A CASE STUDY:

WHY MARINAS SHOULD HAVE WINTER-SPECIFIC TENANT CONTRACTS

Spring will be here before we know it and many a marina will be planning to expand or refurbish facilities.

Often the ravages of the preceding winter are the impetus for the marina's "plan." Such a plan, even if prepared by professionals and approved by government boards and agencies, is often ill-conceived because the marina owner and professional planners never think to consult a maritime attorney or the marina's insurance broker about the possible effects of one of nature's most destructive forces, ice.

As a general rule, a vessel causing damage to a marina or moored vessel by her swell will be held responsible for any failure on the part of her master and crew to appreciate the reasonable effect of the vessel's speed and motion through the water at the particular place and under the particular circumstances where the damage occurred. But the marina, as plaintiff against the offending vessel, has the initial burden to overcome the doctrine of "presumptive negligence" in the construction and maintenance of its docks and mooring facilities by proving they are "seaworthy" and able to withstand normal swells. Once the marina overcomes this "presumption of negligence" the vessel which caused the swell may still exonerate itself from blame by showing it was not in her power to prevent the damage.

However, when it comes to ice, the "Wake Rule" does not apply. Not long ago I represented an offending vessel in a suit brought by various parties.

After winterizing the engines and shrinkwrapping his prized 1957 46-foot wooden Chris-Craft, the owner left the United States for warmer latitudes. The vessel had been tied to the marina's floating dock, which was parallel and in close proximity to a commercial navigation channel. Upon his return in the spring, the owner was shocked to see his vessel out of the water and up on blocks. She had sunk a few months earlier.

The owner filed suit in Federal Court claiming a total loss and alleging bad faith on the part of underwriters after underwriters declined payment. The underwriters claimed the vessel was unseaworthy and that the owner was negligent.

BY EUGENE MCDONALD, J.D.

Most if not all policies of insurance covering vessels and their owners contain exclusions for ice damage. Often the damage is caused by ice deflected and displaced by a passing vessel.

The underwriters also brought the marina into the case claiming it was negligent. The marina responded by stating it had no way to get in touch with the owner, [and that] the owner had not wanted to pay the additional charge and/or move the vessel to the area where the marina employed a bubbler system and other deicing devices, and therefore it was not responsible.

Case of the Missing Contract

As is often the case, the marina did not have a separate customer contract for in-water winter storage limiting its liability. Rather than enter into a new contract for in-water winter storage, the marina orally extended its summer slip agreement, invoicing an additional payment for the winter months.

A marina providing in-water winter storage is not only foolish but

inviting lawsuits if it does not employ a specific contract for such storage.

My client, the passing tug, was not brought into the case but was served with notice by the vessel's underwriters stating if they were adjudged to pay the whole or any portion of the plaintiff's claim, then in that event they would seek reimbursement otherwise known as indemnification (subsequent subrogation suit) against the tug and tug owner.

Underwriters for the tug responded by appointing me to defend their interests and investigate the matter on behalf of the tug and tug operator.

Surveyors employed by the sunken vessel's owner and also its underwriters opined conflicting causes for the vessel's sinking. The plaintiff's surveyor claimed the sinking was due to ice displaced by the tug. The vessel's underwriters claimed the sinking was due to the vessel's unseaworthiness. There were no eyewitnesses to the sinking as the sinking occurred in pre-dawn darkness.

There was testimony of the harsh winter weather that year. The marina and the commercial channel had frozen over on numerous occasions, but on the date the vessel sank the marina and the commercial channel were free of ice, in fact, the overnight low temperature was above freezing.

The matter eventually settled. The plaintiff recovered a fraction of the value of the total loss. Disposing of the vessel, now a wreck, was the responsibility of the plaintiff. The payment to the plaintiff consisted of a contribution from the underwriters for the vessel and underwriters for the marina. The tug operator made no contribution to the settlement and no subsequent subrogation suit was ever filed against it or the tug. The trial judge pointed out that there was no direct testimony, eyewitness or otherwise, proving negligence on the part of the tug even though there were photos of the tug navigating the channel when it was frozen over. Underwriters for the vessel agreed to settle simply because, as the judge pointed out, it was a toss-up as to what a jury would find based upon the conflicting survey reports. Underwriters for the marina agreed to settle because the judge noted the marina should have employed a specific written contract for in-water winter storage if the marina was serious about limiting its liability and obligations.

