THE " A B C's" of the SUPPLEMENTAL ADMIRALTY RULES

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[1] Special thanks to my ever patient (!) and long-suffering (?) assistant of 25 years, Susan M. Leonard, without whose help this would not have been possible.

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Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions

I. Rule A – Scope of the Rules

Rule A defines the scope of the Supplemental Rules for Admiralty or Maritime Claims and Asset forfeiture Actions. The rule specifically lists: a maritime attachment or garnishment; an action *in rem*; a possessory, petitory or partition action; or an action for exoneration from or limitation of liability.[2]

As a preliminary matter, Admiralty jurisdiction under 28 U.S.C. § 1333 must exist for the maritime remedies and procedures governed by the Supplemental Rules to be available. An action to execute a maritime lien *in rem* is exclusively within admiralty jurisdiction. When other grounds for federal subject matter jurisdiction may apply, the application of admiralty jurisdiction is optional pursuant to the Saving to Suitors clause.[3] In such cases, the plaintiff must include a statement in its pleading identifying the claim as an admiralty or maritime claim, electing for the action to proceed in admiralty pursuant to Fed. R. Civ. P. 9(h), to proceed under the Supplemental Rules. [4]

It is also worth noting that the Supplemental Rules do not limit or impair the inherent powers of a federal district court sitting In Admiralty.[5] Arrests and Attachments in particular existed in the general maritime law prior to the adoption of the Constitution, thereby becoming the law of the United States, as may be altered by Congress or defined by the General Maritime Law of the United States. Therefore, the traditional power of a district court, exercising its admiralty and maritime jurisdiction, may act in any manner consistent with the underling purposes and concerns of the Supplemental Rules.

Rule A confirms that the Federal Rules of Civil Procedure also apply in federal admiralty proceedings, to the extent they are not inconsistent with the Supplemental Rules. [6] Additionally, district courts retain the power to make Local Rules not inconsistent with the Supplemental Rules. Many of the federal district courts within the "SEALI States" have adopted local admiralty rules informed by "model local admiralty rules" proposed by the Maritime Law Association of the United States, but uniformity has not been achieved (*to the authors' knowledge and experience*.)

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[2] Supplemental Rule A(1)(A).
[3] 28 U.S.C. 1333(1); Fed. R. Civ. P. 9(h)(1).
[4] United States v. M/Y GALACTICA STAR, 2019 A.M.C. 2433, 784 F. App'x 268, 274–75 (5th Cir. 2019) (*citing* Bodden v. Osgood, 879 F.2d 184, 186 (5th Cir. 1989); T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 587 (5th Cir. 1983); Powell v. Offshore Navigation, Inc., 644 F.2d 1063, 1065 n. 3 (5th Cir.1981)). A Rule 9(h) designation is also a prerequisite to an interlocutory appeal under 28 U.S.C. § 1292(a)(3). Id.
[5] SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609, 621 (11th Cir. 2017)
[6] Supplemental Rule A(2).

II. Rule B – Attachments and Garnishments

Supplemental Rule B controls the processes of maritime Attachment and Garnishment, which are concepts "known of old in admiralty."[7] While Rule B itself refers to these actions as *in personam*, in that the action seeks a judgment against a named defendant, courts routinely refer to Rule B claims as a *quasi in rem* actions.[8] This is because the nature of a Rule B action allows and requires the court to obtain personal jurisdiction through the attachment of an absent defendant's property within the district. While the property "is not the immediate object of the suit, [it is] incidental to its prosecution."[9] As a matter of policy, Courts have upheld this process, noting that merchants engaging in maritime commerce "must reasonably expect to be sued where their property may be found."[10]

Rule B actions are very powerful tools because they provide a means by which the admiralty practitioner can avoid the routine difficulty of securing personal jurisdiction over defendants who are purposefully elusive or simply so transitory that the could not otherwise be hailed into court to respond to meritorious claims.[11] Thus a Rule B action serves two purposes: to gain jurisdiction over an absent defendant in a manner not ordinarily allowed under the Rules of Civil Procedure, and to secure property that can then be applied to satisfy an *in personam* judgment.[12]

Rule B(1) establishes the requirements for initiating and obtaining an attachment. The Complaint itself must be verified and contain a prayer for the court to issue "process to attach the defendant's tangible or intangible personal property."[13] The plaintiff must also file an affidavit, signed by the plaintiff or the plaintiff's attorney, stating that the defendant "cannot be found within the district" where the cause of action is commenced.[14] The court (either a district judge or magistrate) must then review the Complaint and Affidavit and, upon a finding that the conditions of Rule B have been satisfied, issue an order authorizing process of attachment and garnishment.

From there, the clerk of court may issue process without further court involvement, and the Rule allows for the issuance of "supplemental process." Procedurally, garnishees are named *in the process* rather than in the complaint, and that "supplemental process" enforcing the court's

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[7] Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 693, 70 S.Ct. 861, 94 L.Ed. 1206 (1950).

[8] E.g., DS-Rendite Fonds Nr. 108 VLCC Ashna GMBH & Co Tankschiff KG v. Essar Capital Americas Inc., 882 F.3d 44, 47 (2d Cir. 2018) (*citing* Paul D. Carrington, The Modern Utility of Quasi *in rem* Jurisdiction, 76 Harv. L. Rev. 303, 304–05 (1962))

[9] Manro v. Almeida, 23 U.S. 473, 480, 6 L. Ed. 369 (1825)

[10] Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion, 773 F.2d 1528, 1536 (11th Cir. 1985)

[11] Id.

[12] Chemoil Adani Pvt. Ltd. v. M/V Mar. King, 894 F.3d 506, 508 (2d Cir. 2018) (citations omitted).

[13] Supplemental Rule B(1)(a).

[14] Supplemental Rule B(1)(b).

original order may be issued by the clerk. This allows the plaintiff to seek process if additional garnishees associated with the complaint are subsequently discovered.

The procedure and requirement for court review of the complaint and affidavit, as well as the subsequent issuance of process by the clerk, were added to Rule B as part of the 1985 Amendments, "to eliminate doubts as to whether the rule is consistent with the principles of procedural due process."[15] The court must review the Complaint and Affidavit, and if it concludes that the defendant **cannot be found** within the district, the court must enter an "order so stating" and authorizing Rule B attachment (and garnishment).[16] If the property is a vessel or cargo aboard a vessel, then the summons, process, and any supplemental process must be delivered to the marshal for service.[17] For attachment under Rule B(l), the defendant's goods must be in the district or likely to soon be in the district. The subject property sought to be attached may even include property already under *custodia legis* pursuant to one or more other Supplemental Rules.

The 1985 Amendments also included a "safety valve" allowing a plaintiff to file a certification that "exigent circumstances make court review impracticable" so that process will be issued by the clerk of court. If the plaintiff relies on Rule B(1)(c) to obtain a writ of attachment and garnishment from the clerk, the plaintiff will also bear the burden to show that the alleged exigent circumstances existed in a Rule E(4)(f) post-attachment hearing. At that point, judicial review will already have been circumvented, leaving the plaintiff in a vulnerable position because the only apparent outcome is vacatur of the writ if plaintiff fails to meet its burden.[18] Neither the Rule nor the Advisory Committee's Notes define the term "exigent circumstances", but the Advisory Committee's Notes caution that every effort should be made to secure judicial review prior to pursuing process from the clerk. The Notes imply that if a judge can be reached by telephone and will conduct a hearing over the phone, exigent circumstances do not exist. They

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[15]Proposed Amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims, 98 F.R.D. 374, 376 (1983) (Advisory Committee's Explanatory Statement). See also Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion, 773 F.2d 1528, 1538 (11th Cir. 1985) (interpreting the impending amendment of Rule B "not as an admission that Rule B, absent such an amendment, is unconstitutional, but rather as an attempt to end litigation over attachments and to eliminate any speculation as to the constitutionality of the procedure."); Culp, Charting a New Course: Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment, 15 J. Mar. L. & Com. 353, 387–89 (1984).

[16] The Advisory Committee's Notes indicate that the plaintiff must make facie showing that he has a maritime claim against the defendant in the amount sued for and the defendant 1S not present in the district. A simple order will, conclusory findings contemplated. The term "court" is said to be broad enough to embrace review by a magistrate as well as by a district judge.

[17] Supplemental Rule B(1)(d)(i).

