BOATING BRIEFS

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"That certain unnamed gray, two-story vessel" was not a vessel after all

Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013)

In a 7-2 decision issued in January, the U.S. Supreme Court ruled that a "floating home" is not a vessel as defined by federal law and is therefore not subject to a maritime lien for necessaries.

The floating home—a wood-frame structure constructed atop a rectangular platform—had no means of self-propulsion. Yet it had been towed through navigable waters on several occasions, eventually docking at a marina owned by the City of Riviera Beach, Florida.

The craft's owner, Fane Lozman, became embroiled in numerous disputes with the City, and ultimately the City directed Lozman to take the craft elsewhere. Lozman refused to move it.

Claiming a maritime lien for unpaid dockage and for trespass, the City filed an admiralty arrest action captioned *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*. After the craft was arrested, Lozman argued that the federal court lacked admiralty jurisdiction because the craft was not a vessel. The district court and the Court of Appeals for the Eleventh Circuit sided with the City, ruling that the craft was indeed a vessel for purposes of maritime law since it was capable of movement over water. (See Boating Briefs Vol. 20:2.) Seven of nine Supreme Court justices disagreed.

The relevant statute defines a vessel as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Writing for the majority, Justice Breyer concluded that the floating home did not have the practical capacity to be used for waterborne transportation. Although the craft had been taken under tow several times, the Court decided that it was not a vessel because "a reasonable observer, looking to the [craft]'s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water." The craft's lack of self-propulsion, its rectangular bottom, its inability to generate or store electricity, and its construction details (non-watertight doors and windows, for instance) all suggested that the craft was not designed to

This newsletter summarizes the latest cases and other legal developments affecting the recreational-boating industry. Articles, case summaries, suggestions for topics, and requests to be added to the mailing list are welcome and should be addressed to the editor.

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transport anything other than its furnishings and the owner's personal effects.

Justice Sotomayor (joined by Justice Kennedy) dissented. She characterized the Court's new "reasonable observer" standard as too subjective: "If windows, doors, and other esthetic attributes are what take Lozman's craft out of vessel status, then the majority's test is completely malleable. If it is the craft's lack of self-propulsion, then the majority's test is unfaithful to our longstanding precedents. If it is something else, then that something is not apparent from the majority's opinion." Since the craft's capabilities and its performance while under tow were not developed in the record, Justice Sotomayor would have remanded the case for further factfinding. ■

Finance

Yacht mortgage did not entitle borrower to notice of time and place of repossession sale

Barclays Bank PLC v. Poynter, 2013 WL 951229 (1st Cir. March 13, 2013)

With a loan from Barclays Bank, Dr. Thomas Poynter bought a yacht and granted the Bank a preferred mortgage. When he stopped making mortgage payments, the Bank repossessed the yacht and sent Poynter a "Notice of Plan to Sell," which cited the self-help provisions of Florida's Uniform Commercial Code. The notice did not include a date, time, or place of sale but did indicate the amount Poynter owed and did state that any deficiency would be Poynter's responsibility.

The Bank then sold the yacht in Florida for less than what Poynter owed. The Bank informed Poynter of the results of the sale and demanded that he pay the residual balance. Poynter did not do so, and the Bank sued him in federal district court to recover the deficiency.

Poynter moved for summary judgment, arguing that the Bank was not entitled to the deficiency because it had not provided him with proper notice of the sale. The district court was unconvinced; it denied Poynter's motion and instead granted summary judgment for the Bank. (See Boating Briefs Vol. 20:2.) Poynter appealed, and the First Circuit affirmed.

Poynter relied on a mortgage provision which stated that in the event of a default the Bank could repossess the yacht and then sell it "after first giving Owner notice thereof 10 days in advance of the time and place of sale." Poynter read this to mean that he was entitled to 10 days' notice of the time and place of any sale, including a sale conducted under the Florida UCC.

The Bank relied on a different mortgage provision which stated that in the event of a default the Bank could exercise any "rights, privileges and remedies granted by applicable law"—the applicable law here being Florida's UCC.

The First Circuit faced the question of whether the mortgage imposed an absolute notice requirement for every repossession sale, as Poynter argued, or instead whether the Bank could dispense with the mortgage's notice provision and simply proceed in accordance with the UCC.

