

# Admiralty Practicum

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Volume 1995  
Issue 1 *Fall 1995*

Article 11

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## Faneuil Advisors, Inc. v. O/S Sea Hawk, CA1, 50 F.3d 88, 3/29/95

Jennifer Waggoner, Class of 1996

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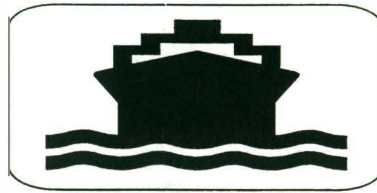
and Empresa filed restricted appearances as owner and owner *pro hac vice*, respectively.

Central Hudson then brought an action *in personam* against Empresa in the Southern District of New York and an additional *quasi in rem* action in Louisiana against another ship operated by Empresa— both actions being consolidated in the New York court. The district court decided in favor of Central Hudson in the *in rem* proceeding, awarding damages totalling \$4,477,584.15, greater than the amount provided for in the letter of undertaking, but dismissed the *in personam* suit against Seiriki for lack of jurisdiction. The district court also held in favor of Central Hudson in the suit against Empresa, awarding the amount of the deficiency from the *in rem* judgment plus pre-judgment interest— \$1,850,895.83 in total. Empresa appealed the district court's rulings.

On appeal, the second circuit decided whether a district court sitting in admiralty could enter an *in rem* judgment in excess of the value of the subject *res* or the substituted bond and whether the *in rem* judgment of an admiralty court bars a subsequent *in personam* action against the bareboat charterer of the subject vessel for a deficiency in the prior *in rem* judgment.

The court of appeals began its analysis with an affirmation of the general rule that *in rem* judgments may not be rendered in excess of the value of the *res* or the substituted bond because *in rem* proceedings are brought against the *res* itself. 7A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ E.16[2], at E-779 (2d ed. 1995). The court then asserted that district courts sitting in admiralty are not bound by the general rule by virtue of their equitable powers. *The Minnetonka*, 146 F. 509, 515 (2d Cir.), *cert. denied*, 203 U.S. 589 (1906)). The court stated that admiralty courts may award damages in excess of a letter of undertaking which was delivered to avoid the arrest of a vessel, adding the caveat that this does not allow execution of judgment for the deficiency against parties not found liable *in personam*.

The court of appeals then proceeded to discuss the *in rem* judgment creditor's ability to secure an *in personam* judgment for the deficiency. Stating that Supplemental Rule C(1)(b) of the Federal Rules

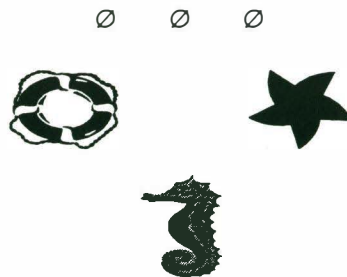


of Civil Procedure specifically allows both *in rem* and *in personam* actions against possibly liable parties, the court found that the doctrine of *res judicata*, if applicable, was the only bar to the *in personam* action by Central Hudson. The court determined that *res judicata* was not applicable unless Empresa was in privity with Seiriki, the owner of the subject *res*. Empresa was found not to be in privity and therefore *res judicata* did not bar the *in personam* suit. The court explained that Empresa's interest in the *in rem* action was strictly representative and separate from its interest in an action to impose *in personam* liability. The court thus concluded that Empresa's liability had not been previously adjudicated. However, the court also held that Empresa was collaterally estopped from contesting liability or damages as these issues had been adjudicated in the *in rem* proceedings and that Empresa was bound by virtue of the principle of *respondeat superior*.

Confirming the findings of the district court, the second circuit affirmed the lower court's judgment in all respects.

In a dissent, Judge Jacobs questioned the majority's holding that the facts relied upon to establish collateral estoppel did not also establish *res judicata* as to Empresa. Judge Jacobs opined that Empresa, as bareboat charterer, was in privity with the ship and that further actions against Empresa were therefore barred by *res judicata*.

Christopher T. Scanlon  
Class of 1996



## Maritime Liens

### SALVAGE CLAIM DOES NOT SUPERSEDE PREFERRED SHIP MORTGAGE IN ABSENCE OF REASONABLE APPREHENSION OF MARINE PERIL

Salvage lien asserted for vessel services not rendered as a result of "reasonably apprehended" marine peril does not supersede preferred mortgage in accordance with purposes of 1920 Ship Mortgage Act.

(*Faneuil Advisors, Inc. v. O/S Sea Hawk*, CA1, 50 F.3d 88, 3/29/95)



In the early morning hours of July 15, 1992, David Kinchla (Kinchla) and his son tried to retake possession of the *Sea Hawk*, a

fishing boat they had abandoned to state custody after having filed for Chapter 11 bankruptcy. Kinchla intended to tow the boat out to sea from the harbor of Hampton-Seabrook, New Hampshire, but did not make the necessary request for the opening of the Hampton River Bridge. The bridge blocked the Kinchlas' exit from the harbor and, while maneuvering under it, they lost control in the current, slamming the hull into a bridge support. The current then shifted the boat and it slid backwards stern first under the bridge, damaging its bridge-superstructure and outrigger tuna poles. Although the Kinchlas were able to abscond, the Coast Guard caught up with them and brought the duo and the *Sea Hawk* to the state pier, where the Kinchlas were arrested.

