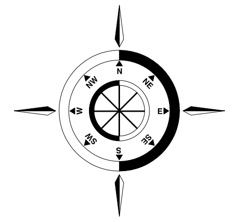
BOATING BRIEFS



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

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First Circuit upholds award for loss of use, despite no pending charters

Sharp v. Hylas Yachts, LLC, 872 F.3d 31 (1st Cir. 2017)

Aggrieved by a series of problems with his new sailing yacht, an owner sued the seller and was awarded loss-of-use damages for the time the yacht had spent undergoing repairs. The First Circuit affirmed the award, even though the owner had not exposed the yacht for charter before the repair period.

The owner, a semiretired engineer, bought the $2 million custom-built yacht from a seller in Massachusetts. The seller warranted that the yacht would be "of excellent quality, of good workmanship and materials, seaworthy and suitable for its intended use of extended ocean cruising."

Shortly after closing, the yacht experienced a series of problems with its hydraulic system, the boom and related equipment, and the battery-charging system. The seller made numerous repairs (either directly or through subcontractors), but many of the problems persisted. Eventually the owner arranged for his own repairs. In all, the yacht was out of service for about eight months.

The owner sued the seller in Massachusetts federal court, and a jury awarded him over $650,000 for lost charter hire, depreciation, out-of-pocket repair costs, and other expenses incurred during the eight months when the yacht was not in use.

The seller appealed, arguing among other things that loss of use was not compensable because the buyer had not taken any steps to charter the yacht before or during the repair period. The buyer cross-appealed, contending that the trial court erred in not awarding him exemplary damages and attorneys' fees under the Massachusetts Consumer Protection Statute.

In general, the owner of a purely recreational vessel cannot recover for loss of use. *The Conqueror*, 166 U.S. 110 (1897). But if a vessel is used for both business and pleasure, then recovery may be allowed to the extent the owner proves a loss of business use. Direct evidence of vessel employment is not required, but the owner must at least show an opportunity and willingness to charter the vessel.

Before and during the eight months at issue in this case, the owner had not taken any steps to advertise the yacht for charter, his insurance policy covered only private use, and he had not taken a business deduction on his taxes. On the other hand, the owner had set up a holding

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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company to hold title and to charter out the yacht for those portions of the year when the owner himself would not be using the yacht. Furthermore, after the repairs were completed, the yacht was in fact regularly chartered at the rate of $20,000 per week. In light of this evidence, the First Circuit held that the trial court correctly allowed the claim for lost charter hire and related detention damages to go to the jury.

As for the buyer's cross-appeal, the court decided that a mere breach of warranty does not constitute a violation of the Massachusetts Consumer Protection Statute. Given the conflicting evidence, the trial court was entitled to conclude that the seller—though unsuccessful in its efforts to repair the yacht—had not engaged in deception. Moreover, had the owner not been so eager to close early, the seller would have had time to conduct more sea trials, which might have revealed the problems in time to fix them before delivery.

The trial court's judgment was therefore affirmed in all respects. ■

Insurance

Ninth Circuit: Federal Arbitration Act preempts state public policy against arbitration clauses in insurance contracts

Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052 (9th Cir. 2018)

Montana residents Taunia and Chris Kittler, sole members of Galilea, LLC, purchased a yacht through Galilea in 2014. About a year later, the Kittlers submitted to Pantanius America Ltd. an online request for an insurance quote for the yacht and exchanged several documents with Pantanius, who acted as the agent for the insurance underwriters. Pantanius received a signed application while the Kittlers docked in Puerto Rico, en route to San Diego through the Panama Canal. The application included arbitration and choice-of-law provisions stating that any dispute arising out of the relationship between the underwriters and the insureds would be settled by American Arbitration Association (AAA) arbitration in New York and governed by the laws of New York. Pantanius issued a binder a day later specifying a cruising area extending south to 30.5 degrees north latitude which, keep in mind, barely gets one into Florida. The formal insurance policy—issued within a day of the binder—provided that the policy was effective only when the insured vessel was within the specified cruising area. Both the policy and the application called for arbitration in New York pursuant to AAA rules, but the policy's choice-of-law provision stipulated that it would be governed by Federal Maritime Law, and where there were gaps, the laws of the State of New York. The policy also provided that disputes arising under the policy would be resolved by binding arbitration within New York County.

