SOURCES OF MARINA LIABILITY FOR STORAGE AND REPAIRS ASHORE AND THE EFFECTIVENESS OF RED LETTER CLAUSES

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Providing legal counsel regarding marina liability involves a seemingly infinite number of issues to consider, both common to land-based businesses and unique to their water-related functions.[2] The issues are complicated by jurisdictional concerns[3] and a lack of clarity in applicable laws. Such complications are not excepted from marina contracts for repair and/or storage of a vessel. The circumstances provide a wealth of opportunity for the practitioner to litigate the unresolved law, disputable facts and develop a transactional approach to address the legal needs of a marina and/or its customers.

This paper will primarily address the following questions:

I. What are the typical sources of liability to which a marina is exposed by virtue of its vessel-related operations ashore? Particularly, is there a basis to bring a tort action in admiralty arising out of shore-based activities?; and

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[2] A non-exhaustive list includes: dredging and depth maintenance, docking pilots, accessing navigable waters, environmental concerns, property rights ashore and associated with dockage, obstructions to navigation such as crab pots and wreckage, debris and disabled vessels, the duty to provide a safe berth, proper mooring, employee issues, aids to navigation, on-shore facilities, taxation, nuisance claims by adjacent property owners, vandalism, hurricane and inclimate weather preparedness and resulting damages (see Julius H. Hines, J. Michael Pennenkamp and Joesph Denney Terry, *Hurricanes - Weathering the Legal Storm*, Program Materials, Southeastern Admiralty Law Institute, Institute of Continuing Legal Education in Georgia June 24-25, 2005,) etc.

[3] Whereas this article was originally generated for the Continuing Legal Education curriculum for the Fall 2005 meeting of the Maritime Law Association of the United States held in Scottsdale, Arizona, readers may be interested in the recent holding of *Aramark Leisure Services, Inc., Limitation Proceedings, RUNABOUT*, 2005 AMC 366 (D.Az. 2003) (Lake Powell, which forms part of the boundary between Utah and Arizona, although not presently used for commercial shipping, could be so used and is therefore a navigable water for purposes of admiralty jurisdiction).

II. What is the affect of a marina's exculpatory clause in a contract for storage or repair of a vessel?

A distinction should be recognized among common vessel storage options. First, "mooring" is the anchoring or making fast to the shore or dock.[4] There is clearly admiralty jurisdiction over torts and contracts relating to mooring, or "wet slip" storage.[5] "Dry docking" is the placement of a vessel in water when, thereafter, the water is removed from about the vessel.[6] There is admiralty jurisdiction over vessels in dry dock as the vessel is deemed to be in water for jurisdictional purposes.[7] Dry docking is generally due to repair rather than storing a vessel. "Dry storage" is the storage of a vessel ashore. Typically, this implies "stack" storage, for instance, in a warehouse ashore.[8] First addressed below are the issues associated with jurisdiction over claims associated with dry storage.[9]

I. PRIMARY SOURCES OF LIABILITY FOR DRY STORAGE[10]

A. Contract

The test to determine whether there is admiralty jurisdiction over a contract is whether the contact is maritime

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[4] Deluxe Black's Law Dictionary, 6th Edition (1990).

[5] *Sisson v. Ruby*, 497 U.S. 358, 367, 1990 AMC 1801, 1808 (1990) ("the storage and maintenance of a vessel at a marina on navigable waters is substantially related to traditional maritime activity").

[6] *The Jefferson*, 215 U.S. 130 (1909).

[7] *The Robert W. Parsons*, 191 U.S. 17, 33-34 (1903).

[8] Query the status of a vessel lifted and suspended above water.

[9] Beyond the scope of this paper (but not beyond the scope of inquiry for the practitioner) is whether, based on the facts, the vessel has been "removed from navigation", in which case the courts will lack an independent basis for admiralty jurisdiction. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995).

