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That Sinking Feeling- A Boat Owner's Liability in the Aftermath of a Hurricane

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Abstract

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KEYWORDS: God, liability, hurricane

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I. INTRODUCTION

True to the notion that "it's better to know a friend with a boat than to own one," wrecks are all that remain of many pleasure boats which were moored in the path of Hurricane Andrew. This hurricane devastated South Florida in August of 1992, and is regarded as one of the most powerful hurricanes ever to strike a metropolitan area in the United States, with winds that exceeded 160 miles per hour.[1] According to the Boat Owners Association of the United States, the hurricane damaged an estimated $500 million worth of pleasure boats, or one of every eight boats in south Florida.[2]

In the aftermath of the hurricane, boat owners were suddenly questioning their insurance coverage as well as their liability for wreck removal, pollution and property damage. These select topics will be discussed in this article.

There are certain concepts in admiralty law that underlie these issues that first need to be addressed. These are Force Majeure/Act of God and liability based on fault. Hurricane forecasting and the unpredictability of a hurricane's path must also be understood.

II. UNDERLYING ADMIRALTY CONCEPTS

A. *Force Majeure/Act of God*

In admiralty law, such overwhelming wind forces as possessed by Hurricane Andrew are generally considered as "heavy weather," and may be sufficient to successfully invoke the defense of "act of God." The numerical scale expressing wind force is known in maritime practice as The Beaufort Scale of Wind Forces. The force numbers range from zero, representing calm conditions, to force twelve (and above), representing a hurricane. The Beaufort Scale describes winds above seventy-five miles per hour (sixty-five knots) as a hurricane, or typhoon.

Courts have frequent occasion to make reference to "acts of God" in deciding various contract and casualty cases.[3] The definition of this term varies more in form than in substance. Some courts treat similar phrases,

1. Jim Loney, *1992 Atlantic Hurricane Season Costliest Ever*, REUTERS, Nov. 26, 1992.
2. L. A. Lorek, *Hurricane Damage Buoys Florida Boat Makers*, J. COM., Oct. 15, 1992, at 5B, Col. 3.
3. *See, e.g.*, Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 103-04 (2d Cir. 1992).

such as "inevitable accident" and "*force majeure*," as entirely equivalent to "act of God," while others draw certain technical distinctions between them.[4]

The term "act of God" has been widely defined as:

> Any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented;[5]
>
> [or,]
>
> [A] disturbance . . . of such unanticipated force and severity as would fairly preclude charging a [defendant] with responsibility for damage occasioned by [the defendant's] failure to guard against it in the protection of property committed to its custody.[6]

Thus, extreme weather conditions, such as hurricanes, are considered in law to be acts of God.[7] The burden of proving an act of God defense rests upon the party asserting it.[8] However, one who asserts the defense of "act of God" or "*force majeure*," has the added burden of establishing his lack of fault in order to be exonerated from liability for damages to property of a third-party,[9] such as a marina or other boat owner. Yet, the defense may be sustained without this additional proof if the force of nature is of "catastrophic" proportions sufficient to overcome all reasonable preparations.[10]

B. *Liability Based on Fault*

Liability in admiralty is based on fault. The mere fact of damage

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4. 1 AM. JUR. 2D *Act of God* § 4 (1962). Unlike an act of God, a *force majeure* may consist of, for example, governmental intervention resulting from the necessities of war.
5. 1A C.J.S. *Act of God*, at 757 (1985).
6. Compania de Vapores INSCO S.A. v. Missouri Pac. R.R., 232 F.2d 657, 660, 1956 AMC 764, 768 (5th Cir. 1956).
7. 1 AM. JUR. 2D *Act of God* § 5 (1962).
8. Hardesty v. Larchmont Yacht Club, 1983 AMC 1059, 1064 (S.D.N.Y. 1982) (citing Compania de Navegacion Porto Ronco, S.A. v. S.S. Am. Oriole, 474 F. Supp. 22 (E.D. La 1976)).
9. United States v. The Barge CBC 603, 233 F. Supp. 85, 87-88 (E.D. La. 1964).
10. Dammers & Van der Heide Shipping & Trading, Inc. v. Steamship Joseph Lykes, 300 F. Supp. 358, 1969 AMC 1233 (E.D. La. 1969), *aff'd*, 425 F.2d 991 (5th Cir. 1970).

having occurred has no legal consequence.[11] As stated in *The Law of Admiralty*:

> An accident is said to be "inevitable" not merely when caused by *vis major* or the act of God but also when all precautions reasonably to be required have been taken, and the accident has occurred notwithstanding. That there is no liability in such a case seems only one aspect of the proposition that liability must be based on fault.[12]

The "inevitable accident" defense is most often invoked when a vessel has been caught in the full force of a storm and driven against another vessel or vessels, or against a fixed structure. In such a case, presumption is against the moving vessel, and the owner's efforts to rebut it take the "inevitable accident" form.[13] To avoid liability, it must be shown that the force of the storm was truly irresistible and that all precautions had been taken.[14]

In *Boudoin v. J. Ray McDermott & Co.*, the court found a barge owner liable for damage to a dock after a barge broke free from its moorings during Hurricane Audrey.[15] The tug captain's precautions, taken prior to the storm, were judged in comparison to what a "prudent shipmaster" would have done under similar circumstances.[16] Although the court found that Hurricane Audrey was an act of God, it determined that the damage was directly caused by the failure of the captain to take reasonable precautions in the face of known conditions. Importantly, the court emphasized that it is within the professional responsibilities of the shipmaster to know the proper precautions to be taken in such a situation.[17]

The *Boudoin* court touched upon a key issue to be resolved in cases involving the pleasure boater. Specifically, what standard of reasonableness is to be applied in defining the appropriate conduct of these recreational boaters. This standard will likely be based upon the marine experience of each individual. By virtue of their different experience and responsibilities, the weekend sailor and the professional mariner cannot be expected to act similarly in the face of a hurricane.

