BOATING BRIEFS

The Maritime Law Association of the United States

Committee on Recreational Boating

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Spring/Summer 2023

VOL. 32, NO. 1

Recent line of district court cases address the validity of pre-event waivers in recreational boating activities

***Ehart v. Lahaina Divers Inc.*, 2022 WL 1472048 (D. Haw. May 10, 2022)**

***Dempsey v. Wild Side Specialty Tours, LLC*, 2022 WL 14846548 (D. Haw. Oct. 26, 2022)**

***Rodriguez v. SeaBreeze Jetlev LLC*, 2022 WL 3639305 (N.D. Cal. June 23, 2022)**

Three recent U.S. District Court cases from the District of Hawaii and the Northern District of California address the enforceability of pre-event liability waivers in the recreational boating context with two of the three courts holding the releases were invalid pursuant to Section 30509 of the Limitation of Liability Act.

Both *Ehart v. Lahaina Divers Inc.* and *Dempsey v. Wild Side Specialty Tours, LLC* arose from recreational boating trips departing from and returning to the same port and in both instances, there was no dispute that the injured party executed a liability waiver in advance of the excursion.

In *Ehart v. Lahaina Divers*, the dive vessel traveled from and returned to Lahaina Harbor, Hawaii after a single stop at a mooring ball next to Molokini Crater, a volcanic atoll and dive site. The trip was a SCUBA excursion; however, the decedent was snorkeling when she disappeared and is presumed to have passed away.

The complaint asserted survival and wrongful death claims against the vessel owner, captain, and two dive instructors. The plaintiff filed a motion to strike the vessel owner and captain's affirmative defenses of waiver and release, which was granted by the court. The court based its decision on the language of 46 U.S.C. § 30509(a)(1)(A), which prohibits contractual provisions limiting liability for personal injury or death by the owner or master of a vessel "transporting passengers between ports in the United States..." The court determined this language applied to the subject SCUBA excursion, and, as such the decedent's waiver was void.

The court acknowledged the conflicting precedent from other jurisdictions on similar facts but determined that the statute as drafted did not limit itself to "common carriers" as argued by the defense. The court, considering the plain language of the statute determined that the excursion constituted transport and that term "ports" despite being plural does not actually require the transport to be between two "different

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.

Inside this Issue:

ports" which Congress could have written into the statute had that been their intent. The court also reviewed portions of the legislative history of the predecessor statute and found that "Congress was well aware of vessels taking passengers on day trips to and from the same port" at the time the statute was originally enacted. Allowing a waiver to stand under these circumstances "would contravene the intent of Congress to void waivers by passengers injured in the process of being transported." The court further stated that "[t]here is no good reason to differentiate between a waiver signed by a passenger who drowns while being transported to a dive spot when a vessel sinks from a waiver signed by a passenger who gets off a vessel at a dive spot and then drowns while diving." As of August 1, 2022, the *Ehart* decision is on appeal to the Ninth Circuit Court of Appeals.

In *Dempsey v. Wild Side Specialty Tours, LLC*, the plaintiff was injured when she fell on the deck of the subject vessel wearing wet fins after returning from a snorkeling trip. Like in *Ehart* the subject trip departed and returned to a single location—Waianae Small Boat Harbor on the island of Oahu with a stopover off the coast for snorkeling. The plaintiff also signed a liability waiver before embarking on the excursion.

The plaintiff asserted claims against the vessel operator for negligence under maritime law and later filed a motion for partial summary judgment also based on 46 U.S.C. § 30509 arguing that the waiver in question was void as a matter of law. In granting the motion, the court similarly reasoned that the statutory language referencing "ports" did not require the vessel to operate between "different ports" and that the statute itself was not limited to common carriers. Following similar reasoning as the court in *Ehart*, the court also found that the subject snorkeling trip was "transportation." The waiver was declared void as a matter of law and the defendant was precluded from relying upon it as a defense at trial.

In *Rodriguez v. SeaBreeze Jetlev LLC*, the plaintiff and decedent participated in a recreational jet ski and tubing trip. They were required to sign waivers prior to their participation. During a tubing ride, the decedent, who had a pre-existing medical condition, passed away and his wife asserted claims for wrongful death against the defendant vessel owners and operators. The defendants filed a motion for summary judgment based on the liability waivers.

