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

BOATING BRIEFS

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

Volume 14 Number 1 *Spring/Summer 2005*

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

Exclusion for Loss Caused by Insured's Criminal Negligence Does Not Render Coverage "Illusory"

The U.S. Court of Appeals for the First Circuit recently affirmed the district court's judgment in *Littlefield v. Acadia Insurance Co.*, 2004 U.S. Dist. LEXIS 8410 (D.N.H. 2004) (previously reported in 13 BOATING BRIEFS NO. 2), agreeing that a yacht policy unambiguously excluded coverage for a wrongful death claim where the operator, a permissive user, was convicted of criminal negligence in connection with the incident. *Littlefield v. Acadia Insurance Co.*, 392 F.3d 1 (1st Cir. 2004).

On August 11, 2002, a 36-foot pleasure boat operated by Daniel Littlefield, the policyholder's son, struck another vessel on Lake Winnipesaukee in New Hampshire, killing one of the latter vessel's occupants. After the deceased's widow brought a wrongful death action against Littlefield in New Hampshire state court, Littlefield filed a complaint for declaratory relief against Acadia, the insurer that issued the yacht policy to his father, seeking a declaration that Acadia was obligated to defend and indemnify him in connection with the wrongful death suit. Acadia removed the case to federal court.

Meanwhile, Littlefield was indicated on two counts of criminally negligent homicide, one for negligently causing the death of another as a result of operating a boat while under the influence of alcohol, and the second for negligently causing the death of another as a result of failing to keep a proper lookout.

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A jury subsequently acquitted Littlefield on the first count but convicted him on the second, a Class B Felony under New Hampshire law.

Acadia moved for summary judgment in the declaratory judgment action, citing two provisions in the yacht policy. One provision excluded coverage for "any loss, damage or liability willfully, intentionally or criminally caused or incurred by an insured person." Another provision excluded coverage for "any loss, damage or expense arising out of or during any illegal activity on your part or on the part of anyone using the insured's property with your permission."

Littlefield filed a cross-motion for summary judgment, claiming that the first exclusion was ambiguous in that a "willfully, intentionally or criminally caused or incurred" loss could be reasonably construed to refer only to losses incurred in the commission of a willful or intentional crime. He also argued that giving effect to the exclusions would result in a large number of non-covered losses and would therefore violate the public policy in favor of compensating victims who are unintentionally injured by insureds.

The district court agreed with Acadia that coverage in the wrongful death matter was clearly excluded by the policy's reference to losses "criminally caused or incurred by an insured person." The court also agreed that enforcement of this exclusion was not contrary to public policy.

On appeal by Littlefield, the First Circuit initially observed that the Acadia policy contained a choice-of-law clause which specified that regardless of forum, the policy "shall be governed by and construed under the general Maritime law of the United States of America." However, since there was no federal statute governing the interpretation of the policy and there apparently was no judge-made rule of construction specifically applicable to marine insurance policies, the court elected to interpret the contract according to New Hampshire state law.
Moreover, the court noted, the litigants had proceeded on the premise that New Hampshire law would apply to the coverage dispute.

Next, the court found that the phrase "any loss, damage or liability willfully, intentionally or criminally caused or incurred" was not reasonably susceptible to the interpretation urged by Littlefield. According to the court, the word "criminally" simply entailed the commission of a crime; it did not require a more culpable mental state such as willfulness or intent. Thus, Littlefield's conviction for the crime of negligent homicide was itself sufficient to trigger the exclusion, notwithstanding the fact that Littlefield admittedly did not intend to cause the collision.

Littlefield's reliance on the doctrine of ejusdem generis was similarly rejected. Littlefield suggested that the word "criminally" as used in the phrase "willfully, intentionally or criminally" should be construed to refer only to those crimes having an element of willfulness or intent. The court found that resort to this canon of interpretation was not appropriate since the term "criminally" had its own clear, unique meaning and entailed acts which, though unintentional, were nonetheless proscribed by law.

