

**THE MARITIME LIEN REFORM ACT —
A POLITICAL WATERSPOUT IN MARITIME
JURISPRUDENCE**

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“Ah! well a-day! what evil looks
Had I from old and young!
Instead of the cross, the Albatross
About my neck was hung.”¹

I. INTRODUCTION

In 2010, the fishing industry in the United States earned approximately \$4.5 billion in annual revenue.² \$1.5 billion of that amount came from Alaska, followed by Massachusetts (\$480 million), Maine (\$377 million), and Louisiana (\$248 million).³ The front line of this industry — fishermen — have been led to believe they will benefit from a new law that would prohibit subjecting federal fishing permits to maritime liens.⁴ The notion that this new law will create any long-term benefits for fishermen⁵ is a misconception.

Alaska Senators Murkowski and Begich, and Representative Young, proposed the Maritime Lien Reform Act (“MLRA”), on March 17, 2011, to the United States Congress.⁶ The Act would prohibit creditors from subjecting commercial fishing permits to maritime liens.⁷ This is the third time this bill has been proposed.⁸ If this law passes, it will reverse recent case-law that allows maritime creditors to lay claim to fishing permits when the vessel’s owner defaults.⁹ Notably, the recent jurisprudence that allows this practice has developed from federal district and appellate court opinions.¹⁰ The Supreme Court has not yet ruled on the application of maritime liens to federal fishing permits.¹¹

1. Samuel Coleridge, *The Rime Of The Ancient Mariner*, in *Selected Poetry And Prose Of Coleridge* 6, 10 (Donald A. Stauffer ed., 1951).

2. National Oceanic and Atmospheric Administration, *Annual Commercial Landing Statistics*, (Aug. 4, 2012), http://www.st.nmfs.noaa.gov/st1/commercial/landings/annual_landings.html.

3. *Id.*

4. Alaska Dispatch, *Federal Law would protect Alaska’s halibut fishermen*, (Mar. 21, 2011), <http://www.alaskadispatch.com/article/federal-law-would-protect-alaskas-halibut-fishermen> [hereinafter Alaska Dispatch].

5. *See id.*

6. Maritime Lien Reform Act, S. 608, 112th Cong. (2011); Maritime Lien Reform Act, H.R. 1210, 112th Cong. (2011); *see* Alaska Dispatch, *supra* note 4.

7. Maritime Lien Reform Act, S. 608, 112th Cong. § 31310(a)(1)(A) (2011); Maritime Lien Reform Act, H.R. 1210, 112th Cong. § 31310(a)(1)(A) (2011).

8. Alaska Dispatch, *supra* note 4.

9. *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 69 (1st Cir. 2011), cert. denied, 534 U.S. 886 (2001) (holding that federal fishing permits were correctly included as part of an auctioned vessel).

10. *See id.* at 69 (noting the dearth of precedent and court’s role in creating new case-law); *see also* *Lush v. F/V Terri and Ruth*, 324 F. Supp. 2d 90, 93 (D.Me. 2004)

This comment will explain the rationale behind the developing case-law that allows these liens, in order to convey the logical gap this new statute will create in maritime jurisprudence.¹² It will then focus on the future effects the statute may have on the fishing industry. The statute may even defeat its own purpose, due to the peculiar operation of admiralty law that holds a vessel liable *in rem* for its debts.¹³ In the long run, a law that prohibits subjecting federal fishing permits to maritime liens will likely benefit mortgagees while harming fishermen.

II. HISTORY OF MARITIME LIENS ON APPURTENANCES

A. *Maritime Liens*

The maritime lien is a special tool created for the benefit of vessels and creditors alike.¹⁴ Maritime liens grant vessels the ability to gain credit in unfamiliar ports where creditors know nothing of the vessel's credit history.¹⁵ These liens also aid creditors of certain goods and services to recoup their loans by holding the vessel and its appurtenances liable for the debt.¹⁶ Although courts stress that a maritime lien does something more than simply create collateral for a loan,¹⁷ that generality fairly describes how the law functions when a vessel defaults.¹⁸

A "maritime lien" can be created by loaning a vessel necessities.¹⁹ "Necessaries" include providing "repairs, supplies, towage, and the use of a dry dock or marine railway."²⁰ Common-

(holding that extension of maritime lien to federal fishing permits depends on local custom).

11. See *Gowen, Inc.*, 244 F.3d at 65.

12. See *id.* at 68-69 (discussing precedent of extending maritime liens to severable and leased equipment, and to intangible rights).

13. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY*, ch. IX (2d ed. 1975).

14. Robert J. Zapf, *Appurtenances: What Are They and Are Fishing Permits Among Them?*, 79 TUL. L. REV. 1339, 1341 (June 2005) (citing *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 602 (5th Cir. 1986)(*en banc*)(noting the mutual benefit derived from the operation of maritime liens to creditors and vessel operators).

15. *Id.*

16. *Id.* at 1340.

17. *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 868 (11th Cir. 2010) ("[A] maritime lien converts the vessel itself into the obligor and allows injured parties to proceed against it directly.").

18. Charles W. Olcott, *Hook, Line and Sinker (and Fishing Permits, Too?): The Inclusion of Fishing Permits as Appurtenances to Maritime Liens*, 8 *Ocean & Coastal L.J.* 205, 209 (2003).

19. 46 U.S.C.A. § 31342 (West 2010).

20. 46 U.S.C.A. § 31301 (West 2010).

law has determined that “supplies” include anything required by the vessel to accomplish its task.²¹ Maritime liens are also created by tort claims, towage, salvage, crew wage claims, and preferred mortgages.²²

Maritime liens are peculiar, not only because they automatically hold a vessel and its appurtenances liable, but also because they are secret and operate in reverse chronology.²³ The loans are secret in that the vessel is not required to record the liens against it, or report the liens to any type of registry.²⁴ At first this would seem to discourage creditors, who would not know the priority their repayment would receive if the vessel defaults.²⁵ For this reason, when a vessel defaults on a maritime lien, creditors are repaid in reverse chronological order.²⁶ The most recent lender is the first to be repaid.²⁷ This naturally encourages lenders to claim their debts promptly.²⁸

Once a vessel defaults on a maritime lien, the lender may sue for the debt and arrest the vessel.²⁹ If the petition goes unanswered, or the vessel simply cannot pay its debts, the creditor may request that the court auction the vessel and its appurtenances.³⁰ Once the vessel is auctioned, all previous maritime liens are extinguished.³¹ The new vessel owner has title that is free and clear of any encumbrances.³² This type of court auction is the only way to clear a vessel’s maritime lien history.³³

21. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California*, 310 U.S. 268, 280 (1940) (“The [maritime] lien is given for supplies which are necessary to keep the ship going.”).

22. 46 U.S.C.A. § 31301 (West 2010).

23. *Olcott*, *supra* note 18, at 209; *Crimson Yachts*, 603 F.3d at 870.

24. *Olcott*, *supra* note 18, at 209; *see Gowen, Inc.*, 244 F.3d at 69; *but see Sustainable Fisheries Act*, 16 U.S.C.A. § 1855(h)(West 2007)(attempting to create a registry system for maritime liens). The registry is not yet mandatory because regulations required for its enforcement are still lacking. *Gowen, Inc.*, 244 F.3d at 70.

25. Normally secured creditors are paid in the order they perfect their lien. U.C.C. § 9-102(a)(73).

26. *Olcott*, *supra* note 18, at 209 (explaining reverse chronology as “last in time, first in right”).

27. *Id.*

28. *Id.* at 212.

29. FED. R. CIV. P. SUPP. C(3)(a)(i).

30. FED. R. CIV. P. SUPP. G(7)(b)(i).

31. 46 U.S.C. § 31326(a)(2006); *See Gulf & S. Terminal Corp. v. S.S. President Roxas*, 701 F.2d 1110, 1111-12 (4th Cir. 1983) (recognizing that an authorized judicial sale of a vessel by a court of competent jurisdiction discharges all liens against the vessel).

