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KNOX MARINE YACHT CLAIMS CONFERENCE JANUARY 19-20, 2011

RECENT RECREATIONAL BOATING CASES

I. ADMIRALTY LAW AS IT RELATES TO RECREATIONAL BOATING IN A NUTSHELL

- A. Location, Location, Location.
- B. Substantial Connection to Maritime Commerce.
- C. Who Are You – Status.
- D. Uniformity – Federal Law.
- E. Unique Features – Limitation of Liability, Maritime Liens, Comparative Fault.

II. LIABILITY CASES

A. Personal Injury and Death Claims

1. Liability of Yacht Owner and Operator

a. Evans v. Nantucket Community Sailing Inc., 582 F. Supp.2d 121, 2009 AMC 360 (D. Mass. 2008). Two sailboats collided while racing – one owner 35% at fault and the other 25% at fault for passenger injured by boom of the jibing sailboat; injured passenger 40% at fault for not paying attention. COLREGS applied to the race maneuvers.

b. Doyle v. Graske, 579 F.3d 898, 2009 AMC 2493 (8th Cir. 2009) and 565 F. Supp 2d 1069 (D. Neb. 2008). Operator of inflatable boat was 90% at fault in accelerating boat to a plane with guest sitting on gunwale or in bow area. A bolt came loose from the steering area, causing the passenger to be thrown overboard.

c. Superior Construction Co. v. Brock, 445 F.3d 1334, 2006 AMC 1038 (11th Cir. 2006). Owner of poorly lighted, moored construction barge solely at fault when struck by recreational boat at night, even though boat operator was intoxicated. (Moored barge was an obstruction to navigation in violation of statute, and intoxication was not the cause of the accident).

d. Kelly v. Di Cerbo, 27 A.D.3d 1082, 811 N.Y.S.2d 530, 2006 N.Y. Slip Op. 01936 ((N.Y. App. 2006) - Parents could be held liable for personal injuries caused by minor son operating their boat under negligent entrustment theory.

e. Colbert v. Moomba Sports, Inc., 135 P.3d 485 (WASH Ct. App. 2006). Father of drowning victim not entitled to recover damages for negligent infliction of emotional distress under Washington State Law where he arrived at the scene after rescuers had altered the scene and he did not see his daughter drown.

f. Lepone v. Brown, Docket No. 05-05374, Court of Common Pleas, Chester County, PA (June 24, 2008)(affirmed without opinion on appeal to the Superior Court, 959 A.2d 981). Passenger claim for head injuries due to operator heading into wake of passing boat for failing to keep a proper lookout denied.

g. Knight v. Longaker, 2007 U.S. Dist. LEXIS 47080, 2007 WL 1864870 (N.D. Cal. June 28, 2007). "Weekend sailing enthusiast" who is uncompensated crew member on defendant's boat for amateur sailboat races does not qualify as a Jones Act seaman because her connection to this vessel is not substantial in nature or duration under Chandris – 30% test.

h. River Riders, Inc. v. Steptoe, 2009 AMC 2153, 672 S.E. 2d 376 (W. Va. 2008). White Water Rafting on Shenandoah River, even if "navigable," does not have a substantial relationship to traditional maritime activity. Maritime law may not apply to drowning death and 13 injuries during river excursion.

i. Binno v. Binno, Docket No. 291437, 2010 WL 2384966 (Mich. App. June 15, 2010) (unpublished). Action against boat owner for death of adult swimmer on Cass Lake in Michigan, where weather changed and swimmer was unable to get back to pontoon boat, dismissed—boat owner had no duty to act as lifeguard.

j. Alprin v. City of Tacoma, 159 P.3d 448, 139 Wash. App. 166, (Wash. App. 2001). Power company not at fault for sailor's electrocution where mast struck power line that was marked on the charts including its height above the water.

k. Caguioa v. Fellman, 747 N.W. 2d 623 (Neb. 2008). House boat owner allowed boat to drift 100 yards away from guest swimmer who was not wearing life jacket. Two retired Coast Guard experts should be permitted to testify that this was negligent operation of vessel.

