

## U.S. MARITIME ARREST AND ATTACHMENT LAW

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The United States is not a signatory to the primary treaty on maritime vessel arrests, the International Convention Relating to the Arrest of Seagoing Ships,<sup>1</sup> so its laws on vessel seizure generally vary from those of other nations.<sup>2</sup> Unlike some other nations, the United States recognizes two main methods for seizure of a vessel in a U.S. port: Rule C arrest and Rule B attachment.<sup>3</sup> Rule C arrest—so called because it is authorized under Rule C of the Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (hereinafter, the “Admiralty Rules”)—allows a creditor to seize a debtor’s vessel to enforce a claim against that particular vessel.<sup>4</sup> In general, the creditor only needs to establish that it has a maritime lien or other statutorily authorized claim against the vessel prior to arrest.

Rule B attachment—authorized by Admiralty Rule B—differs slightly from Rule C arrest because it focuses on the debtor rather than the vessel. Under Rule B a creditor holding a maritime claim against a particular debtor may seize any of that debtor’s vessels to satisfy its claim. In this context, a creditor must establish that it holds a claim arising under maritime law, and that the debtor cannot be found within the district in which litigation on the creditor’s claim is pending.

This discussion of U.S. arrest and attachment laws is separated into four parts. The first part of this discussion analyzes the situations in which creditors have the right to seek Rule C arrest and Rule B attachment. The second part of this discussion explains the process by which a creditor can arrest or attach a vessel. The third part of this discussion analyzes the issues that may arise after the vessel has been seized. This discussion concludes with an explanation of the process by which a vessel can be sold and how the proceeds are typically disbursed.

### **I. Forms of Seizure**

#### **A. Vessel Seizure Through Arrest Under Admiralty Rule C**

Vessel arrests in the United States are governed by Rule C of the Admiralty Rules. Under Admiralty Rule C, a creditor may have a debtor's vessel arrested to satisfy a maritime lien

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<sup>1</sup> International Convention Relating to the Arrest of Seagoing Ships, 1952, 439 U.N.T.S. 193, reprinted in 6B FRANK L. WISWALL, JR., *BENEDICT ON ADMIRALTY*, DOC. NO. 8-1 (2013).

<sup>2</sup> The United States is also different from many countries in terms of its maritime lien laws because it is not a signatory to either of the international conventions on unification of maritime lien laws. *See* International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926, 120 L.N.T.S. 187, reprinted in 6B *Benedict on Admiralty supra*, Doc. No. 8-2; International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967, 120 L.N.T.S. 187, reprinted in 6B *Benedict on Admiralty supra*, Doc. No. 8-3.

<sup>3</sup> Each state within the United States also allows for state law attachment, but the rights and procedures involved in such an action are beyond the scope of this article.

<sup>4</sup> Admiralty Rule C.

against that vessel.<sup>5</sup> Maritime liens in the U.S. are generally defined as claims that arise out of services provided to a vessel, or damages caused by that vessel.<sup>6</sup> Such liens primarily arise out of U.S. case law, although a few statutes, such as the Commercial Instruments and Maritime Liens Act,<sup>7</sup> also provide for maritime liens.<sup>8</sup>

The most widely recognized maritime liens under U.S. case law are claims for provision of necessities,<sup>9</sup> wages for the master and crew,<sup>10</sup> damages for breach of a maritime contract,<sup>11</sup> damages for maritime torts, including personal injury, wrongful death, or collisions;<sup>12</sup> salvage operations;<sup>13</sup> damage to or loss of cargo,<sup>14</sup> unpaid freight charges;<sup>15</sup> and damages due to pollution.<sup>16</sup> This list is not exclusive, however, and often requires a fact-specific analysis to determine whether a particular claim will be considered as forming the basis of a maritime lien.

The United States Congress has also created a few statutory liens, which can form the basis for a Rule C arrest action. Perhaps the most commonly known is the preferred ship mortgage, which provides that a creditor may take a lien claim in a vessel when making a mortgage that covers the entire vessel, so long as the creditor files and records the proper documents with the U.S. Department of Transportation.<sup>17</sup>

## **B. Vessel Seizure Through Attachment Under Admiralty Rule B**

In addition to Rule C arrest, U.S. law also provides that a creditor may seize a debtor's vessel to enforce a maritime claim.<sup>18</sup> Admiralty Rule B provides that a creditor may attach a debtor's assets, including any of its vessels, to secure payment of a maritime claim. The key difference between Admiralty Rule C and Admiralty Rule B is that under Rule B, a creditor can seize any of the debtor's vessels to satisfy a general maritime claim, whereas Rule C only allows seizure of the particular vessel against which the creditor has a lien.

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<sup>5</sup> See Admiralty Rule C(1); see *Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F.2d 983, 987 (5th Cir. 1992).

<sup>6</sup> 1 THOMAS N. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-1 (5th ed. 2011).

<sup>7</sup> 46 U.S.C. §§ 31301 – 31343 (2006).

<sup>8</sup> SCHOENBAUM, *supra* note 4, at § 9-1. Perhaps due to the variety that can result from case law, the United States recognizes more types of maritime liens than most other countries. *Id.* As the U.S. Ninth Circuit Court of Appeals has noted, however, “courts are reluctant to recognize new forms of maritime liens.” *Logistics Mgmt.*, 86 F.3d at 913 (citing *Melwire Trading Co. v. M/V Cape Antibes*, 811 F.2d 1271, 1273 (9th Cir. 1987)).