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11. The Java, 81 U.S. (14 Wall.) 189 (1872) (a collision case).
12. GRANT GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY 486-87 (2d ed. 1975).
13. *Id.* at 488.
14. *See* Boudoin v. J. Ray McDermott & Co., 281 F.2d 81 (5th Cir. 1960).
15. *Id.* at 82.
16. *Id.* at 85.
17. *Id.* at 84.

C. *Hurricane Forecasting*

In *Weather for the Mariner*,[18] Rear Admiral William J. Kotsch, U.S.N.R., said the following about hurricanes:

> From a vantage point in space, hurricanes appear as rather small, flat spirals drifting benignly on the sea—gentle eddies in the endless flowing of our planet's atmosphere. Nothing could be more misleading. Where the drift of hurricanes takes them across shipping lanes and islands and the coasts of continents, their passage is commemorated by the vast destruction of property, the great diminution of prospects—and death.[19]

Forecasting the tracks and speeds of a hurricane is one of the most challenging and difficult tasks encountered by the meteorologist. Despite aircraft, land, shipboard reconnaissance, weather satellites, and other sources of data, exact hurricane paths are rarely predicted with precision.[20] Instead, hurricane tracks exhibit "humps, loops, staggering motions, abrupt course and/or speed changes, and so forth."[21] Indeed, no two, recorded, severe tropical cyclone tracks have ever been exactly the same in any ocean.[22]

To summarize, liability of the pleasure boater for damages to property will be based on fault, and will likely be judged in accordance with the marine experience of the particular boat owner. A storm of "catastrophic" proportions, however, may prove to be an intervening cause sufficient to sustain an act of God defense without the necessity of additional proof.

III. INSURANCE

A. *Hull Coverage*

In the wake of Hurricane Andrew, insurance coverage is on the minds of hundreds of boat owners in South Florida. As outlined herein, the boat owner must carefully review the policy terms to determine not only its coverage provisions, but also any obligations, and importantly, conditions precedent to payment. This article will address certain principles of marine insurance of general applicability. However, it must be emphasized that

18. WILLIAM J. KOTSCH, WEATHER FOR THE MARINER 143 (2d ed. 1977).
19. *Id.*
20. *Id.* at 151.
21. *Id.*
22. *Id.*

variations in policy language together with the unique facts and circumstance of a particular claim must be considered.

A typical policy of marine insurance will insure losses resulting from "perils of the seas," or from any accidental physical loss by any "external cause," known as "all-risks" coverage. Some homeowner policies may, for an additional premium, cover a pleasure boat that is specifically identified in the policy.

There is no question that a hurricane is a peril insured against in a policy of marine insurance. Sea perils have been defined as those perils "which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."[23] Examples of loss by sea perils include heavy weather (whether or not of hurricane force) stranding, collision, contact with floating objects, and striking on rocks or on the sea bottom.[24]

Thus, a constructive total loss or total loss to a boat due to a hurricane should be covered by the standard marine hull policy. A constructive total loss occurs if the vessel's damage exceeds half of its value due to any peril for which it is insured. However, hull policies invariably provide that there will be no recovery for a constructive total loss unless the cost of recovering and repairing the vessel exceeds its insured value.[25] When a total or constructive total loss occurs, the policy deductible is not applied to the settlement of the insured's claim.

It is important that the boat owner read the marine policy and comply fully with its loss provisions. For example, insurers require immediate notice containing details that will assist in investigating the loss. Such details include the insured's name, yacht involved, time and place of loss, where the boat may be inspected, and any witness information. Failure to give notice to the insurer within the time specified in the policy may be fatal to the claim in the event the delay is considered prejudicial to the insurer. Similarly, the policy may require a sworn statement of loss and supporting documents be submitted by the insured as soon as practicable after the loss. Failure to comply with such provision will not only delay resolution of the claim, but if prejudicial to the insurer's rights of investigation and recovery from third parties, may void it altogether.

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23. R.T. Jones Lumber Co. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959) (quoting The Ginla, 218 Fed. 746 (2d Cir. 1914)).

24. LESLIE J. BUGLASS, MARINE INSURANCE & GENERAL AVERAGE IN THE UNITED STATES 54 (2d ed. 1981).

25. *Id.* at 94.

B. *Sue and Labor Coverage*

The boat owner should check the policy to determine whether it provides "sue and labor" coverage. In a typical yacht policy, the sue and labor provision reads as follows:

> If your yacht . . . is damaged, you must take all lawful and reasonable steps to protect the yacht from further damage. We will reimburse you for the reasonable expenses of protecting the property.
>
> [or,]
>
> The insured has a duty not to assume any obligation, admit any liability or incur any expense for which we may be liable without our permission, except expenses incurred to protect the property from further loss or damage.

It is an insured's duty to mitigate the loss. This duty requires reasonable steps be taken to reduce the total damage incurred.[26] Sue and labor charges arise when the insured incurs expenses to protect the boat in order to minimize the loss.[27]

The responsibility to minimize the loss stems from the insured's duty to exercise the care of a "prudent uninsured owner." Acting as a "prudent uninsured," the boat owner is obligated to protect the vessel and save it from further damage resulting from occurrences which the underwriter would otherwise protect against under the policy.[28]

The insured will be reimbursed for all "reasonable" sue and labor expenditures, even if unsuccessful in saving the vessel, because such expenditures "are made primarily for the benefit of the underwriter either to reduce or eliminate a covered loss altogether."[29]

C. *Protection and Indemnity Coverage*

Protection and Indemnity (P & I) policies are issued to insure owners against risks outside the scope of coverage provided under standard hull

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26. Armada Supply Inc. v. Wright, 858 F.2d 842, 848 (2d Cir. 1988).
27. BUGLASS, *supra* note 24, at 333.
28. Reliance Ins. Co. v. The Yacht Escapade, 280 F.2d 482, 488 (5th Cir. 1960).
29. *Id.*

policies.[30]

Where storm loss coverage is sought, it is imperative to determine whether P & I coverage is provided in the marine policy. The P & I policy covers a wide range of possible claims, including physical injuries or property damage sustained by others, expenses resulting from the rescue of the insured or passengers, and costs of any attempt to raise, or the actual raising, removal or destruction of the wreck or debris of the insured yacht. Additionally, pollution expense coverage, if provided, will be found in the P & I portion of the marine policy.

