BOATING BRIEFS

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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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Anh Thi Kieu Lives On, But the Parties May Contract for New York Law

Great Lakes Reinsurance (UK) PLC v. Durham Auctions Inc., 2009 U.S. App. LEXIS 22362 (5th Cir. Oct. 9, 2009)

The U.S. Court of Appeals for the Fifth Circuit has declined to overrule *Albany Insurance Co. v. Anh Thi Kieu*, which held that the marine insurance principle of uberrimae fidei does not necessarily trump state laws that forgive an insured's innocent misrepresentations. The court has also determined, however, that the parties to a yacht policy validly contracted for New York law, including, presumably, New York's recognition of uberrimae fidei.

In this case the insured yacht sank in Mississippi, its owner was a Mississippi corporation, and the policy was limited to navigation on the U.S. Gulf Coast. The insurer was based in the U.K. but had an agent for service of process in New York, was approved as a surplus lines carrier in New York, and maintained a U.S. trust fund account in New York.

The policy included a choice-of law-provision:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the state of New York.

Claiming that the insured misrepresented or failed to properly disclose the vessel's purchase price, loss history, and condition, the insurer filed a declaratory judgment action in federal court in Mississippi, and the insured counterclaimed for coverage.

In the view taken by the lower court, the New York choice-of-law provision was unenforceable because New York did not have a substantial relationship to the parties or the insurance contract. Rather, the policy would be governed by Mississippi law, which

imposed no duty on the insured to disclose matters the insurer did not specifically inquire about. The case was set down for trial as to the materiality of the insured's alleged misrepresentations.

The parties then reached a bracketed settlement by which the insurer's settlement payment would be one of two amounts, to be determined by the outcome of an appeal on the choice-of-law question. Both parties consented to the trial court's certifying the case for appeal on this basis. Consequently, the only question for the Fifth Circuit was whether the policy was governed by Mississippi law on the one hand, or, on the other hand, by "well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice" or "the substantive laws of the state of New York."

As an initial matter the insurer urged the Fifth Circuit to overrule *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), which held that uberrimae fidei was not so entrenched in general maritime law as to displace Texas state insurance law's more lenient treatment of an insured who made innocent misrepresentations to the insurer. But the Fifth Circuit declined to reassess *Anh Thi Kieu* based on the settled practice that one 3-member appeals panel may not overrule the decision of another 3-member panel.

The question therefore became whether the policy's choice-of-law clause was enforceable even with *Anh Thi Kieu* still being the law in the Fifth Circuit. Here the court noted that the insurer, though based in the U.K., did have some relationship with New York as reflected by its appointment of an agent for service of process in New York, its approval in New York as a surplus lines carrier, and its maintenance of a trust fund in New York.

Furthermore, the panel saw nothing in *Anh Thi Kieu* that would prohibit a marine policy from incorporating the law of a state like New York which, as both sides seemed to agree, did impose a strict disclosure obligation on the insured. As the court noted, choice-of-law provisions in maritime contracts are generally enforceable, and the Third Circuit in *AGF Marine Aviation and Transport v. Cassin*, 544 F.3d 255 (3d Cir. 2008) (reported in Boating Briefs Vol. 17:2) recently gave effect to this very same provision by applying New York law to an issue as to which maritime law was silent. The Fifth Circuit also noted that there was no Mississippi statute prohibiting a choice-of-law provision in a marine policy delivered to a Mississippi insured.

As a result, the answer to the certified question was that maritime law or New York law governed the contract. Hence, under the parties' settlement agreement, the insured would receive the lesser of the two previously agreed settlement amounts. ■

Insurance

New York Choice-of-Law Provision Enforceable in Oklahoma, Too

Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC, 2009 U.S. Dist. LEXIS 78042 (W.D. Okla. Aug. 31, 2009)

A yacht stranded off the coast of Mexico, and the insurer sought a declaratory judgment of non-coverage. The insured counterclaimed for breach of contract, bad faith, negligence, and punitive damages. The primary issue was whether the policy's New York choice-of-law provision was enforceable.

