BOATING BRIEFS

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

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FALL/WINTER 2021
VOL. 30, NO. 2

Court finds no established federal maritime rule on Breach of a Captain or Crew Warranty in a Yacht Insurance Policy

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA v. OCEAN REEF CHARTERS LLC, 996 F. 3d 1161 (May 6, 2021).

This case concerns the loss of the *M/Y My Lady*, a 92 foot Hatteras motor yacht. Ocean Reef, the owner, insured it with Travelers at the time of the loss. The policy contained two warranties: (1) a captain warranty requiring the owner to employ a full-time professional captain approved by Travelers, and (2) a crew warranty requiring the owner to have one full or part-time professional crew member onboard. Following the loss, the insurer filed a lawsuit seeking a declaratory judgment that because the owner breached these two warranties the insurer was not obligated to cover the loss.

In September 2017 the Owner did not employ either a professional captain or crew. As Hurricane Irma approached the owner sought to move the boat to a safer location but when he reached out to his former captain, the former captain was unavailable to assist. Following notification, Traveler's agent instructed the Owner's agent that the yacht should not be moved. The Owner used his best efforts to secure the boat in advance of the impending storm but ultimately the boat was lost when a dock piling failed allowing the boat to drift onto other pilings and hit a seawall. It was declared a constructive total loss by Travelers. Travelers denied coverage, asserting that the Owner had breached the captain and crew warranties in the policy.

Following discovery, the parties filed cross-motions for summary judgement. Travelers argued that federal maritime law requires strict compliance with express warranties in marine insurance contracts, and that a breach bars coverage even if unrelated to the loss. Ocean Reef countered that Florida's so-called "anti-technical stat-

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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ute" should instead apply, and that under that statute the breaches did not preclude coverage because they were unrelated to the loss.

The court ultimately focused its analysis on the precedent of *Wilburn Boat Co. v Fireman's Fund Ins. Co., 348 U.S. 310 (1955)*, which held that in the field of marine insurance state law should be applied where there is no established federal maritime rule governing the issue at hand. The Court therefore examined whether there was an existing entrenched federal maritime rule governing captain or crew warranties. It concluded that there was not.

This decision itself makes clear that the panel was not at all fond of the *Wilburn Boat* opinion but felt constrained to honor it and apply its holding that there is no established federal maritime rule requiring strict fulfillment of all marine insurance warranties, and thus the court had to determine instead whether there was an established federal maritime rule on the specific warranty(ies) at issue. Finding no such established rule relating to breach of captain/crew warranties, the court remanded it for consideration under Florida statutory law, which does not strictly enforce a warranty in an insurance policy unless the breach or violation "increased the hazard by any means within the control of the insured."

Jurisdiction/Procedure

Boat Club found to have waived its right to enforce an arbitration provision against a claimant in state court by first having pursued a limitation action in federal court concerning the same underlying issues

***Mirro v. Freedom Boat Club,* Case No. 2D20-3132 (filed October 15, 2021) 2021 WL 4806531 [Not for Publication]**

Virginia Mirro ("Mirro") was a member of the Freedom Boat Club, LLC ("Freedom") and as a part of that membership enjoyed the privilege of renting boats from Freedom. This suit arose when Mirro allegedly sustained personal injuries during one such rental as a result of an accident that occurred aboard one of Freedom's vessels, *Mama's Bouy*. Mirro alleged that as she was climbing down the stern ladder of the vessel into the water a rung suddenly broke, causing her injuries.

Mirro filed a complaint against Freedom in state court for her injuries. Freedom moved to dismiss the complaint or compel arbitration under the arbitration provision of the boating membership agreement between Mirro and Freedom. Mirro responded that Freedom had waived its right to arbitrate by previously filing and participating in a limitation action regarding arbitrable issues concerning the same underlying incident in federal court without invoking its right to arbitration.

