BOATING BRIEFS

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

Lars Forsberg, Chair
Daniel Wooster, Editor

SPRING 2012
VOL. 21, NO. 1

Yacht-mortgage foreclosure stalled by competing chains of title

Branch Banking & Trust Co. v. M/Y Beowulf, 2012 WL 464002 (S.D. Fla. Feb. 13, 2012)

A federal district court in Florida denied a yacht mortgagee's request for final judgment in a foreclosure case after a third party—who had purchased the yacht without notice of the mortgage lien—appeared in the case and claimed that the mortgagor did not own the yacht when he granted the mortgage and that the mortgage lien should in any event be equitably subordinated.

The yacht in question was a custom "Sculley 60" sportfisherman built by Sculley Boatbuilders in 2003. When construction was complete, Sculley Boatbuilders issued a builder's certificate naming Sculley Boatbuilders' president as the person for whom the yacht was constructed. The president then pledged the yacht as collateral for a personal loan of about $1 million. He signed several loan documents, including a security agreement and a preferred mortgage. The mortgage and the application for Coast Guard documentation identified the president as the yacht's owner, but other loan documents identified Sculley Boatbuilders as the yacht owner. After receiving the builder's certificate and the application for documentation, the Coast Guard assigned an official number, issued a certification of documentation, and recorded the mortgage.

Sometime later, Sculley Boatbuilders purported to sell the same yacht to a third party. To do this, it created another builder's certificate. This certificate, unlike the first one, named Sculley Boatbuilders as the person for whom the yacht was constructed, but it listed the same official number and hull identification number that had been assigned to the "first" Sculley 60. After this second certificate was submitted to the Coast Guard with the new buyer's application for documentation, Sculley Boatbuilders wrote a letter to the Coast Guard stating that the second certificate mistakenly showed the same hull identification number that was used for the "first" Sculley 60. The letter asked the Coast Guard to issue a different official number for the "second" Sculley 60. The Coast Guard complied with this request, and in this way the "second" vessel came to be documented in the new buyer's name. There were now two chains of title, only one of which showed the mortgage. The buyer later conveyed the yacht back to Sculley Boatbuilders, and the yacht was sold twice more, finally to Sunfish.

Shortly before the yacht was sold to Sunfish, the president of Sculley Boatbuilders defaulted on his loan agreement with the bank. After failed attempts at a workout, the bank filed a foreclosure proceeding in the Southern District of Florida, moved for summary judgment in rem, and re-

This newsletter summarizes the latest cases and other legal developments affecting the recreational-boating industry. Articles, case summaries, suggestions for topics, and requests to be added to the mailing list are welcome and should be addressed to the editor.

Contents

quested that the yacht be sold at auction to enforce the mortgage lien. Sunfish, as a bona fide purchaser for value without notice, made a claim to the yacht, objected to the sale, and sought to defeat or subordinate the mortgage lien. In particular, Sunfish argued that the president of Sculley Boatbuilders was not the owner of the Sculley 60 when he signed the mortgage, and that without good title he could not have conveyed a valid security interest to the bank. Alternatively, Sunfish argued that the mortgage lien should be subordinated to Sunfish's interest because the bank had engaged in what Sunfish characterized as reckless lending practices by not verifying the mortgagor's ownership of the yacht and not promptly foreclosing when the mortgagor defaulted.

As to the first issue, the court held that the documents initially recorded by the Coast Guard—including the builder's certificate naming the president as the initial transferee of the vessel—were not "documents of title" under Florida's Uniform Commercial Code and were not conclusive evidence of ownership. Given the inconsistencies in the loan documents, the bank had not proved that Sculley Boatbuilders' president was the owner of the yacht when he granted the mortgage in his personal capacity. Accordingly, the bank's motion to sell the yacht was denied pending further proceedings.

As to the second issue, the court decided that there was enough evidence to warrant a trial on Sunfish's equitable-subordination claim. The loan documents contained contradictory information about the yacht owner's identity, and the bank was apparently aware from outset that the yacht's hull identification number was not permanently affixed to the transom as required by Coast Guard regulations. (Presumably Sunfish's argument was that a properly-affixed hull identification number might have alerted purchasers to the competing chain of title.) Also, when the mortgagor defaulted, the bank allegedly agreed to extend the loan for five additional years without checking up on the yacht, demanding proof of insurance, or properly assessing the borrower's creditworthiness. While this evidence would not necessarily sustain an equitable-subordination claim, it was in the court's view sufficient to create a genuine issue of material fact.

Accordingly, the disposition of the yacht would have to await a full hearing. ■

Borrower liable for mortgagee's expenses in freeing yacht from drug seizure and litigating insurance dispute

Markel Am. Ins. Co. v. Díaz-Santiago, 2012 WL 883617 (1st Cir. Mar. 16, 2012)

MDS Caribbean Seas Ltd., incorporated by Díaz-Santiago, obtained a loan to purchase a yacht. The note and preferred mortgage, which were guaranteed by Díaz-Santiago, required MDS to insure the yacht and cover the bank's expenses in defending suits relating to the debt. When Díaz-Santiago applied for insurance, he incorrectly stated that he (not MDS) was the owner of the yacht.

Later, the yacht was seized by U.S. Customs for drug smuggling and was damaged during the agents' search for drugs. The bank incurred significant expense securing the yacht's release. As the loss payee under the insurance policy, the bank made a claim to the insurer to try to recover the costs related to seizure. The insurer then rescinded the policy on the grounds that Díaz-Santiago made material misrepresentations during the marine-insurance application process by declaring himself to be the owner of the yacht instead of MDS.

Coverage litigation ensued, and the insurer and Díaz-Santiago entered into a consent decree stating that the identity of the owner was a material fact that should have been disclosed to the insurer. Accordingly, the court entered judgment for the insurer and declared the policy null and void.

The bank then requested partial summary judgment against Díaz-Santiago and MDS, claiming that the misrepresentation to the insurer was a breach of the preferred mortgage, which specifically required MDS to "fully and adequately" insure the yacht and to pay all "advances and expenditures" that the bank incurred in defending

suits related to the mortgage and note. The district court granted the bank's motion for partial summary judgment, awarding the bank about $75,000 for the fees and expenses it incurred in dealing with the seizure and the insurance dispute.