The insured contended that since the insurance binder did not provide for New York law, the insured did not have proper notice that New York law would apply. But since the binder expressly stated that it was subject to the terms and conditions set forth in the policy wording, and a copy of the policy was delivered to the insured within 30 days after the binder was issued (in sufficient time for the insured to cancel the policy if it wished to do so), the New York choice-of-law provision was applicable. Nor was there any impediment under Oklahoma law to enforcing the choice-of-law provision because the policy was for "ocean marine" insurance and was therefore not subject to an Oklahoma statute that restricts the parties' ability to choose the insurance law of a state other than Oklahoma.

Nor was the choice of New York law adhesionary or fundamentally unfair, as New York had a body of law dealing with marine insurance, New York was within the geographic area covered by the policy, and New York was the location of the insurer's agent for service of process.

Because New York law did not recognize a tort claim for an insurer's bad faith, the insured's tort claims had to be dismissed. However, consistent with New York law, the insured might be able to recover consequential damages under a contract theory if it was able to prove bad faith in the insurer's handling of the claim.

Further, the claim for punitive damages would have to be dismissed because the insured did not allege circumstances sufficient to meet New York's strict standard for awarding punitive damages in first-party insurance cases. Finally, since the insured was a business entity, it could not claim damages for "embarrassment" or "mental pain" and such claims likewise had to be dismissed. ■

"Manufacturer's Defect" Exclusion Inapplicable to Builder's Use of Ill-Suited Materials

French Cuff, Ltd. v. Markel American Insurance Co., 2009 AMC 1206 (11th Cir. 2009)

The Eleventh Circuit has held that a "latent defect" (defined in a yacht policy as "a flaw in the material") may include the builder's selection of inappropriate construction material and is not limited to a defect in the material itself.

The insured made a hull claim after its 64-foot catamaran experienced cracking, flexing, and delamination. A naval architect appointed by the insurer determined that the damage was due to deficiencies in the design of the hull and the manufacturer's use of poorly suited materials, including the use of a foam core that was too thin and friable.

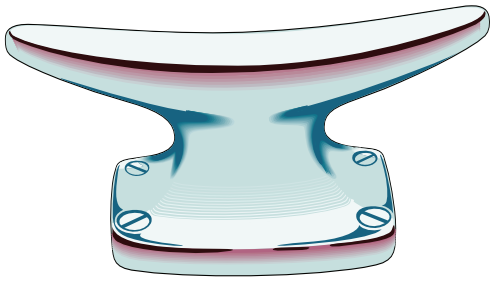
The policy had an express exclusion for loss or damage resulting from "manufacturer's defects or defects in design" but the exclusion also stated that "if the loss or damage has not resulted from the negligence of any insured, this exclusion does not apply to loss, damage or expense directly caused by … any latent defect in the hull or machinery." The trial court concluded that the exclusion for "manufacturer's defects or defects in design" was squarely applicable and granted summary judgment for the insurer.

On appeal, the Eleventh Circuit ruled that the damage could certainly qualify as a "latent defect" so as to fall within the exception to the manufacturer's defects exclusion: "The policy makes clear that the manufacturer's defects or defects in design exclusion does not apply to a loss caused by a latent defect in the hull." Therefore, so long as the damage was the result of a "latent defect," it would not be excluded from coverage.

As to that issue, the policy defined a "latent defect" as "a flaw in the material of the … hull or machinery existing when the Insured Yacht or [its] components were built and not discoverable by common means of testing."

The insurer contended that there was no "flaw in the material" because the foam itself was not defective but was simply too thin for this particular application. The assured, on the other hand, contended that a "flaw in the material" could include the manufacturer's use of ill-suited foam.