If the boat owner's fault for any of the aforementioned liabilities is contested, the insurer typically covers the cost and related expenses of legal representation to defend against such third-party claims. The boat owner must cooperate with the insurer and its counsel during any such legal proceedings.

A third-party has no legal basis, in Florida, to sue the boat owner's insurer directly for loss or damage, nor to include the insurer as a defendant in a suit against the insured boat owner.[31]

Wreck removal is a primary concern to owners in the wake of a hurricane. P & I insurance usually covers expenses incurred by the boat owner to remove or dispose of the sunken or wrecked vessel. However, the policy may condition payment for removal expenses on those instances where removal is "compulsory by law" or "mandated by law."

The term "compulsory by law" is open to several different interpretations. Compulsory removal may be pursuant to an express government

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30. Insurance Co. of N. Am. v. Board of Comm'rs, 733 F.2d 1161, 1166 (5th Cir. 1984).

31. FLA. STAT. ANN. § 627.7262 (1991) (renumbered as FLA. STAT. § 627.4136 (Supp. 1992)). Section 627.7262 prohibits direct actions by third parties against liability insurers that had been previously available under the doctrine of Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). *See* National Corporacion Venezolana, S.A. v. M/V Manaure V, 826 F.2d 6, 7 (11th Cir. 1987); Weeks v. Beryl Shipping, Inc., 845 F.2d 304 (11th Cir. 1988) (involving a marine indemnity policy wherein the Eleventh Circuit affirmed the district court's summary judgment dismissing the plaintiff's complaint against the defendant "Protection and Indemnity" insurer of the vessel owner).

However, the Eleventh Circuit has held that § 627.7262, Florida Statutes, does not bar a salvor's action directly against the insurer because such action is an independent cause of action based upon the salvor's efforts which directly benefit the marine insurer. Cresci v. The Yacht Bunkerer, 874 F.2d 1550 (11th Cir. 1989).

order,[32] a subjective belief that such removal is necessary by law,[33] or a legal obligation to remove the vessel.[34]

IV. RESPONSIBILITY FOR WRECKS

The owner of a vessel has legal responsibilities that do not sink with the vessel. Rather, the owner is subject to both federal and state statutory requirements pertaining to the marking and disposing of the wreck, ensuring the wreck does not obstruct navigable waters,[35] preventing the wreck from causing damage to other property, and bearing the costs associated with these procedures.

A. *U.S. and State Laws*

Of primary concern to the vessel owner is a United States statute known as the Wreck Act.[36] This Act delineates the owner's obligations to locate, mark and remove the sunken vessel.[37] According to section 409 of the Wreck Act, it is unlawful to:

> [S]ink, or permit or cause to be sunk, vessels or other craft in navigable channels; . . . in such manner as to obstruct, impede, or endanger navigation. . . . [I]t shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, . . . and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such

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32. *See* Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500, 504 (2d Cir. 1972).

33. *See* Progress Marine, Inc. v. Foremost Ins. Co., 642 F.2d 816 (5th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981).

34. *See* Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983).

35. "Navigable waters" need not be a defined channel as such, but merely "waters capable of sustaining the traffic of other vessels." United States v. Raven, 500 F.2d 728, 732 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

36. Sections 15, 16, 19, and 20 of the Federal Rivers and Harbors Act of 1899, now amended and codified as §§ 409, 411, 412, 414 and 415 of Title 33 of the United States Code and collectively referred to herein as 33 U.S.C. §§ 409-415. *See* University of Tex. Med. Branch v. United States, 557 F.2d 438, 441 n.1 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

37. The Wreck Act provisions of March 3, 1899 were previously contained within the Federal Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151-61.

> removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States . . . .[38]

State or local navigational laws may also apply within their respective boundaries if not in conflict with existing federal admiralty law.[39] Florida law defines abandoned and derelict vessels and authorizes recovery of removal costs from the boat owner.[40] Thus, an owner of a wrecked vessel within Florida's territorial waters will be liable[41] under state or local municipal laws for the costs of removing the wreck.[42]

B. *Locating and Marking the Wreck*

The boat owner, whether negligent or not in the cause of the sinking, is required to locate the sunken vessel, immediately mark it, and maintain these marks until the vessel is removed or abandoned.[43] The phrase "immediately mark" can be taken to mean a reasonable time from when the owner knew the vessel had been sunk.[44]

While the duty to mark the wreck is not delegable, the owner may be relieved of this task if the United States Coast Guard marks it.[45] However, once the Coast Guard undertakes to mark the wreck, the boat owner should determine whether the Coast Guard has in fact completed the effort.[46] In any event, the Coast Guard, having the authority to mark the sunken vessel[47] also has the right to be reimbursed by the owner for performing

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38. 33 U.S.C. § 409 (1986).

39. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325, 341 (1973) ("Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.").

40. FLA. STAT. § 823.11 (1991).

41. If removal is conducted under the Florida statute, any subsequent attempt to recover costs against the boat owner might be countered by the owner filing a limitation of liability proceeding in Federal Court. The right to limit liability pursuant to 46 U.S.C. §§ 181-189 (1988), while superseded by the federal Wreck Act, may override Florida Statute § 823.11 through the Supremacy Clause. *See Askew*, 411 U.S. at 331; *see also* FLA. STAT. § 823.11 (1991).

