

ALL THAT FLOATS IS NOT A BOAT: THE SUPREME COURT'S LOZMAN DECISION MAKES WAVES IMPACTING MULTIPLE AREAS OF LAW

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"Three men in a tub"¹; "Jonah inside the whale"²; "A garage door"³

Is everything that floats a vessel? The common sense answer to that question would seem to be no. However, for the purposes of 1 U.S.C. § 3, and for the better part of 200 years, federal courts around the country have been applying different variations of a very inclusive standard for determining when a particular contrivance was in fact a vessel sufficient to confer the application of admiralty jurisdiction and maritime law to a given legal dispute. This area of admiralty jurisprudence was generally thought to be relatively well-settled until February 21, 2012, when the United States Supreme Court granted certiorari on an appeal from the Eleventh Circuit Court of Appeals concerning an oddly-shaped structure, known as *"That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet In Length."*

Introduction

On January 15, 2013 the United States Supreme Court decided the case of *Lozman v. The City of Riviera Beach*,⁴ which, unless you closely follow the practice of admiralty and maritime law, probably went largely unnoticed, as many esoteric Supreme Court opinions do. However, taxes are calculated, insurance is procured, and business is generally conducted on the assumption that a thing

is today, and will be tomorrow, what it was yesterday. As discussed in more depth below, the ruling in this case has the potential to shake these assumptions up almost immediately. For that reason, this article looks to shed some light on what the average practitioner should know about this archaic, yet apparently evolving area of admiralty and maritime law.

Lozman created a buzz amongst admiralty practitioners, scholars, and marine-based employers as to how the Court was going to navigate its way out of a narrow channel, so to speak. *Lozman*, at its core, is about the analysis a federal court would undertake to determine whether a particular "contrivance" used on the water constitutes a "vessel" for the purpose of conferring admiralty jurisdiction and, therefore, the application of substantive maritime law to a given matter.

The Supreme Court is often called upon to settle or address divergence between the Federal Circuit Courts of Appeal; *Lozman* was no different. The test for "vessel status" as utilized by the Eleventh Circuit⁵ contains very broad language to be used in classifying whether a particular contrivance was a vessel; other federal circuits utilized slightly more restrictive language tending to narrow the scope of the classification. What made this case so important and surprising is that the foundations of law in question are as old as the Court itself. Both par-

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ties, supporting amici, and the Court itself found themselves reviewing and citing to cases written as far back as the 1800s, which still represent good law today. What made this case so critical were the potentially stark changes that could arise from it by implication.

What is a Vessel?

The Rules of Construction Act in 1 U. S. C. § 3 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.» This is admittedly a broad basis upon which to decide whether something floating upon the water constitutes a vessel. In over 200 years, there have been a variety of interpretations of this definition, but most if not all stick to the text of the statute, which by its “every description of . . . artificial contrivance” begs the question: “[D]oes everything that floats constitute a vessel?”

Outside of the obvious examples, this question has bedeviled the courts for some time, typically in the form of floating docks, work platforms, and similar non-self propelled contrivances that, from time to time, have the ability to float and/or travel with goods or persons aboard. The Supreme Court recently spoke to the issue of vessel status in *Stewart v. Dutra*,⁶ holding that a “vessel” is any watercraft or contrivance *practically* capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Of prime importance to the Supreme Court in adjudicating that case was whether the contrivance at issue was practically capable of transportation, as opposed to merely theoretical.⁷ However, other issues, such as permanent attachment or connection to land,⁸ have often seemed to distract federal courts from a purely objective inquiry as to whether a vessel meets the statutory definition as laid out in 1 U.S.C. § 3. This inquiry, whether something that was once concededly a vessel remains a vessel after actions taken to indefinitely secure it to the shore, appears to be an ancillary question as to whether something remains a vessel after certain actions

have been taken to presumptively strip it of that status. This of course is wholly separate from the issue of whether a contrivance that was designed to and spends its entire existence with such attachments to land, qualifies as a vessel merely because it could theoretically travel with goods and passengers over water. An example of the latter would be a floating dock used for construction that is permanently moored to a shore-side structure and has never traveled with persons or goods aboard, though perhaps it could if towed. Somewhere at the confluence of these myriad inquiries arrived a *Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet In Length* owned by Fane Lozman.

