

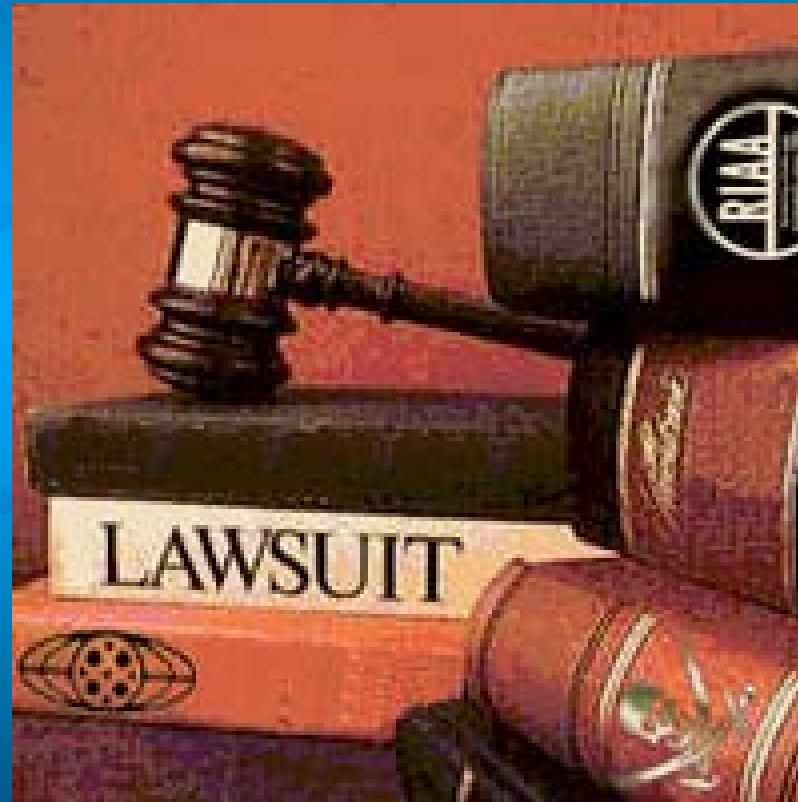
MARINA CONTRACTS AT A GLANCE



Choice of Law Governing Marina Storage Agreements

Wet slip, mooring *and* dry rack storage agreements are governed by maritime law to the exclusion of contradictory state law. *Am. E. Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979). Therefore, both State and Federal courts must apply the federal maritime law when interpreting a marina storage agreement no matter where the yacht is located in the marina.

Possible Claims Against a Marina



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There are three (3) claims a yacht owner and subrogated underwriters can bring against a marina. These claims are: (A) Breach of Contract; (B) Breach of Bailment; and, (C) Negligence.

Breach of Contract

A yacht owner and marina have the duty to Perform the terms of the marina agreement. Should the yacht owner or marina breach its obligation, it is liable for resulting damages.

Breach of Bailment

Marina's Duty to the Yacht Owner Under a Bailment Relationship

Under a bailment relationship, a marina is liable for damages caused by its own negligence or lack of due care in safeguarding the yacht. *Clermont Marine Sales, Inc. v. Binon Gaines Harmon*, 347 So. 2d 836 (Fla. 2d DCA 1977). A marina, however, is not an insurer of the yacht. Meaning that the marina is not liable for losses or damages caused no matter the reason. *City of Clearwater v. Thomas*, 446 So. 2d 1160 (Fla. 2d DCA 1984).

Establishing a Breach of Bailment Claim

A *prima facie* case for a breach of bailment is made when the yacht owner proves that the yacht was: (1) delivered to the marina in good condition; and, (2) damaged while in the marina's possession. *Molasses Corp. v N.Y. Tank Barge Corp.*, 314 U.S. 104 (1941). This is simply a rebuttable presumption. Once the yacht owner establishes the above, a marina can avoid liability by proving a number of defenses shown below.

Breach of Bailment cont.

Marina's Defenses to a Breach of Bailment Claim

The Yacht was Damaged when Delivered

A marina cannot be held liable for damages to a yacht caused before delivery.

Lack of Exclusive Possession

Courts have consistently held that marinas typically do not have exclusive possession of the yacht, and therefore, a lessor/leasee relationship is formed rather than a bailment relationship. *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983); *Security Nat'l Ins. Co. v. Sequoyah Marina, Inc.*, 246 F.2d 830 (10th Cir. 1957). The rationale is that the owner and or its agents (such as captains, guest and repairers) have equal access to the yacht at that of the marina. *Reel Therapy Charters, Inc. v. Marina Management, Inc.*, 2004 AMC 378 (N.D. Fla. 2003).

