



SEA TRIALS

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Marine Insurance: Contract Terms Override Passion

Entertaining friends on boats is a summer ritual. It's amazing, though, how fast a friend becomes a plaintiff if something goes wrong.

The second, if not the first, call an injured friend or family member often makes after being injured aboard a vessel is to a maritime personal injury lawyer. When family is involved, it is sometimes difficult to distinguish reality from fiction, which is why marine insurance policies typically contain an *intra-family* exclusion which precludes coverage for liability claims between family members.

There is no similar exclusion in a policy for liability claims involving friends or even lovers. Thus, an injury to a girlfriend or boyfriend during an outing can become a date in the courtroom. In these situations, one question boat owners' face is whether to notify their insurance company of a "potential" claim involving such an injury and run the risk of having insurance premiums increase or not to inform the insurance company and run the risk of having coverage denied for late or no notice. This was addressed in a recent case decided by federal judge, Robert P. Patterson, Jr., in the United State District Court, Southern District of New York, in *DeGeorge v. Ace American Insurance Company*.

The accident

On a Fourth of July outing, the vessel owner/insured's 36-foot Sea Ray Express was anchored in a cove on the north shore of Long Island with several friends on board including the insured's girlfriend. The vessel owner was riding a jet ski about a mile from his anchored boat. At some point, unbeknownst to the vessel owner, the girlfriend dove off the back of the boat for a swim and apparently struck the swim platform. She climbed back aboard in pain, but didn't say anything to anybody. Later in the day, the woman claimed she was bleeding internally and relayed that she believed she was injured diving off the back of the boat. It became evident that the injury was serious when she went to the bathroom and "filled up the toilet with blood." At that point the vessel owner wisely terminated the festivities and took her to the hospital where she was admitted due to a kidney injury and remained for six days.

The vessel owner called his insurance broker to report the accident and to confirm that his insurance policy was in effect. Not a bad start; however, he did not notify his marine insurance company of the incident until approximately seven months later.

The policy

The insurance policy contained the following provision under "GENERAL PROVISIONS IN THE EVENT OF LOSS":
NOTICE OF LOSS: You must report in writ-

ing to us, or our authorized agent, as soon as possible after the occurrence of any accident, loss, damage or expense that may be covered under this policy. This notice should state when, where and how the event occurred, and should include the name and address of any witnesses. . . . *If you do not provide the notice to us as required by this section as soon as possible, any claim for such loss under this policy will be voided.*

As it turned out, the first person to report the incident to the marine insurance company was the injured woman's attorney, who contacted the insurer by telephone a couple of months after the accident and then in writing several months after that. The vessel owner was surprised to learn that his woman friend, now "plaintiff," was pursuing a claim against him. She filed a personal injury lawsuit naming the vessel owner as defendant in Supreme Court of the State of the New York.

Due to the long delay in receiving notice of the injury from the insured, the marine insurer denied coverage for the incident.

Next, the vessel owner filed a "declaratory judgment" action in federal court against the marine insurance company seeking a declaration that the company was obligated to defend and indemnify him for all claims and damages filed by the woman with respect to the Fourth of July incident. As admiralty counsel for the marine insurer, we responded with a motion for summary judgment asserting that the insurer was entitled to be relieved of liability under the policy. The basis for the motion was that the vessel owner failed to give timely notice of the Fourth of July incident and had no valid excuse for the delay.

The vessel owner argued that he did have good reason for the seven-month delay because of his belief in "non-liability" due to their relationship and that she jumped off the boat. He also claimed that the marine insurer had its own obligation to "timely disclaim" coverage and did not do so.

Notice requirement

Timely notice of an incident is a requirement of all marine insurance policies because it affords the insurance company an opportunity to quickly initiate an investigation, obtain statements from the vessel owner and witnesses, and any pertinent documentation before memories fade and documents disappear.