Applying Massachusetts contract law, the First Circuit found no ambiguity in the mortgage. The mortgage stated that upon default the Bank "may, at its option, do any one or more of the following:" This statement was followed by the two clauses in dispute. The court decided that each clause contained an independent, complete thought (each punctuated with a period). This meant that the Bank had several distinct options and could elect to employ a single one of those options or a combination thereof. The Bank therefore had the option of conducting a sale under the Florida UCC and could dispense with the more detailed form of notice. The trial court's judgment was affirmed. ■

Sixth Circuit approves interlocutory sale in forfeiture case

United States v. Real Prop. & Residence, 699 F.3d 956 (6th Cir 2012)

A husband and wife procured a loan from Bank of America to help purchase a yacht and in turn gave the Bank a mortgage on the yacht. The United States filed a civil forfeiture in rem complaint against several properties, owned and controlled by the borrowers, alleging that they were acquired in part with the proceeds of fraud and money laundering. The yacht was later added to the complaint. Given the pending criminal investigation, the district court stayed the forfeiture proceedings. The wife was eventually acquitted of all criminal charges, but the husband was convicted of fraud and money laundering.

Payments on the yacht mortgage had not been made for years, and the Bank was owed a substantial amount. The Bank and the Government jointly moved to have the yacht sold at an interlocutory sale. The wife sought to have the yacht released to her. The district court ordered an interlocutory sale and denied release of the yacht. The wife appealed.

Supplemental Rule G(7)(b)(i) allows interlocutory sales during forfeiture actions in rem if "the property is subject to a mortgage or to taxes on which the owner is in default." No one disputed that the yacht was subject to a mortgage and that the mortgage had been in default for almost three years. However, because this was a civil forfeiture proceeding that had been stayed while criminal proceedings continued, the wife argued that an interlocutory sale was appropriate only if it satisfied Rule G(7)(b)(i) and also, in light of 18 U.S.C. § 981(g)(6), was necessary "to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property." The Sixth Circuit agreed in principle, but concluded that § 981(g)(6) did not prohibit a sale on these facts. First, the parties agreed that the yacht was "subject to a mortgage on which the owner is in default," and so Rule (G)(7) was satisfied. Second, the value of the yacht was not at risk from an interlocutory sale because the district court's sale order required that the yacht be sold in a commercially reasonable manner. And, because the yacht was subject to a mortgage in default, the wife had no right of possession. At best, she would have a right to any proceeds remaining after the note was paid, and such a right had no bearing on whether the yacht could be sold. ■

Insurance

Sixth Circuit: Jury must decide whether fatality arose out of insured's permissive use of another vessel

New Hampshire Insurance Co. v. Carleton, 2012 WL 4902843 (6th Cir. Oct. 16, 2012) (unpublished)

After a sailing regatta in Michigan, the insured (Carleton) docked his 24-foot sailboat at a local yacht club. But the sailboat was not tied off directly to the dock. Instead, a smaller rigid-inflatable dinghy, owned by a third person, was tied off directly to the dock. Carleton's sailboat was tied to the offshore side of the dinghy. Thus, in order for Carleton to board his boat from the dock, it was necessary to climb from the dock down into the dinghy and then climb aboard the sailboat. All parties agreed that the vessels were permitted to be moored in this fashion, and that it was customary to allow a boat owner to walk across another vessel to board his own boat when the vessels were rafted in this fashion.

That night, Carleton met a young woman at a post-regatta party, and the two began walking back to his sailboat. As was customary, the couple needed to climb from the dock down to the din-

ghy and walk over the dinghy in order to reach the sailboat. Upon climbing into the dinghy, however, Carleton and the woman stopped and had sex. In fact, they never boarded Carleton's sailboat. After a passerby appeared on the scene, Carleton and the woman parted ways—the testimony suggested that she asked Carleton to leave and give her time alone. The evening ended with Carleton leaving the dock and the woman opting to stay in the dinghy by herself. The next day she was reported missing. Her body was later recovered in the harbor. The cause of death was listed as drowning. Her blood-alcohol level was quite high.

