St. Thomas Law Review

Volume 26
Issue 2 *Winter 2014*

Article 5

2014

Defining a Vessel in Admiralty: I Know It When I See It

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DEFINING A VESSEL IN ADMIRALTY: "I KNOW IT WHEN I SEE IT"

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INTRODUCTION

Defining the term "vessel," while seemingly inconsequential at first blush, is an essential preliminary inquiry in almost any maritime law dispute. In *Lozman v. City of Riviera Beach, Florida.*[1] the Supreme Court's latest pronouncement on what it means to be a vessel, the Court inserts a "reasonable observer" standard and a "designed to a practical degree" element into the vessel inquiry, which may upset long-settled law in admiralty. Part I explains through various examples why status as a vessel is important in admiralty jurisdiction.[2] Part II[3] discusses the Supreme Court's latest cases defining a vessel including *Stewart v. Dutra Construction Company*[4] and *Lozman*. Part III.A analyzes how the Court arrives at the new test under *Lozman*, specifically how it adds a "reasonable observer" standard and a "designed to a practical degree" element to the vessel inquiry.[5] In addition, Part III.B considers whether *Lozman* categorically denies vessel status to houseboats.[6] Furthermore, Part III.C evaluates the inherent subjectivity that such a test creates since it is unclear how the "reasonable observer"—whoever she is—will base her determination, especially with the modicum of guidance provided in the "designed to a practical degree" element of the test.[7] Additionally, Part III.D examines whether the test under *Lozman* is necessary and argues that it may not be.[8] Lastly, Part III.E reviews the possible effects this new test may have on maritime industries.[9]

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1. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013).
2. *See* discussion *infra* Part I.
3. *See* discussion *infra* Part II.
4. Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005).
5. *See* discussion *infra* Part III.A.
6. *See* discussion *infra* Part III.B.
7. *See* discussion *infra* Part III.C.
8. *See* discussion *infra* Part III.D.
9. *See* discussion *infra* Part III.E.

I. THE IMPORTANCE OF BEING A VESSEL

Whether or not a floating craft is a "vessel" is often central to determining whether a court may exercise admiralty jurisdiction. Once a federal maritime claim is alleged, the claimant may bring an action in federal court exercising admiralty jurisdiction under Article III, Section 2 of the Constitution.[10] In addition, the savings to suitors clause of 28 U.S.C. § 1333[11] allows for many, if not most, maritime matters where a remedy recognized at common law existed to be heard in state court rather than in federal court under admiralty jurisdiction.[12] In other words, for many maritime claims the plaintiff will be able to choose his or her forum. Parts I.A–I.C will discuss actions and claims that often cannot be heard in admiralty jurisdiction if they do not involve a vessel.[13] These actions highlight that determining whether a floating craft is a vessel is often the first procedural inquiry that must be answered before reaching any substantive maritime claims.

A. ACTIONS AND REMEDIES AVAILABLE TO VESSELS

Certain claims and defenses are only available once a structure has been determined a vessel. Limitation of liability is available as a defense to vessel owners, limiting their liability to the value of the vessel to the extent provided for by statute.[14] Likewise, *in rem* actions are claims available against a vessel that allow a claimant to arrest and sell the vessel to pay a

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10. U.S. CONST. art III, § 2, cl. 1.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--*to all Cases of admiralty and maritime Jurisdiction* . . . .

Id. (emphasis added).

11. 28 U.S.C. §1333 (2012).

> 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.* (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Id. (emphasis added).

12. S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) ("The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."). For example, in this case, a claim was also unable to survive under the "savings to suitors" clause. *Id.* The Court in *Jensen* reasoned that worker's compensation was not a remedy recognized at common law and therefore, could not survive under the savings to suitors clause. *Id.* at 212.

13. *See infra* Part I.A.–I.C.

14. *See infra* Part I.A.i.

maritime lien.[15] Limitation of liability and *in rem* actions often cannot be brought or raised unless a vessel is involved.[16]

i. Limitation of Liability

Status as a vessel may limit one's liability to the value of the vessel. The Shipowners' Limitation of Liability Act[17] was enacted in 1851 to encourage the growing maritime trade industries, which at the time were concerned with almost limitless liability from numerous claims.[18] Currently, 46 U.S.C. § 30505, governing shipping, limits liability for a variety of property loss and injury claims to the value of a vessel.[19] Under § 30306, if the value of the vessel does not cover all expenses for injury or death after the loss, the statute includes a formula that may increase recovery based on the tonnage of the vessel.[20] With limitation of liability now embedded within the corporate structure,[21] the policy concerns

15. *See infra* Part I.A.ii.

16. *See infra* Part I.A.i.–ii.

17. *See* 46 U.S.C. §§ 30501–30512 (2012).

18. *See* Maryland Cas. Co. v. Cushing, 347 U.S. 409, 413–14 (1954); FORCE & NORRIS, *2* THE LAW OF SEAMEN § 30.89 (5th ed. 2012); *see also* The Main v. Williams, 152 U.S. 122, 131 (1894); Petition of Zebroid Trawling Corp., 428 F.2d 226, 228 (1st Cir. 1970); United States v. S.S. Helena, 295 F. Supp. 610, 611 (E.D. La. 1969).

19. 46 U.S.C. § 30505 (2012).

> (a) In General.—Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.
>
> (b) Claims Subject to Limitation.—Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.
>
> (c) Wages.—Subsection (a) does not apply to a claim for wages.

Id.

20. 46 U.S.C. § 30506 (2012). The statute reads in pertinent part:

> (a) Application.—This section applies only to seagoing vessels, but does not apply to pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters, or nondescript vessels.
>
> (b) Minimum Liability.—If the amount of the vessel owner's liability determined under section 30505 of this title is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than $420 times the tonnage of the vessel, that portion shall be increased to $420 times the tonnage of the vessel. That portion may be used only to pay claims for personal injury or death.

Id.

21. *See* Jill A Schaar, *The Shipowners' Limitation of Liability Act: Still Afloat or Sinking Fast?*, 24 TUL. MAR. L.J. 659, 663 (2000) (citing GILMORE & BLACK, THE LAW OF ADMIRALTY, § 10-1, at 818 (2d ed. 1975)).

underlying the enactment of this statute and its predecessor are less relevant. Limitation of liability, however, remains good law.[22] Additionally, as a result of a limitation of liability proceeding, the defendant may force the consolidation of the underlying claims against him before his chosen admiralty forum.[23] If an injury occurs on a floating craft or property damage occurs due to the vessel, the owner will likely argue that the floating craft is a vessel in order to limit their liability rather than be open to potentially limitless liability. An example may provide insight into how effective limitation of liability is as a defense. The Deepwater Horizon explosion, fire, and subsequent oil spill killed eleven workers and resulted in 205.85 million gallons of oil being released into the Gulf of Mexico over several months.[24] Transocean, the owner and operator of the Deepwater Horizon, unsuccessfully sought to limit its liability to the purported value of the vessel at $26.76 million.[25]

ii. *In Rem* Actions

An *in rem* action is a special maritime claim against the vessel itself. It is brought in the federal district where the vessel is located.[26] An *in rem* action arises from the arrest and can lead to the judicial sale of the vessel to pay a maritime lien if the defendant is unable to prevail.[27] *In rem* claims may be brought against the vessel even if the defendant is not found in the jurisdiction whether or not the defendant can be sued *in personam*.[28] For

22. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 517 (2008) (Stevens, J., concurring in part & dissenting in part). As recently as 2008, the Court stated, "[t]his statute operates to shield from liability shipowners charged with wrongdoing committed without their privity or knowledge; the Limitation Act's protections thus render large punitive damages awards functionally unavailable in a wide swath of admiralty cases." *Id.* (citing Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 446 (2001); Coryell v. Phipps, 317 U.S. 406, 412 (1943)).

23. *Cushing*, 347 U.S. at 414

24. Thomas J. Schoenbaum, *The Deepwater Horizon Oil Spill in the Context of the Public International Law Regimes for the Protection of the Marine Environment: A Comparative Study*, 25 U.S.F. MAR. L.J. 1, 2 (2013) (citing, NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL SPILL AND THE FUTURE OF OFFSHORE DRILLING (2011)).

25. In re Complaint & Petition of Triton Asset Leasing GmbH, 719 F. Supp. 2d 753, 756 (S.D. Tex. 2010).

26. FED. R. CIV. P. E(3)(a) (regarding territorial limits of effective service, "process *in rem* or of maritime attachment and garnishment may be served only within the district").

27. FED. R. CIV. P. E(4), (9).

28. FED. R. CIV. P. E(4). *See* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 444–45 (2001) (citing The Hine v. Trevor, 71 U.S. 555, 571–72 (1867); The Moses Taylor, 71 U.S. 411, 431 (1867). *In rem* actions can only be brought in federal jurisdiction as they are not considered saved to suitors under 28 U.S.C. § 1333. *Id.* at 444–45. In contrast, *in personam* actions are maritime law claims with a link in the common law that may be heard in state court. *Id.* at 445

that reason, an *in rem* action is a powerful tool to recuperate losses where there may not be personal jurisdiction against the defendant. If a floating structure is determined not to be a vessel, the claimant will be unable to bring an *in rem* action.

B. ACTIONS AND REMEDIES AVAILABLE TO SEAMEN

Additionally, there are specific actions reserved for "seamen." One must be employed aboard a vessel in navigable waters[29] in order to be a seaman.[30] The Court stated in *McDermott International, Inc. v. Wilander*, "[t]he key to seaman status is employment-related connection to a vessel in navigation."[31] Moreover, there is a long tradition of treating seamen as wards of the court.[32] So, mere status as a seaman is likely to give a party more favorable treatment before the court.

