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Whose Lien Is It, Anyway?

Decisions Regarding Maritime Liens Against Vessels

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Suppliers of goods to ocean-going vessels can face considerable counterparty risk, as the vessels that they supply might never return to the same port. As protection, common law gave suppliers a maritime lien against any vessel to which they provided "necessaries." In the U.S., this common law lien has been codified in the Commercial Instruments and Maritime Lien Act (CIMLA), which states (in relevant part) that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel; [that person] may bring a civil action *in rem* to enforce the lien."[1]

CIMLA focuses on protecting suppliers from insolvent or unscrupulous vessel owners. However, when the supplier is a party who becomes insolvent, its creditors do not have comparable protection. Suppliers often employ subcontractors to assist in fulfilling their obligations to a vessel. Such subcontractors might feel particularly aggrieved when the bankrupt supplier, aided by its CIMLA lien, receives full payment from the vessel owner, while the subcontractors — who performed much of the actual work — are relegated to their distribution as unsecured creditors. Under these circumstances, subcontractors have sometimes argued that they — instead of the supplier — are entitled to the protections of CIMLA liens against the vessel to which the supplies were provided.

The U.S. Courts of Appeals for the Second,[2] Fifth[3] and Ninth[4] Circuits have each decided disputes between a bankrupt seller of fuel to certain ocean-going vessels and that seller's subcontractors over which of them held maritime liens under CIMLA against the vessels to secure unpaid fuel charges. On materially similar facts, these courts decided in favor of the seller, helping to solidify a growing body of case law favorable to sellers.

Background

The decisions each arose from the bankruptcy cases of O.W. Bunker & Trading A/S and its subsidiaries (collectively, "O.W."), which were in the business of selling fuel to vessels. O.W. obtained its fuel from various third-party subcontractors (labeled "physical suppliers") and either delivered the fuel to the vessel itself or had the physical suppliers make the delivery directly. In the latter instances, O.W. essentially acted as a broker. O.W.'s practice was to contract with the vessel owner to provide the fuel, then separately contract with a physical supplier to purchase the fuel that would ultimately be delivered to the vessel. No privity of contract existed between the physical suppliers and vessel owners.

When O.W. began its bankruptcy cases, it was a party to many such dual-contract arrangements pursuant to which the fuel had been delivered to the vessel, but neither the vessel owner nor O.W. had made their contractually required payments. Realizing that they stood very little chance of receiving payments from O.W., the physical suppliers made demands directly upon the vessel owners for payments of the charges that O.W. had failed to pay. Many vessel owners were therefore faced with competing demands for payments for the same fuel: one demand from O.W. pursuant to the fuel-purchase contract between the owner and O.W., and the other demand from O.W.'s unpaid physical supplier.

ING Bank N.V. v. M/V Temara

ING Bank N.V. v. M/V Temara involved exactly the foregoing situation. The action began when ING, as O.W.'s assignee, filed a complaint *in rem* against the vessel that had received the fuel, asserting a maritime lien to secure O.W.'s unpaid charges. The physical supplier intervened and asserted a competing maritime lien. On cross-motions for summary judgment, the U.S. District Court for the Southern District of New York ruled that neither claimant held a lien under CIMLA. The district court ruled against the physical supplier on the grounds that it had not supplied the fuel "on the order of the owner" of the vessel for purposes of CIMLA. Instead, it had provided the fuel on the order of O.W., which "was neither an owner nor the authorized agent of the owner."[5]

The district court also ruled (incorrectly, as it turned out) that O.W. did not possess a lien either, because O.W. had not "provided" the fuel to the vessel for purposes of CIMLA. The district court seemed to have based its decision on a finding that O.W. had not taken on any risk in the transaction "because it was 'steps removed from the physical provision of bunkers and never had a tangible financial risk with regard to them.'"[6]

1 46 U.S.C.A. § 31342(a).
2 *ING Bank N.V. v. M/V Temara*, 892 F.3d 511 (2d Cir. 2018).
3 *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290 (5th Cir. 2018).
4 *Bunker Holdings LTD v. Yang Ming Liberia Corp.*, 906 F.3d 843 (9th Cir. 2018).
5 *ING*, 892 F.3d at 517.
6 *Id.* at 518 (quoting *ING Bank NV v. M/V Temara*, No. 16-cv-95, 2016 WL 6156320, *6 (S.D.N.Y. Oct. 21, 2016) (District Court Opinion)).

