BOATING BRIEFS

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Eleventh Circuit: A floating house, able to leave the dock under tow, is a vessel

City of Riviera Beach v. Unnamed Gray, Two-Story Vessel, 649 F.3d 1259 (11th Cir. 2011)

The U.S. Court of Appeals for the Eleventh Circuit has ruled that a floating house-like structure was a vessel and therefore subject to a maritime lien for unpaid marina fees.

The structure consisted of a two-story wood-frame living space built atop a rectangular fiberglass-coated hull. Used as the owner's primary residence, it was docked at a marina, moored with cables, and connected to shoreside utilities. It had no engine, bilge pumps, navigation equipment, lifesaving gear, or hull identification number, yet it was capable of being taken under tow. Indeed, the owner first purchased it on the Gulf coast of Florida and had it towed—presumably through the Okeechobee Waterway—to a marina near Sebastian Inlet on the Atlantic coast of Florida, where he lived on it. Three years later, he had it towed about 70 miles south to a marina operated by the City of Riviera Beach, where he continued living on it.

Friction ensued between the City and the owner. After a failed attempt to evict him in state court, the City decided that all marina customers would be required to sign new dockage agreements and comply with a new set of marina regulations. The owner of the floating house refused to sign the new dockage agreement, and the City sent him a notice directing him to comply with the new requirements or else leave the marina.

With the parties at a standoff, the City filed an admiralty action against the floating house, claiming a maritime lien for trespass and a necessaries lien for unpaid marina fees. The house was arrested by the U.S. Marshal, and the substitute custodian towed it down the Intracoastal Waterway to Miami, a distance of about 80 miles.

The trial court granted the City's motion for partial summary judgment on the trespass claim, holding that the house was a vessel and had committed a maritime trespass by remaining at the marina without the City's consent. After a trial, the court entered judgment against the house for about $3000, representing unpaid dockage and late fees and $1 in nominal damages on the trespass claim. To enforce the judgment, the house was sold at a Marshal's auction; the City was the winning bidder.

The former owner's principal argument on appeal was that—given its physical characteristics, its use as a primary residence, and the rarity with which it ever got underway—the house was not a vessel capable of incurring a maritime lien. But the appeals court held, in line with circuit precedent, that a structure does qualify as a vessel so long as it has the practical capacity to be used for transportation on water.

That the house rarely moved and was ill-suited for transporting passengers or cargo did not deprive it of vessel status. The applicable federal statute broadly defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." In the Eleventh Circuit, this means that a structure capable of being used for maritime transportation will be considered a vessel

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.

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even if the owner intends never to use it for that purpose. Here, the floating house was capable of being taken under tow and in fact traveled many miles under tow, both in the past and immediately after the arrest.

The Eleventh Circuit acknowledged, however, that its conception of a vessel was perhaps broader than that in the Fifth and Seventh Circuit, both of which allow for the possibility that a structure capable of being used for maritime transportation may nevertheless not be a vessel if the owner intends that it never travel on the water.

Citing a split in the circuit courts on this subject, the former owner of the floating house has petitioned the U.S. Supreme Court to review the Eleventh Circuit's judgment. The case is *Lozman v. City of Riviera Beach*, No. 11-626. ■

Insurance

Passenger was not "operating" boat and therefore not an "insured" under policy

Mize v. Travelers Cas. Co., 2011 WL 891322 (D.S.C. March 10, 2011)

A passenger was rendered paraplegic when the vessel she was riding on—a 19-foot Maxum—was struck from behind by another boat whose owner was uninsured. She made a negligence claim against the Maxum's owner, who was at his vessel's helm when the collision occurred. His marine insurer settled the claim.

The passenger then brought suit against the same insurer, arguing that she was entitled to coverage under the policy's uninsured-boater provision, which covered damages that "any insured [is] legally entitled to recover from the owner or operator of an uninsured boat because of bodily injury caused by a collision/allision with the uninsured boat." The policy defined the word "insured" to include "any person or legal entity while operating [the Maxum] with an insured's permission and without a charge or fee."

The passenger claimed that she was an "insured" because the word "operating" was not defined in the policy and could be construed to refer to a passenger like her, who, though not steering or in command of the Maxum, may have had a duty to keep a lookout and assist the person at the helm.