Almost one month after the insurance policy was issued, the yacht ran aground near Colon, Panama, outside the specified cruising area. Underwriters denied coverage and initiated arbitration in New York. Galilea participated in the arbitration proceedings, but also filed a separate action against underwriters in federal court in Montana, along with a motion to stay the arbitration proceedings. The Montana district court ruled that: (1) the arbitration provision in Galilea's original insurance application was not relevant, because it was not included in the underwriters' demand for arbitration; (2) claims arising under the insurance policy came within admiralty jurisdiction, and under relevant choice-of-law principles, federal maritime law governed the contract; (3) the Federal Arbitration Act (FAA) mandated enforcement of the policy's

arbitration provision; (4) questions relating to the enforceability and scope of the arbitration provision were properly determined by the court, not an arbitrator; and (5) the scope of the policy's arbitration clause did not extend to ten of Galilea's twelve claims.

Notably, the policy differed from the application in that the policy (i) identified federal maritime law and, to fill its gaps, New York law, as the applicable law, and (ii) included different language concerning the scope of arbitrable disputes—"any and all disputes arising under this policy," not "any dispute arising out of or relating to the relationship."

The Ninth Circuit first decided that the insurance application was not a contract because, under New York law, language from an application may be incorporated into an insurance policy only if the application was attached to the policy at the time of delivery. Some of the information provided in the application was reprinted in the policy, but the forum-selection and choice-of-law provisions were not incorporated into the policy, and the application was not identified in the policy as an incorporated document.

The panel then turned to the insurance policy and decided that it was a contract subject to the FAA. Galilea asserted that the FAA did not apply because Montana public policy bars enforcement of arbitration provisions in insurance contracts, and Montana law, preserved from federal preemption by the federal McCarran-Ferguson Act, precludes the FAA's application. The McCarran-Ferguson Act in general leaves it to the states to regulate the business of insurance.

Here, the panel held that since the FAA expressly applies to "maritime transactions," the policy's arbitration provision was enforceable and that landlocked Montana simply did not have a materially greater policy interest that would override federal maritime law as expressed in the FAA. Although federal maritime law leaves room for state insurance regulation if there is no established federal maritime law rule or need for federal uniformity, the FAA specifically applied to the parties' insurance policy and the parties' coverage dispute fell within federal admiralty jurisdiction.

The panel also found that the district court erred by declining to send all of the questions to arbitration, holding that the agreement to arbitrate according to AAA rules was sufficient to show clear and unmistakable intent to resolve arbitrability questions in arbitration, rather than federal court. ■

Court will not decide arbitrability if contract incorporates arbitration rules giving that authority to arbitrator

Raven Offshore Yacht Shipping, LLP v. F.T. Holdings, LLC, 199 Wash. App. 534 (2017)

F.T. Holdings, LLC entered into a contract with Raven Offshore Yacht Shipping, LLP to transport the vessel *Nanea* from Florida to British Columbia. The contract, primarily negotiated by Raven's managing partner, included an arbitration clause in which the parties agreed to resolve disputes arising from the contract through arbitration subject to the Rules of the Maritime Arbitration Association of the United States (MAA). While in transit, the *Nanea* suffered damage amounting to about $300,000.

Citing policy exclusions, Raven's insurer declined the claim, and FT filed suit against Raven and Raven's managing partner in Washington state court alleging violations of the state consumer protection act, among other things. Raven moved to compel arbitration, and the trial court denied the motion. Raven appealed to the Court of Appeals of Washington, arguing that the MAA granted the arbitrator the power to decide any jurisdictional question of the tribunal, as well as

the existence, scope or validity of the underlying arbitration agreement.

