ADIMIRALTY AND BANKRUPTCY REVISITED: EFFECTS OF THE BANKRUPTCY REFORM ACT OF 1978

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Maritime liens have never fit very well with bankruptcy law. They are creatures of admiralty law whose sole distinguishing feature, according to Gilmore and Black, is that they have virtually nothing in common with ordinary liens. As these authors have said, "A lien is a lien is a lien, but a maritime lien is not."¹ This also appears to be the position of the Ninth Circuit, which recently held that maritime liens for seamen's wages could be enforced independently of reorganization proceedings because they were not liens within the meaning of the Bankruptcy Code.²

But if maritime liens have little in common with security interests, they have still less in common with simple unsecured claims. A maritime lienor has a right to proceed against the asset subject to the lien, typically a vessel, through the summary procedure of maritime arrest, followed by an in rem action against the vessel itself. If the lienor prevails, the vessel is sold to satisfy the lien. Maritime liens can also be asserted against freights and the receipts for carrying cargo, which are usually treated as part of the vessel.³ Almost all litigation over maritime

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² United States v. ZP CHANDON, 889 F.2d 233, 237-38 (9th Cir. 1989).
³ Todd Shipyards Corp. v. THE CITY OF ATHENS, 83 F. Supp. 67, 75 (D. Md.
liens concerns the functional equivalent of security interests in vessels in maritime commerce.

Maritime liens are ranked according to a unique, not to say peculiar, system of priorities. They are first ranked by class: liens for seamen’s wages, for instance, take priority over other contract liens. They are then ranked in reverse temporal order: the latest lien within each class receives the highest priority. Maritime liens as a whole take priority over all other security interests. They are also unique among statutory liens in reaching tort claims, such as those for collisions and unseaworthiness. These peculiar characteristics of maritime liens make the most difference, of course, when the debtor is at or near insolvency. Apart from insolvency, the maritime lienor can proceed against the debtor personally without the need to seek recourse against the specific asset bearing the lien.

The special system of enforcement and priority of maritime liens can be reconciled with bankruptcy law only on the assumption that maritime liens are security interests entitled to the special treatment and subject to the same conditions as other security interests under the Bankruptcy Code. Before the Bankruptcy Code was extensively revised by the Bankruptcy Act of 1978, judicial decisions tried to reconcile admiralty and bankruptcy law by allowing maritime lienors to pursue a separate admiralty action if they arrested the vessel before a petition for bankruptcy was filed. This method of enforcing maritime liens concurrently with bankruptcy led to a wasteful race to the courthouse that was costly to both creditors and the bankrupt’s estate. In several provisions, and especially through the automatic stay, the Bankruptcy Act of 1978 attempted to put an end to such jurisdictional disputes based on control of the debtor’s assets. Apart from some persistent doubts about the constitutional power of bankruptcy judges appointed under article I, these provisions should have put to rest any question about the exclusive jurisdiction of the bankruptcy court over the debtor’s assets. Together with a preliminary discussion of the status of

1949). Freights must be distinguished from cargo, which is usually owned separately from the vessel. Maritime liens can also apply to cargo, typically for freight charges or general average expenses claimed by the owner or operator of the vessel. 4,885 Bags of Linseed, 66 U.S. (1 Black) 108, 112-13 (1861); Atlantic Richfield Co. v. Good Hope Refineries, 604 F.2d 865, 872 (5th Cir. 1979); Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A., Panama, 437 F.2d 301, 303-04 (9th Cir.), cert. denied, 402 U.S. 996 (1971).
maritime liens in bankruptcy, this jurisdictional question forms the subject of Part I of this Article.

The jurisdictional dispute between bankruptcy and admiralty courts should now be replaced by litigation in the bankruptcy court over when relief should be granted from the automatic stay. Part II of this Article argues that, notwithstanding its jurisdictional power, the bankruptcy court should normally grant relief from the automatic stay and allow separate admiralty proceedings to go forward. In the typical case, in which the debtor is a shipping firm that has fallen victim to one of the periodic recessions in the shipping industry, there is little chance for a successful reorganization that would justify continuation of the automatic stay. A liquidation of the debtor's assets would not be obstructed by a sale of the debtor's vessels in separate admiralty actions; usually, the debtor would not have equity in the vessel above that necessary to satisfy outstanding maritime liens, and even if it did, that surplus could be remitted to the bankruptcy court for distribution to unsecured creditors and owners. If the debtor is a firm engaged in international shipping, there is all the more reason to allow separate admiralty proceedings to go forward because the debtor's vessels may be seized in foreign ports effectively beyond the reach of the automatic stay.

I. JURISDICTION OF BANKRUPTCY COURTS OVER MARITIME LIENS

In assimilating admiralty claims with all other claims against the debtor, the Bankruptcy Act of 1978 followed the recent trend toward unification of admiralty law with other civil actions in federal court. Unless the special characteristics of the shipping industry or the desire for international uniformity require otherwise, the procedures in admiralty should follow those on land. This trend, pervasive as it may be, has by no means eliminated the distinctive, and often arcane, aspects of admiralty practice. Still less has it affected the distinctive substantive doctrines in admiralty. The system of maritime liens and their enforcement is not the only competitor to bankruptcy law in admiralty. An action to limit liability seeks relief that closely resembles a discharge in bankruptcy: a limitation of the vessel owner's liability to the value of its vessel. So, too, an action to enforce a maritime lien, by arresting and then proceeding in rem against the vessel, can result in a sale of the vessel, which in turn extinguishes all maritime liens against the vessel.
These actions function partly as miniature bankruptcy proceedings devoted solely to maritime claims, a function that was understandable when these actions took their present form in the late nineteenth century. With the development of a general law of bankruptcy, however, this function has become both less necessary and more troublesome.

Without explicitly addressing the status of maritime liens in bankruptcy, the Bankruptcy Act of 1978 simply treated them like all other claims against the bankrupt debtor. It follows, according to the general principle that bankruptcy law preserves the relative priority of entitlements outside of bankruptcy, that maritime liens should be treated as security interests.\(^4\) Thus, the Act defines “claim,” “lien,” “security interest” and “statutory lien” to encompass most maritime liens on property owned by the debtor. A “claim” is any right to payment from the debtor.\(^5\) A “lien” is any “charge against or interest in property to secure payment of a debt or performance of an obligation.”\(^6\) A “security interest” is any lien created by agreement.\(^7\) And a “statutory lien” is any lien created by statute, but not a security interest created by agreement or a judicial lien created by a legal proceeding.\(^8\) These interlocking definitions are likely to cause problems in two cases: first, when the debtor and the owner of the property subject to the maritime lien are different; and second, when the maritime lien is created neither by agreement nor by statute.