[10] The three primary sources of liability are discussed in this section. Not discussed but also actionable include: claims based on breaches of workmanlike performance, Article 7 of the Uniform Commercial Code, the Oil Pollution Act of 1990 (33 U.S.C.A. 2701, *et seq.*)(*see GMD Shipyard Corp v. M/V ANTHEA Y, et al.*, 2004 AMC 2760 (S.D.N.Y. 2004)) and state based remedies including those such as NCGS 99A (allowing agent in possession or bailee to sue on bases including trespass and interference). The following articles may be informative about additional sources of liability: Dennis Minichello, *Marina Liability for Damages to Yachts in Storage*, and G. Hamp Uzzelle, III, *Liability of Wharfingers, Fleeters, and Bailees*, 70 Tul. L. Rev 647 (1995).

in nature.[11] Contracts to repair vessels are maritime in nature.[12] Maritime contracts to be performed on land can be within the admiralty jurisdiction of the court[13]. A contract to provide dry storage ashore is within admiralty jurisdiction.[14] It is "undisputed" that there is an independent basis for admiralty jurisdiction over actions arising out of contracts to store and repair or service vessels taken out of navigable waters,[15] *i.e.*, - vessels in dry storage.

It is notable that post-*Wilburn Boat*,[16] although there may be admiralty jurisdiction, courts will apply state law if the terms at issue are those of an insurance contract. It is doubtful that, absent a specific agreement to do otherwise, a marina storing or repairing a vessel is an insurer of the vessel or its owner(s). To provide further protection for related concerns, marina contracts may require vessel owners to maintain and provide proof of an effective insurance policy.

B. Bailment

Federal common law recognizes the existence of a bailment relationship.[17] Admiralty law recognizes the following elements constituting a bailment:[18]

(i) delivery of goods by the owner (bailor, vessel owner) to another (bailee, marina);

(ii) under an express or implied contract for the mutual benefit of both parties;

(iii) acceptance of the goods by the other, with the express or implied promise that the goods will be returned

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[11] *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass, 1815) (No. 3776), 1997 AMC 550; *New England Mutual Marine Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 23 (1871).

[12] *The Jack-O-Lantern*, 258 U.S. 96 (1922)

[13] *American Eastern Development Corp. v. Everglades Marine, Inc.*, 608 F.2d 123, 1980 AMC 2011 (5th Cir. 1979).

[14] *Medema v. Gombo's Marina Corp.*, 97 F.R.D. 14, 1983 AMC 1611 (N.D. Ill., 1982).

[15] *Omaha Indemnity Co. v. Whaleneck Harbor Marina, Inc.*, 610 F.Supp. 154, 156, 1986 AMC 345 (E.D.N.Y. 1985).

[16] *Wilburn Boat Co. v. Fireman's Fund Ins.* Co., 348 U.S. 310.

[17] Cargo context: *Highlands Ins. Co. v. Strachan Shipping Co.*, 772 F.2d 1520 (11th Cir. 1985); *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349, 1995 AMC 2317 (5th Cir. 1995).

[18] *See Ice Fern v. Golten*, 2005 AMC 1043 (S.D.N.Y. 2005)(dismiss bailor's claim for (a) failing to allege an implied or express contract and (b) alleging that cargo was in the possession of two defendants).

after the purpose of delivery has been fulfilled or be disposed of in conformity with the purpose of the trust; and

(iv) exclusive possession by the bailee.

Placement of a vessel at a wharf or marina for repair may result in a bailment.[19] However, slip rental agreements, in and of themselves, do not necessarily create a bailment.[20] A distinction should be drawn between a mere lease[21] as opposed to a bailment. In a marina context, a lease is an agreement to pay a fee for the opportunity for a vessel to occupy an assigned slip while a bailment requires exclusive possession by the marina, whether for storage or repair.[22]

Bailment does not arise unless delivery to the bailee is complete and the bailee has exclusive possession of the bailed property, even as against the property owner.[23] The exclusive control requirement has been "relaxed" somewhat when a vessel owner has access to her vessel while in dry storage.[24] If a bailment exists, the bailee is charged with exercising reasonable care in the protection of bailed goods[25].

An action based on bailment can sound in contract (breach of bailment) or tort (negligence during the bailment).[26] It is often said that failure to redeliver the bailed item in good condition raises a *presumption of negligence* by the bailee.[27] However, under maritime law, the benefit of the presumption is limited by the following: (a) for the presumption to exist, it

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[19] *Buntin v. Fletchas*, 257 F.2d 512 (5th Cir. 1958).

[20] *In re Wechsler*, 121 F.Supp.2d 404, 2001 AMC 312 (D.Del. 2000).

[21] or license as with some instances of wet slip storage.

