



Mercante's Sea Trials

Knocked Out By a Watercraft Exclusion



It's boating season again! So, it's time to make your list of boating essentials and check it twice, and that includes checking your insurance policy. One unwary boater found out the hard way after an accident (of course) that his coverage was forfeited by policy exclusions. The insureds loaned their "Kite-Tube" to a friend for some waterborne recreation. The friend, who decided to take some of his guests out for a tube ride, had a boat powered by a 120 horsepower outboard engine to tow the tube.

Landing in lawyer's office

A Kite-Tube is a circular inflatable tube designed to be towed behind a power boat. The U.S. Consumer Product Safety Commissioner has recorded many injuries involving Kite-Tube accidents, including death, broken neck, punctured lung, chest and back injuries. Although Kite-Tubes are restricted in several waterways, they have not been banned throughout the nation.

When towed behind at certain speeds, the tube can rise above the surface of the water and become airborne. One must hope to then land safely as the boat continues to travel ahead. One gal didn't land so safely and suffered injuries. Her next landing was in her lawyer's office. She sued both the owner of the vessel and owner of the Kite-Tube in state court. Not to be checkmated, the insurer of the Kite-Tube countered by bringing a "declaratory judgment" action in Federal Court, asking for the court to "declare" that the homeowner's insurance policy issued to the Kite-Tube owner, excluded coverage for the casualty.

Insurer counters

The insurer relied upon an exclusion in the policy to deflate the claim. Every policy of insurance, whether a marine or non-marine policy, will contain some exclusions from coverage. Boaters should read their policy and become familiar with the exclusions. It may govern your conduct during and after the boating season.

The homeowner's policy issued to the Kite-Tube owner had an exclusion that forfeited coverage for certain types of casualties. Exclusion 6 reads in pertinent part as follows:

Exclusions

6. We do not cover bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of watercraft away from an insured premises if the watercraft:

- a) has inboard or inboard-outboard motor power of more than 50 horsepower;
- b) is a sailing vessel 26 feet or more in length;
- c) is powered by one or more outboard motors with more than 125 total horsepower;
- d) is designated as a airboat, air cushion, or similar type of watercraft; or
- e) is a personal watercraft, meaning a craft propelled by a water jet pump engine and designed to be operated by a person or persons sitting, standing or kneeling on the craft.

The Kite-Tube owner admitted during the case that the Kite-Tube was a "watercraft," but when push came to shove, the owner tried to back away from this admission. If *watercraft* and *vessel* are taken to be functional equivalents, then a simple reference to the nautical rules of the road would indicate that a Kite-Tube is not really a "watercraft". The rules of the road (Rule 3) define a *vessel* to include every description of watercraft "used or capable of being used as a means of transportation on water." It implies the craft having its own means of propulsion, whether that be motor, sail, or oars. If a Kite-Tube qualifies as a "watercraft," does a parasail qualify? A banana boat? A water skier?

No coverage

Faced with the "watercraft" admission, the judge rejected the owner's attempt to retract it later in the case. The owner argued in the alternative, that the relevant exclusion only applies to a watercraft that has an inboard or inboard-outboard motor power of more than 50 horsepower as stated in exclusion 6(a). But, the judge stated that the applicable exclusion was 6(c) which excludes coverage for watercraft powered by an outboard motor "with more than 25 total horsepower". The insured argued that this exclusion did not apply because the Kite-Tube was moving behind a boat while attached to a towrope and only the boat, not the Kite-Tube, was being "powered by" a motor.

The judge disagreed again and determined that exclusion 6(c) anticipated and excluded the situation in which a watercraft is being powered by a motor affixed to a vessel and said it would be meaningless if "powered by" in the exclusion also applied where the power was attached to the watercraft. In other words, the court found that exclusion 6(c) was broader than 6(a) and applied regardless of how the outboard motor causes the watercraft to move. In determining that the Kite-Tube owner was not entitled to coverage due to the exclusions, the judge concluded that *the Kite-Tube would have been stationary unless the boat was pulling it.*

Taking the air out of the insured's case, the judge determined that since a boat with an outboard motor of more than 25 horsepower was towing a watercraft, the homeowner's exclusions were triggered and the homeowner's policy did not afford coverage for bodily injuries resulting from that activity.

While I'm no Kite-Tube expert, it seems to me that the judge's concession that the Kite-Tube *would have been stationary* unless it was being pulled by a boat, would mean that the Kite-Tube is not a watercraft. The judge may have reached a proper result under the insurance policy, but it would appear that the "watercraft" logic was not entirely airtight.

Conclusion

Isn't it amazing how a simple set of facts (and a day of fun on the water) can lead to a state and federal lawsuit, and various and inconsistent interpretations of provisions in a seemingly unambiguous policy of insurance? Perhaps a little advance knowledge of policy terms, conditions, exclusions, and indeed, activities that can be potentially dangerous would be a step in the right direction for boaters about to embark upon a new season.

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. E-mail address: jmercante@rubin-fiorella.com. The information in this article must not be construed as legal advice and laws may vary from jurisdiction to jurisdiction.