The first situation occurs most commonly when the owner of a vessel charters it and the charterer then incurs obligations that give rise to maritime liens against the vessel. These obligations can arise by contract (for instance, for supplies to the vessel) or in tort (for instance, by collisions). Maritime liens that arise by contract resemble mechanics’ liens for improvements and repairs to real property.\(^9\) Liens for tort claims, however, have few analogues outside of admiralty.\(^10\) When the charterer

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\(^6\) Id. § 101(33).
\(^7\) Id. § 101(45).
\(^8\) Id. § 101(47); see id. § 101(32) (defining “judicial lien”).
is the debtor, the maritime lienor has a claim against the debtor and a lien against the vessel. In the simplest case, in which the charter party has expired before commencement of the bankruptcy proceedings, the charterer has no interest in the vessel and the vessel itself is outside the bankrupt debtor's estate. The maritime lienor therefore remains free to commence an in rem action against it without regard to the automatic stay of actions against the debtor or its property. The maritime lienor can proceed against the vessel just as if it were a guarantee of the debtor's obligations by a third party. Of course, if the maritime lienor satisfies his claim by an action against the vessel, his claim against the debtor is to that extent reduced. In a more complex case, in which the charter party expires in the course of the bankruptcy proceedings, the debtor has a leasehold interest in the vessel; the leasehold interest remains within the estate and so subjects actions against the vessel to the automatic stay so long as the vessel is necessary to an effective reorganization.

When the bankrupt debtor owns the vessel, but the obligation was incurred by the charterer, bankruptcy proceedings also trigger the automatic stay. Since the vessel belongs to the debtor, it is now part of the estate and any action against the vessel is subject to the automatic stay. Moreover, the maritime lienor has a claim against the debtor, because the lien supports a claim for payment out of the assets of the debtor, even if it is formally denominated as a claim against the vessel itself. It is in all respects identical to a nonrecourse mortgage on property of the debtor. This functional definition of "claim" is fully consistent with the very broad definition of this term adopted by the Bankruptcy Code.

13. Id. § 362(a). In particular, the action against a third party's property is not "any act to collect, assess, or recover a claim against the debtor," under paragraph (a)(6) because it is a claim, in form, against property outside the estate, and in effect, against the third party. In any event, paragraph (a)(6) was intended to prevent collection efforts against consumer debtors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6298; S. Rep. No. 989, 95th Cong., 2d Sess. 50-51, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5836-37.
The second set of problems concerns the gap between security interest and statutory lien as defined in the Bankruptcy Code. "Security interest" is defined as a "lien created by an agreement" and "statutory lien" as a "lien arising solely by force of a statute on specified circumstances or conditions." Many maritime liens do not fit comfortably within either of these definitions because, like much of admiralty law, they are the product of judicial decisions. They are created neither by private agreement nor by statute. The clearest examples of such liens are those supporting claims in tort or for restitution: such as those arising from collisions, for personal injury based on unseaworthiness or maritime tort, and for salvage in the absence of a contract. The list of exempted maritime liens is even longer if we include maritime contracts that do not themselves create a security interest. Most do not, since maritime liens cannot be created by express contractual provision, with the single exception of preferred ship mortgages. As such, no maritime lien could be classified as a "security interest" within the special definition of the Bankruptcy Code, and only preferred ship mortgages and liens for supplies and services to the vessel, which are explicitly authorized by statute, would be treated as statutory liens.

Even accepting this interpretation of the statute, it would not follow that maritime lienors would be treated as general creditors and the priority of their claims reduced accordingly. A claim receives secured status, under the literal terms of the statute, whether or not it meets the statutory definition of a "security interest" or a "statutory lien." The lien need only: first, meet the definition of a "lien," quoted earlier, which essentially extends to a security interest as commonly understood; and second, avoid any of the numerous exceptions specified in the statute.

18. Id. § 101(47).
20. 11 U.S.C. § 506(a) (1988). It provides in relevant part:
An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . .
The exceptions are created mainly by way of the trustee's power of avoidance under 11 U.S.C. §§ 544-545 (1988).
to treat only preferred ship mortgages and liens for supplies and services to a vessel as secured claims and all other maritime liens as unsecured claims. Some of these other maritime liens are granted explicit statutory priority over preferred ship mortgages and liens for supplies and services.\textsuperscript{21} For all practical purposes, maritime liens can be treated as statutory liens as these are technically defined in the Bankruptcy Code, just as liens created by judicial decisions in other fields have been assimilated to statutory liens in bankruptcy.\textsuperscript{22} Statutory liens, in turn, are treated like security interests unless they become effective upon bankruptcy or arise from the rental of real property, neither of which applies to maritime liens.\textsuperscript{23}

In a recent decision, \textit{United States v. ZP Chandon},\textsuperscript{24} the Ninth Circuit rejected both of these conclusions, holding that maritime liens for the crew's wages for work performed after the petition for bankruptcy was filed were not subject to the automatic stay and could be enforced independently of a reorganization. This holding appears to give maritime lienors the best of both worlds: on the one hand, their liens do not fall within the definition of "liens" in the Bankruptcy Act, and so escape the effect of the automatic stay; but on the other hand, they retain the status of secured creditors who can enforce their claims against the vessel through the special procedures in admiralty.\textsuperscript{25} The court's decision may be limited to the crew's claims for wages, since the court relies heavily on the high priority accorded to these liens in admiralty law;\textsuperscript{26} or more broadly, to maritime liens that are valid without filing or recordation, unlike preferred ship mortgages.\textsuperscript{27} In either case, the court relied upon the distinction between admiralty and the other heads of federal jurisdiction in article III of the Constitution,\textsuperscript{28} a dubious distinction after the merger of law, equity and admiralty in the Federal Rules of Civil Procedure.\textsuperscript{29} The separate history of admiralty

\textsuperscript{24} 889 F.2d 233 (9th Cir. 1989).
\textsuperscript{25} Id. at 237-38.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 238.
\textsuperscript{28} U.S. Const. art. III, § 2; \textit{ZP Chandon}, 889 F.2d at 236-37.
\textsuperscript{29} Fed. R. Civ. P. 2. The standard source of the arguments for unifying admiralty
jurisdiction no longer provides any reason for the separate treatment of admiralty claims, especially in bankruptcy. The Bankruptcy Reform Act of 1978, as explained in more detail later,\textsuperscript{30} broadly defined the scope of bankruptcy proceedings to include all claims against the debtor, of whatever nature.

Instead of establishing a general principle about the relationship of admiralty and bankruptcy, \textit{ZP Chandon} is better read as a case concerned with the priority among different maritime liens. Under a specific statutory exception to the automatic stay,\textsuperscript{31} the United States was foreclosing on a preferred ship mortgage on several vessels of the debtor in separate in rem proceedings. The maritime liens for back wages normally would have had priority over the preferred ship mortgage,\textsuperscript{32} but they were subject to the automatic stay while the preferred ship mortgage was not. If the preferred ship mortgage had been separately foreclosed, it would have exhausted the value of the vessels, leaving the crew with unsecured claims against the debtor.\textsuperscript{33} The Ninth Circuit’s decision in \textit{ZP Chandon} can be partly explained on the ground that the members of the crew were entitled to the priority that they would have received outside of bankruptcy. On this interpretation, the decision really concerns the exception to the automatic stay for preferred ship mortgages held by the United States, rather than the general treatment of maritime liens in bankruptcy. In particular, once that exception has been invoked, it should apply to the enforcement of any maritime liens on the same vessel.\textsuperscript{34} Even so, this rationale still leaves unexplained the accrual of the lien for wages after the petition for bankruptcy was filed. A lien to secure a post-petition claim can be created only under very restrictive conditions after notice and hearing by the bankruptcy court.\textsuperscript{35} Otherwise, post-petition claims can be given priority as administrative expenses only over the claims of general

\begin{itemize}
\item[30.] See infra text accompanying notes 55-57.
\item[33.] Ship mortgages usually exhaust whatever remains of the value of the vessel. G. GILMORE & C. BLACK, supra note 1, at 736-37. In \textit{ZP Chandon}, the ship mortgage was for $25 million, while the vessels were sold for only $3.5 million. Brief for the United States at 3-4, United States v. \textit{ZP CHANDON}, 889 F.2d 233 (9th Cir. 1989) (No. 88-3980).
\item[34.] See infra text accompanying notes 126-27.
\end{itemize}
creditors.\textsuperscript{36}

