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## Statutory Liens on Vessels in Washington: When Does State Law Govern Liens on Blackship?

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## STATUTORY LIENS ON VESSELS IN WASHINGTON: WHEN DOES STATE LAW GOVERN LIENS ON BLACKSHIP?

When dealing with vessels, the investor or creditor takes risks unknown in real property transactions. Unlike Blackacre, Blackship—a fictional maritime res—is mobile, may sink or be lost at sea, and may commit torts that will give rise to a lien on the ship herself. Broadly speaking, federal law governs liens on Blackship.<sup>1</sup> Specifically, the Ship Mortgage Act<sup>2</sup> and the Maritime Lien Act<sup>3</sup> govern maritime liens. Because neither statute is comprehensive, state law applies interstitially to ship mortgages and to liens on vessels.<sup>4</sup>

The Washington Supreme Court has recently ruled that the federal Maritime Lien Act preempts state lien law. In *Farwest Steel Corp. v. DeSantis*,<sup>5</sup> the court held, specifically, that the Maritime Lien Act preempts the state chattel lien and “boat lien” statutes. While the *Farwest Steel* holding seems to state the obvious, the limits of federal preemption are far from clear. Federal law does not allocate all of the risks involved in building, outfitting, financing, servicing, repairing, and retiring Blackship. The statutes “preempted” in *Farwest Steel* still provide the only available law for many transactions involving Blackship in Washington. The major state law transactions are ship construction, chattel liens, Uniform Commercial Code (“U.C.C.”) financing of vessels and appurtenances, and vessel storage.

The purpose of this article is to survey Washington’s statutory lien law as currently applicable to vessels. After an introduction to the commercial transactions involving Blackship, *Farwest Steel* will be briefly reviewed. The Washington chattel lien, the boat lien, and the wharfinger’s lien will then be discussed.

### I. COMMERCIAL TRANSACTIONS WITH BLACKSHIP: AN OVERVIEW

Blackship’s financing<sup>6</sup> ordinarily begins in a shipyard. A contract to

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1. 28 U.S.C. § 1333 (1982). “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

2. 46 U.S.C. §§ 911–84 (1982).

3. *Id.* §§ 971–75.

4. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 695–702, 718–22 (2d ed. 1975).

5. 102 Wn. 2d 487, 687 P.2d 207 (1984), *cert. denied*, 105 S. Ct. 2024 (1985).

6. Technological changes in vessels and in the shipping industry have led to new types and sources

build Blackship is nonmaritime. Thus, the builder, buyer, and banker will be governed by state law at this stage.<sup>7</sup> The builder and banker must secure any credit they extend under article 9 of the U.C.C. and state lien statutes. Once Blackship becomes a "vessel in fact,"<sup>8</sup> that is, capable of navigation, she is governed primarily by federal maritime law. In general, maritime claims take priority over nonmaritime claims. The builder and banker, as well as other nonmaritime suppliers, must secure their interests in Blackship carefully before she becomes a vessel in fact. Their options afterwards are to demand payment, take a preferred ship mortgage,<sup>9</sup> or remain as general unsecured creditors.

After Blackship is a vessel in fact, she may incur maritime liens for operating expenses that will prevail over claims of the builder and banker. A maritime lien is a "secret" lien, arising by operation of law. It is a right of property in Blackship adhering to her wherever she goes. This property right may be enhanced or undermined by changes in her condition or equipment. Once Blackship is initially equipped for service and capable of navigation, maritime liens, like barnacles, attach to her appurtenances as well as her hull.<sup>10</sup> Such liens attach, for example, when Blackship leaves the shipyard with her repair bill unpaid,<sup>11</sup> when a contract for services to her is made,<sup>12</sup> and when necessities are furnished to her.<sup>13</sup> Once a mar-

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of financing. See generally Poole, Powell & Gray, *Financing of United States-Flag Vessels*, 56 TUL. L. REV. 1172-1226 (1982). Traditional sources, primarily banks and insurance companies, are now supplemented by pension and welfare funds, limited partnership arrangements, and leveraged leases, as well as title XI guaranteed financing. *Id.* at 1226. Vessel financing has extended beyond mortgages to assignments to freight, charters, and stock pledges, each of which is governed by article 9 of the Uniform Commercial Code. *Id.* at 1222. See also Mahla, *Some Problems in Vessel Financing—A Lender's Lawyer's View*, 47 TUL. L. REV. 629, 632 (1973).

7. For discussion of ship construction transactions, see *infra* notes 26-29 and accompanying text.

8. For purposes of the admiralty jurisdiction, a structure does not become a vessel until she is capable of navigation. *North Pac. S.S. Co. v. Hall Bros. Marine R. & Shipbuilding Co.*, 249 U.S. 119 (1919).

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by state law enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.

*Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

9. See *infra* notes 15-17, and accompanying text.

10. *Perkins v. The Golden Girl*, 185 Mich. 200, 151 N.W. 660 (1915). If Blackship is sold after she has been repaired, her purchaser is liable for any maritime liens incurred by the seller before delivery of the vessel. *Shaw v. 46-Foot Chris-Craft Camelot*, 391 F. Supp. 1026 (W.D. Wash. 1975) (where seller had management of vessel at port of supply, presumption arose that he was authorized to incur repair lien).

11. *Pan Am. Bank v. Oil Screw Denise*, 613 F.2d 599 (5th Cir. 1980) (maritime lien attached at time vessel left repair yard with bill unpaid).

12. *TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA*, 696 F.2d 1135, 1138 (5th Cir. 1983)

itime lien attaches, the lienor acquires a vested right to cause a sale of Blackship in an in rem proceeding<sup>14</sup> against her.

