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

BOATING BRIEFS

Thomas A. Russell, Chairman **Frank P. DeGiulio, Editor**

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

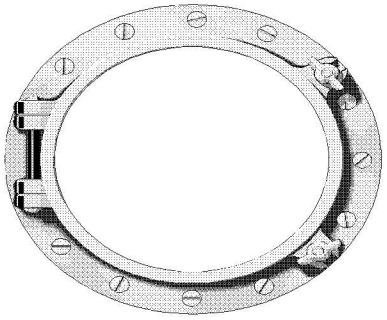
In This Issue

Dueling Presumptions: *Oregon* vs. *Pennsylvania* with a Twist

After dark on December 29, 2001, a twenty-five foot pleasure boat carrying twelve passengers and operated by William Brock allided with a stationary and unoccupied barge, the *Mobro 605*, in the Cedar River in Jacksonville, Florida. The boat was traveling at 22 knots at the time of impact. Brock admittedly had consumed alcohol earlier in the evening and toxicology tests take n three hours after the accident showed that he had a blood alcohol level of 0.112, well above the legal intoxication limit of 0.08 under Florida law. The barge was under bareboat charter to Superior Construction Company which was engaged in a project to widen the Blanding Boulevard Bridge. On the night of the incident, the barge was moored parallel to the bridge, blocking all but 38 feet of the 120-foot wide navigational channel. According to eye-witnesses, only three of ten navigational lights installed on the barge were operating. Passengers on Brock's boat, who had not consumed alcohol, testified that the barge was virtually "invisible" until immediately prior to the allision. Brock and the twelve passengers sustained serious injuries as a result of the accident.

Superior filed an action pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. §181, *et seq.* in the U.S. District Court for the Middle District of Florida. Following a bench trial, the district court found that the barge operator Superior was not entitled to limit its liability and furthermore, that Superior was solely at fault for the allision notwithstanding the evidence of Brock's intoxication. The district court awarded in excess of $19 million to the injured claimants. Superior appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.

In a rather remarkable decision, the Eleventh Circuit affirmed the district court's judgment and in so doing engaged in a lengthy discussion of the interplay between the legal presumptions created by the doctrines known as the *Pennsylvania* Rule and the *Oregon* Rule where both are applicable, and the application of the *Pennsylvania* Rule where there is evidence of intoxication by a vessel operator. *In re Superior Construction Co.*, __ F.3d __, 2006 U.S. App. LEXIS 9498 (11th Cir. April 14, 2006).



The *Oregon* and *Pennsylvania* Rules take their names from the court decisions in which they were originally created. Both rules create legal presumptions which impact the burden of proof obligations of the parties in a maritime collision case. The *Oregon* Rule creates a rebuttable presumption of fault against a moving vessel that strikes a stationary object or vessel which can be overcome only upon proof that the allision was the fault of the stationary object, that the moving vessel was operated with reasonable care or that the allision resulted from an inevitable accident. Under the *Pennsylvania* Rule, a finding by the court that a vessel or its operator violated a statute or regulation intended to prevent collisions creates a presumption of fault which can be overcome only by proof that the violation "could not have been" a cause of the accident.

On appeal Superior argued that the district court erred in finding that the barge constituted an unlawful obstruction to navigation in violation of 33 U.S.C. §409, thereby giving rise to a presumption of fault by Superior under the *Pennsylvania* Rule which according to the district court Superior could not overcome, and further that the district court erred in finding that Brock's intoxication "could not have been" a cause of the accident so as to permit Brock to overcome the presumption of fault imposed upon him by the *Pennsylvania* Rule and escape the imposition of comparative fault for the allision.

In its opinion the Eleventh Circuit first addressed the proper application of the two rules were both are applicable. The court held that where a moving vessel strikes a stationary object or vessel, the *Oregon* Rule applies in the first instance to impose a burden of proof of fault on the moving vessel. However, if the moving vessel establishes that the stationary object or vessel violated a statute or regulation, the initial presumption falls away and the burden of proof is shifted to the stationary vessel by the virtue of the *Pennsylvania* Rule to show that its violation could not have been a cause of the accident. Finally, the court recognized that if the stationary vessel then establishes that the moving vessel or its operator also violated a statute or regulation, both vessels must then prove that their statutory violations could not have been a cause of the incident in order to escape the imposition of fault – if neither can overcome the *Pennsylvania* Rule presumption then the court must apportion liability between them based on comparative fault.

The Eleventh Circuit held that the positioning of the barge by Superior was a violation of 33 U.S.C. 409 which provides that "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft..." and, therefore, that the district court correctly found that the burden of proof was shifted from Brock to Superior to prove that its statutory violation could not have been a cause of the collision under the *Pennsylvania* Rule and that Superior could not overcome the presumption of fault imposed against it.

The court of appeals then turned to Superior's argument that the district court erred in its finding that Brock had no comparative fault for the allision because he had overcome the *Pennsylvania* Rule presumption imposed against him by proof that his operation of the boat while intoxicated "could not have been" a cause of the allision. At trial the parties presented conflicting expert testimony regarding Brock's toxicology tests. Brock's expert gave an opinion that his injuries would have caused his blood alcohol level to increase after the accident, making the results of the test inconclusive as to his intoxication level at the time of the incident. Superior's expert testified that the results of the toxicology test taken

three hours after the incident meant that his blood alcohol level was even higher at the time of the incident.

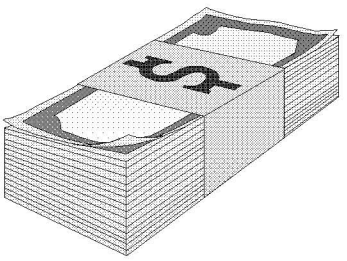
However, the court of appeals noted that the district court assumed for the purposes of its opinion that Brock's blood alcohol level exceeded the permissible levels under both Florida statutes and federal law at the time of the allision, thereby placing him in violation of a statute and subjecting him to the burden of the *Pennsylvania* Rule to prove that his legal intoxication could not have been a cause of the collsion. On appeal Superior argued that it was "impossible" as a matter of law for the district court to conclude that Brock had satisfied his *Pennsylvania* Rule burden and that a court must always apportion some fault to a vessel whose operator was legally intoxicated at the time of an incident.

