

**TO INCLUDE THE FISHING PERMIT, OR NOT TO INCLUDE THE PERMIT?
THAT IS THE QUESTION!
A LOOK AT THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY'S HOLDING IN *IN RE COMPLAINT OF B&C SEAFOOD, LLC*,
426 F. SUPP. 3D 82 (D.N.J. 2019).**

By Kirby Aarsheim, Esq.*

Introduction to Fishing Permits¹

In 1976, Congress enacted the Magnuson Act, later re-named the Magnuson Stevens Act ("MSA") in response to overfishing and inadequate conservation measures.² In implementing the MSA, Congress also created eight regional fishery management councils charged with efficiently managing the federal fisheries seaward of the states comprising them in accordance with the conservation directives of the MSA.³ The councils develop fishery management plans ("FMPs") to outline the rules for each fishery pursuant to the MSA, which for most fisheries included establishment and issuance of fishing permits and history as a method of gaining control of the fishery.⁴ Fishing permits essentially reflect rights to fish for certain species for a certain number of days each

year.⁵ Interestingly, courts have held that holders of fishing permits issued pursuant to the MSA do not possess valid property interests in such permits.⁶

In some fisheries, the fishing permits and histories hold substantial value. Currently, a Limited Access Full Time Scallop Permit for a two [2] dredge vessel issued by the Greater Atlantic Regional Fisheries Office of the National Oceanic and Atmospheric Administration ("NOAA") has an estimated market value of approximately \$5.5-5.75 million based on an average baseline permit, excluding the value of the fishing vessel and depending on whether the permit includes other permitted fisheries as well.⁷ The larger baseline permits have an estimated value at higher amounts in the \$6.0 million range.⁸ A Full Time Small Dredge permit, with a good baseline of at least eight [80] feet and a 500 horsepower engine, is currently valued at approximately \$3.9 million.⁹

Appraising permit values for other fisheries, such as groundfish and lobster, requires a more complex analysis. The value of a groundfish permit depends on the composition of groundfish species on the permit. It is difficult to provide a quantitative estimate for groundfish permits since the value depends on the annual catch

* Kirby Aarsheim is a Partner at Farrell Smith O'Connell, a maritime defense firm. Attorney Aarsheim also assists with the management of her family's commercial scallop vessels.

¹ See Aarsheim, Kirby, Sparks Heisterhagen, Kasee, *Opposing Perspectives: Should Fishing Permits be Classified as Appurtenances and Subject to Attachment of a Maritime Lien?* 15 Benedict's Mar. Bull. 192 (Fourth Quarter 2017), for a further explanation of fishing permits and background on maritime liens. Attorney Aarsheim also previously authored an article on the topic of fishing permits in the Limitation of Liability context published in the fall 2013 edition of the ABA Admiralty and Maritime Law Committee Newsletter titled, *Limiting the Vessel Owner's Liability to the Value of the Vessel and...Its Fishing Permits?*

² See *Hall v. Evans*, 165 F. Supp. 2d 114, 123-24 (D.R.I. 2001) (citing *Parravano v. Babbitt*, 837 F. Supp. 1034, 1040 (N.D.Cal.1993), *aff'd*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016, 116 S. Ct. 2546, 135 L. Ed. 2d 1066 (1996) (citing 16 U.S.C. § 1801(a)).

³ *A.M.L. International, Inc. v. Daley*, 107 F. Supp. 2d 90, 93 (D. Mass. 2000) (citing 16 U.S.C. § 1852(a)(1)).

⁴ *PNC Bank Delaware v. F/V MISS LAURA*, 381 F.3d 183, 185 (3d Cir. 2004) (citing 16 U.S.C. § 1801 (2000)); *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001) (some fishing vessels "are valuable significantly, and sometimes almost entirely, because of their permits").

⁵ *Gowen*, 244 F.3d at 68.

⁶ *Willie R. Etheridge Seafood Co. v. Pritzker*, No. 2:14-CV-73-BO, 2015 U.S. Dist. LEXIS 93281, at *6 (E.D.N.C. July 16, 2015) (citing *Conti v. United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (permit issued by Department of Commerce to harvest swordfish in Atlantic Swordfish Fishery does not confer a property interest); see also *Am. Pelagic Fishing Co., v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004) (mackerel and herring commercial fishing permit does not confer a property interest for purposes of the Fifth Amendment).