[18] See Ms Adele Schifffahrtsgesellschaft mbH & Co. KG v. Wonderland Int'l Corp., No. 10-20963-CIV, 2010 WL 8932403, at *2 (S.D. Fla. Apr. 12, 2010) (vacating attachment where plaintiff filed its complaint and affidavit on Friday stating that "the Vessel would be arriving in the Port of Miami at 6:00 a.m. on Sunday . . . and departing at 6:00 p.m. the same day."); Unitas Fin. Ltd. v. Di Gregorio Navegacao, Ltda., No. 99-1233 JCLLIFLAND, 1999 WL 33116415, at *4 (D.N.J. Nov. 8, 1999).

also explicitly reference circumstances "such as when the judge is unavailable, and the ship is about to depart from the jurisdiction" as being exigent. Prior to the 1985 Amendments, the term "exigent circumstances" was used primarily, if not exclusively, in the context of Fourth Amendment search and seizure criminal cases, which found exigent circumstances in those cases where the societal cost of obtaining a warrant outweighed the reasons for prior recourse to a neutral magistrate or when a substantial risk of harm to parties or to the administration of justice would arise from a delay until judicial review could be obtained.[19]

Substantively, to properly plead and obtain a Rule B attachment the plaintiff must show that 1) it has a valid prima facie admiralty claim against the defendant; 2) the defendant cannot be found within the district; 3) the defendant's property may be found within the district; and 4) there is no statutory or maritime law bar to the attachment.[20] Conversely, a district court must vacate an attachment if the plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rules B and E.

Thus, the Complaint in a Rule B action must state a cause of action cognizable under admiralty jurisdiction.[21] That cause of action must be considered a maritime claim under United States law, even when foreign law that would otherwise apply to the case does not recognize the claim as being maritime.[22] Likewise, an action to enforce a foreign judgment from a non-admiralty court may support a Rule B action when the claim underlying the judgment would be deemed maritime under the standards of U.S. law.[23] So long as the Complaint states a maritime claim, nothing in the rule requires the property to be attached to be maritime in nature.

Rule B also requires that the plaintiff affirmatively state by affidavit that "the defendant cannot be found within the district."[24] This requirement stems from the genesis of the process of attachment in general, as it were devised to satisfy the difficulty in obtaining personal jurisdiction over transient *in personam* defendants.[25] Whether a defendant can be "found within the district" generally involves a two-pronged analysis consistent with constitutional and practical personal jurisdiction. That is, a defendant can be found if it is subject to the personal jurisdiction of the

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[19] United States v. Blasco; United States v. Gardner

[20] Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 (2d Cir. 2006), overruled on other grounds by Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58 (2d Cir. 2009).

[21] Flame S.A. v. Freight Bulk Pte. Ltd., 762 F.3d 352, 357 (4th Cir. 2014). Cf. Belcher Co. of Alabama v. M/V Maratha Mariner, 724 F.2d 1161, 1164 (5th Cir. 1984) (allowing *in rem* action to proceed despite pendency of attachment proceeding, fin "the fact that an *in rem* action could not be brought in the Netherlands does not convert the attachment there filed into an *in rem* proceeding)

[22] Id.

[23] D'Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd., 756 F.3d 151, 153 (2d Cir. 2014).

[24] Supplemental Rule B(1)(b).

[25] Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 69 n. 12 (2d Cir.2009); World Fuel Servs. Europe, Ltd. v. Thoresen Shipping Singapore Private Ltd., 155 F. Supp. 3d 1226, 1231 (S.D. Ala. 2015)

Court because it has engaged in sufficient activity in the district or the cause of action has sufficient contacts with the district to permit the court to exercise *in personam* jurisdiction over that defendant. A defendant can also be found within the district if it can be found within the district for service of process.[26] Nonetheless, if a defendant is not found within the district when process is served, a later general appearance will not dissolve an attachment.[27]

Indeed, Rule B contemplates and presumes that a court will lack *in personam* jurisdiction over the defendant when it orders that a writ of attachment be issued. In such a proceeding, the court's coercive authority is coterminous with the scope of its jurisdiction, and limited to the extent of the defendant's interest in the attached property; that authority does not extend to the exercise of *in personam* jurisdiction over a Rule B defendant.[28] For this reason, the two purposes of a Rule B Action are inseparable; attachment "cannot be used purely for the purpose of obtaining security . . . for security cannot be obtained except as an adjunct to obtaining jurisdiction."[29]

Third, the complaint and affidavit must establish that the defendant's property can be found within the district. Where the defendant cannot be found within the district, the *res* is the only means by which a court can obtain jurisdiction over the defendant. Thus, the question of ownership is critical, as "the validity of a Rule B attachment depends entirely on the determination that the res at issue is the property of the defendant at the moment the res is attached."[30] While Rule B does not contain an explicit requirement that the plaintiff describe the property with any particularity, modern federal pleading standards have been applied to Rule B complaints to require the plaintiff to identify the property in the process of alleging facts establishing it is plausible to

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[26] Nehring v. Steamship M/V Point Vail, 901 F.2d 1044, 1051 (11th Cir. 1990); Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 582 (2d Cir.1963) (citation omitted).

[27] Heidmar, Inc. v. Anomina Ravennate Di Armamento Sp.A of Ravenna, 132 F.3d 264, 268 (5th Cir.1998).

[28] Jaldhi Overseas Pte Ltd., 585 F.3d 58, 69 n. 12

[29] SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609, 614–16 (11th Cir. 2017) (*quoting* Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 582 (2d Cir. 1963)).

[30] Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 69 (2d Cir. 2009) (citing Transportes Navieros y Terrestres S.A. de C.V. v. Fairmount Heavy Transp. N.V., 572 F.3d 96, 108 (2d Cir.2009)). The Second Circuit's opinion in Jaldhi, "put the kibosh on" the attachment of electronic funds transfers, which had become a cottage industry in the Southern District of New York following the court's prior opinions in Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 278 (2d Cir.2002) and Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 436 (2d Cir.2006). That period produced a plethora of opinions and orders addressing Rule B practice too numerous to detail here. For analysis of that period, Gold, Adam D., *The Calm After the Storm? Ucc Article 4a, Jaldhi, and the Future of Rule B Attachment in the Second Circuit*, 2 Geo. Mason J. Int'l Com. L. 14, 15 (2010) and Taylor, Ian F., *Maritime Madness: Rule b, Electronic Funds Transfers, Maritime Contracts, and the Explosion of Admiralty Litigation in the Southern District of New York*, 34 Tul. Mar. L.J. 211, 212 (2009).

believe that a defendant's property will be in the district when the writ of attachment is served.[31] Therefore, a Rule B complaint "must provide targeted guidance as to the property" that is likely to become subject to a Rule E(4) hearing.[32]

Once the plaintiff has demonstrated that it has met each of these procedural and substantive requirements, and obtained a writ of attachment from the clerk, Rule E provides the framework for actually bringing the property subject to the attachment within the control of the Court.

Rule B(2) establishes the requirement of "notice" to the Defendant. The notice requirements do not affect the validity of the attachment, but only prevent the entry of a default judgment without notice to the defendant. A plaintiff may give "Notice" to the defendant by service under Fed. R. Civ. P. 4 or by any form of mail requiring a return receipt. A garnishee in possession of the defendant's property can also provide notice to the defendant via mail requiring a return receipt. Alternatively, either the plaintiff or the garnishee may establish by affidavit that it "tried diligently to give notice of the action to the defendant but could not do so."[33] To have a judgment by default entered, a showing must be made that the plaintiff or garnishee has given notice of the action to the defendant by mail requiring a return receipt; or that the complaint, summons and process of attachment or garnishment was served on the defendant under F.R.C.P. 4(d)(i); or that plaintiff or the garnishee has made diligent efforts to give notice and has been unable to do so.

Rule B(3) establishes separate requirements governing the responsive pleadings of the garnishee and the defendant. A garnishee must answer the complaint and any interrogatories served therewith within twenty-one days after being served with process.[34] While the defendant has thirty days to file an Answer, that period runs from the date "process has been executed," either by attachment of the property or service on the garnishee.[35] Therefore, the defendant is subject to default under Fed. R. Civ. P. 55(a) thirty days after attachment of the property or service of process on the garnishee, even when actual notice has not been served. The defendant is subject to default judgment immediately thereafter upon the filing of an affidavit of Notice under Rule B(2).