As a seaman, one is entitled to rights he would otherwise not be eligible for outside of admiralty jurisdiction such as maintenance and cure, unseaworthiness, and other remedies under the Jones Act.[33] Maintenance, cure and unseaworthiness are derived from general maritime law.[34] Because they are strict liability offenses, they make it easier for seamen to quickly recover for injuries rather than having to file a claim for worker's compensation or allege and prove negligence.[35] In addition, Congress enacted the Jones Act in 1920 providing seamen the right to allege negligence against an employer for injury or death.[36] This is a cause of action that is typically not available to employees against their employers. Each of these claims will be discussed below.

(citing Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123 (1924)).

29. The Daniel Ball, 77 U.S. 557, 563 (1870). Navigable waters are any waters "navigable in fact," which means that they could be used for commerce or travel. *Id.*

30. McDermott Int'l., Inc. v. Wilander, 498 U.S. 337, 355 (1991).

31. *Id.* at 355.

32. *See* Mobil Oil Corp v. Higginbotham, 436 U.S. 618, 626–27 (1978) (Marshall, J., dissenting) (citing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970)). Maritime law "has always shown 'a special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages.'" *Id.*

33. *See infra* Part I.B.i.–iii.

34. *See infra* Part I.B.i.–ii.

35. *See* discussion *infra* Part I.B.i–ii.

36. *See infra* Part I.B.iii.

i. Maintenance and Cure

Maintenance and cure is an ancient remedy particular to admiralty law that was first noted in the jurisprudence of the United States in 1823.[37] It is an absolute or strict liability claim against a seaman's employer for injuries received while in the ship's service.[38] Even though the seaman is injured and may be unable to work, the ship's owner or employer must continue to pay the seaman's wage or "maintenance,"[39] as well as medical expenses or "cure,"[40] until he is able to resume work, or if not, for the duration of the voyage.[41] Maintenance and cure stems from the courts' concern that seamen, who were often in far-off exotic places, would fall ill and be left unable to care for themselves in foreign territory.[42]

Maintenance and cure is often a broader remedy when compared to state and federal workers' compensation statutes. For example, a seaman may become injured while in the ship's service but not necessarily as a result of his employment.[43] In contrast, workers' compensation statutes typically require that the employee be injured in the course of her employment duties.[44] In addition, maintenance and cure must be given as soon as possible and has few procedural steps.[45] By contrast, under state law, there is often a waiting period between the reporting of the injury and the remittance of compensation benefits.[46] Therefore, being employed aboard a vessel and being a seaman as a result may make it easier for an aggrieved party to recover for wages and medical expenses.

ii. Unseaworthiness

Unseaworthiness is a strict liability offense available to a seaman against the employer or ship owner for an unsafe condition aboard the ship

37. Rory Bahadur, *Protecting Cruise Line Employees' Rights to Maintenance and Cure: The Need for Pre-Trial Adjudication*, 18 U.S.F. MAR. L.J. 221, 230 (2006) (citing Harden v. Gordon, 11 F. Cas. 480, 485 (D. Me. 1823) (no. 6,047)).

38. *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938) (citing Cortes v. Baltimore Insular Line, 287 U.S. 367, 371 (1932)).

39. *Id.* at 527–28 (citing The Henry B. Fiske, 141 F. 188, 192 (D. Mass. 1905)).

40. *Id.* at 528 (citing Whitney v. Olsen, 108 F. 292, 297 (9th Cir. 1901)).

41. The Osceola, 189 U.S. 158, 175 (1903).

42. Harden v. Gordon, 11 F. Cas. 480, 483 (D. Me. 1823) (no. 6,047).

43. Warren v. United States, 340 U.S. 523, 524, 529–30 (1951) (holding that a seaman who broke his leg after falling off of a balcony at a dance hall was entitled to maintenance and cure).

44. *See* FORCE & NORRIS, *supra* note 18, § 26:2.

45. Bahadur, *supra* note 37, at 224 (citing Vella v. Ford Motor Co., 421 U.S. 1, 4 (1975)).

46. *See* FORCE & NORRIS, *supra* note 18, § 26:2.

that causes injury.[47] The Court stated in *Mitchell v. Trawler Racer, Inc.*, "it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness . . . ."[48] It was believed that a seaman could not accept the risk of the conditions aboard the ship because he was required to obey his superiors on board.[49] As a practical matter, it is also difficult to leave the ship once it has set sail. In addition, holding the employer or ship owner strictly liable for unsafe conditions encouraged vessel owners to provide safe environments for seamen.[50]

Because unseaworthiness is a strict liability offense, the seaman need only prove that there was an unsafe condition aboard the ship that caused his injuries in order to recover for their injuries.[51] In contrast, under state law, a non-seaman would likely be entitled to worker's compensation if the injuries were within the course of employment.[52] Assuming a worker's compensation action can be brought, his benefits would likely be limited and would often be based on a statutory formula[53] whereas damages available under an unseaworthiness claim are often more expansive and include pecuniary and certain non-pecuniary losses.[54] In addition, under state law, the non-seaman could bring a negligence claim.[55] Many states, however, grant employers immunity to most employee negligence suits under worker's compensation statutory frameworks and would require the plaintiff to sue a non-employer party, assuming one exists.[56] Further, if a non-seaman were able to bring a negligence claim, the non-seaman would likely have to prove all of the elements of negligence,[57] which is often more difficult to do than proving an unsafe condition that caused an injury. Therefore, working aboard a vessel as a seaman may make it easier for a

47. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 50 (1960).

48. *Id.*

49. Mahnich v. Southern S. S. Co., 321 U.S. 96, 103 (1944).

50. *See id.* at 103–04.

51. *See id.*

52. *See* FORCE & NORRIS, *supra* note 18 at § 26:2 and accompanying text.

53. *See* Gerhard Wagner, *Tort, Social Security, and No-Fault Schemes: Lessons from Real-World Experiments*, 23 DUKE J. COMP. & INT'L L. 1, 8 (2012) (citing MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 6.23, § 6.29 (2d ed. 1999)).

54. *See* FORCE & NORRIS, *supra* note 18, § 27:36, § 30:56.

55. *See* DAN B. DOBBS ET AL., 1 THE LAW OF TORTS § 1:2, at 4 (2d ed. 2011).

56. Wagner, *supra* note 53, at 4–5; *see also* ROTHSTEIN ET AL., *supra* note 53, § 6.3, at 541.

57. *E.g.*, Palsgraf v. Long Island R. Co., 162 N.E. 99, 99–102 (N.Y. 1928) (reversing a finding of negligence where all of the elements of negligence were not proven); *see* FORCE & NORRIS, *supra* note 18, at § 27:26; 32 C.F.R. § 536.41 (2013). The elements of negligence will vary based on jurisdiction, but as any first year law student can probably tell you, the elements will likely be some variation of duty, unreasonable conduct, causation in fact, proximate causation, and damages.

plaintiff to recover damages. Under unseaworthiness, he will only have to show that his injuries are the result of an unsafe condition rather than finding a non-employer and proving all the elements of negligence.

iii. The Jones Act

The Jones Act, enacted in 1920, created the right of seamen to bring negligence claims against their employers for injury or death.[58] It also created a right of wrongful death against a seaman's employer.[59] Wrongful death as a cause of action was absent otherwise under admiralty until 1970 when the Supreme Court decided *Moragne v. States Marine Lines, Inc.*[60] Before the enactment of the Jones Act, the only claims a seaman had against an employer for injury or death were under general maritime law, including maintenance and cure and unseaworthiness as discussed above.[61] The Jones Act also allows a plaintiff to choose whether or not he would like a trial by jury.[62] Typically, a court sitting in admiralty will only involve bench trials.[63] In addition, the Jones Act also allows a seaman to join his other general maritime claims in the same trial before the jury.[64] So, a plaintiff with a Jones Act claim can choose between a bench trial and a jury trial. Some argue that plaintiffs may know whom their judge would be before selecting between a bench trial and a jury trial, which may assist in their litigation strategy.[65] Additionally, Jones Act claims are not removable from state court, which allows the plaintiff to choose his forum.[66] Because negligence claims are typically unavailable against employers under worker's compensation schemes, status as a seaman is critical in order to bring such a claim.[67] As already mentioned, to be

58. Jones Act, 46 U.S.C. § 30104 (2012) ("A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.").

59. *Id.*

60. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970).

61. *See* The Osceola, 189 U.S. 158, 175 (1903); *see also supra* Part I.B.i–ii.

62. *See* section 30104 of the Jones Act.

63. 9 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2315 (3d ed. 2013) (internal citations omitted).

64. *See* section 30104 of the Jones Act.

65. David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. MAR. L. & COM. 649, 650–51 (1999) (criticizing plaintiff's often unilateral choice between a bench trial and a jury trial).

66. 28 U.S.C. § 1445(a) (2012) ("A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States."); *see also* 46 U.S.C. § 30104.

67. *See supra* note 56 and accompanying text.

considered a seaman in admiralty, one has to be employed aboard a vessel.[68] Therefore, the vessel inquiry is essential before a seaman may bring a negligence claim under the Jones Act against his employer.

C. SIERACKI SEAMEN

In addition to a traditional seaman, there may also be a cause of action for unseaworthiness as a Sieracki seaman. In *Seas Shipping Co. v. Sieracki*, the Supreme Court created a cause of action of unseaworthiness for stevedores and longshoremen, a cause of action which until then had solely been reserved for water-based employees or seamen.[69] Historically, seamen who were employed by the vessel owner loaded and unloaded the ships, but a cultural shift had led to stevedore contractors who loaded and unloaded vessels for a vessel owner with their own land-based employees.[70] The Court reasoned that the status of the employee as either water-based or land-based should not change the underlying policy reasons of holding vessel owners strictly liable in order to encourage safer vessels.[71] The Court stated, "the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights."[72] This new class of land-based employees with a claim to unseaworthiness is often referred to as "Sieracki seamen."