Fane Lozman Versus The City of Riviera Beach, Florida

While the complete back story of this case is unnecessary to this article’s purpose, some explanation of the facts will help set the context for the Court’s decision and its likely consequences. Fane Lozman owned what is typically referred to as a “floating house,” not to be confused with a “house boat.”⁹ Mr. Lozman’s floating house¹⁰ was described in its petition for arrest as “That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet In Length”; this is not all that unusual, as vessels are typically described by their given name, length, make, and often have included other aspects of its personage, including engines, tackles, equipment, etc., when serving as an *in rem* defendant in admiralty. What makes the name in this case ironic is that the vessel, in maritime terms, essentially defied articulate description. According to the records used at the various proceedings, Lozman’s floating house was a rectangular structure on pontoons that could be towed and, indeed, was towed on several occasions over many miles; the floating structure also carried his goods from place to place when it was so towed. It was outfitted to be towed, but remained for the most part tethered to the shore by electrical hookups and water hose pipes.

The origins of the controversy will probably never be resolved to satisfaction of the parties involved,

but suffice it to say the City of Riviera Beach was apparently less than thrilled with Mr. Lozman’s structure being moored at its city-owned marina. After various disputes between the city and Mr. Lozman, resulting in protracted and unsuccessful efforts to evict him from the marina, the city brought a federal admiralty lawsuit *in rem* against the floating home on the basis of a maritime lien for unpaid dockage fees and damages for trespass.¹¹ As an incident to a vessel “arrest” under admiralty and maritime law, the vessel was seized by the United States Marshal’s Office and held pursuant to an order of the court.

Lozman, acting *pro se*, asked the district court to dismiss the suit on the ground that the court lacked admiralty jurisdiction, based on the fact that, according to Lozman, his house was not a vessel under the applicable test. After summary judgment proceedings, the court found that the floating home was a “vessel” and concluded that admiralty jurisdiction was consequently proper.¹² The judge then conducted a bench trial on the merits and awarded the city \$3,039.88 for dockage along with \$1 in nominal damages for trespass. Prior to the judicial sale, the district court ordered the city to post a \$25,000 bond to secure Mr. Lozman’s value in the vessel, ensuring that he could obtain monetary relief if he ultimately prevailed in his appeal. The city purchased the floating structure at auction, subsequently ordering it destroyed.

Mr. Lozman appealed the ruling to the Eleventh Circuit Court of Appeals. Based on the factual findings of the trial court, and considering itself to be following binding precedent, the Eleventh Circuit affirmed the district court’s finding that it had subject matter over Lozman’s case, as the floating structure was property termed a vessel.¹³ Lozman sought to present several bases in support of his assertion that his structure was not legally a vessel; unfortunately, all were equally unavailing to the Eleventh Circuit, which cited to the craft’s practical capacity for maritime transport in its determination of whether a contrivance is a vessel.¹⁴ This specific application of the Eleventh Circuit’s test is the genesis of the “everything that floats” pejorative description of

the analysis assailed by both the majority and dissenting opinions in *Lozman v. The City of Riviera Beach*.

Many thought the United States Supreme Court would deny certiorari based on the fact that the matter of what constitutes a vessel recently had been addressed in *Stewart v. Dutra Const. Co.*¹⁵ Others thought the fact that the structure had been destroyed made the question moot and improper for resolution at that level. The Court did neither and accepted the case for review with the following question presented:

Whether a floating structure that is indefinitely moored receives power and other utilities from shore and is not intended to be used in maritime transportation or commerce constitutes a “vessel” under 1 U.S.C. §3, thus triggering federal maritime jurisdiction.¹⁶

Provided with this instruction, many scholars, commentators, and practitioners noted the presence of a term within the question presented not otherwise found in the statute cited; the *intended* use of the vessel was about to become an issue before the Court.

The Perspective of a Reasonable Observer: An Additional Level of Analysis into the Inquiry of Vessel Status

The Supreme Court concluded after much debate, in a 7-2 opinion, that *Lozman*’s floating structure was not a vessel. In other words, the district court should not have allowed it to be arrested under the applicable Local Rules for Admiralty and Maritime Claims and subsequently sold at auction. Somewhat more importantly, the ruling indicated that the Supreme Court disapproved of the “test” or analysis utilized by the Eleventh Circuit Court of Appeals in determining whether *Lozman*’s structure was indeed a vessel, such that it conferred the benefits and rules associated with admiralty jurisdiction. It is this facet of the case that is drawing attention and potentially creating turmoil in the admiralty and maritime world.

The new “test” arising from *Lozman* could be formulated along the following lines:

A particular vessel, structure, or contrivance will be determined to meet 1 U.S.C. § 3’s requirement of being *capable* of being used as a means of transportation on water if a reasonable observer, looking to structure’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.¹⁷

To the astute observer, gone is the “practically capable, not merely theoretical” language of *Stewart v. Dutra*,¹⁸ which has apparently been replaced with an inquiry by the reasonable observer as to whether it thinks that, based on its design characteristics and past history of activities, the structure was designed to a practical degree to be capable of carrying people or things over water.