<sup>9</sup> See *Trico Marine Operators, Inc. v. Falcon Drilling Co.*, 116 F.3d 159 (5th Cir. 1997). “Necessaries” are defined by statute as “repairs, supplies, towage, and the use of a dry dock or marine railway.” 46 U.S.C. § 31301(4). Case law alternatively defines “necessaries” to mean “any item which is ‘reasonably needed for the venture in which the ship is engaged.’” *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 699 (9th Cir. 1987) (quoting 2 S. FRIEDEL ET AL., BENEDICT ON ADMIRALTY § 37 at 3-27 (7th ed. 1986)).

<sup>10</sup> See *The John G. Stevens*, 170 U.S. 113 (1898).

<sup>11</sup> See *Cardinal Shipping Corp. v. M/S SEISHO MARU*, 744 F.2d 461, 466 (5th Cir. 1984).

<sup>12</sup> *Merchants Nat'l Bank of Mobile v. Dredge Gen G.L. Gillespie*, 663 F.2d 1338, 1347 (5th Cir. 1981).

<sup>13</sup> *The Sabine*, 101 U.S. 384, 384 (1879) (holding that a valid salvage claim requires: “1. A marine peril. 2. Service voluntarily rendered when not required as an existing duty or from a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success.”).

<sup>14</sup> See *Oriente Commercial, Inc. v. M/V Floridian*, 529 F.2d 221, 221 (4th Cir. 1975).

<sup>15</sup> *Logistics Mgmt., Inc. v. One (1) Pyramid Tent Arena*, 86 F.3d 908, 913 (9th Cir. 1996).

<sup>16</sup> *Cal. Dep't of Fish and Game v. S.S. Bournemouth*, 307 F. Supp. 922, 928–29 (C.D. Cal. 1969).

<sup>17</sup> See 46 U.S.C. § 31322(a).

<sup>18</sup> Admiralty Rule B.

In order to seize a vessel under Admiralty Rule B, a creditor must generally meet four requirements: “(1) Plaintiff has a valid prima facie admiralty claim against the defendant; (2) defendant cannot be found within the district; (3) property of the defendant can be found within the district; and (4) there is no statutory or maritime law bar to the attachment.”<sup>19</sup> The first element generally requires a creditor to hold a claim that falls under the court’s admiralty jurisdiction.<sup>20</sup> The precise bounds of the district court’s admiralty jurisdiction are beyond the scope of this article, but in general this means that a claim must arise out of a maritime tort (meaning the tortious conduct took place on the navigable waters of the United States, had a “significant connection with traditional maritime activity”,<sup>21</sup> and had a “potentially disruptive impact on maritime commerce”<sup>22</sup>) or maritime contract (meaning the nature and subject matter of the contract are “directly related to the operation of a vessel and navigation”<sup>23</sup>).

The creditor’s second requirement is to show that the debtor-vessel owner cannot be “found within the district” in which the action is pending.<sup>24</sup> While Congress has not defined what it means to be “found” within a judicial district, courts construe this to mean that a defendant is subject to personal jurisdiction within the district and capable of being served with a summons and complaint there.<sup>25</sup> A creditor seeking to invoke Admiralty Rule B must therefore show that the defendant does not have sufficient contacts with the district to be subject to personal jurisdiction there, and does not have an agent in the district upon which service of a summons and complaint can be effect.<sup>26</sup>

The third and fourth requirements are fairly straightforward. Much like in the Rule C arrest context, the creditor must attest that property (in this context, the vessel) belonging to the debtor-vessel owner is located within the district.<sup>27</sup> The creditor must also ensure that no statute or other maritime law prohibits attachment under Rule B.<sup>28</sup>

## II. PROCESS OF SEIZURE

Once a creditor determines that a valid claim for arrest or attachment exists, the next step is to determine the particular procedure to follow. The overall rules for vessel seizures are the same

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<sup>19</sup> *Equatorial Marine Fuel Mgmt. Servs. Pte Ltd. v. MISC Berhad*, 591 F.3d 1208, 1210 (9th Cir. 2010) (internal citations omitted).

<sup>20</sup> *Alphamate Commodity*, 627 F.3d at 186 (“A Rule B maritime attachment is a remedy available only under a court’s admiralty jurisdiction”).

<sup>21</sup> *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673–74 (1982).

<sup>22</sup> *Sisson v. Ruby*, 497 U.S. 358, 362–63 (1990).

<sup>23</sup> SCHOENBAUM *supra* note 4, at § 3-10.

<sup>24</sup> See Admiralty Rule B(1)(b).

<sup>25</sup> See *D/S A/S Flint v. Sabre Shipping Corp.*, 228 F. Supp. 384, 387 (E.D.N.Y. 1964).

<sup>26</sup> Some courts have even held that a creditor may not be able to invoke Admiralty Rule B if the defendant can be found within a “convenient adjacent jurisdiction.” *ProShipLine Inc. v. Aspen Infrastructures Ltd*, 609 F.3d 960, 969 (9th Cir. 2010). This issue involves a fact-specific inquiry that will depend on the geographical locations of the ports and courthouses involved in any Rule B attachment.