The court considered the application of 46 U.S.C. § 30509 to the subject waivers, ultimately determining that the statute did not apply under the circumstances. While in dicta agreeing with the *Ehart* court's reasoning that the statute did not require there to be multiple "ports," the court went on to find that the activity in question was not "transportation," and, as such, § 30509 did not apply. The court also found the waiver did apply to the tubing activity but only as to the plaintiff's negligence claims and not claims for gross negligence. The court granted partial summary judgment as to the negligence claims only. ▯

Limitation of Liability

Owner's operation of vessel during allision did not defeat limitation of liability action

Matter of Denver, No. 21-CV-11841-ADB, 2022 WL 4111873 (D. Mass. Sept. 8, 2022)

Plaintiff Ryan Denver filed a limitation action pursuant to 46 U.S.C. §§ 30501, *et seq.* arising from an allision that occurred in the early morning hours of July 17, 2021 in Boston Harbor. Denver, while operating his own vessel the M/V MAKE IT GO AWAY ("Vessel"), allided with a fixed navigational aid with seven passengers aboard. The allision resulted in Denver and his passengers entering the water to escape the sinking Vessel. Soon thereafter, another vessel (the "Unidentified Vessel") approached with the apparent intent of offering aid. However, the Unidentified Vessel quickly departed before any assistance was given and without

any notice or explanation. During these events, Denver and another passenger attempted to help save the others while waiting to be rescued but one passenger drowned despite their efforts. The Coast Guard eventually rescued Denver and the remaining passengers. Denver's Vessel was also towed into port.

In his limitation complaint, Denver alleged that he lacked any privity or knowledge of negligence as it related to the cause of the accident. Denver alleged he was navigating the Vessel in a proper manner, at an appropriate speed, and on the same track line that he had travelled before. Further, the incident would not have occurred if: (1) the navigational aid was better lit; and (2) the Unidentified Vessel actually offered aid. The Claimants, individually and on behalf of the decedent, moved to dismiss the limitation action as Denver's own operation of the Vessel at the time of the accident meant only he could be liable and that he could not plausibly assert a lack of privity or knowledge of negligence.

The U.S. District Court for the District of Massachusetts held that Denver's alleged lack of privity or knowledge of negligence was plausible as his complaint contained several factual allegations that he acted reasonably and that the accident and related injuries were caused by other parties' negligence. In doing so, the court rejected the Claimants' argument that an owner's operation of a vessel during an accident automatically precludes filing a limitation action because it limits the analysis to only two facts: (1) whether the plaintiff owned the vessel; and (2) whether the plaintiff was operating the vessel at the time of the accident. Instead, the court considered the plausibility of the complaint allegations as a whole, including the allegations that Denver acted reasonably in the operation of the Vessel. The court held Denver's limitation action was sufficiently plead and denied the Claimants' motion to dismiss despite his status as both owner and operator of the Vessel at time of the accident. ▯

District court affirms long-standing tenets applicable to bareboat charter agreements

In The Matter of Wilson Yachts, LLC, 605 F. Supp. 3d 695 (D. Md. 2022)

The U.S. District Court for the District of Maryland entered summary judgment affirming many tenets of the typical charter management business model, in which a yacht owner engages a charter management company to handle bareboat charters and charterers typically hire a "preferred captain" of the charter management company.

Wilson Yachts is an ongoing Rule F limitation action for a bareboat passenger death on a catamaran chartered under such a management agreement. The court found that the standard bareboat charter agreement, whereby the charterers were responsible to select, hire, and pay the captain (although in practice the captain was a "preferred suggestion" of the charter company), constituted a valid bareboat charter. The court further found that, although the owner and charter management company retained modest elements of control such as geographic and safety restrictions, the arrangement still constituted a bareboat charter, and therefore, the owner and charter management company were not liable for the negligence of the master or crew. The court also upheld the *Miles v. Apex Marine* dependency requirement in finding that the non-dependent parents of the non-seafarer decedent could not recover loss of society or other non-economic damages. Finally, the court construed the maritime "zone of danger" and "physical impact" tests for emotional distress as applying only to emotional damages caused by the plaintiff's *own* physical injury or apprehension thereof. Consequently, where the decedent's twin brother suffered concurrent but unrelated bodily injury as well as emotional distress from watching his twin brother drown, the court dismissed the twin brother's maritime Negligent Infliction of Emotional Distress claim because the alleged emotional distress stemmed from wit-

nessing his brother drown, rather than the physical injuries he himself suffered. The opinion is currently on appeal to the Fourth Circuit. ▯