The Eleventh Circuit held that both interpretations of the term "flaw in the material" were reasonable. Since the language was open to two reasonable interpretations, it had to be construed in a manner favorable to the insured in accordance with Florida law. The district court's grant of summary judgment for the insurer was reversed. ■



Theft Exclusion

Great Lakes Reinsurance (UK) PLC v. Vasquez, 2009 U.S. App. LEXIS 17802 (11th Cir. Aug. 10, 2009)

A trailered boat was stolen from a supermarket parking lot, along with the trailer and the truck to which it was hitched. The truck and trailer were recovered but the boat was never found.

The insurance policy excluded coverage for damage sustained by the vessel "whilst being transported over land… more than 100 miles from the normal place of storage." The policy also excluded loss due to theft of the vessel "whilst on a trailer/boatlift/hoist/dry storage rack unless the scheduled vessel is situate in a locked and fenced enclosure or marina and there is visible evidence of forcible entry and/or removal made by tools, explosives, electricity or chemicals."

Concluding that the first exclusion was ambiguous as to whether it applied when the vessel was making a temporary stop for supplies and that the second exclusion applied only when the vessel was in storage, the trial court entered judgment for the insured.

The Eleventh Circuit reversed. In the appellate court's view, the first exclusion "applies to exclude *damage* sustained by the subject vessel; by its plain and ordinary terms [it] has no application to theft of the vessel." The second exclusion, however, was clearly applicable because there was no dispute that the vessel was stolen "whilst on a trailer" and at a time when the vessel was not "situate in a locked and fenced enclosure or marina."

The insured suggested that the second exclusion should operate only while the vessel was in some form of dry storage given the exclusion's use of the phrase "trailer/boatlift/hoist/dry storage rack." But this argument was rejected as a "tortured construction" that "fails to give full meaning to each of the terms of the exclusion (i.e., trailer/boat lift/hoist/dry storage rack)." As a result, there was no coverage for the theft. ■

Marinas

Sixth Circuit Says Yacht Dealer/ Marina Operator's Insurance Policy is Not a Maritime Contract

New Hampshire Insurance Co. v. Home Savings and Loan Co., 2009 U.S. App. LEXIS 21133 (6th Cir. Sept. 24, 2009)

A yacht dealer/marina operator was sued by several customers and two banks in state court on claims of fraudulent misrepresentation and failure to deliver boats with clear title. The marina sought coverage under the "truth in lending" provision of its yacht dealer/marina operator's general liability insurance policy. The marina's insurer filed a declaratory judgment action in admiralty. The district court declined to hear the case on the basis of *Wilton/Brillhart* abstention, which gives a district court discretion not to entertain a declaratory judgment action when there is parallel litigation in state court.

On appeal, the Sixth Circuit held that the yacht dealer/marina operator's policy was not a maritime contract and, consequently, the federal court was without admiralty jurisdiction.

As to the "yacht dealer" section the policy, the court stated that "it is evident that the primary interest insured by [this section] do not relate to maritime commerce. By its very terms the yacht-dealer provisions relate to boats as objects of commerce—i.e., 'stock for sale'—not as agents of maritime commerce."

The "marina operations" section of the policy presented a closer question in the court's view, but ultimately this section was likewise deemed non-maritime in nature since it related to the marina's operations as a whole rather than to any specific vessel. In reviewing the cases, the court discerned "a conceptual distinction between a contract relating to a particular vessel involved in a commercial operation as opposed to the overarching operation of a fixed structure that happens to involve boats." Accordingly, the court determined that the policy was not a maritime contract "despite the fact that some of the services provided by the marina may relate incidentally to or facilitate maritime commerce." ■

No Presumption of Negligence Against Bailee Without Exclusive Control

Northern Insurance Co. v. Point Judith Marina, LLC, 2009 U.S. App. LEXIS 19238 (1st Cir. Aug. 27, 2009)

Vessel owner Picchione and his subrogee insurer brought suit against Point Judith Marina after Picchione's boat sank alongside the marina. Picchione docked his boat at the marina pursuant to a slip agreement, and the marina also undertook to decommission the boat in the fall, store her on land for the winter, and commission the boat in the spring. In the course of these activities, the marina repaired some of the boat's components. However, Picchone hired an independent mechanic to service the engines during the off-season.