On appeal by Raven, FT argued that no Washington or Ninth Circuit authority has held the incorporation of the MAA constitutes the intent to delegate arbitrability of jurisdictional questions to an arbitrator. FT also argued that even if FT and Raven agreed to arbitrate questions of jurisdiction, Raven's managing partner was not a party to the agreement and therefore jurisdictional questions were reserved for a trial court. Although Washington courts had not addressed the effect of incorporating the rule of an arbitration body in an arbitration clause, Raven relied on holdings from various Federal Circuit Courts of Appeal, including the Ninth Circuit, which enforced the rules of arbitrating bodies when those were incorporated into the arbitration agreement.

The court agreed with Raven, finding the MMA entrusted jurisdictional questions to the arbitrator. This was so even though rules of arbitration should be strictly construed when incorporated into arbitration agreements by reference. Lastly, the court held that Raven's managing partner was bound by the arbitration agreement via principles of agency. ■

Insurer did not commit bad faith by construing "jet ski" to include a Honda personal watercraft

Fire Ins. Exch. v. Oltmanns, 2018 WL 1078604 (Utah 2018)

Robert Oltmanns was piloting a Honda F-12 AquaTrax personal watercraft with brother in-law Brady Blackner in tow. Blackner sustained injuries and brought a lawsuit against Oltmanns, who sought coverage from his homeowner's insurer, Fire Insurance Exchange, who in turn filed a declaratory action seeking a determination of its responsibility to Oltmanns under the policy. The policy excluded liability for bodily injury resulting from "the ownership, maintenance, use, loading or unloading of … jet skis and jet sleds." The district court ruled in favor of Fire Insurance, finding that the "jet skis and jet sleds" exclusion precluded coverage.

The court of appeals reversed, holding that the term "jet ski" as used in the exclusion was ambiguous because it could reasonably be read as referring not to personal watercraft in general but rather specifically to personal watercraft manufactured by Kawasaki, which held the trademark on the name "Jet Ski." The court of appeals therefore construed the contract against the insurer and in favor of Oltmanns. (We reported on this decision in *Boating Briefs* Vol. 21:2.)

Fire Insurance then settled with Blackner for the policy limit of $300,000 and paid Oltmanns' defense costs. Dissatisfied, Oltmanns filed a counterclaim to recover the legal fees incurred in challenging the coverage denial, on the basis that the denial was in bad faith. Fire Insurance moved for summary judgment and the district court granted the motion, finding that Fire Insurance's actions in litigating whether the "jet ski" exclusion applied were reasonable. The court of appeals affirmed the trial court's ruling.

The issue before the Utah Supreme Court was whether Fire Insurance's coverage position was "fairly debatable," thus negating Oltmanns' allegation of bad faith. Oltmanns argued that the term "jet ski" could not reasonably be read to encompass a Honda F-12 Aquatrax, since the "Jet Ski" name was a Kawasaki trademark. But Fire Insurance put forward substantial usage evidence suggesting that the term "jet ski" was, in Fire Insurance's words, a "genericized term for any type of personal watercraft." The Utah Supreme Court recognized that "jet ski" is frequently treated as a generic term in cases, ordinances, and dictionaries. Thus, the scope of the term was

fairly debatable, and Fire Insurance had acted in good faith by relying on the exclusion.

Pollution exclusion applies to injury and death by carbon monoxide

Travelers Property Casualty Company of America v. Klick, 867 F.3d 989 (8th Cir. 2017)

Three people were exposed to carbon monoxide while on board a recently purchased fishing boat. When the owner, Christopher Klick, noticed the engine was not operating properly, a passenger opened the engine compartment and carbon monoxide flowed up to the wheelhouse, causing Klick to lose consciousness and fall into the engine compartment. Unbeknownst to Klick and his passengers, the exhaust pipe had broken off, and the engine had been releasing carbon monoxide into the engine compartment. Two passengers died from the exposure, and Klick suffered severe burns as well as permanent brain damage. Klick filed suit against the dealer that sold the boat.

