

MARITIME LIEN FAQ's

Warning: The body of maritime lien law is riddled with exceptions, qualifications and conflicting judicial decisions too extensive to cover here. What may usually be accurate may not be accurate in the circumstances of a particular case or in different jurisdictions. Accordingly, the following generalizations should not be relied upon without the assistance of qualified legal advice to deal with a particular question or case.

What is a "lien"?

A lien is a legal interest in property, held by a creditor, that secures payment of a debt or a liability. A lien may entitle the creditor to take the property or to have the property sold to raise money to pay a debt in default or a liability secured by the lien.

What is a "maritime lien"?

A maritime lien is a lien created by admiralty or other federal law in a vessel or other "maritime property."

What property may a maritime lien apply to?

Depending on the type of lien, a maritime lien may attach to a vessel, a vessel's electronics, furniture, boats, fishing gear, certain types of fishing rights and permits, machinery, spare parts, fuel and other equipment, cargo, fish and property that has been salvaged from navigable waters. Some types of lien apply to leased and borrowed equipment placed on board a vessel, and some do not. Maritime liens do not apply to shore-based property such as wharves, piers and floats. Once a lien attaches to an item on a vessel, it will usually remain attached if the item is removed from the vessel.

Does anything special have to be done to create a maritime lien?

The filing of appropriate documents with the National Vessel Documentation Center is needed to create a preferred ship mortgage lien. All other liens arise spontaneously upon the provision of goods or services to the vessel or other maritime property, or upon the commission of the accident or other event that gives rise to a liability secured by the lien. Since there is no need to file, there is no reliable means of discovering all liens that may exist against a vessel. Liens not of record are called "secret liens."

What are some examples of debts and liabilities that may be secured by a maritime lien on a vessel?

Charges for goods and services rendered to the vessel (referred to as "necessaries"), such as moorage, fuel and other consumables, maintenance, repairs, and some types of insurance premiums; towage; seamen's wages; salvage; liability to repair dock and collision damage; liability to compensate for personal injury; and maintenance, cure and unearned wages owed to former crewmen.

Does it matter whether a vessel is "documented"?

No, except that a vessel must be a documented vessel to be subject to a preferred ship mortgage.

How long does a maritime lien last?

It depends on the lien and the circumstances. Some fishing vessel crew wage liens may expire in 6 months. A preferred mortgage lien that secures payment of a promissory note expires when the applicable statute of limitations runs on claims based on a breach of the note. A carrier's lien against cargo lasts only as long as the cargo remains in the carrier's possession. Most maritime personal injury claims are subject to a 3 year statute of limitations, pure salvage claims for 2, and some cargo damage claims for 1. Lien claims not governed by a statute of limitations are governed by the doctrine of *laches*. This doctrine bars a lien claim when (1) there has been an unreasonable delay in pursuing it and (2) another party's legal position has been harmed by the unreasonable delay. For example, pursuit of a lien claim more than a few months old may be barred when a third party ignorant of the lien has purchased the vessel in the interim, or when a lender ignorant of the lien has lent money and taken a ship mortgage to secure the loan.

When the original owner retains the vessel, *laches* will usually not be applied aggressively on that owner's behalf.

If there is no statute of limitations on the claim secured by the lien, existing statutes of limitation on similar claims may be used as a rule of thumb in assessing whether delay was unreasonable for purposes of a *laches* defense.

What are some examples of non-maritime liens that can arise against a vessel?

Federal, state and local tax liens, UCC liens, mechanic's liens, and storage liens.

Can notice of a maritime lien claim be registered with the National Vessel Documentation Center?

Yes, but only if a preferred ship mortgage has first been recorded there.

Should a notice of lien be registered with the National Vessel Documentation Center?

A preferred ship mortgage must be registered to create a lien. No other maritime lien need be registered at the NVDC or anywhere else to be valid. But registration may extend the life of a lien by precluding a claim of *laches*. Further, lenders and buyers who have learned of a lien on file may require a vessel owner to pay off the debt or obligation secured by the lien before proceeding with a loan or sale. A form and filing information can be found at www.uscg.mil/hq/g-m/vdoc/nvdc.htm.

May a vessel be subject to more than one lien at a time?

Yes. For example, the owner of a vessel subject to a mortgage lien may fail to pay for fuel and services rendered to his vessel, which would give rise to a "lien for necessities," may fail to pay crew, giving rise to a lien for seamen's wages, and may cause an accident with the vessel, giving rise to a lien for personal injury or property damage. All these liens and other maritime and non-maritime liens may co-exist.

What happens if there is more than one maritime lien?

