

MARITIME LIENS AND ASSETS IN BANKRUPTCY

NEW DEVELOPMENTS

By

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Maritime liens developed as an essential event of vessel operations. They are similar to a security interest but differ from most land liens, although they are analogous in concept to materialmen's liens, which arise as a matter of law, a result of work performed in the construction industry. The maritime liens arose from contract claims and are controlled by the Federal Maritime Lien Act, which states: "a person providing necessities to a [private] vessel [with the owner or owner's agent's permission] ... has a maritime lien on the vessel, may enforce the lien in a civil in rem action, and is not required to allege or prove that credit was given to the vessel." On foreign-flagged vessels, these liens actually prime all other credits perfected or unperfected against a vessel by operation of law even though they are not filed and may, in certain instances been virtually undetectable by other creditors performing lien searches. On vessels flagged in the United States, these liens do not prime secured debt but do come ahead of all unsecured liens in priority.

Necessaries in the maritime environment are those costs that are important to the seaworthiness of the vessel. These include such expenses as seamen's wages, custodial expenses, tort claims, repairs, maintenance, towage, supplies, and other necessities used to keep the vessel in commerce. Without upkeep, the vessel would deteriorate and have limited or no value. Further, financing for a vessel that did not maintain its value would be nonexistent. For example, at the time a necessary expense occurs, such as seamen's wages the seamen automatically have a lien on the vessel, which incurred the expense until they are paid. The guidelines that enforce the

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control over who can impose a maritime lien is regulated by Admiralty Law, which is similar to UCC (Uniform Commercial Code), but was established strictly for vessels so they could not sail away and leave debt behind.

Another type of maritime lien that is exclusive to maritime law is The Secret Lien. Secret Liens arise due to the transient nature of a ship and the impracticality of recording liens while it is on a voyage and out of the jurisdiction in which the supplier of necessities resides. A system does not exist where a seaman or vendor can file a lien each time debt for wages or necessities occur. Therefore, a maritime debt that does not have a recorded lien can still exist, be absolutely valid, prime other liens and be unknown to anyone but the holder of the lien. Two-year statutory requirements exist for noticing of a maritime lien by the vendor or seamen. This creates a special form of financial complexity for creditors assessing the value of the assets of a vessel in bankruptcy.

When dealing with maritime bankruptcy lien issues it must be understood that maritime liens are governed by their own set of laws, and therefore financing issues that arise in a maritime bankruptcy are traditionally complicated. Any potential liens arising under the unique provisions of maritime law need to be identified and evaluated before financing a DIP or any Exit financing because of what is effectively a super priority status.

The most recent development in maritime law relates to the definition of a vessel. In 2005 the U.S. Supreme Court revisited the definition of a vessel in Stuart v. Dutra Construction Co., 543 U.S. 481 (2005). The case filed by the plaintiff sought relief under the Jones Act and in the Longshore and Harbor Workers Compensation Act, which applies to land-based maritime

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employees, for personal injury damages where a marine engineer was severely injured. The accident took place aboard a harbor-dredge in Boston Harbor. This particular harbor-dredge had limited self-propulsion and was only able to move a very short distance in the water. Longer journeys required the use of a tugboat to move the harbor-dredge. In Justice Clarence Thomas' opinion the word vessel in statutory language "includes every description of water-craft or other artificial apparatus used, or capable of being used, as a means of transportation on water." The harbor-dredge, although it moved very short distances, and did not have a captain, was concluded to be deemed a vessel, in that it served as waterborne transportation, carrying machinery, equipment and crews over water. The significance of this recent development will have a great impact on maritime liens in bankruptcy filings.

Essentially, the Stewart case materially expanded the number of potential claimants found to hold maritime liens and thereby enabled a class of creditors who would not have previously been classified as priority creditors to assert their interests over non-maritime lien holders

Subsequent cases, which have been decided since Stewart, reflect the impact of the Stewart case on the question of defining a "vessel" by focusing on the issue of its use as a means of transportation includes:

- a. Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans, 439 F. Supp. 2d 1178 (S.D. Ala. 2006) – In this case, the judge decided that a riverboat was not a "vessel" where the riverboat was semi-permanently or permanently moored with steel cables. Electrical, computer and communication lines

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attached the riverboat from a shore-side source. Sewage was pumped off riverboat to shore and the riverboat was not being used as a means of transportation, or in navigation.

