IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 94-4093

LESLIE S. DIETRICH,
Appellant,

- V. -

KEY BANK, N.A.
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 87-08407-CIV-JAG

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES *AMICUS CURIAE*

CHESTER D. HOOPER
President
The Maritime Law Association
of the United States
195 Broadway
New York, New York 10007-3100
(212) 341-7000

DAVID McI. WILLIAMS
250 West Pratt Street
Baltimore, Maryland 21201
(410) 539-5040

JOHN A. EDGINTON
6400 Hollis Street
Emeryville, California 94608
(510) 450-9920

BRUCE A. KING
601 Union Street
Seattle, Washington 98101
(206) 682-5151

Counsel for The Maritime Law Association of the United States, Amicus Curiae

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 94-4093

LESLIE S. DIETRICH,
Appellant,

- V. -

KEY BANK, N.A.
Appellee.

RULE 26.1 DISCLOSURE

Amicus Curiae, The Maritime Law Association of the United States, Inc., is a non-stock corporation having no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The persons known to have an interest in the outcome of this appeal are:

Honorable Sidney M. Aronowitz, United States District Judge

Leslie S. Dietrich, Appellant

John A. Edginton, Esquire, Counsel for The Maritime Law Association of the United States, *Amicus Curiae*

Richard W. Glenn, Esquire, Counsel for Appellant

Honorable Jose A. Gonzalez, Jr., United States District Judge

Chester D. Hooper, Esquire, President of The Maritime Law Association of the United States, *Amicus Curiae*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 94-4093

LESLIE S. DIETRICH,
Appellant,

- V. -

KEY BANK, N.A.
Appellee.

RULE 26.1 DISCLOSURE (continued)

Key Bank, N.A., Appellee

Bruce A. King, Esquire, Counsel for The Maritime Law Association of the United States, *Amicus Curiae*

The Maritime Law Association of the United States, *Amicus Curiae*

Robert D. McIntosh, Esquire, Counsel for Appellee

National Marine Bankers Association, *Amicus Curiae*

Paul R. Regensdorf, Esquire, Counsel for Appellee

Thomas A. Russell, Esquire, Counsel for National Marine Bankers Association, *Amicus Curiae*

David McI. Williams, Esquire, Counsel for The Maritime Law Association of the United States, *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES AND REGULATIONS

TREATISES

MISCELLANEOUS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 94-4093

LESLIE S. DIETRICH,
Appellant,

- V. -

KEY BANK, N.A.
Appellee.

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE, KEY BANK, N.A.

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Appellee, Key Bank, N.A.

NATURE OF MLA'S INTEREST

The MLA has a strong interest in the disposition of this case because it concerns important issues affecting marine finance. The MLA is a nationwide bar association founded in 1899 and incorporated in 1993. Its membership of approximately 3600 includes attorneys, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of

Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests--shipowners, marine lenders, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime plaintiffs and defendants.

The MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, . . . and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives the MLA has helped sponsor a wide range of legislation dealing with maritime matters, including the 1989 amendment and recodification of the Ship Mortgage Act, 1920,[1] the Carriage of Goods by Sea Act[2] and the Federal Arbitration Act.[3] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[4]

---

1. Act of November 23, 1988, Pub. L. No. 100-710, tit. I, *reprinted in* 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4735-4752 (1988), *codified at* 46 U.S.C. §§ 31301-31343 (hereafter cited by U.S.C. section).

2. 46 U.S.C. §§ 1300-1315.

3. 9 U.S.C. §§ 1-15.

4. For fuller explanation, *see* Motion of The Maritime Law Association of the United States to File *Amicus Curiae* Brief, granted September 19, 1994.

The issue presented in the present appeal is fundamental to the law of maritime finance. This Court's decision will define the range of remedies available to mortgagees of the U.S. documented fleet.[5] Particularly in yacht finance, the judicial remedies in admiralty provided by the Ship Mortgage Act often are unnecessary and the lender would prefer to foreclose a defaulted mortgage by self-help repossession and sale under state law. If the state law remedies are not approved as an appropriate alternative to the judicial remedies under the Act, however, maritime lenders will have no prudent alternative but always to foreclose ship mortgage liens by *in rem* process in admiralty. Thousands of yacht mortgage foreclosures will be unnecessarily driven through the federal courts. The expense and complexity of these proceedings will serve as a significant disincentive to yacht finance.

STATEMENT OF THE ISSUE

Whether by enactment of the Ship Mortgage Act, 1920, Congress disapproved, by implication, alternate remedies not mentioned in the federal legislation such as foreclosure by non-judicial repossession and sale under state law.

SUMMARY OF THE ARGUMENT

The fundamental purpose of the Ship Mortgage Act was to stimulate investment in U.S. flag vessels by providing a new "preferred" status for qualifying mortgages which entitled them to foreclosure by process *in rem* in admiralty. The ship mortgage is not a maritime contract, however. Under state chattel mortgage law, the mortgagee

---

5. Over 200,000 vessels are now documented under 46 U.S.C. chap. 121. 58 Fed. Reg. 51920 (Oct. 5, 1993). Most are yachts subject to a preferred mortgage.

was permitted to take possession of the mortgaged ship upon default without recourse to a court. The 1920 Act brought qualifying mortgages within the courts' admiralty jurisdiction but did not prescribe a new body of substantive mortgage law. As between the parties to the transaction, the ship mortgage contract remained founded in state law. The Act did not make *in rem* judicial foreclosure mandatory or exclusive and did not purport to eliminate existing state law remedies.

In granting rights in admiralty to preferred ship mortgagees, Congress did not intend to preempt the existing state law remedies. Indeed, foreclosure by *in rem* process under the Ship Mortgage Act produces a significantly different result than foreclosing by self-help repossession and sale under state law. A state law repossession and sale in no way invokes the "preferred" status of the mortgage in admiralty established by the Ship Mortgage Act, nor can it foreclose another party's preferred mortgage or any traditional maritime lien. When federal admiralty jurisdiction is not invoked, the state law remedies remain available on an entirely consistent and supplementary basis.

State law remedies, governed primarily by the Uniform Commercial Code, have been widely used in marine lending and are recognized for that purpose by courts and federal agencies. There can be no sound reason unnecessarily to swell our federal court dockets with thousands of *in rem* preferred yacht mortgage foreclosures. Consistent with the purpose of the Ship Mortgage Act, this Court should confirm the availability of the alternate state law remedies.

