

## **MARITIME LIENS**

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## **MARITIME LIENS**

This paper is intended to give a general overview of maritime liens and their purpose and effect. Maritime liens can become complicated in some instances, and not all potential issues or situations are covered in this paper. We have attempted to make the paper simple, practical and reader friendly for non-lawyers. Citations to legal authorities appear only at the end of the text so that the innocent reader will be protected from a barrage of legal formalities interesting only to lawyers and the morbidly curious.

### ***What is a Maritime Lien?***

A maritime lien is a privilege on maritime property arising out of goods and services furnished to or injuries caused by that property.<sup>1</sup> Maritime liens were originally designed to promote shipping by allowing suppliers to freely extend credit to ships but still be protected from shipowners who may try to escape their debts by sailing away without payment.<sup>2</sup> Most maritime liens arise out of the operation of the general maritime law, but some liens have been codified in the Commercial Instruments and Maritime Liens Act (the “Act”) in the United States Code.<sup>3</sup>

Maritime liens can serve various important functions, two of which are discussed in this paper. First, maritime liens permit a creditor or injured party to assert a claim directly against maritime property rather than a personal claim against an owner who may be difficult to locate, based overseas or unwilling or unable to pay. A maritime lien can also give the lien holder priority over other potential claimants in the event of a judicial sale of a vessel.

### ***What Claims Give Rise to a Maritime Lien?***

Maritime liens can arise out of maritime torts or maritime contracts. The Act specifically provides for some claims which give rise to maritime liens. Examples include preferred ship

mortgages,<sup>4</sup> wages of the master and crew,<sup>5</sup> general average,<sup>6</sup> wages of certain stevedores<sup>7</sup> and salvage.<sup>8</sup> Other contractual claims include breach of charter,<sup>9</sup> unpaid freight<sup>10</sup> and demurrage (vessel delay claims).<sup>11</sup> Parties to a contract may not create a lien where a lien would not otherwise exist.<sup>12</sup>

Maritime liens can also arise out of tort for damage resulting from allisions, collisions, cargo damage, property damage, conversion (wrongful possession), pollution and personal injury and death.<sup>13</sup> But negligence claims against an employer under the Jones Act and the Longshore and Harbor Workers Compensation Act do not give rise to a maritime lien.<sup>14</sup> Claims for maintenance and cure and unseaworthiness, on the other hand, can give rise to a maritime lien.<sup>15</sup>

The majority of maritime liens tend to arise out of the provision of “necessaries” to a vessel. Some necessaries are outlined in the Act and include repairs, supplies, towage, dry dock and marine railway.<sup>16</sup> That listing is not intended to be exhaustive and has been expanded by the courts, which have liberally defined necessaries to include those “goods or services that are useful to the vessel, keep her out of danger, and enable her particular function. Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged.”<sup>17</sup>

Whether certain goods or services are necessaries is a factual question determined on a case by case basis and depends upon the function of the vessel and the nature of the goods and services furnished.<sup>18</sup> The courts’ broad definition of necessaries has resulted in a variety of claims enjoying maritime lien status. For example, the following goods and services have been classified by the courts as necessaries: pilotage,<sup>19</sup> wharfage and dockage,<sup>20</sup> stevedoring services,<sup>21</sup> advances made by a ship’s agent,<sup>22</sup> unpaid insurance premiums,<sup>23</sup> radar,<sup>24</sup> engines,<sup>25</sup> survey

fees,<sup>26</sup> bunkers<sup>27</sup> and even liquor and cigarettes for pleasure boats.<sup>28</sup> Some claims, such as attorneys' fees<sup>29</sup> and ship construction,<sup>30</sup> have been held by the courts not to be necessities.

The following is a chart listing some common claims in the inland marine industry which may give rise to a maritime lien.

Claimant	Type of Claim
Tower	Unpaid towage Damage to towboat Unpaid freight Breach of charter Demurrage
Barge Owner	Damage to barge Demurrage Breach of charter Unpaid freight
Cargo Owner	Cargo damage Breach of charter Breach of contract of affreightment
Supplier	Unpaid fuel, lube, oil and other necessities
Fleeter	Unpaid fleet charges Damage to fleet property
Stevedore	Certain stevedoring services
Insurer	Unpaid insurance premiums
Repair facility	Unpaid repairs, dry dock

The Act provides that the owner, master, manager or an agent (appointed by the owner, charterer, owner *pro hac vice* or agreed buyer) are all presumed to be authorized to procure necessities for the vessels and incur liens.<sup>31</sup>

In general, goods and services must be furnished to a particular vessel to create a lien.<sup>32</sup> A supplier who furnishes goods or services to an owner of a fleet of vessels does not have a lien

unless the goods or services are earmarked for specific vessels.<sup>33</sup> However, this rule has become somewhat relaxed in recent years.

