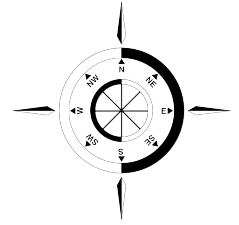


# BOATING BRIEFS



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

Todd Lochner, Chair  
Jody McCormack, Editor

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## National Transportation Safety Board: NTSB Adopts its Final Report on the Investigation into the Fatal Fire and Subsequent Sinking of the Commercial Dive Vessel *Conception*

**Fire Aboard Small Passenger Vessel *Conception*, Platts Harbor, Channel Islands National Park, Santa Cruz Island, 21.5 miles South-Southwest of Santa Barbara, California, September 2, 2019 (DCA19MM047)**

At its meeting on October 20, 2020 the National Transportation Safety Board (NTSB) adopted its final report on the investigation into the fatal fire and sinking aboard the dive boat *Conception* off of Santa Cruz Island in September of 2019.

At approximately 3:14 a.m. PDT on Septem-

ber 2, 2019 the US Coast Guard received a distress call from the *Conception*, a 75-foot-long small passenger vessel operated by Truth Aquatics, Inc. According to the report:

*When the fire started, 5 crewmembers were asleep in their bunks in the crew berthing on the upper deck, and 1 crewmember and all 33 passengers were asleep in the bunkroom below. A crewmember sleeping in an upper deck berth was awakened by a noise and got up to investigate. He saw a “glow” outside.*

*Realizing that there was a fire rising up from the salon compartment directly below, the crewmember alerted the four other crewmembers sleeping on the upper deck. The captain was able to radio a quick distress message to the Coast Guard. Crewmembers jumped down to the main deck and attempted to access the salon to assist the passengers and crewmember in a bunkroom below the main deck but were blocked by fire and overwhelmed by thick smoke. The five surviving crewmembers jumped overboard. Two crewmembers swam to the stern, re-boarded the vessel, and found the access to the salon through the aft corridor was also blocked by fire, so, along with the captain who also had swum to the stern, they launched the vessel’s skiff and picked up the remaining two crewmembers in the water. The crew transferred to a recreational vessel anchored*

*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**

NTSB Reports (cont.).....	2
Insurance.....	2
Jurisdiction/Procedure .....	4
Trade Secrets.....	6
Taxation.....	6
RICO/Fraud.....	7
Coast Guard Update .....	8
State-Law Update .....	8

*nearby where the captain continued to radio for help, while two crewmembers returned to the waters around the burning Conception to search for possible survivors.*

*The Coast Guard and other first responder boats began arriving on scene at 4:27 a.m. Despite firefighting and search and rescue efforts, the vessel burned to the waterline and sank just after daybreak, and no survivors were found. Thirty-three passengers and one crewmember died. The surviving crew were transported to shore, and two were treated for injuries. Loss of the vessel was estimated at \$1.4 million.*

The Board determined the probable cause of the accident on board the small passenger vessel *Conception* was the failure of Truth Aquatics, Inc., to provide effective oversight of its vessel and crewmember operations, including requirements to ensure that a roving patrol was maintained, which allowed a fire of unknown cause to grow, undetected, in the vicinity of the aft salon on the main deck. Contributing to the undetected growth of the fire was the lack of a United States Coast Guard regulatory requirement for smoke detection in all accommodation spaces. Contributing to the high loss of life were the inadequate emergency escape arrangements from the vessel's bunkroom, as both exited into a compartment that was engulfed in fire, thereby preventing escape.

As a result of this investigation, the NTSB issued 10 new safety recommendations. Seven were issued to the US Coast Guard, two to the Passenger Vessel Association, Sportfishing Association of California, and National Association of Charterboat Operators, and one to Truth Aquatics. Further, one previously issued recommendation to the Coast Guard, currently classified as "open - unacceptable response," has been reiterated.