After the boat was re-launched in spring 2005, marina employees worked onboard commissioning her for the upcoming season. During this period, Picchione visited on several occasions to provision the vessel. No evidence was introduced as to precisely who was aboard last, but the vessel sank over the weekend of April 22, 2005. When the vessel was salvaged and reconditioned, inspectors noticed all the bilge pump switches were in the "off" position. A sliced exhaust hose was also discovered behind the fuel tanks. On the basis of this information, plaintiff's expert posited that the leaking hose slowly filled the engine room until the exhaust portal was submerged and significant backflooding occurred. Expert testimony established that one operational bilge pump would have prevented the sinking.

The complaint asserted claims against the marina for failing to discover and remedy the initial leak, and for allegedly turning off the bilge pump. As for the former allegation, the trial court found no evidence that the agreement to commission the vessel obligated the marina to provide general preventative maintenance beyond what was specifically contracted for, or otherwise obligated the marina to discover hidden defects.

Because plaintiffs could not produce evidence as to the bilge pump claim, they attempted to rely on a presumption of negligence on the part of the marina as a bailee of the vessel. While noting that the law of

bailment gives rise to such a presumption, the court declined to apply it because the marina did not have exclusive control of the vessel.

With respect to the marina's counterclaim for attorney's fees, the court found that the indemnity agreement between the parties was limited to the slip rental and did not apply to allegations of negligence in a service contract.

The Court of Appeals for the First Circuit affirmed in all respects. ■

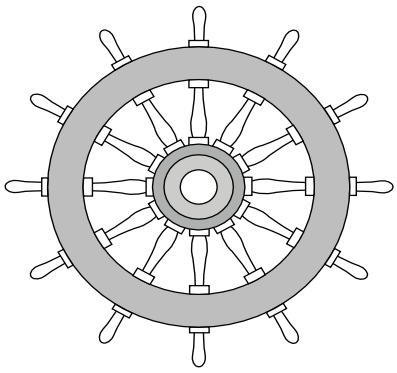
Plaintiffs Survive Summary Judgment Re: Exculpatory Clause

Falcone v. MarineMax, Inc., 2009 U.S. Dist. LEXIS 84705 (E.D.N.Y. Sept. 17, 2009)

This action arose out of a fire at the defendants' marina. Plaintiffs were each owners of boats damaged by the fire. Before discovery was completed, the marina moved for summary judgment, contending that the exculpatory clause in its winter storage contract was valid and enforceable.

The court concluded that further factual development was required to assess the enforceability of the clause. In doing so, however, the court examined the jurisprudence regarding the enforceability of clauses which purport to relieve a party of liability for its own negligence. It first noted that, though such provisions are disfavored under New York law, they will be enforced if the agreement is unequivocal and there is no contravening public policy. The disclaimer must expressly relieve a party and include the word "negligence" or a word of similar import. And any ambiguity must be construed against the drafter of the agreement. Provisions merely advising the customer to obtain insurance, the court continued, were insufficient.

The court found that the damage to the plaintiffs' boats fell within the scope of the marina's exculpatory clause but noted that the enforceability of such clauses also depends on the circumstances surrounding the transaction. This further inquiry looks to (1) the nature of the services covered by the contract; (2) whether the exculpatory clause is being applied to intentional, reckless or grossly negligent behavior, rather than to ordinary negligence; and (3) whether the exculpatory provisions were obtained through overreaching. With respect to these matters the court found that the factual record was too thin and, therefore, summary judgment was premature. ■



Tort Jurisdiction

Accident in Area Reserved for Jet Skis is Subject to Maritime Jurisdiction

Complaint of Mission Bay Sports, LLC, 570 F.3d 1124 (9th Cir. 2009)

Two teenagers were ejected from a jet ski in San Diego's Mission Bay. The incident occurred in a "cul-de-sac," an area of the bay approximately 8 to 10 inches deep and several hundred feet wide that was reserved for personal watercraft and marked by buoys. The area was within the ebb and flow of the tide but was not used by commercial vessels.