An insured has an obligation to give his or her insurance company notice of loss when from the information available relative to the accident, an insured "could glean a reasonable possibility of a policy's involvement." *C.C.R. Realty of Dutchess v. N.Y. Century Mutual Fire Ins. Co.* (2003). Proper notice is a

"*condition precedent*" to the insurer's duty to provide coverage. Thus, absent a valid excuse, the failure to give the required notice of an incident forfeits coverage. In the State of New York, the insurer does not have to show that it was prejudiced by the late notice. In other words, if the policy's notice provision was breached and there is no valid excuse for the failure or delay in giving notice, coverage will be jeopardized.

Here, Judge Patterson found that the insured's obligation to give notice of loss was triggered by his immediate knowledge that the accident had occurred even though he did not witness it firsthand. The vessel owner had learned that same afternoon that his girlfriend had been injured while diving off the back of his boat and he personally observed that she had been unable to function normally for the remainder of the day and had "filled up the toilet with blood" when she went to the head. The judge also found it significant that the insured drove the woman to the hospital on his own insistence and knew that she remained hospitalized for six days. Under these circumstances, the court found that the insured would have been able to "glean a reasonable possibility of the policy's involvement," even if he could not assess with certainty his *personal* liability. Since the vessel owner's marine insurance policy required him to give notice of loss "as soon as possible after the occurrence of any accident, loss, damage or expense that may be covered under this policy," notice of the accident should have been given within a "reasonable time under the circumstances." In this case, the vessel owner allowed nearly seven months to elapse between the Fourth of July, when he became aware of the accident, and February, when he gave notice to his marine insurer. Judge Patterson recognized that both federal and state courts have held that even much shorter delays violate prompt notice provisions. (Courts have held that unexplained delays of 38 days and 68 days have failed to satisfy a policy's requirement for notice "as soon as practicable.")

The vessel owner argued that failure to give notice may be excused when an insured has *reasonable belief of non-liability*. However, the law places a heavy burden on the insured to show the reasonableness of this belief. In this case, the vessel owner did not present evidence demonstrating a "reasonable belief" in his non-liability. The court considered important the vessel owner's knowledge of the potential seriousness of the injury and, therefore, found it would be unreasonable for him to believe he was free from any potential civil liability.

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Notice to broker

The vessel owner's second argument was that his notice of loss was timely because he reported the accident to his "authorized agent." However, at his examination under oath ("EUO") during the investigation, the vessel owner testified that he reported the accident to "his broker". Notice to a "broker" as opposed to notice to an insurance company "agent" or the insurance company directly does not satisfy the requirement of notice to the insurer. Under the circumstances, the court found that the vessel owner knew he had to report the incident independently to the marine insurer and there was no basis to conclude that his report to his broker constituted the requisite notice to the marine insurer.

Timely denial?

The insured's third argument was that the insurance company should be precluded from denying coverage because the company did not deny coverage in a "timely" manner. The vessel owner relied on New York Insurance

Law for this proposition, but, as pointed out in our opposition to this argument, the New York Insurance Law does not apply to policies of insurance in connection with "ocean-going vessels." The court determined that the Sea Ray Express was an ocean-going vessel. Interestingly, the court decided that whether a vessel is "ocean-going" or not is made by reference to the geographic limits expressed in the insurance policy rather than to the factual "ocean-going" capabilities of a particular vessel. Since the insured's marine insurance policy permitted him to operate the Sea Ray Express in ocean waters, specifically in "Atlantic coastwise and inland tributary waters of the United States and Canada," his vessel was considered ocean-going unlike vessels whose policy territory is confined to inland and coastal waters of rivers. Thus, having contracted for authorization to sail his vessel along the Atlantic Coast, the court determined that the vessel owner could not now claim that his vessel was not *ocean-going* and rely on New York Insurance Law requirements.

Accordingly, the court enforced the insurance company's denial of coverage and declared that the marine insurer was relieved of

liability under the insurance policy for the personal injury claims arising out of the Fourth of July incident.

Conclusion

The duty of a vessel owner includes exercising reasonable care for the safety of his or her guests. As this case demonstrates, accidents can happen quickly and innocently. While a vessel owner may not be able to keep two eyes on each guest at all times, attention must be paid to the terms and conditions of your insurance policy. Turning a blind eye to the policy's notice requirements can be costly.

Take time to read your policy as part of your spring season preparation.

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