AGENDA

MARINE FINANCING COMMITTEE AND ITS SUBCOMMITTEES

9:00 A.M. – 12 A.M.

November 11, 2004

At

First American Transportation Title Insurance Co.
510 Bienville Street
New Orleans

The Joint Subcommittee on Liens and Mortgages, the Subcommittee on Coast Guard Documentation, Citizenship, and Related Matters, and the main committee will meet one after the other in the same room.

The Yacht Financing and Tax subcommittees will not meet at this time. They will meet again in New York in May.

The new working group to suggest legislation on Bankruptcy Code section 1110 will meet before the May meeting, and report to the May meeting of the Joint Subcommittee on Liens and Mortgages. Members interested in participating in that working group should contact Lawrence Rutkowski, rutkowski@sewkis.com, (212) 574-1200.

Our guests will include:

Thomas Willis – National Vessel Documentation Center
Patricia Williams – National Vessel Documentation Center
Douglas Cameron – National Vessel Documentation Center

PLEASE BRING THIS AND THE ATTACHMENTS WITH YOU TO THE MEETINGS. COPY FACILITIES IN NEW ORLEANS ARE LIMITED AND WE HAVE OVER 100 PAGES OF MATERIAL FOR EACH MEMBER. IT WILL NOT BE POSSIBLE TO TRAVEL WITH ENOUGH COPIES TO HAND OUT TO EVERYONE

JOINT SUBCOMMITTEE ON MARITIME LIENS AND MORTGAGES

(A joint subcommittee of the Marine Financing and Practice and Procedure Committees)

Chair: Edward J. Powers

9:00 A.M.

Discussion and subcommittee vote on the proposed amendment to the Maguson Stevens Fishery Conservation Management Act to provide that security interests in fishing rights will be subject to the UCC rather than the preferred mortgage regime, and to provide that maritime liens will not attach to fishing rights. Materials Attached from the Fisheries Committee, Exhibit 1

The issue will also be voted on by the main committee at 11:00 A.M, preferably without being discussed twice. If both votes are successful, the chairman of the Fisheries Committee, David Farrell, expects to take the matter to the MLA General Meeting on Friday for full MLA endorsement of the proposal.

The legislative proposal was discussed at the meeting last May. The only changes since then are shown in the attachments, namely, changing a reference to mortgage "filing" from mortgage "recording," and, where an amendment deleted a statutory subsection, dealing with a hanging "or" on the preceding subsection.

The proposal was favorably acted on by the Fisheries Committee in May. President Hayden asked Mr. Farrell to consult with other interested MLA committees. The Fisheries Committee will be asked to approve the corrections at its meeting on Thursday, November 11 at 2:00 P.M., to be held at Fowler, Rodriguez and Chalos.

The materials include the recent case *PNC Bank Delaware v. F/V MISS LAURA*, 381 F.3d 183 (3d Cir. 2004), in which a maritime lien that the court assumed *arguendo* to have attached to a vessel's fishing rights was deemed to be extinguished when, the vessel having sunk, the fishing rights were in essence reissued to a successor vessel. This case is the last item in Exhibit 1.

SUBCOMMITTEE ON COAST GUARD DOCUMENTATION, U.S. CITIZENSHIP AND RELATED MATTERS

Chair: Thomas J. Whalen
(Bruce King will substitute for Mr. Whalen)

10:00 A.M.

1. Consideration of whether the subcommittee should propose amendments to the ship mortgage statutes and vessel documentation statutes to allow vessels under construction to be federally documented, and for preferred mortgages to be filed on them. Issues List Attached as Exhibit 2.

2. Recent developments regarding the amendments to the coastwise leasing statute, 46 U.S.C. 12106(e) and (f). Statute and Amendment Attached as Exhibit 3.

3. Last week the Offshore Marine Service Association filed a petition in the Fifth Circuit challenging a U.S. Coast Guard documentation for the coastwise trade of a fleet of vessels financed by a mortgagee that had previously been unsuccessful in establishing a Section 12106(e) ownership structure. The mortgage debt apparently exceeds the cost of the vessels. The petition challenging it, and its two attachments, are being forwarded as a separate e mail in case the attached PDF and that additional material would be too long for anyone's server to accept. The legislative proposal referred to in Attachment 2 to the petition was apparently never introduced in the Senate.

4. Status of the recodification of Title 46. H.R. 4319. Adopted by House of Representatives and forwarded to the Senate.

MARINE FINANCING COMMITTEE

MAIN COMMITTEE MEETING

Chair: Bruce King

11:00 A.M.

1. Full committee vote on the Fisheries Committee legislative proposal regarding mortgages and liens on fishing rights. Materials Attached, Exhibit 1.

2. Discussion of the recent amendments to the Oil Pollution Act, 1990 exempting some vessel lessors from strict liability as responsible parties under the statute, bringing the statute in line with CERCLA. Materials Attached, Exhibits 4, 5 and 6.

Exhibit 4 is the amendment to OPA 90.

Exhibit 5 is a short paper on this topic by Glen Oxton, Matthew Marion and Marel Katsivela

Exhibit 6 is an advance copy of an article that will appear in the next issue of Benedict's Maritime Bulletin on the same topic by Greggory Mendenhall and Eileen Gorman.

Not every owner of a demise chartered vessel qualifies for the exemption from strict liability under the revised statute. Of special note for us to focus on is the interplay among three regimes that distinguish between leases and security interests: (a) whether a lease has enough of the incidents of a financing arrangement that the lessor will not be deemed to be an owner or operator under OPA 90 and CERCLA, (b) whether, once a lessor qualifies for the OPA 90/CERCLA exemption from being deemed a responsible party, the lessor has retained enough of the incidents of ownership that the lessor may document the vessel with the U.S. Coast Guard under 46 U.S.C. Chapter 121, and (c) how this relates to the ownership of the vessel for tax purposes.

<u>EXHIBIT 1</u>

FISHERIES MATERIALS

1. Proposed amendment to 16 U.S.C. §1855(h)

2. Proposed amendment to 46 U.S.C. §12102(c)(5)

3. Section-by-Section Analysis of proposed amendment to 16 U.S.C. §1855(h)

3. Memorandum to Thomas Rue from David Farrell

5. Memorandum to MLA Fisheries Committee from Pamela Palmer

6. *PNC Bank Delaware v. F/V MISS LAURA*, 381 F.3d 183 (3d Cir. 2004)

An amendment to the Magnuson-Stevens Act clarifying the status of fishing privileges allocated under limited access systems

Section 305(h) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1855(h), is amended by striking the entire text thereof and substituting the following:

"(h) Limited access systems

(1) A license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter shall be subject to limitation, modification or revocation at any time by regulation adopted or permit sanction imposed in accordance with this chapter. No limited access system established pursuant to this chapter shall be construed --

(A) to confer any right of compensation, monetary or otherwise, enforceable against the United States on any person if the fishing or processing privileges or other interests of such person under such system are revoked or limited in any way by a regulation adopted or permit sanction imposed in accordance with this chapter; or

(B) to create any right, title, or interest in or to any fish in any fishery.

(2)(A) A security interest in a license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter may be granted, perfected and enforced in the manner provided under applicable state law for the granting, perfecting and enforcing of a security interest in general intangibles, subject to the regulations for such limited access system, as such regulations may be amended from time to time, consistent with this subsection.

(B) The interest of a secured party in a license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter may be terminated by forfeiture, revocation or permit sanction imposed with respect thereto for a violation of a law of the United States only if the secured party authorized, consented, or conspired to do the act, failure, or omission that is the basis of the violation.

(3) No maritime lien shall attach to a license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter, and the ~~recording~~filing of a mortgage under chapter 313, Title 46 of the United States Code, shall be ineffective to perfect or establish the validity of the mortgagee's interest in such license, permit, quota or privilege against any person.

(4) No fish may be harvested under the authority of a license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter unless the holder thereof is eligible to own a vessel with a fishery endorsement under Title 46, United States Code, or other applicable law, and is otherwise in compliance with the regulations establishing such limited access system. Subject to the preceding sentence, a person that is not eligible to own a vessel with a fishery endorsement may (*a*) take a security interest in such

license, permit, quota or privilege and acquire and hold such license, permit, quota or privilege in its own name for the purpose of realizing on its security interest through subsequent transfer to a person eligible to own a vessel with a fishery endorsement; and (*b*) acquire such license, permit, quota or privilege pursuant to court order, by operation of law, by inheritance or by involuntary transfer in any manner in which an interest in intangible personal property may be involuntarily transferred under applicable state or federal law.

(5) For purposes of this subsection 1855(h):

(A) The term "limited access system" has the same meaning as in sections 1851(a)(4) and 1853(b)(6) of this title and includes any system of individual fishing quotas, quota shares, license limitation or limited access permits or other system by which fishing privileges are allocated or assigned among a limited number of persons; provided, however, that "a license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter" also includes any processing license, processing permit, individual processing quota, processing quota share or other device by which fish processing privileges are allocated or assigned among a limited number of fish processors as part of a limited access system.

(B) The term "fish processor" means any person, vessel or facility that receives unprocessed fish, except the vessel that harvested that fish.

(6) Within 6 months after the enactment of this Act, the Secretary shall adopt such regulations as may be necessary to implement the requirements of this subsection.

Amendment to 46 USC 12102(c)(5)(A)

Section 12102(c) of title 46, United States Code, as amended by section 202(a) of the American Fisheries Act 46 U.S.C. 12102 note), is amended --

(1) in sub paragraph (5)(A)(i) by adding the word "and" after the semicolon;

(2) in subparagraph (5)(A)(ii) by striking the word "and" after the semicolon and inserting in lieu thereof the word "or"; and

(3) by striking subparagraph (5)(A)(iii) in its entirety.

Explanation

The proposed amendment would delete existing 46 U.S.C. 12102(c)(5)(A)(iii), which currently provides that a vessel greater than 165 feet in registered length, of more than 750 gross registered tons (as measured under chapter 145 of title 46) or 1,900 gross registered tons (as measured under chapter 143 of that title), or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower is not eligible for a fishery endorsement under section 12108 if its fishery endorsement is invalidated and application is not made for a new fishery endorsement within fifteen (15) business days from such invalidation.

The existing provision was adopted to ensure that large vessels that had been removed from the U.S. fisheries prior to enactment of the American Fisheries Act in 1998 would not be able to return to the fisheries. However, limited access systems in place for most large-boat fisheries have substantially eliminated this concern.

Permanently barring the vessel from the U.S. fisheries as a result of the vessel owner's failure to re-apply for a fishery endorsement within 15 days of invalidation could produce draconian results entirely unrelated to the purpose of the existing provision. Thus, a vessel's fishery endorsement is valid only for one year and must be renewed annually. 46 CFR 67.163. Further, a vessel's Certificate of Documentation, together with its endorsements, "becomes invalid immediately" as a result of any of the following events, among others: change in the vessel's ownership in whole or in part; change in the general partners of a vessel-owning partnership; change in a corporate owner's state of incorporation; change in the legal name of the vessel owner; change in the vessel's hailing port, change in the vessel's name; placement of the vessel under the command of a person who is not a citizen of the United States; change in the legal name of any vessel owner; or change in the gross or net tonnage of the vessel. See 46 CFR 67.167(b) and (c). In some cases, a vessel's fishery endorsement can become invalid without the vessel owner even being aware of the event that causes invalidation, such as an inadvertent change in the vessel's tonnage during shipyard work. In short, the existing provision constitutes a trap for unwary vessel owners and threatens the owners of large fishing vessels with a draconian sanction that has no relationship to the provision's original intent.

Finally, the security of lenders holding mortgages on large fishing vessels could be rendered worthless as a result a vessel owner's failure to re-apply for a fishery endorsement within 15 days of its invalidation. This would cause a drastic and entirely unintended forfeiture.

An amendment to the Magnuson-Stevens Act clarifying the status of fishing privileges allocated under limited access systems

Section-by-Section Analysis

Introduction

Section 305(h) of the Magnuson-Stevens Act, 16 U.S.C. 1855(h) ("Central registry system for limited access permits"), was added to the Act in 1996 (*see* Pub. L. 104-297, §110(d)) but has never been implemented.

