ADMIRALTY LAW-FEDERAL MARITIME LIEN ACT - No MARITIME LIEN FOR CONTAINERS SUPPLIED ON A FLEETWIDE BASIS - Foss Launch & Tug v. Char Ching Shipping U.S.A.

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ADMIRALTY LAW—FEDERAL MARITIME LIEN ACT—NO MARITIME LIEN FOR CONTAINERS SUPPLIED ON A FLEETWIDE BASIS—Foss Launch & Tug v. Char Ching Shipping U.S.A. — The advent of containerized shipping has often been described as "one of the most important technological developments in the transportation of goods by sea since steam replaced sail."¹ During the past twenty-five years, an increasing percentage of internationally traded goods have been transported in standardized containers² capable of being hauled overland by trucks or railcars between points inland, and to ocean going container vessels.³ In the wake of this shift to intermodal transport,⁴ the courts have been left to struggle with a variety of new legal issues arising under statutes enacted when the distinctions among individual transportation industries were more easily drawn and their specific needs were more clearly recognized.⁵ One such statute is the Federal Maritime Lien Act


2. The Internal Revenue Service has described these types of containers and their principal benefits as follows:

   These cargo containers are constructed to save the trouble and expense of crating cargo, to eliminate multiple handling of cargo, to protect cargo during its loading, transporting, and unloading, and to reduce the time and cost involved in transferring it from one form of transportation to another. For example, cargo headed for one destination is loaded into cargo containers which have been fastened on railroad flat cars or platform-type trailers or semitrailers. The loaded cargo containers are then transported to a waterfront dock or pier, where they are lifted in some manner, such as by an overhead crane, and placed on a specially constructed container ship. At the point of destination of the ship, the containers are unloaded by similar means and placed on either railroad flatcars or trailers or semitrailers for further transportation to their ultimate destination. 1960-1 C.B. 412; see also 1980-1 C.B. 53; 1983-1 C.B. 747.


4. The term "intermodal" refers to the capability of standardized shipping containers to be quickly and easily transferred from one mode of transportation to another. See supra note 2; see also Tombari, Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry, 5 J. MAR. L. & COM. 311 (1979).

5. See G. GILMORE & C. BLACK, supra note 3, § 3-24, at 144; see also Hickey, Legal
The FMLA confers maritime liens, enforceable in rem against a vessel, for supplies and services that can be characterized as "necessaries." In the United States, the generally accepted theory of in rem

**Problems Relating to Combined Transport and Barge Carrying Vessels, 45 TUL. L. REV. 863 (1971); Massey, Prospects for a New Intermodal Regime, 3 J. MAR. L. & COM. 725 (1972); Schmeltzer & Peavy, Prospects and Problems of the Container Revolution, 1 J. MAR. L. & COM. 203 (1970); Simon, Latest Developments in the Law of Shipping Containers, 4 J. MAR. L. & COM. 441 (1972).**


7. The current version of the FMLA is codified as follows:

§ 971. Persons entitled to a lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

§ 972. Persons authorized to procure repairs, supplies, and necessaries

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

§ 973. Notice to person furnishing repairs, supplies, and necessaries

The officers and agents of a vessel specified in section 972 of this Appendix shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel.

§ 974. Waiver of right to lien

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against a vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

§ 975. State statutes superseded

This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries.
maritime lien liability is that a vessel is personified and thereby becomes the defendant in an action in rem to enforce a maritime lien. The ramifications of this theory of liability can be gleaned from a text writer's observation that "a ship can be sued, arrested, defaulted or found at fault, and sold to purchaser at a marshal's auction, all without actual involvement of the shipowner in personam at any stage." In order to invoke in rem process under the FMLA, a lien claimant must establish that "necessaries" were "furnished" to the vessel against which in rem process is sought.

In Foss Launch & Tug v. Char Ching Shipping U.S.A., the Court of Appeals for the Ninth Circuit affirmed, in principle, so much of a decision by the District Court for the Central District of California which held that containers are "necessaries" within the meaning of the FMLA. The Central District of California decision, Flexi-Van Leasing v. M/V C.C. San Francisco, was the third in a recent line of dis-

9. In contrast, the English theory of maritime liens "is said to be merely procedural: the process in rem against the ship is in the nature of foreign attachment to compel the owner's appearance by subjecting to the court's control property within its territorial jurisdiction." G. Gilmore & C. Black, supra note 3, § 9-3, at 589-90; see also Vartian, supra note 8, at 642.
11. See infra text accompanying notes 69-77.
12. See infra text accompanying notes 93-130.
13. As stated by the Ninth Circuit in Farwest Steel Corp. v. Barge Sea Span 241, 769 F.2d 620 (9th Cir. 1985), "[t]he [FMLA] grants a maritime lien to any person 1) furnishing repairs, supplies, or other necessaries 2) to any vessel 3) 'upon the order of the owner of such vessel, or of a person authorized by the owner.'" Id. at 623 (quoting 46 U.S.C. § 971). The scope of inquiry within this case comment, however, is limited to the concepts of "furnishing" and "necessaries" as identified in the first of three propositions set forth by the Ninth Circuit in Farwest Steel. See id.
15. The case came before a three judge panel consisting of Circuit Judges Goodwin, Wallace, and Anderson. 808 F.2d at 698. Judge Goodwin wrote the opinion of the court. Id. A separate opinion, concurring in part and dissenting in part, was filed by Judge Anderson. Id. at 703.
16. Id. at 699-700.
The Ninth Circuit’s refusal to sustain claims of maritime lien under the FMLA for containers “furnished” to a shipowner under fleetwide leasing arrangements.