ARGUMENT

The current turmoil in the marine finance industry on the topic of this appeal stems principally from the unfortunate decision in *Bank of America Nat'l. Trust & Sav. Ass'n. v. Fogle*, 637 F. Supp. 305, 1986 AMC 2005 (N.D. Cal. 1985), which held that by enacting the Ship Mortgage Act,[6] Congress manifested an intent that the judicial private sale provisions of 28 U.S.C. § 2001(b) available in an *in rem* proceeding should, by implication, preempt any non-judicial private sale remedy under state law. *Fogle*, 637 F. Supp. at 307. The *Fogle* case has been rejected by lower courts[7] and criticized,[8] but until *Fogle* is rejected by a federal appellate court, foreclosure of a

---

6. Act of June 5, 1920, ch. 250, § 30, 41 Stat. 1000-1097, *prev. codified* at 46 U.S.C. §§ 911 - 984 (repealed 1989) (hereafter cited by U.S.C. section).

7. *First Fed. Sav. F.S.B. v. M/Y Sweet Retreat*, 844 F. Supp. 99, 1994 AMC 1974 (D.R.I., 1994); *Maryland Nat'l. Bank v. Darovec*, 820 F. Supp. 1083, 1994 AMC 122 (W. D. Ill. 1993); *Pee Dee State Bank v. F/V Wild Turkey*, 1992 AMC 1896 (D.S.C. 1991); *Dietrich v. Key Bank, N.A.*, 693 F. Supp. 1112, 1989 AMC 1330 (S.D. Fla. 1988). *See also Key Bank v. Vessel Asever*, 1993 AMC 263 (C.D. Cal. 1992).

8. A. Sabino, "The Exclusivity of Remedies Under the Ship Mortgage Act: The Controversy Continues," 6 Mar. L.R. 18 (1994); G. Fontenot, "Plugging the Leaks in the Ship Mortgage Act: *Nate Leasing Co. v. Wiggins*," 16 Tul. Mar. L.J. 213 (1991); T. Russell, "Nonjudicial Foreclosure Under The Ship Mortgage Act, 18 J. Mar. L. & Com. 555 (1987); D. Williams, "Yacht Financing Since Public Law 100-710: A New Era," Recreational Boating Law § 11.04[D] (Matthew Bender 1992); 2 Benedict on Admiralty § 70f at 6-64, *et seq.* (7th ed., 1994).

preferred mortgage other than by suit *in rem* in federal court will remain imprudent. This disincentive to marine financing was never intended by Congress.

I. The Ship Mortgage Act of 1920 Was Intended to Augment, Not Eliminate, Existing State Law Remedies Such as Repossession

The fundamental purpose of the Ship Mortgage Act was to promote investment in U.S. flag vessels by providing a new "preferred" status for qualifying mortgages which entitled them to foreclosure by process *in rem* in admiralty.[9] To this end, the Ship Mortgage Act was grafted onto an existing body of state law chattel mortgage law. The purpose and language of the Act indicate Congress intended only to add to the existing state law remedies, not preempt them.

A. The Ship Mortgage Contract Is Founded in State Law Permitting Repossession.

It seems a paradox: a mortgage of a ship is not a maritime contract. Following English authority, in *Bogart v. The John Jay*, 58 U.S. (17 How.) 399, 402, 15 L.Ed. 95, 96 (1854), the Supreme Court held that a ship mortgage was merely a personal contract "without reference to navigation or perils of the sea" and was not within the admiralty courts' jurisdiction. A mortgage did not create a maritime lien enforceable by suit *in rem* against the mortgaged vessel nor could the obligation be enforced by

---

9. "The primary purpose of the Ship Mortgage Act is to induce private capital to invest in shipping." *Custom Fuel Services v. Lombas Industries*, 805 F.2d 561, 568, 1987 AMC 1321 (5th Cir. 1986), quoted in *In re Alberto*, 823 F.2d 712, 719, 1987 AMC 2409 (3d Cir. 1987) (citing authorities).

an admiralty suit *in personam*.[10] Courts have dutifully followed this rule excluding the non-preferred ship mortgage contract from the federal courts' admiralty jurisdiction. *See McCorkle v. First Penna. Banking & Trust Co.*, 459 F.2d 243, 249, 1972 AMC 1596 (1972).

The precursor to the Ship Mortgage Act was the Recording Act of 1850, providing for the recordation of instruments and perfection of mortgage liens.[11] In 1927, in *James Stewart & Co. v. Rivara*, 274 U.S. 614, 618, 47 S.Ct. 718, 720, 1927 AMC 939 (1927), the Supreme Court held that New York chattel mortgage law applied to a conditional sale of a federally enrolled tug notwithstanding the passage of the Enrollment Act and the Recording Act because Congress had not "nationalized or federalized" the law in respect of conditional sale contracts of enrolled vessels and the application of state law was not inconsistent with the federal law. The court noted that the Recording Act expressly provided that it did not affect the title to vessels as between the parties to the transactions to which it applied.[12]

As a result, the validity of the non-preferred ship mortgage rests entirely on

---

10. *See* B. Smith, Ship Mortgages, 47 Tul. L.J. 608, 609 (1973).

11. Vessel Sales and Mortgage Recording Act, Act of July 29, 1850, ch. 27, 9 Stat. 440, *prev. codified at* Revised Statutes § 4192, *et seq.* (repealed 1920).

12. *See The J.E. Rumbell*, 148 U.S. 1, 16 (1893) ("a mere registry act"); *Jackson v. Inland Oil Transport Co.*, 318 F.2d 802, 809-9, 1963 AMC 1355 (5th Cir. 1963) (perfection of nonmaritime mortgage). The Ship Mortgage Act retained this exclusion. *See* 46 U.S.C. § 921 (repealed 1989) ("other than the grantor or mortgagor").

state law. *McCorkle*, 459 F.2d at 246; *Security Bank v. Levens*, 480 P.2d 706, 708 (Or. 1971). Based on state law principles, the holder of a non-preferred ship mortgage has long been recognized to have the right to take possession of the mortgaged ship and sell it without judicial process upon a default.[13]

B. **Gaps In The Ship Mortgage Act May be Caulked With State Law.**

Because a ship mortgage could have no standing in U.S. admiralty courts prior to 1920, as a device for financing U.S. flag shipping it was "practically worthless."[14] In order that the large Government-owned WWI fleet could be sold, in 1920 Congress amended and recodified the Recording Act, adding provisions creating a new "preferred" status elevating the priority of the lien of qualifying mortgages and entitling their holders to prejudgment arrest and judicial sale foreclosure by process *in rem* in admiralty. The 1920 Act thus provided the first satisfactory security in U.S. flag vessels.

In 1934, in *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 41-42, 55 S.Ct. 31, 37, 1934 AMC 1417 (1934), the Supreme Court upheld the Act's constitutionality, refusing to impose a condition that the borrowed funds be put to a maritime purpose when this was not stated in the statute. The statute is also silent as

---

13. 2 Jones, Chattel Mortgages and Conditional Sales § 551 at 315 (6th ed., Bowers, 1933); 1 Benedict on Admiralty § 77, Form No. 3, at 167 (6th ed., Knauth, 1940).