32. 46 U.S.C. § 31326(a); *S.S. President Roxas*, 701 F.2d at 1111-12.

33. *See S.S. President Roxas*, 701 F.2d at 1111-12; *see also Olcott*, *supra* note 18, at 211-12 (discussing why maritime liens stay with the vessel despite selling to a good faith purchaser); *but see, Phelps v. The Cecelia Ann*, 199 F.2d 627, 629 (4th Cir. 1952) (holding

Interestingly, ship mortgages did not create a maritime lien under maritime common-law.³⁴ For that reason, Congress passed the Maritime Lien Act in order to promote shipping by allowing mortgagees to hold a vessel and its appurtenances liable for debt.³⁵

B. *Traditional Appurtenances*

A maritime lien's ability to hold a vessel and its appurtenances liable *in rem* for the vessel's debts is rooted in early English law.³⁶ By the early eighteenth century, European countries had begun enacting laws to protect their shipping industries, limiting ship-owners' liability to the value of their vessels.³⁷ England followed suit by limiting ship-owner liability through a series of laws culminating in 53 G. III c.159.³⁸ This law limited a ship-owner's liability in any action against the vessel to the value of the vessel, tackle, furniture and appurtenances.³⁹ The United States currently has a similar version of this law — the Limitation of Liability Act.⁴⁰ It also limits ship-owner liability to "the value of the vessel and pending freight" unless the owner had "privity or knowledge" of the circumstances leading to the vessel's debt or lien.⁴¹

that an unreasonable delay in enforcing a maritime lien constituted laches which barred enforcement of the lien against an innocent third party).

34. Zapf, *supra* note 14, at 1341.

35. Maritime Commercial Instruments and Liens Act, Pub. L. No. 100-710, § 102, 102 Stat. 4735, 4738-49 (codified as amended at 46 U.S.C.A §§ 31301-43 (West 2010)); see *In re The Portland*, 273 F. 401, 403 (9th Cir. 1921) (noting the purpose of the original act was to give certainty regarding the question of liability of a ship for materials and service); see also *Equilease Corp.*, 793 F.2d at 602 ("Congress passed the Act in an attempt to spur incentive for the financing of ship-owners by making private investment in shipping more attractive than it had been."); see also H.R. REP. 100-918, at 11 (1988) reprinted in 1988 U.S.C.C.A.N. 6104, 6104 (explaining that the aim of the recent legislation is to make mortgage and lien laws easier to administer and less cumbersome for the maritime community to use).

36. William Tetley, Q.C., *Arrest, Attachment and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1900-01 (1999). Although there is some dispute whether English law's *in rem* action originated from Roman law, it was an established procedural right by at least the sixteenth century in English admiralty courts. *Id.* at 1901.

37. See *The Dundee*, (1823) 166 Eng. Rep. 39 (Adm.) 44, 1 Hagg. 109, 121 (citing the laws of Holland as inspiration for English limitation of liability for vessels); see also Alberto C. Cappagli, *Limitation of Liability in the Rotterdam Rules—A Latin American Perspective*, COMITE MAR. INT'L, 1 (Oct. 27, 2010), <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf>.

38. *United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 F. 40, 41-42 (2d Cir. 1914).

39. *The Dundee*, 166 Eng. Rep. at 44, 1 Hagg. at 121.

40. 46 U.S.C. § 30505 (2006).

41. § 30505(a)-(b).

In *The Dundee*, an English court interpreted the meaning of "appurtenances."⁴² The case concerned a ship, *The Dundee*, which struck and sank another vessel in the Thames River.⁴³ At the time of the incident, the *Dundee* was loaded with fishing stores for a fishing expedition to Greenland.⁴⁴ The fishing stores were worth £2236, which nearly equaled the value of the vessel itself at £2685.⁴⁵ Counsel for the vessel argued that the term "appurtenances" only included items that were not severable from the vessel without destroying the structure's status as a vessel.⁴⁶ Lord Stowell, however, ruled that "appurtenances" included transferable items such as fishing stores if the equipment was necessary to the purpose of the vessel.⁴⁷

United States courts have largely adopted this same definition of appurtenances; anything essential to the vessel's operation.⁴⁸ In Robert Zapf's article *Appurtenances: What are They and are Fishing Permits Among Them?*, he concludes that there is a "long-established body of precedent" in the United States that incorporates anything used by a vessel to carry out its mission as an appurtenance subject to maritime lien.⁴⁹ He cites cases where a vessel's appurtenances included equipment owned by a third party⁵⁰ and even spare parts kept in a warehouse on shore.⁵¹ While this may be representative of the law generally, there are many instances where court opinions

42. *The Dundee*, 166 Eng. Rep. at 46, 1 Hagg. at 126-27.

43. *Id.* at 39, 43, 1 Hagg. at 109, 120.

44. *Id.* at 40, 1 Hagg. at 109.

45. *Id.* at 44, 1 Hagg. at 122.

46. *Id.* at 42, 1 Hagg. at 117. It was also argued that interpreting "appurtenances" in a broad sense would defeat the intent of the limitation of liability statute, which ended the ancient practice of holding a vessel owner liable for the full amount of damage. *Id.* at 43, 1 Hagg. at 118.

47. *Id.* at 46, 1 Hagg. at 127-28 (commenting that this definition supports good policy, preventing a potential windfall for a negligent vessel).

48. *The Edwin Post*, 11 F. 602, 606 (D. Del. 1882) (holding a wrecking apparatus was an appurtenance of a ship); *The Witch Queen*, 30 F. Cas. 396, 397 (D. Cal. 1874) (No. 17916) (citing *The Dundee*, 166 Eng. Rep. at 46, 1 Hagg. at 126-27, and holding that all objects onboard a vessel aiding in the purpose of the voyage are appurtenances); *United States v. Dewey (The Manila Prize Cases)*, 188 U.S. 254, 270 (1903) (holding that the term "ship" is understood to include appurtenances such as sails, tackle and boats).

49. Zapf, *supra* note 14, at 1350.

50. *Id.* (citing *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (D. Me. 1963)) (holding that a leased fathometer became integral part of the ship used for navigation and subject to a maritime lien against the vessel).

51. *Id.* (citing *Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 561 (N.D. Miss. 1995)) (holding that various spare parts in a warehouse were subject to a maritime lien against the vessel even though the parts were not carried onboard).

have conflicted.⁵² In *United States v. F/V Golden Dawn*, a U.S. district court in New York held that a leased “fishfinder” on a fishing boat was not an appurtenance of the vessel.⁵³ This was because a third party owned it, and it was removable without damage to the vessel.⁵⁴ The court’s holding directly opposed the holding of a 1963 case from Maine, *United States v. F/V Sylvester F. Whalen*.⁵⁵ The New York court attempted to distinguish *Sylvester F. Whalen* by emphasizing different language in that case’s disputed mortgage contract⁵⁶ and by implying that the Maine court used inexact language.⁵⁷ However, the court also acknowledged that defining a vessel’s appurtenances requires an analysis that is “complex and often difficult to apply.”⁵⁸

C. *Intangible Appurtenances*

For a maritime lien to properly encompass fishing permits, it must be allowed to embrace an intangible appurtenance. This is nothing new.⁵⁹ Aside from the traditional physical appurtenances discussed above, courts have also applied maritime liens against intangible appurtenances.⁶⁰

In *United States v. The Mount Shasta*, a vessel owner maintained a lien on freight for unpaid fees by the vessel’s charterer.⁶¹ Despite delivery of the freight by a sub-lessee to its purchaser, the unpaid debt owed to the vessel owner by the charterer was considered a *res* and appurtenant to the vessel.⁶² Oliver Wendell Holmes, writing for the Court, held that the debt created by unpaid freight fees on the sub-freight could also be an

52. See Clinton Snow & Peter Ruggero, *Exposing Secret Maritime Liens in Bankruptcy*, 29-JAN AM. BANKR. INST. J. 52, 52 (West 2011)(citing 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-1, at 489 (2d ed. 1994)).

