BOATING BRIEFS

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Updates and Developments on the M/V Dali Following Owner and Manager's Petition for Limitation of Liability

In re Grace Ocean Private Limited, et al., **Case No. 1:24-cv-00941 (D. Md. April 1, 2024).**

The prior edition of *Boating Briefs* took note of the tragedy that occurred on the morning of March 26, 2024, whereupon the M/V Dali allided with Maryland's Francis Scott Key Bridge—a key piece of Interstate 695—resulting in deaths, injuries, and devastation to the local and regional business, logistics networks, and economies.

Shortly after the Key Bridge disaster, Grace Ocean Private Limited as owner of the M/V Dali, and Synergy Marine Pte Ltd. as manager of the M/V Dali, filed a Rule F limitation of liability petition in Maryland federal court. Judge James K. Bredar is assigned the case; Judge Bredar was chief judge for the district and has since transferred to senior status, presumably to focus solely on the limitation proceeding.

The Court set a September deadline for claims, and over 45 claims have been filed. The Court will determine the exoneration question first before moving to the question of petitioners' liability to the individual claimants. Exoneration will be hotly contested given damages running into the billions. Congressman John Garamendi (D-CA) has introduced the "Justice for Victims of Foreign Vessel Accidents Act" which, if enacted, would increase the limitation to ten (10) times the dollar value of the vessel and its cargo for foreign-flagged vessels. The Act would apply retroactively to the Key Bridge incident.

A number of private entities claiming economic losses have filed suit through a single class action, which will likely test the *Robins Dry Dock* economic loss doctrine for negligence claims, though these entities have filed public nuisance and intentional tort claims as well. The Court is also likely to break new ground on the interplay of class actions within a Rule F proceeding, for which little case law exists. The question will be whether the Rule F procedural rules have the unintended consequence of barring class actions against ship owners.

The NTSB has not yet published its final report, but the Department of Justice's claim provides the most detailed explanation so far of the incident. The claim alleges as follows:

1. The ship had known and longstanding vibration problems which caused damage to the ship's electrical systems.

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:

2. The first blackout was caused by the failure of a transformer which had suffered severe vibration problems. A cargo turnbuckle was inappropriately welded to the transformer to dampen the vibrations.
3. A second transformer should have automatically taken over to provide power after the blackout, but the switch was set to "manual" rather than "automatic". As a result, the ship lost all power, propulsion, and steering.
4. The crew was able to restore power through the second transformer manually, but the flushing pumps which supplied fuel to the generators had already shut off due to the first blackout. DOJ alleges that these "flushing pumps" were not designed to automatically recover from a blackout, and that "supply and booster pumps" which recover automatically should have been used in place.
5. As a result, the generators did not receive sufficient fuel to continue operating, and shut down approximately 65 seconds later. The generators received a small amount of fuel from a pneumatic pump which automatically started, but this provided insufficient fuel pressure to keep the generators running.
6. Following the first blackout, the pilot issued an emergency order to release the port anchor, approximately two minutes before the allision. However, the anchor was not ready for immediate release, and was not dropped until less than half a ship's length from the bridge.

The preceding is merely a summary of the DOJ's claim allegations, and we expect petitioners will provide a robust defense in due course.

The largest claims made thus far are as follows:

1. $2 Billion by the State of Maryland, which owned the bridge and makes claim for various recovery costs and loss of revenue.
2. $350 Million by ACE, which insured the bridge, subrogating the loss payment they made to Maryland;
3. $100 Million by the United States for recovery costs. This constitutes approximately $74 million for the Corps of Engineers, $22 million for the Coast Guard, and smaller amounts for the Navy, MARAD, NOAA, the DOL, and CERCLA and OPA 90 claims.
4. $40 Million by Markel, insurer of Ports America, for business interruption damages.
5. Class action suit by private entities suffering economic losses.
6. Cargo interests have made claims for damage, and indemnity for general average.
7. The estates of the six highway workers who died in the incident have also brought claim.

Nearly all claimants seek punitive damages as well. Petitioners have provided an interim stipulation of value requesting a limitation fund of $43.7 Million.

Boating Briefs will continue to track the litigation surrounding the M/V Dali as it develops.