14. Sen. Rep. No. 573, 66th Cong., 2d Sess 9 (May 4, 1920).

to many other critical provisions, such as the criteria for a "valid mortgage."[15] The Act was not comprehensive and did not create a whole new body of substantive mortgage law.[16] To fill the "gaps" in the Ship Mortgage Act, courts have continued to look to the underlying state law for guidance.[17]

C. Under The Ship Mortgage Act, Judicial Foreclosure Was Neither A Mandatory Nor Exclusive Remedy.

The Ship Mortgage Act offered marine lenders improved security in vessels, but explicitly did not force it upon them. The preferred status granted at 46 U.S.C. § 953 was given effect only: "[u]pon the sale of any mortgaged vessel by order of a district court of the United States in any suit in admiralty for the enforcement of a preferred mortgage lien thereon, ..." Section 951 expressly stated that such a suit in admiralty was a permissive, not mandatory, remedy: "Upon default of any term or condition of

---

15. *See ITT Industrial Credit Co. v. M/V Richard C.*, 617 F. Supp 761, 764 (E.D. La. 1985) ("Merely following the correct recording procedures set forth in the statute do not convert an invalid mortgage into a valid preferred ship mortgage.").

16. *See* Uniform Commercial Code § 9-104(a), Official Comment, 3 U.L.A. 181 (West, 1992) ("Even such a statute as the Ship Mortgage Act is far from a comprehensive regulation of all aspects of ship mortgage financing.").

17. *See generally* G. Gilmore & C. Black, The Law of Admiralty § 9-57 at 718 *et seq.* (2d ed. 1975) (reviewing cases) ("Gilmore & Black"). *Cf. Morgan Guaranty Trust Co. v. Hellenic Lines Ltd*, 621 F. Supp. 198, 215, 1986 AMC 1074 (S.D.N.Y. 1985) (foreign mortgage).

the mortgage, such [preferred mortgage] lien may be enforced by suit *in rem* in admiralty." 46 U.S.C. §951 (repealed 1989) (emphasis added).

Similarly, the mortgagee's right under the Ship Mortgage Act to sue the mortgagor *in personam* in admiralty upon a default under the mortgage was also explicitly permissive. 46 U.S.C. § 954(a) (repealed 1989) ("the mortgagee may bring suit *in personam* in admiralty"). The Ship Mortgage Act did not, for instance, seek to preclude the mortgagee from suing the mortgagor in state court under state law on the note secured by the mortgage.[18] Although original jurisdiction of all suits *in rem* in admiralty was granted to the district courts exclusively, the *in rem* remedy was not made exclusive. As between the parties to the transaction, existing remedies under state law remained available.

As a result, parties were free to pursue foreclosure remedies provided by state law. Forms of preferred mortgage in popular use following passage of the Act typically provided for the mortgagor's right of entry and retaking of the vessel without

---

18. In *Reedsburg Bank v. Apollo*, 508 F.2d 995, 999 (7th Cir. 1975), the Act was held inapplicable to a guarantee of debt secured by a preferred ship mortgage:

> Only the jurisdiction to foreclose the lien of the mortgage and to determine its priority in relation to that of other liens in a proceeding *in rem* is made exclusive by the Act. (46 U.S.C. § 951).

See also Cape Ann Comm. Fisheries Loan Fund v. Schlichte, 1993 AMC 2839, 2840 (Mass. App. Div., 1993) (state court suit on promissory note).

legal process.[19] In *Port Welcome Cruises, Inc. v. S.S. Bay Belle*, 215 F. Supp. 72, 83-84 (D. Md. 1963), Judge Winter upheld the preferred mortgagees' right to relief on *in rem* claims even though the mortgagees had previously taken possession of the mortgaged vessels. In *Challenger v. Durno*, 227 F.2d 918, 922, 1956 AMC 111 (5th Cir. 1955), the court accepted the validity of "the existing contractual right to a private foreclosure" in holding that the mortgagee in possession must compensate the vessel owner for use of the repossessed vessel after a reasonable period of time. The court distinguished the admiralty remedy:

> The Mortgagee [in possession] must determine what he is going to do: a private foreclosure after which the vessel owner's rights cease or an Admiralty Preferred Ship Mortgage foreclosure in which, until seizure, (*cf.* 46 U.S.C.A. § 952 authorizing receiver) the owner is entitled to the compensation due an owner.

Challenger v. Durno, 227 F.2d at 922.

Other courts also have distinguished the remedies under state law from the judicial remedies in admiralty under the Act. In *Brown v. Baker*, 688 P.2d 943, 949 (Alaska, 1984), the court held that the Alaska Uniform Commercial Code applied to a voluntary return of a federally mortgaged vessel to the mortgagees, reasoning:

> In the instant case, upon default there was *no foreclosure action* and therefore the Ship Mortgage Act is inapplicable. The Bakers have not directed the court to any other federal statute that would preclude the

---

19. *See* 1 Benedict on Admiralty § 78, Form No. 10 (Article XIX) at 191, Form No. 11 (Art. II, Sec. 1, Subsec. 3) at 205, Form No. 12 (Art. III, Sec. 3(d)) at 224 (6th ed., Knauth, 1940).

> application of AS 45.09.503 - .505 [Uniform Commercial Code] and we are unaware of any. Thus we conclude state law is applicable here.

Similarly, in *Price v. Seattle-First Nat'l. Bank*, 582 F. Supp. 1568, 1569-70, 1988 AMC 1518 (W. D. Wash. 1983), the court held that the issue of whether the mortgagee's repossession and private foreclosure in lieu of *in rem* arrest barred the mortgagee from recovering a deficiency would be resolved under state law.

More recently, three courts have concurred that the permissive verb "may" used in 46 U.S.C. § 31325, the successor to 46 U.S.C. § 951, indicates Congress' intent that the Act's *in rem* remedy is not exclusive:

> The use of the word "may" rather than "must" indicates that a mortgagee may proceed under the Act to effectuate a foreclosure, but is not required to and may seek to proceed outside the Act. Thus, the Act itself stops short of preempting extra-judicial repossessions and private sales.

Maryland Nat'l. Bank v. Darovec, 820 F. Supp. at 1087. *See also First Fed. Sav. F.S.B. v. M/Y Sweet Retreat*, 844 F. Supp. at 102; *Pee Dee State Bank v. F/V Wild Turkey*, 1992 AMC at 1900. All three held that the remedy of self-help repossession and sale under state law was available to the mortgagee.

No other conclusion fulfills the purpose of the Ship Mortgage Act to promote marine financing. Grafting rights in admiralty onto an existing body of state chattel mortgage law, Congress in 1920 certainly did not intend to discard the remedies long available to marine lenders and borrowers. The judgment below should be affirmed.