However, Congress closed the door to many unseaworthiness claims of Sieracki seamen when it enacted § 905(b) of the Longshore and Harbor Worker's Compensation Act (hereinafter "LHWCA") in 1972.[73] The House Committee report stated,

> The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.[74]

Unseaworthiness was no longer a remedy to those whom the LHWCA applied. In some jurisdictions, however, Sieracki seamen may still exist and have unseaworthiness claims where the LHWCA does not cover

68. *See supra* note 30 and accompanying text.
69. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90–97 (1946).
70. *Id.* at 96.
71. *Id.* at 93–94.
72. *Id.* at 97.
73. Longshore and Harbor Worker's Compensation Act of 1972, 33 U.S.C. § 905(b) (2012) (stating in pertinent part: "The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred").
74. H.R. Rep. No. 1441, 92-1441, at 4703 (1970).

them.[75] Section 902(3) lists classes of employees who are not covered under the LHWCA.[76] With little to no guidance from the Supreme Court, some circuits have continued to find unseaworthiness claims for land-based workers involved in maritime activity where they fall under one of these exceptions. For example, in *Green v. Vermilion Corp.*, the Fifth Circuit found that a cook and watchman at a duck camp had an unseaworthiness claim as a Sieracki seaman where he was injured aboard a vessel.[77] The Fifth Circuit reasoned that the employee fell under the "club/camp" exception of § 902(3)(B) of the LHWCA, and therefore, the LHWCA could not disavow his unseaworthiness claim.[78]

As a result, certain land-based employees, while few, may also have a claim of unseaworthiness as Sieracki seamen. Likewise with the remedies for traditional seamen, a threshold procedural issue will be whether a vessel is involved.

II. DEFINING A SECTION 3 VESSEL

Having noted the importance of a vessel to admiralty jurisdiction as well as several causes of action and defenses including limitation of liability, *in rem* actions, maintenance and cure, unseaworthiness for traditional and Sieracki seamen, and negligence under the Jones Act, we

75. *See, e.g.*, *Green* v. Vermilion Corp., 144 F.3d 332, 334 (5th Cir. 1998).

76. 33 U.S.C. § 902(3) (2012). Section 902(3) reads:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this act;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;
>
> (G) a master or member of a crew of any vessel; or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

77. *See Green*, 144 F.3d at 334.

78. *Id.*

now turn to two cases from the last decade where the Supreme Court utilized different approaches to define a vessel. First, in *Stewart v. Dustra Construction Co.*,[79] the Court held that the vessel inquiry was whether a floating craft was "used, or capable of being used, as a means of transportation on water," quoting 1 U.S.C. § 3 of the Rules of Construction Act.[80] Eight years later, the Court revisited the same issue in *Lozman v. City of Riviera Beach, Florida* and inserted a "reasonable observer" standard and a "designed to a practical degree" element to the test.[81] There, the Court held that the relevant question to determine vessel status was whether a "reasonable observer" would believe that a particular floating craft was "designed to a practical degree" to transport "people or things over water."[82]

A. STEWART V. DUTRA CONSTRUCTION COMPANY

In *Stewart*, the Court held that the large "dredge" called the Super Scoop used to build a tunnel beneath Boston Harbor for the "Big Dig" was a vessel.[83]

The Super Scoop was a large floating platform that removed debris from the bottom of Boston Harbor and carried it up to the surface.[84] It contained a "captain and crew, navigational lights, ballast tanks, and a crew dining area," which is typical of many vessels.[85] However, unlike many vessels, for long distances it required towing, and otherwise "manipulated its anchors and cables" in order to travel 30 to 50 feet.[86] It moved itself every couple of hours.[87] Willard Stewart, who worked on the Super Scoop as a marine engineer maintaining the mechanical systems, was injured aboard the craft while it was idle.[88] He sued Dutra Construction, his employer, for negligence as a seaman under the Jones Act.[89] He alternatively filed a claim under the LHWCA against the "vessel,"

79. Stewart v. Dutra Const. Co., 543 U.S. 481 (2005); *see* discussion *infra* part II.A.
80. *Id.* at 489; *see* 1 U.S.C. § 3 (2012).
81. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 740 (2013); *see* discussion *infra* part II.B.
82. *Id.*
83. *Stewart*, 543 U.S. at 484.
84. Stewart v. Dutra Constr. Co., 543 U.S. 481, 484 (2005).
85. *Id.*
86. *Id.* at 484–85.
87. *Id.* at 485.
88. *Id.*
89. *Id.; see* discussion *supra* Part I.B.iii.

presumably to assure some sort of recovery in the event that the court found that he was not a seaman.[90]

The district court granted summary judgment in favor of Dutra for Stewart's negligence claim under the Jones Act citing *DiGiovanni v. Traylor Brothers, Inc.*[91] In *DiGiovanni*, the First Circuit, sitting en banc, determined that a worker was not a seaman under the Jones Act where he was employed on a floating craft whose purpose was not primarily navigation or commerce.[92] The First Circuit reasoned that because the primary purpose of the craft was not navigation or commerce, the employee was not a seaman unless the craft was moving at the time of the accident.[93] Applying *DiGiovanni*, the district court determined that the Super Scoop was not a vessel because (1) the Super Scoop's primary purpose was dredging rather than transportation, and (2) the Super Scoop was idle at the time of the accident.[94] Therefore, Stewart was not a seaman and could not recover under the Jones Act,[95] and the First Circuit affirmed.[96] On remand, the district court granted summary judgment in favor of Dutra on Stewart's LHWCA claim against the "vessel,"[97] and the First Circuit again affirmed.[98] The Supreme Court, however, reversed the LHWCA claim because the Super Scoop was a vessel under 1 U.S.C. § 3.[99]

In assessing Stewart's LHWCA claim, the Supreme Court noted that the LHWCA did not define a "vessel" but Congress had done so in 1 U.S.C. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of

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90. *Stewart*, 543 U.S. at 485; Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 904(3), 905(b) (2012). The LHWCA, in contrast to the Jones Act, provides workers' compensation benefits to land-based maritime employees. 33 U.S.C. § 904(3). In addition, under 33 U.S.C. § 905(b), a claimant may bring an action against the "vessel":

> (b) Negligence of vessel
>
> 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.

33 U.S.C. § 905(b).

91. *Stewart*, 543 U.S. at 485–86.
92. DiGiovanni v. Traylor Bros., Inc. 959 F.2d 1119, 1123 (1st Cir. 1992).
93. *Id.*
94. *Stewart*, 543 U.S. at 486.
95. *Id.* at 485–86.
96. *Id.* at 486.
97. *Id.*
98. *Id.*
99. *Id.* at 497–98.

transportation on water."[100] It was codified as early as 1873 and had remained largely unchanged.[101]

According to the Court, floating crafts similar to the Super Scoop had been considered vessels under 1 U.S.C. § 3 as early as 1884. In *The Alabama*,[102] a lower court found that a dredge that could only move short distances on its own or be towed longer distances was a vessel under 1 U.S.C. § 3.[103] The Court noted that it had also found dredges to be vessels under 1 U.S.C. § 3.[104] For example, in *Ellis v. United States*,[105] another case involving dredging in Boston Harbor nearly 100 years prior to the instant case, the Court stated that "the floating dredges were vessels" and "[t]herefore[,] all the hands mentioned in the informations were seamen."[106] Therefore, the definition of "vessel," particularly with regard to dredges, was settled law when Congress enacted the Jones Act and the LHWCA in the 1920s.[107]

The Court rejected Dutra's argument that the Super Scoop was not a vessel because it was not practically capable of moving persons or things.[108] Dutra had cited *Cope v. Vallette Dry-Dock Co.*[109] and *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*[110] *Cope* involved a floating drydock that had been moored in the same location for twenty years and was not found to be a vessel.[111] Similarly, in *Evansville*, a wharfboat that received utilities from the shore evidenced a "permanent location."[112] The wharfboat was never transported after docking and did not "carry freight from one place to another."[113] The Court concluded that the wharfboat was not practically capable of transporting freight and therefore was not a vessel.[114] The Court distinguished *Cope* and *Evansville*

100. 1 U.S.C. § 3 (2012).
101. *Stewart*, 543 U.S. at 489–90.
102. The Alabama, 19 F. 544 (S.D. Ala. 1884).
103. *Stewart*, 543 U.S. at 490–91 (citing *The Alabama*, 19 F. at 545); *The Alabama*, 19 F. at 545. In contrast to the most recent Supreme Court case defining a vessel, *Lozman v. City of Riviera, Fla.*, *The Alabama* court found that the dredge was a vessel even though it was "not made for or adapted to the carriage of freight or passengers." *The Alabama*, 19 F. at 545.
104. *Stewart*, 543 U.S. at 491 (citing Ellis v. United States, 206 U.S. 246, 259 (1907)).
105. Ellis v. United States, 206 U.S. 246 (1907).
106. *Id.* at 259.
107. *Stewart*, 543 U.S. at 491.
108. *Id.* at 493–94.
109. Cope v. Vallette Dry-Dock Co., 119 U.S. 625 (1887).
110. Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19 (1926).
111. *Stewart*, 543 U.S. at 493 (citing *Cope*, 119 U.S. at 626–27).
112. *Id.* (citing *Evansville & Bowling Green Packet Co.*, 271 U.S. at 22).
113. *Id.*
114. *Id.*

from the instant case because those cases applied to floating crafts that were permanently affixed or attached to the sea floor.[115] The Court stated, "a watercraft 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."[116] Therefore, *Cope* and *Evansville* did not apply to the instant case.[117]