The circuit court, persuaded by Freedom, granted Freedom's motion to dismiss, holding that Freedom had not waived its right to arbitrate because its conduct in the limitation action, as a limited admiralty matter, was not inconsistent with its right to arbitration. The Court of Appeals reversed, concluding that based on the "totality of circumstances of the case" Freedom had in fact waived its right to arbitrate when it not only filed the limitation action, but also sought exoneration from liability and raised substantive objections to the claim filed by Mirro all without ever asserting its right to arbitration.

Court affirms district court's order compelling arbitration in accordance with the clear language of the contracts

***Cheruvoth v. Seadream Yacht Club Inc., et al.* 2021 WL4595177 / Case No. 20-14450 (11th Cir. Filed 10/06/2021)**

Ronald Cheruvoth, a citizen of Saudi Arabia, had signed (on behalf of Abdullah Saleh Hamel) two separate charter contracts for two distinct charters scheduled to take place in 2017 and 2018. Even though the deposits were paid, Mr. Hamel

was unable to attend either charter due to his detention at the time by the Saudi Arabian government. Mr. Cheruvoth sought to recover the deposits by filing suit in the Southern District of Florida, in lieu of proceeding to arbitration as required by the charter contracts.

Both contracts contained identical arbitration clauses mandating that all disputes "arising out of or in connection with this Agreement shall be referred to arbitration in accordance with the Norwegian Arbitration Act ..." *Id at 1.* The court analyzed the issue of whether to compel the arbitration under the New York Convention and found that in deciding a motion to compel arbitration under the Convention the court was restricted to a "limited inquiry" and found that it must compel arbitration unless (1) the four jurisdictional prerequisites are not met, or (2) one of the Conventions' affirmative defenses applies. *Id. at 2.* The four prerequisites require that "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Bautista v. Star Cruises, 396 F. 3d 1289, 1295 *11th Cir. 2005).*

Mr. Cheruvoth did not directly argue that any of these elements were not met. Instead he argued simply that the charter agreements "were never formed" due to the failure of the parties (in particular Mr. Hamel) to "fulfill certain conditions precedent." Despite his not framing them as such, the court interpreted Mr. Cheruvoth's arguments to go towards the first prerequisite, i.e., whether there was a sufficient agreement in writing. Ultimately the court concluded that the particular conditions that Mr. Cheruvoth alleged were not satisfied were not sufficient to defeat contract formation. Finding all other elements present, the court upheld the grant of defendant's motion to compel arbitration. □

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Limitation of Liability

Owner and operator of vessel that struck and killed user of personal watercraft brought action seeking exoneration from or limitation of liability pursuant to LOLA

***In the Matter of Bensch v. Estate of Ahmed Abdulla Umar,* 2 F. 4th 70 (Decided June 23, 2021)**

This case arises from a boating accident on the Niagara River in August 2018. The petitioner was piloting his boat in a marked channel on the river. The decedent was operating a jet ski that he had rented with his young daughter as a passenger. The decedent fell off the jet ski in front of the petitioner's vessel, which then struck and killed him. The daughter survived. The parties disputed responsibility for the fatal collision.

Petitioner filed a Limitation of Liability action seeking to limit and / or exonerate himself from liability for the accident by asserting that he was not at fault in the accident. The court noted that the mere fact that the vessel owner himself was operating the vessel at the time of the fatal casualty "does not defeat the limitation of liability action" and went on to note that "privity and knowledge is a term of art meaning complicity in the fault that caused the accident." *Id* at 73 (quoting *Blackler v. F. Jacobus Transp. Co.,* 243 F.2d 733, 735 (2d Cir. 1957)).

Significantly the decision charts a course for Limitation of Liability pleading requirements in examining the sufficiency of allegations by a vessel owner in a limitation action. The Court held that (1) maritime complaints seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act must contain sufficient factual matter to satisfy the plausibility standard applicable to Federal pleadings; (2) that the initial complaint did not plausibly allege owner's lack of negligence, as required to state claim under Limitation of Liability Act; and (3) the proposed amended complaint plausibly alleged owner's lack of negligence. *Id* at 70. □

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Yacht Finance/Forfeiture

Lender and borrower brought cross-claims against each other for claims arising out of borrowers' default on the loan used to purchase a yacht

***Suntrust Banks, Inc. v. Be Yachts, LLC*, No. C18-840 (Signed 05/05/2020) [2020 WL 213120]**

**Of note, this case was the first admiralty bench trial in the United States to be held virtually.

In January 2013 defendant Edward Balassanian and Be Yachts, LLC borrowed $1,800,000.00 from Sun Trust Banks to purchase a 2012 Sunseeker International Manhattan 63 Motor Yacht. On February 12, 2016 after Defendants defaulted on the loan, the lender repossessed the Yacht. At the time of the repossession the unpaid principal balance on the loan was $1,689,187.97.