⁷ Telephone interview with Bill Rocha, a broker at Athearn Marine Agency, Inc., (October 2, 2020). Athearn Marine Agency, Inc. has been engaged in the brokerage of commercial fishing vessels, permits, and related services since 1946. Mr. Rocha can be reached by telephone at 774-766-2199 and email: brocha@atearnmarine.com to obtain more information.

⁸ *Id.*

⁹ *Id.*

entitlement attached to the permit.¹⁰ In assessing the value of a lobster permit, the geographic location of the fishery, state versus federal, value per trap tag, and tag allocation, are considered. As an example, an Area 3 offshore lobster vessel with a price of \$350 per tag and a 1,000 tag allocation may be worth approximately \$350,000.¹¹

The highly valued fishing permits described above often exceed the value of the associated vessels. These vessel owners are able to use the permits to secure loans for new builds where they may not have been able to secure the loan if not for the highly valued permit. The current cost of building a two [2] dredge scallop vessel can exceed \$4 million depending on the shipyard. A lender will likely require a scallop vessel owner looking to commission a new build to use its permit with its existing vessel as collateral for the new construction loan.¹² Most banks will not collateralize the loan with just the permit, hence support for the argument that the permit is an appurtenance of the vessel subject to a maritime lien. On the other hand, an owner of a scallop vessel that holds a Limited Access Full Time Scallop Permit valued over \$5 million is unlikely to benefit from attempting to limit its liability if that permit is to be included in the limitation fund. Further, inclusion of the permit in a limitation fund would require vessel owners to incur increased operational costs in order to obtain additional protection and indemnity insurance to cover the value of the permit. Otherwise, a vessel owner risks being under insured if its coverage is below the value of the vessel plus permit and it attempts to limit its liability where the permit is included in the fund.

Recent Decision: *In re Complaint of B&C Seafood, LLC*, 426 F. Supp. 3d 82 (D.N.J. 2019)

The United States District Court for the District of New Jersey is the first court to squarely address the issue of whether fishing permits are appurtenances to be included in the value of a Limitation Fund.¹³ The court

¹⁰ *Id.*

¹¹ *Id.*

¹² *See Gowen*, 244 F.3d at 68-69 (“Thus, not only the market value but the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation equipment. Maritime liens underpin the extension of credit to fishermen, and this mechanism for ready credit would be impaired by excluding from the lien the permits that allow vessels to carry on their accustomed fishing activities. Thus, in the large, fishermen seeking repairs and supplies on credit are likely to benefit from treating a vessel’s permits as appurtenances.”)

¹³ *In re Complaint of B&C Seafood, LLC*, 426 F. Supp. 3d 82, 88 (D.N.J. 2019).

correctly held that case law interpreting the Limitation of Liability Act as well as case law assessing the value of a vessel does not support the assertion that a fishing permit should be included as an appurtenance of a vessel for purposes of the Act.¹⁴ The court emphasized that finding fishing permits to be appurtenances subject to the limitation fund would be inconsistent with the Supreme Court’s holding in *The Main* that the limitation fund should include “all the appurtenances comprising whatever is on board for the object of the vessel.”¹⁵

The court first analyzed what is included in the valuation of a vessel when determining the limitation fund.¹⁶ The ultimate measure of the value of a vessel for purposes of the Act is the fair market value of the vessel to be established by evidence of either the actual sale of the vessel or sales of comparable vessels at the approximate time and within the relevant market.¹⁷ The vessel’s fishing permits are not considered when assessing the vessel’s fair market value, are typically valued independently of the vessel, and do not have to be sold with the vessel.¹⁸

The next key factor considered was whether fishing permits fall within *The Main* description of what the owners have on board the vessel.¹⁹ The limitation fund should include “all the appurtenances comprising whatever is on board for the object of the vessel.”²⁰ The decision in *The Main* intended to “cover what the owners have at risk on the vessel for the object of the adventure.”²¹ Case precedent supports the notion that physical objects are appurtenances, not permits or licenses, to be included in the fund.²²

Fishing permits are intangible objects that were not “on board” the vessel at the time of the collision at issue in

¹⁴ *Id.*

¹⁵ *Id.* at 87 (citing *The Main v. Williams*, 152 U.S. 122, 131, 14 S. Ct. 486, 38 L. Ed. 381 (1894)).