Additionally, the breach of an agreement to furnish or accept goods or services or to perform certain services does not give rise to a lien.<sup>34</sup> These contracts are often called executory contracts because they have not yet been executed. While breaches of executory contracts may give rise to a personal claim against a party, they do not create a maritime lien. Common examples of executory contracts in this industry include an agreement to carry cargo but the cargo has not been delivered to the vessel; an agreement to charter a vessel but the vessel has not been delivered to the charterer; an agreement to tow a barge but the barge has not been delivered to the tower; and an agreement to supply goods or services for a certain period but the goods or services are supplied only for a portion of the period.<sup>35</sup> “Delivered” has been given a slightly broad interpretation with respect to executory contracts. For instance, under a charter agreement, a vessel is delivered when the vessel is placed at the charterer’s disposal.<sup>36</sup> Cargo may be considered delivered when it is under the vessel’s control.<sup>37</sup>

A person has no lien against property in which he is an owner, shareholder or joint venturer.<sup>38</sup> A person with such an interest, even if he provides goods or services to the vessel, does not acquire any lien rights against the vessel or property.

### ***What Property is Subject to a Maritime Lien?***

A lien may only be asserted against maritime property.<sup>39</sup> Thus, a vessel under construction or which has been permanently withdrawn from navigation is not subject to a maritime lien.<sup>40</sup> However, a vessel only temporarily withdrawn from navigation (for repairs or other reasons) is considered “in navigation” and is subject to a lien.<sup>41</sup> Generally, the entire

vessel, including its hull, engines, tackle, apparel and furniture may be attached by a maritime lien.<sup>42</sup> Under most circumstances, this can include property installed on the vessel that is leased from a third party.<sup>43</sup> A lien may also attach to a vessel's freight (funds paid for the use of the vessel).<sup>44</sup>

Liens against cargo are available on a more limited basis. Cargo liens can become very complex because of the interaction between contractual provisions, including those in charter parties and bills of lading, the applicable law and the facts of the case. Cargo liens alone have been the subject of entire books and could be the basis of an entire seminar. Although caution should always be exercised before asserting a maritime lien, this is especially true in the case of cargo liens. However, the following are some general principles of cargo liens which may be applicable in this industry.

A person who salvages cargo has a lien against it.<sup>45</sup> A shipowner has a lien against cargo for general average.<sup>46</sup> Generally, a shipowner also has a lien against cargo for unpaid charter hire or freight if the cargo is owned by the charterer.<sup>47</sup> The shipowner may also have a lien against cargo for demurrage.<sup>48</sup> However, as aforementioned, these liens may be affected by both the contracts between the parties and federal law.

#### ***How is a Maritime Lien Asserted?***

A maritime lien attaches at the moment the goods or services are furnished.<sup>49</sup> There is no recording or filing requirement.<sup>50</sup> Unless the vessel is sold by the United States Marshal, a lien will generally follow the vessel, even in the case of a good faith, unaware purchaser.<sup>51</sup> Accordingly, a wise purchaser will always obtain an Abstract of Title from the Coast Guard and

require satisfaction of and indemnity for existing liens (including unrecorded liens) before purchasing a vessel.

There are two ways to effectively pursue maritime liens. Although not in the strictest sense “enforcing” the lien, the easiest and most economical method (\$8 per page) is to record a Notice of Lien with the United States Coast Guard Office of Vessel Documentation if the vessel is documented. A copy of a sample Notice of Claim of Lien and the instructions for filing are attached at the end of this paper. If the vessel is not documented with the Coast Guard, the lien may be recorded in the parish or county where the shipowner’s principal office is located.

The filing of a lien places third parties on notice and often results in satisfaction of the debt. Financing and charter agreements typically contain language specifically prohibiting liens; and the shipowner may be forced to satisfy the lien or risk breaching the agreement. Further, a recorded lien may impede the sale or future financing of a vessel. Another benefit of filing a notice of lien is that it places the United States Marshal on notice in the event of a judicial sale (as the result of a seizure or bankruptcy).<sup>52</sup>

There are also instances that may permit a lien holder to simply refuse to release a vessel or property in its custody. Cases which have allowed such detention usually have been for unpaid repair invoices.<sup>53</sup> The lien must be both valid and enforceable at the time of the detention. Because of the potential exposure to the lien holder for wrongful conversion or detention of the property, this “self-help” enforcement of a lien is not usually recommended.

