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AN OVERVIEW OF MARITIME LIENS AND THEIR PRIORITIES IN THE UNITED STATES

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Preface

The author admonishes the reader that this paper is intended as a general and practical overview of maritime liens and their priority in the United States.

Definition

A maritime lien under American law has been defined as:

"... a right of property in a ship adhering to it wherever it may go, vesting a right in the person whose claim is thereby secured, to cause a sale of the ship in a proceeding directly against it in order to obtain satisfaction of a debt."

In the *Rupert City*, 213F 263 (SD Wash 1914); *Pierside Terminal Operators, Inc* v. *M/V Floridian*, 389 F Supp 25, 1974 AMC 1954 (ED Va 1974), aff'd 529 F 2d 221, 1975 AMC 2484 (4th Cir 1975).

Procedure for enforcement

In the United States a maritime lien is enforced by an *in rem* action against the vessel itself. The action is directed solely against the maritime property; if the owners of property appear they do so as claimants of an interest, not as defendants unless joined as defendants *in personam*. A maritime lien in the United States can only be enforced by proceeding *in rem* in a court having admiralty jurisdiction which is the United States District Court. The procedure for initiating an action is to be found in the "supplemental rules for certain admiralty and maritime claims of the federal rules of civil procedures" as promulgated by the United States Supreme Court, specifically Rule C. It should be noted that these rules have local additions relating to such matters as publication of notices, party's right to intervene in proceedings, etc., and thus must be consulted.

In general, the process is begun by the filing of a verified complaint also, an allegation that the *res* is within the district or will be during the pendency of the action. The complaint may be filed "in advance" of the ship's arrival and held in abeyance if the plaintiff so requests. The complaint and supporting documents will be reviewed by the court. If the plaintiff has met the requisite conditions for an action, the court will issue an order directing the clerk of the court to issue a warrant of arrest which will then be directed to the US Marshal for execution.

The complaint should accurately describe the ship and her location. Before the serving of process, the Marshal will require a deposit from the plaintiff to cover his initial expenses, again local district court rules must be consulted.

The plaintiff meanwhile must comply with any rules relating to the publication notice of the action of an arrest. Having learned of the arrest or pending arrest of the vessel, the ship owner may seek to have the ship released on a deposit of sufficient security. When a ship is not so released she may be sold by the Marshal acting on orders of the court.

The vessel or other maritime property must be arrested under process of the court to establish jurisdiction over the vessel or other property against which the lien is asserted: *Goodman* v. *1973 26 Foot Trojan Vessel*, 859 F 2d 71 (8th Cir 1988); *Alaska Pipeline Service Co* v. *The Vessel Bay Ridge*, 703 F 2d 381, 1983 AMC 2719 (9th Cir 1983). *In rem* actions can only be brought in the US District where the vessel can be arrested. The jurisdiction of the court in an action *in rem* is limited to the value of the property. Ownership over the vessel and/or the maritime property does not give rise to jurisdiction *in personam* unless the individual defendants have been joined *in personam*.

A maritime lien may attach to a vessel, the cargo, or the wreck of the vessel and/or the cargo, and/or the proceeds of their sale and the freight.

A vesssel is defined by statute as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water": 1 USC §3. This definition has been adapted in a number of various cases: *M/V Marifax* v. *McCrory*, 391 F 2d 909 (5th Cir 1968); *The New Yorker*, 93 F 495 (1899). The former SS *Queen Elizabeth* moored as a tourist attraction at Port Everglades, Florida: *In the Matter of the Queen, Ltd Bankrupt*, 1973 AMC 646; *Broere* v. *Two thousand one hundred and thirty-three dollars*, 72 F Supp 115, 1947 AMC 1523 (ED NY 1947), a salvage claim against money found in a wallet of a floating corpse and *Medina* v. *One Nylon Purse Seine*, 259 F Supp 789 (SD Ca 1966), a salvage claim against a fishing net found floating at sea. Maritime liens may also attach to leased equipment on board the vessel: *United States* v. *Golden Dawn*, 222 F Supp 186, 1964 AMC 691 (ED NY 1963).

Should the vessel be owned by the government of the United States, the Suits in Admiralty Act of 1920 provides for a cause of action against the United States *in personam* where an *in rem* liability would have arisen on the same facts as against a private owner: *The Western Maid*, 257 US 419 (1922).