The Court also rejected the First Circuit's analysis that denied vessel status to any floating craft whose primary purpose was not navigation or commerce because it was idle at the time of the injury.[118] This analysis, the Court determined, was not consistent with the language of 1 U.S.C. § 3.[119] All that 1 U.S.C. § 3 requires is that a floating craft be "used, or capable of being used, as a means of transportation on water" in order to be a vessel; it says nothing about being *primarily* used for transportation.[120] Since the Super Scoop transported its captain, crew, and equipment, it was "capable of being used as a means of transportation on water."[121] Therefore, it fit within 1 U.S.C. § 3.[122]

The Court noted that the "in navigation" requirement of a vessel did not mean that a vessel had to be in transit but rather denied vessel status to watercrafts that had been withdrawn from service. The Court stated, "the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time."[123] In determining if a vessel had been withdrawn from service, the Court concluded that it was a factual issue that turned on whether it was a "practical possibility or merely theoretical" that the craft could be used as transportation over water.[124] Here, the Super Scoop was in service in Boston Harbor. The Court stated, "[it] had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport."[125]

The Court ultimately found that the Super Scoop was a vessel. Throughout the opinion, the Court emphasized the plain language of 1

115. *Id.* at 493–94.
116. *Id.* at 494.
117. *Stewart*, 543 U.S. at 493–94.
118. *Id.* at 495.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Stewart*, 543 U.S. at 496 (citing Roper v. United States, 368 U.S. 20, 21, 23 (1961)).
124. *Id.*
125. *Id.*

U.S.C. § 3, which largely had remained the same since 1873.[126] In addition, the Court noted the Super Scoop's ability to move on its own, how often it moved, how far it could move in one instance, whether the Super Scoop shared characteristics common to other vessels, and who or what was transported aboard.[127] The Court cited case law nearly as old the 1873 predecessor of 1 U.S.C § 3, which indicated that similar structures to the Super Scoop were vessels.[128] Furthermore, the "in navigation" requirement derived from case law does not mean that a floating structure must be moving at the time of injury, but rather it means that the vessel must be in service.[129] Moreover, once a floating structure has been determined to be in service, it is irrelevant whether it was moving at the time of an injury in order for the floating structure to be a vessel.[130]

B. *LOZMAN V. CITY OF RIVIERA BEACH, FLORIDA*

Eight years after *Stewart*, the Supreme Court revisited the vessel test in *Lozman* in January 2013. Petitioner, Lozman, owned a floating home that was sixty feet by twelve feet, which "contained a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space."[131] The floating home received its utilities through connections to land.[132] Lozman towed it 200 miles after purchasing it.[133] He towed it an additional three times over more than seventy miles before arriving at a dock in Riviera Beach, Florida.[134]

The City of Riviera Beach brought an *in rem* action in admiralty against the floating home seeking to assert a maritime lien for dockage fees and damages for trespass.[135] Lozman sought dismissal of the claim arguing

126. *Id.* at 495.
127. *Id.* at 493–96.
128. *Id.* at 490–491.
129. *Stewart*, 543 U.S. at 495.
130. *Id.* at 496.
131. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 739 (2013).
132. *Id.* at 741.
133. *Id.* at 739.
134. *Id.*
135. *See* 46 U.S.C. § 31342 (2012). An *in rem* action is a special maritime claim against the vessel itself, which can lead to its seizure. *Id.* Section 31342 allows a party to bring an *in rem* action against a vessel for necessaries provided to a vessel. *Id.* It reads:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner--
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

that the home was not a vessel, and therefore, there was no admiralty jurisdiction and there could be no *in rem* action.[136] The District Court found that the floating home was a vessel and awarded the City damages.[137] On appeal, the Eleventh Circuit affirmed because the floating home was capable of transit on water.[138] The Supreme Court reversed because a "reasonable observer" looking at the characteristics of the floating craft would not have considered it capable of moving persons or things on water.[139] Had the Supreme Court held that Lozman's floating home was a vessel, the City's *in rem* action would not have failed. The City must now find a remedy outside of admiralty jurisdiction in order to recover the dockage fees and damages for trespass, such as an in personam breach of contract claim in state court.

i. The Majority's "Reasonable Observer" Standard and "Designed to a Practical Degree" Element

Unsurprisingly, the Majority looked to the language of 1 U.S.C. § 3 and cited language from the *Stewart* opinion as the basis for its "reasonable observer" analysis. The Court focused primarily upon the phrase "capable of being used," which encompasses "practical" possibilities, not "merely . . . theoretical" ones.[140] Under this analysis, the Court found that Lozman's floating craft was not a vessel because no reasonable observer would conclude that it was designed to transport "people or things over water."[141] In determining the correct inquiry, the Court rejected the "anything that floats" approach, which would tend to find any instrument floating in water to be a vessel.[142] The Court likened Lozman's home to the wharfboat in *Evansville* and distinguished it from the Super Scoop in *Stewart*.[143] In addition, the Court observed that certain policy considerations that support vessel status for certain structures did not apply to floating homes.[144] The Court also found support in several state law jurisdictions.[145] Furthermore,

(b) This section does not apply to a public vessel.

Id.

136. *See Lozman*, 133 S. Ct. at 739.

137. *Id.*

138. *Id.* at 739–40.

139. *Id.* at 740–41, 746.

140. Stewart v. Dutra Constr. Co., 543 U.S. 481, 496 (2005).

141. *Lozman*, 133 S. Ct. at 741.

142. *Id.* at 745.

143. *Id.* at 742–43; *Stewart*, 543 U.S. at 497; Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 22 (1926).

144. *Lozman*, 133 U.S. at 743–44.

145. *Id.* at 744.

the Court rejected the assertion that its "reasonable observer" test would add a subjective component to the inquiry.[146] Having determined the correct test, the Court performed a fact-specific inquiry that looked to the characteristics of Lozman's home compared to other common vessels and found that it was not a vessel.[147]

The Court first considered and rejected the Eleventh Circuit's finding that Lozman's floating craft was a vessel under 1 U.S.C. § 3.[148] The Eleventh Circuit reasoned that Lozman's craft was "capable" of transportation since it could float and be towed.[149] The Court determined that the Eleventh Circuit's interpretation of "vessel" was too expansive.[150] The Court stated that:

> [A] wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not "vessels," even if they are "artificial contrivance[s]" capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so.[151]

The Court zeroed in on the "as a means of transportation on water" language of 1 U.S.C. § 3 and determined, based on several dictionaries, that "transportation" required moving persons or things "from one place to another."[152] The Court noted that the definition must be applied in a "'practical,' not a 'theoretical' way."[153] For that reason, the Court chose an objective standard to determine whether a floating craft could be considered a vessel. The Court stated that a floating craft would not be considered a vessel under 1 U.S.C. § 3 "unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[154]

In addition, the Court found support for its interpretation in the language of the statute and case law. The Court likened the instant case to

146. *Id.* at 744–45.

147. *Id.* at 746.

148. *See* 1 U.S.C. § 3 (2012) ("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.").

149. *Lozman*, 133 S. Ct. at 740 (citing City of Riviera Beach, Fla. v. Unnamed Gray, Two-Story Vessel, 649 F.3d 1259, 1266 (11th Cir. 2011)).

150. *Id.*

151. *Id.*

152. *Id.* at 740–41.

153. *Id.* at 741 (citing Stewart v. Dutra Constr. Co., 543 U.S. 481, 496 (2005)).

154. *Id.*

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.[155] In that case, a wharfboat was not a "vessel" even though it was stationed at a dock, received utilities from the dock, and was towable because it did not carry any persons or things from one place to another.[156] In contrast, the Court distinguished the instant case from *Stewart*.[157] In *Stewart*, the Court found that a dredge was a "vessel" even though it could only move by "manipulating its anchors and cables."[158] Nevertheless, the dredge transported persons and things over water, and therefore, was a vessel.[159]

The Court noted but did not endorse other courts that had adopted an "anything that floats" approach as its vessel inquiry.[160] The "anything that floats" approach tended to find anything capable of floating in water to be a vessel regardless of other factors.[161] The Court alluded to its reservations with the "anything that floats" approach through its comical quote alleging that even Pinocchio, inside the whale, would be a vessel under such an analysis.[162]

Next, the Court observed that there were few reasons to classify floating homes as vessels under admiralty law. As one example, the Court reasoned that the attachment procedures that prevent ships from sailing away from liability are unnecessary for floating homes.[163] In addition, remedies afforded to seamen under the Jones Act are unnecessary for a floating home, as are maritime safety statutes that allow the Coast Guard to conduct inspections on vessels.[164] Moreover, the Court found support from

155. *Lozman*, 133 S. Ct. at 742.

156. *Id.* (citing Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21–22 (1926)).

157. *Id.* (citing *Stewart*, 543 U.S. at 490–95).

158. *Id.* (citing *Stewart*, 543 U.S. at 484).

159. *Id.* (citing *Stewart*, 543 U.S. at 491–92).

160. *Id.* at 743.

161. *Lozman*, 133 S. Ct. at 742 (citing Miami River Boat Yard, Inc. v. 60' Houseboat, 390 F.2d 596, 597 (5th Cir. 1968)); *e.g.*, Holmes v. Atl. Sounding Co., 437 F.3d 441, 443, 449 (5th Cir. 2006) (concluding that a quarterbarge is a vessel as it is essentially a "floating dormitory"); Summerlin v. Massman Constr. Co., 199 F.2d 715, 715–16 (4th Cir. 1952) (concluding that the floating derrick, although anchored in the river, is a vessel for purposes of the Jones Act); Sea Vill. Marina, LLC v. A 1980 Carlcraft Houseboat, No. 09-3292, 2010 WL 338060, at *2–3, *43–44 (D.N.J. 2009) (referring to floating homes that Sea Village Marina operated as vessels within the meaning of maritime law); Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) (holding that "a floating houseboat capable of being towed from one location to another is a vessel . . . ."). A houseboat was found to be a vessel because "it affords a water-borne place to live with the added advantage of at least some maritime mobility." *Miami River Boat Yard*, 390 F. 2d at 597.