53. *United States v. F/V Golden Dawn*, 222 F. Supp. 186, 190 (E.D.N.Y. 1963).

54. *Id.* at 188-89.

55. *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (S.D. Me. 1963) (holding that a leased fathometer had become an integral part of the vessel’s navigation and fishing purposes and was therefore subject to the creditor’s lien).

56. *Golden Dawn*, 222 F. Supp. at 190 (asserting that *Whalen* was different because its mortgage applied against “fishing equipment,” and construed the mortgage as a maritime lien rather than non-maritime security device).

57. See *id.* (stating that the *Whalen* fishfinder was included because it was expressly subject to the mortgage’s language, rather than embracing that court’s treatment of the *Whalen* mortgage as a strict maritime lien).

58. *Id.* at 188.

59. See *Gowen, Inc.*, 244 F.3d at 68 (“There is no general objection to treating an intangible as an appurtenance”).

60. See *id.*

61. *United States v. The Mount Shasta*, 274 U.S. 466, 469 (1927).

62. *Id.* at 470.

appurtenance as easily as the cargo itself.⁶³ The debt for sub-freight fees was an intangible appurtenance; the physical cargo or an actual fund of money was not necessary to support the lien.⁶⁴

Courts continued to follow this precedent,⁶⁵ and the First Circuit Court of Appeals partly relied on it to expand “appurtenances” to include fishing permits.⁶⁶

D. *Insurance Policy Interpretation*

Aside from courts’ legal interpretations of what parts of a ship are included as collateral for maritime liens, insurance law had also decided its own historical definition for the term “ship.”⁶⁷ In 1823, Willard Phillips wrote in his treatise titled *The Law of Insurance*, that a policy written for a “ship” in the United States was understood to include its “sails, rigging, tackle, furniture, boat and provisions.”⁶⁸ This is very similar to the legal meaning of “appurtenance.”⁶⁹ In a fishing expedition, Willard claimed that policies typically covered a “ship, the outfits and the cargo.”⁷⁰ This would have included the fishing stores contemplated by the English court in *The Dundee*.⁷¹

E. *Federal Fishing Permits*

Federal fishing permits are a product of the Magnuson-Stevens Act,⁷² granting power to the Secretary of Commerce to limit the number of each species of fish harvested annually.⁷³

63. *Id.*

64. *See id.*; *but see id.* at 471-72 (McReynolds, dissenting) (noting the peculiarity of an “in rem” proceeding where there is actually no physical object to take into custody).

65. *See In re Millenium Sea Carriers, Inc.*, 275 B.R. 690, 697 n.4 (S.D.N.Y. 2002) (explaining current operation of maritime law includes intangible appurtenances); *see also United States v. 3 Parcels in La Plata Cnty., Colo.*, 919 F.Supp. 1449, 1453 (D. Nev. 1995) (citing *Mount Shasta* as support for the principle that liens are allowed against intangibles).

66. *See Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68-69 (1st Cir. 2001). The court cites *Mount Shasta* to prove “[t]here is no general objection to treating an intangible as an appurtenance.” *Id.*

67. *See generally* Willard Phillips, *A Treatise on the Law of Insurance* 71-72 (Boston, Wells & Lilly 1823).

68. *Id.* at 71.

69. *See Dewey*, 188 U.S. at 270 (holding that the term “ship” is understood to include appurtenances such as sails, tackle and boats).

70. Phillips, *supra* note 67, at 72.

71. *The Dundee*, (1823) 166 Eng. Rep. 39 (Adm.) 46, 1 Hagg.109, 126-28.

72. The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-83 (1996).

73. Olcott, *supra* note 18, at 222-23.

The permits are issued to vessels rather than owners.⁷⁴ The vessel's permit history transfers with the sale of a vessel, enabling easier regulation.⁷⁵ They are not technically transferable unless the permit-bearing vessel sinks or is disabled.⁷⁶ In this respect they are akin to the physical fishing stores of the vessel, and not as amorphous as the intangible sub-freight debt respected by United States courts.⁷⁷ However, there are legal loopholes that fisherman use to sell the permits.⁷⁸ Some fishermen circumvent the bar on transferring permits by selling a vessel with its permits and then immediately buying the vessel back without the permits.⁷⁹

Some economists argue that allowing for easy transfer of permits would allow market forces to prevent over-fishing.⁸⁰ In practice, however, the free market approach has led to over-fishing.⁸¹ Also, while attachment of fishing permits to vessels rather than individuals may seem arbitrary at first glance, it allows for easier regulation and monitoring.⁸²

High stakes surround the question of whether fishing permits should be subject to maritime liens — certain permits can reach into the millions of dollars.⁸³ While some argue that submitting permits to maritime liens injures the fishing industry,⁸⁴ both proponents and opponents to the statute can agree that the law must be predictable for vessel owners, lenders, and insurers.⁸⁵ While one court has seemed to imply that

74. *Id.* at 224 (citing 50 C.F.R. § 648.4(a)(i) (2002)).

75. *Id.* at 224 (citing 50 C.F.R. § 648(a)(i)(D) (2002)).

76. *Id.* at 224-25.

77. *Compare Dundee*, 166 Eng. Rep. at 46 (describing fishing stores as appurtenant to the vessel even though they can be physically separated from the vessel), *with Mount Shasta*, 274 U.S. at 470 (declaring that there is no need for a physical object in order to assert a maritime lien against sub-freight debt).

78. Olcott, *supra* note 18, at 225.

79. *Id.* (citing Bart Jansen, *Supreme Court Refuses to Hear Maine Fishing Permits Decision*, PORTLAND PRESS HERALD, Oct. 1, 2001, at B1).

80. Nicola Kieves, *Crisis at Sea: Strengthening Government Regulation to Save Marine Fisheries*, 89 MINN. L. REV. 1876, 1888 (2005).

81. *Id.*

82. *See id.* at 1890 (citing ORG. FOR ECON. CO-OPERATION & DEV., *New Zealand Case Study: Institutional Effects of the Introduction of Individual Transferable Quotas (ITQs)*7 (Mar. 05, 2005), <http://www.oecd.org/dataoecd/38/27/2349219.pdf>).

83. David J. Farrell, *Maritime Liens on Fishing Privileges: Towards a Congressional Resolution*, 2 *Benedict's Maritime Bulletin* 339, 339 (2004) (quoting the value of certain scallop permits at \$1,000,000).

84. *Id.*

85. *See id.* at 341 (claiming that the purpose of a law disallowing maritime liens against fishing permits would be to "eliminate uncertainty and facilitate the financing of enterprises engaged in limited access fisheries").

fishermen are vested with a kind of property right in fish,⁸⁶ courts have largely dismissed this categorization and held that fishing permits only confer a “privilege.”⁸⁷ Consequently, at different times, a commercial fishing permit may have been viewed in two different lights – as an intangible privilege or as the non-transferable property right of a vessel.⁸⁸

The debunked notion of a property right would have allowed for permits to easily be considered appurtenances because they would have been a non-transferable property right necessary to the function of the vessel.⁸⁹ The now universally accepted practice of viewing fishing permits as intangible privileges still allows inclusion as an appurtenance under *Mount Shasta*.⁹⁰ Either theory set the stage for the First Circuit Court to expand the definition of appurtenances to include fishing permits.⁹¹

III. DIVERGING COURTS

In 2001, the First Circuit Court of Appeals held that federal fishing permits are appurtenances of a fishing vessel.⁹² It was the first court to expressly address this issue, although one other court’s ruling had granted the same result without discussion.⁹³ In *Gowen*, the owner of a fishing vessel, Quality One, owed money to Gowen for unpaid wharfage and repair services.⁹⁴ When the vessel was arrested and sold to pay the owner’s debts, the district court ordered the vessel’s permits transferred to the

86. See *Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953) (discussing special tort considerations for fishermen; “[F]ishermen who, as we have here indicated, had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well.”).