Admiralty law confers priority on the order of payment of different types of lien from the proceeds of a foreclosure sale. Holders of higher priority liens are to be paid in full before holders of lower priority liens may collect anything. Within priority ranks, the last lien to attach

to the vessel is usually to be paid first, though liens may be grouped by year, season or voyage. In general, common liens are paid off in the following descending order: liens for seaman's wages, and for maintenance, cure and unearned wages; salvage liens; liens securing accident claims; liens for necessities rendered before a preferred ship mortgage lien attaches; preferred ship mortgage liens; liens for goods and services rendered after any preferred ship mortgage lien attaches.

What happens to non-maritime liens, such as federal, state and local tax liens and state law UCC liens?

None are paid from vessel sale proceeds until all administrative expenses (see below) and maritime liens are paid in full. The balance usually is the owner's property, and may be subject to non-maritime lien and other claims.

What is the procedure for collecting on a maritime lien?

A maritime lien may only be foreclosed, or "executed," by the filing of an admiralty action in federal court by one or more lien claimants. The vessel is then arrested by a deputy marshal, and held in custody pending further developments. The custodian is usually a private vendor, because the marshal's charges for custody are prohibitive. Other lien claimants may enter the action. If any of the lien claimants prove entitlement to foreclose and payment, then the court will order the vessel sold, usually at public auction conducted by the marshal. Successful lien claimants will then be paid from sale proceeds in order of priority. Any remaining balance may be paid to the owner. Visit www.AlaskaMarineLaw.com for additional details.

Regrettably, vessels usually bring less, and often much less, than their fair market value at a foreclosure sale. But a lien claimant may be able to purchase the vessel using the credit of its claim, avoiding any outlay of additional cash. The vessel may be resold later, just like any other privately owned vessel, perhaps realizing market value.

How long does the procedure take?

Arrest of a vessel may precipitate prompt payment, resulting in custody of only a few days. If payment is not forthcoming and no owner or other entity appears to defend the vessel from the claim, the vessel may be taken through marshal's sale in 60 to 75 days. If a defense is mounted on behalf of the vessel, resolution may require many months, and can drag on for still longer.

How much does this procedure cost?

There are two primary categories of cost. "Administrative costs" include the travel and other costs incurred by and wages billed by the marshal to arrest the vessel and costs incurred in keeping the vessel in custody until it is conveyed to the buyer following foreclosure sale. The marshal's wages and expenses will vary depending on the location of the vessel and other factors. Costs of keeping the vessel may include a custodian's fee, moorage, shore power, custodian and government liability insurance premium, and the like. The other category is lawyers' fees and related litigation expenses. These expenses vary depending on the complexity of the case, whether the owner contests the action, whether other lien claimants enter the action to compete, and other events.

In a case requiring little investigation and analysis to prepare and which is promptly resolved, legal expenses may be as little as \$1,500.00 to \$2,000.00. The marshal's charge for

arrest in an out-port, if the port is not too remote, may run \$750.00 to \$1500.00. The custodian's fee for a vessel that is moored in port, is not at risk, and does not require a custodial crew may run \$25.00 to \$50.00 per day. There may be an additional charge at the inception of custody, to secure and inventory the vessel and its equipment. Liability insurance premium is presently approximately \$23.00 per day for the first \$1MM in coverage. Moorage will vary, and shore power may be needed.

If the vessel is not promptly released, both legal and custodial costs will rise. Legal and related issues requiring attention tend to emerge over time. The vessel will likely require periodic special attention, such as winterizing.

Can these costs be recovered?

"Administrative expenses" are paid out of sale proceeds before any lien is paid. Lawyers' fees are not part of the debt or liability secured by any maritime lien, with the exception of a preferred ship mortgage lien.

Can these costs be avoided?

The vessel owner or other entity having an interest in the vessel can avoid arrest, or can have an arrested vessel released, by posting a bond, or by offering a "letter of undertaking" or "stipulation for value" acceptable to the party making the claim. The alternative offered stands in the place of the vessel, avoiding the need for and costs of arrest and custody.

If, following arrest, other parties enter the case to pursue their own lien claims, the arresting party can promptly move to require them to contribute to the costs of custody, thereby reducing the arresting party's outlays.

If, following arrest, the owner cannot bond the vessel out and it appears the case will not be resolved for many months, the arresting party or other lien claimant can ask the court for an order to sell the vessel before the case has been concluded. When that occurs, the sale proceeds are paid into court to be disbursed in accord with the final outcome.

Are there collection alternatives to foreclosure action in federal court?