2. Jet Skis and Personal Watercraft

a. Ford v. Polaris Industries, Inc., 43 Cal. Rptr.3d 215, 2006 AMC 1476 (Cal. App. 2006). Manufacturer of 2001 2-seater Polaris personal watercraft can be held liable for not better protecting passenger who fell off the back of the pwc (missing strap could be considered a design defect that increased the risk of a particular injury); a warning that passengers should wear a wetsuit to avoid orifice injuries was not sufficient. The manufacturer could not allocate fault to the operator/owner of the PWC.

b. Moore v. Matthews, 445 F. Supp.2d 516 (D. Md. Aug. 24, 2006). Collision between two jet skis at senior class picnic analyzed by application of multiple Rules of the Road; maritime law applied.

c. Complaint of Royal Caribbean Cruises, 459 F. Supp.2d 1275 (S.D. Fla. 2006). "Off throttle steering loss" does not render Jet Ski defective. Unseaworthiness does not apply to jet ski passengers. Florida state laws are pre-empted and parents signing of Release does not waive claims of minor son.

d. Hodges v. Summer Fun Rentals, Inc., 203 Fed. Appx. 89, 2007 AMC 599 (9th Cir. 2006). Obvious danger of falling off personal water craft by wave jumping negates liability of rental company for failure to warn when user fell, was struck by another PWC, and lost a leg.

e. Alarcon v. Rasanow, 2006 Ohio 5804 (Ohio App. 2006). Rental company owed no duty to passenger of renter of PWC, but even if it did, would only owed a duty to see that PWC was in working order and renter had no visible impediments to operation of the PWC. No negligent entrustment.

f. Tassinari v. Key West Water Tours, L.C. – 2007 U.S. Dist. LEXIS 46490, 2007 WL 3238678 (S.D. Fla. June 27, 2007). Rental company liable for violation of Florida Statute 327.39 and 327.54, requiring employee to have taken an approved safety course and to give safety instruction to the user.

g. KDME, Inc. v. Bucci, 2007 U.S. Dist. LEXIS 59810, 2007 WL 2345026 (S.D. Cal. Aug 14, 2007) – Injured plaintiff who rented a 16 foot Bayliner Capri overcame rental company's Hold Harmless Agreement by proof of "gross negligence" in failing to explain the configuration of the bridle attached to the innertube and to explain the lanyard kill switch.

h. Folsom v. Kawasaki Motors Corp., 509 F. Supp.2d 1364, 2007 U.S. Dist. LEXIS 37936 (M.D. Ga. May 24, 2007). Although jet ski had 11 different warning labels about off-throttle steering loss, the jury is entitled to consider whether

the manufacturer's failure to place one where the seated user could see it was negligence.

3. Liability of Public Entities – Government

a. Fortner v. Tennessee Valley Authority, 2005 WL 2922190, 2005 U.S. Dist. LEXIS 28036 (E.D. Tenn. 2005). U.S. Dam owner (T.V.A.) not liable for release of water through spillway swamping small boat. Government erected billboard-size warning sign - discretionary function exception.

b. McMellon v. United States, 395 F. Supp 2d. 422, 2006 AMC 1636 (S.D. W. Va. 2005) – Army Corps of Engineers operated dam was liable for failure to warn upriver jet skiers with “conspicuous” signs.

c. Northern Insurance v. Chatham County, 547 U.S. 189 (2006). U.S. Supreme Court held County cannot assert sovereign immunity as defense to admiralty suit in a case where drawbridge malfunctioned.

d. Powell v. United States, 2007 U.S. Dist. LEXIS 60347, 2007 WL 2292693 (D. Or. Aug 6, 2007); Coast Guard acted reasonably in rescuing sailor with engine breakdown in rough weather and cause of injury was sailor's inexperience and premature deployment of drogue.