87. See Farrell, *supra* note 83, at 339. The government agency overseeing fishing permits (NOAA Fisheries) asserts that “fishery participation is a harvesting ‘privilege’ rather than a property ‘right.’” *Id.* Courts have agreed with this analysis. *Id.* (citing *American Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1373 (Fed. Cir. 2004); *Conti v. U.S.*, 291 F.3d 1334, 1341-42 (Fed. Cir. 2002)).

88. Compare *Mount Shasta*, 274 U.S. at 470 (applying a maritime lien against an intangible debt), with *United States v. Dewey*, 188 U.S. 254, 270 (1903) (holding that the term “ship” is understood to include non-transferable physical appurtenances such as sails, tackle and boats).

89. See *Dewey*, 188 U.S. at 270 (discussing the essential nature of appurtenances on a fishing vessel); *Gowen, Inc.*, 244 F.3d at 68 (discussing the importance of fishing permits to the fishing vessel).

90. *Gowen, Inc.*, 244 F.3d at 68.

91. *Id.* at 65, 67.

92. *Id.* at 68-71.

93. *Id.* at 69 (citing *Bank of Am. v. Pengwin*, 175 F.3d 1109, 1119 (9th Cir. 1999)).

94. *Id.* at 65.

purchaser.⁹⁵ These permits granted the vessel permission to catch a limited number of a particular species of fish.⁹⁶ The federal fishing permit can be worth several times the value of the vessel.⁹⁷

The appellate court considered the history of appurtenances included in vessel auctions.⁹⁸ Normally, when a vessel is arrested and sold, all of its appurtenances are included in the sale.⁹⁹ Appurtenances are equipment necessary to the vessel's purpose.¹⁰⁰ Historically, appurtenances were physical objects, such as fishing-stores, rigging, and nets.¹⁰¹ However, over time courts recognized that intangibles could also be included, such as pending freight charges.¹⁰²

The court found little precedent addressing whether fishing permits should be included as an appurtenance.¹⁰³ The court then turned to the history of maritime liens to determine if including permits fit the original purpose of maritime liens.¹⁰⁴

The principal reason for maritime liens, and the special legal treatment they merit, arose from a ship's need to have mobile credit that could be trusted in any port.¹⁰⁵ Because a maritime lien can hold the vessel itself accountable for payment, credit was supported by the collateral value of the vessel itself.¹⁰⁶

Because fishing permits are so tightly regulated, they are commodities that add substantial value to a ship.¹⁰⁷ Vessels reasonably receive more credit from maritime lenders due to this additional value.¹⁰⁸ The court found that the vessel depended on

95. *Id.* at 65-66.

96. *Id.* at 65.

97. Farrell, *supra* note 83, at 339; see *Gowen, Inc.*, 244 F.3d at 68 (acknowledging that federal fishing permits have substantial value).

98. See *Gowen, Inc.*, 244 F.3d at 67-69.

99. *Id.* at 67 (referencing generally GILMORE & BLACK, *supra* note 13, § 9).

100. *Dewey*, 188 U.S. at 270 (discussing the essential nature of appurtenances on a fishing vessel); see BLACK'S LAW DICTIONARY 118 (9th ed. 2009).

101. *Swift v. Brownell*, 23 F. Cas. 554, 557 (C.C.D. Mass. 1875) (No. 13,695); see *Trinidad Corp. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 130 F. Supp. 46, 48-49 (S.D.N.Y. 1955) (citing *In re Margetts and The Ocean Accident and Guarantee Corp.*, 2 KB 792, 794 (1901)).

102. *United States v. Freights of the Mount Shasta*, 274 U.S. 466, 469-70 (1927).

103. *Gowen, Inc.*, 244 F.3d at 69.

104. *Id.*

105. *Id.* at 68; see 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 9-1, at 515-16 (4th ed. 2004) (attributing the origins of maritime liens to the need for ship's to have a source of mobile credit).

106. William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1898-99 (1999).

107. *PNC Bank of Del. v. F/V Miss Laura*, 381 F.3d 183, 185 (3rd Cir. 2004).

108. *Gowen, Inc.*, 244 F.3d at 68.

the value of these permits as much as on its engines or navigation equipment when seeking credit.¹⁰⁹ Because current liens against a vessel are known only by the vessel's master or owner, maritime lenders must rely on the added value of the permits to cover the risk of default.¹¹⁰ Reliance on the value of these permits is destroyed if the permits are not included in the vessel's sale.¹¹¹

However, the court acknowledges that there is little precedent proving whether lenders have a reasonable expectation that the value of the permits is included.¹¹² Nonetheless, the court affirmed the district court's ruling.¹¹³

Three years later, the Third Circuit Court of Appeals refused to extend *Gowen's* holding and enforce a maritime lien against the fishing permits of a sunken ship because the owner had transferred the permits to another vessel.¹¹⁴ PNC Bank of Delaware had arrested a fishing vessel, *Miss Laura*, for defaulting on a preferred mortgage.¹¹⁵ Maine Shipyard asserted that it had first claim to the vessel's permits.¹¹⁶

Maine Shipyard's claim arose from the transfer of fishing permits from another vessel, the *Miss Penelope*, to *Miss Laura*.¹¹⁷ The shipyard had held a maritime lien against *Miss Penelope*.¹¹⁸ Before the shipyard could arrest and auction the *Miss Penelope*, the vessel sank.¹¹⁹ The owner had then transferred *Miss Penelope's* fishing permits to the *Miss Laura*.¹²⁰

The district court held that a lien on a vessel's fishing permits could not survive a vessel's sinking.¹²¹ The appellate court did not endorse this reasoning because it would have come "needlessly close to conflicting with . . . *Gowen*," and the court did

109. *Id.*

110. *Id.* at 68-69; *See generally* Snow & Ruggero, *supra* note 52, for a discussion of the "secret" nature and unusual bankruptcy procedures surrounding maritime liens.

111. *See Gowen, Inc.*, 244 F.3d at 68-69; *see also* Snow & Ruggero, *supra* note 52 (discussing the selling of property encumbered by a maritime lien during bankruptcy).

112. *Gowen, Inc.*, 244 F.3d at 68-69 (quoting 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 9-1, at 489 (2nd ed. 1994) noting case-by-case determination of appurtenances and a lack of common-law precedent).

113. *Id.* at 71.

114. PNC Bank of Del. v. F/V *Miss Laura*, 381 F.3d 183, 185, 187 (3rd Cir. 2004).

115. *Id.* at 185.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 185-86.

120. PNC Bank of Del. v. F/V *Miss Laura*, 243 F. Supp. 2d 175, 185 (D.N.J. 2003).

121. *Miss Laura*, 381 F.3d at 179.

not want to risk conflicting with the First Circuit.¹²² The court ignored the question of whether a lien on fishing permits could survive a vessel's sinking.¹²³ Instead, the court held that the shipyard's lien on the *Miss Penelope* could not extend to appurtenances of the *Miss Laura*.¹²⁴ The shipyard's lien could not be enforced against the permits because they had been transferred.¹²⁵

While the court attempted to avoid a conflict with the First Circuit, it seems to have failed.¹²⁶ Allowing a vessel owner to escape a maritime lien against his fishing permits by transferring them to another vessel takes the wind out of *Gowen's* sails.¹²⁷ Owners of several vessels merely have to transfer their fishing permits to protect them from liens.¹²⁸ This defeats much of the reasoning in *Gowen*, that the permits should be a reliable aspect of the vessel's value.¹²⁹ Also, allowing vessel owners to protect their fishing permits by transferring them to another vessel gives owners of fishing vessel fleets an advantage not easily matched by a traditional one-vessel fisherman.¹³⁰

In *Offenbacher v. Ahart* a district court in Oregon applied the reasoning of *Gowen* and *Miss Laura*.¹³¹ The court considered a seaman who fell through an open hatch on the fishing vessel *Migrator*.¹³² He waited several months before filing a Jones Act claim against the *Migrator*.¹³³ In the interim, a company purchased the *Migrator* and its associated crab permit for \$140,000.¹³⁴ The purchaser then swapped the *Migrator's* crab

122. *Miss Laura*, 381 F.3d at 186.