The court of appeals rejected Superior's argument, holding that the *Pennsylvania* Rule creates a rebuttable, but not insurmoutable, burden of proof that may be overcome in an appropriate case, even in a case where a vessel operator is proven to have violated Boating Under the Influence statutes. The court held that the district court had "ample evidence" by which to conclude that Brock's intoxication "could not have been" a cause of the allision. Specifically the appellate court pointed to expert testimony that Brock's operation of the boat prior to the allision was proper in all respects and indicative of no impairment of his motor skills or mental facilities. More importantly, according to the court, was the testimony by Brock's passengers that the barge was virtually invisible until immediately prior to impact, indicating that the allision could not have been avoided by Brock even if he had been stone sober.

First Circuit's Final Warning to Buyers – Record Your Bill of Sale

The U.S. Court of Appeals for the First Circuit recently issued a decision which may represent the final installment in Dr. David Mullane's eight year litigation saga arising from his seemingly routine purchase of the yacht LADY B GONE in 1998. The message to buyers is clear – record your Bill of Sale immediately.

Dr. Mullane purchased the federally documented LADY B GONE from David and Angela Murphy pursuant to a bill of sale dated July 2, 1998. As part of the transaction Mullane paid $98,000 to satisfy an existing preferred ship's mortgage on the boat held by Eastern Bank and a separate unsecured loan of $40,000 owed by Murphy. Mullane did not immediately file the Bill of Sale from Murphy with the National Vessel Documentation Center. On August 28, 1998, the local sheriff's department seized the yacht to enforce two state court writs of execution held by the Murphys' judgment creditors. The creditors had previously obtained judgments totaling $97,000 against Murphy. Five days after the yacht was seized by the judgment creditors, Mullane recorded his Bill of Sale with the National Vessel Documentation Center. Mullane filed suit in the U.S. District Court for Massachusetts seeking possession of the yacht and a determination that the creditors' claims against the vessel were invalid. In the first trial, the district court held that the seizure of a federally documented yacht to execute on state law judgments held by the creditors of the former owners was invalid, even though the new owner had not recorded the Bill of Sale at the time of the seizure. According to the district court, Mullane was a bona fide purchaser for value without notice of claims and, therefore, took the vessel free and clear of all encumbrances. *Mullane v. Chambers*, 206 F.Supp.2d 105 (D.MA. 2002).



The judgment creditors appealed the district court's decision in the first trial to the U.S. Court of Appeals for the First Circuit. The First Circuit reversed and remanded. *Mullane v. Chambers,* 333 F.3d 322, 2003 AMC 1740 (1st Cir. 2003). On appeal, the judgment creditors argued that their seizure of the yacht was proper because Mullane's unrecorded bill of sale was invalid as to them under 46 U.S.C. § 31321 of the Federal Maritime Lien Act. 46 U.S.C. § 31321(a)(1) provides in relevant part as follows: "A bill of sale ... whenever made, that includes any part of a documented vessel ... must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, *against any person* except: (A) the grantor, mortgagor, or assignor; (B) the heir or devisee of the grantor, mortgagor, or assignor; and (C) *a person* having actual notice of the sale ....(emphasis added). Construing the language and intention of § 31321, the Court of Appeals for the First Circuit agreed that judgment creditors are included among the "persons" protected by the statute and that Mullane's unrecorded Bill of Sale could not preclude the judgment creditors' seizure unless Mullane could prove that the creditors had actual notice of the sale at the time of the seizure. Noting that the district court did not make any findings regarding the creditors' notice, the circuit court reversed and remanded the case for further proceedings on the issue.

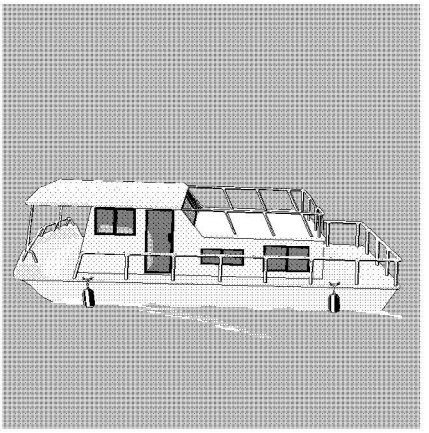
A second trial was conducted following remand to the district court. The district court concluded that the judgment creditors did not have actual or constructive notice of Mullane's purchase of the boat at the time of their seizure on August 28, 1998 and that the creditors' liens were therefore valid. *Mullane v. Chambers*, 349 F.Supp.2d 190 (D.MA. 2004). At the second trial Dr. Mullane argued that even if the judgment creditors' state law liens were valid, he was entitled to a superior maritime lien on the vessel under the "rule of advances" by virtue of his having satisfied the outstanding Eastern Bank mortgage at the time of the sale. The district court rejected Mullane's argument, holding that no maritime lien existing in favor of Mullane. Mullane appealed again.

In its most recent decision, *Mullane v. Chambers*, 438 F.3d 132 (1st Cir. 2006), the First Circuit considered whether the district court correctly held that Mullane's satisfaction and discharge of the Eastern Bank mortgage did not create a maritime lien in his favor. The district court's decision was affirmed. At the second trial in the district court Mullane had argued that his discharge of the Eastern Bank mortgage created a maritime lien in his favor under the common-law principle known as the "rule of advances." The rule of advances provides a lien to a person who satisfies an outstanding or future lien on a vessel – typically by paying for necessaries provided on behalf of a third party. The Court of Appeals held that maritime liens, including liens created under the rule of advances, are intended only to benefit "strangers" to the vessel and that a maritime lien can never arise in favor of a vessel owner or others who directly control a vessel's affairs.

