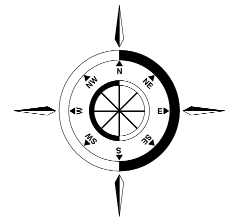
BOATING BRIEFS



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Ninth Circuit allows tort claims for damage to owner-furnished equipment

CHMM, LLC v. Freeman Marine Equipment, Inc., 791 F.3d 1059 (9th Cir. 2015)

The Ninth Circuit Court of Appeals has held that a yacht owner may proceed with tort claims against a component-part manufacturer hired by the builder if the component damages equipment that the owner—whether during the original build or afterward—added to the yacht.

The owner in this case contracted with a German yard to build a luxury yacht. Under the contract, the yard was to construct the "bare ship," while the owner was to provide the yacht's "Interior Outfit." During construction, the yard contracted with Freeman Marine Equipment to design and manufacture a weather-tight door to be installed on the yacht.

The owner, for its part, contracted with various third parties to supply and install the yacht's interior outfitting, such as woodwork, furniture, carpeting, wiring, and electronics.

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.

Inside this Issue

Product Liability 2
Torts 3
Insurance 5
Legislative Developments 7

Several years after the yard delivered the completed yacht, the Freeman door allegedly malfunctioned. Seawater entered the yacht and caused some $18 million in damage to the interior outfitting that had been furnished by the owner or by the third parties with whom the owner contracted during the build process.

The owner sued Freeman under various tort theories. Freeman moved to dismiss on the basis that the economic-loss rule, as articulated in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), barred the tort claims because the damaged interior outfitting was integrated into the completed yacht and was therefore part of the "product itself" as to which, under *East River*, no tort remedy was available. The district court agreed with Freeman and dismissed the tort claims.

On appeal, the Ninth Circuit reversed and held that the economic-loss rule did not bar the tort claims. This was because the interior outfitting was not part of the "product itself" as supplied by the yard but rather was furnished by the owner pursuant to its contracts with other third parties.

The Ninth Circuit recited the economic-loss rule as follows: "If a plaintiff is in a contractual relationship with the manufacturer of a product, the plaintiff can sue in contract for the normal panoply of contract damages ... [but] can sue the manufacturer in tort only for damages resulting from physical injury to persons or to property *other than the product itself*."

Freeman argued that since the interior outfitting was done before the yard delivered the finished yacht, the outfitting—though furnished by the owner and its contractors—was part of the "product itself." But the Ninth Circuit held that the question whether the damaged property constitutes the "product itself" does "not turn on the *timing* of the addition to the product. What matters for purposes of tort recovery is that the items were added by the user."

The fact that the interior outfitting was installed while the yacht was still in the yard's possession was therefore held to be immaterial. The yard's obligation under the construction contract was to build the bare vessel, not to provide the interior outfitting. As a result, the Ninth Circuit held that "[t]he economic loss doctrine does not bar [the owner] from suing in tort for damage to the Interior Outfit caused by the allegedly defective Freeman door." ■

Product Liability

Injury claims preempted by Coast Guard's decision to exempt personal watercraft from ventilation requirement

Rollins v. Bombardier Recreational Products, Inc., 366 P.3d 33 (Wash. App. Dec. 21, 2015)

As she attempted to start a Sea-Doo personal watercraft manufactured by Bombardier, the plaintiff was seriously injured when an electrical arc ignited gasoline vapors in the engine compartment. The Sea-Doo did not have a powered ventilation system, which might have prevented the explosion by eliminating the accumulated vapors.

The plaintiff sued Bombardier in Washington state court, alleging violations of Washington's Product Liability Act and Consumer Protection Act. All of her claims were based on Bombardier's failure to equip the Sea-Doo with a powered ventilation system. The trial court granted summary judgment to Bombardier, holding that the claims were preempted by Coast Guard regulations promulgated under the Federal Boating Safety Act (FBSA). Although the regulations mandated powered ventilation systems for most boats, the Coast Guard had issued an exemption to Bombardier and other personal-watercraft manufacturers based on the unique characteristics of their fuel systems.