Marine Insurance

Supreme Court grants certiorari to consider the enforceability of choice of law provisions in marine insurance contracts

Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC, —S.Ct.— (2023), 2023 WL 2357327 (March 6, 2023)

The last edition of Boating Briefs (Vol. 31, No.2) discussed the Third Circuit Court of Appeals' opinion in *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 47 F. 4th 225 (3d Cir. 2022) which addressed the enforceability of a choice of law provision in a marine insurance contract and reversed the trial court's order dismissing certain counterclaims in favor of Great Lakes Insurance SE ("Great Lakes").

On March 6, 2023, the Supreme Court granted Great Lakes' petition for a writ of certiorari to consider "[u]nder federal admiralty law, can a choice of law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the 'strong public policy' of the state whose law is displaced?" *See Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, No. 22-500, 2023 WL 2357327.

As background, the choice of law provision of the subject insurance policy adopts the "substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, th[e] insuring agreement is subject to the laws of the State of New York."

The insured, Raiders Retreat Realty Co. ("Raiders Retreat") made a claim with Great Lakes arising from a vessel grounding. During the investigation of the grounding, it was discovered that the vessel's fire extinguishers had not been properly certified and tagged in violation of an express warranty in the policy, which Great Lakes argued made the policy void from inception.

Great Lakes filed a declaratory judgment action and Raiders Retreat counterclaimed for bad faith breach of contract and breach of fiduciary duty under Pennsylvania law. Great Lakes moved for judgment on the pleadings as New York law does not recognize such causes of action under the facts of the case. The district court agreed and dismissed the claims arising under Pennsylvania law. The Third Circuit later reversed, finding that the insurance policy's choice of law provision may not be enforceable if its election of New York law was contrary to the "strong public policy" of the displaced law of the State of Pennsylvania. The Third Circuit's reasoning was based in part the Supreme Court's decision in *Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) which sets out a framework for evaluating the enforceability of a forum selection clause (not a choice of law clause) in a maritime contract. The Third Circuit remanded the case to the district court for consideration as to whether Pennsylvania has a strong public policy that would preclude the application of New York law.

In November 2022, Great Lakes filed a petition for a writ of certiorari to the Supreme Court of the United States, which was granted on March 6, 2023. Great Lakes argues in their petition that further guidance is needed on the enforcement of choice law clauses in marine insurance contracts in the wake of *Wilburn Boat v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) and the problems with identifying an "entrenched" rule of federal admiralty law when interpreting contractual provisions. Great Lakes further argues the Supreme Court should follow guidance from the Fifth, Ninth, and Eleventh Circuits that holds choice of law clauses in maritime contracts are enforceable so long as the chosen law has sufficient connection to the parties or transaction and does not conflict with the fundamental purposes of maritime law. Finally, Great Lakes argues that following the Third Circuit's reasoning will result

in state law and specifically state choice of law rules taking priority over federal admiralty law in violation of longstanding precedent and the Supremacy Clause of the U.S. Constitution. ▯

Eleventh Circuit reverses summary judgment in favor of insurer for yacht owner's alleged breach of captain's warranty

Serendipity at Sea, LLC v. Underwriters at Lloyd's of London, 56 F.4th 1280 (11th Circuit, 2023)

This case arises from an insurance coverage dispute for a yacht that was destroyed by Hurricane Dorian in the Bahamas. In late July of 2019, the insured yacht owner moved the yacht SERENDIPITY from Cape Canaveral, Florida to Great Abaco Island in the Bahamas. When the vessel arrived in the Bahamas, the owner and a licensed captain secured the vessel and the owner returned to Florida in early August. In the owner's absence, two licensed captains occasionally checked on the yacht.