Section 305(h) currently provides in pertinent part that "[w]ithin 6 months after October 11, 1996, the Secretary shall establish an exclusive central registry system . . . for limited access system permits established under section 1853(b)(6) of this title or other Federal law . . . which shall provide for the registration of title to, and interests in, such permits, as well as for procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosure of interests, enforcement of judgments thereon, and related matters deemed appropriate by the Secretary." The remaining provisions of section 305(h) set certain parameters for the proposed "central registry system" and authorize the Secretary to adopt "such regulations as may be necessary" to implement the system.

Although NMFS subsequently issued an advance notice of proposed rulemaking requesting public comment on issues related to the implementation of the central registry system, no rules have been forthcoming and the central registry has never been implemented.

Section 305(h) was originally adopted as a means to facilitate lending to the fishing industry on the security of limited access permits. The intent was to create a "central registry" where the status of a permit holder's "title" and the existence of any consensual liens on the permit could be quickly and accurately determined. Unfortunately, implementation of section 305(h) and achievement of its objectives have been stymied by concerns that creation of the central registry under the terms of section 305(h) could provide support for an argument that such permits are a form of "property" which could not be subsequently modified or revoked without "just compensation" under the Fifth Amendment of the U.S. Constitution. NMFS has been understandably concerned that its ability to make changes in limited access systems once adopted would be severely constrained if permits issued under such systems were viewed as "property" protected by the Fifth Amendment.

The proposed amendment would repeal existing section 305(h) in its entirety and replace it with a new provision that addresses the original objectives of section 305(h) while clarifying that limited access systems do not create a form of property in the permits issued under those systems that will constrain NMFS from modifying or revoking those systems without compensating the permit holders.

New Subsection 305(h)(1)

The first sentence of new subsection (h)(1) states directly that "[a] license, permit, quota or privilege allocated or assigned under a limited access system established pursuant to this chapter shall be subject to limitation, modification or revocation at any time by regulation adopted or permit sanction imposed in accordance with this chapter." Since the holder of a permit under a limited access system holds the permit subject to the condition that its interests are "subject to limitation, modification or revocation at any time," it is clear that the permit holder's conditional interests under the permit cannot give rise to claims for compensation if the permit is limited, modified or revoked.

To make this point even more explicit, the second sentence of new paragraph (h)(1) states directly that "[n]o limited access system . . . shall be construed -- (A) to confer any right of compensation, monetary or otherwise, enforceable against the United States on any person if the fishing or processing privileges or other interests of such person under such system are revoked or limited in any way by a regulation adopted or permit sanction imposed in accordance with [the Magnuson-Stevens Act]; or (B) to create any right, title, or interest in or to any fish in any fishery."

The language of new Section 305(h)(1)(A) and (B) is modeled after Section 208(i)(1) and (2) of the American Fisheries Act.

New Section 305(h)(2)

New Sections 305(h)(2) and (3) are intended to clarify how security interests may be taken in limited access system permits. New Section 305(h)(2) provides that security interests in limited access system permits may be granted, perfected and enforced in the manner that security interests in general intangibles are granted, perfected and enforced under applicable state law. In most cases, this means that security interests in limited access system permits will be granted, perfected and enforced according to the provisions of the Uniform Commercial Code in the state where the debtor resides or is located.

While the interest of the permit holder in a limited access system permit is a privilege that may be modified, limited or revoked pursuant to the Magnuson-Stevens Act, new Section 305(h)(2) is intended to facilitate the taking of security in such permits, subject to the limitations imposed by the regulations establishing the limited access system, as such regulations may be amended from time to time, consistent with new Section 305(h).

Note that new Sections 305(h)(2) does not say that the interests of a permit holder under a limited access system permit are intangible personal property, only that security in such permits may be granted, perfected and enforced "in the manner provided under applicable state law for the granting, perfecting and enforcing of a security interest in general intangibles."

New Section 305(h)(2) makes clear that the secured party takes its security interest in a limited access system permit "subject to the regulations for such limited access system, as such regulations may be amended from time to time, consistent with this subsection." Thus, new

Section 305(h)(2) will not affect regulations requiring permit transfers to be registered with NMFS or other regulatory requirements related to the administration of limited access systems and limited access system permits.

New Section 305(h)(3)

New Section 305(h)(3) clarifies that maritime liens that attach to a fishing vessel will not attach to a limited access system permit and that the ~~recording~~filing of a mortgage or other instrument under 46 U.S.C. 31321 will be ineffective "to the extent such instrument purports to affect such license, permit, quota or privilege." This is intended to make clear that security interests in limited access permits may only be granted, perfected and enforced pursuant to the applicable state Uniform Commercial Code and that filing with the Secretary under 46 U.S.C. 31321 of a mortgage that ~~purport~~purports to convey an interest in a limited access permit has no effect.

New Section 305(h)(4)

New Section 305(h)(4) makes clear that no fish may be harvested under the authority of a limited access system permit unless the permit holder is eligible to own a vessel with a fishery endorsement under Title 46, United States Code, or other applicable law, and is otherwise in compliance with the regulations establishing such limited access system. However, new paragraph (h)(4) distinguishes between eligibility to hold a permit and eligibility to use the permit to harvest fish.

This provision makes clear that acquisition of the permit by a person not eligible to own a vessel with a fishery endorsement will not destroy the fishing privileges represented by the permit, although no fish may be taken under the permit until it has been re-transferred to a person eligible to own a vessel with a fishery endorsement. Thus, lenders that are not eligible to own a vessel with a fishery endorsement, including major U.S. banks and commercial lenders that cannot establish their eligibility because they are publicly traded, may nonetheless acquire the interest of the borrower in the permit through judicial or nonjudicial foreclosure of a security interest or by voluntary transfer from the borrower. New Section 305(h)(4) makes clear that such a lender may register the permit in its own name, permitting the lender to more easily transfer the permit to a subsequent purchaser eligible harvest fish under the permit.

Thus, new Section 305(h)(4) follows the model of 46 U.S.C. 31329, which permits a mortgagee not eligible to own a U.S. documented vessel to acquire such a vessel for resale.

New Section 305(h)(4) also makes clear that acquisition of a limited access system permit by a person not eligible to own a vessel with a fishery endorsement by way of inheritance, court order, operation of law or involuntary transfer will not destroy the fishing privileges represented by the permit, although the permit may not be used to harvest fish until transferred to an eligible person.

New Section 305(h)(5)

New Section 305(h)(5) defines the terms "limited access system" and "fish processor" solely for purposes of Section 305(h). "Limited access system" is defined by reference to existing provisions of the Magnuson-Stevens Act that refer to limited access systems. The new definition also makes clear that the term "limited access system" encompasses systems that limit processor access to fish harvested in any limited access fishery and that licenses, permits, quotas or privileges allocated or assigned to fish processors under such a system are subject to the provisions of new Section 305(h). This is intended to ensure that the benefits of new Section 305(h) are extended to fish processors that receive limited access system permits, to ensure that registration and transfer of such permits are handled in the same manner as limited access system permits issued to harvesters, and to ensure that fees may be collected by NMFS for the registration and transfer of such permits.

The term "fish processor" is defined as a person, vessel or facility that receives unprocessed fish, except the vessel that harvested the fish.

MEMORANDUM

TO:	**President Thomas S. Rue** **The Maritime Law Association of the United States**
FROM:	**David J. Farrell, Jr.** **Chair, Fisheries Committee**
DATE:	**November 1, 2004**
RE:	**Maritime Liens on Fishing Permits** **Proposed Amendment to 16 U.S.C. § 1855(h)**

INTRODUCTION

Recent case law holds that maritime liens may attach to fishing permits and intangible fishing histories. The Fisheries Committee unanimously believes this is bad law which unduly complicates fishing vessel financing. Furthermore, the central registry system codified at 16 U.S.C. §1855(h) is unworkable, as shown by the National Marine Fisheries Service's (NMFS) failure to implement it since the statute's passage in 1996. Research conducted by the Young Lawyers Committee on that statute in addition confirms that Congress never intended fishing permits to be subject to maritime liens.

Pursuant to MLA By-Laws 504 and 701.2(a), the Fisheries Committee has previously unanimously voted to bring a motion at the New Orleans General Meeting on November 13, 2004 for a Maritime Law Association resolution to amend 16 U.S.C. §1855(h) by making clear that NMFS permits are not subject to maritime liens and that security interests in permits be governed by UCC-9.

Members of the Fisheries Committee have discussed the proposed amendment with several other MLA committees and members and with fishing vessel owners, financiers, brokers, congressional staffers, NMFS attorneys, and regional fishery management council leaders across the country. We have elicited broad industry support to improve the law and fishing vessel financing by seeking an amendment of 16 U.S.C. § 1855(h) during 2005 when it is anticipated Congress will consider several fishery management bills.

FISHING PRIVILEGES – THE TRADITIONAL VIEW

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §1801 et seq., provides a mechanism whereby each of seven regional fishery management councils sets annual catch limits for individual species of fish in its region. Allocating the annual catch limits among the industry's participants is often complicated, with allocations to participants based on a variety of factors: historical participation in the fishery, catch history, and the like.

NMFS is the federal agency that oversees the seven regional councils. Supported by statutory[1] and regulatory[2] provisions, NMFS takes the position that fishery participation is a harvesting "privilege" rather than a property "right" -- in an effort to avoid Fifth Amendment takings claims. NMFS does not want to run the risk that a closure or other change in the fishery management regime would leave it open to a claim from a fishing "rights" owner that the regulatory change eliminated or diminished the value of the fishing "rights."

These fishing privileges are nevertheless valuable and are frequently bought and sold, often at a price in excess of the fishing vessel's hull value. As examples, Bering Sea factory trawler permits are currently worth $20 million and New Bedford scallop permits are currently worth $1 million. It follows that the financeability of the industry depends in good measure on the ability of lenders to take enforceable security interests in fishing permits.

Traditionally, the consensus view of maritime lawyers was that fishing permits and fishing histories were general intangibles under the UCC and that the proper method of taking security in them was to have the borrower grant a security interest and file a UCC-9 financing statement. This worked quite smoothly for more than a decade or so.

CONGRESSIONAL AND JUDICIAL CONFUSION

In 1996 Congress enacted convoluted 16 U.S.C. §1855(h) (attached) which directed NMFS to set up a central registry system for fishing permits, but it has not yet been implemented. Several novel court cases followed from Washington, Maine, and New Jersey. The result is unsettled law that unduly complicates fishing industry financing and transactions involving permits.

The TENACITY Case

An unpublished decision, Western Pioneer v. F/V TENACITY, No. C97-09585 (W.D.Wash. 1998), held that a preferred ship mortgage on the fishing vessel TENACITY which specifically included fishing rights in the collateral description could attach to and create a preferred mortgage lien on a vessel's fishing rights. It also held that if a preferred mortgage did not mention fishing rights specifically, the mortgage did not attach to them.

The court ruled that the first preferred mortgage, which did not mention fishing rights, had a first priority position in the vessel, but was not perfected against the fishing rights, and the second preferred mortgage, which did mention fishing rights, had first priority in the fishing rights.

The TENACITY case was not appealed. But at about the same time, in another Seattle case that was appealed to the Ninth Circuit, the issue of whether fishing rights

[1] 16 U.S.C. § 1853(d).
[2] 50 C.F.R. § 635.4(a)(3).

were subject to a maritime lien and could therefore be sold with a vessel at a Marshal's sale was assumed, but not contested. Bank of America v. F/V PENGWIN, 175 F.3d 1109, 1999 AMC 1905 (9th Cir.), cert. denied 528 U.S. 872 (1999).

The Gowen Case

Gowen, Inc. v. F/V QUALITY ONE, 244 F.3d 64, 2001 AMC 1478 (1st Cir.), cert. denied, 534 U.S. 886 (2001), discussed in a case of first impression whether fishing permits and intangible fishing histories could be arrested in rem.

Factually, Gowen asserted a necessaries lien for wharfage and repairs against the F/V QUALITY ONE. The vessel was arrested pursuant to a warrant commanding the seizure of "her equipment, engines and appurtenances." After a default judgment, the District of Maine's sale order included "any valid fishing permits and history to the extent permitted by law."