Once Blackship is documented by the United States Coast Guard, she may be encumbered by a preferred ship mortgage. The Ship Mortgage Act of 1920<sup>15</sup> creates a “preferred” status among creditors for mortgagees who comply with the Act’s requirements. A ship mortgage under common law is not a maritime contract and thus cannot give rise to a maritime lien.<sup>16</sup> Under the Ship Mortgage Act, however, those mortgages meeting its requirements are given a maritime character and mortgagees are given an admiralty action in rem in federal court.<sup>17</sup> Under the Ship Mortgage Act, lenders may sue the vessel in rem for its value and the mortgagors in personam for any deficiency.

If Blackship is sold following a federal court in rem in admiralty proceeding (a “marshal’s sale”), she is scraped clean of all encumbrances. The new buyer at a marshal’s sale takes a title good against the world. All other rights against Blackship are extinguished. Thus, a creditor who fails to file a claim against the vessel or the proceeds of its sale will be barred forever from an action against her. Federal district courts have exclusive jurisdiction over such in rem actions.<sup>18</sup> Jurisdiction depends on the arrest of the res, that is, Blackship. If Blackship is removed from a court’s jurisdiction, or if the sale proceeds are distributed, then in rem jurisdiction ordinarily ceases.<sup>19</sup>

If Blackship sinks, her liens and the in rem remedy sink with her. Creditors relying solely on the vessel for security will lose their investment. Thus, short-term and long-term creditors must keep abreast of Blackship. They must assure themselves that she is creditworthy as well as seaworthy.

## II. *FARWEST STEEL CORP. V. DESANTIS*

*Farwest Steel*<sup>20</sup> provides the occasion for surveying the boundaries of state and federal lien law. In *Farwest Steel*, a debt collection matter came

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(maritime lien against vessel arose at time of contract for stevedoring services).

13. *Riffe Petroleum Co. v. Cibro Sales Corp.*, 5 B.C.D. 687, 20 C.B.C. 765, 601 F.2d 1385 (10th Cir. 1979) (maritime lien arises automatically upon the furnishing of necessities; prior mortgagees and purchasers without notice are subject to the lien).

14. See *infra* text accompanying note 17.

15. 46 U.S.C. §§ 911–84 (1982).

16. *Bogart v. The Steamboat John Jay*, 58 U.S. (17 How.) 399 (1855), superseded by statute as stated in *Dravo Corp. v. Maxon*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

17. 46 U.S.C. § 951 (1982).

18. For discussion of admiralty jurisdiction in the United States, see generally G. GILMORE & C. BLACK, *supra* note 4, at 18–52.

19. For discussion of in rem sales, see generally G. GILMORE & C. BLACK, *supra* note 4, at 786–805.

20. 102 Wn. 2d 487, 687 P.2d 207 (1984).

before the Washington State Superior Court in the form of an in personam action by Oregon steel suppliers against owners of a barge.<sup>21</sup> The suppliers had contracted to sell steel in Oregon to the shipbuilders, but not directly to the barge owners.<sup>22</sup> The in personam actions on the underlying obligation had been dismissed in federal court in Oregon for lack of contractual liability of the barge owners.<sup>23</sup> The Washington superior court agreed with the Oregon court. On appeal, the Washington Supreme Court upheld the Washington trial court's decision, including its ruling that the federal Maritime Lien Act preempts the Washington chattel lien and boat lien statutes.<sup>24</sup> In so doing, the Washington Supreme Court overlooked the fact that the federal Maritime Lien Act preempts only state causes of action that are both in rem and in admiralty. Because the chattel lien statute does not provide for in rem actions, chattel liens should fall entirely outside the federal statute. Because the boat lien statute provides for in rem actions that are not in admiralty, as well as some that are, boat liens should fall partly in and partly outside the federal Maritime Lien Act.

The *Farwest Steel* court should have decided the matter entirely in personam, between the two parties, as to their interest in the barge.<sup>25</sup> This could have been done even though the barge was not formally before the court. The Washington lien law should not have been at issue. The court's analytic difficulty in *Farwest Steel* appears to stem from a failure to distinguish between an in personam judgment with execution on the judgment and a proceeding in rem and in admiralty. A review of Washington and federal lien law should clarify this analytic difficulty.

### III. STATE-CREATED LIENS ON VESSELS

Blackship is a creature of state law until she becomes a vessel in fact. Any lien that arises from her original construction<sup>26</sup> is a nonmaritime

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21. *Id.* at 489, 687 P.2d at 209.

22. *Id.* at 488-89, 493, 687 P.2d at 209, 211.

23. *Id.* at 489-90, 687 P.2d at 209. *See Farwest Steel Corp. v. Barge Sea-Span 241*, 1985 A.M.C. 404 (1984), *rev'd*, F.2d (Aug. 23, 1985) (No. 84-3754, 84-3755) (remanded for trial court finding of whether steel supplier had relied on credit of barge).

24. 102 Wn. 2d at 488, 687 P.2d at 209.

25. *Fall v. Eastin*, 215 U.S. 1 (1909) (Washington court properly determined property rights as between parties within its jurisdiction even though property was situated in Nebraska; the decree was, however, inoperative to affect title to the Nebraska land).

Under Washington law, the personalty of a judgment debtor, for example, the barge in *Farwest Steel*, is subject to execution. WASH. REV. CODE § 6.04.060 (1983). "Property Subject to Execution. All property, real and personal, of the judgment debtor, not exempted by law, shall be liable to execution." *Compare Jackson v. Inland Oil & Transp. Co.*, 318 F.2d 802 (5th Cir. 1963) (where judgment statute permitted execution on realty only, pre-existing judgment for breach of charter did not give rise to lien against vessel; thus, claims were settled on principles of equity).