123. *Id.*

124. *Id.* at 186-87

125. *Id.*

126. *See id.*; but *see Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 69 (1st Cir. 2001)(acknowledging that maritime liens extend to severable equipment); *see also Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillian*, 890 F. Supp. 552, 561 (N.D. Miss. 1995)(holding that components of a vessel, even though "readily removable," may be appurtenances).

127. *See Gowen, Inc.*, 244 F.3d at 68 (emphasizing the importance of the permit's value to the vessel creditworthiness).

128. *Miss Laura*, 381 F.3d at 185-86.

129. *Gowen, Inc.*, 244 F.3d at 68 (sometimes vessels are valued entirely based on permits).

130. *See Miss Laura*, 381 F.3d at 186 (allowing an owner of more than one vessel to transfer the fishing permits of one vessel to the other).

131. *Offenbacher v. Ahart*, No. 07-CV-326-BR, 2009 WL 523097, at *7 (D. Or. Feb. 25, 2009).

132. *Id.* at *1.

133. *Id.* at *3.

134. *Id.*

permit with another vessel's less valuable permit before the seaman asserted his claim.¹³⁵

The court determined that the purchaser had not transferred the permit in a deliberate attempt to decrease the vessel's value, but as a business decision to increase efficiency.¹³⁶ Accordingly, it held that the seaman could only assert a lien against the less valuable crab permit that was assigned to *Migrator* at the time he asserted his lien.¹³⁷ Interestingly, the court implies that had the purchaser of *Migrator* intentionally transferred the permit to decrease the vessel's value, the seaman may have been able to assert his lien against the transferred permit.¹³⁸

Courts have not been consistent when determining what items are appurtenant to a vessel.¹³⁹ Some have allowed maritime liens to extend to leased equipment, while others have not.¹⁴⁰ This may reflect the sentiment that what is appurtenant to a vessel is determined on a case-by-case basis.¹⁴¹ While that naturally results in a degree of unpredictability in a vessel's value, the gray area of inclusion as an appurtenance has typically surrounded less valuable equipment.¹⁴²

IV. THE MARITIME LIEN REFORM ACT

The Maritime Lien Reform Act represents the third time a bill has been introduced to specifically reverse *Gowen's* holding that fishing permits are appurtenant to a fishing vessel.¹⁴³ The Act states:

“This Chapter-

(1) does not establish a maritime lien on a license that-

135. *Id.* at *3-4.

136. *Id.* at *7.

137. *Id.*

138. *See id.*

139. *United States v. F/V Sylvester F. Whalen*, 217 F. Supp 916, 917 (D. Me. 1963) (holding that a leased fathometer was an appurtenance of the vessel); *but see United States v. F/V Golden Dawn*, 222 F. Supp. 186, 190 (E.D.N.Y. 1963) (holding that a leased “fishfinder” was not appurtenant to the vessel).

140. *See Sylvester F. Whalen*, 217 F. Supp at 917; *but see Golden Dawn*, 222 F. Supp. at 190.

141. *See Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001) (quoting THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 7-1, at 429 [sic] (2d ed. 1994)).

142. *See Sylvester F. Whalen*, 217 F. Supp. at 917 (determining whether a fishfinder was an appurtenance of a vessel).

143. *See Coast Guard Authorization Act of 2006*, H.R. 5681, 109th Cong. § 308 (2006) (enacted); *Coast Guard Authorization Act for Fiscal Year 2008*, S. 1892, 110th Cong. § 505 (2008); *Alaska Dispatch*, *supra* note 4.

(A) authorizes a person or use of a vessel to engage in fishing; and

(B) is issued under State or Federal law; and

(2) does not authorize any civil action to enforce a maritime lien on such a license.”¹⁴⁴

Also, taking direct aim at the *Gowen* court, the Act clarifies that “[a] fishing permit . . . is not included in the whole of a vessel or as an appurtenance or intangible of a vessel for any purpose.”¹⁴⁵ The bill was introduced on March 17, 2011, and it was referred to the Senate Committee on Commerce, Science, and Transportation and to the House’s Transportation and Infrastructure Committee.¹⁴⁶

Both Senators Murkowski and Begich, and Representative Young, intend for the reform to “keep fishermen on the water employed with the one asset in which they can keep earning a living and address their creditors.”¹⁴⁷

On September 8, 2011, the proposed bill was approved by the House Committee,¹⁴⁸ continuing its march towards enactment.¹⁴⁹ If enacted, the Act may create several undesirable consequences while defeating its own purpose.

V. FUTURE EFFECTS OF THE MLRA

To begin analyzing the possible practical effects the MLRA would have on the fishing community, it is important to understand how vessel mortgages operate. The mechanics of maritime law and its interplay with mortgages will likely produce effects that defeat the very purpose of the law – protecting fishermen.¹⁵⁰ Finally, one should view these effects through the lens of the Maritime Lien Act and determine if the proposed reform would further the purpose of the original Act.

144. Maritime Lien Reform Act of 2011, S. 608, 112th Cong. § 2 (2011); Maritime Lien Reform Act, H.R. 1210, 112th Cong. § 2 (2011).

145. Maritime Lien Reform Act, H.R. 1210, 112th Cong. § 2 (2011).

146. 157 Cong. Rec. S1826-02, 2011 WL 918506.

147. Alaska Dispatch, *supra* note 4.

148. *House Transportation & Infrastructure Committee Passes Coast Guard Reauthorization* (Sept. 8, 2011), <http://donyoung.house.gov/News/DocumentSingle.aspx?DocumentID=258920>.

149. See Coast Guard and Maritime Transportation Act of 2011, H.R. 2838, 112th Cong. § 405 (2011) (enacted in House on Nov. 15, 2011 with maritime liens provision); *but see* Coast Guard Authorization Act of 2012, H.R. 2838, 112th Cong. (2012) (enacted in Senate on Sept. 22, 2012 omitting the maritime liens provision).

150. Alaska Dispatch, *supra* note 4.

A. Vessel Mortgages

Mortgages for vessels are controlled by federal law under the Preferred Ship Mortgage Act ("Mortgage Act").¹⁵¹ This Act, originally enacted in 1920,¹⁵² was intended to encourage mortgagees to invest in the shipping industry.¹⁵³ The statute was required because historically, under maritime common law, mortgages were not considered maritime liens.¹⁵⁴ When a ship defaulted on a maritime lien before the Mortgage Act, all maritime liens had priority over non-maritime liens for repayment.¹⁵⁵ The mortgagee would have to fight the other non-maritime lien holders for whatever remained from the vessel's sale.¹⁵⁶ Although the Mortgage Act resulted in mortgagees acquiring one of the last priorities among maritime lien holders, this was an improved position from the past.¹⁵⁷ The first requirement to create a preferred maritime mortgage is to document the vessel in the United States.¹⁵⁸ The mortgage necessarily contemplates a mortgage for the "whole" of the vessel.¹⁵⁹ This includes appurtenances.¹⁶⁰ However, it is also permissible for the mortgagee to use other non-vessel property as collateral.¹⁶¹

Secondly, to be valid as a preferred mortgage the vessel must not be documented under the laws of a foreign country, the

151. 46 U.S.C.A. § 31322 (West 2006).

152. Ch. 250, § 30, 41 STAT. 1000, (1920) (repealed and codified at 46 U.S.C.A. §§ 31321-30 (2012)).

153. Chase Manhattan Fin. Servs., Inc. v. McMillian, 896 F.2d 452, 458 (10th Cir. 1990) (citing J. Bond Smith Jr., *Ship Mortgages*, 47 TUL.L.REV. 608, 608 (1973)).

154. See *id.* (discussing historical court decisions that did not consider ship mortgages as maritime contracts or maritime liens).

155. *Id.*

156. *Id.*

157. Robert M. Jarvis, *Marine Financing*, in SEC. TRANSACTIONS IN FLA. SECT FL-CLE 12F-1, §12.59, SECT FL-CLE 12F-1, *10 (1996) (declaring that after the Ship Mortgage Act, the "bad old days of ship mortgage practice appear to truly be over").