Seamen's wages

Seamen's wages are "... sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds of the security for his wages ...": *The John G Stevens*, 170 US 113 (1898).

The term seaman, embraces "... all employed upon a vessel in any capacity ... whose labor contributes in any degree to the main object in which the vessel is engaged ...": *Saylor* v. *Taylor*, 77 F 476 (1896). However, in *Worthington* v. *Icicle Sea Foods, Inc*, 774 F 2d 349, 1986 AMC 2653 (9th Cir 1984), it was held that the status of a seaman for wage protection depended on the character of the work performed by the claimant. The court held that the employee's duties on a dredge were primarily industrial in nature and not that of a traditional seaman, as defined in 46 USC §10101(3).

Under the general maritime law of the United States, the master of a documented vessel has the same lien with the priority against the vessel for his wages as any other seaman serving on the vessel: 46 USC §11112.

Salvage

A salvage lien is a "preferred" maritime lien, with priority over a mortgage whether it arises from "pure salvage" or "contact salvage": 46 USC §3131(5)(F); *A L Veverica Salvage Co* v. *Buccaneer No 7*, 488 F 2d 880, 1974 AMC 26 (5th Cir 1974).

Tort

Claims arising from collision damage or personal injury give rise to a majority of the maritime tort litigation. Moreover, it appears from the interpretation of the case of *State of California* v. *SS Bournemouth*, 307 F Supp 922, 1970 AMC 642, 318 F Supp 834, 1971 AMC 485 (CD Ca 1967), that any maritime tort connected with a vessel on a navigable water will give rise to maritime lien. This case held that a state has a lien against a vessel which tortiously damages navigable waters and marine life within its territory. However, a seaman's claim for personal injuries based upon the Jones Act of 1920, 46 USC §688, does not give rise to a maritime lien; the action may be brought only *in personam*.

The preferred ship mortgage

Prior to the passage of the Ship Mortgage Act of 1920, a mortgage on a vessel and a proceeding to enforce it, was not a matter that could be litigated in an admiralty court. *The Thomas Barlum*, 293 US 21 (1934); *Bogart* v. *The John Jay*, 58 US 399 (1854). Its purpose was to improve the lienholders' security and to encourage the establishment of a strong US merchant fleet: 46 USC §§31301 *et seq*.

The Act provides that a ship mortgage, duly executed and recorded in accordance with the Act, is accorded the status of a lien upon the mortgage vessel, is enforceable *in rem* in Admiralty and is given priority over all claims against the vessel, except preferred maritime liens, expenses and costs allowed by the court: 46 USC §31301(5). It has been held that contractual obligations to provide services to a vessel entered into prior to recording, and endorsement, of the mortgage even though services may be provided to the vessel after perfection of the mortgage, are deemed to arise prior in time to the perfection. *Reconstruction Finance Co* v. *The Eastern Shore*, 31 F Supp 694, 1940 AMC 388 (D Md 1940). Construction requisites for perfection of preferred ship's mortgage are strictly enforced. However, preferred status of the mortgage is not defeated because of typographical errors or minor discrepancies in execution or recording of the mortgages and related documents; provided "there is an honest and substantial compliance with the statute": *Prudential Insurance Co* v. *SS American Lance*, 870 F 2d 867, 1989 AMC 1097 (2nd Cir 1989).

To be eligible to be filed with the Coast Guard, a mortgage must be accompanied by a bill of sale, conveyance, mortgage, assignment, or other

related instrument and must: (1) identify the vessel; (2) state the name and address of each party to the instrument; (3) if a mortgage, state the amount of the direct or contingent obligations that are or may become secured by the mortgage, excluding interest, expenses and fees; (4) state the interest of the grantor, mortgage or assignor in the vessel; (5) state the interest sold, conveyed, mortgaged or assigned; and (6) be signed and acknowledged: 46 USC §31321(A)(2). The mortgagor must have valid title to the vessel to be accorded preferred status.

The profits of the vesssel are not subject to a mortgage lien since a preferred ship mortgage does not create an all encompassing right because the preferred shipped mortgage is merely a pledge for payment of the shipowner's debts, as opposed to debts incurred by the vessel: *In Re Levy-Mellon Marine*, 61 BR 331, 1987 AMC 472 (WD La 1986).