162. *Lozman*, 133 S. Ct. at 740.

163. *Id.* at 744.

164. *Id.*

state statutes in California and Washington that do not consider "floating homes" to be "vessels."[165]

The Court dismissed objections that this "purpose-based" test would add a subjective component to the analysis that could easily be manipulated.[166] It reasoned that the reasonable observer standard, which requires courts to look at objective evidence to determine whether or not a structure was "designed to a practical degree" to move persons or things over water, guarded against any subjectivity.[167] The Court noted that it is possible that a floating device be used to transport persons or things over water without being practically designed for that purpose.[168]

The Court determined that under the reasonable observer test, Lozman's floating home would not be considered a vessel based on a number of factors.[169] First, it was not "designed to a practical degree for carrying people or things over water."[170] For example, it had no rudder, no ability to store electricity, and its "rooms looked like ordinary nonmaritime living quarters."[171] The Court noted that the structure had French doors rather than portholes.[172] Next, while not dispositive, the Court observed that Lozman's home had no ability to propel itself.[173] The Court concluded that a "reasonable observer" would not consider Lozman's home to be designed to a practical degree for carrying persons or things over water.[174]

Lastly, the Court objected to the City's assertion that Lozman's home was used as transportation. The Court determined that while Lozman's home had been towed, it did not carry persons or cargo.[175] The Court stated that "when it moved, it carried, not passengers or cargo, but at the very most (giving the benefit of any factual ambiguity to the City) only its own furnishings, its owner's personal effects, and personnel present to assure the home's safety."[176]

165. *Id.*
166. *Id.*
167. *Id.* at 741–45.
168. *Lozman*, 133 S. Ct. at 745.
169. *Id.* at 739.
170. *Id.* at 741.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Lozman*, 133 U.S. at 741.
175. *Id.* at 746.
176. *Id.*

ii. The Dissent's Objections to the Majority's New Test

The dissent agreed that the Eleventh Circuit's interpretation was overinclusive and that an objective test was necessary in order to determine whether a floating structure was a vessel.[177] However, the dissent determined that the case should have been remanded to further develop the record.[178] The dissent noted that the vessel inquiry had been the same for decades under 1 U.S.C. § 3 and was purposefully broad to include the diverse structures used in maritime transportation.[179] However, not all floating structures are considered vessels.[180] The dissent noted that permanently moored structures floating over water and contrivances over water, which could not practically be used for transportation (i.e., dead ships or ships withdrawn from service), were not vessels.[181] In addition, if a floating structure's purpose was not to move persons or things from one place to another, it also was not a vessel.[182] This last factor was one that the "anything that floats" test had ignored.[183]

Nonetheless, the dissent expressed concern that the "reasonable observer" inquiry would add a subjective component when determining whether a structure was a vessel and that it had an "I know it when I see it flavor."[184] It noted that the majority's preoccupation with the presence of French doors rather than portholes in Lozman's home, as well as other stylistic elements of the structure, evidenced the majority's subjectivity.[185] The dissent stated, "[a] badly designed and unattractive vessel is different from a structure that lacks any 'practical capacity' for maritime transport."[186]

Moreover, the dissent expressed confusion over the majority's reasoning that Lozman's home did not transport persons or things.[187] The

177. *Id.* at 748 (Sotomayor, J., dissenting).
178. *Id.* at 754.
179. *Id.* at 749.
180. *See Lozman*, 133 U.S. at 749
181. *Id.* at 750.
182. *Id.*
183. *See id.* at 751.
184. *Id.* at 751–52 (quotations omitted) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
185. *Id.*
186. *Lozman*, 133 S. Ct. at 752.
187. *Id.*

majority accepted that Lozman's home had transported his personal possessions and people while being towed but determined that a "reasonable observer" would not have agreed that the floating structure was "designed to any practical degree for carrying people or things on water."[188]

Based on the facts as the dissent knew them, it was unclear to the dissent what facts the majority relied on to conclude Lozman's home was not a vessel.[189] The dissent stated,

> [I]t is unclear why Lozman's craft is a floating home, why all floating homes are not vessels, or why Lozman's craft is not a vessel. If windows, doors, and other esthetic attributes are what take Lozman's craft out of vessel status, then the majority's test is completely malleable. If it is the craft's lack of self-propulsion, then the majority's test is unfaithful to our longstanding precedents. If it is something else, then that something is not apparent from the majority's opinion.[190]

In addition, the dissent was concerned the majority's decision would undermine other lower court decisions that had determined floating homes without propulsion to be vessels under § 3.[191]

In the dissent's view, more facts were necessary to determine whether Lozman's home was a vessel.[192] The dissent would have remanded the case rather than hold that the structure was not a vessel.[193] It was concerned that the majority's reasoning would add a lot of uncertainty among many maritime industries that rely on predictable legal rules.[194] As an example, it indicated the majority's decision would disapprove of *Holmes v. Atlantic Sounding Co.*,[195] a Fifth Circuit opinion finding a 140-foot long and 40-foot wide dormitory barge with 50 beds was a vessel.[196]

188. *Id.*
189. *See id.* at 753.
190. *Id.* (citations omitted).
191. *Id.*
192. *Lozman*, 133 S. Ct. at 754.
193. *See id.*
194. *Id.*
195. Holmes v. Atl. Sounding Co., 437 F.3d 411 (5th Cir. 2006); *see* discussion *infra* Part III.E.
196. *Lozman*, 133 S. Ct. at 755.

III. ANALYSIS

A. WHERE DID THE "REASONABLE OBSERVER" AND "DESIGNED TO A PRACTICAL DEGREE" LANGUAGE COME FROM?

The majority in *Stewart* made no attempt to formulate a vessel test in its own words. Instead, it relied on the language of 1 U.S.C. § 3 which states, "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[197] In contrast, the majority in *Lozman* formulated its test by emphasizing the "capable of being used" language of 1 U.S.C. § 3 and by invoking *Stewart*.[198] The *Lozman* Court stated, "In answering [whether petitioner's floating home falls within the terms of 1 U.S.C. § 3] we focus primarily upon the phrase 'capable of being used.' This term encompasses 'practical' possibilities, not 'merely . . . theoretical ones.'"[199] Focusing on this language from 1 U.S.C. § 3 and from *Stewart,* the Court derived the "reasonable observer" test as well as the "designed to a practical degree" language. The Court stated, "in our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[200] With this new test, the Court inserts both a "reasonable observer" standard as well as a "designed to a practical degree" element into the statutory language of 1 U.S.C. § 3. However, there is little to no support for this change from the standard expressed in the language of 1 U.S.C. § 3.

i. "Reasonable Observer" Standard

Even though 1 U.S.C. § 3 makes no mention of a "reasonable observer" or of objective evidence, the "reasonable observer" standard seems to have hatched from earlier admiralty cases which looked to objective evidence to determine whether or not a floating structure was a vessel. For example, in *Stewart*, the Court applied the language of 1 U.S.C. § 3 to determine whether or not the Super Scoop was a vessel.[201] The Court weighed objective evidence such as the Super Scoop's ability to move on

197. 1 U.S.C. § 3 (2012).
198. *See id.*; *Lozman*, 133 S. Ct. at 739.
199. *Lozman*, 133 S. Ct at 739 (referring to the Supreme Court's language in *Stewart*).
200. *Id.* at 741.
201. Stewart v. Dutra Constr. Co., 543 U.S. 481, 489–90 (2005); *see* 1 U.S.C. § 3.

its own, how often it moved, how far it could move in one instance, whether the Super Scoop shared characteristics common to other vessels, and who or what was transported aboard to determine that the Super Scoop was "capable of being used as transportation over water" and therefore a vessel.[202] In *Lozman*, the Court claimed that it had inserted the "reasonable observer" standard to avoid any subjectivity that may arise as a result of looking at the purpose of the floating craft to determine its vessel status.[203] The Court stated, "we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose. That is why we have referred to the views of a reasonable observer."[204]

When pronouncing the "reasonable observer" standard, the Court hinted at its concern with the broad interpretations that had led to the "anything that floats" approach in certain lower courts.[205] The Court stated, "[n]ot *every* floating structure is a 'vessel.'"[206] Later in the opinion, the Court dismissed the "anything that floats" approach.[207] It ruled, "we find such an approach [is] inappropriate and inconsistent with our precedents."[208] With the "reasonable observer" standard, the Court may be trying to weed out certain floating structures that it does not think ought to be considered vessels. However, as will be discussed below, without more specificity, the Court leaves us with a test that is difficult to apply.

ii. "Designed to a Practical Degree" Element

It is unclear where the Court derives its "designed to a practical degree" language for its new test. The "designed to" piece likely comes from the "capable of being used" language of 1 U.S.C. § 3, and the "practical degree" language likely comes from the Court's emphasis on the "'practical' possibilities, not 'merely . . . theoretical' ones" language taken from *Stewart*.[209] Looking at the language of 1 U.S.C. § 3 and the test under *Lozman*, the "designed to a practical degree" language from *Lozman* seems to substitute the "capable of being used" language of 1 U.S.C. § 3.[210]

202. *Stewart*, 543 U.S. at 484–85.
203. *Lozman*, 133 S. Ct. at 744.
204. *Id.*
205. *Id.* at 740, 743.
206. *Id.* at 740.
207. *Id.* at 743.
208. *Id.*
209. *See* 1 U.S.C. § 3 (2012); Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 739 (2013); *Stewart*, 543 U.S. at 496.
210. *See* 1 U.S.C. § 3; *Lozman*, 133 S. Ct. at 741.