On appeal, the Second Circuit began its analysis by breaking CIMLA into its elements: "CIMLA requires three elements for a maritime lien: (1) that the goods or services at issue were 'necessaries,' (2) that the entity 'provid[ed]' the necessaries to a vessel; and (3) that the entity provided the necessaries 'on the order of the owner or a person authorized by the owner.'"[7] There was no question that fuel is a "necessary" for purposes of CIMLA, but the dispute centered on the second and third elements of CIMLA: whether either O.W. or the physical supplier had "provided" the fuel to the vessels, and whether they had done so "on the order of the owner."

Did O.W. Possess a Lien?

The Second Circuit first analyzed whether O.W. satisfied the requirements under CIMLA to hold a lien against the vessel. There was no question that O.W. had received the requests for fuel "on the orders" of the "vessel owner or a person authorized by the owner," as O.W. was the counterparty on the vessel owners' fuel-purchase contracts. Accordingly, O.W. satisfied the third element of the statute. However, the physical supplier argued that O.W. did not meet the second CIMLA element because it had not "provided" the fuel to the vessels. The physical supplier — not O.W. — had physically delivered the fuel to the vessel. Accordingly, the physical supplier argued that it was they — not O.W. — that had "provided" the fuel for purposes of CIMLA.

The Second Circuit disagreed. Citing to the *Restatement (Second) of Contracts* and "straightforward principles of contract law," the Second Circuit explained that "a supplier may provide necessaries to a vessel indirectly through a subcontractor because when a subcontractor does so pursuant to its contract with a contractor, the subcontractor's performance is attributable to the contractor."[8] Accordingly, the Second Circuit held that O.W. "was a provider of necessaries under CIMLA and may assert a maritime lien against the Vessel."[9]

The Second Circuit criticized the district court's conclusion that O.W could not have been deemed to have "provided" the fuel because it had not "incur[red] any financial risk down the contractual chain."[10] "The District Court's risk analysis was beside the point," explained the Second Circuit.[11] "To assert a maritime lien, all a bunker contractor must establish is that it contracted with a statutorily authorized person for the delivery of the bunkers and that the bunkers were delivered pursuant to that contractual arrangement."[12] The Second Circuit added that even though a "risk analysis" was irrelevant, O.W. indeed had borne "routine commercial risk" in the transaction, as it had been contractually liable both to the vessel to provide the fuel and to the physical supplier to provide payment. Accordingly, the Second Circuit held that the district court had erred in holding that O.W. did not possess a lien.

Did the Physical Supplier Possess a Lien?

Turning next to the physical supplier, the Second Circuit held that although it was the party who had actually delivered the fuel, the physical supplier nonetheless had no lien under CIMLA because it had provided the fuel at the direction of O.W. and not "on the order of the owner or a person authorized by the owner" as required by CIMLA. The court explained:

> CIMLA defines "persons ... presumed to have authority to procure necessaries for a vessel" as "(1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by — (A) the owner; (B) a charterer; (C) an owner *pro hac vice*; or (D) an agreed buyer in possession of the vessel."[13]

Since O.W. was none of these, the Second Circuit affirmed the district court's denial of summary judgment for the physical supplier. The court noted that if "we were to allow a subcontractor — without any indication that a statutorily authorized entity provided direction — to assert a maritime lien, we would be subjecting vessels to arrest on the basis of disputes between contractors and their subcontractors."[14]

Valero Marketing & Supply v. M/V Almi Sun

The facts in *Valero* were materially similar to those in *ING*, except that in *Valero* the vessel owner had already paid O.W. in full — not the physical supplier — thereby risking having to double pay in the event that the physical supplier ended up entitled to a maritime lien.

Valero began when the physical supplier, having been rebuffed by both O.W. and the vessel owner, brought an *in rem* action against the vessel asserting a lien under CIMLA. As in *ING*, the physical supplier had made the actual delivery, but had not been in contractual privity with the vessel owner. Instead, the physical supplier was strictly a subcontractor of O.W., and only O.W. was in privity with the owner.

The U.S. District Court for the Eastern District of Louisiana awarded summary judgment in favor of the vessel, and the physical supplier appealed to the Fifth Circuit. On appeal, the Fifth Circuit framed the following query: "The sole inquiry before us is whether [the physical supplier] furnished the necessaries to the Vessel 'on the order of the owner or a person authorized by the owner.'"[15]

The physical supplier argued that O.W. was effectively an "agent" of the vessel owner for purposes of § 31341(a) of CIMLA, which lists "an agent appointed by the owner" in the list of persons presumed to have the authority to order the supplying of necessaries to a vessel. Support exists for the proposition that a physical supplier's general contractor (*i.e.*, the party in O.W.'s role) might be considered an "agent" of the vessel owner for purposes of CIMLA.[16] However, to support such a finding, a physical supplier would need to show that the entity to which it had sold the goods (*i.e.*, the party in O.W.'s role) had an authority to bind the vessel.[17] Unfortunately for the physical supplier in