A synopsis of the investigation's findings and recommendations is available online at: <https://go.usa.gov/x7a7G>

## **NTSB Findings regarding the Fire at Jackson County Park Marina on January 27, 2020**

On September 3, 2020 the National Transportation Safety Board (NTSB) issued its Marine Accident Brief concerning the fire and explosion at Jackson County Park Marina, Dock B which started aboard the M/V *Dixie Delight* in January 2020. At approximately 0035 local time a fire broke out aboard the *Dixie Delight*, a 43-foot liveaboard houseboat tied to Dock B at Jackson County Park Marina in Scottsboro, Alabama. The owner of the vessel attempted to extinguish the fire and push the burning vessel away from the dock but the blaze engulfed the *Dixie Delight* and then spread to the neighboring vessels and the wood-framed covered dock. The ensuing fire trapped seventeen people on the dock. In the process of attempting to escape, eight people died.

The NTSB concluded that the probable cause of the fire aboard the *Dixie Delight* and subsequent fire at Dock B was a fire of unknown source, originating aboard the *Dixie Delight* in the vicinity of the vessel's electrical panel. Contributing to the severity of the fire and loss of life were the County and marina's limited fire safety practices. □

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## **Insurance**

**District Court for the District of Rhode Island affirms denial of insurance coverage due to improper and faulty repairs by insured**

*Boat US v. Carman*, 419 F. Supp.3d 336, 2019 AMC 2986 (D. R.I. 2019)

In December of 2015, plaintiff Nathan Carman purchased a thirty-one-foot recreational sport fishing boat, the M/V *Chicken Pox*, which he insured with defendants National Liability & Fire Insurance Company and Boat Owners Association of the United States (“National”). Initially, National provided Mr. Carman with a quote for an All Risk Policy which was “subject to policy limits, warranties and exclusions” (the “Quote”). A few days later Mr. Carman received a Marine Insurance Binder, containing the terms from the Quote. Before issuing the final policy, National had the vessel surveyed by a marine surveyor who determined that it was in good shape and seaworthy. The Yacht Policy itself was then issued and mailed directly to Mr. Carman’s home.

The Policy language mirrored that in the Quote and in the Binder, subject to the limitations and exclusions in the Policy including an exclusion of coverage for “any loss, damage, expense, or cost of repair caused directly or indirectly by incomplete, improper or faulty repair.”

Following his purchase of the vessel Mr. Carman made several upgrades to the vessel including installation of an autopilot, chart plotter, VHF radio, Automatic Identification System (AIS), and a life raft. Following these upgrades, he increased the insured value of the vessel under the Policy to \$85,000. Shortly before the final voyage Mr. Carman made several ‘repairs’ to the boat including: (1) removal of the forward bulkheads, (2) removal and repair of the vessel’s trim tabs, and (3) replacement of the port bilge pump.

Nine months after the policy was issued the boat sank while Mr. Carman and his mother were out on a fishing trip off the coast of Long Island, New York. Mr. Carman’s mother, Linda Carman, was killed in the sinking. The vessel was never recovered.

Less than 3 weeks after the accident occurred Mr. Carman filed a claim seeking to recover under the property insurance coverage afforded by

his policy. Because of the unusual circumstances of the sinking – the untimely death of his mother, the fact that Mr. Carman was stranded alone at sea on a raft for many days after the boat sank, and the fact that the boat was never recovered – an investigation was promptly commenced. The investigation revealed, in particular with respect to the repairs that were conducted by Mr. Carman, that said repairs were “incomplete, improper and faulty.” Mr. Carman removed the forward bulkheads for no apparent reason. On the day he left the Ram Point Marina to go fishing with his mother he removed the trim tabs using an electric power drill. He took off the actuator from the transom leaving four half dollar size holes in the transom which he increased in size to facilitate removal of the fitting through the hull. He filled the holes with epoxy putty but did not use either any backing of any fiberglass mat on the outside to seal the holes. He did this despite apparently intending to go trolling offshore for five hours at a slow speed with a following sea that same day. Lastly on the day of departure he also replaced the port bilge which had a history of failure.