26. Original construction logically includes installation of basic structures after initial launching.

lien.<sup>27</sup> The Maritime Lien Act supersedes state statutes “insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessities.”<sup>28</sup> Because state-created construction liens are nonmaritime, they create no rights “in admiralty”; that is, they are not within the limited admiralty jurisdiction of the federal courts. They are enforceable by suits in state court. These state-created liens are, as previously indicated, terminated by an in rem sale of Blackship in federal court.<sup>29</sup>

States may create maritime liens, enforceable exclusively in federal court, within narrow but ambiguous limits. As with much of the law, the statutes that will not be enforced are easier to describe than those that will be enforced. State statutes purporting to create liens enforceable in rem in admiralty will not be enforced if they (1) contravene acts of Congress, (2) prejudice the characteristic features of the maritime law, or (3) interfere with harmony and uniformity of international and interstate maritime relations.<sup>30</sup> These guidelines, referred to broadly as the *Jensen* rule of uniformity,<sup>31</sup> have become the litany for overruling state law. Except for the first guideline, they serve as bywords, not as tests or standards. They direct analysis rather than advancing it.

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See *B & B Salvage & Rigging, Inc. v. M/V North Bend*, 548 F. Supp 123 (E.D. Mo. 1982) (contract to supply rigging for motor vessel not maritime even though installation occurred after launching for publicity run), *aff'd*, 716 F.2d 908 (3d. Cir. 1983).

27. See, e.g., *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242 (1920); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874); *Peninsula Sav. v. O/S Seismic Sea*, 1984 A.M.C. 2635, 2639 (D. Or. 1984) (“[A] vessel construction contract cannot be the basis of a maritime lien because the contract is not maritime in nature.”).

28. 46 U.S.C. § 975 (1982).

29. *Id.* § 953(b).

30. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), superseded by statute as stated in 632 F.2d 504, *cert. denied*, 452 U.S. 905; 459 U.S. 297; 433 So. 2d 139. See G. GILMORE & C. BLACK, *supra* note 4, at 649–52. Gilmore & Black’s test for validity of state lien statutes is helpful here: (1) the state lien should not already exist under general maritime law, (2) the underlying claim must be maritime, and (3) the lien must not seriously conflict with the nationally uniform system of maritime law. *Id.*

31. The most notable exceptions to the *Jensen* rule of uniformity have been the absorption into maritime law of the states’ wrongful death statutes and local regulation of and penalties for marine pollution. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (where general maritime law allowed no recovery for wrongful death, state law may be the basis for a maritime cause of action), *on remand*, 446 F.2d 906 (5th Cir. 1971); *American Waterways Operators, Inc. v. Askew*, 335 F. Supp 1241 (M.D. Fla. 1971) (state may determine penalties for marine pollution).

Prior to *Moragne* in 1970, the felony merger doctrine of general maritime law denied recovery for pain and suffering to seamen if they died, but allowed such recovery if they lived. Recognizing that every state had a wrongful death statute to fill this gap, the United States Supreme Court absorbed this right to wrongful death recovery into the general maritime law. Such questions as amounts of damages and determinations of beneficiaries were expressly left to the lower federal courts; those courts were to be informed by state law or analogous federal statute. *Moragne*, 398 U.S. at 408.

Guidelines for absorption of state law, while more difficult to describe, are perhaps less vague. In a careful exposition of this subject, the Admiralty Court of the Southern District of New York set out a test for the validity of state law in 1893:

state legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by congress, viz.: (1) In the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature.<sup>32</sup>

This test gives substance to the long established United States Supreme Court doctrine that such “border legislation” is valid until Congress interposes.<sup>33</sup> State law furnishes such supplementary rules of law only within the state’s territory, for events occurring upon its navigable waters.

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32. *The City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893), *aff’d in part and rev’d in part sub nom. The Transfer No. 4*, 61 F. 364 (2d Cir. 1894).

The New York court found authority in United States Supreme Court decisions for upholding a state statute. The court referred to *Sherlock v. Alling*, 93 U.S. 99 (1876), in which the Court observed that: with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water.

*Id.* at 103–04. In *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), the Court stated that admiralty jurisdiction is not fixed by the constitution, but rather depends upon maritime usages of the country and on competent legislation.

33. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875); *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1852) (as to certain local matters, including pilotage, state statutes may grant rights enforced in admiralty); *see also* *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398, 407 (1907) (court held claimants entitled to full benefits of state statute granting right to relief where otherwise it could not be administered by maritime court); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (state statutes create maritime rights if subject is maritime but local, and if the modification or supplementation of an admiralty rule will not prejudice the characteristic features of the general maritime law nor interfere with uniformity); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972) (states provide supplementary maritime law).

The *Norwalk* court, *supra* note 32, reviewed the range of “new legal rights” created by state legislation in the maritime area: liens for supplies to domestic vessels; liens for master’s wages; liens for damages for refusing to load under a charter; liens for double wharfage; actions for half pilotage where a pilot’s services were refused; liens for expenses of seamen at a quarantine hospital; regulations as to rivers, harbors, and wharves; penalties imposed for the protection of fisheries; quarantine laws; regulations for floating elevators; and the establishing and regulation of ferries. *Norwalk*, 55 F. at 106. *Compare* *Barton v. Brown*, 145 U.S. 335, 347 (1892) (admiralty court may administer state law where in personam cause of action is maritime in nature); *The Moses Taylor v. Hammons*, 71 U.S. (4 Wall.) 411 (1867) (the “saving to suitors clause” saves only common law remedies to suitors in the common law courts; a proceeding in rem is not a remedy afforded by the common law).