The woman's estate sued Carleton for negligence. The insurance policy issued by Carleton's marine liability insurer contained the following provision:

> COVERAGE FOR VESSELS YOU DO NOT OWN: We shall pay bodily injury and property damage arising out of your permissive use of a private pleasure vessel which you do not own or rent . . . .

The insurer denied coverage and filed a declaratory judgment action, reasoning that while the insured and his companion may have had implicit permission to walk across the dinghy, they did not have permission to use the dinghy for intimate relations. As reported in Boating Briefs Vol. 20:1, the district court agreed with the insurer, holding that Carleton's implicit permission to walk across the dinghy did not give him the right to "use the dinghy in any way he wished."

On appeal, the Sixth Circuit looked at the substantive law of both Michigan (where the casualty occurred) and Virginia (where the insured lived), and found that both supported the same conclusion: the scope of the implicit permission was a question of fact that needed to be answered by a jury. The court noted that the couple's activities aboard the dinghy were a "red herring" since the decedent's accident did not occur during those activities but rather at some later time, presumably as she was attempting to leave the dinghy to return to the dock (an act that she had permission to do regardless of the intervening activities). The scope of the permitted use, whether it was exceeded, and whether acts outside the scope of the permitted use caused the accident, were all issues for the jury. The Sixth Circuit therefore reversed and remanded for further proceedings. ■

Torts

Cruise line may be liable for allowing inattentive guest to operate jet ski

In re Royal Caribbean Cruises Ltd., 2013 WL 425837 (S.D. Fla. Feb. 4, 2013)

While on a Royal Caribbean Cruises jet-ski tour, Linda Arnold was injured when Inghram, the operator of another jet ski, collided with the jet ski on which Arnold was a passenger. The cruise line filed an action for limitation of liability, and Arnold filed a claim seeking damages for her injuries.

The jet-ski tour was supposed to be led by a tour guide on a jet ski, with the tourists' jet skis following in single file spaced at 100-yard intervals. A second tour guide would decide when each jet ski was allowed to proceed, and he would then follow at the end of the line. Arnold was on jet ski number six, and Inghram was on either eight or nine. The collision occurred less than one hundred yards from the starting point, and Arnold alleged that the second tour guide was negligent in permitting jet ski seven and Inghram's jet ski to start without sufficient space between them. Arnold also argued that Inghram was not competent to operate the vessel and that the cruise line was negligent in allowing her to do so.

In moving for summary judgment, the cruise line argued that (1) an executed liability waiver barred the injury suit; (2) there was no evidence of

negligence on the tour guides' part; and (3) any liability should be limited as the cruise line had no privity or knowledge of any negligence. Arnold countered that (1) the waiver was void; (2) the tour guide was negligent in controlling the spacing at which the jet skis began the tour; and (3) permitting an incompetent person to operate a jet ski constituted negligent entrustment.

In support of her claim, Arnold presented evidence that, during the pre-ride orientation, Inghram was acting silly and unfocused, needed to be told her jet-ski number three times, was told by the tour guide that she wasn't paying attention, kept forgetting whether she would be the operator or passenger, and held up the group for ten minutes. Arnold argued that the guides were negligent in permitting an apparently incompetent operator to take control of the jet ski.

The district court determined that the liability waiver, purporting to disclaim liability for negligent acts of the cruise line's employees, was void under 46 U.S.C. § 30509, which provides that cruise operators sailing from U.S. ports may not rely on contractual provisions to limit "the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents."

Arnold's next argument—that the second tour guide was negligent—was unsupported by the record, as there was no evidence that allowing jet skis to operate less than one hundred yards apart was inherently unsafe, or that the tour guide's control over the initial spacing was a substantial factor in bringing about the collision.

The cruise line argued that it was entitled to limit any liability because it had no privity or knowledge of any negligence. But the court held that where a vessel is unseaworthy due to an incompetent operator, and where this condition existed before the start of the voyage, the vessel owner may not limit its liability. The cruise line therefore would not be able to limit its liability to the extent a factfinder determined that it negligently allowed an incompetent person to operate the jet ski and that this negligence caused Arnold's injuries. ■

Virgin Islands court enforces exculpatory clause in jet-ski rental agreement

Jerome v. Water Sports Adventure Rentals & Equip. Inc., 2013 WL 692471 (D.V.I. Feb. 26, 2013)

The plaintiff was injured during a jet-ski and snorkeling tour in St. Croix and brought claims of negligence and gross negligence against the rental company.