Jet Ski Rental Company Entitled to Limitation of Liability Where Intentional Act of Customer Caused the Death of Another

In re Luxury Jet Ski Rentals LLC, No. 22CV2009-LL-JLB, 2024 WL 3367530 (S.D. Cal. July 9, 2024).

Mohammad Farhan Mohammad (the "Decedent") and Adian H. Ali ("Ali") rented jet ski from Luxury Jet Ski Rentals, LLC ("LJR"). During the course of her rental, Ali operated her jet ski at excessive and unsafe speeds, and she used her jet ski to spray and splash other jet skis around her—including the Decedent's jet ski. When Ali went to splash the Decedent's stationary jet ski, she collided into it, sending herself, the Decedent, and two passengers into the water. Unfortunately, Decedent suffered fatal injuries and died as a result of the collision.

Following the Decedent's death, LJR filed for limitation of liability in the United States District Court for the Southern District of California, which sought to limit LJR's liability to $9,592.64—the value of the jet ski Decedent was operating at the time of the collision.

In response, Farhan Hammad (Decedent's father), Ayman Mahmmad (Decedent's brother), Noor Tashtosh (Decedent's sister)—individually and as guardian *ad litem* of M.F., Decedent's minor niece and one of the passengers thrown into the water—Kardinia Almosawi (Decedent's sister), and Maytham Farouq (Decedent's nephew) (collectively the "Claimants") filed an answer to the petition for limitation of liability. The Claimants, on behalf of themselves and the Decedent, also filed claims of negligence and gross negligence against LJR and Ali. In turn, LJR counterclaimed against several Claimants, and also asserted its own claims against Ali for breach of contract, express indemnity and defense, implied indemnity, contribution, and declaratory relief. The parties subsequently filed dispositive motions.

In a lengthy opinion, the court addressed the parties' various claims against one another, including LJR's claims against Ali. As relevant to the issue of LJR's petition for limitation of liability, the court found that Ali's intentional, reckless operation of the jet ski was not foreseeable to LJR because, prior to renting the jet ski from LJR, Ali signed a waiver wherein she expressly acknowledged and represented that she would not operate the jet ski in a reckless manner. In line with this finding, the court found that Ali's intentional conduct was a superseding cause of the collision that caused Decedent's death, and therefore, because LJR's conduct was not a proximate cause of the collision, the court ruled that LJR was entitled to limitation of liability as a matter of law.

Marine Insurance

Court Holds Long-Standing Doctrine of *Uberrimae Fidei* Invalidated Marine Insurance Policy.

Musashi AZ LLC v. Accelerant Specialty Ins. Co., No. 23-22781-CIV, 2024 WL 3445321 (S.D. Fla. May 30, 2024)

Musashi AZ LLC ("Owner"), owned a 2021 47' Azimut Verve yacht (the "Vessel"), which was insured under a policy issued by Accelerant and Lloyd's of London ("Accelerant"). Owner purchased the Vessel for $1,575,000, but the Vessel was insured for $1,850,000. On February 28, 2023, the Vessel caught fire and was declared a total loss. Owner filed a claim under the insurance policy, but Accelerant denied coverage, citing the increased purchase price and claiming that such a misrepresentation was material to the underwriting of the policy.

Owner sued Accelerant in the United States District Court for the Southern District of Florida claiming that Accelerant breached the contract of marine insurance by failing to pay under the policy. Accelerant counterclaimed, asserting that the policy was void *ab initio* due to Owner's misrepresentation of the true purchase price of the Vessel.

Accelerant subsequently filed a motion for summary judgment, which Owner opposed. In granting Accelerant's motion, the Court evaluated the materiality of Owner's misrepresentation of the Vessel's purchase price—which Owner represented to be $2,000,000 on the initial insurance application. The court determined that the misrepresentation of the purchase price was material to the risk assumed by the insurer. Testimony from Accelerant's representative indicated that the insurer would not have insured the yacht for more than its purchase price had the true value been known. Accordingly, the court found that Owner breached its duty under the doctrine of *uberrimae fidei* by failing to disclose the accurate purchase price. This breach rendered the insurance policy void *ab initio*.