But the court held that there was no ambiguity in the word "operating" and that the passenger could not reasonably be considered to have been "operating" the Maxum. The court observed that the dictionary definition of "operate" is to "perform a function" or "exert power or influence"; to "cause to function" or "work"; or to "run or control the functioning of."

Here the Maxum's owner was in command and at the wheel, and he was the only person to have steered or navigated the vessel that day. The fact that the passenger may have had a duty to keep a lookout did not mean that she was "operating" the vessel since she "was not performing a function to exert power or influence over the boat nor was she causing the boat to function." Accordingly, she could not be considered an "insured" under the Maxum owner's policy. ■

In arbitration, insureds waived challenge to policy's cooperation clause

Northern Assur. Co. v. Payzant, 952 N.E.2d 436 (Mass. App. 2011)

A suspicious fire broke out on a yacht named, of all things, the *Blaze of Glory*. The yacht's insurance policy listed various duties of cooperation and stated that if the insureds breached these duties there would be no coverage unless the insureds proved that the breach did not prejudice the insurer.

After taking testimony from the insureds under oath and receiving numerous documents from them, the insurer denied coverage on the basis that the insureds had not sufficiently cooperated with the investigation of the loss.

Coverage litigation ensued, but at the insureds' request the dispute was referred to private arbitration in accordance with the policy's arbitration clause. The arbitrator decided that there was no coverage because the insureds insufficiently cooperated with the insurer's investigation and because they failed to carry their burden under the policy of proving that the insurer was not prejudiced.

At the insureds' request, the trial court vacated the arbitrator's decision, holding that the policy's cooperation clause impermissibly imposed the

burden of proof on the insureds to show lack of prejudice when, under Massachusetts law, it was the insurer's burden to show prejudice when denying coverage on the basis of noncooperation.

But the appellate court held that the insureds had forfeited the right to contest the validity of the policy's cooperation clause because they did not raise this argument with the arbitrator and in fact conceded to the arbitrator that they had the burden of showing lack of prejudice. Accordingly, the arbitrator's decision was reinstated. ■

Salvage

Arbitrators order partial refund of salvage payment

Arbitration between H.R.M., Inc. d/b/a Safe/Sea and S/V Ilene (New York July 12, 2011)

Underway during a Nor'easter on Block Island Sound, the 43-foot sailboat *Ilene* sought shelter in Point Judith Pond, a saltwater tidal pond inside the Point Judith Harbor of Refuge. While looking for a place to tie up for the night, the vessel grounded outside the channel. The owner launched a rubber dinghy in an attempt to set a kedge anchor to pull the vessel off the strand, but his efforts were thwarted by strong winds and an outgoing tide.

The owner, a member of BoatUS, called for a tow. While the owner was still on the phone with BoatUS, a towboat operated by a local salvage service arrived. The towboat had been alerted to the situation by a homeowner who saw the stranded sailboat from his living-room window.

The towboat captain said that he could only assist if the *Ilene*'s owner signed a standard-form no-cure/no-pay salvage contract. Saying that the towboat captain had him "over a barrel," the owner signed the contract. The towboat passed a single tow line, pulled the *Ilene* safely off the strand, and towed her about 300 yards to a marina dock.

The *Ilene*'s insurer paid the salvor an interim salvage fee of almost $28,000, representing 12 percent of the *Ilene*'s value. Later concluding that it had overpaid, the insurer sought a partial refund. The salvor, on the other hand, believed that a substantially higher fee was in order. The dispute was submitted to arbitration.

The arbitrators observed that the parties' respective versions of the events "could not have been more starkly opposed to each other." The salvor characterized the seas around Point Judith that night as the "Cape Horn of the North"—so bad, in fact, that the Block Island ferry had suspended service. The salvor also claimed that the *Ilene* had been pounding on a rock-strewn bottom and that without assistance could have found herself driven into a seawall.

The insurer countered that the *Ilene* was in a relatively safe position and that the salvor did little more than pull her off a sandy bottom, albeit in adverse weather.

Noting that the vessel had grounded in an area protected from the seas off Point Judith, and that when the towboat captain arrived on the scene he quickly raised the subject of compensation without expressing any concerns about the condition of the *Ilene*, the arbitrators concluded that the salvage was much less dramatic than the salvor alleged. They ruled that the salvor should receive an award of 5 percent of the *Ilene*'s value; this meant that the insurer was entitled to a refund of about $16,000 against the interim fee it had already paid. ■

Thanks to James Mercante of New York for calling our attention to this decision.