In an effort to place the Ninth Circuit’s Char Ching Shipping decision within the broader context of maritime lien law development under the FMLA, this Comment will review the original limited legislative purpose of the FMLA and then proceed to examine the trends in judicial interpretations of the statutory terms “necessaries” and “furnishing.” Within this context, the Ninth Circuit’s handling of the issues in Char Ching Shipping demonstrates an attempt to accommodate traditional maritime law to one of the many problems posed by intermodalism, while at the same time declining to abandon established case law and traditional concepts of “furnishing.”

The Char Ching Shipping litigation centered around a series of separate container leasing agreements between C.C. Line and a group of container lessors. The leased container equipment was to be used by C.C. Line in its intermodal transpacific shipping service between points in the Far East and the United States. This equipment was delivered directly to C.C. Line at different times and locations. The

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19. See infra text accompanying notes 133-56.
20. See infra text accompanying notes 133-50.
21. See infra text accompanying notes 69-77.
22. See infra text accompanying notes 97-130.
23. See infra text accompanying notes 133-50.
24. 808 F.2d at 698. In its opening brief, counsel for the defendant M/V C.C. San Francisco stated: “There are at least 32 major lease contracts between plaintiffs and CC Line, dating from as early as July 1978. Only one of them was entered into after [the] CC SAN FRANCISCO was launched.” Opening Brief for Defendant-Appellant at 8, 808 F.2d 697 (9th Cir. 1987) [hereinafter Opening Brief for Defendant-Appellant].
25. 808 F.2d at 698. On this point, counsel for the defendant M/V C.C. San Francisco stated: “Plaintiffs leased equipment (containers and chassis) to CC Line. It was intended that the containers and chassis be used in CC Line’s transportation business, which involved an integrated combination of rail, truck and ocean carriage between points anywhere in the U.S. and Japan, Korea and Taiwan.” Opening Brief for Defendant-Appellant, supra note 24, at 5.
26. 808 F.2d at 698.
leasing agreements provided that invoices for container rentals and other charges would be addressed directly to C.C. Line.\textsuperscript{27} In keeping with industry practice, C.C. Line was not prevented from exercising unrestricted discretion in appropriating containers among the vessels involved in its transpacific shipping service.\textsuperscript{28}

C.C. Line opened its Far East to United States intermodal service in June 1983.\textsuperscript{29} The M/V C.C. San Francisco was launched in November 1983 and entered C.C. Line’s transpacific service in January 1984.\textsuperscript{30} The vessel was registered under Panamanian law to the ownership of Char Yigh Marine (Panama) S.A. [Char Yigh], a Panamanian corporation.\textsuperscript{31} Char Yigh, in turn, bareboat chartered\textsuperscript{32} the M/V C.C. San Francisco to C.C. Line.\textsuperscript{33} C.C. Line subsequently failed to meet its obligations under the leasing agreements to pay rentals and other charges to the container lessors, as well as under the charter to pay vessel hire to Char Yigh.\textsuperscript{34}

In August 1984, six container lessors commenced four separate actions \textit{in rem} alleging valid maritime liens against the M/V C.C. San Francisco in the District Court for the Central District of California.\textsuperscript{35} The vessel was arrested, without a pre-seizure hearing, pursuant to federal \textit{in rem} admiralty practice.\textsuperscript{36} Char Yigh, as the vessel’s regis-

\textsuperscript{27} In describing the terms of the lease agreements, counsel for the defendant M/V C.C. San Francisco stated: “All contracts provide for payments to be made monthly, with invoices to be addressed to CC Line’s Hong Kong or Taiwan office. No contract . . . and no invoice makes any distinction between charges for time onboard any vessel and for time ashore.” Opening Brief for Defendant-Appellant, \textit{supra} note 24, at 8.

\textsuperscript{28} 808 F.2d at 698. Judge Goodwin noted: “This practice is apparently consistent with the current industry practice with respect to containerization. Containers are leased in bulk lots so that they can be employed interchangeably or sequentially in the conveyance of freight by means of various modes of transport including ships, airplanes, railroads, and trucks.” \textit{Id.} n.1.

\textsuperscript{29} Opening Brief for Defendant-Appellant, \textit{supra} note 24, at 9.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} “The term ‘charter party,’ often shortened to ‘charter,’ designates the document in which are set forth the arrangements and contractual engagements entered into when one person (the ‘charterer’) takes over the whole of a ship belonging to another (the ‘owner’).” G. GILMORE & C. BLACK, \textit{supra} note 3, § 4-1, at 193. Under the bareboat form of charter, “the charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner \textit{pro hac vice}, just as does the lessee of a house and lot, to whom the [bareboat] charterer is analogous.” \textit{Id.} at 194.

\textsuperscript{33} Opening Brief for Defendant-Appellant, \textit{supra} note 24, at 9.

\textsuperscript{34} \textit{Id.} at 10.

\textsuperscript{35} \textit{Id.} at 1.

\textsuperscript{36} When the M/V C.C. San Francisco was arrested in August 1984, the procedural rule governing actions \textit{in rem}, Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, provided in relevant part: “Upon the filing of a complaint the
tered owner, challenged the arrests and sought a prompt post-seizure hearing on the validity of the liens alleged by the container lessors. Post-seizure hearings were held following the arrest, but there was no final judicial determination on the validity of the liens until August 1985.