## Statutory Liens on Vessels

Two Washington statutes that occupy this twilight zone of “border legislation” are the chattel lien statute<sup>34</sup> and the statute creating liens on vessels and equipment for labor, material, damages, and handling cargo (the “boat lien” statute).<sup>35</sup>

### A. *The Chattel Lien in Washington*

The chattel lien statute creates a nonpossessory lien in favor of those who provide labor or materials for construction or repair of personal property. Under this statute, Washington superior courts are given jurisdiction to foreclose a lien for construction of a ship.<sup>36</sup> The statute does not purport to create rights in rem or rights in rem in admiralty. Because the Maritime Lien Act supersedes only those state statutes that give rise to claims in rem in admiralty, the Maritime Lien Act does not by its terms supersede the state chattel lien statute.<sup>37</sup> Priority given by state statute to chattel lien holders over persons with subsequent interests is limited, however, by the federal statutes: such priority applies only to subsequent nonmaritime encumbrances. Maritime liens and preferred ship mortgages always take priority over nonmaritime liens and common law mortgages.<sup>38</sup>

The Washington chattel lien statute provides that if an owner authorizes the furnishing of materials or labor for the construction or repair of a chattel, the laborer or materialman has a lien upon that chattel until paid.<sup>39</sup> The lien does not depend on possession. The lien must be perfected by filing a notice in the office of the auditor of the county in which the chattel is kept at the time of filing.<sup>40</sup> The notice must be filed within ninety days of the delivery of the chattel to the owner, or of the last delivery of material. A third person

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34. WASH. REV. CODE § 60.08 (1983).

35. *Id.* § 60.36.

36. *See, e.g., State ex rel. Christensen v. Superior Court for Pierce County*, 108 Wash. 666, 185 P. 623 (1919).

37. *Compare Danning v. Pacific Propeller, Inc. (Re Holiday Airlines Corp.)*, 620 F.2d 731 (9th Cir. 1980) (Federal Aviation Act does not preclude Washington's chattel lien filed against aircraft by repair company), *cert. denied*, 449 U.S. 900 (1980).

38. *See generally* G. GILMORE & C. BLACK, *supra* note 4, at 734.

39. WASH. REV. CODE § 60.08 (1983).

40. *Id.* § 60.08.020. *See Sumner K. Prescott Co. v. Franklin Tool Works*, 117 Wash. 283, 201 P. 308 (1921) (limitation period runs from day of last delivery of material); *Campen v. Jamieson*, 88 Wash. 109, 152 P. 679 (1915) (filing must be in county where chattel is kept at time of filing).



acquiring title to the chattel in good faith, for value and without actual notice of the lien, will take title free of the lien if it has not been perfected.<sup>41</sup>

The perfected chattel lien has priority over any earlier unrecorded lien, mortgage, or other encumbrance unless the lien claimant has actual notice of the prior encumbrance.<sup>42</sup> The perfected chattel lien has priority over any subsequent nonmaritime lien, chattel mortgage, or other security interest.<sup>43</sup> The chattel lien's priority attaches at the time of the commencement of labor or of furnishing of materials, not the time of perfection. The lien is preferred over the interests of a seller or buyer in a conditional sales contract.<sup>44</sup>

The chattel lien may be enforced by nonjudicial notice and sale ("summary procedure")<sup>45</sup> or by judicial procedure.<sup>46</sup> Jurisdiction depends in either case on the presence of the chattel in the county where the state court sits. As with any foreclosure, the court exercises equity in the enforcement of a lien and will deny a claim brought in bad faith.<sup>47</sup>

An action to enforce a chattel lien must be taken within nine months after filing the lien notice.<sup>48</sup> A lienor who has lost his chattel lien also loses his right to recover attorney's fees for foreclosure.<sup>49</sup> Although the lien will cease after nine months, the lienor's cause of action on the debt survives for three years.<sup>50</sup>

Before delivering materials to Blackship or performing work on her, potential lienors must be certain (1) that the purchase or work contract is authorized by the owner, and (2) that title to the vessel or parts of it will not

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41. WASH. REV. CODE § 60.08.010 (1983). Before purchasing Blackship from a builder or broker, the buyer should check the county auditor's index of chattel liens. Liens are indexed alphabetically by name of owner and name of lien claimant, not by name of vessel. The lien notice will state the name of the claimant, the name of the owner, a description of the vessel on which the claimant performed labor or furnished material, the amount for which a lien is claimed, and the date of completion. It must be signed by the claimant or his agent. The auditor's file will also contain the date of filing and the date of release. WASH. REV. CODE § 60.08.060 (1983).

42. *Id.* § 60.08.030.

43. WASH. REV. CODE § 62A.9-310 (1983) provides that state chattel lienors take priority over perfected security interests. Washington amended U.C.C. § 9-310 to preserve the state chattel lien statute. Shattuck, *Secured Transactions (Other than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code Article 9*, 29 WASH. L. REV. 1, 195, 263 (1954) (Washington's 9-310 drafted to preserve chattel lien statute).

44. *Barbour v. Hodge*, 99 Wn. 578, 170 P. 115 (1918); *Crosier v. Cudihee*, 85 Wash. 237, 147 P. 1146 (1915).

45. WASH. REV. CODE §§ 60.10. 61.12.162 (1983).

46. *Id.* § 60.08.040.

47. *Radley v. Raymond*, 34 Wn. 2d 475, 209 P.2d 305 (1949) (loss of possessory lien for knowing overcharge).

48. WASH. REV. CODE § 60.06.040 (1983).

49. *Radley v. Raymond*, 34 Wn. 2d 475, 209 P.2d 305 (1949).

50. WASH. REV. CODE §60.36.010(5) (1983).

## Statutory Liens on Vessels

pass to a third party bona fide purchaser before the lien notice is filed.<sup>51</sup> Because a lien is premised on the actual commitment of labor or materials to a particular vessel, lienors must be able to show that they labored on the vessel they sue or that their materials actually went “over the rail.”<sup>52</sup>

### B. *The Boat Lien in Washington*

The Washington boat lien statute creates an in rem action, to be enforced either in state court or as an in rem in admiralty action in federal court. The statute creates a lien against all vessels and boats for services rendered on board, for work done, or for materials furnished in this state at the request of owners, charterers, masters, agents, or consignees.<sup>53</sup> A boat lien arises for wharfage and anchorage within Washington, for nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents, or consignees, and for certain injuries. This lien statute requires no filing of notice. The enforcement action must be taken within three years from the time the cause of action accrues.<sup>54</sup>

The boat lien statute is Washington’s home port statute.<sup>55</sup> It was passed to fill the gap in maritime lien law created by the Supreme Court’s home port rule.<sup>56</sup> Under the home port rule, suppliers and repairmen of a vessel in its home port did not acquire a maritime lien, presumably because they had access to the owner in personam in the vessel’s home port. The Maritime Lien Act of 1910, as amended, revoked the home port rule and expressly pre-empted state home port statutes insofar as these state statutes created rights of action enforceable in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessities.<sup>57</sup> Because the term “other necessities” is construed to include nearly

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51. *Morrison-Knudsen Co. v. Hite Crane & Rigging, Inc.*, 36 Wn. App. 860, 678 P.2d 346 (1984) (where title to constructed panels passed to third party before chattel lien notice was filed, court found no valid lien).