Owners of Chartered Houseboat Can Maintain Limitation Action

The owners of a chartered houseboat, and two individuals with management and operational responsibilities for the vessel, were entitled to maintain a limitation action in connection with personal injury claims by passengers for exposure to carbon monoxide, the U.S. District Court for the Middle District of Tennessee has ruled. *In re Houseboat Starship II*, No. 2:05-0086, 2005 U.S. Dist. LEXIS 36237 (M.D. Tenn. Dec. 12, 2005).

The alleged carbon monoxide exposure occurred on the third day of a charter voyage on Dale Hollow Lake, when the houseboat was temporarily moored to an island. The affected passengers sued the titled owners, the two individuals who operated and chartered the vessel to them, and the companies that manufactured the vessel, its exhaust system, and related components. The owners and operators filed a petition for exoneration from or limitation of liability, which the boat's manufacturer sought to have dismissed for lack of admiralty jurisdiction and on the basis that the operators were not "owners" within the meaning of the Limitation Act (46 U.S.C. app. §§ 183, 185).



According to the court, the standard for admiralty tort jurisdiction was met inasmuch as the houseboat "was in use to facilitate travel on the Dale Hollow Lake, a navigable waterway," and "such usage falls within the maritime activity of riverboat travel that clearly impacts maritime commerce." This was so even though the houseboat happened to be moored to an island at the time of the alleged carbon monoxide leak. In this regard, the court distinguished the Ninth Circuit's decision in *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996), which found admiralty jurisdiction lacking in a case of carbon monoxide exposure aboard a houseboat made fast to the shore of Lake Havasu. In the Ninth Circuit case the passengers had yet to commence their trip, whereas in this case the incident occurred mid-voyage, a distinction the court deemed significant.

The court went on to state that under *Richardson v. Harmon*, 222 U.S. 96 (1911), the Limitation Act itself supplied an independent basis for federal subject matter jurisdiction, such that the limitation action could have been maintained even if the passengers' alleged exposure did not qualify as a maritime tort. Compare *Seven Resorts v. Cantlen*, 57 F.3d 771 (9th Cir. 1995); *David Wright Charter Service, Inc. v. Wright*, 925 F.2d 783 (4th Cir. 1991).

Finally, the court declined to dismiss the limitation action as to the two individuals who, though not owners of the vessel, did appear to have substantial control over its operation, including chartering the vessel to customers and providing maintenance services. This was sufficient, at least at the preliminary stage of the proceedings, to treat these individuals as "owners" entitled to seek limitation.

Yacht Manufacturer Wins Dismissal of Buyer's Contract and Warranty Claims

In *Gricco v. Carver Boat Corp.*, No. 04-1845, 2005 U.S. Dist. LEXIS 33108 (D. Md. Dec. 15, 2005), the U.S. District Court granted summary judgment to a yacht manufacturer on a buyer's claims for breach of contract, breach of implied warranty for a particular purpose, breach of express warranty, and violation of the Maryland Products Guaranty Act.

In 2001 plaintiffs Barbara and Joseph Gricco purchased a Carver yacht from a dealer in Maryland who had bought it wholesale from Carver. Carver provided the Griccos with a warranty guaranteeing repair of defective materials or workmanship for a limited period of time.

The yacht was allegedly beset with leaks, mildew and a listing problem, which Carver made several (allegedly unsuccessful) attempts to remedy. In the ensuing litigation, the Griccos attributed the ongoing problems to defects in design rather than defects in material or workmanship.

As to the breach of contract claim, the Griccos maintained that even though they had no direct sales contract with Carver, they were the intended beneficiaries of the contract between Carver and the dealer. The court rejected this contention, finding no evidence that Carver and the dealer "intended their contract to benefit anyone but themselves." Carver's knowledge that the yacht would ultimately be sold to a consumer was not sufficient to treat the Griccos as the intended beneficiaries of the original sales contract.

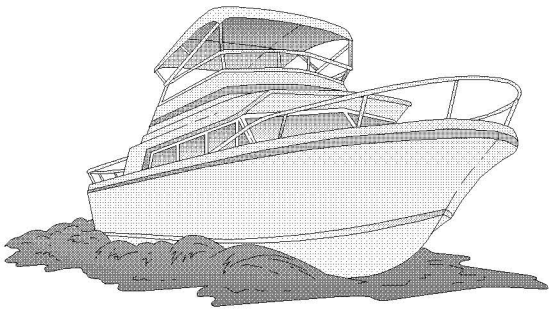
The Griccos also claimed that Carver breached an implied warranty of fitness for a particular purpose, i.e., that Carver had reason to know they were purchasing the vessel for the specific purpose of having and using a quality luxury watercraft. The court saw no basis for such a claim, inasmuch as there was no evidence that the Griccos' reasons for acquiring the vessel were different from those of the typical yacht buyer. A desire to engage in luxury yachting was not sufficiently unique to give rise to an implied warranty of fitness for a particular purpose. Moreover, the court noted, there was no indication that Carver was aware of a "particular purpose" for which the Griccos would use the yacht, given that the Griccos at the time of their purchase were communicating only with the dealer.

The Griccos' claim for breach of express warranty was based on the limited warranty given by Carver at the time of purchase and on certain statements found on Carver's website commending the quality and desirability of its products. The court found the limited warranty inapplicable because it guaranteed only that Carver would make certain repairs to the yacht, not that the yacht itself was properly designed. As to the statements on Carver's website, the court viewed these as general expressions of opinion or "mere puffery," which lacked particularity and "did not relate specifically to any of the yacht's characteristics about which the Griccos complain."

As to the claim under the Maryland Consumer Products Guaranty Act, which "serves as a gloss on warranties" and forces sellers "to live up to any guarantees they attach to their products" within a reasonable time," the court found no grounds for recovery. The Act allows an aggrieved buyer to seek an injunction ordering the seller to comply with the warranty, compensation for "reasonable incidental expenses" incurred as a result of the seller's failure to live up to its guarantee, and attorneys' fees and costs.

In the court's view, it was relatively clear that the Griccos were alleging a design defect rather than a failure by Carver to comply with the written warranty to repair defective materials or workmanship. Indeed, the Griccos maintained that it was not feasible to attempt further repairs given the alleged defect in the yacht's design. Finally, there was no indication that the Griccos had incurred compensable "incidental expenses" on account of Carver's allegedly ineffective attempts to remedy the problems with the vessel.

