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By Graydon S. Staring

Introduction

As things presently stand, the coverage of a loss while in breach of the Lay-up Warranty may fall to be judged by the general maritime law or by a State law that denies coverage only if the breach contributed to the loss or increased the hazard. But does such a rule—or should it—change the result?

A recent decision applying State law to a Lay-up Warranty raises the question whether common sense should not be considered a feature of established federal maritime law, or for that matter, of competing State law, and comes to rather a "surprise ending". The case will be referred to as “I.N.A.”.

The vessel's liability policy warranted the vessel laid-up afloat in the relevant period and specifically “out of commission... in a safe berth ashore or afloat, and not navigated.” During that period the owner sailed the vessel to another port for repairs in a yard, an employee of which was injured and sued the owner. The insurer denied coverage for breach of warranty. The breach does not appear to be denied.

On a motion of the insurer for summary judgment, the court decided first that there was no established federal admiralty rule of strict compliance with warranties, that would eliminate State law under the rule (whatever it is) of Wilburn Boat. It then considered and denied the existence of a federal admiralty rule in respect of lay-up warranties in particular, and concluded that the issue of causation imposed by State law prevented summary judgment and must be tried.

Whose Law?

The plaguy Wilburn Boat case confronts us with the question whether Admiralty law or State law governs. Wilburn Boat has been ably discredited elsewhere and I have nothing to add here, except that it is still “in force”, whatever that means to the lower courts, which treat it variably. I will therefore consider the Lay-up

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1 See, e.g., Fla. Stat. § 627.409(2) ("increased the hazard"); Highlands Ins. Co. v. Koetie, 651 F. Supp. 346, 347 (W.D. Wash. 1987) (Wash. common law: “contributed to the loss sustained or increased the risk of loss of the type sustained”).
5 See quotation from “Goldstein, supra, in I.N.A. at 276 n.5.
Warranty under both the traditional Admiralty rule and the State rules where they have been thought to apply and are considered to differ from it, and will consider only decisions after Wilburn Boat. Although I much prefer “condition”, I use “warranty” throughout because it prevails in the materials discussed.

The general maritime law of insurance, which I shall call the Admiralty law for convenience, is the doctrine distilled from the English decisions of the 18th and 19th centuries and American decisions that followed them harmoniously. The English decisions were codified in the Marine Insurance Act 1906, which through inheritance or re-enactment with minor refinements, prevails in most of the British Commonwealth. The same doctrine represented the starting point for the American States. In California it is codified from the sources mentioned as they stood in mid-19th century. New York’s warranty law has presumably descended from the same sources. Thus the Admiralty rule is the explicit chosen law of some States and, it is said, “the law of most states”, presumably by reason of their not having legislated any departure from it.

The Admiralty rule on our point is quickly stated: warranties are binding unconditionally and breach terminates the contract from the time of breach, or permits the insurer to do so. Accordingly, where the Admiralty rule is either explicitly or impliedly considered established per se, and where it is applied as though it were State law, the Lay-up Warranty is strictly enforced. In all the

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9 See N.Y. Ins. Law § 3106 and, e.g., Commercial Union Ins. Co. v. Flagship Marine Services, 190 F.3d 26, 31-32, 2000 AMC 1, 6-7 (2d Cir. 1999) (explaining that § 3106(c) exempts marine policies from the section and thus leaves their warranties absolute and unencumbered by conditions of causation and materiality).
10 Commercial Union, supra, 190 F.3d at 31, 2000 AMC at 6.
cases cited, breach is found and that is sufficient to deny coverage. In only one of them would the issue of causation have required inquiry beyond description of the warranty and the loss; in that one the boat was taken out fishing without incident and afterward burned at her mooring, and even there the bare facts would not pass the test of no increase of risk.14

**Contributing to the Loss or Increasing the Risk**

What does it mean to contribute to the loss? Laying aside here damage by electromagnetic rays and the like, damage is produced by a coincidence of two objects and one or more forces in space-time. Take one away and it doesn’t happen. In common language, we may say that, when an object moves unwelcome into the same space as another, damage is likely. This common sense does not require expert testimony. The Supreme Court long ago embraced it as a determinant of causation. The issue was whether a vessel had contributed to cause a collision in fog. She had heard fog signals forward of her beam and reduced her speed and later stopped her engine completely five minutes before collision, into which she drifted at barely headway. Had she stopped her engine immediately and proceeded with caution, as called for by the rule, she would not have been at the point of collision at the time of collision. No fancy calculation was required.15

The same logic applies to almost all the characteristic instances of breach of the Lay-up Warranty: being in water instead of ashore, or in the force of a storm instead of shelter, or invaded by water that should have been kept out. In a case where the vessel sank when she was warranted to be laid up on shore, and the court followed the Admiralty rule, the assured relied on a Florida statute purporting to make increase of hazard a condition of the defense of breach of a marine policy. With a concise application of good sense, the court observed that, if the statute were applicable, it would not alter the result since: “(1) absent some truly extraordinary circumstances, a vessel will not sink if she is on shore; and (2) placing a vessel in water increases the risk that the vessel may sink.”16 Q.E.D.

