Gordon Arata
MONTGOMERY BARNETT

U.S. 5th Circuit Affirms Fuel Supplier Does Not Have Maritime Lien for Bunkers

AUTHOR: R. Ethan Zubic
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In yet another court decision in the wake of the O.W. Bunker collapse of 2014, the Fifth Circuit affirmed in *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290 (5th Cir. 2018) that a vessel fuel supplier, performing under a subcontract with O.W. Bunker, does not have a maritime lien for necessaries supplied to a vessel.

Before November 2014, O.W. Bunker ("OWB") was one of the world's largest intermediary suppliers of bunkers (marine fuel). In a typical transaction, a shipowner would contract with OWB, and OWB would then subcontract with a fuel supplier to actually supply the vessel with fuel. These transactions would be made on credit, and in some situations the shipowner would have consumed the fuel before paying for it.

OWB collapsed and declared bankruptcy in November 2014 with more than $750 million in debts owed. At that point, many of OWB's customers had consumed bunkers with no money having traded hands, leaving both OWB and its subcontractors uncompensated. Shipowners began receiving payment demands from both OWB and its subcontractors. Confusion and uncertainty arose over the identity of the proper payee: was it OWB, as the party to the contract with the ship, or was it instead the fuel supplier, as the party that actually supplied the vessel with the fuel? Under general maritime law and the Commercial Instruments and Maritime Liens Act (CIMLA), 46 U.S.C. § 31341 *et seq.*, a supplier of necessaries (such as food, fuel and repairs) has a maritime lien on the vessel and may bring an *in rem* action to enforce the lien. Thus, when OWB's subcontractors did not receive payment from the shipowners, many began seizing vessels and filing *in rem* actions against them.

In *Valero Mktg. & Supply Co. v. M/V Almi Sun,* Almi Tankers S.A., an agent for the ALMI SUN's owner, Verna Marine Co. Ltd., contracted with O.W. Bunker Malta, Ltd., a fuel trader, to procure bunkers. O.W. Malta issued a final sales order, listing Valero Marketing & Supply Company as the supplier and listing itself as the seller. Another OWB entity, O.W. Bunker USA, Inc., then

contracted with Valero to purchase the fuel. OWB's involvement ended there. Valero coordinated delivery directly with the ALMI SUN, and the vessel's agents tested and verified the bunkers' quality. After delivery was completed, an authorized officer of the vessel signed the bunkering certificate, and Valero submitted an invoice to O.W. USA. Following OWB's bankruptcy filing, Valero filed an *in rem* action against the ALMI SUN and seized the vessel.

The trial court entered summary judgment in favor of Verna, holding that Valero had not furnished necessaries to the ALMI SUN "on order of the owner or a person authorized by the owner" and thus was not entitled to a maritime lien on the vessel. On appeal, the Fifth Circuit stated that the sole inquiry was whether Valero furnished the necessaries to the ALMI SUN "on the order of the owner or a person authorized by the owner." Based upon its analysis of the CIMLA as "strictly applied" to the underlying facts of the case, the Court concluded Valero did not.

Under section 31343(a) of the CIMLA, a person providing necessaries to a vessel "on the order of the owner or a person authorized by the owner" is entitled to a maritime lien on the vessel. Section 31341(a) lists the following "persons … presumed to have authority to procure necessaries for a vessel:"

(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.

The Fifth Circuit recognized two lines of cases addressing whether the actual supplier of necessaries has a maritime lien: the general/subcontractor cases and the principal/agent or "middle-man" cases. The court cited *Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR*

POPOV MV, 199 F.3d 220 (5th Cir. 1999), as holding that "the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a maritime lien;" however, "subcontractors hired by those general contractors are generally not entitled to assert a lien on their own behalf, unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." In *Lake Charles*, ED&F Man Sugar, Inc. contracted with Broussard Rice Mill, Inc. to purchase rice. Under the contract, Broussard was responsible for procuring stevedoring services. Broussard, working through an agent, contracted with Lake Charles Stevedores (LCS) to load the rice onto the vessel. LCS loaded the rice, and when Broussard failed to pay, LCS asserted a maritime lien for its services. The court in *Lake Charles* determined that because Man Sugar "retained no control over the selection of a stevedoring concern, and Broussard accepted all the risk associated," LCS was not entitled to a maritime lien. One may ask why control over the selection of a subcontractor should be the linchpin here; however, the court left that question unanswered.

Applying *Lake Charles*, the Fifth Circuit determined that for Valero to have a maritime lien, it must show that an entity authorized to bind the ALMI SUN "controlled [its] selection … and/or its performance." Although there was evidence of Verna's "awareness" that Valero had been retained to supply the bunkers, there was no evidence that Verna "controlled" the selection or performance of Valero, and "mere awareness" of Valero did not equate to "authorization" under CIMLA. In summary, Valero had provided the bunkers at OWB's request, and OWB was not a person presumed to have authority to procure necessaries. Thus, the court held, Valero did not have a maritime lien.

Valero was decided by a 2-1 majority, and much of the opinion addresses a disagreement between the majority and dissenting judge on whether the majority's decision creates a split with cases decided by the Eleventh Circuit holding that a shipowner's identification and acceptance of a subcontractor prior to performance grants the subcontractor a maritime lien. The majority disagreed with the dissent's characterization of the state of the law in the Eleventh Circuit, citing *Barcliff, LLC v. M/V DEEP BLUE*, 876 F.3d 1063 (11th Cir. 2017), another case decided in the aftermath of OWB's insolvency. In *Barcliff*, the Eleventh Circuit held that the supplier was not entitled to a lien because it "acted on the order of O.W. USA," not the shipowner.

Somewhat surprisingly, *Valero* does not analyze whether OWB was an appointed *agent* of Verna, presumed to have authority to procure necessaries for a vessel as articulated in section 31341(a)(4) of the CIMLA. Considering that the court relied on OWB decisions from the Second and Eleventh Circuits to support its holding and that it devoted a significant portion of its opinion to addressing the potential circuit split raised by the dissent, it seems the court made a conscious

effort to justify its decision as being aligned with other courts' holdings that OWB's subcontractors do not have a maritime lien. As a result, the suppliers' recourse will be limited to what they can recover from OWB in the bankruptcy court. Such decisions have been criticized as protecting the shipowners from being doubly liable for the fuel (as often happened in England) at the expense of the unpaid fuel suppliers. Indeed, the indisputable purpose of the CIMLA is to protect American suppliers by providing them with lien rights to recover against the vessel for unpaid necessaries. Without doubt, these decisions limiting the lien rights provided under CIMLA will torment the admiralty bar long after the memory of OWB fades.