



FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

# BOAT FAX

*A Publication for Insurance Providers and Adjusters*

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From the Editor  
Thomas W. Emery<sup>1</sup>

April 15<sup>th</sup> is the first day that most Insurers allow boat owners to launch their favorite toy (and still have coverage!). In honor of that Sign O' Spring, Mr. Borin has graciously loaned us Law Fax.

## **GREAT LAKES NEWS - Low Water Levels - High Gas Prices**

Water levels on the Great Lakes continue to linger at the lower level of their range, despite what seemed like an endlessly snowy winter. Whether they rebound is the subject of a lot of scuttlebutt (that's marina talk for "I dunno") but one thing is certain - there will be groundings, holings, striking submerged objects (SSO's) and other events where the boat's bottom "touches" (more snappy lingo) something it shouldn't this boating season.

This can lead to a call to your desk that goes something like this "HELP!!!" The immediate questions are - (1) what exactly is the type of help the boater needs, and (2) is it covered under the policy?

There are essentially three types of services that are provided to a stranded or damaged boat - (1) towage, (2) salvage, and (3) wreck removal.

The difference among the three is usually based on the condition and situation of the vessel. If a boat is on a sandbar, but can be pulled off with the gentle application of a tow line - then that is towage. On the other hand, if the same boat is on that same sand bar, but waves are now pounding the hull and everyone is getting very concerned that the boat might get damaged, take on water, and begin to sink - that is arguably salvage. However, when you go out there the next day and find the boat broken to bits and sunk - well, that's probably wreck removal.

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The distinctions are important because it seems like every policy is different in terms of what it does and does not cover. There is no mandated coverage for property damage to a boat, and the underwriting and sales departments have been very creative in writing language that the claims staff now has to interpret and apply. Some policies cover only towage, while others have limits on what will be paid for what, and some are really vague. Making this a little tougher is that it's often difficult to distinguish between a tow situation and salvage - especially if it got worse over time, or wasn't reported promptly, etc.

Another very common situation is getting a voice mail on Monday morning from an insured giving you the good news that he "saved the boat" through the services of a friendly marine contractor, who just happened to hear the distress call and show up on the scene with three rescue boats equipped with men, pumps and patches. And, oh yes, I did sign a contract for something called salvage services (or I didn't - do you know what "open salvage" means?) and he wants your fax number to send you the bill.

Suffice it to say, it's complicated. It would be nice if accident investigation on the lakes could be as specific as a red light - green light case, but unfortunately there are no skid marks on the water. Plus, it seems like things are always going from bad to worse, and the situation is going from what should be a simple lending a hand to "all hands on deck."

How gas prices will affect boating is pretty predictable - there will be less of it at \$4.00 per gallon at the pump at the end of the dock. On the other hand, some folks may want to get out of boating (and their payment) altogether, causing a boat and its trailer to go missing. We have done our fair share of Exams Under Oath concerning the, er, suspicious disappearance of the formerly beloved boat, and would be pleased to assist your company in its investigation.

Our expertise in writing policies, interpreting policies, and litigating coverage disputes is available to you. And, we will make arrangements with your company to respond on an emergency basis to your questions or need for immediate legal representation.

### **WHAT'S THE LAW?**

Depends. Federal law generally applies to any claim arising on the Great Lakes, Lake St. Clair, and any of the rivers that connect to them (until you reach a dam). These are called the "navigable waters of the United States."

State Law applies to claims arising on the inland lakes, rivers and streams of the State. Since all water eventually rolls to the sea, the line of demarcation is whether a boat (a canoe) can navigate from the sea (or Great Lakes) to a given point, where it gets too shallow or there are dams, or something else is blocking the boat.

Whether state or federal law - you do not need a license to operate a boat. In order to operate a Personal Watercraft (Jet Skis) you must be a certain age (14) and complete a boater safety course, if you were born after December 31, 1978. Those born on or before December 31, 1978, may operate a Personal Watercraft legally without completing a boater safety course. You must have Personal Floatation Devices (Life Preservers) available for all individuals aboard the watercraft. And . . . you have to be sober (below .10) to operate a boat.

There is a lot of overlap in the law - for example the duty to keep a lookout, travel at a safe speed, and give way, are essentially the same, whether on Lake Huron or Houghton Lake. On the other hand, there are some big differences, especially in the application of tort reform and other aspects of damages. If a claim occurs on the Great Lakes, jury demands can be struck. Also, there is a federal law that permits filing a Limitation of Liability action on behalf of the insured owner that would limit his exposure to the value of the hull, post accident. This same law applies to all vessels - from freighters to jet skis - and can be a very useful tool in negotiating a settlement, particularly in high exposure cases.