The immediate take-away from this holding is that it will introduce a measure of uncertainty into this analysis. While implicating the reasonable person test, admittedly an objective standard of sorts, this new analysis requires the observer to look to the physical attributes and behavior of the structure as objective manifestations of any relevant purpose, without consideration of the subjective intentions of the owner, in determining whether it was intended to carry people or things over water.

Despite the introduction of the seemingly novel “reasonable observer” standard into the test for vessel status, the Supreme Court in *Lozman* sought to demonstrate how its newly-worded analysis drew support from its previous opinions. It primarily focused its discussion on two cases that had served as guideposts in the oral arguments. In *Evansville & Bowling Green Packing Co. v. Chero Cola Bottling Co.*,¹⁹ the Court held that a wharf boat that was positioned floating next to a dock, used to transfer cargo, and towed to harbor each winter was not a vessel for the purposes of 1 U.S.C. § 3.²⁰ Conversely, in *Stewart v. Dutra*, the Court found that

an otherwise immobile dredge used to remove silt from the ocean floor, which carried a captain and crew and could be navigated only by manipulating anchors and cables or by being towed, was a vessel.²¹ Writing for the majority, Justice Breyer stated that:

the basic difference, we believe, is that the dredge in *Dutra* was regularly, but not primarily, used (and designed in part to be used) to transport workers and equipment over water while the wharf boat in *Evansville* was not designed (to any practical degree) to serve a transportation function and did not do so.²²

In that vein of reasoning, the Court developed its eventual holding that the objective design characteristics, combined with what types of activities the particular contrivance had previously and currently engaged, had always played a role in determining vessel status.

Why *Lozman* Matters: Changes on the Horizon?

So a floating rectangular structure is not a vessel for the purposes of admiralty and maritime jurisdiction, unless a reasonable observer perceives that it was designed in such a way to be practically capable of carrying persons or things over water. The overarching reason why *Lozman* matters is that where a vessel is involved in a particular incident, there is a very good chance that the substantive law of admiralty will be applied to the dispute.²³ This body of law can be strikingly dissimilar from its terrestrial counterparts; many aspects of admiralty substantive law may have no cognate under state law at all.

The particular facts of this case were admittedly strange; the record before the Court apparently reflected that at the early stages of the case, a surveyor was unable to find any comparable craft for sale in the state of Florida with which to compare *Lozman*’s floating home.²⁴ Oddly-designed and shabbily constructed floating structures, however, are not the only contrivances now facing

closer scrutiny under this revised analysis for vessel status under 1 U.S.C. § 3; the owners of a variety of other structures located upon the water are now looking at their particular contrivances and asking, “is this thing a vessel, or not?”

As a popular example, “Casino Boats” that spend much or all of their time securely moored to the shore, but are still very much designed to and most certainly capable of transporting things over water, will merit another look from the courts. While the legal discussion of these structures will likely continue to focus on the degree to which they are tethered to land or permanently attached to the shore,²⁵ some models of the these structure types may be nothing more than faux-boats, large blocks of floating concrete with an outer façade meant to resemble river boats of old. To the extent these structure’s design characteristics are interpreted as rendering the structure capable of transporting passengers and goods across navigable waters, this seems to be one particular area where the reasonable man’s interpretation of a vessel’s design characteristics may turn out to be patently inadequate without some accounting for the actual seaworthiness of such a structure.

Another area to be watched closely will be the myriad variety of floating docks, dumb barges, and floating platforms. The same structure in different settings could arguably be judged in a dissimilar matter. A flat-bottomed, working barge may seem perfectly fitted to transport goods and persons in a flat water riverine environment requiring short trips on an infrequent basis; however, that same structure is grossly inadequate to take on the perils of the open seas. While the two structures could have been designed in precisely the same way, despite genuine attempts to the contrary, it is likely that external and environmental factors will play a role in whether the reasonable observer thinks the vessel, when considering its design, believed it to be capable of transporting passengers and goods across navigable waters based at least in part on how the structure is intended to be used.

Finally, as noted by the *Lozman* dissent,²⁶ floating homes and houseboats are going to require a

closer look as to whether they retain or perhaps lose their status as vessels following this opinion. It goes without saying that not all houseboats or floating houses are built alike. Using this deceptively simple dichotomy likely belies the complexity in design differences between what the Court has chosen to call a “house boat” versus a “floating home.” Theoretically, very few after-market design modifications would be required to render a floating house capable of its own locomotion and therefore, potentially, crossing over into a designation as a “vessel.” To say confidently that all floating houses are not vessels would be a risky proposition on which to base a defense strategy. These are some of the types of structures that could possibly be affected by this holding. In the following section, this article will discuss why it matters.