III. Rule C – Actions *in rem*

Rule C governs actions *in rem* to arrest a vessel or other maritime property, known as the *res*. Rule C actions are what generally comes to mind when you recommend to your client that the arrest of a vessel or cargo is in order. In a Rule C action, the vessel itself is named as a

[31] DS-Rendite Fonds Nr. 108 VLCC Ashna GMBH & Co Tankschiff KG v. Essar Capital Americas Inc., 882 F.3d 44, 50 (2d Cir. 2018). See also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
[32] Id.
[33] Supplemental Rule B(2)(c).
[34] Supplemental Rule B(3)(a).
[35] Supplemental Rule B(3)(b).

defendant, and process is served upon the *res* by the US Marshal.[36] A party who may proceed *in rem* may also, or in the alternative, proceed *in personam* against any person who may be liable, often the owner or owner *pro hac vice* (operator/charterer) of the vessel.[37]

Rule C(2) provides the explicit requirements for pleading a Rule C arrest. As a substantive matter, the complaint must also state facts sufficient to establish that the plaintiff has a maritime lien.[38] While that aspect is not explicitly stated in the rule, it is required to properly satisfy both Rule C(3)(a)(1), which requires the court to review the complaint and any supporting papers to determine if the conditions for an *in rem* action exist, along with Rule E(2)(a), which requires a complaint to "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

If the complaint also states an *in personam* claim against the owner, it may also request attachment under Rule B in addition or in alternative to the Rule C claim. Under standards of Fed. R. Civ. P. 15, courts may permit a Rule C arrest to be converted to a Rule B attachment or to allow a complaint to be amended to add Rule B allegations after an arrest under Rule C is found to have been improper.[39]

Procedurally, the complaint[40] must be verified. This requirement is intended to protect the vessel owner from abuse of the procedure and to satisfy concerns about the constitutionality of an *in rem* arrest *ex parte and* without prior notice.[41]

Unlike Rule B, Rule C(2)(b) contains an explicit requirement that the complaint describe with reasonable particularity the property to be arrested. Presumably, the complaint will do so in the process of stating a maritime lien, but generally, this requires "a meaningful level of detail in

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[36] Careful attention should be paid to the United States Marshals Service ("USMS") Policy directives (http://www.americanmaritimecases.com/assets/Nov2018/US-Marshal-Service-Policy-Directives-and-Forms.pdf) which set forth (in detail) how the USMS accomplishes arrest AND the practical requirements with which the practitioner will be faced. There are variations from port to port, so the importance of local counsel cannot be overstated.

[37] Belcher Co. of Alabama v. M/V Maratha Mariner, 724 F.2d 1161, 1163 (5th Cir. 1984)

[38] Supplemental Rule C(1)(a); Minott v. M/Y BRUNELLO, 891 F.3d 1277, 1284–85 (11th Cir. 2018).

[39] Heidmar, Inc. v. Anomina Ravennate Di Armamento Sp.A. of Ravenna, 132 F.3d 264, 268 (5th Cir.1998) (allowing conversion where *in personam* defendant "has not alleged that it has suffered any prejudice from [plaintiff]'s mistake in seeking arrest under Rule C instead of attachment under Rule B"); Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 989 (5th Cir.1992); Caribbean Yacht Works, Ltd. v. M/V "NEENAH Z", 410 F. Supp. 2d 1261, 1264 (S.D. Fla. 2005).

[40] For an example, see John Unger's evergreen and excellent paper in the 2004 SEALI seminar materials: "Maritime Arrest – From Seizure to Security to Sale."

[41] Barnes v. Sea Hawaii Rafting, LLC, 889 F.3d 517, 531–32 (9th Cir. 2018). Notably, the Barnes court held that an Amended Complaint need not be verified if the court has already obtained *in rem* jurisdiction.

describing the property" at issue.[42] In practice, a Rule C caption will name a vessel as an *in rem* defendant, describing her by registered name and her official, registration, or IMO number, and a brief account of her particulars will be stated in the body of the pleading.

Rule C(2)(c) requires the Complaint to affirmatively state that the property is within the district or will be during the pendency of the action. This assures that the court is technically capable of executing a maritime lien, as Rule E(3)(a) prevents arrest or attachment outside of the district.

Rule C(3) also provides a procedure for judicial review of the pleadings before the court issues a warrant for arrest *in rem*. The procedural requirements for judicial review are similar to those for Rule B attachment. The substance of the review differs, and Rule C(3) directs the Court to review the complaint and "any supporting papers." Neither Rule C nor the Advisory Committee's Notes suggest the meaning of "supporting papers," but it would be good practice to provide all documents supporting a maritime lien claim as exhibits to the complaint. The Advisory Committee's Notes do indicate that the plaintiff must make a *prima facie* showing that he has an action *in rem* against the defendant in the amount sued for and that the property is within the district.

As in Rule B(1), Rule C(3) says if the condition for an action *in rem* "appear" to exist, an order so stating and authorizing a warrant for arrest shall issue. Rule C(3)(d) provides that supplemental process may be issued without further review or order of the court. The same "safety valve" in the event of "exigent circumstances" where judicial review is "impracticable" is provided in Rule C(3) as was provided in Rule B(1).

A maritime lien on a vessel or property aboard a vessel must be served by the U.S. Marshal. If the *res* is "other property," process may be served by a select list of others, but at a minimum the server must be "appointed by the court for that purpose."[43]

Rule C(4) governs notice in a Rule C action. The Supplemental Rules presume that the arrest of a vessel or other maritime property will provide notice to the owner.[44] Therefore, Rule C(4) I geared toward notice to the rest of the world, as the execution of a maritime lien by arrest in a Rule C Action with extinguish all other claims upon the sale of the vessel. If the property is released under Rule E(5) by stipulation or the posting of a bond, no further notice is required. If the property is not released from arrest within fourteen days, the plaintiff must publish notice of the action and the arrest in a newspaper of general circulation to be designated by the court.

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[42] Fathom Expl., LLC v. Unidentified Shipwrecked Vessel or Vessels, 352 F. Supp. 2d 1218, 1222 (S.D. Ala. 2005) (*citing* United States v. One Parcel of Real Property with Bldg., Appurtenances, and Improvements Known as 384–390 West Broadway, South Boston, 964 F.2d 1244, 1248 (1st Cir.1992).

[43] Supplemental Rule C(3)(b)(ii).

[44] See Merchants Nat. Bank of Mobile v. Dredge Gen. G. L. Gillespie, 663 F.2d 1338, 1351 (5th Cir. 1981) ("Rule C is well calculated to bring notice of the action to all persons having an interest in the vessel.").

Rule C(5) allows for "ancillary process" to be issued to order any person having possession or control of a portion of the *res* or its proceeds to show cause why it should not give it up to the custody of the marshal or pay it into the court. Ancillary process can not be used to gain *in rem* jurisdiction in the first place, it is only available when a substantial portion of the *res* is within the control of the court.[45] However, if a district court has jurisdiction over the *res* , ancillary process can be issued outside the district to compel the production of appurtenances, additional property, or proceeds from the sale of property within the district.[46]

Rule C(6) establishes the requirements for responsive pleadings and also contains procedures for serving and answering interrogatories with a response. In an *in-rem* action under Rule C, a person who asserts a right of possession or any ownership interest in the vessel or property arrested, (*most commonly referred to as a "Claimant"*) must file both a verified statement of interest and an answer to the complaint. The verified statement of interest must be filed within fourteen days after execution of process, or within the time allowed by the court.[47] Otherwise, the claimant will lack standing to file an Answer contesting the allegations of the complaint. Generally, a statement that the claimant is the owner or mortgagee and has a "claim to or interest in" the *res* is sufficient.[48] The prudent practitioner will file a Statement of Interest even in cases where the in-rem action is initiated on behalf of their client (e.g., under Rule D or F.)

Thereafter, Rule C(6)(a)(iv) requires a Claimant to serve his Answer within twenty-one days after the filing of the Statement of Interest. The claimant must serve answers to any interrogatories served with the complaint along with its answer.