52. *Farwest Steel Corp. v. DeSantis*, 102 Wn. 2d 487, 492, 687 P.2d 207 (1984) (where neither supplier nor shipbuilder could identify steel deliveries with material used in barge, steel supplier failed to establish lien as matter of law), *cert. denied*, 105 S. Ct. 2024 (1985); *Callahan v. Aetna Indem. Co.*, 33 Wash. 583, 74 P. 693 (1903) (no boat lien if materials not for particular ship but on general contractor’s credit). *See also In re Vancor S.S. Corp.*, 8 Bank. 470 (S.D.N.Y. 1981) (repair supplied to one vessel will not give rise to lien on another vessel of same debtor).

53. WASH. REV. CODE § 60.36.010 (1–5) (1983).

54. *Id.* § 60.36.010(5). *See Callahan v. Aetna Indem. Co.*, 33 Wash. 583, 74 P. 693 (1903).

55. *The Robert Dollar*, 115 F. 218 (D. Wash. 1902).

56. *The General Smith*, 17 U.S. (4 Wheat) 438 (1819); *The Lottawana*, 88 U.S. (21 Wall.) 558 (1875).

57. *See generally* G. GILMORE & C. BLACK, *supra* note 4, at 652–60, 663.

everything an operating vessel might use, the federal lien law governs nearly all maritime liens on vessels.<sup>58</sup>

By its terms, the Washington boat lien statute purports to create maritime liens enforceable by a suit in rem in admiralty and nonmaritime liens enforceable by a civil action in state superior court.<sup>59</sup> Insofar as this statute creates liens for "other necessities," its maritime lien provisions are preempted by the Maritime Lien Act. Insofar as it creates liens that are "preferred maritime liens" described within the Ship Mortgage Act, its maritime lien provisions are preempted. If the boat lien statute creates maritime liens not superseded by the Maritime Lien Act, nor encompassed by the Ship Mortgage Act's preferred maritime liens, then these liens are enforceable in rem in admiralty.

All of the circumstances under which the boat lien will still arise under state law and be enforceable in federal court cannot be comprehensively discussed within the scope of this survey. A few possibilities will, however, be suggested.

### *1. Maritime Liens Under the Boat Lien Statute*

Of the liens created under the boat lien statute, the first class of liens, for services rendered on board, and the second, for work done or material furnished for construction or repair, presumably fall within the terms of the "other necessities" provision of the Maritime Lien Act.<sup>60</sup> An argument could be made, however, that the boat lien extends beyond other necessities in its protection of all whose services advance the main object of the ship's enterprise. For example, the boat lien has been held to provide a lien on a dredger for wages of pipe-layers working on or about a filled area.<sup>61</sup>

Such a lien might exceed the scope of the Maritime Lien Act. Section 975 of the Maritime Lien Act creates a maritime lien as to services reasonably necessary for a ship's business. Federal courts have liberally interpreted "other necessities" when determining liens for goods and services that go "over the rail" and for materials used for the ship's business

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58. *The Henry S. Grove*, 285 F. 60 (W.D. Wash. 1922); *Carl Enters. v. Barge Hudson Handler*, 475 F. Supp. 42 (S.D. Ala. 1979) (valid maritime lien on vessel for provision of airline tickets to crew members). Gilmore & Black observe that any service "convenient, useful and at times necessary" may qualify under section 971. G. GILMORE & C. BLACK, *supra* note 4, at 658.

59. WASH. REV. CODE § 60.36.020 (1983).

60. A vessel undergoing reconstruction that withdraws it from navigation may lose its maritime status temporarily; thus, it might fall within the reach of the boat lien statute. *See* 46 C.F.R. § 67.27-1.27-3 for guidelines as to "new vessel determination" and "rebuild determination."

61. *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C. Wash. 1898). An alternative ground for this result could be that a dredger is not a "vessel" for purposes of maritime law; thus state law would apply.

landward, such as advertising brochures.<sup>62</sup> However, the lien for wages for services performed off the ship might not be considered as a maritime “necessary” under the federal statute.<sup>63</sup> Presumably, a maritime lien for such services could then be provided by the boat lien statute, enforceable exclusively in federal court.

An argument might also be made that the boat lien statute empowers more people to create liens on Blackship than does the federal statute. Three slightly different groups may create boat liens. A boat lien is created for (1) on-board services requested by owners, charterers, masters, agents, or consignees; (2) construction, repair or equipment at the request of the owners, charterers, masters, agents, consignees, contractors, subcontractors, or other persons having charge in whole or in part of the construction, alteration, repair or equipment of any vessel or boat; and (3) supplies furnished in Washington for their use at the request of owners, charterers, masters, agents (including purchasing agents for the vessel or boat), or consignees.

The federal statute is arguably less expansive. Under section 972 of the Maritime Lien Act, the persons authorized to procure necessities giving rise to a maritime lien are the managing owner, the ship’s husband, the master, or any person to whom the management of the vessel at the port of supply is entrusted. The term “management” refers to physical or manual control.<sup>64</sup> Because a boat lien may be incurred by authorized persons not in physical control of the vessel, the boat lien statute arguably creates a maritime lien beyond the scope of section 972, enforceable in rem in admiralty in federal court.