<sup>27</sup> See *Equatorial Marine Fuel Mgmt.*, 591 F.3d at 1210.

<sup>28</sup> *Id.*

throughout the United States. However, each judicial district<sup>29</sup> has different procedures for where and how to file documents, and how to coordinate with federal officials involved in the process. This discussion focuses on the general procedures in the United States, with reference at times to the local rules in the Seattle area and the Western District of Washington.

### A. Process for Vessel Seizure Through Arrest Under Admiralty Rule C

Vessel arrest procedure in the U.S. involves a unique procedure by which the vessel itself is named as the defendant in a lawsuit, rather than an individual or entity as would normally be the case. This is known as an *in rem* action. The first step in attempting to arrest a vessel is thus to file a complaint with the federal district court sitting in the jurisdiction in which the vessel will be arrested and naming the vessel as the defendant.<sup>30</sup> The complaint must (a) explain that the creditor has a valid maritime lien,<sup>31</sup> (b) describe with reasonable particularity the vessel to be arrested; (c) state that the vessel is now or will be within the district while the action is pending; and (d) be verified (meaning it is signed under oath) by the creditor.<sup>32</sup>

The first element requires careful legal drafting, as the creditor must set forth enough facts to show that it has a plausible claim to a valid maritime lien.<sup>33</sup> There are no strict requirements when describing the vessel to be arrested, but information such as the vessel's official number listed by the International Maritime Organization, its approximate length, and its type should be included. With respect to the third requirement, the creditor must simply attest that the vessel will in fact be coming into a port within the district court's jurisdiction.

Along with the verified complaint, a creditor must file an application—in the form of a motion—asking the court to issue a warrant for the vessel's arrest. The creditor typically must also file a proposed order granting the motion, as well as a proposed arrest warrant. Due to the need for quick action, this motion can be filed without prior notice to the vessel owner. Upon filing, the court will review the complaint and motion; so long as the complaint meets the requirements listed above, the court will then issue a warrant for the vessel's arrest.<sup>34</sup>

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<sup>29</sup> The United States federal court system is broken into 94 different district courts. Each district must follow the same general rules, but is allowed to make its own local rules in certain situations, such as when dealing with administrative matters. Maritime arrest and attachment also involves the United States Marshals Service, and each area office for the Marshals may have slightly different administrative procedures. Anyone seeking to arrest or attach a vessel in a U.S. port should consult local counsel to determine any unique procedures. This article focuses on the general procedures and, where applicable, provides some commentary on local procedures to provide the reader with examples of the types of issues that may arise.

<sup>30</sup> The U.S. district courts have exclusive jurisdiction over vessel arrest actions under 28 U.S.C. § 1333 (2006), and thus an arrest action cannot be prosecuted in state court.

<sup>31</sup> See Admiralty Rule C(1).

<sup>32</sup> Admiralty Rule C(2).

<sup>33</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Creditors must also be careful to ensure that they hold a valid maritime lien. Courts can award sanctions for wrongful arrest when a vessel owner demonstrates that the arresting creditor did not hold such a maritime lien, and acted in bad faith or with reckless disregard for the vessel owner's rights). See *Arochem Corp. v. Wilomi, Inc.*, 962 F.3d 496, 499 (5th Cir. 1992).

<sup>34</sup> Admiralty Rule (C)(3)(a). Often the court will issue the warrant promptly, but a creditor concerned that the vessel may depart before the warrant has issued may seek immediate issuance of the warrant by certifying that exigent circumstances exist that make review impracticable. Admiralty Rule C(3)(a)(ii). A creditor moving under this rule should be prepared, however, to defend its claim that exigent circumstances existed, as it will bear the burden of proving the issue in any post-arrest hearing. *Id.*

The warrant itself may only be executed by the United States Marshals Service.<sup>35</sup> Once the warrant is signed, it must therefore be delivered to the local Marshals' office.<sup>36</sup> The exact process for delivery of the arrest warrant and accompanying documents varies from district to district. The U.S. Marshals' office in the Western District of Washington and many local districts require the arresting creditor to deliver with the arrest warrant a completed form (known as a USM Form 285) identifying the name and official number of the vessel, its current location, and the port at which it is expected to arrive; three copies of the verified complaint; three certified copies of the court's order authorizing issuance of the arrest warrant; the original and three copies of the arrest warrant; and a deposit to cover the marshal's anticipated costs associated with the arrest, such as insurance, custodian charges, and moorage fees.<sup>37</sup> Due to the fact that the U.S. Marshals also handle criminal matters, which take priority over vessel arrests, it is often advisable to get the arrest warrant to the marshal at least a week before it must be executed.<sup>38</sup>

Upon receipt of the arrest warrant, the Marshal will arrest the vessel by posting notice of the arrest aboard the vessel and serving a copy of the complaint and arrest warrant on the master or person in charge of the vessel.<sup>39</sup>