Finally, Littlefield contended that enforcement of the exclusion would violate public policy by making coverage "illusory." Specifically Littlefield argued that insurance coverage would be unavailable in a wide array of cases in which a negligent operator could theoretically

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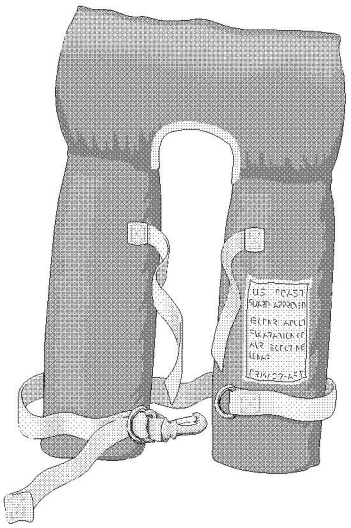
be subject to prosecution for criminal negligence. The court pointed out, however, that in this case Littlefield was in fact convicted of a felony, and, even if he had been prosecuted for a lesser crime, any conviction under New Hampshire law would still have required proof of the requisite level of culpability. Since losses resulting from civil negligence were not affected by policy's criminal exclusion, coverage was not illusory and there was no contravention of public policy.



Racing Exclusion in Policy Held Applicable to Any "Contest of Speed"

Friends and companions Robert Crockford and Ted Collingsworth each purchased high performance speed boats capable of speeds of up to 110 knots, and regularly used the boats together on Lake Tarpon, Florida. During one of their outings on the Lake, the two boats collided, resulting in Collingsworth's death and in serious injuries to Crockford. There was no speed limit in effect on Lake Tarpon at the time. Eyewitnesses provided testimony that the two boats were traveling "side-by-side" at between 80 to 85 knots prior to the collision. An official accident investigation concluded that the boats were "racing (unsanctioned) south on Lake Tarpon" when the collision occurred. However, Crockford testified that the two were "simply enjoying driving fast across the water as our boats were designed to do" and denied that they were racing.

Crockford filed suit against Collingsworth's estate to recover for his personal injuries. The estate gave notice of the suit to Continental Insurance Company, which had issued a marine liability policy covering Collingsworth's boat through Boat U.S., and demanded a defense and coverage. Continental denied coverage for Crockford's claim based on a policy exclusion which provided as follows: "[W]e will not cover powerboats while engaged in any speed race or test. We do cover predicted log cruises or similar competitions and sailboat racing."

Continental filed a declaratory judgment action in Florida state court seeking a declaration that no coverage was owed in connection with Crockford's claims as a result of the policy's racing exclusion. The trial court rejected the insurer's position, holding that the racing exclusion was ambiguous and therefore must be construed in favor of coverage. Continental appealed.

On March 24, 2005, the Florida Court of Appeal reversed the trial court's decision and remanded the case to the trial court. *Continental Ins. Co. v. Collingsworth,* 2005 Fla. App. LEXIS 3956 (Ct. App. 2005). On appeal the Collingsworth estate argued that the words "any speed race" in the exclusion (quoted above) are ambiguous and should be interpreted to refer only to formal or officially

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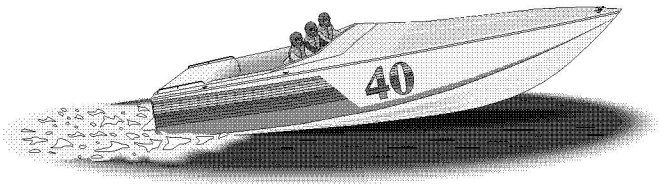
sanctioned races. In support of its argument, the estate pointed to the language in the balance of the exclusion which creates an exception for "predicted log cruises" and "sailboat racing," arguing that both could only be interpreted to refer to formal, organized events and thus informed the meaning of the words "any speed race." The court of appeals turned the estate's own argument against it, holding that the existence of the defined exceptions means that the exclusion was otherwise intended to be all encompassing.

hull value of $100,000. The

The court of appeals held that the meaning of the words "speed race" must be construed according to the common meaning of the term which, according to Webster's dictionary, is "a contest of speed." The court therefore held that the words "any speed race" are clear and unambiguous and mean

a sea trial. During the trial Gfroerer permitted the "any contest of speed regardless of whether it is sanctioned, unsanctioned, official or unofficial." The court remanded the case to the trial court, noting that it remained to be determined whether or not Crockford and Collingsworth were in fact racing at the time of the casualty.