Díaz-Santiago and MDS appealed, but they did not identify any genuine issues of material fact that would have precluded summary judgment for the bank. They merely alleged that the bank knew about the discrepancy in the insurance policy concerning the yacht owner's identity but still accepted the ship mortgage and promissory note in MDS's name despite such knowledge. The court described the appeal as "nothing more than a smokescreen to try [to] artfully evade the writing on the wall." No one disputed the validity of any of the loan agreements, and both MDS and Díaz-Santiago contractually bound themselves to reimburse the bank for any costs it incurred in defending suits related to the mortgage or promissory note. Thus, the First Circuit affirmed the district court's grant of partial summary judgment for the bank. ■

Insurance

No coverage where yacht carried more passengers than policy allowed

Northern Assurance Co. v. Keefe, 2012 WL 603579 (D. Mass. Feb. 23, 2012)

A yacht policy's chartering endorsement provided coverage during charter trips but stated that "NO MORE THAN 6 PASSENGERS may be carried on board the yacht." The endorsement further stated that the policy would become null and void if the insured violated any of the endorsement's terms and would remain null and void so long as the violation continued.

While on a charter trip and carrying 18 passengers, the yacht grounded on a shoal. The hull was punctured and the yacht flooded, though the parties disagreed whether the puncture occurred simultaneously with the grounding or sometime later, after the passengers had safely disembarked. In any event, the insurer denied coverage and filed a declaratory-judgment action.

In deciding the coverage dispute, the court examined both maritime law and Massachusetts law. Under maritime law, the court held, the policy's condition limiting charters to no more than six passengers functioned as a warranty, and the established rule was that an insured's breach of warranty excuses a marine insurer from payment regardless of whether the breach contributed to the loss.

The court went on to examine Massachusetts law, which distinguishes a warranty from a condition. Under Massachusetts statute, a breach of warranty will ordinarily not defeat coverage unless the breach increased the risk, but under Massachusetts case law, a violation of a condition precedent will defeat coverage regardless of whether the violation was related to the loss. Here, the court held that the limit on the number of passengers was a condition precedent under Massachusetts law because the chartering endorsement expressly stated that the policy would be void during any period in which the insured violated the endorsement's terms. Exceeding the allowed number of passengers therefore deprived the insured of coverage even though the violation did not contribute to the loss.

As a backup position, the insured argued that most of the damage occurred after the passengers disembarked from the yacht and that coverage should be reinstated for losses occurring after the breach was cured. Discerning no established federal maritime rule on the subject, the court examined Massachusetts marine-insurance cases from the 1800s and determined that insurance coverage does not reattach when a breach is cured unless the risk to the marine insurer after the cure is no greater than it was before the breach began. Here, the risk was clearly higher after the yacht grounded, so there was no coverage even for damage sustained after the passengers left.

Finally, the owner contended that the violation of the chartering endorsement affected only the coverage for personal-injury liabilities, not the coverage for hull damage. The court applied Massachusetts law because there was no federal mari-

time rule on point. Under Massachusetts law, this was a question of basic contract interpretation, and here the chartering endorsement plainly meant that a violation of its terms would suspend the entire policy, not merely the liability coverage.

Accordingly, there was no coverage for any losses related to the grounding. ■

Coverage claim dismissed due to insured's unwillingness to submit to examination under oath

Kerr v. State Farm Fire & Casualty Co., 2012 WL 786342 (M.D. La. Mar. 7, 2012)

After his boat, motor, trailer, and other property disappeared, the insured made a claim on his insurance policy. As part of its investigation, the insurer required the insured to submit to an examination under oath (EUO). Instead of submitting to the EUO, the insured hired an attorney and sued the insurer for breach of contract. The insurer moved for summary judgment, arguing that the insured's failure to cooperate was a material breach of the insurance contract and under Louisiana law barred any claim for coverage.

Among the insured's "duties after loss" specified in the policy was the duty to "submit to examinations under oath." The policy also provided that no lawsuit could be brought against the insurer "unless there has been compliance with the policy provisions."

The insured claimed that he viewed the insurer's demand for an EUO as an accusation of fraud, since it was accompanied by a letter stating that the insurer might deny coverage for various reasons, including fraud.

Although the insurer had the burden of showing that the insured's breach of a cooperation clause was material and prejudicial, cases from the Eastern District of Louisiana and the Fifth Circuit established that an intentional refusal to submit to an EUO constitutes a material breach of the contract.

The court then examined whether the insured's failure to participate in the EUO prejudiced the insurer. While a failure to attend an EUO might not prejudice the insurer if the insured has a reasonable explanation for the failure to attend and expresses a willingness to submit to an alternative form of examination, here the insured's refusal deprived the insurer of the contractual right to investigate the claim thoroughly, and it also deprived both parties of a potential opportunity to settle the claim without litigation. Feeling accused of fraud was not a sufficient reason to refuse to submit to an EUO. In the circumstances, the court held that the insured's refusal to submit to the EUO was a material breach that prejudiced the insurer, and the insurer was therefore granted summary judgment. ■

Inner tubes rafted together were not "watercraft" as defined by policy

Wood v. Scottsdale Indemnity Co., 2012 WL 242852 (9th Cir. Jan. 26, 2012) (unpublished)

A 12-year-old girl drowned while inner tubing with three other minors on the Trinity River in California. The group had been floating down the river on inner tubes tied together with rope. The girl's parents sued the chaperone, who was insured under a personal umbrella policy for liabilities "[w]ith respect to automobiles or watercraft to which this policy applies." The district court held that the term "watercraft" was ambiguous but that the policyholders did not have an objectively reasonable expectation that the policy would cover the kind of liability at issue here.

On appeal, the Ninth Circuit affirmed, but on different grounds, holding that the inner tubes were not "watercraft" as defined in the policy. The policy defined "watercraft" as "any craft, boat, vessel, or ship designed to transport persons or property on water." The court applied the "ordinary meaning" of craft, boat, vessel, and ship—i.e., their dictionary definitions—and concluded that the inner tubes were not a "craft" or "boat" because they were not propelled by oars, paddles, sail, or power. Nor were the inner tubes a "vessel" or "ship," since they were not used for navigation. The court did not, however, consider whether the inner tubes might qualify as vessels under the broader definition used in maritime law.