It is often expensive to have the Marshals stand guard over the vessel, so most, if not all judicial districts allow creditors to have a substitute custodian appointed. To accomplish this, a creditor must locate a suitable company to maintain the vessel, and then file a motion to appoint a substitute custodian. This is often filed at the same time as the creditor files its verified complaint and motion for an arrest warrant to avoid incurring extra fees from the U.S. Marshals. In the Western District of Washington, the motion to appoint a substitute custodian must be accompanied by an affidavit from the proposed substitute custodian setting forth its custodial fees and stating that the individual: (1) "has knowledge of and experience with" care of the type of vessel to be arrested; (2) has an adequate facility at which to moor the vessel; (3) knows the requirements for the vessel's safekeeping under the court rules; (4) "is not interested in the outcome of the action" in which the vessel is under arrest; and (5) accepts the appointment as substitute custodian and will safeguard the vessel.<sup>40</sup>

In the Western District of Washington, the motion to appoint a substitute custodian must also be accompanied by a proposed order containing a number of specific provisions. In particular, the

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<sup>35</sup> Admiralty Rule C(3)(b)(i).

<sup>36</sup> *See id.*

<sup>37</sup> United States Marshals Services Western District of Washington, *Procedures to Arrest a Vessel*, <http://www.usmarshals.gov/district/wa-w/admiralty/pdf/admiralty.pdf> (last visited Feb. 18, 2014) [hereinafter "Western District Marshal Procedures"]; *see also* W.D. Wash. Supp. Adm. R. 120(c)(1). The U.S. Marshals in the Western District of Washington also require Form USM 285 documents to be filed along with any other documents on which the marshal must take action, such as the appointment of a substitute custodian, publication of notice of arrest, and release of the vessel.

<sup>38</sup> Creditors should be cautious, however, not to file the action too far in advance of the vessel's arrival in port, as the owner may simply divert to another port to avoid arrest. Retaining local counsel familiar with the particular U.S. Marshals office can be crucial, as some offices may take significantly longer than others to execute an arrest warrant, and thus good communication is necessary to effect the arrest in a timely manner.

<sup>39</sup> Admiralty Rule C(3)(b).

<sup>40</sup> W.D. Wash. Supp. Adm. R. 135(b).

order must identify the vessel's current location and its expected location during arrest, state that the fees and costs incurred in turning the vessel over to a custodian will be less than the costs of simply leaving the vessel with the marshal, affirm that the substitute custodian has obtained adequate insurance for the vessel, and affirm that the vessel cannot be moved except by the custodian if necessary to safeguard the vessel.<sup>41</sup>

Appointing a substitute custodian also requires a creditor to coordinate with the Marshals. For example, the Western District of Washington requires any proposed order to appoint a substitute custodian to be approved in writing by the U.S. Marshals before the court will issue any such order. Before filing the motion, the creditor must therefore confer with the Marshals to ensure the proposed substitute custodian will be acceptable, and then must deliver the proposed order to the marshal for written approval.

Assuming all documents are filed appropriately and approved by the court, the substitute custodian will typically travel with the Marshals to the vessel for the arrest. Once the Marshal has posted the arrest warrant, notified the captain, and secured the vessel, the Marshal will then turn the vessel over to the substitute custodian for safekeeping.

## **B. Process for Seizure Through Attachment Under Admiralty Rule B**

The process for seizing a vessel through a Rule B attachment bears a significant resemblance to the process for Rule C arrest, but differs in terms of the exact requirements. As with a Rule C arrest, the creditor must file a verified complaint. The major difference here, though, is that the complaint must name the vessel owner as the defendant, rather than the vessel as in a Rule C arrest.<sup>42</sup> The verified complaint must describe with some specificity the creditor's claim, provide enough factual detail to demonstrate that the claim falls within the court's admiralty jurisdiction,<sup>43</sup> state that the debtor cannot be found within the district, and contain a prayer that the court issue a writ of attachment.<sup>44</sup> In the Western District of Washington, creditors must also describe the efforts made to locate the debtor within the district.<sup>45</sup>

Concurrent with the filing of the verified complaint, the creditor should file a motion asking the court to issue a writ of attachment.<sup>46</sup> As with a Rule C arrest, the court will review these documents to ensure all requirements are met and, if so, will issue an order authorizing the court clerk to issue a writ of attachment.<sup>47</sup>

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<sup>41</sup> *Id.* The Western District Marshal Procedures, *supra* note 37, also require the substitute custodian to be insured and bonded for a minimum of one million dollars.

<sup>42</sup> See generally 29 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 705.04[1] (3d ed. 2013).

<sup>43</sup> As a matter of course, a creditor must plead that the action is brought within the meaning of Fed. R. Civ. P. 9(h), and pursuant to the court's jurisdiction under 28 U.S.C. § 1333.

<sup>44</sup> Admiralty Rule B(1).

<sup>45</sup> W.D. Wash. Supp. Adm. R. 115(b).

<sup>46</sup> While the rules do not specifically state that a motion is required, filing such a motion allows an opportunity to explain to the court the reasons for attachment in a simpler format than the typical complaint, and ensures that the court will review the request in a timely manner.

<sup>47</sup> Admiralty Rule B; W.D. Wash. Supp. Adm. R. 115(c).

Once the writ of attachment is issued, the process follows a similar path to that of a Rule C arrest. The writ must be delivered to the U.S. Marshals for service,<sup>48</sup> and the creditor can seek appointment of a substitute custodian, if desired.<sup>49</sup> The creditor will also be required to give a deposit to cover the expected costs to be incurred in the attachment.