42. FLA. STAT. § 823.11(2) (1991).

43. Nunley v. M/V Dauntless Colocotronis, 727 F.2d 455 (5th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 832 (1984).

44. Morania Barge No. 140, Inc. v. M. & J. Tracy, Inc., 312 F.2d 78, 80 (2d Cir. 1962).

45. Berwind-White Coal Mining Co. v. Pitney, 187 F.2d 665 (2d Cir. 1951).

46. Failing to ascertain that the Coast Guard has in fact marked the wreck could make the owner liable for damages caused by failure to mark. *Id.* at 669.

47. 14 U.S.C. § 86 (1965) (as amended).

this task.[48]

Of course, in order to mark a sunken vessel, one must know its location. Courts have held that the statutory duty to mark may be relieved if a good faith search for the vessel has been unsuccessful.[49]

C. *Removing the Wreck*

The language of section 409[50] of the Wreck Act[51] was amended in November of 1986, so as to no longer relieve the boat owner of the statutory duty to remove a wreck which was caused by a *force majeure* or act of God. Prior to these amendments, negligence in causing the wreck was required to prove liability for removal expenses[52]. Section 409 now imputes strict liability for removal. Sections 414 and 415 (both also amended in 1986), require the owner to pay any costs associated with removal.[53]

Given the situation of most South Florida boat owners who lost their vessels in August, 1992, the most consequential aspects of sections 414 and 415 are contained in the aforementioned 1986 amendments.[54] In both

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48. *Id.*

49. *Nunley*, 727 F.2d at 460.

50. 33 U.S.C. § 409.

51. Sections 15, 16, 19 and 20 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 409, 411, 412, 414 and 415) are collectively known as the Wreck Act. *Nunley*, 727 F.2d at 457 n.1.

52. *Id.* at 459.

53. Under § 415, the Secretary of Army may take immediate possession of a sunken vessel in an emergency situation, either destroying it or causing it to be removed.

54. The amendments to §§ 409, 414 and 415 of the Wreck Act were effective Nov. 17, 1986 as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, Title IX, § 939(a) & (b), 100 Stat. 4199.

The identical amendments to §§ 414 and 415 appear to have been fiscally motivated, as explained in S. REP. NO. 126, 99th Cong., 2d Sess. 26 (1986), *reprinted in* U.S.C.C.A.N. 6639, 6663, in part:

> This section involves vessels that have sunk or otherwise become wrecks. Under present law . . . costs for removal can be only offset by the salvage value of the wreck. In the case of abandoned vessels, this is usually far less than the cost of removal.

The amendments read as follows:

> (b) Liability of owner, lessee, or operator
>
> The owner, lessee, or operator of such vessel, boat, water craft, raft or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered

sections, the 1986 amendments are identical in impact, i.e., the boat owner is personally liable to the United States government for all removal and disposal costs that exceed the salvage value of the boat. Prior to the 1986 amendments, the owner would have been liable to the government only for the salvage proceeds derived from the wrecked vessel. The vessel and its contents become the property of the government contractor upon removal.

Another consideration for the boat owner is who will remove the wreck. A well-intentioned but inexperienced "salvor" may possibly cause more damage by incompetent removal efforts than might otherwise have occurred had the owner: 1) abandoned the vessel to the U.S. government and paid for the ensuing government-directed removal; or 2) engaged the services of a professional salvor whose expertise could limit the expense and risk involved.

Prior to engaging in a do-it-yourself salvage operation, it would be prudent of the boat owner to contact his insurance carrier or broker concerning policy coverage, i.e., sue and labor, wreck removal and like clauses to determine the most proper course of action.

D. *Abandoning the Vessel*

"Abandonment is the surrendering of all rights to a vessel . . . by the owner . . . ."[55] This is accomplished by the boat owner affirmatively declaring an intention to abandon the vessel or by the owner's failure to "commence immediate removal of the [sunken vessel] and prosecute such removal diligently."[56]

There are certain procedures which the vessel owner must comply with concerning abandonment. "Declaring" one's intention to abandon a sunken boat is done by sending notice to the local district office of the Army Corps

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from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

55. 33 C.F.R. § 245.45(a) (1992).

56. *Id.* § 245.45(a)(1), (2). If no notice is given, abandonment is presumed 30 days after the sinking, pursuant to 33 U.S.C. § 414 (1985).

However, the court in Nunley v. M/V Dauntless Colocotronis, 863 F.2d 1190, 1198-99 (5th Cir. 1989), declined for policy reasons to hold that thirty days "inactivity" by the owner of a sunken vessel constituted "legal abandonment." The court reasoned that such an interpretation of the Wreck Act "removes the owner's incentive to mark or remove . . . if the cost of such efforts does not exceed the salvage value . . . ." *Id.* at 1199 n.12. However, with the 1986 amendments to the Wreck Act, even a non-negligent owner who has abandoned his vessel will be responsible for marking and removal costs.

of Engineers. Such "notice" acts as the owner's declaration of abandonment.[57] The Army Corps of Engineers, while not "accepting" abandonment notices, will nevertheless acknowledge its receipt.

Under the 1986 amendments to the Wreck Act, abandoning one's vessel will not relieve the boat owner of responsibility for removal or the costs associated with removal of the wreck.[58]

V. Liability for Damage

A. *Marina Liability*

When a boat is placed in the care, custody and control of a marina, a bailment results for the mutual benefit of the boat owner (bailor) and the marina operator (bailee).[59] This contractual relationship imposes upon the bailee a duty to exercise reasonable care for boats placed in its custody.[60] Failure of the marina operator to exercise reasonable care constitutes a breach of the bailment, or a breach of contract where a storage agreement is in effect, or a tort (negligence), where a duty is implied by law.[61]

Courts have considered various factors in determining the reasonableness of the care used by the marina to protect boats in its custody, including: 1) the standard in the locale or industry; and, 2) the foreseeability of the harm.[62] The burden of proving liability is on the boat owner. In a bailment relationship, however, the boat owner may make out a *prima facie* case of liability by showing that the vessel was delivered to the marina in good condition and damaged while in the marina's possession.[63] The burden of persuasion then shifts to the bailee (marina operator) to present evidence that shows that the cause of the damage was beyond its control

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57. 33 U.S.C. § 245.45(b).