In and Out of the Water: Why the Application of Maritime Law Matters

The law of admiralty has a long and venerable past. Its roots easily predate almost any existing legal system still in operation today, with scholars potentially identifying a specialized and differentiated set of rules for ocean-based trade as far back as the high times of the Greeks and Romans.²⁷ Both these civilizations had special rules for trade and commerce over the seas. These special sets of laws later infiltrated in the Anglo Saxon and other Western legal systems as those burgeoning societies began their ascent in global exploration. Much of the past history of admiralty is still in play today. The law of admiralty is still applied in special courts in Great Britain sitting for that purpose. In the United States, admiralty and maritime matters are generally heard before federal district courts sitting in admiralty by designation and implication of Federal Rule of Civil Procedure 9(h), although even absent that designation a federal court will apply maritime and admiralty law where it governs. State courts may also apply admiralty and maritime law in certain situations under the “Savings to Suitors” clause, which provides for state courts to apply a remedy where they are otherwise competent to do so.²⁸ What

does all this mean? Admiralty and maritime law is persistently interwoven into both contract and personal injury/tort law of the states and the federal courts where there is a “maritime” flavor.

To demonstrate the potential effect of this decision, provided below is a hypothetical scenario presenting a set of facts and circumstances which, following the *Lozman* decision, will have a dispositive effect on defense strategy and practice depending on whether the contrivance at issue is determined to be a vessel or not. Following the hypothetical are a few examples, though not an exhaustive list, of idiosyncrasies of maritime law that tend to serve important roles in determining the strategy and outcomes of admiralty and maritime cases. While the *Lozman* opinion does not affect the law in this area, to the extent that “borderline” structures such as floating houses, barges, and other things that float are involved in a dispute, the holding in *Lozman* may bring the following aspects of admiralty and maritime law into and out of the defense practitioners’ strategy.

Fire at The Marina

Consider the following contrivance: a floating platform built in a very similar fashion to *Lozman*’s floating house. For the purposes of this exercise, it helps if the structure is as close to the dividing line as to a vessel/non-vessel designation under *Lozman*.

Now, consider the following event: the contrivance is moored by way of its two port (left) side cleats to a seawall within a marina. A marine-grade power cord attached to a dock post on land powers portable electronic devices on board. A temporary gangway is placed across the space between the seawall and the contrivance. A grill is mounted on the contrivance and, while a guest aboard is trying to light the grill, the guest accidentally creates a fireball that sets the contrivance ablaze. Everyone is able to exit the contrivance but, before the fire can be put out, it spreads to a neighboring vessel and finger pier, causing substantial damage to both before the fire is finally extinguished. The owners of the marina and the affected vessel are

both preparing to turn to the owner of the platform seeking recovery for their losses.

For purposes of this example, it should be assumed that the owner of the contrivance had it insured as a vessel with both first party property damage and third party liability coverage intact. However, the limits are clearly going to be exceeded by the total amount of claims. As demonstrated below, the potential for the application of the substantive maritime law, versus the otherwise applicable state law, would almost certainly be outcome determinative for the parties involved.

Petition for Exoneration from or Limitation of Liability

One of the first procedural steps in the defense of an admiralty claim similar to the one above is to file a petition for exoneration from, or limitation of, liability on behalf of the vessel and the owner. The admiralty and maritime law of the United States provides for the owner of a ship, in certain cases of loss or damage, to completely exonerate himself from liability arising from a maritime accident/incident. In the alternative, if certain conditions are not met, the owner may still be able to limit any liability for the same to the post-accident value of the owner's interest in the vessel and pending freight, provided that the accident occurred without the knowledge and privity of the owner.²⁹ Such is the case even where there are insurance proceeds otherwise available to cover damages arising from the accident.

The impetus for this protection was based in a desire to promote investment in shipping, primarily ownership and managing of sea going vessels, in an age where a successful trip across the "pond" was far less certain than it is today. While damage to property can be distinguished from personal injury and death, the Limitation of Liability Act³⁰ ("LOLA") and the "Petition for Limitation" provide an indelible defense strategy to owners of both commercial and recreational vessels.

