A Shot Across the Bow: The US Supreme Court rules on "What is a Vessel

A permanently moored houseboat is not a vessel because “a reasonable observer, looking to the home’s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water" - U.S. Supreme Court.

Published 29 April 2014

On 15 January 2013, the U.S. Supreme Court ruled in *Lozman* v. *City of Riviera Beach* [1] that a permanently moored houseboat was not a vessel because " *a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water* ."[2] The underlying dispute involved unpaid dockage fees of approximately USD 3,000 and, not surprisingly, a great deal of acrimony. The City of Riviera Beach asserted a maritime lien against the houseboat, which led to its sale at auction and ultimate destruction. The legal issue presented was whether the houseboat could be the subject of such proceedings – that is, whether federal maritime law was applicable – which, in turn, depended upon whether the houseboat was or was not a "vessel".

Prior to this decision, U.S. federal appeals courts had applied different tests to determine "what is a vessel", ranging from looking at the intent of the owner of the watercraft to a more literal "anything that floats" approach. In *Lozman* , the Supreme Court sought to resolve this conflict.

Despite its decidedly local flavor and the *de minimus* monetary amount involved, the impact of the *Lozman* case is potentially far-reaching, particularly for the offshore industry. As one trial court recently noted, "... [*Lozman*] has sent a shot across the bow of those lower courts that have endorsed the 'anything that floats' approach to defining vessels."[3] Going forward, disputes or casualties that involve barges, work platforms, offshore drilling/production units and floating casinos/ restaurants may turn on whether they are "vessels". For example, one of the more important legal concepts that benefits maritime interests is limitation of liability following a marine casualty. In the U.S., the Limitation of Liability Act provides for limitation to the "owner of any *vessel* ".[4] In the context of casualties resulting in pollution, the Oil Pollution Act of 1990 (OPA 90), provides for limitation of liability for a *vessel* based on a "dollars per ton" formula (but no less than USD 23,496,000), whereas the limitation amount for non-vessels is USD 75 million. Similarly, as in *Lozman* , whether a maritime lien exists and can be enforced against a particular structure depends upon a determination that the structure is a "vessel". Equally, whether a claimant seeking recovery of damages for personal injuries sustained on board a floating structure qualifies as a "Jones Act" seaman also requires that the watercraft be a "vessel".

A more detailed discussion of *Lozman* and its implications for offshore cases follows in a paper prepared for Gard Insight by Joanna Lee, a third year Boston University law student.

How the Lozman decision may affect offshore cases On January 15, 2013, the United States Supreme Court delivered its opinion in *Lozman v. City of Riviera Beach, Florida* , which could have a significant effect on offshore cases.[5] The Court determined that the statutory phrase " *capable of being used ... as a means of transportation on water* " meant that in order to be a "vessel," the water craft had to have "practical possibilities" of transportation on water, and not merely "theoretical ones."[6] District Courts are now armed with a test to determine whether an offshore case occurred on or near a vessel. However, because that test requires an intensive factual inquiry for each case, the *Lozman* decision may result in less clarity and consistency, and ultimately increase litigation costs.

I. Analysis of the Lozman decision At issue in *Lozman* was whether Petitioner Lozman's floating home fell within the definition of "vessel" under §3 of the Rules of Construction Act, which defines a vessel as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[7] The Court in *Lozman* concluded that the floating home was not a vessel because "a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water."[8] In the opinion, the Court enumerated all the reasons a 'reasonable observer' could not conclude that the floating home in question was a vessel:

It had no rudder or other steering mechanism. Its hull was unraked, and it had a rectangular bottom 10 inches below the water. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land. Its small rooms looked like ordinary non-maritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows.[9]

Moreover, while the " *lack of self-propulsion is not dispositive, it may be a relevant physical characteristic* ."[10] Therefore, the Court concluded that *"[b]ut for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water* ."[11]