The safest and most effective way to enforce a maritime lien is to file an *in rem* action against the vessel or property in federal court. However, arresting a vessel or property is expensive. The United States District Court for the Eastern District of Louisiana requires an

initial \$10,000 as a deposit to cover marshal costs, custodial (guard) costs and \$1,000,000 in insurance. The party arresting a vessel or property may choose (or be forced) to obtain additional insurance. A private (or substitute) custodian may also be appointed, in which case the initial deposit is \$3,000. There is also a risk, although usually remote, that the vessel or property may have a claim for damages against the seizing party for wrongful seizure if the lien is later found to be invalid or unenforceable.

If a lien holder decides to arrest a vessel or maritime property, a complaint is filed in federal court in the district where the vessel or property is physically located. The court issues a warrant for the arrest of the vessel and the marshal goes to the vessel and detains it pending further instructions by the court or the seizing party. The vessel then files an answer and may post security either in the form of a bond or a letter of undertaking to effect its release. If no agreement on the amount of security can be reached between the parties, the court may set the security in the amount of twice the stated value of the claim, fairly stated, or the value of the property, whichever is less.<sup>54</sup> The claims then proceed against the security and the vessel is free to leave the district. If no security is posted, the vessel remains under arrest and is sold at a judicial sale if the owner does not satisfy the judgment.

A lien holder may also avoid the cost of seizing a vessel and lessen his exposure to wrongful seizure by contacting the owner before filing suit (or before arrest) and requesting security. This procedure is beneficial to both the seizing party (cost effective) and the vessel interest (no delay). The obvious drawback is that if the shipowner refuses to post security, he has been given notice of the potential seizure and may avoid or leave the district if possible. A lien

holder may also lessen his exposure to wrongful seizure damages by allowing a seized vessel (to be included in the order of arrest) to load, discharge and move within the port.

The above arrest procedures presume that there is no pending bankruptcy proceeding which involves the property or vessel. If a bankruptcy petition has been filed and a stay order had been issued, the lien holder may not arrest the vessel and must assert his claim in the bankruptcy proceeding.<sup>55</sup>

### ***How is a Maritime Lien Lost or Suspended?***

Satisfaction of the debt, of course, extinguishes a lien. If the lien is recorded, the lien holder must file a Satisfaction of Lien with the Coast Guard (or parish or county authority if filed there). Attached at the end of the paper are filing instructions and a sample Satisfaction of Lien.

Liens are also lost if the property is completely destroyed.<sup>56</sup> If the property is only partially destroyed, the lien will attach to the remaining property.<sup>57</sup>

Liens may also be lost by waiver. For a lien to arise, the supplier must have relied upon the credit of the vessel, as opposed to the personal credit of the owner. If the supplier relied solely on the credit of the owner, he is deemed to have waived his lien against the vessel.<sup>58</sup> The Act provides a presumption that a supplier has relied upon the credit of the vessel.<sup>59</sup> Subcontractors of a repair facility and subcontractors in general are usually deemed to have relied upon the credit of the repair facility and have no lien against a vessel.<sup>60</sup> An exception to this rule may arise when the repair facility is acting as the owner's agent to engage specific subcontractors or the owner has ratified the use of the subcontractors.<sup>61</sup>

The Act provides that a party may waive or subordinate his lien by contract.<sup>62</sup> Waiver of liens is common in charter agreements. Charters often contain a "no lien clause" whereby the

owner of a vessel attempts to insulate the vessel from liens by instructing the charterer that he has no authority to create liens against the vessel. In other words, all goods and services furnished to the vessel while under charter are for the account of the charterer personally, not the vessel.

Suppliers, however, have no duty to inquire about such a clause and must have actual knowledge of its existence to be denied a lien against the vessel.<sup>63</sup> If a supplier has knowledge of the no lien clause, no lien arises.

A party may also lose his lien through the operation of laches. Laches is the maritime equivalent of a statute of limitations (or prescription for those who ply Louisiana waters). Laches is defined as an unreasonable delay in asserting a lien.<sup>64</sup> Courts generally look to the statute of limitations of the state in which the lien arose to determine whether the delay was unreasonable.<sup>65</sup> However, the state statute of limitations is only a starting point. Just as a supplier who asserts a lien outside of the state statute of limitations may not be barred by laches, a supplier who asserts a lien within the state statute of limitations may not be immune from laches. In both cases, the courts will examine the reason for the delay and whether the delay was unreasonable and prejudiced the shipowner.<sup>66</sup> For this reason, it is recommended that a lien holder immediately record his lien as outlined in the preceding section to help protect the lien from a laches attack.