Maritime attachment provides an illuminating contrast to maritime liens. It has none of the characteristics of a statutory lien or a security interest, as those terms are defined in the Bankruptcy Code. Maritime attachment does not require an underlying maritime lien and it does not give rise to one. Although maritime attachment follows summary procedures which resemble those for arrest,\textsuperscript{37} it only allows the attached property to be sold subject to security interests with greater priority.\textsuperscript{38} In this sense, and probably as the term is technically defined in the Bankruptcy Code, it is a judicial lien that is voidable as a preference if created within ninety days before a petition for bankruptcy is filed.\textsuperscript{39} Maritime attachment is also subject to the automatic stay like any other action to enforce a claim against the debtor.\textsuperscript{40} And if an attachment nevertheless should be made after filing of the bankruptcy petition, it would be voidable by the trustee as a hypothetical judgment creditor as of the date of filing.\textsuperscript{41} It is, in short, treated just like any other judicial lien under the Bankruptcy Code. By contrast, a maritime lien usually is not voidable on either of these grounds. It is not voidable as a preference because it is not given on account of an antecedent debt; instead, the underlying obligation arises simultaneously with the maritime lien, with the possible exception only of preferred ship mortgages.\textsuperscript{42} The status of the trustee as a hypothetical judgment creditor does not affect any maritime liens because they outrank all liens from other sources of law, except those for expenses while the vessel is \textit{in custodia legis} in an admiralty action.\textsuperscript{43}

The traditional source of difficulty in reconciling the treatment of maritime liens with bankruptcy has been jurisdictional. Admiralty was regarded as a separate head of federal jurisdiction that allowed, and in some circumstances required, adm-

\textsuperscript{36} \textit{Id.} \textsuperscript{503}.
\textsuperscript{38} G. Gilmore \& C. Black, \textit{supra} note 1, at 801-02.
\textsuperscript{40} 11 U.S.C. § 362(a).
\textsuperscript{41} \textit{Id.} \textsuperscript{§ 544(a)}.
\textsuperscript{42} The obligation underlying a preferred ship mortgage might arise earlier, but these transactions are usually structured so that the sale is made and the mortgage is perfected at the same time. Birdwell, \textit{Admiralty Contract Jurisdiction and Contract Liens Under American Law}, 11 Whittier L. Rev. 171, 198-99, 206 (1989).
\textsuperscript{43} G. Gilmore \& C. Black, \textit{supra} note 1, at 734.
rality claims to be adjudicated outside of bankruptcy. The Bankruptcy Act of 1978 attempted to resolve this problem in the general definitions of “claim” and “lien,” which could not be broader, and more explicitly in the scope of the automatic stay and the grant of jurisdiction to the bankruptcy courts. The automatic stay extends to any effort to collect on any obligation of the debtor. A special exception for purchase-money security interests in equipment aboard vessels confirms the application of the automatic stay to maritime liens, as does the subsequently added exception for preferred ship mortgages financed by the United States.

The jurisdictional provisions of the Act are even clearer. These provisions were extensively revised after the Supreme Court held, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., that the original provisions granted too much power to bankruptcy judges appointed under article I of the Constitution. Specifically, the Court held that Congress could not confer jurisdiction upon bankruptcy judges to resolve claims under state contract law asserted by the bankrupt debtor against third parties who did not assert any claims against the bankrupt estate. Whether bankruptcy judges would have the power to adjudicate admiralty claims by the debtor against third parties presents a different question, since admiralty law is almost entirely federal. It is, in any event, a question that need not be answered to ascertain the status of maritime liens in bankruptcy, which arises almost entirely in what are now known as “core proceedings” in bankruptcy. Maritime liens, like other security interests, are asserted far more frequently by creditors seeking to recover on claims against the bankrupt estate than by the trustee in bankruptcy seeking to recover upon claims against third parties, the situation in Marathon.

In 1984, in response to the Marathon decision, Congress revised the jurisdictional provisions of the Bankruptcy Code. It granted bankruptcy jurisdiction to the federal district courts and

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46. Id. § 1110(a).
47. Id. § 362(b)(12)-(13). These provisions were added by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 5001, 100 Stat. 1874, 1911-12.
49. Id. at 76-87 (Brennan, J.); id. at 90-91 (Rehnquist, J., concurring in the judgment).
gave the district judges, appointed under article III, ultimate control over bankruptcy proceedings.\(^5\) Congress did not alter the status of bankruptcy judges under article I, but it made them only a unit of the district court\(^1\) and allowed them to exercise jurisdiction only upon reference from a district judge.\(^2\) Although all the district courts now have adopted standing orders for reference of bankruptcy proceedings,\(^3\) bankruptcy judges can make final decisions subject to limited appellate review only in “core proceedings” or in “non-core proceedings” in which the parties have consented to such a reference.\(^4\)

Core proceedings include most litigation over the status and effect of a maritime lien. In addition to proceedings generally concerned with administration, allowance or disallowance of claims, and liquidation, “core proceedings” include “determinations of the validity, extent, or priority of liens,” and “motions to terminate, annul, or modify the automatic stay.”\(^5\) These provisions literally encompass almost all of the litigation over the validity of maritime liens and relief from the automatic stay to allow independent admiralty actions to go forward. Some maritime claims by creditors would fall outside the core proceedings, but only in some respects, in particular, insofar as they are contingent or unliquidated claims for personal injury or wrongful death.\(^6\) But even in non-core proceedings, the district judge may refer the proceedings to the bankruptcy judge for recommended findings of fact and conclusions of law or, if the parties consent, a final decision.\(^7\)

Both core and non-core proceedings may be withdrawn from a bankruptcy judge upon a showing of good cause. In a provision particularly relevant to maritime liens, withdrawal is mandatory “on timely motion of a party, . . . if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating orga-

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\(^{51}\) Id. § 151.

\(^{52}\) Id. § 157.


\(^{55}\) Id. § 157(b)(2)(K)-(G). The more general provisions are to be found in 28 U.S.C. § 157(b)(2)(A), (B), (O).


\(^{57}\) Id. § 157(c).
nizations or activities affecting interstate commerce." The question of the status and effect of maritime liens appears to fall under this clause: first, because it requires reconciliation of the Bankruptcy Code and the federal law governing maritime liens; and second, because the latter constitutes "laws of the United States regulating . . . activities affecting interstate commerce." The legislative history recommends a narrow interpretation of this provision and it cites only federal statutes regulating interstate commerce. Nevertheless, as in the earlier analysis of statutory liens, "laws of the United States" could be interpreted to include judge-made admiralty law. The purpose of mandatory withdrawal appears to be to have federal district judges, instead of bankruptcy judges, reconcile provisions of the Bankruptcy Code with other bodies of federal law. This is at least as necessary in admiralty law as it is in purely statutory law.