The court noted in closing that despite the award of summary judgment in Carver's favor on these four claims, the Griccos had asserted in their amended complaint three other causes of action against the dealer that remained to be addressed: unfair and deceptive trade practices, fraud in the inducement, and negligent misrepresentation.



Court Gives Full Effect to Waiver-of-Subrogation in Marina Slip Agreement but Limits Enforceability of Indemnity Clause

In two decisions issued concurrently, the U.S. District Court for the Southern District of Alabama deemed enforceable a waiver-of-subrogation provision in a marina berth lease/storage agreement, *In re Johnson*, 2006 U.S. Dist. LEXIS 2996 (S.D. Ala. Jan. 17, 2006), but found an indemnity clause unenforceable to the extent it reached damages caused by the marina's own negligence or other culpable fault. *In re Johnson*, 2006 U.S. Dist. LEXIS 2987 (S.D. Ala. Jan. 17, 2006).

A fire broke out on Arden Johnson's Sea Ray Sundancer while berthed at the Dog River Marina and Boat Works in Mobile, Alabama. Mr. Johnson's vessel was damaged, along with three other boats and the marina itself. Mr. Johnson brought a limitation action and asserted a claim against the marina for negligence and breach of bailment. Mr. Johnson's insurer, which had paid over $600,000 in connection with the incident, intervened to assert a subrogation claim against the marina.

Mr. Johnson's contract with the marina contained a waiver-of-subrogation clause as follows:

> [Vessel] Owner waives any right or claim against the Marina for damage sustained by Owner which is covered under any insurance policy, and Owner shall cause Owner's insurance carriers to waive their respective rights of subrogation with respect to the same, and to so notify the Marina.

The marina argued that the provision prevented Mr. Johnson from recovering losses already paid by his insurer, and barred his insurer's subrogation claim entirely. The court agreed.

In the court's view, the provision was unambiguous as a matter of law and thus Mr. Johnson's and his insurer's reliance on post-contractual conduct to "concoct ambiguity" was unavailing. Although the marina had permitted Mr. Johnson to berth his vessel without verifying that he had obtained his insurer's assent to waive subrogation, this did not reflect an intent to exclude the provision from the berthing agreement or relieve Mr. Johnson from its operation.

The court noted that under *Fluor Western, Inc. V. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1970), waiver-of-subrogation clauses were not contrary to public policy. Similarly, Mr. Johnson and his insurer failed to show the clause was unconscionable. Even if the contract were entered on a take-it-or-leave-it basis, this was not sufficient to render the provision unenforceable. There also appeared to be other marinas in the vicinity that Mr. Johnson could have approached before deciding to berth his vessel at the Dog River Marina. In any event, the court found the waiver-of-subrogation provision to be substantively reasonable, such that it should not be overcome by unequal bargaining positions or an alleged lack of alternative berthing facilities in the Mobile area.

Mr. Johnson also argued that the indemnity clause in the marina contract was ineffective, or alternatively, violated the public policy disfavoring exculpatory agreements. The clause stated as follows:

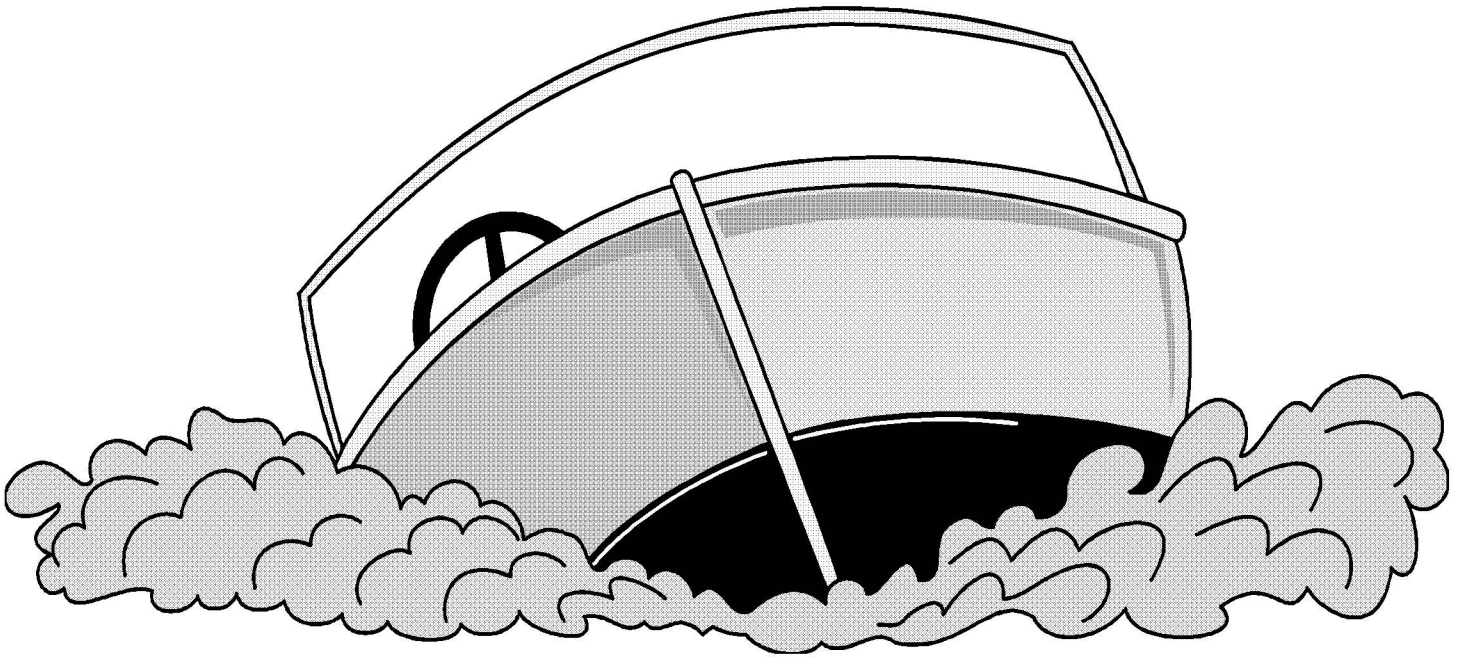
> Owner shall, to the extent owner may do so without violating the terms and conditions of Owner's liability insurance policy, indemnify, and hold Marina harmless against all damage caused by Owner or Vessel to Marina's property, docks, pilings and bulkhead and against all claims, including cost of litigation and reasonable attorney's fees by third parties arising from owner's use of the above-described slip/space. Owner shall

> maintain a liability insurance policy for property damage and/or personal injury arising from the use of Vessel with minimum limits of $ 300,000.00.

