



## SEA TRIALS

by James E. Mercante, Esq.

### Who Is An "Operator"? Regions Highest Federal Court Decides



It doesn't pay to ignore a warranty in a marine policy. Literally. One boater found this out recently when his insurance claim for the total loss of his vessel was denied by the highest federal court in this region.

The boater owned a 38-foot Donzi ZX powerboat. His marine insurance policy provided liability coverage and agreed value hull coverage in the amount of \$100,000 subject to the policy's terms and conditions. The Donzi, described as a "water rocket" on its website, had nearly 1000 horsepower, was capable of speeding near 80 miles per hour and required a skilled driver. Accordingly, the insurance policy contained a High Performance Vessel Endorsement which provided the following terms:

In consideration of the premium charged, the policy is amended as follows:

Named Operator \_\_\_\_\_

Warranted by the insured that the coverage provided by this policy applies only if the insured vessel is operated by: [the boater]

The dispute in the case was over the meaning of the term "operated by" in the High Performance endorsement.

The accident happened when plaintiff was aboard his vessel with three people who were interested in purchasing it and were conducting a

sea-trial. The owner turned the controls over to the potential purchaser's marine mechanic and high performance vessel "expert". When the expert increased speed and over-corrected a sharp turn, the boat flipped over and ejected its passengers. The capsizing resulted in a total loss.

Plaintiff filed an insurance claim. After an investigation revealed the owner was not operating the boat at the time of the casualty despite the Named Operator warranty, the insurer denied the claim.

The owner then filed suit against the insurance company in the Western District of New York in Buffalo. The insurer followed with an application to the court for a prompt determination without a trial (a motion for summary judgment) of the legal issue as to whether or not the terms of High Performance Vessel warranty were enforceable to bar coverage. The insured, full throttle, cross-moved for coverage, punitive damages and attorneys' fees, arguing that the term "operated by" was ambiguous because it could be interpreted in more than one way and should therefore be construed in his favor.

The boater also argued it was okay to let someone else be at the wheel as long as he was on board to supervise. In other words, he urged that he was an "operator" as long as he was aboard

next to the helm station.

In insurance law, if a policy term is reasonably susceptible to more than one meaning - when reasonable minds could differ as to its meaning - it will be deemed ambiguous. An ambiguity may be resolved in favor of the insured because it is the insurer who drafts the policy terms. The test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy.

The federal district court in Buffalo, New York, in *Gfroerer v. Ace American Ins. Co.*, did not find the insured's interpretation of the term "operated by" to be reasonable. The court found that any confusion was unique to this plaintiff. The decision held that the terminology is not reasonably susceptible to any meaning but "actually driving" the Donzi. It was clear as worded in the policy warranty and under the ordinary meaning of the term, since "operating" is often used synonymously with "driving" a car or a boat. The term "operated" or "operation" may mean something different in a hospital setting, for example, but its meaning aboard a vessel and in a marine insurance policy is clear.

The court explained that the endorsement was valid and enforceable because when insuring

*Continued on page 41*

*Continued from page 18*

vessels capable of such speeds, insurance companies require the operator to be skilled; otherwise, "such insurance becomes a high risk venture that, presumably few would take." In such cases, where the skill and competence of the operator is imperative, the court noted that marine insurance policies contain provisions that limit those who are allowed to operate the vessel. Indeed, many marine insurers, like this one, required as a condition of coverage for high performance boats, that the motor vehicle driving record for any who will be operating the boat be checked in advance of approving the policy. Here, the plaintiff identified himself as the only operator and only his driving record was checked.

Accordingly, the judge ruled that the insurer's denial of coverage was correct. The policy warranty was enforced to preclude the claim, and plaintiff's claim to recover punitive damages and

attorney's fees was denied as well.

The United States Court of Appeals for the Second Circuit, the highest federal court covering New York, Connecticut and Vermont, recently affirmed the results. It ruled that the term "operated by" unquestionably refers to the operation of the particular vessel insured and in light of the Donzi's performance capabilities, the only one capable of truly "operating" such a vessel is the person at the wheel. The court also found that the average insured would have understood the term "operated by" to mean, clearly and unambiguously, "directly and physically controlled by".

This case demonstrates that the boater must know that anyone he or she trusts with the controls of the vessel, is covered by marine insurance.

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, represented the marine insurer in this case.