Causes of action to foreclose a ship's mortgage can be brought only in United States District Courts, in Admiralty: 46 USC §31325(b); *Detroit Trust Company* v. *The Thomas Barlum*, 293 US 21, 1934 AMC 1417 (1934).

Preferred ships' mortgages, under 46 USC §31301(5), have priority over post-mortgage statutory liens for necessaries, but are junior to liens for wages for seamen and wages due to stevedores hired by the vessel, general average, salvage and liens for necessaries arising prior to the filing of the mortgage, to the extent that pre-mortgage liens are not destroyed by application of doctrine of laches. See "What is a Preferred Maritime Lien Under the Ship Mortgage Act", 42 ALR Fed 542.

Mortgages and the supporting loan documents usually provide language that allows the mortgagee to take possession of the mortgage vessel and conduct a private non-judicial sale of the vessel. Such non-judicial sales do not extinguish other maritime liens from the vessel. Title 28 USC §201(b) sets forth the procedure for judicial approval of private sales. Title 28 USC §204 makes §201(b) applicable to private sale of personalty as well. The enforceability and effect of self-help and private sale provisions in a ship mortgage are governed by state law as set forth in *Price* v. *Seattle First National Bank*, 582 F Supp 1568 (WD Wa 1983). However, the effect of a non-judicial sale on any right to a deficiency depends on applicable state law. In the case of *Bank of America* v. *Fogle*, 637 F Supp 305, 1986 AMC 2005 (ND Ca 1985) the court held that judicial approval of a private sale must be obtained, or, under California law, the mortgagee/lender forfeits its right to pursue any deficiency under the note after distribution of the sale proceeds. However, in *Deitrich* v. *Key Bank*, N/A 693 F Supp 1112, 1989 AMC 1330 (SD Fl 1988) the court held that where the mortgage so provides, the mortgagee can utilise state law self-help procedures to repossess the vessel and conduct a private foreclosure sale. If the sale complies with those procedures, Florida law allows recovery of the deficiency judgment.

Foreign mortgages

Under 46 USC §31328, except for fishing vessels including fish processing and other tender type vessels and pleasure vessels, United States documented vessels cannot be validly mortgaged to foreign mortgagees absent the use of a qualified US citizen trustee approved by the Secretary of State of Transportation: *Chemical Bank New York Trust Company* v. *West Hampton*, 358 F 2d 574, 1966 AMC 1136 (4th Cir 1965); 46 USC §31328.

As previously stated a maritime lien such as one for salvage, may attach to the leased property aboard a vessel that itself is subject to a maritime lien. However, mortgage liens do not attach to the leased property: *Bank of New Orleans* v. *Marine Credit Corp*, 583 F 2d 1063, 1980 AMC 754 (8th Cir 1978). However, in the case of *Southwest Washington Production Credit Ass'n* v. *O/S New San Joseph*, 1977 AMC 1123 (ND Ca 1977), the court found that the equipment in issue to be the subject of a conditional sale contract, rather than a lease and thus was subject to the mortgage. Title 46 USC §31325 describes the procedure for foreclosure of a preferred ship's mortgage. Actual notice of the action must be given to the master or the person in charge of the vessel and to any person having given notice of a lien under §31343, and to any mortgage holder recorded under §31321.

The ship mortgage act does provide for the recognition and enforcement of ship mortgages on foreign-documented vessels perfected under the laws of the nation of the vessel's flag: 46 USC §31301(6)(B). Further 46 USC §31326(b)(2) provides that said preferred mortgage on a foreign vessel is subordinate to a maritime lien for necessaries which were provided in the United States.

Maritime liens have been characterised as "secret liens", in that they are perfected when they arise. Therefore, to be perfected, they need not be recorded. The same is not true of a ship's mortgage. For a ship's mortgage to be perfected it must be recorded with the Coast Guard Vessel Documentation Office in the port where the vessel is documented and meet the statutory requirements as prescribed in 46 USC §31343, CFR §67.29 *et seq*.

The effect of a foreclosure of a maritime lien or preferred ship mortgage is to terminate any claim in the vessel existing on the date of the sale of the vessel and to sell the vessel free and clear of any and all liens: 46 USC §31326(a).

The claims upon which the action was brought to enforce the lien or mortgage attach to the proceeds of the sale: 46 USC §31326(b).