At the time of the repossession the Lender hired a specialty firm to manage the repossession who in in turn hired a professional yacht mover to move the Yacht to its dock. The yacht remained at the dock of the specialty firm which it was marketed and prepared for sale. The defendants alleged that during that time the yacht was not adequately cared for, resulting in a diminution in value of the Yacht. Ultimately the vessel was sold for $1,050,000.00 and a deficiency notice was provided to the defendants, informing them that they owed a balance of $857,979.60 as of March of 2017.

In June of 2018, having not been paid, the Lender filed a complaint asserting claims for breach of contract and breach of the implied duty of good faith and fair dealing. The defaulted borrower asserted counterclaims invoking a UCC provision that requires lenders to exercise reasonable care in the preservation and sale of a repossessed vessel. Lenders who run afoul of the provisions run the risk of seeing their deficiency claims eliminated. In addition, they can potentially even be liable for damages that far exceed the deficiencies they are seeking to collect.

The court denied Defendants' motion for summary judgement, ultimately finding that there was ample evidence that the sale was conducted in a commercially reasonable manner. The fact that the selected broker lacked a Washington license did not affect that determination. Plaintiff sought summary judgment on Defendant's counterclaim for failure to preserve the Yacht. The court found that while the defendant had presented some evidence that the Yacht was not maintained perfectly, the defendants had not sufficiently demonstrated that any such lack of care diminished the Yacht's value. On that basis, the court granted the Plaintiff's motion for summary judgment on the Defendant's counterclaim for Failure to Reasonable Care in Preservation of the Collateral.

Court upholds forfeiture of Yacht to United States Government

***United States of America, et al. v. M/Y Galactica Star*, et al. (2021 WL 4145929) No. 20-20471 (Filed September 13, 2021)**

The *M/Y Galactica Star*, a 65 meter super yacht, was allegedly purchased from the ill-gotten gains obtained from an international conspiracy involving the bribery of Nigerian officials in exchange for lucrative oil and gas contracts. The Yacht was arrested by the US Government in connection with its efforts to recover the Yacht (and other assets) worth a total of approximately $144 million dollars. Nigeria made an appearance, filing a verified claim that it was entitled to the assets as they had been misappropriated from the Nigerian Treasury. Other parties joined, seeking to stake their claims. Ultimately the case is worth a read

as it raises a host of interesting issues relating to forfeiture because of unlawful actions by a corporate owner, waiver of claims, corporate shareholder's lack of standing to assert the "innocent owner" defense, interest in particular assets of a corporation, and foreign sovereign immunity.

Torts

Boat Manufacturer loses 200 million dollar jury trial

Batchelder v. Malibu Boats, LLC – Civil Action 2016-Cv-0114-C (verdict August 28th, 2021)

Seven-year-old Ryan Batchelder was in the bow section of a 2000 Malibu Response XL ski boat with three other children. The operator was slowly circling the boat in a lake when it crossed a wake. The wake caused large quantities of water to come over the bow and swamp the boat. As a result, Ryan fell into the water. The vessel operator put the boat into reverse in an effort to stop the inflow of water into the bow and avoid sinking. The propeller struck Ryan, resulting in his body becoming entangled in the propeller.

The plaintiffs argued that the vessel was designed with inadequate freeboard even when underway. They further argued that Malibu, the vessel manufacturer, was aware of the problem and did not warn customers of the problem. The defense claimed that the design was adequate and safe, and contended that the accident was the result of the actions of the vessel operator.