Prior to *Lozman* , the Supreme Court had considered "what is a vessel" in *Stewart v. Dutra Construction Company* , a case which involved a dredge.[12] In determining that the dredge was a vessel, the Court noted that dredges "serve[] a waterborne transportation function," in that they "carr[y] machinery, equipment, and crew over water." [13] Similar to other watercraft, the dredge had "a captain and crew, navigational lights, ballast tanks, and a crew dining area." [14] While a dredge "could navigate only by manipulating its anchors and cables or by being towed," it did move, and moved quite frequently. [15] The Court held that "[s]ection 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose."[16] The Court explained that a water craft "is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."[17]

After *Stewart* , the lower courts split in interpreting *Stewart's* holding and came to different answers as to "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."[18] The Fifth Circuit Court of Appeals looked to the water craft owner's intent, and found that a water craft was not a vessel if the owner's intent was "not maritime in nature."[19] The Fifth Circuit concluded that while the water craft was "still physically capable of sailing, such a use was merely theoretical."[20] Other courts took a literal approach to the usage of the term "capable of being used" and adopted an "'anything that floats' approach"[21] to determine what was a vessel. The Eleventh Circuit Court of Appeals interpreted *Stewart* as instructing the courts to "direct their focus to whether a watercraft is practically capable of serving as a means of transportation upon water rather than her owner's intended use or her actual mobility at the time in question."[22] The Supreme Court decided to resolve this conflict in *Lozman* .[23]

II. How Lozman has affected litigation regarding offshore cases Whether a floating structure is a "vessel" will often be a threshold issue, because a finding that the craft is a vessel may be necessary for the court to retain admiralty jurisdiction.[24] A claim involving a "vessel" is the basis for application of federal statutes such as the Jones Act, the Longshore and Harbor Workers' Compensation Act ("LHWCA") and the Outer Continental Shelf Act (OCSLA). It is also the basis for application of the general maritime law on unseaworthiness. The Jones Act provides a seaman who is injured in the course of employment with a negligence cause of action against his/her employer. In order to be a Jones Act seaman, the claimant must be the 'master or member of a crew of any *vessel*. '[25] Section 905(b) of the LHWCA provides stevedores and other harbor workers with the right to sue the owner of a vessel for injuries caused by the owner's negligence.[26] Similarly, the applicability of maritime law to cases involving the Outer Continental Shelf[27] depends upon three factors, one of which is "the type of craft or structure involved (whether it qualifies as a ' *vessel*')."[28] If there is a structure that qualifies as a vessel, then federal maritime law applies.[29] If there is no vessel, the law of the adjacent State is applied.

In heeding the principles of *Lozman* , district courts frequently enter into an intensive fact-finding analysis in order to determine what a “reasonable observer” would conclude, and justify their decisions by comparing the watercraft in question to the Supreme Court’s analysis of Mr. Lozman’s floating home. The following are holdings from recent post -*Lozman* cases:

1. In Mooney v. W & T Offshore, Inc.,[30] the parties litigated whether the MATTERHORN SEASTAR, a tension leg platform in the Gulf of Mexico, was a vessel. The MATTERHORN SEASTAR did not qualify as a vessel, and as a result, the district court granted a motion for partial summary judgment under the Jones Act, the LHWCA and the general maritime law for unseaworthiness. The remaining claims were governed by OCSLA, and therefore, the district court had subject matter jurisdiction to apply the law of the adjacent state. The district court highlighted the testimony of a facilities engineer, who attested to the function and mobility of the craft. He confirmed that "the MATTERHORN SEASTAR is permanently attached to the subsoil and seabed of the Outer Continental Shelf by six 32–inch diameter neutrally buoyant steel tubes."[31] The importance of this fact was that the MATTERHORN SEASTAR "generally remains at a nominal position over seven previously drilled wells where it produces oil and gas from the wells, processes and separates the oil and gas, and then transports the oil and gas to Louisiana via two connected export pipelines."[32] Further, the MATTERHORN SEASTAR has "no system of self-propulsion, no raked bow, is not intended to be towed or moved (with the exception of its positioning in the MC243 and its ultimate removal at the end of the life of the reservoirs it serves), and has not been moved since it was installed and anchored to the sea floor."[33]