158. 46 U.S.C.A. § 31322 (West 2006). Also, for the requirements of a "documented" vessel, see 46 U.S.C.A. § 12103 (West 2006) (e.g. vessel must weigh over 5 tons).

159. 46 U.S.C.A. § 31322 (West 2006).

160. The Huntington Sanford, 73 F. Supp. 67, 68 (D. Mass. 1947) (holding that equipment used by a vessel in its fishing operations were included as appurtenances of the ship, and therefore included in the preferred mortgagee's sale of the vessel).

161. See, e.g., Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster, 475 F.2d 504 (5th Cir. 1973) (holding preferred mortgage status is unchanged if mortgage is also secured with separate collateral).

individual owner must be a U.S. citizen, and the mortgage must be properly recorded under the act.¹⁶²

Importantly, the Mortgage Act preserved other maritime liens' priority over the mortgage.¹⁶³ This means that a mortgagee cannot receive first priority over other liens as a true secured creditor of the vessel by contractually specifying the vessel as collateral.¹⁶⁴ Even if this language is included in the contract, if the vessel owner defaults on any maritime lien or the mortgage itself, all other maritime liens will be paid first with proceeds from the vessel's sale.¹⁶⁵ If fishing permits are appurtenances of a vessel, and a mortgagee requires the collateral of the vessel and its permits, the mortgagee will still be last in line to collect behind the other maritime creditors.¹⁶⁶ Even if the vessel owner simply defaults on the mortgage itself, at auction any other maritime lender would be satisfied first.¹⁶⁷ On the other hand, if the mortgagee uses property separate from the vessel as collateral, the mortgagee will have first claim to the property as a normal secured creditor under Article Nine of the Uniform Commercial Code.¹⁶⁸

These principles are demonstrated in *Pratt v. United States*.¹⁶⁹ The case involved a seaman that had acquired a judgment against a vessel for his tort claim.¹⁷⁰ The judgment, however, was never satisfied.¹⁷¹ Six months later, the vessel

162. 46 U.S.C.A. § 12103 (West 2006); see also *Chem. Bank N.Y. Trust Co. v. S.S. Westhampton*, 358 F.2d 574, 580 (4th Cir. 1965) (interpreting the Ship Mortgage Act to forbid foreign citizen of holding preferred mortgages).

163. 46 U.S.C.A. § 31326(b)(1) (West 2006) (a preferred ship mortgage has "priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens) . . .").

164. *Jarvis*, *supra* note 157, at *18 (listing six categories of liens that must be satisfied before a preferred ship mortgage); See also *Good Ship Applesdore, Ltd. v. Key Bank of S. Me.*, 122 B.R. 821, 830 (Bankr. D. Me. 1990) (if the proceeds from sale of a vessel will not be enough to satisfy all creditors, a preferred ship's mortgage may go unsatisfied).

165. *Id.*

166. *First Nat'l Bank of Greenville v. O/S Charlotte Ann*, 302 F. Supp. 360, 361-62 (N.D. Miss. 1969) (emphasizing courts' liberal policy allowing interveners holding maritime liens to intervene in vessel foreclosures).

167. *Id.*; see also *Kopac Int'l, Inc. v. M/V Bold Venture*, 638 F. Supp. 87, 90 (W.D. Wash. 1986) (noting the inability of mortgagees to protect themselves from maritime liens created after the mortgage).

168. U.C.C. § 9-109 (2000) (U.C.C. Article 9 applies to any transaction creating a security interest through a mortgage); see *Jarvis*, *supra* note 157, at *13 ("Article 9 will continue to be looked to whenever questions arise regarding the mortgagor-mortgagee relationship").

169. *Pratt v. United States*, 340 F.2d 174 (1st Cir. 1964).

170. *Id.* at 176.

171. *Id.*

defaulted on its preferred mortgage.¹⁷² When the mortgagee attempted to sell the vessel, the seaman intervened.¹⁷³ The seaman's valid tort-claim had created a maritime lien with a higher priority for repayment than the mortgage.¹⁷⁴

In a more recent example, *U.S. v. Smith*, the Chairman of the Board of Trustees of the Masters, Mates & Pilots Vacation Plan and Masters, Mates & Pilots Individual Retirement Account Plan intervened in a vessel foreclosure.¹⁷⁵ The vessel had defaulted on its preferred mortgage, and the chairman asserted the right to claim the proceeds under a higher priority lien — a maritime lien for seaman's wages.¹⁷⁶ The court recognized that seaman'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 as a security for his wages."¹⁷⁷ Finding that the vacation plan contributions were analogous to wages, the court held that the fund was entitled to a higher priority for repayment than the secured creditor mortgagee — the United States government.¹⁷⁸

B. *Futility of the Reform*

As stated by Congressman Young, the purpose of the Maritime Lien Reform Act is to allow fishermen to repay their debt through their trade.¹⁷⁹ On the surface, this may sound like a desirable law for debt-ridden fisherman. While the politicians have given the reform a populist appeal, it is an inaccurate representation of what would happen if the bill becomes law.¹⁸⁰ Through the normal operation of admiralty law, if the permits are not automatically subjected to maritime liens, a maritime creditor will simply arrest the entire vessel and sell it.¹⁸¹

If the permits were not subject to maritime liens, one would not find fishermen on dock-side vessels with no right to fish; one would find fishermen with no permits and no vessels. That is because the traditional workings of maritime law would still subject the vessel to arrest and auction to pay its debts.¹⁸² If the

172. *Id.*

173. *Id.*

174. *Id.* at 178.

175. *United States v. Smith*, 828 F. Supp. 2d 863, 865 (E.D. Tex. 2011).

176. *Id.*

177. *Id.* at 866 (quoting *The John G. Stevens*, 170 U.S. 113, 119 (1898)).

178. *Smith*, 828 F. Supp. 2d at 869.

179. Alaska Dispatch, *supra* note 4.

¹⁸⁰*Id.*

181. See FED R. CIV. P. SUPP. C(3)(a), G(7)(b)(i).

182. *Id.*

MLRA became law it would only accomplish a change in the allocation of assets between creditors, and the fisherman would still be unable to fish. It is interesting to consider who that reallocation may benefit.

If the permits could not be subject to a maritime lien, they would almost certainly be required as collateral for a vessel's mortgage.¹⁸³ This is because the permit is often the most valuable asset of the vessel.¹⁸⁴ Any current vessel owners would be in a better position with the MLRA, because creditors could not pursue the permits unless the vessel owner chose to use them as collateral.¹⁸⁵ However, all future fishermen who will one day purchase a vessel, would likely be required to secure a mortgage with their permits.¹⁸⁶

Banks that offer these mortgages would also benefit under the MLRA. They would not have to fight other creditors for the value of the permits.¹⁸⁷ In the post-MLRA world, if permits are prohibited from maritime liens, a maritime creditor will simply arrest the vessel and sell it.¹⁸⁸ The fisherman will not have the option of exchanging or selling his fishing permits to satisfy the creditor because the permits will already be obligated as security for the vessel's mortgage.¹⁸⁹ The fisherman, now without a vessel, will still have a mortgage to pay but will be unable to pay it through his trade.¹⁹⁰ Now, vessel-less, he will most likely choose to forfeit the permits to the mortgagee.¹⁹¹

183. See 2 Problem Loan Workouts § 17:13 (2012), available at <http://www.westlaw.com> (explaining that “[s]tandard ship mortgages ordinarily provide the lender with the *widest* possible options in responding to default”) (emphasis added).

