

# BUBBLERS – AND WE DON'T MEAN CHAMPAGNE

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For years, some marinas on the Great Lakes have utilized compressed air machines in the winter to prevent ice damage by ensuring that ice does not form around permanent docks and large boats. These are often referred to as “bubblers.” In the past, the use of bubblers on inland lakes in Michigan has been rare, but the practice is increasing.

Many riparians (including the authors of this article) believe that bubblers on inland lakes create a severe safety hazard and should be banned. What is the problem? Quite simply, bubblers create open water and also weaken the ice for some distance beyond the open water. It is very easy for children, pets, ice fishermen and snowmobilers to fall into the open water or through weakened ice near bubblers, particularly at night or during snowstorms. We believe that the limited benefit of bubblers to property such as docks and boats is greatly outweighed by the danger to life. Furthermore, permanent docks should generally not be utilized in inland lakes anyway, and boats should be removed in the winter.

Are bubblers legal? Probably. Under the Michigan Marine Safety Act (MCL 324.80103 et. seq.), the DNR does have jurisdiction to abate dangers or nuisances to navigation, but it is unclear whether “navigation” is involved in frozen waters. Local municipalities (cities, villages and townships) can enact local ordinances which expressly ban or severely regulate bubblers. However, in *Belle Maer Harbor v Harrison Charter Township*, 170 F.3d 553 (6th Cir. 1999), a federal appeals court invalidated a local ordinance which regulated bubblers. Notably, the ordinance was not struck down due to the inability of a municipality to pass such an ordinance, but rather because it was unduly vague. It is highly likely that a well-drafted ordinance would be upheld by the courts. Furthermore, while a riparian generally owns the bottomlands under a lake adjacent to his or her shoreline property, the waters are owned by the people in the state of Michigan. Accordingly, a use such as bubblers which dramatically affects public waters and the uses thereof would normally be an entirely appropriate subject for local municipal regulation.

In the old days, one of the incidents of riparian ownership was the right to cut and remove ice over one's bottomlands for use in the riparian's ice box or for sale to other users. That consumptive use of ice was still subject to the “reasonable use doctrine” (also sometimes known as the “riparian use doctrine”).

In other words, ice could only be removed to such a degree and in such fashion so as not to unreasonably endanger other riparians or interfere with the coequal rights of other riparians to remove ice. Is not the use of a bubbler simply another permitted use akin to removal of ice in the olden days? Perhaps, but it is possible that the reasonable use doctrine as applied today would prevent significant ice removal. In the distant past, open water pursuant to ice removal was much less of a threat to other people than it would be today for at least two reasons. First, most lakes were remote or lightly populated, such that the chances of someone falling through a large open hole in the ice were remote. Second, travel on the ice almost always involved walking, and on rare occasions, horseback travel. It is much easier to fall through a large hole in the ice today with a high speed snowmobile, 4-wheeler, or vehicle, which did not exist in the old days.

By definition, the reasonable use doctrine changes over time to meet contemporary situations. It is possible that the courts would find that large scale ice removal from lakes would now be unreasonable. It is also possible that the courts could find that bubblers on many inland lakes would constitute an unreasonable interference with the rights of others to use the whole surface of the frozen lake in a safe fashion. What about ice fishing holes? Rarely are they large enough on inland lakes to allow a snowmobiler, 4-wheeler, or even a pedestrian to fall into the water.

Even without a specific state or local law making bubblers illegal on inland lakes, it is usually foolish to utilize bubblers due to the liability potential. If someone drowns or is injured due to open water or weakened ice caused by a bubbler, it is almost inevitable that the owner or operator of the bubbler will be sued for damages under tort liability. It is highly probable that a jury could find such a person liable based on negligence, if not gross negligence or even recklessness. It is unlikely that markers or warning signs would prevent such liability.

It is unfortunate that in this litigious society everyone tends to think only in terms of legal requirements or potential tort liability. Before a riparian even considers using a bubbler, one would hope that they would decide not to use a bubbler due to more important considerations such as human life, safety and courtesy.