Ultimately the Jury found for the plaintiffs and awarded a total of $200 million dollars including $120 million in punitive damages against Malibu Boats West and Malibu Boats LLC.

Court Enforced a Pre-Carriage Wood Boat / Hull Release on a Yacht Damaged During Overland Transport

Watson v. Moger (2021 WL 3510426) Case No. 20-5344 RJB (Decided 8/20/2021)

This case arose from damage sustained by a 1962 wooden Chris Craft motorboat during transport overland from California to Oregon. The parties disputed the condition of the boat when it was pulled out of the water prior to being transported. The defendant alleged that it was in poor condition unsuitable to transport. The plaintiff alleged that it was in good condition, that at the time there was no patching to the hull, and that it had a new epoxy bottom paint job.

Prior to beginning the transport, defendants had the plaintiff sign a specific "Wood Boat / Hull Release" in which the plaintiff acknowledged latent and obvious defects and holding the defendant harmless from damages attributable to those defects. In addition, the release also relieved the defendant "of any liability or responsibility for damages that may result from the transport of the boat from time of loading to time of unloading." Ultimately the boat was damaged during transport, resulting in holes in the bottom of the boat where the trailer pads had been. The plaintiff, after unsuccessfully pursuing a claim against defendant's insurer, sought to recover from the defendant for the damages.

The defendant filed a motion for summary judgment on various grounds, including on the plaintiffs' Carmack claims and in reliance on the executed release. The court granted the defendant's motion for summary judgment both on the Plaintiff's Carmack claims as well as by choosing to enforce the pre-carriage Wood Boat / Hull Release.

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Coast Guard Update

USCG Suggests to Allow for Ship Mortgages on State Titles

Titling of vessels in the United States is currently controlled by both State and Federal law. Over 99 percent of vessels in the United States are exempt from documentation, as documented vessels are typically large and commercial in nature. For these 99 percent of vessels, which fall outside of the United States Coast Guard's ("USCG") documentation requirements, titling and registration is left up to the States, and the laws vary from State to State. At present, 38 States participate in the Vessel Identification System ("VIS") — a centralized database which relies on information provided to the USCG by the participating States relating to undocumented vessels. Although a State's participation in VIS is voluntary, States are incentivized by the availability of preferred mortgages — a perfected lien that enjoys priority over all non-maritime liens and certain maritime liens in an *in rem* admiralty foreclosure action. Because a preferred mortgage must be filed or perfected in compliance with several statutory requirements, it is available only to: (1) vessels documented with the USCG; or (2) undocumented vessels titled in a State which satisfies certain Federal requirements and receives approval from the USCG.

Despite 38 States participating in VIS, no State has titling laws that satisfy current USCG requirements, and therefore, undocumented vessels are not eligible for Preferred Mortgages. The reason for this is well understood: There is a conflict between USCG guidelines and Articles 2 and 9 of the Uniform Commercial Code ("UCC"), on which most States rely to conduct commercial transactions. Recently published in the Federal Register (re: 33 CFR Part 187), the USCG has issued a Notice of Proposed Rulemaking which seeks to revise the conflicting USCG guidelines by allowing for State titling laws modeled after the Uniform Certificate of Title Act for Vessels ("UCOTA-V") to satisfy USCG certification requirements. If the proposed change to the USCG guideline is implemented, States' participation in VIS would likely increase, and owners of undocumented vessels in States with titling laws patterned off UCOTA-V and participating in VIS would have access to preferred mortgages.

Additionally, the proposed rule implements a "branding" system, whereby a damaged vessel's title is permanently marked, effectively preventing "title washing," the practice of transferring the vessel's title to another state to conceal the damage. □

Federal Legislation Update

Small Passenger Vessel Liability Fairness Act of 2021

The tragic fire on board the dive boat *Conception*, which claimed the lives of thirty-four on board, is relatively well known. Perhaps less known is the fact that, under the Limitation of Liability Act of 1851, presently codified at 46 U.S.C. §§ 30501–12, the owner of the *Conception* can only be held liable for the post-casualty value of the *Conception*, and since the vessel was a total loss as a result of the fire, the owner is effectively shielded from the claims of the estates of those who lost their lives.