### **III. POST-SEIZURE PROCESS**

#### **A. Proceedings Following a Vessel's Arrest Under Admiralty Rule C**

Once a vessel is arrested, the case will typically proceed down one of two paths. If the debtor-vessel owner wishes to avoid having its vessel tied up while the creditor's claim is resolved, the debtor-vessel owner can post security, often in the form of a letter of undertaking from its privileges and indemnities underwriter, up to the amount of the creditor's claim to obtain the vessel's release.<sup>50</sup> Given the nature of maritime trade, debtors often choose this option to keep their vessels in the stream of commerce.

Assuming no security is posted to obtain the vessel's release, the creditor must next ensure that all interested parties received notice of the vessel's seizure. Under Admiralty Rule C, if the vessel is not released within 14 days after its arrest, the creditor "must promptly—or within the time that the court allows—give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district."<sup>51</sup> The notice must generally contain the title and cause number for the arrest action, the date of arrest, a description of the vessel, the name and address of the creditor's attorney, a statement that anyone claiming a possessory interest in the vessel must file such a claim within 14 days after the arrest or within a time set by the court, and a statement that the answer to the complaint must be filed within 21 days after any possessory interest claim is filed.<sup>52</sup>

The creditor must also send actual notice to any lien claimants that have recorded their liens, such as individuals holding preferred maritime mortgages, and any persons known to have an interest in the vessel.<sup>53</sup> That notice must be personally delivered or sent via certified mail to the last known address for each lienholder, and generally must include the same information as the published notice.<sup>54</sup>

Following the vessel's arrest, anyone who holds a right of possession or ownership interest in the vessel must file a verified statement with the court describing that person's interest and how it supports the person's right to defend against the creditor's claim.<sup>55</sup> This includes the vessel owner and any other parties that hold lien claims against the vessel, such as a mortgage holder. The vessel owner must then file an answer to the complaint within 21 days after filing the

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<sup>48</sup> Admiralty Rule B(1)(d)(i).

<sup>49</sup> W.D. Wash. Supp. Adm. R. 135(b).

<sup>50</sup> See Admiralty Rule E(5).

<sup>51</sup> Admiralty Rule C(4).

<sup>52</sup> Admiralty Rule C(6); W.D. Wash. Supp. Adm. R. 125.

<sup>53</sup> See 46 U.S.C. § 31325(d)(1).

<sup>54</sup> See W.D. Wash. Supp. Adm. R. 130(c).

<sup>55</sup> Admiralty Rule C(6)(a)(i)–(ii); see also W.D. Wash. Supp. Adm. R. 131.

verified statement.<sup>56</sup> Any lienholder who fails to file a claim of interest risks losing any lien against the vessel because, ultimately, any sale of the vessel following arrest will be made free and clear of all liens.<sup>57</sup>

A vessel owner or any other person claiming an interest in the property may also challenge the arrest before filing answer. Under the local rules for the Western District of Washington, “any person claiming an interest in the property shall be entitled to a hearing before a judicial officer” so long as the person gives the arresting creditor five days’ notice.<sup>58</sup> The burden is then on the arresting creditor to show that the arrest was justified.

Assuming the arrest is not vacated, the case then proceeds like other civil litigation, eventually requiring a trial to adjudicate the arresting creditor’s lien. If the creditor successfully establishes its lien claim, then the creditor can seek a judicial sale to satisfy that claim. As will be explained more fully below, the creditor can also seek to have the vessel sold while the action is still pending, in which case the creditor’s lien would shift from the vessel to the proceeds from its sale.

## **B. Proceedings Following a Vessel’s Seizure Through Attachment Under Admiralty Rule B**

The procedure following a Rule B attachment differs somewhat from the procedure following Rule C arrest. Simultaneous with or shortly after attachment, the attaching creditor must serve the vessel owner with the complaint and a summons under Fed. R. Civ. P. 4.<sup>59</sup> As in a Rule C arrest, though, the defendant is entitled to a hearing before the court on the validity of the attachment so long as the defendant gives the attaching creditor five days’ notice.<sup>60</sup>

Following service of the complaint and summons, the defendant must file an answer to the complaint within 30 days.<sup>61</sup> If no answer is filed in time, the attaching creditor may move for a default judgment, provided the creditor submits proof—typically in the form of an affidavit—that the defendant was properly served under Fed. R. Civ. P. 4, that the attaching creditor mailed a copy of the complaint and related documents to the defendant, or that the attaching creditor has tried diligently to give the defendant notice of the action but has been unable to do so.<sup>62</sup>

As with Rule C arrest, if the defendant files an answer, then the case proceeds like other forms of civil litigation. The attaching must prove its claim against the defendant, and must show that the case arises under the court’s admiralty jurisdiction, thus justifying the Rule B attachment. If the attaching creditor does so successfully, it may then seek to have the vessel sold to satisfy its claim.

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<sup>56</sup> Admiralty Rule C(6)(a)(iii).

<sup>57</sup> See 46 U.S.C. § 31326(a).

<sup>58</sup> W.D. Wash. Supp. Adm. R. 116(b).