Before the tour, the plaintiff read and signed a release purporting to exculpate the rental company from "any and all claims based upon negligence, active or passive, with exception of intentional, wanton, or willful misconduct."

During the snorkeling part of the tour, the plaintiff was swimming in the water when another jet ski, under the control of a guide employed by the rental company, struck her in the head. The company contended that the guide's jet ski was off or idling and that it hit the plaintiff due to the action of a wave. Conversely, the plaintiff asserted that the jet ski was under power and was being operated in a grossly negligent fashion.

The court first decided that the case was subject to admiralty jurisdiction because (1) the accident occurred in the navigable waters off St. Croix; (2) an injury caused by a maritime tour provider has the potential to disrupt maritime commerce; and (3) a recreational maritime tour bears a substantial relationship to traditional maritime activity.

Citing the release, the company sought summary judgment on the plaintiff's negligence claim. The plaintiff responded that the release was ambiguous and unenforceable. The court decided that the release was clear and unequivocal and that the relationship between the rental company and the plaintiff did not involve an inherent risk

of overreaching. The exculpatory clause was therefore enforceable, and the negligence claim was dismissed.

As for the claim of gross negligence, the court held that there were disputes of material fact as to whether the rental company's guide was grossly negligent. The case would therefore be allowed to proceed, but the plaintiff could recover only if she proved gross negligence. ■

Florida court rejects claim by marina worker whose hand was crushed during docking

Arcure v. McCabe, 2013 WL 140220 (M.D. Fla. Jan. 11, 2013)

This was a suit by a marina employee, Arcure, whose hand was crushed as he assisted in tying up a 40-foot Rinker named the *Landshark*. The defendants were McCabe (owner of the *Landshark*) and TowBoatUS.

During an outing in the Gulf of Mexico, the *Landshark* ran out of fuel and had to be towed back to shore by TowBoatUS. In order to get the *Landshark* to the dock, the TowBoatUS vessel towed the *Landshark* in the direction that it wanted it to follow, and then at the last moment, turned away and released its towline, allowing the *Landshark* to coast to the dock. Meanwhile, Arcure was standing on the dock to assist in the mooring operation. As the *Landshark* approached the dock, it was traveling at idle speed and McCabe, apart from using the bow thruster, had no way to steer the vessel. Arcure testified that the vessel was approaching "really slowly and calmly, and then the next thing I know I was looking down and I lost track of the towline. I had seen a towline and I didn't know where it went. And then the next thing I know, without any warning and unexpectedly the bow of the *Landshark* came straight at me, at my head and face." Arcure instinctively reached up with his hand, which was then crushed between the boat and a pylon. Although Arcure testified that this movement of the vessel happened abruptly, no one on the *Landshark* felt any impact or jolt or lost their balance.

The expert testimony offered by Arcure was that McCabe, as the captain of the vessel, had the responsibility to moor the vessel safely and to avoid injuring people on the dock. The expert opined that McCabe should have had someone throw a bow line to Arcure as the *Landshark* was approaching, which would have allowed Arcure to grab it and would have prevented Arcure's hand from being near the pylon.

McCabe's expert, on the other hand, testified that "it's common sense that you don't get between a boat and a stationary object" and that Arcure was the only one who could have prevented his hand from being placed between the boat and the pylon. He also testified that even if the bow thruster had been engaged, it was not capable of causing the *Landshark* to make such a sudden movement toward the dock.