However, this "designed to a practical degree" language has little support under 1 U.S.C. § 3 and under *Stewart*.

The context in which the *Stewart* Court uses the "practical possibility, or merely a theoretical one" language does not support the "designed to a practical degree" language from the *Lozman* Court's vessel test. The Court in *Stewart* used the "practical possibility, or merely a theoretical one" language in the context of determining whether or not a floating craft was currently "in navigation" or in service.[211] If a floating craft is permanently moored or affixed to land, then it is not a vessel.[212] The Court acknowledged that many otherwise seaworthy floating crafts *could be* freed from their moorings or permanent anchors and be reintroduced to service and return to "navigation."[213] However, the likelihood of returning to service had to be "a practical possibility" and not "merely a theoretical one."[214]

Being "designed to a practical degree for carrying people or things over water" is different than being permanently moored or affixed to land. There are many ways, some more amorphous than others, in which a floating structure may not be "designed to a practical degree for carrying people or things over water." One of those ways in which a floating craft is not "designed to a practical degree for carrying people or things over water" is that it is permanently moored. However, not being "designed to a practical degree for carrying people or things over water" includes many other grounds on which to deny vessel status. Therefore, whether or not a floating structure would be considered a vessel but for being permanently moored to land is a significantly more narrow ground on which to deny vessel status than being "designed to a practical degree for carrying people or things over water."

In addition, the plain and ordinary meanings of "capable of being used" versus "designed to a practical degree" demonstrate the differences between the two elements. According to the Merriam-Webster Dictionary, "capable" means "susceptible"; "having attributes (as physical or mental power) required for performance or accomplishment"; "having traits conducive to or features permitting"; or "having or showing general efficiency and ability."[215] "Used" means "employed in accomplishing

211. *See Stewart*, 543 U.S. at 496.
212. *See id.* at 494.
213. *See id.* at 496.
214. *Id.*
215. *Capable*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/capable (last visited Nov. 11, 2013).

something."[216] Therefore, "capable of being used" means that something is "susceptible," "[has] attributes . . . required for performance or accomplishment," "[has] traits conducive to or features permitting," or "[has] or [shows] general efficiency and ability" to be "employed in accomplishing something." Drawing from these definitions, "capable of being used" more simply stated means that something *can* do something.

On the other hand, "design" means "to create, fashion, execute, or construct according to plan" or "to conceive and plan out in the mind . . . to have as a purpose . . . to devise for a specific function or end."[217] In other words, "designed" describes how something is *made*, often for a particular purpose. While "practical" means "of, relating to, or manifested in practice or action: not theoretical or ideal"; "being such in practice or effect: virtual"; "actively engaged in some course of action or occupation"; "capable of being put to use or account: useful" or "disposed to action as opposed to speculation or abstraction."[218] In more simple terms, "practical" means that something is realistic and not theoretical. Lastly, "degree" means "a step or stage in a process, course, or order of classification"; "the extent, measure, or scope of an action, condition, or relation"; or "one of the forms or sets of forms used in the comparison of an adjective or adverb."[219] More simply put, "degree" means the extent to which a particular action is carried out. Therefore, "designed to a practical degree" means that something is made with a particular purpose in mind, and that purpose is significantly realistic rather than theoretical.

The ordinary meanings of "designed to a practical degree" and "capable of being used" are distinct. The ordinary meaning of "capable of" infers that something *can* do something whereas the "designed to a practical degree" means that something is *made* with a purpose in mind. In changing the language, the Court has effectively changed the vessel test from requiring that something be able to do something to requiring that something be designed to do something. However, being made for a particular purpose and being able to do something are two very different inquiries. For example, a nail file often can remove or tighten a screw, but it is made for the purpose of filing nails. Therefore, a nail file is capable of

216. *Used*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/used (last visited Nov. 11, 2013).

217. *Design*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/design (last visited Nov. 11, 2013).

218. *Practical*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/practical (last visited Nov. 11, 2013).

219. *Degree*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/degree (last visited Nov. 11, 2013).

removing or tightening a screw even though it was designed to a practical degree for filing nails.

However, the Court may be onto something when it says that something ought to be "designed to a practical degree" instead of just "capable of being used."[220] Using the nail file example again, even though a nail file is capable of being used as screwdriver, most people looking at a nail file would likely not classify it as a screwdriver even though it is "capable of being used" as such. Instead, we might rely upon our experiences and cultural notions to try to figure out whether or not the nail file is a screwdriver.[221] We might look at the shape of the handle of the nail file compared to most screwdrivers we have seen. We might see that the nail file is capable of filing down surfaces whereas most if not all screwdrivers are not. We might look to see how durable the nail file is as a screwdriver. In other words, we might investigate how long the nail file would last when used as a screwdriver before no longer being able to drive screws. We might look at the shape of the tip of the nail file compared to screwdrivers to see any similarities or differences. All of these inquiries essentially look to how the nail file is designed compared to a screwdriver. Nevertheless, as discussed in more detail below, this inquiry may categorically deny vessel status to houseboats and inject significant subjectivity into what had been and ought to be a simple procedural issue.

B. AFTER *LOZMAN*, ARE HOUSEBOATS WITHOUT SELF PROPULSION VESSELS?

The reasoning in *Lozman* can be interpreted to mean that houseboats without self propulsion are categorically not vessels. The majority struggled with many design inquiries when it analyzed Lozman's floating craft similar to the nail file and screwdriver example above. Nonetheless, houseboats without self propulsion should not be categorically denied vessel status, but rather, should undergo the same vessel inquiry as any other floating craft.

Although it did not explicitly say so, the Court seemed to imply that Lozman's craft was more of a home without self propulsion than a vessel. The *Lozman* Court compared Lozman's craft to a home with its French doors and "rooms [that] looked like ordinary nonmaritime living

220. *See* 1 U.S.C. § 3; Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 741 (2013).

221. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 66–73 (1998) (discussing prototype theory for classifying concepts which argues that we tend to have an idealized notion of what a particular concept is and that those concepts "become fuzzy at the margins").

quarters."[222] It also noted that unlike many typical vessels, Lozman's craft could not propel itself and could not store its own electricity.[223]

It is implausible, however, that no boat home is a vessel. Going back to the nail file example, just as a vessel can incorporate characteristics of a home and vice versa, one can imagine a situation where someone invents a screwdriver that is also nail file. It could incorporate the round handle of a screwdriver, the filing capabilities of a nail file, and a flat point that can endure repeated screw driving. It would be difficult to argue that this item was more a nail file than a screwdriver or vice versa. Just as this new invention is possible, one should be cautious before denying vessel status because a floating craft purportedly fits into one category more than it fits into the vessel category. In other words, if a floating craft contains characteristics of a home, it does not necessarily mean that the floating craft is not a vessel.

As the dissent points out, if no houseboat without self propulsion is a vessel after *Lozman*, this may call into question lower court decisions.[224] In *The Ark*,[225] the Southern District of Florida held that a houseboat used as a residence and a restaurant was a vessel even though it lacked self-propulsion because it was not permanently moored to the shore.[226] Similarly, in *Miami River Boat Yard, Inc. v. 60' Houseboat, etc.*,[227] in a one-page opinion, the Fifth Circuit, without a lengthy factual inquiry, found that a houseboat without self-propulsion was a vessel.[228] The court stated,

> A houseboat is nonetheless a boat because, as its name implies, it affords a water-borne place to live with the added advantage of at least some maritime mobility. That she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel.[229]

Likewise, in *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*,[230] the Southern District of New York relied on *Miami River* and found that a thirty-five foot fiberglass houseboat was a vessel.[231] Similar to *Miami River*, the court in *Hudson Harbor* did not discuss at length the Sea

222. *Lozman*, 133 S. Ct. at 741.
223. *Id.*
224. *Lozman*, 133 S. Ct. at 753 (Sotomayor, J., dissenting).
225. The Ark, 17 F.2d 446 (S.D. Fla. 1926).
226. *Id.* at 447–48.
227. Miami River Boat Yard, Inc. v. 60' Houseboat, etc., 390 F.2d 596 (5th Cir. 1968).
228. *See id.* at 597.
229. *Id.*
230. Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa, 469 F. Supp. 987 (S.D.N.Y. 1979).
231. *Id.* at 988–89.

Casa's design elements.[232] Lastly, in *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D*,[233] the District Court of New Jersey, also relying on *Miami River*, held that four houseboats lacking self-propulsion were nonetheless vessels because they were not permanently moored and "[could] be towed to a new marina without substantial effort."[234] The court in *Sea Village Marina* also did not discuss at length the design elements of the floating crafts in question.[235]

The majority in *Lozman* asserts that the latter three lower courts applied the "anything that floats" approach.[236] The implication may indeed be that houseboats without self propulsion categorically cannot be vessels after *Lozman*. However, since many of these cases lack a developed factual record, the majority cannot know whether these boats would have been vessels under its new test in *Lozman*. If there were a more developed factual record, we may find that these houseboats were in fact vessels. Rather than categorically deny vessel status to houseboats without self propulsion, they should undergo the same vessel inquiry like any other floating craft.

Since *Lozman* came down in January 2013, the *Sea Village Marina* court revisited the issue of admiralty jurisdiction in light of *Lozman* and found that there it did not have admiralty jurisdiction "because the *Lozman* case established that floating homes which do not transport passengers or cargo, such as the residences in this action, are not subject to federal admiralty jurisdiction."[237] There, the defendant who sought to maintain jurisdiction, however, did not brief the court on whether the court retained admiralty jurisdiction after *Lozman*.[238] It is unclear whether the court was applying *Lozman* categorically to houseboats without self propulsion or whether in the absence of briefing from the defendant the court was forced to deny admiralty jurisdiction. Regardless, it remains to be seen whether lower courts will apply *Lozman* in a categorical way to houseboats without self propulsion.