Mr. Johnson's insurance policy expressly excluded coverage for "liability assumed by [the policyholder] under any contract or agreement." He therefore argued that there could be no indemnity owed under the slip agreement because assuming such an obligation would "violat[e] the terms and conditions of [his] policy." The court found that the plain meaning of the term "violate" is to "breach, break, or disregard," and that Mr. Johnson did not breach his insurance contract by agreeing to indemnify the marina; rather, he would simply forego coverage for that particular item while the remainder of the policy remained in full effect.

The court did find the clause ambiguous, however, in its use of the phrase "Owner shall... indemnify... Marina... against all damage caused by Owner or Vessel." This language could have meant that Mr. Johnson had to indemnify the marina for (1) damage resulting from the concurrent fault of the marina and Mr. Johnson or his vessel, or (2) damage caused exclusively by Mr. Johnson or his vessel. Because both were reasonable interpretations, the court adopted the former construction, as urged by Mr. Johnson who had not drafted the agreement.

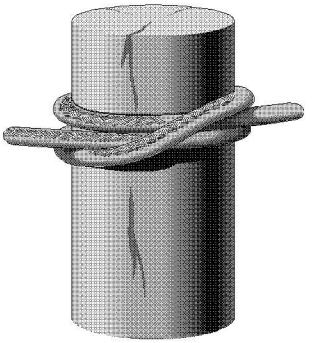
Viewed in this light, the clause was exculpatory in that it would have required Mr. Johnson to indemnify the marina for its own negligence. Because the contract did not clearly and unequivocally reflect that the parties' intended such a result (i.e., that the marina would be indemnified even if wholly at fault), the court held that it was unenforceable to that extent. The marina would, however, still be entitled to indemnification in the event Mr. Johnson or his vessel were found to be the sole cause of the marina's losses.



Sailboat Racing - Applicable Standards

***Krelick v. Alter*,**
New York State Supreme Court, Monroe County, Docket No. 05-00231 (Jan. 18, 2006).

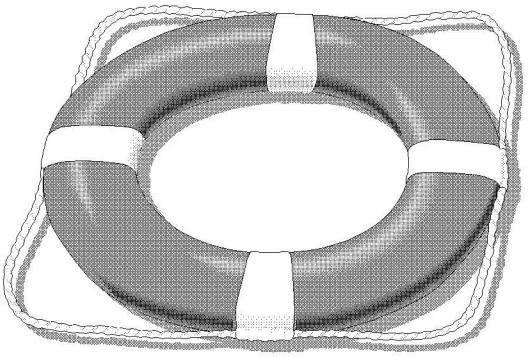
This unreported decision involved a claim for personal injuries arising out of a collision during a sailing race. The plaintiff moved for summary judgment, arguing that the decision of the race protest committee, which found the defendant at fault for the collision under the U.S. Sailing Rules, acted as collateral estoppel and further, that the defendant's admitted violation of Rule 12 of the Inland Rules of the Road entitled the plaintiff to judgment as a matter of law on the issue of liability. The court denied the plaintiff's motion, finding in the first instance that the decision of the protest committee could not provide a basis for collateral estoppel since the "hearing" lacked the necessary attributes of a "full and fair" adjudication. The court also found that although the defendant admitted that he failed to yield to the plaintiff's boat in violation of Inland Rule 12, there was triable issue of fact for the jury on the issue of the plaintiff's comparative fault based on the plaintiff's alleged violations of various racing and Inland Rules requiring a privileged vessel to take evasive action to avoid a collision. (The Editors thank Committee Member James E. Mercante for bringing this decision to their attention).



Marina Fires

***In re Rhoten*,**
397 F.Supp.2d 151 (D.MA. 2005).

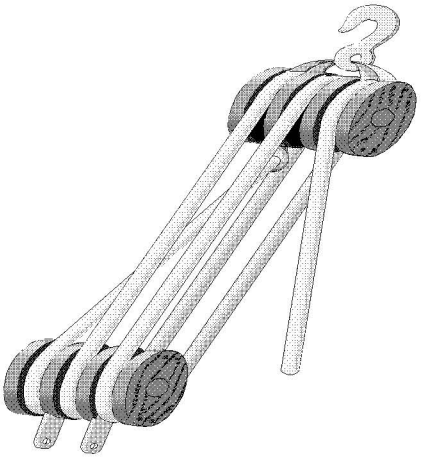
(Read the instructions!) This decision from the U.S. District Court for the District of Massachusetts involves a Limitation of Liability action arising out of a marina fire. The fire allegedly resulted from overheating of a 30 amp shore power cord on the limitation plaintiffs' pleasure boat. The court accepted expert testimony that the cause of the fire was the direct result of the plaintiffs' failure to properly install "locking rings" to secure the power cord to the power inlet, resulting in overheating, and their failure to detect symptoms of overheating such as discoloration of the power cord and to take preventative action. The decision is significant in that the court determined that the plaintiffs' negligence was the direct result of their admitted failure to read and apply the directions in the power cord "owner's manual" which, if followed, would have prevented the fire. Limitation was denied. The decision is recommended reading for anyone involved in pleasure boat fire cases. (The Editors thank Committee Member David J. Farrell for bringing this decision to their attention)