If increase of risk is a condition, the field of consideration is broader. We may then think not just about the actual event, if one has occurred, but the whole range of mischance that might be related to the breach. It will rarely strain the intelligence of a mariner, counsel or judge to see risks in a vessel’s operating

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14 Cunningham, supra.
16 AXA Global Risks, supra, note 12.
rather than not, being away from her chosen place of safety, or being prepared with less than the usual precautions.

In short, it is hard to see how the factors of causation and increase of risk can affect the outcome of any but a frivolous defense of breach, in which case their consideration will be irrelevant.

The Instant Case

This discussion was prompted by the curious I.N.A. opinion described at the outset. The warranty was “from 01/01 to 04/14 Afloat”, and was defined with more than usual detail as “[a]series of consecutive months during the policy period when your vessel is laid up and out of commission. During this time your vessel must be laid up in a safe berth ashore or afloat, and not navigated or used for living aboard.” The Declarations page stated that the vessel would be principally berthed at Friday Harbor, Washington. On or about March 10th in the lay-up period the vessel was sailed from there to Port Angeles for repairs at a boatyard there, where a yard employee was injured when he fell from the vessel. He made a claim against the boat owner, who invoked the policy in which the defense of breach of warranty is asserted.

Breach was not admitted, but the judge does not linger over the issue and appears in the end to take it for granted, while he struggles with Wilburn Boat and whether strict application of the Lay-up Warranty is established federal law. He decides it is not (more on that later). He therefore looks to the general doctrine in Washington (which is not statutory), that warranties will only be enforced if breach contributes to a loss or increases the hazard. He recognizes that there is therefore an issue of contribution to the loss or increase of risk and denies summary judgment, reserving those issues for trial. Was this not a somewhat startling lapse of rationality? Without a flight of speculation beyond anything known to our legal system, how could one conceive that the loss could have occurred if the vessel had not been moved to the yard where vessel and injured worker coincided? The argument would presumably not stand longer than it took to state it. Probably that will become clearer to the court at trial, but the reservation of such a point implies that there is something to it and invites much imaginative verbal obscurantism.

The judge wrote a rather long opinion for a case of this nature (14 pages in AMC), most of it to get to the choice of Washington law. Is it not a mistake in a case like this to labor through such constructs in order to make a choice that doesn’t affect the result? It would be more practical and less troublesome in the future as well as the present to do as the Florida court described above and get briefly to the logic that it doesn’t matter anyway.

Thoughts on the Wilburn Boat Issue
If the facts of *I.N.A.* make the choice of law irrelevant, the court’s considerable labors in determining that strict compliance with the warranty is not established *Admiralty law* are wasted. But they cannot be ignored because there they stand to represent a view and (apparent) holding contrary to some worthy arguments by those who do not admire *Wilburn Boat*.

Professor Goldstein’s masterly article is the definitive study on *Wilburn Boat*’s roots, its ambiguity and the differing views of the courts applying it as to when a rule is “established” or “entrenched” in federal law. He summarized the several approaches, with cited illustrations:

At times, a single citation to an appellate court decision has been sufficient to support a finding that “entrenched” law exists. Some cases suggest that the “federal courts” -- presumably any federal court -- can establish a governing rule. Others have allowed a few appellate decisions to establish a relevant admiralty rule, a showing less than what the Court found insufficient in *Wilburn*. Indeed, some have relied on the same breach of warranty cases *Wilburn* found insufficient to find a federal rule regarding the effect of a breach of warranty. But others have found no “judicially established federal admiralty rule” even after citing two cases and two texts to support a proposition. Some believe a federal rule, to be pertinent, must be one which the Supreme Court has generated.17 (Footnotes omitted.)

These selective approaches prevail in the lower courts and are necessarily premised on a disposition to treat the Supreme Court’s decision as dealing only with the warranty before it. The Ninth Circuit has not been very helpful on this point, referring to the confusion described by Goldstein, modestly passing up the opportunity to resolve it for the Circuit, and neatly finessing the issue by concluding that Hawaii, given the chance, would adopt the maritime rule of absolute compliance with a Captain Warranty requiring the insurer’s approval of a new captain.18

In *I.N.A.* the court finds his way out of the confusion with this statement: “However, one criterion that consistently appears throughout Ninth Circuit case law is the requirement that there be substantial agreement among authorities that have considered the rule.”19 He concludes that there is “no agreement among courts” as to the lay-up rule. Let us look at the evidence he credited for this conclusion, consisting of four, or perhaps five, decisions, none of which he thought stood for the existence of an established federal admiralty rule.20

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19 2006 AMC at 2765.
20 2006 AMC at 2767-69.
• In AXA Global Risks, a district court in Florida forthrightly stated and applied the Admiralty rule of strict compliance, and then dealt with the insured’s contention that a State statute requiring increase of hazard should govern, to which the judge replied that it would make no difference because the breach did “increase the hazard”, by the simple logic that a vessel in water rather than ashore is in greater risk of sinking.