7 *Id.* at 519.
8 *Id.*
9 *Id.* at 520.
10 *Id.* (citing District Court Opinion, 2016 WL 6156320 at *7).
11 *Id.*
12 *Id.*
13 *Id.* at 519 (quoting 46 U.S.C. § 31341(a)).
14 *Id.* at 522 n.7.
15 *Valero Mktg. & Supply Co.*, 893 F.3d at 294.
16 *Id.* at 293-94 (citing *Marine Fuel Supply & Towing Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988)).
17 This authority might be proven by showing that the vessel owner — acting through the general contractor — controlled the selection or performance of the physical supplier. *See, e.g., Clearlake Shipping Pte Ltd. v. O.W. Bunker (Switzerland) SA*, 239 F. Supp. 3d 674, 687 (S.D.N.Y. 2017) ("An owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor.").

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Valero, O.W. had no such authority. Accordingly, the Fifth Circuit affirmed the district court's award of summary judgment for the vessel.

In response to a point raised by the dissent, the Fifth Circuit noted a line of Eleventh Circuit decisions that contain an "exception to the general rule" that a physical supplier is not entitled to a lien under CIMLA unless it supplies goods on the order of the owner or an agent of the owner. Under this exception,

> where the general contractor is not an agent of the owner, and the owner does not initially order the subcontractor to perform the work, it might still be said that the owner "somehow authorized" the work if it "was sufficiently aware of, and involved in, the work that it might be said that the subcontractor was working for the owner."[18]

There appears to be some uncertainty over the scope of this exception, which the Fifth Circuit in *Valero* labeled as the "significant-and-ongoing-involvement exception."[19] The Fifth Circuit neither endorsed nor criticized the exception, but clarified that under its reading of Eleventh Circuit case law, the exception would be limited to situations where "the owner's participation with the subcontractor was so substantial that it could not seriously be argued the work was not done on the owner's orders."[20] The Fifth Circuit concluded that even if this exception were applicable, a one-off fuel resupply, such as the one at issue in *Valero*, would not come close to implicating the exception.

Bunker Holdings v. Yang Ming Liberia

In *Yang Ming Liberia*, the Ninth Circuit likewise ruled in O.W.'s favor and against the physical supplier under similar facts. In a relatively brief opinion, the court stated the "general rule" that subcontractors of a party selling bunkers to a vessel are not entitled to a maritime lien on the vessel. The only exception, the court continued, "applies when the vessel owner directs the general contractor to use a particular subcontractor. In that scenario, the general contractor essentially acts as the owner's agent and thus exercises authority to bind the vessel."[21] The court made no mention of the "significant-and-ongoing-involvement exception" discussed by the Fifth Circuit in *Valero*.

Takeaway

The strict approach exemplified by the Second Circuit in *ING*, the Fifth Circuit in *Valero* and the Ninth Circuit in *Yang Ming Liberia* — under which the subcontractor may only assert a maritime lien if the general contractor was acting as the vessel owner's agent when it hired the subcontractor — is the majority rule. The "significant-and-ongoing involvement exception" appears to be confined to the Eleventh Circuit. The former approach is seemingly the more practical, as it applies a "bright-line" rule that provides certainty for vessel owners and their creditors, and avoids a potentially murky factual assessment of the level of involvement of the vessel owner in the work of the physical supplier. However, as long as the exception remains in the Eleventh Circuit, suppliers to vessels should be aware that they might be subject to either approach. abi

18 *Valero Mktg. & Supply Co.*, 893 F.3d at 297 (quoting *Barcliff LLC v. M/V Deep Blue*, 876 F.3d 1063, 1071 (11th Cir. 2017)).

19 *Id.* For example, the U.S. District Court for the Northern District of Florida recently stated that a subcontractor to a vessel owner's contract counterparty "sometimes does and sometimes does not acquire a lien, depending on whether 'the level of involvement between the owner and the third-party provider [*i.e.*, the subcontractor of the contract counterparty] was significant and ongoing during the pertinent transaction.'" *Martin Energy Servs. LLC v. M/V Bravante IX*, 233 F. Supp. 3d 1269, 1277 (N.D. Fla. 2017). This court awarded a lien in favor of the subcontractor on the grounds that it "was known to and indeed closely coordinated the operation" with the owner, and received a "signed bunkering certificate" from the owner. *Id.* at 1278.

20 *Valero Mktg. & Supply Co.*, 893 F.3d at 297 (quoting *Barcliff*, 876 F.3d at 1072).

21 *Yang Ming Liberia*, 906 F.3d at 846.