After a bench trial, the court found that McCabe and TowBoatUS acted reasonably and breached no duty to Arcure. The court further noted that Arcure's expert's opinion—that Arcure would not have been injured had McCabe thrown a tow line—was purely speculative and that in fact Arcure was negligent by placing his hand between the *Landshark* and the pylon. Judgment was therefore entered for the defendants. ■

Products Liability

Court dismisses tort claims following fatal boating accident, but allows some contract claims to stand

Alongi v. Bombardier Recreational Products, Inc., 2013 WL 718755 (E.D. Mich. Feb. 27, 2013)

This case arose from a fatal accident involving a 15-foot Bombardier Speedster Jet Boat. The plaintiffs sued both the manufacturer of the Jet Boat and the dealer who sold it. The court granted summary judgment to both defendants on the tort claims. It also granted summary judgment to the manufacturer on all contract claims. But the court allowed some contract claims to stand against the dealer.

After just five hours of using their new Jet Boat, the plaintiffs allegedly began experiencing an intermittent problem consisting of a high-temperature alarm and a drop in engine speed.

The accident itself occurred two weeks after the plaintiffs' purchase. The plaintiffs' 17-year-old son took five friends for a ride in the Jet Boat after drinking. As he approached a canal at high speed, the temperature alarm sounded, and the Jet Boat's controls allegedly stopped responding, at which point the son cut the throttle and lost steering capability. The Jet Boat struck a seawall, killing a passenger.

Nearly four years later, the plaintiffs sued on a variety of tort and contract claims, and the defendants moved for summary judgment.

The court dismissed the plaintiffs' claims under the Michigan Consumer Protection Act because that statute by its terms did not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Here, the sale of the Jet Boat was specifically authorized by law inasmuch as the Federal Boat Safety Act (FBSA) regulated the Jet Boat as a "recreational vessel."

The claims under the FBSA likewise failed: they were based on a regulation that did not apply. The defendants had allegedly failed to provide notification that the Jet Boat did not comply with SAE J2608, the recommended practice for assessing off-throttle steering in personal watercraft. First, the court noted that the Sixth Circuit does not recognize a private right of action for violating a notification requirement. Second, the Jet Boat was not a "personal watercraft," which is defined by SAE J2608 to be a vessel less than 13 feet long and "designed to be operated by a person . . . sitting, standing or kneeling on the craft rather than in the confines of the hull." The Jet Boat was 15 feet long and was meant to be operated by a person in the hull.

The court summarily dismissed various other claims. First, the negligence and strict-liability claims were barred by Michigan's three-year statute of limitations (the plaintiffs had filed suit nearly four years after the accident). The plaintiffs' implied-warranty claims were barred because the Jet Boat's warranty contained explicit and conspicuous language, written in all capital letters, disclaiming all implied warranties.

The court also dismissed the plaintiff's revocation-of-acceptance claims. As to the manufacturer, the plaintiffs were not in privity of contract, so there was nothing to revoke. And, as to the dealer, the plaintiffs tried to revoke acceptance nearly four years after their purchase, which was not "within a reasonable time after" they discovered or should have discovered the ground for revocation.

The plaintiffs had mixed results on the remaining theories. As to express warranties, the court found that the manufacturer could not have breached, because, as noted above, the manufacturer was not in privity of contract with the plaintiffs. Without a valid underlying contractual

claim, the Magnuson-Moss Warranty Act claim also failed.

But the claim for breach of express warranty against the dealer did not fail for lack of privity. And, an issue of fact precluded summary judgment on the dealer's statute-of-limitations defense. The statute began running when the breach was or should have been discovered, but here there was no indication as to precisely when the plaintiffs first experienced the alleged overheating problem. Instead of making a definitive ruling, however, the court asked the parties to brief two issues: whether the Jet Boat actually malfunctioned (i.e. whether there was a breach) and whether any such malfunction was the proximate cause of the accident.

As a result, the court also withheld ruling on the Magnuson-Moss claim against the dealer because, as noted earlier, a Magnuson-Moss claim requires an underlying warranty action. The court did, however, grant summary judgment to the dealer on the Magnuson-Moss implied-warranty claim because the underlying claim had already been defeated. ■

Products-liability plaintiff may obtain full damages from any maritime tort-feasor

Sands v. Kawasaki Motors Corp., 2013 WL 1149601 (11th Cir. 2013) (unpublished)

A passenger who fell off the back of a Kawasaki Jet Ski was seriously and permanently injured when the force of the water from the nozzle tore through her bodily cavities. She brought a products-liability action under maritime law, alleging defective design and failure to warn. The case was tried to a jury in the Southern District of Georgia, Savannah Division. The jury found for the plaintiff on the design-defect claim and for Kawasaki on the failure-to-warn claim.