By the same token, however, once the status and effect of maritime liens in bankruptcy has been settled, there is little reason to follow the cumbersome procedure for mandatory withdrawal. Indeed, some cases have limited mandatory withdrawal to cases in which the interpretation of other federal laws is necessary. If, as I have argued, maritime liens should simply be treated as secured claims, then they should not generally require mandatory withdrawal. Just like other secured claims, they require: first, consideration of external law to determine the existence and priority of the security; and second, consideration of bankruptcy law to determine whether the security must be recognized in bankruptcy. It does not require consideration of both sources of law together, as the provision for mandatory withdrawal requires. Indeed, any other conclusion would defeat the provision that includes in core proceedings "determinations of the validity, extent, or priority of liens." Mandatory withdrawal also requires a timely motion by a party, made at the first reasonable opportunity after notice that the conditions for

58. Id. § 157(d).
60. See supra text accompanying note 22.
61. See Collier on Bankruptcy, supra note 23, ¶ 301, at 3-61 to -68.
63. King, supra note 53, at 697-98.
mandatory withdrawal have been met.  

65.  This requirement, together with the reluctance of district judges to assume jurisdiction over proceedings that they have already referred to a bankruptcy judge, appears to have greatly diminished the practical effect of the provision for mandatory withdrawal.

Despite the plenary authority granted to district judges, doubts have persisted over the constitutionality of the 1984 amendments, and in particular, over the division of power between district judges and bankruptcy judges.  

66.  For instance, the Supreme Court recently held that a trustee's action to recover property that was the subject of a fraudulent conveyance must be tried to a jury.  It also raised, but did not decide, the question of whether such an action might fall outside the constitutional power of bankruptcy judges, despite its status as a core proceeding.  

67.  Whatever the merit of these doubts, they do not sanction independent admiralty actions to enforce maritime liens.  For instance, there is no right to jury trial in litigation over maritime liens.  

68.  More generally, uncontested provisions of the Bankruptcy Code explicitly grant exclusive jurisdiction to the district court in which the bankruptcy case is filed.  Foremost among these is the automatic stay, which enjoins all proceedings against the debtor, subject only to narrow exceptions, until relief is granted from its operation.  

69.  The exception to the automatic stay for preferred ship mortgages financed by the United States confirms the general application of the provision to maritime liens.  

70.  In addition to the automatic stay, the district court is vested with "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."  

71.  The debtor's estate, in turn, is broadly defined to include "all legal or equitable interests of the debtor in property as of the commencement

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65.  1 Coller on Bankruptcy, supra note 23, ¶ 3.01, at 3-68 n.119c.


68.  There is no right to jury trial in admiralty actions unless they are brought as common-law actions under the savings clause, but actions in rem to enforce maritime liens can only be brought as admiralty actions.  Fed. R. Civ. P. 9(h), 38(e); The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-31 (1867); The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 571-72 (1867).


70.  Id. § 362(B)(12)-(13).

of the case," subject only to limited exceptions.\textsuperscript{72} Although \textit{Marathon} did lead to the repeal of a provision explicitly granting to the bankruptcy courts "the powers of a court of equity, law, and admiralty,"\textsuperscript{73} the district courts in which bankruptcy proceedings take place already had the same power and are now authorized to use it to the exclusion of other proceedings against the debtor.\textsuperscript{74}

Nevertheless, some courts have continued to uphold admiralty jurisdiction over separate in rem proceedings under the doctrine of \textit{custodia legis} that applied before the Bankruptcy Act of 1978. Under this doctrine, an admiralty court, which acquired jurisdiction by seizure of the vessel before a bankruptcy petition was filed, could continue to exercise jurisdiction to the exclusion of the bankruptcy court during the bankruptcy proceedings. Even these cases, however, limited the doctrine to liquidations and upheld the exclusive jurisdiction of the bankruptcy court over reorganizations.\textsuperscript{75} This division of jurisdiction may have been permissible under prior law because a bankruptcy court, at least in liquidation proceedings, did not have exclusive jurisdiction over the debtor's property.\textsuperscript{76} Even so, it encouraged a costly race to seize the debtor's assets on the eve of bankruptcy, precisely what the collective bankruptcy proceeding is designed to avoid.\textsuperscript{77} The Bankruptcy Act of 1978 eliminated any basis for this doctrine, in liquidations as well as in reorganizations.\textsuperscript{78} Likewise, the 1984 amendments eliminated


\textsuperscript{74} For a detailed argument that reaches much the same conclusion, see Kennedy, \textit{Jurisdictional Problems Between Admiralty and Bankruptcy Courts}, 59 Tul. L. Rev. 1182 (1985).


\textsuperscript{76} 1 \textit{COLLIER ON BANKRUPTCY} ¶ 2.10, at 179-80 (J. Moore & L. King 14th ed. 1974); J. MacLachlan, \textit{HANDBOOK OF THE LAW OF BANKRUPTCY} 205-09 (1956); Landers, supra note 44, at 493-97.

\textsuperscript{77} T. Jackson, supra note 4, at 14-19.

any doubt about the constitutional basis for the exclusive jurisdiction exercised by courts in bankruptcy. It gave that jurisdiction to the federal district courts, the same courts that exercise exclusive jurisdiction in admiralty.

In any event, the recent decisions endorsing a limited version of the doctrine of custodia legis mix up two separate considerations: first, when the separate admiralty proceeding is commenced, which should be irrelevant; and second, whether the debtor is undergoing a reorganization, which might be relevant, not to jurisdiction, but to lifting the automatic stay. The jurisdictional debate over the power of district courts sitting in bankruptcy and the same district courts sitting in admiralty must give way to consideration of the practical concerns that justify relief from the automatic stay. Although these concerns lack the doctrinal dimensions of jurisdiction and constitutional law, they are no less significant. Separate actions in rem to enforce maritime liens can go forward only if relief is granted by the bankruptcy court or the federal district court of which it is a part. The circumstances in which relief should be granted form the subject of Part II of this Article.

II. RELIEF FROM THE AUTOMATIC STAY

All secured creditors are interested in seeking relief from the automatic stay. It allows them to enforce their claims against the debtor before their collateral deteriorates in value and before the interest on their claims, together with the claims themselves, exceeds the value of the collateral. Relief from the automatic stay also allows them to forego the expense and delay of bankruptcy proceedings and to rely instead on expeditious procedures for foreclosing upon, repossessing, or selling the property subject to the security interest. They also benefit from using familiar procedures instead of the esoteric complexities of bankruptcy law.

Maritime lienors are no different from other secured creditors in their interest in obtaining relief from the automatic stay, but they are different, or so I will argue, in the circumstances in which relief from the automatic stay should be granted. These differences derive from two sources: first, the cyclical nature of the shipping trade, which causes both the profitability of shipping companies and the value of their vessels to decline; and second, the international character of much of maritime commerce. Both of these general characteristics justify relief from the auto-
matic stay, at least when they apply in particular cases. The cyclical nature of the shipping trade diminishes the likelihood that a reorganization of an insolvent shipping company will be successful and, consequently, that any purpose would be served by staying actions to arrest its vessels. The international character of maritime commerce increases the difficulty of enforcing the automatic stay, at least where the debtor's vessels have been arrested in foreign ports. These considerations support a presumption in favor of relief from the automatic stay in all cases except those in which the debtor operates in the protected market for American shipping.