232. *See id.*

233. Sea Vill. Marina, LLC v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D, No. 09-3292, 2009 U.S. Dist. LEXIS 96651 (D.N.J. Oct. 19, 2009).

234. *Id.* at *23.

235. *See id.*

236. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 743 (2013).

237. *Sea Vill. Marina, LLC.* A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D, No. 09–3292, 2013 WL 1501789, at *3 (D.N.J. Apr. 11, 2013).

238. *Id.*

C. THE INHERENT SUBJECTIVITY OF THE "REASONABLE OBSERVER" STANDARD AND "DESIGNED TO A PRACTICAL DEGREE" ELEMENT

As the dissent indicated, the new *Lozman* test has an "I know it when I see it flavor."[239] If we cannot deny vessel status, however, because a craft has characteristics of some non-vessel structure, for example, a home, it begs the question as to the defining characteristics of a vessel. It is safe to say that almost everyone in a modern industrialized society has come into contact with some form of nail file or screwdriver and can debate whether or not a particular item could fall into one or both categories. There may be slight variations across cultures, but almost everyone will have a sense of what a nail file and screwdriver ought to look like and how they ought to work. However, whether or not a craft is a vessel is a significantly more technical and complex inquiry. An individual's intuitions will be based on their personal experience and cultural notions. In other words, their definition will be subjective. As discussed above, the Court claims that it has guarded against any subjectivity that may arise from their new test with the "reasonable observer" standard.[240] However, the Court does not specify who this "reasonable observer" is. Lawyers, law students, and scholars are now left wondering, "Who is this reasonable observer?"

Certain inquiries are more intuitive, more common, and lend themselves more readily to a reasonable observer standard such as the nail file and screwdriver. As an example within the legal field, in a negligence case involving injuries sustained at someone's home, a court would likely look to how a reasonable person—here, a homeowner—would have acted under the circumstances. Almost all adults can relate to keeping and maintaining the safety of those within a home whether or not they have actually owned a home. It is a common experience, and therefore, lends itself to a reasonable person standard. On the other hand, in a medical malpractice case, a court would likely look to how a *reasonable doctor* would have acted under the circumstances rather than the general public.[241] The general public typically does not have the requisite training or experience to know how a doctor should act in such a situation. Were we to ask them how a doctor should have acted, we can imagine the general

239. *Lozman*, 133 S. Ct. at 752 (Sotomayor, J., dissenting) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

240. *Id.* at 744 (majority opinion).

241. *See* STEVEN E. PEGALIS, *§ 3:3 Standard of Care, Generally, in* AM. L. OF MED. MALPRACTICE (3d. 2013) (citations omitted).

public reaching myriad conclusions based on comparably diverse life experiences.

Similarly, judgments can vary significantly based on expertise if we ask a "reasonable observer" whether or not a floating craft is designed to a practical degree to be a vessel. Most people will not have had significant experience with vessels, and even if they have, their experience may not cover the gamut that the law has traditionally covered, such as the peculiar Super Scoop from *Stewart*. Depending on the expertise of the observer, we can reach very different results. For example, if the reasonable observer is a maritime engineer, she may have a more technical opinion as to what is required in a vessel. She may look to its general design, the materials used, the type of propulsion, and other technical details. Likewise, if we ask a seaman, he may draw from his life experience on vessels to determine whether or not a particular floating craft conforms with his definition of a vessel. But, if our reasonable observer has little to no experience with vessels, she may rely on less technical judgments. She may not know what is typical of a vessel, and therefore have nothing to compare it to. As it turns out, she may primarily rely on whether or not the craft floats to determine if it is a vessel. We are then left no better off than where we started.

In addition, because the standard is so unclear, courts will be unable to determine how to apply it. Inevitably, courts and possibly even juries will have to choose their own prototypical reasonable observers. These reasonable observers may differ from jurisdiction to jurisdiction, and even case-to-case, leading to less uniformity when uniformity is one of the central tenets of maritime law and an underlying reason for admiralty jurisdiction. An inherent aspect of maritime commerce is the movement of vessels across borders, and uniformity among the states promotes maritime commerce because parties in a dispute will not be subject to different rules based on where the suit arises.

Moreover, this subjectivity in the inquiry makes it less predictable. As in other industries, maritime commerce relies on predictability. Without predictability, potential maritime investors may avoid particular business ventures when it is unclear how cases will turn out. Predictability, therefore, encourages more investment in maritime commerce and helps the industry grow.

To avoid subjectivity, the Court could require that experts determine whether or not a craft is a vessel. However, requiring experts is an additional administrative burden on the courts and an expensive litigation burden on any parties. In addition, requiring experts to define whether or

not something is a vessel may only lead to a battle of the experts and may not achieve fairness or clarity. Whoever has the most convincing expert acquires or averts admiralty jurisdiction rather than the party with a valid claim. Interestingly, of the few cases to rely on *Lozman* since January 2013, two lower courts considered testimony from "[a]n independent marine surveyor"[242] and "a marine structural engineer."[243]

D. WAS THIS NEW INQUIRY NECESSARY?

With the "reasonable observer" and "designed to a practical degree" language in *Lozman*, the Court has tried to fashion a more restrictive test to determine what is a vessel. The Court was concerned with the broad interpretations that had led to the "anything that floats" approach in certain circuits.[244] However, this new test may not have been necessary to resolve Lozman's case and ultimately, in practice, it may not have made a significant change to *Stewart*. Moreover, *Lozman* may not have even gotten rid of the "anything that floats" approach.

The Court in *Lozman* may not have needed to make up the "reasonable observer" standard in order to deny vessel status to Lozman's craft. Based on the facts, it appears that Lozman's home had been docked for several years.[245] In addition, it received its utilities from land.[246] The Court could have found that this evidenced a "permanent location" and concluded that Lozman's home was not a vessel similarly to *Cope* and *Evansville* discussed above. While not dispositive, the lack of self-propulsion on Lozman's home could also have counted against it. However, the court may have wanted to avoid categorically denying vessel status because a craft is docked for an extended period of time and receives its utilities from land. A more bright line rule, such as this, potentially could have instantly denied vessel status to otherwise typical vessels.

242. Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc., Nos. 11-2093, 11-2116, 2013 WL 1403264, at *9 (D.P.R. Apr. 8, 2013), *vacated on other grounds* 2013 WL 1944457 (D.P.R. May 13, 2013) (on file with author).

243. Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York, No. 10 Civ. 1653, 2013 WL 311084, at *3 (S.D. N.Y. Jan. 25, 2013).

244. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 743 (2013).

245. *See id.* at 739; *see also* City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length, No. 09–80594–CIV, 2009 WL 8575966 (S.D. Fla. Nov. 19, 2009) (noting that the dispute with the City ensured in August 2009). "In 2006 Lozman had the home towed 70 miles to a marina owned by the city of Riviera Beach (City), respondent, where he kept it docked." *Lozman*, 133 S.Ct. at 739. The case is silent on whether it moved at all after being docked in Riviera Beach. *Id.*

246. *Lozman*, 133 S. Ct. at 741.

In addition, such a rule would not have dealt with the "anything that floats" approach, which presumably finds that Pinocchio transported inside the whale is a vessel. However, as discussed above in Part III.C, the *Lozman* test does not necessarily get rid of the "anything that floats" approach.[247] It all depends on who the "reasonable observer" is. If the reasonable observer has no technical experience with vessels, as presumably many among the general population do not, what she may ultimately rely upon is whether or not the vessel floats. It may not be the only consideration she relies on, but it may be a significant factor. Moreover, five cases resolved since *Lozman* involving floating crafts arguably could have reached the same conclusion under the more simple approaches in *Cope* and *Evansville* calling into question the need for the new test under *Lozman*.[248] There is evidence, however, that the new *Lozman* test may be an analysis used only in "borderline cases."[249]

E. THE UNCERTAINTY AND ADDITIONAL COSTS TO MARITIME COMMERCE

Lozman may inject more uncertainty into the vessel inquiry and call into question past precedent in lower courts finding that particular floating crafts were vessels. For example, in *Holmes v. Atlantic Sounding Co., Inc.*, the Fifth Circuit, due to the decision in *Stewart*, revisited whether the

247. *See supra* Part III.C.

248. *See* Riley v. Alexander/Ryan Marine Services Co., No. 3:12-CV-00158, 2013 WL 5774872, at *5 (S.D. Tex. Oct. 24, 2013) (holding that the Mad Dog, a floating craft connected to the seabed with eleven suction piles 4,500 feet below the water with "no steering mechanism, system of self-propulsion, or raked bow" that was intended to be used at the location for 25 years was not a vessel under Lozman); Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc., Nos. 11–2093, 11–2116, 2013 WL 1944457, at *1, *7 (D.P.R. May 13, 2013) (holding that a drydock attached to a pier that occasionally moved "ten-to-fifteen feet back along the pier" was not a vessel under *Lozman*); Mooney v. W & T Offshore, Inc., No. 12–969, 2013 WL 828308, at *1, *5 (E.D. La. Mar. 6, 2013) (holding that "a tension leg platform" that was "permanently attached to the subsoil and seabed of the Outer Continental Shelf by six 32-inch diameter neutrally buoyant steel tubes . . . ." was not a vessel under *Lozman*); *Warrior_Energy Servs. Corp.*, 941 F. Supp. 2d 699, 701, 705 (E.D. La. 2013), *aff'd*, 2014 WL 31410 (5th Cir. 2013) (holding that a floating production facility "securely moored to the floor of the Outer Continental Shelf by twelve moorings connected to mooring piles that are embedded over 205 feet into the sea floor and weight over 170 tons each" was not a vessel under *Lozman*); *Fireman's Fund Ins. Co.*, 2013 WL 311084, at *4–5 (holding that drydock AFDB 5, which was "more or less permanently moored in one place" was not a vessel under *Lozman*).