The First Circuit held that fishing permits and intangible fishing histories are "essential to the vessel's navigation, operation, or mission" and therefore constitute appurtenances of a fishing vessel to which maritime liens attach.[3] Five reasons were discussed, which the Fisheries Committee believes lack merit.

First, the First Circuit relied by analogy on United States v. Freights of THE MOUNT SHASTA, 274 U.S. 466 (1927), which held "freight charges due on account of a vessel's carriage of cargo" are "subject to maritime liens against the vessel." But that case did not hold that freight charges constitute appurtenances. Moreover, freight charges are prospective, identifiable to a voyage, whereas fishing histories are retrospective and may be based on fish caught by *different* owners on *different* vessels.

Second, the First Circuit reasoned that the creditworthiness of a fishing vessel is largely due to its permits, which have a market value. However, if a creditor looks at a fishing vessel as a going concern based on its fishing history, that seems to constitute reliance on the personal credit of the fishing enterprise/owner, sufficient to defeat the presumption that goods and services were furnished in reliance on the credit of the vessel under 46 U.S.C. §31342(a)(3). In fact, the First Circuit seemed to blur the distinction between creditworthiness of the vessel and personal credit of the owner when it stated "Maritime liens underpin the extension of credit to fishermen…." 244 F.3d at 68, 2001 AMC at 1483.

Third, the First Circuit assumed that permits can "be severed from the vessel upon her sale and retained by her old owner" and concluded that there are "no obvious arguments against treating the permits as subject to lien." 244 F.3d at 69, 2001 AMC at 1484. However, as will be discussed below, severing permits from fishing vessels presents a financing debacle when maritime liens are held to attach to those permits.

[3] In unreported decisions, the District of Massachusetts ruled similarly and the First Circuit followed its decision in Gowen and then the U.S. Supreme Court denied a petition for a writ of *certiorari* in Daniels v. Patenaude, 534 U.S. 1039 (2001).

Fourth, the First Circuit considered its Gowen holding would not "upset settled expectations." Id. However, vessel arrest strategy and logistics are significantly altered by Gowen's holding that fishing permits and histories are appurtenances. Now it would seem a lienor could tie up a vessel by merely attaching its fishing history on file ashore at the appropriate NMFS regional office without arresting the vessel. See generally The MLA Report, No. 756 at 12503-04 (May 4, 2001) (G. William Birkehead comments). Also, a Rule F Limitation of Liability fund would now seem to include the value of the fishing permits but it is doubtful a hull underwriter would be willing to post security for a $1 million scallop permit when a $150,000 hull sank in the casualty, even though hull policies typically cover appurtenances.

Fifth, the First Circuit ignored the argument that 16 U.S.C. §1855(h) created a registry system that would "preempt any use of maritime liens against fishing permits." 244 F.3d at 69, 2001 AMC at 1482. Instead, the First Circuit's discussion obfuscated the obvious: textually, §1855(h)'s direction to create a lien registry system at NMFS takes permits outside of the maritime lien regime managed by the USCG National Vessel Documentation Center in Falling Waters, WV, which is confirmed by legal research into §1855(h)'s legislative history conducted by the Young Lawyers Committee.

The MISS LAURA Case

In PNC Bank Delaware v. F/V MISS LAURA, 381 F.3d 183 (3d Cir. 2004), the court faced this situation: when fishing vessel A sank and was a total loss, the owner transferred the vessel's fishing history and permits to new vessel B. The purchase of vessel B was financed by means of a preferred mortgage. When the mortgagee foreclosed on vessel B, a creditor with a maritime lien on vessel A intervened. It claimed that by virtue of Gowen, its maritime lien on vessel A attached to the vessel's fishing history and permits, and therefore, when the history and permits were transferred to vessel B, the maritime lien went with them, and still attached to them while issued to vessel B, on the theory that a maritime lien on a vessel attaches to "the last plank" of the vessel.

In MISS LAURA, the Third Circuit declined to endorse the holding in Gowen and instead ruled that *if* Gowen is good law, the lien still did not survive the transfer of the fishing history and permits to vessel B because, when a vessel is a total loss, the maritime liens on any surviving parts of it that are incorporated into another vessel do not survive that transfer. MISS LAURA essentially held that when "the last plank" is incorporated into another vessel, the liens on it are extinguished.

As Bruce A. King, Chair of the Marine Financing Committee notes, the MISS LAURA holding makes it very difficult for a lender to finance a vessel and its permits when the permit is the primary asset. The reason is that the lender's security will be effectively destroyed on the occurrence of a total loss of the vessel. It is not likely that a hull insurer will insure a vessel and its permits for their combined value when, after the total loss and payment of that combined value, the owner may simply revive the permit by purchasing another vessel. The moral risk in insuring on this basis would be

enormous. Thus, the lender will not be fully paid on a total loss. Because the MISS LAURA case holds that the lender's security will be lost when the fishing history and permits are transferred to another vessel, a lender must in essence insure itself against total loss. Similarly, under a transferable permit system, MISS LAURA places a mortgagee's security in the permit at jeopardy when the permit is transferred, at least on the total loss of a vessel.

It follows that the proposed amendment to 16 U.S.C. §1855(h) is needed to shift fishing history/permits outside of the preferred mortgage orbit, and into the UCC, so that security interests in them will be unaffected by the travails of the vessels that use them from time to time. Otherwise, MISS LAURA will make it very difficult to finance what is often the most valuable asset on the fishing company's balance sheet.

16 U.S.C. §1855(h) Central registry system for limited access system permits

(1) Within 6 months after October 11, 1996, the Secretary shall establish an exclusive central registry system (which may be administered on a regional basis) for limited access system permits established under section 1853(b)(6) of this title or other Federal law, including individual fishing quotas, which shall provide for the registration of title to, and interests in, such permits, as well as for procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosures of interests, enforcement of judgments thereon, and related matters deemed appropriate by the Secretary. Such registry system shall --

(A) provide a mechanism for filing notice of a nonjudicial foreclosure or enforcement of a judgment by which the holder of a senior security interest acquires or conveys ownership of a permit, and in the event of a nonjudicial foreclosure, by which the interests of the holders of junior security interests are released when the permit is transferred;

(B) provide for public access to the information filed under such system, notwithstanding section 1881a(b) of this title; and

(C) provide such notice and other requirements of applicable law that the Secretary deems necessary for an effective registry system.

(2) The Secretary shall promulgate such regulations as my be necessary to carry out this subsection, after consulting with the Councils and providing an opportunity for public comment. The Secretary is authorized to contract with non-Federal entities to administer the central registry system.

(3) To be effective and perfected against any person except the transferor, its heirs and devisees, and persons having actual notice thereof, all security interests, and all sales and other transfers of permits described in paragraph (1), shall be registered in compliance with the regulations promulgated under paragraph (2). Such registration shall constitute the exclusive means of perfection of title to, and security interests in, such permits, except for Federal tax liens thereon, which shall be perfected exclusively in accordance with the Internal Revenue Code of 1986 (26 U.S.C.1 et seq.). The Secretary shall notify both the buyer and seller of a permit if a lien has been filed by the Secretary of the Treasury against the permit before collecting any transfer fee under paragraph (5) of this subsection.

(4) The priority of security interests shall be determined in order of filing, the first filed having the highest priority. A validly-filed security interest shall remain valid and perfected notwithstanding a change in residence or place of business of the owner of record. For the purposes of this subsection, "security interest" shall include security interests, assignments, liens and other encumbrances of whatever kind.

(5)(A) Notwithstanding section 1854(d)(1) of this title, the Secretary shall collect a reasonable fee of not more than one-half of one percent of the value of a limited access system permit upon registration of the title to such permit with the central registry system and upon the transfer of such registered title. Any such fee collected shall be deposited in the Limited Access System Administration Fund established under subparagraph (B).

(B) There is established in the Treasury a Limited Access System Administration Fund. The Fund shall be available, without appropriation of fiscal year limitation, only to the Secretary for the purposes of—

(i) administering the central registry system; and

(ii) administering and implementing this chapter in the fishery in which the fees were collected. Sums in the Fund that are not currently needed for these purposes shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

MEMORANDUM

TO: MLA Fisheries Committee

FROM: Pamela A. Palmer

SUBJECT: Maritime liens and fishery permits under the Sustainable Fisheries Act

DATE: October 28, 2004

Facts: In *Gowen, Inc. v. F/V QUALITY ONE et al.*, 244 F.3d 64 (1st Cir. 2001), the First Circuit found that fishing permits were appurtenances of a vessel and were thus subject to a maritime lien on the vessel. In addition to arguing that the permits were not appurtenances of the vessel, the owner argued that the Sustainable Fisheries Act, 16 USC § 1855(h), preempted execution of Gowen's maritime lien against the fishing permits as the statute created a separate regime in which liens against fishing permits were to be perfected and executed upon. Although the First Circuit stated that the statutory provision "contains language that could be used to argue that the registry system will preempt any use of maritime liens against fishing permits," *Id.* at 69, the court rejected preemption by the statute as the language of the statute indicated that it did not apply to the perfection of a security interest against the owner. The subject statutory provision in the NMFS reads as follows:

> To be effective and perfected against any person except the transferor, its heirs and devisees, and persons having actual notice thereof, all security interests, and all sales and other transfers of permits described in paragraph (1) shall be registered in compliance with the regulations promulgated under paragraph (2). Such registration shall constitute the exclusive means of perfection of title to, and security interests in, such permits . . .

16 U.S.C. 1855(h)(3) (emphasis added). The First Circuit determined that based upon its review of this statutory language, preemption by the NMFS would not apply to the perfection of a security interest against the owner, the transferor of that interest. Moreover, the Court noted that the registration system had not yet been established as implementing regulations are not in force

thus "otherwise applicable law" would remain effective in questions regarding security interests on permits. *Id.* at 70.

Question Presented: Did Congress intend NMFS permits issued pursuant to 16 USC § 1855(h) to be subject to maritime liens?

Brief Answer: No, the legislative history of this provision indicates that the national registry system for fishing permits was to be the sole and exclusive means of perfection of title and security interests in NMFS permits.

Analysis: Early in the legislative history of the Act, it was clear that the central registry system was intended to cover a broad spectrum of encumbrances. As the Senate Committee on Commerce, Science, and Transportation reported:

> The registry system would be required to allow for the registration of title to, and interests in, limited access permits, as well provide procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosures of interests and the enforcement of judgments on interests.

104 S. Rpt. 276 (emphasis added).

The Committee report also indicates that the central registry system would be a wholly separate recording system apart from the U.S. Coast Guard filings. The Committee reported:

> Many participants in limited access system fisheries use permits as loan collateral to finance the acquisition of the permit itself or to otherwise finance their operations. While loans for vessels can be secured with a preferred ship mortgage filed in a central registry administered by the Coast Guard under chapter 313 of title 46 of the United States Code, currently there is no comparable mechanism for limited access system permits, an increasingly important component of fisheries conservation and management.
>
> New section 305(h) would establish a registry system for limited access system permits intended to be the exclusive means of perfecting security against third parties without notice. The registry system should reduce the risk that security granted by a permit holder will be encumbered by someone else, and reduce the transaction costs associated with financing limited access system permits. The registry system would be exclusive and administered centrally, thereby eliminating the uncertainty presently facing lenders and other secured parties as to the appropriate jurisdiction in which to file.

104 S. Rpt. 276.

Indeed, in February 1997, the NOAA Office of General Counsel prepared "A Guide to the Sustainable Fisheries Act" and states, in a section entitled "Legislative History":

> What kind of encumbrances are included? Although this system was intended to facilitate intentional encumbrances (i.e. loans on permits), since the statute makes this registry the exclusive means of perfecting an interest in a limited access permit, the registry will also include involuntary encumbrances, such as judicial and statutory liens.

<http://www.nmfs.noaa.gov/sfa/sfaguide/110.htm>

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1695

PNC BANK DELAWARE, a banking institution organized under the laws of the State of Delaware with a place of business in Wilmington, County of New Castle, State of New Jersey

v.