You would think that with the rich U.S. maritime history there would be numerous ice cases from which the court could draw knowledge. But there aren't many and, in fact, there is only one specifically dealing with this situation: *Great American Ins. Co. v Tug Cissi Reineauer, 933 F. Supp. 1205 (S.D.N.Y. 1996).* The fact pattern in that case was almost identical to my case. It also involved a marina, a vessel, a tug, and ice.

Setting Legal Precedent

In the Great American case, the court reaffirmed the tug's right of navigation as a priority over the marina and the vessel owner's rights. The Doctrine of Assumption of the Risk, while not a recognizable defense in admiralty cases, would be applied in this particular instance. The court reasoned that a marina owner, while having certain riparian rights to build a dock, wharf, and other structures that have access to navigable or deep water, assumes certain risks even if its dock, wharf and other structures do not extend beyond its riparian grant

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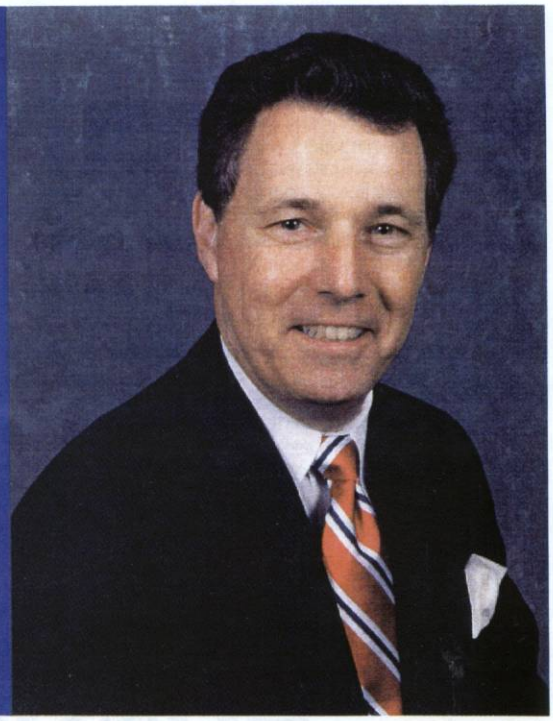

or right. The marina has the obligation to maintain its dock, wharf, and other structures in good condition, and the vessels tied to the dock, wharf, or other marina structures must be seaworthy and properly moored.

The dock owner must anticipate harm from passing vessels and guard against such damage. The court noted that shore installations, by reason of their location, are "subject to the dangers incident to the paramount right of navigation, ... (such as) actions resulting from moving craft along the waterway." In short the navigable waterway existed prior to the commercial structures and, therefore, the marina owner has the responsibility to anticipate the possibility of ice damage and other risks when he builds a dock or structure near harm's way.

As for the vessel, the court found, as in my case, that although it was capable of moving on its own, that fact did not by itself preclude the conclusion that it was "permanently moored" and thus a riparian structure. The judge went on to state that "the capacity to navigate is only one factor to be considered in such analysis but is not the determinative."

The court further noted that the vessel served as the owner's place of residence at the marina for more than seven months and therefore could be considered a permanently moored vessel and therefore the same analysis that was applied to the marina would be applied to the vessel. Consequently the marina and the vessel owner were barred from recovery against the tug, and because their respective policies of insurance contained exclusions for ice damage, neither the marina nor the vessel owner could recover from their respective underwriters and had to personally bear the loss.

It is a very detailed and well-reasoned decision consuming some 17 pages. It is the preeminent law when it comes to ice.

So, before you come up with a marina idea, have your engineer put it to paper, apply for a permit, or begin to drive a piling, read your insurance policy, consult your insurance broker and also a maritime attorney to make sure your plan comports not only with various state, federal, and other governmental regulations, but also maritime law when it comes to seasonal worst-case scenarios. MBJ

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