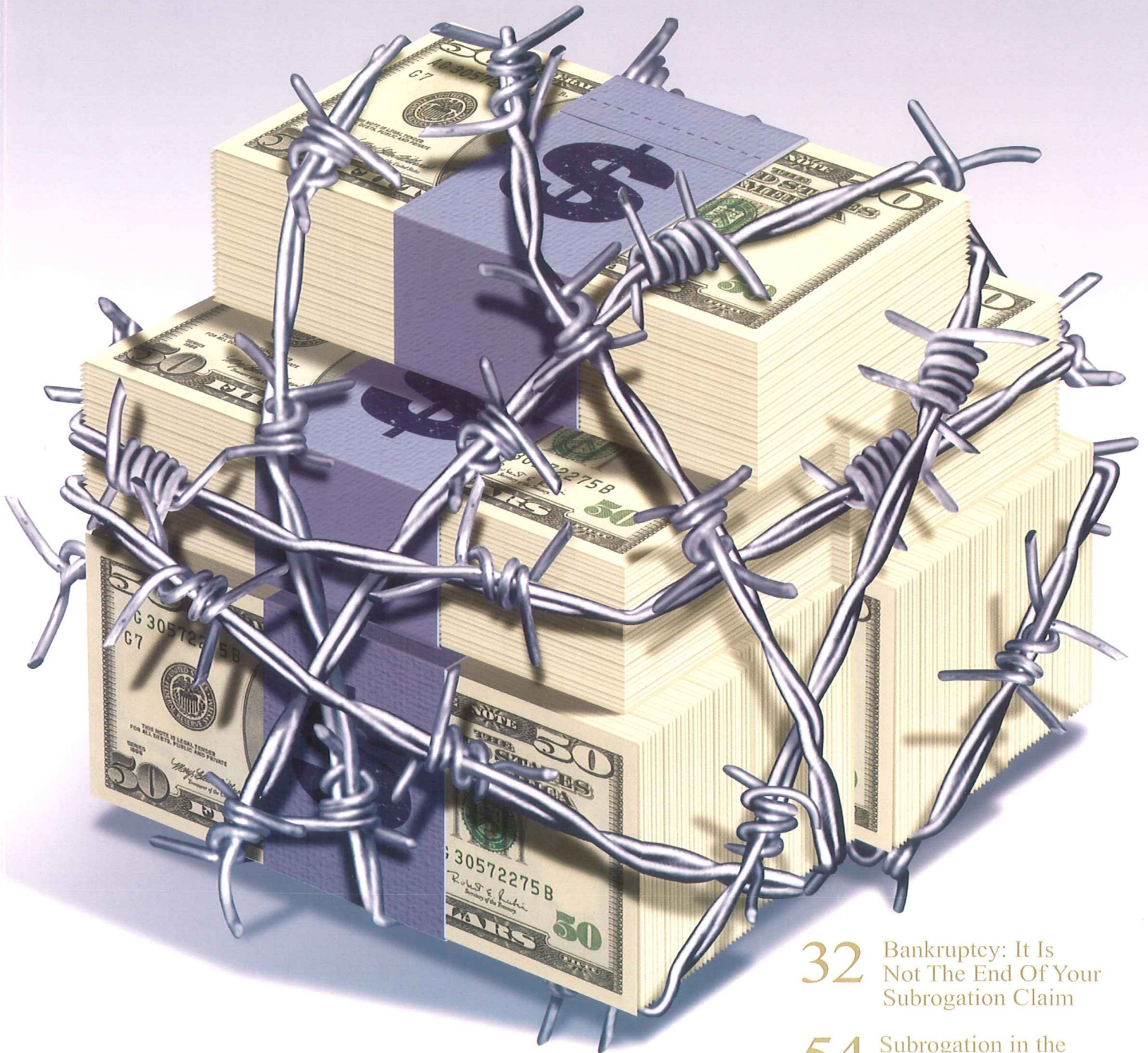


# subrogator<sup>®</sup>

A PUBLICATION DEDICATED TO THE ART OF RECOVERY BY NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS ► WINTER 2010



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Quest Fore, Inc.

*Publication Date: February 2010*

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Published by The National Association of Subrogation Professionals

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# Local Railroad Company Recovers for Demolished Bridge Fender

IN *NORFOLK AND PORTSMOUTH BELT LINE RAIL ROAD CO. V. M/V MARLIN*, 2009 WL 3363983 (E.D.VA.), 2009 A.M.C. 2465, THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AWARDED DAMAGES OF \$286,456.00, PLUS PREJUDGMENT INTEREST, AGAINST THE CARGO SHIP THAT DESTROYED A 50 YEAR-OLD WOODEN FENDER SYSTEM PROTECTING A RAILROAD BRIDGE.