F/V MISS LAURA, (O.N. 542762), her engines, machinery, equipment, masts, fishing permits, etc., in rem

R.D. GRIER & SONS, INC.; MAINE SHIPYARD & MARINE RAILWAY, INC.; SMITHWICK & MARINERS INSURANCE COMPANY; DON'S HYDRAULICS, INC.,

Intervenor-Plaintiffs in District Court

Maine Shipyard & Marine Railway, Inc., Appellant

On Appeal from the United States District Court
for the District of New Jersey
No. 01-cv-04427

District Judge: Honorable Joseph E. Irenas

Argued: March 22, 2004

Before: FUENTES, SMITH and GIBSON,* Circuit Judges.

(Filed: August 25, 2004)

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OPINION OF THE COURT

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*The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

JOHN R. GIBSON, Circuit Judge:

This case presents the novel question of whether, assuming a vessel's fishing history may be the subject of a maritime lien, the lien follows the transfer of the fishing history to a replacement vessel after the original vessel sinks. The district court held that fishing history could not be "salvaged" from a sunken vessel and therefore any maritime lien that may have existed was extinguished at the time of the sinking. We affirm, but on different grounds.

I.

Maine Shipyard & Marine Railway, Inc., provided repair services in 1997 to the vessel *F/V Miss Penelope*, which was owned by David Greenly. This provision of services entitled Maine Shipyard under federal law to a maritime lien against the vessel and its appurtenances. See 46 U.S.C. § 31342 (2000); Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 67 (1st Cir. 2001). The *Miss Penelope* sank on January 28, 1998.

As a result of a complex scheme of federal rules and regulations designed to protect declining fishing stocks and otherwise conserve fishery resources, the fishing history and fishing permits of a vessel like the *Miss Penelope* are integral to the value of the vessel itself. See generally 16 U.S.C. § 1801 (2000); Gowen, 244 F.3d at 68 (some fishing vessels "are valuable significantly, and sometimes almost entirely, because of their permits"). The amount and species of fish that a particular vessel is licensed to catch often depends on that vessel's fishing history, and certain species cannot be fished at all except by or in place of vessels that have previously held permits to do so. See, e.g., 50 C.F.R. § 648.4(a)(1)(i). However, when a vessel sinks, its fishing history does not go down with the ship; instead, the history and permits may be applied to a replacement vessel. See id. Thus, when the *Miss Penelope* sank, Greenly applied her fishing history and permits to the vessel he bought to replace her, the *F/V Miss Laura*.

Greenly's purchase of the *Miss Laura* was financed by the appellee, PNC Bank Delaware, Inc., which made an initial loan of $475,000 and later increased the amount of the loan to $570,000. In exchange, Greenly executed and delivered a Promissory Note to PNC, which was secured by a Preferred Ship Mortgage on the *Miss Laura*. Greenly later defaulted on the note.

PNC commenced the present action seeking the judicial sale of the *Miss Laura*. Maine Shipyard intervened, claiming that it held a maritime lien on the *Miss Laura* to the extent of her fishing permits and history because the permits and history had been transferred from the *Miss Penelope*. Maine Shipyard further contends that its lien has priority over any security interest held by PNC.

II.

Maine Shipyard rests its argument primarily on Gowen, Inc. v. F/V Quality

One, 244 F.3d 64, 67-70 (1st Cir. 2001), in which the First Circuit held that a vessel's fishing permits were appurtenances to the vessel and therefore subject to a lien on the vessel. The court reasoned that the market value and creditworthiness of the vessel depended as much on the fishing permits as on tangible items like the engine or navigation equipment; thus, a creditor's lien should be understood to extend over the permits. Id. at 68-69.

PNC persuasively responds that Gowen does not govern the instant situation because the fishing permits in that case were still attached to the *original* vessel, whereas the present situation involves the transfer of the fishing permits to a *replacement* vessel. Thus, even if we were to follow Gowen and hold that a vessel's fishing permits may be the subject of a maritime lien, we would still need some legal basis for concluding that the lien extends to a replacement vessel once the permits are transferred.

Maine Shipyard simply ignores this problem, perhaps because neither Gowen nor other statutory or case law provides such a legal basis. Instead, the law of maritime liens has consistently recognized that a maritime lien attaches only to the specific vessel to which services are provided. See, e.g., 46 U.S.C. § 31342 (2004) ("[A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner– (1) has a maritime lien on *the* vessel. . . .") (emphasis added); Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 4 (1920) ("[O]ne vessel of a fleet cannot be made liable under the [Federal Maritime Lien Act] for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract."); In re Container Applications Int'l, Inc., 233 F.3d 1361, 1365-66 (11th Cir. 2000) (following Piedmont and denying maritime lien because the purported lienholder did not provide necessaries to any particular vessel). The vessel-specific character of maritime liens results from the legal fiction that a vessel receiving services "is considered to be a distinct entity responsible only for its own debts." Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697, 701 (9th Cir. 1987). Because Maine Shipyard provided no services to the *Miss Laura*, its attempt to enforce a lien over that vessel violates this principle of maritime liens. The *Miss Laura* cannot be held responsible for the debts of the *Miss Penelope*.

In resolving this case, we need not endorse the district court's position that fishing history cannot be salvaged from a sunken vessel. The court believed that Maine Shipyard's lien over the fishing permits could survive the sinking of the *Miss Penelope*, if at all, only through principles of salvage law. However, the court concluded that salvage law was inapplicable because it understood salvage to involve some sort of physical rescuing or saving of a tangible piece of property, which did not occur here. Thus, it held that Maine Shipyard's lien extinguished at the time of the sinking.

We believe this rationale comes

needlessly close to conflicting with the theory of Gowen, and are mindful of our obligation to avoid circuit conflict. Under the district court's reasoning, any lien held by Maine Shipyard over the *Miss Penelope*'s fishing permits ceased to exist once the vessel sank. It is possible that a court following Gowen would not agree; after all, the fishing permits continued to exist in at least some form, retained significant value, and contributed to the creditworthiness of the vessel in the first place. See Gowen, 244 F.3d at 68 ("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."); see also United States v. Freights, Etc. of the Mount Shasta, 274 U.S. 466, 470 (1927) (intangibles may be subject to maritime liens against the vessel); The Fort Wayne, 6 F. Cas. 119, 122 (S.D. Ohio 1861) ("[I]f any part of the vessel is saved, this lien adheres to it, even to the last plank."). Should a creditor attempt to foreclose on a sunken vessel's fishing permits *before* the permits become incorporated into a second vessel, a court following Gowen might enforce the lien, whereas the district court's rationale clearly would deny it.

Rather than invite this possible conflict, we base our holding on the undisputed fact that Maine Shipyard did not provide services to the vessel over which it now claims a lien. Even if, as Maine Shipyard metaphorically suggests, the "valuable and transferable fishing permits and history remain very much afloat," Maine Shipyard has not cited, nor have we found, any cases where a lien over salvaged or never-sunken parts of a vessel was extended to a subsequent vessel to which those parts became attached. Instead, maritime liens have consistently been limited to the specific vessel to which services were provided. See Piedmont, 254 U.S. at 4 ("The difficulty which under the general maritime law would have blocked recovery by the [purported lienholder] is solely that it did not furnish coal to the vessels upon which it asserts a maritime lien; and there is nothing in the [Federal Maritime Lien Act] which removes that obstacle."); see also 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 9-1 (4th ed. 2004) ("A maritime lien is a privileged claim upon maritime property, such as a vessel, arising out of services rendered to or injuries caused by that property."). We are bound to follow this long-standing principle here and therefore conclude that any lien held by Maine Shipyard on the *Miss Penelope*'s fishing permits and history ceased to exist once the *Miss Penelope* sank and the fishing history was incorporated into the *Miss Laura*.

Because we hold that Maine Shipyard has no cognizable property interest in the *Miss Laura*, we need not consider its assertion that PNC is ineligible to assert a lien in an *in rem* action against the *Miss Laura*. Maine Shipyard has no standing to make such a challenge. See, e.g., Citicorp Sav. of Illinois v. First Chicago Trust Co. of Illinois, 645 N.E.2d 1038, 1045 (Ill. App. Ct. 1995) ("Standing

requires injury in fact to a legally cognizable interest."); Southern Maryland Oil, Inc. v. Kaminetz, 272 A.2d 641, 644-45 (Md. 1971) (party lacks standing to challenge a mortgage foreclosure sale unless that party has an interest in the proceeds of the sale or has an interest in the property which may be adversely affected as a result of the sale).

We will affirm the district court's judgment.

EXHIBIT 2

DOCUMENTATION OF VESSELS UNDER CONSTRUCTION

Some issues with respect to documentation of a vessel under construction:

1. When may documentation occur?

    -When the construction contract is signed? (What if the construction is never started?)

    -When there is property "identified to its construction" in the parlance of UCC 2-401, which is the earliest point at which tangible personal property can exist and be conveyed? (This implies that there is some tangible "thing" to document.)

2. What if construction is abandoned?

3. Should it matter whether the shipyard is the owner or whether the customer is the owner under a contract that passes title as the vessel progresses to completion?

4. Maritime lenders would prefer to have the maritime lien status of a construction period mortgage commence as early as the beginning of vessel construction. Politically, is this achievable? The alternative would be to provide a mechanism for recording a construction period mortgage, but leave the priority of state law construction liens to state law as if, for priority purposes, the mortgage were a security interest that is perfected under the UCC. A corollary to this would be relying on state law foreclosure procedure during the construction period. In any event, the USCG will surely not want construction period creditors flooding the NVDC with notices of claims of lien.

5. When may the construction period documentation become permanent vessel documentation? At this point the USCG can issue a Certificate of Documentation with a trade endorsement.

    -Recalling the recent case in the Fifth Circuit on whether a vessel under construction had been prematurely documented (*United States v. TRIDENT CRUSADER and Det Norske Veritas*, 366 F.3d 391 (5th Cir. 2004)) do we need to have a clear standard so that we avoid arguments about whether a shipyard, owner or lender "jumped the gun" on achieving "built" status?

    -Should this be the point when the builder certifies "substantial" completion? Note that if we are leaving state lien law and priority rules undisturbed during construction, this is the likely going to be the moment when the construction preferred mortgage becomes a normal preferred mortgage, achieving maritime lien status. There is room for abuse of state lien creditors by filing the certificate of substantial completion early. Should there be some objective benchmarks – such as engines, shafts, and propellers (or equivalent) installed and functioning? or, if it is a vessel for which there is formal admeasurement, USCG inspection, or classification society inspection, the issuance of the certifications? On the earlier of any of the above?

Note, the USCG/NVDC is of the view that a vessel is not eligible for documentation until it is complete for its intended use, and that the builder's certification should not be issued before the vessel is complete. By analogy, we can anticipate that they will take the position this is also the earliest point at which construction documentation could roll over into a navigating certificate of documentation with a trade endorsement.

5. At present, and subject to the effect of the *Trident* case, to file a preferred mortgage one must file with it an application for documentation of a vessel that has been built (whatever that means in close cases), or the vessel must be documented already. Ordinary maritime liens attach when the construction project is a "vessel" in "navigation." When the construction documentation converts to permanent vessel documentation, should the construction preferred mortgage automatically become a standard preferred mortgage and maritime lien at that point, and thus become senior to subsequent liens for construction period goods and services under state law? Or should this point be the more nebulous one when the object being built becomes a "vessel" under admiralty common law principles? This nuance would not necessarily adversely affect the perfection of the mortgage; the point at which it becomes "preferred" and starts to outrank suppliers is the question.

EXHIBIT 3

46 U.S.C. 12106 and Amendment

(e)(1) A certificate of documentation for a vessel may be endorsed with a coastwise endorsement if –

(A) the vessel is eligible for documentation;

[REVISED – SEE ATTACHED: (B) the person that owns the vessel, a parent entity of that person, or a subsidiary of a parent entity of that person, is primarily engaged in leasing or other financing transactions;]

(C) the vessel is under a demise charter to a person that certifies to the Secretary that the person is a citizen of the United States for engaging in the coastwise trade under section 2 of the Shipping Act, 1916;

(D) the demise charter is for a period of at least 3 years or a shorter period as may be prescribed by the Secretary; and

(E) the vessel is otherwise eligible for documentation under this section.

