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# FISHERMEN'S

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# NEWS

# SAFETY



A photograph showing several commercial fishermen in red waterproof survival suits and black caps floating in the ocean. One man in the foreground is looking towards the right. The water is blue and slightly choppy. The background shows more of the ocean horizon.

*Ocean Peace*  
Rerudder

Bering Sea  
Fisheries Recap

BAREBOAT  
CHARTERS

## Using Bareboat Charters to Expand Fishing Fleets

BY ISAIAK HURST, ESQ.

**A**fter a wintery reprieve, this year's fishing season began in earnest – and not a moment too soon for most of us. Already geared up for the fishing season, some vessel owners may wish to expand their fleets and businesses this year. Yet, finding and accessing cheap capital to build or buy a boat is one of the most ubiquitous hurdles facing vessel owners in the maritime industry. Fortunately, bareboat charters can be used to provide feasible means to expand fishing fleets.

### What is a bareboat charter, and how can it be used to expand a fishing fleet?

In its simplest form, a bareboat charter arises when the Owner leases his or her vessel out to the Charterer for a fixed period of time. This type of contract is known as a "charter party." Once the Charterer takes possession of the vessel, the Charterer becomes entirely responsible for the vessel. This means that the Charterer is accountable for the vessel's crew, fuel, insurance, and necessary maintenance and repairs. In exchange for the Charterer's use of the vessel, the Owner receives a daily, weekly, or monthly stipend known as "charter hire". Effectively, a bareboat charter maximizes the earning capacity of the vessel so that both the Owner and Charterer make money.

The terms and conditions of a bareboat charter party depend on a number of variables, including but not limited to: the purpose of the charter, the bargaining strength of the parties, the length of the charter period, the type of the vessel, and the trade involved. That said, there are certain terms and conditions that are fundamental to any bareboat charter, including: trading warranties that govern where the vessel can go; insurance warranties that dictate the

type of insurance that the Charterer must carry while operating the vessel; and other clauses applicable to the safe operations of the vessel, such as crewing standards, permitted cargoes, and indemnity agreements. Regardless of the terms and conditions of the bareboat charter, these contracts provide Owners and Charterers with a clear, contractual roadmap that lands each party at its respective financial destination.

Once the charter party has expired, the Charterer redelivers the vessel to the Owner in the same condition as it was found upon delivery to the Charterer – minus ordinary wear-and-tear. Importantly, in some instances, the charter party will allow for a transfer of ownership once the charter party has ended, which is analogous to a residential

tenant's "rent-to-own" agreement with his landlord. Thus, a bareboat charter party employs the Owner's vessel and later may enable the Charterer to buy a boat without jumping through banks' traditional gauntlets, which is a win-win for both parties.

### Are there any special considerations for Owners and Charterers?

As with any contract, however, the parties have competing concerns: while the Owner is most often concerned with non-payment of hire, failure to maintain/repair the vessel, and failure to arrange/maintain insurance on the vessel, the Charterer is primarily concerned with chartering an unseaworthy vessel. Pertinently, the Owner and the Charterer in a bareboat charter

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## Bareboat Charters

frequently contest the allocation of liability.

For the Charterer, bareboat charters present an attractive alternative to traditional financial arrangements, but they do come with increased liability. The Charterer becomes responsible for paying hire to the Owner, wages to the crew (Maintenance and Cure), personal injuries (Jones Act claims), any ordinary diligence in the care of the vessel, any loss or damage to the vessel, including but not limited to that which is caused by collisions, any pollution damage (OPA 90), and any third party liabilities as if the Charterer was the Owner itself. Basically, to acquire a boat through a bareboat charter, the Charterer must first assume a significant amount of liability.

For the Owner, bareboat charters reduce liability, but require complete surrender of the vessel. On the one hand, if everything proceeds as planned under the charter party, the Charterer bears the responsibility for nearly all the costs associated with the vessel, while the Owner just collects the charter hire. On the other hand, in order to establish a valid bareboat charter, Owners must completely surrender "operational control" of the vessel to the Charterer for the duration of the charter period. Operational control is a legal term-of-art that means that the Owner must go so far as to relinquish "possession,

command and navigation" of the vessel in a manner that is "tantamount to, although just short of, an outright transfer of ownership." *Guzman v. Pichirilo*, 1962 AMC 1142 (1962). Legally, this requires three elements: 1) full possession and control of the vessel must be delivered to the Charterer for a specified period of time; 2) the vessel is then directed by its Master, manned by his crew, makes his voyages, and carries the cargo as he chooses; and 3) the services performed on board the vessel are primarily for the benefit of the Charterer. Essentially, U.S. courts require evidence that the Owner has completely and exclusively relinquished possession, command, and navigation of the vessel to the Charterer.