184. Farrell, *supra* note 83.

185. Olcott, *supra* note 18, at 208 n.26 (citing *In re Topgallant Lines, Inc.*, 154 B.R. 368, 376 (S.D. Ga 1993) (finding in the few cases where U.C.C. Article 9 and maritime law conflict, that maritime law was followed)); *but see* U.C.C. § 9-109 (2004) (stating that U.C.C. Article 9 applies to any transaction creating a security interest through a mortgage). If maritime liens no longer apply to fishing permits, U.C.C. Article 9 would govern their use as collateral for a mortgage. *Id.*

186. Problem Loan Workouts, *supra* note 183; *see also* Jarvis, *supra* note 157, at *13 (stating “Article 9 will continue to be looked to whenever questions arise regarding the mortgagor-mortgagee relationship.”).

187. The William Leishear, 21 F.2d 862, 863 (D. Md. 1927) (ranking the priority of lien holders as “1)Seamen’s wages; 2)salvage; 3)tort and collision liens; 4)repairs, supplies . . . and other necessities; 5)bottomry bonds in inverse order of application; 6)non maritime claims”).

188. See FED R. CIV. P. SUPP. C(3)(a), G(7)(b)(i).

189. U.C.C. § 9-109 (2004) (discussing the scope of Article 9 and its application to any transaction creating a security interest in mortgages); *id.* § 9-503 (mortgagee would have right to take possession of collateral if in default).

190. See § 9-607.

191. See *id.*

In today's world, the fisherman can choose to forfeit his permits when faced with a vessel arrest, instead of losing the vessel itself.¹⁹² Because the permits may be the fisherman's most valuable asset, the fishermen may be able to pay his debts without selling the vessel.¹⁹³ While this results in a fisherman with a vessel who cannot fish, it is only a temporary condition that lasts until he can afford to purchase new permits.¹⁹⁴ At least he is not starting from scratch, with no vessel and no permits.

The real difference the MLRA will make is the practical determination of whether a fisherman will keep his vessel after default. While "keeping fishermen on the water"¹⁹⁵ sounds good, that result would not be accomplished by the statute. Fishermen would be worse off with the MLRA, because they would have fewer assets to bargain with when negotiating with creditors.¹⁹⁶

C. *The Purpose of the Original Maritime Lien Act*

The Maritime Lien Act was originally created to simplify the confusing state of maritime law.¹⁹⁷ While admiralty law generally agreed on the principle of maritime-lien's operation, there were several areas of confusion.¹⁹⁸

This confusion is demonstrated by Judge Learned Hand in *The Muskegon*.¹⁹⁹ The case arose from a contract between a vessel and the stevedores who loaded the vessel.²⁰⁰ After loading the ship, the vessel became bankrupt and unable to pay for the stevedoring service.²⁰¹

192. See *L&L Marine Transpo., Inc. v. M/V Hokuetsu Hope*, 895 F.Supp. 297, 300 (S.D. Ala. 1995) (stating that once a vessel is arrested it may be released if an appropriate security is posted).

193. See generally Farrell, *supra* note 83 (acknowledging the value of fishing permits and discussing congressional efforts to regulate commercial fishing).

194. *Id.* at 339.

195. Alaska Dispatch, *supra* note 4.

196. See generally Snow & Ruggero, *supra* note 52, at 53 (Maritime liens supersede the majority of other vessel liens, providing creditors significant leverage over debtors).

197. John W. Griffin, *The Federal Maritime Lien Act*, 37 HARV. L. REV. 15, 15 (1923) (declaring the federal maritime lien act was intended to "simplify the law"); see also *id.* (noting that the law had largely achieved its goal of simplifying the law by 1910).

198. See *id.* at 18 (describing confusion over whether necessaries covered towage, pilotage or insurance premiums).

199. See *id.* at 21 (citing *The Muskegon*, 275 F. 117, 119 (S.D.N.Y. 1921) *aff'd* 275 F. 348 (2d Cir. 1921)).

200. *The Muskegon*, 275 F. 348, 348 (2d Cir. 1921).

201. *Id.*

Judge Hand noted conflicting and confusing precedent, some of which supported a maritime lien for stevedoring services,²⁰² but did not support a lien for a “master stevedore.”²⁰³ Although *The Muskegon* came before Judge Hand and after the enactment of the Maritime Lien Act of 1910,²⁰⁴ it was still unclear whether the Act applied to all maritime liens.²⁰⁵

In answer to this confusion, the Maritime Lien Act of 1920, encompassed in the Merchant Marine Act of 1920, expressly addressed whether services such as towage or stevedoring would incur a maritime lien.²⁰⁶ The act’s goal of simplifying maritime law continued through the most recent revision of the law in 2006.²⁰⁷

After considering fishing permits’ proper place as appurtenances of a vessel,²⁰⁸ the proposed reform would seem to roll back the clock.²⁰⁹ If statutes begin to strip vessels of their several judicially created appurtenances, vessel owners and creditors may begin to wonder what other appurtenances may disappear. Will statutes begin to outlaw maritime liens against intangibles all together?²¹⁰ Will statutes also begin to protect fishing nets, engines and equipment from maritime liens in order to “keep fishermen on the water?”²¹¹

The Maritime Lien Reform Act may be the tip of an iceberg, a trend that would certainly thwart the original act’s purpose of simplicity.²¹² It may only serve to confuse maritime law’s growing predictability by scuttling trends in jurisprudence that began over one hundred years ago with the first Maritime Lien Act.²¹³

202. *The Muskegon*, 275 F. 117, 118 (S.D.N.Y. 1921) (citing *The Hattie M. Bain*, 20 F. 389, 389 (S.D.N.Y. 1884)).

203. *Id.* at 118 (citing *The Seguranca*, 58 Fed. 908, 910 (S.D.N.Y. 1893)) (holding that the services of a Master Stevedore are not “necessary” to a ship as are the services of the stevedores themselves).

204. *Id.* at 118.

205. *Id.* at 119.

206. Merchant Marine Act of 1920 (46 U.S.C. § 971).

207. See 46 U.S.C.A. §§ 31301-31343 (West 2010).

208. *Gowen, Inc.*, 244 F.3d at 67-69.

209. Maritime Lien Reform Act, S. 608, 112th Cong. (2011); Maritime Lien Reform Act, H.R. 1210, 112th Cong. (2011).

210. *U.S. v. Freights of the Mount Shasta*, 274 U.S. 466, 470 (1927).

211. *Alaska Dispatch*, *supra* note 4 (quoting Senator Lisa Murkowski).

212. *Griffin*, *supra* note 197, at 15.

213. See *id.* at 15-16 (identifying The Maritime Lien Act of 1910 as the first congressional attempt to make maritime-lien rights uniform).

The Maritime Lien Act was also meant to increase credit available to vessels operating in unfamiliar ports.²¹⁴ If the MLRA is enacted, it will deprive fishing vessels of the value of their federal fishing permits. The vessel's ability to gain credit with maritime lenders will be hampered by the reform, creating a result repugnant to the original purpose of the Maritime Lien Act.²¹⁵

D. MLRA – *The Fisherman's Albatross*

Because the ship and its appurtenances are essentially considered collateral for maritime liens, ships are able to gain services in ports where they have no credit history.²¹⁶ This necessarily means that the likelihood of receiving credit, or the interest owed on borrowed services, could vary on the lender's appraisal of the vessel's value.²¹⁷ By allowing maritime lenders to lay claim to a vessel's fishing permits, a fishing vessel is much more likely to gain credit for services or necessities.²¹⁸

It is easiest to imagine this effect on a worn and aging vessel in need of repairs. If such a vessel pulled into an unfamiliar port to repair a hole in its hull, and its fishing permits were not subject to the shipyard's lien, the yard may refuse repairs unless a cash security was first deposited. Acquiring the required sum of cash may not be a feasible option (unless the situation truly is dire and the yard can claim salvage fees).²¹⁹

Some argue that if the law prohibits subjecting permits to maritime liens, fishermen will be empowered to choose when to use the permits as collateral.²²⁰ In the context of the aging vessel that requires repairs, the vessel could theoretically choose to use its fishing permits as collateral for the yard's repair work.²²¹

214. Snow & Ruggero, *supra* note 52, at 53 n.23 (citing *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (2d Cir. 2001)); *Equilease Corp.*, 793 F.2d at 602 (observing that the Maritime Lien Act was intended to "establish sound security in favor of loans to ship owners").

