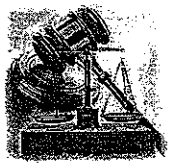
Mercante's Sea Trials



Fire Case Won by TKO!

It's certainly a bummer when your brand new yacht catches fire and is destroyed before your eyes. What's worse is when you can't figure out what caused the fire despite many theories.

When a vessel burns to the waterline leaving mostly charred fiberglass, it is often difficult, even for fire experts, to determine the cause and origin of the fire. In one recent total loss by fire, the vessel owner could be thankful that he had a marine insurance policy in place that paid him for the loss. On the other hand, the marine insurer was not as fortunate in trying to recover what it paid out because a federal judge determined that the theories as to what caused the fire were only speculative and that the option chosen to salvage the vessel left little evidence to determine the cause of the fire.

The Fateful Voyage

The vessel owner set sail from Staten Island aboard the new vessel for a short trip to Horseshoe Cove to have lunch aboard and swim. His crew included his wife, teenage son and his friend, and the two family dogs. They anchored in about 10 to 15 feet of water and began to enjoy a summer day marveling over the new yacht and the pristine ocean waters off Staten Island. When it came time to heave anchor and return, the owner started the two diesel engines. Using a boat hook, the son attempted to lock the anchor into position on the bow, but lost his grip on the boat hook and dropped it into the water. As they tried to retrieve it, the boat drifted into shallow water, but apparently nobody noticed. By the time the owner returned to the cockpit, the bow had run aground on a sandbar. The owner cut the engines and engaged the stern and bow thrusters to try to swing away from the sandbar. The owner testified in deposition that he engaged the stern thruster 3 or 4 times for about 15 seconds, but did not personally notice if the stern thruster responded. His wife said she did not see any water churning near the stern as a result of the thruster's operating and, therefore, concluded that it was not working.

Fire!

About a minute later, the wife and children smelled something burning and saw smoke rising out of the port engine vent. The owner radioed the Coast Guard for help and, in the meantime, directed everyone to put on life jackets and gather on the stern platform. Everyone mustered on the stern as directed, except one of the dogs that did not make it before the decks began to melt. The family was taken off the yacht by another vessel.

This was a ferocious fire that within 10 minutes from abandoning ship engulfed the vessel in flames. The Coast Guard tried in vain to put out the fire, but the yacht burned to the waterline and the skeleton drifted into a rock pile and laid to rest there.

Then Came the Lawsuit

The marine insurer/plaintiff initiated a "subrogation" suit in federal court against several defendants including the vessel manufacturer, yacht dealer, and the supplier of the stern thruster. In this type of suit, the insurer can bring an action in the name of the insured (vessel owner) to seek to recover the insurance payment and related expenses from others who may be responsible for causing the loss. The claims asserted in the case included negligence, strict products liability, breach of contract and breach of warranty. The plaintiff also claimed that the "risk of loss" remained with the dealer at the time of the fire because the owner had not yet taken title or registered the vessel. The insurer was seeking only economic damages to recover the money it paid out for the total loss of the vessel, over $1 million dollars, because, fortunately, no one was injured in the fire except for the family dog which did not make it off the vessel in time for evacuation.

After discovery and deposition testimony of all witnesses and parties to the lawsuit was completed, each of the defendants made an application (motion) to the court asking that the case be dismissed because no evidence had been developed to show a defect in the design of the yacht or in any of its equipment including the stern thruster or fire extinguishing system. The court agreed that plaintiff had produced no evidence that there was anything wrong with the yacht or any of its components that caused the fire. One reason for this, as federal judge Brian M. Cogan put it, was that the insurance carrier had to make a tough decision as to which of two options to choose in salvaging the yacht out of Horseshoe Cove. One option for the salvage at a cost of over $300,000 and 2 weeks time called for construction of a cradle with the goal to raise the yacht in one piece. The other option was to use a crane, remove the wreck in pieces in 2 to 3 days, and dispose of it at a cost of about $52,000, plus pollution containment costs. Because of the potential for pollution and Coast Guard pressure to remove the wreck quickly, the insurance company chose the second option to remove and dispose of the wreck. The combination of the intense fire and this method of salvaging the hull left the evidence, according to the court, "*substantially destroyed*" even though certain components including part of the stern thruster were recovered.