¹⁶ *Id.* at 86.

¹⁷ *Id.* at 85 (citing *Cody v. Phil’s Towing Co.*, 247 F. Supp. 2d 688, 693-94 (W.D. Pa. 2002), citing *Standard Oil of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 155 (1925)).

¹⁸ *Id.*; see also *Sailor Inc. F/V v. City of Rockland*, 324 F. Supp. 2d 197, 200 (D. Me. 2004) (“The value of the fishing permits, which were not impaired due to the sinking, is not properly includible in the vessel’s fair market value for the purpose of determining whether the vessel was a constructive total loss.”).

¹⁹ *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 86-87.

²⁰ *Id.* (citing *In re Waterman S.S. Corp.*, 794 F. Supp. 601, 605 (E.D. La. 1992)).

²¹ *Id.* (citing *The Main* 152 U.S. at 819).

²² *Id.*

In re Complaint of B&C Seafood.²³ Even if a copy of the fishing permit is on the vessel at the time of a casualty, the value of the permit rests with the intangible right to fish vested with the permit holder.²⁴ The First Circuit in *Gowen* acknowledged that “[a]lthough a vessel’s fishing permits generally must be kept ‘on board,’ 50 C.F.R. § 648.4(l), the rights themselves are what matter, and they are intangible.”²⁵ Thus, there is a distinction between physical objects on board a vessel and objects not on board a vessel for purposes of determining what is an appurtenance under the Limitation of Liability Act.²⁶ “Fishing permits are intangible objects not on board a vessel, therefore, holding that fishing permits should be included as an appurtenance for purposes of the Act would be inconsistent with relevant case law.”²⁷

The court credited the differences with how appurtenances are handled in maritime lien cases, on the one hand, from how they are handled under the Limitation of Liability Act on the other, to the intended industry goals in each area.²⁸ “Maritime liens were created to promote commerce by allowing suppliers to freely extend credit to ships but still be protected from shipowners escaping their debts by sailing away without payment.”²⁹ In contrast, the Limitation of Liability Act was intended to protect vessel owners from unlimited exposure to liability.³⁰ Notably, both the Act and maritime liens are aimed at encouraging maritime commerce and investments.

Appurtenances: Maritime Liens vs. Limitation of Liability

As acknowledged in the *In re Complaint of B&C Seafood, LLC* case, the determination of what are appurtenances differs between maritime lien and limitation of liability cases. The ownership of the appurtenance and whether it is on board the vessel are two important factors with different repercussions when analyzing appurtenances subject to a maritime lien or to be included in the limitation fund.

²³ *Id.* (citing *In re Waterman S.S. Corp.*, 794 F. Supp. at 605).

²⁴ *Id.*

²⁵ *Gowen*, 244 F.3d at 68.

²⁶ *Id.*

²⁷ *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 87.

²⁸ *Id.*

²⁹ *Id.* (citing Raleigh P. Watson, Understanding Maritime Liens, MARLIN (Mar. 27, 2018), <https://www.marlinmag.com/maritime-liens/> (providing general information relating to maritime liens); *Gowen*, 244 F.3d at 67-68 (explaining why fishing permits should be considered appurtenances for purposes of maritime liens)).

³⁰ *See id.* (citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001)).

Maritime liens attach to maritime property or *res* which can include vessels, as well as the vessel’s engines, equipment, appurtenances, cargo, freight, and sub-freights.³¹ The vessel’s equipment and appurtenances are subject to liens *even if not actually owned by the vessel owner*.³² A maritime lien can attach to a vessel’s equipment that the vessel owner leases from a third party.³³

The maritime lien system is based upon practical realities confronting maritime businesses.³⁴ The rule allowing liens against severable and leased equipment “is predicated upon the principle that one extending credit to a ship has the right to assume that the entire vessel, including all of her equipment essential to her navigation or to the completion of the voyage upon which she is embarked, stands as security for the debt.”³⁵

Conversely, in determining the value of the vessel for purposes of the Limitation of Liability Act, the Supreme Court has stated:

³¹ Schoenbaum, Thomas J., 1 Admiralty & Mar. Law § 9-1.

