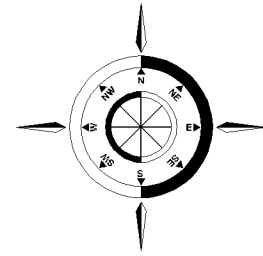


BOATING BRIEFS



Donald C. Greenman, Chairman
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This journal will summarize the latest cases and other developments which impact the recreational boating industry. We welcome any articles of interest or suggestions for upcoming issues.

- The Editorial Staff

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Unseaworthy Condition Voids Coverage

On June 5, 1999 the yacht GYPSY sank in calm weather at her berth in a marina in San Juan, Puerto Rico. Several days prior to the sinking the owner and a mechanic that he hired removed two of four seawater cooled air conditioning units in order to perform other interior maintenance. The four air conditioning units were cooled by seawater supplied through separate hoses connected to a single pump. Surveyors acting independently for the owner and the hull underwriters both concluded that the cooling water hoses for the two air conditioning units which were removed from the vessel had not been capped following removal of the units, thereby allowing seawater to be pumped directly into the vessel when the system was in operation. An investigation following

the loss revealed that the owner left the vessel's air conditioning system running when he departed the vessel on the day prior to the sinking. The owner maintained that he was not aware that the cooling water hoses had not been capped before he departed the vessel.

The boat was insured under a yacht policy issued by Lloyd's providing coverage for physical loss resulting from "any external cause...including any hidden defect." The policy contained a warranty of seaworthiness and exclusions for loss or damage due to "failure to maintain the vessel in a sound and reasonably fit condition" or "occurring during or resulting from repairs, restoration or remodeling."

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The underwriters commenced a declaratory judgment action in federal court seeking a declaration that no coverage existed for the loss on the grounds that the sinking resulted from an unseaworthy condition in breach of the policy's warranty, or that coverage was excluded in that the loss resulted from "repairs, restoration or remodeling." The district court found that the vessel was unseaworthy at the time of the sinking and granted summary judgment in favor of the underwriters. The owner appealed.

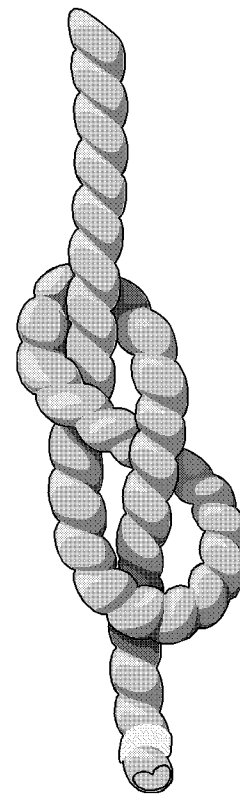
The decision of the district court was affirmed by the U.S. Court of Appeals for the First Circuit in *Underwriters at Lloyd's v. Labarca*, 260 F.3d 3 (1st Cir. 2001). On appeal the boat owner argued that the intrusion of seawater through the uncapped cooling water hoses was fortuitous and within the ordinary perils insured against or, alternatively, that a defective above the water line through hull fitting was a primary or contributing cause of the sinking.

In rejecting the owner's argument that the sinking was fortuitous and therefore within the ordinary perils insured against, the Court of Appeals held that a warranty of seaworthiness such as the clause contained in the Lloyd's policy is absolute

and that the question of whether or not the condition resulted from the owner's negligence or fault is irrelevant to the inquiry. Accordingly, the Court held that the owner's failure to cap the cooling water hoses or his operation of the partially dismantled system created an unseaworthy condition regardless of the assured's alleged lack of knowledge of the condition or the foreseeability of the loss.

The owner had presented evidence to the district court that an uncapped one-inch diameter through hull fitting located above the load waterline had not been discovered or reported by prior surveys and that this fitting contributed to or hastened the vessel's sinking by allowing uncontrolled flooding of the vessel when the fitting became submerged. On appeal the assured argued that this condition constituted a latent defect which caused or contributed to the sinking within the meaning of the policy's grant of coverage. In rejecting this argument the Court of Appeals noted that a presumption of unseaworthiness arises when a vessel sinks in calm conditions and held that the presumption can be overcome only by evidence showing that the sinking resulted from some other cause. Further, the Court

held that where a loss results in part from an unseaworthy condition and in part from a covered cause, no coverage exists unless the covered cause is the "predominant efficient cause." On the basis of the evidence presented to the district court, the Court of Appeals concluded that the proximate cause of the sinking was the uncapped cooling water hoses because the assured could not demonstrate that the defective through hull fitting would have caused the boat to sink in calm conditions in the absence of water ingress through the uncapped air conditioning hoses.