The remaining classes of maritime liens created by the boat lien statute are preempted, with minor exceptions, by the federal statutes. For example, the third class, liens for wharfage and anchorage,<sup>65</sup> are maritime liens as long as Blackship is a “vessel in fact,” that is, until she is a dead ship. The fifth class, liens for injuries committed by vessels or boats to persons or property within the state,<sup>66</sup> are maritime tort liens governed by federal maritime law and beyond the scope of this survey.

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62. *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549, 1969 A.M.C. 13 (5th Cir. 1969).

63. *But see Jan C. Uiterwyk Co. v. M/V Mare Arabico*, 459 F. Supp. 1325 (D. Md. 1978) (lien for necessities recognized for warehouse operators, ship’s agents, and stevedores).

64. *The Oceana*, 233 F. 139 (D.N.Y. 1916), *modified*, 244 F. 80 (2d Cir. 1917), *cert. denied*, 245 U.S. 656 (1916); *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940) (term “management” connotes direction and control of vessel for its intended purposes); *Shaw v. 46-Foot Chris-Craft Camelot*, 391 F. Supp. 1026 (W.D. Wash. 1975) (seller of vessel had “management” of vessel at port of supply thereby authorized to incur repair lien).

65. WASH. REV. CODE § 60.36.010(3) (1983).

66. *Id.* § 60.36.010(5).

## 2. *Nonmaritime Liens under the Boat Lien Statute*

Because the United States Supreme Court continues to hold that a contract for construction of a vessel is not a maritime contract, the furnishing of necessary parts for new construction does not give rise to a maritime lien. This is true even after the hull is in water.<sup>67</sup> Thus, the Washington boat lien statute presently applies to vessels under original construction that are not yet "vessels in fact."

The boat lien goes beyond the scope of the chattel lien for original construction in several ways. First, the boat lien's three year statute of limitations applies to actions in personam on the debt underlying a lien and establishes a time reference for an admiralty court's determination of laches.<sup>68</sup> Second, the labor or material giving rise to a boat lien may be provided at the request of any person having charge in whole or in part of the construction, alteration, repair, or equipment of any vessel or boat.<sup>69</sup> Such a person is held to be the agent of the owner. The chattel lien is limited to work and materials authorized by the owner.<sup>70</sup> Third, the work or material may be furnished for alteration of the vessel or boat; the chattel lien is limited to new construction or repair of existing structures.<sup>71</sup> The boat lien statute is preempted, of course, if repairs or alterations are performed while the vessel is in maritime service. Fourth, the boat lien arises in favor of all whose nonmaritime services further the ship's enterprise, including the master, firemen, and engineers.<sup>72</sup> The chattel lien statute is limited to those who labor or supply materials for construction or repair. The boat lien does not arise in favor of brokers who negotiate commercial contracts nor for unpaid marine insurance premiums.<sup>73</sup>

A state lien act similar to Washington's boat lien statute has recently been upheld as a proper authorization of state court action with respect to nonmaritime liens, that is, liens for labor and materials used in original ship construction.<sup>74</sup> The construction of the Rocky B, a fishing vessel, was

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67. *See, e.g.*, *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242 (1920); *In re Mission Marine Assocs.*, 633 F.2d 678, 680 (3d Cir. 1980).

68. *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 P. 815 (1909) (if action is taken within three years, lien is not lost by failing to give notice, to assert lien, or by laches).

69. WASH. REV. CODE § 60.36.010(2) (1983).

70. *Wilcox v. Mobley*, 116 Wash. 118, 198 P. 728 (1921).

71. *Labberton v. Shilaos*, 126 Wash. 43, 217 P. 37 (1923).

72. *McRae v. Bowers Dredging Co.*, 86 F. 344, 348 (C.C. Wash. 1898).

73. *La Merced*, 11 F.2d 672 (W.D. Wash. 1926); *The Hope*, 49 F. 279 (D. Wash. 1892). *Cf.*, *Grow v. Steel Gas Screw Loraine K*, 310 F.2d 547, 548 (6th Cir. 1962) (state legislation creating in rem liens for insurance premiums is enforceable in federal court where the subject matter is maritime in nature but outside federal maritime law or statute).

74. *Rocky B. Fisheries v. North Bend Fabrication & Mach., Inc.*, 66 Or. App. 625, 1984 A.M.C. 2594, 676 P.2d 319 (1984) (where section 783 authorizes state court actions for maritime liens, it conflicts with exclusive admiralty jurisdiction in federal courts).

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financed by a credit union that secured its long term loan of nearly half a million dollars with a ship's mortgage.<sup>75</sup> Defendant North Bend supplied services and materials on open account for the construction and outfitting of the vessel. North Bend filed a nonmaritime lien claim for \$5410.04 under Oregon's boat lien statute and moved for the Rocky B's arrest in state court. A circuit court required North Bend to post a bond, then issued a warrant for the arrest of the vessel. After the sheriff arrested the vessel, the credit union moved to foreclose its mortgage in federal court because the seizure constituted default under the terms of the mortgage.<sup>76</sup>

Under the Oregon statute, as under the Washington statute, a creditor claiming a lien may commence an in rem action in state court in any county where the vessel may be found.<sup>77</sup> The nonmaritime lien need not be filed or recorded, but rather is perfected by filing of a complaint and seizure of the vessel. After considering recent United States Supreme Court decisions on the constitutionality of pre-judgment seizure, the Oregon court concluded that the pre-judgment seizure of a vessel for perfection of a nonmaritime lien is not a violation of its owner's due process rights.<sup>78</sup> As the court explained, the statute provides adequate procedural protections, particularly since the defendant in such an action is the vessel itself.<sup>79</sup> The Oregon statute provides that the owner, agent, or consignee of the vessel may appear and answer the complaint and that the master or other interested person may have the vessel released prior to adjudication of the claim by "entering into an undertaking in favor of the plaintiff."<sup>80</sup> Although the lien is perfected only by seizure, this must occur within one year after the cause of action has accrued.<sup>81</sup>

The constitutionality of the Washington boat lien statute is more difficult to assess. The boat lien statute provides no procedural protections that supplement statutory judicial or summary foreclosure procedures.<sup>82</sup> The limitations period of three years might be objectionable on public policy grounds.<sup>83</sup> If a supplier such as North Bend could arrest an operating vessel

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75. *Id.*, 1984 A.M.C. at 2595, 676 P.2d at 322.