National denied coverage on the basis that the repairs that Mr. Carman had performed on the vessel rendered it unseaworthy and because there was no coverage for “any loss, damage, expense or cost of repair caused directly or indirectly by incomplete, improper, or faulty repair.” Mr. Carman argued that he had never been presented with the policy and therefore the exclusions contained within it should not affect the coverage available to him. Ultimately, specifically without making a determination of whether Mr. Carman intended to sink his boat or harm his mother, the court concluded that the Policy was in fact the operative contract. The Court stated that the Policy, not the Binder or the Quote controlled and that the Binder and Quote had effectively merged into the Policy. On that basis cov-

erage was properly denied under the improper repair exclusion. □

recommendation has not, as of the date of publication, been scheduled. □

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## Jurisdiction/Procedure

**Federal Magistrate Judge recommends dismissal of criminal charges against three men indicted over the 2018 sinking of a duck boat in Branson, Missouri that killed 17 people**

*United States of America v. Kenneth Scott McKee, et al.*, Case No 18-05043-01/03-CR-SW-MDH (09/04/2020)

Practitioners will recall that on July 19, 2018 an amphibious vessel known more specifically as a Stretch Duck 7, owned and operated by Ripley Entertainment sank during a ferocious thunderstorm on Table Rock Lake near Branson, Missouri. Seventeen people were killed including nine members of a single family.

A 47-count indictment brought under the Seaman’s Manslaughter Statute unsealed in June 2019 accused the general manager of the boat’s operator and the manager on duty that day with a variety of neglect and misconduct charges. Previously, the boat’s captain had been charged with failure to properly assess incoming weather before launching the boat and not telling passengers to use flotation devices as weather conditions worsened.

On September 4, 2020 U.S. Chief Magistrate Judge David P. Rush concluded that charges should be dismissed because Table Rock Lake, where the boat sank in a storm, is not considered a navigable waterway under binding Eighth Circuit precedent, and therefore the federal court lacks subject matter jurisdiction in the case. In reaching his recommendation the Magistrate drew a distinction between “judicial” subject matter jurisdiction and “legislative” subject matter jurisdiction.

A final decision in the case has not been made and a hearing on Magistrate Judge Rush’s

**U.S. District Court of Massachusetts considers duties owed by the owner of a business to its insurer**

*Atlantic Specialty Ins. Co. v. Karl’s Boat Shop, Inc. Civil Action 19-11219-WGY* (Filed 08/20/2020)

Harwich boat repair & storage business (Karl’s Boat Shop, Inc.) (“boatyard”) and its customers jointly filed a claim seeking indemnification from the boatyard’s insurance company for losses from a 2018 fire at the boatyard’s storage facility that had destroyed numerous customers’ vessels. The insurance company (Atlantic Specialty Insurance Co.) agreed to pay for the damages to the boatyard storage facility itself but refused to cover the damages for the customers’ destroyed boats. After a number of the boatyard’s customers whose boats were destroyed in the fire threatened to sue the boatyard for their losses, the boatyard brought an action against the insurance company claiming that the customers’ losses should have been covered by its policy. The insurance company denied the boatyard’s claim on the grounds that the boatyard had violated its policy by not following the policy’s specific “loss control recommendations” and on that basis asserting that the customers’ damages (“third-party claims”) were not covered. Specifically, the insurance company said the boatyard had violated its insurance policy because it did not (regularly) require its customers to sign storage agreements and indemnity waivers.

The U.S. District Court agreed with the insurance company, saying that the boatyard’s failure to require all customers to sign storage agreements and indemnity waivers was a clear violation of the terms of its marine insurance policy. This caused the U.S. District Court to agree with the

insurance company that the entire policy was voidable.