Yes, there are other collection avenues, all of which will usually be less expensive to pursue. Preferred ship mortgages often provide for private repossession as an alternative to judicial foreclosure, though jurisdictions differ on the validity of such provisions. Some transactions give rise to both maritime and state-law liens, enabling the creditor to act on the latter only, pursuant to procedures prescribed by state law. The vessel owner may agree in advance to subject his vessel to a UCC security interest and lien under state law, which could be pursued with procedures allowed under state law. Where debts to a municipality are concerned, local ordinances may authorize the harbor department to pursue administrative collection procedures. Finally, the creditor could elect to sue the vessel owner or operator personally for the underlying debt secured by a maritime lien. Debts not exceeding \$7,500.00 may be pursued economically in small claims court. If the creditor wins a judgment against the owner, he may have the "judgment debtor's" personal property, inclusive of vessels, sold pursuant to state law procedures to raise money to pay the judgment. Alaska Permanent Fund dividends could also be seized. The creditor may also obtain a judgment lien under state law against the judgment debtor's real estate by following the appropriate recording procedure.

Is there a disadvantage to pursuing collection action against a vessel in some way other than judicial foreclosure in federal court?

Yes. A sale pursuant to court order in a foreclosure action is the only way to clear a vessel of valid liens short of satisfying the underlying obligation. Potential buyers' concerns about the presence of secret liens could inhibit sale of the vessel by other means, or could require a discount in price or an agreement to indemnify.

When should a harbor master elect to foreclose on a maritime lien for harbor charges, or for damage or injury due to accident?

There are too many factors that can bear on the decision to cover in a short space. The following are some factors to consider.

Addressing first the collection of bills for ordinary harbor charges, there may be the following options: (1) foreclose any maritime lien securing the charges; (2) sell the vessel using the procedure provided by state law, ordinance or moorage agreement; (3) sue the owner, operator or other person responsible for the debt secured by the lien; and (4) dispose of the vessel as abandoned or derelict. A harbor master's necessities lien foreclosure action should usually be relatively economical. The claim will usually require little or no investigation or legal analysis to commence. Claims will largely be repetitive, permitting use of standardized legal forms. Consequently, legal fees in an uncontested case may not much exceed \$1,000.00. A harbor master can be appointed as custodian for his city's claim, thus avoiding outlays for custodial services and moorage. His city may be able to obtain the required custodial liability insurance coverage more economically than insurance obtained through the marshal's office.

Since the harbor will be looking to marshal sale proceeds to pay its "administrative costs," as well as the debt secured by the lien, whether the vessel will sell for any useful sum, either at the marshal's sale or at later private resale, is a crucial question. Be sure to consider whether the lien covers valuable fishing gear and other equipment that may have been removed from the vessel, and fishing rights or permits.

If it appears a maritime lien foreclosure sale will raise enough money to at least pay the cost of the action, the next most important question is whether the vessel is subject to a mortgage or other lien that will have to be paid ahead of the harbor's claim. The NVDC should be checked for liens of record that may outrank the harbor's lien. Old lien claims may no longer be viable. Statutes of limitation governing claims on the underlying debt may have expired, or *laches* may bar pursuit. Further, the holders of small liens tend not to get involved in lien foreclosure actions because the expense is unwarranted. If there is a superior lien, negotiation with that lien holder may be productive. For example, the lien holder may agree to a split of proceeds if it is spared the expense and nuisance of getting involved in the action. Likewise, it may agree to some financial arrangement if without one, the vessel will be a candidate for disposal.

Just filing a claim of lien with the NVDC and letting it ride may be the best choice. The owner may later be required to clear the lien to complete a transaction involving the vessel. Selling a vessel under harbor ordinances may be the better course with pleasure vessels and commercial vessels of little value. But the existence of viable liens will point away from this alternative, unless the lien claims can be resolved in the process. A civil suit, which may be in small claims, against the owner or operator could be a very economical alternative. If filing suit itself does not precipitate payment, the various collection avenues identified above could be pursued once judgment is obtained.

Of course, chaining a vessel up under the applicable ordinances and/or moorage agreement shortly before a season begins would exert great pressure. While cash might be short, the operator might be able to put up more convenient substitute collateral, a guarantor, a "letter

of undertaking,” or an assignment to the municipality of upcoming fish or other proceeds.

Some owners feel that the fact that their vessel is “documented” protects it from collection action taken under state law, local ordinance or a moorage agreement. There is no substantial support for that view.

Pursuit of a lien claim based on damage or injury caused by an accident should promptly be reviewed with a maritime lawyer. Proof of liability and damages in an accident case will usually be less straightforward than proof of a claim for ordinary harbor charges. Further, evidence may need to be promptly identified and preserved. Finally, if the vessel is not local, it may need to be arrested, or substitute collateral obtained, before the vessel departs the jurisdiction.

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