The District Court for the Central District of California decision in *Flexi-Van Leasing v. M/V C.C. San Francisco* governed summary judgment motions in each of the four actions brought by individual container lessors against the M/V C.C. San Francisco. The container lessors sought to establish, as a matter of law, that containers provided to a shipowner gave rise to maritime liens enforceable in rem. Char Yigh opposed these motions on the ground that the "furnishing" requirement under the FMLA had not been met because the containers were not supplied specifically to the M/V C.C. San Francisco. The District Court for the Central District of California rejected Char Yigh's argument and held that "the delivery of containers to a fleet of vessels, without specification as to a specific ship, does not defeat a maritime lien where the actual use of those containers aboard a specific ship can be proved." The District Court for the Central District of California decision in *Flexi-Van Leasing v. M/V C.C. San Francisco* governed summary judgment motions in each of the four actions brought by individual container lessors against the M/V C.C. San Francisco. The container lessors sought to establish, as a matter of law, that containers provided to a shipowner gave rise to maritime liens enforceable in rem. Char Yigh opposed these motions on the ground that the "furnishing" requirement under the FMLA had not been met because the containers were not supplied specifically to the M/V C.C. San Francisco. The District Court for the Central District of California rejected Char Yigh's argument and held that "the delivery of containers to a fleet of vessels, without specification as to a specific ship, does not defeat a maritime lien where the actual use of those containers aboard a specific ship can be proved."

The clerk shall forthwith issue a warrant for the arrest of the vessel . . . and deliver it to the marshal for service.” FED. R. CIV. P., ADMIRALT'Y SUPP. RULE C(3) (1985). Effective August 1, 1985, Rule C was amended to provide for judicial scrutiny of a moving party's complaint prior to the issuance of any warrant of arrest. FED. R. CIV. P., ADMIRALT'Y SUPP. RULE C(3) advisory committee note.

37. 808 F.2d at 698.

38. Id.


40. The plaintiffs in these actions were Flexi-Van Leasing, Inc. (CV 84-6331), Genstar Container Corporation (CV 84-6175), Interpool Limited (CV 84-6243), Itel Containers International Corporation (CV 84-6175), Nautilus Leasing Services, Inc. (CV 84-6289), and Transamerica ICS, Inc. (CV 84-6289). 628 F. Supp. at 1078.

41. Id. Plaintiffs also sought “to establish that the lien encompasses all periods the containers served as the ‘functional equivalent’ of the vessel’s hold, including incidental land uses.” Id.

42. Id. at 1079. This argument is derived from the statutory language that provides, in effect, that only necessities furnished directly to a vessel give rise to a maritime lien enforceable in rem. See 46 U.S.C. § 971 (1982 & Supp. III 1985).

43. 628 F. Supp. at 1080. The court also held “that the maritime lien encompasses all periods plaintiff’s containers served as the functional equivalent of the hold of the C.C. San Francisco, including incidental land use.” Id.; see supra note 41. On appeal, counsel for the defendant-appellant M/V C.C. San Francisco argued that the lower court had thereby “created an ‘intermodal’ lien, and not a maritime lien, in de facto recognition of the inseparably mixed nature of intermodalism.” Opening Brief for Defendant-Appellant, supra note 24, at 43.
California also held that containers were "necessaries" within the meaning of the FMLA.\(^4\)

The Ninth Circuit, on appeal by Char Yigh, reversed the lower court order upholding the validity of the container liens and remanded the case for further proceedings.\(^45\) The Ninth Circuit, in an opinion written by Judge Goodwin, held that "cargo containers leased in bulk to a time-charterer of a group of vessels for unrestricted use on board the vessels in that group, are not furnished to any particular vessel of the group, on which they subsequently happen to be employed, within the meaning of [the FMLA].\(^46\) The Ninth Circuit flatly rejected the argument that modern business conditions in the shipping industry justified an expansive interpretation of the FMLA "furnishing" requirement.\(^47\) The Ninth Circuit did, however, accept the proposition that containers can be characterized as "necessaries" within the meaning of the FMLA.\(^48\) Judge Anderson, believing that the majority's restrictive interpretation of "furnishing" was contrary to the purpose of the FMLA, filed a separate opinion concurring in part and dissenting in part.\(^49\)

The issue of what constitutes "necessaries" and "furnishing" within the meaning of the FMLA has repeatedly been the basis of litigation throughout the seventy-seven year history of the FMLA.\(^50\) In view of the confusion generated by varying judicial interpretations of these terms,\(^51\) it is ironic that the FMLA was originally intended to simplify the law of maritime liens.\(^52\)

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44. 628 F. Supp. at 1080.
45. 808 F.2d at 703.
46. Id.
47. Id. at 702-03.
48. Id. at 699-700.
49. Id. at 703.
51. Id.
52. In Piedmont & Georges Creek Coal v. Seaboard Fisheries, 254 U.S. 1 (1920), Justice Brandeis observed that the purposes of the FMLA were to:

   First, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or sister state, but denied where the supplies were furnished in the home port or state. The General Smith, 4 Wheat. 438. Second, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. The St. Jago de Cuba, 9 Wheat. 409. Third, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. Peroux v. Howard, 7 Pet. 324.
Prior to the enactment of the FMLA in 1910, maritime lien law was composed of a troublesome patchwork of federal case law and state lien statutes. As early as 1819 in The General Smith, the Supreme Court recognized maritime liens enforceable *in rem* arising under general maritime law for repairs and necessaries furnished to a vessel. The Supreme Court decision in The General Smith went on to recognize an exception to this class of general maritime law liens when the same types of repairs and necessaries were furnished to a vessel in her home port. Thus, to the extent that the home port exception negated liens under the general maritime law, local municipal law controlled.

Quick to fill this void, several states enacted comprehensive statutes creating liens for maritime services and supplies. Often exceeding the scope of liens recognized under the general maritime law, these statutes posed an infinite variety of conflicts. Notably among these were state created liens enforceable *in rem* for claims that were not recognized as maritime claims under the general maritime law and claims which, although recognized as maritime under federal law, were not afforded the status of maritime liens.