The case involved an interesting decision to apply both federal maritime law and state contract/insurance law in achieving the same result. Federal maritime law was applied even though the losses were related to “dry” storage at an inland facility that was 2 miles from the closest waterway. The U.S. District Court applied maritime law on the grounds that the insurance policy at issue was a “marine insurance contract.” While the application of maritime law reached the same conclusions as Massachusetts state law, according to the federal judge, it is worthwhile to note how broadly the concept of “maritime commerce” can be viewed, and therefore how many contracts related to same can be brought in federal court .

**Marina Owner prevails against Vessel on marina owner’s maritime lien on Vessel arising under its wharfage contract with vessel owner**

***Bartell Hotels v. S/L Talus*, 445 F. Supp. 3d 983 (2020)**

A marina owner brought an action *in rem* against a vessel seeking foreclosure on the marina owner’s maritime lien on the vessel arising under its wharfage contract with the vessel owner.

In April of 2016 the vessel owner, Mr. Ronald Lee (“Lee”) entered a Contract for Private Wharfage (“Wharfage Contract”) with plaintiff Bartell Hotels dba Half Moon Marina (“Half Moon Marina”) whereby Plaintiff provided wharfage and other maritime services to the Vessel. The Vessel was in arrears on several occasions since the contract was executed. Wharfage fees were last tendered in June of 2018 and in November of 2018 Half Moon Marina sent a letter notifying Lee of the termination of the Wharfage contract pursuant to the terms of the Wharfage Contract. Following termination of the wharfage agreement the Vessel failed to vacate

the marina where she remained without contractual or other authority. The Marina owner filed a motion for interlocutory vessel sale and authorization to credit bid.

Rule (E)(9)(a) of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Claims (“Supplemental Admiralty Rules), amended 2016, which governs interlocutory vessel sales provides:

- (i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold- with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court-if:
  - (A) The attached or arrested property is perishable or liable to deterioration, decay or injury by being detained in custody pending the action;
  - (B) The expense of keeping the property is excessive or disproportionate; or
  - (C) There is unreasonable delay in securing the release of the property.

While prior case law has held that in order to prevail the lienors need only show one of the three criteria, in the instant case the Plaintiff argued that all three conditions had been met. Plaintiff argued that by virtue of its location and nature the Vessel was deteriorating, that the in excess of \$125 /day cost of arrest was excessive and disproportionate, and the fact that the Vessel Owner had not appeared or posted substitute security in more than six months since the initial arrest was an unreasonable delay.

The court held that that (1) the marina owner established that the vessel was deteriorating

in condition and value as she sat idle while under arrest; (2) the expense of keeping the vessel was excessive or disproportionate; (3) there had been an unreasonable delay in securing the release of the vessel; and (4) the marina owner was authorized to a credit bid.

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## Trade Secrets

**Michigan Sailmaker Quantum Sails prevails in drawn-out fight over Trade Secrets and Sales of Sails**

*Quantum Sail Design Group, LLC v. Jannie Reuvers Sails, Ltd.* No. 18-2348 (Filed September 10, 2020) NOT FOR PUBLICATION

The original action was brought by Quantum Sails Design Group, LLC (“Quantum”) against South Africa based Jannie Reuvers Sails, Ltd. (“JRS”) and Leading Edge Sailmakers, Ltd. (“LES”) for breach of contract and breach of the parties Trade Secret License Agreement. Quantum alleged that JRS and LES continued to use Quantum’s trade secrets and to improperly manufacture membrane sails unlawfully after the termination of the parties’ relationship. Quantum alleged that the defendants did so under the trade name of Ullman Sales. Quantum further alleged that the defendants had improperly downloaded more than one thousand sail designs, which they alleged the defendant went on to also improperly use under the Ullman brand.