The owner of the jet ski petitioned for limitation of liability and the two injured teenagers sought to dismiss the petition for lack of admiralty jurisdiction. The district court concluded that although the incident occurred on navigable waters, the incident did not have the potential to disrupt maritime commerce because there was no commercial shipping and no docks, wharves, or other commercial marine establishments in that particular area of the bay.

The Ninth Circuit reversed. The area at issue was physically accessible from the rest of Mission Bay as well as the Pacific Ocean and therefore had to be considered "navigable waters." Incidents of this sort also posed the potential to disrupt commercial maritime activity given the possibility that they may require search-and-rescue services which can interfere with commercial activities in other areas of the bay. And given that the jet ski was undisputedly a vessel, the general character of the activity involved (which the court characterized very generally as "operation of a vessel on navigable waters") did bear a substantial relationship to traditional maritime activity. The federal court therefore had admiralty jurisdiction to hear the limitation action.

The Editors thank Sterling J. Stiles of San Diego for calling their attention to this case. ■

Kiteboard Manufacturer Subject to Suit in Admiralty

Donnelly v. Slingshot Sports LLC, 2009 AMC 707 (D. Del. 2009)

While kiteboarding in the navigable waters off Dewey Beach, Delaware, plaintiff was allegedly carried up by a gust of wind and dropped with great force into a tidal marsh, resulting in multiple bone fractures. Plaintiff brought a product liability and negligence suit in admiralty against the kiteboard manufacturer, and the manufacturer sought dismissal for lack of admiralty jurisdiction.

A federal court has admiralty jurisdiction over torts that occur on navigable waters so long as the general type of incident involved has the potential to impact maritime commerce and the character of the activity giving rise to the incident bears a substantial relationship to traditional maritime activity.

In this case the district court held that admiralty jurisdiction did exist. For purposes of locality, it was sufficient that plaintiff had been using the kiteboard on navigable waters at the time of the incident; the mere fact that the plaintiff landed in the marsh did not mean that the tort "occurred" on land.

Further, the incident had a potentially disruptive impact on maritime commerce, as confirmed by the numerous courts that have viewed injuries to recreational boaters, with the possibility of on-the-water rescues and investigations, as posing potential disruptions to commercial activity on the water.

As to the "substantial relationship to traditional maritime activity," the court concluded that the defendant's designing and manufacturing a recreational device for use on navigable waters was sufficient in this case. Accordingly, the motion to dismiss was denied. ■

Limitation of Liability

Owner Denied Limitation in Jet Ski Towing Incident

In re Messina, 574 F.3d 119 (2d Cir. 2009)

Kevin Messina owned a jet ski and allowed his guest Michael Murray to operate it while Messina was towed astern on an inner tube. Murray apparently executed some form of slingshot maneuver and the inner tube (with Murray still on it) struck a man standing on shore. The man sued Messina and Murray in New York state court, and Messina filed a limitation action seeking to limit his liability to the combined value of the jet ski and inner tube (about $6,000).

After a bench trial, the federal court denied Messina limitation, concluding that the jet ski was negligently operated and was unseaworthy by reason of Murray's incompetence, and that these conditions were within Messina's privity and knowledge. Specifically, the court found that Messina had told Murray to run the jet ski faster during the course of the ride and later directed him to guide the inner tube toward the shore while the jet ski was still operating at high speed. Excessive speed, combined with Murray's failure to notice the people standing along the shoreline, caused the accident. The court further noted that "a vessel is unseaworthy if it is being operated by an incompetent crew," and the court found that Messina did not verify that Murray had experience towing a person on an inner tube.

