



# Mercante's Sea Trials



## Close Encounters of the Uncovered Kind

Every so often *Sea Trials* reviews marine insurance policies, the proper understanding of which is of utmost importance to a boater. *Sea Trials* has reviewed court decisions involving marine insurance coverage disputes that arise frequently in the world of pleasure craft and commercial shipping. But a recent dispute brings a whole new meaning to the term pleasure craft.

The May issue of Long Island Boating World, *Sea Trials* column entitled "Insurance Coverage Show Down," reviewed an insurance coverage dispute between an insured/vessel owner and his insurance company arising out of a fatal shooting of the insured's girlfriend aboard his yacht. The legal issue in that case was whether there was a sufficient nexus between the shooting and the use or operation of the insured yacht to trigger coverage under the vessel owner's marine insurance policy. Subsequent to that article, Lynn from the Boat Owners' Association of the United States (BOAT U.S.), sent an e-mail saying that it reminded her of one of her cases where a vessel owner sought defense and indemnity coverage under his marine policy after being sued by a former girlfriend who had contracted the Herpes virus aboard his pleasure craft. It was a California case by an insured against his marine insurance company, Fireman's Insurance Company of Newark, New Jersey, reported at 1999 AMC 397.

As they say on TV, *Sea Trials* must forewarn that if any minors are looking over your shoulder while you are reading this article on the foredeck - now would be a good time to ask them to fetch you a bucket of steam. (This is what my father would say to get rid of us when he wanted to sleep late!) And, for reasons which will soon become obvious, the parties' names will not be used in this article.

### Close Encounter

The vessel owner argued that his yacht was "used" within the meaning of his boat insurance policy to transmit the Herpes virus to his girlfriend. He claimed that the policy sprung into effect because his pleasure craft was "a sign of his wealth and status" which "fostered a romance and sexual conduct" leading ineluctably to a specific type of sexual activity which transmitted the pernicious virus to his (former) girlfriend. Not surprisingly, the insured's argument foundered in the trial court which gave judgment to the insurance company. Not to be deterred, the insured continued his quixotic quest for coverage in the appellate court.

The insured's girlfriend had initiated the lawsuit against the yacht owner for negligence, battery, intentional transmission of an incurable sexual disease and fraud. The two began dating just in time for boating season. Shortly after boating season, the woman was

diagnosed with the Herpes I and II viruses. Upon confronting the yacht owner, he admitted that she was not the first woman who had accused him of transmitting the Herpes virus to her; that he knew he had Herpes, and used "home remedies" to combat the virus. This guy was totally honest, or foolish, and even admitted that during their sexual relationship, he was involved in a sexual relationship with another woman who had active Herpes I and II viruses, and that he previously had a sexual relationship with yet another woman who had the disease. After falling on his sword, the boat owner allegedly expressed remorse for transmitting the Herpes virus to the woman.

In response, the woman filed a suit in state court, but mentioned nothing about a boat or water craft. Nevertheless, the vessel owner doggedly tried to implicate his liability policy on his 42-foot yacht. The insurance company declined to defend him against the woman's lawsuit. The yacht owner eventually settled with the woman for \$120,000 and paid his own lawyer some \$20,000 in attorney's fees. Thereafter, the yacht owner filed a suit against Fireman's Insurance of Newark, New Jersey for breach of contract and bad faith. He alleged that the yacht policy issued to him by Fireman's Insurance required the insurer to defend and indemnify him against the lawsuit by his ex-girlfriend.

### Two coverages

A marine insurance policy typically contains two primary coverage sections, one being "third-party" liability coverage which will defend and indemnify an insured for a covered occurrence. The other coverage is for "first-party" claims such as property damage or loss to the hull, engines and personal effects.

Here, the insured specifically pointed to policy language under his third-party "boating liability" coverage which stated that the insurance company will pay damages "for any claim or suit covered under this policy for bodily injury or property damage for which any insured person becomes legally liable through the ownership, maintenance or use of the insured boat. We will settle or defend, as we consider appropriate, any claim or suit which asks for these damages. We will also pay for an attorney we select to defend you." As with all marine policies, there was an "exclusion" section and in this policy it excluded from coverage any bodily injury "caused by or resulting from an intentional act of any insured..."

In the legal analysis that followed, the appeals court recognized that the issue of whether there is a potential for coverage under an insurance policy and a duty to defend is a question of law. An insurer typically will have a duty to defend an insured if the insurance company becomes aware of, or if the lawsuit pleads facts giving rise to the po-

tential for coverage under the insuring agreement. The test as to what triggers a marine insurance company's duty to defend may vary from state to state and an admiralty attorney should be consulted in that regard. In most states, however, where there is no possibility of liability coverage, there is no duty to defend. The determination of whether the marine insurer owes a duty to defend the yacht owner usually is made by the court in the first instance by comparing the allegations of the complaint with the terms of the policy. Some states will allow "extrinsic facts" (facts not alleged in the complaint) to give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy.

### No salty facts

The court first looked at the allegations in the complaint and determined that it contained absolutely no "salty" facts giving rise to a potential for coverage under a marine policy. There was no mention of the yacht, nor any allegation that the woman contracted the Herpes virus while on the vessel with the yacht owner. Thus, in the initial analysis by comparing the allegations of the complaint with the terms of the vessel owner's policy, there was no basis for a covered claim. Next, the court looked to extrinsic facts and found a tenuous link between the woman's Herpes virus and the insured's yacht. For example, it was claimed that they began their sexual relationship during boating season and it was a "fateful romantic boat voyage" that reportedly caused the damage because it was this purported setting - on the yacht owner's prestigious water craft - which led to the "sex-filled sailing adventure" which resulted in the transmission of the Herpes virus.

The yacht owner urged that because his policy provided coverage for "bodily injury" arising out of the "use" of the vessel, the policy was broad and should be given comprehensive application. The appellate court did not bite and decided that the extrinsic facts raised by the yacht owner did not come within the "use" provision of his yacht policy. The judges found that neither the movement of the yacht nor the manner of its operation had anything to do with the transmission of the Herpes virus from yacht owner to the woman. Rather, the yacht simply provided a situs - along with his house and her house - where the yacht owner executed his plan to engage in a variety of "very free sexual activities" with his girlfriend. Thus, according to the court, this was not the type of vessel "use" contemplated by the yacht policy. Indeed, the insured had come up with a preposterous hypothesis that the disease may have been transmitted while the two were underway in his yacht, as he desperately tried

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to get insurance coverage under the "use" provision. However, the appellate court found that the vessel owner was only "fabricating outlandish theories."

Lastly, the court noted that the policy exclusion for intentional misconduct did not apply because although the yacht owner intended to engage in sexual relations, he did not intend to transmit the disease to the woman. According to the court, the policy exclusion would only apply if the yacht owner intended to transmit a disease. This appears to be the wrong result because the yacht owner was aware that he had the disease, intentionally engaged in sexual relations with the woman knowing that he had the disease, and was simultaneously dating another woman who also had the disease.

### Conclusion

This case demonstrates that on land and sea, there are stories, and even admiralty cases, containing stuff that you just can't make up. Finally, after such an experience, it would be understandable if this yacht owner subscribed to the theory that has become a rather popular bumper sticker: "*I'd rather be fishing.*"

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