More importantly, a watercraft as defined in the policy had to be "designed to transport persons or property on water." Consulting the dictionary, the court read the words "designed to transport" as suggesting that the watercraft "must be designed to actively move persons or properties on water rather than merely float [with] the natural flow of a river." In the Ninth Circuit's view, the inner tubes were therefore not "watercraft" as defined by the policy. ■

Limitation of Liability

Second Circuit: No jurisdiction to hear limitation action arising from passenger's injury on land

MLC Fishing, Inc. v. Velez, 667 F.3d 140 (2d Cir. 2011)

The U.S. Second Circuit Court of Appeals has held that the federal courts have no jurisdiction to hear a boat owner's limitation action if the underlying incident giving rise to the action was not itself subject to admiralty jurisdiction.

The *Capt. Mike* was a recreational fishing vessel that, on the date in question, was moored to a floating dock at Capt. Mike's Marina in Howard Beach, Queens, New York. In order to board the *Capt. Mike*, customers would walk from the marina onto a ramp that led to the floating dock, and from there would traverse the floating dock to reach the vessel. Julio Angel Velez, on his way to the vessel for a charter-fishing outing, slipped and fell while walking down the ramp toward the floating dock. The vessel owner filed an action for limitation of liability. The trial court dismissed it for lack of subject-matter jurisdiction, and the Second Circuit affirmed.

An incident is subject to admiralty jurisdiction if (1) it occurred on or over navigable waters (or was caused by a vessel on navigable waters) and (2) the activity giving rise to the incident was substantially related to traditional maritime activity such that the incident had the potential to disrupt maritime commerce. Here, the incident occurred not on navigable waters but on a ramp, which the court concluded was an extension of land in the same way a pier or floating dock would be. Although an injury on land may be within admiralty jurisdiction if it was caused by a vessel on navigable waters, the vessel here did not cause the accident, nor was the ramp an appurtenance of the vessel.

The Second Circuit also addressed an issue raised by the owner but not discussed by the district court: whether the Limitation Act provides an independent basis for federal jurisdiction. Although the U.S. Supreme Court has not addressed the issue, every federal appellate court to reach the question has concluded that the Limitation Act does not permit a federal court to hear a limitation action if the claim for which limitation is sought would not itself be cognizable in admiralty.

Limitation action survives despite arguably defective notice to claimant

In re Yanicky, 2011 WL 5523600 (W.D.N.Y. Nov. 14, 2011)

During a fishing trip on Lake Ontario, a passenger on a Hydra Sport Runabout jumped into the water and drowned. Expecting to be sued by the passenger's estate, the vessel owner—who was aboard the vessel at the time of the incident—brought an action in federal court for exoneration or limitation. The passenger's estate moved for dismissal, arguing that the owner did not plead a proper claim for exoneration or limitation and did not give proper notice of the limitation action.

The limitation complaint alleged that the passenger jumped into the lake even though the owner told him not to, and that the drowning was not the owner's fault. These allegations, the court held, were sufficient to withstand the motion to dismiss. And contrary to the estate's argument, the owner's mere presence on the vessel did not prevent him from seeking limitation.

The court also denied the estate's motion to dismiss for insufficient notice of the limitation action. By rule, an owner filing a limitation action must mail notice of the action to all known claimants and, in a death case, "to the decedent at the decedent's last known address." Here, rather than

mailing notice to the decedent's address, the owner mailed the notice to a lawyer representing the estate. That lawyer had previously written to the owner advising of the estate's intent to file a wrongful-death suit and asking that all correspondence be sent directly to him.

Yet there was no evidence that the estate was prejudiced by receiving notice through the lawyer rather at than at the decedent's last known address. By communicating through the lawyer, the estate could reasonably be seen as having waived the right to receive notice in the manner specified by rule. Accordingly, the limitation action would not be dismissed for insufficient notice. ■

Torts

Damages capped at pre-casualty value where allision rendered yacht a constructive total loss; pretrial settlement wipes out award

F.C. Wheat Maritime Corp. v. United States, 663 F.3d 714 (4th Cir. 2011)

A moored yacht was struck by a U.S. Army Corps of Engineers vessel whose captain fell asleep at the helm. The U.S. government admitted liability for the allision and settled with the yacht's hull insurer for $682,500, which the hull insurer then paid to the yacht owner. Seeking a greater recovery, the yacht owner proceeded to trial against the government but stipulated that any amount the court awarded for the physical damage to the yacht would be reduced by $682,500.

After a bench trial, the court found that the yacht was a constructive total loss and awarded $440,000, which the court found to be the pre-casualty value. Because the award was less than the $682,500 the government already paid to the hull insurer, the trial court molded the award into a take-nothing judgment. The yacht owner was dissatisfied and appealed to the Fourth Circuit Court of Appeals.

The primary issue on appeal was whether the yacht was a constructive total loss, i.e., whether the cost of repairing the damage exceeded the pre-casualty value. If the yacht was a constructive total loss, then the award was properly limited to the pre-casualty value. If the yacht was not a constructive total loss, then the owner should have been awarded reasonable repair costs, which were alleged to greatly exceed $440,000.

The trial court heard valuation testimony from three experts, two of them experienced marine surveyors testifying for the government, and the third a yacht broker testifying for the owner. The government's two witnesses relied on soldboats.com, an online database of sale prices, as well as on a personal inspection of the yacht. They estimated the yacht's pre-casualty value at $440,000 and $470,000, respectively. The owner's expert, by contrast, opined that the vessel was worth $900,000 before the allision. But the owner's expert based his opinion largely on asking prices rather than actual sale prices. Also, he had an ongoing social relationship with the owner, he did not undertake a detailed inspection of the yacht, and by his own admission his valuation lacked scientific certainty. Accordingly, the Fourth Circuit saw no error in the trial court's decision to credit the government's experts over the owner's expert, or in the trial court's determination that the pre-casualty value of the yacht was $440,000.