LOLA essentially provides for a vessel owner to force all claims against him for a particular incident to be brought against him in a single

forum.³¹ If the claimant(s) cannot prove that an act of negligence or an unseaworthy condition caused the loss, the shipowner must be exonerated from liability.³² If the claimants can prove negligence or an unseaworthy condition, then the burden switches to the vessel owner to show that the condition complained of was outside of his privity and knowledge.³³ If the vessel owner can so prove, the owner is allowed to limit his liability to the post-casualty value of the vessel.³⁴ Where the owner cannot, the owner is not afforded the protection of LOLA.³⁵

Applied to the factual scenario above, whether or not the contrivance is going to be deemed a vessel will be crucial to the owner. If the contrivance is deemed to be a vessel, the owner will at least be given the opportunity to initiate the limitation proceedings, force all claimants to join in a single proceeding, and place the initial burden on the claimants to show negligence or an unseaworthy condition. The protection of LOLA will allow the owner to limit any losses, if the vessel is found responsible for the loss, but that such negligence or unseaworthy condition occurred without his privity and knowledge, irrespective of available insurance limits. Depending on the extent of damage to the vessel, its post-casualty value may be negligible; in many cases, this will leave claimants with little to nothing in the limitation fund.

For this reason, the injured parties will certainly contest vessel status for the contrivance, as without that designation, the owner loses the ability to file the limitation petition. State procedural rules will govern the manner in which the parties can file their claims against the owner. More importantly, the owner is going to be liable for all the damages for which the owner is deemed responsible. Insurance may, depending on the cause of the loss in relation to the policy language, provide defense and coverage up to the policy limits, but where losses exceed coverage amounts, the owner of the contrivance will be liable for those amounts. The difference in overall exposure can be staggering and can result in personal and professional consequences of an extreme nature.

Joint and Several Liability

After several years of progression, Florida law now provides that absent certain statutory and common-law based exceptions, in the case of joint tortfeasors, liability will be apportioned on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.³⁶ Having the protection of the Florida Comparative Fault Statute, defense counsel can focus on establishing its client's role, if any, in causing plaintiff's damages without undue regard or worry about getting left holding the bag for a co-party with little to no assets or ability to pay. Comparative fault also guides plaintiff's strategy in naming parties as defendants and its overall strategy for putting forth its case for recovery. Since the 2006 amendments to section 768.81, Florida Statutes, this framework has guided the prosecution of civil suits in Florida with a welcomed degree of predictability.

Unfortunately, the general maritime law as interpreted by the United States Supreme Court does not take the same position as the state of Florida on joint and several liability. Despite the application of comparative fault in a joint tortfeasor setting,³⁷ as well as the use of principles of comparative fault to reduce a negligent plaintiff's recovery,³⁸ the United States Supreme Court has said that the inclusion of this doctrine into the general maritime law in no way limits the general right to joint and several liability from all tortfeasors.³⁹ The substantive law of admiralty provides that an injured party can obtain the entire amount from any one party, leaving the defendants, through the doctrines of contribution and indemnity, to equitably re-apportion any inequities as to relative degrees of responsibility to the plaintiff remaining as a result of it paying more than its "fair share."⁴⁰ Therefore, where the substantive law of admiralty applies, so too will the doctrine of joint and several liability, regardless of what the Florida Legislature and Florida courts have said about it.

The hypothetical example above requires only minor tweaking in order to accommodate a contingency where joint and several liability becomes an essential moving part

to a defense strategy. Consider the following: suppose a third party was transporting fuel on the docks, negligently spilling gasoline on the docks and the water surrounding the soon-to-be damaged vessel and finger pier. Now, the fireball originating from the contrivance interacts with the spilled gas to damage both the finger pier and the adjacent vessel. The third party and the vessel owner are now almost certainly joint tortfeasors as to the injured parties and, depending on which body of law applies to the dispute, each defendant, at least potentially, could be liable for the entire amount of each plaintiff's damages.

Assuming for the moment that the contrivance is determined to be a vessel and the owner was unable to limit his liability to the post-casualty value of the contrivance, the owner and the third-party, under the application of substantive maritime law, would be jointly and severally liable for each plaintiff's damages. How each plaintiff goes about collecting the judgment is up to them individually; again, under the general maritime law each plaintiff is entitled to seek the entire amount of damages from one of several joint tortfeasors, regardless of any apportionment of fault by the court. Where one co-defendant is seen to have deeper pockets than another, that defendant may be treated as the initial target, ultimately being forced to bring a contribution action against the remaining co-defendants.

State law in this instance would be more favorable to the contrivance owner. Absent the operation of a statutory exclusion or a finding that the two offending parties are initial and subsequent (as opposed to joint) tortfeasors, liability in this case is going to be apportioned according the relative degrees of fault as determined by the court. Where the court issues a final adjudication concerning apportioned responsibility for the incident, no claim for contribution by any party should be permitted.