Repairs, suppliers and other necessaries

One of the essential roles of a vessel in commerce is to move expeditiously about the sea. To do so, the vessel must be kept in good repair and must be well supplied with stores, bunkers and other necessaries. American law recognises the importance of this concept by allowing the ship repairer and materialman a maritime lien against the vessel.

This type of lien is alive and well and accounts for most of the lien litigation in the United States.

Prior case law was crudely codified under the Federal Maritime Act 1910 amended in 1920 and again in 1991. See 46 USC 31301(4) and (5), 31341–31343. Title 46 USC §31307 supersedes any state statute conferring a lien on a vessel. Some examples of necessaries include repairs, provisions, power, liquor for passenger vessels, and insurance premiums. The term "other necessaries" has been liberally interpreted by US courts "... we think the statutory words 'other necessaries' should not be narrowly interpreted ... but that they should be given a broad meaning ... and held to include maritime services generally at least in so far as port services are concerned, whether such services consist of the furnishing of labour or material": *The Western Wave*, 77 F 2d 695, 1935 AMC 985 (5th Cir 1935), cert den 296 US 633 (1935).

Breach of charterparty obligation

Under American law unlike English law, the breach of a charterparty gives rise to a maritime lien. The charterer, therefore, has a lien on the ship, on a breach by the owner; the owners have a lien upon the cargo and freights on a breach by the charterer: *The Director*, 27 F 708 (1886); *The Bird of Paradise*, 76 US 454 (1866). However in *Kopac International Company* v. *M/V Bold Venture*, 638 F Supp 87, 1987 AMC 182 (WD Wa 1986), the court distinguished torts arising in carriage situations from breach of a charterparty, and held that claims of a charterer arising out of the owner's non-performance of its charter obligations are grounded in the contract rather than in tort and therefore are subordinate to an earlier recorded preferred ship's mortgage. The court distinguished the claims arising from contract as opposed to those arising from tort on a basis of whether they arose "from purposeful activity in the course of performing under the charterparty ...".

Notice

In 1971 Congress amended the former 46 USC §973 (now §31341(a)) and changed the long-standing rule that a "provider" had the burden of determining that a charterer had authority to incur liens, by reviewing the charter for any "no lien clause", all at his risk. Since 1971, it is deemed that the officers and agents of a vessel, even if appointed by a charterer or purchaser in possession, have authority to incur liens, unless the "provider" has actual notice of a lack of such authority: *Marine Fuel and Supply Towing, Inc* v. *M/V Ken Lucky*, 859 F 2d 1405, 1989 AMC 390 (9th Cir 1988). However in the case of *Maritime Coatings of Alabama, Inc* v. *United States*, 674 F Supp 819 (SD Ala 1987) the court held that it is presumed a provider knows that a shipyard or other person having possession of a US Navy vessel or other government-owned vessel has knowledge that the person in possession has no authority to incur liens against said vessel: *Inversions Isleta Marina, Inc* v. *United States*, 650 F Supp 5 (DPR 1986).

However, the court in *Ramsy Scarlett Company* v. *SS Koh Eun*, 462 F Supp 277, 1979 AMC 970 ((d) Va 1978), held that if a "provider" has actual knowledge of a "no lien clause" in a charterparty, then he has no lien for necessaries ordered by the charterer. Providers have no duty to make an inquiry. Title 46 USC §31341 codifies the person and/or persons presumed to have authority to order necessaries and bind the vessel and her owners.

The following sample form letter has been sent to suppliers in US ports by shipowners who have chartered their vessels; so as to prevent a maritime lien for necessaries arising.

> Dear Sirs,
> We have time chartered our ___ flag vessel named the ___ to Messrs ___ as charterers.
>
> It has come to our attention that in your capacity as ___ at the ports of ___ where our said vessel may be trading, you may be called upon by said charterers to furnish ___ for their use in connection with the vessel.
>
> We wish to advise for your guidance and give you notice that under the terms of the charter between us as owners of said vessel, and said charterers, neither the charterers nor the master nor any other person has power or authority to pledge either our or said vessel's credit, or to create, or permit to be created any liens on

> our said vessel, and that accordingly any such furnishing by you to our said vessel will be so furnished solely upon the credit of Messrs ____ as charterers, and not on the credit of the vessel or ourselves as her owners.

The master and/or the person ordering the repairs and/or necessaries should give the following receipted clause:

> The goods/or services being hereby acknowledged, receipted for, and/or ordered are being accepted and/or ordered solely for the account of charterers of the vessel ____ and not for the account of said vessel or her owners. Accordingly, no lien or other claim against said vessel or her owners can or will arise.