Fifth Circuit Holds that State Law Can Serve as a Source of Potential Liability Sufficient to Compel the Removal of a Wreck Where Such Removal is "Compulsory by Law"

Wapiti Energy, L.L.C. v. Clear Spring Prop. & Cas. Co., 106 F.4th 420, 425 (5th Cir. 2024).

In July of 2024, the Court of Appeals for the Fifth Circuit had occasion to review the parameters of a wreck removal clause. Wapiti Energy, LLC ("Wapiti") was the owner of a 155-foot barge (the "Barge") that was permanently moored near Myrtle Grove, Louisiana. The Barge was insured by a protection and indemnity policy from Clear Spring Property and Casualty Company ("Clear Spring"). Importantly, the policy covering

the Barge contained a provision covering wreck removal expenses when wreck removal was compulsory by law.

Shortly after the inception of the policy, Hurricane Ida caused the Barge to break free of its moorings and drift several miles away from its berth. Ultimately, the Barge ran aground in Barataria Bay. Wapiti notified Clear Spring of the incident, and Clear Spring dispatched a surveyor to the Barge, who determined that the cost to remove the Barge to be approximately $900,000.00.

The owner of the property where the Barge ran aground contacted Wapiti and inquired into Wapiti's removal efforts. Wapiti advised the owner that it was in the process of removing the Barge, and the owner requested that Wapiti provide updates on the removal proves. Wapiti then retained a contractor to remove the Barge at a cost of $926,840.32, and the Barge was removed successfully. Although Clear Spring tendered $265,000.00 to Wapiti pursuant to the Barge's hull policy, Wapiti asserted that it was entitled to full reimbursement of the amounts it paid to remove the Barge under the protection and indemnity policy's wreck removal clause. Clear Spring disagreed, and litigation ensued.

In district court, Clear Spring argued that coverage for wreck removal had not been triggered since the removal of the Barge was not compulsory by law. The district court agreed and granted summary judgment in Clear Spring's favor.

On appeal to the Fifth Circuit, the court noted its prior holding in *Progress Marine, Inc. v. Foremost Insurance Company, Grand Rapids, Michigan*, 642 F.2d 816 (5th Cir. 1981), wherein it had interpreted the meaning of the phrase "compulsory by law" in the context of wreck removal clauses. The court explained that such a phrase was "to be interpreted pursuant to its plain meaning and concluded that that the wreck removal at issue there was compulsory because the owner of the vessel faced criminal penalties." The holding in *Progress Marine, Inc.* was further expanded in *Continental Oil Company v. Bonanza Corporation*, 706 F.2d 1365 (5th Cir. 1983), wherein the court held that wreck removal was compulsory by law where "a reasonable owner, fully informed, would conclude that failure to remove would likely expose him to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal." Notably, the court recognized that its interpretation of the phrase was much broader than those of the Second Circuit, which limited wreck removal coverage to instances where there was an express order for wreck removal by a government entity.

Despite the court's prior holdings in *Progress Marine, Inc.* and *Continental Oil Company*, an open question remained: Can state law be the source of potential liability to a vessel owner such that wreck removal becomes compulsory under prior precedent? The court answered this question in the affirmative. It held that, because marine insurance cases are governed by state law absent a controlling federal rule, "[s]tate law thus supplements the universe of theories of liability that may compel a reasonable vessel owner to remove a wreck."

Turning to the facts before it, the court found that Wapiti was compelled to remove the Barge as Wapiti was at risk of a state-based possessory action by the owner of the property upon which the Barge ran aground: "the stranding of the [Barge] on the property of a third party immediately exposed [Wapiti] to at least the cost of the vessel's removal under Louisiana's possessory action." Accordingly, the court reversed the entry of summary judgment in favor of Clear Spring and remanded to the district court for further proceedings.

Federal Admiralty Law Did Not Compel Application of Florida Law to Tort Claims Where Choice-of-Law Clause in Marine Insurance Policy Designated the Law of New York

Liermo v. Nat'l Cas. Co., No. 23-CV-23045, 2024 WL 2113765 (S.D. Fla. May 10, 2024).