Vessel Arrest and In Rem Proceedings

The hypothetical above could again be altered slightly to demonstrate the effect of another procedural device unique to the general

maritime law. If the offending contrivance was not destroyed in the fire as depicted above and was deemed to be classified as a vessel, either of the offending parties could move to have the vessel arrested on the basis of a maritime tort lien based upon the negligence of the contrivance in starting the fire.⁴¹ One of the most recognizable features of admiralty and maritime law is the ability of an offended party to take action directly against the vessel itself, known as an *in rem* proceeding, where the vessel has played some part in a dispute involving the injured party.⁴² Such a dispute could involve the breach of a maritime contract, such as dockage, fuel, marine necessities, or wages, giving rise to a maritime lien; the *in rem* proceeding is also available to claimants that have been injured by the ship in a way that would confer admiralty subject matter jurisdiction to the incident (as is the case in the hypothetical).⁴³ What makes the *in rem* proceeding so unique is that the vessel itself is named as a party in the complaint and to the lawsuit. The owner and/or master of the vessel may not be named as a party at all, though he or she may elect to appear to protect his or her interests in the vessel.⁴⁴

In addition to being named as a party, the vessel is actually arrested, or repossessed by order of a federal district court, prior to any adjudication of liability. This concept has its roots in the fact that traditionally an ocean-going vessel might call on a particular port no more than once or twice in its existence; especially in the world of sailing ships and "Norwegian Steam"-powered traders, courts sitting in admiralty elected not to force the injured party to chase a particular vessel across the globe to settle debts or force accountability for liability arising from negligent acts committed by the "ship" and its crew. Therefore, the body of admiralty and maritime law has developed and retained the vessel arrest procedure to allow an injured party to have a vessel arrested where they find it, exercising the ability to settle the particular dispute in that location. A combination of statutory⁴⁵ and judicially developed law⁴⁶ governs the order and priority in which claims are paid, both as to between and within a

given type of claim. Claims are paid out according to this hierarchy, with a given category of claims being fully satisfied before dropping down to the next "level" of claim.⁴⁷

The application of the *in rem* proceeding to the hypothetical scenario presents a variation of the situation in *Lozman*. Instead of a maritime lien for necessities (or dockage in *Lozman's* case), the maritime lien would be described as a maritime "tort" and the damage suffered by the arresting parties against the vessel itself. Without the application of maritime law, the injured parties' would be left to pursue an *in personam* action against the two individuals, with state law governing the principles of liability and apportionment of damage. The contrivance owner retains his "property" (in terms of the contrivance) for now, with the potential for a writ of execution to be levied against him for real and personal property as provided by state law. The relative importance of vessel status in the context of vessel arrest cannot be understated.

This issue was at the heart of the *Lozman* decision. Fane Lozman argued that his structure should have never been arrested as it was not a vessel for the purposes of conferring subject matter jurisdiction, and hence the *in rem* proceeding, used to arrest, sell, and destroy his floating home. Absent vessel status, the City of Riviera Beach would have surely been forced to take more detailed and time-consuming steps to either condemn the structure or otherwise force Mr. Lozman to move his floating house. Regardless, the city would not have been entitled to the summary nature of the *in rem* vessel arrest procedures which were in fact designed to ensure quick summary resolution of these types of disputes.

A Sea of Examples

The three aspects of admiralty and maritime law discussed are but just a few of the issues a defense practitioner needs to be familiar with in the wake of the *Lozman* decision's potentially unsettling of the vessel status test to be used across the country. The effects, however, are not limited to defense strategy and jurisdictional practice; the consequence of such uncertainty as to vessel status

under 1 U.S.C. § 3 go far beyond the practicing attorney's desk. How will marinas and state/local governments deal with the issue of floating houses? Operating under a general, though possibly short-sighted assumption, that these structures will consistently be held not to be vessels, how do business and governmental units interacting with these structures adequately prepare themselves to regulate their use and how/where they are positioned? Insurance for these structures, as well as other types of floating, non-traditional contrivances, may similarly be thrust into flux. The loss of the ability to limit liability, as well as confusion over the appropriate policies and coverages to provide to such structures, will certainly cause headaches for that particular industry.