On August 23, 2019, what later became Hurricane Dorian began developing in the Atlantic Ocean. That same day, the owner consulted with both captains, and determined that the safest place for the vessel to weather the storm, which was predicted to hit Central Florida, was in the Bahamas. The captains secured the vessel where it was docked; however, Dorian was particularly erratic, and the forecast changed quickly and frequently. On August 29, 2019, Dorian was predicted to miss the Bahamas, but the next day it strengthened into a category five hurricane and made landfall on Great Abaco destroying the yacht.

After the vessel's insurer denied coverage for the total loss of the yacht, the insured owner sued. Coverage was denied on the grounds that the insured owner breached the "captain warranty" by not employing a full-time licensed captain and that this breach increased the hazard to the yacht. The subject policy language required the insured "[w]arranted a full time licensed captain is employed for the maintenance and care of the vessel and is aboard while underway." The insurer argued that a full-time captain would have navigated the yacht back to Florida when the storm was announced. Therefore, the failure to employ a full time captain increased the hazard to the yacht. While both the captains that had assisted the owner were licensed, neither were employed as "a full-time captain."

The district court ruled in favor of the insurer on competing motions for summary judgment. The court found that the captain warranty provision was unambiguous, and that there was no factual dispute concerning whether the owner breached the warranty or that the breach increased the hazard to the yacht.

On appeal, the Eleventh Circuit reversed the district court. The Eleventh Circuit held that the captain warranty provision of the policy was ambiguous. The clause was subject to at least two interpretations: (1) that the insured was required to hire a person whose full-time profession is that of a captain but who only works for Serendipity, LLC part time, or (2) that the insured hire a person to work on the yacht exclusively as a full-time captain for the vessel.

Despite construing the policy language in favor of the insured, the court ultimately found that the insured owner breached the captain warranty. The captains that assisted with the yacht were not working full-time as captains for the insured or anyone else. After finding that there was a breach, the court determined there were also disputed facts as to whether the breach of the captain warranty increased the hazard to the yacht. The insured owner produced meteorology and news reports that Hurricane Dorian was consistently predicted to hit Central Florida, and that it would have been "an unnecessary hazard to attempt to move the vessel" due to the storm's unpredictability. This evidence directly contradicted the insurer's expert witness who claimed it was advisable to navigate the yacht back to Florida. The Eleventh Circuit remanded the case for further proceedings consistent with its findings. ▯

Fishing Regulation

Fifth Circuit strikes rule requiring GPS monitoring of charter-boats in Gulf of Mexico

Mexican Gulf Fishing Co. v. U.S. Dept. of Commerce, 2023 WL 2182268 (5th Cir. Feb. 23, 2023)

On July 21, 2020, the National Marine Fisheries Service and National Oceanic and Atmospheric Administration (collectively referred to as "NMFS") issued their Final Rule on Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries ("Final Rule"). The Final Rule included three requirements. First, the "GPS-tracking requirement" required that charter-boat owners install NMFS-approved Vessel Monitoring System ("VMS") hardware and software capable of transmitting the vessel's GPS location at least hourly, twenty-four hours a day, every day of the year. Second, the "business-information requirement" required that charter-boat owners submit a report to NMFS before offloading any fish detailing harvested and discarded fish, and "other information," including information about the NMFS permit holder, vessel, location fished, fishing effort, discards, and socio-economic data. Third, the "trip-declaration requirement" required the submission of a declaration to NMFS indicating the purpose of the trip, such as for-hire recreational fishing, or non-fishing.

As a result of the issuance of this rule, a group of charter-boat owners from the Gulf Coast brought a class action suit against NMFS and NOAA challenging the GPS-tracking requirement as exceeding the authority granted to the agencies under the Magnuson-Stevens Act, violative of the Fourth Amendment's prohibition against unlawful searches and seizures, and arbitrary and capricious under the Administrative Procedure Act ("APA"). On cross-motions for summary judgment, the Eastern District of Louisiana ruled in the agencies' favor. The charter-boat owners appealed, principally challenging the GPS-tracking requirement. The Fifth Circuit reversed, holding that the Final Rule was not statutorily authorized, ran afoul of the APA, and likely violated the Fourth Amendment.