[22] *See Fletcher v. Port Marine Center, Inc.*, 1990 AMC 2877 (D.Mass. 1990) and *Snyder v. Four Winds Sailboat Centre, Ltd.*, 701 F.2d 251, 1983 AMC 1510 (2nd Cir. 1983).

[23] *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349, 1995 AMC 2317 (5th Cir. 1995).

[24] *Commercial Union Insurance Company v. Bohemia River Associates, Ltd.*, 855 F. Supp. 802, 805 1994 AMC 1410 (D.Md. 1991), citing *Hicks v. Tolchester Marina, Inc.*, 1984 AMC 2027 (D.Md. 1983); *TNT Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 1984 AMC 1341 (5th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983) (if the bailor or its agent or employee remained on the vessel or had access to it, the bailee's duties were limited).

[25] *English Whipple Sailyard, Ltd v. Yawl Ardent*, 459 F.Supp. 866, 1980 AMC 1104 (W.D. Pa. 1978).

[26] *Reel Therapy Charters, Inc. v. Marina Management, Inc.*, 2004 AMC 378 (N.D. Fla 2003).

[27] *Richmond Sand & Gravel Corp. v. Tidewater Construction Corporation*, 170 F.2d 392 (4th Cir. 1948).

must be proven that the item was not redelivered in good condition, (b) the burden of proof to show negligence remains with the bailor and only the burden of showing that it was without fault shifts to the bailee[28], (c) the bailee need only show that the loss was caused by some act consistent with due care on his part and then the bailor is charged with showing negligence by the bailee,[29] (d) the presumption applies only if the evidence lies within the knowledge and control of the bailee[30], and (e) the presumption remains a *rebuttable* one and may be overcome by showing that the damage was not caused by any act or omission of the bailee or that the bailee exercised due care with respect to the vessel.[31]

The "presumption" is one of *negligence*, not *liability*. As will be discussed below, there is not an independent basis for admiralty jurisdiction for torts arising out of storage or repair to vessels in dry storage. At first blush it seems that the effect of the presumption jeopardizes the logic behind allowing bailment "sounding in tort" as an independent basis of admiralty jurisdiction. However, the rationale seems to be that the tort analysis is born of the bailment which is formed via contract.

If the remedy were not to allow the presumption of *negligence*, what would be the benefit of alleging a bailment? What would be the benefit of allowing a presumption of *breach of contract*?

C. Tort

1. Generally, no independent basis for admiralty jurisdiction.

The test to determine whether there is independent admiralty jurisdiction over a tort requires an examination of the locality plus a nexus to traditional maritime activity.[32] In seeking to invoke admiralty jurisdiction pursuant to 28 U.S.C.

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[28] *Matter of Flowers*, 526 F.2d 242 (8th Cir. 1975), citing *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941).

[29] *Buntin v. Fletchas*, 1958 AMC 2416, 257 F.2d 512 (5th Cir. 1958).

[30] *Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc.*, 343 F.Supp 347, 1972 AMC 765 (D.Mass. 1971)(the presumption did not apply when neither party had knowledge of the origin of a fire but the cause was ascertained).

[31] *Leyendecker v. Cooper*, 1980 AMC 1061 (D.Md. 1979).

[32] *Executive Jet Aviation, Inc. v. City of Cleveland*, Ohio, 409 U.S. 249 (1972); Sisson v. Ruby, 497 U.S. 358, 1990 AMC 1801 (1990)(admiralty jurisdiction over damages from fire from washer/dryer unit on a private yacht moored at a marina).

1333(1), the court must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test involves an assessment of the general features of the type of incident involved. The general character of the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity.[33] In a recent case, a court ruled that it lacked jurisdiction when a marina (claiming fees and charges for berthing and services to a sailboat) repossessed[34] the sailboat from navigable waters at another marina.[35] The court ruled that the incident did not have a potentially disruptive effect on commerce.[36]

Courts have held that there is no independent basis for admiralty jurisdiction based on torts occurring from negligence ashore associated with dry storage. For instance, in a case regarding a sailing vessel that fell from a cradle in dry storage, a court held that, "[t]he tort occurred on land and had no more connection with maritime activity than if a sea captain's car was damaged in a repair shop."[37] Following such logic, the 4th Circuit has held that it did not have admiralty jurisdiction over tort claims arising out of an explosion on a vessel on blocks 75 feet from the water.[38]