II The *In Rem* Judicial Remedy Does Not Preempt The Self-Help, Non-Judicial Remedy

In asserting that the Ship Mortgage Act preempted alternate state law remedies, the court in *Fogle* and the Appellant here have failed to consider the law of preemption as announced by the Supreme Court. In the absence of an express congressional command, state law is preempted only if that law actually conflicts with the federal law or if federal law so thoroughly occupies the legislative field "as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 112B S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992).

The Ship Mortgage Act did expressly address certain matters such as the rate of interest, § 926(d), the formal requirements for preferred status, § 922, and the priority of the preferred mortgage lien in an *in rem* judicial foreclosure, § 953. In these respects the federal law certainly preempted any contrary state law. The Ship Mortgage Act was entirely silent, however, as to any remedy other than the judicial foreclosure it offered in admiralty. Non-judicial repossession and sale under state law is entirely consistent with and complementary to the statutory admiralty remedy.

A. The Judicial Sale in Admiralty and the Sale After Repossession Produce Entirely Different Results.

The judicial sale of a vessel *in rem* in admiralty and the sale of a vessel after self-help repossession under state law could hardly be more different.

The judicial sale in admiralty was available under general maritime law long prior to the enactment of the Ship Mortgage Act, or 28 U.S.C. §§ 2001-2007, as a

means to execute traditional maritime liens.[20] The issuance of *in rem* process involves judicial scrutiny. Rule C(3), Supplemental Rules for Certain Admiralty and Maritime Claims. The sale itself has been, since 1893, subject to the requirements of 28 U.S.C. § 2001, and upon confirmation, all liens attach to the sale proceeds.[21] The *in rem* sale of a ship by a court of competent admiralty jurisdiction executes all liens and mortgages, whether maritime or non-maritime.[22] The *in rem* process is constructive notice of the proceedings to all having an interest in the arrested vessel and the admiralty court's conveyance of clear title to the vessel is recognized internationally.[23]

By way of comparison, the legal benefits of self-help repossession and sale under state law may seem meager. State courts have no power to foreclose a maritime lien or a preferred mortgage lien,[24] and unless foreclosed by *in rem* process in

---

20. > The [maritime] lien and the proceeding ***in rem*** are . . . correlative--where one exists, the other can be taken, and not otherwise.

The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867). *See* 46 U.S.C. §§ 31341-43 (maritime lien for necessaries).

21. 46 U.S.C. § 953(b) (repealed 1989); 46 U.S.C. § 31326.

22. *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1552-53, 1990 AMC 2478 (11th Cir. 1990); *The Trenton*, 4 F. 657, 661 (E. D. Mich. 1880).

23. *See generally* Gilmore & Black § 9-85.

24. 46 U.S.C. § 951 (repealed 1989); 46 U.S.C. § 31325(c). *See The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 19 L.Ed. 451 (1866); *The Moses Taylor*, 71 U.S. 411, 18 L. Ed. 397 (1866); *The Gazelle*, 10 F. Cas. 127 (No. 5,289) (D. Mass. 1858).

admiralty, those liens follow the vessel into the hands of a purchaser.[25] Under Uniform Commercial Code §§ 9-501 to 9-507,[26] various constraints apply to the non-judicial remedy. A secured party may take possession without judicial process only if this can be done without breach of the peace. § 9-503(1). The sale or other disposition of the property must be commercially reasonable. § 9-504(3). Reasonable notice of the sale generally must be given to the debtor. *Id.* In some circumstances the secured party may retain the property in satisfaction of the debt. § 9-505. Disposition of the property transfers to a purchaser for value all of the debtor's rights in it, discharges the security interest under which it is made, and discharges any subordinate security interest or lien. § 9-504(4). Thus, title to the property free and clear of all liens is not necessarily conveyed at the sale.

Nevertheless, foreclosure by state law repossession and sale is often warranted. Federal court foreclosures are relatively expensive and slow, even if unopposed. The state law remedy may be indicated depending on the likelihood of third party maritime lien claims, the value of the vessel and the likelihood of a deficiency or surplus after sale, and whether repossession could be accomplished peacefully. Thus the lender is often presented a choice between federal and state law remedies which are quite different in procedure and consequences, but quite complimentary to one another in practice.

B. The Requisites for Federal Preemption of Alternate State Law

---

25. *The Bold Buccleugh*, 7 Moore P.C. 267, 13 Eng. Rep. 884 (P.C. 1852).

26. 3B U.L.A. 10-430 (West, 1992).

Remedies Do Not Appear.

Applying the standard for federal preemption, it seems clear that the state law non-judicial remedy does not conflict with the federal law judicial remedy, nor has the federal law so thoroughly occupied the field "as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. at 2617.

The state law non-judicial remedy does not purport to "scrape the hull clean" of all liens nor does it invoke the preferred status of the mortgage lien. It coexists with the federal *in rem* remedy, just as do other remedies under state law such as an action for replevin. Supplementation of the *in rem* foreclosure provided by the Ship Mortgage Act with state law remedies in no way frustrates the federal interest to stimulate investment in U.S. flag shipping; it compliments that interest by affording the mortgagee a wider range of options. In far less compelling circumstances, in *United States v. Kimbell Foods,* 440 U.S. 715, 729, 99 S.Ct. 1448, 1459, 59 L.Ed.2d 711 (1979), the Supreme Court noted the virtue of applying the Uniform Commercial Code where no federal rule was required:

> Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s]," *United States v. Standard Oil Co.*, [332 U.S. 301, 309, 67 S.Ct. 1604, 1609, 91 L.Ed 2067 (1947)], we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.

Cf. O'Melveny & Myers v. FDIC, 62 U.S.L.W. 4487, 114 S.Ct. 2048, 2054, 129 L. Ed. 2d 67 (1994) ("matters left unaddressed in such a [federal statutory] scheme are

presumably left subject to the disposition provided by state law.") (citing cases).

There is no valid basis for concluding that Congress intended, by the passage of the Ship Mortgage Act, to preempt alternate remedies available to the mortgagee under state law. The judgment below should be affirmed.

III The Preferred Ship Mortgagee's Right To Peaceful Repossession Has Been Widely Recognized

A. The *Fogle* Precedent Has Been Largely Discredited By Other Courts.

In *Fogle* the court found that state law could be applied "interstitially" to govern the legal effect of a failure to comply with 28 U.S.C. § 2001(b) but held that by explicitly legislating the requirements for judicial private sales, "Congress obviously meant to disapprove of extrajudicial private sales." *Fogle*, 637 F. Supp. at 307. Several subsequent courts have rejected this "obvious" proposition.