A marina, however, has been found to be in exclusive possession when it held the only set of keys for the yacht. *Snyder v. Four Winds Sailyacht Centre, Ltd.*, 701 F.2d 251 (2^d Cir. 1983). This argument may be extended to rack storage agreements wherein the facilities hold the yacht's keys and regulates the time the owners can access the yacht. *Hicks v. Tolchester Marina, Inc.*, 1984 AMC 2027 (D. Md. 1983).

Breach of Bailment cont.

The Loss was Not as a Result of the Marina's Negligence or Lack of Due Care

As shown above, a Marina is liable under a breach of bailment theory if its own negligence or lack of due care caused the loss. This is not a heavy burden. In fact, a Florida court held that the mere chaining of a vessel to an immovable object is enough for a jury to determine that a marina was not liable for a stolen yacht. *Clermont Marine Sales*, 347 So. 2d 836 (Fla. 2d DCA 1977).

Waiver of Bailment Clause

Marinas also can “contract out” of a bailment relationship by simply including a clause in the storage agreement which states that the contract does not give rise to a bailment relationship.

Negligence

Marinas are also liable to yacht owners and the yacht's insurers for negligence resulting in the loss or damage to the yacht. As a protective measure, marinas routinely incorporate clauses in the marina agreements designed to exculpate, mitigate or shift damage exposure. Below is an examination of the common clauses found in Marinas' Storage Agreements.

Common Clauses Found in Florida Marina Agreements



Exculpatory Clauses

Nearly every Florida marina storage agreement contains an exculpatory clause. The enforceability of an exculpatory clause mainly depends upon the contract's wording and the bargaining power of the marina and yacht owner.

Construing Exculpatory Clauses

Exculpatory clauses which attempt to hold a marina harmless for a loss are looked upon with disfavor in Florida and strictly construed against the marina. *Sunny Isles Marina, Inc. v. Adulami*, 706 So. 2d 920 (Fla. 3d DCA 1998). Furthermore, exculpatory clauses must clearly express the marina's intention to hold it self harmless for the loss. *Harbor One, Inc. v. Preston*, 172 So. 2d 478 (Fla. 3d DCA 1965). If an exculpatory clause is ambiguous or can be construed to have more than one meaning, it will be deemed unenforceable. *Michel v. Merrill Stevens Dry Dock Co.*, 554 So. 2d 593 (Fla. 3d DCA 1998).

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An Exculpatory Clause Must Contain the Following to be Enforceable:

1. The clause must “clearly and unequivocally indicate the parties’ intention.”

Courts have refused to enforce an exculpatory clause that contains language demonstrating an intention to exculpate itself from its own negligence. *Conch Cove Inc. v. Hartford Accident & Indemnity Co.*, 473 So. 2d 758 (Fla. 4th DCA 1985); *Affolter v. Virginia Key Marina*, 601 So. 2d 1296 (Fla. 3d DCA 1992).

2. The clause must *not* absolve the marina of *all liability* and must *still provide a deterrent to negligence*.

As a matter of public policy, courts have refused to enforce exculpatory clauses which do not provide a deterrent to the marina's negligence. The most common way for marinas to comply with this requirement is to place a monetary limitation to its liability (i.e., "the marina's aggregate liability shall not exceed \$300,000"). Such provisions have been held to provide a deterrent to negligence and; therefore, enforceable.

3. The parties to the contract must have "equal bargaining power."

Finally, both the yacht owner and marina must have equal bargaining power in order for the exculpatory clause to be held valid

Indemnification Clauses

Sample language of an Indemnification Clause

The yacht owner shall indemnify, defend and hold harmless the marina from any costs, expenses, damages and against all claims, demands, loss, law suits, including judgments and attorney fees for damages to property, injury or life to third parties resulting or arising from the yacht owners use of the yacht regardless of fault.

Enforceability of an Indemnification Clause

An Indemnification Clause must be clearly, unequivocally and unambiguously agree to indemnify the marina for any damages to the marina or third parties caused by the vessel regardless of fault. *See e.g. University Plaza Shopping Center v. Stewart*, 272 So. 2d 507 (Fla 1973).

Indemnification Clauses

Indemnification Clauses and the ACE Policy

The ACE Policy expressly excludes from coverage any “liability assumed by you under any contract or agreement”. This will likely exclude any obligation by ACE to respond to a claim brought by the marina pursuant to a marina storage agreement indemnification clause. However, the yacht owner will be obligated to fulfill its indemnification obligation under the marina storage agreement despite underwriters’ denial of the claim.

Waiver of Subrogation Clauses

Sample Waiver of Subrogation Clause

Yacht Owner waives any right or claim against the Marina for damage sustained by Owner which is covered under any insurance policy, and Yacht Owner shall cause its insurance carriers to waive their respective rights of subrogation with respect to the same, and to so notify Marina.