**T**he railroad suffered a loss totaling \$570,500.00, for both the immediate costs of surveying damage and clearing the waterway, and later replacing the demolished fender. In this admiralty case, the shipowner conceded that it could not overcome the rule of *The Oregon*, 158 U.S. 186 (1895), (presumption of fault that arises when a moving vessel collides with a stationary object), admitted liability for response costs, and stipulated to the reasonableness of replacement costs. It contested liability for the cost of replacement, contending that the fender had exceeded its service life and was, therefore, depreciated 100%. As the vessel MARLIN was solely at fault, the only issue at trial was the quantum of damages.

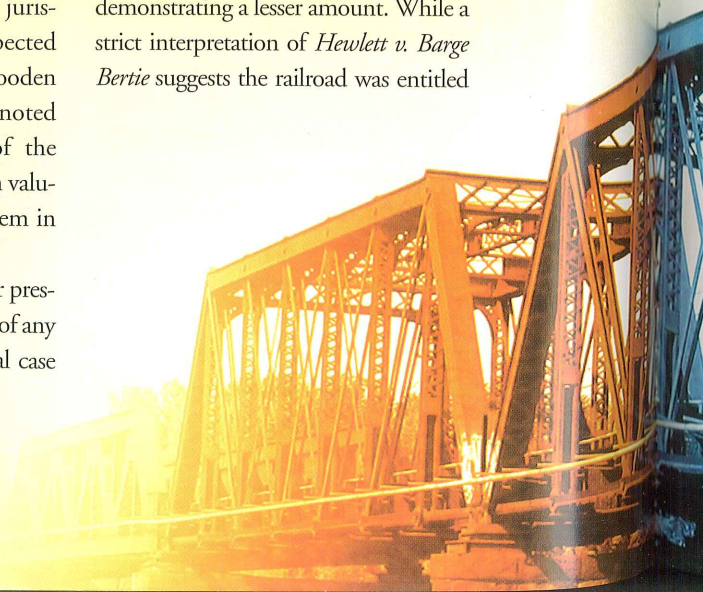
Because wooden bridge fenders have no ascertainable market value, the railroad met its burden of proof on damages by its stipulation that the replacement cost was fair and reasonable. This shifted to the shipowner the burden of demonstrating a lesser or depreciated amount, in accordance with

*Hewlett v. Barge Bertie*, 418 F.2d 654, 657 (4th Cir. 1969).

MARLIN proffered testimony of a highly experienced marine surveyor on the pre-incident value of the fender. Although the Court allowed the marine surveyor to testify about his personal observations, all expert opinion testimony relating to the pre-incident value or depreciation was excluded. Despite the Court's finding that he had extensive experience, it found "no evidence that [the marine surveyor] had any experience, training, or specialized knowledge in estimating the pre-incident value of a structure." Rejecting precedent from other jurisdictions concerning the expected service life of certain similar wooden marine structures, the Court noted that there was no evidence of the appropriate factors to apply when valuing a wooden bridge fender system in this case.

The plaintiff's decision to defer presentation of evidence or testimony of any depreciated value until its rebuttal case

proved critical to the favorable result. After rejecting the shipowner's proffered expert testimony, the Court relied upon the factual testimony of several marine construction workers, who removed and replaced the structures, to establish the pre-damage value of the structure based on its actual physical condition. Among other things, this case highlighted the rule applicable in admiralty cases that when a structure, such as the railroad's 50 year-old wooden bridge fender, does not have a readily ascertainable market value, the first measure of damages is the cost of replacing the system, thereafter shifting to the defendant the burden of demonstrating a lesser amount. While a strict interpretation of *Hewlett v. Barge Bertie* suggests the railroad was entitled





to recover 100% of its loss (based on defendant's failure of proof), the Court properly balanced the equities in arriving at its determination that even a 50 year-old and visibly deteriorated structure had substantial value to the railroad. "A court of admiralty is ... a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction." 2009 WL 3363983, \*10, (quoting *The David Pratt*, 7 F. Cas. 22, 24 (D.Me. 1839)).

Cases involving recovery for damaged marine structures, including piers, wharves, docks, bulkheads, and fenders – even those attached to land – require admiralty practitioners to apply the unique rules of admiralty applicable in these maritime cases. In this case, the rules of admiralty provided for an additional award of nearly \$40,000 for pre-judgment interest.

*The Norfolk and Portsmouth Belt Line Rail Road Co. was represented by James L. Chapman, IV, and Steven M. Stancliff of the firm of Crenshaw, Ware and Martin, P.L.C., 1200 Bank of America Center, Norfolk, Va. 23510.*

**The railroad suffered a loss totaling \$570,500.00, for both the immediate costs of surveying damage and clearing the waterway, and later replacing the demolished fender.**