249. *See* Armstrong v. Manhattan Yacht Club, Inc., No. 12-CV-4242(DLI)(JMA), 2013 WL 1819993, at *4 (E.D.N.Y. Apr. 30, 2013); *see also* Pipia v. Turner Const. Co., No 2014 WL 386552, at *2 (N.Y. App. Div. Feb. 4, 2014) (holding that a floating stage "regularly used to carry workers and materials around the water" was a vessel after a brief factual inquiry); Leger v. Offshore Staffing Services of Acadiana LLC, No. 11-1539, 2013 WL 6075640, at *3 (holding that a jack-rig is indisputably a vessel after almost no factual inquiry).

floating craft, on which Addie Holmes worked as a cook and was injured, was a vessel.[250] The court previously had answered that a similar floating craft was not a vessel in *Gremillion v. Gulf Coast Catering Co.*,[251] but found that it was a vessel after *Stewart*.[252]

Holmes worked aboard a quarterbarge BT-213 (hereinafter "the BT-213").[253] The BT-213 was a "140 feet long and 40 feet wide" barge on which a two-story, 50–bed facility was mounted.[254] It "ha[d] a raked bow on each end, and two end tanks where the rakes are . . . for flotation."[255] The BT-213 was used to house employees who worked on dredging projects.[256] It contained "sleeping quarters on both stories, as well as toilet facilities, a fully-equipped galley, locker rooms, freshwater deck tanks, diesel-powered electrical generators, and a gangway with railings."[257] It, however, lacked "winches, running lights, a radar, a compass, engines, navigational aids, Global Positioning System, lifeboats, or steering equipment such as rudders."[258] The BT-213 could not propel itself, and so it had to be towed from one location to another, but had "never been offshore."[259] It had "no captain, engineer, or deckhand," but it did have a crew "of two cooks and two janitors."[260] From the record, it is unclear whether anyone was aboard the BT-213 while it was transported from place to place.[261] However, the record is clear that the BT-213's purpose was not to transport people or things over water. The Fifth Circuit indicated that the BT-213 was "not intended to transport personnel, equipment, passengers, or cargo, and no evidence in the record reflects that it has ever done so."[262]

The BT-213 was moored in a boat slip when Holmes was injured.[263] Holmes claimed that a locker and television fell on her when she opened her locker door causing "injuries to her neck, shoulder, ears, and nose and caus[ing] dizziness as well."[264] She sought maintenance and cure as well as

250. *See* Holmes v. Atl. Sounding Co., Inc., 437 F.3d 441, 443 (5th Cir. 2006).
251. *See* Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990).
252. *See Holmes*, 437 F.3d at 443.
253. *Id.*
254. *Id.*
255. *Id.* at 444 (citations omitted).
256. *Id.* at 443.
257. *Id.*
258. *Holmes*, 437 F.3d at 444.
259. *Id.*
260. *Id.* at 443–44.
261. *Id.*
262. *Id.* at 444.
263. *Id.*
264. *Holmes*, 437 F.3d at 444.

claims under the Jones Act and general maritime law, all relief which depended on whether the BT-213 was a vessel.[265]

If the Fifth Circuit's assertion that the BT-213 was "not intended to transport personnel, equipment, passengers, or cargo, and no evidence in the record reflects that it has ever done so,"[266] is accepted, then the BT-213 is likely not a vessel under *Lozman*. The *Lozman* test requires that a "reasonable observer, looking to the [floating craft's] physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water."[267] Because the Fifth Circuit asserts that the BT-213 was not "intended to transport personnel, equipment, passengers, or cargo" it is likely that a reasonable observer would not find it "designed to a practical degree for carrying people or things over water."

It is not clear, however, on what facts the Fifth Circuit relied to reach its conclusion that the BT-213 was "not intended to transport personnel, equipment, passengers, or cargo," and it is not necessarily true that even if something is not "intended" to do something that it may actually be "designed" to do it. The owners of the BT-213 may not use the BT-213 with the intention to move people or things over water, but as the Fifth Circuit pointed out, the BT-213 moves "the sleeping and eating 'equipment' and feeding and housing supplies . . . from shore to dredge site and from dredge site to dredge site . . . ."[268] Arguably, the BT-213 was designed to move "the sleeping and eating equipment." To add to the confusion, the moving of the "sleeping and eating equipment" may be analogous to the towing of Lozman's home, which the Court found insufficient to make Lozman's home a vessel. The Court stated, "when it moved, it carried, not passengers or cargo, but at the very most . . . only its own furnishings, its owner's personal effects, and personnel present to assure the home's safety."[269] Actually moving "people or things over water" is not enough. It has to be designed to a practical degree to do so.

In addition, under *Lozman*, whether or not the BT-213 is a vessel will depend on whether or not the "reasonable observer believes that the BT-213 was designed to a practical degree to move "the sleeping and eating equipment."[270] As discussed previously, the reasonable observer's opinion

265. *Id.*
266. *Id.*
267. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 739 (2013).
268. *Holmes*, 437 F.3d at 448–49.
269. *Lozman*, 133 S. Ct. at 752.
270. *See id.* at 743 (holding that whether a structure falls within the statutory description of a vessel depends on whether a reasonable observer would consider the structure, to a practical

will depend on who the prototypical reasonable observer is, their experience with vessels and nonvessels, expertise or lack of expertise in the in maritime industry, and cultural notions.

A maritime engineer may look to the technical design aspects of the BT-213. She may find that the BT-213 was a vessel because "it ha[d] a raked bow on each end" where flotation devices were attached and it was capable of towing. She also may not find that it was vessel because it lacked self-propulsion, "winches, running lights, a radar, a compass, engines, navigational aids, Global Positioning System, lifeboats, or steering equipment . . . ."[271]

On the other hand, if the prototypical "reasonable observer" is a seaman, he may base his observations on his experience, presumably on more conventional vessels, to determine whether a floating craft is a vessel or not. He may find that the BT-213 is a vessel because it contained "sleeping quarters on both stories, as well as toilet facilities, a fully-equipped galley, locker rooms, freshwater deck tanks, diesel-powered electrical generators, and a gangway with railings."[272] But he might also find that the BT-213 was not a vessel because its design did not require a "captain, engineer, or deckhand" and the BT-213 had "never been offshore."[273]

In addition, if the prototypical "reasonable observer" lacks expertise or personal experience in vessels, she will have to draw on her own notions—whatever they may be—to determine if the floating craft is a vessel. She might rely on typical images of what a "vessel" or ship is supposed to look like and determine that the BT-213 just does not look like a vessel. However, she might just see whether the BT-213 floats and is able to move over water and determine that the BT-213 is vessel. Again, if this were the case, we have not been precise enough to avoid essentially the "anything that floats" approach.

Looking at several potential "reasonable observers," it is possible for any of the different conclusions given the criteria the Court has provided. Despite its attempt to be as objective as possible, the "reasonable observer" standard only masks the fact that this inquiry is subjective. In addition, this inquiry is, at best, fact intensive. Threshold procedural issues are supposed to be simple and straightforward.[274] This tenet also holds true for admiralty

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degree, for the purpose of carrying people or things on water).

271. *Holmes*, 437 F.3d at 444.

272. *Id.* at 443.

273. *Id.* at 444.

274. *See* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010) ("[W]e place primary weight upon the

jurisdiction.[275] Clear procedural rules allow the court to move on to the merits as quickly as possible. This unclear, fact-intensive inquiry in *Lozman* could be described as "the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible."[276]

> The boundary between judicial power and nullity should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising 'questions of penumbra, of shadowy marches,' two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.[277]

Moreover, this definition of a vessel may be an area where Congress should provide more specific guidance to the courts considering its technical nature and complexity. Congress could attempt to make a more exhaustive list of possible vessels with enough broad language to include what is necessary and with enough specificity to avoid the "anything that floats" approach. However, this would require that Congress act on the issue. If such a statute were to pass, it also would risk injecting more uncertainty into the inquiry in other ways depending on the language that Congress used.

Nonetheless, *Lozman* may also be a standalone case that serves to narrow the list of vessels similarly to *Cope* and *Evansville*. For example, some lower courts may narrowly construe *Lozman* as a "house boat" case. However, this article has already discussed several cases in lower courts where vessel status was denied to non-houseboat floating structures in reliance on *Lozman*. Or perhaps *Lozman* will be treated more broadly as a borderline case analysis. Regardless, it remains to be seen the gamut of floating structures to which *Lozman* will be applied.

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need for judicial administration of jurisdictional statute to remain as simple as possible.").

275. *See* Sisson v. Ruby, 497 U.S. 358, 374 (1990) (Scalia, J., concurring).

276. *See id.* at 375.

277. *Id.* at 375 (quoting ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 312 (1950) (quoting Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 426 (1916) (Holmes, J., concurring)).

CONCLUSION

With the Supreme Court's latest vessel inquiry in *Lozman*, the Court has added a new "reasonable observer" standard and a "designed to a practical degree" element to the test. Despite the court's attempt to ensure the objectivity of the test with the "reasonable observer" standard, the test is inherently subjective due to the technical and complex inquiry that it requires. This subjectivity with an "I know it when I see it flavor"[278] injects uncertainty into what ought to be a simple threshold procedural inquiry, and in doing so, it also creates uncertainty in a maritime industry that relies on predictability. In addition, this test may not have been necessary to resolve *Lozman*. Moreover, it may not resolve the Court's concern with the "anything that floats" approach. We have yet to see how the new *Lozman* test will play out in the lower courts, but it may turn out to cause more harm than good.

278. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 751–52 (2013) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).