As to statutory authorization, the court conducted a *Chevron* analysis and held that the Magnuson-Stevens Act's ("the Act") grant of authority to develop fishery management plans did not empower the GPS tracking requirement because the VMS was not "equipment" under the statute as it is not a device that facilitates enforcement of the Act. The court also noted that charter-boat operators are already required to report the information the GPS-tracking requirement was designed to collect, making the requirement duplicative and therefore not in furtherance of enforcement of the Act.

The GPS-tracking requirement also exceeded the authority granted under the Act because its benefits did not outweigh its costs. The court found that the benefits of the VMS system did not outweigh the $3,000 initial cost and $40-$75 per month charges that would be shouldered by charter-boat operators who generate approximately $26,000 per year. In addition to the unnecessary economic burden, demanding that charter-boat operators transmit their exact location to the government every hour of every day forever, regardless of why they are using the vessel, is unnecessary for the conservation and management of the Gulf fishery.

Having held that the Final Rule was unlawful based on the plain language of the Act, the Court noted, without ruling on the issue, that the Final Rule likely violated the Fourth Amendment because the GPS-tracking requirement appeared to be a search and was presumed unreasonable because no warrant existed for same. While the Government argued that there was a history of close regulation such that the charter-boat owners did not have a reasonable expectation of privacy, the court instructed that "fishing industry" too broadly defined the relevant scope and that the proper group to consider was the "charter boat fishing industry." Finding that no evidence existed to show that the charter-

boat fishing industry was closely regulated, the court relayed its "serious concerns that the GPS requirement violates the Fourth Amendment."

The court also held that the GPS-tracking requirement was arbitrary and capricious in violation of the APA. The agencies failed to address personal privacy concerns raised in the notice-and-comment process. The agencies also failed to adequately justify the GPS-monitoring requirement's costs and benefits in light of the duplicative data collected and the lack of any indication that existing data collection methods produced unreliable information.

Finally, the court addressed the business-information requirement, finding that it violated the APA because the Final Rule was not a logical outgrowth of the proposed rule. The proposed rule used the term "other information" and included socio-economic information in that term. The Final Rule, however, included a list of five purely economic data points that were not previously described in, and could not have been anticipated through, the proposed rule. The fact that the proposed rule contemplated socio-economic data was not sufficient to constitute notice of the purely economic data sought in the Final Rule.

The court reversed and rendered judgment for the charter-boat owners and held unlawful and set aside the Final Rule. ▯

Mary Carter Agreements

Federal district court reaffirms the continued validity of Mary Carter Agreements

In re M/T Stolt Flamenco, 2023 WL 1967952 (S.D. Tex. Feb. 3, 2023)

A Mary Carter Agreement is generally defined as a settlement agreement which provides the settling defendant some reimbursement or recovery from funds later received by the claimant from other defendants. *See Wilkins v. P.M.B. Systems Engineering, Inc.*, 741 F.2d 795, n.2 (5th Cir. 1984).

The case of *In re M/T Stolt Flamenco* arises from a boating accident in June of 2020 resulting in the death of one boater and injury to his fellow fisherman passenger. Dewey Monroe and Donald Currie were fishing in a 20-foot aluminum skiff near the Houston Ship Channel. The claimants alleged that the wake of two passing ships, one inbound and one outbound, caused their skiff to capsize resulting in the death of Monroe and injuries to Currie. Monroe's estate and Currie filed suit against the ships in Texas state court and both the ship owners–Stolt and Hammonia–filed limitation actions in the Southern District of Texas which were later consolidated.

Before trial, Stolt settled with the claimants who dismissed Stolt and filed amended stipulations seeking to remand the proceedings to state court with respect to their remaining claims against Hammonia. Hammonia challenged the remand to state court on the grounds the settlement between the claimants and Stolt was a Mary Carter Agreement and should be struck as void on public policy grounds. The settlement agreement entered into between Stolt and the claimants provided that Stolt would share in the first $400,000 of the claimant's recovery against Hammonia on a 50/50 basis. Hammonia argued that this settlement agreement was essentially just a contribution claim by Stolt against Hammonia and that they should remain in federal court to assert their own contribution claim against Stolt.