Other, formal characteristics of maritime liens also favor independent consideration of their validity and priority in a separate action. With the exception of preferred ship mortgages, maritime liens do not require perfection. Maritime lienors can record their liens with the Secretary of Transportation if the vessel is already subject to a preferred ship mortgage, but in doing so, they only obtain the right to notice in any action foreclosing on the mortgage. A maritime lien arises and is perfected simultaneously with the claim that it supports. It therefore cannot be set aside by the trustee in bankruptcy as a preference or as a security interest subordinate to a hypothetical judicial lien. Even preferred ship mortgages, which must be perfected by filing, are not likely to fall within these provisions because a loan sufficient for the purchase of a vessel is seldom made to a shipping firm near insolvency. In addition, district judges are more likely than bankruptcy judges to have encountered the idiosyncratic system of priorities among maritime liens, in which liens

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79. Bermuda Express, N.V. v. M/V Litza, 872 F.2d 554, 560 (3d Cir.), cert. denied, 110 S. Ct. 73 (1989). In this respect, they resemble security interests that are perfected without filing under section 9-302(1) of the Uniform Commercial Code.


83. Only extraordinary delay in recording the preferred ship mortgage is likely to make it voidable. In re Alberto, 823 F.2d 712, 723 (3d Cir. 1987) (almost one year between filing and transaction and six months before Coast Guard entered documents, but filing with Coast Guard may have been sufficient); see Birdwell, supra note 42, at 206-09.

A creditor may also obtain a security interest in the vessel under Article 9 of the Uniform Commercial Code. Although this security interest is subordinate to a later preferred ship mortgage, the creditor has a secured claim in bankruptcy. Id. at 195-97, 207-09.
are ranked first according to class and then in reverse temporal order, with the latest lien having the highest priority.

A. Grounds for Relief from the Automatic Stay

The Bankruptcy Code identifies two grounds for granting relief from the automatic stay. The first is "good cause," which is left undefined, but which includes "lack of adequate protection" of the secured creditor's interest. Adequate protection, in turn, is given an elaborate statutory gloss which essentially requires the secured creditor to receive the economic equivalent of its security interest. The second ground allows a secured creditor to obtain relief from the automatic stay if the debtor has no equity in the collateral and the property is not necessary to an effective reorganization. This last provision is crucial to maritime lienors who seek relief from the automatic stay. Most bankruptcies of shipping firms occur during recessions in the shipping industry. Such recessions decrease both the value of the vessel and the chance for a successful reorganization. For these reasons, and for others to be elaborated later, maritime lienors should benefit from a general inference in favor of relief from the automatic stay.

The procedures for granting relief from the automatic stay divide the burden of proof between the secured creditor and the trustee. The secured creditor has the burden of production and persuasion on the question whether the debtor has no equity in the collateral, and the trustee has the burden on the question whether the collateral is necessary to an effective reorganization. The automatic stay, as its name implies, takes effect upon the filing of the petition for bankruptcy or reorganization and, in the absence of a motion for relief, it remains in effect as long as the property is part of the estate or until the bankruptcy proceedings end. The secured creditor must seek relief from the stay by written motion. The secured creditor, as the moving party, naturally bears the initial burden of proving that the

85. Id. § 361.
86. Id. § 362(d)(2).
87. Id. § 362(g); see United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 375 (1988).
89. BANKR. R. 4001(a)(1), 9014. The stay expires if no hearing is held within 30 days of the motion or no decision is issued within 30 days of the hearing, unless the stay is extended by the bankruptcy judge, as it usually is if the motion for relief is denied. 11
debtor has no equity in the collateral. If it carries this burden, the trustee must then establish the need for the property in a reorganization.

In addition to receiving adequate protection for its security interest, or obtaining relief from the automatic stay, the secured creditor may have its claim reinstated by the trustee through suitable provisions in a reorganization plan. Unlike the other alternatives, reinstatement plays no significant role in the enforcement of maritime liens. Not only is a successful reorganization of a shipping firm unlikely, but only preferred ship mortgages are susceptible to reinstatement. Almost all other maritime liens support obligations that go into default immediately or soon after they have been incurred; there is nothing to reinstate that is not already past due. Preferred ship mortgages, however, are likely to exceed the decreased value of a vessel during a recession in the shipping industry. In any event, reinstatement simply cures the debtor’s default and eliminates the need for further proceedings in admiralty. If the bankruptcy court finds that a reorganization plan has made sufficient provision to cure the default, including compensation for damages from the creditor’s reasonable reliance, there is no need for further proceedings at all, unless another default occurs.

Abandonment of the vessel by the trustee leads to an even simpler conclusion. Abandonment effectively relinquishes jurisdiction of the bankruptcy court and releases the vessel from the effect of the automatic stay because it is no longer property of the estate. Maritime lienors are then free to arrest the vessel in separate admiralty proceedings. Abandonment may be accomplished by the trustee upon notice to all parties in the bankruptcy proceedings or by motion of a party and court order. In either case, the abandoned property must be “burdensome to the estate” or “of inconsequential value and benefit to the estate.” These requirements are likely to be met only for vessels that are not likely to provide any operating profit to the estate or in which the debtor has no remaining equity. These two factors,

91. Id. § 1124(2)(C).
93. 11 U.S.C. § 554(a), (b); BANKR. R. 6007(a).
94. 11 U.S.C. § 554(a), (b). The trustee may also abandon property to the debtor at the close of the case if the property has been scheduled but not administered. Id. § 554(c).
however, are interrelated. The market value of a vessel depends upon the current demand for shipping services, so that any vessel with a significant value is likely to generate an operating profit for the estate. Moreover, the value of the maritime liens upon a vessel depends upon the value of the underlying claims against its owner or operator, which may well be in dispute. The trustee therefore is likely to abandon a vessel only when its value is plainly less than those of the meritorious claims against it. In doubtful cases, the trustee has a strong incentive to retain the vessel in the hope that it will augment the estate for the benefit of unsecured creditors. Judicially ordered abandonment, on the other hand, raises the same issues as motions for relief from the automatic stay.

Most of the litigation over the choice between adequate protection and relief from the automatic stay occurs in reorganizations, but it can also occur in liquidations. If the debtor’s assets are worth more when they are kept together than when they are sold separately, the trustee should sell the debtor’s business as a going concern in order to maximize the return to creditors, even in a liquidation. Under these conditions, the difference between a reorganization and a liquidation is only over who owns the firm when it emerges from bankruptcy. In a reorganization, the owners are creditors and shareholders of the firm before bankruptcy. In a liquidation, it is the buyer at the liquidation sale.

