Knauss to provide written notice to Dwek of any "repossession sale." Dwek argued that the term "repossession sale" required Knauss to give him notice of any proposed sale of the vessel, regardless of whether the sale was related to a self-

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help repossession or was a court-ordered sale in a formal foreclosure action. After reviewing the terms of the mortgage and case law, the district court found that the mortgage clearly differentiated between a private sale associated with a self-help repossession and a judicial sale in a foreclosure action, requiring notice only in the case of a private sale. In these circumstances the court found that the mortgage did not require Knauss to give notice of the pending judicial sale to Dwek.

The district court then considered whether notice to Dwek was required by the Ship's Mortgage Act, 46 U.S.C. § 31303 et seq. The court noted that although the Act expressly requires that lien claimants and mortgagees be given notice of the filing of a foreclosure action, there is no requirement that a mortgage guarantor be notified. The court therefore found that Dwek was not entitled to notice of the judicial sale under the Ship's Mortgage Act.

Notwithstanding the district court's conclusion that lack of notice to Dwek did not bar Knauss' claim for a deficiency judgment, the court found that there were genuine issues of material fact which prevented the entry of summary judgment in Knauss' favor. Dwek alleged in the alternative that Knauss expressly agreed to keep him informed of developments in the foreclosure action and to notify him in advance of any scheduled judicial sale. Based on these allegations Dwek argued that Knauss should be equitably estopped from recovering a deficiency judgment against Dwek as guarantor. The district court found that issues of material fact precluded summary judgment because a reasonable fact-finder could conclude that Dwek reasonably relied to his detriment on Knauss' alleged promise to inform him of any judicial sale.

Third Circuit Affirms Trial Court's Decision to Exclude Certain Expert Testimony in *Calhoun* Case

The final chapter in the fourteen-year legal saga arising from the 1989 death of twelve year-old Natalie Calhoun may finally have been written. In late 2003 the U.S. Court of Appeals for the Third Circuit affirmed a judgment and jury verdict entered in favor of defendants Yamaha Motor Company and Yamaha Motor Corp., U.S.A. following a trial on liability. *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 2003 AMC 2895 (3d Cir. 2003).

Twelve-year-old Natalie Calhoun was killed in 1989 while operating a Yamaha Wavejammer jet ski in the territorial waters of Puerto Rico. She suffered massive head and neck trauma when the Wavejammer crashed into an anchored boat at the Palmas del Mar resort.

Her parents brought negligence, strict liability, and breach of warranty claims against the Yamaha companies in the U.S. District Court for the Eastern District of Pennsylvania. They alleged, among other things, that the jet ski had an improperly designed throttle control and inadequate warning labels.

As previously reported in 4 Boating Briefs No. 2 (Mar.L.Ass'n 1995), 5 Boating Briefs No. 1 (Mar.L.Ass'n 1996), 8 Boating Briefs No. 2 (Mar.L.Ass'n 1999), and 10 Boating Briefs No. 1 (Mar.L.Ass'n 2001), the case became the subject of several notable appeals, including a 1996 decision of the U.S. Supreme Court. *Yamaha*

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Motor Corp. v. Calhoun, 516 U.S. 199 (1996).

Eventually, the Calhouns' negligence and strict liability claims were tried to a jury. At the close of evidence, the judge entered judgment for the defendants on the Calhouns' negligence claims. The jury later returned a defense verdict on the strict liability claims.

On appeal to the Third Circuit, the Calhouns argued that the district court erred by limiting the testimony of three of their expert witnesses.

The first expert, an experimental psychologist, was permitted to testify that the Wavejammer's throttle controls resembled a bicycle's brake handle, and that a child operator trying to stop the jet ski in an emergency would instinctively tend to squeeze the throttle control rather than letting go. However, he was not permitted to testify that an operator would tend to clench her hands as a "stress reaction," as the expert was unable to point to any existing tests or literature that would support such an opinion. The expert was also precluded from testifying that the Wavejammer's warning label should have restricted operators to individuals 16 years of age or older. (Yamaha's label designated a "minimum recommended operator age" of 14 years.) In excluding this testimony, the trial court noted that the expert could not articulate a scientific basis for the proposed age restriction.