76. *Id.* The marshal then seized the vessel.

77. *Id.*, 1984 A.M.C. at 2596, 676 P.2d at 322-23.

78. *Id.*, 1984 A.M.C. at 2598-99, 676 P.2d at 323-25.

79. "Under Chapter 783 [of the Oregon statute], as in maritime liens, the concept that the vessel, apart from its owner, has incurred a liability is fundamental in the context of the arrest or seizure of vessels." *Id.*, 1984 A.M.C. at 2599, 676 P.2d at 324.

80. *Id.*, 1984 A.M.C. at 2596, 676 P.2d at 323.

81. *Id.*, 1984 A.M.C. at 2599, 676 P.2d at 324. ("There is no filing procedure under chapter 783, the statutory lien being perfected only by seizure, which must be accomplished within one year after the cause of action has accrued.")

82. *State ex rel. Eureka Cedar Lumber & Shingle Co. v. Superior Court of Pierce County*, 107 Wash. 620, 627, 182 P. 607 (1919) (boat lien silent as to matter of substitution of security for ship).

83. *See In re Mission Marine Assocs.*, 633 F.2d 678 (3d Cir. 1980) (marine lien not enforced when

through state court any time within three years after a cause of action accrued, it could seriously obstruct a fishing or commercial operation. In effect, the supplier could coerce the vessel into payment of the supplier's claim to buy the vessel's freedom to operate.<sup>84</sup>

The Washington boat lien may also be vulnerable to bona fide purchasers without notice after vessel documentation. In *McCorkle v. First Pennsylvania Banking & Trust Co.*,<sup>85</sup> a yacht seller assigned his installment sales contract, under which he reserved title, to a bank.<sup>86</sup> The bank filed an Article 9 financing statement to perfect its interest in the yacht. The purchaser, who had possession of the Master Carpenter's Certificate,<sup>87</sup> enrolled the yacht as a "vessel of the United States," concealing the bank's ownership and security interest.<sup>88</sup> The purchaser then sold the yacht to the McCorkles for cash and left the country. Because there was nothing of record in the Customs House to alert the McCorkles of the bank's interest, the Fourth Circuit Court of Appeals found the equities to be plainly with the McCorkles.<sup>89</sup> Although the court dismissed the case for lack of federal jurisdiction, the analysis is pertinent to all holders of security interests in a newly built, undocumented vessel.<sup>90</sup>

### 3. *Summary of the Present Effect of the Boat Lien Statute*

The boat lien statute fills some gaps in federal law and in the Washington chattel lien statute. Like most home port statutes, however, it suffers from old age and neglect.<sup>91</sup> It should be decently buried or revised in light of present federal law. The Washington Supreme Court's holding in *Farwest*

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it would interfere with public policy of protecting bona fide purchasers).

84. However, in the *Rocky B* situation, where seizure constituted a mortgage default and the mortgagee knew of the seizure and moved for foreclosure in federal court, the nonmaritime lienor would be subordinated to the mortgagee. If the *Rocky B* were sold in an in rem sale for the mortgage amount or less, *North Bend* would lose its lien against the vessel.

85. 459 F.2d 243 (4th Cir. 1972).

86. *Id.* at 245.

87. See generally Poole, Powell & Gray, *supra* note 6, at 1171, 1185, 1188.

88. 459 F.2d at 245.

89. *Id.* at 251.

90. The 1982 Vessel Documentation Act requires that any vessel of at least five net tons that engages in fisheries, Great Lakes trade, or coastwise trade must be documented unless exempt under 46 C.F.R. §§ 67.01-7, -5 (1982). Vessels exempt are (a) those of less than five net tons, (b) vessels that do not operate on navigable waters of the United States (although it may be documented if five tons and owned by U.S. citizens), and (c) non-self-propelled vessels qualified for coastwise trade when used in the coastwise trade within harbors, on river or lakes, or on internal state waters. *Id.* § 67.01-7 (1982).

Any vessel of at least five net tons, wholly owned by United States citizens, is eligible for documentation, including pleasure vessels. *Id.* § 67.01-9 (1982).

91. Gilmore & Black observe that state service lien statutes (i.e., for maritime liens) are either moribund or dead. G. GILMORE & C. BLACK, *supra* note 4, at 544-45, 659.

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*Steel* should have no effect on its validity. The court simply stated what was true as of 1910: the Maritime Lien Act preempts the boat lien statute insofar as it creates maritime liens for Blackship's "necessaries."<sup>92</sup>

### C. *Wharfinger's Lien in Washington*

If Blackship is withdrawn from service and moored or dry-docked, a wharfinger's lien claim may arise under either of two state statutes, the boat lien statute or the warehouseman's statute.<sup>93</sup> These liens fall outside of the federal Maritime Lien Act.<sup>94</sup>

The boat lien statute provides a lien on vessels for "wharfage and anchorage within the state."<sup>95</sup> This nonmaritime lien is enforceable in a civil action in any superior court of Washington.

A nonmaritime possessory lien for wharfage or storage is created by Washington's warehouseman's statute.<sup>96</sup> This lien continues so long as the personal property remains in the warehouseman's possession. He may lawfully sell it as provided by the statute if the property is not called for within thirty days after the storage charges have become due. The possessory lienor must give ten days notice by publication and by personal notice to interested parties, if feasible.<sup>97</sup> Although this statute normally applies to storage of freight or cargo, it should be applicable to vessels, particularly vessels in dry land storage. In *Sun Harbor Marina v. Sellick*,<sup>98</sup> a similar warehouseman's statute in California provided for a similar lien on moored vessels. The California court held the possessory lien to be enforceable in a non-judicial sale.

