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ADMIRALTY LAW

Expert Analysis

Yacht on My Lawn: Trick or Treat?

Hurricanes leave destruction in their wake and boats washed up on your lawn. After Hurricane Florence recently deposited a large sailing yacht on the front lawn of a North Carolina home, President Donald Trump responded quizzically, stating (not tweeting): "I think it's incredible. To see what we're seeing—this boat, I don't know what happened, but this boat just came here. They don't know whose boat that is. Nice boat. Maybe it becomes theirs. What's the law?"

Good question!

Maritime Law Makes Landfall

In 2017 alone, major weather events cost the United States $306.2 billion in battered coastlines. See Office for Coastal Management, National Oceanic and Atmospheric Administration, Fast Facts: Hurricane Costs. As a result, sinkings, collisions, allisions, pollution, and property damage are par for the course. Thus, maritime law is clearly on radar in the aftermath of a ferocious storm.

By **James E. Mercante**

When a vessel on navigable waters causes personal injury or property damage ashore, such as when a hurricane sends a yacht crashing onto private property, federal maritime jurisdiction attaches. This widened net of jurisdiction is pursuant to the Admiralty Extension Act of 1948, 46 U.S.C. §30101. After major hurricanes, ships and barges wind up along highways and even railroad tracks. Pleasure craft drift their way onto lawns, rooftops, and even into living rooms and swimming pools. The Admiralty Extension Act provides federal court jurisdiction in admiralty over such actions. Thus, it seems that not only federal judges, but Congress too, enjoy the lure of all things maritime. Most often, federal judges decide the issues as the federal rules do not give a right to trial by jury in admiralty actions. Fed. R. Civ. P. 9(h); 39 (e)

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After a hurricane, one of the first things on the mind of a vessel owner is marine insurance coverage. Some policies will have a "named storm" endorsement that specifically provides a higher deductible for losses arising out of such storms.

If the insurance carrier pays out the hull value for the vessel because it is deemed a CTL or "constructive total loss" (cost of repairs exceeds the value of the vessel), then the policy will typically provide the insurance company with the right to sell the vessel for its remaining salvage value and retain the proceeds of that sale. In these CTL circumstances, the insurer will have the desire to recover its insured vessel from the home that the vessel has drifted to. But do they have the right? In many instances, the property owner refuses to allow the vessel owner, marine surveyor or insurance company access to the property to inspect and/or remove the vessel. This is a no win situation for the homeowner, as refusal to allow access could prove costly if the wreck is abandoned there due to such refusal. The marine insurer is in the driver's seat in such instances, as the insurer controls

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the retention of a marine surveyor to evaluate the situation and the purse strings pursuant to the insurance policy to have the vessel removed. If the homeowner balks and the vessel is a wreck, the insurer may simply say "ok, here's the title, you deal with it." On the other hand, if the vessel retains value and its owner or insurer want the vessel back, then it might require a court order to access the reluctant owner's property to retrieve the vessel. This latter scenario is common in the aftermath of hurricanes or superstorms where, as Trump observed, property owners may believe the fake news that they have some ownership right in a vessel simply because the vessel sits on their property.

Finders, Keepers?

Some say possession is 9/10's of the law; however, they would not know much about maritime law.

In admiralty, the phrase "finders, keepers" does not apply. To obtain title as a *finder* of property left behind by a hurricane (or on the front lawn as the case may be), the vessel owner must first have expressly or impliedly "abandoned" it. *Bemis v. RMS Lusitania*, 884 F. Supp. 1042 (E.D. Va. 1995). This is often difficult to prove as courts impose a strong presumption of non-abandonment, as an owner simply may not be able to find it. *Balzano v. Kutchytska*, 981 N.Y.S.2d 633 (Sup. Ct. N.Y. Richmond County, 2013) ("there was no abandonment of the beached vessel by the claimant even though he did not locate it until ten days after the hurricane struck. The facts established that owing to the nature of Hurricane Sandy and the displacement of boats and the distance they were carried, claimant acted reasonably expeditiously in locating and reclaiming his boat"). In New York, a vessel owner may abandon a wrecked pleasure craft by notifying the New York State Department of Motor Vehicles and surrendering the vessel's certificate of registration.

Under certain limited circumstances, a homeowner might be entitled to a "salvage" reward. The law of "*salvage*" is an equitable remedy in admiralty that compensates a volunteer who successfully saves property in peril. Entitlement to salvage rights requires (1) that the vessel is in peril, (2) that the effort is voluntary, and (3) success in rescuing the vessel from peril. This was decided in 1870 by the U.S. Supreme Court in *The Blackwall*, 77 U.S. 1 (1870) (also setting forth the criteria federal courts should evaluate in arriving at a salvage award). Compensation for a salvage service can range from a monetary reward to title over the vessel itself. *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63 (2d. Cir. 1998) (holding vessel must be "arrested" under Rule D of the Supplemental Admiralty Rules for federal court to have jurisdiction over the vessel in a salvor's in rem action seeking title). However, once the hurricane has passed and the vessel comes to rest on the property, the "peril" to the vessel has ended. As such, the first element of salvage would be missing, and the owner would not have rights to a salvage award under maritime law.