58. Prior to the aforementioned 1986 Wreck Act amendments, abandonment was a viable alternative only for non-negligent boat owners, relieving owners of liability for costs of wreck removal and subsequent damages to third parties. The 1986 amendments clearly indicate that wreck removal is to be borne by the owner regardless of responsibility for the sinking.

59. Stegemann v. Miami Beach Boatslips, Inc., 213 F.2d 561, 1954 AMC 1372 (5th Cir. 1954).

60. Fireman's Fund Am. Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F. Supp. 347, 350 (D. Mass. 1971).

61. *Marina Liability for Damages to Yachts in Storage*, ABA Admiralty & Mar. L. Comm. (1989).

62. *Id.*

63. *Stegemann*, 213 F.2d at 564.

(i.e., act of God), or that the marina and its personnel at all times exercised reasonable care with respect to the yachts.[64] Therefore, liability for damage to a boat while in a marina's possession will generally depend upon the presence or absence of the marina's negligence.[65]

A marina's potential liability for damages sustained to a yacht by a hurricane, is fact sensitive and a court will examine such incidents on a case-by-case basis.

An act of God defense may or may not relieve the marina of liability. For example, even if the act of God cannot be foreseen, the marina will be liable if, by its negligent conduct, it has risked the same harm that ultimately occurred.[66] Thus, to be entitled to exoneration from liability, the burden is on the defendant (marina operator) to prove not only that the storm constituted an act of God, but also that the marina's acts or omissions did not contribute to the damage.[67]

There are numerous cases in which courts have exonerated defendants because the claimed damage was caused by a storm found to be an act of God.[68] However, in certain instances, liability of the bailee was established notwithstanding the presence of a storm, due to some act or omission found to be the proximate cause of the damage.[69]

B. *Boat Owner Liability*

A boat owner may be held responsible for damages to property of another despite heavy weather. The cause of action could lie in negligence, or breach of contract if a marina docking contract is involved. The contract cause of action will be discussed in the safe haven section of this article.

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64. *Id.*; Leyendecker v. Cooper, 1980 AMC 1061 (D. Md. 1979).

65. Chanler v. Wayfarer Marine Corp., 302 F. Supp. 282, 286, 1969 AMC 1435, 1440-41 (D. Me. 1969); Pennington v. Styron, 153 S.E.2d 776 (N.C. 1967).

66. *See* Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 195-97, 1933 AMC 1023, 1026-30 (6th Cir. 1933).

67. Hicks v. Tolchester Marina, Inc., 1984 AMC 2027, 2030 (D. Md. 1983).

68. *See, e.g., id.*; Chanler v. Wayfarer Marine Corp., 302 F. Supp. 282 (S.D. Me. 1969); Buntin v. Fletchas, 257 F.2d 512 (5th Cir. 1958); Stegemann v. Miami Beach Boatslips, Inc., 213 F.2d 561, 1954 AMC 1372 (5th Cir. 1954); Gelb v. Minneford Yacht Yard, Inc., 108 F. Supp. 211 (S.D.N.Y. 1952); Potomac Poultry Food Co., Inc. v. M/V Anna Maersk, 1934 AMC 166 (D. Md. 1934).

69. Woodworth v. Tacoma Yacht Club, 377 F.2d 486 (9th Cir. 1967); The Helderberg v. Pennsylvania R.R., 17 F. Supp. 721 (E.D.N.Y. 1937); Pennington v. Styron, 153 S.E.2d 776 (N.C. 1967) (after a finding for the plaintiff boatowner in the trial court, a new trial was ordered on appeal because the trial court's instructions were found to have been confusing to the jury).

With respect to the negligence aspect, the issue to be resolved would be the proximate cause of the property damage, whether it be to the marina, or to another vessel. The court may look to whether the owner properly secured the vessel with enough lines, and with lines of sufficient strength and size. Any acts or omissions of the boat owner will likely be judged in accordance with that individual's marine experience. It could be expected that a defendant in such an action will raise the act of God defense. As mentioned, such defense is usually considered to cover losses resulting from lightning, earthquakes, tidal waves of great size, or extraordinary storms, such as hurricanes or typhoons.[70] One who asserts this defense may have the added burden of establishing lack of fault in order to be exonerated, unless the court determines the storm was severe enough to overcome all reasonable preparations.[71]

In *Dion's Yacht Yard, Inc. v. Hydro-Dredge Corp.*,[72] the sole question presented was whether the damage to a pier was a result of the boat owner's negligence or the result of an intervening act of God. The court found against the defendant boat owner for failing to adequately secure the vessel in the existing weather conditions, therefore, displaying a lack of good seamanship. The court determined that notwithstanding a storm of great force, the accident and damage could have been prevented with the use of reasonable care that the situation demanded, and which was within the capability of the boat owner. The storm was forecasted and consisted of snowfall, high tides, and wind gusts to seventy miles per hour. The act of God defense did not relieve the owner of liability because the defendant's negligent conduct risked the same harm that ultimately occurred.[73]

In *United States v. Bruce Dry Dock Co.*,[74] a lightship owned by the United States was secured to a shipyard at the height of a hurricane. The hurricane, accompanied by an unusually high tide, caused the bow lines to part and the lightship to collide with and destroy a floating dry dock. The court found the vessel owner liable despite the act of God defense. The court determined that the owner was not entitled to take that position because the master and crew failed to take reasonable precautions in advance to prevent the damage that resulted. Here, the court found fault because the

70. 2A BENEDICT ON ADMIRALTY § 152, 15-2 (1977).