Insurance Claim For Loss Ashore Within Admiralty Jurisdiction

In February, 1998 Brad Barnes obtained an insurance policy providing liability and hull coverage for his twenty foot powerboat from the French insurance company La Reunion. The policy contained a navigation warranty restricting use to the “inland waters” of California and a six month annual dry lay up requirement. In May, 1998, Barnes reported that his boat had been stolen while layed up ashore and filed a claim against the insurer for the insured value of \$64,000.

La Reunion commenced a declaratory judgment action in admiralty against Barnes in the U.S. District Court for the Central District of California seeking rescission of the policy. La Reunion alleged that the insured had misrepresented or failed to disclose material facts in his application for insurance relating to prior insurance claims for theft of his property.

The insured moved to dismiss the insurer’s declaratory judgment action for lack of admiralty subject matter jurisdiction on the grounds that the insurance policy did not satisfy the requirements for maritime contract jurisdiction. The district court granted the insured’s motion to dismiss and La Reunion appealed.

The Ninth Circuit Court

of Appeals reversed the decision of the district court in *La Reunion Francaise S.A. v. Barnes*, 247 F.3d 1022, 2001 AMC 1521 (9th Cir. 2001), holding that the policy was a maritime contract for jurisdictional purposes.

On appeal the insured argued in part that there was no admiralty subject matter jurisdiction because the policy restricted use of the boat to state “inland waters.” In support of his argument the insured relied in part on the decision of the Ninth Circuit in *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 1995 AMC 2087 (9th Cir. 1995). In *Seven Resorts* the court held that a houseboat charter contract for use of a recreational boat on a land locked lake was not a maritime contract for purposes of admiralty jurisdiction because it lacked a sufficient connection to navigable waters. In *La Reunion* the Court of Appeals rejected the insured’s argument, noting that the “inland waters” navigational limit in the policy encompassed waters which clearly satisfy the test for navigability such as the Sacramento and San Joaquin Rivers. In addition, the Court took the opportunity to clarify its prior holding in *Seven Resorts*, specifically holding that the requirement

of a connection with navigable waters applies only to the test for admiralty tort jurisdiction and that maritime contract jurisdiction depends solely on whether the subject matter of the contract is maritime in nature.

The insured argued in the alternative that the policy was not a maritime contract because it provided coverage for loss on land and the alleged theft which formed the basis of the claim occurred on land. This was the basis on which the district court had concluded that admiralty subject matter jurisdiction was lacking. The Court of Appeals, relying on the Second Circuit’s decision in *Sirius Ins. Co. v. Collins*, 16 F.3d 34, 1994 AMC 1683 (2nd Cir. 1994), rejected the insured’s argument and held that a boat policy of the type issued to the insured is wholly maritime in nature and that the contract’s essential nature is not altered by the requirement that the boat be stored ashore or that the loss arose on land.

Property Owner Immune From Tort Liability

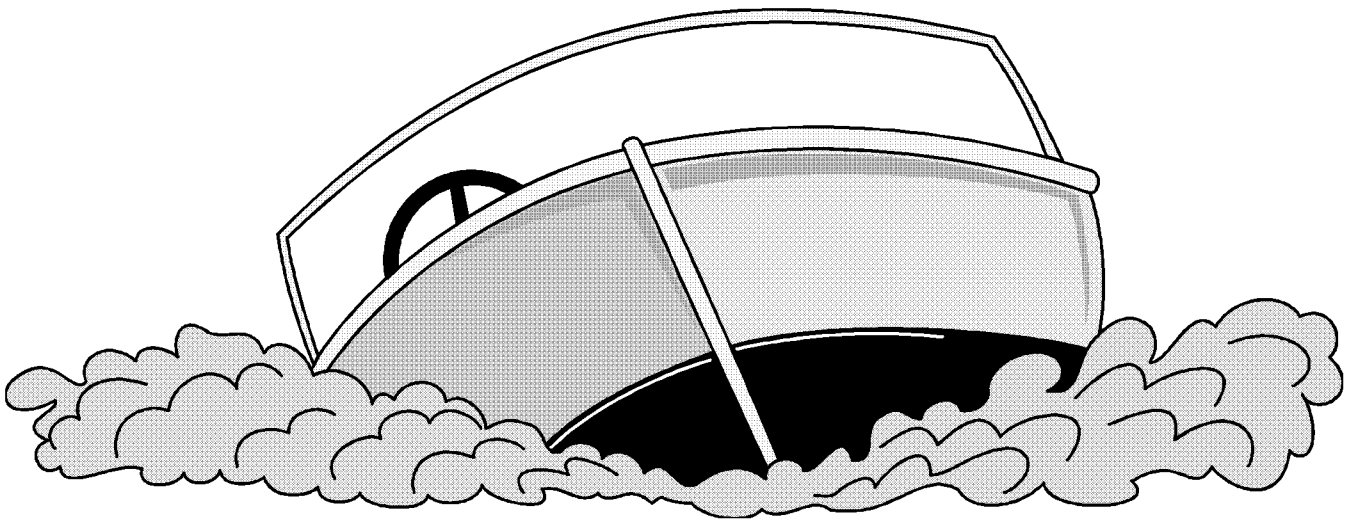
In a previous issue we focused on state recreational use immunity statutes and the potential relevance to claims arising in connection with the use or operation of recreational vessels. 8 Boating Briefs No. 2 (Mar.L.Ass'n. 1999). Although the specific provisions vary, these statutes are generally intended to provide immunity from civil liability to property owners who