The court found that Hammonia lacked standing to challenge the settlement agreement between the claimants and Stolt. They were not a party to the agreement, and it could only be set aside upon Hammonia's showing of a deprivation of a substantive or procedural right. Hammonia argued it was deprived of the right to assert a contribution claim against Stolt. However, the court reasoned that Hammonia would never be obligated to pay more than its proportionate share of fault for the casualty under the Supreme Court's holding in

McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994). As such, they would never have a valid contribution claim against a settling co-tortfeasor and were not deprived of any substantive right justifying invaliding the settlement agreement between Stolt and claimants.

The court went further in its analysis, evaluating the validity of the settlement agreement under both Texas state law and under federal maritime law. Under Texas law, Mary Carter type settlement agreements are invalid as against public policy where the settling defendant remains a party to the lawsuit. In this case, Stolt was dismissed and was no longer a party. Therefore, the settlement agreement was not void against public policy under Texas state law.

The district court relying heavily on prior Fifth Circuit precedent addressing Mary Carter Agreements, including *Lexington Ins. Co. v. S.H.R.M. Catering Services, Inc.*, 567 F.3d 182 (5th Cir. 2009), found the settlement agreement was not void under federal maritime law. The court rejected the argument that the settlement amounted to a contribution claim against Hammonia. While it was clear from the court's opinion that it did not think highly of the "perverse financial incentive" structure created by Mary Carter Agreements, binding Fifth Circuit precedent upholds such settlement agreements where they are not a wholesale assignment of an entire claim requiring a second lawsuit.

The court noted that, opposite of Texas state law, it does not matter under federal maritime law whether or not the settling co-tortfeasor remains a party to the litigation. The Fifth Circuit has previously upheld Mary Carter type settlements under both circumstances, where settling defendant was dismissed or remained a party. Ultimately, the court held that the subject settlement agreement between Stolt and the claimants did not deprive Hammonia of any substantive or procedural rights and was enforceable under both Texas and federal maritime law. ▯

Federal Law Update

Congress Amends the Shipowner's Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.* to exclude "covered small passenger vessels"

On December 23, 2022, President Biden signed the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 into law. PL 117-263, December 23, 2022, 136 Stat 2395. While the overwhelming majority of the lengthy legislation addresses financial appropriations related to defense spending, the final "Division K" of the bill's eleven divisions, entitled the "Don Young Coast Guard Authorization Act of 2022," contains several significant amendments impacting the maritime sector. This includes Section 11503, which amends the Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.* ("Limitation Act"), to specifically exclude its application to "covered small passenger vessels" while maintaining its application for owners and operators of "seagoing vessels and vessels used on lakes and rivers or in inland navigation." § 30501(a) & (b).

While the Limitation of Liability Act has been no stranger to criticism over the years, this most recent amendment was originally introduced by Senator Dianne Feinstein (D-CA) and Representative Salud Carbajal (CA-24) in 2021 as result of the fire aboard the dive boat CONCEPTION off the coast of California in September 2019 which resulted in the loss of thirty-three passengers and one crewmember. The originally proposed legislation, entitled the "Small Passenger Vessel Liability Fairness Act of 2021" required, in part, for the "Coast Guard to promulgate rules that require owners or operators of small passenger vessels to provide just compensation in any claim for which they are found liable." Further, the legislation would have been retroactive to be effective as of the date of the CON-

CEPTION casualty discussed above. However, the final legislation passed by congress and signed into law on December 23, 2022, is more limited in scope, essentially carving small passenger vessels out of the Limitation Act, among other changes discussed below, and, significantly, is not retroactive in effect.

The primary amendments to the Limitation Act are contained in Sections 30501 and 30502 entitled "Definitions" and "Application" respectively. Section 30501(1)(A) now defines a "covered small passenger vessel" as a "small passenger vessel, as defined in [46 U.S.C. § 2101] that is (i) not a wing-in-ground craft; and (ii) carrying – (I) not more than 49 passengers on an overnight domestic voyage; and (II) not more than 150 passengers on any voyage that is not an overnight domestic voyage..." The definition of an "owner" remains unchanged. The "Application" section of the Limitation Act, section 30502, now includes subsection (b), which reads "Exception- This chapter (except for section 30526) shall not apply to covered small passenger vessels." As such, the amendment defines a "covered small passenger vessel" with reference to 46 U.S.C. § 2101 and with further consideration for the number of passengers being "carried" based on the type of voyage, overnight or not overnight, and then, excludes that defined subcategory of "covered small passenger vessels" from the Limitation Act.