A lien may also be valid but not yet enforceable. This most commonly occurs when services or goods are provided but payment is not immediately due upon performance. In that case, a lien may exist when the goods or services are provided but cannot be enforced until payment is due.<sup>67</sup>

Maritime liens are extinguished as a result of a sale by the United States Marshal. When a vessel is sold by the marshal, it is sold free and clear of all liens.<sup>68</sup> The lien holder may be

entitled to payment from the proceeds of the sale depending on the dollar amount of the liens which rank ahead of his lien.

Cargo liens can be very complicated and have many nuances. Because cargo liens are “possessory,” the shipowner must assert a lien against cargo while the cargo is still in its possession.<sup>69</sup> Possession does not necessarily require that the cargo physically remain aboard the ship as long as it is evident that the parties intended to preserve the lien. However, if the cargo has been unconditionally delivered, the shipowner loses his lien.

### ***How does Your Maritime Lien Rank?***

If the proceeds from a sale of a vessel by the marshal are insufficient to satisfy all liens, it is necessary to determine the priority of the liens. Lien priorities can change if a preferred ship mortgage exists. In that case, the Ship Mortgage Act supplies the ranking.<sup>70</sup> Otherwise, the general maritime law supplies the ranking.<sup>71</sup>

Generally, within each category, the most recent claim has higher priority and gets paid first.<sup>72</sup> The date that attaches to a lien is the date the lien is created, not the date the lien is enforceable or is sought to be enforced.<sup>73</sup>

At times, a contract is breached simply because property damage is incurred. This can arise in towage agreements and contracts of carriage. In such a case, it is more beneficial to assert a claim in tort because tort liens outrank many other liens, including contractual liens.

### ***Conclusion***

Maritime liens can serve as an effective way to collect monies owed for services and goods furnished and payment for damages caused by maritime property. The seizure (or threat of seizure) of property often induces prompt payment of a debt. Moreover, maritime liens can give

a lienholder priority over other debts in the event of the sale of the property by the U.S. Marshal.

In sum, maritime liens provide some security to an industry where debtors are difficult to locate and are often unwilling or unable to pay.

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- 1.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
2. Id.
- 3.46 USCA §31301, et seq. The Federal Maritime Liens Act, originally enacted in 1910, was incorporated as part of the Commercial Instruments and Maritime Liens Act in 1988.
- 4.46 USCA §31301(6), 31322.
- 5.46 USCA §31301(5)(D).
- 6.46 USCA §(5)(E).
- 7.46 USCA §31301(5)(C).
- 8.46 USCA §31301(5)(F).
9. Cardinal Shipping Corp. v. M/S SEISHO MARU, 744 F.2d 461, 466 (5<sup>th</sup> Cir. 1984).
10. Arochem Corp. v. Wilomi, Inc., 962 F.2d 496, 499 (5<sup>th</sup> Cir. 1992).
11. Id. at 500.
12. Piedmont & George's Creek Coal Co. v. Seaboard Fishing Co., 254 U.S. 1, 5 (1920).
- 13.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
14. Plamals v. The Pinar Del Rio, 277 U.S. 151, 156 (1928); 33 USCA 905(b); 1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
15. Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).
- 16.46 USCA §31301(4).
17. Equilease Corp. v. M/V SAMPSON, 793 F.2d 598, 603 (5<sup>th</sup> Cir.) (en banc), cert. denied., 479 U.S. 984 (1986).
- 18.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-3 (4<sup>th</sup> Ed. 2004).
19. Blair v. M/V BLUE SPRUCE, 315 F.Supp. 555, 557 (D. Mass. 1970).
20. THE WESTERN WAVE, 77 F.2d 695, 698 (5<sup>th</sup> Cir. 1935).
21. TTT Stevedores of Texas v. M/V JAGAT VIJETA, 696 F.2d 1135, 1138 (5<sup>th</sup> Cir. 1983).

22. Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991).
23. Equilease Corp., 793 F.2d at 604.
24. Layton Industries v. GLADIATOR, 263 F.Supp. 356, 360 (D. Mass. 1970).
25. Johnny's Automatic Transmission v. One 1971 Viking Ellen J, 635 F.Supp. 442, 443 (N.D. Ohio 1985).
26. Miki Miki, 1970 AMC 1928 (M.D. Cal. 1970).
27. Gulf Oil Trading Corp. v. M/V CARIBE MAR, 757 F.2d 743 (5<sup>th</sup> Cir. 1985).
28. Payne v. S.S. TROPIC BREEZE, 423 F.2d 236, n.5 (1<sup>st</sup> Cir. 1970).
29. Gulf Marine and Industrial Supplies, Inc. v. M/V GOLDEN PRINCE, 230 F.3d 178, 181 (5<sup>th</sup> Cir. 2000).
30. Thames Towboat Co. v. THE FRANCIS MCDONALD, 254 U.S. 242, 244 (1920).
31. 46 USCA 31341(a).
32. Piedmont & George's Creek Coal Co., 254 U.S. at 4.
33. Id.
34. The Schooner Freeman v. Buckingham, 59 U.S. 182, 183 (1856).
35. Garcia v. Warner, Quinlan Co., 9 F.Supp. 1010, 1011 (S.D.N.Y. 1934).
36. E.A.S.T. Inc. v. M/V Alaia, 876 F.2d 1168, 1175 (5<sup>th</sup> Cir. 1989).
37. Id.
- 38.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
- 39.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
40. Thames Towboat Co., 254 U.S. at 244.
41. First Bank & Trust v. Knachel, 999 F.2d 107 (5<sup>th</sup> Cir. 1993).
- 42.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
43. Kesselring v. F/T Arctic Hero, 30 F.3d 1123, 1125 (9<sup>th</sup> Cir. 1994).

44. United States v. Freights of the Mount Shasta, 274 U.S. 466, 470 (1972).
45. Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F.Supp. 115, 118 (E.D. N.Y. 1947).
46. Beverly Hills National Bank & Trust Co. v. Compania De Navegacion Almirante, S.A., Panama, 437 F.2d 301 (9<sup>th</sup> Cir. 1971).
47. Rainbow Line, Inc. v. M/V Tequila, 341 F.Supp. 459 (S.D. N.Y. 1972).
48. California & Eastern S.S. Co. v. 138000 Feet of Lumber, 23 F.2d 95 (D.Md. 1927).
- 49.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-1 (4<sup>th</sup> Ed. 2004).
50. United States v. Z.P. Chardon, 889 F.2d 233, 238 (9<sup>th</sup> Cir. 1989).
51. Id.
52. Mouldoux, Andre J., Rights of a Fleeter as Creditor or Lienholder, 1983 GNOBFA River and Marine Industry Seminar.
53. Id.
54. Fed. Rule Civ. Proc. Supp. Adm. Rule E(5).
- 55.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-9 (4<sup>th</sup> Ed. 2004).
56. Walsh v. Tadlock , 104 F.2d 131, 132 (9<sup>th</sup> Cir. 1939).
57. Chapman v. The Engines of Greenpoint, 38 Fed. 671, 672 (S.D.N.Y. 1889).
58. First National Bank of Jefferson Parish v. M/V Lightning Power, 851 F.2d 1543, 1546 (5<sup>th</sup> Cir. 1988).
- 59.46 USCA 31342(a)(3).
60. Galehead, Inc. v. M/V Anglia, 183 F.3d 1242, 1245 (11<sup>th</sup> Cir. 1999).
61. Integral Control Sys. V. Consolidated Edison Co., 990 F.Supp. 295, 301 (S.D. N.Y. 1998).
- 62.46 USCA §31305.
- 63.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-3 (4<sup>th</sup> Ed. 2004).
64. Gardner v. Panama R. Co., 342 U.S. 29 (1951).
65. Jones v. Reagan, 748 F.2d 1331, 1335 (9<sup>th</sup> Cir. 1984).

66. Stevens Technical Services, Inc. v. S.S. BROOKLYN, 885 F.2d 584, 588 (9<sup>th</sup> Cir. 1989).

67. Ververacia v. Drill Barge BUCCANEER, 488 F.2d 888 (5<sup>th</sup> Cir. 1974).

68.46 USCA § 31326(a).

69. Beverly Hills National Bank & Trust Co. v. Compania De Navegacione Almirante, S.A., Panama, 437 F.2d 301, 304 (9<sup>th</sup> Cir. 1971).

70.46 USCA § 31321, *et. seq.*

71. Fredelos v. Merritt - Chapman and Scott Corp., 447 F.2d 435, 439 (5<sup>th</sup> Cir. 1971).

72.1 Schoenbaum, Thomas J., Admiralty and Maritime Law, §9-6 (4<sup>th</sup> Ed. 2004).

73. Bank One, Louisiana v. MR. DEAN, 293 F.3d 830, 834 (5<sup>th</sup> Cir. 2002).