In a recent case[39] involving engines stolen from a vessel ashore at a marina, the court in asserting jurisdiction noted that "[c]ourts have assumed admiralty jurisdiction of negligence claims arising from a contract to repair or bailment agreement."[40] To support its contention, the court cites a case in which it was held that no bailment existed.[41]

Courts' legal contortions to allow tort-based claims arising out of breaches of a contract or bailment suggest a willingness to expand admiralty tort jurisdiction beyond the

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[33] *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995).
[34] Said, "converted".
[35] *Ramirez v. Butler*, 319 F.Supp.2d 1034, 2004 AMC 2203 (N.D.Cal. 2004).
[36] *Id.*
[37] *Omaha Indem. Co. v. Whaleneck Harbor Marina, Inc.*, 610 F.Supp. 154, 1986 AMC 345 (E.D.N.Y. 1985).
[38] *David Wright Charter Service of North Carolina, Incorporated v. David Wright, et. al.*, 925 F.2d 783, 1991 AMC 2927 (4th Cir. 1991).
[39] *AXA re Property & Casualty Insurance Company, et al. v. Tailwalker Marine, Inc.*, 2005 AMC 749 (D.S.C. 2004).
[40] *Id.* at 754, FN 1.
[41] *Commercial Union Ins. Co. v. Bohemia River Assocs.*, 1994 AMC 1410, 855 F. Supp. 802 (D.Md. 1991).

confines of the principles espoused in *Executive Jet* and its progeny. However, the logic complies with admiralty law's benefit of uniformity. For instance, the Admiralty Extension Act,[42] the Longshore and Harbor Workers' Compensation Act,[43] the Jones Act,[44] and the traditional remedy of maintenance, cure and wages[45] provide an independent basis for admiralty jurisdiction over seemingly tort-based injuries ashore.

2. Keeping the tort claim in federal court - supplementary jurisdiction

Although there is no independent basis for admiralty jurisdiction for torts occurring from negligent dry storage ashore, if the claims arise out of the same nucleus of operative facts as those permitting an independent basis for admiralty jurisdiction over a contract or bailment, the court may exercise supplementary jurisdiction over the tort claim.[46] In exercising supplementary jurisdiction, the court must apply state law as to the tort claim.[47] In such instance, the law to be applied may limit or expand the remedies of the claimant (which may be the vessel owner and/or the marina) and, as discussed in the next section, the defenses available to the marina.

II. EXCULPATORY CLAUSES - THE FREEDOM TO CONTRACT VERSUS PROTECTION OF PUBLIC INTERESTS

A common way marinas seek to avoid or limit their liability to patrons and others is for their contract of storage and/or repair to contain an appropriate provision, often called a "red letter" or exculpatory clause. The colorful phrase is derived from the often contrasting color, bolding or capitalization of the clause as it appears in a repair or storage contract.[48] Marinas often seek to limit any combination of the following: theories of recovery, types of damages recoverable, sums for which they may be found liable, time within which a suit may be

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[42] 46 U.S.C.A. 740 (1976).
[43] 33 U.S.C. 901-950 (1988).
[44] 46 U.S.C. 688.
[45] *Aguilar v. Standard Oil Co. of N. J.*, 318 U.S. 724 (1943), *cert. denied*, 317 U.S. 681.
[46] 28 U.S.C.A. 1367; *Omaha Indem. Co. v. Whaleneck Harbor Marina, Inc.*, 610 F.Supp. 154, 1986 AMC 345 (E.D.N.Y. 1985); *Medema v. Gombo's Marina Corporation*, 97 F.R.D. 14, 1983 AMC 1611 (N.D. Ill. 1982).
[47] *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Promisel v. First Am. Artificial Flowers, Inc.*, 943 F2d 251 (2nd Cir. 1991), cert denied, 502 U.S. 1060 (1992).
[48] Daniel B. MacLeod, *The Use and Enforceability of Exculpatory (Red Letter) clauses in Ship Repair Contracts*, 6 USF Mar L J 473, 478 (Spring 1994).

brought, the forum in which suit may be brought and the law which may be applied.

The practitioner drafting or interpreting a red letter clause must be concerned with which law to apply: state, federal or admiralty. At first blush, it seems admiralty law should apply because interpretation of a maritime contract is at issue. However, if the contract amounts to one of insurance or if the court must determine the extent or existence of negligence, pursuant to the analysis above, courts should apply state law.