In *Sun Harbor*, a wharfinger's summary foreclosure sale of a vessel still in service was challenged. The vessel had been moored at the marina by the defendant, Sellick, who later sold it under a conditional sales contract.<sup>99</sup> The purchaser failed to pay moorage fees for approximately a year and a half. The marina sold the vessel, under the California warehouseman's statute. Sellick challenged the sale on the ground, among others, that any lien for storage of a vessel was a maritime lien, therefore a federal matter.<sup>100</sup>

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92. *Farwest Steel Corp. v. DeSantis*, 102 Wn. 2d 487, 687 P.2d 207 (1984), *cert. denied*, 105 S. Ct. 2024 (1985).

93. WASH. REV. CODE §§ 60.36.010(3), 60.60.010 (1983).

94. See G. GILMORE & C. BLACK, *supra* note 4, at 659.

95. WASH. REV. CODE § 60.36.010(3) (1983).

96. *Id.* § 60.60.010.

97. *Id.* § 60.24.010; *Investment Exchange Corp. v. Magnum T., Inc.*, 3 Wn. App. 612, 613, 476 P.2d 731 (1970).

98. 250 Cal. App. 2d 281, 58 Cal. Rptr. 459, 1967 A.M.C. 2783 (Cal. App. 1967).

99. 58 Cal. Rptr. at 460, 1967 A.M.C. at 2783.

100. *Id.*, 58 Cal. Rptr. at 460, 1967 A.M.C. at 2784.



The California appellate court observed that where a remedy is available in both state and federal courts, jurisdiction is concurrent. This concurrent jurisdiction is indicated by the "saving to suitors clause" in the United States Code.<sup>101</sup> In cases of admiralty or maritime jurisdiction, the saving to suitors clause saves to suitors "all other remedies" to which they would be entitled in state court. The California court concluded that the possessory lien before it was a common law remedy excepted from the exclusive jurisdiction of the federal courts by virtue of the saving clause. The *Sun Harbor* analysis could be applied to possessory liens in Washington, particularly to Washington's wharfinger and warehouseman's liens.

A nonjudicial sale under Washington's wharfinger or warehouseman's statute extinguishes only the rights of the debtor. Prior creditors holding maritime liens, a preferred ship mortgage, or perfected security interests may proceed against the vessel in the hands of a new owner for a reasonable time after the sale.<sup>102</sup> The seller may be liable in personam to prior secured parties for conversion. Thus, the possessory lienor must check both the Coast Guard records, if any exist, and Article 9 filings in Olympia and in the vessel owner's home county. Unperfected security interests cannot be asserted against the vessel following a sale.

If Blackship is withdrawn from service pending judicial sale, that is, in *custodia legis*, no lien arises for her maintenance.<sup>103</sup> If she is under state court arrest, no boat lien arises in favor of its watchman.<sup>104</sup> If she is under federal arrest, payment of marshal's costs are governed by federal law.<sup>105</sup>

If Blackship is permanently withdrawn from maritime service, she becomes a "dead ship." As such, she is no longer a "vessel," and thus no longer maritime. No maritime liens can subsequently attach to her.<sup>106</sup> Whether Blackship is in fact "dead" is generally a question of fact. She is not dead, for example, if moored and for sale.<sup>107</sup>

All of the state liens considered here may be recorded with the Coast Guard after the vessel becomes subject to a preferred ship mortgage.<sup>108</sup> Even though these liens will normally have arisen prior to the preferred ship

101. See 28 U.S.C. § 1333 (1982).

102. 46 U.S.C. § 951. See generally G. GILMORE & C. BLACK, *supra* note 4, at 757.

103. *Medina v. Marvirazon Compania Naviera, S.A.*, 533 F. Supp. 1279, 1290 (D. Mass. 1983), *aff'd*, 709 F.2d 124 (1st Cir. 1983).

104. *The Northern Light*, 106 F. 748, 750 (D. Wash. 1901).

105. 28 U.S.C. § 1921 (1982). See also *Coast Engine & Equip. Corp. v. Sea Harvester, Inc.*, 641 F.2d 723 (9th Cir. 1981).

106. G. GILMORE & C. BLACK, *supra* note 4, at 659. *But see Self v. Central Station Equip. Co.*, The V-14813, 65 F.2d 789 (5th Cir. 1933) (lien arose for "necessaries" where vessel was repaired while out of service).

107. *Mercereau v. M/V Woodbine*, 551 F. Supp. 811 (N.D. Ohio 1982).

108. 46 C.F.R. § 67.35 (1982).

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mortgage, in the event of an in rem sale, they will rank last behind that mortgage and behind any maritime lien.<sup>109</sup>

### IV. CONCLUSION

State lien law will continue to be an integral part of admiralty practice in Washington. Because there is no federal common law of property, torts, or contracts, state law provides the only answer to many substantive lien questions, as well as to many germane procedural questions.<sup>110</sup>

The boundaries of federal preemption of state lien law will always be difficult to draw. Where federal law is available, it should prevail. But where no federal law can be found and the matter is answered by a state statute, then logic, common sense, and the reasonable expectations of parties transacting business in Washington support use of the local law.

*Lynn B. Squires*

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109. *United States v. F/V Zarco*, 187 F. Supp. 371, 1961 A.M.C. 78 (S.D. Cal. 1960).

110. The Ship Mortgage Act does not provide the procedure for foreclosure of a preferred ship mortgage. The Supplemental Rules C and E for Certain Admiralty and Maritime Claims, FED. R. CIV. P., govern in rem actions generally, but not preferred ship mortgages specifically. Poole, Powell & Gray, *supra* note 6, at 1211 n.233.