God Help Us!

In addition to the law of "finds" and "salvage," hurricanes bring many other "see-worthy" maritime laws.

When a vessel breaks away from its moorings or is otherwise set adrift and collides with a fixed object (such as a dock, another boat or a house), general maritime law presumes the drifting vessel to be at fault. *The Louisiana*, 70 U.S. 164 (1865). However, if the incident is caused by a hurricane, cyclone, or tropical storm, the vessel owner may invoke the "Act of God" defense. This defense applies if (1) the accident is caused by a natural event, and (2) no human error or negligence is involved. *John W. Stone Oil Distrib. v. Bollinger Shipyards*, 2007 U.S. Dist. LEXIS 67426 (E.D. La. 2007) (discussing the Act of God defense in light of a presumption of some fault after barge broke from moorings, drifted away from shipyard and struck another vessel during Hurricane Katrina).

Most hurricanes are powerful enough to satisfy the first prong of the Act of God defense. Indeed, most if not all hurricane destruction cases will involve the Act of God defense. As such, federal judges in admiralty cases have had ample opportunity to consider and clarify the defense. See Mercante, J., "Hurricanes and Act of God: When the Best Defense is a Good Offense," 18 U.S.F. Mar. L.J. 1, 17-18 (2005-06) (providing overview of federal maritime cases involving Act of God defense). This federal judge made law is known as "General Maritime Law." The goal of uniformity of such law in federal courts across the nation is important to the maritime bar.

Some hurricanes are of such ferociousness that nearly any resulting damage will be blameless. However, whether the defense will hold water is fact specific.

In *Nat'l Union Fire Ins. Co. v. Garpo Marine Servs.*, 2017 U.S. Dist LEXIS 152082 (E.D.N.Y. 2017), New York Federal Judge Frederick Block held that Superstorm Sandy did not provide a marina with an Act of God defense after a vessel broke from the marina's moorings and damaged a dock. The *Garpo Marine* court determined that the marina had sufficient foreseeability of Superstorm Sandy, and thus should have taken precautionary measures to prevent the vessel from breaking away from its moorings. On the other hand, in *Lord & Taylor v. Zim Integrated Shipping Servs.*, 108 F. Supp. 3d 197 (S.D.N.Y. 2015), New York Federal Judge Analisa Torres held that Superstorm Sandy did provide a shipper with an Act of God defense for cargo damage because the severity of the storm, and in particular, its storm surge, were not reasonably foreseeable.

Major weather events are oftentimes unpredictable, but to be blessed with a viable Act of God defense, it helps to take precautions if possible. In *Moran Transp. v. New York Trap Rock*, 194 F. Supp. 599 (S.D.N.Y. 1961), a vessel charterer disregarded New York weather reports of an October hurricane. There were repeated warnings of approaching gale force winds. The wind stormed through and wrecked the vessel. When the vessel owner brought suit against the charterer, New York Federal Judge John F.X. McGohey held that the charterer was not entitled to the Act of God defense because it failed to exercise reasonable care in the face of this autumn storm. Thus, the vessel owner recovered damages for the loss of its vessel. Id.

As is evident, while these monster storms can be unpredictable, once the storm has cleared, maritime law will become even clearer.

Shipwrecked

If a vessel is wrecked in a storm at sea or in shallow waters, the vessel owner is responsible for the costs associated with marking and disposing of the wreck and preventing the wreck from obstructing navigable waters. This well-entrenched 1899 law is now more commonly known as the "Wreck Act." 33 U.S.C. §409.

For a vessel owner, the Act of God defense may provide protection from liability for damage to third parties. The homeowner gets no treat to either ownership or possession of a yacht washed ashore by a hurricane.

The Act of God defense does not apply to the Wreck Act, which instead imposes strict liability on the vessel owner to locate, mark and remove the vessel once the storm has cleared to avoid a hazard to navigation. *In re S. Scrap Material Co.*, 713 F. Supp. 2d 568 (5th Cir. 2010) (Act of God defense held unavailable in wreck removal suit brought by United States against drydock owner after Hurricane Katrina). However, if the vessel owner is unable to locate its vessel after a storm, courts have held that the duty to mark the wreck may be relieved so long as the owner made a reasonable (albeit unsuccessful), good faith search. *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir. 1984). If the U.S. Coast Guard locates and removes the wreck, it may pursue the vessel owner for costs associated with its services. On the other hand, if a third-party removes an abandoned vessel from the sea, it may be entitled to a "salvage" award, or even "finders" rights.

Homeowner Beware!

A Frankenstorm can cause catastrophic damage on land and sea. For a vessel owner, the Act of God defense may provide protection from liability for damage to third parties. The homeowner gets no treat to either ownership or possession of a yacht washed ashore by a hurricane. But, whether the vessel owner will be held responsible for damages, well, only God (and federal judges) know!