28 U.S.C. §§ 2001 - 2007 predates[27] the Ship Mortgage Act and prescribes the judicial public and private sale procedures for all federal judicial sales, not simply sales of vessels. By the statute's plain language it applies only to judicial sales.[28] In *Weir v. United States*, 339 F.2d 82, 85 (8th Cir. 1964), the court refused to apply 28 U.S.C. §§ 2001 - 2002 to an execution sale under federal court process on grounds that the statute spoke only of judicial sales and federal courts have considerably more

---

27. *See* Act of March 3, 1893, ch. 225, § 1, 27 Stat. 751.

28. Section 2004, for instance, is explicitly limited to "Any personalty sold under any order or decree of any court of the United States . . .." 28 U.S.C. § 2004.

involvement in judicial sales than in execution sales.[29] If the judicial sales provisions do not preempt rights of non-judicial sale as to other types of property, so also they should not preempt rights to non-judicial sales of vessels. This is particularly true where the judicial remedy in the Ship Mortgage Act is made permissive, not exclusive, and the effect of an *in rem* judicial sale of a vessel is entirely different than the effect of an non-judicial sale.

Courts rejecting *Fogle* have also analyzed its principal foundation, the broad language of the opinion in *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818, 819, 1972 AMC 907 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972). The *McDermott* court held that in a judicial vessel sale, the appraisal requirement of Louisiana law would restrict the public sale provisions of 28 U.S.C. § 2001(a) and therefore must be inapplicable. The unnecessary breadth of the opinion's statements about the lack of any "void in the statutory scheme" has been criticized,[30] however.

More importantly here, in the context of the judicial foreclosure before it, the *McDermott* court never had occasion to consider whether state law might apply to a non-judicial foreclosure. Thus *McDermott* never addressed the permissive language of

---

29. *See United States v. Branch Coal Corp.*, 390 F.2d 7, 9-10 (3rd Cir. 1968); *DeMarco v. Kertz*, 151 F.2d 305, 306 n.4 (D.C. Cir. 1945) (inapplicable to a judicial sale pursuant to will); *Acadia Land Co. v. Horuff*, 110 F.2d 354 (5th Cir. 1940) (purpose of restriction on judicial sales).

30. *See* Gilmore & Black, § 9-57 at 726 ("rhetorical exuberance"). The *en banc* court apparently mainly focused on reversing the error in the prior panel decision.

the Ship Mortgage Act or the fact that the availability of non-judicial foreclosure might best promote the Act's purposes to stimulate marine finance. The *McDermott* case provides no valid basis for asserting that state law remedies are preempted.[31]

Unfortunately *Fogle* has been followed by two state courts.[32] In *Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 94 (Wash. 1990) (*en banc*), the court explicitly rested its decision on the "strongly worded, clear holding" in *McDermott* that the Ship Mortgage Act and judicial sales act together provided a "comprehensive procedure" for the foreclosure of a preferred ship mortgage. The *Nate Leasing* court addressed the permissive language in § 951 of the Ship Mortgage Act but strained to read it as simply providing an alternative to the *in personam* remedy set out in § 954. *Nate Leasing Co. v. Wiggins*, 789 P.2d at 94 n.2. In so doing, the *Nate Leasing* court overlooked the

---

31. Nor is *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504 (5th Cir. 1973), which held only that Georgia usury law was preempted by express command of 46 U.S.C. § 926(d) (repealed 1989). *See also First Fed.Sav. F.S.B. v. M/Y Sweet Retreat*, 844 F. Supp. at 102; *Maryland Nat'l. Bank v.Darovec*, 820 F. Supp. at 1086; *Dietrich v. Key Bank, N.A.*, 693 F. Supp. at 1116.

32. *Fogle* was followed by another state court in *Meilicke v. County of Los Angeles*, 231 Cal. App. 3d 1306, 1991 AMC 2781 (Cal. Ct. App. 1991), a case involving unusual facts, again principally on the basis of *McDermott*. The Supreme Court of California has decertified *the Meilicke opinion*, disallowing any precedential effect and barring its citation. *Meilicke v. County of Los Angeles*, No. S022340, 1991 Cal. LEXIS 4628 (Cal. Oct. 1, 1991).

underlying state law foundation of the ship mortgage contract, the limited purpose of the judicial sales act, and the substantive difference between the sale of a vessel *in rem* in admiralty and a sale under state law, and the established law on federal preemption.

B. **Federal Agencies Recognize The Error In *Fogle*.**

Surprisingly, the *Fogle* court first analyzed the availability of the self-help repossession remedy without reference to the Coast Guard regulation on the topic, which expressly provided for the repossession and sale of a documented vessel:

> When title to a vessel has passed by reason of an extra-judicial repossession and sale, such passage must be established by : . . ..

46 CFR § 67.07-11 (1985).[33] This regulation, together with an interpretation letter issued by the Coast Guard in 1989,[34] make clear the Coast Guard's view that extra-judicial repossession and sale of a documented vessel pursuant to the terms of a preferred mortgage is a permissible remedy. Indeed, in order to redocument the vessel in the name of the purchaser following repossession, the Coast Guard requires evidence showing compliance with applicable state law.

When a federal statute is silent or ambiguous with respect to the specific question addressed by a federal agency regulation, a reviewing court must determine whether the agency's construction of the statute is "permissible" under *Chevron,*

---

33. *See* 46 C.F.R. § 67.83, 58 Fed. Reg. 60256, 60273 (Nov. 15, 1993).

34. Letter dated February 23, 1989, to Dwight L. Guy, Esq. from Thomas L. Willis, Chief, Vessel Documentation Branch, Merchant Vessel Inspection and Documentation Division, U.S. Coast Guard (G-MVI-6/13). *See* Addendum at 28.

U.S.A., v. Natural Resources Defense Council, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). This standard is highly deferential.[35]

In this case there is nothing to indicate that the Coast Guard's interpretation of the Ship Mortgage Act remedies is impermissible--to the contrary, the position is supported by the weight of authority. It is noteworthy that the Maritime Administration also concurs that "the legal theory of *Fogle* and *Nate* is incorrect."[36]

C. The 1989 Recodification of the Ship Mortgage Act Retained Prior Law.

The repossession in this action occurred long prior to the 1989 legislation amending and recodifying the Ship Mortgage Act. The same was true in *Nate Leasing*, yet in its opinion the *Nate Leasing* court argues that the changes wrought by the 1989 legislation support the view that Congress intended the mortgagee's remedies to be limited to those within the Act. *Nate Leasing Co. v. Wiggins*, 789 P.2d at 95. The argument has no merit.

First and most importantly, the 1989 legislation retained the permissive term "may" in 46 U.S.C. § 31325(b), stating: "On default of any term of the preferred mortgage, the mortgage[e] *may* . . . [exercise the statutory judicial remedies]"

---

35. *See Amoco v. Skinner*, 970 F.2d 1206, 1216-17 (3d Cir. 1992).