³² *Gowen, Inc. v. F/V Quality One*, 2000 U.S. Dist. LEXIS 8587 (D. Me. June 14, 2000), *aff’d*, 244 F.3d 64 (1st Cir. 2001) (citing *SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1st Cir. 1972)).

³³ *See Gonzalez v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1356 (S.D. Fla. 2000) (an item may be appurtenant to a vessel even though the vessel and the item are not under common ownership); *The Augusta*, 1920 U.S. Dist. LEXIS 688, at *2 (E.D. La. Sep. 7, 1920) (radio equipment leased from the Radio Corporation of America could be used to satisfy maritime liens against the vessel if the proceeds of the ship were insufficient); *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (D. Maine 1963) (radar equipment and a fathometer installed on board a fishing vessel were appurtenances subject to a maritime lien on the vessel even though the owner of the vessel had leased the equipment from a third party); *United States v. F/V Golden Dawn*, 222 F. Supp. 186, 188 (E.D.N.Y. 1963) (held that preferred maritime liens “tend toward reaching every sort of interest in the congeries of vessel, tackle, apparel and furniture that has been committed to the hazard of the vessel’s voyages and enterprise without regard to ownership and sub-divisions of ownership interests” but that mortgages extend only to what mortgagor owns); *The Frolic*, 148 F. 921, 923-24 (D.R.I. 1906) (the title of an appurtenance becomes immaterial if the vessel owners have in fact consented to its use as an appurtenance of the vessel).

³⁴ *Gulf Copper & Mfg. Corp. v. M/V Lewek Express*, No. 3:19-CV-00034, 2019 U.S. Dist. LEXIS 101822, at *6-7 (S.D. Tex. June 18, 2019).

³⁵ *Id.* (quoting *Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 562 (N.D. Miss. 1995)).

the custom has been to include all that **belongs to the ship**, and may be presumed to be **the property of the owner**, not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances comprising whatever is on board for the object of the voyage, **belonging to the owner**, whether such object be warfare, the conveyance of passengers, goods, or the fisheries.³⁶

Multiple courts have analyzed the issue of permit ownership when addressing permit holder claims that the government's revocation of the permit constitutes either a categorical or a noncategorical regulatory taking in violation of the Fifth Amendment. In applying "traditional notions of property and existing rules and understandings" courts have concluded that a fishing permit does not confer a legitimate property interest.³⁷ To be considered property, fishing licenses conferring a "right to use a vessel to fish" must exist "independent of the regulatory regime."³⁸ The licensees granted fishing permits through a regulatory process "do not possess a valid property interest in such permits."³⁹ Since fishing permits are technically not the property of the vessel owner, that characteristic of the permit fails to meet a threshold requirement to be an appurtenance under the Limitation Act as stated in *The Main*.⁴⁰

While appurtenances deemed part of the limitation fund can be severable from the vessel, those appurtenances must still be on board the vessel during the subject voyage. The appurtenances must also be part of what is risked during the subject voyage, a factor not exactly considered in the maritime lien context. These were key issues considered by the court in *In re Complaint of B&C Seafood, LLC*.

³⁶ (Emphasis added) *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 85 (quoting *The Main*, 152 U.S. at 131).

³⁷ *Willie R. Etheridge Seafood Co. v. Pritzker*, No. 2:14-CV-73-BO, 2015 U.S. Dist. LEXIS 93281, at *6 (E.D.N.C. July 16, 2015) (citing *Conti*, 291 F.3d at 1341; *Am. Pelagic Fishing Co.*, 379 F.3d at 1374).

³⁸ *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436, 444-45 (D. Del. 2016) (citing *Gen. Category Scallop Fishermen v. Sec'y of U.S. Dep't of Commerce*, 720 F. Supp. 2d 564, 576 (D.N.J. 2010)); *See also Am. Pelagic Fishing Co.*, 379 F.3d at 1377-80 ("Because the right...was not inherent in its ownership of the [property], [but instead was totally dependent upon the regulatory scheme,] American Pelagic did not suffer the loss of a property interest...when its...permits were revoked.").

³⁹ *United States ex rel. Moore & Co.*, 196 F. Supp. 3d at 445 (citing *Gen. Category Scallop Fishermen*, 720 F. Supp. 2d at 576; *Am. Pelagic Fishing Co.*, 379 F.3d at 1377, 1380 ("[U]se of...vessels to fish in the [Exclusive Economic Zone]...does not equate to a cognizable property interest.")).