At the time of the sale, Travelers insured the dealer against damages resulting from bodily injury arising out of its operations, including the sale of vessels. But the policy excluded coverage for "any liability…arising out of the actual…seepage, discharge, dispersal, disposal or dumping, release, migration, emission, spillage, escape, or leakage of 'pollutants' into … atmosphere." Travelers sought a declaration that under Minnesota law the pollution exclusion precluded coverage for injuries arising out of the carbon monoxide leak. In granting summary judgment for Travelers, the district court held that the injuries arose exclusively out of the release of a pollutant into the atmosphere.

Klick appealed, arguing that (1) the engine compartment did not contain an "atmosphere" and thus the proximate cause of the injuries was not the dispersal of pollutants to the wheelhouse, but rather the engine's release of the carbon monoxide into the engine compartment; (2) the boat dealer's liability did not arise out of the release of carbon monoxide into the wheelhouse, because the injuries arose out of the release of carbon monoxide into the engine compartment; and (3) even if the liability did arise out of the release of carbon monoxide into the wheelhouse, that compartment did not contain "atmosphere."

The court rejected Klick's first argument, noting that once the carbon monoxide leaked from the engine and into the engine compartment, the movement to the wheelhouse was also a release, dispersal or migration of the pollutant. The court rejected the second argument by applying the Minnesota Supreme Court's definition of "arising out of" as "causally connected with," and holding that the release of carbon monoxide to the engine compartment causally led to Klick's injuries. Lastly, relying on Minnesota precedent that defined atmosphere as "ambient air," the court observed that the wheelhouse was not a sealed environment but rather was open to the surrounding air.

Accordingly, the pollutant exclusion applied because Klick's injuries arose exclusively out of the release, dispersal, or migration of pollutants from the engine to the atmosphere. ■

Products Liability

Punitive damages reduced in failure-to-warn action

Warren v. Shelter Mut. Ins. Co., 233 So. 3d 568 (La. 2017)

A 1998 Champion was underway, traveling on plane on the Calcasieu River, when the hydraulic steering system failed. The failure put the vessel into a violent turn (known as a "J-hook"), which ejected several passengers from the vessel, tragically killing one of them. The parents,

individually and on behalf of the decedent, brought an action against the steering system's manufacturer, Teleflex, and various other defendants. After motion practice and settlement, the remaining parties were the father, the decedent's estate, and Teleflex.

The jury returned a defense verdict. However, the trial judge ordered a new trial after learning that he had given mistaken information to the jury in response to a juror's question about an item of evidence. The case was tried again, and the second jury awarded $125,000 in compensatory damages and $23 million in punitive damages.

The hydraulic steering system had three main components: (a) the helm pump which was attached to the helm and contained hydraulic fluid; (b) two hoses that ran from the helm pump to the outboard engine; and (c) a horizontal cylinder with a piston inside, mounted on the outboard engine. When the helm is turned to port or starboard, the helm pump moves hydraulic fluid to the corresponding hose, causing the piston to slide inside the cylinder and thereby turn the engine.

The design of the system was such that any loss of hydraulic fluid could allow air into the system. The air would then be compressed, causing a spongy feeling in the helm. If even a few ounces of hydraulic fluid leaked, the vessel could lose steerage, resulting in serious injury or even death. Testimony showed that Teleflex knew about the danger of a leak and also knew that the defect could not be designed out of the system. The evidence established that a sticker containing a proper warning would have cost thirty cents and could have been placed on the helm, rear cylinder, and wherever fluid is added to the system.

On appeal, the Louisiana Supreme Court held that an award of punitive damages was warranted because Teleflex's conduct did amount to more than simple negligence. Teleflex knew of the defect for almost a decade before this particular vessel was sold, and the cost of a sticker to properly warn an operator about the danger of an oil leak was quite low.