### How might one reduce legal exposure when using a bareboat charter?

Avoiding liability is not as easy as one might think—even with a sophisticated, well-written contract. To avoid liability, two common scenarios arise that often engender more problems:

1) In an effort to avoid liability, some vessel owners bareboat charter their vessels to their own Masters. From there, the Masters proceed to hire their own crews. Yet when things go south, i.e., someone gets hurt or the vessel is damaged, the injured crewmembers or the vessel Owner will challenge the validity of the bareboat charter party. This is not surprising because, after all, friends rarely sue each other. And, more often than not, the Master of the vessel does not have as deep of pockets as the former vessel owner.

2) In an effort to double their catch or to simply increase revenue, shipowners will informally charter one of their vessels to a friend who, in turn, subsequently hires their own crew (usually a friend) to work the boat. Following an injury, however, the injured crewmember soon realizes that his longtime friend/captain has no financial means of providing the necessary maintenance and cure obligations. As you would expect, the injured crew and his new attorney then turn to the shipowner for restitution, and by alleging that they were employees of the shipowner, not the charterer, they can effectively tap into the shipowner's insurance policy. Indeed, these loose crew arrangements are ripe for maritime litigation, because the Owner, not the Charterer, will typically have the necessary insurance to pay for a claim, and, as a general rule, injured crew and their lawyers tend to follow the money.

The landmark case illustrating the above scenario is *Deal v. A.P. Bell Fish Co.*, 1985 AMC 446 (5th Cir. 1982). The case involved the disappearance and presumed death of Mr. Richard S. Deal, a deckhand on the F/V MISS IRENE. Mr. Deal's wife and minor child sought a six-figure recovery from A.P. Bell Fish Company ("AP Bell"), alleging Jones Act and unseaworthiness violations. The case proceeded all the way to the 5th Circuit Court

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of Appeals, which scrutinized the bareboat charter agreement between Captain Creamer (the skipper of the MISS IRENE) and AP Bell (the Owner of the MISS IRENE). First, the court was not impressed with the Charterer's ability to hire and fire crewmembers, finding that this ability was customary in such instances regardless of who owned the boat. Second, the court was not impressed with the fact that the Charterer was allegedly going to give the Owner a percentage of his catch, finding that this agreement was merely illusory since it was oral and lacked set duration. Third, the court noted that all of the vessel's repairs were charged to the Owner, not the Charterer, which suggested that the Owner had retained operational control of the vessel. The court concluded that the Charterer lacked sufficient command, possession, and control of the vessel to validate the bareboat charter, and thus, that the Owner, not the Charterer, was responsible for Mr. Deal's death. Essentially, if the Owner retains operation control of the vessel, there is no shelter from liability, regardless of the sophistication of the contract.

#### **So, with all this liability, is a bareboat charter a good idea?**

Bareboat charter agreements can be a great financial alternative, especially for those lacking capital. However, the liabilities associated with these arrangements must be taken seriously. Owners need to be careful when bareboat chartering out their vessels to long-time captains or crewmembers—especially without written contracts. As *Deal v. A.P. Bell Fish Co.* illustrates, bareboat owners can be liable to 3rd parties even when they had no formal contract with that party.

That said, parties conversant with the terms of a standard bareboat charter party are less likely to be caught off-guard by onerous clauses or unforeseeable 3rd party liability claims. So,

yes, a written bareboat charter does reduce miscommunication and risk, so that both parties can concentrate on the essential goals of the contract—to go fishing and

make money. In the absence of traditional financing arrangements, owners can use carefully written bareboat charters to expand fishing fleets. FN

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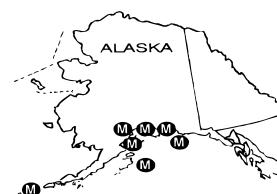
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