Vessel Status Under *Lozman v. City of Riviera Beach*: The "Reasonable Observer" Test

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I
INTRODUCTION

The meaning of "vessel" is significant throughout maritime law.[1] Unfortunately, the definition has not always been clear. By the end of the twentieth century, the country's vessel-status jurisprudence was chaotic.[2] Then, eight years ago, *Stewart v. Dutra Construction Co.*[3] brought considerable order to the field by holding that section 3 of the Rules of Construction Act, now codified at 1 U.S.C. § 3, defines "vessel" throughout the United States Code. That statute provides:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.[4]

On its facts, *Stewart* was an easy case; the Supreme Court considered the dredge used in the construction of the Ted Williams Tunnel under Boston Harbor, and dredges have long been understood to be vessels.[5] The difficulty for the Court was in limiting the section 3 definition so that it would not be applied too broadly. The Court accordingly concluded that the definition was

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[1] *See*, *e.g.*, DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 22 (2d ed. 2008) (noting that the vessel-status issue "pervades [the entire substance of federal] admiralty and maritime law").

[2] *See*, *e.g.*, John W. deGravelles, Stewart v. Dutra Construction Co. *From the Seaman's Perspective*, 3 BENEDICT'S MAR. BULL. 116, 116-117 (2005) (characterizing the pre-*Stewart* jurisprudence as "complex," "multi-layered," and "prolix and flabby") (citation and internal quotation marks omitted); Jeffrey Nicholas, Comment, *The Future of Vessel Status in the Fifth Circuit*, 28 TUL. MAR. L.J. 153, 153 (2003) ("vast collection of hairline distinctions," "quagmire of case law").

[3] 543 U.S. 481, 2005 AMC 609 (2005). I participated in the *Stewart* litigation, primarily by drafting (along with David Robertson) all of the Supreme Court briefs (the petition for certiorari, the cert-stage reply brief, the opening brief on the merits, and the merits-stage reply brief) on behalf of Willard Stewart.

[4] 1 U.S.C. § 3.

[5] *See*, *e.g.*, *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896).

satisfied only when a watercraft was "*practically* capable of being used" as a means of transportation on water.[6]

Earlier this year, in *Lozman v. City of Riviera Beach*,[7] the Supreme Court decided that an eccentric watercraft, which its owner intended to use as a stationary "floating home," was not a "vessel" under section 3. In this more marginal case, the Court struggled in its efforts to describe the limits of the definition when applied to watercraft that are near the borderline. In an effort to clarify its approach, the Court announced a new "reasonable observer" test. In this paper, I examine the *Lozman* decision in some detail; assess the new test; consider how future courts may apply the decision in the familiar context on which the pre-*Lozman* courts had disagreed; and suggest that the new test should be applied only in limited situations.

II
A DETAILED ACCOUNT OF THE *LOZMAN* LITIGATION

A. The Factual Background

1. Lozman's Purchase and the Appropriate Taxonomy

The story of the *Lozman* case — to the extent that the facts are known[8] — begins in December 2002, when Fane Lozman (a multi-millionaire,[9] retired financial trader[10] who was then in his early forties[11]) paid $17,0000 for a "Homemade Custom Houseboat/Barge"[12] that he

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[6] *See* 543 U.S. at 493, 2005 AMC at 617.

[7] 133 S. Ct. 735, 2013 AMC 1 (2013).

[8] A great many of the potentially relevant facts are unknown. For example, when Lozman was asked at his deposition "[w]hen was the vessel built?," he replied "I don't know." Videotaped Deposition of Fane Lozman at 61 (Aug. 25, 2009) (dist. ct. dkt. #98) [*hereinafter* Lozman Deposition]. When pressed, he estimated that at the time of purchase "I think it was ten to 15 years old, maybe." *Id*. at 62. In his opening brief at the Supreme Court, Lozman asserted that "it apparently had never moved" before he purchased it, and that "[i]t had been built by the previous owner and was affixed to that owner's seawall on a canal in the Ft. Myers area." Brief for the Petitioner at 4, *Lozman* (No. 11-626), 2012 WL 1651336 [*hereinafter* Lozman S. Ct. Merits Br.]. It appears that the previous owner was a corporation, Qest International, Inc., *see* Bill of Sale (Dec. 6, 2002), Lozman Deposition, *supra*, exh. A [*hereinafter* Bill of Sale], *reprinted in* Joint Appendix at 79, *Lozman* (No. 11-626), 2012 WL 1651726 [*hereinafter* Joint App.]. At his deposition, Lozman was unsure of the craft's exact location when he bought it, saying only that "[i]t was somewhere around Fort Meyers. I think east along a river that goes to Lake Okeechobee near Fort Meyers." *Id*. at 9, *reprinted in* Joint App., *supra*, at 71. There is no evidence in the record of the builder's identity, of where the houseboat was built, of how the builder intended it to be used, or of how it had actually been used.

[9] Lozman Deposition, *supra* note 8, at 44.

[10] At the Supreme Court, Lozman characterized himself as "a former United States Marine Corps officer and financial trader." Lozman S. Ct. Merits Br., *supra* note 8, at 2. In a press report, he was described as "a man who made a fortune as a commodities trader in Chicago." *When is a boat a house?; South Florida case goes to high court*, FLORIDA TIMES-UNION (JACKSONVILLE), March 9, 2013, at B8. For more details about his former career, *see*, *e.g.*, *Lozman v. Putnam*, 379 Ill. App.3d 807, 810-811, 884 N.E.2d 756, 759-764 (2008).

[11] *See*, *e.g.*, Brent Kendall & Jess Bravlin, *High Court Boat Ruling Is a Relief for Casinos*, WALL ST. J., Jan. 16, 2013, at B2 (describing Lozman as 51 at the time of the decision).

[12] *See* Bill of Sale, *supra* note 8, *reprinted in* Joint App., *supra* note 8, at 79.

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