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SEA TRIALS

by James E. Mercante, Esq.



Boater Loses On Missed Lay-Up

In law, as in sports, a missed lay-up can be costly. In basketball, however, an easy lay-up is usually the result of a breakdown in coverage, while in admiralty law, the missed lay-up may result in losing coverage. In a recent Court of Appeals ruling, three federal judges on an appeals panel decided that the failure to make the lay-up in time was game over for the boat owner.

Insurance Forfeited

In the June 2005 issue of "Long Island Boating World," I reported on a federal district court ruling in a case we handled involving a boat owner who unwittingly forfeited his insurance coverage by failing to have his boat laid up by the date required in his insurance policy. The federal district court decision in favor of the marine insurer was issued by Judge Mary M. Lisi in Rhode Island. The boat owner appealed to the United States Court of Appeals for the First Circuit. The United States, for judicial purposes, is divided up into Circuits, with each Circuit Court of Appeals having jurisdiction over appeals emanating out of the federal district (trial) courts within its geographic

boundaries. For example, the jurisdiction of the First Circuit Court of Appeals is Massachusetts, Rhode Island, New Hampshire, Maine and Puerto Rico; New York, Connecticut and Vermont are in the Second Circuit; New Jersey, Pennsylvania, Delaware and the U.S. Virgin Islands comprise the Third Circuit, et cetera.

I will briefly outline the facts and then discuss the Court of Appeals decision. But first...how many of you readers know what a "lay-up" is (in boating not basketball), what your marine insurance policy says about it, and what lay-up period is specified? Do you have a copy of your insurance policy? The lay-up terms are either in the text of the insurance policy, on the declarations page, or both. Check it out!

Missed Lay-Up

A lay-up warranty in a marine insurance policy typically requires the vessel owner/insured to have his or her vessel fully winterized and out of commission and either stored ashore or afloat for the winter months. In the case recently decided, *New Hampshire Insurance Company v. Dagnone*, the policy

contained a clause stating that the vessel "must be laid-up and out of commission during the period shown on the declarations." The declarations page confirmed the "Lay-Up Warranty" stating that it is "Warranted that the described yacht be laid up and out of commission and not used by the insured for any purpose during the period from October 31 to April 15".

The case involved a 49-foot Blue Water motorboat with twin diesel engines. The vessel owner not only navigated the vessel from one marina to another during the lay-up period, but failed to fully winterize the engines prior to the October 31 deadline specified in the policy. While the insured had taken some steps to winterize the interior of the boat, the final step of putting anti-freeze in the two engines, was not yet done. The vessel remained in the water awaiting haul out at a Rhode Island marina. Before it could be hauled, however, a storm passed through the marina and the vessel broke free of the dock. The Blue Water sustained over \$38,000 in damage and collided with two sail yachts, damaging them as well. The

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owner faced liability claims for the damage to those other vessels. The vessel owner's insurance claim was denied because the accident occurred during the lay-up period and the boat was not "laid-up and out of commission" in violation of policy terms.

One of the insured's arguments here, and one insurers hear often, is that the vessel owner did all he could do and the marina failed to get the boat out of the water in time. That argument was rejected because, first, it is the vessel owner's non-delegable duty to comply with the terms and conditions of his or her marine insurance contract. Second, the marina had a first-come first-served protocol and notified the vessel owner that it would haul his boat after it hauled the yachts already waiting to be taken out of the water for dry storage. Third, in this case, the vessel owner, not the marina, was planning to winterize the two main engines after the vessel was hauled out. The insured had admitted during the litigation, that in years past, he had used anti-freeze in his engines as part of the winterization process. Since the engines

had not been completely winterized on the date the accident occurred, December 6, the vessel was neither laid up nor out of commission by the lay-up deadline.

Argument Not Appealing

The First Circuit Court of Appeals panel, consisting of Judges Torruella, Cyr and Howard, explained that while the vessel owner was not taking the yacht out for a voyage on the night it was damaged, it did not matter because the vessel was still fully operable. Thus, the yacht was still "being used" in the sense that it was in the water, having just motored to the marina, and awaiting hauling out, rather than having been "laid up and out of commission" as required, i.e. being inoperable. The appeals panel found that the clear intent of the insurance policy wording is to encourage owners not merely to stop using their vessels during the winter, but to take affirmative steps to winterize their vessels so that they are "laid up and out of commission."

The Court of Appeals determined that there was a breach of warranty because the yacht had not been fully winterized.

Since the policy excluded claims for damage that occurs when a vessel is being used during specified months if it is not laid up and out of commission, the insurance company was not responsible for covering the damage claims.

This was the first lay-up warranty ruling by a federal appellate court in over twenty years.

Conclusion

Literally, it "pays" to be fully aware of your marine insurance policy terms, conditions, warranties and exclusions. In boating, as in sports, knowing the rules of the game can oftentimes avoid costly mistakes.

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