Cozen and O'Connor 1998 Marine and Cargo Seminar
Legal Theories for Subrogation Actions in Pleasure Boat and Yacht Losses

INTRODUCTION:

This paper will discuss, in summary fashion, the key considerations in subrogation claims that arise from private boat and yacht losses.

Available theories include:

(1) negligence on the part of the individual or entity responsible for the loss;

(2) breach of contractual undertakings including warranties; and

(3) (because boats and their component parts are essentially products) theories of products liability.

NEGLIGENCE:

Negligence is probably the most frequently relied upon theory of liability in the subrogation of boat and yacht claims. Typically defined as the failure to act as a reasonable person would act under similar circumstances, negligence requires the presence of a number of elements including, specifically:

1. A duty or obligation;
2. A breach of duty; and
3. Damages that reasonably flow from that breach.

The damages sustained must be proximately caused by the specific breach of duty.

Negligent conduct is typically described as conduct that falls below a generally accepted standard or level of care. In analyzing yacht claims from a subrogation standpoint, it is particularly important to identify and understand those generally accepted rules of conduct applicable to the care and operation of pleasure boats. Federal, state and local authorities have

established special codes of conduct, rules and regulations, that govern not only the operation of private boats and yachts, but also, the kinds and types of equipment that are required upon such vessels.

For the claims professional considering a subrogation action based upon negligence in a boating context, a working knowledge of the applicable rules and regulations is critical. The most frequently cited standards are those issued by the United States Coast Guard. However, individual states and municipalities also frequently propound their own special rules and regulations, as well.

When investigating a boating accident, it is important to determine whether the particular incident has been reported to the local marine or harbor police or the U.S. Coast Guard and, whether any citations or other criminal legal action has been instituted. Even without such formal investigations, the applicable rules and regulations will serve as standards of care by which conduct is judged. Additionally, these standards will be admissible into evidence at civil trials although their weight and presumptions to be drawn from such rules and regulations will vary from jurisdiction to jurisdiction.

There is a great temptation to compare private boat operations and motor vehicle operations. And, while the operations are somewhat analogous, there are several significant differences. Specifically, boaters, for the most part, are entirely unlicensed. In most instances, all that is needed to operate a pleasure boat is the financial wherewithal to purchase or lease the vessel. Additionally, children frequently operate boats (either with or without the permission of their parents).

Finally, it is not unusual to learn that pleasure boat operators have ingested significant amounts of alcoholic beverages and then find themselves involved in some form of boating accident.

Fact patterns that give rise to subrogation actions based upon negligent acts or omissions in boating and yachting losses include:

1. Collisions with other boats, docks, piers or structures due to excessive speed;

2. Collisions attributable to an operator's failure to observe navigational rules of the road;

3. Collisions attributable to failing to maintain a proper lookout or to observe other boats;

4. Proceeding in fog without sounding the appropriate warnings via the use of horns or bells;

5. Improperly setting or fixing an anchor which then permits the boat to "drag" its anchor, eventually colliding with other boats or property;

6. Operating a boat while intoxicated or otherwise impaired;

7. Allowing children to operate a boat;

8. Fires occurring at a fuel dock due to improper procedures by fueling or dock attendants;

9. Damages, particularly to sailboats, from lightning strikes or contact with overhead powerlines;

10. Damages sustained during hauling, storing on land or launching operations by marina personnel.

BREACH OF CONTRACT OR WARRANTY THEORIES:

Viable contract or warranty subrogation actions in boat and yacht claims frequently exist against a variety of potential defendants. These typically include parties involved in either the sale or servicing of the particular boat. Large boats require considerable maintenance and upkeep. Accordingly, boat owners, like home owners, frequently engage various craftsmen and service personnel to install and service components; repair, restore and refinish portions of the vessel; or to move the vessel from one location to another. The vast majority of these service relationships are evidenced by a contract, signed in advance, which sets forth the specific terms and conditions of the services to be provided. For the claims professional seeking to subrogate against a service provider believed responsible for property damage to a yacht, it is essential that the written contract be obtained and carefully reviewed. More importantly, it is critically important to obtain a complete copy of the contract with particular emphasis on the "small print" which is frequently found on the reverse side or on the final pages of the document.

During the boating season, most boats and yachts are regularly moored or docked at a private marina. The contract for such marina use resembles a lease agreement with the terms and conditions spelled out in some detail --- the length of the storage (usually so many months "in water" and so many months "on land"); the specific dock or mooring location provided by the contract; the rent or fees for such storage; the rules and regulations of the marina; and a variety of other terms and conditions. Additionally, just as a landlord attempts to limit or extinguish its liability for damages to the property of a tenant, the marina operator typically includes language within the contract that seeks to limit or extinguish its financial responsibility for the boat owner's property.

In like fashion, it is not unusual for contractors and other service providers to attempt to strictly limit their liability to the cost of the contract or to some other fixed dollar amount.

These exculpatory provisions and/or limits of liability are not necessarily binding and need to be examined within the specific context of the transaction and with a view towards the law of the particular jurisdiction in which the contract arose. The claims professional should not be dissuaded from pursuing subrogation even if such exculpatory language or limitation of liability language exists within the contract for it is frequently possible to circumvent such language or have it otherwise declared unconscionable or unenforceable by a court of law.