The Supreme Court’s disenchantment with the home port exception carved out in The General Smith became apparent by 1873 in the first of two separate decisions on state law maritime lien issues in The Lottawana. After reviewing the difficulties created under the home port doctrine, Justice Clifford stated that there were “serious doubts as

254 U.S. at 11 (citing S. Rep. No. 831, 61st Cong., 2d Sess. 3 (1910)).


56. Justice Story, writing for the Court, held:

Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem*, in the admiralty, to enforce his right.

*Id.* at 442.

57. Justice Story stated: “But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied unless it is recognised by that law.” *Id.*

58. *See id.*


60. *Id.*


62. 87 U.S. (20 Wall.) 201 (1873).
to the correctness” of The General Smith. When The Lottawana came before the Court again in 1874, Justice Bradley concluded that “[i]t would be far more satisfactory to have a uniform law regulating such liens, but until such law be adopted . . . the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.”

Congress did not answer Justice Bradley’s call for a uniform law until the 1910 enactment of the FMLA. In derogation of the preempted state created liens enforceable in rem for necessaries furnished to a vessel, statutory FMLA liens also displaced some, but not all, federal liens arising under the general maritime law. As enacted in 1910, the FMLA extended a statutory lien to “any person furnishing repairs, supplies, or other necessaries, including the use of a dry dock or marine railway, to a vessel . . . .” The lack of precision in the words “other necessaries” opened the door to questions on what “necessaries,” other than those specifically enumerated, were covered under the FMLA. Judicial thought on this issue was initially dominated by the view that “other necessaries” referred only to things ejusdem generis with repairs and supplies.

The language of the act was amended when Congress reenacted the FMLA provisions as part of the Merchant Marine Act of 1920. As

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63. Id. at 219.
64. 88 U.S. (21 Wall.) 558 (1874).
65. Id. at 581.
67. Id.
68. Id. at 652-58.
70. See G. Gilmore & C. Black, supra note 3, § 9-34, at 657-58.
71. See, e.g., The Doherty, 207 F. 997 (S.D.N.Y. 1913); The Hatteras, 255 F. 518 (2d Cir. 1918).
amended, the FMLA extended a statutory lien to "[a]ny person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel. . . ."78 In addition to enumerating towage as a "necessary," the 1920 amendment placed the words "dry dock or marine railway" before, rather than after, "other necessaries."74 As applied to this amended language, the ejusdem generis rule of construction supported a broader reading of the words "other necessaries."77 Following the 1920 amendment, judicial constructions of the FMLA gradually shifted toward ever broader interpretations of "other necessaries."79 Support for a narrow interpretation of "necessaries" under the FMLA all but vanished by the early 1930's.77

The unforeseen results of broadened coverage under the FMLA were the overshadowing of the original limited legislative purpose to correct problems created under the home port doctrine and the substitution of the FMLA for general maritime lien law in almost all cases.78 The FMLA itself does not exclude the classes of liens that already existed under the general maritime law prior to its enactment.79 The availability of actions based on the FMLA, combined with broadened coverage under the 1920 amendment, has caused the general maritime law to fall into disuse.80 Commentators have observed that the combination of these factors "put an end to the development of specialized learning as to the differences between statutory liens and general maritime law liens."81

As early as 1856, in The Yankee Blade,82 the Supreme Court stated that the general maritime law lien was "a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore 'stricti juris', and cannot be extended by construction, analogy, or inference."83 Within the statutory framework of the FMLA, however, the concept of "necessaries" was extended well beyond the limits it had known under the general maritime law.84

75. Id.
76. Id.
77. See, e.g., The Artemis, 53 F.2d 672, 1932 A.M.C. 195 (S.D.N.Y 1931) (claims for winter storage of a yacht, for crew uniforms, and even for taxi fare run up in delivering provisions to a yacht all held entitled to statutory liens).
79. Id.
80. Id.
81. Id. at 659.
82. 60 U.S. (19 How.) 82 (1856).
83. Id. at 89.
84. See G. Gilmore & C. Black, supra note 3, § 9-35, at 659. "The present state of
the 1986 *Equilease Corp. v. M/V Sampson* decision, for example, the Court of Appeals for the Fifth Circuit stated that "'[t]he term 'necessary' under the FMLA includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function.'"88

Within the context of the trend to favor broad interpretations of "necessaries," one could well have expected that it would be merely a matter of time before containers were held to be "necessaries" under the FMLA.87 Indeed, prior to the *M/V C.C. San Francisco* case, two federal district courts had already so held.88 In the first of these two lower court decisions, *Nautilus Leasing Services v. M/V Cosmos,*89 the District Court for the Southern District of New York stated: "Although there are no cases directly on point, we have no difficulty holding that the containers in the instant case are 'necessaries' within [the FMLA]."90 A similar result was reached by the District Court for the Southern District of Florida in *Transamerica ICS v. M/V Panatlanic.*91 The *M/V Panatlanic* court stated: "After reviewing the history and operation of the container leasing business as explained by plaintiffs, the Court is convinced that containers are 'necessaries' within the meaning of [the FMLA]."92

However predictable the holdings may have been that containers are "necessaries," it remained much less certain whether containers are indeed "furnished" to a vessel when they are leased to a shipowner on