71. Dammers & Van Der Heide Shipping & Trading, Inc., 300 F. Supp. 358 (E.D. La. 1969), *aff'd*, 425 F.2d 991 (5th Cir. 1970).

72. 1982 AMC 1657 (D. Mass. 1981).

73. *Id.* at 1662.

74. 65 F.2d 938 (5th Cir. 1933).

owner was negligent by leaving the vessel inadequately secured.[75]

In *Swenson v. The ARGONAUT*,[76] the Third Circuit Court of Appeals reversed the lower court which had characterized a collision as an "inevitable accident" when the vessel ARGONAUT, moored to a New Jersey pier, broke adrift and struck a catamaran and four barges moored nearby. The storm lasted only twenty minutes, with wind gusts to sixty miles per hour. It was described in testimony as a typical summer thunderstorm, common for the locality. The circuit court noted that the ARGONAUT failed to overcome the "moving vessel presumption" and concluded that the storm was not of "catastrophic" proportions, nor of such unusual character as to constitute an inevitable accident.[77]

C. *Pollution*

The recent emergence of environmental standards, statutes and heightened public awareness, coupled with pollution exclusions in many insurance policies have created a quagmire for the unlucky owner of a sunk or wrecked pleasure boat.

A boat owner must be concerned with numerous state and federal laws concerning pollution liability. Of primary concern is the Federal Water Pollution Control Act (FWPCA),[78] and the Oil Pollution Act of 1990 (OPA),[79] which collectively cover marine pollution prevention, pollutant removal, clean-up, and vessel owners' liabilities in this regard. In the face of actual or imminent pollutant discharge from a marine disaster, the federal government can summarily remove or destroy the culpable vessel.[80] In the event of actual discharge of a pollutant, the vessel owner is strictly liable to the federal government for clean up and removal charges pursuant to the FWPCA,[81] and, under the OPA, to private parties as well.

The OPA precludes the vessel owner from limiting liability under the Limitation of Liability Act.[82] Additionally, the OPA allows a state to enforce its own pollution laws. Likewise, the vessel owner may not limit liability under state pollution laws by invoking the Limitation of Liability

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75. *Id.* at 939.
76. 204 F.2d 636 (3d Cir. 1953).
77. *Id.* at 640.
78. 33 U.S.C. §§ 1251-1387 (1988, 1989 Supp. I & 1990 Supp II).
79. 33 U.S.C. §§ 2701-2761 (1990 Supp. II).
80. 33 U.S.C. §§ 1321(c) (1988, 1989 Supp. I & 1990 Supp. II).
81. 33 U.S.C. §§ 1321(f)(1) (1988, 1989 Supp. I & 1990 Supp. II), 2702 (1990 Supp. II).
82. 46 U.S.C. §§ 181-189 (1988).

Act.[83]

The boat owner may escape liability for pollution damages if it is established that the pollution was caused by an act of God.[84] This could be problematic, however. If the hurricane has destroyed the boat and released oil upon the waters in one fell swoop, an act of God defense may be asserted. On the other hand, if the boat is partially sunk, abandoned by the owner, and subsequently left to deteriorate, the owner may be viewed as negligent, and thus liable for resulting damages. Further, considering state pollution laws such as Florida's Pollutant Discharge Prevention and Control Act,[85] an owner who has "reason to know of the discharge" or does not reasonably cooperate and assist as "requested by a state or federal on-scene coordinator,"[86] may be held accountable. While this particular statute was drafted for oil tanker and terminal spills, the liability of a pleasure boat owner for pollutant clean-up costs may, arguably, be applicable.

In any case, there is no alternative to strict adherence to the OPA and FWPCA regulations which require the owner's full cooperation in connection with pollutant removal operations.[87]

D. *Safe Haven*

Some marina docking contracts contain "hurricane clauses." This provision provides that when a hurricane watch is issued, boat owners shall immediately remove their vessels and all personal property from the marina and seek safe haven. Failure to comply with this requirement, according to the clause, will result in the boat owner being liable for all damage to docks, piers, other vessels, or any property damaged by the owner's vessel or as a result of its presence.

It appears that no court has construed the validity of such a "hurricane clause" in this context. However, with the extensive amount of damages realized by boats and marinas in the aftermath of Hurricane Andrew, the validity of this clause may be tested. The courts will likely be called upon to decide whether the clause is void as against public policy for numerous

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83. 33 U.S.C. § 2718(a).

84. 33 U.S.C. §§ 1321(f) (1988, 1989 Supp. I & 1990 Supp. II), 2703(a) (1990 Supp. II). However, to avail oneself of the act of God defense, the incident must be reported, and full cooperation and assistance must be provided in connection with the oil removal in accordance with § 2703(c).

85. FLA. STAT. §§ 376.011-.17, 376.19-.21 (1991) (short title as amended in the 1992 Supplement to the 1991 Florida Statutes).

86. *Id.* § 376.12(7)(a), (b).

87. 33 U.S.C. § 2703(c) (1990 Supp. II).

reasons including whether it jeopardizes the safety of a pleasure-boat owner by requiring the owner, despite having paid a docking fee, to embark on a dangerous journey in what could be considered a futile attempt to seek safe haven.

In view of the unpredictability of a hurricane's path, efforts by a pleasure boater to seek "safe haven" may be futile. It may also be unreasonable to expect a weekend boater to determine the existence of a safe haven. Moreover, the clause may be suspect in that it purports to hold boat owners contractually responsible for damages sustained by the marina expressly as a result of an act of God.