36. Letter dated May 9, 1994, to Honorable John B. Breaux, United States Senate, from Stephen H. Kaplan, General Counsel, United States Maritime Administration. *See* Addendum at 31. *See also Chemical Bank v. United States Lines, S.A. (In re McLean Indus.),* 132 Bankr. 271, 281-83 , 1993 AMC 2703 (Bankr. S.D. N.Y. 1991).

(emphasis added). Nothing in the statute makes the judicial admiralty remedies either mandatory or exclusive, although obviously that could have been written into the legislation had Congress so intended.[37]

Second, the argument in *Nate Leasing* based on the comment in the House Report about removing the incentive for a vessel owner to move a vessel overseas to avoid United States jurisdiction is fundamentally flawed. Physical presence in the district is not required for an *in personam* suit in admiralty on the unpaid debt.[38] In order to foreclose the mortgage and convey clear title to a purchaser, however, the mortgagee of a U.S. flag vessel which has been removed abroad must arrest the vessel in foreign waters.[39] In any such suit, the only remedy will be the foreign law remedy, not one under U.S. federal or state law.[40] Indeed, one of the virtues of making clear

---

37. *See* H.R. Rep. No. 100-918, 100th Cong., 2d Sess. (Sept. 15, 1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 6104 (describing intended amendments).

38. *See International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945) (only "minimum contacts" required); *Reedsburg Bank v. Apollo,* 508 F.2d at 999.

39. *See, e.g., Thorsteinsson v. M/V Drangur,* 891 F.2d at 1553.

40. *See Bankers Trust Int'l. Ltd. v. Todd Shipyards Corp. (Halcyon Isle)*, [1981] A.C. 221, [1980] 2 Lloyd's Rep. 235, 1980 AMC 1221, 1238 (P. C. Sing., 1980). The contractual remedies provided in the mortgage may be the only basis for the lender's foreclosure if the applicable foreign law does not provide for enforcing foreign ship mortgages.

that alternate remedies are available under the Ship Mortgage Act is the recognition, for purposes of establishing reciprocity with the laws of other nations, that foreign *in rem* foreclosure proceedings are available to the mortgagee.[41]

IV Even If Not Stated In The Mortgage Contract, Repossession Should Be Permitted Where State Law So Provides

As noted by the lower court, Florida law provides for self-help repossession even if the parties' contract does not explicitly so provide.[42] The lower court correctly concluded that any possible ambiguity as to Key Bank's contractual right to foreclose by self-help repossession and sale is insignificant. *Dietrich*, 693 F. Supp. at 1116.

Clarifying the state law foundation of the preferred ship mortgage will benefit marine financing by imparting certainty to the transaction. State lending law is certain, well-defined, and the basis for "daily commercial transactions." *United States v. Kimbell Foods, Inc.*, 440 U.S. at 729, 99 S.Ct. at 1459. Any amorphous federal common law the courts might devise to caulk the gaps in the Ship Mortgage Act would have none of those virtues. Knowing that state law applies, the parties to the mortgage can choose which state law shall govern those aspects of the loan not preempted by the

---

41. *Hilton v. Guyot*, 159 U.S. 113, 167, 16 S.Ct. 139, 144, 40 L.Ed. 95 (1895). Presumably the court in *Nate Leasing* did not mean to indicate that the *only* remedy available to a U.S. preferred mortgagee is by suit in U.S. district court, even if the vessel is abroad, but clearly that implication could be argued from the opinion.

42. *See* Fla. Stat. § 679.9-503 ("Unless otherwise agreed a secured party has on default the right to take possession of the collateral.").

Ship Mortgage Act and plan accordingly.[43]

The availability of state law remedies also has the important practical benefit of providing a speedy and inexpensive alternative to an *in rem* foreclosure in federal court, a proceeding which is relatively slow and expensive, even if uncontested. In the vast majority of yacht mortgage foreclosures there is no opposition to the peaceful repossession of the vessel, no likelihood of third party maritime lien claims, and no reason not to proceed under state law. As one court recently stated:

> Financiers typically enforce their mortgages by means of self-help provisions provided by their state's commercial statutes, rather than comply with the more cumbersome and expensive judicial foreclosure proceedings.

Maryland Nat'l. Bank v. Darovec, 820 F. Supp. at 1087. There is surely no good reason to drive all these foreclosures into the federal courts unnecessarily -- a result directly in conflict with the fundamental purpose of the Ship Mortgage Act.

Regardless of any ambiguities in the parties' agreement, the judgment below should be affirmed.

V. Conclusion

The Ship Mortgage Act was intended to stimulate financing of U.S. documented vessels and should be construed to add to, not eliminate, existing remedies under state law. There is no basis for preemption of alternate remedies available to the mortgagee

---

43. *See First Fed. Sav. F.S.B. v. M/Y Sweet Retreat,* 844 F. Supp. at 100 (Connecticut law); *Maryland Nat'l. Bank v. Darovec,* 820 F. Supp. at 1086 (Maryland law).

under state law and no basis to overturn the Coast Guard's regulation permitting transfer of title by extrajudicial repossession and sale. This Court should reject the *Fogle* precedent and confirm that remedies not provided for in the Ship Mortgage Act, such as repossession and sale under state law, may be available to the preferred mortgagee. Only this conclusion reflects the foundation of the ship mortgage contract in state law, implements the permissive language of the provision for judicial remedies in the Act, and honors Congress' purpose in the legislation.

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

CHESTER D. HOOPER
President
The Maritime Law Association
of the United States
195 Broadway
New York, New York 10007-3100
(212) 341-7000

DAVID McI. WILLIAMS
Counsel of Record
250 West Pratt Street
Baltimore, Maryland 21201
(410) 539-5040
JOHN A. EDGINTON
6400 Hollis Street
Emeryville, California 94608
(510) 450-9920
BRUCE A. KING
601 Union Street
Seattle, Washington 98101
(206) 682-5151

Counsel for The Maritime Law Association of the United States, Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 1994, I served the foregoing Brief of the Maritime Law Association of the United States, *Amicus Curiae*, on the Parties to this appeal by placing two (2) copies in a sealed envelope with postage fully prepaid, in the United States mail at Baltimore, Maryland addressed as follows:

Richard W. Glenn, Esq.
823 North Olive Avenue
West Palm Beach, Florida 33401
Counsel for Appellant

Robert D. McIntosh, Esq.
Fleming, O'Bryan & Fleming
500 East Broward Boulevard, 7th Floor
Fort Lauderdale, Florida 33338
Counsel for Appellee

Thomas A. Russell, Esq.
William, Woolley, Cogswell, Nakazawa & Russell
200 Oceangate, Suite 700
Long Beach, California 90802-4333
Counsel for *Amicus Curiae*
National Marine Bankers Association

Executed on October ____, 1994 at Baltimore, Maryland.