On appeal to the Second Circuit, Messina contended that Murray was a competent operator who merely made a navigational error and that this did not make the vessel unseaworthy or deprive Messina of the right to limitation. In analyzing this argument, the Second Circuit first noted that jet skis are subject to the Limitation of Liability Act. Continuing, the court noted that the phrase "privity or knowledge" means complicity by the owner in the fault that caused an accident, and "in the case of individual owners, it has commonly been held . . . that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury."

Here, the trial court found that Messina, by telling Murray to speed up and by instructing him to guide the tube toward shore, played a direct part in causing the accident. Since there was support in the record for this finding, the trial court's denial of limitation had to be affirmed. Moreover, the record contained little or no evidence of Murray's competency apart from Messina's own subjective belief, and since a vessel owner "is not entitled to limited liability as a matter of law merely because he subjectively believed the person he has allowed to operate his craft was competent," the district court had adequate grounds to deny limitation. ■

Tort Damages

Eight Circuit Rejects Loss-of-Consortium Award for Spouse of Recreational Boater

Doyle v. Graske, 579 F.3d 898 (8th Cir. 2009)

Leland Graske and two friends, one of them Daniel Doyle, decided to go fishing in the waters off Grand Cayman, where Graske owned a vacation home. The three set out on Graske's 14-foot inflatable boat with Graske at the helm. Graske sped the boat up to bring it on plane, at which point a nylock nut came loose from the boat's steering system, causing the system to malfunction and the boat to turn abruptly and sharply to the left. Doyle was thrown into the water where he was struck on the back and head by the vessel. As a result of his injuries, Doyle suffered permanent brain injury while hospitalized.

Doyle and his wife brought a negligence suit against Graske. As reported in Boating Briefs Vol. 17:2, the trial court applied general maritime law and found Graske negligent for bringing the boat up on plane while Doyle was seated on the gunwale tube or the bow cushion. The court awarded over $3 million in compensatory damages to Doyle and $750,000 in damages for loss of consortium to his wife.

On appeal, the Eighth Circuit Court of Appeals affirmed the lower court's findings as to liability, as well as Doyle's damages award. The court noted, however, that the availability of loss-of-consortium damages for a non-fatal injury in the maritime context was a question of first impression in the Eighth Circuit. As such,

the court looked to both Supreme Court precedent and federal statutory law to determine whether such damages are available. The court looked first to the Supreme Court's decision in *American Export Lines, Inc. v. Alvez,* in which the Supreme Court stated that "there is no apparent reason to differentiate between fatal and non-fatal injuries in authorizing the recovery of damages for loss of society." The court then examined the Death on the High Seas Act (DOHSA), which would have governed had Doyle died from his injuries, and observed that DOHSA does not allow loss-of-consortium damages. Connecting the dots, the Eighth Circuit reversed the trial court's grant of loss-of-consortium damages to Doyle's wife. ■

Consequential Damages Unavailable in Case of Total Loss

In re Hlywiak, 613 F. Supp. 2d 647 (D.N.J. 2009)

Two vessels, the TWIGHLIGHT and the 50/50, collided. The owner of the TWIGHLIGHT sued the owner of the 50/50, seeking to recover the fair market value of the vessel. He also sought approximately $30,000 in what he termed "additional damages," which included annual licensing fees he had paid to operate the boat, mortgage interest, advertising, maintenance and equipment charges, refunds to passengers on the board the boat on the day of the collision, and dock rental charges.