Violation of Named Operator Warranty Voids Coverage for Hull Damage

In *Gfroerer v. ACE American Ins. Co.*, 2005 A.M.C. 404 (W.D.N.Y. 2004), the U.S. District Court for the Western District of New York held that the defendant insurer had no first-party property coverage obligation for the constructive total loss of the insured boat, where the insured was found to have violated the policy's named operator warranty. The plaintiff Gfroerer obtained a marine policy from ACE which provided liability and hull coverage for his 1000 horsepower, 38 foot Donzi power boat, with an agreed

policy contained a "High Performance Vessel Endorsement" which included a "Named Operator" warranty. The warranty contained in the issued policy provided as follows: "Warranted by the insured that the coverage provided by this policy applies only if the insured vessel is operated by: MARK F. GFROERER."

After purchasing the policy Gfoerer decided to sell the boat. On September 6, 2003, two prospective buyers and their "high-performance vessel expert" accompanied Gfoerer aboard the Donzi on

buyers'expert to drive the boat and, while the expert was at the helm, the boat flipped over and ejected all of the occupants. The boat was rendered a constructive total loss. Gfroerer filed a claim with the insurer for the agreed hull value. ACE denied the claim based on violation of the Named Operator warranty.

Gfroerer sued ACE, arguing that New York state insurance law prohibits the issuance of a marine policy unless it includes coverage for losses arising from operation of the vessel by a

permissive user, thus

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rendering the policy's warranty unenforceable and, in the alternative, that he was in fact "operating" the boat at the time of the casualty as he understood the meaning of that policy term. Cross-motions for summary judgment were filed by the parties.

The District Court first considered Gfroerer's argument that the warranty was unenforceable under New York state law. The New York insurance code includes a statute which prohibits an insurer from issuing a marine policy covering "liability arising from the ownership, maintenance or operation of any...vessel...*unless it contains a provision...insuring the named insured against liability...as a result of negligence in the operation...of such...vessel...by any person operating...the same with the permission, express or implied, of the named insured.*" Although concluding that the statute did in fact apply to the policy issued by ACE on Gfroerer's Donzi (because it was not an "ocean-going vessel"), the court held that the statutory prohibition applies only to *liability* coverage and does not prevent parties to a marine policy from agreeing to limit the availability of first party property coverage for loss or damage to the insured vessel and to exclude damage caused during operation by a permissive user. Accordingly the court held that the policy's Named Operator warranty was valid and enforceable as to first-party property damage claims by the insured.

Gfroerer argued in the alternative that the term "operated by" in the warranty is ambiguous and in his interpretation simply meant that he, as the named operator, must have "ultimate control for the vessel." The court rejected the argument, holding that the term "operated by" was not ambiguous and was not reasonably susceptible to any meaning other than the equivalent of "driving." In dismissing Gfroerer's claim that he was "confused" about the meaning of the warranty, the court found that he should have raised the issue when the policy was negotiated if confusion about the meaning existed in his mind. The

Good Faith Purchaser Acquires Vessel Free of Bank's Security

Recreational Marine Employment Act of 2005

District Court granted summary judgment on the hull loss claim in favor of the insurer ACE.

In September 2001 John Meskell purchased a 66-foot Chapparral with $31,601 in financing provided by Key Bank. Meskell signed a Note and a Security Agreement in connection with the loan. The Note prohibited Meskell from transferring ownership or possession of the boat without the Bank's consent. Shortly after his purchase, Meskell obtained a Massachusetts state registration number for the boat and a certificate of title naming the Bank as first lienholder. The Bank did not file a UCC financing statement documenting its security interest.