Spoilation of Evidence

***Golden Yachts, Inc. v. Hall*,**
920 So.2d 777 (FL. Ct. App. 2006).

William Hall sustained permanent injuries when a cradle supporting a boat that he was examining for possible purchase collapsed in the dealer's boat yard. The remains of the collapsed cradle, which consisted of manufactured metal stantions assembled with hardware and wood provided by the boat yard, were photographed extensively shortly after the incident by the boat yard and by an investigator hired by the cradle manufacturer. However, when the plaintiff's attorney demanded an opportunity to inspect the damaged cradle a year after suit was filed, the yard was unable to produce the cradle. The plaintiffs moved for sanctions and the imposition of a negative inference against the boat yard. The trial judge denied the motion for sanctions but granted the request for a negative inference against the yard. In response the yard moved to exclude at trial any evidence relating to its alleged conduct surrounding the loss of the cradle. The trial judge allowed the evidence to be presented at trial. The jury returned a verdict against the boat yard. The boat yard appealed, arguing that it was error for the trial court to have allowed the plaintiff to present evidence regarding the loss of the cradle at trial and to also permit a negative inference instruction to be submitted to the jury. The court of appeals affirmed the trial court judgment, holding that remedies for spoliation are within the discretion of the trial judge and that cumulative or multiple remedies may be imposed in an appropriate case.



Yacht Sales

***Tyson v. Louis Marine Ltd.*,**
2005 Conn. Super. LEXIS 2813 (Ct. Sup. Ct. 2005).

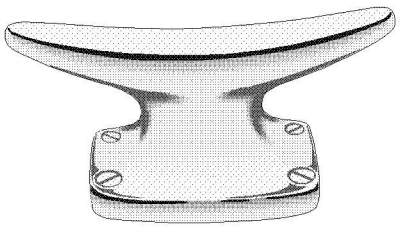
Philip Tyson, a Chief Executive Officer of a substantial company, signed a sales contract to purchase a 57 foot Rival Navigator motor yacht from the defendant dealer. The agreed purchase price was $798,000. Tyson gave the dealer a deposit of $100,000 when he signed the contract. Although the dealer's representative was aware that Tyson would need financing to complete the purchase, the contract did not contain any contingency making the sale subject to Tyson obtaining a loan. Tyson could not obtain financing and demanded return of his deposit. Typical of most boat sale contracts, the contract contained a liquidated damages clause allowing the seller to retain the buyer's deposit if the purchase was not consummated. The dealer refused to return the deposit. Tyson filed suit and the case was tried to the court without a jury. Tyson alleged that the liquidated damages provision of the contract was unenforceable, that the defendant dealer was liable for fraudulent misrepresentation for verbally informing Tyson that the sale was subject to financing but failing to include language in the contract and that the dealer violated the Connecticut Unfair Trade Practices Act. The court rejected the plaintiff's fraudulent misrepresentation claim because the written contract contained no financing contingency. The court also rejected Tyson's claim under the Unfair Trade Practices Act, finding that although the dealer engaged in "sharp practices," an individual like Tyson, who is a CEO of a company, should have read the contract and realized that it did not contain a financing contingency clause. Applying Connecticut law, the trial judge held that the liquidated damages clause of the contract was unenforceable because the amount of the deposit was "grossly disproportionate" to the actual damages suffered by the dealer. The court held that the dealer sustained actual damages of only $4,000, the amount of financing charges that the dealer paid while the sale was pending, and that Tyson was obligated to pay that amount in damages to the dealer. Tyson was entitled to the return of the $96,000 balance of the deposit. Notwithstanding the decision that Tyson was obligated to pay limited damages to the dealer, the court held that Tyson was entitled to recover his attorneys fees of $22,084 from the dealer based on a provision of the sales contract allowing recovery of attorneys fees by the "prevailing party." The court entered a judgment in favor of Tyson in the amount of $138,884.

***Nuckolls v. Atlanta Marine, Inc.*,**
275 Ga. App. 635 (2005).

Philip Nuckolls purchased a used Warlock power boat through the defendant yacht broker for $70,000. The former owner executed and delivered to Nuckolls a bill of sale which included a standard warranty conveying title free of liens and encumbrances. After the sale Nuckolls discovered that the boat was subject to a $52,00 mortgage by the former owner's bank. The bank repossessed the boat after the former owner defaulted on the loan. Nuckolls paid the bank an additional $44,000 to satisfy the bank's mortgage and sued the broker and the former owner. The trial court granted the broker's motion for summary judgment, finding that it could not be held liable to the buyer as the seller's agent. Nuckolls appealed. The appellate court held that under Georgia law, in the absence of evidence that the broker had actual knowledge of the mortgage lien, it could not be held vicariously liable as the agent of the seller for the seller's fraud.

***Roberts v. Legendary Marine Sales*,**
65 Mass. App. Ct. 198 (MA. Ct. App. 2005).

William Roberts, a Massachusetts resident, purchased a "new" Fountain Lightning power boat from the defendant dealer, a Florida company, for $130,000. Roberts's interest in the boat resulted from an internet advertisement by the Florida dealer. Roberts never traveled to Florida to inspect the boat and the entire transaction was conducted by telephone and written correspondence. The dealer had never before sold a boat to a Massachusetts' resident. After the purchase the boat was delivered to Roberts in Massachusetts and he discovered various defects. Roberts brought suit against the Florida dealer in Massachusetts state court alleging breach of warranty, misrepresentation and a violation of the Massachusetts Unfair Trade Practices Act. The dealer filed a motion to dismiss for lack of personal jurisdiction. The trial court granted the dealer's motion and Roberts appealed. The appellate court reversed the trial court's dismissal of the suit, holding that the dealer's alleged misrepresentations regarding the boat were communicated to Roberts in Massachusetts and that these contacts were sufficient to subject the dealer to the jurisdiction of the Massachusetts courts.