Agreeing that the precluded aspects of the psychologist's proposed testimony lacked sufficient reliability, the Third Circuit held that the trial court had not abused its discretion by limiting the expert's testimony.

The district court also limited the testimony of a metropolitan marine safety department officer. The expert was permitted to testify in general terms about the various types of jet ski throttles and the layout of warning labels. However, given his lack of design experience, the trial court did not permit him to opine on the relative suitability of the various types of throttle controllers. Also, he was precluded from offering his opinion on the appropriate minimum age for a jet ski operator or the adequacy of the Wavejammer's warning label because the trial court concluded that he lacked any scientific or statistical basis for his opinions.

Again, the Third Circuit found no abuse of discretion with the trial court's determinations in this regard.

The Calhouns' third expert was a naval architect, who was permitted to offer testimony regarding the mechanical design of the Wavejammer throttle, but was prevented from stating that the design was unsafe. This expert had little firsthand experience with the design or operation of jet ski throttles, and he had not conducted any tests to assess the relative safety of one throttle design over another. This, the Third Circuit stated, was a sufficient basis for precluding opinion testimony regarding the safety of the Wavejammer throttle.

In addition to their evidentiary objections, the Calhouns also argued that the trial court erred by dismissing their negligence claims at the close of the evidence. However, given that the Calhouns' trial presentation had focused almost exclusively on the strict liability claims, the Third Circuit found no error in the trial court's decision to dismiss their negligence claims.

Finally, the Calhouns argued that the trial court erred by instructing the jury to consider the comparative negligence of the individual who rented the Wavejammer to their daughter and the Palmas del Mar resort (neither of which were parties in the Calhouns' suit against the Yamaha defendants). The Third

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Circuit found that even if the trial court's instruction regarding these non-parties was erroneous (which was a doubtful proposition), any such error was harmless. The trial court's instruction to the jury made it clear that the jury should first decide whether the Wavejammer was defective, and only if they found that the Wavejammer was defective were they to consider the comparative negligence of the two non-parties. Because the jury found that the Wavejammer was not defective in the first instance, they would not have been swayed by the court's instructions on the comparative negligence issue.

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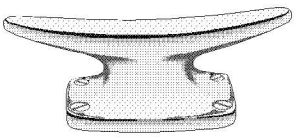
Progressive Northern was not entitled to rescind the policy based on an alleged misrepresentation of the vessel's top speed. Mr. Bachmann presented several affidavits which stated that neither he nor any of his passengers had ever witnessed the boat exceeding the 75 m.p.h. top speed listed on the insurance application. The insurer countered with an affidavit from its claims adjuster, who stated that several boat dealers and the manufacturer had told him that a boat like Mr. Bachmann's could be expected to have a top speed exceeding 75 m.p.h. The court rejected the affidavit as hearsay.

Finally, the district court considered the insurer's alternative argument that the loss resulted from a mechanical failure or defect and was therefore not covered under the policy. While questioning the credibility of the claims adjuster's opinion regarding causation (in light of the fact that the opinion was based on an inspection conducted after repairs were nearly completed), the court concluded that resolution of the factual dispute over the cause of damage was a task best left to a jury.



Mississippi Supreme Court Holds that Boat Owner and Operator Were Not Entitled to a Jury Instruction on the Doctrine of "Inevitable Accident"

A motorboat approaching a congested bend on the Tchoutacabouffa River encountered the wake of another vessel. The motorboat's operator, who had a knee ailment, was standing up at the time so as to get a better view of the bend. The action of the other vessel's wake caused the operator's knee to buckle, and he fell away from the helm. The wake also caused the motorboat's owner, who was seated on the passenger side, to be thrown against the outboard side of the cabin. As a result, the boat's helm was unattended for a period of about fifteen seconds, during which time the motorboat entered a swimming area and struck a twelve-year-old child.