The owner ("Owner") of *M/Y Advantage*, a 2009, 72' Pershing Sport Motor Yacht (the "Vessel") sued National Casualty Company ("NCC")—the insurer of the Vessel—in the United States District Court for the Southern District of Florida alleging that NCC breached its contract of marine insurance, negligently adjusted the loss, breached its duty of good faith and

fair dealing under the policy, and acted in bad faith in violation of Florida law.

The facts, as Owner alleged in the complaint, were relatively straightforward: On or about July 7, 2022, while operating off the coast of the Bahamas, a fire broke out in the Vessel's engine room, causing extensive damage to the Vessel—all of which was covered under the insurance policy. Although owner timely notified NCC of the loss, NCC failed to send a marine surveyor to survey the damage. NCC subsequently failed to consider whether the Vessel should be deemed a constructive total loss under the policy.

NCC moved to dismiss all but Owner's claim for breach of contract, contending that the policy's choice-of-law clause required the application of New York law, and under New York law, Owner could not bring claims for the negligent adjustment of the loss, breach of good faith and fair dealing, and bad faith under Florida law. The court agreed.

At the outset, the court determined that Owner's claims were subject to the policy's choice of law provision as those claims—negligence, breach of good faith and fair dealing, and bad faith in violation of Florida law—were all premised on an underlying coverage dispute. Next, the court addressed whether the law of New York or the law of Florida applied to the policy. Owner recognized that maritime law applied, but Owner argued that the law of Florida should fill the gaps because Owner brought his claims pursuant to the court's diversity jurisdiction. Notably, Owner failed to argue that the choice of law clause naming the law of New York was unenforceable. Without resorting to the Supreme Court's recent decision in *Raiders Retreat*, the court found that the policy's choice of law provision required the application of New York law regardless of any conflict of laws principles, and therefore, the parties clearly agreed for New York law to apply.

After determining that New York law applied to the underlying coverage dispute to the extent not covered by maritime law, the court evaluated Owner's claims of negligence, breach of good faith, and bad faith. With respect to negligence, the court determined that such a claim was premised on NCC's contractual obligations, and under New York law, "a contract does not create a duty (for negligence purposes) between the contracting parties unless that duty existed separately from the contract's formation." Accordingly, the court determined that Owner's negligence claim failed as a matter of law.

Turning next to Owner's claim that NCC breached its duty of good faith and fair dealing, the Court looked to the maritime doctrine of *uberrimae fidei*. Although the longstanding maritime doctrine is traditionally used by insurers to defeat coverage in the event of a material misrepresentation by the insured, the doctrine also imposes a duty of utmost good faith on the insurer. Accordingly, the court declined to dismiss Owner's claims for breach of good faith.

Lastly, with respect to Owner's claim of bad faith—which Owner premised on the application of Florida law—the court noted that the application of New York law was fatal to Owner's claim of bad faith, as it was well settled in New York that "'there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance policy."

Jurisdiction

Fourth Circuit Finds Admiralty Jurisdiction Where Barge Struck Cable in Residential Cove

Baltimore Gas & Elec. Co. v. Coastline Commercial Contracting, Inc., 107 F.4th 264 (4th Cir. 2024).

In 2019, owners of waterfront property in Pasadena, Maryland, retained Coastline Commercial Contracting, Inc. ("Coastline"), to extend their existing pier into the cove. As part of the pier extension, Coastline sent a barge to excavate the cove and install new pilings. As Coastline was transporting the barge, the barge struck a high-voltage cable owned by Baltimore Gas and Electric Company ("BGE") which caused a loss of power to the surrounding area and $1.3 million in damages.

Invoking admiralty jurisdiction, BGE filed suit against the owners and Coastline in federal district court alleging that Coastline failed to exercise reasonable care in performing the work, and that the owners were negligent in failing to notify Coastline of the cable's location.

The owners and Coastline moved to dismiss BGE's complaint citing a lack of admiralty jurisdiction. In support, the owners and Coastline asserted that the cove where the damage occurred was not part of the navigable waters of the United States "because it could not accommodate commercial navigation and was not susceptible of being used as a highway for commerce." They further argued that the occurrence did not bear a significant relationship to traditional maritime activity because the barge was only present in the cove to extend an existing pier. The district court agreed with these arguments and dismissed BGE's complaint for lack of admiralty jurisdiction.