New legislation introduced by Senator Dianne Feinstein and Representative Salud Carbajal seeks to retroactively change this result by modifying ship owners' liability with respect to small vessels. Named the "Small Passenger Vessel Liability Fairness Act of 2021", the new legislation, if enacted, would hold the owners of small passenger vessels responsible for damage irrespective of the post-casualty value of the vessel. Small passenger vessels are defined as those "less than 100 gross tons," which are carrying no more than forty-nine passengers while engaged in "overnight domestic voyages," and no more than 150 passengers while engaged in "all other voyages." Small passenger vessels also include "any wooden vessel constructed prior to March 11, 1996, that carries passengers on

overnight domestic voyages." The proposed legislation directs the Commandant of the Unites States Coast Guard to promulgate rules that relate to the "exoneration and limitation of liability for all covered small passenger vessels" which "provide just compensation in any claim for which the owner or operator of a covered small passenger vessel is found liable[.]" Furthermore, for personal injury and death claims, the "privity or knowledge of the [vessel's] master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner."

If passed as currently drafted, the law would take effect retroactively to September 2, 2019—the same day as the *Conception* fire.

Fire Protection For Recreational Vessels – Final Rule. [88 FR 58560]

The Coast Guard is amending fire extinguishing equipment regulations for recreational vessels that are propelled or controlled by propulsion machinery. This rule relieves owners of these recreational vessels from certain inspection, maintenance, and recordkeeping requirements that are more suited for commercial vessels. To make it easier to find these regulations, this rule also relocates the regulations to another part of the Code of Federal Regulations.

The final rule is effective April 20, 2022.

National Transportation Safety Board Update

The National Transportation Safety Board Update publishes Safe Seas Digest 2020

The National Transportation Safety Board has released its Safer Seas Digest 2020, which compiles the NTSB's marine accident investigations that were completed in 2020. While many of these investigations involved a variety of commercial marine operations, there are a number of important lessons in these cases for recreational boaters.

Link here: https://www.ntsb.gov/news/press-releases/Pages/NR20210824.aspx

State-Law Update

- California
  - Boat Registration and Quagga/Zebra Mussel Fee Stickers now offered Separately
    - Renewal notices will no longer display the mussel fee, nor will there be an option to purchase the sticker at the same time the registration is renewed. While a sticker is required for boats that operate in fresh water, the sticker and registration card will be purchased and mailed separately.
  - CA Boater ID Card – Effective January 2021 all boaters 40 or younger must be licensed
- Florida
  - A bill was signed into law on June 16, 2021 by Florida Governor Ron DeSantis and went into effect on July 1, 2021 which added and/or amended Florida Statute 327.59 "Marina Evacuations". The bill addresses the evacuation of vessels under 500 gross tons from marinas located in deep water ports that have been deemed unsuitable for refuge during a hurricane.
- Washington
  - Update on Non-Resident Permits
    - See Special Notice dated July 23, 2021 - Washington State will now allow nonresident entity-owned yachts to acquire two 60-day permits a

year to stay in the State without tax. This is in addition to the 60 days allowed currently. Nonresident entity and individually owned boats will now be treated similarly for the first time. Essentially this new law does three things: (1) Creates a framework to sell permits for crewed charters for nonresident owned yachts; (2) Increases the size of all nonresident owned vessels eligible for two 60-day permits per year to include boats up to 200 feet; and (3) Keeps the current rule that boats can return each year, year after year for 60 days (and those days do not need to consecutive).

Other News...

We note the recent filing in Broward County Florida (Broward County Case Number CACE20018936) of a class action lawsuit alleging that Bank of the West sent to the Counter-Plaintiff "and hundreds of other consumers a form post-repossession notice which failed to disclose consumer rights required by the Uniform Commercial Code." See Counter-Plaintiff Michael Asseff's Counterclaim for Damages and Incidental Relief and Notice of Class Representation: CACE20018936 - Counterclaim (browardclerk.org)

BOATING BRIEFS is a publication of
The Maritime Law Association of the United States,
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