Aside from challenging the $440,000 valuation, the yacht owner also argued that the concept of constructive total loss should not even apply because this yacht had many custom upgrades and a market valuation did not reflect its true worth to the owner. While recognizing the possibility that replacement cost, rather than market value, might be the appropriate measure of damages for a vessel having a unique use not reflected in her market price, here the Fourth Circuit declined to apply that exception. Here the owner used the vessel as a yacht, and such use was not "so idiosyncratic as to lack any market comparables." The award was therefore limited to the pre-casualty value as determined by the trial court.

Finally, in light of the pretrial settlement between the government, the hull insurer, and the owner, the Fourth Circuit agreed that the trial

court properly converted the $440,000 award into a take-nothing judgment. As part of the settlement, the owner had already been paid $682,500 for the damage done to the yacht, and that figure entirely offset the $440,000 awarded at trial. ■

Jet-ski rental company defeats claim of negligent instruction and supervision

DiNenno v. Lucky Fin Water Sports, LLC, 2011 WL 5410382 (D.N.J. Nov. 4, 2011)

Two rented Waverunners collided off Wildwood, New Jersey, breaking the leg of a passenger on one of them. The injured passenger sued the rental company. (As reported in Vol. 20:1, the court denied the rental company's motion for summary judgment.) The case was tried to Senior District Judge Irenas, who found for the rental company.

Although the parties seemed to assume that New Jersey law applied, the collision gave rise to admiralty jurisdiction and the court observed that general maritime law should therefore govern the liability issues. But since New Jersey's common law of negligence was not in conflict with federal maritime law, the court applied New Jersey common law consistent with the parties' assumptions.

Before the outing began, the rental company required all renters to sign a lease agreement, which included a set of detailed riding rules. The renters were then transported via pontoon boat from shore to a floating dock adjacent to the riding area, where safety instructions were given to the group of eight renters, four operators and four passengers. Safety equipment, including a whistle to be used in emergency situations, was provided to each person, and everyone was instructed to keep a 300-foot distance between vessels.

The renters were then allowed to operate the Waverunners in the riding area in accordance with the written rules and verbal instructions. The riding area was square, measuring 880 yards by 880 yards, and had large buoys at each of the four corners.

The plaintiff rode aboard a Waverunner operated by Djukanovic. Another Waverunner was operated by Roy. A co-owner of the rental company, Reynolds, rode a separate Waverunner and supervised the renters.

Shortly before the accident, Reynolds reprimanded Roy for riding too close to another Waverunner. Reynolds did this by approaching Roy, using hand gestures, and verbally explaining the rule violation when he was close enough to do so.

Despite these warnings, Roy began following Djukanovic's Waverunner too closely, but Reynolds was 70-80 yards away and unable to signal either vessel. Djukanovic then made a sudden turn without looking behind him, and Roy was unable to avoid a collision. Roy subsequently pleaded guilty to operating the craft at an unsafe speed.

The plaintiff sued the rental company for negligent entrustment, but his complaint focused on allegations of negligent training and negligent supervision. In the final pretrial order, the plaintiff omitted any claim for negligent entrustment and instead complained of negligent instruction, an unsafe riding area, and negligent supervision. Since the pretrial order takes the place of pleadings at that point in the litigation, the omission of a negligent-entrustment claim constituted a waiver of that claim, and the plaintiff's post-trial attempts to amend the pretrial order were denied. Therefore, the court considered only whether the rental company was negligent in instructing its customers, setting up the riding area, and supervising the Waverunners.

Plaintiff's first remaining claim—that the company breached its duty of care by failing to adequately instruct the renters on the proper way of overtaking another Waverunner—was unsuccessful. Even if the rental company had breached its duty of reasonable care regarding safety instructions, the court found that the plaintiff had not proven that the breach was the proximate cause of the collision. Reynolds had instructed the renters not to travel within 300 feet of, and not to follow directly behind, another Waverunner. Had Roy followed these instructions, the accident would not have occurred.

Plaintiff's second remaining claim—that Reynolds had a duty to signal Djukanovic and Roy with his whistle in order to alert them to the danger—was similarly unsuccessful. The court determined that, even if such a signal should be used when danger is spotted, Reynolds could not have prevented the collision, as he could not have foreseen that an accident was going to occur until Djukanovic suddenly turned, at which point there was no time to warn anyone.

Finally, the claim that the riding area was too small and unorganized, and that the riders should have been required to ride in a circle, likewise failed for lack of causation, as there was no evidence that riding in a circular motion would have prevented Roy from operating his Waverunner too close to, and directly behind, Djukanovic. Indeed, requiring the riders to follow each other in a circle may have been even more likely to cause a collision.

Judgment was therefore entered for the rental company. ■

Resort that dropped off drunken patron at his boat wins dismissal of negligence and dram-shop claims

Vollmar v. O.C. Secrets, Inc., 2011 WL 6382536 (D. Md. Dec. 20, 2011)

After a night of heavy drinking at a resort in Ocean City, Maryland, Scott Shepard was driven by one of the resort's water taxis—the *Tipsy III*—to his moored boat. Later, Danielle Vollmar, another resort patron, rode the resort's water taxi and debarked at Shepard's boat. Shepard, still intoxicated and with Vollmar onboard, got underway and allided with cement pilings. Vollmar was seriously injured and brought suit against the resort for negligence, civil conspiracy, and dram-shop liability. The resort moved to dismiss.

First, the district court analyzed Vollmar's maritime negligence claim, which required Vollmar to show a duty owed by the resort to Vollmar, a breach of that duty, an injury, and a causal connection between the breach and injury. The resort did owe a duty of ordinary care to deliver Vollmar safely to her destination and not to put her in danger. But as to the breach element, the court determined that Vollmar failed to allege sufficient facts to show that the resort negligently violated its duty. "There are no allegations that make it plausible to contend that the water taxi operators knew, or should have known, that Shepard would be the person—of the group delivered to the boat—who would operate the boat," the court wrote. Finally, the court held that intervening causes negated any plausible finding of proximate cause: after being dropped off by the water taxi and boarding the boat, Vollmar and other passengers observed Shepard to be in a "conspicuously intoxicated" state but still allowed him to drive the boat.

Next, the court considered the plausibility of Vollmar's maritime civil-conspiracy claim. Due to the absence of federal maritime law on civil conspiracy, the court applied Maryland law, which does not recognize civil conspiracy as an independent tort. Instead, Maryland law will hold a defendant liable for torts committed by a co-conspirator within the scope of the conspiracy. According to the court, Vollmar failed to plead facts sufficient to support an allegation that Shepard and the resort agreed to negligently transport her from the resort to Shepard's boat while knowing Shepard was intoxicated.