In both situations, the secured creditor must be given either adequate protection or relief from the automatic stay in order to prevent the owners of the firm from eroding the value of the security interest through delaying tactics. As the bankruptcy proceedings continue, the secured creditor loses the use of the money which it would otherwise have obtained from foreclosing on the security. Its collateral is also likely to decrease in value, if only through ordinary depreciation. As compensation, and to eliminate the debtor’s benefits from delay, the secured creditor is entitled to adequate protection, in theory, equivalent in value to its security interest on the date that the creditor could have foreclosed against the collateral, augmented by interest to compensate for the delay caused by bankruptcy proceedings. If the secured creditor cannot be given adequate protection, it is enti-

95. T. Jackson, supra note 4, at 184-87, 211-13.
96. Id. at 184-87.
tled to relief from the automatic stay by the specific provision that equates absence of adequate protection with good cause.97

In practice, the law does not operate so favorably for secured creditors. The bankruptcy court may deny the creditor the economic equivalent of its security either by denying a secured creditor interest in excess of the value of the security or by granting interest but setting it below the market rate.98 Secured creditors have been denied compensation for interest that accrues after bankruptcy on the ground that they are entitled to protection only from physical deterioration or depreciation of the collateral, not compensation for delay in collecting the debts owed to them.99 They are allowed compensation for delay only to the extent that they are oversecured, in which case their claim for post-petition interest is secured by the additional value of the collateral.100 This additional value, called the "equity cushion," is the excess of the value of their collateral over their accelerated claim for principal and interest at the date the petition for bankruptcy is filed. Conversely, secured creditors are denied secured status to the extent that their claim exceeds the value of the collateral. Instead, they are treated simply as general creditors, even on claims for post-petition interest; to that extent, they have an ordinary unsecured claim.101

The cases that have denied protection to undersecured creditors for post-petition interest have also distinguished between the protection of secured creditors necessary for approval of a reorganization plan and adequate protection necessary for denying relief from the automatic stay. A reorganization plan can be approved only if the secured creditors receive deferred cash payments equal in value, on the effective date of the plan, to their security interest.102 Discounting the value of future installments to the date of the reorganization compensates the secured creditor for the delay in payment. On the other hand, adequate protection necessary for the automatic stay is defined only in general terms of protecting the secured creditor's "interest," not in the sense of payment for the use of its money, but in the sense

101. Id.
102. Id. § 1129(b)(2)(A)(i)(II).
of protecting the economic value of its collateral. "Interest," in other words, does not include interest payments.

The Supreme Court essentially approved this reasoning in *United Savings Association v. Timbers of Inwood Forest*, 103 in which the Court held that an undersecured creditor cannot obtain relief from the automatic stay on the ground that it was denied protection for post-petition interest. Adequate protection does not extend to what is, in effect, an unsecured claim for post-petition interest. A secured creditor who is undersecured, or becomes undersecured as post-petition interest accrues, suffers an economic loss from the automatic stay. The secured creditor may receive compensation for delay during bankruptcy only to the extent that it is oversecured. Otherwise, it is only compensated for delay that occurs after a reorganization plan takes effect. The secured creditor bears the cost of delay from the filing of the petition until the effective date of the plan and loses the opportunity to invest the delayed payments during that time.

Moreover, even when a secured creditor receives compensation for post-petition interest, as it does when it is oversecured or when a reorganization plan is approved, it can still suffer an economic loss if it receives interest at less than the current market rate. An oversecured creditor is entitled to interest but at a rate which may be less than the current market rate. 104 Likewise, adequate protection of secured creditors in a reorganization plan is often determined by discounting the value of future payments using the statutory rate of interest for income tax refunds, which again may be less than the current market rate. 105 In either case, the secured creditor is left in a worse position than if it had foreclosed on its security interest and invested the proceeds at the current market rate. Bankruptcy courts nevertheless tend to impose this loss on secured creditors in order to promote reorganizations. 106

The cumulative effect of these qualifications of the requirement of adequate protection is to increase the importance of the second ground for relief from the automatic stay: the debtor's lack of equity in the collateral and the fact that it is not necessary to an effective reorganization. Especially in admiralty,

106. Id.
when the value of the vessel is likely to decline for the same reason that the shipping firm has become insolvent, secured creditors are more likely to become undersecured, which is just another way of saying that the debtor lacks equity in the collateral. As the first ground for obtaining relief from the automatic stay becomes harder to satisfy, because adequate protection is more easily provided to the secured creditor, the second ground becomes easier to satisfy, because the creditor is more likely to be or to become undersecured. The crucial inquiry then is whether an effective reorganization is possible, a topic taken up in the next section of this Article.

Outside of a reorganization, or less frequently, a sale of the debtor's business as a going concern, it is much easier for the secured creditor to obtain relief from the automatic stay. When the debtor's estate is liquidated piecemeal, the proceeds from the sale of encumbered assets must first be used to satisfy the claims of secured creditors, in order of priority, before they are available to satisfy the claims of general creditors. If the secured creditor's claim exhausts the value of the collateral, however, there is no reason to force it to await liquidation in bankruptcy in order to satisfy its claim. The secured creditor's own self-interest will lead it to make an informed judgment about the wisdom of pursuing separate collection efforts and to sell the collateral for as much as possible. Accordingly, the Bankruptcy Code allows for relief from the automatic stay when the debtor has no equity in the collateral and it is not necessary for a successful reorganization.\(^\text{107}\) Conversely, if the secured creditor's claim does not exhaust the collateral, relief usually is not granted because the debtor still has equity in the collateral.\(^\text{108}\) In a separate proceeding, and especially in a sale following repossession of the collateral, the secured creditor may seek a sale price only high enough to satisfy its own claims.\(^\text{109}\) The other creditors who are also entitled to the proceeds, to the extent that they exceed the security interest, can only be represented through consolidated collection proceedings in bankruptcy.

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109. T. Jackson, supra note 4, at 60-62.
B. The Prospects for Successful Reorganizations of Shipping Firms

Shipping firms usually go bankrupt because of a general decline in waterborne trade. For the same reason, they are not likely to be successfully reorganized after they have gone bankrupt. The demand for shipping services is derived demand, dependent upon the demand for the cargo that is shipped. Apart from carriage of passengers, which makes up only a small segment of the industry, shipping services are not sought for their own sake but to satisfy demand at the destination to which the cargo is shipped. Demand for most forms of cargo varies over the course of a general business cycle, which therefore affects the demand for shipping. The demand for shipping also depends upon changes in international relations, which affect not only the volume of international trade, but also the means of maritime commerce. For instance, the closing of the Suez Canal in 1967 increased the demand for shipping from the Persian Gulf by increasing the length of the voyage to Europe and the United States. Likewise, the opening of the canal in 1975 caused a corresponding decrease in demand.110

The shipping industry is especially vulnerable to changes in demand because of the inelastic supply of shipping capacity. When demand is low, capacity can be reduced to a degree by reducing the operating speed of vessels and thereby reducing their operating cost. Further reductions in capacity can be achieved only by taking vessels out of service, either by scrapping or by laying up. Both of these processes are costly, however. Scrapping causes the owner to lose whatever value the vessel might have in the future and laying up requires the owner to bring the vessel to an appropriate location, prepare it for layup, and then maintain it while it is laid up. Although the costs of layup are less than operating costs, they are still substantial.

In the shipping industry, the value of a shipping firm and the value of its vessels are correlated in a way that favors relief from the automatic stay. A decline in trade, the typical cause of insolvency among shipping firms, also causes a decline in the value of the firm’s vessels. A decline in trade causes freight rates to fall over the short term as a constant supply of vessels competes to carry a shrinking volume of cargo. The decline in

freight rates in turn reduces the value of vessels by reducing the income that they will earn. The maintenance and depreciation of a vessel, on the other hand, remain fixed above certain amounts, even if the vessel is taken out of service and laid up.\textsuperscript{111} The decline in future net income from the vessel constitutes a decline in its value, which is nothing more than the discounted present value of the stream of future income from the vessel, less the expenses in operating it. These processes eventually force surplus vessels out of service, through the bankruptcy of shipping firms, scrapping, or laying up.