The court allowed recovery for the fair market value of the vessel, but denied recovery on the other items of damages except the refunds to the passengers on board the boat at the time of the incident. In so doing, the court noted the traditional maritime rule that collision damages in the case of a total loss are limited to the value of the vessel, with interest thereon, plus the net freight pending at the time of the collision, but do not include loss of use or consequential damages. The court deemed the refunds owed to the passengers to be "freight pending," but considered all the other claimed damages to be consequential damages for which there could be no recovery. ■

Procedure

"Aggressive" Use of Forum Non Conveniens in DOHSA Case

Loya v. Starwood Hotels & Resorts Worldwide, Inc., 2009 U.S. App. LEXIS 21643 (9th Cir. Oct. 2, 2009)

The Ninth Circuit Court of Appeals affirmed a lower court's dismissal of a Washington widow's claim for wrongful death in a case that led the dissenting judge to remark: "I have not found precedent for so aggressive an exclusion of an American plaintiff from American courts under the doctrine [of forum non conveniens] in any other case, and I think it is mistaken here."

Gillian Loya's husband, Ricardo, died in a scuba diving accident while vacationing at the Westin Resort & Spa Los Cabos, a Starwood resort in the Mexican state of Baja California Sur. Allegedly, the scuba diving trip was conducted by an underage guide who abandoned Ricardo and then failed to rescue him. Gillian sued the resort, its parent company, and the scuba diving operation in Washington state court for wrongful death and violations of Washington's consumer protection law. The defendants removed the case to federal court and asked the court to dismiss the case on the basis of forum non conveniens, arguing that Baja California Sur, Mexico, was a more appropriate forum.

The court granted defendants' motion, and the Ninth Circuit affirmed in a 2-1 decision. The court first determined that a claim under the Death on the High Seas Act (DOHSA) was subject to forum non conveniens dismissal. The majority then found no abuse of discretion in the district court's conclusion that an adequate alternative forum was available and that the private and public interest factors favored resolving the case in Mexico.

The dissenting judge noted that there was little or no chance of the plaintiffs actually obtaining relief in Mexico, as the evidence showed that the maximum recovery there would be about $17,000 and a Mexican lawyer would charge at least $50,000 to handle the case, with no possibility of a contingency fee. ■

Owner's Suit Against Bank Remanded to State Court

Cartwright v. Bank of America, 2009 U.S. Dist. LEXIS 52964 (S.D. Tex. June 22, 2009)

A boat owner sued Bank of America in Texas state court under state law theories of partition and sale, unjust enrichment, negligence, and conversion, claiming that he had legal title to his boat and that Bank of America was wrongfully depriving him of possession. Characterizing the boat owner's claims as maritime in nature, the bank removed the case to federal court on the basis of admiralty jurisdiction.

The federal court remanded the case to state court, finding that the boat owner was within his right, under the saving to suitors clause of 28 U.S.C. § 1333(1), to bring his claim in state court seeking state court remedies or in federal court under admiralty jurisdiction, and that removal was improper unless it was based on something other than admiralty jurisdiction, which it was not. ■

Liens

Joint Venturer Has No Maritime Lien

Ridinger v. 33' Speedboat, 2009 U.S. Dist. LEXIS 58447 (S.D. Fla. June 9, 2009)

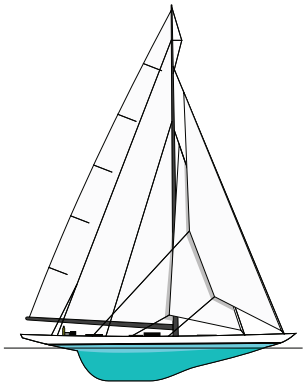
The owner of a speedboat entered into an oral agreement with a friend for the use and maintenance of the boat. Under the agreement, both parties were free to use the boat at their pleasure, and in exchange for his enjoyment and use of the boat, the owner's friend would provide basic maintenance and care. The parties agreed to split the costs of any major repairs and to "work out" any scheduling conflicts over the use of the boat.

A few years later, the parties became involved in a dispute over a real estate investment, and the dispute began to adversely impact their boating venture. The boat owner refused to pay for his share of the repairs performed on the boat, and in response the friend refused to turn the boat over until the money was paid. Rather than pay the money, the owner called the police

and, as the boat's titled owner, had them help him recover the boat.