The court then analyzed Vollmar's claim for maritime dram-shop liability. Although federal courts have disagreed about whether there is a maritime claim for dram-shop liability, the court held that even if such a claim existed, Vollmar failed to state sufficient facts to support it. Since the provision and consumption of alcohol in this case occurred entirely on land rather than on the water taxi, the only possible claim for dram-shop liability would be under Maryland state law. Yet Maryland law does not recognize dram-shop liability.

Finally, the court addressed Vollmar's state-law negligence claim. Because this claim was substantively governed by the same elements as her maritime negligence claim, it fared no better than the maritime negligence claim and had to be dismissed. ■

Ill. appeals court: Unexpectedly shallow water in a natural lake is an open and obvious danger

Bezanis v. Fox Waterway Agency, 2012 WL 904647 (Ill. App. 2 Dist. Mar. 15, 2012)

A teenager dived head-first from a boat into a shallow area of a lake, about 400 feet from shore, and was rendered quadriplegic when his head struck the lake bottom. He sued the state waterway-management agency and the county sheriff having jurisdiction over the lake, claiming that they should have warned of the danger of diving into the water. The trial court dismissed the claim, and the appellate court affirmed, holding that the danger of shallow water in a natural lake was an open and obvious danger of which the defendants had no duty to warn.

The court relied on several Illinois cases holding that a property owner ordinarily owes no duty to warn of the danger of diving into a natural body of water. Illinois law generally presumes that people will take care to avoid dangers inherent in a natural body of water and will ascertain the depth of water before diving in. While the depth of a natural body of water usually increases farther from shore, one cannot assume that this is always the case. The trial court's dismissal was therefore affirmed. ■

Maritime conflict-of-laws analysis leads to dismissal of parental-consortium claim

Donais v. Green Turtle Bay, Inc., 2012 WL 399160 (W.D. Ky. Feb. 7, 2012)

A Tennessee boat owner decided to take his boat from Nashville to New Johnsonville, Tennessee, by way of Cumberland River and Lake Barkley, which is in Kentucky. While on Lake Barkley, the boat hit a submerged object. The owner hired a marina on Lake Barkley to repair the damage. About a month later, the owner returned to the marina to pick up the boat. An explosion and fire erupted moments after he started the boat's engines, and he was killed.

His adult daughter brought a wrongful-death action in the Western District of Kentucky against the marina, claiming that the fire was caused by faulty repairs. She included a claim for loss of her father's companionship, love, and support.

Both parties moved for partial summary judgment on this parental-consortium claim. The daughter argued for application of Tennessee law, under which an adult child may recover for loss of parental consortium when a parent dies as a result of a tortious act. The marina argued for application of Kentucky law, which does not recognize a claim by an adult child for loss of parental consortium.

This case was subject to admiralty jurisdiction because the injury occurred on navigable waters and the general character of the activity at issue—the repair and maintenance of a vessel used on navigable waters—was significantly related to traditional maritime activity. Applying the maritime conflict-of-laws factors in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and the Restatement (Second) of Conflict of Laws, the court found that Kentucky had the most significant relationship to the case because the injury and the allegedly faulty repairs took place there. Accordingly, the court dismissed the daughter's claim for loss of parental consortium. ■

Maritime law preempts Louisiana statute that barred recovery for death of intoxicated boater

In re Antill Pipeline Construction Co., 2011 WL 6056461 (E.D. La. Dec. 5, 2011)

An apparently intoxicated operator of a recreational fishing vessel died in an allision with a moored barge in Louisiana navigable waters. The barge owner filed a limitation action and then moved for partial summary judgment, arguing that under Louisiana state statute the decedent's intoxication barred his estate from any recovery.

The statute in question—La. Rev. Stat. § 9:2798.4—prohibits recovery for the injury or death of a person operating a motor vehicle, aircraft, watercraft, or vessel while legally intoxicated, so long as the operator is found to be more than 25% negligent due to the intoxication and his

negligence is found to be a contributing cause of the accident.

Because this accident happened in territorial waters, the estate's claim against the barge owner was governed by general maritime law, which recognizes a cause of action for wrongful death of non-seamen killed in territorial waters. A maritime wrongful-death claim is subject to the ordinary rule of comparative fault, by which recovery is reduced according to the decedent's percentage of fault but not eliminated unless the decedent was 100% at fault.

The barge owner argued that under *Yamaha v. Calhoun*, 516 U.S. 199 (1996), a state statute baring recovery for an intoxicated operator's death could be properly applied in a maritime case. The court noted that *Yamaha* did allow state remedies to supplement the general maritime remedies of non-seamen killed in territorial waters but did not permit state law to control the allocation of liability.

To answer the question, the court applied *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which required the court to evaluate whether the Louisiana statute (1) conflicted with an act of Congress, (2) would work material prejudice to a characteristic feature of general maritime law, or (3) would interfere with the uniformity of general maritime law. If the state statute did any of these things, it would be preempted.

Although the statute did not conflict with a federal statute, it still could not be applied because it would interfere with the way in which fault is apportioned under general maritime law. Barring recovery for the death of someone who was not entirely at fault would undermine the maritime principle of pure comparative fault.

The statute would also interfere with the uniformity of general maritime law, as an accident occurring in Louisiana waters could produce a completely different liability allocation than would a similar accident occurring in some other state's territorial waters. Accordingly, the court held that that the Louisiana statute barring recovery for the death of a vessel operator whose intoxication renders him more than 25% negligent is incompatible with general maritime law and could not be applied here. ■

Marinas

Question of fact whether indemnification clause survives expiration of written dockage agreement

In re Gingrich, 2011 WL 6001347 (D.N.J. Nov. 30, 2011)

This case arose after a fire at a yacht club; the issue was whether the yacht club had a contractual right of indemnity against the owner of the yacht on which the fire started. The yacht owner claimed that there could be no contract of indemnity since the parties' written dockage agreement had expired two months before the fire, but the court ruled that the issue would be resolved at trial.