In late 2002, without the Bank's permission, Meskell delivered the boat to a broker with the understanding that the broker would market the vessel for sale on Meskell's behalf. After several months John Bertone agreed to buy the vessel for $44,000. Before the sale the buyer arranged for a title search which revealed no record of liens or financing statements against the boat. At the closing, Bertone received a

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In March 2005, a Bill known as the Recreational Marine Employment Act of 2005 (H.R. 940) was

introduced in the U.S. House of Representatives by the primary sponsor, Congressman Ric Keller of Florida. There are currently 16 co-sponsors on the House Bill. If enacted the proposed legislation would amend the Longshore and Harbor Worker's Compensation Act to exempt all workers in the recreational boating industry from the LHWCA.

In 1984, Congress attempted to exempt employees in the recreational boating industry from the LHWCA by amending the statute to make it inapplicable to employees performing work on boats 65 feet in length and under. Such workers were then, and are now, covered by state workmen's compensation statutes.

Proponents of the legislation maintain that further amendment of the LHWCA is necessary, primarily because the size of recreational boats has increased dramatically since the 1984 amendment exempting vessels less than 65 feet in length. According to a press release by the House Committee on Education and the Workforce, there are more than 400,000 recreational boats with a length of more than 65 feet registered in the United States today. The LHWCA imposes criminal and other penalties on employers who fail to provide LHWCA coverage when required. Because workers at any given facility may perform work on boats both over and under 65 feet in length, the current statutory scheme essentially requires an employer to maintain two forms of insurance – both Longshore and state workers' compensation coverage. According to the House Workforce Protections Subcommittee Chairman Charles Norwood, the amendments to the LHWCA are required because "U.S. companies are losing jobs in this industry to foreign competitors, [i]n large part [due] to the increased costs

for many employers who, under current law, must maintain duplicative workers' compensation coverage under both state workers' compensation law and under the Longshore Act."

According to proponents, the practical impact of the additional insurance requirements imposed by the Longshore Act is a significant loss of American jobs because U.S. employers are put at a competitive disadvantage to overseas competition. It is said that one in five boat projects have migrated from the U.S. to Canada or elsewhere because of the additional cost of duplicative insurance coverage mandated by the Longshore Act according to a press release from Mr. Norwood's subcommittee.

The proposed legislation would exempt the recreational boating industry from the LHWCA by amending the statute to exclude "individuals employed by or at, or engaged in the construction or maintenance of, a recreational marine facility or structure," and any "individuals employed principally to build, repair, test, maintain, accommodate, buy, sell, store, restore, transport by land, or dismantle a recreational vessel." The proposed legislation defines a "recreational vessel" as "a vessel manufactured principally for pleasure use."

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bill of sale and a written sales agreement stating that the vessel was to be delivered free of "any liens, mortgages or bills" or, in the alternative, that all existing liens would be satisfied through deductions from the proceeds of sale.

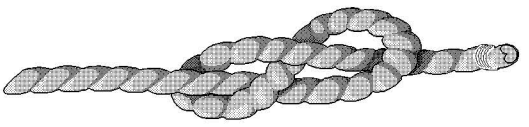
The buyer Bertone paid the sales price to the seller's broker and immediately after the closing arranged to federally document the boat with the U.S. Coast Guard. Shortly after the closing, the broker delivered a check to Meskell for about $7,000, a figure which represented the sale proceeds after deduction of the broker's commission, costs, and the amount necessary to satisfy the balance on Meskell's loan from Key Bank. Rather than forwarding the payoff amount to the Bank, however, the broker absconded with all the remaining sale proceeds, leaving the Bank's lien unsatisfied.

After learning that the broker had disappeared with the sale proceeds and that the Key loan had not been satisfied, the seller Meskell filed suit against the buyer Bertone in Massachusetts' state court alleging conversion of the boat. Bertone answered and filed a counterclaim against Meskell demanding that he satisfy the outstanding loan in accordance with the sales agreement. Key Bank filed a separate civil action in replevin against Bertone and Meskell, asserting that Meskell's breach of the Note through unauthorized sale of the boat entitled the Bank to immediate possession of the vessel. The two cases were consolidated.