Admiralty courts have routinely allowed a Claimant's Answer in an *in rem* action to assert counterclaims and presumably cross-claims and third-party claims that also relate to the *res*.[49] Rule E(7) explicitly addresses the procedure for requiring security on a compulsory counterclaim for wrongful arrest or attachment. However, there is currently a petition for certiorari before the Supreme Court seeking review of a circuit split as to whether a Rule G claimant may assert a counterclaim against the United States, which could affect this practice.[50]

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[45] Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan, 890 F. Supp. 552, 565 (N.D. Miss. 1995)

[46] State of Florida v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir.1980), *remanded on other grounds*, 458 U.S. 670 (1982); Vo v. Lu Thi Cao & Duong, No. CIV. A. 98-1008, 1999 WL 104412, at *1 (E.D. La. Feb. 22, 1999).

[47] Rule C(6)(a)(i)

[48] United States v. $579,475.00 in U.S. Currency, 917 F.3d 1047, 1049 (8th Cir. 2019)

[49] Beluga Holding, Ltd. v. Commerce Capital Corp., 212 F.3d 1199, 1202 (11th Cir. 2000) (finding no appellate jurisdiction to review non-admiralty claims where "the district court's summary judgment did not dispose of all of the claims in this case (including the counterclaims and the third party claims)".)

[50] Compare United States v. $4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653, 942 F.3d 655, 661 (5th Cir. 2019) (noting that admiralty courts "have long entertained counterclaims (or their equivalents) *in rem* proceedings) (Petition for Certiorari Filed, Jan. 30,

IV. Rule D – Possessory, Petitory and Partition Actions

"[A]dmiralty has jurisdiction in a possessory suit by the legal owner of a vessel who has been wrongfully deprived of possession."[51] Rule D exists to prescribe the process to be used in such actions. Thus, Rule D deals with several infrequent situations where the availability of a maritime proceeding *in rem* is independent of the existence of a maritime lien.

Generally, in order to commence either a possessory or petitory suit, the plaintiff must show that he has legal title to the *res* and not merely an equitable right to the vessel or other property in dispute.[52] Partition actions are proceedings by part owners to force the sale of a vessel and distribution of sale proceeds among its owners. The process shall be by warrant of arrest of the vessel, cargo or other property, and by notice in the manner provided by Rule B(2) to adverse parties. This includes all of the requirements (and expenses) of maintaining the *res in custodia legis.*

A **petitory** action is an action in which title alone is determined. The person claiming title must have a specific adversary in mind. Possession is not a bar to a petitory action, but a plaintiff in possession must base his case upon wrongful refusal of the defendant to provide him with the indicia of title or ownership to satisfy the case or controversy requirement.

A **possessory** action is one in which the right to possession is determined. In a possessory suit, the plaintiff must be out of possession of the vessel or cargo. A plaintiff may assert both petitory and possessory claims in the same action.

Rule D refers to petitory and partition actions involving vessels, as well as possessory suits to cargo or other maritime property. It has been argued that the rule and judicially created distinctions between possessory and petitory suits limit petitory and partition actions solely to vessels, while possessory suits extend to cargo or other maritime property. Possessory and petitory actions involving vessels apply only to vessels in navigation.

V. Rule E – Actions *in rem* and Quasi *In rem*: General Provisions

Supplemental Rule E contains provisions applicable to all arrest, attachment, and possessory, and partition actions. It provides the means by which vessels and other property are brought within the court's jurisdiction and thereafter released from it.

Rule E(2) states the general pleading requirement for actions for arrest or attachment, requiring the complaint to "state the circumstances from which the claim arises with such

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2020) with United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 35 (1st Cir. 1991) and Zappone v. United States, 870 F.3d 551, 561 (6th Cir. 2017).

[51] Gallagher v. Unenrolled Motor Vessel River Queen, 475 F.2d 117, 119 (5th Cir.1973) (internal citations omitted).

[52] Gulf Coast Shell & Aggregate LP v. Newlin, 623 F.3d 235, 239 (5th Cir. 2010)

particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."[53] Rule E(2)(a)'s requirement for pleading specific circumstances is one part of the process which guards against the improper use of admiralty seizure proceedings. The remedy for failure to comply with the pleading standards of Supplemental Rule E(2)(a) is to challenge the complaint in a hearing pursuant to Rule E(4)(f). Therefore, the remedy for a failure to comply with Rule E(2)(a) is vacatur of the attachment, dismissal of the complaint is not an available remedy in an E(4)(f) hearing.[54] Under this standard, "it is at least theoretically possible that a Complaint adequate to withstand a Rule 12(b)(6) motion may, nevertheless, not be adequate to avoid the vacatur of an attachment."[55]

Rule E(2)(b) provides the means by which the court may require a party to post security for costs and expenses. Typically, this rule is applied to a plaintiff seeking the attachment or arrest of a vessel or other property, to protect the parties affected by the detainment.[56] However, it is important to note that Rule E(2)(b) provides explicit authority for a court to require *any party* to post "security, or additional security" *at any time*.[57] A U.S. Marshal's fees may be taxed as such costs, including fees for serving "attachment *in rem*, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process"; "[t]he preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale"; or "[t]he keeping of attached property (including boats, vessels, or other property attached or libeled)."[58] It is the duty of the marshal to safekeep arrested property until the vessel's release or until the ultimate disposition of the case, including any appeals In most cases, the practitioner will arrange for a substitute custodian most suited to maintaining a watch over the vessel or cargo at a substantial cost savings over the U.S. Marshal.[59]

Rule E(3) restricts process for arrest or attachment to the district where the claim is pending, and generally provides that the timing of service of process may be controlled (somewhat) by the plaintiff. Rule E(4) governs all other aspects of process, including execution, return, custody, and release.

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[53] Supplemental Rule E(2)(a).

[54] Vitol, S.A. v. Primerose Shipping Co., 708 F.3d 527, 539–40 (4th Cir. 2013); Chiquita Int'l Ltd. v. MV BOSSE, 518 F.Supp.2d 589, 596 (S.D.N.Y.2007).

[55] Id.

[56] Merchants Nat. Bank of Mobile v. Dredge Gen. G. L. Gillespie, 663 F.2d 1338, 1344 (5th Cir.1981).

[57] Supplemental Rule E(2)(b).

[58] 28 U.S.C. § 1921

[59] The authors recommend that the selection and terms of engagement for a substitute custodian should be negotiated BEFORE the filing of the Complaint, and that a Motion for Appointment of a Substitute Custodian should be filed contemporaneously with the Complaint.

Rule E(4)(a) requires process to be served by the U.S. Marshal "forthwith . . . making due and prompt return."[60] Rule E(4)(b) outlines how tangible property is attached and/or arrested, while Rule E(4)(c) does the same for intangible property in the hands of a "garnishee or other obligor." Rule E(4)(d) allows the marshal to seek guidance from the court as necessary, and Rule E(4)(e) protects the Marshal's right to charge for expenses and costs as noted above.

Rule E(4)(f) provides the procedure by which a defendant, owner, garnishee, or anyone else claiming an interest may seek the release of an attachment or arrest. When a vessel or other property is subject to a writ of attachment under Rule B or arrested under Rule C, "any person claiming an interest" in the res is entitled to a "prompt Hearing" under Rule E(4)(f). A Rule E(4)(f) hearing requires the plaintiff to show cause "why the arrest or attachment should not be vacated or other relief granted consistent with these rules."[61] This provision was added in 1985, also to address due process concerns by guaranteeing a shipowner a prompt post-seizure hearing at which it may attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings.

It has been observed that Rule E(4)(f) may state that the person claiming an interest is entitled to a hearing, but it does not relieve the claimant from asking for one.[62] Rule E(8) explicitly provides for a defendant in a Rule B case or the property interest in a Rule C case to enter a restricted appearance to demand a hearing under Rule E(4)(f), among other things. It is common practice in a Rule C case to simultaneously file a Statement of Interest under Rule C(6)(a), Notice of Restricted Appearance under Rule E(8), and demand for a "prompt hearing" under Rule E(4)(f).

As the Rule indicates, the plaintiff initiating arrest or attachment bears the burden of showing why the seizure should not be vacated, OR "other relief granted consistent with these rules." In circumstances where the plaintiff took advantage of the safety valve provisions provided by Rules B(1)(c) or C(3)(ii), the plaintiff bears the additional burden of establishing that "exigent circumstances" required the issuance of process without judicial review. Among the issues that may constitute "other relief," the Advisory Committee's Notes indicate that the hearing may also determine the amount of secur1ty to be granted or the propriety of imposing counter-security to protect the defendant from an improper seizure.