215. See *Equilease Corp.*, 793 F.2d at 602 (observing that the Maritime Lien Act was intended to "establish sound security in favor of loans to ship owners").

216. See Snow & Ruggero, *supra* note 52, at 53 n.23 (citing *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (2d Cir. 2001)).

217. See *id.*

218. See Farrell, *supra* note 83 (declaring that some permits are worth \$1,000,000).

219. Problem Loan Workouts, *supra* note 183, § 17:12 General Issues (three requirements for salvage claims are "1) a marine peril; 2) service voluntarily rendered when not required as an existing duty from a special contract; and 3) success in whole or in part, or service contributing to such success").

220. Farrell, *supra* note 83 ("permit holders need to be able to obtain loans using permits as collateral").

221. See *id.*

This would be preferred by the shipyard, because it would then become a secured creditor under the U.C.C. and avoid fighting other creditors for repayment from the permit's sale.²²²

However, if permits were prohibited from automatic subjection to maritime liens, they would *de facto* be required as collateral by all mortgagees.²²³ Currently, using a fishing permit to contractually secure a mortgage would only serve as a redundant back-stop to maritime law's operation concerning maritime liens.²²⁴ Mortgagees are paid according to the law's prioritization of maritime creditors.²²⁵ Mortgagees typically receive payment after four other groups of creditors; administrative costs to maintain the vessel, crew wages, salvage costs, and tort and collision liens.²²⁶ If these other creditor's maritime liens do not automatically encompass the fishing permits, mortgagees will take advantage of the freed asset and require it as collateral for the purchase of a vessel.²²⁷

Instead of empowering fishing vessels with a new tool for negotiating credit, prohibiting liens against fishing permits would simply deprive a vessel owner of the substantial value of his assets.²²⁸

VI. CONCLUSION

Fishing in the United States in 2010 was responsible for \$4.5 billion in revenue.²²⁹ Congress has passed legislation to protect investment in this industry.²³⁰ Specifically, the Ship Mortgage Act,²³¹ the Maritime Lien Act,²³² and the Magnuson-Stevens Act²³³ have created a framework that insurers, investors, and vessel owners have been working within for nearly one hundred

222. U.C.C. § 9-607, 609 (2010) (mortgagee would have right to take possession of collateral if in default).

223. See Problem Loan Workouts, *supra* note 183, § 17:13.

224. 46 U.S.C. § 31326(b)(1) (West 2006).

225. The William Leishear, 21 F.2d 862, 863 (D. Md. 1927).

226. *Id.* For a full discussion of Maritime Liens and their priority in bankruptcy or default, see generally Raymond P. Hayden & Kipp C. Leland, *The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens*, 79 TUL. L. REV. 1227 (2005).

227. See Problem Loan Workouts, *supra* note 183, § 17:13.

228. See Farrell, *supra* note 83, at 339.

229. NAT'L MARINE FISHERIES SERV. OFFICE OF SCI. & TECH., FISHERIES OF THE UNITED STATES 2010, at 4 (2011).

230. See Farrell, *supra* note 83, at 339.

231. 46 U.S.C.A. § 31322 (West 2006).

232. 46 U.S.C.A. §§ 31301-43 (West 2010).

233. Fishery Conservation and Management (Magnuson-Stevens) Act of 1976, 16 U.S.C. §§ 1801-83 (2006).

years.²³⁴ Courts' interpretation and application of maritime law have consistently broadened the application of maritime liens.²³⁵ The courts began by allowing maritime liens against physical appurtenances.²³⁶ This definition then expanded to incorporate intangible appurtenances.²³⁷ Courts recently began to include federal fishing permits as an appropriate intangible appurtenance for the purpose of maritime liens.²³⁸

Politicians now attempt to sever this case law by imposing a statutory bar protecting permits from maritime liens.²³⁹ While the proposed law, the Maritime Lien Reform Act, is intended to allow fishermen to repay their debts through their trade,²⁴⁰ that is an unlikely result.

The first and most important observation is that the law would not change anything regarding a fisherman's ability to fish.²⁴¹ Instead of losing his federal fishing permit in a court auction he would simply lose his vessel.²⁴² Either way, he will not be able to repay his debts through his trade.

Secondly, mortgagees for vessels under the Ship Mortgage Act currently receive the last priority among maritime liens for repayment in the event of a vessel's default.²⁴³ If maritime liens are not allowed against fishing permits, mortgagees will require them as collateral when the vessel owner purchases his vessel.²⁴⁴

When the fisherman later defaults, he will not have the option of shielding his vessel from maritime creditors by selling his permits.²⁴⁵ The law's only long-term effect would be to change the mortgagee's priority over the fishing permits from

234. See Griffin, *supra* note 197, at 15 (identifying the Federal Maritime Lien Act of 1910 as the first statute protecting the common-law rights of maritime liens holders).

235. See Chris Reeder, *Maritime Lien Status for Unpaid Hull or Liability Insurance Premiums: Whether the Nonpayment of Hull and Protection and Indemnity Insurance Premiums Should Create a United States Maritime Lien Against the Insured Vessel in Favor of the Insurer*, 15 TUL. MAR. L.J. 285, 298-99 (1991).

236. *The Dundee*, (1823) 166 Eng. Rep. 39 (Adm.) 46; 1 Hagg.109, 126-28.

237. *United States v. Freights of the Mount Shasta*, 274 U.S. 466, 470 (1927).

238. *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68-69 (1st Cir. 2001).

239. See, e.g., Maritime Lien Reform Act of 2011, S. 608, 112th Cong.; Maritime Lien Reform Act, H.R. 1210, 112th Cong. (2011).

240. See Alaska Dispatch, *supra* note 4.

241. See GILMORE & BLACK, *supra* note 13 (describing the process of execution on valid ship liens where the ship itself is sold).

242. *Id.*

243. See Ship Mortgage Act, 46 U.S.C.A. § 31301(b)(1) (2006) (providing for priority of preferred mortgage liens except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens).

244. See Problem Loan Workouts, *supra* note 183 ("Standard ship mortgages ordinarily provide the lender with the *widest* possible options in responding to default") (emphasis added).

245. See U.C.C. Art. 9 § 9-109.

last among maritime creditors to first under the U.C.C.²⁴⁶ While banks may appreciate this result, it does nothing to help fishermen.

Thirdly, once fishing permits are required as security for mortgages, fishermen will not be able to use the permits' value to gain credit with maritime lenders.²⁴⁷ Aside from gaining the mortgage, it would be as if the fisherman lost possession of half his available assets. Maritime credit would be based strictly on the value of the vessel itself, which is can be less than the vessel's federal fishing permits.²⁴⁸

Finally, the reform would not only defeat its own purpose, but it would also defeat the purpose of the Act it is meant to enhance — the Maritime Lien Act.²⁴⁹ The Maritime Lien Act was created to encourage loans to vessels.²⁵⁰ It was also created to clarify U.S. law regarding maritime liens.²⁵¹ Clarity is an important aspect for all interested parties,²⁵² and the reform would only serve to muddy the waters and discourage maritime lending.

It seems that the Maritime Lien Reform Act's only effect will be to decrease fishermen's credit while increasing mortgagee's leverage. In light of this, Alaska's politicians would be wise to avoid shooting down recent jurisprudence — it will only serve as an albatross to hang about their necks.²⁵³

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246. *See id.*

247. *See id.*

248. Farrell, *supra* note 83.

249. *See* Griffin, *supra* note 197 (exploring purpose of Maritime Lien Act).

250. Snow & Ruggero, *supra* note 52, at 53 n.23 (citing *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (2nd Cir. 2001)); *Equilease Corp.*, 793 F.2d at 602 (observing that the Maritime Lien Act was intended to "establish sound security in favor of loans to ship owners").

251. Griffin, *supra* note 197, at 15.

252. *See id.*

253. *See* COLERIDGE, *supra* note 1, at 10.