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85. 793 F.2d 598 (5th Cir. 1986) (en banc).
86. Id. at 603. In *Equilease*, the Fifth Circuit held that "because insurance is essential to keep a vessel in commerce, insurance is a 'necessary' under [the FMLA]." Id. at 604. A revealing contrast is presented when *Equilease*, a controversial decision granting a maritime lien under the FMLA for unpaid insurance premiums, is compared to the pre-FMLA Insurance Co. v. The Proceeds of the Sale of Barge Waubushene, 24 F. 559 (C.C.N.D.N.Y. 1885), decision. In *Waubushene*, an insurance company attempted to assert a general maritime law lien for unpaid insurance premiums. Id. In denying the existence of such a lien, the Circuit Court for the Northern District of New York held that a "'[maritime] lien does not extend to contracts which do aid the vessel, but are merely for the personal benefit of the owner." Id. The *Waubushene* court went on to state that "'[u]nlike contracts and engagements in which every lienholder has an interest, because they fortify his security, the contract of maritime insurance contributes to no fund for the general benefit, and its fruits are monopolized by the owner." Id.
87. See infra text accompanying notes 75-77 and 84-86.
88. See infra text accompanying notes 89-92.
90. Id.
92. Id. at 490.
a fleetwide basis. The well established decisions in this area of the law require that "necessaries" be identified by the supplier to a specific vessel or fleet of vessels in order to establish a maritime lien. Failing such identification, a maritime lien does not arise and the supplier of "necessaries" has been found to have relied on the general credit of the owner and not the security of a maritime lien. The remedies available to a supplier under these circumstances would lie in personam against a shipowner, rather than in rem against a vessel.

The first important opinion to address "furnishing" within the meaning of the FMLA was the 1920 Supreme Court decision in Piedmont & Georges Creek Coal v. Seaboard Fisheries. In Piedmont, an oil company which owned a fleet of fishing steamers and two fish oil factories contracted with a coal dealer to purchase a season's supply of coal. The understanding of the parties was that the coal supplied would be used by both the fishing steamers and the fish-oil factories. The dealer delivered and billed the coal to the oil company. The oil company subsequently appropriated a large part of the coal to some of the vessels in its fleet.

The central issue in Piedmont was whether the coal had been "furnished" to the vessels by the coal dealer or by the oil company. Justice Brandeis, writing for a unanimous Court, reasoned that, absent an understanding that certain amounts of coal were for specific vessels, the oil company's subsequent appropriation did not constitute "a furnishing by the coal dealer." Justice Brandeis enumerated several factors which, although useful, fell short of providing a clear test for "furnishing." Some of the more instructive aspects of Justice Brandeis's

93. See infra text accompanying notes 98-130.
94. See infra text accompanying notes 98-124.
95. See infra note 114.
96. Id.
97. 254 U.S. 1 (1920).
98. Id. at 5.
99. Id.
100. Id. at 8.
101. Id.
102. Id. at 6.
103. Id. at 8.
104. Among the factors considered by the Court were that:
   No coal was delivered by the Coal Company directly to any vessel; and it had no dealings of any kind concerning the coal directly with the officers of any vessel. All the coal was billed by the Coal Company to the Oil Corporation and there was no reference on any invoice, or on its books, either to the fleet or to any vessel. There was no understanding between the companies when the agreement to supply the coal was made or when the coal was delivered that any part of it was specifically for any one of the several vessels libeled, or that it was for
opinion addressed the fundamental differences between maritime and terrestrial liens, the limited legislative purpose of the FMLA, and the principle of stricti juris as applied to maritime liens.

Guided by Justice Brandeis’s opinion in Piedmont, the Second Circuit denied a fuel supplier’s claim of maritime lien in the 1937 Bankers Trust v. Hudson River Day Line decision. In Bankers Trust, Day Line entered into a written contract to purchase fuel oil for six specific vessels “and any other vessel owned, operated, chartered or controlled by the buyer.” The agreement further provided that the

any particular vessel of the fleet, or even for the vessels then composing the fleet.

As commentators have pointed out, “[t]he Piedmont case is all things to all men and is regularly cited on both sides of every case in which it is relevant: since some of Justice Brandeis’ facts are always present, it is an authority for shipowner’s counsel for denial of the lien; since all of them are never present, it is equally an authority for supplier’s counsel in favor of the lien.” G. Gilmore & C. Black, supra note 3, § 9-36, at 661.

Justice Brandeis reasoned that:

To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest and the substitution therefor of a very different principle which underlies mechanics’ and materialmen’s liens on houses and other structures. The former had its origin in a desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. The maritime lien developed as a necessary incident of the operation of vessels. Because the ship’s need was the source of the maritime lien it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary in obtaining them; if they were actually obtained; and if they were furnished upon her credit. The mechanics’ and materialmen’s lien, on the other hand, attaches ordinarily although labor and material cannot be said to have been necessary. The principle upon which the mechanic’s lien rests is, in a sense, that of unjust enrichment.

With respect to the legislative history of the FMLA, Justice Brandeis noted that:

The reports expressly declare that the bill makes ‘no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.’ The act relieves the [supplier] of the burden of proving that credit was given to the ship when necessaries are furnished to her . . . but it in no way lessens the materialman’s burden of proving that the supplies in question were furnished to her . . .

Justice Brandeis wrote that: “The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore stricti juris and will not be extended by construction, analogy or inference.”

93 F.2d 457, 1938 A.M.C. 38 (2d Cir. 1937).

93 F.2d at 457.
supplier would make deliveries directly to such vessels and "will rely on any vessel receiving fuel oil and/or this contract for the purchase price thereof." In the course of performing this contract, the supplier made its deliveries to a tank barge owned by Day Line, rather than furnish fuel directly to the six vessels as provided for in the contract. The oil delivered in this manner was billed directly to the barge "and owners." Day Line, in turn, distributed the oil among its vessels on an as needed basis.

The Second Circuit, in an opinion written by Judge Swan, held that a maritime lien did not arise in favor of the supplier against any of the six steamers. Judge Swan accepted the proposition that various quantities of oil ultimately used by each vessel could be proven, but refused to find such fact determinative. Rather, the Second Circuit maintained that "furnishing" within the meaning of the FMLA requires that "supplies must be furnished by the supplyman to the vessel." Even though the sales contract identified specific vessels, the court reasoned that Day Line's unrestricted discretion in appropriating the oil was tantamount to the supplier's "furnishing" fuel to Day Line, rather than to the vessels.