<sup>59</sup> For defendants located outside the U.S., the creditor-plaintiff must effect service according to the Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 Matters (commonly known as the Hague Convention).

<sup>60</sup> W.D. Wash. Supp. Adm. R. 115(d).

<sup>61</sup> Admiralty Rule B(3)(b).

<sup>62</sup> Admiralty Rule B(2).



#### IV. SALE AND DISTRIBUTION OF PROCEEDS

The process for sale of a vessel is generally the same in Rule C arrests and Rule B attachments. The moving creditor can either request a sale while the case is still pending (referred to as an “interlocutory” sale) or wait until the case is fully resolved. A creditor may seek an interlocutory sale if (a) the vessel may deteriorate or otherwise lose value pending resolution of the case; (b) the cost of holding the vessel during the action is excessive or disproportionate; or (c) there is some unreasonable delay in securing a release of the vessel.<sup>63</sup> If the case is fully resolved, then the creditor can simply file a motion for sale to satisfy the amount of its claim.

There is no specific requirement for a pre-appraisal of the vessel before sale, but local rules sometimes provide that an interested party may request a pre-appraisal. In the Western District of Washington, an interested party may file a motion with the court requesting an appraisal, in which case the court will appoint an appraiser (unless the parties agree in writing to a particular individual).<sup>64</sup> The appraiser must then give three days’ notice of the time and place at which the appraisal will take place to any attorneys who have appeared in the arrest action.<sup>65</sup>

Once the court grants an order for sale of the vessel, the creditor must then coordinate with the U.S. Marshals to conduct the sale.<sup>66</sup> The order of sale must be delivered to the Marshals, along with a Form USM 285 and a copy of the notice of sale.<sup>67</sup> Local courts typically require specific notice of the sale to be published in a newspaper with general circulation in the judicial district, although the contents and timing of such notice varies. In the Western District of Washington, for example, a notice of sale must be published daily for eight days in a row prior to the sale.<sup>68</sup>

The manner in which the sale is conducted varies depending on the judicial district, but must generally be done through a public auction.<sup>69</sup> Once the bidding is complete, the successful bidder must immediately pay a deposit of a portion of the bid price, and the balance will be due a short time later.<sup>70</sup>

The sale must then be confirmed by the court, which can be done through a motion and formal hearing or can occur automatically if no one objects to the sale within the time set by the court.<sup>71</sup>

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<sup>63</sup> Admiralty Rule E(9)(a); *see also Ferrous Fin. Servs. Co. v. O/S Arctic Producer*, 567 F. Supp. 400, 401 (W.D. Wash. 1983).

<sup>64</sup> *See* W.D. Wash. Supp. Adm. R. 140(a).

<sup>65</sup> *Id.*

<sup>66</sup> *See* Admiralty Rule E(9)(b). The U.S. Marshals in the Western District of Washington in fact require coordination before the order for sale is even entered; the creditor must get approval of the proposed order for sale from the U.S. Marshals before presenting it to the court. *See* Western District Marshal Procedures, *supra* note 37.

<sup>67</sup> *See* Western District Marshal Procedures, *supra* note 37.

<sup>68</sup> W.D. Wash. Supp. Adm. R. 145(a).

<sup>69</sup> *See* U.S. DEP’T OF JUSTICE MANUAL FOR UNITED STATES MARSHALS, para. 11.4.P.2 (2003), *reprinted in* 2006 A.M.C. 2083–2112. Vessel sales are governed by 28 U.S.C. § 2001 (2006) as directed by 28 U.S.C. § 2004, which provides that sales are to be conducted by public sale, but also allows the court to order a private sale for cash if that is in the best interests of the estate.

<sup>70</sup> *See, e.g.*, W.D. Wash. Supp. Adm. R. 145(b). A successful bidder who fails to pay the full purchase price on time may also become liable for the marshal’s costs in holding the vessel. *See* W.D. Wash. Supp. Adm. R. 145(c).

<sup>71</sup> *See, e.g.*, W.D. Wash. Supp. Adm. R. 145(e).

The court will not ordinarily set a reserve price or minimum bid prior to sale, but may review the purchase price during a confirmation hearing. However,, the possible objections to confirmation of a sale are relatively few, as courts have opined that they should exercise “extreme caution” when considering challenges to confirmation.<sup>72</sup> Even a sale price well below fair market value will not be enough to deny confirmation, unless the sale price is grossly inadequate.<sup>73</sup>

Once the vessel has been sold and the sale has been confirmed, the proceeds will then be deposited into the court registry for subsequent distribution.<sup>74</sup> Creditors may then file motions with the court seeking payment of their claims provided they have been reduced to judgment. The order of distribution varies between Rule C arrests and Rule B attachments, however, as explained below.

### **A. Distribution of Proceeds From a Sale Following Rule C Arrest**

In a sale following a Rule C arrest, all existing claims against the vessel terminate and the vessel is sold free and clear of liens.<sup>75</sup> Any lien claims terminated by the sale then shift so that they automatically attach to the proceeds of the sale,<sup>76</sup> which allows them to be paid to creditors to the extent there are adequate funds available.