On appeal, the Washington Court of Appeals affirmed the grant of summary judgment for Bombardier. The Court of Appeals began by reviewing the basic principles of federal preemption. Deriving from the supremacy clause in Article VI of the United States Constitution, federal preemption can be either express or implied. Express preemption occurs when Congress "explicitly defines the extent to which it intends to supersede state law." Implied preemption can occur in one of two ways: "field preemption," where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and "conflict preemption," where "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The Court of Appeals held that conflict preemption applied here. In the FBSA, Congress explicitly provided that federal regulation of personal watercraft would preempt conflicting state laws. See 46 U.S.C. § 4306. The FBSA also gives the Secretary of Transportation (and his delegee the U.S. Coast Guard) discretion to exempt certain vessels from otherwise applicable regulations, just as the Coast Guard did in 1988 when it granted Bombardier an official exemption

from the requirement that engine compartments have a powered ventilation system.

The plaintiff challenged Bombardier's preemption argument on two grounds. First, she argued that because the Coast Guard's exemption was granted to Bombardier in a letter and was not published in the Federal Register, the exemption did not constitute a "regulation" sufficient to warrant preemption. The Court of Appeals rejected this argument, noting that there were no authorities holding that only "published regulations have preemptive force." Rather, federal courts have recognized that "federal agency action taken pursuant to statutorily granted authority short of formal, notice and comment rulemaking may also have preemptive effect over state law."

The plaintiff alternatively argued that the savings clause in the FBSA, 46 U.S.C. § 4311, saved her state-law claims from preemption. The FBSA's savings clause provides that compliance with the FBSA and its regulations "does not relieve a person from liability at common law or under State law." But the Court of Appeals held that the savings clause merely prevented manufacturers from using "compliance with federal regulations as a broad defense to tort claims." Where, as here, the Coast Guard had conveyed an "authoritative message" about an equipment requirement, that authoritative message would preempt state-law claims premised on a contradictory requirement. ■

Torts

Professional sailor awarded $1.4 million for career-ending arm injury

Nevor v. Moneypenny Holdings, LLC, 2016 WL 183906 (D.R.I. Jan. 14, 2016)

A federal judge in Rhode Island has held the owner of a racing sailboat liable for more than $1.4 million in damages to a sailor who tore his bicep tendon as he boarded a tender off the U.S. Virgin Islands.

The plaintiff, age 35 at the time of the incident, had a distinguished racing career and was a member of the defendant's sailing team for about four years. He had recently joined the crew of the *Vesper*, the defendant's 52-foot state-of-the-art racing sailboat.

On the day of the incident, the *Odd Job*—the *Vesper*'s 35-foot rigid-inflatable tender—was sent to bring the crew of the *Vesper* to clear customs in St. Thomas. The transfer occurred in the open waters of Sir Francis Drake Channel, east of St. John. Both vessels were making way and oscillating in choppy seas. Winds were 8-12 knots, and both vessels had less than a full crew.

The *Odd Job* came alongside the *Vesper* for the transfer. The vessels were not tied together, and essentially the crew had to jump from the *Vesper* to the *Odd Job*.

As the plaintiff attempted to make the transfer, the vessels separated. The plaintiff slipped on the *Odd Job*'s inflatable tube and clung to the *Vesper*'s lifeline with his right arm. The *Odd Job* then pitched back toward the *Vesper*, and the plaintiff—his arm hung up on the lifeline—fell to the *Odd Job*'s deck. His right bicep tendon was severed.

The plaintiff underwent surgery to repair the tendon, wore a brace for ten weeks, and performed physical therapy for six months. He was left with a permanently tightened tendon, was unable to straighten his arm, and could not return to professional racing at the elite level.

Following a four-day bench trial, the court found that the sailboat owner was negligent by performing a risky at-sea transfer with an insufficient crew complement. According to the court, the vessels should have moved to protected waters before undertaking the transfer and should have run a line between them to minimize the movement relative to each other. While recognizing

that professional sailors are assumed to know how to board a tender at sea, the court nevertheless found that the sailboat owner failed to properly train the crew and implement safety procedures for underway transfers. The court also held that the *Odd Job* was unseaworthy because it did not have a non-skid product applied to its hypalon tube, on which sailors would ordinarily place their feet during a transfer. The plaintiff was found to be free of any comparative negligence.