On appeal to the Fourth Circuit, the Court of Appeals for the Fourth Circuit held that the district court had employed the incorrect standard. Noting that a party seeking to invoke admiralty jurisdiction over a tort claim must demonstrate that the wrong occurred on a navigable waterway and bear a significant relationship to maritime activity, the court further described the application of that test to the facts before it.

With respect to navigability, the court explained that tidal waters, such as the cove, are unquestionably navigable for the purposes of admiralty jurisdiction. Even though the district court recognized that the cove was a tidal water for the purposes of navigability, it found the navigability element lacking on the basis that it was not susceptible for use in commercial activities. This analysis, per the court, was incorrect. First, the court explained that the cove was lined with commercially built piers, and moreover, Coastline's barge was engaged in the commercial activity of pier building when it struck the cable. Simply put, the fact that residential homes lined the cove had no effect on whether it was a navigable waterway: "A jurisdictional rule that required courts to assess the residential-ness versus commercial-ness—or the depth at each point along a continuous water route—would be unworkable and generate a patchwork of state law jurisdiction and admiralty law jurisdiction along the same body of water."

With respect to the connection test, the court explained that admiralty jurisdiction is not dependent on the tort's actual effects on maritime commerce, but rather, the tort's general features and its potential to disrupt maritime commerce. In this particular instance, the court found that there was potential to disrupt maritime commerce: "Electricity and water are a dangerous combination. The striking of an underwater electric cable could plausibly lead to an electrical fire, an explosion, or electrocution of those on board a vessel or in the waters around. And in response to such exigencies on navigable waters, the Coast Guard and other commercial rescue vehicles would be called upon to render aid."

Accordingly, after finding admiralty jurisdiction, the court reversed the district court's dismissal of the complaint and remanded for further proceedings.

State Law Updates

New Hampshire Amends Law Concerning Marine Accident Reporting Requirements

NH LEGIS 56 (2024), 2024 New Hampshire Laws Ch. 56 (H.B. 1046)

On June 14, 2024, the Governor of New Hampshire signed HB 1046 into law, which amended the marine accident reporting requirements set forth in N.H. Rev. Stat. Ann. § 270:1-a(I). Under that statute, operators of vessels who know or should have reasonably known that he or she has been involved in any accident involving death, personal injury, or property damage are required to (1) immediately stop the vessel at the scene of the accident; (2) render necessary assistance to the occupants of the other vessel; and (3) provide the operator and/or owner's information to those injured in the accident. The vessel operator must also report the accident to the department of safety within fifteen (15) days of the accident. Previously, and until January 1, 2025, the owner—to the extent that the owner was not the operator—is required to report the accident only if "the operator is physically or mentally incapable of making such report." The amended statute now requires the owner to make the report if the operator "fails or refuses to make the report." In other words, if the operator fails to make the report for any reason, the burden falls squarely on the owner's shoulders.

Natural persons who are required to report marine accidents but fail to do so can be charged with a class A misdemeanor, whereas business entity owners can be charged with a felony.

Maine Enacts Restrictions on Vessels Engaged in Wakesurfing Activities

Me. Rev. Stat. Ann. tit. 12, § 13068-A(18)

Effective August 9, 2024, boaters in Maine must comply with restrictions on wakesurfing activity—defined as "an activity that involves using a surfboard, wakeboard or similar device while being propelled by a motorboat's wake or while on or in a motorboat's wake directly behind that motorboat." The recently-amended statute, Me. Rev. Stat. Ann. tit. 12, § 13068-A(18), prohibits all wakesurfing activity "in less than 15 feet of water or within 300 feet of the shoreline." Boater who violate the new restrictions on wakesurfing activities will face a civil violation and fine of up to $100, but repeat offenders can face harsher penalties.