2. The Eastern District Court of Louisiana decided another dispute about whether a craft was a vessel in Warrior Energy Servs. Corp. v. ATP TITAN,[34] where it found that the ATP TITAN, a floating production facility moored approximately 65 miles offshore Louisiana in a production field, was not a vessel. Therefore, no in rem claim could be made against it. The Court held that the "triple-column, deep-draft, floating production facility was not a vessel" because it had "not moved locations since it was fully installed in March 2010, and its eventual relocation will require a massive expenditure of money and manpower."[35] The Court concluded that because of ATP TITAN's function as a production platform and its lack of mobility due to its infrastructure, a reasonable observer could not conclude it was a vessel.

3. The Eastern District Court of Louisiana revisited the issue in Dune Energy, Inc. v. FROGCO Amphibious Equip., LLC.[36] The parties argued whether a marsh buggy excavator – an amphibious back hoe that assists with dredging – was a vessel. If it were a vessel, its owner would attempt to limit its liability to the value of the marsh buggy excavator. The Eastern District Court of Louisiana held that because "the Lozman test is highly fact dependent, and the material facts appear to remain in dispute," it could not make a determination of vessel status without additional information and denied FROGCO's motion for partial summary judgment.[37] This is an example of how the fact-based inquiry required by the Lozman decision may result in more protracted and costlier proceedings.

4. In Armstrong v. Manhattan Yacht Club, Inc.,[38] the parties sought to determine whether a floating club house was a vessel. The Eastern District of New York granted the motion for summary judgment after concluding that "a reasonable observer, looking to the Club house's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water" so it was not a vessel.[39] Because the court determined the floating club house was not a vessel, the plaintiff could not bring an action under the Jones Act or general maritime law and those claims were dismissed.[40] In coming to its conclusion, the Court compared the floating club house to the floating house in Lozman. It noted that the floating club house "shares many physical characteristics and activities in common with the floating house in Lozman."[41] The club house also differed from Lozman's floating house in many important aspects. However, the mobility, (or lack of any in this case) and the function (which was not to transport people and cargo) were most heavily factored in concluding that the floating clubhouse was not a vessel.
5. In Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York,[42] the parties litigated whether a floating drydock was a vessel. The Southern District of New York concluded that it was not a vessel, holding that a reasonable observer could not say "the drydock [was] designed, or 'regularly' used, to transport persons or things over water."[43] As a result, the district court lacked admiralty jurisdiction over a dispute concerning insurance of the drydock. Again, the mobility of the craft in question was crucial to the court's determination. The court reasoned that although it was towable, "the drydock lacked the ability to propel itself;" did not have a steering mechanism; "lacked navigational lights, life boats, a wheel house or other equipment that would allow it to be used for the transportation of passengers; and "was never used to transport cargo or people, and the living quarters were no longer in use when the drydock was stationed at Port Arthur."[44] The Court found even more convincing how little the drydock had traveled in its recent history.[45]

III. Conclusion – the future use of the Lozman standard The *Lozman* decision will likely cause a shift toward resolving borderline cases in the direction of "non-vessel" status. This will impact the "borderline" offshore floating structures which are not traditional vessels.