4. Defenses

a. Act of God – Hurricanes and Storms

(1) New Hampshire Insurance v. Dagnone, 2006 AMC 1920 (D. R. I. 2006). Marina liability failing to haul plaintiff's boat prior to nor'easter denied. Storm was Act of God.

(2) Northern Ins. Co. v. Pelican Point Harbor, Inc., 2006 AMC 1586, U.S. Dist. LEXIS 30380 (N. D. Fla. May 5, 2006) – Yacht owner's insurers could bring subrogation action for loss of yacht during Hurricane Ivan against marina despite marina slip rental agreement requiring yachts to leave marina in case of hurricane warning. Florida Statute 327.59 prohibiting agreements re removal of yachts with hurricane warnings discussed.

(3) Stuart Cay Marina v. M/V SPECIAL DELIVERY, 510 F. Supp.2d 1063, 2008 AMC 68 (S.D. Fla. March 27, 2007) - Expert testimony will be received as to whether owners acted prudently in securing their 97 foot aluminum crew

boat to the pier with 20 lines on 6 mooring pilings when it broke loose in Hurricane Frances damaging 2 piers.

(4) Simmons v. Lexington Ins. Co., 2010 WL 1254638 (E.D. La. 2010) – Hurricane Katrina was Act of God and yacht owner whose yacht broke loose from moorings was not liable for damage to marina where he presented testimony of former Coast Guard officer of 40 years experience that he took all reasonable precautions.

(5) Hatt 65 L.L.C. v. Kreitzberg, 2010 AMC 100 (N.D. Fla. 2009) – owner of drifting vessel took reasonable precautions constructing a hurricane mooring to secure sailboat in anticipation of Hurricane Dennis, but hurricane unexpectedly shifted direction at the last moment.

b. Limitation of Liability

(1) In Re Houseboat STARSHIP II, 2005 WL 3440788, 2006 AMC 1335 (M.D. Tenn. Dec. 12, 2005) – Owners' and operators' houseboat moored to an island on navigable waters can bring limitation action in carbon monoxide exposure case.

(2) In Re Rhoten, 397 F. Supp 2d 151 (D. Mass. 2005) – Owner may not limit liability where boat caused marina fire due to overheating of 30 AMP shore power cord – failure to install locking rings and failing to detect signs of overheating.

(3) Petition of Johnson, 2007 U.S. Dist LEXIS 20467, 2007 WL 735776 (D. Conn. March 2, 2007) – Limitation proceeding arising out of collision on lake situated wholly within the state of Connecticut dismissed for lack of underlying federal jurisdiction over collision.

(4) In re Ruiz, 494 F. Supp. 2d 1339, 2007 AMC 1991 (S.D. Fla. 2007). Owner's limitation proceeding dismissed because if negligent entrustment of 90 HP motorboat to 13 year old was either not negligent entrustment dismissed) or with privity and knowledge which are elements of the underlying claim either way the case would be dismissed.

(5) In Re Via Sales & Leasing, Inc., 499 F. Supp.2d 887, 2008 AMC 438 (E.D. Mich. 2007). Where owner is on board and piloting vessel at the time of collision his failure to maintain a proper lookout is owner privity and knowledge prohibiting limitation of liability.

B. Property Damage Claims and Subrogation

1. Marina Liability

a. Broadley v. Mashpee Neck Marina, Inc., 471 F.3d 272, 2007 AMC 413 (1st Cir. 2006). Clause in slip rental agreement must explicitly reference marina of its own negligence. Overbroad exculpatory clause not upheld on appeal.

b. Markel American Ins. v. Dagmar's Marina LLC, 2007 AMC 2259, 161 P.3d 1029 (Wash. App. 2007). Exculpatory clause not upheld where marina was negligent.