The size of the award, however, did not pass constitutional muster. Under general maritime law, a ratio of 1:1 is accepted, unless there are extenuating circumstances, such as an egregious act with a low compensatory damages award. The court decided that such circumstances existed here: a death had resulted from Teleflex's inaction, yet the jury's compensatory award was relatively low. Noting that the intermediate appellate court had fairly recently affirmed a $2 million award of general damages to the mother of a deceased child in a different failure-to-warn case, the court decided that the compensatory damages in this case could reasonably be $2,125,000 (i.e., the $125,000 the jury actually awarded, plus the hypothetical $2 million for general damages). Applying a 2:1 multiplier, the court decided that the punitive damages award should be reduced to $4.25 million. ■

Fourth Circuit: A watercraft is not unreasonably dangerous when accompanied by warnings that, if followed, make the product safe

Hickerson v. Yamaha Motor Corp., 882 F.3d 476 (4th Cir. 2018)

The Fourth Circuit, applying South Carolina law and the Restatement (Second) of Torts, has ruled that a claim for defective design of a personal watercraft must fail where the injured passenger failed to observe warnings that were designed to prevent that very harm she sustained.

The passenger was riding on a 2011 Yamaha VXS WaveRunner on Lake Hartwell in South Carolina. She sustained serious orifice injuries when she fell backwards off the watercraft and into the jet thrust. At the time of the accident, she was wearing a bikini with no wet suit. She had also been drinking and was the fourth passenger

on the watercraft, which was being operated by a ten-year-old. Before boarding the watercraft she did not read any warnings printed in the manual or on the craft itself.

The craft was equipped with warning labels on both the front and the back. The warnings read, in relevant part, as follows:

> WEAR PROTECTIVE CLOTHING. Severe internal injuries can occur if water is forced into body cavities as a result of falling into water or being near jet thrust nozzle. Normal swimwear does not adequately protect against forceful water entry into rectum or vagina. All riders must wear a wet suit bottom or clothing that provides equivalent protection (See Owner's Manual).

The passenger filed suit against Yamaha in federal court in South Carolina, alleging product-liability claims under South Carolina law for design defect and inadequate warnings.

The case revolved around the expert testimony of Dr. Anand Kasbekar, a mechanical engineer who was familiar with personal watercraft and who had been retained as an expert in dozens of product-liability cases. The gist of Dr. Kasbekar's opinion was that the watercraft's warnings were inadequate, that a set of alternative warnings was better, and that design alterations like a contoured seat and hand straps would have made the craft safer. He also concluded that the warnings were "congested" and confusing.

The trial court found Dr. Kasbekar qualified to testify as an expert on personal watercraft. However, the trial court subsequently found Dr. Kasbekar's opinions to be unreliable, in that his theory was not supported by "research, data, or scientific theories." Rather, Dr. Kasbekar offered summary conclusions that existing warnings on the craft were inadequate because passengers could more easily see a warning located directly on the seat instead of warnings appearing on the glove box and at the rear of the craft. Yet he offered no demonstrative testing or research or data to support the conclusions. The Fourth Circuit took particular issue with Dr. Kabekar's opinion that the wetsuit depicted in the on-craft warnings should be black rather than white "based solely on his personal recollection that he had never seen a white wet suit." Ultimately, the Fourth Circuit upheld the lower court's decision to exclude Dr. Kasbekar's opinions, noting that "Dr. Kasbekar's own testimony established that his opinions lacked the markers of reliability Rule 702 and *Daubert* require to prevent an expert from misleading a jury with unproven conjecture."

Because the plaintiff had relied solely upon Dr. Kasbekar's expert opinion to support her claim that the warnings placed on the craft were inadequate, once his opinions were stricken there was no remaining evidence from which a jury could deduce that the warnings were inadequate.