One way to look at it is this - it's like the old days in auto cases, before no fault. There are statutes and regulations that control the operation of boats, but once the claims arise, it generally is a question of negligence - the exercise of reasonable care. There is no coverage for PIP type benefits. There is no immunity from property damage or tort claims, no serious impairment requirement, and no requirement that you maintain insurance at all on your boat.

We are very experienced at navigating our way through the various scenarios giving rise to a claim, and can advise you on all of these issues.

### **LIABILITY FOR THIRD PARTY CLAIMS**

There are basically two types of third party claims - passenger claims and collision claims.

When you think that most people out on a boat together are family and close friends, you realize there is a lot of interpersonal relations that go into claims handling. Generally, what you see is an inexperienced boat owner going too fast and something bad happening - a sudden stop, a passenger thrown, or even a capsized. "There are no soft spots on a boat." Suddenly your close friend is badly hurt, being taken to the hospital in a halo brace, bleeding from the leg, and conflicting emotions arise - to help your pal; to be defensive; to ignore the obvious. Among other things, this leads to late notice and a demonstrable change in memory and recitation of events leading up to the incident. We have seen everything from total collaboration between the claimant and insured to a fundamental break-off of relations between the two. The point is that statements and other evidence are filtered through these relationships and the passage of time.

The other type of liability - collisions (striking a moving object) and allisions (striking a fixed object, such as a pier) are equally complicated, but for different reasons. Instead of the insured having conflicting emotions, often they will want to engage in conflict - blaming the other boat and vehemently (and perhaps unrealistically) denying any responsibility. The law provides for pure

comparative fault, with each party responsible for the damages caused by his negligence. The law presumes that when a boat hits a fixed object (for example - another boat anchored legally) it is at fault. When two boats collide, however, most courts have fixed blame on both vessels, and let the chips fall where the evidence takes them.

### **EXCLUSIONS TO COVERAGE**

Again, every policy is different, including how exclusions are written. We know what you meant to say, but will your average judge rule that your "All Risks Policy" covers each and every risk, despite those pesky exclusions? Some of the more typical claims involve a rotting hull, a deteriorated hose coupling, or a worn out "through hull" connection. Whether your policy effectively excludes those claims can be the subject of a lot of debate between the company and the insured. We can help you figure out the answer, and also help write your policy to clarify any ambiguities.

### **OVERLIMITS EXPOSURE**

Owners are not required by law to purchase insurance for their watercraft. They usually call their agent from the floor of the sales office, right after they get off the phone with the bank, which informs them that they do require insurance. The insured buys the cheapest policy, with the lowest limits possible, and after that simply renews it year after year. \$50,000 or \$100,000 are the typical limits. For example, in a situation where the claimant has suffered a permanent paralysis diving from the boat's swim platform, the insured is obviously facing a severe overlimits exposure. This is, unfortunately, much more common than it should be, and often leads to real anxiety and apprehension on the part of the insured. Our experience in using, for example, Limitation of Liability to bring the claimants into a single proceeding in Federal Court, without a jury, has been useful in negotiating resolution of these very difficult claims.

### **UBERRIMAE FIDAE**

Ok - lawyers do love Latin, because it makes them feel smart. This is the duty of "utmost loyalty" owed by an insured to the insurer of a boat operating on the Great Lakes (Navigable waters). This duty requires the insured to report to underwriters any aspect of the insuring risk that would impact the decision to insure or the calculation of the premium, on penalty of rescission ab initio (there we go again). For example, someone purchases a used boat and knows it has a rotting hull, but fails to inform the insurer of the rotting hull when he fills out the application. Or the boat is damaged over the winter by ice, but when the policy is renewed, there is no mention that the insured noticed it. When presented with a claim for damage that looks like it took place over time, and under circumstances where the insured knew or should have known of it - consider whether the policy might be void due to the failure to give notice at the time of the initial application – or at renewal.

### LEARN MORE

We have prepared a very detailed manual concerning the handling of boat claims and would be happy to provide you with copies. We would be pleased to walk you through the manual, and provide you with specialized training on handling claims of this type. We would be happy to review your particular policy and provide you with our analysis and recommendations. Finally, we are prepared to respond to emergencies - whether on scene or as consultants - throughout the boating season. We can recommend investigators, towers, salvors, and other marine contractors, have extensive experience in dealing with the Coast Guard and other marine authorities (including oil spill response) and can recommend experts and other consultants. We are very flexible in terms of tailoring our services to your organization's needs.

For more information and answers to your questions, please contact a member of Garan Luow Miller's Admiralty Law Practice Group or visit the firm's website at [www.garanluow.com](http://www.garanluow.com) or the Admiralty Law Practice Group page at <http://garanluow.com/new2/aol/admiralty.htm>.

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