DAVID McI. WILLIAMS
250 West Pratt Street
Baltimore, Maryland 21201
(410) 539-5040

Counsel for
The Maritime Law Association
of the United States,
Amicus Curiae

ADDENDUM

G-MVI-6/13
(202) 267-1492

16713/24/7
February 23, 1989

Mr. Dwight L. Guy, Esq.
Attorney at Law
1411 4th Avenue Bldg., Suite 730
Seattle, WA 98101

Dear Mr. Guy:

Your client appealed the determination of the Documentation Officer at Juneau, Alaska, that the affidavit of Kevin F. McManus, dated December 5, 1988, failed to meet the requirements of 46 C.F.R. §67.07-11. The appeal was forwarded through the chain of command and only reached this office after we received your letter of February 10, 1989. Lieutenant Commander Bruce's conversation with you on January 11, 1989, was based on a telefaxed copy of Mr. McManus' affidavit. Lieutenant Commander Bruce called to offer you the opportunity to submit "the statute(s) under which foreclosure was made" as 46 C.F.R. §67.07-11 requires, or any precedent approving the passage of title to a vessel by non-judicial repossession and sale, under authority other than state law. It is our policy not to act on an appeal until it comes to us through the proper chain of command.

We agree with the Documentation Officer that Mr. McManus' affidavit fails to meet the requirements of 46 C.F.R. §67.07-11 because it does not cite a proper statutory authority, or other acceptable authority, for the non-judicial repossession and sale. Moreover, it fails to adequately state what steps were taken to comply with the relevant instrument and statutes. Even if we accepted your position that compliance with the terms of the mortgage itself, without concern for state law, satisfies the regulation, this affidavit would be deficient. The affidavit fails to state what steps were taken to comply with the provision in the preferred ship mortgage that the mortgagee may sell the vessel "after first giving a notice of a legal number of days, to be given by publication in some newspaper published in King Kove, or the vessel is located (sic). . ."

We interpret 46 C.F.R. §67.07-11 to mean that a preferred ship mortgage, a note, a retail installment sales contract or another such instrument, may be the instrument upon which a non-judicial repossession and sale is made. However, regardless of the instrument under which the action is taken, the validity of the procedure is governed by applicable state law. For this purpose we do not treat a preferred ship mortgage any differently than any other instrument granting a creditor a secured interest in a vessel.

We find nothing in 46 U.S.C. App. §§921-84 (now codified at 46 U.S.C. Chapter 313) or in Port Welcome Cruises v. S.S. BAY BELLE, 215 F. Supp. 72 (D. Md.), aff'd, 324 F.2d 954 (4th Cir. 1963), the only statutes or precedent you have cited, that conflicts with our position that non-judicial remedies granted by a preferred ship mortgage are governed by state law. Nor do we find per-

suasive support there for your position that such remedies may properly be exercised based on the instrument itself, without concern for state law. Port Welcome Cruises recognizes, as we do, that a preferred ship mortgage may grant the creditor remedies in addition to a civil action in federal district court in rem or in personam in admiralty. Port Welcome Cruises, however, does not address what law, state or federal, is applicable to such non-judicial remedies. A more recent case, Dietrich v. Key Bank, N.A., 693 F. Supp. 1112 (S.D. Fla. 1988), clearly holds that federal law permits parties to a preferred ship mortgage to agree that the mortgagee can use state-law self-help to repossess and sell the vessel.

Our interpretation of 46 C.F.R. §67.07-11 is not new, and we are not alone in our view that state law is applicable to the passage of title to a vessel by non-judicial repossession and sale. Note 21, in T. Schoenbaum, Admiralty and Maritime Law, Hornbook series-Practitioners Edition (1987), at page 262, states:

> A mortgagee, however, may include in a preferred ship mortgage certain "self help" provisions allowing private sale of a vessel. These are valid, but they can be implemented only in accordance with state law. See Price v. Seattle-First National Bank, 582 F. Supp. 1568 (W.D. Wash. 1983). See also Bank of America National Trust and Savings Association v. Fogle, 637 F. Supp. 305, 1986 AMC 2005 (N.D. Cal. 1985).

As does this author, we find that the Price case supports the conclusion that the validity of non-judicial remedies, provided for in a preferred ship mortgage, is an issue to be resolved under state law.

We also find merit in the reasoning of the Supreme Court of Alaska in Brown v. Baker, 688 P.2d 943 (Alaska 1984). The issue was whether the Ship Mortgage Act or state law governed the distribution of a surplus from the sale of a vessel where the mortgagees, with a preferred ship mortgage, voluntarily took the vessel and sold it upon the default of the mortgagors. The court found that state law generally applies to security interests in vessels, unless the area has been preempted by federal law. It also recognized that the Ship Mortgage Act is such a preemptive statute. However, the court concluded that the Ship Mortgage Act was inapplicable to a non-judicial repossession and sale, even though the vessel was covered by a preferred ship mortgage. The court noted that it had not been directed to "any other federal statute that would preclude the application of [the state law] and we are unaware of any." 668 P.2d at 949. It held that state law applied.

Having carefully considered your client's appeal, we conclude that our interpretation of 46 C.F.R. §67.07-11 is correct. The Documentation Officer acted properly in refusing to accept Mr. McManus' affidavit as acceptable evidence of title to the vessel in accordance with 46 C.F.R. §67.07-11. A proper affidavit must include citations to the applicable state law governing the

non-judicial repossession and sale, and state what steps were taken to comply with the relevant instrument and statutes.

Sincerely,

(Signed) T. L. WILLIS

THOMAS L. WILLIS
Chief, Vessel Documentation Branch
Merchant Vessel Inspection and
Documentation Division
By direction of the Commandant

Copy: VDO, Juneau, AK

BRUCE:rwb:89FEB23 0577D

U.S. Department of Transportation

General Counsel

400 Seventh St. S.W.
Washington D.C. 20590

May 9, 1994

The Honorable John B. Breaux
Chairman, Subcommittee on Merchant Marine
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In response to your request, I would like to convey the views of the Department of Transportation regarding the enclosed legislative proposal, which was prepared by the Committee on Marine Financing of the Maritime Law Association of the United States (MLA).

The MLA proposal would permit mortgagees of preferred mortgages covered by 46 U.S.C. Chapter 313 (the "Ship Mortgage Act") to exercise self-help remedies, including but not limited to nonjudicial sales of federally mortgaged vessels, upon default of a loan. The proposal is intended to override the decision in Bank of America Nat'l. Trust & Sav. v. Fogle, 637 F.Supp. 305 (N.D. Cal. 1985), which held that a lender that repossessed and sold a federally mortgaged vessel in compliance with state law lost its right to recover the deficiency balance due from the debtor. A deficiency is defined as the difference between the amount owed on the debt and the amount realized by the sale of the vessel which was mortgaged to secure that debt. Fogle and another more recent case, Nate Leasing Co., Inc. v. Wiggins & Sea Horse Seafood Corp., 114 Wash. 2d 508 (Wash. 1990), stand for the proposition that the Ship Mortgage Act provides the exclusive remedies for a mortgagee disposing of a vessel mortgaged under its provisions. That Act provides "preferred" status for mortgages that fit certain requirements and permits them to be foreclosed by an action in rem.