An increase in the volume of shipping causes a corresponding increase in shipping rates, which then increases the supply of shipping capacity by causing vessels then in service to be more fully utilized, old vessels to be brought back into service, and new vessels to be constructed. When shipping again declines, the cycle repeats itself. If vessels could be quickly and cheaply added to or taken out of service, these cycles would be moderated as shipping firms adjusted the supply of shipping capacity to the demand. But vessels are ordered when their value is high, as measured by current freight rates, and they may be delivered and operated during periods when freight rates are low. Likewise, if cycles in trade were predictable, shipping firms could avoid surpluses in shipping capacity by appropriately discounting the value of vessels, and hence their purchase price, to take account of shipping rates over the entire business cycle. At least since World War II, however, the shipping industry has been vulnerable to unforeseen events, and economic models have not succeeded in predicting changes in international trade and the derived demand for shipping.\textsuperscript{112}

The parallel movements in shipping volume and vessel prices leave maritime lienors with a difficult choice between enforcing their maritime liens against a vessel whose value may have declined dramatically since the lien was incurred or participating in a reorganization for which the vessel is essential. When the price of vessels is depressed, some holders of preferred ship mortgages end up purchasing the arrested vessel at the judicial sale following a foreclosure action.\textsuperscript{113} In this situation, they are left with all the expenses of maintenance and depreciation of

\textsuperscript{111} Id. at 40-44.
\textsuperscript{112} T. SHIMOJO, ECONOMIC ANALYSIS OF SHIPPING FREIGHTS 269-75, 296-98 (1979).
\textsuperscript{113} Jaffe, Chapter II Strategies and Techniques—Creditors Committees, Effective
the vessel, but none of the expertise of a shipping firm in operating it. The costs of pursuing a separate admiralty action restrains maritime lienors to some degree in seeking relief from the automatic stay.

A maritime lienor cannot obtain relief from the automatic stay, absent some other form of good cause, unless the maritime liens exceed the value of the vessel. Under the Bankruptcy Code, maritime lienors seeking to pursue independent actions for arrest have the burden of proving that the debtor has no equity in the vessel and hence, that at least one maritime lienor is undersecured. The decline in value of vessels during a recession in the shipping trade, accompanied by the accrual of interest charges, may cause even senior maritime lienors to become undersecured. Depending on the degree to which they are undersecured, maritime lienors might well gain from a reorganization, which can be approved by the bankruptcy court only upon a finding that all secured creditors have received adequate protection. As maritime lienors become more and more undersecured, they resemble unsecured creditors in their interest in a reorganization; they are more likely to hold an unbiased estimate of the chances that a reorganization will succeed.

Their estimate, however, may not be entirely unbiased, partly because of the general difficulty of convincing creditors that they will receive the economic equivalent of their security through a reorganization. Part of this difficulty arises from the economic inadequacy of what the courts have accepted as adequate protection. Part also is attributable to the possibility that a secured creditor may obtain a better deal through the sale of the firm to a third party than in a reorganization. In addition, maritime lienors face a unique problem because of the reverse temporal order of priority among maritime liens. Later liens in the same class take priority over earlier liens. Consequently, vessels that continue to operate during a reorganization accumulate maritime liens which may take priority over the prepetition maritime lienors who are entitled to adequate protection. Although these liens should not be recognized by an American

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114. For an elaboration of this argument, see Baird & Jackson, Bargaining After the Fall and the Contours of the Absolute Priority Rule, 55 U. Chi. L. Rev. 738, 750-55 (1988).
court, because their accrual is blocked by the automatic stay,\textsuperscript{115} they still may be recognized and given priority by a foreign court. A reorganization plan therefore must protect the value of prepetition maritime liens, either by providing additional collateral or by taking steps through insurance, or through cash payments instead of credit, to keep the vessel free of later maritime liens.\textsuperscript{116} If these assurances are not forthcoming, maritime liensors may well have good reason to obtain relief from the automatic stay.

The owners and managers of the firm, on the other hand, have every reason to overestimate the chance for a successful reorganization. Managers stand to lose their jobs if the firm is liquidated; and the owners, whom they represent, have claims that are worth nothing because, by definition, a firm is insolvent only if its residual value after liquidation is negative.\textsuperscript{117} Yet it is the managers who have the first opportunity to propose a plan of reorganization.\textsuperscript{118} They may well do so only in order to delay liquidation so that their claims may increase in value. In these circumstances, there is both more reason to increase the burden upon the trustee to prove that a reorganization is likely to be effective and less reason to be suspicious of an undersecured maritime lienor who seeks relief from the automatic stay.

The rate of successful reorganizations in the shipping industry appears to be no better than that in other industries. Most reorganizations fail\textsuperscript{119} and, in particular, most reorganizations of shipping firms fail because the same market conditions that lead to the insolvency of shipping firms also prevent effective reorganization.\textsuperscript{120} On the other hand, it might be argued that evidence of the general failure of reorganizations should not support relief from the automatic stay; only the likelihood that the proposed reorganization might fail should count. Even so, the characteristics of the shipping industry cannot be dismissed as irrelevant.


In United States v. ZP Chandon, 889 F.2d 233, 237-38 (9th Cir. 1989), the Ninth Circuit held that maritime liens continued to accrue even after the petition was filed, despite the automatic stay. It reached this conclusion, however, only by the drastic step of excluding maritime liens from the definition of “lien” in the Bankruptcy Code. \textit{Id.} at 238; see supra text accompanying notes 24-36.


\textsuperscript{117} T. Jackson, supra note 4, at 216-17.


\textsuperscript{119} T. Jackson, supra note 4, at 220-21.

\textsuperscript{120} Jaffe, supra note 113, at 1298-1301.
Relief from the automatic stay must be granted or denied before the bankruptcy court has any evidence about the operation of the reorganized firm. Conditions in the industry are therefore likely to be a decisive factor in evaluating the firm’s prospects for continued operation.

Reorganizations of shipping firms fall into several different categories, depending upon the flag of the firm’s vessels, the extent to which the vessels have been financed by the United States, and the risk that they might be seized by foreign courts. Reorganizations are most likely to succeed in the protected market for American-flag shipping, which is more or less insulated, depending on the type of shipping, from the business cycles in the international shipping industry. These reorganizations are complicated by the varying effectiveness of the automatic stay, which is subject to explicit exceptions for actions to foreclose on preferred ship mortgages financed by the United States, and which may be ignored by foreign courts that have seized the debtor’s vessels. Reorganizations of international shipping firms are subject to all of the risks of business cycles that decrease both the firm’s value as an ongoing business and the value of its vessels as security for admiralty claims. The effectiveness of the automatic stay also depends much more heavily upon recognition by foreign courts than it does in an essentially domestic case involving American-flag vessels.

Depending upon these factors, the burden of proof on the trustee should be made lighter or heavier. The Bankruptcy Code establishes a flexible presumption against an effective reorganization, and in favor of relief from the automatic stay, by putting the burden of production and persuasion on this issue on the trustee. 121 Although this presumption may have been ignored by bankruptcy judges who have encouraged reorganizations in other industries, it should be given a prominent role in the bankruptcy of shipping firms. Adjustments to this presumption can guide bankruptcy judges in evaluating motions for relief from the automatic stay by a maritime lienor and, at the same time, allow for the peculiarities of particular cases that cannot be anticipated by any absolute rule.