In the years before the fire, the yacht owner and the yacht club had entered into four identical agreements for dockage. These agreements included an indemnification clause requiring the yacht owner to indemnify the club against any damage the yacht caused to someone else's property (including damage by fire). The most recent agreement expired two months before the fire.

The club sued the yacht owner to force him to indemnify the club for damages relating to the fire. The owner moved for partial summary judgment, saying that there was no implied contract between him and the club, at least not one that required him to indemnify the club.

The parties submitted conflicting statements about whether a new agreement had been mailed to the yacht owner before the fire. Either way, the yacht owner never signed a new agreement, did not pay a new deposit, and did not speak to the club's staff about continuing to keep his yacht there. But between the expiration of the old agreement and the time of the fire, the club did help him move the yacht between docks so that a dock could be resurfaced. The club also continued to supply the yacht with electricity, and the owner continued to pay for it. He also manifested an

intent to hook his yacht up to the club's winter water supply, and he continued to pay for dockage.

In the circumstances, the court denied the yacht owner's motion because there was a genuine issue of material fact as to whether the written agreement was still in effect. Under maritime law, the court noted, contracts do not need to be written. Also, contract law generally permits a contract to remain in force even after its formal date of lapse if the parties continue to act as though they are performing under the contract. But maritime law also requires exculpatory or indemnification clauses to be clear and unequivocal.

Considering all the facts, the court held that the contract could have survived past its expiration date. Every prior agreement between the parties included the indemnification clause, neither party ever challenged the inclusion of this clause, and neither party expressed any wish not to be bound by the contract after its lapse. Because the language of the contract had always been explicit and clear in requiring indemnification, a reasonable jury could find that the yacht owner was obligated to indemnify the club. ■

Absence of pennant rendered mooring defective

Podgurski v. Town of North Hempstead, 2011 WL 5517011 (E.D.N.Y. Nov. 14, 2011)

A boater kept his twin-engine catamaran sailboat at the Town of North Hempstead mooring area in Manhasset Bay. All of the moorings had been installed by a service contractor hired by the Town. After the boater was directed to use a different mooring for the upcoming season, he complained to the contractor that the new mooring was difficult to use, and he asked that a "pickup" and pennant be installed on the mooring. About a week later, the mooring still did not have a pickup or pennant. When the boater attempted to untie his boat from the mooring, the middle finger of his right hand got caught between a carabiner and a shackle and was crushed. The finger was repaired through surgery, but his use of the finger remained impaired and he would need further medical attention in the future.

The boater filed suit against the contractor and the Town for negligence, and the judge held a bench trial. Applying maritime law, the court found that the boater established by a preponderance of the evidence that his injury was the result of the contractor's negligence. The contractor had a duty to exercise reasonable care when it set up the mooring, and in light of the ease and practice of installing pickups or pennants, it should have installed them on this mooring. The court declined to impose any liability on the Town, however, because the boater rented the mooring from the contractor, not the Town, which had nothing to do with the installation or maintenance of the mooring.

The court then examined whether the plaintiff himself was negligent. At trial, the plaintiff's own expert stated that the plaintiff's attempt to unfasten his vessel was awkward and that he had put his finger in a poor place. The court apportioned fault equally between the parties, i.e., 50% each.

The court recognized that the plaintiff had sustained a serious injury, and that he would require surgery and would never regain full use of the finger. But the court saw no evidence of lost earnings and little evidence of medical expenses. After reviewing past awards for comparable injuries, the court awarded $125,000 for past pain and suffering, $125,000 for future pain and suffering, and $45,000 for future medical expenses. The award was reduced by 50% to account for the plaintiff's comparative negligence, resulting in a net award of $147,500. ■

Salvage

Citing easy salvage operation, arbitrators reduce contractual salvage award

Atlantic Coast Marine Group, Inc. v. Williford, Case 11-727 (BoatU.S.) (Koster, McAlpin, & Welte, Arbs.)

While operating near Morehead City, North Carolina shortly after midnight, the 32-foot Regulator motor yacht *Soundmate* ran aground in soft

sand. The winds were approximately 15-25 knots and the seas were 2-3 feet. Unable to free the vessel, the operators called for assistance. A salvage boat arrived about an hour later, and although no precise terms were discussed, it was understood that the salvor's services would be treated as salvage, not as towage. The salvor passed a line to the vessel, pulled her off the sand, and towed her to Morehead City; the entire operation took about 15-25 minutes.

The salvor then presented a form of salvage contract, and both parties signed it. The contract provided that the vessel would pay the salvor 20 percent of the salved value, or about $20,000 based on a salved value of $100,000.

The BoatU.S. salvage panel noted that a salvage contract typically enjoys presumptive acceptance, but that the presumption can be overcome where the payment called for by the contract "is in an excessive degree too large or too small for the services actually rendered." The panel then found that the $20,000 price term bore no reasonable relationship to the salvage operation, which was a simple tow of an otherwise sound vessel from a soft grounding in moderate seas and weather. The contractual award was therefore subject to modification. After evaluating the usual factors for determining a reasonable salvage award, the panel set the salvage award at $9,500. ■

Warranty

Bernouilli's principle, not dealer, was to blame for wet ride

Paulsen v. Spellman's Marina, LLC, 2012 WL 933683 (Wis. App. Mar. 21, 2012) (unpublished)

A man purchased an Alumacraft powerboat and bought a canvas canopy and side curtains as add-ons, all from the same dealer. Later he decided to deploy the canopy and curtains while the boat was underway. With the canopy and curtains deployed, spray from the wake would blow over the transom and into the passenger area. When the canopy and curtains were not deployed, this problem did not occur. The dealer offered to install a stern curtain and make other adjustments to try to correct the problem, but the man rejected the offer and sued the dealer for breach of warranty and breach of contract. The trial court granted summary judgment to the dealer, and the appellate court affirmed.

The dealer submitted multiple uncontradicted affidavits showing that the canvas coverings were meant to protect boat occupants from sun and rain but were not meant to be deployed when the boat was underway. Deploying them underway created a low-pressure area near the stern, drawing spray and exhaust fumes into the cockpit—a phenomenon known as the "station wagon" effect. The owner's manual for the boat also warned against using canvas coverings while underway due to the risk of drawing carbon monoxide into the passenger area. Moreover, there was no evidence that the dealer ever represented or warranted that the coverings were suitable for use underway.