Given the plaintiff's work-life expectancy of 30.3 years, the court awarded him $710,458 for lost earning and lost earning capacity, plus $750,000 for pain and suffering, for a total of $1,460,458. The sailboat owner has appealed. ■

Boat owner had no duty to warn guests about crowded and wet swim platform

Schade v. Clausius, 2016 WL 233237 (Ill. App. 1st Dist. Jan. 15, 2016) (unpublished)

Four boats were rafted together on Lake Michigan for a Fourth of July outing. One of the boats was a 52-foot Sea Ray, whose owner was using his tender to give rides to guests visiting from the other boats. The Sea Ray's swim platform was lowered, almost to the water, and was being used by guests to jump into the water and to transfer to or from the tender.

The plaintiff, who was visiting from one of the other boats, claimed that the swim platform was overcrowded with guests waiting for a ride on the tender. She testified that, due to the numerous guests standing on the platform, she could not see whether the platform was wet. As she was attempting to walk among the passengers on the platform (for what purpose is not clear), she slipped and fell on her right hand. She remained aboard the Sea Ray and watched the fireworks.

A couple of days later she was diagnosed with a torn rotator cuff. She underwent surgery but suffered complications and had chronic pain. She brought suit against the Sea Ray owner, claiming that he was negligent in failing to keep the swim platform dry, in allowing too many guests to congregate on the platform, and in failing to warn her that the platform was wet.

The Sea Ray owner testified he had over 40 years of boating experience in which none of his passengers ever sustained injury. His boat was inspected annually and was designed with a skid-resistant swim platform with cuts to allow water to drain. He claimed that on the day in question the platform was in constant use by guests. He also testified that he did not even learn of the plaintiff's injury until about a year and a half after it occurred. He moved for summary judgment, arguing that the condition of the swim platform was open and obvious and therefore required no warning. The trial court agreed with him, and the plaintiff appealed.

The appellate court held that "both the number of guests on the swim platform and the potential for the swim platform to be wet were open and obvious conditions." As such, federal maritime law imposed no duty to warn of these conditions. The plaintiff knew that the swim platform was close to the water, and the fact that it might be wet "was discernible through common sense." While vessel owners must warn passengers of dangers that are known to the owner but neither apparent nor obvious to passengers, owners have no duty to warn passengers of open and obvious dangers.

The plaintiff raised a novel argument based on the "distraction exception," a concept applied in Illinois cases involving landowners. The court noted the absence of any caselaw applying this concept to maritime matters but nonetheless addressed the argument on the merits.

The exception applies where a possessor of land has reason to expect that an invitee's attention may be distracted in such a way "that he will not discover what is obvious, or will forget what he

has discovered, or fail to protect himself against it." Here, the plaintiff was aware of the crowd of people on the platform when she decided to walk on the platform herself. And because the crowd of people was one of the very hazards she was complaining about, the distraction exception simply did not apply. "Moreover, nothing in the record indicates plaintiff was forgetful of the fact that she was on a boat anchored offshore when she decided to join the group of people waiting on the swim platform for a ride on the tender." Summary judgment for the Sea Ray owner was therefore affirmed. ■

Insurance

Does my "all risk" policy cover "all damages"?

Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc., 2016 WL 285464 (11th Cir. Jan. 25, 2016) (unpublished)

A recent decision by the Eleventh Circuit Court of Appeals serves as a reminder that "all risk" insurance does not necessarily cover "all damages." The case was filed after a 51-foot Bluewater Motor Yacht sank at its slip in Florida. The culprit was a bilge-pump system that had failed due to a blown fuse. The reason why the fuse blew was unknown.

The policy covered "accidental physical loss of, or accidental damage to" the yacht but did not define "accidental physical loss." After concluding that no "accidental" or "fortuitous" loss had occurred, the insurer denied coverage. The insurer also relied on an exclusion that purported to exclude coverage for "[d]amage to the engines, mechanical and electrical parts, unless caused by an accidental external event such as collision, impact with a fixed or floating object, grounding, stranding, ingestion of foreign object, lightning strike or fire."

In finding for the insured, the district court ruled that a blown fuse was a fortuitous event and that the resulting loss was covered. The district court also held that the insurer could not rely on the exclusion because the exclusion was inconsistent with the grant of coverage and therefore created an ambiguity that had to be construed in the insured's favor.