The injured child and her guardian filed suit against the motorboat's owner and operator in Mississippi state court. The Complaint alleged negligence against both defendants and included a negligent entrustment claim against the boat owner alleging that the owner negligently permitted the passenger to operate the boat in a congested area of the river. The Complaint sought compensatory and punitive

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damages.

The trial judge entered a directed verdict against the plaintiffs on their negligent entrustment and punitive damage claims. The court refused the plaintiffs' request for a jury instruction on the state law concept of negligent supervision, under which a person may be held liable for injuries resulting from his improper supervision of a subordinate. The court did permit the jury to receive an instruction on the doctrine of "unavoidable accident," which provides that a party cannot be held liable for an accident that was not intended and that could not have been foreseen or prevented by the exercise of reasonable care. The jury returned defense verdicts in favor of both defendants.

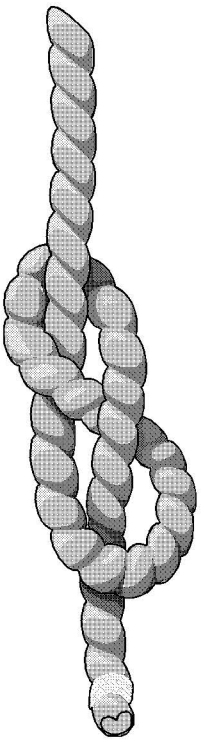
On appeal, the Supreme Court of Mississippi affirmed the trial court's entry of directed verdicts in favor of the defendants on the plaintiffs' negligent entrustment and punitive damage claims, but held that it was error for the jury to have received an instruction on the doctrine of unavoidable accident. The Court therefore reversed the judgment and remanded the case for a new trial. *Tillman v. Singletary*, 865 So. 2d 350 (Miss. 2003).

According to the majority opinion the accident could not reasonably be viewed as unavoidable. The court noted that the motorboat's speed (10 to 12 knots, according to the operator) was excessive, given the boat's proximity to the bend in the river and the presence of other boaters. In addition, the evidence demonstrated that the operator was not using a kill switch, which would have stopped the engine in the event that he fell away from the helm.

The Supreme Court also held that the trial court erred by refusing to instruct the jury on the plaintiffs' theory of negligent supervision. There was evidence that the boat's owner was the more experienced of the two defendants and that just prior to the accident he had been instructing the operator on how to maneuver the vessel. This evidence was sufficient to present the jury with an instruction on the issue of negligent supervision.

In affirming the trial court's entry of a directed verdict in favor of the defendants on the plaintiffs' negligent entrustment claim, the Court noted that the passenger had previous experience operating other boats, and that although the owner was aware of his friend's knee ailment, the owner was not aware that it might buckle as a result of the movement of the boat. Thus, there was insufficient evidence to support the plaintiffs' negligent entrustment theory.

Finally, the court affirmed the trial court's decision to grant a defense verdict on the plaintiffs' punitive damages claims. The sole basis for these claims was the testimony of one witness who stated that the boat owner appeared to be drunk after the accident. However, this witness's observation was made at a distance of at least 35 feet. Other testimony established that the boat owner and operator had consumed only a minimal amount of alcohol. Therefore, the trial judge had not abused his discretion in keeping the plaintiffs' claims for punitive damages from the jury.



New York Federal Court Refuses to Enforce Exculpatory Provision in Boat Storage Contract

In August, 2001, motorboats owned by Michael Cantamessa and Charles Durso were destroyed by fire while in storage at Blue Water Yacht Club in Merrick, New York. Commercial Union Insurance Company and Employers' Fire Insurance Company insured the boats, paid their respective insured's claims and became subrogated to the insureds' interests. The insurers filed suit against the Yacht Club in the U.S. District Court for the Eastern District of New York alleging breach of contract, negligence and breach of bailment.

The Yacht Club moved to dismiss the insurers' complaint based on lack of admiralty subject matter jurisdiction and on the basis of an exculpatory provision of the Yacht Club's storage contract. The Yacht Club's contract included the following clause: "[Yacht Club] does not maintain insurance for the benefit of any [owner] to protect against loss or damage to [owner's] boat from fire, theft, vandalism, collision, acts of God, or other casualty, or for personal injury thereon. [Owner] is required to maintain independent insurance for such purposes. [Owner] expressly acknowledges that [Yacht Club] shall not be liable to [Owner]... for any loss, injury or damage to [Owner's] boat...irrespective of how the same is caused, unless the same results from [Yacht Club's] willful misconduct or gross negligence..."