(2) The demise charter and any amendments to that charter shall be filed with the certificate required by this subsection, or within 10 days following the filing of an amendment to the charter, and such charter and amendments shall be made available to the public.

(3) Upon termination by a demise charterer required under paragraph (1)(C), the coastwise endorsement of the vessel may, in the sole discretion of the Secretary, be continued after the termination for default of the demise charter for a period not to exceed 6 months on such terms and conditions as the Secretary may prescribe.

(4) For purposes of section 2 of the Shipping Act, 1916, and section 12102(a) of this title, a vessel meeting the criteria of this subsection is deemed to be owned exclusively by citizens of the United States.

[ADD: new subsection (f), attached.]

Amended by Section 608 of P.L. 108-293, Aug. 9, 2004, on the following pages.

SEC. 608. REQUIREMENTS FOR COASTWISE ENDORSEMENT.

(a) IN GENERAL.—Section 12106 of title 46, United States Code, is amended—

(1) by striking subsection (e)(1)(B) and inserting the following:

"(B) the person that owns the vessel (or, if the vessel is owned by a trust or similar arrangement, the beneficiary of the trust or similar arrangement) meets the requirements of subsection (f);"; and

(2) by adding at the end the following:

"(f) OWNERSHIP CERTIFICATION REQUIREMENT.—

"(1) IN GENERAL.—A person meets the requirements of this subsection if that person transmits to the Secretary each year the certification required by paragraph (2) or (3) with respect to a vessel.

"(2) INVESTMENT CERTIFICATION.—To meet the certification requirement of this paragraph, a person shall certify that it—

"(A) is a leasing company, bank, or financial institution;

"(B) owns, or holds the beneficial interest in, the vessel solely as a passive investment;

"(C) does not operate any vessel for hire and is not an affiliate of any person who operates any vessel for hire; and

"(D) is independent from, and not an affiliate of, any charterer of the vessel or any other person who has the right, directly or indirectly, to control or direct the movement or use of the vessel.

"(3) CERTAIN TANK VESSELS.—

"(A) IN GENERAL.—To meet the certification requirement of this paragraph, a person shall certify that—

"(i) the aggregate book value of the vessels owned by such person and United States affiliates of such person does not exceed 10 percent of the aggregate book value of all assets owned by such person and its United States affiliates;

"(ii) not more than 10 percent of the aggregate revenues of such person and its United States affiliates is derived from the ownership, operation, or management of vessels;

"(iii) at least 70 percent of the aggregate tonnage of all cargo carried by all vessels owned by such person and its United States affiliates and documented under this section is qualified proprietary cargo;

"(iv) any cargo other than qualified proprietary cargo carried by all vessels owned by such person and its United States affiliates and documented under this section consists of oil, petroleum products, petrochemicals, or liquified natural gas;

"(v) no vessel owned by such person or any of its United States affiliates and documented under this section carries molten sulphur; and

"(vi) such person owned 1 or more vessels documented under subsection (e) of this section as of the date of enactment of the Coast Guard and Maritime Transportation Act of 2004.

"(B) APPLICATION ONLY TO CERTAIN VESSELS.—A person may make a certification under this paragraph only with respect to—

"(i) a tank vessel having a tonnage of not less than 6,000 gross tons, as measured under section 14502 of

this title (or an alternative tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title); or

"(ii) a towing vessel associated with a non-self-propelled tank vessel that meets the requirements of clause (i), where the 2 vessels function as a single self-propelled vessel.

"(4) DEFINITIONS.—In this subsection:

"(A) AFFILIATE.—The term 'affiliate' means, with respect to any person, any other person that is—

"(i) directly or indirectly controlled by, under common control with, or controlling such person; or

"(ii) named as being part of the same consolidated group in any report or other document submitted to the United States Securities and Exchange Commission or the Internal Revenue Service.

"(B) CARGO.—The term 'cargo' does not include cargo to which title is held for non-commercial reasons and primarily for the purpose of evading the requirements of paragraph (3).

"(C) OIL.—The term 'oil' has the meaning given that term in section 2101(20) of this title.

"(D) PASSIVE INVESTMENT.—The term 'passive investment' means an investment in which neither the investor nor any affiliate of such investor is involved in, or has the power to be involved in, the formulation, determination, or direction of any activity or function concerning the management, use, or operation of the asset that is the subject of the investment.

"(E) QUALIFIED PROPRIETARY CARGO.—The term 'qualified proprietary cargo' means—

"(i) oil, petroleum products, petrochemicals, or liquefied natural gas cargo that is beneficially owned by the person who submits to the Secretary an application or annual certification under paragraph (3), or by an affiliate of such person, immediately before, during, or immediately after such cargo is carried in coastwise trade on a vessel owned by such person;

"(ii) oil, petroleum products, petrochemicals, or liquefied natural gas cargo not beneficially owned by the person who submits to the Secretary an application or an annual certification under paragraph (3), or by an affiliate of such person, but that is carried in coastwise trade by a vessel owned by such person and which is part of an arrangement in which vessels owned by such person and at least one other person are operated collectively as one fleet, to the extent that an equal amount of oil, petroleum products, petrochemicals, or liquefied natural gas cargo beneficially owned by such person, or an affiliate of such person, is carried in coastwise trade on 1 or more other vessels, not owned by such person, or an affiliate of such person, if such other vessel or vessels are also part of the same arrangement;

"(iii) in the case of a towing vessel associated with a non-self-propelled tank vessel where the 2 vessels function as a single self-propelled vessel, oil, petroleum products, petrochemicals, or liquefied natural gas cargo that is beneficially owned by the person who owns both such towing vessel and the non-self-propelled tank vessel, or any United States affiliate of such person, immediately before, during, or immediately after such cargo is carried in coastwise trade on either of the 2 vessels; or

"(iv) any oil, petroleum products, petrochemicals, or liquefied natural gas cargo carried on any vessel that is either a self-propelled tank vessel having a length of at least 210 meters or a tank vessel that is a liquefied natural gas carrier that—

"(I) was delivered by the builder of such vessel to the owner of such vessel after December 31, 1999; and

"(II) was purchased by a person for the purpose, and with the reasonable expectation, of transporting on such vessel liquefied natural gas or unrefined petroleum beneficially owned by the owner of such vessel, or an affiliate of such owner, from Alaska to the continental United States.

"(F) UNITED STATES AFFILIATE.—The term 'United States affiliate' means, with respect to any person, an affiliate the principal place of business of which is located in the United States.".

(b) TREATMENT OF OWNER OF CERTAIN VESSELS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a person shall be treated as a citizen of the United States under section 12102(a) of title 46, United States Code, section 2 of the Shipping Act, 1916 (46 U.S.C. App. 802), and section 27 of the Merchant Marine Act, 1920 (46 U.S.C. App. 883), for purposes of issuance of a coastwise endorsement under section 12106(e) of title 46, United States Code (as that section was in effect on the day before the date of enactment of this Act), for a vessel owned by the person on the date of enactment of this Act, or any replacement vessel of a similar size and function, if the person—

(A) owned a vessel before January 1, 2001, that had a coastwise endorsement under section 12106(e) of title 46, United States Code; and

(B) as of the date of the enactment of this Act, derives substantially all of its revenue from leasing vessels engaged in the transportation or distribution of petroleum products and other cargo in Alaska.

(2) LIMITATION ON COASTWISE TRADE.—A vessel owned by a person described in paragraph (1) for which a coastwise endorsement is issued under section 12106(e) of title 46, United States Code, may be employed in the coastwise trade only within Alaska and in the coastwise trade to and from Alaska.

(3) TERMINATION.—The application of this subsection to a person described in paragraph (1) shall terminate if all of that person's vessels described in paragraph (1) are sold to a person

eligible to document vessels under section 12106(a) of title 46, United States Code.

(c) APPLICATION TO CERTAIN CERTIFICATES.—

(1) IN GENERAL.—The amendments made by this section, and any regulations published after February 4, 2004, with respect to coastwise endorsements, shall not apply to a certificate of documentation, or renewal thereof, endorsed with a coastwise endorsement for a vessel under section 12106(e) of title 46, United States Code, or a replacement vessel of a similar size and function, that was issued prior to the date of enactment of this Act as long as the vessel is owned by the person named therein, or by a subsidiary or affiliate of that person, and the controlling interest in such owner has not been transferred to a person that was not an affiliate of such owner as of the date of enactment of this Act. Notwithstanding the preceding sentence, however, the amendments made by this section shall apply, beginning 3 years after the date of enactment of this Act, with respect to offshore supply vessels (as defined in section 2101(19) of title 46, United States Code, as that section was in effect on the date of enactment of this Act) with a certificate of documentation endorsed with a coastwise endorsement as of the date of enactment of this Act, and the Secretary of the Department in which the Coast Guard is operating shall revoke any such certificate if the vessel does not by then meet the requirements of section 12106(e) of title 46, United States Code, as amended by this section.

(2) REPLACEMENT VESSEL.—For the purposes of this subsection, "replacement vessel" means—

(A) a temporary replacement vessel for a period of not to exceed 180 days if the vessel described in paragraph (1) is unavailable due to an act of God or a marine casualty; or

(B) a permanent replacement vessel if—

(i) the vessel described in paragraph (1) is unavailable for more than 180 days due to an act of God or a marine casualty; or

(ii) a contract to purchase or construct such replacement vessel is executed not later than December 31, 2004.

(d) WAIVER.—The Secretary of Transportation shall waive or reduce the qualified proprietary cargo requirement of section 12106(f)(3)(A)(iii) of title 46, United States Code, for a vessel if the person that owns the vessel (or, if the vessel is owned by a trust or similar arrangement, the beneficiary of the trust or similar arrangement) notifies the Secretary that circumstances beyond the direct control of such person or its affiliates prevent, or reasonably threaten to prevent, such person from satisfying such requirement, and the Secretary does not, with good cause, determine otherwise. The waiver or reduction shall apply during the period of time that such circumstances exist.

(e) REGULATIONS.—No later than one year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall prescribe final regulations to carry out this section, including amendments made by this section to section 12106 of title 46, United States Code.

<u>EXHIBIT 4</u>

OPA 90 Lessor Amendments

Section 703 of P.L. 108-293, Aug. 9, 2004

SEC. 703. LIABILITY AND COST RECOVERY.

(a) DEFINITION OF OWNER OR OPERATOR.—Section 1001(26) of the Oil Pollution Act of 1990 (33 U.S.C. 2701(26)) is amended to read as follows:

"(26) 'owner or operator'—

"(A) means—

"(i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel;

"(ii) in the case of an onshore or offshore facility, any person owning or operating such facility;

"(iii) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

"(iv) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand;

"(v) notwithstanding subparagraph (B)(i), and in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including for purposes of liability under section 1002, any State or local government that has caused or contributed to a discharge or substantial threat of a discharge of oil from a vessel or facility ownership or control of which was acquired involuntarily through—

"(I) seizure or otherwise in connection with law enforcement activity;

"(II) bankruptcy;

"(III) tax delinquency;

"(IV) abandonment; or

"(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

"(vi) notwithstanding subparagraph (B)(ii), a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

"(I) exercises decision making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for oil handling or disposal practices related to the vessel or facility; or

"(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

"(aa) for the overall management of the vessel or facility encompassing day-to-day decision making with respect to environmental compliance; or

"(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance; and

"(B) does not include—

"(i) A unit of state or local government that acquired ownership or control of a vessel or facility involuntarily through—

"(I) seizure or otherwise in connection with law enforcement activity;

"(II) bankruptcy;

"(III) tax delinquency;

"(IV) abandonment; or

"(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

"(ii) a person that is a lender that does not participate in management of a vessel or facility, but holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility; or

"(iii) a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

"(I) forecloses on the vessel or facility; and

"(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a removal action under section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the

vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements;".