Executory contracts

As a general proposition executory contracts do not give rise to maritime liens, as the interim liability of a particular vessel does not arise until "necessaries" are delivered or furnished to the vessel. Similarly in contracts for workage, towage, salvage and pilotage, the service must be furnished before the contract comes into being. The same is also true of cargo. The lien does not arise until the cargo is loaded aboard the vessel or its officers take control of the cargo: *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co*, 260 US 490, 1923 AMC 55 (1923).

An exception occurs when the cargo passes into possession by the vessel's master and bills of lading are issued, liens attach irrespective of whether the cargo was ever loaded aboard the vessel: *Buckley* v. *Naumberg Steam Cotton Company*, 65 US 386 (1860). A charterparty is no longer executory in nature and a maritime lien may arise from a breach of the charter, when, under its terms, the vessel is tendered to the charterer: *EAST, Inc* v. *M/V Alaia*, 876 F 2d 1168 (5th Cir 1989).

A person who advances money to pay for the necessaries which gives rise to a maritime lien claim stands in the shoes of the suppliers whose debt has been paid provided: (1) the money is advanced to the ship; (2) it is advanced on the order of the master or someone with similar authority and (3) the money is actually used to satisfy outstanding or future lien claims: *First National Bank of Jefferson Parish* v. *M/V Lightning Power*, 851 F 2d 1543, 1989 AMC 170 (5th Cir 1988).

Persons entitled to maritime liens

To assert a maritime lien, the claimant cannot himself have a direct ownership interest in the vessel: *Medina* v. *Marirazon Company Naviera, SA*, 709 F 2d 124, 1983 AMC 2113 (1st Cir 1983).

Owners of vessels and others in fiduciary relationships, such as a general agent who maintains a running account with his principal [the shipowner], has no maritime lien for advances and disbursements. He, as general agent, is presumed to rely exclusively on the credit of the shipowner, and not on the security of the ship: *ES Binnings, Inc* v. *M/V Saudi Riyadh*, 815 F 2d 660 (11th Cir 1987). This presumption, may be and has been rebutted: *First National Bank of Jefferson Parish* v. *M/V Lightning Power*, 851 F 2d 1543, 1989 AMC 170 (5th Cir 1988). But a "specialisation agent"—one who submits his

accounts on a voyage basis and looks to the credit of the ship, and not to the owner, is allowed a maritime lien in respect of his advances and disbursements, see *First National Bank, supra.*

Priorities

When the proceeds of the sale of the vessel and/or the *res* are insufficient to satisfy outstanding claims, the question of priorities arises.

As a general rule, maritime claims have preference over non-maritime claims; with maritime lien claims having priority over non-maritime claims: *The Lottowanna*, 88 US 558 (1875).

It has been said the priorities of maritime liens in America are "filled with confusion": *The William Leishear* 1927 AMC 1770; "... with each court a law unto itself": *The City of Tawas*, 3 F 170 (ED Mich 1880).

The general criteria for priority depend on (1) the specific type of maritime lien involved, i.e. class, and (2) time, i.e., grouping liens which accrue during a specific period of time such as a voyage, and satisfying the groups in the inverse order of their creation.

The order of priority classes is, i.e., the descending rank of competing claims according to class. *United States* v. *One 254 Foot Freighter, M/V Andoria*, 570 F Supp 413 (ED La) states descending rank of competing maritime claims according to the class:

1. Expenses of justice during *custodia legis* (not regarded as a lien but given first priority);
2. Seamen's wage liens (including those of masters) for wages, maintenance and cure; and for wages of longshoremen directly employed by the vessel;
3. Salvage and general average liens;
4. Tort liens, including personal injuries and death;
5. Pre-mortgage liens for necessaries;
6. Preferred ship mortgage liens;
7. Liens for necessaries under 46 USC §971;
8. State-created liens of a maritime nature;
9. Liens for penalties and forfeitures for violation of federal statutes;
10. Preferred non-maritime liens, including tax liens;
11. Attachment liens (Supplementary Admiralty Rule B);
12. Maritime liens in bankruptcy.