⁴⁰ *The Main*, 152 U.S. at 131.

An appurtenance subject to a maritime lien is "any specifically identifiable item that is **destined for use aboard** a specifically identifiable vessel and is essential to the vessel's navigation, operation, or mission."⁴¹ It is well-established that an appurtenance need not be installed or on board a vessel at the time of her arrest to be itself subject to the warrant for arrest.⁴² The issue of whether a lien can attach to an intangible fishing permit has been specifically decided in the affirmative.⁴³

Indeed, an item may be an appurtenance even though it has never been installed on the vessel to which it belongs.⁴⁴ For example, a chronometer not on board the vessel when the marshal made his seizure, and never in his physical possession, was nonetheless an appurtenance of the ship.⁴⁵ A tail shaft that had never been installed on the boat for which it was destined was an appurtenance to the vessel that was the subject of a preferred ship mortgage.⁴⁶ Installation of the equipment may not be a necessary pre-condition to a finding that a given item is appurtenant to a vessel.⁴⁷

Courts have repeatedly upheld maritime liens on appurtenances not owned by the vessel owner and not on board the vessel. However, those appurtenances would not satisfy the requirements that an appurtenance be "the property of the owner" and physically on board the vessel to be included in a limitation fund.⁴⁸

⁴¹ *Gulf Copper & Mfg. Corp. v. M/V Lewek Express*, No. 3:19-CV-00034, 2019 U.S. Dist. LEXIS 101822, at *6 (S.D. Tex. June 18, 2019) (quoting *Motor-Servs. Hugo Stamp, Inc. v. M/V REGAL EMPRESS*, 165 Fed. Appx. 837, 840, 2006 U.S. App. LEXIS 2961 (11th Cir. Feb. 7, 2006)) (citing *Gonzalez*, 102 F. Supp. 2d at 1356)).

⁴² *Gonzalez*, 102 F. Supp. 2d at 1354-55 (citing *The Great Canton*, 1924 AMC 1074, 1075 (S.D.N.Y. 1924)).

⁴³ *Gowen*, 244 F.3d at 68; *Bank of Am. v. PENGWIN*, 175 F.3d 1109, 1119 (9th Cir.), *cert. denied*, 528 U.S. 872, 120 S. Ct. 174, 145 L. Ed. 2d 147 (1999) (Court assumed without discussion that permits were subject to liens); *Offenbacher v. Ahart*, No. 07-CV-326-BR, 2009 U.S. Dist. LEXIS 16231, at *16-17 (D. Or. Feb. 25, 2009) (Court adopted the reasoning of *Gowen*); *Bank of the Pac. v. F/V ZOEAL*, No. 3:15-CV-05758-RBL, 2017 U.S. Dist. LEXIS 29928 (W.D. Wash. Mar. 2, 2017) (ship mortgage lenders can have a security interest in Washington commercial fishing permits appurtenant to a mortgaged vessel); *see also PNC Bank Del. V. F/V Miss Laura*, 381 F.3d 183 (3d Cir. 2004).

⁴⁴ *Gonzalez*, 102 F. Supp. 2d at 1355.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Stewart & Stevenson*, 890 F. Supp. at 561-62).

⁴⁷ *Gonzalez*, 102 F. Supp. 2d at 1355.

⁴⁸ *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 85 (quoting *The Main*, 152 U.S. at 131).

Conclusion:

Under the foregoing case law – where fishing permits are appurtenances subject to maritime liens but not appurtenances to be included in the limitation fund – the goals of encouraging investment and protecting the interests of fishing vessel owners are achieved.

Classifying permits as appurtenances subject to maritime liens allows a fishing vessel owner to use said permits as collateral to secure loans beyond its vessel's

value. This is particularly important when the vessel owner is building a new fishing vessel or faced with purchasing a replacement vessel. In the event of a marine casualty, a fishing vessel owner is potentially able to limit its liability to the value of its vessel, excluding the permit, assuming lack of privity or knowledge. The owner can still preserve its right to that permit for use as security. Thanks to the holding in *In re Complaint of B&C Seafood, LLC*, the current legal climate allows a fishing vessel owner to essentially have its cake and eat it too.