Though not discussed here, thought should also be given to the marine industry employment issues that may arise as a result of the shift in determining vessel status. Where individuals contribute to the mission of a vessel in navigation and where that connection is substantial in both its duration and nature⁴⁸, those employees are "seamen" for the purpose of the "Jones Act," the set of statutory provisions governing the maritime commerce in the United States.⁴⁹ This designation brings with it insurance and medical provisioning requirements which must be maintained by the employers of seamen. Where a floating structure serves as the basis for marine construction activities, do the owners/employers of this structure gamble and assume they do not need Jones Act coverage for individuals working only on this contrivance?⁵⁰

Even the effects on third parties are not beyond the realm of possibility. Will maritime salvors change their behavior in light of the fact that they may not be entitled to the summary salvage award proceedings provided by the *in rem* proceeding of maritime law? Though admittedly far-fetched (and assuming no lives at risk), a salvor is more likely to be paid for his work for recovering a sunken non-vessel as opposed to performing salvaging services traditionally rewarded under the general maritime law. Will mechanics and other contactors refuse to work on/with these struc-

tures outside of additional, burdensome, contractual wrangling over rights to recovery and uncollected fees, again dangerously assuming for the moment that not everything that floats is a vessel?

Conclusion: "Make Fast" Your Practice

It is more likely than not that there will be fewer odd-looking structures being classified as vessels than the opposite; the holding in *Lozman* was no doubt intended, if only indirectly, to reduce the scope of what could be considered a vessel for the purposes of admiralty and maritime law. At the very least, controversy will almost certainly follow where these types of structures are found. Although the United States Supreme Court determined Mr. Lozman's home was a vessel, the "reasonable observer" is going to be making the call concerning other vessels in the future. Where the potential for the application of admiralty and maritime law exists, the practicing attorney needs be prepared to determine quickly and conclusively how to fight its jurisdiction where it does not apply and to prepare to wield appropriate defenses where the law will be applied. The marine and insurance industries will also need to be keenly aware of how subsequent interpretations of *Lozman* will come down, waiting for the seas to once again settle in the realm of admiralty and maritime law as it applies to vessel status determinations.

¹ "No doubt the three men in a tub would also fit within our definition . . ." *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 740 (2013) (Breyer, J., writing for the majority).

² "[O]ne probably could make a convincing case for Jonah inside the whale." *Id.* (Breyer, J., writing for the majority).

³ "How about a garage door?" Justice Sotomayor was quoted as asking Counsel for Respondent (City of Riviera Beach) David C. Fredrick. Transcript of Oral Arguments, p. 32 In 19.

⁴ *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013).

⁵ *Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F. 3d 1259 (2011), *rev'd sub nom. Lozman v. City of Riviera Beach*, Fla., 133 S. Ct. 735, 184 L. Ed. 2d 604 (2013).

⁶ 543 U.S. 481, 497; 125 S. Ct. 1118, 1129; 160 L. Ed. 2d 932 (2005).

⁷ *Id.*

⁸ In a pair of cases, the Court held that a

drydock, *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 630; 7 S. Ct. 336, 30 L. Ed. 501 (1887), and a wharfoat attached to the mainland, *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22; 46 S. Ct. 379; 70 L. Ed. 805 (1926), were not vessels under § 3, because they were not *practically* capable of being used to transport people, freight, or cargo from place to place. Later cases such as *Dutra*, supra note 5, suggest that these holdings did not actually narrow the definition of §3's vessel status, but merely drew attention to the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor. (cited from *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 493-94; 125 S. Ct. 1118, 1127; 160 L. Ed. 2d 932 (2005)).

⁹ "Houseboat means a *motorized* vessel ... designed primarily for multi-purpose accommodation spaces with low freeboard and little or no foredeck or cockpit." (emphasis added). *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 741; 184 L. Ed. 2d 604 (2013).

¹⁰ "The home consisted of a house-like plywood structure with French doors on three sides. It contained a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. An empty bilge space underneath the main floor kept it afloat." *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 739-40; 184 L. Ed. 2d 604 (2013).

¹¹ For an additional explanation of the referenced cause of action, see Federal Maritime Lien Act, 46 U.S.C. § 31342 (authorizing federal maritime lien against vessel to collect debts owed for the provision of "necessaries to a vessel"); 28 U.S.C. § 1333(1) (civil admiralty jurisdiction); see also *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74 (1871); *The Rock Island Bridge*, 6 Wall. 213, 215, 18 L. Ed. 753 (1867).

¹² *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 09-80594-CIV, 2009 WL 8575966 (S.D. Fla. Nov. 19, 2009) *aff'd*, 649 F.3d 1259 (11th Cir. 2011) *rev'd sub nom. Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 184 L. Ed. 2d 604 (U.S. 2013)

¹³ *City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet In Length*, 649 F.3d 1259, 1269 (11th Cir. 2011) *cert. granted*, 132 S. Ct. 1543, 182 L. Ed. 2d 160 (U.S. 2012) and *rev'd sub nom. Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 184 L. Ed. 2d 604 (U.S. 2013).