The legal significance of allowing a vessel owner or operator to exercise unrestricted discretion in appropriating supplies is apparent when the Second Circuit's Bankers Trust opinion is compared with The American Eagle, a 1929 decision by the District Court for the District of Delaware. In American Eagle, a single lot of coal was purchased F.O.B. at a supplier's wharf and delivered by the buyer to two of its dredges. Unlike the contract in Bankers Trust, the contract in

110. Id.
111. Id.
112. Id. at 458.
113. Id. at 457.
114. Id. at 459. The lower court had confirmed a commissioner's report "denying the existence of maritime liens but allowing the aggregate indebtedness as an unsecured debt." Id. at 457. Significantly, the supplier was not attempting to assert a lien against the tank barge. Id. at 458.
115. Id. at 458.
116. Id. at 459 (emphasis in original).
117. Judge Swan reasoned that:

Although the supplyman may, in effect, make the owner his agent to complete the "furnishing" by putting the goods on board when the quantity and vessel are expressly designated, no case appears to have held that the supplyman may obtain a lien when he authorizes the owner to distribute the supplies among such of his fleet as he sees fit.

Id.
118. 30 F.2d 293, 1929 A.M.C. 470 (D. Del. 1929).
119. 30 F.2d at 293.
American Eagle stipulated the percentage of coal to be delivered to each of the two dredges.\textsuperscript{120}

On these facts, the District Court for the District of Delaware found that the requirements for a maritime lien had been met since “the supplies, though delivered in mass to the owner of a fleet under a single contract, [were] expressly ordered by the owner and delivered to him by the supplyman for the use of the named vessels in specified portions...”\textsuperscript{121} Thus, in effect, the supplier made the dredging company an agent for the purpose of “furnishing” the coal to the vessels.\textsuperscript{122} The American Eagle opinion demonstrated that requiring actual and certain identification of “necessaries” for a specific vessel need not pose an impassable barrier to a supplier, even in the context of a fleet-wide contract.\textsuperscript{123}

The reasoning of earlier interpretations of “furnishing” within the meaning of the FMLA is absent from the 1983 Southern District of Florida decision in Transamerica ICS v. M/V Panatlantic.\textsuperscript{124} In denying a shipowner’s motion to dismiss the in rem complaint of a container lessor, the District Court for the Southern District of Florida stated that “for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that a container be delivered directly to the vessel, be sold rather than leased, or be earmarked for a particular vessel.”\textsuperscript{125} The District Court for the Southern District of Florida neither cited nor attempted to distinguish established case law requiring the actual and certain identification of “necessaries” to a specific vessel or fleet of vessels.\textsuperscript{126}

In similar disregard of established case law, the District Court for the Central District of California, in Flexi-Van Leasing v. M/V C.C. San Francisco,\textsuperscript{127} upheld a maritime lien for “necessaries” in the absence of actual and certain identification to a specific vessel or fleet of vessels.\textsuperscript{128} The District Court for the Central District of California held that “[t]he delivery of necessaries to a fleet of vessels gives rise to a maritime lien to the extent that necessaries in fact were placed on indi-
vidual vessels in the fleet."\textsuperscript{129}

The way the law was evolving in these district court opinions, "furnishing" for FMLA purposes in the container setting was clearly moving away from any requirement that containers be purposefully identified to a specific vessel.\textsuperscript{130} Being the first appellate court to consider the question of maritime liens for container services, the Ninth Circuit's handling of the "furnishing" issue in \textit{Char Ching Shipping} is particularly significant. Unlike the issue of whether containers are "necessaries," where an underlying trend of decision was well established, the "furnishing" issue presented a far more substantial question for review. A divided court adopted a traditional approach, in line with \textit{Piedmont} and \textit{Bankers Trust}, and denied a maritime lien upon a showing that "necessaries" had not been "furnished" to the vessel by the lien claimants.\textsuperscript{131}

Writing for the Ninth Circuit, Judge Goodwin framed the "furnishing" issue in terms of whether it is "a condition precedent to a lien that containers which have been leased to managers of a fleet of container vessels also must have been specifically set apart for use on the particular vessel against which the lien is asserted."\textsuperscript{132} The starting point for the Ninth Circuit's analysis was the legislative intent "in drafting a form of the verb 'to furnish' into the text of [the FMLA]."\textsuperscript{133} Before moving forward with this analysis, however, the Ninth Circuit first addressed the treatment that the "furnishing" question had recently received in other jurisdictions.\textsuperscript{134}

Judge Goodwin characterized the movement within two circuits to broadly construe "furnishing" as an apparent "effort to accommodate professed expectations and needs of the shipping industry."\textsuperscript{135} In \textit{Equi-lease Corp. v. M/V Sampson},\textsuperscript{136} the Fifth Circuit concluded that there was "no persuasive reason to read the term 'furnishing' . . . narrowly . . . [because the FMLA] was intended to encourage private investment in the maritime industry."\textsuperscript{137} The Fifth Circuit had also stated

\textsuperscript{129} \textit{Id.} at 1079. As set forth in both \textit{Piedmont} and \textit{Bankers Trust}, whether "necessaries" are actually placed on board individual vessels is not a determinative element in establishing a lien under the FMLA. Both these decisions, in fact, recognize that "necessaries" can be delivered aboard a vessel without having been "furnished" by the supplier.

\textsuperscript{130} \textsl{See infra} text accompanying notes 140-50.

\textsuperscript{131} \textit{Id.} at 701.