To the extent that the decision creates uncertainty and unpredictability as to "what is a vessel," it is probable that the issue will be litigated more frequently. As Justice Sotomayor pointed out in her dissent in *Lozman* , the Supreme Court left the legal and maritime community *"[w]ithout an objective application of the § 3 standard, one that relies in a predictable fashion only on those physical characteristics of a craft that are related to maritime transport and use* ," and as a result, " *parties will have no ex ante notion whether a particular ship is a vessel* ."[46]

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[1] 133 S. Ct. 735, 2013 AMC 1 (2013). [2] Id. At 739. [3] Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y. 2013 WL 311084, 2013 AMC 567 (S.D.N.Y. 2013). [4] Limitation of Liability Act of 1851, 46 USC, s. 183. [5] 133 S. Ct. 735, 2013 AMC 1 (2013). [6] Id. at 739. [7] Lozman, 133 S. Ct. at 735, 2013 AMC at 17 (citing to 1 U.S.C. § 3). [8] Id. at 739. [9] Id. at 741 (internal citations removed). [10] Id. [11] Id. [12] 543 U.S. 481, 2005 AMC 609 (2005). [13]Lozman, 133 S. Ct. at 742, 2013 AMC at 8. [14] Id. [15] Id. (internal quotations omitted). [16] Id.at 495. [17] Id. at 494. [18] De La Rosa v. St. Charles Gaming Co., 474 F.3d 185, 187, 2006 AMC 2997, 2998 (5th Cir. 2006). [19] Id. [20] Id. [21] Lozman, 133 S. Ct. at 743, 2013 AMC at 10. [22] Bd. of Comm'rs of Orleans Levee Dist. v. M/V Belle Of Orleans, 535 F.3d 1299, 1310 (11th Cir. 2008) abrogated by Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013). [23] See David W. Robertson & Michael F. Sturley, Vessel status in Maritime Law: Does Lozman Set a New Course?, 44 J. Mar. L. & Com.393 (2013) (for a detailed discussion on the legal background on vessel status before Lozman and the post-Stewart problems that led to the Lozman). [24] This is not always the case. Admiralty jurisdiction may exist in some instances even without the structure being a "vessel" (see, for example, Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, 946 F. Supp. 2d 256, 2013 AMC 2740 (D.P.R. 2013), upholding admiralty jurisdiction in a marine insurance case involving a "non-vessel" drydock). [25] Robertson & Sturley, supra note 19 (citing to McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347, 1991 AMC 913, 926 (1991) and 46 U.S.C. § 30104). [26] 33 U.S.C. § 901 et seq. Section 905 (b) provides: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." [27] See Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355, 1969 AMC 1082 (1969) ("The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf."). [28] Thomas J. Schoenbaum, Admiralty and Maritime Law, 50-51 (5th ed. 2012). [29] Rodrigue, 395 U.S. at 362, 1969 AMC at 1089. [30] CIV.A. 12-969, 2013 WL 828308, 2013 AMC 1480 (E.D. La. Mar. 6, 2013). [31] Id. [32] Id. [33] Id. [34] CIV.A. 12-2297, 2013 WL 1739378, 2013 AMC 1960 (E.D. La. Apr. 22, 2013). [35] Id. [36] CIV.A. 11-3166, 2013 WL 1856058 (E.D. La. Apr. 30, 2013). [37] Id. [38] 12-CV-4242 DLI JMA, 2013 WL 1819993, 2013 AMC 1938 (E.D.N.Y. Apr. 30, 2013). [39] Id. [40] Id. [41] Id. [42] 10 CIV. 1653 JPO, 2013 WL 311084, 2013 AMC 567 (S.D.N.Y. Jan. 25, 2013). [43] Id. [44] Id. [45] Id. ("Moreover, while the drydock has been moved long distances at least twice in the distance past, it was, in the years leading up to its destruction, more or less permanently moored in one place. Although the drydock was still moved away from its mooring at least every two to three years for dredging of the sea floor beneath the drydock, Lozman makes plain that this amount of transportation is not sufficient. More to the point, the drydock's later movements were brief and of short distances, and the short trips were made solely to allow for dredging the slip, Cates Dep. at 114–115, which is self-evidently not the sort of "transportation" contemplated by the Supreme Court in Lozman. Indeed, this type of movement is not "transportation" at all."). [46] Lozman, 133 S. Ct. at 754, 2013 AMC 25 (Sotomayor, J., dissenting)