Following a trial, the Massachusetts Superior Court held that Bertone was the rightful owner of the boat and took title free of Key Bank's security interest. *Meskell v. Bertone*, 18 Mass. L. Rep. 423, 55 U.C.C. Rep. Serv. 2d (Callaghan) 179 (Mass. Super. 2004)

The court initially considered whether the broker was authorized to act as the seller's agent for the purpose of selling the boat and accepting the purchase price from the buyer. The court found that the broker had both actual and apparent authority and that the buyer was entitled to rely on that authority as binding the seller.

As to the right of possession of the boat, the court found that Key Bank was not required to file a financing statement in order to perfect its security interest in the boat because the loan to Meskell was a purchase money security interest within the meaning of UCC Article 9. Thus, perfection of the bank's security interest was automatic. Accordingly, the Bank's perfected purchase money security interest would take priority over Bertone's ownership interest, unless Bertone established that he fell within the Article 9 exception for consumer transactions. The court held that in order to obtain the protection of the exception Bertone must prove that he purchased the vessel in a "consumer-to-consumer" transaction, for value, in good faith, and without knowledge of the Bank's preexisting security interest . In this case, although Bertone bought the vessel through a broker, he was aware that Meskell, a consumer, was the actual seller. According to the court this knowledge created a consumer-to-consumer transaction within the meaning of the Article 9 exception. The court also found that Bertone acted in good faith, crediting his testimony that he had no knowledge of the Bank's lien at the time of sale. The court held that Bertone took title to the boat free and clear of the bank's security interest and that the bank's sole remedy was against the seller Meskell for breach of the Note and security agreement.



Other Recent Cases of Interest

Jefferson Ins. Co. v. Roberts, 349 F. Supp. 2d 101 (D.MA. 2004). The District Court for the District of Massachusetts granted summary judgment to the plaintiff Hull & Machinery insurer, holding that the policy in question excluded casualty damage to the insured boat's engines. The insured, William Roberts, purchased a 12 year old boat which had been refitted with two-year old twin 600 horsepower engines. Roberts sought Hull & Machinery insurance through an insurance broker. The policy contained an exclusion stating that damage to engines on vessels over 10 years of age was not covered unless caused by fire or lightening. After reviewing a "highlight sheet" prepared by the broker which outlined the coverage (but not the policy itself), Roberts specifically questioned whether the two-year old engines on his boat would be fully covered for all risks. The broker assured him that full coverage would apply because the engines were less than 10 years old. The engines sustained serious damage as a result of a casualty during the policy period. Roberts filed a claim for the loss. The insurer denied coverage based on the exclusion for damage to engines on vessels more than 10 years old and filed a declaratory judgment action against Roberts. In the lawsuit Roberts argued that the policy language was ambiguous and did not clearly exclude coverage for the engine damage. Roberts also maintained that the broker was acting as the insurance company's agent when he specifically represented that the policy would provide full coverage for the two-year old engines notwithstanding the age of the boat itself and, therefore, the insurer should be estopped from invoking the exclusion. The district court rejected both positions. The court found that the policy language clearly and unambiguously excluded engine damage on vessels over 10 years old, regardless of the age of the engines themselves. The court also found that the insurance broker in question was an independent broker who had no express or implied agency relationship with the insurance company. Finding that no agency relationship existed, the court held that the broker's misrepresentations regarding the policy's coverage could not bind or be used against the insurance company.

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eBlanc v. M/V NAUMACHIA, 2005 A.M.C. 506 (D.R.I. 2005). In 1998, Robert LeBlanc and his then fiancee Melony Kenyon planned to buy a vessel to be used in a charter fishing business and as a pleasure boat for the couple. They located a suitable 47 foot Hatteras with a sale price of $147,000. Because of LeBlanc's poor credit history, their initial joint mortgage application was rejected. Melony Kenyon reapplied in her own name, the application was approved and Kenyon became the sole titled owner. For three years the couple operated a charter business with LeBlanc serving as captain and also used the boat for personal recreation with family and friends. The charter operation was not profitable and Melony Kenyon paid the mortgage payments and on-going repair and improvement costs from her own funds. When the business, and the relationship, went on the rocks, LeBlanc filed suit against the vessel, *in rem,* asserting maritime liens for unpaid captain's wages and for amounts which he allegedly paid for supplies, maintenance and repairs in an amount exceeding $130,000. LeBlanc argued that his lien