It is stated that a post-arrest or post-attachment hearing "is not intended to resolve definitively the dispute between the parties" but only to determine whether reasonable grounds, i.e. probable cause, exists for the detention of the property. If the plaintiff meets its burden, the court must set an appropriate bond.[63]

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[60] As to matters of attachment, Rule E(4)(A) requires execution of process "when it appears that the defendant cannot be found within the district". Presumably, this refers to the court's finding under Rule B(1)(b) and does not require the Marshal to undertake its own review of whether the defendant may be served within the district.

[61] Supplemental Rule E(4)(f); Chemoil Adani Pvt. Ltd. v. M/V Mar. King, 894 F.3d 506, 508–09 (2d Cir. 2018)

[62] Salazar v. Atl. Sun, 881 F.2d 73, 79 (3d Cir. 1989).

[63] Id.

In practice, the conceivable scope of a Rule E(4)(f) hearing is very broad.[64] The court has authority to vacate an attachment due to a plaintiff's failure to satisfy the requirements of Supplemental Rules B, C, or E. It has been said that a plaintiff bears the burden in a Ruel E(4)(F) hearing not only of showing a prima facie case, but to show it has a *valid* prima facie case.[65] Therefore, in a Rule B Case, the defendant can challenge exigent circumstances, admiralty jurisdiction, its presence within the district, ownership of the property, or any other statutory or maritime law impediment to attachment.[66] In a Rule C case, a property claimant can challenge exigent circumstances, subject matter jurisdiction, the substantive law relating to the claimed maritime lien, the arrest, the security demanded, or any other defect in the proceedings up to that point.[67] A challenge to the substantive maritime nature of the claim under Rule B or C can involve issues of alter-ego entities, quasi-contractual claims, choices of law, and application of foreign substantive law.[68] The court has discretion to admit outside evidence, to examine or allow the presentation of testimony from witnesses, and to direct the parties to brief legal issues affecting the sufficiency of the complaint.[69] The property claimant may be entitled to a prompt hearing, but that does not always lead to a prompt ruling.

In the context of Rule B Attachment, several circuits have recognized a district court's discretion to vacate an attachment under its inherent powers of equity.[70] The exercise of this power includes vacating the attachment when 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in

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[64] Not so broad, however, as to allow for the application of admiralty law to require the release of federal prisoner. United States v. Lee, 525 F. App'x 918, 919–20 (11th Cir. 2013) (citing 1 U.S.C. § 3; Supplemental Rule (E)(5)(c)).

[65] Equatorial Marine Fuel Mgmt. Servs. Pte Ltd. v. MISC Berhad, 591 F.3d 1208, 1211 (9th Cir. 2010) (emphasis in original).

[66] Equatorial Marine Fuel Mgmt. Servs. Pte Ltd. v. MISC Berhad, 591 F.3d 1208, 1210 (9th Cir. 2010)

[67] Barnes v. Sea Hawaii Rafting, LLC, 889 F.3d 517, 532 (9th Cir. 2018)

[68] See Vitil, 708 F.3d at 537; Blue Whale Corp. v. Grand China Shipping Dev. Co., 722 F.3d 488, 493–95 (2d Cir. 2013) (Assessing the prima facie validity of a claim is a substantive inquiry that should be governed by the relevant substantive law. By contrast, whether a claim sounds in admiralty is a procedural question, the answer to which supplies the source of a court's subject matter jurisdiction); Barna Conshipping, S.L. v. 2,000 Metric Tons, More or Less, of Abandoned Steel, 410 F. App'x 716, 722 (4th Cir. 2011) (plaintiff's "inability to assert a contract claim . . . does not automatically foreclose its quasi-contract claims).

[69] Mujahid v. M/V Hector, 948 F.2d 1282 (4th Cir. 1991); Barna Conshipping, S.L. v. 1,800 Metric Tons, more or less, of Abandoned Steel, No. CIVA 09-0027-KD-C, 2009 WL 1203923, at *3 (S.D. Ala. Apr. 29, 2009); Linea Naviera de Cabotaje, C.A. v. Mar Caribe de Navigacion, C.A., No. 99-471-CIV-J-10C, 1999 WL 33218589, at *3 (M.D. Fla. Nov. 17, 1999).

[70] Vitol, S.A. v. Primerose Shipping Co., 708 F.3d 527, 537 (4th Cir. 2013); ProShipLine Inc. v. Aspen Infrastructures Ltd., 609 F.3d 960, 969 (9th Cir. 2010); Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 (2d Cir.2006);

the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise.[71]

Under Rule E(5), the vessel may be released on the giving of security, by the stipulation of the parties, or upon order of the court. Rule E(5) allows an owner or garnishees to post security in lieu of having their property under attachment or arrest. However, it is entirely permissive, and the court has no authority to order a property claimant to post security[72] Once security is posted, the plaintiff's claim is transferred from the *res* to the security. Thereafter, a district court may require substitute or replacement security, but the court has no authority to order an increase in security.[73]

Rule E(5)(a) provides for the release of the *res* upon posting of a special bond to cover "the amount of the plaintiff's claim fairly stated with accrued interest and costs."[74] Bonds and stipulations are interchangeable for the purposes of Rule E(5)(a), and either will suffice. Posting of a special bond or stipulation will not insulate the *res* from again being attached or arrested for other claims. Rule E(5)(a) provides two avenues to effect such a release. First, the "parties may stipulate the amount and nature of such security." Second, "[i]n the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs."[75]

Without question, a "plaintiff's claim fairly stated" can be a subject of heated debate. While the rules do not provide any standards for making that determination, it must not exceed the lesser of the value of the property or two times the plaintiff's claim.[76] A court can look beyond the four corners of the complaint and review additional evidence to ascertain the amount actually in controversy. Where the amount sought is liquidated, there should be little trouble in determining the "claim basis," and the amount of damages sought in the complaint should be used as the basis for determining the amount of the bond or deposit unless the claim is blatantly or obviously overstated.[77] Where the claim is unliquidated and the parties cannot agree as to the amount of the bond, it will be incumbent upon the court to make some effort to place "reasonable value" on the

[71] Id. See also McDermott Gulf Operating Co. v. Con-Dive, LLC, 371 F. App'x 67, 69–70 (11th Cir. 2010) (vacating attachment where Plaintiff absconded from Mexico with attached property in violation of order of Mexican authorities).
[72] ProShipLine Inc. v. Aspen Infrastructures Ltd., 609 F.3d 960, 969 (9th Cir. 2010).
[73] Moore v. M/V ANGELA, 353 F.3d 376, 386 (5th Cir. 2003) (citations omitted).
[74] See also 28 U.S.C. § 2464.
[75] Supplemental Rule E(5)(a).
[76] Id.
[77] See ING Bank N.V. v. M/V Voge Fiesta, 2016 AMC 2941 (S.D.N.Y. 2016) (finding the "claim fairly stated" to be 100% of the invoice balance).

claim.[78] Whether fixed by the parties or by the court, "[t]he bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum." [79]

Rule E(5)(b), which applies only to "the owner of any vessel," allows the owner to file a court-approved general bond to "answer the judgment . . . in all or any actions that may be brought" in a court where a vessel is arrested or attached. The general bond differs from the special bond in that its posting may prevent the subsequent arrest or attachment of a released vessel by someone other than the claimant whose arrest or attachment precipitated posting of the bond. General bonds are rarely used. It is conceivable that a general bond could be useful to a vessel owner who anticipates that a number of claims in a particular district will be made against his vessel and he wishes to both insulate the vessel from the disruptive effect of the arrests or attachments and reduce the costs inherent in filing separate bonds in each action.

Rule E(5)(c) provides for the release of property by stipulation. A vessel or other property can be released upon stipulation or other security signed by the party on whose behalf the property was detained or his attorney, provided all costs and charges of the court and its officer s have been paid. Typically, this arrangement involves a letter of undertaking by an underwriter or P&I Club, acceptable to the Plaintiff, pledging their assets to the payment of the claim.[80] A letter of undertaking is essentially a contract that in consideration of the vessel not being seized and/or being released, the vessel owner will file a claim to the vessel and the owner or someone on his behalf pay any judgment rendered against the vessel even if the vessel itself is subsequently lost.[81] A letter of undertaking stands in place of the *res*, but when issues arise as to their meaning they are generally interpreted in accordance with principles of contract law and they are enforced according to their terms.[82]

Rule E(5)(d) applies to Rule D cases. In those matters, the property may not be released as of right, but may only be released by order of the court. The rule does not state to whom

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[78] 20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc., 992 F. Supp. 1429, 1430–31 (M.D. Fla. 1997) (citing Angad v. M/V Fareast Trader, 1989 WL 201605 (S.D.Tex.1989); Whitney–Fidalgo Seafoods, Inc. v. Miss Tammy, 542 F.Supp. 1302, 1303–04 (W.D.Wash.1982); Konstantinidis v. Denizcilik Bankasi, 307 F.2d 584 (2d Cir.1962)).