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121. 11 U.S.C. § 362(g)(2) (1988). The secured creditor has the burden of proof on the question whether the debtor has any equity in the collateral. Id. § 362(g)(1).
1. American-Flag Shipping

Federal law confines some forms of shipping to American-flag vessels, primarily the coasting trade between ports in the United States and carriage of cargo owned or financed by the United States. The exclusion of foreign shipping effectively insulates these markets from the business cycles in the international shipping industry. Shipping firms also have strong economic incentives to separate their American-flag operations from foreign-flag operations because American-flag vessels must meet more stringent safety and environmental regulations than vessels registered under a flag of convenience and must employ more expensive American crews. The protected market for American-flag shipping tends to preserve the value of American-flag vessels in bankruptcy. It follows both that maritime lienors have more reason to pursue separate admiralty actions, because they can recover more against the vessel, and that a reorganization of American-flag operations is more likely to be successful.

Separate treatment of American-flag vessels also simplifies the treatment of vessels that are not involved in shipping (such as tugs, barges, and pleasure boats) but operate primarily or exclusively in American waters. Bankruptcies of the owners of these vessels raise few problems unique to maritime commerce. Relief from the automatic stay to allow enforcement of maritime liens against these vessels should be granted as in other business and personal bankruptcies. Whether or not they are involved in shipping, American-flag vessels present the strongest case for applying the general standards for granting or denying relief from the automatic stay.

Two distinctive characteristics of admiralty cases nevertheless complicate the issue. First, American-flag vessels may be subject to seizure by foreign courts if they are carrying cargoes owned or financed by the United States to foreign countries. These courts may not recognize the automatic stay and the bankruptcy court may be unable to force the foreign actions to be abandoned by exercising its contempt power since the plaintiffs in those actions may be outside its personal jurisdiction. Second, American-flag vessels may be arrested by the United

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States to enforce preferred ship mortgages held by the Department of Transportation or the Department of Commerce. These mortgages, by which the federal government guarantees financing for the construction or purchase of vessels, now cover over one quarter of the active American-flag fleet. Actions to foreclose on these mortgages are specifically exempt from the automatic stay.

If seizures occur for either of these reasons, relief should also be granted to all other maritime lienors with liens on the seized vessels so that they can join in the admiralty proceedings. Otherwise, they are likely to lose their maritime liens or be subordinated to the lienors who commenced those actions. As in United States v. ZP Chandon, preferred ship mortgages do not have priority over subsequently incurred "preferred maritime liens" for wages of the crew. When the seizure is by a foreign court, the bankruptcy court should, and usually does, try to obtain recognition of the automatic stay. Failing that, however, it should recognize that a stay against other maritime lienors only enhances the advantage of those who brought the foreign action initially. The court will not be able to bring the vessel into the estate of the debtor unless it enters an American port. Even then, it could do so only by ignoring the effect of the foreign court's judgment and its sale of the vessel, steps that admiralty courts have taken only reluctantly.

2. International Shipping

If American-flag shipping presents the strongest case for maintaining the automatic stay, international shipping under

124. In 1988, 138 deep-draft vessels were covered by ship financing guarantees from the Maritime Administration and the American-flag fleet contained 509 deep-draft merchant vessels. 1988 MARITIME ADMIN. ANN. REP. 6, 8.
126. 889 F.2d 233 (9th Cir. 1989).

Recovery by a creditor in foreign proceedings does reduce the amount recoverable in bankruptcy in this country, but it imposes no penalty on the creditor to deter it from evading the automatic stay by going overseas. 11 U.S.C. § 508(a) (1988).
foreign flags presents the weakest case. An effective reorganization is likely to be obstructed both by the general market conditions that led to the bankruptcy of the shipping firm in the first place and by the threat of foreign seizures. International shipping feels the full force of business cycles in international trade. A decline in the volume of shipping may affect only a limited segment of the market because different vessels are specialized to different cargos, such as oil or containerized cargo, but only shipping firms that are diversified can mitigate the consequences of declining volume and freight rates in one segment of international shipping.

The threat of seizures by foreign courts also has a far more dramatic impact on firms engaged in international shipping than on firms engaged in American-flag shipping. Such seizures are far more likely to occur in international trade because vessels spend substantially more time in foreign ports. A firm in international shipping may find many of its vessels in or en route to foreign ports when a petition for bankruptcy is filed. Foreign creditors, or even American creditors, may have the vessel seized by foreign courts which do not recognize the automatic stay. If some of the creditors are outside the personal jurisdiction of the bankruptcy court, it will be unable to force them to abandon the foreign action by holding them in contempt. The threat of seizure only increases during a reorganization in which the firm remains in operation. Whether or not they do business with the firm while it is in reorganization, foreign creditors may seek to collect prepetition or post-petition debts by seizing the vessel. Even if the bankruptcy court succeeds in enforcing the automatic stay, the cost of doing so by monitoring proceedings by creditors around the world may eliminate the advantages of a reorganization.

These problems could be reduced, if not eliminated, by international cooperation in recognizing bankruptcy proceedings in other countries. American law has taken a step in this direction by allowing ancillary proceedings to a foreign bankruptcy in American bankruptcy courts. Several such proceedings have

130. M. Stopford, supra note 110, at 64-66.
133. Jaffe, supra note 113, at 1300-01.
134. Keech, supra note 116, at 1246-49.
enforced the foreign equivalent of the automatic stay against American admiralty proceedings.\textsuperscript{136} For the same reason, the trustee in bankruptcy in this country should seek recognition of the automatic stay in the courts of other countries. Otherwise, creditors who cannot commence proceedings here will simply do so elsewhere. As we have already seen, however, if the foreign action is likely to go forward anyway, then innocent American creditors should be allowed to participate in it. Barring American creditors who did not instigate the foreign action would only cause them to suffer for the benefit of the foreign creditors who did. Despite the advantages of international cooperation over the long term, the practical obstacles to enforcement of the automatic stay just add to the reasons for finding that a reorganization is not likely to be effective and for granting relief from the automatic stay.

III. Conclusion

Before the Bankruptcy Act of 1978, the federal courts addressed the status of maritime liens in bankruptcy as a jurisdictional contest between bankruptcy courts and admiralty courts to be resolved by a race to the courthouse. \textit{Marathon} revived doubts about the allocation of jurisdiction between article I bankruptcy courts and article III district courts that heard appeals from them. Although all of these doubts have not been laid to rest by the 1984 amendments to the Bankruptcy Code, they should have no bearing upon the division of jurisdiction between district courts sitting in bankruptcy and district courts sitting in admiralty. These situations are, after all, just one court exercising jurisdiction under two different heads.

The real question concerns how that jurisdiction is to be exercised. Almost all of the cases under the current Bankruptcy Code and its predecessors agree that maritime lienors should be treated as secured creditors in bankruptcy. I suggest that the jurisdictional competition between admiralty courts and bankruptcy courts should be replaced by a practical decision by the bankruptcy court whether or not to grant relief from the automatic stay. Such relief normally should be granted when the debtor is a shipping firm engaged in international trade, if the

maritime lienors prove that the debtor has no equity in the vessel bearing the maritime liens. A similar, but weaker, presumption should apply to firms engaged in American-flag shipping. Although these presumptions necessarily admit of exceptions, they should focus the decision of the bankruptcy court on the practical question whether to preserve the debtor as a going concern, instead of encouraging wasteful litigation over abstract questions of jurisdiction.