Following a decision by the district court granting summary judgment to Quantum, the defendant appealed. In September of 2020 the Sixth Circuit affirmed the lower court’s decision granting summary judgment in favor of Quantum and awarding damages, sanctions and pre-judgment interest in the amount of \$2.5 million dollars. The Sixth Circuit concluded that the district court had not failed to review *de novo* any objections to the Master’s reports it relied upon in making its decision because neither party had filed such objections. Further it concluded that

the district court had not improperly accepted or adopted findings and recommendations that exceeded the scope of the Master’s mandate. Lastly the Sixth Circuit rejected defendant’s argument that the district court’s findings of fact themselves were clearly erroneous with regard to the method of calculation of damages. □

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## Tax Law

**Deductions disallowed for depreciation of a yacht**

*Langston v. Commissioner of Internal Revenue* No. 19-9002 (Filed October 2, 2020) (NOT FOR PUBLICATION)

Husband and wife taxpayers Carlos and Pamela Langston (The “Langstons”) petitioned for redetermination of income tax deficiencies and accuracy-related penalties arising from disallowed deductions for claimed depreciation on their yacht and recreational vehicle (RV) and disallowed loss deduction from the sale of their residence.

The statute in effect in 2012 and 2013, the relevant years, disallowed certain business deductions, including depreciation for “listed property” unless the taxpayer substantiates the business use of the property with “adequate records” or “sufficient evidence corroborating the taxpayer’s own statement.” All parties agreed that the yacht was considered “listed property” at the relevant time.

In 2011, the Langstons purchased Port Carlos Marina from Mr. Langston’s mother. Port Carlos' primary location consists of 100 covered dock slips and multiple structures while its secondary location, Masthead Marina, is 15 minutes from the primary location. Masthead Marina is a sailboat cove with 50 uncovered boat slips. Just prior to the purchase of Port Carlos the Petitioners had purchased a Meridian 580 and a Raptor RV which they immediately contributed to a newly formed business entity which held title to the

Marina. Petitioners testified that the Meridian 580 was used solely for business purposes, operating as a boat sales office at Port Carlos. However, there was no testimony from anyone other than the petitioners and their general manager to support their claims. Petitioners did not produce any documentation, records, or logs of any business activity taking place onboard the Meridian 580 outside of testimony from petitioners and their manager. Further, the Meridian 580 had no sign or other indication it was being used as a boat sales office. The Court did not find this testimony credible.

The Court did however find the testimony of the Revenue Agent (RA) sent to investigate credible. The RA testified that on her visit to Port Carlos the yacht was littered with items indicative of personal use. Without more, petitioners' self-serving testimony did not meet the strict substantiation requirements of section 274(d).

The Court of Appeals affirmed that they were not entitled to the claimed depreciation deductions for the yacht, RV, or loss on the sale of property and that they were liable for accuracy-related penalties. Ultimately the court concluded that the Langstons failed to establish that the yacht (or RV) was held for legitimate business use and as a result disallowed the related deductions. □

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## **RICO/FRAUD**

### **Fraud and RICO violations alleged related to Yacht Purchase and Sailboat Pooling Agreement dismissed**

*Little v. Dufour Yachts SAS et al.*, No. 19 C5411 (N. D. Ill.) (Signed 09/28/2020)

In March 2015, plaintiffs Matthew Little and Sherry Little (the “Littles”) entered into two agreements with Broad Reach Sailing LLC, which

was both a dealer of yachts and an organizer of a pool of yachts available for charter. In the first agreement the Littles agreed to purchase a yacht, and in the second agreement they agreed to let Broad Reach Sailing LLC use the yacht in the yacht pool. After things went wrong with their purchase of a yacht, the plaintiffs filed a RICO and Fraud case against various entities indirectly associated with the original purchase. Two of these entities were Dufour Yachts SAS and Erik Macklin, an individual, both of whom the plaintiffs alleged “marketed and operated fractional ownership programs throughout the United States including... Broad Reach in Chicago Illinois.” An additional entity was Crosslink Marketing, LLC, an entity whose sole member was Erik Macklin.