In addition to carving out small passenger vessels, the other significant substantive change to the Limitation Act is to former Section 30508 (now 30526) which previously addressed contractual time limits for bringing notice of a claim and an action against a seagoing vessel. Section 30526 now adds "covered small passenger vessels" to these provisions setting out the permissible minimum claim time limits and provides that passengers aboard covered small passenger vessels must have no less than two years to provide notice or bring an action after injury or death. Therefore, those operating a covered small passenger vessel may now not contractually limit the time to bring a claim or notice of a claim against them to less than two years from the date of incident. The amendment does not reference or address its impact or relationship to 46 U.S.C. § 30106, and its three-year time limit for bringing maritime tort claims for injury or death. The Limitation Act amendments also renumber all sections following 30502, and, specifically, prior sections 30503 through 30512 are now renumbered consecutively as 30521 through 30530.

From a practitioner's perspective, the amendment appears likely to create many questions in the short term. For example, no reference is made to Rule F of the Supplemental Rules for Admiralty or Maritime Claims or whether the concursus procedure remains available to those operating "covered small passenger vessels." Additionally, it is unclear what result these amendments will have on available marine insurance coverage for owners and operators of "covered small passenger vessels" who will no longer have the benefit of the Limitation Act's protection. Given the recent adoption, there does not appear to be any judicial guidance on interpreting the amendments at the time of drafting; however, the ultimate impact of carving out "covered small passenger vessels" from the Limitation Act will likely take years to fully evaluate.

Source of Amendment:

PL 117-263, December 23, 2022, 136 Stat 2395, James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, (11) Division K "Don Young Coast Guard Authorization Act of 2022" Title CXV – Maritime, Subtitle A- Vessel Safety, Sec. 11503. ▯

Congress enacts further safety and operational requirements for "DUKW" boat operators

In the wake of several recent deadly casualties involving DUKW amphibious passenger vessels ("duck boats"), Congress recently enacted legislation providing additional operational and equipment safety requirements for their future use.

The new regulations require duck boats: to contain additional passive reserve buoyancy; to have defined limiting environmental conditions, including weather conditions, in which duck boats may or may not operate as a limiting condition in the certificate of inspection; have defined requirements for proceeding to safe harbor in high wind conditions; to maintain and monitor a weather radio; inform passengers not to wear a seatbelt during waterborne operations with crew confirmation of this instruction including maintaining a logbook documenting the instruction; and finally further and additional mandatory training for duck boat crews.

The USCG is instructed to initiate rulemaking within six months of passage of the bill and for implementation of regulations within eighteen months. The legislation also includes interim requirements that within 180 days operators of duck boats must remove overhead canopies during waterborne operation or install canopies that do not obstruct horizontal or vertical escape, require passengers to wear PFDs, reengineer the vessels to close all unnecessary through-hull penetrations, and to install additional bilge pumps and lighting.

The new regulation was included in the Don Young Coast Guard Authorization Act of 2022, a part of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, signed by President Biden on December 23, 2022.

Source of regulation:

PL 117-263, December 23, 2022, 136 Stat 2395, James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, (11) Division K "Don Young Coast Guard Authorization Act of 2022" Title CXV – Maritime, Subtitle A- Vessel Safety, Sec. 11502. Requirements for DUKW Amphibious Passenger Vessels. □

U.S. Coast Guard Update

USCG increases OPA 90 limits, 87 Fed. Reg. 78860, Docket Number USCG 2022-0252

Effective March 23, 2023, the USCG increased the limits of liability under the Oil Pollution Act of 1990 ("OPA 90") to reflect the increase in the Consumer Price Index since the limits were last set in 2019. The new limits reflect a 7.91 percentage increase over the prior limits, which are required to be adjusted every three years under OPA 90 in order to preserve the "deterrent effect and 'polluter pays' principle" embodied in OPA 90. □

USCG issues MSIB on Small Passenger Vessel fires, MSIB Number: 05-23

Citing several fires aboard small passenger vessels over the last twelve months, on April 6, 2023, the USCG issued Marine Safety Information Bulletin Number 05-23 highlighting the need for a renewed focus on fire safety. The USCG is initiating a two-fold effort of self-assessment by owners and operators, including a fire safety and equipment checklist, as well as a USCG led concentrated inspection campaign.