Finance

Under UCC, borrower need not be given notice of time and place of private repossession sale

Barclays Bank PLC v. Poynter, 2011 WL 3794890 (D. Mass. Aug. 25, 2011)

A yacht mortgage gave the lender the right in the event of a default to repossess and sell the vessel "after first giving [the borrower] notice thereof ten (10) days in advance of the time and place of sale."

The borrower defaulted on the mortgage, and the lender repossessed the yacht and sent notice to the borrower that the vessel would be sold at a private sale. But the notice did not inform the borrower

when and where the sale would occur. Since the notice did not comply with the 10-day-notice provision in the mortgage, the borrower argued that he was relieved of any obligation to pay the deficiency.

Separate from the 10-day-notice provision, however, the mortgage also stated that the lender would have "such other rights, privileges and remedies granted by applicable law." Since in this case the lender had elected self-help repossession instead of judicial arrest, the court determined that the "applicable law" was the Uniform Commercial Code as enacted in Florida, where the repossession sale was held. Under Florida's UCC, when a lender intends to sell collateral at a private sale, notice of sale sent to the borrower "10 days or more before the earliest time of disposition" is considered reasonable; the notice need not specify the time and place of the sale. In this case, the notice was adequate since it complied with the UCC, even though it did not comply with the mortgage's more specific notice provision.

The court also observed that the lender's failure to advise the date and time of sale apparently did not prejudice the borrower, since there was no evidence that the borrower was prepared to cure the default before the sale or that any aspect of the repossession sale was commercially unreasonable. Accordingly, the borrower remained liable for the deficiency. ■

Lender without preferred mortgage had no recourse in admiralty

Home Savings & Loan Co. v. Super Boats & Yachts, LLC, 2011 WL 2447641 (S.D. Fla. June 15, 2011)

After a boat owner defaulted on a note and state-law security agreement, the lender filed a replevin action in state court and obtained an order of possession. In the meantime, the borrower conveyed the boat to a third party. The lender then filed an admiralty action in federal court against the boat and the third party, seeking the arrest of the boat, a judgment of possession, and an award of damages. But since the lender did not have a preferred mortgage or a maritime lien on the vessel and did not allege any breach of a maritime contract, there was no basis for an arrest, and the court dismissed the action for lack of admiralty jurisdiction. ■

Torts

New York anti-exculpatory statute pre-empted by maritime law

Brozyna v. Niagara Gorge Jetboating, Ltd., 2011 WL 4553100 (W.D.N.Y. Sept. 28, 2011)

The plaintiff sustained a compression fracture in her lower back during a ride on a "Whirlpool Jet" excursion boat on the Niagara River. She had been seated in the bow of the boat as it made its way though Devil's Hole, an area of Class-5 whitewater rapids below Niagara Falls. The boat was part of a fleet of eight diesel-powered jet boats specifically designed to carry passengers in these conditions.

Before boarding the boat, she and all the other passengers signed a "Participation Agreement" acknowledging the "risks, hazards and dangers inherent in jet boating . . . including bumping and jolting of the boat," and releasing the excursion company from all claims, including claims of negligence. The passengers also attended a safety briefing, at which company employees described the risks and warned that the ride could be rougher for passengers who chose to sit in the front of the boat.

Plaintiff sued the excursion company, alleging negligent operation of the boat, inadequate warnings to passengers, and inadequate training of the boat operator. The court granted the company's motion for summary judgment, holding that the release barred her claims.

The case was governed by maritime law because the lower Niagara was navigable and the operation of the excursion boat was substantially related to traditional maritime activity. The judge noted that other courts hearing similar cases have held that "a pre-accident waiver will absolve an owner or operator of liability for recreational accidents taking place on navigable waters where the exculpatory clause (1) is clear and unambiguous; (2) is not inconsistent with public policy; and (3) is not an adhesion contract." Here the Participation Agreement was worded clearly, and it was not a contract of adhesion since the boat excursion was a recreational pursuit and participation was entirely voluntary.

Nor was the agreement inconsistent with public policy. Although New York statute (General Obli-

gations Law § 5-326) provides that operators of certain recreational establishments may not exculpate themselves from the consequences of their own negligence when contracting with paying customers, the court held that the New York statute was preempted by maritime law. Pre-accident releases were commonplace and generally enforceable in the recreational marine context, and here the plaintiff did not show why "the interests expressed in General Obligations Law § 5-326 should be found to predominate over the long-recognized national interest in the development of a uniform body of maritime law."