c. In Re Johnson, 2006 WL 126613, 2006 U.S. Dist. LEXIS 2996 and 2987 (S. D. Ala. Jan. 7, 2006). Marina slip rental agreement waiving subrogation by boat owner's insurer is enforceable, but indemnity clause seeking to hold boat owner solely liable is not.

d. Martin v. Metropolitan Yacht Club, 2010 AMC 2398, 2010 WL 3044052 (1st Cir. Aug. 5, 2010) (unpublished) – Yacht Club By-Laws Exculpatory clause upheld in absence of superior bargaining power of yacht club and the existence of a monopoly.

e. Martinez v. Matt-a-Mar Marina, LLC, 2007 N.Y. Slip Opinion 51637(U), 847 N.Y.S.2d 903 (N.Y. Suffolk Co. 2007) – Broad language exculpating marina from “any responsibility or liability of any nature whatsoever” not upheld because it does not mention specifically negligence of the marina.

2. Products Liability

a. Wood v. Northside Marina, 2006 WL 832588, 20 Mass. L. Rptr. 618 (Mass. Super. Ct. 2006). Manufacturer who complied with Federal Boat Safety Act (FBSA) warning on bilge blower system is not liable for engine explosion. State law claims pre-empted under Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

b. Fanok v. Carver Boat Corp., 576 F. Supp.2d 404 (E.D. N.Y. September 16, 2008). Plaintiff failed to prove stern thruster was defective and caused a fire or that fire suppression system was defective simply because the yacht burned.

c. Brochtrup v. Mercury Marine No. 07-CV-643 (W.D. Tex. 2010) – Manufacturer held liable in propeller guard case (\$3.9 million verdict) despite defendant's expert testimony that metal shield would be susceptible to fouling.

3. Property Damages

a. Ace American v. Grand Banks, 587 F. Supp.2d 697, 2008 AMC 2846 (D. Md. 2008). No recovery in tort for economic loss in claim against manufacturer for structural defects to used boat.

b. Hatt 65, LLC v. Kreitzberg, 2010 AMC 100, 2009 AMC 1678 (N.D. Fla. 2009). Loss of market value of luxury yacht involved in allision after repairs not recoverable.

c. United States v. Barlow, 2008 WL 5155652, 2008 U.S. Dist. LEXIS 102228 (S.D. Fla. Dec. 8, 2008). U.S. Government *in rem* claim for damage to sea grass in Florida Keys National Marine Sanctuary by grounding of recreational boat not proven.

III. COVERAGE CASES – Breach of Warranties and Exclusions

A. Insurance – Exclusions and Breach of Warranty

1. Continental Insurance v. Collinsworth, 2006 AMC 746 (Fla. Cir. 2006). Racing Exclusion - Two high performance boats traveling side by side at 80 mph not “racing” so exclusion does not apply.

2. New Hampshire Ins. Co. v. Dagnone, 475 F.3d 35, 2007 AMC 334 (1st Cir. 2007). Lay Up Warranty Breached – “Being used” includes presence in slip prior to being laid up.

3. Lloyd’s of London v. Pagan-Sanchez, 539 F.3d 19, 2008 AMC 1990 (1st Cir. 2008) - Breach of Promissory Warranty that boat’s fire extinguishing equipment would be inspected annually voids coverage even though loss was due to sinking rather than fire.

4. Standard Fire Ins. Co. v. Smith, 2008 AMC 2313 (E.D.N.C. 2008). Definition of “insured” operating boat with owner’s permission includes guest who left stove top burner on when he left.

5. Markel American Ins. v. Nodarse, 2008 AMC 1402 (S. D. Fla. 2008). Warranty of *uberrimae fidei* or “Good Faith” violated when owner misrepresented price of boat (\$180,000 - \$126,000).

6. Great Lakes v. Barrios, 2009 AMC 482 (S.D. Fla. 2008). Insured had a duty to disclose prior cancelled coverage when applying for marine insurance.