A marina seeking to recover damages against boat owners, shoulders the added burden of apportioning the fault among the various vessels. Each boat owner must be judged individually. Apportioning the liability will prove difficult in light of the magnitude of the post-Andrew wreckage. Additionally, there may have been damages caused by vessels which were not owned by customers of the marina, but were carried by wind and tide into the marina. Obviously, there would be no "hurricane clause" claim against these vessels which were not under contract to the particular marina. Yet, in apportioning damages boat-by-boat, similar difficulties will likely arise as to those confronted in the more straight forward owner-marina liability situations.

In testing the validity of a hurricane clause, consideration may also be given to whether the marina has in place and has enforced a "hurricane plan of action" for its customers. Such a plan requires the boat owner to provide information to the marina when the docking agreement is signed, including a contact person in case of the owner's absence, and the intended location of the boat during the hurricane.

In most circumstances, an action by a marina against a boat owner for breach of a hurricane clause in a docking contract would seem difficult to establish. Such a case will contain factually sensitive arguments to be determined on a boat-by-boat basis. For example, there will likely be questions as to whether the particular boat owner had notice of the storm, whether the owner had sufficient marine experience to take adequate precautionary measures, whether the boat was secured prudently, whether additional mooring lines could have been positioned, whether the boat owner was in a position to travel to the marina on a timely basis, whether there were any preparations or precautions the boat owner could have taken to prevent the boat from breaking loose, whether any safe haven existed nearby and its location, whether a safe haven could have been safely reached, and whether the marina itself could have removed the boat from the water, thereby reducing the likelihood of damage to its facility.

VI. Cases Involving Severe Weather

The existence of weather which may be considered an act of God/*force majeure* will not necessarily exonerate the boat owner from liability. For example, in the *Boudoin* case,[88] the courts found against the boat owner despite the presence of weather classified as an act of God. A key issue raised by the *Boudoin* court, was how to judge the actions of the vessel owner. Specifically, the court looked to the marine experience of the owner and in light of his significant experience, determined that his precautionary actions were inadequate.[89]

However, in the following cases involving property damage to a facility, the defense of *force majeure* was sustained. In *Dammers & Van Der Heide Shipping & Trading, Inc. v. S.S. JOSEPH LYKES*,[90] the court found that the proximate cause of the vessel's coming adrift and causing property damage was the "unprecedented and catastrophic phenomenon of Hurricane Betsy, rather than negligence in mooring."[91] The court found that Betsy, which at the time "caused more devastation in New Orleans and to the marine community than any hurricane of record, with unprecedented wind velocity, tidal rise and up-river tidal surge, is a classic case of an act of God."[92] Hurricane Betsy was found to be a storm of such magnitude as to overcome all reasonable preparations, and therefore, the defense of *force majeure* was successful.

In the appeal of *Dammers'* decision, the Fifth Circuit Court of Appeals held that the test for determining whether shipowners "were free from fault is whether they took reasonable precautions under the circumstances as known or reasonably to be anticipated."[93] The Fifth Circuit stated that if those responsible for the vessels "were reasonable in their anticipation of the severity of the impending storm and undertook reasonable preparations in light of such anticipation, then they are relieved of liability. The standard of reasonableness is that of a prudent man familiar with the ways and vagaries of the sea."[94] In affirming the district court, the Fifth Circuit held that the vessel owners were not negligent in making preparations for the

88. 281 F.2d 81 (5th Cir. 1960).
89. *Id.* at 84-86.
90. 300 F. Supp. 358 (E.D. La. 1969), *aff'd*, 425 F.2d 991 (5th Cir. 1970).
91. *Id.* at 365.
92. *Id.* at 366.
93. 425 F.2d 991, 995 (5th Cir. 1970).
94. *Id.*

arrival of the storm and that the damage inflicted "was caused solely by the extraordinary, unforeseeable, and catastrophic character of Hurricane Betsy, an act of God."[95]

In *United Geophysical Co., Inc. v. John Vela*,[96] the Fifth Circuit rejected a property owner's claim for damages to his dock and structure during a hurricane because the owner failed to prove that the collapse of the structure was caused by plaintiff's vessel. The court found for the defendant because the property owner failed to produce "a single witness [to] testify that the buildings collapsed upon, not before, being hit by the [vessel]."[97] Importantly, the court also stated that "a vessel is not to be condemned simply because lines part in the face of nature's unrelenting violence or because men, braving these elements, cannot rectify the failure before damage is done."[98]

In *Eva Twery v. Houseboat Jilly's Yen*,[99] the Southern District Court of Florida found that the owners of a houseboat had exercised reasonable precautions in securing their boat, which broke free from its mooring during Hurricane Betsy and subsequently damaged a dock downstream. Accordingly, the court stated that the owners "could not have anticipated that the [vessel] would have broken loose during [the] hurricane. There was no showing that the [vessel] could, or should, have been made more secure, or that it should have been moved prior to the hurricane."[100] The court ruled that the vessel broke from its mooring as a result of an inevitable accident or an act of God.[101]

VII. Limitation of Liability

When faced with damage claims by third parties, the pleasure boat owner must consider whether to invoke the benefits of the Limitation of Liability Act (Limitation Act).[102] The Limitation Act limits a vessel owner's liability for an accident to the vessel's post-casualty value if the owner had no knowledge of, or privity to, any negligence or unseaworthi-

95. *Id.* at 996.
96. 1956 AMC 745 (5th Cir. 1956).
97. *Id.* at 752.
98. *Id.* at 753.
99. 1968 AMC 453 (S.D. Fla. 1967).
100. *Id.* at 456.
101. *Id.*
102. *See* 46 U.S.C. app. §§ 181-189 (1988); Fed. R. Civ. P., Supplemental Admiralty Rule F.

ness that caused the accident. The privilege of limiting liability is not widely known among pleasure boat owners.[103] This privilege may also inure to the benefit of a marine insurer when its assured is entitled to limitation.