The case was therefore dismissed. ■

Question of fact whether jet-ski orientation satisfied Florida livery statute

Straw v. Aquatic Adventures Management Group, Inc., 2011 WL 5008359 (N.D. Fla. Oct. 20, 2011)

The plaintiff was injured when she was thrown from a jet ski that she had rented as part of a guided tour near the waters of Panama City Beach, Florida. She sued the rental company on claims of negligence, violation of statutory duties, and vicarious liability.

Before renting the jet ski, the plaintiff had executed a release entitled "Assumption and Acknowledgement of Risks and Release of Liability Agreement." The release identified specific risks such as tides, currents, wave action, wakes, collisions, equipment failure, and so on. It also provided that the plaintiff "agree[d] to assume responsibility for all the risks of the activity, whether identified or not (EVEN THOSE ARISING OUT OF THE NEGLIGENCE OF THE [rental company])."

The rental company moved for summary judgment, contending that the release barred the plaintiff's claims. She countered that that the company breached the Florida livery statute—Florida Statute 327.54(e)(1)—and that the release was therefore invalid. The livery statute provides:

> A livery may not knowingly lease, hire, or rent a vessel [with a motor of 10 horsepower or greater] to any person . . . unless the livery provides prerental or preride instruction that includes, but need not be limited to:
>
> 1. Operational characteristics of the vessel to be rented.
> 2. Safe vessel operation and vessel right-of-way.
> 3. The responsibility of the vessel operator for the safe and proper operation of the vessel.
> 4. Local characteristics of the waterway where the vessel will be operated.

The Florida courts have held that a violation of this statute is negligence per se and renders a rental company's otherwise valid exculpatory clause unenforceable.

In this case the rental company argued that it complied with the statute by having the plaintiff review and sign a "PWC Renter Orientation Checklist." The checklist covered a variety of subjects and included detailed instructions concerning "protective clothing and equipment," three items for "PWC controls," and three items on "Avoid[ing] Collisions." The final item asked whether the renter had any questions about the PWC or its operation. The plaintiff had signed the checklist and initialed each of these items.

The court noted that waivers relieving a party of liability for its own negligence are generally disfavored but are valid if the waiver is clear and unequivocal. The court concluded that the waiver here was presumptively valid. However, while the livery statute did not expressly require that the customer be given live instructions or an interactive presentation, there were questions of fact as to whether the checklist satisfied the statute. The rental company's motion for summary judgment was therefore denied.

While the issue was not briefed by the parties, the court did say that the livery statute did not appear to create a private right of action as alleged by the plaintiff. ■

In allision case, sailboat owner overcame Louisiana Rule

Hatt 65, LLC v. Kreitzberg, 2011 WL 4056818 (11th Cir. June 29, 2011) (unpublished)

Before it came ashore, Hurricane Dennis was expected to pass west of Gulf Breeze, Florida; this would have resulted in winds from the south and west, sparing the Gulf Breeze area from the worst conditions.

The defendant had recently purchased the sailboat *Escape* and sought to properly secure the vessel in advance of the storm. Due to the height of the main mast, his mooring options were limited. He requested advice from a marina regarding the placement and type of mooring that had allowed a 42-foot catamaran to survive Hurricane Ivan the previous year. He then constructed a similar mooring out of concrete, metal rebar, and chain, and placed the mooring outside the marina. He did not obtain a permit before sinking the mooring.

He secured the vessel to the mooring using a 40-foot line to make a 20-foot bridle. He also set a Super Max storm anchor with a snubber by dropping it and reversing the engines. He also attached a line to another nearby mooring.

Meanwhile, in preparation for the storm, the plaintiff's 65-foot Hatteras convertible sportfisherman, the *WEJ*, was secured with two anchors and a number of mooring lines tied to freestanding pilings, a dock, and a tree on shore.

Hurricane Dennis did not take the anticipated path, and hurricane-force winds buffeted Gulf Breeze from the north and then the northwest rather than from the south and west. Although the testimony of the witnesses varied, it appeared that the *Escape* somehow broke free, crossed the *WEJ*'s anchor line, and allided with the *WEJ*.