The final question to be answered on appeal by the Fourth Circuit was whether the craft was unreasonably dangerous, notwithstanding the adequacy of the warnings. This issue turned upon application of Comment j to the Restatement (Second) of Torts, § 402A, which provides:

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

The plaintiff argued that, even if the warnings were adequate, the craft was still defective in the sense that it was unreasonably dangerous. She put forth the argument that design claims should be independent of warning claims, because to hold otherwise would allow "good warnings to trump bad design," and thus "subordinate design safety to warnings."

The court disagreed. Relying upon the plain language of Comment j, as well as South Carolina and Fourth Circuit case law applying Comment j,

the court found that a product bearing a warning which, if heeded, would make the product safe for use, is neither defective nor unreasonably dangerous. Therefore, the seller is not liable for any injuries caused by the use of the product if the user ignores the warning.

Thus, in light of the plaintiff's failure to read the warnings placed upon the craft, the fact that the plaintiff's injuries were the kind of injuries the warnings were designed to prevent, and the absence of any evidence indicating that the warnings were inadequate, the Fourth Circuit upheld the lower court's grant of summary judgment in favor of Yamaha. ■

First Circuit: Failure to include adequate warning with instruction manual not actionable where vessel owner does not read the manual

Santos-Rodríguez v. Seastar Solutions, 858 F.3d 695 (1st Cir. 2017)

Citing a vessel owner's failure to read his steering system's instruction manual and other safety warnings, the First Circuit has found that a company's alleged failure to provide adequate warnings or instructions cannot be the proximate cause of a plaintiff's injuries where the warnings, even if given, would not have been read.

Plaintiff was a passenger in a boat near Guayama, Puerto Rico. The vessel was equipped with a hydraulic steering system manufactured by Seastar Solutions. A ball-joint on the rod connecting the steering system to the right motor broke while the boat was in motion, ejecting plaintiff from the boat. As a result, he sustained serious permanent injuries, including paraplegia. Subsequent examination revealed that the rod end failed because of corrosion.

Plaintiff sued Seastar in admiralty, alleging that the ball joint's susceptibility to corrosion was a design defect, and that Seastar was liable for failing to place a warning against corrosion in the steering system's instruction manual. While the manual did inform owners that "[b]i-annual inspection [of the steering system] by a qualified marine mechanic is required" and instructed them to "[c]heck fittings and seal locations for leaks or damage and service as necessary," the manual did not include a specific warning about corrosion of the rod end.

The boat's owner had acquired the vessel second-hand, and it was undisputed that he had not read the manual or any of the warnings affixed to the steering system. The owner had hired third-party mechanics to maintain the boat, but none of those mechanics ever brought the corroded rod end to his attention.

In affirming the lower court's ruling in favor of the manufacturer, the First Circuit ruled that, even assuming that the manual did not contain adequate warnings or instructions, the lack of warnings could not be the proximate cause of the plaintiff's injuries, as a matter of law, where the vessel owner had not actually read the manual. The First Circuit similarly upheld the lower court's finding that the plaintiffs had failed to introduce any evidence to support their expert's conclusion that the rod end was defectively designed. Plaintiff was simply arguing that the failure of the rod end itself was sufficient evidence of a design defect. But the mere fact that something went wrong with the rod end was not sufficient to show that Seastar's design of the rod end was defective. ■

Liens

Owner's bankruptcy filing does not oust admiralty court of jurisdiction to enforce seaman's lien for maintenance and cure

Barnes v. Sea Haw. Rafting, LLC, 2018 WL 1513087 (9th Cir. 2018)

A seaman, Chad Barnes, was injured when the *M/V Tehani*, a 25-foot rigid hull inflatable boat he was working on, exploded. Barnes was seriously injured in the accident. For a period of time after the accident, he received monetary assistance from the vessel's owner. When this monetary assistance stopped, Barnes filed an admiralty suit against the vessel, the LLC that owned the vessel, and the LLC's owner and manager. Barnes sought maintenance and cure in addition to other relief, including the enforcement of his seaman's lien against the vessel. (The vessel owner was not insured for liabilities to Barnes.)

