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Third Circuit: Carrier's "Extended" Maritime Possessory Liens Upheld

In a case of first impression at the circuit level,¹ the U.S. Court of Appeals for the Third Circuit recently held that maritime carriers and their customers may contractually extend the carrier's common law possessory liens on cargo securing payment of shipping charges. This covers not only the particular cargo for which shipping charges are outstanding, but *all* cargo belonging to the customer in the carrier's possession, including cargo in different shipments than the one for which charges are outstanding.

Background

Under common law, a maritime carrier has a possessory lien on the customer's cargo in the carrier's possession to secure payment of the carrier's charges for transporting that cargo. Once the carrier hands over the cargo to the customer, however, the carrier's lien is lost. The case law is sparse regarding whether the carrier and the customer may, by contract, extend that lien to cover all cargo of the customer in the carrier's possession, including cargo other than the particular cargo for which freight charges are outstanding.

In *In re World Imports Ltd.*, the documents governing the services provided by a maritime carrier to its customer, including the terms and conditions of the bills of lading, tariffs, applicable invoices and a credit application signed by the customer, provided that the carrier would have "a general lien and security interest in any and all property" of the customer in the carrier's possession that would secure all sums owed by the customer to the carrier for *any* shipment.² The customer commenced a bankruptcy case, and the carrier promptly filed a motion for permission to retain the cargo then in its possession belonging to the customer/debtor until its pre-petition claims were paid. The debtor owed the carrier approximately \$1.45 million, of which approximately \$458,000 consisted of charges for the shipment of the cargo then in the carrier's possession (the "current goods"), and \$994,000 consisted of charges for the shipment of cargo previously delivered and released to the debtor (the "pre-petition goods").

The total value of the current goods was approximately \$1.9 million (*i.e.*, enough to fully secure the

carrier's claim if its liens were valid). In response, the debtor commenced an adversary proceeding seeking to compel the carrier to turn over all of the current goods.

The bankruptcy court granted the relief sought by the debtor, ordered the carrier to turn over all of the current goods, and ordered the debtor to pay the carrier only the freight charges as related to the current goods (*i.e.*, \$458,000). The court held that the carrier's asserted liens securing payment of the charges for the pre-petition goods (*i.e.*, \$994,000) were unenforceable; therefore, the carrier was unsecured with respect to that portion of its claim. On appeal, the district court affirmed. The carrier then appealed to the court of appeals, which reversed the bankruptcy court's ruling and held that the carrier's liens on the current goods to secure payment of charges related to the pre-petition goods were enforceable.

Discussion

The Third Circuit began its analysis by describing common law maritime liens generally. This "lien for unpaid freight arises from the right of the ship-owner to retain the possession of the goods until the freight [has been] paid," operates without notice, and enjoys priority over general creditors, purchasers, and even secured lenders.³

A carrier's common law lien is lost upon "*unconditional* delivery to the consignee."⁴ The key word is "*unconditional*." Where a carrier delivers goods but demonstrates an intent to preserve its lien rights, the carrier "enjoys a strong presumption that absent a clear indication to the contrary, he has not waived his cargo lien upon delivery of that cargo."⁵

Beginning its analysis with the concept of this presumption against a carrier waiving its lien merely by handing over possession of the cargo, the court of appeals criticized the lower courts, stating that those courts "appear to have assumed, without analysis, that [the carrier] did not merely deliver the Pre-petition Goods to [the debtor], but did so unconditionally and thus in waiver of its liens on those goods."⁶ The Third Circuit continued, "Given the strong presumption against waiver, and in the



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¹ *World Imports Ltd. v. OEC Grp. New York (In re World Imports Ltd.)*, No. 15-1498, 2016 WL 1580730 (3d Cir. April 20, 2016).

² *Id.* at *1.

³ *Id.* at *4-5.

⁴ *Id.* at *5 (quoting *The Bird of Paradise*, 72 U.S. 545, 555, 18 L. Ed. 662 (1886)).

⁵ *Id.*

⁶ *Id.*

absence of clear evidence of unconditional delivery, we cannot agree with that assumption.”⁷

On the contrary, the Third Circuit held that the parties’ understanding, evidenced by the credit application, bills of lading, tariffs and invoices, was that the carrier’s lien rights would survive delivery to the consignee.⁸ Following delivery, although the carrier’s liens would no longer adhere to the delivered goods, they would also continue to adhere to all other goods belonging to the debtor in the carrier’s hands. In other words, when the debtor failed to pay the carrier’s freight charges for the pre-petition goods, following delivery of those goods the carrier’s lien rights securing payment of those outstanding charges remained fully intact with respect to the current goods.