On appeal, the Eleventh Circuit explained that all-risk insurance covers "fortuitous" losses unless otherwise expressly excluded by the policy; that a fortuitous event is one that is dependent on chance; and that an insured may prove fortuity under an all-risk policy even if the precise causes of a loss are unknown. The Eleventh Circuit held that the blown fuse in this case was an unexplained event that, as far as the parties were aware, was dependent on chance. The insured therefore met its burden of showing that the loss was fortuitous.

The lower court had ruled that the exclusion created an ambiguity and that the insured was therefore entitled to a full recovery. The perceived ambiguity arose from the fact that the coverage grant and the exclusion used overlapping terminology. The policy extended coverage to the hull, machinery, electrical equipment, etc., while the exclusion precluded coverage for damage to "engines, mechanical and electrical parts" unless caused by an "accidental external event."

But the Eleventh Circuit held that this overlapping terminology created no ambiguity. The fact that one provision in the policy granted coverage and another provision limited the coverage did not mean that the policy was ambiguous. The interplay between the coverage and the exclusion meant that the policy would cover "accidental physical damage" to engines and mechanical and electric parts, but only if the damage was caused by an "accidental external event." Because the district court had not determined whether the damage to the engines and mechanical and

electrical parts was caused by an accidental external event, the appellate court remanded the case to the district court for further proceedings.

On remand, the district court would have to consider whether the phrase "accidental external event" was itself ambiguous, and particularly whether ingress of water could qualify as such an event. If so, the engine, mechanical, and electrical damage would be covered despite the exclusion. ■

Court applies "mysterious disappearance" exclusion after sailboat goes missing at sea

St. Paul Fire & Marine Ins. Co. v. Britt, 2016 WL 360654 (Alabama Jan. 29, 2016)

A man lived aboard his sailboat for several years in Florida and insured it with St. Paul. The policy provided $85,000 in coverage for "accidental direct physical loss of or damage to [the sailboat]" but excluded coverage "for any loss or damage caused by or resulting from . . . mysterious disappearance."

One day the man telephoned his father and said that he had accepted a new job and needed to travel to Oklahoma City for training. He told his father that he would sail the boat from West Palm Beach to Jacksonville, where he would store the boat and then rent a car to drive to Oklahoma City.

Four days later the Coast Guard encountered the vessel and inspected it off Cape Canaveral, finding it to be seaworthy. Although there was no evidence of any severe weather in the area around that time, no one ever saw the man or his sailboat again.

The father contacted St. Paul to report the sailboat as lost and was thereafter appointed conservator of his son's estate. The father later filed a claim with St. Paul for the loss of the sailboat. Citing the "mysterious disappearance" exclusion, St. Paul denied the claim.

In the ensuing litigation, an Alabama trial court held that the loss was covered under a policy provision that afforded coverage "if your boat is totally destroyed or lost for more than 30 days." According to the trial court, this provision applied despite the "mysterious disappearance" exclusion. St. Paul appealed.

The appellate court noted that the policy did not define "mysterious disappearance" and that the phrase should therefore bear the common everyday meaning that a reasonable person of ordinary intelligence would give to it. The court relied on authority from other jurisdictions that had read a "mysterious disappearance" to mean: "[a]ny disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain." The appellate court applied that definition and held that the sailboat's disappearance was indeed "mysterious."

The court then addressed the "30 day" provision and held that, when read in conjunction with the "mysterious disappearance" exclusion, the exclusion was effective and that summary judgment should have been entered for St. Paul. ■

Legislative Developments

Arkansas has made the offense of boating while intoxicated the equivalent of driving a vehicle while intoxicated, meaning that a BWI will be now included in the driving record and may be considered for sentencing in future offenses. See Arkansas Code § 5-4-104(e)(1)(A)(iv).

California now requires that boaters pass a sanctioned boating-education course and obtain a Vessel Operator Card in order to operate a "motorized" vessel. Furthermore, Section 307 of the Harbors and Navigation Code was amended to change the status of the following violations

from infractions to misdemeanor offenses: (1) mooring a boat to a beacon or buoy that is not designated for mooring; (2) exceeding the 5-mph speed limit within 200 feet of a marina; (3) and towing a water skier without a spotter. See Chapter 5 Art. 1.4 of Division 3 of the Harb. & Nav.; Harb. & Nav. § 307.