¹⁴ *Id.*

¹⁵ See note 5, supra.

¹⁶ See Supreme Court Reporter version of opinion available at: <http://www.justice.gov/osg/briefs/2011/3mer/1ami/2011-0626.mer.ami.pdf>

¹⁷ *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 741; 184 L. Ed. 2d 604 (2013) (emphasis added).

¹⁸ See note 5, supra.

¹⁹ 271 U.S. 19; 46 S.Ct. 379; 70 L.Ed. 805.

²⁰ *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 738; 184 L. Ed. 2d 604 (2013).

²¹ *Id.*

²² *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 743; 184 L. Ed. 2d 604 (2013).

- ²³ There are exceptions to when state law would be applied in an admiralty context, but those doctrines are beyond the scope of this paper. In the context of the role of state law in Marine Insurance, see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310; 75 S. Ct. 368; 99 L. Ed. 337 (1955); For a discussion of the "Maritime but Local" doctrine, see *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1533 (11th Cir. 1990).
- ²⁴ *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 752; 184 L. Ed. 2d 604 (2013).
- ²⁵ *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 740; 184 L. Ed. 2d 604 (2013) (citing *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir. 2006) (concluding that a structure is not a "vessel" where "physically," but only "theoretical[ly]," "capable of sailing," and the owner intends to moor it indefinitely as a floating casino) but see *Board of Comm'rs of Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1311–1312 (11th Cir. 2008) (holding that a structure is a "vessel" where it is capable of moving over water under tow, "albeit to her detriment," despite intent to moor indefinitely)).
- ²⁶ *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 752-53; 184 L. Ed. 2d 604 (2013) (Sotomayor, J., dissenting).
- ²⁷ See, e.g., *The Lottawanna*, 88 U.S. 558, 565; 22 L. Ed. 654 (1874).
- ²⁸ See 28 U.S.C. § 1333 (2006) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled...").
- ²⁹ See 46 U.S.C. §§ 30501 – 30512 (2006).
- ³⁰ See generally *id.*
- ³¹ 46 U.S.C. § 30511(c); Supplemental Rule for Admiralty and Maritime Claims F(3).
- ³² *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996).
- ³³ *Hercules Carriers, Inc. v. Claimant State of Florida, Dep't of Transportation*, 768 F.2d 1558, 64 (11th Cir. 1985); *Colman v. Jahncke Service, Inc.*, 341 F.2d 956, 958 (5th Cir. 1965) cert. denied. 382 U.S. 974 (1966).
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ §768.81(3) Fla. Stat. (2012).
- ³⁷ See *United States v. Reliable Transfer Co.*, 421 U.S. 397; 95 S. Ct. 1708; 44 L. Ed 251; 1975 AMC 541, on remand 522 F.2d 1381, 1975 AMC 1508 (2d Cir. 1975).
- ³⁸ See *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985).
- ³⁹ See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256; 99 S. Ct. 2753; 61 L. Ed. 521; 1979 AMC 1167 (1979), rehearing denied, 444 U.S. 889; 100 S. Ct. 194; 62 L. Ed. 2d. 126 (1979).
- ⁴⁰ See generally Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165 (1981).
- ⁴¹ See generally Supplemental Rule for Admiralty and Maritime Claims C [Action In Rem] and E [Actions In Rem and Quasi In Rem: General Provisions]; see also *Sea Legs Marina, Inc. v. Sayre*, 106 F. Supp. 2d 1287, 1289 (S.D. Fla. 2000) (discussing the role of Rule C as a prerequisite to vessel arrest under admiralty law).
- ⁴² Supplemental Rule for Admiralty and Maritime Claims C [Action In Rem] and E [Actions In Rem and Quasi In Rem: General Provisions].
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ See 46 U.S.C. §§ 3131 – 31343 (2006).
- ⁴⁶ See generally *The St. Jago de Cuba*, 22 U.S. 409; 6 L. Ed. 122 (1824).
- ⁴⁷ *Id.*
- ⁴⁸ See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370; 115 S. Ct. 2172, 2191; 132 L. Ed. 2d 314 (1995).
- ⁴⁹ 46 U.S.C. § 30104 (2006).
- ⁵⁰ As an aside, this statement oversimplifies the nature of determining insurance coverage for employers whose activities might implicate the necessity to obtain either federal Jones Act or Longshore and Harbor Workers Compensation Act (LHWCA) coverage for their employees. Selecting amounts and layers of coverage must be done by a thorough review of all employment related activities and done according regulations and administrative guidance in force at the time.

Coverage denial? Defense under Reservation of Rights? Insured in need of "Personal" counsel?

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