7. Federal Ins. Co. v. PGG Realty, LLC, 2007 AMC 1125, 529 F. Supp.2d 460 (S.D. N.Y. 2008). Vessel's mortgagee did not violate duty of disclosure pursuant to *uberrimae fidei* by failing to provide marine surveyor's report to the insurer.

8. New Hampshire v. C'Est Moi, Inc., 519 F.3d 937, 2008 AMC 931 (9th Cir. 2008). Insurer cannot contract away insured's duty of good faith in the absence of clear language (intention of misrepresentation not enough). Owner's representation of purchase price based on subjective evaluation and failure to mention vessel was uninsured for 9 years voids coverage.

9. Digh v. Nationwide Mutual Fire Ins., 654 S.E. 2d 37 (N.C. App. 2007). Delay in notifying insurer of damage claim due to "Rogue wave" (2 years) was not reasonable. Coverage denied.

10. DeGeorge v. Ace American Ins. Co., 2008 AMC 270 (S.D.N.Y. 2008). Delay in reporting potential personal injury claim of 7 months (when plaintiff's attorney called) voids coverage.

11. Insurance Co. of North America v. Zagloul, 526 F. Supp.2d 361, 2008 AMC 17 (E.D. N.Y. 2007) – Named operator warranty breached. Insurer not obligated to defend mechanic who flipped high performance vessel where not named operator.

12. New Hampshire Insurance Co. v. Krilich, 2010 WL 2825574 (11th Cir. July 20, 2010) (unpublished). Proximate cause of the sinking was not the fracture in yacht's fiberglass keel, but rather the insured's failure to properly secure the sewage tank and sea chest covers. Policy excluded damage caused by lack of due diligence in operation and maintenance of yacht.

13. St. Paul Fire and Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181, 2009 AMC 2794 (11th Cir. 2009). "Manufacturer's defect" in marine insurance policy includes design defect (use of yellow brass for failed hose barb) in that it corroded when in contact with salt water.

14. Commercial Union Ins., Co., v. Lord, 392 F. Supp.2d 402 (D. Conn. 2005) - No coverage in sinking case where insured represented that he purchased pleasure boat new when, in fact, he purchased a partially completed hull, which he finished off.

15. Connecticut Indemnity Co. v. Perrotti, 390 F. Supp.2d 158 (D. Conn. 2005) – Policy language requiring "intentional" misrepresentation negates insurer's entitlements to rely on *uberrimae fidei*.

16. Chiariello v. ING Groep NV, 2006 AMC 2148, 2006 WL 1889920, 2006 U.S. Dist. LEXIS 18516 (N.D. Cal. March 2, 2006) – Coverage for sinking during solo trip not negated due to “single-handed” navigation clause in insurance application where statements were true when made.

17. Cunningham v. Insurance Co. of North America, 521 F. Supp.2d 166 (E.D.N.Y. August 31, 2006) – 50 foot fishing boat in the water on March 11 was in breach of lay up warranty (laid up December 1 – April 1) and no coverage for destruction by fire.

18. Gfroerer v. Ace American Insurance Co. – 184 Fed. Appx. 26, 2006 U.S. App. LEXIS 12975 (2d Cir. May 19, 2006) – Named operator warranty is breached where insured turns helm of 38’ Donzi over to potential purchaser’s “expert” who capsizes vessel – no coverage.

19. Grande v. St. Paul Fire & Marine Ins. Co., 436 F.3d 277, 2006 AMC 519 (1st Cir. 2006) – Insured entitled to jury trial on whether 100 mile navigational limit warranty was breached but did not violate ownership warranty by failing to disclose cousin’s interest in vessel.

20. AGF Marine Aviation & Transport v. Cassin, 2007 U.S. Dist. LEXIS 6749 (D. V.I. Jan. 22, 2007), aff’d by 544 F.3d 255 (3d Cir. Sept. 29, 2008) – Insured misrepresentation of purchase price of yacht (\$600,000 instead of \$400,000) is breach of admiralty obligation of *uberrimae fidei* and coverage denied.