The boat owner's friend then filed suit in federal court, both in personam against the boat owner and in rem against the boat itself, seeking to recover the amount he was owed for the vessel's maintenance, repairs, upgrades, and general upkeep of the vessel. The friend had the vessel arrested by the U.S. Marshal, and moved for an interlocutory sale, seeking to have the court order the boat sold so that the proceeds from the sale could be deposited into the court pending resolution of his claim.

The court denied the friend's motion and dismissed the case. The court noted that its in rem jurisdiction over the boat was premised upon the existence of a maritime lien in favor of the boat owner's friend, and noted that a party is entitled to a maritime lien where that party provides necessaries to a vessel on the order of the owner. However, someone having an ownership interest in the vessel may not obtain a maritime lien. Here the court determined that the arrangement between the parties had been a joint venture, and as such the boat owner's friend was not entitled to a maritime lien because he could not be considered a "stranger to the vessel." ■



Government Liability

Sign Replacement as a Discretionary Function

Bailey v. United States, 2009 U.S. Dist. LEXIS 36818 (E.D. Cal. April 16, 2009)

Joseph Bailey took his two sons rafting down the Yuba River in California. During the trip, the Baileys floated over a submerged dam and were thrown into the water. The two boys were rescued, but Mr. Bailey drowned. A month earlier the U.S. Army Corps of Engineers had placed a warning sign 1500 feet upstream from the dam. Additional signs were posted closer to the dam. However, heavy water flow washed the signs away ten days before the incident. Army Corps employees knew the signs were missing and had gone to the area to evaluate the situation, but due to high water conditions took no immediate action. The Army Corps finally replaced the signs the day after Bailey's death.

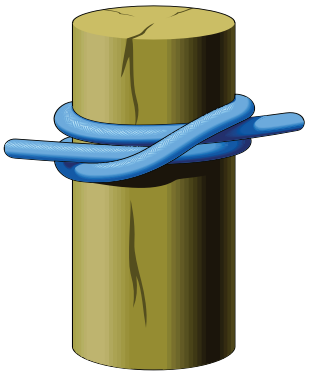
Bailey's survivors filed suit against the United States, alleging his death was caused by the Army Corps' failure to properly warn of the submerged dam. The federal court dismissed the suit on the basis of sovereign immunity.

The court first noted that, under the Federal Torts Claims Act, the government waives its sovereign immunity for claims arising out of the negligence of government employees unless the government employees' conduct falls within the discretionary function exception. The discretionary function exception leaves the government immune from suit when government employees' conduct (1) involved an element of judgment and (2) was based on considerations of public policy.

In considering the first prong of the test, the court reviewed the Army Corps' "Sign Standards Manual," which sets forth the Corps' responsibilities for sign maintenance. Plaintiffs argued that the manual placed a mandatory duty on the Corps to replace the missing signs "as soon as possible." The court disagreed, finding that the manual provided only "guidelines" and afforded considerable discretion to Army Corps personnel. Because the court determined that the manual did not provide any specific command regarding the timeliness of sign replacement, the local government actors were

left to exercise the discretion thus delegated to them.

Accordingly, the court turned to the second prong of the test: whether the conduct was based on considerations of public policy. Plaintiffs argued that the Corps' failure to timely replace the signs was nothing more than a failure to perform routine maintenance. The government disagreed, arguing that the decision was susceptible to a policy analysis because the Corps was required to evaluate the safety of the public, the safety of its employees, and the availability of resources. On the facts, the court agreed with the government and relied on a distinction previously drawn by the Ninth Circuit: while "matters of routine maintenance are not protected by the discretionary functions exception… we observe that sometimes 'maintenance' is far from routine and may involve considerable discretion that invokes policy judgment." Ultimately, the court concluded that Corps employees were required to make a judgment call as to whether public safety outweighed risks to their own safety and whether the expenditure of resources on signs that might once more wash away was justified. Accordingly, the government was deemed immune from suit. ■



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