circumstances where access to the property was not available to the public at large, but only to individuals renting boat slips on adjoining waterfront property.

In *Urban*, a property owner had granted an easement to an adjoining property owner to permit boat owners and their guests to access boats at a marina located on the adjoining parcel. The property owner

court's decision was affirmed by the intermediate appellate court and the plaintiff appealed to the Wisconsin Supreme Court.

The Wisconsin Recreational Use Immunity Statute provides that "no owner...is liable for the death of, any injury to, or any death or injury caused by, a person engaging in recreational activity on the owner's land." The Wisconsin Supreme Court



permit the public to use their land for recreational purposes without charge.

The Supreme Court of Wisconsin recently considered the applicability of that state's recreational use immunity statute in *Urban v. Grasser*, 243 Wis.2d 673, 627 N.W.2d 511 (WI. 2001). The decision is notable in that a landowner was held to have immunity under the statute in

that granted the easement was sued for personal injuries allegedly sustained by a boat owner utilizing the easement when he was chased by the property owner's dog. The trial court found that the property owner was immune from liability under the Wisconsin Recreational Use Immunity Statute, Wis. Stat. § 895.52, and granted summary judgment in favor of the land owner. The trial

identified various factors to be considered in connection with a claim of immunity under the state statute including the intrinsic nature, purpose and consequences of the activity giving rise to the claim, the intent of the user, the nature of the property and the intent of the property owner.

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The Supreme Court held that the grantor of the easement qualified as an owner under the statute and that the activity in question, walking across property to access a pleasure boat, constituted recreational activity within the meaning of the statute. Unlike similar statutes in other states, the Wisconsin statute does not expressly condition the immunity on the owner's agreement to permit use by the general public. Accordingly, the fact that the easement was available only to users of a marina was not in itself a sufficient ground to preclude application of the immunity statute. The Court

also considered but rejected the plaintiff's arguments that the claim fell within the "social guest" and "profit" exceptions to the statute. The Wisconsin statute contains an exception to immunity where an injury is sustained by an individual who is specifically invited onto the property by the owner as a social guest. The Court held that the social guest exception was not operative because the property owner had granted a general easement to a particular class of individuals and he had no direct contact with the injured party. The Court also rejected the plaintiff's argument that the statute's "profit" exception

was applicable. The "profit" exception removes the protection of the statute where a property owner derives income of more than \$2,000 per year for the right of recreational use. The plaintiff argued that the exception was applicable because the easement was for the benefit of the marina owner who derived profit from the operation. The Court held that the exception did not apply since there was no evidence that the grantor of the easement received any pecuniary benefit from either the injured party or the adjoining marina owner and that any profit derived by the marina owner was merely incidental.

U.S. Government Exonerated In Two Pleasure Boat Cases

Two recently reported decisions involved suits against the agencies of the United States under the Suits in Admiralty Act in connection with recreational boating casualties. In both cases the federal agencies were found to have no liability to the claimants.

In *Pearce v. United States*, 261 F.3d 643 (6th Cir. 2001), the Sixth Circuit Court of Appeals considered an appeal from the district court's decision granting judgment in favor of the United States in connection with a boating casualty on Old Hickory Dam in

Tennessee. In July, 1997, Jeffrey Pearce and Keith Harris were fishing from Pearce's boat on the Cumberland River below Old Hickory Dam. The dam is a hydroelectric facility owned and operated by the Army Corps of Engineers. Pearce and Harris navigated the boat upriver to the base of the dam and tied off inside one of the turbine openings to fish. Enroute to the dam the boat passed a number of signs warning of turbulence, fluctuating water levels and dangerous conditions. Neither occupant was wearing a life jacket. Both

Pearce and Harris were thrown from the boat and drowned when the dam gates were opened to release water through the turbine openings.