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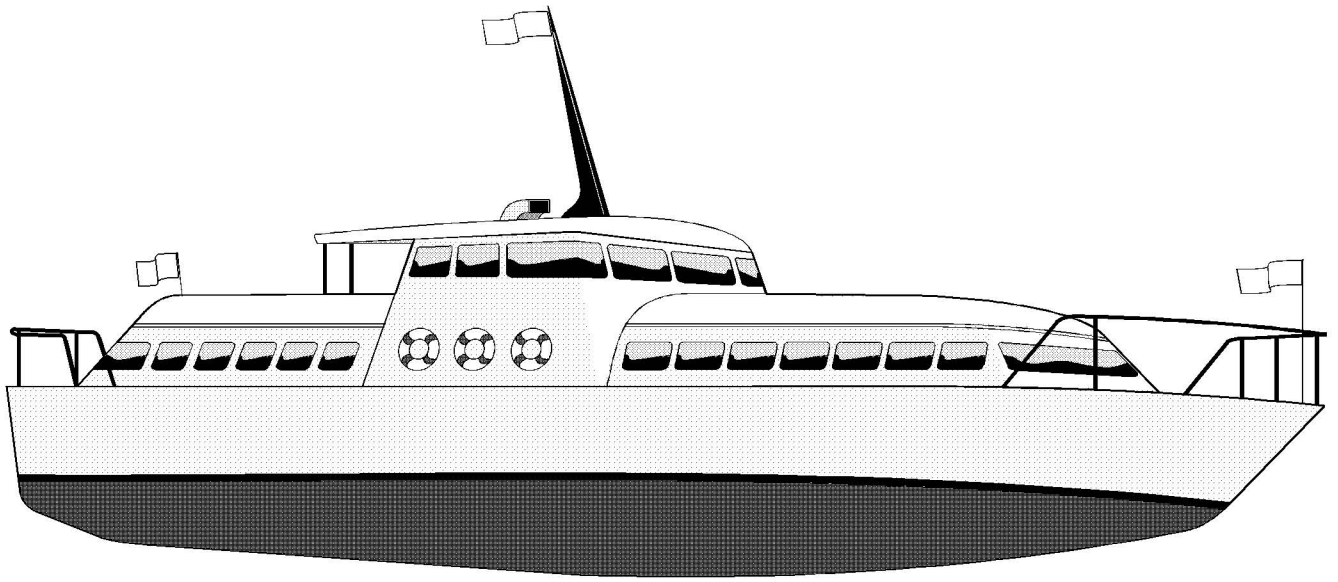

Ninth Circuit Affirms Dismissal of Claims Against Coast Guard for Alleged Negligent Response to Boating Emergency

While kayaking in Hawaii, the plaintiff husband, an American citizen, and his wife Nahid, an Iranian national, encountered heavy weather. A witness observing from land telephoned the U.S. Coast Guard, which, after a brief delay, dispatched one of its cutters to the area. A search began but was suspended as darkness fell. Winds swept the kayak out to sea where Nahid was attacked by a shark and died. Her husband washed ashore on an island and was rescued three days later.

Nahid's husband, her estate, and her parents brought a wrongful death action against the kayak rental company and later added the United States as a defendant, alleging that the Coast Guard conducted a negligent search and negligently failed to contact local authorities who had ready access to helicopters and more suitable rescue vessels. Since the claims against the United States were not brought within the two-year time frame available under the Public Vessels Act (PVA) and the Suits in Admiralty Act (SAA), plaintiffs attempted to assert their claims under the Federal Tort Claims Act (FTCA). The district court found the FTCA inapplicable and granted summary judgment in favor of the United States. *Taghadomi v. Extreme Sports Maui*, 257 F. Supp. 2d 1262, 2002 AMC 2365 (D. Haw. 2002).

The Ninth Circuit recently affirmed the district court's decision in *Taghadomi v. United States*, 401 F.3d 1080 (9th Cir. 2005).