Negligent Entrustment

***Kelly v. Di Cerbo*,**
2006 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 2006).

Colleen Kelly was seriously injured when the boat on which she was a passenger was struck by another power boat operated by Christopher DiCerbo, a minor. The boat operated by Christopher was owned by an unrelated party, Jerome Morgan. Kelly sued the boat's operator Christopher, as well as his parents and the boat's owner under a negligent entrustment theory. The parents and the owner moved for summary judgment on the negligent entrustment claim. The trial court denied the summary judgment motion, finding that there were triable issues of fact with regard to whether the owner and the parents were negligent in allowing the minor to operate the boat. An appeal followed. The appellate court affirmed the trial court's decision with respect to the claim against the parents, but reversed the decision with respect to the boat owner. Although Christopher testified that he needed his parents' permission to operate the boat and the plaintiff Kelly had not produced evidence to prove that the parents were actually aware that the boat was being operated by their son on the date in question, the appellate court held that a triable issue of fact was created by other evidence including the affidavits of neighbors stating that Christopher often operated the boat in a reckless manner and that the parents' automobile was present at the time of the incident. As to the claim against the owner of the boat, the appellate court held that the owner was entitled to summary judgment because no evidence was offered by the plaintiff to prove that he was present on the date in question or had knowledge of any prior reckless operation of the boat by the minor.

Jurisdiction and Procedure

Wilson v. Suzuki of Orange Park, Inc.,
2005 U.S. Dist. LEXIS 34207 (M.D.FL. 2005).

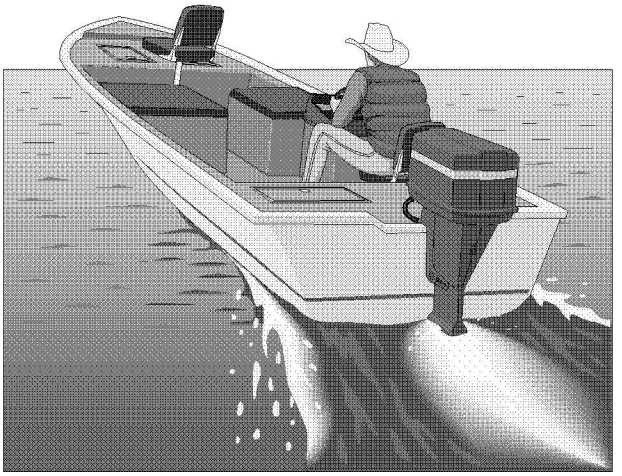
Robert Wilson sustained injuries while operating a jet ski shortly after the defendant had performed repairs and maintenance on the steering gear. Wilson sued Suzuki in state court to recover damages and demanded a jury trial. Suzuki removed the case to the federal district court on the basis of Admiralty subject matter jurisdiction. Wilson moved to remand the case to state court. The original remand petition did not contend that removal based on Admiralty jurisdiction alone is improper and a violation of his rights under the Savings to Suitors Clause, 28 U.S.C. §1333 – Wilson raised that argument only in a subsequent pleading filed more than 30 days after the removal. The district court denied Wilson's motion to remand, holding that his claims did fall within the court's Admiralty jurisdiction and that Wilson had waived the objection to removal based on the Savings to Suitors Clause by failing to raise the argument within 30 days of removal.

Clements v. Preston,
2005 U.S. Dist. LEXIS 34414 (S.D.AL. 2005).

David Clements and Dean Preston signed a sales contract whereby Clements agreed to sell Preston a 1987 Tiara power boat for $99,000. Preston gave Clements a deposit of $9,600 when the contract was signed. The contract required Preston to close the transaction on March 17, 2005 but he was unable to close on the designated date due to financing problems. When Preston could not close, Clements decided to cancel the sale. The seller Clements filed a suit against Preston in the U.S. District Court for the Southern District of Alabama seeking a declaratory judgment that he was entitled to cancel the sale and to retain both the boat and the buyer's deposit as liquidated damages. Clements alleged both diversity of citizenship and Admiralty jurisdiction as the basis of subject matter jurisdiction. Clements and Preston each filed motions for summary judgment against the other. The district court, sua sponte, dismissed the suit for lack of subject matter jurisdiction, holding that a contract for sale of a vessel does not fall within Admiralty jurisdiction and that diversity jurisdiction was lacking because the amount in controversy between the parties did not exceed the jurisdictional threshold of $75,000. Specifically the court held that because Clements sought only declaratory relief in his Complaint, the amount at issue could not be measured by the agreed sales price of $99,000. According to the court, the only monetary amount at issue was the deposit of $9,600 – the remainder of relief sought by Clements was simply the "physic value" of knowing that he properly cancelled the sale.

Aquae International, Inc. v. M/Y OSIANA II,
2005 U.S. Dist. LEXIS 25144 (D.MA. 2005).

The plaintiff initiated the action by arrest of the defendant pleasure yacht to assert a lien for unpaid repair charges. A counterclaim was filed against the plaintiff in the name of the defendant vessel only, alleging that the repairs were not authorized. The district court thereafter permitted one Curt Feuer to intervene as the "next friend" of the vessel for the purpose of prosecuting the counterclaim, believing that Feuer was the boat's owner. It subsequently came to light that the boat was owned by a Cayman Island's corporation in which Feuer was the sole shareholder. The plaintiff then moved to dismiss the counterclaim on the grounds that Feuer was not a real party in interest and that a claim cannot be prosecuted solely in the name of a vessel. The district court granted the plaintiff's motion to dismiss, holding that the theory of personification of a vessel for purposes of in rem jurisdiction does not extend "to authorize a vessel to prosecute an action...in its own name."



Government Liability

Fortner v. Tennessee Valley Authority,
2005 U.S. Dist. LEXIS 28036 (E.D.TN. 2005).