Shortly before trial, Kawasaki sought to add to the verdict slip the person who was operating the Jet Ski at the time of the accident. But this person was not a party to the lawsuit and had not entered into any sort of settlement. The court decided that allowing the jury to assign a percentage of fault to the operator would be improper because the operator had not been sued and Kawasaki had not raised the issue until after the close of discovery.

At trial, Sands presented an expert who offered an alternative design based on his patented rotatable seat back; Kawasaki sought to exclude his testimony, arguing his opinion was unreliable because he had not sufficiently tested his design. The court evaluated his qualifications and determined that he had performed sufficient testing to offer a reliable opinion. Kawasaki countered with its own expert, who testified that the rotatable seat back was not a safer design.

Sands was awarded $3 million for past and future medical expenses, but nothing for pain and suffering. The award was reduced by fifty percent based on her negligence in failing to hold on to the vessel or its operator.

Both Sands and Kawasaki moved for a new trial. Sands argued that the jury verdict was inadequate as a matter of law due to the absence of any award for pain and suffering. Kawasaki offered ten different arguments for a new trial, including its previous contention that Sands' expert was unreliable, its contention that the operator's name should have been on the verdict slip, and various other challenges to the trial judge's evidentiary rulings. The motions were denied, and both parties appealed.

In its appellate brief, Kawasaki argued that the trial judge misapplied maritime law by not including the operator on the verdict slip. Without the operator listed, Kawasaki argued that the jury was unable to assess everyone's percentage of fault. The appellate court noted that under general maritime law a plaintiff may sue any defendant for the full amount of damages, so long as that defen-

dant's negligence was a substantial factor in causing the injury. A plaintiff may proceed in this fashion even if the negligence of some other person also contributed to the incident. Thus, the district court did not err by omitting the operator from the verdict slip.

Regarding Kawasaki's many other arguments, the court found that the trial court had not committed any reversible error in its evidentiary rulings or jury instructions.

Finally, the court ruled that Sands' challenge to the lack of an award for pain and suffering was barred by *Coralluzzo v. Education Management Corp.*, 86 F.3d 185 (11th Cir. 1996), as Sands failed to object to the verdict before the jury was discharged. Thus, despite the "overwhelming evidence" of pain and suffering, the verdict could not be revisited on appeal. ■

Criminal Law

Man sentenced to seven years in prison for causing false distress call to U.S. Coast Guard

U.S. v. Deffenbaugh, 2013 WL 729118 (4th Cir. Feb. 28, 2013)

Larry Deffenbaugh, a licensed captain, hatched a scheme to fake his own death so that he could avoid an upcoming hearing about an alleged probation violation. His plan was to get his unsuspecting (and legally blind) brother to rent a boat to go fishing in the Chesapeake Bay and, while the brother was distracted, jump out of the boat and swim to shore. He would then meet his girlfriend and flee the state. Deffenbaugh thought that his brother would alert the authorities, who would respond and conduct a search. When his body was not found, Deffenbaugh figured that he would be declared dead.

The brother called 911 as expected, and the dispatcher contacted the U.S. Coast Guard, which mounted a fruitless search costing over $220,000. But Deffenbaugh was not declared dead. Instead, he was arrested out of state and, after one mistrial, eventually convicted of causing a false distress call to be communicated to the U.S. Coast Guard and of conspiring with his girlfriend to commit the same offense.

Deffenbaugh appealed on the basis that the Government couldn't prove conspiracy because his girlfriend didn't share in the objective of the conspiracy. He also argued that his sentence was excessive. The Fourth Circuit affirmed.

Essentially, Deffenbaugh argued that there could be no conspiracy under federal law unless the girlfriend knew that the recipient of the distress call would be the U.S. Coast Guard (as opposed to the state police or another agency). The court disagreed. The court reasoned that proving a conspiracy does not require proving intent to violate federal law unless the underlying offense requires it. Because the language of the applicable statute (14 U.S.C. § 88(c)) makes it a federal crime to "knowingly and willfully communicate[] a false distress message to the Coast Guard or cause[] the Coast Guard to attempt to save lives and property when no help is needed," the court reasoned that the perpetrator need only have the intent to communicate a false distress message; the U.S. Coast Guard need not be the intended recipient. The conspiracy conviction was therefore upheld.