There is presently a split among the Circuits as to whether an exculpatory clause that fully absolves a marina of liability is enforceable in admiralty law. The cases may be distinguished according to the type of contract (storage or repairs) and the extent of the limitation. However, there appears to be a consensus as to the following maxims:

(a) exculpation must be clearly and unequivocally expressed;

(b) the clause must not be the result of unequal bargaining power or overreaching;[49] and

(c) a marina may not exculpate itself of liability in excess of ordinary negligence (*i.e.* - gross negligence).

A. *Bisso* - red letter clause in a towage contract

The starting point of the analysis is *Bisso v. Inland Waterways Corporation*[50] which involved towage of the oil barge BISSO up the Mississippi River by the towboat CAIRO. The negligent towage resulted in a collision with a bridge pier.[51] The purported exculpatory clauses stated that the towing movement was the "sole risk" of the barge and that operators of the CAIRO should "in the performance of said service become and be the servants" of the BISSO. The Court held that the exculpatory clauses were invalid.

In the wake of *Bisso* lies the split among the Circuits as to whether a clause (such as those frequently seen in contracts

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[49] overcome by (i) distinguishing contracts of adhesion from overreaching and (ii) noting the modern day reality of availability of other marinas)

[50] 349 U.S. 85 (1955).

[51] Although the Court uses the term collision (*Id.* at 86), maritime practitioners may describe the accident as an allision.

for storage and/or repair of vessels) relieving one of liability is enforceable in admiralty. In other words, is the holding in *Bisso* the rule in admiralty or is it limited to application to towage contracts?

The rationale of the holding in *Bisso* is to: (1) discourage negligence by making wrongdoers responsible by paying damages and (2) protect those in need of goods or services from being overreached by those with a perceived ability to drive hard bargains.[52] The first rationale is inapplicable to red letter clauses which are limited by, for instance, allowing a claim for negligence but capping damages or limiting the types of damages. The underlying concern is further diminished when red letter clauses bar a claim for negligence but allowing a claim for conduct more reprehensible than mere negligence (ie - gross negligence). The second rationale is adverse to the principals of freedom of contract and capitalism. Further, it is out-of-date with the modern reality of the extensive availability of marinas, particularly for pleasure craft. It has been said that the *Bisso* holding has been "universally criticized" for its lack of clarity[53] and lower courts generally limit *Bisso* strictly to towing contracts.[54] Nevertheless, *Bisso's* holding and purported rationale is the starting point for application of red letter clauses in repair and storage contracts.

B. Departing from but winking at *Bisso* while unnecessarily reiterating its holding

1. Logical steps away from *Bisso*

A logical movement away from *Bisso* is to limit the application of its holding to contracts for *complete* absolution of liability. In 1964, in American *Steamship Company v. Great Lakes Towing Company,*[55] the 7th Circuit followed *Bisso* and refused to enforce a red letter clause attempting to cap recovery in a towage contract. The 6th Circuit, under similar facts, departed from the holding in the 7th Circuit and permitted a cap on

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[52] *Id.* at 91.

[53] Benjamin Brown, *Splitting the Difference: Reassessing Bisso in light of Sander v. Alexander Richardson Investments*, 29 Tul. Mar. L.J. 489, 491 (Summer 2005), citing Daniel MacLeod, *The Use and Enforceability of Exculpatory (Red Letter) Clauses in Ship Repair Contracts*, 6 U.S.F.Mar.L.J. 473, 503 (1994).

[54] Daniel MacLeod, *The Use and Enforceability of Exculpatory (Red Letter) Clauses in Ship Repair Contracts*, 6 U.S.F.Mar.L.J. 473, 503 (1994).

[55] 333 F.2d 426 (7th Cir. 1964), *cert. denied*, 379 US 889.

recovery.[56] Soon thereafter, the United States Supreme Court ruled in *East River S.S. Corp. v. Transamerica Delaval, Inc.*,[57] that maritime contractors can restrict liability within limits by disclaiming warranties or limiting remedies.