The FTCA waives the sovereign immunity of the United States for certain torts, but, under 28 U.S.C. § 2680(d), the Act does not apply to claims "for which a remedy is provided by" the PVA or the SAA, the two statutes which generally waive U.S. sovereign immunity in cases of maritime tort committed by a public vessel or by a federal agency. In this case, the parties agreed that the "negligent-search claim" sounded in admiralty, but

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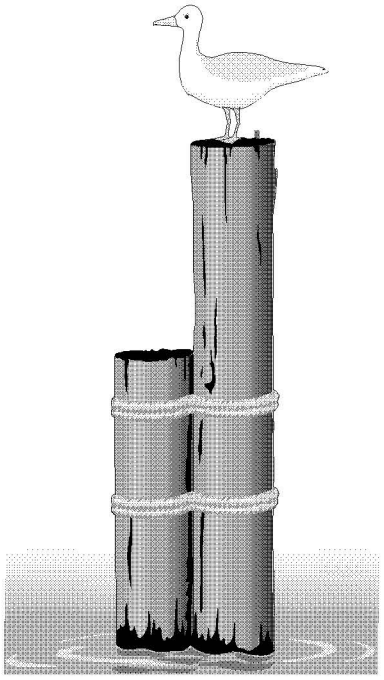
plaintiffs argued that the "failure-to-communicate claim" (i.e., the claim involving the Coast Guard's alleged failure to contact local authorities better situated to effect a rescue) was not maritime in nature and could therefore be brought under the FTCA.

The Ninth Circuit held, however, that the latter claim was indeed cognizable in admiralty, as both the maritime "situs" and "nexus" tests were satisfied. Although the alleged negligence took place on land at the Coast Guard's offices, the resulting injury manifested itself on navigable waters. According to the court, this was sufficient to satisfy the status test under Ninth Circuit precedent, which focused on the site of the injury rather than the location where the negligence originated. The nexus test was likewise satisfied, since negligence in the coordination of a rescue operation would effect the safety of both the persons and property at sea, and search-and-rescue operations have an historic connection to traditional maritime activity.



Having determined that both claims against the United States were maritime in nature, the court then considered whether the claims might nevertheless be brought under the FTCA. Since the failure-to-communicate claim involved an alleged maritime tort committed by a federal agency, the court held that the plaintiffs were required to bring it within the SAA's two year statute of limitation and, having failed to do so, could not now invoke the FTCA.

With regard to the negligent-search claim, although the Coast Guard cutter was a "public vessel" alleged to have committed a maritime tort, the court held that Nahid's parents, as citizens of Iran, were afforded no remedy under the PVA due to a reciprocity provision in that statute which waives U.S. sovereign immunity for claims by foreign nationals only in cases where the claimants' nation would permit a similar suit by an American citizen. Since Iran would not permit suits by U.S. citizens under similar circumstances, the PVA reciprocity requirement was not satisfied. The SAA was likewise unavailable to Nahid's parents in light of the U.S. Supreme Court's decision in *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), which held that in cases involving a public vessel, a foreign national cannot proceed under the SAA if doing so would circumvent the PVA's reciprocity requirement.

Since neither the PVA nor the SAA provided a remedy to Nahid's parents for their negligent-search claim, a literal reading of the FTCA's admiralty exception should have allowed their claim to go forward. See 28 U.S.C. § 2680(d). Relying on the Supreme Court's rationale in *Continental Tuna*, however, the Ninth Circuit held that since the parents were foreign nationals whose claim involved a public vessel, their claim against the United States could proceed only if the PVA reciprocity requirement was satisfied. Since in this case it was not, the Ninth Circuit held that the district court had properly dismissed their negligent-search claim.

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claims for wages and necessaries took priority over the lien of National City Bank, which held a preferred ship mortgage on the boat. The bank intervened in the lawsuit to assert its rights under the mortgage. The bank argued that LeBlanc was a joint venturer with Kenyon in the ownership and operation of the boat and, therefore, was not entitled to assert any liens as a matter of law. Following a trial the district court held that LeBlanc could not assert any maritime liens against the vessel if he was a joint venturer with Kenyon in the enterprise. After reviewing the evidence the court found that the enterprise exhibited all of the characteristics of a joint venture relationship and that LeBlanc could not therefore assert any maritime liens against the vessel.