The saga began in January 1988, when Kinchla purchased the 45-foot *Sea Hawk*, by taking out a \$148,000 note with Atlantic Financial Federal Savings and Loan Association (Atlantic); thereafter, Kinchla granted Atlantic a first preferred ship mortgage. Subsequently, Atlantic went into receivership and was taken over by Resolution Trust Company (RTC), which sold the mortgage to Faneuil Advisors, Inc. (Faneuil) on April 23, 1993.

During the time leading up to the purchase of Kinchla's mortgage by Faneuil, Kinchla stopped making payments on his note and filed a petition for bankruptcy on January 6, 1992. On June 3, 1992, the *Sea Hawk* began its travail when it broke free from its harbor moorings and drifted until it snagged near the Hampton River Bridge. William Cronin (Cronin), a harbor-master of the New Hampshire State Port Authority, towed the boat to a state pier with the help of the U.S. Coast Guard. Cronin contacted Kinchla, the seeming owner, but Kinchla told Cronin he had abandoned his interest in the *Sea Hawk*. Subsequently, Cronin tried to contact the mortgage holder. Because the state had no facility large enough to store the *Sea Hawk*, Cronin arranged with a local individual to take custody of the boat until ownership could be ascertained, telling that person that he would have a possessory lien on the boat for towing and storage. After Kinchla's attempt to retake the boat, the individual declined further involvement.

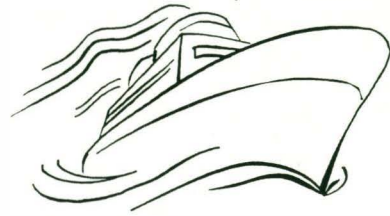
At that point, Portsmouth Harbor Towing (PHT) was contacted by Cronin who asked the company to tow the *Sea Hawk* to Portsmouth, New Hampshire to store it safely in dry storage. PHT consented and consequently stowed, stored, maintained and repaired the boat over a period of fifteen months, trying fruitlessly on several occasions to contact the *Sea Hawk's* mortgage holder to establish a claim. PHT claimed a salvage lien but never brought an action to foreclose on it.

In October 1993, Faneuil initiated an *in rem* proceeding in district court against

the *Sea Hawk* to foreclose on its mortgage. Federal marshals arrested and took custody of the vessel in December 1993, whereupon PHT intervened in January 1994 in order to assert its salvage lien. The *Sea Hawk* was sold at auction netting \$32,537.20— not enough to cover the claims of Faneuil (\$177,676) and PHT (\$30,885). The district court held that PHT had a valid salvage lien which had priority over Faneuil's claim since PHT had spent "much time and effort in preserving the *Sea Hawk*." Faneuil appealed to the first circuit.

The questions raised in the case were whether an unattended vessel's inevitable deterioration could be construed as a "marine peril" and whether a vessel in safe custody of a state officer could "reasonably be apprehended" to be facing marine peril giving rise to a valid salvage claim. In its review and reversal of the district court in favor of Faneuil, the appeals court found that: (1) repairs, supplies, storage and towing were ordinary "necessaries" and therefore subordinate to a preferred ship mortgage and (2) PHT failed to prove marine peril or a reasonable apprehension thereof necessary to establish a salvage claim.

The first circuit began its analysis by reviewing the priorities established by the 1920 Ship Mortgage Act. 46 U.S.C. § 30101-31343. The court noted that, prior to passage of the Act, a mortgage on a ship was outranked in admiralty proceedings by ordinary maritime liens on a ship, even those arising after the



mortgage. *Chase Manhattan Fin. Servs., Inc. v. McMillan*, 896 F.2d 452, 458 (10th Cir. 1990). However, the Act changed the law by granting priority to preferred ship mortgage holders over all other claims with limited exceptions. Further, the court did not recognize the services provided by PHT as anything more than "necessaries," a category not enumerated among the Act's exceptions as a "preferred maritime lien," which could possibly trump the mortgage. 46 U.S.C. § 31301(4).



The court went on to examine the straits the *Sea Hawk* was in at the time she was recovered from the Kinchlas and turned over to PHT for safekeeping. Examining the general maritime law, the court did not find that the orphaned *Sea Hawk* was in "immediate or absolute peril," because Cronin, as agent for the State of New Hampshire, had a duty to care for her. The court held that the lower court had clearly erred in elevating PHT's claim over the preferred mortgage.

"In holding that the circumstances constituted a reasonable apprehension of marine peril, the district court misreads the salvage cases holding that marine peril need not be immediate or absolute. While it is true that the threat need not be *imminent*, \* \* \* the cases make apparent that the threat must be something more than the inevitable deterioration that any vessel left unattended would suffer; \* \* \*." *Faneuil*, 50 F.3d at 93 (emphasis in original). "Such a result could hardly be squared with the intent of the Ship Mortgage Act." *Id.*

Finally, the court noted that state liens could not lie as an exception to the pre-emption rights of the preferred mortgage holders nor were "expansive notions" of equity enough to subordinate Faneuil's claim to that of PHT.

Jennifer Waggoner  
Class of 1996



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