[79] Crescent Towing & Salvage Co. v. CHIOS BEAUTY MV, 610 F.3d 263, 269 (5th Cir. 2010)

[80] Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion, 773 F.2d 1528, 1536 (11th Cir. 1985) *(Citing* Meredith, *Fines, Penalties, and Other Miscellaneous Liabilities; Expenses of Defense; General Conditions and Exclusions; Grounds for Cancellation; Second Seaman's Policy; Club Letters of Guarantee or Undertaking*, 43 Tul.L.Rev. 602, 612–14 (1969)).

[81] See Luera v. M/V Alberta, 635 F.3d 181, 184 (5th Cir. 2011); Panaconti Shipping Co., S.A. v. M/V Ypapanti, 865 F.2d 705, 707–08 (5th Cir.1989).

[82] Crescent Towing & Salvage Co. v. CHIOS BEAUTY MV, 610 F.3d 263, 269–70 (5th Cir. 2010); Chiquita Int'l Ltd. v. Liverpool & London Steamship Prot. & Indem. Ass'n Ltd., 124 F.Supp.2d 158 (S.D.N.Y.2000).

the *res* should be released, only that it should be released according to the "terms and conditions" best seen fit by the court.[83]

Rule E(6) provides the mechanism by which a court may reduce the required security or require and party posting security to post substituted security. After security is set, the circumstances or the conditions that initially supported security at a particular level can change. The court may reduce or increase security upon motion and hearing for good cause shown, and new or additional sureties ay be required. Rule E(6) is intended to accommodate such changes. On one hand, the amount set by a court typically places a cap on a plaintiff's recovery. On the other hand, a court must be mindful that excessive security is inherently unfair and restrains funds that a vessel's owner is entitled to use for other purposes.[84] Rule E(6) is intended to afford courts the flexibility to balance these competing interests. Ehen a court is requested to reduce security under Rule E(6), it should assess the reasonableness of plaintiff's damages claim and "weigh other equitable considerations."

Ruel E(7) provides the procedure for seeking security for a compulsory counterclaim. Where there is a compulsory counterclaim and the defendant or claimant has given security, and plaintiff for whose benefit such security has been given shall give security in the usual amount to respond in damages to the claims set forth in the counterclaim. The purpose of Rule E(7) is to place the parties on equal footing regarding security, not to inhibit the plaintiff's prosecution of its suit. A district court should be particularly reluctant to compel a party to post counter security where that party is not attempting to secure the release of any property. Unless the court otherwise directs, proceedings on the original claim shall be stayed until the security under Rule E(7) is given.

Under Rule E(8), a defendant's appearance to defend Rule B and C actions may be expressly restricted to the defense of such claims and shall not constitute an appearance for purposes of other claims where process was not available or was not served. The filing of a permissive counterclaim, as opposed to a compulsory counterclaim is tantamount to a waiver of E(8) protection for the defendant. It is unclear as to whether filing of a crossclaim or a third-party claim would constitute such a waiver.

Rule E(9) provides the procedures for the sale of the property arrested or subject to attachment. The most frequently litigated issue in this area relates to a party seeking an interlocutory sale. Under Rule E(9), upon application of any party or the marshal, the court may order an interlocutory sale of property that has been attached or arrested if it is perishable; liable to deterioration, decay or injury by being detained; the expense of keeping is excessive or

[83] . Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1183 (11th Cir. 2011)

[84] Transportes Navieros y Terrestres S.A. de C.V. v. Fairmount Heavy Transp., N.V., 572 F.3d 96, 108 (2d Cir. 2009)

disproportionate; or there is unreasonable delay in securing release of the property.[85] The proceeds of such a sale are deposited into the registry of the court. Any such sale must also be confirmed by the court before it is final. Rule E(9)(b) also says that the court may, on motion of the defendant or claimant, order delivery of the property upon the giving of security in accordance with these rules. It is hard to see how this is any different in substance from Rule E(5)(a).

Rule E(9)(b) directs all sales to be made by the marshal or deputy marshal, but allows for the court to assign the duty to any other person or organization under certain circumstances.[86] The proceeds are paid into the registry of the court. The court need only retain proceeds sufficient to satisfy plaintiff's claim.

VI. Rule F - Limitation of Liability

Rule F provides the procedure for implementing the rights conferred by the Limitation of Liability Act. The history and purpose of the rule is described by the Supreme Court as follows:

> Congress passed the Limitation Act in 1851 "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich & N.Y. Transp. Co. v. Wright,* 13 Wall. 104, 121, 20 L.Ed. 585 (1871). See also *British Transport Comm'n v.* United *States,* 354 U.S. 129, 133–135, 77 S.Ct. 1103, 1 L.Ed.2d 1234 (1957); *Just v. Chambers,* 312 U.S. 383, 385, 61 S.Ct. 687, 85 L.Ed. 903 (1941). The Act also had the purpose of "putting American shipping upon an equality with that of other ***447** maritime nations" that had their own limitation acts. *The Main v. Williams,* 152 U.S. 122, 128, 14 S.Ct. 486, 38 L.Ed. 381 (1894). See also *Norwich Co., supra,* at 116–119 (discussing history of limitation acts in England, France, and the States that led to the passage of the Limitation Act).
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> The Act is not a model of clarity. See 2 T. Schoenbaum, Admiralty and Maritime Law 299 (2d ed. 1994) ("Th[e] 1851 Act, badly drafted even by the standards of the time, continues in effect today"). Having created a right to seek limited liability, Congress did not provide procedures for determining the entitlement. This Court did not have an opportunity to review the Act in detail until 20 years after its enactment. See *Norwich Co., supra.* Deeming the Act

[85] The "expense" and "delay" are often cited by Plaintiffs who have arrested pursuant to Rule C. The prudent practitioner for the defense (vessel owner) should carefully counsel the client about the availability of this remedy to the Plaintiff and the risk it poses.

[86] Carl Schröter GmbH & Co. KG v. Smooth Navigation, S.A., CaseNo. 2:20-0334-RMG (D.S.C. April 28, 2020) involved a recent and notable example of the interlocutory sale of the M/V EVOLUTION, in which the auction was successfully conducted worldwide via Zoom due to courthouse and travel restrictions relating to the COVID-19 pandemic. See McDermott, J., *Virtual auction nets a buyer for detained ship in Charleston Harbor (The Post and Courier May 19, 2020)*

"incapable of execution" without further instructions to courts, *id.,* at 123, we designed the procedures that govern a limitation action, and promulgated them the same Term, see Supplementary Rules of Practice in Admiralty, 13 Wall. xii-xiv. We later explained that the scheme "was sketched in outline" by the Act, and "the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority." *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578, 590, 3 S.Ct. 379, 27 L.Ed. 1038 (1883).

The 1872 rules were "intended to facilitate the proceedings of the owners of vessels for claiming the limitation of liability secured by the statute." *The Benefactor,* 103 U.S. 239, 244, 26 L.Ed. 351 (1880). Under the rules, a vessel owner seeking limitation of liability had to file a petition. The district court would obtain an appraisal of the vessel's value or the owner's interest in the vessel, and ensure that payment or some guarantee of payment was deposited with the court. The court would then order all claimants to appear. Supplementary Rule of Practice in Admiralty 54, 13 Wall., at xii-xiii. In the process of seeking limited liability, the owner was permitted to contest the fact of liability. Rule 56, 13 Wall., at xiii. The ability to contest liability relieved vessel owners of the "very onerous" English rule, which required ***448** vessel owners to confess liability in order to seek the benefit of limitation. *The "Benefactor," supra,* at 243 ("[T]his court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever"). The ****1001** claimants would then contest the vessel owner's claims for exoneration and limitation of liability. Rule 56, 13 Wall., at xiii. If the owner succeeded in its effort to limit liability, but was not exonerated, the court was responsible for distributing the fund deposited in the court among the claimants. Rule 55, 13 Wall., at xiii.