Based on this record—and the fact that the water spray did not occur when the boat was operated without the coverings—the appellate court agreed that the problem lay not with the boat itself but rather with the owner's imprudent decision to use the coverings when underway. Summary judgment for the dealer was affirmed. ■

Product Liability

Plaintiff's expert allowed to testify that outboard engine was defective because it could run without a kill-switch lanyard

McGarrigle v. Mercury Marine, 2011 WL 6371177 (D.N.J. Dec. 20, 2011)

While operating a 12-foot aluminum fishing boat equipped with a 15-horsepower Mercury Marine outboard engine, the plaintiff was ejected overboard. The boat began circling around him, getting closer to him with every circle. As he attempted to climb back aboard, the boat ran over him, the propeller striking his face and neck. The marine-patrol officer investigating the accident noted that the water was "choppy" and "rough" for such a small vessel, but no small-craft

advisory had been issued that day. The officer also opined that the plaintiff was operating the boat at an excessive speed, although the officer had no personal knowledge of this.

The engine should have been fitted with a kill-switch lanyard, which stops the engine in the event the operator is thrown overboard. Unlike some Mercury engines, this engine model could run without the operator having to insert a lanyard. There were no warnings on the engine advising the operator to use a lanyard or to read the owner's manual.

When the plaintiff's father purchased the engine, he received an owner's manual describing the function and purpose of a kill-switch lanyard and the dangers of failing to use one. But neither he nor his son read the owner's manual, and he did not receive a lanyard with his purchase.

Plaintiff brought a product-liability action against Mercury, alleging that the engine was defective because it could be operated without a kill-switch lanyard and that Mercury failed to adequately warn of the danger of operating the engine without a lanyard. In its opinion, the court decided three issues: (1) whether the plaintiff's expert witness would be permitted to testify that the engine was defective, (2) whether Mercury could introduce evidence of the plaintiff's operating the boat at high speed in choppy seas and his trying to climb back aboard, and (3) whether Mercury could introduce evidence that the plaintiff and his father never read the owner's manual.

Plaintiff's expert

Mercury argued that the pladintiff's expert had no education, training, or employment experience with this particular type of engine. Also, Mercury alleged that his testimony was not reliable because it was based on (1) the American Society of Testing and Materials (ASTM) F 1166-07 standard and (2) the U.S. Coast Guard's Navigation and Vessel Inspection Circular No. 4-89 regarding the application of human-factors engineering to the design, construction, overhaul, and maintenance of vessels. In Mercury's view, neither the ASTM nor the 4-89 Circular applied to recreational boats.

As to the witness's qualifications, the court held that his experience with safety features used on larger commercial vessels was sufficient to qualify him as an expert in this case. As to reliability, the court stated that Mercury's challenge to the expert's "reliance on the ASTM F 1166-07 is more a disagreement in methods than a showing of unreliability" and that the ASTM standard could be applied by analogy to recreational vessels. But the court agreed with Mercury that the witness could not give testimony based on the Coast Guard's 4-89 Circular because the plaintiff failed to show that it could be applied to smaller crafts. Finally, the court deemed the expert's opinion—that the engine was defectively designed because it allowed the operator to start and operate it without using the lanyard—relevant and likely to assist the jury because the expert had examined the outboard engine involved in this case, reviewed certain regulations and codes, and reviewed the owner's manuals published by Mercury as well as those of its competitors.

Plaintiff's comparative negligence

Mercury sought to introduce evidence that the accident was caused by the plaintiff's decision to operate the boat in choppy waters at high speed and by his attempt to climb back aboard when the boat was circling around him. Although under New Jersey law the conduct of a plaintiff is generally not relevant in determining whether a product was defectively designed, a plaintiff's conduct may be relevant to the issue of what caused the injury. Here, the court would allow Mercury to present evidence of the manner in which the plaintiff operated the boat and of his attempt to climb back aboard, but only on the issue of proximate cause, not as evidence of comparative negligence.

Plaintiff's failure to read manual

Mercury knew that some operators do not read the manual before operating their engines. Under New Jersey law, in applying strict liability in tort for design defects, manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable. Here, since the father and son's failure to read the owner's manual was foresee-

able, Mercury would not be permitted to introduce evidence on that subject. ■

Court allows action against houseboat manufacturer for too-steep stairway

Donlon v. Gluck Group, LLC, 2011 WL 6020574 (D.N.J. Dec. 2, 2011)

While walking aboard a 49-foot Aqua Cruiser houseboat that she was considering buying, the plaintiff fell down a flight of stairs from the sundeck to the main deck. The plaintiff had previously ascended and descended the stairway without incident, though she expressed concern about how steep the steps were. She later climbed the stairway again, and on her way back down she slipped on the top step and fell down the entire stairway. She lost all memory of the incident.

Claiming that the stairs were steeper than allowed by ASTM standards and that the stairs' handrail was loose, she sued several defendants, including the houseboat owner, the houseboat manufacturer, and the selling broker who accompanied her on the tour. The defendants moved for summary judgment.

As an initial matter, the court noted that maritime law could have applied but that the plaintiff had failed to plead admiralty jurisdiction. Without an affirmative statement pleading admiralty, the court chose to apply land-based law, here the law of New Jersey.

As to the claim against the owner, the court held that the owner did have a duty to conduct a reasonable inspection of the houseboat. A reasonable inspection, the court held, would not have turned up the stairs' deviation from ASTM standards, but it would have revealed the loose handrail. Failure to inspect the boat and discover the loose handrail therefore breached that duty. But because the plaintiff had no memory of the fall, and there was no evidence that the loose handrail contributed to the accident, the plaintiff could not show causation and therefore could not maintain a negligence action.

As for the claim against the broker, there was a genuine issue of material fact as to whether the broker should have discovered the loose handrail, but here again there was no evidence that the handrail caused the accident. Absent such evidence, the claims against the owner and the broker had to be dismissed.

The court next addressed the plaintiff's design-defect claim against the houseboat manufacturer. In New Jersey, a plaintiff claiming a design defect must prove that: (1) there was a defect in the product, (2) the defect existed when the product left the defendant's control, (3) the defect caused an injury to a reasonably foreseeable user, and (4) a safer alternative design was available.