Alabama Enacts Legislation Requiring Nonresidents to Possess a Valid Boating Safety Certificate

AL LEGIS 2024-394, 2024 Alabama Laws Act 2024-394 (H.B. 375)

The prior edition of *Boating Briefs* noted sweeping changes the Alabama Legislature enacted to its boating code—Ala. Code §§ 33-5-1, *et seq.*—which took effect on January 1, 2024. More recently, the Alabama Legislature enacted additional changes to its code pertaining to boating safety requirements for nonresident vessel operators. Previously, Ala. Code § 33-5-52 exempted nonresidents that were twelve years of age or older from Alabama's requirement for vessel operators to possess a valid boating safety certificate so long as the nonresident's home state did not require such a certificate. This exemption was valid for up to forty-five days. Effective October 1, 2024, however, regardless of whether the nonresident's home state requires a valid boating safety certificate, all nonresident vessel operators in Alabama must possess a valid boating safety certificate.

"Nick's Law" Takes Effect in Maryland, Imposing Harsher Penalties for Boating Under the Influence and Establishing a Database to Track Offenders for Future Law Enforcement

Md. Code Ann., Nat. Res. §§ 8-738, 8-738.3

The previous edition of *Boating Briefs* took note of "Nick's Law", a new piece of Maryland legislation named after Nick Barton, who died in a June 2022 boat crash caused by an intoxicated vessel operator. Following the last edition of *Boating Briefs*, Nick's Law was signed into law and has taken effect as of July 1, 2024. The law amends Md. Code Ann., Nat. Res. §§ 8-738 and 8-738.3, which now prohibits a person convicted of boating under the influence from operating a vessel for two years at a minimum, and up to five years if the intoxicated operation results in the death of another. The law also directs the Department of Natural Resources to establish and maintain a database of persons prohibited from operating a vessel due to violations of Nick's Law by October 2025.

Federal Updates

Representative John Garamendi Introduces the Justice for Victims of Foreign Vessel Accidents Act

H.R. 9348, 118th Cong. (2nd Sess. 2024)

In August of 2024, Representative John Garamendi of California introduced the Justice for Victims of Foreign Vessel Accidents Act (the "Act"). If enacted, the Act would amend Title 46 of the United States Code to increase the general limit of maritime liability with respect to owners of foreign vessels. Specifically, although current law permits domestic and foreign vessels to limit liability to the value of the vessel and pending freight, the Act would create a carve out for foreign vessels. Under the carveout provision, owners of foreign vessels could still limit their liability, but the limits of their liability would be increased to ten (10) times the value of the vessel and pending freight.

Additionally, under the current law, limitation does not apply to claims for wages. Under the Act, claims for wages are still exempt from liability, but new language would be added specific to foreign vessels to carveout

claims, debts, and liabilities arising from personal injury or wrongful death of a person who was not a crewmember or passenger of the foreign vessel at the time of the injury—including fatal injury. Such a carveout is squarely aimed at those who perished or sustained injuries as a result of the allision between the M/V Dali and the Key Bridge.

As of August 13, 2024, the Act has been referred to the Committee on Transportation and Infrastructure. Although aimed at a loss caused by a massive container ship, if adopted, the Act would have significant repercussions on recreational vessels in US waters that are foreign flagged, as owners of those vessels would not be able to limit damages for claim of personal injury and wrongful death by persons who are not passengers or crew.

USCG publishes 2023 Recreational Boating Accident Statistics

In May 2024, the USCG published its 2023 recreational boating accident statistics. The USCG counted 3,844 accidents, of which involved 564 fatalities, 2,126 injuries, and approximately $63 million in property damage. The overall fatality rate was 4.9 deaths per 100,000, which represents a 9.3% decrease from 2022, which saw a fatality rate of 5.4 deaths per 100,000. As in years prior, Accidents overall decreased by 4.9%, and the number of fatalities and injuries decreased by 11.3% and 4.3% respectively. In instances where cause of death was known, 75% of fatalities involved drowning, and of that percentage, 87% of victims were not wearing life jackets. As in years prior, alcohol use was the number one known contributing factor in fatal boating accidents in 2023.

The USCG reported that the top five contributing factors to accidents were (1) operator inattention, (2) improper lookout, (3) operator inexperience, (4) excessive speed, and (5) machinery failure. These five contributing factors were identical to those listed in 2022.

The 2023 Recreational Boating Statistics report is available at: https://www.uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2023-Ch1.pdf.

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