Broadley v. Maspee Neck Marina, Inc., 2005 U.S. Dist. LEXIS 2752 (D. MA. 2005). The plaintiff sustained personal injuries on a dock owned by the defendant marina and filed suit. The plaintiff leased a slip for his boat at the marina and had signed a written contract which contained a broad and lengthy exculpatory clause by which the lessee agreed not to assert any claim for damages of any kind against the marina, regardless of the nature of the claim. The plaintiff's complaint sought a declaration that the contract was unenforceable as a matter of public policy and also alleged that the marina's negligence caused his injuries. The complaint invoked admiralty jurisdiction as the basis of the court's subject matter jurisdiction. The marina filed a motion to dismiss the plaintiff's complaint for lack of admiralty subject matter jurisdiction. The marina argued that the contract claim could not support admiralty jurisdiction because it contained both maritime and non-maritime elements and the

plaintiff's injury was limited to alleged negligence in the maintenance of shoreside property. The court rejected this contention, holding that the marina contract was a maritime contract and, moreover, that the dispute over the enforceability of the exculpatory clause directly affected "maritime interests." As to the plaintiff's negligence claim, the court agreed with the defendant that the claim alone would not support admiralty jurisdiction, but held that the court could consider the claim under its supplemental jurisdiction since the contract claim was sufficient to support admiralty jurisdiction.

Miller v. Rinker Boat Co., Inc., 815 N.E.2d 1219 (Ill. App. Ct. 2004). Illinois Court of Appeals reversed trial court's grant of summary judgment to pleasure boat manufacturer in products liability action brought by estate of boat owner killed when he slipped on the motorboat's transom, hit his head and drowned in the Mississippi River near Quincy, Illinois. The evidence at trial showed that the decedent slipped either on the boat's transom, which did not have a non-skid surface, or on the swim platform, which according to the plaintiff's experts had a defective or insufficient non-skid surface. The plaintiff's complaint alleged that the

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manufacturer was strictly liable under Illinois product liability law for manufacturing a defective or unreasonably dangerous product and for failure to provide adequate warnings regarding the dangers of standing or stepping on the boat's transom. The appellate court reversed the trial court's grant of summary judgment to the manufacturer in part on the grounds that the lower court had improperly failed to apply the "danger-utility" test whereby a manufacturer must prove that the benefits of a design outweigh the risk of danger inherent in the design in order to escape liability. The trial court held that the "danger-utility" test was not applicable to the plaintiff's claim under Illinois precedent because the danger of slipping on a wet boat deck is open and obvious and because the transom and swim platforms were "simple products." The appellate court held that it is the entire boat, not any component, which must be considered in determining whether a product is "simple" so as to exempt it from the danger-utility test. Moreover, the appellate court held that a genuine issue of material fact existed as to whether the danger posed by wet boat decks is "open and obvious" to an ordinary consumer and thus, summary judgment was improper.

Complaint of Lavender, 2004 U.S. Dist. LEXIS 25550 (S.D.FL. 2004). Owner of a 62 foot sailboat which caught fire while undergoing repairs on land in Dania Beach, Florida, filed a petition pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. § 181, et seq. in connection with damage to nearby vessels caused by the fire. The petitioner's boat was undergoing major repairs and the all seacocks had been removed. The claimants in the limitation case moved to dismiss for lack of subject matter jurisdiction. The District court held that admiralty jurisdiction was lacking because the boat had been withdrawn from navigation and, as a result, the "locality" prong of the test for admiralty tort jurisdiction could not be satisfied. The court distinguished the holding in *American Eastern Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979) wherein the court held that admiralty jurisdiction existed as to claims arising from a fire in a "dry-store" marina where small pleasure boats were stored in covered racks on land when not in use on the grounds that the boats in *American Eastern* had not been removed from navigation.

BOATING BRIEFS

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

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Cite as 14 Boating Briefs No. 1 (Mar. L. Ass'n) (Frank P. De Giulio Ed. 2005).

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