The procedure for a limitation action is now found in Supplemental Admiralty and Maritime Claims Rule F. Much like its predecessor provisions, Rule F sets forth the process for filing a complaint seeking exoneration from, or limitation of, liability. The district court secures the value of the vessel or owner's interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims. In these proceedings, the court, sitting without a jury, adjudicates the claims. The court determines whether the vessel owner is liable and whether the owner may limit liability. The court

> then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants.[87]

A complete exposition on Rule F would require a separate seminar on the Limitation Act. The last SEALI paper on the supplemental rules simply stated "[t]he provisions of Rule F(2),(3),(4),(5),(6),(7),(8) and (9) as to procedure are fairly self-explanatory and are similar to some of the provisions in Rules A through E." We offer the following highlights, falling somewhere between.

The Supplemental Rules adopted certain terminology from the Federal Rules of Civil Procedure; they refer to a "complaint" for limitation of liability, and they call the person filing that pleading a "plaintiff." Admiralty practitioners more commonly use the terms "petition" and "petitioner."[88]

Rule F(1) states the requirements for commencing an action for Limitation of Liability. At base, this is accomplished by the filing of a Petition and the deposit of funds or posting of security to establish the limitation fund. The initial amount of the fund is typically set by the petitioner with the filing of an Ad Interim Stipulation for Value, which courts routinely approve pending further review if challenged by a claimant.

The petition must be filed within "six months after receipt of a claim in writing."[89] The six-month bar was added to the Limitation Act in 1936 to require a shipowner to decide promptly whether to seek to limit liability. Prior to that amendment, limitation practice allowed a shipowner to defend a claim and file a petition for limitation after an adverse judgment exceeding the value of the vessel had been affirmed on appeal.[90]

There is a recently developed circuit split on the question of whether the six month bar is jurisdictional or is a 'non-jurisdictional claim processing rule.[91] As the Eleventh Circuit aptly stated, "Where, you might ask, does that leave us procedurally? Fair question."[92] Can the six-month period be waived? Tolled? Raised *sua sponte* or for the first time on appeal? The prudent practitioner (and owner) may wish to consider filing well before their six months has expired to avoid receiving an answer to any of those questions.

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[87] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446–48, 121 S. Ct. 993, 1000–01, 148 L. Ed. 2d 931 (2001).

[88] See Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 241 (2d Cir. 2014).

[89] Rule F(1) tracks the language of 46 U.S.C. § 30511 (formerly 46 U.S.C. § 185) which requires a limitation action to be "brought within 6 months after a claimant gives the owner written notice of a claim." The Admiralty Extension Act contains similar language setting a waiting period for filing suit against the United States until six months "after the claim has been presented in writing to the agency owning or operating the vessel". 46 U.S.C § 30101(c)(2).

[90] Petition of Goulandris, 140 F.2d 780, 781 (2d Cir.1944).

[91] Compare Orion Marine Constr., Inc. v. Carroll, 918 F.3d 1323, 1328 (11th Cir. 2019); with In re Eckstein Marine Serv., L.L.C., 672 F.3d 310, 315 (5th Cir. 2012); Cincinnati Gas & Elec. Co. v. Abel, 533 F.2d 1001, 1003 (6th Cir. 1976).

[92] Id.,at 1330.

Another question is whether the petitioner satisfies the statute by filing the limitation petition, or must it also establish the *ad interim* limitation fund within the six-month window.[93] While Rule F(1) only refers to the Complaint in the same sentence as the time bar, the Limitation Act states that the petitioner "shall" establish the find "[w]hen the action is brought."[94] Again, it would seem prudent to file the ad interim stipulation and security with the petition for limitation.

In any event, the six-month period for filing a petition for limitation of liability is triggered by notice. Notice is generally sufficient to trigger the six-month period for filing if it (1) informs the vessel owner of claimant's "demand of a right or supposed right," (2) blames the vessel owner "for any damage or loss," or (3) calls upon the vessel owner for something due claimant.[95] The majority of courts require the notice to contain information sufficient to place the owner on notice that the claim may exceed the value of the vessel.[96] Courts have held that notice to the insurance carrier does not suffice,[97] but notice from a claimant that its carrier may bring a subrogation claim does.[98] The notice of the claim must actually be "received." Service upon a registered agent appears to be sufficient, while receipt by a statutorily appointed agent does not.[99]

Rule F(2) governs the content of the petition for limitation. It would probably go without saying that a petition for limitation of liability must set forth facts sufficient to establish a basis for the right to limit liability and for the court to determine the amount of the limitation fund. The Rule explicitly requires this, and also provides a limitation petitioner with a detailed list of what must be in a proper petition. These include

1) the voyage if any, on which the demands sought to be limited arose;
2) the date and place the voyage terminated;
3) the amount of **all** demands known to the plaintiff, arising on that voyage;

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[93] Compare Guey v. Gulf Ins. Co., 46 F.3d 478, 481 (5th Cir. 1995) with Goulandris, 140 F.2d at 781.

[94] 46 U.S.C. § 30511(b).

[95] Matter of Loyd W. Richardson Constr. Co., 850 F.Supp. 555, 557 (S.D.Tex.1993). See also In re Complaint of McCarthy Bros. Co./Clark Bridge, 83 F.3d 821, 829 (7th Cir. 1996) ("the written notice of a claim must reveal a 'reasonable possibility' that the claim made is one subject to limitation); Complaint of Morania Barge No. 190, Inc., 690 F.2d 32, 34 (2d Cir. 1982) ("A rule requiring a shipowner to seek limitation of liability regardless of the amount claimed might encourage claimants to understate the amount of their damage in the hope that the shipowner would be misled into not filing a timely petition for limitation.").

[96] See Orion Marine Constr., Inc. v. Carroll, 918 F.3d 1323, 1331-33 (11th Cir. 2019) (discussing the application of various standards).

[97] Petition of Spearin, Preston & Barrows, 190 F.2d 684 (2d Cir.1951).

[98] Petition of Allen N. Spooner & Sons Owner of the Derrick No. 17, the Scow No. 29, 148 F. Supp. 181, 182 (S.D.N.Y. 1956), *aff'd sub nom.* In re Allen N. Spooner & Sons, Inc., 253 F.2d 584 (2d Cir. 1958)

[99] Complaint of N.Y.T.R. Transp. Corp., Scow Marcy (No. 95), 105 F.R.D. 144, 146 (E.D.N.Y. 1985)

4) what actions and proceedings, if any, are pending on those demands;

5) whether the vessel was damaged, lost, or abandoned, and, if so, when and where;

6) the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage;

7) strippings, or proceeds, if any, and where and in whose possession they are; and

8) the amount of any pending freight recovered or recoverable.[100]

Rule F(2) also contains additional requirements n the event the "plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee."

After the petitioner files its petition and deposits or secures the limitation fund, Rule F(3) provides that "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." However, the petitioner must still move the court for an Order to "enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action."

After the petitioner has filed the complaint and established the limitation fund, Rule F(4) required the court to "issue a notice to all persons asserting claims with respect to which the complaint seeks limitation." The notice directs claimants where to file and serve their claims, on or before a date not "less than 30 days after issuance of the notice." For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

Rule F(5) provides the means by which a party may file a claim in the limitation proceeding and also file a response to the petition for limitation. Rule F(5) creates statutory standing requirements for challenging limitation actions. The purpose of Rule F(5), much like that of Rules C(6) and G(5), is to bring all potentially interested parties into one proceeding to address competing claims to certain property. Therefore, every party seeking part of the limitation fund or challenging the right to limit must file a claim.[101] Each claim shall specify the facts upon which

[100] Supplemental Rule F(2).

[101] In re Am. River Transp. Co., 728 F.3d 839, 841–43 (8th Cir. 2013) (citing In re Triton, 719 F.Supp.2d 753, 757–58 (S.D.Tex.2010) (potential claimants who had not filed claims under Rule F(5) lacked standing to seek dismissal of the limitation action); In re Lenzi, Civ. A. No. 89–4571, 1989 WL 146659, at *1 (E.D.Pa. Dec. 1, 1989) (concluding that party who filed an answer and a motion for summary judgment in a limitation complaint, but not a proper claim under Rule F(5), lacked standing to contest the right to limitation or exoneration).

the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer. In theory, not all claimants are required to challenge limitation and therefore need not respond directly to the petition.