The Department believes that the legal theory of Fogle and Nate is incorrect. Indeed, in another context, the Department of Justice, on behalf of the Maritime Administration, has previously argued and prevailed on the contrary theory that the Ship Mortgage Act is not a complete body of Federal mortgage law and that its interstices must be supplemented with state common law and state statutory law, such as the Uniform Commercial Code.

See Chemical Bank v. United States Lines, S.A. (In re McLean Indus., Inc.), 132 Bankr. 271 (Bankr. S.D.N.Y. 1991).

Legislation clarifying the right of maritime lenders to engage in self-help repossession and sale outside of the foreclosure process established by the Ship Mortgage Act is needed to ease the unfair and unnecessary burdens imposed by the Fogle and Nate decisions. There is little reason in law or policy to require a lender to undergo the expense and delay involved in Federal litigation merely to realize upon its collateral, particularly when no controversy exists between the lender and the debtor. The Department, therefore, agrees that the Ship Mortgage Act should be amended to explicitly provide for nonjudicial remedies.

The Department supports the MLA proposal, which would amend section 31325(b) of title 46 of the United States Code to clarify explicitly that, on default of any term of a preferred mortgage, the mortgagee is not precluded from exercising any legal remedy, including an extra-judicial remedy, against a vessel, a mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness, so long as the "remedy is allowed under applicable law" and will not result in a violation of sections 9 or 37 of the Shipping Act, 1916. However, we suggest that the proposal's reference to "applicable law" be explicitly expanded to "applicable federal, state or foreign law," which we understand is the intent of the MLA proposal.

In addition, the Department perceives a problem with proposed Section 31325(f). On the one hand, that Section would require notice to mortgagees and lienors who have recorded their claims with the Coast Guard and, most importantly, deny extra-judicial sales the effect of transferring title to vessels free and clear of existing liens. We believe these requirements are desirable, and we support them.

On the other hand, proposed Section 31325(f)(2) specifies that the failure to give the required notice "shall not affect the transfer of title to the vessel." This would permit the mortgagee exercising an extra-judicial remedy to disregard the previous requirements with impunity. Although extra-judicial transfers will not, by statute, wipe away any existing liens (and indeed they ought not to eradicate any liens without resort to judicial process), a lienor may still be injured by a transfer without notice.

For instance, a transfer of a vessel located in the United States to a shipowner in a foreign country, without notice to a seaman wage claimant, could impose substantial hardships on that

claimant. Had the seaman received notice of the proposed transfer when the ship was still in the United States, the seaman might have asserted the lien and arrested the vessel or otherwise sought compensation for the claim. Without prior notice of the proposed transfer (and any subsequent transfers), a lienor could suffer the financial burden and delay of locating the new owner and the vessel and of starting foreclosure proceedings overseas. For some lienors, this could be the practical equivalent of having their secured interest terminated by legal foreclosure. There is no reason to insulate the maritime lender so entirely from the inconvenience of dealing with competing claimants.

To remedy this problem, the Department would propose that the notice provision be given legislative teeth. Without affecting the nonjudicial transfer of the vessel, failure of a mortgagee to give prior notice of a proposed transfer of title or control of a vessel through nonjudicial actions would expose the violator to liability for damages caused to a recorded lienor or mortgagee, depending on the circumstances, of the amount of the lien, attorney fees, and costs. This remedy is patterned after the liability afforded by section 31325(d)(3) of the Ship Mortgage Act for failure to give notice of an in rem civil action to a master of a vessel, a recorded lienor, or a recorded mortgagee of a vessel.[1]

Investment capital has always been difficult to come by in the maritime industry and the Department believes maritime lenders and their counsel deserve to know in advance that a simplified form of disposing of their collateral and recovering on their loans is available. The intent of the proposal is laudable -- to make it easier and cheaper for mortgagees to recover their interest in the vessel collateral. It only remains to ensure that the rights of competing lienors and mortgagees are also adequately protected.

---

[1] Section 31325(d)(3) provides that "Failure to give notice required by this subsection does not affect the jurisdiction of the court in which the civil action is brought. However ... the party required to give notice is liable to the person not notified for damages in the amount of that person's interest in the vessel terminated by the action .... A civil action may be brought to recover the amount of the terminated interest. The district courts have original jurisdiction of the action, regardless of the amount in controversy or the citizenship of the parties. If the plaintiff prevails, the court may award costs and attorney fees to the plaintiff."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

Stephen H. Kaplan

Enclosure

ALTERNATE REMEDY AMENDMENT

(a) Section 31325(b) of title 46, United States Code, is amended--

(1) by striking the words "mortgage may" immediately preceding paragraph (1) and inserting the words "mortgagee may";

(2) by striking "; and" at the end of paragraph (1) and inserting ";"; and

(3) by inserting at the end of paragraph (2) the following:

"(3) enforce the preferred mortgage lien or a claim for the outstanding indebtedness secured by the mortgaged vessel, or both, by exercising any other remedy (including an extra-judicial remedy) against a documented vessel, a vessel for which an application for documentation is filed under chapter 121 of this title, a foreign vessel, or a mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness if -

"(A) the remedy is allowed under applicable law and

"(B) the exercise of the remedy will not result in a violation of section 9 or 37 of the Shipping Act, 1916 (46 App. U.S.C. 808, 835).

(b) Section 31325 of title 46, United States Code, is further amended by inserting after subsection (e) the following:

"(f) (1) Before title to the documented vessel or vessel for which an application for documentation is filed under chapter 121 is transferred by an extra-judicial remedy, the person exercising the remedy shall give notice of the proposed transfer to the Secretary, to the mortgagee of any mortgage on the vessel filed in substantial compliance with section 31321 of this title before notice of the proposed transfer is given to the Secretary, and to any person that recorded a notice of a claim of an undischarged lien on the vessel under section 31343(a) or (d) of this title before notice of the proposed transfer is given to the Secretary.

"(2) Failure to give notice as required by this subsection shall not affect the transfer of title to the vessel. However, the rights of any holder of a maritime lien or a preferred mortgage on the vessel shall not be affected by a transfer of title by an extra-judicial remedy, regardless of whether notice is required by this subsection or given.

(c) The Secretary shall prescribe regulations on the time and manner for providing notice under section 31325(f) of title 46, United States Code (as enacted by subsection (b)).

(d) The amendments made by subsections (a) and (b) of this section may not be construed to imply that remedies other than judicial remedies were not available before the date of enactment of this section to enforce claims for outstanding indebtedness secured by mortgaged vessels.