• In New Hampshire Insurance Company v. Dagnone, the court addressed the question as whether strict compliance with warranties was generally required, and provided the answer that Wilburn Boat said it was not. The court then turned to the law of New York and found that it was required there. No thought is given to why this is the rule in New York. To describe it as New York law is somewhat delusory; it appears to be no more nor less than the general maritime law, which New York continues to follow. Indeed the statutory reference cited is to a provision excluding marine policies from certain restrictions of State law. In affirming, the court of appeals applied “New York law” as “[b]oth parties suggest[ed]”.

• In a footnote to discussion of the decision next above, the court cursorily dismisses Gelb v. Automobile Insurance Company of Hartford, a Second Circuit case strictly enforcing the Lay-up Warranty, as “describing New York law”. It was a 1948 decision, well before Wilburn Boat and so there was no question of applying State law, and the opinion makes no mention of it. The presumable basis of its “describing New York law” was that it was law described by a court sitting in New York and relying in part on other decisions in New York, including one by itself citing the leading English text, Arnold on Marine Insurance (11th ed. 1924) as stating the rule of strict compliance to be followed. So much for “New York” law.

• Goodman v. Fireman’s Fund Insurance Co. is read by the court as favoring a State rule but makes no mention of one and the inference is highly strained. Failure to “winterize” a yacht properly led to pipes freezing, bursting and admitting sea water. The D.C. had denied coverage claimed under the Inchmeree Clause. The Court of Appeals opinion was concerned mainly with that clause, and disagreed but concluded that the

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21 AXA Global Risks, supra note 12, at 2681.
22 Supra note 13, 394 F. Supp. 2d at 485-86, 2005 AMC at 1344-45.
23 N.Y. Ins. Law § 3106(c).
24 New Hampshire Insurance Co. v. Dagnone, No. 06-1048, ___ F.3d ___, Slip op. at 5 (1st Cir. Feb. 2, 2007) (“being used in any way … prohibited by this policy” unambiguously not limited to navigation and includes lying at pier).
25 2006 AMC at 2768 n. 11.
26 168 F.2d 774, 1948 AMC 1257, 1259 (2nd Cir. 1948).
28 600 F.2d 1040, 1979 AMC 2534 (4th Cir. 1979).
judgment could be supported by the Lay-up Warranty. It said at the outset: “that judgment for defendant was proper because we conclude that plaintiff breached a warranty contained in the policy and therefore was precluded from recovery thereunder.” At the end of the opinion is a paragraph pointing to the warranty, stating that it was breached and concluding: “It is a familiar rule that the breach of an express warranty in a contract for marine insurance releases the insurer from any liability due to the breach,” citing a case on the Captain Warranty that concludes, “It is settled … that the only question in such cases is whether the thing warranted to be performed was or was not performed …”, citing in turn two circuit cases stressing that causation is not involved; the first of them, which the second relied on, is explicit that the Admiralty law is followed.29 All this was done with no mention of any State law whatever. The words “due to the breach” were simply true in any case, under whatever law.

- In the Jefferson Insurance Company of New York v. Huggins,30 the boat caught fire while being operated in violation of the warranty. On the warranty issue in the case, the court started by quoting the truism in Goodman, supra that “breach of an express warranty … releases the insurer from any liability due to the breach.” Without dealing with causation or risk or referring to any State law, the court went briskly to the conclusion that “use of the boat off the coast of Florida … was a clear breach of the Lay-up Warranty and voided the marine insurance policy.”31 The court in I.N.A., having gone awry about Goodman, treated the reference to that case as likewise an embrace of State over Admiralty law32 despite the absence of any reference to the matter and a conclusion clearly based on the use of the vessel rather than the casualty.

In short, not one of the cases relied on by the court in I.N.A. supported the point that there was a difference of opinion about the Admiralty rule of strict compliance with the Lay-up Warranty.

The I.N.A. opinion casts light on a mischaracterization of State law that undoubtedly occurs in other Wilburn Boat analyses. It is common legal knowledge that “State law” includes federal law where it is supreme or where the State has discretion to depart from it and does not do so. When we see an opinion from a State court applying long-standing federal law to an issue, we do not think it has become “State law”. And when courts in admiralty cases apply conventional marine insurance rules long followed in the State where they sit, there is no warrant for thinking that their repeated decisions establish a peculiar State law displacing the general maritime law. Nor should a rule of the maritime

30 Supra note 12.
31 2000 AMC at 2360-61.
32 2006 AMC at 2768.
law cease to be considered so even if the State has endorsed it by enacting it. Indeed, where California has enacted virtually the whole body of traditional marine insurance law, it would surely be nonsense to conclude that it disfavored establishment or entrenchment. Whatever the standard ought to be, while *Wilburn Boat* remains in force, it surely must not be unanimity, which has never been, and cannot reasonably be, a criterion for a national rule of law.

**Conclusion**

One may hope that courts will be more perceptive than in the *I.N.A.* case. It is generally understood that, within the limits of insurable interest and other public policies and reasonable monetary limits, the risk of any fortuity can be insured if one will pay the premium for it. Warranties are undertakings given by proposers of insurance in return for reduction of premium. There will always be some legitimate issues in the enforcement of warranties but judges should not strain the law too much to see that the assured keeps the premium but not the promise.