Regarding the first element—defect—the plaintiff's expert noted that the stairs' dimensions, nosing, and angle of inclination did not meet ASTM standards. The manufacturer's expert countered that the stairs could nevertheless be descended safely if the user faced the stairs, as if descending a ladder. In the circumstances, the court held that a reasonable jury could find that the stairs were defective.

Regarding the second element, no one argued that the stairs were different than they were at the time of construction. A jury could find this element satisfied.

As to the third element, no one disputed that the plaintiff fell on the stairs. Also, because there was no warning anywhere advising a user to descend the stairs backwards, it was reasonably foreseeable that a person might chose to descend the step while facing forward. The court held that a jury could find the third element was satisfied.

Finally, by relying on the ATSM standards, the plaintiff presented sufficient evidence to support the fourth element. Accordingly, she could present her design-defect claim to a jury. ■

Government Liability

Coast Guard could not be sued for allowing vessel to operate with noncompliant navigation light

In re Steinle, 2011 WL 6153122 (N.D. Ohio Dec. 12, 2011)

One night on Sandusky Bay, Lake Erie, a Coast Guard crew spotted a 41-foot Formula leaving a dock without its masthead or stern lights illuminated. The Coast Guard crew boarded the Formula and decided that the Formula could proceed on its brief voyage using a 360-degree light as a temporary replacement for the masthead and stern lights. (The sidelights were working properly.) While en route to a nearby marina, the Formula collided with a Sea Ray. One passenger on the Sea Ray was ejected and drowned and another was seriously injured.

The Sea Ray passengers sued the federal government, claiming that the Coast Guard was negligent in allowing the Formula to operate without proper navigation lights. The government moved to dismiss for lack of subject-matter jurisdiction.

The main issue was whether the Coast Guard exercised discretion in its handling of the Formula's lighting violations such that the court lacked subject-matter jurisdiction under the Suits in Admiralty Act. Courts apply a two-part test to determine whether a particular claim falls under the discretionary-function exception: (1) whether the challenged conduct involved a true discretionary choice, and (2) whether it was the kind of conduct that the discretionary-function exception was designed to shield.

Here the plaintiffs argued that the Inland Navigation Rules left the Coast Guard no alternative but to act. Yet the court decided that the Coast Guard has discretion—rather than an obligation—to enforce the Inland Navigation Rules. By statute, any decision to direct a noncompliant vessel to return to the dock is committed to "the judgment of the official." See 46 U.S.C. § 4308. The plaintiffs were unable to point to any statute, regulation, or policy that would have required the Coast Guard to order the vessel back to the dock or to ensure that its lights were in all respects compliant.

A court should also consider whether the government's conduct implicates public-policy considerations. Here the conduct did, because the Coast Guard must balance considerations of safety and economics in deciding how best to deal with a noncompliant vessel.

Accordingly, the court dismissed the case. ■

Regulatory Developments

Maryland proposes to regulate VOC emissions from pleasure-craft coating

The State of Maryland's Department of the Environment (MDE) has proposed new regulations to govern the emission of volatile organic compounds (VOCs) from pleasure-craft coating operations. VOCs, for the purposes of this regulation, are chemicals commonly found in many products used in boat construction and maintenance, such as bottom paints and gelcoats. The proposed regulations (COMAR § 26.11.19.27-1) will affect many marinas and private boat owners throughout the state by making some commonly-used paints and coatings obsolete, and by imposing greater potential liability upon the yards where coating operations are performed.

Maryland is following a recent trend of states adopting stricter regulation of VOC emissions. The EPA initially promulgates the emission standards; this lowers the amount of VOCs that are permitted in various coatings. States can then adopt more stringent standards, as Maryland is endeavoring to do. Four categories of coatings will be affected by the proposed regulations: Finish Primer/Surfacer; Antifouling Sealer/Tiecoat; Other Substrate Antifoulant; and Extreme High Gloss.

The proposed regulations affect pleasure craft and fiberglass boat coating operations at premises with actual VOC emissions of more than 15 pounds per day from coating operations (such as

bottom painting or gelcoat spraying). Once a premises has exceeded the 15 pounds per day threshold, only products that satisfy the new, lower limits can be used. These thresholds are very low and will affect almost every marina that allows work to be done on vessels while they are on the hard. As an example, the new proposed limits for antifoulant coatings are 3.3 pounds of VOCs per gallon. Many bottom paints have VOC pounds-per-gallon ratios well in excess of 4 pounds of VOCs per gallon. After the proposed regulations take effect, many common products will no longer be permissible, and if they are used, the marina could be subject to liability.

The language of the proposed regulations raises some questions. "Premises" is never clearly defined. Does the entire marina/boatyard constitute a "premises," or is the definition limited to just the actual painting and/or spraying operation itself? If a boatyard allows subcontractors to paint or spray, must the yard aggregate their collective emissions? A business runs the risk of coming to a different interpretation than the MDE, which could result in fines or other liability.

These rules will likely result in additional record-keeping requirements for small businesses. Because the threshold for applicability has been lowered, more business will be required to maintain statistics concerning the monthly total volume of VOCs used, and to make those records available for inspection by the MDE.

Another potential issue concerns the ability of boat owners to perform work on their own vessels while they are stored on the hard. Smaller marinas that perform only a limited amount of work may prohibit owners from working on their own vessels so as not to rise above the VOC emissions threshold. Because averages are calculated monthly, a yard that performs only limited painting and coating operations may simply prohibit owners from working on their own vessels to "save" the VOC emissions for their own workers. Alternatively, yards may just prohibit boat owners from using the higher VOC paint.

Fortunately, these will likely be short-term—rather than long-term—issues. Coatings, particularly antifoulants, that meet the proposed standards do exist. Manufacturers are likely to shift toward making and marketing products that satisfy these stricter standards, especially as more states move toward more stringent regulations. Until this happens, however, boat owners and marinas alike will have one more regulatory hoop to jump through.

Thanks to Todd Lochner and Josh Parks of Annapolis for submitting this article. ■

BOATING BRIEFS is a publication of
The Maritime Law Association of the United States,
Committee on Recreational Boating.