(b) OTHER DEFINITIONS.—Section 1001 of the Oil Pollution Act of 1990 (33 U.S.C. 2701) is amended by striking "and" after the semicolon at the end of paragraph (36), by striking the period at the end of paragraph (37) and inserting a semicolon, and by adding at the end the following:

"(38) 'participate in management'—

"(A)(i) means actually participating in the management or operational affairs of a vessel or facility; and

"(ii) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations; and

"(B) does not include—

"(i) performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility;

"(ii) holding a security interest or abandoning or releasing a security interest;

"(iii) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

"(iv) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

"(v) monitoring or undertaking one or more inspections of the vessel or facility;

"(vi) requiring a removal action or other lawful means of addressing a discharge or substantial threat of a discharge of oil in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

"(vii) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

"(viii) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

"(ix) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

"(x) conducting a removal action under 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if such actions do not rise to the level of participating in management under subparagraph (A) of this paragraph and paragraph (26)(A)(vi);

"(39) 'extension of credit' has the meaning provided in section 101(20)(G)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(i));

"(40) 'financial or administrative function' has the meaning provided in section 101(20)(G)(ii) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(ii));

"(41) 'foreclosure' and 'foreclose' each has the meaning provided in section 101(20)(G)(iii) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(iii));

"(42) 'lender' has the meaning provided in section 101(20)(G)(iv) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(iv));

"(43) 'operational function' has the meaning provided in section 101(20)(G)(v) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(v)); and

"(44) 'security interest' has the meaning provided in section 101(20)(G)(vi) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601(20)(G)(vi)).".

(c) DEFINITION OF CONTRACTUAL RELATIONSHIP.—Section 1003 of the Oil Pollution Act of 1990 (33 U.S.C. 2703) is amended by adding at the end the following:

"(d) DEFINITION OF CONTRACTUAL RELATIONSHIP.—

"(1) IN GENERAL.—For purposes of subsection (a)(3) the term 'contractual relationship' includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless—

"(A) the real property on which the facility concerned is located was acquired by the responsible party after the placement of the oil on, in, or at the real property on which the facility concerned is located;

"(B) one or more of the circumstances described in subparagraph (A), (B), or (C) of paragraph (2) is established by the responsible party by a preponderance of the evidence; and

"(C) the responsible party complies with paragraph (3).

"(2) REQUIRED CIRCUMSTANCE.—The circumstances referred to in paragraph (1)(B) are the following:

"(A) At the time the responsible party acquired the real property on which the facility is located the responsible party did not know and had no reason to know that oil that is the subject of the discharge or substantial threat of discharge was located on, in, or at the facility.

"(B) The responsible party is a government entity that acquired the facility—

"(i) by escheat;

"(ii) through any other involuntary transfer or acquisition; or

"(iii) through the exercise of eminent domain authority by purchase or condemnation.

"(C) The responsible party acquired the facility by inheritance or bequest.

"(3) ADDITIONAL REQUIREMENTS.—For purposes of paragraph (1)(C), the responsible party must establish by a preponderance of the evidence that the responsible party—

"(A) has satisfied the requirements of section 1003(a)(3)(A) and (B);

"(B) has provided full cooperation, assistance, and facility access to the persons that are authorized to conduct removal actions, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial removal action;

"(C) is in compliance with any land use restrictions established or relied on in connection with the removal action; and

"(D) has not impeded the effectiveness or integrity of any institutional control employed in connection with the removal action.

"(4) REASON TO KNOW.—

"(A) APPROPRIATE INQUIRIES.—To establish that the responsible party had no reason to know of the matter described in paragraph (2)(A), the responsible party must demonstrate to a court that—

"(i) on or before the date on which the responsible party acquired the real property on which the facility is located, the responsible party carried out all appropriate inquiries, as provided in subparagraphs (B) and (D), into the previous ownership and uses of the real property on which the facility is located in accordance with generally accepted good commercial and customary standards and practices; and

"(ii) the responsible party took reasonable steps to—

"(I) stop any continuing discharge;

"(II) prevent any substantial threat of discharge; and

"(III) prevent or limit any human, environmental, or natural resource exposure to any previously discharged oil.

"(B) REGULATIONS ESTABLISHING STANDARDS AND PRACTICES.—Not later than 2 years after the date of the enactment of this paragraph, the Secretary, in consultation with the Administrator of the Environmental Protection Agency, shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under subparagraph (A).

"(C) CRITERIA.—In promulgating regulations that establish the standards and practices referred to in subparagraph (B), the Secretary shall include in such standards and practices provisions regarding each of the following:

"(i) The results of an inquiry by an environmental professional.

"(ii) Interviews with past and present owners, operators, and occupants of the facility and the real property on which the facility is located for the purpose of gathering information regarding the potential for oil at the facility and on the real property on which the facility is located.

"(iii) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property on which the facility is located since the property was first developed.

"(iv) Searches for recorded environmental cleanup liens against the facility and the real property on which the facility is located that are filed under Federal, State, or local law.

"(v) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and waste handling, generation, treatment, disposal, and spill records, concerning oil at or near the facility and on the real property on which the facility is located.

"(vi) Visual inspections of the facility, the real property on which the facility is located, and adjoining properties.

"(vii) Specialized knowledge or experience on the part of the responsible party.

"(viii) The relationship of the purchase price to the value of the facility and the real property on which the facility is located, if oil was not at the facility or on the real property.

"(ix) Commonly known or reasonably ascertainable information about the facility and the real property on which the facility is located.

"(x) The degree of obviousness of the presence or likely presence of oil at the facility and on the real property on which the facility is located, and the ability to detect the oil by appropriate investigation.

"(D) INTERIM STANDARDS AND PRACTICES.—

"(i) REAL PROPERTY PURCHASED BEFORE MAY 31, 1997.—With respect to real property purchased before May 31, 1997, in making a determination with respect to a responsible party described in subparagraph (A), a court shall take into account—

"(I) any specialized knowledge or experience on the part of the responsible party;

"(II) the relationship of the purchase price to the value of the facility and the real property on which the facility is located, if the oil was not at the facility or on the real property;

"(III) commonly known or reasonably ascertainable information about the facility and the real property on which the facility is located;

"(IV) the obviousness of the presence or likely presence of oil at the facility and on the real property on which the facility is located; and

"(V) the ability of the responsible party to detect oil by appropriate inspection.

"(ii) REAL PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.—With respect to real property purchased on or after May 31, 1997, until the Secretary promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as 'Standard E1527–97', entitled 'Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process', shall satisfy the requirements in subparagraph (A).

"(E) SITE INSPECTION AND TITLE SEARCH.—In the case of real property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, inspection and title search of the facility and the real property on which the facility is located that reveal no basis for further investigation shall be considered to satisfy the requirements of this paragraph.

"(5) PREVIOUS OWNER OR OPERATOR.—Nothing in this paragraph or in section 1003(a)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Act. Notwithstanding this paragraph, if a responsible party obtained actual knowledge of the discharge or substantial threat of discharge of oil at such facility when the responsible party owned the facility and then subsequently transferred ownership of the facility or the real property on which the facility is located to another person without disclosing such knowledge, the responsible party shall be treated as liable under section 1002(a) and no defense under section 1003(a) shall be available to such responsible party.

"(6) LIMITATION ON DEFENSE.—Nothing in this paragraph shall affect the liability under this Act of a responsible party who, by any act or omission, caused or contributed to the discharge or substantial threat of discharge of oil which is the subject of the action relating to the facility.".

EXHIBIT 5

Oxton, Marion, Katsivela Paper

2004 Amendment to OPA 90: Lender - Lessor Safe Harbor
Marine Money Conference, New York, NY, October 21, 2004

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Marel Katsivela

H&B
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I. Introduction

The premise of OPA 90 is simple: the polluter pays. As others have said, the difficult part is determining who is the polluter and what does he pay? Last August we were given some assistance in answering this question. The Coast Guard and Maritime Transportation Act of 2004 (H.R. 2443) included several amendments to definitions in OPA 90, the effect of which is to provide a safe harbor for lenders and lessors.

II. Main Features of the Safe Harbor

1. A lender or lessor will not be liable under OPA if it does not exercise actual control over vessel operations.

2. All kinds of bona fide financial transactions are included in the safe harbor regardless of their structure, form or nomenclature as long as it does not include an investment in the vessel. For lessors, some other party must have initially selected the vessel and the lessee must have operational control of the vessel.

3. A lender or lessor may take possession on default, including for a lender, by bidding in its debt in a marshal's auction and taking possession in order to maximize repayment of its loan from the collateral, as long as the vessel is sold or re-leased as soon as commercially practicable. If the vessel is held too long, it will be deemed held for investment and the safe harbor will not apply.

4. When the lender or lessor is in possession of the vessel after a default, the safe harbor will protect it from OPA liability (liability without fault), but not from liability for its own negligence. Under the facts of the EXXON VALDEZ, for example, if a lessor were in possession of the ship, placed a captain on board with a known alcohol problem, the captain put the ship on the rocks and a huge spill resulted, the safe harbor would be of no help to the lessor. It would be liable for its own negligence in the same manner as Exxon.

5. The OPA amendment does not affect state pollution laws which also impose strict liability and many have no safe harbor provision. State laws apply to oil spill damage within 3 miles of the coastline (9 miles in the Gulf of Mexico in some states) concurrently with OPA. OPA applies from the coastline out to 200 miles.

III. History of the Safe Harbor

Most of the actual text of the safe harbor is not new, and it is useful to consider its origins. CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, was adopted in 1980. 42 U.S.C. § 9601 et seq. Also known as the superfund law, it covers pollution on land. CERCLA contains a barebones safe harbor provision for lenders holding indicia of ownership primarily for the purpose of protecting a security interest as long as they do not participate in management.

Several courts construed the CERCLA safe harbor broadly, but in 1990, the court in the infamous Fleet Factors case, suggested that a lender's capacity to influence operations even if not exercised, could constitute participation in management which would remove the lender from the safe harbor. U.S. v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990). This suggestion effectively eliminated the statutory safe harbor contained in CERCLA.

As originally adopted, OPA 90 had no lender safe harbor. A safe harbor provision was considered and rejected by Congress. Some commentators have suggested that Congress did not want to include a safe harbor in OPA only to have it nullified by the courts as it was under CERCLA.

In response to the Fleet Factors case, the EPA proposed regulations in 1991 that spelled out in detail the eligibility and limits of the safe harbor in CERCLA. Many comments were received and the comments as well as the EPA's intentions in the regulations were discussed at length in the adoption of the final rule in 1992. The proposed regulations may be found at 56 F.R. 28798, and the discussion and final rule at 57 F.R. 18344.

The EPA Rule was generally well received. It provided clear and sensible guidelines under which a lender could have a reasonable degree of comfort that it would not be held liable for pollution. Unfortunately, a court held that the EPA Rule exceeded the authority of the agency because it impermissibly purported to amend the statute.

In 1996, Congress came to the rescue by amending CERCLA to add the text of the EPA Rule to CERCLA. This year, Congress amended OPA 90 to add what is substantially the text of the EPA Rule to OPA.

IV. The Language of the Amendment

Liability under OPA is imposed on a "responsible party," which for a vessel is defined as "any person owning, operating or demise chartering the vessel."

The amendment expanded the definition of "owner or operator" to exclude lenders who do not participate in management and hold indicia of ownership primarily to protect their security interest in a vessel. (Defined terms are underscored.)

A "lender" is defined by reference to the CERCLA definition which includes banks and any person that makes a bona fide extension of credit to or acquires a security interest from a nonaffiliated person.

An "extension of credit" includes loans and lease financing transactions in which the lessor does not initially select the vessel and does not control its operation or maintenance.

A "security interest" is also defined by reference to CERCLA and includes rights under a mortgage, assignment, security agreement, lease, or any other right to secure the repayment of money or any other obligation. Under the Uniform Commercial Code (the "UCC"), "security interest" excludes certain types of leases. UCC 1-102(37). A true lease for purposes of the tax laws (which is usually characterized by a purchase option at fair market value at the end of the lease) is not a "security interest" under the UCC. The EPA comments in adopting the final EPA rule, make it clear that the definition of "security interest" under CERCLA and OPA is much broader than the UCC definition. Not only are true leases included, but any lease or other transaction that is a bona fide financing arrangement is considered a security interest regardless of its type, form or the nomenclature given to it, provided that the transaction comes within the type of lease included in the definition of an "extension of credit." 57 F.R. 18344.