Last in time, first in right

The general theory behind this rule reverses the rules relative to real estate liens, in that the providers of the later necessaries have benefited earlier providers by keeping the vessel in navigation longer, thereby allowing the vessel to earn profits to pay off earlier liens: *The St Jago de Cuba*, 22 US 409 (1824). However all liens which arise during the same voyage or navigating season are generally considered to have arisen simultaneously. Consequently all liens of a particular class arising on the same voyage or 12 month calendar year are given equal status: 46 USC §974.

(1) *The Voyage Rule* is the oldest time priority rule. It apparently having

first been used in bottomry: see G Robinson, *Handbook of Admiralty Law in the United States*, §55 at 604–605. The rule has customarily been applied to vessels engaged in long ocean voyages but is unreasonable where the vessel makes a number of short voyages during a year or during a shipping or fishing season and the like. This rule has been criticised as to its unreasonableness under modern day operations nevertheless it still persists.

(2) *The Year Rule* is composed of two distinct but interrelated principal categories: (1) The calendar year gives priority to contract liens that occurred in the same calendar year as the arrest with other contract liens subordinated successively on a calendar year basis in inverse order of accrual. (2) The 12-month rule grants priority in a similar manner except that the period is measured on a fiscal year basis from the time of the first arrest of the vessel. The priority periods are also computed successively and inversely: *National Shawmut Bank* v. *Winthrop*, 134 F Supp 370, 1955 AMC 2089 (D Mass 1955), *Gulf Coast Marine Waves Inc* v. *The J R Harde*, 107 F Supp 379, 1952 AMC 1124 (SD Tex 1952).

The terms Calendar Year Rule and Year Rule have been used interchangeably in some jurisdictions, therefore, the decisions must be scrutinised to determine which rule is followed in the particular District where the case is venued.

(3) *The Seasonal Rule* (Great Lakes Rule). The navigation period on the Great Lakes was and still is seasonal. The seasonal rule was announced in 1880 by Judge Henry B Brown in *The City of Tawas* 3 F 170 (ED Mich 1880) and is the first of local time period rule affecting priorities. This rule measured by seasons, the diligence required to enforce contract liens with respect to vessels navigating the Great Lakes. In essence, the rule states that liens accruing during the same season are on equal footing. The rule has survived to the present day essentially because while the maritime industry has changed Mother Nature has not! Navigation on the Great Lakes is still approximately 8 months followed by a winter lay up of 4 months.

(4) *The 40-day Rule or New York Harbor Rule.* The New York Harbor Rule originated in the case of *Bourdon* v. *The Proceeds of The Gratitude*, 42 F 299 (SD NY 1890). This rule was strictly limited to New York Harbor and applied only to those watercraft whose operations were confined to the harbor limits. It followed the theory of the seasonal and/or Great Lakes Rule. It has for all practical purposes disappeared.

(5) *The 90-day Rule or Puget Sound Rule.* The 90-day rule is a modification of the New York Harbor Rule and/or 40-day Rule. It so got its name because it had been applied primarily to the Seattle Harbor (Elliott Bay and Puget Sound): *The Sea Foam*, 243 F 939 (WD Wash 1917); *The Edith*, 217 F 300 (WD Wash 1914). There appears to be no other reason for the fixing of 90 days except that of the rationality contained in the 40-day rule. The 90-day rule appears to be dead as it is no longer viable.

Priority of pre- and post-mortgage liens for necessaries

The normal rule was last in time; first in right, with respect to liens of the same class arising during different voyages. However 46 USC §31301(5)(A), states that liens already existing at the time the mortgage is perfected keep priority over the mortgage, but all suppliers' liens arising after perfection of the

mortgage are junior to the mortgage interest. As previously stated 46 USC §31326(b)(2) provides that a preferred mortgage lien on a foreign flag vessel is subordinated to a maritime lien for necessaries provided in the United States.

Comparative negligence

The owner of a vessel whose fault contributed to the collision has a claim against any other vessel at fault for apportioned damages. This type of claim by the owner gives rise to a preferred maritime lien in tort. However, the courts have held that claimants charged with fault will be subordinate on equitable principles to other claimants: *Petition of Kinsman Transit Co*, 338 F 2d 708, 1964 AMC 2503 (2nd Cir 1964).