The Fire Safety checklist is available at: https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/MSIB/2023/MSIB-05-23_Fire_Safety_on_Small_Passenger_Vessels.pdf □

State Law Update

Georgia Court holds motorized watercraft are not 'motor vehicles' under uninsured motorist statute

***Kelley v. Cincinnati Insurance Company*, 876 S.E. 2d 51 (Ga. App. 2022)**

This case arises from a June 2019 recreational boating collision on the Coosa River in Northwestern Georgia. Plaintiff Kelley was a passenger in a vessel struck by another vessel operated by Ellison while rounding a bend in the river. As a result of the collision, Kelley suffered significant physical injuries resulting in over

$500,000 in medical expenses. Ellison was cited for violation of federal and state boating regulations. At the time of the collision, Ellison had a liability insurance policy for his vessel with limits of $100,000 which was exhausted by payments to Kelley and the other boat owner. Kelley also had several policies of insurance with Cincinnati Insurance Company ("Cincinnati") including an automobile policy and a personal watercraft policy.

After Ellison's insurance policy limits were exhausted, Kelley sought additional coverage from Cincinnati under his own underinsured/uninsured motorist and underinsured/uninsured watercraft polices. Cincinnati denied coverage based on exclusions in the policies applicable because Ellison had separate liability coverage on his vessel. Kelley and Cincinnati filed competing motions for summary judgment, and the trial court ruled in favor of Cincinnati. On appeal, Kelley did not challenge Cincinnati's coverage position under the policies, but rather, argued that Georgia's uninsured motorist statute, OCGA § 33-7-11 ("UM Statute"), required coverage. The Court of Appeals of Georgia's review was limited as to whether coverage was required by statute rather than under Kelley's insurance policies. Georgia's UM statute requires an auto or motor vehicle policy to include liability coverage for injury or property damage to an "insured under the named insured's policy sustained from the owner or operator of an *uninsured motor vehicle*." OCGA § 33-7-11(a)(1) (emphasis added).

The Court of Appeals noted that the term "uninsured motor vehicle" was not specifically defined in the statue but based on the plain language of the statute and dictionary definitions of "motor vehicle" this term would not encompass a motorized watercraft. The Kelleys argued the court should interpret the UM statute in a manner that would effectuate its remedial purpose and provide coverage and argued that other statutory provisions in Georgia would support a finding that a watercraft should be included within the definition of "motor vehicle." However, the court rejected these arguments noting that elsewhere in the same statue there were separate definitions for "marine protection and indemnity insurance" and that broader definitions of motor vehicle from different chapters of the Georgia Code were not determinative. The court also referenced case law finding motorcycles and a farm tractor to be motor vehicles, but held these cases do not require a broader interpretation of "motor vehicle" in this instance.

As such, the Court of Appeals of Georgia affirmed the trial court's grant of summary judgment, holding "we conclude that the plain and ordinary meaning of 'uninsured motor vehicle' is limited to land vehicles and does not include motorized watercraft. Accordingly, UM benefits pursuant to OCGA § 33-7-11 are not available for losses resulting from collisions between motorized watercraft on a public waterway. Therefore, we affirm the trial court's order granting Cincinnati's motion for summary judgment and denying the Kelleys' competing summary judgment motion."

Following the Court of Appeals affirmance of the trial court's decision, Kelley appealed to the Supreme Court of Georgia in July 2022. The appeal was unanimously denied by the Supreme Court of Georgia on March 7, 2023 (*See* S22C1274, Certiorari -Writ Denied, "All the Justices concur." March 7, 2023). Therefore, a motorized boat is not considered a 'motor vehicle' or an 'uninsured motor vehicle' under Georgia's UM statute definition and "UM benefits pursuant to OCGA § 33-7-11 are not available for collisions between motorized watercraft on public waterways in Georgia." ▯

BOATING BRIEFS is a publication of
The Maritime Law Association of the United States,
Committee on Recreational Boating.

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