- b. Holmes v. Atlantic Sounding Co., 437 F.3d 441 (5th Cir. 2006) – This case, similar to the Stewart case, involved an injured cook on board a barge used to provide temporary housing to employees hired to perform dredging work. Although it was incapable of self-propulsion, it was moved long distances by tugs. It was found that the greater the structure’s semblance to conventional seafaring craft, the greater the odds of securing vessel status. As long as the water borne structure is practically capable of being used for transportation on navigable waters, it is a “vessel”.

In Re Torch Offshore No.’s 05-10137, 05-10138, 05-10140 (Bankr. Eastern District of Louisiana), the law firm Lugenbuhl, Wheaton, Peck Rankin & Hubbard, adapted a Proof of Maritime Claim Form (“POC”) specifically for the Torch case¹. The development of this claim form was intended to identify maritime liens in this case and provide for a bar date for filing a maritime lien. The form and the noticing procedures superseded the statute of limitations on Secret Liens. Forethought by the attorneys applied in the adaptation of the POC facilitated the financial advisors ability to evaluate assets in preparation for asset sales, as well as negotiations with the company’s lenders.

¹ A copy of the Maritime Proof of Claim developed in the Torch case is attached as Exhibit “_”

In conclusion, the definition of a “vessel” in the U.S. Supreme Court’s decision broadens the scope and application of possible maritime liens. In order to properly deal with these developments in the context of maritime bankruptcies it is important for practitioners to consider establishing a Proof of Maritime Lien Claim Form and noticing period, specifically aimed at forcing timely identification of maritime bankruptcy claims, to assist in identifying those claims that have maritime liens and giving professionals involved in the bankruptcy case a more effective way to evaluate the possibility of secured liabilities being inadvertently primed.

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Name of Debtor:

Case Number 05-_____

TO ALL HOLDERS OF MARITIME
LIEN AND *CUSTODIA LEGIS* CLAIMS
AGAINST THE M/V MIDNIGHT BRAVE,
M/V MIDNIGHT CARRIER, M/V
MIDNIGHT DANCER, M/V MIDNIGHT
EAGLE, M/V MIDNIGHT EXPRESS, M/V
MIDNIGHT FOX, M/V MIDNIGHT
GATOR, M/V MIDNIGHT RIDER, M/V
MIDNIGHT SAPPHIRE, M/V MIDNIGHT
STAR, M/V MIDNIGHT WRANGLER

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case unless such claim is a *custodia legis* expense claim, which *custodia legis* claim is subject to court determination as to allowability. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. §503.

**THE DEADLINE FOR FILING A PROOF
OF MARITIME LIEN CLAIM IS
SEPTEMBER 30, 2005**

Name of Creditor (The person or other entity to whom the debtor owes money or property):

Name and address where notices should be sent:

Telephone Number: (____) ____-_____

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your Maritime Lien or *Custodia Legis* Expense Claim. Attach a copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

If you are required to file a proof of maritime lien or *custodia legis* claim but do not do so before the above deadline, your claim(s) will be barred and you will not receive distribution on account thereof.

This completed form must be electronically filed or returned to the following address on or before September 30, 2005:

Clerk of Bankruptcy Court
Eastern District of Louisiana
500 Poydras Street, Suite B-601
New Orleans, LA 70130

Account or other number by which creditor identifies debtor:

Check here ☐ replaces
If this claim ☐ amends a previously filed claim, dated:

1. Basis for Claim

- ☐ Goods sold
☐ Services performed
☐ Wages
☐ Custodia Legis Expense(s)
☐ Other (Please specify):

2. Date(s) that Goods or Services were Provided or that Injury was Sustained:**3. a. Location in which Goods or Services Were Provided:**

City/County/Parish: _____ State: _____

Federal Block # _____, Lease # _____, or

State Well # _____, Section # _____, Township _____,

Range _____, Serial # _____

b. Location where Injury was Sustained:**6. Identity of Individual or Entity Requesting Goods or Services or Which Authorized or Ordered the Activity Which Allegedly Resulted in the Injury Sustained (if different from the Debtor named above):****7. Did you acquire this Maritime Lien Claim by assignment or subrogation?**

☐ Yes If yes, please explain and attach supporting documents.