Plaintiffs’ complaint implied that the yacht pool was unlawful under the Jones Act, owing to the fact that the yacht was not manufactured in the United States. The plaintiffs contended that a representative for Broad Reach Sailing (who was not ultimately a party to this suit) stated that the program involved “strictly bareboat charters” and thus the program was considered to be “recreational” rather than commercial or “passenger for hire” under the law of the United States. Plaintiffs further allege that, unbeknownst to them, the program’s use of yachts from outside the United States constituted “commercial” use under U.S. law and, therefore, violated the Jones Act. Based on those allegations the plaintiffs asserted four RICO claims against four defendants and one count of common-law fraud against two defendants (Macklin and Crosslink Marketing, LLC).

Macklin and Crosslink moved to dismiss. Ultimately the motions to dismiss were granted because the allegation of Fraud was improperly based on an alleged misstatement of law and the RICO allegation did not meet the necessary and particular pleading requirements.

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# Coast Guard Update

## USCG to Consider Regulations on Autonomous Vessels

On August 11, 2020, the USCG posted a Request for Information seeking input regarding the introduction and development of automated and autonomous commercial vessels and vessel technologies subject to U.S. jurisdiction, on U.S. flagged commercial vessels, and in U.S. port facilities. The Coast Guard will also be evaluating potential barriers to developing autonomous vessels.

## Navigation and Vessel Inspection Circulars: 01-20

A newly published Navigation and Vessel Inspection Circulars (NVICs) concerning revisions to guidelines for addressing cyber risks at maritime transportation security act regulated facilities was published in February 2020. Visit the U.S. Coast Guard NVIC webpage to view newly issued NVICs. □

## United States Coast Guard Marine Safety Advisory - May 13, 2020 - 04-20

The USCG Marine Safety Advisory Inspections and Compliance Directorate issued a reminder that accurate AIS data entry and display is essential to safe navigation as one of the many important tools used in providing vessel operators with a clear picture of potential upcoming vessel passing situation.

## United States Coast Guard Marine Safety Advisory - July 6, 2020 - 05-20

The USCG Marine Safety Advisory Inspections and Compliance Directorate issued an alert to emphasize the importance of properly installed and maintained listed or certified safe electrical equipment in hazardous areas in order to reduce the risk of fire or explosion on board vessels. □

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# State-Law Update

- **Florida**
  - FL H.B. 133 (NS)
    - Authorizes local governments to enact rates to tow vessels on private property & remove & store vessels.
- **Maryland**
  - 2020 Maryland Laws Ch. 75 (H.B. 143)
    - The State Boat Act sets forth the notice requirements for removal of abandoned or sunken vessels by the Department of Natural Resources.
- **Ohio**
  - 2019 OH H.B. 211 (NS)
    - This bill establishes a process by which a person may obtain title to a watercraft vessel or outboard motor that has been left on the person's property.
- **Oklahoma**
  - OK ADC 710:22-1-3
    - Registration requirements have been amended to implement the provisions of HB 1156, which amends definitions and provides that canoes, kayaks or paddleboats when powered by any means other than human power, must be titled and registered.
- **Oregon**
  - OR ADC 856-016-0001
    - Temporary requirements have been put in place to al-



low waiver of certain provisions and annual renewal requirements that are necessary for state and national emergencies, due to the ongoing pandemic.

- **South Carolina**

- SC ADC 136-100

- The state has regulated to provide for emergency licensure as pilots of current apprentices and retired pilots previously licensed during the state of emergency caused by COVID-19.

- **Texas**

- 31 TAC 55.401, 402

- The Texas Parks and Wildlife Department proposed amendments to clarify that livery vessels (a rented vessel for which operation and provisioning are the responsibility of the renter rather than the owner of the vessel) are subject to Chapter 31, Subchapter G ss. 55.401-402, which requires licenses and regulation of party boats.

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