Enforceability of a Waiver of Subrogation Clause

Waiver of subrogation clauses, in and of themselves, have been found enforceable and not contrary to public policy. *Flur Western, Inc. v. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1970); However, as with most risk-shifting clauses, the intent to shift the risk of loss to underwriters must be express and unequivocal. *Conch Cove Inc. v. Hartford Acc. and Indem. Co.*, 473 So. 2d 768 (Fla 4th DCA 1985).

Requirement of Insurance with Additional Named Insured Clauses

Under such clauses, should loss occur, marinas can claim that they are a party to the insurance contract and thereby require underwriters to provide cover for defense costs and indemnity for claims by yacht owners whose vessels were damaged or destroyed at the marina.

Sample language of a Requirement of Insurance and Additional Named Insured Clause

The yacht owner shall, at his sole cost and expense, maintain liability and property damage insurance covering the yacht with liability limits in amounts sufficient to ensure performance by the owner of all of the exemption, waiver, hold harmless and indemnity provisions contained in this agreement, including claims involving premises liability or marina's negligence and/or other fault, and shall have marina expressly identified in the insurance policy as an additional insured.

Requirement of Insurance with Additional Named Insured Clauses

Enforceability of Requirement of Insurance and Additional Named Insured Clauses

If properly worded, such clauses will be deemed enforceable by Florida courts. The key to the enforceability is the express the intention to shift the risk of loss to underwriters. *Continental Ins. Co. v. Kennerson*, 661 So. 2d 325 (Fla. 1st DCA 1995). The example above will likely be enforceable as it clearly requires the yacht owner to maintain liability insurance answerable to the marina's negligence and expressly name the marina as an additional insured in the policy. A marina storage agreement simply reading "Owner to have their own insurance cover"; however, is "far too vague" to shift the risk of loss to the yacht owner's insurer and is therefore unenforceable. *Affolter v. Virginia Key Marina*, 601 So. 2d 1296 (Fla. 3d DCA 1992). .

Requirement of Insurance with Additional Named Insured Clauses

Same Rights and Obligations as the Yacht Owner

If named as an additional insured, the marina will have the same rights and obligation (not more) as the insured yacht owner. *Price v. Zim-Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980).

Waiver of Subrogation

Besides requiring underwriters to respond the loss, adding a marina as an additional insured forfeits underwriters' rights to peruse subrogation efforts against the marina. *Insurance Co. of North America v. Nezelek*, 480 So 2d 1333 (Fla. 4th DCA 1985).

Requirement of Insurance with Additional Named Insured Clauses and the ACE Policy

The ACE policy expressly excludes “any person or legal entity employed by, or the agent of a marina...” in its definition of “Covered Person”.

Furthermore, the ACE policy contains the following clause:

***NO BENEFIT TO OTHERS:** No person or organization which has custody of your insured property and is to be paid for services will benefit from this insurance.*

Pursuant to the express exclusion of marinas and the “No Benefit to Others” clause, a marina is unlikely to benefit from an Additional Insured clause without the Yacht Owner obtaining an endorsement specifically naming the marina as an additional insured. With this said, however, the yacht owner may be individually liable to the marina under a breach of contract theory if it fails to have the marina named as an additional insured.

Hurricane Removal Clauses

After Hurricane Andrew, the Florida legislature enacted Fla. Stat. 327.59 prohibiting marinas from forcing an owner to evacuate its vessel following the issuance of a hurricane watch or warning. Moreover, a marina cannot sue the yacht owner for damages to the marina caused by the failure to evacuate. The yacht owner, however, has a duty to take all reasonable precautions to secure its vessel to protect the marina from harm. *Burklow & Associates, Inc. v. Belcher*, 719 So.2d 31 (Fla. 1st DCA 1998).

In response to Fla. Stat. 327.59, Florida marinas are incorporating clauses in their storage agreements whereby the yacht owner authorizes the marina to secure or remove the vessel from its slip or moorage.

Hurricane Removal Clauses

Sample Language of a Removal Clause

Yacht owner hereby authorizes marina, its employees, representatives and contractors to exercise their best efforts in attempt to secure the yacht from hurricane damages. These efforts may include securing the vessel in its present slip, anchoring my vessel in sheltered waters or whatever actions are deemed to be prudent under the circumstances. Yacht owner further authorize the purchase of additional chain, anchors, anchor rope and other related items, if necessary and available. Yacht owner also agrees to relieve the marina, its employees, representatives' and contractors, of any liability whatsoever, and agree to pay for any items purchased on the yacht owner's behalf.

Enforceability of the Hurricane Removal Clause

There currently are no cases which discuss the enforceability of removal clauses. However, it is likely that such clauses, to the extent of allowing the marina to secure or remove the vessel, will be upheld. With regard to the exculpatory provision, courts will likely treat such clauses as it would a stand alone exculpatory clause previously discussed.

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