\textsuperscript{132} \textit{Id.} at 700.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}


\textsuperscript{137} 793 F.2d at 603.
that it "will not begin now to defeat the purpose of the Act by layering
technicalities onto its interpretation." The District Court for the
Southern District of Florida applied a similar approach when it aban-
donned the technical requirements of "furnishing" in Transamerica ICS v. M/V Panatlantic. Refusing to find the reasoning of either court persuasive, the Ninth Circuit stated that it was "reluctant to subject the heretofore relatively certain law of maritime liens to the uncer-
tainty and flux of developing shipping industry practices when the con-
trolling precedents governing interpretation of the Act favor a narrow
construction of the 'furnishing' requirement."

Choosing to make its own assessment of legislative intent, the
Ninth Circuit began with the plain meaning of the FMLA's relevant
language. Noting that the verb "to furnish" is written into the
FMLA in the active voice, the Ninth Circuit concluded that "[i]n cre-
ating a preferred class of secured creditors, Congress chose not to draft
the [FMLA] in the passive voice and . . . the correct inference is
that Congress intended 'furnishing' to require active forethought or ad-
vance identification of particular vessels in relation to 'necessaries'
supplied." Although this inference buttressed a restrictive interpre-
tation of the "furnishing" requirement, the Ninth Circuit's opinion was
ultimately driven by reliance on the longstanding precedent of Pied-
mont and Bankers Trust.

The Ninth Circuit, quoting Justice Brandeis's opinion in Pied-
mont, noted that the defect which defeated the lien in Piedmont "was
not 'in the failure to show that the coal was furnished to the vessels
but in the failure to prove that it was furnished by the [coal dealer].' As viewed by the Ninth Circuit, the facts and posture in

138. Id.
140. 808 F.2d at 701.
141. Id.
142. Id.
143. Id. Judge Goodwin stated that "[t]his inference is consistent with the historical
docket-specific character of a maritime lien." Id. Judge Goodwin observed:

[T]he statute could have been drafted to state that 'necessaries that are
furnished to any vessel' can support a maritime lien. In such circumstance, it
would have been possible for even the fortuitous application or use of neces-
saries by a vessel to create a valid maritime lien against a vessel.

Id. (emphasis in original).

144. Id. (quoting Piedmont, 254 U.S. at 13 (emphasis in original)). Judge Goodwin
further noted that "Piedmont was also responsible for the incorporation of the stricti
juris principle, long a feature of maritime liens, . . . into the law governing interpreta-
tion of maritime liens under the [FMLA]." Id. at 702 (citing Vanderwater v. Mills, 60
U.S. (19 How.) 82, 89 (1857)).
Char Ching Shipping paralleled those in Piedmont. Judge Goodwin observed that “[i]n each case a materialman provided bulk supplies—coal in Piedmont, containers here—in circumstances where the final allocation of supplies, to any vessel of the group intended to be supplied, was left to the discretion of the procuring authority.” Judge Goodwin reasoned that “[a]lthough, in both cases, it was understood that the supplies provided would predominantly be put to maritime use, in neither case was there any evident attempt to designate any individual vessel to receive any identifiable component of the supplies.”

Judge Goodwin relied on Bankers Trust to rebut the container lessors’ argument that Piedmont should have been read narrowly because it “represents a case driven by a simple failure of proof as to the amounts of coal actually received by each vessel in a group of vessels supplied with coal.” Judge Goodwin noted that the Bankers Trust court, in denying a maritime lien, “understood the holding of Piedmont on the ‘furnishing’ question to require that ‘supplies, though delivered in mass to the owner of a fleet under a single contract, [must be] expressly ordered by the owner and delivered to him by the supplyman for the use of named vessels in specified portions.’”

Earlier in its opinion, the Ninth Circuit in principle affirmed the lower court’s finding that containers could be characterized as “necessaries” for FMLA purposes. The Ninth Circuit observed that the term “necessaries,” under “modern interpretations, had been expanded to encompass any item which is ‘reasonably needed for the venture in which the ship is engaged.’” Accepting that cargo containers were “reasonably necessary” to the operation of the M/V C.C. San Francisco, the Ninth Circuit held that the containers provided to the vessel

145. Id. at 702.
146. Id.
147. Id.
148. Id. at 701.
149. Id. (emphasis in original).
150. Id. at 700. Although the Ninth Circuit generally agreed with the trend established by the M/V Panatlantic and M/V Cosmos decisions, Judge Goodwin recognized that characterizing containers as “necessaries” remains a question of fact. Id. n.3. The Ninth Circuit reserved judgment on the question of whether containers are “necessaries” when they are supplied in excess of the needs of a given vessel or fleet of vessels. Id. In this regard, Judge Goodwin stated: “We note without deciding that proof of excess leasing of containers in relation to the capacities of a single vessel or fleet of vessels might undermine a materialman’s claim to having furnished ‘necessary’ items to a vessel.” Id. (citing Bellingham National Bank v. Oil Screw Pac. Horizon, 587 F. Supp. 26 (W.D. Wash. 1984)).
151. Id. at 699 (quoting 2 S. FRIEDELL, S. BELLMAN, A. JENNER & J. LOO, BENEDICT ON ADMIRALTY § 37, at 3-27 (7th ed. 1986)).
under the leasing agreements were "necessaries" within the meaning of the FMLA.152

In a separate opinion, Judge Anderson agreed with the majority's holding that the containers provided to the vessel were "necessaries," but took issue with the restrictive interpretation of "furnishing."153 Judge Anderson attacked the majority's assessment of "inferential intent" and questioned the majority's reading of the controlling case law.154 Judge Anderson accepted the issue as it was framed by the majority, but read Piedmont so as to obtain the opposite result.155

In Judge Anderson's view, "Piedmont and its progeny allow a lien to attach to a particular vessel, even though the supplies were not delivered to a prespecified vessel, if the vessel in fact received the supplies furnished."156 In Piedmont itself, however, Justice Brandeis had in fact stated that "[t]o hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of the vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest. . . ."157

The Char Ching Shipping decision is noteworthy as the first attempt by any appellate court to address the validity of maritime liens under the FMLA for containers "furnished" to a particular vessel under fleetwide leasing arrangements. The Ninth Circuit's recognition that containers can be characterized as "necessaries" in certain circumstances represents at least a partial victory for container lessors. The Ninth Circuit made it clear, however, that it remains an open question of fact to what extent containers are "necessaries" when they are supplied in excess of a particular vessel's needs.158 By far the most significant aspect of the Char Ching Shipping decision was the Ninth Circuit's refusal to accommodate claims of maritime liens by container lessors at the cost of abandoning established case law and traditional concepts of "furnishing."