The decedents' estates filed suit against the United States under the the Suits in Admiralty Act, 46 U.S.C. App. §741 et seq. The complaint alleged that the Army Corp of Engineers was negligent in failing to install adequate warning

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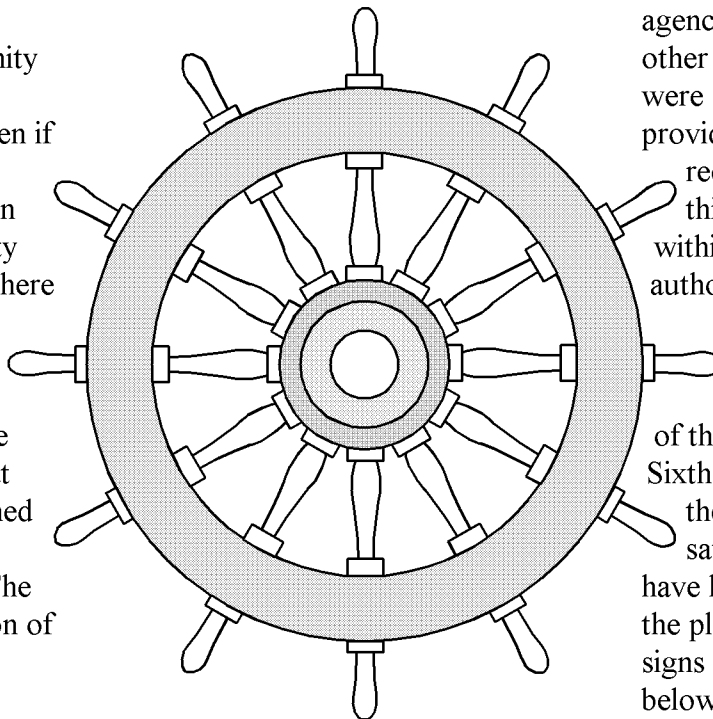
signs, failing to prohibit

recreational boating below the dam, failing to warn boaters of an impending release of water and failing to maintain a working audible warning system. Following a bench trial the district court found that the United States was not liable to the claimants because the proximate cause of the accident was the decedents' failure to use reasonable care for their own safety and because the Tennessee Recreational Use Immunity Statute precluded the imposition of liability even if the Army Corps was negligent. (See article on recreational use immunity statutes appearing elsewhere in this issue).

At the outset of its opinion in *Pearce* the Sixth Circuit rejected the plaintiffs' contention that their claims were governed by state law rather than federal admiralty law. The Court, without discussion of whether the area of the Cumberland River was navigable within the meaning of the test for admiralty jurisdiction, held that general maritime law applied exclusively to the claims.

On appeal the plaintiff's primary contention was that the Army Corps was negligent in failing to have an operating audible warning system in place at the dam to warn the decedents and that this negligence was the proximate cause of their

deaths. The evidence at trial established that the Army Corps had installed an audible warning system which was inoperative due to prior storm damage at the time of the accident in question. The plaintiffs contended that an agency regulation required the Army Corps to maintain a working audible horn system at the dam to warn boaters of an impending water



release and that the Army Corps' alleged violation of the regulation constituted negligence per se under the *Pennsylvania* Rule. *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125 (1873).

After reviewing the regulation in question the Sixth Circuit concluded that the provision, which had not been published in the Code of Federal Regulations or the Federal Register, was not a

substantive federal agency regulation having the force of law and, therefore, created no legal duty for the Corps' to maintain an audible warning system. The Court also rejected the plaintiffs' argument that the Corps failure to repair the existing audible warning system prior to the date of the accident constituted negligence. According to the Court of Appeals the agency had determined that other visual warning signs were alone sufficient to provide adequate warning to recreational boaters and this determination was within the discretionary authority of the agency.

In affirming the district court's entry of judgment in favor of the United States, the Sixth Circuit also held that the Army Corps had satisfied any duty it may have had to warn boaters by the placement of warning signs in and about the area below the dam and that, in any event, the sole proximate cause of the accident was the decedents' failure to exercise reasonable care for their own safety. The Court of Appeals did not reach the issue of whether the Army

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Corp would have immunity from liability to the decedents regardless of

negligence on the agency's part under the Tennessee Recreational Use Immunity Statute.