The district court declined to award Barnes any maintenance before trial, despite multiple motions for summary judgment on the issue and Barnes' undisputed entitlement to maintenance. Then, after fifteen months of litigation, the vessel owner and manager declared bankruptcy. The district court ruled that the automatic stay barred enforcement of Barnes' maritime lien against the vessel. The district court then dismissed the claims against the vessel because Barnes failed to verify an amended complaint, though the original complaint had been verified. During the pendency of the appeal, the bankruptcy court approved the trustee's sale of the vessel free and clear of Barnes' maritime lien.

Upon review, the Court of Appeals concluded that the district court erred in dismissing the claims against the vessel, because the vessel and the other defendants waived any objection to in rem jurisdiction by answering the original verified complaint and litigating the case for over 15 months. Further, the failure to file a verified amended complaint did not divest the district court of in rem jurisdiction. The Court of Appeals reasoned that an amended complaint only supersedes the original complaint as to substance, not procedural effect. Once in rem jurisdiction has vested, requiring the verification of subsequent amended pleadings for the district court to retain jurisdiction serves no procedural purpose.

The Court of Appeals also determined that the automatic bankruptcy stay did not apply to maritime liens for maintenance and cure, and therefore the bankruptcy stay did not prevent Barnes from enforcing his maritime lien. Since the district court sitting in admiralty had already obtained jurisdiction over the vessel, the filing of the bankruptcy petition did not divest the district court of jurisdiction. Even if the bankruptcy court had in rem jurisdiction over the vessel, it is an open question whether a bankruptcy court has legal authority to sell a vessel free and clear of maritime liens, at least where the lienor did not consent to the bankruptcy court's jurisdiction. Since Barnes did not submit voluntarily to the bankruptcy court's jurisdiction, that court did not have jurisdiction to dispose of his maritime lien.

Finally, the Court of Appeals acknowledged that it lacked appellate jurisdiction to review the district court's summary judgment decision not to award maintenance until after trial. However, the appellate court had the authority to treat the notice of appeal as a petition for a writ of mandamus. In evaluating the underlying record, the Court of Appeals determined that Barnes had established his entitlement to maintenance and cure. The Court of Appeals issued a writ of madamus directing the district court to award maintenance subject to a potential upward modification after trial. In doing so, the Court of Appeals for the Ninth Circuit, as a matter of first impression, adopted the burden-shifting frame-

work of *Hall v. Noble Drillings (U.S.) Inc.*, 242 F.3d 582 (5th Cir. 2001), and the *Incandela v Am. Dreding Co.*, 659 F.2d 11 (2d Cir. 1981), for determining the maintenance amount. ■

State Legislation

The following is a sampling of certain new or proposed state legislation relating to recreational boating. The summary was provided by Todd Lochner of Annapolis and prepared with assistance from Colin Fitzpatrick, a 2019 J.D. candidate at Tulane Law School.

Alabama

- *Act 2018-179*

  This act provides a procedure by which an Alabama law enforcement officer may remove a derelict vessel from the waters of the state of Alabama.

California

- *AB-2175*

  Proposed legislation. Section 1 empowers a peace officer to remove a vessel from public property in certain circumstances when the vessel is related to a crime. Section 2 imposes a criminal penalty of 6 months imprisonment for the negligent or reckless use of a vessel, water skis, or aquaplane that causes great bodily injury.
- *SB-1247*

  Proposed legislation. Amends the boating-under-the-influence statue to change "mechanically propelled vessels" to "vessels."
- *SB-644*

  Proposed legislation allowing vessels to be impounded for 30 days when a violation of the reckless boating statue results in a person's death.

Connecticut

- *SB-476*

  Proposed legislation to exempt vessels, vessel motors, and vessel trailers from sales and use taxes and for a fuel tax exemption for dyed diesel fuels.