The Ninth Circuit decision reestablished the importance of a principle set forth by Justice Brandeis for a united Supreme Court in Piedmont and followed by the Second Circuit in Bankers Trust—that "necessaries" must be "furnished" to a particular vessel or fleet of ves-

152. *Id.* at 700.
153. *Id.* at 703 (Anderson, J., concurring in part and dissenting in part).
154. *Id.* at 703-04.
155. *Id.* at 704.
156. *Id.* at 704-05.
157. 254 U.S. at 8; *see supra* note 105.
158. *See supra* note 150.
The Ninth Circuit found that the liens claimed by the container lessors in *Char Ching Shipping* were lost once Char Yigh exercised unrestricted discretion in allocating containers to other vessels in the C.C. Line fleet. Critics of the *Char Ching Shipping* decision may argue that the Ninth Circuit defeated the purpose of the FMLA by "layering technicalities" onto its interpretation in a manner that the Fifth Circuit declined to do in *Equi-lease*.

This begs the question whether the Ninth Circuit relied too heavily on precedents that are out of step with modern thinking and indulged itself in a sterile, overly technical concept of "furnishing" that has outlived its contemporary relevance. Containerization has brought about profound changes in all the major transportation industries, certainly not the least of which is maritime shipping. There is really no question that the law governing business conduct in the maritime industry should be responsive to the changing shipping conditions and practices brought on by intermodalism. The relevant questions are how and to what extent should maritime law change?

The maritime lien enforceable *in rem* operates with a vengeance unknown in mainstream debtor and creditor law. For a great many traditional maritime suppliers, the maritime lien provides the only viable form of security. One need only consider the situation presented when a ship requires necessary goods and services in an unfamiliar port to appreciate why other prearranged forms of security are often not practical alternatives. Congress recognized as much when it enacted an amendment to a FMLA provision in 1971. The House Report by the Committee on Merchant Marine and Fisheries recommended the amendment only after considering the plight of the "materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea."

Do modern leasing companies really need the same type of protection as do those more traditional suppliers of maritime goods and services who must, out of practical necessity, rely on the security of maritime liens? A maritime *in rem* arrest is a drastic remedy that stops a

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159. See supra text accompanying notes 97-117.
160. See supra text accompanying notes 144-49.
161. See supra text accompanying notes 137-38.
ship dead in its tracks. Is there no less drastic alternative available to the container leasing industry? The container leasing agreements involved in Char Ching Shipping were complex transactions negotiated over a period of several years. All but one of the thirty-two separate leasing agreements were entered into prior to the M/V C.C. San Francisco being launched. The magnitude of these transactions suggest both the time and bargaining power to prearrange adequate contractual security by bond or otherwise. What, if any, justifiable connection can be made between these long-term container leasing agreements and a “great economic pressure to put back to sea”?!

Is there a failure of the law to adapt or does the failure lie with the leasing industry’s business practices? Indeed, one can ask whether container lessors are really advocating after-the-fact maritime liens for intermodal container services simply because vessels are the only components of troubled intermodal transportation businesses that are vulnerable to in rem process. Even if maritime liens for intermodal container services were to become widely recognized by the courts, what type of solution would this offer the container leasing industry? Would it be an appropriate long term solution to an unavoidable problem or merely a “quick fix” for a leasing industry that may have over-extended itself?

Since the Ninth Circuit found that the “furnishing” requirement had not been met, it was able to avoid judgment on the questions whether a maritime lien could extend to the “incidental land uses” of intermodal containers and to what extent “a creditor could permit maritime attachment of containers located far in the interior of the country even though they may have been subject to the preference accorded maritime liens while aboard ship.” Had the Ninth Circuit more liberally construed the “furnishing” requirement and more freely embraced the concept of an intermodal lien, then it could have arguably set the stage for a future conflict between the traditional maritime in rem remedy and renewed constitutional concerns over procedural due process and fundamental fairness. It was, after all, these concerns that led to amendment of the rules for in rem admiralty practice to provide for judicial scrutiny of a complaint prior to the issuance of any warrant of arrest.

There are no easy answers to the questions raised by intermodal

164. See supra note 24.
165. Id.
167. 808 F.2d at 699 n.2.
168. See supra note 36.
container liens. The Ninth Circuit held the line by refusing to accommodate claims of maritime liens by container lessors at the cost of abandoning established case law and traditional concepts of "furnishing." Those courts who may in the future choose to turn a deaf ear to the principles followed by the Ninth Circuit in Char Ching Shipping should be prepared to deal with many of the questions that have been suggested.

A fresh reading of the FMLA in this area by the United States Supreme Court would be welcome. The container lessors in the Char Ching Shipping litigation filed a petition for certiorari to the Supreme Court on June 19, 1987. The Court denied the petition on October 6, 1987. Thus, at least for now, the Ninth Circuit decision in Char Ching Shipping stands as the only appellate treatment of the container lien issue.

Nicolas G. Sakellis


170. Id.