The second recent decision involving a suit against the United States arose from a collision between a pleasure boat and a sunken barge in Louisiana. In *Liner v. Dravo Basic Materials Co.*, ___ F.Supp. ___, 2001 WL 336983 (E.D.La. 2001), personal injury plaintiffs brought suit against the alleged owner of the barge and against the United States. The accident occurred in October, 1999, when Christopher Liner was operating his seventeen foot power boat at night on Bayou Dularge in Terrebonne Parish near Sister Lake. Visibility was reduced by patchy fog and Liner was not using radar or any electronic navigational aids. Liner had navigated the Bayou on several prior occasions and was generally aware of the presence of a sunken barge to the east of the main channel. The barge in question sank in 1995 and shortly thereafter the U.S. Coast Guard installed a temporary wreck buoy to mark the location and issued a Notice to Mariners to warn of the presence and exact location of the wreck. The temporary buoy was later replaced with an unlighted radar reflective nunbuoy which was charted on the relevant NOAA chart for the

area. Liner did not possess the relevant navigation chart, had not read the Notice to Mariners and was unaware of the existence of the buoy marking the wreck. Liner's boat struck the submerged wreck while traveling at a speed of 25 to 30 knots. Christopher Liner was ejected from the boat and the other passengers suffered serious injuries.

An investigation following the accident revealed that the marker buoy was located approximately sixty yards from its original and charted position on the date of the accident.

Liner and the injured passengers sued the United States under the Suits in Admiralty Act, 46 U.S.C.App. § 741 et seq., alleging that the U.S. Coast Guard and the Army Corps of Engineers were negligent for failing to remove the wreck, failing to adequately mark its location and failing to properly maintain the buoy which had been installed. The United States moved for summary judgment in its favor on the basis of the "discretionary function" exception to liability under the Suits in Admiralty Act. The district court granted the United States' motion and entered judgment in its favor.

Under the Suits in Admiralty Act the federal government waives its immunity in admiralty cases

and may be held liable for negligence in an appropriate case where a cause of action would be available against a private party. However, courts have uniformly held that the Act incorporates the discretionary function exception to liability contained in the Federal Tort Claims Act. Under the discretionary function exception the United States has no civil liability for "any claim based...upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

In *Liner* the court analyzed the plaintiffs' claims that the Coast Guard and Army Corps were negligent for failing to remove the wreck and for marking the wreck with an unlighted buoy under the discretionary function exception. The court, relying on the Fifth Circuit's decision in *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986), held that a

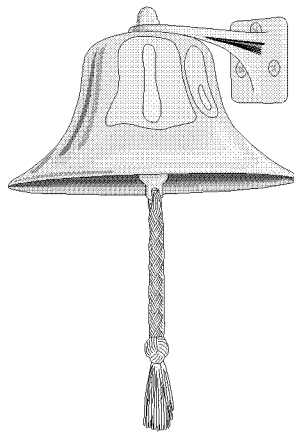
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decision by a government agency regarding whether to remove an obstruction to navigation is discretionary and thus within the statutory exception. With respect to

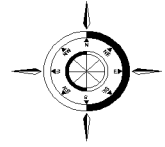
the plaintiffs' claim regarding the alleged failure to utilize a lighted marker buoy the United States presented evidence from the Coast Guard officer who made the decision. He stated in an affidavit that the decision was made after consideration of numerous factors including the amount and nature of the boating traffic in the area and the additional cost of servicing a lighted marker buoy. The court held that the decision regarding the type of buoy was discretionary within the meaning of the statutory exception and was based on a reasonable weighing of policy considerations.

The plaintiffs also advanced the alternative argument that the Coast Guard was negligent in choosing to utilize a nunbuoy rather than a wreck buoy to mark the sunken barge and for failing to maintain the buoy in its original charted position. They based their argument on the Supreme Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122 (1955). In *Indian Towing* the Court held that the discretionary function exception does not apply to immunize a government agency for liability arising from conduct after making a decision to take action in a particular case. The court noted that the record evidence demonstrated that

the plaintiff had not been aware of the existence or location of the buoy prior to the accident and had not consulted the navigation chart or read the notice to mariners. Moreover, the record demonstrated that the boat would have passed close to the buoy in its altered location prior to the collision but that the plaintiff had never sighted it. Based on this record the court held that the plaintiff operator was unable to establish his reliance on the buoy for the purposes of navigation and was therefore unable to prove that either the type of buoy or its altered location was a proximate cause of the collision.



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