In a January, 2003, decision, *Commercial Union Insurance Co. v. Blue Water Yacht Club Ass'n*, 239 F. Supp. 2d 316, 2003 AMC 289 (E.D.N.Y. Jan. 17, 2003), the district court found that the insurer's contract claims were clearly within admiralty subject matter jurisdiction and that it was proper to exercise supplemental jurisdiction over the tort-based claims.

In the same January, 2003, decision, after noting that neither party had briefed the issue of applicable law, the district court also determined that the enforceability of the exculpatory provisions in the Yacht Club's contract was governed by New York state law rather than federal maritime law. The court found that the exculpatory clause was not sufficiently clear to relieve the Yacht Club from the consequences of its own negligence under New York law, which requires that any agreement to disclaim liability for one's own negligence must be clear and unequivocal. The court noted that although a disclaimer can be effective without explicitly using the word "negligence," it must at least "convey a similar import." The court observed that the Yacht Club's contract did not specifically mention "negligence," nor did it explicitly disclaim responsibility for damage caused by the Yacht Club's own fault or lack of reasonable care. In addition, the court observed that the boat owners were probably unsophisticated customers who might not have recognized the Yacht Club's attempt to disclaim liability. The district court denied the Yacht Club's motion for summary judgment based on the contract provisions.

Following the district court's January, 2003, decision, three separate New York trial courts in Nassau County ruled that the identical exculpatory provisions of the Yacht's Club's contract were enforceable under New York law and entitled the Yacht Club to summary judgment in its favor in connection with claims for fire damage resulting from the same

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Florida Court of Appeal Enforces Exculpatory Language in Boat Club Membership Agreement

Applying federal maritime law, the Florida Court of Appeal held that exculpatory provisions in releases signed by boat club members were enforceable as a matter of law and affirmed the trial court's entry of summary judgment against the members on their personal injury claims against the Club and its employee. *Hopkins v. The Boat Club, Inc.*, 866 So. 2d 108 (Fla. 1st Dist. Ct. App. 2004).

Ronald Hopkins entered into a written contract with The Boat Club, Inc. for the right to use recreational watercraft owned and maintained by the Club. Thereafter, as required by the Club's conditions of membership, he and his wife each executed documents entitled "Assumption and Acknowledgment of Risks and Release of Liability Agreement." The releases contained provisions by which the Hopkins acknowledged and assumed the risk of personal injury and released the Club and its employees from liability for any injury arising from their participation in watersport activities.

After signing the releases the Hopkins participated in a "checkout cruise" with a Club employee, William Brawner. The purpose of the outing was to allow Mr. Hopkins to become familiar with the operation of the Club's vessels. While operating a power boat under the direction and supervision of the Club's employee, Mr. Hopkins crossed the wake of a larger vessel at a high rate of speed. Mr. Hopkins' wife was thrown from her seat and suffered severe injuries.

The Hopkins filed suit against the Club and its employee Brawner alleging negligence on the part of the Club's employee. The defendants filed a motion for summary judgment based on the exculpatory provisions in the releases signed by the plaintiffs. The trial court dismissed the Hopkins' negligence suit against the Club and the Club's employee based on the release language. The Hopkins appealed.

On appeal, the Hopkins argued that the language of the release was insufficient to relive the Club and its employee of liability for their own negligence under Florida law. Relying on reported decisions of a number of Florida courts, the Hopkins argued that a release is ineffective to relieve a releasee of liability for its own negligence unless the release contains specific language to that effect. The releases signed by the Hopkins contained no specific reference to negligence by the Club or its employees.