The first step to distribution of sale proceeds is to determine the order of priority in which claims must be paid. While there is some debate as to the exact order,<sup>77</sup> claims are generally ranked as follows:

1. Administrative expenses (often referred to as *in custodia legis* expenses), including costs incurred while the vessel was in the court's custody, such as wharfage and caretaking expenses to maintain the vessel;<sup>78</sup>
2. Liens for seamen's wages;<sup>79</sup>
3. Liens for salvage and general average;<sup>80</sup>
4. Liens arising out of maritime torts, such as claims arising out of personal injury, death or collisions;<sup>81</sup>
5. Liens arising out of maritime contract claims;<sup>82</sup>

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<sup>72</sup> MOORE'S FEDERAL PRACTICE, *supra* note 42, § 706.2[7][c][i] (citing *Wong Shing v. M/V Gardina Trader*, 564 F.2d 1183, 1188 (5th Cir. 1977)).

<sup>73</sup> See *Wong Shing*, 564 F.2d at 118 (“The grounds recognized as justifying setting aside a sale include fraud, collusion, and gross inadequacy of price.”) (citing 2 C.J.S. *Admiralty* § 247 (1972)).

<sup>74</sup> Admiralty Rule E(9)(b).

<sup>75</sup> 46 U.S.C. § 31326(a).

<sup>76</sup> 46 U.S.C. § 31326(b).

<sup>77</sup> SCHOENBAUM, *supra* note 4, §9-6.

<sup>78</sup> See *New York Dock Co. v. S.S. Poznan*, 274 U.S. 117, 122-23, 47 S. Ct. 482 (1927). This rule essentially ensures that all creditors will have to share in these expenses since they benefitted from the seizure and maintenance of the vessel. See *Transamerica Commercial Finance Corp. v. F/V Smilelee*, 944 F.2d 186, 189 (4th Cir. 1991).

<sup>79</sup> See 46 U.S.C. § 31301(5)(D); *Kesselring v. F/T Arctic Hero*, 30 F.3d 1123, 1126 (9th Cir. 1994).

<sup>80</sup> See 46 U.S.C. §31301(5)(E)-(F).

<sup>81</sup> 46 U.S.C. § 31301(5)(B); *California v. S.S. Bournemouth*, 307 F. Supp. 922, 926-27 (C.D. Cal 1969). Some courts have given the same level of priority to claims arising out of cargo damage or loss. See *Oriente Commercial, Inc. v. M/V Floridian*, 529 F.2d 221, 222-23 (4th Cir. 1975).

6. Liens arising under state law that are maritime in nature;<sup>83</sup>
7. Liens for government taxes;<sup>84</sup>
8. Liens arising under non-maritime law;<sup>85</sup> and
9. Claims held by other general creditors.<sup>86</sup>

Within each of these categories, the generally rule of priority is that later liens will take priority over earlier liens.<sup>87</sup> Thus, a lien for seamen's wages that accrued two weeks before the arrest took place would take priority over a lien for seaman's wages that accrued a year earlier.

If the vessel is subject to a preferred ship mortgage,<sup>88</sup> however, the order of priority changes. In general, the preferred ship mortgage will take priority over all claims other than those for the custodial expenses of arrest and statutorily defined "preferred maritime liens."<sup>89</sup> Those preferred maritime liens are maritime liens against the vessel:

- (A) arising before a preferred mortgage was filed under [the preferred ship mortgage laws];
- (B) for damage arising out of maritime tort;
- (C) for wages of a stevedore when employed directly by a person listed in section 313141 of this title [meaning the owner or an agent with sufficient authority to retain the stevedore's services];
- (D) for wages of the crew of the vessel;
- (E) for general average; or
- (F) for salvage, including contract salvage.<sup>90</sup>

When a preferred ship mortgage is involved, the priority of distribution thus shifts to the following order: (1) *in custodia legis* expenses; (2) preferred maritime liens; (3) preferred ship mortgages; (4) other maritime liens; (5) state law maritime liens; (6) government tax liens; (7) non-maritime liens; and (8) unsecured general creditors' claims.<sup>91</sup> Within each category, the rule remains the same, though: liens arising later in time take priority over liens that arose earlier.<sup>92</sup>

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<sup>82</sup> See *The St. Paul*, 277 F. 99 (S.D.N.Y. 1921).

<sup>83</sup> See *The Diane*, 45 F. Supp. 510, 512 (S.D. Fla. 1942).

<sup>84</sup> See BENEDICT ON ADMIRALTY, *supra* note 9, § 51.

<sup>85</sup> See *Vevevica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 884-86 (5th Cir. 1974).

<sup>86</sup> SCHOENBAUM, *supra* note 4, § 9-6.

<sup>87</sup> *United States v. The Audrey II*, 185 F. Supp. 777, 780 (N.D. Cal. 1960) ("[T]he general rule is that maritime liens of the same rank take priority in an order inverse to that in which they accrued, the latter taking precedence over the earlier.").

<sup>88</sup> A preferred ship mortgage is defined as a mortgage that includes the whole vessel and is filed in compliance with 46 U.S.C. § 31321. Such mortgages were given priority under the Ship Mortgage Act of 1989, 46 U.S.C. §§ 31301 - 31343 (1988), which was later updated by the Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§ 31301 - 31343 (2006).

<sup>89</sup> See 46 U.S.C. § 31326(b)(1). Where a mortgage is asserted against a non-U.S.-flagged vessel, however, any preferred mortgage lien is subordinate to liens for necessities that were provided in the United States. 46 U.S.C. § 31326(b)(2).