Generally, exculpatory clauses between commercial entities, such as marinas, and private individuals are not favored in the law. Accordingly, courts will frequently construe such provisions strictly against the entity seeking to exculpate itself or otherwise limit its own liability. Similarly, because the exculpatory or limiting language is almost always authored by the marina operator/landlord, traditional rules of contract construction would hold that the language should be constructed strictly against the author i.e. the marina operator.

For example, assume a marina contracts for seven months "in water" and five months "on land" storage for a private boat. The contract will no doubt contain either an exculpatory clause or limitation of liability clause in favor of the marina operator for any damages to the boat owner's property. However, hauling the boat at the end of the season and performing various maintenance or upgrade services, such as cleaning, painting or equipment installation, may be contracted entirely separately --- either with or without a written contract. And, even where a contract exists, it may resemble a "Purchase Order" and not contain any specific provisions with regard to risk of loss or limitations of liability.

In the event of a loss during the hauling or service operations, the marina operator will no doubt seek the shelter of the language found in the dockage/storage agreement. However, the actual negligence responsible for the loss may well have occurred during operations that fall

outside the terms and conditions of such agreement, and, instead, within a separate service contract without such language.

For those instances where there is no written contract between the parties, the law will frequently imply a contract provided that the other elements to contract formation exist including a mutual understanding of the parties, typically referred to as offer and acceptance; consideration, typically the price or the element of the bargain or transaction; and no particular defenses to the contract such as mistake, illegality or lack of capacity.

Accordingly, in the service contract arena, one who holds himself out as an experienced mechanic or repairman will be held to imply warranties that the service will be provided in a workmanlike fashion consistent with generally accepted standards of craftsmanship.

PRODUCTS LIABILITY:

Traditional notions of products liability apply to the manufacturers, wholesalers and retailers of boats and yachts. A boat itself represents a product. Additionally, component parts, such as engines, electronics and on-board appliances in yachts, are frequently manufactured by companies other than the boat manufacturer.

In those states that recognize the doctrine of strict liability in products cases, manufacturers and others in the chain of distribution will be held responsible for defects in design, manufacturing, and inadequate warnings.

As an example of the products liability theory arising out of the implied warranty of fitness for a particular purpose, one treatise writer provides an example based upon the sale of a sailboat:

> Concerning lastly the implied warranty of fitness for a particular purpose, imagine a sailboat purchaser, having no substantial

> expertise in ocean sailing, who explains to a seller his goal of participating in an ocean race. Advised as to the suitability of a particular boat for such a task, and in reliance upon the seller's expertise, the buyer makes a purchase. In the ocean race the boat breaks up in the first substantial squall. Upon evidence that the boat was suited only to inland sailing and not ocean racing, the buyer might have a claim in breach of the implied warranty of fitness for a particular purpose. As suggested above, causes of action might also exist for breach of the tort duties to warn, i.e., the seller's failure to advise the buyer: "Only use this boat on inland waterways."

M. Stuart Madden, Products Liability, Second Edition, 1995 pocket part at page 32 (West Publishing Company 1995).

Fires and other casualties on board boats and yachts, including relatively new vessels, are frequently attributable to electrical systems and wiring. While underway, boats that utilize electricity to power electronics and lighting rely either upon on-board batteries, gasoline, or diesel powered generators. At dockside, power is usually supplied by a "shore power" hookup line. A heavy electrical cable connects electricity from a dockside outlet to a receptacle located on the boat hull. The connection point on the boat can be a source of electrical breakdown and fire.

Other product liability loss scenarios on board boats and yachts may be derived from comparable losses in vehicles and residences, including: engine compartment breakdowns and

fires; piping and valve failures that might lead to taking on water or sinking; and appliance malfunctions that give rise to fires.

RECOMMENDATIONS RE: INVESTIGATION AND PURSUIT OF SUBROGATION CLAIMS

Investigating subrogation potential in boating casualty losses includes the full range of forensic techniques such as:

1. Photographing the scene using black and white and color still photography and videotape;

2. Interviewing relevant eyewitnesses to the casualty;

3. Meeting with local authorities involved in the official investigation after the loss including harbor police, marine fire departments, or U.S. Coast Guard investigators;

4. Obtaining and maintaining relevant evidence utilizing care not to damage or otherwise spoliate such evidence through mishandling;

5. Obtaining documents or contracts relevant to the incident including any and all relevant purchase documents in connection with the boat; plans, drawings, logs and registers; any service agreements, maintenance agreements, or service records; relevant warranties, guarantees or surveys of the vessel; and any relevant operating instructions or warnings.

6. Reviewing available data bases in order to identify whether there have been any product recalls, prior losses or claims associated with similar types of boating equipment.

Once the decision is made to pursue subrogation, it is well advised to consider whether or not the insurance carrier should enter a proration agreement providing for the policyholder's participation in connection with any uninsured or underinsured claims. As with old subrogation claims, consultation with legal counsel at a very early stage of the claims handling process is

encouraged to ensure that all appropriate investigative, fact gathering and legally required procedures are being followed.

Cozen and O'Connor

Joseph A. Gerber