2. 1st Circuit - *La Esperanza*

In 1997, the 1st Circuit decided *La Esperanza De P.R., Inc. v. Perez Y CIA. De Puerto Rico, Inc.*,[58] which involved a repair contract. The marina claimed it was not paid for repairs and the owner claimed negligent repairs. The exculpatory clause at issue precluded liability for loss of use and loss of profits in the event of a breach by the marina. The Court *enforced* the contractual provision and limited damages. However, in so doing, the Court stated that red letter clauses are enforceable if expressed clearly in contracts entered into freely by parties of equal bargaining power, provided that the clause does not provide for a total absolution of liability.[59]

3. The 1st *Circuit's* mis-reliance on *Alcoa*

The root case cited in *La* Esperanza for the proposition that red letter clauses allowing complete absolution of liability are not enforceable following *Bisso* is *Alcoa Steamship* Company, *Inc. v. Charles Ferran & Company, Inc.*[60] *Alcoa* involved an invoice presented by a repairer to its repeat customer which contained, as did past invoices, a red letter clause. The clause provided for full absolution except for negligence and allowed a maximum recovery of $300,000. The vessel owner unsuccessfully challenged the recovery cap. The court concluded that the rationale for *Bisso* (to discourage negligence and to protect those in an inferior bargaining position) was not violated because a $300,000 cap deters negligence and in

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[56] *Canarctic Shipping Company, Limited v. Great Lakes Towing Company*, 670 F.2d 61 (1982).
[57] 476 U.S. 858, 1986 A.M.C. 2027 (1986).
[58] 124 F.3d 10, 1998 AMC 21 (1st Cir. 1997).
[59] *Id.* at 19, citing *Edward Leasing Corp. v. Uhlig & Assocs., Inc.*, 785 F.2d 877, 889 (11th Cir. 1986) (did not enforce "confusing" but purportedly absolute disclaimer), *Todd Shipyards Corporation, v. Turbine Service, Inc.*, 674 F.2d, 401, 410, 1982 AMC 1976 (5th Cir. 1982) (upheld clause permitting cap on liability), and *Alcoa Steamship Company, Inc. v. Charles Ferran & Company, Inc.*, 383 F.2d 46 (5th Cir. 1967) (upheld clause permitting cap on liability).
[60] 383 F.2d 46 (5th Cir. 1967).

subsequent contracts between the parties the clause was excluded.[61]

As with *La Esperanza*, the court in *Alcoa* did not have an independent basis to conclude that fully exculpatory red letter clauses are unenforceable nor was that the issue in the case. Despite seeming to be the basis for or origin of the law in the 1st Circuit, after *Alcoa*, the 5th Circuit has been fairly quiet on the issue. However, at least one court within the 5th Circuit has limited *Bisso's* holding to the towing industry.[62] Nevertheless, red letter clause litigation in the United States Supreme Court will need to address (and marina interests should be prepared to distinguish) *Alcoa*.

4. Courts within the 1st Circuit may part from *La Esperanza*

Stanton v. North side Marina at Sesuit Harbor, Inc.,[63] which was decided this summer suggests that courts within the 1st Circuit may apply red letter clauses more broadly than in *La Esperanza*. The case involved a Summer Dockage Contract and an allegedly intentionally lit fire which caused damage. The red letter clause provided: "All reasonable precautions will be taken by the Marina to ensure the Tenant's property and safety. However, the Marina assumes no responsibility for the safety of any vessel docked in the Marina and will not be liable for fire, theft or damage to said vessel, its equipment or any property in or on said vessel, however arising." [64]

The court found that the first sentence of the red letter clause was consistent with the marina's ordinary tort duty of care which "does not render ambiguous the second sentence's limitation on liability."[65] Although it does not use the word "negligence" and it might allow absolution for action or inaction more reprehensible than mere negligence, the second sentence seems to be a clear provision for absolution. The court found it a "difficult question" to answer whether the clause provided "for a total absolution of liability and if so, whether it is nonetheless enforceable in this type of slip rental contract." Despite *La Esperanza*, the court stated that "it is unclear in this circuit if slip rental agreements can absolve a

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[61] *Id.* at 55.
[62] *Ortiz v. ETPM-USA, Inc.*, 553 F.Supp. 549, 551, 1984 AMC 608 (S.D. Tx. 1982)
[63] 2005 WL 2035586 (D.Mass. 2005).
[64] *Id.* at 8.
[65] *Id.*

party from liability for ordinary negligence."[66] The court distinguished *La Esperanza* noting that the clause in that repair contract precluded recovery for certain kinds of damages but did not provide for a total absolution of liability.