Section 183(a) of the Limitation Act provides that "the liability of the owner of any vessel . . . for any . . . loss . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[104] This 1851 statute was designed to allow American commercial vessels to compete with their foreign counterparts who were permitted to limit liability, and to promote investment in the domestic commercial shipping industry.[105] The owner's "interest" in the vessel, within the meaning of the statute, does not include insurance money received by the vessel owner[106] on the rationale that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured.[107]

A request for limitation of liability is raised in a separate proceeding by filing a petition or complaint,[108] or may be raised by the vessel owner as a defense in an answer to a suit for damages.[109] There is a requirement that a petition for limitation be filed within six months after the first written notice of claim is received by the owner.[110]

A benefit of the limitation proceeding is the "concursus," which is the power of the court to bring together "into concourse" all claims against a vessel owner in one forum, and to thereby avoid a multiplicity of lawsuits. This restrains all other proceedings against the vessel owner outside of the limitation action.[111] A boat owner who may face multiple claims upon the

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103. Lewis Herman, *Limitation of Liability for Pleasure Craft*, 14 J. MAR. L. & COM. 417, 417 (1983).

104. 46 U.S.C. app. § 183(a) (1988).

105. Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1227 (11th Cir. 1990).

106. City of Norwich, 118 U.S. 468 (1886).

107. *Id.* at 494.

108. 46 U.S.C. app. § 185 (1988).

109. Hammersley v. Branigar Org., Inc., 762 F. Supp. 950, 954 (S.D. Ga. 1991). Note, however, that in the Eleventh Circuit, a petitioner may not base admiralty jurisdiction solely upon the Limitation Act in the absence of a significant relationship between its claim and traditional notions of maritime activity. *See* Lewis Charters, Inc. v. Huckins Yacht Corp., 871 F.2d 1046 (11th Cir. 1989).

110. 46 U.S.C. app. § 185; FED. R. CIV. P., Supplement Admiralty Rule F.

111. Maryland Casualty Co. v. Cushing, 347 U.S. 409, 1954 AMC 837 (1954) (stating that at the heart of this system is a concursus of all claims to insure prompt and economical disposition of controversies in which there are often a multitude of claimants).

sinking of his vessel would benefit from such concursus.

While some courts are critical of the application of the Limitation Act to pleasure crafts, the decisions allow this application, and leave any alterations "up to Congress to fix."[112] One lower court that disallowed limitation to a pleasure boat owner noted that insurance companies have become the principal beneficiaries of the Limitation Act.[113]

The Supreme Court's 1990 decision in *Sisson v. Ruby*, has put the question to rest.[114] *Sisson* involved the owner of a fifty-six foot pleasure craft who petitioned to limit liability. The Court determined that district courts have jurisdiction over a pleasure boater's limitation of liability claim.[115]

The law in the Eleventh Circuit is in accord. *Keys Jet Ski, Inc. v. Kays*,[116] involved the owner of a jet ski who sought to limit liability subsequent to a collision between the jet ski and a fishing boat. The court determined that a jet ski was a "vessel" for purposes of the act, and followed the Fifth Circuit,[117] reasoning that: "[T]he weekend sailor is as privileged to limit liability for damages committed by his yacht as are hard pressed commercial owners for those by their multi-tonnaged merchantmen plying their trade across the crowded shipping lanes . . . ."[118]

Some courts have held that when the boat owner is operating his pleasure craft at the time an accident occurs he obviously has "privity or knowledge" of the boat's negligent operation, and therefore, will not be entitled to limit liability.[119] On the other hand, where an unmanned moored vessel sinks in a hurricane and where the boat owner is without personal fault, limitation of liability should be looked upon favorably.

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112. Endsley v. Young, 872 F.2d 176, 178 (6th Cir. 1989).
113. Baldassano v. Larsen, 580 F. Supp. 415 (D. Minn. 1984).
114. Sisson v. Ruby, 493 U.S. 1055 (1990).
115. Under the Rivers and Harbors Act of 1899, however, the boat owner is not permitted to limit liability when the government seeks to recoup its costs associated with wreck removal. *See* Wyandotte Transp. Co., v. United States, 389 U.S. 191, 205 (1967); *see also* United States v. Blaha, 889 F.2d 422 (2d Cir. 1989).
116. 893 F.2d 1225, 1228 (11th Cir. 1990).
117. The Eleventh Circuit Court of Appeals adopted, as precedent, all of the decisions of the former Fifth Circuit decided prior to Oct. 1, 1991, in Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc).
118. *Keys Jet Ski, Inc.*, 893 F.2d at 1228 (quoting Gibboney v. Wright, 517 F.2d 1054, 1057 (5th Cir. 1975)).
119. Fecht v. Makowski, 406 F.2d 721 (5th Cir. 1969).

VIII. CONCLUSION

It must be mind-boggling for the weekend sailor, or even the serious yachtsman, to learn of the potential liabilities they may be confronted with subsequent to their unmanned vessel being sunk or wrecked in the fury of a hurricane. No doubt, many "innocent" boat owners will become defendants in suits for wreck removal costs, pollution, and property damage claims as a result of Hurricane Andrew. A catastrophic storm classified as an act of God or *force majeure* may exonerate the boat owner from liability for property damage claims. If not exonerated by a *force majeure* alone, boat owners may be judged according to his/her particular marine experience to determine the existence of fault. However, no such test will be available when the owner is faced with claims for wreck removal and pollution. For these claims the boat owner may be liable regardless of marine experience, act of God, or fault.

A storm with the destructive force of Hurricane Andrew will most probably be considered one of unexpectedly "catastrophic" proportions, such that resulting damages in a marina context, may not have been prevented no matter what advance precautions were taken. It's difficult to envision a court finding that the impact and vast destruction caused by this hurricane might have been prevented by the actions of a weekend sailor.

FLORIDA'S PATH OF DESTRUCTION—HURRICANE ANDREW (Historic Publications, Aug. 1992).