

# The Docket

M A R I T I M E L A W

## Maritime Liens 101: How to avoid walking the plank of malpractice

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“**A** lien is a lien is a lien, but a maritime lien is not.” So say Grant, Gilmore and Black, in *The Law of Admiralty*, 586 (2nd ed. 1975). This article provides a general overview of maritime lien law, and the process for enforcing maritime liens.

Maritime liens are odd creatures in the law. They don't act like real property liens because they often arise automatically, and require no possession, notice or recording to attach. They are authorized by both federal and state law, and are foreclosed on only pursuant to 46 U.S.C. §§31301 et seq. (some sources of Florida law purport to create vessel foreclosure procedures as well — the issue of whether those statutes are preempted by federal law is beyond the scope of this article). There are also Supplemental Rules in the Federal Rules of Civil Procedure that deal with admiralty



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claims, and each district also has local rules that govern such claims.

### **Creation of Maritime Liens**

Federal Statute 46 U.S.C. § 31342 grants a maritime lien on a vessel to anyone who provides “necessaries” to the vessel, if ordered by the owner or a person authorized by the owner. “Necessaries” are defined in 46 U.S.C. §31301 as including repairs, supplies, towage, and the use of a dry dock or marine railway. General maritime law also grants liens on vessels for damages arising out of a maritime tort, the law of general average (which, if you want to look it up, is pretty interesting in and of itself), wages of the crew of a vessel, wages of a stevedore, and for salvage. Maritime law views a vessel as an independent legal entity. As such, maritime liens attach directly to the vessel and lien holders must look to the vessel for payment (although independent, supplemental

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causes of action may also exist against owners or operators of the vessel).

Many states also have provisions that create maritime-like liens on vessels. For instance, Florida Statute §713.58 grants a possessory lien on a vessel in favor of a person performing labor or services upon the vessel. Florida Statutes §328.18 grants a marina a possessory lien upon any vessel for storage fees, dockage fees, repairs, improvements, or other work-related storage charges, and for expenses necessary for preservation of the vessel or expenses reasonably incurred in the sale or other disposition of the vessel. The primary difference between state-law liens relating to vessels and federal-law liens relating to vessels is the manner of enforcement for each.

### Recording of maritime liens

Some vessels are permitted (or sometimes required) to be “documented” by federal law. Generally, pleasure vessels that exceed a particular tonnage may be documented, and commercial vessels that exceed a particular tonnage must be documented. Documentation requires submission of an application to the U.S. Coast Guard Vessel Documentation Center, and upon approval the Coast Guard will issue a vessel an Official Number, and reflect the vessel’s documentation in a central registry that records changes in ownership and encumbrances on the vessel (similar to a County’s public records relating to real property). Persons claiming a maritime lien on a documented vessel are permitted to record liens with the Coast Guard, but are not required to. To be recordable, maritime liens must contain specific statutory information. Because maritime liens are not required to be recorded, there is no reliable way of

accurately discovering all maritime liens that may exist relative to a vessel. For that reason they are often referred to as “secret liens.” If a vessel is not documented, maritime liens will still attach to it, and there is no official recording agency in which to reflect that fact. That uncertainty creates heartburn for lenders, buyers, and practitioners. However, many maritime liens are short-lived, and courts sometimes apply the doctrine of laches to bar claims against buyers who purchase a vessel without notice of a lien, or lenders who make purchase money loans without notice of a lien.

### First Preferred Ship’s Mortgage

A First Preferred Ship’s Mortgage is a mortgage recorded against a vessel that is documented with the U.S. Coast Guard. A First Preferred Ship’s Mortgage is recorded in conformance with 46 U.S.C. §31325, and takes precedence over all liens other than “preferred maritime liens.” A “preferred maritime lien” is a maritime lien on a vessel arising before a First Preferred Ship’s Mortgage was recorded for damage arising out of maritime tort, wages of a stevedore, wages of the crew of the vessel, for general average, or for salvage (whether pure salvage or contract salvage). Recording requirements for a First Preferred Ship’s Mortgage must be strictly adhered to ensure an effective lien.

### Foreclosure of a maritime lien

Pursuant to federal law, a maritime lien can be enforced in only one way. Enforcement requires filing a complaint in federal court that names the vessel itself as a defendant, and requesting that the Court issue a warrant of arrest in rem for the vessel. The action is typically filed in the district in which the vessel is located. The Court will issue an arrest warrant if a prima facie entitlement to arrest is

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demonstrated in a verified complaint. The U.S. Marshal serves the warrant on the vessel’s master, posts the warrant of arrest on the vessel, and takes the vessel into custody. The U.S. Marshal requires an advance deposit relative to the arrest of the vessel (currently \$5,000 in the Middle District of Florida). The U.S. Marshal is required to maintain the safety of the vessel during the pendency of the proceedings, but the Marshal’s services are prohibitively expensive. Application is usually made to the Court to appoint a substitute vessel custodian at a reduced rate.

A vessel’s owner has the ability to file a Notice of Claim to defend the vessel, and any lien holders may likewise participate in the foreclosure. The result of a vessel foreclosure is a judicial sale of the vessel by the U.S. Marshal. When that occurs, the vessel is sold free and clear of all claims against it. Each of the claims that are terminated attaches, in the same amount and in accordance with their priorities (discussed below), to the proceeds of the sale. Court costs and expenses of the sale are paid from the sale proceeds.

### Priority of maritime liens

Much like in a real property foreclosure, a vessel foreclosure often deals with multiple liens. Statutory law dictates what classes of maritime liens will take precedence over others, and all liens in a class of liens must be fully satisfied from the proceeds of a judicial sale before lower classes of liens may be paid. Within the same class of liens, the last lien to attach to the vessel will usually be paid first, which is contrary to the usual “first in time, first in right” concept that is familiar in real estate. The theory behind payment of maritime liens in order of recency is that more recent providers of goods and services keep the vessel operational, which benefits the previous lien

holders. In general, liens are paid off in the following order: liens for seaman’s wages; salvage liens; liens securing accident claims; liens for necessities rendered before a preferred ship mortgage lien attaches; preferred ship mortgage liens; liens for goods and services rendered after any preferred ship mortgage lien attaches; state-law-created liens of a maritime nature.

### Alternatives to foreclosure

Although the statutes cited above provide the only means of judicially foreclosing on a maritime lien, other alternatives exist. The primary benefits of judicially foreclosing on a maritime lien are the certainty that comes with a final order of foreclosure (in terms of obtaining clear title to the vessel), and the pressure that is brought to bear once a vessel is arrested. The primary downside is cost. Even an uncontested vessel foreclosure can cost several thousand dollars when attorney’s fees, court costs, Marshal’s fees, and custodian fees are taken into account.

Some authority suggests that self-help repossession is a viable alternative to the judicial foreclosure process if the mortgage documents provide for that remedy. Lenders considering that remedy face the same risk they do in any self-help situation: how to cause the repossession to occur without breaching the peace. If a vessel is a “working vessel” that will likely be impossible unless the borrower is willing to cooperate.

Utilizing a state-law foreclosure procedure may be a viable alternative, depending on the nature of the lien that is being foreclosed on. While maritime liens arising under state law may be amenable to such treatment, it is unlikely that maritime liens created by federal law can be foreclosed in any manner other than an *in rem* action in federal court. The risk associated with this approach should be discussed with the lien holder before proceeding.