The court in *Stanton* declined to address the issue which is the subject of this investigation, instead ruling for the marina on the merits. Notably, the court could have stricken the clause if it violated the maxim prohibiting escape from liability for conduct more reprehensible than negligence (i.e., gross negligence). Not seizing such opportunity and refusing to follow the *Bisso* rule recycled in *La Esperanza* may suggest a movement favorable for marinas.

Stanton supports the proposition that courts have a propensity to go to great lengths to find ambiguities or errors in drafting in order to avoid deciding the legitimacy of contractual language which limits or exculpates one party from the results of its torts or breaches of contract.[67]

5. 11th Circuit - *Repower*

In 2001, the 11th Circuit decided *Diesel "Repower", Inc. v. Islander Investments Ltd.*,[68] which involved a repair contract in which the repairer[69] would re-condition an *engine*, transmission and propulsion system. The repairs purportedly failed and the repairer attempted to limit liability with a limited warranty that did "not extend to or cover labor downtime, loss of income, shipping costs, freight damage(s), abuse, alteration, misapplication, improper installation (unless contracted with Diesel Repower Systems, Inc.), punitive, progressive, or consequential damages of any type…total dollar amount of liability is the purchase price of the equipment sold on this invoice."[70] The clause, which is a limited warranty, does not attempt to fully absolve the repairer of liability.

The court, however, in *upholding* the clause, unnecessarily attempted to expand the rule from *Bisso* by concluding that a red letter clause must not absolve a repairer of all liability and

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[66] *Id.* at 9, citing *Sander v. Alexander Richardson Invs.*, 334 F.3d 712 (8th Cir. 2003).
[67] Daniel B. MacLeod, *The Use and Enforceability of Exculpatory (Red Letter) Clauses in Ship Repair Contracts*, 6 USFMLJ 473, 504 (1994) (citation omitted).
[68] 271 F.3d 1318, 2002 AMC 751 (11th Cir. 2001).
[69] The Court's opinion does not indicate whether the repairer was also a marina but indicia suggests otherwise.
[70] *Id.* at 1325.

must still provide a deterrent to negligence.[71] This pronouncement, like that in *La Esperanza* and *Alcoa* is dicta because the court, in *enforcing* the red letter clause, concluded that the clause contained an adequate deterrent to negligence and the limitation did not absolve the repairer of all liability.[72] A similar analysis occurred and a similar conclusion was reached recently in *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II*.[73]

C. Support of red letter clauses (including some allowing full absolution) in the remainder of the Circuits

In 1999 the 9th Circuit decided *Royal Insurance Company of America v. Southwest Marine*,[74] which involved a yacht damaged by the collapse of a yard's crane. The instant contract involved a repair order *and* a storage agreement[75] which contained a red letter clause permitting full absolution. The court directly addressed the precise issue about which other courts had espoused a general rule which such other courts did not have occasion to apply. Specifically, the court answered in the affirmative whether red letter clauses permitting full absolution may be upheld. As such, *Royal* should be asserted and relied upon by practitioners seeking to enforce a red letter clause.

In 2003 the 8th Circuit decided *Sander v. Alexander Richardson* Investments,[76] which involved an exculpatory clause allowing full absolution which the court upheld. The Court distinguished the contrary law in the 1st and 11th Circuits by acknowledging that the instant contract was for the rental of a slip rather than repairs. The distinction was not essential in light of the law from the 9th Circuit. However, practitioners drafting contracts for marinas should be cognizant of and account for the distinction.

In 1973 the 4th Circuit decided *Kerr-McGee Corporation v. Law*,[77] which involved a contract of affreightment between a cargo owner and an affiliate of the charterer. The red letter clause, which the court upheld, allowed full absolution of liability

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[71] *Id.* at 1324.
[72] *Id.* at 1325.
[73] 329 F.3d 809, 2003 AMC 1228 (11th Cir. 2003).
[74] 194 F.3d 1009, 1999 AMC 2873 (9th Cir. 1999).
[75] Both apparently shore-based, although the tort was consummated on the navigable waters. *Id.* at 1012-1013.
[76] 334 F.3d 712, 2003 AMC 1817 (8th Cir. 2003).
[77] 479 F.2d 61, 1973 AMC 1667 (4th Cir. 1973).