In affirming Deffenbaugh's 7-year sentence, the court stated that it was not plainly unreasonable for the district court to treat sending a false distress call as analogous the crimes like fraud or theft, which can justify a longer sentence under federal sentencing guidelines. Nor was the sentence unreasonably long, given that the defendant had been convicted of both the principal offence and the conspiracy, that he used his maritime experience when planning the crime, and that he

had endangered his disabled brother by abandoning him on the boat. ■

Legislative Developments

Thanks to Gregory Singer and Todd Lochner of the Lochner Law Firm P.C. (boatinglaw.com) for providing the following updates.

Uniform Certificate of Title for Vessels Act (UCOTVA)

The Uniform Law Commission has recommended a model vessel-titling act. The Act does four things:

1. Allows undocumented state-titled vessels to secure preferred mortgages.
2. Brands the titles of vessels that have suffered hull damage.
3. Unifies procedures and titling laws among states.
4. Brings state titling laws in line with UCC Articles 2 and 9.

Virginia just became the first state to adopt the Act.

In general, the Act is about codifying best practices for titling vessels and making sure the requirements for all states are consistent. Only 34 states have titling laws in the first place, and those that do vary greatly, which allows gaps and duplicities to exist and opens opportunities for fraud. For example, at present a 17-foot dinghy might be a vessel requiring title in one state, but another state may refuse to title boats of that length; this creates friction in the sales transaction and opens opportunities for fraud and theft. The process of titling under the Act remains virtually unchanged, and shouldn't create any new burdens on the states or boat owners. Normal exemptions for state titling apply—for example, dinghies and stationary floating structures.

The big win in the Act is for vessel lenders, and hopefully borrowers as well. Currently only federally documented vessels are eligible for preferred mortgages (only 1% of U.S. vessels are documented). But under 46 USC § 31322(d)(1), state-titled undocumented vessels may be eligible for preferred mortgages if the state's titling law satisfies applicable federal requirements and is approved by the Coast Guard. This was done to encourage states to participate in the Coast Guard's Vessel Identification System (VIS). A number of states participate in VIS, but no state so far has attempted to clean up its titling law to gain Coast Guard approval. The purpose of the Act is to provide a ready-made law that the Coast Guard will approve. The Coast Guard hasn't formally approved the Act yet, but the drafters are under the understanding that this will happen, as the Act complies with all requirements. Theoretically, states that adopt the act will have a competitive advantage because their marine lenders will be able to secure preferred mortgages, while other states will not. It's easy to see why various marine-financing associations are supporting the Act.

Boat buyers and sellers should also benefit from the uniformity and record-keeping aspects of the Act. Transaction costs on interstate transfers should go down because of the uniformity of procedures, documentation, etc. Better record-keeping in the VIS database theoretically means it should be easier to verify a vessel's title history and harder to sell a stolen boat. Additionally, the drafters are hopeful that once the titling process is standardized, the VIS database for state-titled vessels will be opened to the public.

The title-branding requirement is probably the most contentious part of the Act. It means that the owner of a vessel that has suffered hull damage—even running aground could count if the hull's integrity is compromised—must disclose the hull damage when transferring title to the vessel

or when applying for a new title. The model Act's forms show a simple checkbox to indicate that the vessel has suffered hull damage; no opportunity is given to explain the nature or extent of the damage. The brand remains on the title forever, even if title goes to another state or the damage is repaired. The owner of record is responsible for compliance with this provision, and the fine for noncompliance is $1,000.

Dealers and brokers will generally be exempt from the branding requirement because they typically are not owners of record for the vessels they sell. Some are worried that vessels with the "scarlet letter" brand on their title will be difficult or impossible to sell, but more disclosure should be a good thing for boat buyers, especially in the case of boats damaged by hurricane, fire, sinking, etc. This portion of the Act may be the sticking point in state legislatures, though if the Coast Guard will approve (for preferred-mortgage purposes) a state's law with the branding provision removed, it shouldn't be an issue.