"Participate in management" means actually participating in management or operational affairs of the vessel and does not include the capacity to influence or the unexercised right to control vessel operations. A lender or lessor will be held to participate in management if, while the borrower is in possession of the vessel (i.e. before foreclosure):

1. It exercises decision making control over environmental compliance such that it has undertaken responsibility for oil handling or disposal practices; or

2. It acts as a manager with day-to-day decision making such that it has assumed or manifested responsibility for:

a) Environmental compliance; or

b) Substantially all operational functions (as distinguished from financial or administrative functions) of the vessel other than environmental compliance.

The following actions are not participating in management as long as they do not rise to the level of 1 or 2 above:

1. Actions taken prior to the creation of a security interest in the vessel;

2. Holding, abandoning or releasing a security interest;

3. Requiring an environmental compliance covenant in a security agreement or an extension of credit;

4. Monitoring or enforcing terms of an extension of credit or a security interest;

5. Monitoring or inspecting the vessel;

6. Requiring remedial action for a threatened or actual pollution incident;

7. Providing financial advice;

8. Restructuring or exercising forbearance;

9. Exercising other remedies for breach;

10. Conducting a removal action.

As long as there is no participation in management before foreclosure, a lender may foreclose and a lessor may take possession of a vessel, and thereafter take over vessel operation without losing the protection of the safe harbor as long as the lender seeks to divest itself of the vessel (or the lessor seeks to re-lease the vessel) at the "earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." The requirement to divest itself of the vessel reflects Congress' intention that no one should enjoy the profits of a vessel's operation, then stand by and let the government pay for clean-up of a spill. The safe harbor permits a lender or lessor to receive the profits of a loan or lease, but not the profits generated by vessel operation except to the extent they were obtained during a limited period for the purpose of foreclosure. A lender that holds a vessel for investment is not holding primarily to protect a security interest and is not within the safe harbor.

IV. Putting the OPA Amendment in Context

OPA applies in the US Exclusive Economic Zone (the "EEZ") which extends 200 nautical miles out from the baseline (which is generally the coast line). The coastal states all have pollution laws for which the jurisdiction is typically 3 nautical miles from the baseline (except for some states in the Gulf of Mexico where the limit is 3 marine leagues which is about 9 nautical miles). When he vessel is inside the limit claimed by a state, or when pollution damage occurs within the state limit, the pollution claims may be made under either state or federal law. While a lender might be within the OPA safe harbor, liability could be imposed by state law.

The laws of the states concerning a lender safe harbor for pollution liability can be roughly grouped in four categories:

1. CERCLA, as amended, or similar safe harbor: CA, DE, HI, MA, NJ.

2. CERCLA unamended: AK

3. No safe harbor, but "responsible party" is defined in OPA 90: CT, GA, MS, SC.

4. No safe harbor: AL, FL, LA, MD, ME, NC, NY, RI, TX, VA, WA.

In the third category, the state laws refer to OPA 90 in its original form by the public law number, which would not include the recent amendment. One can hope that these states will amend the reference to OPA to include the safe harbor provided by the amendment.

Other state and federal laws may result in liability arising from a pollution incident, but most of them impose liability only if there has been fault.

V. Conclusion

The amendment to OPA provides a major improvement in the risk scenario for tanker financing, but it is too soon to say that the floodgates are open. Many coastal states have pollution laws that, like OPA, impose strict liability for pollution, but do not have a safe harbor for lenders and lessors.

<u>EXHIBIT 6</u>

Mendenhall and Gorman Paper

New Comfort for Maritime Financial Lessors: Amendments to OPA 90

By Greggory B. Mendenhall and Eileen M. Gorman

Introduction

Many financial institutions and lenders have been wary of involvement in maritime financing since the passage of the Oil Pollution Act of 1990 ("***OPA 90***"),[1] legislation which imposes strict liability for any losses sustained as a result of an oil spill. The reluctance of willing financiers to become involved in this capital intensive and financing reliant industry has resulted in fewer new financings, particularly with respect to tank vessels. However, in August 2004, Congress amended OPA 90 to be more attractive and favorable to certain lenders by exempting security holders who would otherwise be subject to statutory liability and focusing liability on the parties responsible for vessel operations and the care, custody and control of oil cargoes. This article will summarize OPA 90, the basis for lender liability, the landmark lender liability case decided under OPA 90 and the new amendment. Lastly, this article will analyze how cases will likely be decided under the revised statute.

OPA 90 and the "Responsible Party" Concept

OPA 90, enacted in the aftermath of the 1989 EXXON VALDEZ oil spill, was intended to create a "more comprehensive compensation and liability scheme"[2] by establishing strict liability for each party responsible for a vessel from which oil is discharged or which poses a substantial threat of a discharge of oil into the navigable waters or shorelines of the United States.[3] The extent of potential liability encompasses all removal costs and resulting damages in six categories including damages from loss of natural resources, real or personal property,

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[1] 33 U.S.C. §2701 *et seq.*

[2] In the Matter of the Complaint of MetLife Capital Corp., 132 F.3d 818, 820 (1st Cir. 1997).

[3] OPA 90 covers petroleum, which is not classified as a hazardous substance and thus is not covered by the Comprehensive Environmental Response, Compensation and Liability Act (47 U.S.C. §9601).

subsistence use of the natural resources, revenues, profits and earning capacity and the costs of providing public services during and after the removal activities;[4] notably punitive damages are not permitted.[5] OPA 90 allows recovery of economic damages without evidence of actual physical harm. In addition to damages, the act also provides for mandatory penalties based on circumstances surrounding the discharge and the potential for criminal charges to be brought.

The key provision of OPA 90 is the definition of a "responsible party" because that term becomes the threshold issue of what persons or entities may be civilly and criminally liable and thus financially responsible for a spill. OPA 90 defines a responsible party of a vessel as "any person owning, operating, or demise chartering" a vessel.[6] A responsible party will be held liable, regardless of whether fault is involved. Owners, operators and other responsible parties may be held jointly and severally liable for the damages resulting from an oil spill.

The definition of "owner" however does not take into account the bareboat or demise charter arrangements that are common place in a lease financing of a vessel in the maritime industry.[7] In a typical lease financing arrangement, a financing company purchases/owns the vessel and demise charters or leases it to a maritime operating company. The operator exercises all logistical and management control over the vessel for the demise charter or lease term and determines how, when and where the vessel will be utilized. The owner is typically not involved in the vessel's maintenance or operation until the end of the lease term, other than to ensure compliance with the charter terms. However, the owner retains title to the vessel to protect its financial investment.

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[4] 33 U.S.C. §2702(b).

[5] South Port Marine v. Gulf Oil Ltd., 234 F.3d 58, 64-66 (1st Cir. 2000) (statute itself does not list punitive damages as a remedy).

[6] 33 U.S.C. §2701(32)(A).

[7] 3 *Benedict on Admiralty* §112(A)(3).

OPA 90's strict liability for owners exposes financial institutions that own vessels primarily for financial purposes to potential liability, despite the demise charter and the lack of the owners' active role in the management or operation of the vessels. This provision of OPA 90 deviated from the previous rule of maritime law that "an owner of a vessel [can] insulate itself from the liability for the acts of a vessel or her crew by bareboat or demise chartering the vessel to another party."[8] Although OPA 90 does provide some limits on liability,[9] passive owners, such as financial lessors, were faced with the possibility of being held fully liable for the damages caused by operators fully engaged in the operation of a vessel.

Although there are various alternatives for passive lessors to minimize the risk posed by OPA 90's liability provisions, none were fully protective. Lessors obviously could enter into agreements with their demise charterers in which the demise charterers provided full indemnity to the owner in the event an owner is burdened with liability. However, as illustrated below, when an oil spill occurs, the demise charterer and/or operator often will suffer financial difficulties sooner than the financial lessor and thus the demise charterer/operator may not have sufficient assets, adequate insurance coverage or other financial means to provide the indemnity.

The MetLife Case

One of the more well-known cases examining OPA 90 and owner and lender liability is the case involving the spill from the MORRIS J. BERMAN. In 1994, the oil barge MORRIS J. BERMAN struck a coral reef off the coast of Puerto Rico and ran aground, spilling 1.5 million

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8 Com. of Puerto Rico v. M/V Emily S, 13 F.Supp.2d 147, 148 (P.R. May 13, 1998), *quoting* 3 *Benedict on Admiralty* §112.

9 33 U.S.C. §2704. Additional money can be drawn from the Oil Spill Liability Trust Fund. However, there is unlimited liability if the discharge results from a responsible party's gross negligence, willful misconduct, or violation of federal safety standards.

gallons of fuel oil into the Atlantic Ocean and onto the beachfront.[10] The unmanned barge had no means of self-propulsion and thus was being pulled by the tug boat EMILY S.[11] When the tow line between the boat and the barge snapped, the barge was set adrift, thus leading to the allision. The impact of the oil spill was enormous in terms of geographic impact, environmental impact, effect of wildlife and marine life, impact on tourism, etc. The barge owner carried $10 million in pollution insurance coverage, consistent with the maximum liability set forth in OPA 90 for a barge such as the MORRIS J. BERMAN. Shortly into the cleanup effort, the costs had exceeded $10 million; the Coast Guard assumed the additional cleanup costs, which exceeded $81 million.

Claims were filed against all responsible parties by the federal and commonwealth governments, fisherman, nearby hotels and small businesses among others. Defendants included the demise charterer of the tugboat, the operator of the tugboat, the owner and operator of the barge and the owner of the tugboat, MetLife Capital Corporation ("MetLife").

In response to claims brought against it as owner of the tug and a "responsible party", MetLife contended in the District Court of Puerto Rico that it could not be considered a "responsible party" under OPA 90 because no oil was discharged from the tugboat it owned; thus the tug was not a "discharging vessel" and the tug's owner was not a "responsible party."[12] The court determined that because the barge was unmanned and not self-propelled, the tug was an essential part of the barge and it was "natural to consider the two as a single entity."[13] The tug and the barge were both considered "discharging vessels" making MetLife, as an owner, a

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[10] U.S. Department of Justice, CIV/ENRD Press Release, *$83.5 Million Settlement Reached in 1994 Puerto Rico Oil Spill*, January 19, 2001.

[11] Com. of Puerto Rico v. M/V Emily S, 13 F.Supp.2d 147, 148 (P.R. May 13, 1998).

[12] *Id.*

[13] *Id.* at 150.

"responsible party" liable for the oil spill. MetLife, it should be noted, owned the tug boat for primarily financial purposes and had demise chartered it to a maritime operator. MetLife and other institutional companies, including the insurance company, eventually settled with the federal and Puerto Rican governments for $83.5 million, which reimbursed the government for cleanup coasts, compensated the natural resource trustees for injuries to natural resources and assessments costs, and addressed Puerto Rico's economic claims.[14]

The 2004 Amendment to OPA 90

On August 9, 2004, The Coast Guard and Maritime Transportation Act of 2004 (the "***Act***")[15] was enacted. The Act exempted certain lenders from liability under OPA 90 by importing into OPA 90 the terms of the "secured creditor exemption" in the Comprehensive Environmental Response, Compensation and Liability Act[16] ("CERCLA"). CERCLA imposes liability on any owner or operation, which is defined to mean "in the case of a vessel, any person owning, operating, or chartering by demise, such vessel."[17] However, the "secured creditor exemption" specifically excludes from the definition of owner a person that is a "lender, that without participating in the management of a vessel ... hold indicia of ownership primarily to protect the security interest of the person in the vessel."[18] CERCLA defines a lender as any person that makes a bona fide extension of credit, which includes a "lease finance transaction in which the lessor does not initially select the leased vessel ... and does not during the lease term control the daily operation or maintenance of the vessel."[19]

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[14] U.S. Department of Justice, CIV/ENRD Press Release, *$83.5 Million Settlement Reached in 1994 Puerto Rico Oil Spill*, January 19, 2001.

[15] Pub. L. No. 108-293 of 2004, §701-708, 118 Stat. 1028.