The Court of Appeals declined to apply Florida law, holding that the construction and enforceability of the release were governed exclusively by federal maritime law. The Court concluded that federal maritime law does not require specific reference to a releasee's own

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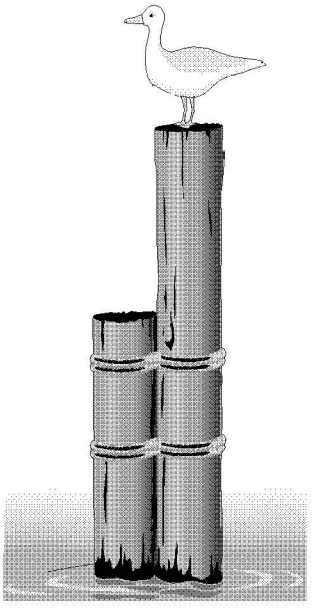

Regulatory Developments and Other Cases of Interest

Proposed Regulations - State Boating Registration

The Coast Guard's Office of Boating Safety has proposed regulatory amendments to permit states to require proof of liability insurance as a condition for obtaining a state-issued vessel registration. 33 CFR 174.31 currently permits states to impose only two conditions – proof of tax payment and proof of title. Under the current regulations any state which imposes additional conditions on registration risks withdrawal of the Coast Guard's approval of the state's registration program. The amendment would allow, but not require, a state to impose the additional condition. The comment period closed on 13 April 2004. Information regarding the proposed amendment may be obtained from the Office of Boating Safety, Program Operations Division, at telephone 202-267-1077 or email, apickup@comdt.uscg.mil.

***Professional Marine Corp. v. Underwriters at Lloyd's*, 77 P.3d 658 (Wash. Ct. App. 2003)**

On appeal by underwriters, the Washington State Court of Appeals affirmed the trial court's entry of a default judgment and award of attorneys fees against "Underwriters at Lloyd's" in a declaratory judgment action filed by an assured, a Seattle boat yard. The state trial court entered judgment against the underwriters on the assured's marine insurance coverage claims and supported the judgment by specific findings of fact and conclusions of law. The trial court also awarded attorneys fees to the boat yard under a state Consumer Protection Act. The underlying loss arose from wind damage to two vessels docked at the assured's facility. After filing the declaratory judgment action the boat yard assigned its policy claims to the hull insurers of the two damaged vessels (Fireman's Fund and Albany Insurance) in exchange for a covenant not to execute judgment. On appeal the underwriters argued that the default judgment was unenforceable because it was entered against a non-juridical entity ("Underwriters at Lloyd's") which is neither capable of suing or being sued. The Court of Appeals rejected this argument, noting that the policy identified the insurer as "Underwriters at Lloyd's of London," referred to the insurer as "the company" and included no information about the identity of individual underwriters. The underwriters also challenged service of process based on an affidavit from an employee of Mendes & Mount denying that she accepted service of the summons and complaint; the Court of Appeals rejected the argument, holding that service of process was properly effected as provided in the policy. Finally, the underwriters argued that they had appeared "informally" in the declaratory judgment action and that it was therefore error for the trial court to enter a default judgment without notice and an opportunity to defend. Although the Court of Appeals recognized that an "informal" appearance by a party may require that the party be given notice of an application for entry of a default judgment under Washington law, the court held that the underwriters' actions in this case did not amount to an informal appearance.

Jury Awards BUC International $2 million For Copyright Infringement

A federal jury in Fort Lauderdale reportedly awarded more than $2 million in damages to BUC International Corp. in a suit filed by BUC against MLS Solutions, Inc. and the International Yacht Council alleging that the defendants misappropriated and published BUC's copyrighted yacht sale listings. BUC alleged that the defendants routinely copied its exclusive and copyrighted website sale listings to their own internet listing service.

***Turner v. Pleasant*, 2004 U.S. Dist. LEXIS 1061 (E.D.La., Jan. 27, 2004)**

Passenger on a bass boat filed suit alleging that she sustained injuries to her lumbar spine when she was thrown in the air due to an excessive wake caused by the defendant's vessel. The incident occurred in the Intercoastal Waterway in Terrebonnne Parish, Louisiana. Following a bench trial the court entered a defense verdict in favor of the defendants supported by findings of fact and conclusions of law. The district court judge concluded that every vessel has an obligation to use reasonable care to avoid excessive wake but that there is no actionable claim unless the wake is "unusual" and cannot be reasonably anticipated by others. The court found that the plaintiff had failed to prove that the defendant's vessel caused the alleged wake, that the defendant's vessel was operating at an unsafe speed or that any "unusual" wake impacted the plaintiff's boat. The court also found that the plaintiff's liability expert lacked credibility and that, in any event, the plaintiff had failed to prove that the incident caused her alleged back injury.