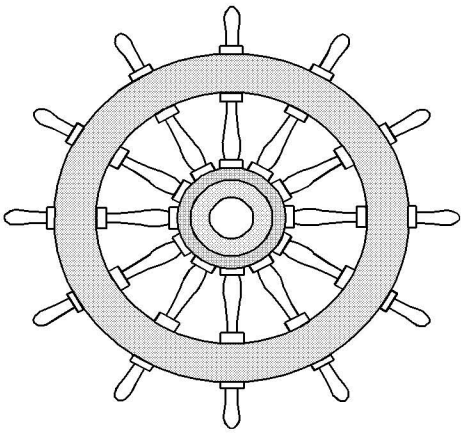
The plaintiff Fortner sustained injuries when his small fishing boat was swamped downstream of the Fort Loudoun Dam on the Tennessee River. His boat capsized when the dam operator released water through the spillway, creating subsurface currents and turbulence below the dam. The TVA had erected billboard-size signs below the dam reading "Warning Dangerous Waters." Fortner sued the United States by the Tennessee Valley Authority, alleging that the TVA negligently failed to adequately warn him of the danger that existed to boaters during spillway operation. The TVA moved for summary judgment, arguing that it was immune from liability to the plaintiff because its decisions regarding the number, nature and content of the posted warning signs were subject to the discretionary function exception to the waiver of sovereign immunity contained in the Flood Control Act, 33 U.S.C. §702. The district court granted the government's motion and dismissed the case

McMellon v. United States,
395 F.Supp.2d 422 (S.D.W.VA. 2005).

The McMellon case arose from injuries sustained by jet ski operators on the Ohio River in West Virginia in August, 1999. The operators of the jet skis mistook the Robert C. Byrd Lock and Dam for a bridge. When they finally realized they were not encountering a bridge, it was too late. The vessels and their operators plunged over the gates of the dam into the water below, a vertical distance of about 25 feet. Although there were several warning signs posted above the dam, the jet skiers did not see them. Local boaters testified that the warning signs were either obscured by vegetation or difficult to read. In a prior issue we reported on the decision of the U.S. Court of Appeals for the Fourth Circuit in the McMellon case, in which the circuit court overruled its own prior decisions and held that maritime claims against the U.S. Government under the Suits in Admiralty Act ("SAA") are subject to an implied discretionary function exception. 13 Boating Briefs No. 2 (Mar. L. Ass'n. 2004). Following the appeal the circuit court remanded the case to the district court in West Virginia for further proceedings. On remand the government moved for summary judgment, arguing that its actions or omissions relating to the posting of warnings were shielded from liability by the discretionary function exception to the waiver of sovereign immunity. The district court denied the government's motion, finding that the federal statutes mandated the posting of "conspicuous" warning signs above the dam and, therefore, decisions by the Army Corp of Engineers relating to how and where the signs should be posted were not discretionary decisions within the ambit of the exception to sovereign immunity.

Northern Insurance Co. v. Chatham County,
No. 04-1618, 2006 U.S. LEXIS 3449 (U.S. Ct. April 25, 2006).

In a unanimous opinion by Justice Thomas, the Supreme Court has held that a local governmental entity not qualifying as an "arm of the state" cannot assert sovereign immunity as a defense to an admiralty suit. The case arose from a 2002 allision on the Wilmington River in Georgia, between a pleasure boat and a drawbridge owned and operated by Chatham County. The bridge tender opened the bridge to allow the vessel to pass but a malfunction caused one of the spans to descend and strike the vessel. The vessel's insurers brought suit in admiralty against the County, which prevailed in the trial court and in the Eleventh Circuit on the basis of sovereign immunity. According to the Eleventh Circuit, even though the County did not qualify as an "arm of the State" entitled to immunity under the Eleventh Amendment, the concept of "residual sovereign immunity" still protected it from suit. The Supreme Court reversed, holding that the County could not invoke Eleventh Amendment immunity given its apparent concession that it was not an "arm of the State." With respect to concept of "residual sovereign immunity," which the County said ought to apply in instances where the local government exercises a "core state function" like operating a drawbridge over navigable waters, the Court saw no reason to treat an admiralty suit differently than any other case. Under Workman v. New York City, 179 U.S. 552 (1900), the general rule was that local governmental entities were subject to suit in federal court, whether at law or in admiralty.



Insurance Coverage

Commercial Union Ins. Co. v. Lord, 392 F. Supp.2d 402 (D.CT.2005). The WANDERLUST a pleasure boat owned by Franklin Lord, sank off the coast of St. Thomas on April 29, 2003, as a result of an engine room explosion. Lord made a claim of $450,000 against Commercial Union under s a marine insurance policy originally issued in 2001. The insurer denied coverage and filed an action seeking a declaratory judgment that the policy was void ab in initio based on alleged misrepresentations by Lord in the original insurance application. In the insurance application Lord stated that he purchased the vessel "new" from a Canadian builder in 2000 for $450,000. In fact Lord purchased the partially completed hull in 1996 from a third party in Virginia for $48,000 and completed construction in Rhode Island, allegedly for a total cost of $450,000, in 2000. The court found that the misrepresentations by Lord were material to the insurer's acceptance of the risk and violated the insured's obligation of utmost good faith to the insurer. The court granted the insurer's motion for summary judgment, finding that the policy in question was void.

Connecticut Indemnity Co. v. Perrotti, 390 F.Supp.2d 158 (D.CT. 2005). The plaintiff insurer commenced a declaratory judgment action seeking a determination that the marine policy on Perrotti's 121 foot yacht was void due to alleged misrepresentations in the policy application regarding the identity of the registered owner, the vessel's home port and the intended navigational limits. The insurer had previously issued a rescission notice and had refused to provide Perrotti with a defense to a suit for personal injuries by a crew member. The district court held that the policy was enforceable and that the insurer breached the contract by failing to provide a defense to the personal injury action. In reaching its decision the district court held that the policy language prevented the insurer from relying on the doctrine of *uberrimae fidei* or utmost good faith by which an insurer may ordinarily avoid coverage based on material misrepresentations or omissions of the insured, regardless of whether the misrepresentations or omissions were intentional or not. The relevant policy included the following clause: "All coverage provided by us will be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, whether before or after a loss." The court concluded that any misrepresentations by the insured were not intentional and, therefore could not provide a basis for the insurer to avoid coverage

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Editor
Committee Vice-Chairman

Frank P. DeGiulio
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

Rebecca Rinehart
Stephanie F. Lewis

Contributors to This Issue

Daniel H. Wooster, Esq.

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