Rule F(6) outlines the general requirements for giving notice to known claimants. Generally, the petitioner must mail each known claimant (or its attorney) a list setting forth All known claimants, their contact information, and information on the nature and amount of the claim.

Rule F(7) provides that

> [a]ny claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction.

This rule provides a preliminary means by which a claimant can challenge the petitioner's *ad interim* stipulation of value, and also make an initial attempt to convince the court to order an overall increase in the limitation fund. For example, a claimant may seek an increase in the fund by challenging the value of the vessel, seeking discovery on the value of pending freight, or asserting the application of the "flotilla doctrine."[102]

Rule F(8) provides the procedure for objecting to and/or controverting claims. Any interested party may question or controvert any claim without filing an objection thereto. Rule F(8), also describes the basic rules for how the limitation fund should ultimately be distributed. If the vessel owner is found liable, but is entitled to limit, the fund shall be divided pro rata by the

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[102] The term "freight" is the compensation received by the vessel for its work, not the actual goods transported. It may include any and all "rewards, hire, or compensation, paid for the use of ships, either for an entire voyage, one divided into sections, or engaged by the month, or any period." The Main v. Williams, 152 U.S. 122, 129, 14 S.Ct. 486, 38 L.Ed. 381 (1894). Freight is deemed to be "pending" if it is earned for the voyage or mission on which the casualty occurs, both pre-paid and to be collected. The Black Eagle, 87 F.2d 891, 894 (2d Cir.1937). What constitutes a voyage is a question of fact, which depends on the circumstances of the situation. A round-trip or multi-leg voyage can be equivalent to a "single adventure," requiring the owner to surrender earned freight for the entire venture. Complaint of Caribbean Sea Transp., Ltd., 748 F.2d 622, 626 (11th Cir. 1984), amended, 753 F.2d 948 (11th Cir. 1985).
If cargo is not delivered, freight is not earned and therefore does not constitute "pending freight." Id. Pacific Coast Co. v. Reynolds, 114 F. 877, 881–82 (9th Cir. 1902). Under the "flotilla doctrine," the value of all vessels "engaged in a common enterprise or venture with the vessel aboard which the loss or injury was sustained" may be included in the limitation amount. Complaint of Patton–Tully Transp. Co., 715 F.2d 219, 222 (5th Cir.1983).

amount "of their respective claims, duly proved". However, that general rule is "subject to all relevant provisions of law" and reserves the General Maritime Law and Maritime Lien Act priorities amongst categories of claimants.

Rule F(9) sets forth the venue requirements for limitation actions. If the [or "a"] vessel has been arrested or attached by process relating to the same claim, the petitioner must file a limitation action in the district where the vessel has been attached or arrested. If a putative claimant has filed suit, but has not attained jurisdiction over a *res*, the petitioner must file a limitation action in any district in which the owner has been sued. If neither of those have occurred, a limitation action may be filed in the district where the vessel is located, or in any district if the vessel is not within a district.

The rule makes clear that if the owner has been sued with respect to any claim to which the plaintiff seeks to limit liability, the limitation complaint must be filed in the district in which the owner has been sued. The word "district" refers to the geographical area that corresponds to the boundaries of a United States District Court.[103] The complaint may be filed in "any district" only if a lawsuit has not yet commenced against the owner and the vessel is not within any district. When there is more than one action pending at the time that the limitation petition is filed, a limitation petitioner may file in any district in which an action is pending; a petitioner does not need to file the limitation action in the venue where the first suit was filed.[104]

If venue is "properly laid" under Rule F(9), the court may then transfer the action to any district if doing so is in the interest of justice for the convenience of the parties and witnesses. In determining whether to effect such a transfer, the court considers the same factors that apply to a transfer under 28 U.S.C. § 1404(a).[105] The doctrine of *forum non conveniens* also applies to limitation actions.[106] A district court can dismiss or transfer a limitation action under Rule F(9) at the request of any party, including the petitioner.

When venue is not properly laid, Rule F(9) states that the court may dismiss or transfer the action. While transfer "is the usual (and perhaps more appropriate) procedure when a statute of limitations would prevent a claim from being refiled in the appropriate venue," it is within a district court's discretion to dismiss a limitation action outright when filed in an improper venue.[107] If the six-month statute of limitations has run, at least one court has found that equitable tolling could not revive a case in a proper district after it was dismissed in an improper district.[108]

Therefore, if a petitioner wishes for a limitation action to be heard in a particular district for convenience, it must first file the petition in a proper district under Rule F(9), then move that

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[103] In re Mike's, Inc., 337 F.3d 909, 896-97 (8th Cir. 2003).
[104] In re Oskar Tiedemann & Co., 259 F.2d 605, 607 (3d Cir. 1958).
[105] In re TLC Marine Services, Inc., 900 F. Supp. 54, 56 (E.D. Tex. 1995); In re Alamo Chem. Transp. Co., 323 F. Supp. 789, 791 (S.D. Tex. 1970).
[106] Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV, 569 F.3d 189 (4th Cir. 2009)
[107] In re Complaint of Mike's, Inc., 317 F.3d at 898.
[108] In re Mike's, Inc., 337 F.3d 909, 913 (7th Cir. 2003).

court to transfer the action to another district, or dismiss under the doctrine of *forum non conveniens*.[109] A claimant with Article III standing may be able to seek a transfer of a limitation action prior to filing a claim, but a putative claimant must file a claim under Rule F(5) to have standing to move to dismiss a limitation proceeding under Rule F(9).[110] Again, it would appear to be prudent to file a claim in conjunction with a motion to dismiss and/or transfer.

VII - RULE G

In 2006, Rule G was added to the Supplemental Rules to segregate the procedures applicable to federal civil forfeiture proceedings, which are *in rem* claims, from admiralty *in rem* claims. While the civil forfeiture process is generally beyond the scope of this paper, Rule G codified many standards developed by courts interpreting Supplemental Rules C and E.[111] Also, Supplemental Rules C and E and the Federal Rules of Civil Procedure continue to apply to issues that are not addressed in Rule G.[112] Therefore, civil forfeiture cases prior to 2006, as well as Rule G cases thereafter, may be useful in an analysis of procedural issues arising in a maritime claim, and several such cases are cited herein can be directly applicable to admiralty claims, or at least persuasive authority, under those Rules.

VIII - Conclusion[113]

Now these are Rules Supplemental,
Now written and uniform they be;
And they that are wise will observe them,
In practice before the Admiralty;

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[109] In re American River Transp. Co., 864 F.Supp. 554, 556 n. 1 (E.D.La.1994) (transferring limitation action because suit had been commenced in another district but noting that case may be transferred back for *forum non conveniens*); In re Chevron U.S.A., Inc., Civ.A.No. 90–1685, 1990 WL 161036, at *1 (E.D.La. Oct.12, 1990) (finding that venue was improper because suit had been filed against owner in another district and noting that any further proceeding by the court was therefore improper).

[110] In re Complaint & Petition of Triton Asset Leasing GmbH, 719 F. Supp. 2d 753, 759 (S.D. Tex. 2010).

[111] See FED. R. CIV. P. SUPP. R. G advisory committee's note to 2006 amendment. United States v. Real Prop. Located at 1407 N. Collins St., Arlington, Texas, 901 F.3d 268, 275 (5th Cir. 2018)

[112] Supplemental Rule G(1).

[113] With apologies to Rear Admiral Ronald Arthur Hopwood, CB (7 December 1868 – 28 December 1949), a British naval officer and poet. He began his career in 1882 with the Royal Navy as a gunnery officer, completed it in 1919 as a rear admiral, and was acclaimed in 1941 as poet laureate of the Royal Navy by *Time Magazine.*

As the wave rises clear to the hawse pipe,
Washes aft, and is lost in the wake,
So shall ye drop astern all unheeded,
Such time as the Rules ye forsake.

Take heed in your manner of speaking
That the language ye use may be sound,
In the list of the words of your choosing
"Impossible" may not be found.

Now these are the Rules Supplemental
And many and mighty are they,
But the hull and the deck and keel
And the truck of the Rules is - OBEY!