The *WEJ* owner filed suit and invoked the Louisiana Rule, alleging that the *Escape* was presumptively at fault because she allided with a stationary vessel. The Louisiana presumption may be rebutted, however, where the defendant proves, by a preponderance of evidence, that (1) the allision was the fault of the stationary object; (2) the drifting vessel acted with reasonable care; or (3) the allision was an unavoidable accident.

Although there was some testimony that the *Escape* was drifting several hours before the winds became dangerous, the court determined that the testimony from the *Escape* owner and his expert credibly showed that reasonable action had been taken to properly secure the vessel.

The *WEJ* owner also asserted that, under the Pennsylvania Rule, the *Escape* owner had the burden of proving that his failure to obtain a mooring permit as required by Florida law could not have been a cause of the allision. But since there was no indication that the purpose of the permitting requirement was to avoid incidents like the one that occurred here, the court determined that the Pennsylvania Rule did not apply.

The district court found in favor of the *Escape*, and the appeals court affirmed. ■

Claimants not at the accident scene had no emotional-distress claim

Ortiz v. Zambrana, 2011 WL 4018260 (D. Puerto Rico Sept. 12, 2011)

A group of family and friends anchored their boats at a Puerto Rico beach. Some of the men separated from the group to go harpoon-fishing and snorkeling. A couple of hours later, two of the men were struck by a passing boat. As a result of the impact with the propeller, one man's leg had to be amputated above the knee, his remaining leg had to be repaired with ten skin staples, he required transfusions totaling 14 pints of blood, and he remained in a coma for four days. The man's common-law wife (a status not recognized by Puerto Rico law) and children made claims for emotional distress.

Under maritime law, the court wrote, a claim for negligent infliction of emotional distress requires that a plaintiff (1) suffer some physical contact or injury in addition to emotional distress; or (2) be at risk of physical injury while witnessing the endangerment of another; or (3) be physically close to the scene, directly witness the incident, and be a close relation of the victim. Under any of these three scenarios, a plaintiff must have been close enough to the scene to witness the accident.

The injured man's common-law wife was on one of the anchored boats and did not witness the accident. His children were all at the beach or on the main island, and none of them witnessed the accident. Accordingly, none of these plaintiffs could recover on an emotional-distress claim under maritime law.

The plaintiffs argued that Puerto Rico law permitted recovery for emotional distress in the circumstances of the accident, but the court held that the claim had to be assessed under maritime law and that the plaintiffs could not rely on Puerto Rico law to obtain a different result. ■

Product Liability

Fifth Circuit affirms judgment for plaintiff in propeller-guard case

Brochtrup v. Mercury Marine, 426 Fed. App'x 335 (5th Cir. 2011) (unpublished)

A young man was boating with friends on a Texas lake and entered the water to retrieve a tow line. The boat operator put the engine in reverse while the man was still in the water. The man's leg was severely lacerated by the spinning propeller and had to be amputated at the hip. The man sued the boat manufacturer, claiming that the propeller should have been fitted with a guard. Ultimately a Texas jury agreed with the man and awarded him over $2.5 million. (See Boating Briefs Vol. 19:2.)

The manufacturers appealed, contending that the plaintiff's evidence did not satisfy two of the elements of a design-defect claim under Texas law, namely (1) that the boat was unreasonably dangerous by virtue of a defective design, and (2) that a safer, feasible alternative design was available.

In the Fifth Circuit's view, however, the jury was entitled to conclude that the absence of a propeller guard rendered the boat unreasonably dangerous. First, the plaintiff presented evidence of other incidents in which unguarded propellers had caused injuries similar to the one suffered by plaintiff. Second, as an alternative to an unguarded propeller, the plaintiff's experts designed and built a shield mechanism around the spinning propeller—a design that, according to the plaintiffs' experts, did not sacrifice the boat's utility. Third, the plaintiff's experts testified that their shielded propeller was safer than an unguarded one, was not excessively expensive, and would have prevented the plaintiff's injury. Fourth, there was evidence that some buyers would pay more for a boat with a propeller shield. Taken together, this evidence was sufficient to allow the jury to conclude that the boat was defectively designed and unreasonably dangerous.

The manufacturers also argued that, given the costs of designing and building shielded propellers and installing shields on existing boats, the plaintiff had not proven the economic feasibility of his proposed shield mechanism. But the Fifth Circuit ruled that under Texas law a plaintiff is not required to present exhaustive evidence of economic feasibility. Here there was evidence that the cost incurred by the plaintiff's expert to build the shield mechanism was $300, plus an extra $100 to weld the mechanism to the sterndrive. According to the Fifth Circuit, this was enough evidence to allow the question of economic feasibility to go to the jury.