Accordingly, the carrier was entitled to assert liens on all of the goods in its possession (*i.e.*, the current goods) to secure payment of its unpaid freight charges not only related to the current goods, but also for the unpaid charges related to the delivered pre-petition goods. The current goods essentially took the place of the pre-petition goods to secure payment of the freight charges for the pre-petition goods.

In support of the lower court decisions, the debtor argued that the carrier was attempting to essentially create a maritime lien by contract where none would otherwise exist as a matter of common law. Since maritime liens are creatures purely of law, the debtor argued that creation by contract is not proper. The court of appeals disagreed and explained that the parties’ agreement had not *created* the maritime liens. Rather, the parties’ agreement evidenced the fact that the parties had “agreed ... in advance that such liens would survive delivery and would be applied to any of [the debtor’s] goods currently in [the carrier’s] possession.”⁹ Moreover, the court of appeals explained, once created by law, a maritime lien could certainly “be extended or modified by agreement of the parties.”¹⁰ “In other words,” the court of appeals continued, “a traditional maritime lien cannot be created by contract alone, but that does not mean that such liens, once created, are beyond contractual modification.”¹¹ Summing up its analysis, the Third Circuit concluded, “Especially in light of the ‘familiar doctrine’ that a maritime lien may attach to property substituted for the original object of the lien, we see no sound reason why the parties’ contractual transfer of the unwaived liens to the Current Goods should not have been enforceable.”¹²

The Third Circuit concluded its opinion by discussing policy reasons favoring parties being allowed to extend maritime liens on already-delivered goods to goods currently being held by the carrier. Among these reasons was

that a carrier’s ability to deliver goods and release them into the flow of commerce, without worrying about waiving its lien rights by doing so, would encourage the free flow of goods in trade around the world. If a carrier were forced to retain goods as its sole means of preserving its lien rights, the result would be that many carriers would do exactly that, and commerce would be hampered. The court of appeals described this scenario as a “protracted, commerce-restrictive process of withholding each shipment until its attendant lien was satisfied.” It reiterated its holding by stating that “[i]f parties to a maritime contract, through negotiation and private ordering, opt to streamline that process by retaining and consolidating liens arising by operation of longstanding maritime law, at least as such liens apply to goods still in the [carrier’s] possession, there is no compelling argument to undo such an agreement.”¹³

In addition, the Third Circuit debunked the policy reason that the district court had advanced in support of its holding. The district court had “worried that ‘a third-party purchaser of the undelivered goods would have no notice that the goods it purchased could be withheld pursuant to a maritime lien on previously shipped goods.’”¹⁴ The Third Circuit countered:

[T]he potential harm to third parties is implicated regardless of whether the maritime lien is intended to satisfy the consignee’s immediate charges or past ones. In either case, the lien creates the danger that the consignee’s failure to meet its obligations to the carrier will impede its ability to put the cargo into the hands of a third party. ‘This is a characteristic of all maritime liens.’ ... In other words, the type of lien asserted in this case was still, at bottom, a possessory lien over goods that had not yet entered the stream of commerce.¹⁵

In addition, the Third Circuit noted that third parties actually did have notice of the carrier’s liens because the lien provisions in question were set out in the applicable tariff, which was published and available to the general public.

Significance

In re World Imports is the first circuit-level decision on the question of whether these “contractually extended” maritime liens are enforceable. The court’s affirmative answer is an important precedent for all maritime carriers and significantly bolsters their protection when a customer is in dire financial straits. The decision also stands to benefit financially imperiled customers, as their carriers may now be more inclined to release goods without first receiving payment, safe in the knowledge that courts, at least within the Third Circuit, will uphold their right to look to other cargo as collateral. **abi**

¹³ *Id.* at *12.

¹⁴ *Id.* at 10 (citing *World Imports Ltd. v. OEC Grp.* New York, 526 B.R. 127, 134 (E.D. Pa. 2015)).

¹⁵ *Id.* (quoting *Usher v. M/V Ocean Wave*, 27 F.3d 370, 374 (9th Cir. 1994)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *9 (citing *Bank of British N. Am. v. Freights, etc. of the Hutton*, 137 F. 534, 536 (2d Cir. 1905)).