The lack of evidence left the plaintiff essentially with its bare assertions as to what caused the fire and without proof to support the theories of liability such as a claimed defect in the yacht and an automatic fire extinguishing system that allegedly failed to trigger. For example, even if the court accepted the plaintiff's conclusion that the stern thruster did not activate (based on the wife's reported observation that no water was churning), the judge said that just because it did not turn on did not mean it burst into flames on this boat at this particular time. And, the judge concluded that it did not logically flow, without evidence, "*that an inoperative machine is an incendiary machine.*" There was just no rational basis to conclude that on this one occasion the thruster not only failed to activate, but ignited.

Warranty

Even on the warranty issues, the plaintiff had to offer some evidence of a "causal relationship" between the fire and the yacht's performance. Moreover, the yacht dealer issued no warranty and specifically stated so in the purchase paperwork. The reverse side of the purchase agreement had some fine print that the dealer was making "no warranties express or implied" and "no warranties of merchantability or fitness for any particular purpose," and finally, that any warranty "shall be solely the warranty given by the manufacturer". The manufacturer provided only a limited express warranty that the yacht would be "free from defects in material and workmanship for one year from delivery to the original retail owner". However, for the warranty to be valid, the manufacturer had to receive a "Warranty Registration Form", signed by the owner, within 15 days of delivery of the yacht. Here, the owner had not returned the signed form. Nonetheless, the purchase agreement stated that "your acceptance of delivery of the warranted Marquis yacht constitutes acceptance of the terms of this limited warranty."

Judge Cogan acknowledged that plaintiff had an appealing intuitive argument that "something" must have gone wrong with the yacht to cause the fire, but an appeal to a jury's intuition without more evidence than plaintiff offered here "*is too speculative to support a verdict in his favor.*"

This left plaintiff with basically circumstantial evidence that the judge found did not warrant continuing with the case because the theories would be "too speculative to submit to a jury" and could not "reasonably support a determination in [plaintiff's] favor." If this sounds complicated, just think of it as the judicial equivalent of a boxing referee stopping a fight before the final round and declaring the other fighter the winner by TKO [technical knock out].

A Yacht Is not a "Life Jacket"

Judge Cogan also gave short shrift to the "risk of loss" argument in which the owner suggested that the vessel wasn't his yet when the loss occurred. The gist of the argument was that he had not yet taken delivery or "received" the yacht. The vessel owner had purchased the new 59-foot Marquis yacht on Staten Island entering into a purchase agreement with the dealer. The yacht passed all inspection and the dealer completed a "pre-delivery service record" confirming the proper operating condition and seaworthiness of the yacht. When the

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vessel owner signed the purchase agreement, the dealer agreed to install some after-market features and make certain repairs from a "punch list" the buyer had compiled, but which had not yet been completed.

To this, the judge simply noted that "*a yacht is not like a life jacket; it cannot be picked up and carried away*." The "physical" part of possession had been readily met because the owner had unfettered access to the boat when he wanted it and indeed he actually took the yacht out on several occasions, putting his entire family and a friend and his dogs on it on at least one occasion. In addition to that, the facts showed that the owner already paid the bulk of the purchase price, asserted dominion and control over the vessel taking it out when he wanted during the delivery phase as he did on the day of the fire, and held himself out as the owner by even buying insurance on it, putting in an insurance claim for its loss (and accepting payment) and obtaining a Certificate of Documentation in his name from the Coast Guard.

In conclusion, it can be extremely difficult to determine the cause of a fire that completely consumes a vessel. Also, it is important for the buyer of a new boat to pay attention to and comply with all paperwork, including warranty forms. Having marine insurance in place from day one is extremely important as this case demonstrates.

JAMES E. MERCANTE, admiralty partner with Rubin, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York, together with Patrick J. Corbett, Esq. represented the stern thruster manufacturer in the case. E-mail address: jmercante@rubinfiorella.com.