Carney Family Investment Trust v. Ins. Co. of North America, 296 F.Supp. 2d 629 (D.Md. 2004)

Plaintiff insured brought declaratory judgment action against insurer on yacht policy seeking a judgment of $1.1 million for fire damage to the insured vessel. In addition, the plaintiff sought recovery of treble damages and attorneys fees for alleged unfair claims settlement practices by the insurer under Massachusetts' law. The insurer moved to dismiss the plaintiff's claims for punitive damages and attorneys fees on the grounds that federal maritime law preempted application of Massachusetts' state law. The district court found that state law governs claims by an insured for attorneys fees and punitive damages against an insurer under a marine insurance policy in light of the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (S.Ct. 1955). Accordingly the district court denied the insurer's motion to dismiss the plaintiff's state law claims for punitive damages and attorneys fees.

Dominguez v. United States, 2004 U.S. Dist. LEXIS 5345 (S.D.N.Y., March 31, 2004)

Suit alleging negligence by the U.S. Coast Guard in connection with attempted rescue of boaters dismissed upon motion of the United States where the plaintiffs' Complaint was filed more than two years after the incident. Plaintiffs' Complaint alleged jurisdiction and a right of recovery under the Federal Tort Claims Act, 28 U.S.C. § 1346. The district court found that the plaintiffs' claims were admiralty claims governed exclusively by the Suits in Admiralty Act, 46 App. U.S.C. § 741 et seq., and were subject to the SIAA's two-year statute of limitations. Accordingly, the district court dismissed the Complaint as time barred.

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incident brought by other boat owners.

The Yacht Club filed a motion for reconsideration of the federal district court's January, 2003, decision on the basis of the intervening New York state court decisions. The federal court, however, was not persuaded that the related state court decisions were correct. After restating the rationale for its original decision, the district court stated that it simply disagreed with the conclusions reached by the three trial courts. The district court also noted that the Yacht Club's motion for reconsideration was untimely under local civil rules and that, in any event, the decisions of state trial courts do not bind a federal district court. Accordingly, the Yacht Club's motion for reconsideration was denied. *Commercial Union Ins. Co. v. Blue Water Yacht Club*, 289 F. Supp. 2d 337 (E.D.N.Y. Nov. 5, 2003).

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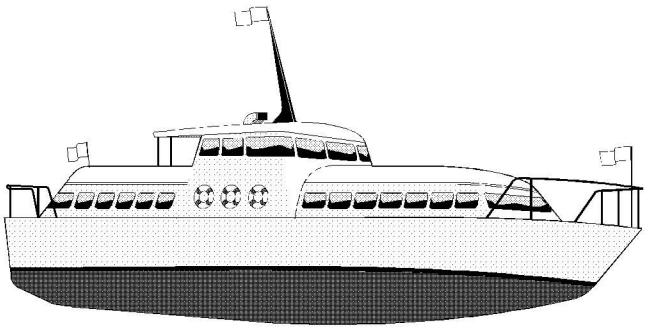
negligence and that state law requirements to the contrary are therefore preempted. In support of its holding the Court noted that the releases explicitly required the Hopkins to acknowledge the risk of encountering "changing water flows, tides, currents, wave action and ships' wakes," and broadly provided that the Club and all its employees and agents would be relieved of all liability arising out of the customer's participation in boating activities. In addition, the Court held that there was no evidence of unequal bargaining positions between the parties. Thus, the court concluded, the contract was sufficient to inform an ordinary customer that he or she was agreeing to release the Club from liability arising from the Club's own negligence. The trial court's entry of summary judgement in favor of the Club and its employee was affirmed.



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