Florida

- *HB-915, SB-1132*

  Gives the Fish and Wildlife Commission authority to designate by rule the expiration timeframe and design of vessel safety inspection decals.
- *SB-1612*

  Proposed legislation to be called "Ellie's Law" regulating airboats carrying passengers for hire on waters of the state.

Georgia

- *HB 357*

  Establishes titling provisions for vessels in Georgia. Passed in both houses, awaiting the governor's signature.
- *HB 665*

  Proposed legislation slightly modifying the abandoned-vessel statute.

Illinois

- *Public Act 100-0469*

  Updates Boat Registration and Safety Act. Slightly changes the PFD requirements to remove the USCG classification. Slightly increases registration fees.

Kentucky

- *HB-183*

  Removes exemption for federal vessels from registration requirements.

Louisiana

- *HB-706*
  Bill that would allow possession of certain fishes aboard a vessel traversing between the vessel owner's fish camp and a boat ramp.
- *HB-435*
  Bill that would authorize certain water conservation boards to regulate or prohibit vessel traffic during flood events.
- *HB-549*
  Registration of non-motorized house boats.
- *HB-784*
  Would increase boat registration fees.

Maryland

- *SB-46*
  Bill that would remove the requirement of carbon monoxide detectors and provide for the publication of a safety pamphlet on the danger of carbon monoxide.

Massachusetts

- *H3913, S1634*
  Bill that would reform vessel taxes.
- *H2745*
  Bill that would require motorboat safety program
- *H1801*
  Proposed legislation to regulate parasailing.
- *H2909*
  Bill that would modify the law about abandoned vessels on Commonwealth property to allow for vessels abandoned in the tidewaters or shore to be moved.
- *H1312*
  Bill that would regulate kayak instructors.
- *S463*
  Bill to allow out-of-state vessels to moor for up to 60 days.

New Jersey

- *A 712*
  Bill that would provide for the removal of abandoned vessels during a natural disaster.
- *A 1544*
  Bill that would allow persons under the age of 16 to operate motorboats under direct parental supervision.

New York

- *A 00246*
  Bill that would prohibit jet ski passengers from riding in front of the driver and raise the minimum age to rent a jet ski to 18.
- *A 01520*
  Bill that would revoke privilege to operate a pleasure vessel upon revocation of driver's license.
- *A 01852*
  Would require a boating safety course to rent a boat
- *A 02640*
  Authorizes towing a water skier without an observer under certain circumstances.
- *A 06708*
  Requires closed bow boats to have carbon monoxide detectors
- *A 07405*
  Adds US Sailing Association to list of organizations authorized to give boating safety courses.
- *A 08194*
  Prohibits party boats in Sheepshead Bay
- *S 03524*
  Requires all passengers in rowboats, canoes, and kayaks to wear PFDs.

Oklahoma

- *HB 3074*
  Exempts canoes, kayaks, and paddleboards from vessel registration requirements
- *HB 2840*
  Requires PFDs for canoe passengers

South Carolina

- *S 367, H 3577*
  Prohibits operating a watercraft above idle speed within 100 ft of a moored or an anchored vessel, wharf, dock, bulkhead, pier, or a person in the water.

Tennessee

- *HB 1114, S 1062*
  Regulates motorboats that carry passengers for hire

Virginia

- *HB 1229*
  Bill that would prohibit water skiing within 150 feet of a dock, pier, boathouse, boat ramp, or person in the water.

Washington

- *HB 2634*
  Phases out copper-based anti-fouling paints

West Virginia

- *SB 347*
  Defines the term "state of principal operation"; establishes a fee schedule for motorboat registration; establishes motorboat numbering, lighting, fire extinguishers, engine bilges, and flotation device requirements; increases the financial amount of property damage before certain accidents need to be reported; clarifies the requirements for the operation of personal watercrafts; limits the hours during the day water skiing and surfboarding are permitted; and authorizes rulemaking.

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