<sup>90</sup> 46 U.S.C. §31301(5).

<sup>91</sup> See SCHOENBAUM, *supra* note 4, § 9-6.

<sup>92</sup> *The Audrey II*, 185 F. Supp. at 780.

As previously mentioned, however, the precise order may vary depending on the specific facts giving rise to each particular lien or claim.

## **B. Distribution of Proceeds From a Sale Following Rule B Attachment**

Unlike a Rule C arrest action, the proceeds from a sale following a Rule B attachment action may not be distributed among multiple creditors. This is so because a Rule B attachment only deals with the attaching creditor's claim against the vessel owner, and does not affect any liens on the vessel.<sup>93</sup> Those liens remain in effect against the vessel and can be enforced against it at a later time despite there being a new owner.<sup>94</sup> Given the fact that these liens remain, there is obviously no need to distribute proceeds from the sale to those lienholders.

The proceeds from the vessel's sale will thus typically be distributed to two parties. First, the attaching creditor is entitled to a distribution of the proceeds up to the amount necessary to satisfy the judgment on its claim against the vessel owner.<sup>95</sup> As in a Rule C arrest action, the attaching creditor can accomplish this by filing a motion for distribution with the court. Second, if there are excess proceeds after satisfaction of the attaching creditor's judgment, those proceeds are then distributed back to the now former vessel owner.<sup>96</sup>

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<sup>93</sup> MOORE'S FEDERAL PRACTICE, *supra* note 42, § 706.02[8].

<sup>94</sup> See *Belcher Co. v. M/V Martha Mariner*, 724 F.2d 1161, 1165 (5th Cir. 1984).

<sup>95</sup> MOORE'S FEDERAL PRACTICE, *supra* note 42, § 706.02[8].

<sup>96</sup> *Id.*

Question and Answer between Seno & Partners and GSB

***[Question 01 from Seno & Partners]***

Please assume that we represent the registered mortgagee on the vessel, and the vessel is arrested by the application of the maritime lien holder (the “**Arresting Party-Maritime Lien Holder**”).

We note from your explanation (see; III A) that if the vessel is not released within 14 days after its arrest, the creditor “must promptly—or within the time that the court allows—give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district”.

- (1) In such case, may the registered mortgagee on the vessel (the “**Mortgagee**”) receive from the Arresting Party-Maritime Lien Holder or other party a notice by mail, personal delivery or otherwise to the effect that the Vessel has been arrested? Only from the newspaper designated by court order and having general circulation in the district?
- (2) Please let us know as to what kind of procedures for the Mortgagee to take in order to obtain the information as to the procedures of arrest and/or sale of the vessel is currently taking.
- (3) Unless the Mortgagee takes the procedures for intervention or otherwise, will the Mortgagee receive no notice from the court or otherwise until the distribution of sales proceeds of the vessel?

***[Answer by GSB on Question 01 from Seno & Partners]***

- (1) The Mortgagee and any lienholders of record shall receive actual notice through personal service or certified mail.
- (2) As explained above, the Mortgagee will receive notice of the arrest. If the Mortgagee wishes to receive notice of what is occurring in the arrest proceedings, the Mortgagee can file a claim of interest, or can have a local attorney monitor the Court’s docket, although simply monitoring the docket will not protect the Mortgagee’s lien. The U.S. District Courts all maintain their dockets online, so anyone with a subscription can view the docket at any time for a small fee.
- (3) The Mortgagee will receive notice as described above.

***[Question 02 from Seno & Partners]***

- (1) Please let us know of some examples for non-preferred maritime lien on the vessel? Such non-preferred maritime lien holder may arrest the vessel under the Rule C arrest?
- (2) A person who provides the “necessaries” on the vessel may have the non-preferred maritime lien on the vessel? or preferred maritime lien on the vessel?

***[Answer by GSB on Question 02 from Seno & Partners]***

- (1) Examples of non-preferred maritime liens include liens for the master's wages (the master is not considered within the definition of "crew"), *Payne v. S.S. Tropic Breeze*, 423 F.2d 236, 244 (1st Cir. 1970), liens for repairs, and liens for bunker fuel. These lien holders may arrest the vessel, as they hold maritime liens, regardless of whether those liens have statutory preferred status.
- (2) A person who provides "necessaries" to the vessel does not have a statutory "preferred maritime lien."

***[Question 03 from Seno & Partners]***

How long does it take from the order of sale of the vessel by the court until the date on which the sales price of the vessel is to be distributed to the creditors?

***[Answer by GSB on Question 03 from Seno & Partners]***

The answer to this question depends on a number of different factors. First, if the vessel is sold as part of an interlocutory sale, meaning a sale before the case has fully resolved, then the proceeds will be deposited into the court registry and will not be distributed until the case is complete, which could be a year or more away. Second, if the vessel is sold after the case is complete and the creditor has obtained a judgment, then the proceeds can be distributed relatively quickly. In this second context, the creditor's claim must be reduced to a judgment, and the priorities of all other claims must have been determined. Assuming that has all taken place, then the creditor simply needs to file a motion with the court asking for a distribution of the funds out of the court registry.

[end]