☐ No

8. Have you filed any notice of claim or lien regarding the amount claimed Herein?

☐ Yes If yes, please attach copies of the notice(s) and claim(s).

☐ No

9. Have you filed any legal proceeding or taken any other actions to attempt to collect the amount claimed herein?

☐ Yes If yes, please attach copies of the Complaint or Petition and other related documents.

☐ No

4. Total amount of claim at time case filed: \$ _____

- ☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Name of the Individual, Entity, and/or Identification Number of the Vessel which received the Goods or Services Provided or Where Injury was Sustained:**10. Credits:** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

11. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments and other pleadings, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, please explain. If the documents are voluminous, you may attach a summary.

12. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope. Claims may be filed electronically. For additional information on electronic filing, visit our website at www.laeb.uscourts.gov.

THIS SPACE IS FOR COURT USE ONLY

Date

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any).

INSTRUCTIONS FOR PROOF OF MARITIME LIEN CLAIM

The instructions and definitions below are a general explanations of the law. There may be exceptions to these general rules and definitions and you are advised to consult with your own counsel regarding the particular facts and nature of your claim.

– DEFINITIONS –

Debtor(s)

The person, corporation, or other entity that has filed a bankruptcy case is called the Debtor. In this matter, Torch Offshore, Inc., Torch Offshore, L.L.C., and Torch Express, L.L.C. are the Debtors.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Custodia Legis Expense

A *custodia legis* expense claim is a claim for expenses incurred to maintain a vessel while that vessel is in custody or under seizure.

Maritime Lien Creditor

A Maritime Lien Creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed and that debt is a Maritime Lien Claim.

Maritime Lien Claim

A Maritime Lien Claim is a secured claim to the extent that the creditor has a maritime lien against a vessel owned by or in which the debtor has an ownership interest (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Maritime Lien

A Maritime Lien is a claim against a vessel which arises pursuant to and subject to the definitions and requirements of Sections 31301, *et seq.* of Title 46 of the United States Code. Section 31342(a) provides:

“(a) Except as provided in subsection (b) of this section, a person providing necessities to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel.”

ITEMS TO BE COMPLETED IN PROOF OF CLAIM FORM (IF NOT ALREADY FILLED IN)

Court, Name of Debtor, and Case Number:

Fill in the name of the federal judicial district where the bankruptcy case was filed, the name of the debtor in the bankruptcy case, and the bankruptcy case number. Please note that these bankruptcy cases have not been substantively consolidated and are only being jointly administered. Therefore, a maritime lien or *custodia legis* claim must be filed against the proper debtor. Paragraph 5 of the accompanying Notice provides additional information on completing these sections.

Information about Creditor:

Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:

Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check “Other” and briefly describe the type of debt.

2. Date(s) that Goods or Services Were Provided or That Injury was Sustained:

Fill in the date when the debt for the goods or services was first was owed by the debtor or that the injury was sustained. If the debt or injury was incurred over a period of time, fill in the beginning and ending dates for the relevant period of time.

3. Location in Which Goods or Services Were Provided or Where Injury was Sustained:

Fill in the City, County, or Parish and the State in which the goods and services were provided, or where the injury was sustained, which is the basis for the claim. If there are multiple locations, fill in “see attached” and attach a list or copies of documents which contain the requested information.

4. Total Amount of Claim at Time Case Filed:

Fill in the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Name of the Individual, Entity, and/or Identification Number of the Vessel which received the Goods or Services Provided or Where Injury was Sustained:

Fill in the name of the individual, entity, or provide the name and/or identification number of the vessel which received the goods or services, or where injury was sustained, which is the basis for the claim.

6. Identity of the Individual or Entity Requesting Goods or Services or Which Authorized or Ordered the Activity Which Allegedly Resulted in the Injury Sustained:

Fill in the name of the individual or entity which requested that the goods or services or which authorized the activity which allegedly resulted in the injury sustained and which is the basis for the claim.

7. through 9. Questions Regarding the Maritime Lien Claim:

Check the appropriate box in response to each question. If you answer “yes” to any question, attach copies of the referenced documents or other supporting documents.

10. Credits:

By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor(s) or any party with regards to the debt arising from the provision of the goods or services which are the basis for the claim.

11. Supporting Documents:

You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.