[16] 42 U.S.C. §9601 *et seq.*

[17] 42 U.S.C. §9601(20)(A).

[18] 42 U.S.C. §9601(20)(E).

[19] 42 U.S.C. §9601(20)(G)(i).

The Act amends the definition of owner in OPA 90 to specifically exclude passive lenders that do not participate in management of a vessel but hold indicia of ownership primarily to protect their security interests in the vessels.[20] Financial lenders, although permitted to monitor compliance with the terms and covenants of the financing documents, including those relating to environmental compliance, and capable of influencing the operations of the vessel, may not actually participate in the management or operational affairs of the vessel, without becoming subject to potential liability.[21] The Act specifically states that the term "lender" shall have the same meaning as it does in CERCLA.[22]

Likely Judicial Interpretation of the OPA 90 Amendment

Since the OPA 90 amendment is modeled after the "secured creditor exemption" in CERCLA, it is helpful to review CERCLA case law to determine how courts will view owner and lender liability in the context of the new amendment. The exemption relies on three requirements, namely that the owner satisfies the definition of a lender,[23] that the owner holding indicia of ownership does so primarily to protect a security interest and that the owner does not participate in the management of the vessel. Thus the CERCLA case law analyzes when these three requirements are met.

In *In re Bergsoe Metal Corporation,*[24] the Ninth Circuit analyzed what it meant to be a secured creditor in the context of a complicated financing transaction. The Port of St. Helens contracted with Bergsoe Metal in order to construct a lead recycling facility. The port issued bonds to fund the purchase of the land, the construction of the facility, and the associated costs

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[20] Pub. L. No. 108-293 of 2004, §703, 118 Stat. 1028, amending 33 U.S.C. §2701(26).

[21] Pub. L. No. 108-293 of 2004, §703, adding 33 U.S.C. §2701(38).

[22] Pub. L. No. 108-293 of 2004, §703, 118 Stat. 1028, adding 33 U.S.C. §2701(42).

[23] It is doubtful that a traditional lessor, not occupying the unique position of a financial lessor, would satisfy the definitional requirements to be considered a lender and thus able to avail itself of the secured creditor exemption.

[24] 910 F.2d 668 (9th Cir. 1990).

and equipment and sold the land to Bergsoe so that the plant could be constructed. The port and Bergsoe then engaged in a sale and leaseback transaction, whereby Bergsoe leased both the land and the plant from the port. Bergsoe paid the rent directly to the United States National Bank of Oregon, through which the port financed the operation and to which the port had assigned all of its rights under and the revenue generated from the leases. The rent under the leases equaled the amounts due on the bonds.

In a CERCLA suit brought against the port as owner, the court acknowledged that although the port's name was on the deed and that it in fact was an owner, it fell within the secured creditor exemption. The court focused on the first prong of the exemption and analyzed why the port held the ownership in the plant. The court determined that the port held the deed primarily to ensure that the Bergsoe would meet its obligations under the leases and thus under the bonds that the port had issued. The Court acknowledged that the port held title not to ensure that "it would receive payment, but to guarantee that Bergsoe would cover the port's own indebtedness under the bonds,"[25] which is different from the typical secured creditor who holds title to ensure that it would be paid. This fact did not change the analysis but rather demonstrated that the port's ownership was merely part of the financing arrangement. The leases, although not called "security agreements," granted Bergsoe "all other traditional indicia of ownership, such as responsibility for the payment of taxes and for the purchase of insurance."[26] Even more telling to the Court was that the rent payments equaled the amount due under the port's indebtedness. Based on these factors, the court held that the port held title to protect its security interest, thereby satisfying the first requirement of the secured creditor exemption; the

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[25] *Id.* at 671.
[26] *Id.*

court's holding also implicitly stated that the port, as an intermediary financing entity, was considered a lender able to utilize the exemption.

The *Monarch Tile Inc. v. The City of Florence* decision further supported the holding in *Bergsoe*. In *Monarch Tile*, the City of Florence purchased a piece of property and then leased it to a factory operator. As in *Bergsoe*, in order to finance the purchase, the city issued bonds and mortgaged the property to First National Bank of Florence. The city pledged the rents it would receive from the factory operator to the bank to secure repayment of the bonds held by the bank. When hazardous substances were determined to have been discharged into the neighboring watershed, Monarch Tile, the then-current owner, was directed to clean up the spill and brought suit against the city for contribution based on the city's status as a prior owner. The district court, relying heavily on *Bergsoe*, dismissed the suit holding that the city was exempt from CERCLA liability because the city held indicia of ownership primarily to protect security interests in the facility and did not participate in the management of the facility. The purpose of CERCLA is to "place the ultimate responsibility for the clean-up of hazardous wastes on those responsible for problems caused by the disposal of chemical poison."[27] The city held "bare title and devoted the lease revenues to pay off" the purchase price debt, which the court equated with holding a security interest.[28]

The above cases involved financed sale-leaseback arrangements but cases with more standard sale-leaseback arrangements have been decided similarly. In determining whether a leasing transaction creates a security interest, courts consider facts such as the lessor's status as a financier, whether the lessee is responsible for insuring the property in favor of the lessor,

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[27] Monarch Tile, Inc. v. City of Florence, No. 99-11372 (11th Cir. 2000), *quoting* Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990).

[28] Monarch Tile, Inc. v. City of Florence, No. 99-11372 (11th Cir. 2000).

whether the lessee bears the risk of loss, whether the lessee pays the taxes on the property, and whether the lessor lacks the facilities or ability to store or retake the property.[29] The courts have held that the party seeking to invoke the security interest exemption has the burden of establishing its entitlement to the exemption and that it holds indicia of ownership primarily to protect its security interest.[30]

In *Waterville Industries, Inc. v. Finance Authority of Maine*, the court indicated that with respect to the secured creditor exemption, the "legislative history and case law confirm that Congress had in mind not only the classic case of the bank mortgage but also equivalent devices serving the same function, such as lease financing arrangements."[31] In its determination that the finance authority fell within the secured creditor exemption, the court relied on the fact that the operator/lessee "continued to be responsible for real estate taxes and the payment schedule provided that the monthly sums payable to [the lessor] were to be applied first to 'interest,' which suggests repayment of a debt."[32] The court found that the lessor held "nominal title typical of the lender in a lease financing transaction" and thus was exempt from CERCLA liability.[33] In this case, the operator/lessee had the option to purchase the property at the end of the lease term for $1; such repurchase options for nominal consideration are typical components of financed sale leasebacks. The court, however, observed that if the lessor had re-leased the property without

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[29] Kemp Industries, Inc. v. Safety Light Corp., 857 F. Supp. 373, 389 (N.J. 1994), quoting 2 White & Summers 251-252.

[30] *See* United States v. Fleet Factors Corp., 901F. 2d 1550, 1556 (11th Cir. 1990), cert. denied, 498 U.S. 1046, 11 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

[31] Waterville Industries, Inc. v. Finance Authority of Maine, 984 F. 2d 549, 552 (1st Cir. 1993).

[32] *Id.* at 554.

[33] *Id.* at 552.

continuing the purchase option, its line of analysis would be different and the lessor's position could be weaker.[34]

In *Kemp Industries, Inc. v. Safety Light Corp.*,[35] the debtor/operator sold industrial property to a creditor, The Prudential Insurance Company ("Prudential"), for the acquisition price of the property. Prudential then simultaneously leased the property to the debtor for its continued use. Prudential held title to the property but "was interested not in owning or operating industrial properties, but in obtaining a fixed rate of return on its investment."[36] In holding that Prudential was not liable under CERCLA as an owner because of the secured creditor exemption, the court analyzed several factors,[37] none of which were dispositive, to determine that Prudential's position was consistent with that of a lender as opposed to a landlord. Among the factors analyzed were the structure of the rental payments to amortize the amount committed by Prudential to purchase the property, the control that the lessee had with respect to the property in terms of repairs and upkeep, the fact that Prudential purchased the property specifically for the lessee, and that Prudential was not capable of nor even anticipated operating the facility itself. Although the precedents stated in *Waterville Industries* and *Bergsoe* relied on the fact that the lessee had an option to repurchase the property at the end of the lease term for nominal value, the court in *Kemp Industries* held that the "existence of a repurchase option, though relevant ..., is by no means necessary to a determination that the leaseback constitutes a

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[34] *Id.* at 552-553.

[35] Kemp Industries, Inc. v. Safety Light Corp., 857 F. Supp. 373 (N.J. 1994).

[36] *Id.* at 378.

[37] *Id.* at 389. "No mechanical test has arisen to guide the determination as to the purpose of ownership and whether an owner's taking title falls within the security interest exemption depends on the facts particular to each case. In general, however, the exemption protects 'owners who [, by taking title,] are not in fact seeking to profit from the investment opportunity normally presented by prolonged ownership'." *Id.* at 385, quoting *Northeast Doran, Inc. v. Key Bank of Maine,* 15 F.3d 1, 2-3 (1st Cir. 1994).

security arrangement."[38] "The court in *Waterville Industries* did not indicate anything talismanic about the existence of a repurchase option, but merely stated that [the lessor's] current position could be weaker in the absence of a repurchase option."[39] The absence of a repurchase option is not even relevant where the residual value of the property at the end of the lease term is next to nothing.[40] Furthermore, the court noted that the lessor's requirement that the lessee provide it with ongoing information regarding its financial condition and creditworthiness is indicative of a creditor/debtor relationship.[41] Viewing the totality of the circumstances, the court determined that the factors weighed in favor of finding that Prudential had a security interest in the property and held ownership in the property in order to protect that interest.

Based on the *Waterville Industries* and *Kemp Industries* precedents, it appears that finance companies that retain an ownership interest in a vessel and engage in both financed and traditional sale leaseback arrangements, can be protected from owner liability under the amended OPA 90 provisions, provided the ownership interest is intended as security and the finance company does not actively participate in the management of the vessel.[42] The inclusion of the secured creditor exemption in OPA 90 means, that for the first time, courts will need to grapple with lease financing of personal property.[43] How far the OPA 90 secured creditor exemption will extend into what would, under the Uniform Commercial Code, be deemed to be a true lease

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38 *Id.* at 389.

39 *Id.*

40 *Id.*

41 *Id.*

42 Courts have held that reserving rights to participate in management of a vessel, monitoring the business of the lessee and being involved in "occasional and discrete financial decisions relating to the protection of its security interest [do] not equate with participation in the management." *See* Kemp Industries, Inc. v. Safety Light Corp., 857 F. Supp. 373 (D.N.J. 1994) (*citing* In re Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990)).

43 The *Kemp Industries* court found an analysis of the UCC particularly instructive in defining the scope of the security interest exemption in CERCLA. The court found the similarity between the language and scope of the two provisions and that the UCC may properly guide interpretation of CERCLA's security interest exemption. *Id.* at 387-389.

of personal property remains to be seen.[44] An observation from the court in the *Kemp Industries* case provides guidance as to how courts will analyze in the future traditional sale leaseback arrangements under the amended OPA 90 provisions: "[t]his is not a case where each and every relevant factor weights in the secured creditor's favor. . .[r]ather, the transaction must be characterized after viewing the totality of the facts surrounding [the] transaction and the relationships created therein; no one factor can be determinative."[45]

Conclusion

Had the MetLife case been decided under the revised statute, the tug boat and barge would still have been considered a single vessel but MetLife as an owner and lender could have been spared from liability because it owned the tug primarily for financial purposes and could have fallen within the secured creditor exemption and would not have been a responsible party liable.

The new legislation standardizes the liability guidelines with respect to spills involving oil and other hazardous substances by aligning OPA 90 liability exemptions with CERCLA exemptions. Financial lessors can now enjoy the benefits of their vessel ownership from an accounting and tax treatment perspective while minimizing the risk exposure to potential oil spill liability, provided they are careful in structuring their transactions.

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[44] There is not a clear demarcation line between a true lease and a finance lease, and in considering any particular case, parties to a transaction must evaluate the demarcation in two other contexts. First, whether the lessor has sufficient indicia of ownership to document the vessel, and second, whether the owner will be treated as the owner for tax purposes.

[45] *Id.* at 389.

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