The judgment for the plaintiff was therefore affirmed. ■

No claim for inadequate warning where plaintiff did not read label

Altman v. HO Sports Company, Inc., 2011 WL 1885407 (E.D. Cal. May 18, 2011)

The plaintiff in this case was an avid wakeboarder who had been wakeboarding many hundreds of times and considered himself an expert. On one occasion, while performing a trick jump and wearing wakeboarding boots manufactured by the defendant, the plaintiff sustained a serious fracture to his ankle. His jump had progressed normally until the landing, at which point the boot bent sharply and the plaintiff's ankle snapped.

The plaintiff alleged that the boot was defective because it allowed his ankle to be bent while his foot was still strapped into the boot and the boot was still connected to the wakeboard. He also challenged the adequacy of the warnings accompanying the boots. The defendant moved for summary judgment.

The heel of each boot, as well as the owner's manual, included a warning that the boots "may or may not release in a fall which could result in injury." The plaintiff argued that he had no reason to read the warnings because the manufacturer had been supplying the same warnings with its boots for many years, thus making it less likely that a user would actually pay attention to the warnings. But the plaintiff's testimony indicated that the real reason for his not reading the warnings was that "he felt that he knew enough about wakeboard boots and simply did not need to read the warnings." The court observed that, under California law, when a plaintiff does not read a product's warnings, any alleged inadequacy in the warnings generally cannot have been a substantial factor in causing the injury.

Summary judgment was therefore granted to the manufacturer on the failure-to-warn claim.

But there was a genuine issue of fact as to whether the boots were defectively designed. The plaintiff's experts criticized the boots as having insufficient stiffness around the ankle and opined that more support in that area of the boot would have likely prevented the plaintiff's injury. Therefore, the design-defect claim could proceed. ■

Maritime comparative fault applied in state product-liability suit

Hill v. Chaparral Boats, Inc., 2011 WL 5009413 (Nev. Supr. Oct. 18, 2011)

While operating his newly-purchased boat on Lake Mead, a man discovered that he was unable to put the engine into reverse due to a malfunction of the throttle assembly. He decided he could dock the vessel in this condition by putting the engine in neutral, walking to the bow, and then jumping onto the dock and grabbing the boat in order to secure it to the dock. He shifted the throttle to the neutral position as he approached the dock, but the boat remained in gear and struck him as he jumped onto the dock. He brought a product-liability claim against the boat manufacturer.

The trial judge instructed the jury on the principle of comparative fault, and the jury found for the manufacturer. On appeal to the Nevada Supreme Court, the man contended that the trial court should have instructed the jury according to Nevada law, which does not treat a plaintiff's comparative fault as a defense to a strict-product-liability claim.

Since the incident occurred on navigable waters and had the potential to disrupt maritime commerce, and navigating and docking a vessel is a traditional maritime activity, the Nevada Supreme Court readily concluded that the case was subject to maritime law. Apportioning liability according to the parties' respective degrees of culpability was a characteristic feature of maritime tort cases, including maritime product-liability cases. The trial judge was therefore correct to instruct the jury on comparative fault rather than Nevada state law. ■

Regulatory Developments

Final rule on LHWCA's recreational-vessel exclusion

After receiving public input, the U.S. Department of Labor has now finalized regulations implementing the 2009 amendments to the Longshore and Harbor Workers' Compensation Act. Those amendments made the LHWCA inapplicable to workers employed to repair recreational vessels and to workers employed to build recreational vessels less than 65 feet in length. (See Boating Briefs Vol. 18:1.)

The statutory amendments do not define the term "recreational vessel," but the regulations generally adopt the Coast Guard's view of what constitutes a "recreational vessel." A vessel will be deemed recreational under the LHWCA regulations if it is "[b]eing manufactured or operated primarily for pleasure" or "leased, rented, or chartered to another for the latter's pleasure."

The regulations also clarify that a builder may treat a vessel as recreational for purposes of the LHWCA exclusion "if the vessel appears intended, based on its design and construction, to be for ultimate recreational uses," the burden being on the builder to show that this is the case.

The final rule, with agency comments, is published in 76 Federal Register 82117 (Dec. 30, 2011). ■

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