except as to general average, sue and labor and collision. In 1991, the District Court of Maryland in *Commercial Union Insurance company v. Bohemia River Associates, Ltd.*[78] reviewed a slip rental agreement with a red letter clause allowing full absolution. The Court ultimately refused to enforce the clause not because of the *Bisso* rule but because the clause failed to satisfy one of the essential maxims - it was not clearly and unequivocally expressed by virtue of its failure to use the word "negligence." *Bohemia* may not be applicable to admiralty cases if, as it has been suggested, it applied Maryland state law.[79]

State law within the 4th Circuit provides an example of why the analysis in part I of this paper is critical when interpreting a red letter clause. A court applying Maryland state law enforced a fully exculpatory red letter clause.[80] However, North Carolina has refused to enforce a fully exculpatory red letter clause.[81]

Although the 2nd Circuit has not addressed the precise issue, on June 25, 2005, the District Court of Connecticut decided *Dominici v. Between the Bridges Marina,*[82] which involved a clause in a contract for winter storage allowing full absolution from liability. The Court examined three factors: (a) the nature of services covered by the contract, (b) whether the clause applied to intentional, reckless or grossly negligent behavior or merely ordinary negligence and (c) whether the clause was obtained through overreaching.[83] In what appears to be a trend among District Courts in Circuits which have not decided this issue, the Court upheld "the strong public policies of recognizing parties' liberty to contract and enforcing contracts as written[84]" but, by denying a 12(b)(6) motion, did not rule on whether the contract was factually sufficient to pass scrutiny of the second and third factors. However, based on the test applied, it seems courts in the 2nd Circuit may follow the Circuits allowing red letter clauses permitting full absolution.

The 3rd Circuit has not directly ruled on the enforceability of a fully exculpatory red letter clause in a maritime context.

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[78] 855 F.Supp. 802, 1994 AMC 1410 (D. Md. 1991).

[79] *Cornell v. Council of Unit Owners Hawaiian Village Condominiums*, 983 F.Supp. 640 (D.Md. 1997) (enforcing an exculpatory clause that did not contain the term "negligence").

[80] *Id.*

[81] *Brockwell v. Lake Gaston Sales and Service*, 105 N.C.App. 226 (1992).

[82] 375 F.Supp.2d 62 (D.Conn. 2005).

[83] *Id.* at 66.

[84] *Id.* at 67.

However, the District Court of Delaware enforced an exculpatory clause in a contract absolving a marina from any liability for its negligence regarding a slip rental agreement in *In the Matter of the Complaint of Wechsler*.[85] The court clearly adopted the analysis of *Royal*[86] from the 9th Circuit[87]. Notably, the majority of the opinion is dedicated to sanctioning the vessel owner for failing to properly preserve evidence, to wit, the destroyed vessel. On July 8, 2005, the District Court of New Jersey upheld red letter clauses in a storage contract which allowed liability for damages caused while the vessel was being moved[88] but not for damages once "placed" for storage.[89] Therefore, precedent exists that suggests courts within the 3rd Circuit may follow the circuits allowing red letter clauses, even those permitting full absolution.

Earlier this year, the 10th Circuit, sitting on the law side in a non-maritime context, permitted a fully exculpatory clause on the grounds that it did not excuse conduct worse than negligence.[90] Such precedent may be helpful in arguing for enforcement of a red letter clause permitting full absolution in a maritime context.

D. Conclusion

Until the uncertainties are cleared up, marinas employing a red letter clause are well served to include the word "negligence" in their contracts, not attempt to escape liability for conduct worse than negligence, insert a clause to cap monetary liability, and, from time to time, exclude the clause in exchange for an appropriate fee or other consideration.

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[85] 121 F.Supp.2d 404, 2001 AMC 312 (D. Del. 2000).

[86] *Royal Insurance Company of America v. Southwest Marine*, 194 F.3d 1009, 1999 AMC 2873 (9th Cir. 1999).

[87] *Id.* at 433.

[88] The Court addressed one of *Bisso's* rationale by noting that movement of the vessel was the period with the greatest propensity for damage.

[89] *Harbour Cove Marine Services, Inc. v. Rabinowitz*, 2005 WL 1630871 (D.N.J. 2005).

[90] *Shell Rocky Mountain Production, LLC v. Ultra Resources, Inc.*, 2005 WL 2002510 (10th Cir. 2005)