21. Gaffey v. Acadia Ins. Co., 453 F. Supp. 2d 236 (D. Mass. 2006) – theft of vessel by yacht broker in course of sales transaction is covered despite argument that it was theft of purchase money.

IV. SURVEYORS ISSUES

A. Expert Witness

1. Rabozzi v. Bombardier, Inc. – 2007 U.S. Dist. LEXIS 21724 (N.D. N.Y. 2007) – Expert witness as to alternative design for 1996 Sea Doo speedster jet boat paddle wheel which broke apart while being power-washed injuring plaintiff’s eye, is excluded from testifying under Daubert test for lack of design experience.

2. Old Park Inves. In. v. S/Y LEDA, 469 F. Supp.2d 1201 (S.D. Fla. 2006) – Yacht owner’s expert witness did not use correct data when determining that piling’s fracture was due to shipworms as opposed to 105 mph winds of Hurricane Frances.

3. Stuart Cay Marina v. M/V SPECIAL DELIVERY, 2007 U.S. Dist. LEXIS 21703 (S.D. Fla. March 27, 2007) - Expert testimony will be received as to whether owners acted prudently in securing their 97 foot aluminum crew boat to the pier with 20 lines on 6 mooring pilings when it broke loose in Hurricane Frances damaging 2 piers.

4. Simmons v. Lexington Ins. Co., 2010 W.L. 1254638 (E.D. La. 2010) – Hurricane Katrina was Act of God and yacht owner whose yacht broke loose from moorings was not liable for damage to marina where he presented testimony of former Coast Guard officer of 40 years experience that he took all reasonable precautions.

5. Folsom v. Kawasaki Motors Corp., 2007 U.S. Dist. LEXIS 37936 (M.D. Ga. May 24, 2007) – Plaintiff's experts, although experienced in PWC operation, maneuverability, safety and one had even designated a rudder system to address the off-throttle steering loss were disqualified under Georgia law for lacking background to perform risk utility analysis.

B. Spoliation

1. Golden Yachts, Inc. v. Hall, 920 So. 2d 777 (Fl. Ct. App. 2006) – Where remains of damaged boat cradle were lost by defendant boatyard court allowed negative inference instruction to jury.

2. Maldonado v. Baja Marine Corp., 310 Fed. Appx. 298, 2009 U.S. App. LEXIS 1986 (11th Cir. Feb. 2, 2009) – Failure to notify manufacturer and destructive testimony of gimbel housing by plaintiff's metallurgist resulting in exclusion of evidence in case where defect alleged to have caused high performance boat to spin out of control. Case dismissed.

3. In re Kessler, Owner of M/V NOTEWORTHY, 2009 AMC 1355 (E.D. N.Y. 2009) – Spoliation not sanctioned where remains of burned out boat were inadvertently destroyed by insurer's salvor 16 months after marina fire and all parties had inspected it.

IV. OTHER

A. Clean Boating Act of 2008 Passes

Exempting discharge incidental to normal operation of recreational vessels from permitting requirements of Clean Water Act (33 U.S.C. Sec. 1342).

B. Federal Stimulus Package

Made Longshore and Harbor Workers Compensation Act (LHWCA) inapplicable to worker employed to repair recreational vessels. 33 U.S.C. 902(3)(F).

C. U.S. v. Haun, 494 F.3d 1006 (11th Cir. 2007) – Defendant who left boat to fake his disappearance to avoid a trial date was properly convicted of communicating false distress message to Coast Guard under 14 U.S.C. 88(c) when others caused search to begin.

D. Div. Of Waterworks v. Ardale, 2007 Ohio 3022 (Ohio App. 2007) – Operator properly convicted of operating while intoxicated even though at time of arrest he was stopped and in engine compartment fixing lights. Does not have to be at helm.