Statutory liens

Statutory liens giving rise to rights *in rem* against vessels are varied. The government does have the ability to proceed in admiralty and to arrest the vessel. Traditionally, this happened only in exceptional cases because the amounts involved were usually small. However this has changed with the adoption of the Federal Water Pollution Prevention and Control Act, 33 USC §§1251–1361, which gives rise to maritime liens as does the River and Harbor Act, 33 USC §§403, 408, the Tariff Act, 19 USC §1584. The Limitation Act, 46 USC §§181–195, creates a maritime lien in that it requires the vessel itself, together with its freight, or a stipulation for value be submitted to the Court as a prerequisite for filing for protection under the Act. The Oil Pollution Act of 1990, 33 US §2700 *et seq.*, is silent as to whether or not violation gives rise to a maritime lien. However section 1002(a) of the Act provides that liability imposed under the Act is not subject to limitation. Moreover, there are presently amendments pending to clarify the statute and impose maritime liens.

Bankruptcy

Prior to enactment of the Bankruptcy Reform Act of 1978, there was a line of cases which held that if property was arrested in admiralty before the owner of the property filed a petition in bankruptcy, the Admiralty Court retained jurisdiction over the property.

This is no longer the case. The court in *United States of America* v. *LeBouf Brother Towing*, 45 BR 887, 1985 AMC 1956 (ED La 1985), pronounced the following holding:

> The disparity between treatment of liquidations and reorganizations existing under the Bankruptcy Act was eliminated by the Bankruptcy Reform Act of 1978 which established the Bankruptcy Code. The plain language of the automatic stay provisions of the Bankruptcy Code applies equally to liquidations and reorganizations ...
>
> Congress certainly intended, and the statute clearly provides, that the automatic stay effected by §362 prevents all post-executions on a debtors property ...

The court went on to state

> ... 28 USC §1334 was amended by the 1984 amendments so the District Court in the

district in which a title eleven case is commenced has 'exclusive jurisdiction of all of the property wherever located, of the debtor'. ... I would, therefore, have no jurisdiction over the boats and thus, there could have been no conflict of jurisdiction.

In the recent case of the *United States* v. *Z P Chandon*, 889 F 2d 233, 1990 AMC 316 (9th Cir 1989), the court discussed the important issue of whether a maritime lien can arise during the period a vessel is being operated under a Chapter Eleven Reorganisation. Section 362(a)(a)(4) of the Bankruptcy Code prohibits any act to create, perfect or enforce any lien against property of the estate. Section 363 authorises the trustee to enter into transactions in the ordinary course of business without notice or a hearing. Section 364(c) and 364(d)(1) allow a trustee to incur secured debt with priority over other administrative expenses only upon notice and a hearing to creditors. The court, however, went on to hold that the automatic stay provision of the Bankruptcy Reform Act, does not apply to liens for seamen's wages earned after filing for reorganization of the vessel operator.

Violation of the automatic stay provision by a creditor is not only dangerous but expensive. In *Riffe Petroleum Co*, 601 F 2d 1385, 1979 AMC 1611 (10th Cir 1979); the Bankruptcy Court awarded damages in the sum of $212,000 against the plaintiff-creditor who proceeded with its admiralty action and found the plaintiff's counsel to be in contempt and released plaintiff's counsel from jail pending appeal on a superseded bond of $425,000. The award of damages and the citation of contempt were reversed on the grounds that the debtor was a time charterer of the vessel involved; had no title or right to possession of the vessel, hence was not properly subject to the bankruptcy court's jurisdiction. But the message sent by the bankruptcy court was loud and clear!

Non-maritime liens including the liens for taxes

Generally stated a maritime lien is superior to any non-maritime lien including a tax lien or security device. *United States* v. *Flood*, 247 F 2d 209. The theory is that the claim is against the owner and therefore is non-marine in character.

Expenses of custody

A person who furnishes goods or services to a vessel after its arrest, *custodia legis*, does not acquire a maritime lien against the vessel for value of those goods and services. But Admiralty Courts do have equitable power and do give priority to claims arising out of the administration of property within their jurisdiction: *New York Dock Company* v. *Poznan*, 274 US 117, 1927 AMC 723, 789 [1927]; *Kingsgate Oil* v. *M/V Greenstar*, 815 F 2d 918 (3rd Cir 1987). Title 46 US Code §31326(b)(1), codifies the priority of administrative fees and expenses allowed by the court.

Conclusion

Legal writers, commentators and scholars continue to cite ancient decisions so as to aggrandise themselves thus creating confusion. However with the recent codification and continued case law development this confusion no longer exists.