In **Connecticut**, no one under the age of 16 may operate a vessel engaged in water skiing, and anyone age 16 or older operating a vessel engaged in water skiing must have a valid license with a "water skiing endorsement." Furthermore, anyone operating a vessel must have a valid vessel operator license (with an additional restriction that no one under 16 may obtain such a license unless they will be under the direct onboard supervision of a licensed operator who is at least 18 years of age and who has held an operator's license for at least two years). See Conn. Gen. Stat. 15-140e.

Beginning July 1, 2016 through June 30, 2017, **Florida** will lower registration fees for vessels equipped with an emergency position-indicating radio beacon or a personal locator beacon, thus limiting the application to one vessel per owner. Furthermore, the state excise/use tax section was updated to cap the tax on repair of vessels to $60,000. Fla. Stat. §212.05(5). Finally, Florida will ban anchoring in many popular sections of the Intracoastal Waterway in south Florida, particularly a large section of the Middle River, Sunset Lake, and sections of Biscayne Bay. The legislation was strongly opposed by recreational boaters who regularly cruise and anchor in these areas.

In **Georgia**, vessels held in "inventory" by licensed boat dealers are now classified separately for ad valorem taxation purposes. Starting January 1, 2016 through December 31, 2019, those vessels that are held for sale or resale are not subject to the classification for ad valorem taxation. See Ga. Code. Ann. §48-5-10-7.

Illinois can now seize a watercraft used with the knowledge and consent of the owner in the commission of specified offenses, including operation of a watercraft while under the influence of alcohol, drugs, or intoxicating compounds if the operator has a documented history of similar misconduct. See Ill. Criminal Code of 2012 §36-1, 36-1a, 36-2, 36-3, and 36-4. Also, the operator of any watercraft that is towing a person must display a bright orange flag measuring at least 12 inches per side. The flag must be visible from all directions See Ill. Boating Act §5-14.

Finally, no person born on or after January 1, 1998, may operate a motorboat with over 10 horsepower unless that person has a valid Boating Safety Certificate issued by the Department of Natural Resources or an entity or organization recognized and approved by the Department. Exceptions include: those with USCG licenses, commercial fishermen, non-residents, and those operating vessels on private property. See Ill. Boating Safety and Registration §5-18.

In **Minnesota**, water skiing is now forbidden between a half hour after sunset and sunrise of the following day. Minn. Stat. §86B.315.

Nebraska has created an invasive species program requiring owners not registered in Nebraska to purchase an aquatic invasive species stamp. The price of the stamp is between $5 and $10. See LB142 (2015).

Nevada has defined "under the influence" as impaired to a degree that renders a person incapable of safely operating or exercising actual physical control of a vessel. Nev Rev. Stat §202.257.

If you double paid for vessel registration in **New Hampshire**, you can now get your refund.

New Jersey has set a new vessel tax rate at 3.5%, not to exceed $20,000. See P.L.1966, c. 30 (C.54:32B-1 et seq.). Pontoon boat rental businesses must post a sign at their entrance, stating: "All unlicensed pontoon boat operators shall

complete a pre-rental instruction course in accordance with New Jersey State Law". The center portion of the sign is to display an image depicting the outline of a person near a propeller surrounded by a red circle with a red backslash bisecting the image. The bottom portion of the sign is to state: "Warning: Rotating propellers can cause serious injury or death." Finally, the exemption for operators without a license now applies to non-tidal waters. See P.L.1987, c.453 (C.12:7-61).

South Dakota has updated state title requirements for vessels titled in the state, requiring owners of large boats that must be titled under state law to register with the state within 45 days of acquisition. Furthermore, no large vessel can be transferred without an assignment of the title given within 45 days to the transferee.

In **Texas**, if you are licensed to carry, you can now open-carry a holstered weapon on board a watercraft.

Utah now requires that all vessels have wearable flotation devices for each person on board. This does not apply to sailboard or crew shells. Vessel over 16 feet must have a throwable personal flotation device as well.

Virginia now only requires reasonable suspicion before law enforcement may board and inspect a vessel. Meanwhile, conservation officers are allowed to stop and inspect hunting and fishing licenses or catch limits. Va. Code Ann. §19.2-10.3. ■

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