Finally, the Act will update antiquated state-titling acts to reflect UCC Articles 2 and 9, which all but one state have adopted. Most state title acts were written pre-UCC and this creates discord between those acts and state laws on sales and security interests. The Act specifically references the UCC and brings state titling in line with it. As with most Uniform Acts, helpful interpretational comments are also provided. ■

State-by-state legislative update

Georgia just enacted a law lowering the Boating Under the Influence (BUI) legal limit from .10% to .08% BAC. The new law also requires boating-safety courses for all operators born after January 1, 1998, and requires PFDs to be worn by all children under age 13. (Ga. Code 52-7-12).

Hawaii now requires all resident boat operators to complete a boating-safety course. Additionally, children under age 16 may not operate a vessel unless accompanied by an adult over 21. (Haw. Code R. § 13-244-15.5).

Illinois now requires boat owners to clean their vessel's bottom before trailering from one body of water to another, in order to curtail invasive species. (IL ST CH 625 § 45/5-23).

Indiana now imposes harsher penalties for BUI offenses if the operator is involved in an accident—up to 1 year in jail and a fine of up to $5,000. (Ind. Code § 7.1-1-3-13.5).

Iowa lowered its BUI legal limit from .10% to .08% BAC. (Iowa Code § 321J.2).

Kansas passed a constitutional amendment to allow the state legislature to tax boats differently from other personal property; the amendment was needed to empower the legislature to impose lower tax rates on boats. (HCR 5017 (2012)).

Maryland enacted a vessel excise-tax cap of $15,000. The state also closed a "drunken sailor" loophole which exempted non-motorized sailboats from state BUI laws. (Md. Code, Nat. Res. § 8-716).

New York enacted legislation requiring those convicted of BUI to get a boating-safety certificate before operating a vessel again. Suffolk County now requires any boat operators in Suffolk waters to take a boating-safety course. New York is currently considering a law that would tie DUI and BUI violations together, such that any boater convicted of BUI would have his driver's license suspended, and vice versa. (N.Y. Nav. Law § 49-a).

Oklahoma lowered its BUI legal limit from .10% to .08% BAC. (Okla. Stat. tit. 63, § 4210.8).

Pennsylvania now requires all passengers on vessels under 16 feet to wear life jackets during cold weather months (November 1 through April 30). (58 Pa. Code § 97.1).

Texas now requires all boat operators born after September 1, 1993, to obtain a boating-safety

certificate and to carry it with them when operating a vessel. (Tex. Parks & Wild. Code § 31.109).

Virginia just became the first state to pass the Uniform Certificate of Titles for Vessels Act (UCOTVA). The Act was written and promulgated by the Uniform Law Commission in 2011. Besides improving and homogenizing current state title laws, the Act requires "title branding" of vessels that have suffered hull damage—marking the damage directly on the title. Additionally, if the Coast Guard approves the UCOTVA titling procedures (as it is expected to), vessels titled in UCOTVA states will be able to secure preferred mortgages without having to federally document their vessels. ■

Meeting Notes

The following is an outline of a presentation by Gavin O'Hare of CED Investigative Technologies, given at the Recreational Boating Committee's Spring 2013 meeting.

Working with engineering experts in marine litigation

1. **Industries served.**
   - Product liability, personal injury, marine construction, shipyard/OSHA accident.
2. **Engineering disciplines applied to litigation support.**
   - Naval architecture, structural, mechanical, electrical, chemical, material science, biomechanical.
3. **Typical types of investigations.**
   - Accident reconstruction, fire investigation, composite material analysis, mechanical equipment failure analysis, rules of road/navigation.
4. **Having the goal in mind: trial testimony.**
   - Consulting expert v. testifying witness.
   - Expert credibility: pure academic v. industry tradesman.
5. **Case study discussion.**
6. **Recommendations on how to best work with engineering experts.**
   - Retain expert early.
   - Have expert inspect evidence and participate yourself.
   - Consult expert on drafting deposition questions.
   - Consider exemplar testing and participate yourself.
   - Review report draft. ■

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