MINUTES OF THE COMMITTEE ON PRACTICE & PROCEDURE
MARITIME LAW ASSOCIATION OF THE UNITED STATES
MAY 1, 2013

Chair: Edward J. Powers
Secretary: Gina M. Venezia

Chair Edward J. Powers called the Committee to order at 10:05 a.m. in the offices of Carter, Ledyard & Milburn, located at Two Wall Street. Twenty persons attended in person and another four attended by telephone conference call. The following agenda items were addressed:

1. **Presentation by Mr. John Cleary, Vedder Price PC.**

Mr. John C. Cleary of New York gave a presentation entitled *"'The Reasonable Observer' Comes to the Aid of Vessel Status under U.S. Law"* which focused on the recent Supreme Court case *Lozman v. City of Riviera, Florida* (decided in January 2013) and its potential implications.

Mr. Cleary, who assisted in the preparation of the *amicus* brief filed on behalf of the MLA in *Lozman* and attended oral arguments at the Court, was particularly knowledgeable about the case. The MLA filed an *amicus* brief in the *Lozman* case because the issue seemed to be focusing on whether the subjective intent of the owner should be considered in the vessel status analysis. To this extent, the MLA was successful because subjective intent was not identified as one of the factors in *Lozman*. Nonetheless, in *Lozman*, the Supreme Court interjected a "reasonable observer" factor by holding that a structure does not fall within the scope of the statutory phrase of vessel "unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a partial degree for carrying people or things over water." 133 S.Ct. at 741.

Mr. Cleary explained that the *Lozman* decision appears to adopt an "I know it when I see it" analysis of vessel status that may lead to uncertainty in its application under U.S. law. In this connection, there was a good deal of discussion about whether *Lozman* and its focus on the "reasonable observer" affords a great deal of power to the district judge who presumably will be acting as the reasonable observer. Further, a question was raised as to whether *Lozman* might somehow render the vessel status inquiry one incapable of summary judgment.

There was a great deal of discussion of how *Lozman* impacts the cases involving dockside vessels such as casinos. A question was also raised as to how the reasonable observer test might impact the law related to first preferred mortgages and maritime liens which require the existence of a vessel. Mr. Brian Wallace of New Orleans, who also practices in the marine finance area, explained that in practice, for finance purposes, in a situation where a structure's vessel status is questionable (*e.g.*, dockside casinos), a lender typically uses corresponding security interests by filing a first preferred maritime mortgage as well as a UCC-1 financing statement. In this way, the lender is protected whether the structure is deemed to be a vessel or not in which case state law would apply to the lending transaction. The consensus is that if this is how such structures are treated in practice, then *Lozman* may not change the analysis all that much.

In connection with his presentation, Mr. Cleary provided a handout entitled "*Lozman* & Progeny Case list as of May 1, 2013" identifying some cases since *Lozman* which he believes are relevant and might shed further light on the after-effects of *Lozman*. The handout includes what Mr. Cleary described at the *Lozman* Trilogy consisting of *Lozman* and two other cases that were pending before the Supreme Court at the time that it issued *Lozman* (*Lemelle* and *Mendez/Red Hawk Spar*). The Supreme Court decided *Lozman* on January 15, 2013. On January 22, 2013, the Supreme Court granted certiorari in the *Lemelle* case, vacated the judgment, and remanded the case for further consideration in light of *Lozman*.[1] The Supreme Court denied certiorari in the *Mendez (Red Hawk Spa)* case.

One of the more recent lower court cases identified in Mr. Cleary's handout to address the vessel status question in light of Lozman is *Warrior Energy Services Corp. v. ATP Titan*, 2013 U.S. Dist. LEXIS 57269 (E.D. La. April 22, 2013). Mr. David B. Sharpe of New Orleans, who attended the committee meeting by telephone, was the attorney representing the plaintiff in that case. Mr. Sharpe explained that the plaintiff was seeking to assert a maritime lien against the *ATP Titan* which was a floating production facility. Mr. Sharpe explained that *Lozman* came out when the issue of vessel status was being briefed in the ATP case. The district judge (Judge Vance) invited further briefing on the issue. The district court determined that the structure was not a vessel and dismissed the case for lack of subject matter jurisdiction. The district judge essentially served as the reasonable observer described in *Lozman*. Mr. Sharpe explained that final judgment has only recently been entered and no decision has yet been made on whether to appeal.

To conclude his remarks, Mr. Cleary commented that the *Lozman* trilogy could foster development of separate lines of authority concerning vessel's status for: (1) platforms; (2) dockside vessel structures (such as casinos); and (3) all other vessels. Time will tell.

Mr. Cleary made his PowerPoint and handout available for all.

2. Changes to Rule 82

Mr. Robert J. Zapf of Los Angeles reported on the issue concerning the change to Rule 82 of the Federal Rules of Civil Procedure. By way of background, Professor Edward Cooper of the University of Michigan School of Law, the Reporter of the Judicial Council's Advisory Committee on the Federal Rules of Civil Procedure, requested input from The Maritime Law Association concerning changes to Rule 82 of the Federal Rules of Civil Procedure made necessary by the 2011 changes to 28 U.S.C. Chapter 87 (District Courts; Venue). Specifically, Pub. L. 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392.[2]

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[1] Mr. Brian Wallace of New Orleans represented the casino in the *Lemelle* case. Mr. Wallace confirmed that the *Lemelle* has since been settled. Thus, there will not be any opinion on the vessel status issue following the remand by the Supreme Court.

[2] Former 28 U.S.C. § 1392 provided that "[a]ny civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.'' Because amended 28 U.S.C. § 1391(a)(2) abolished the local-action rule, § 1392 was repealed as unnecessary.

New 28 U.S.C. § 1390(b) conforms to existing admiralty law in excluding admiralty cases from the general venue provisions of Chapter 87, except the transfer provisions. It provides:

> (b) Exclusion of certain cases. – Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Rule 82 of the Federal Rules of Civil Procedure currently provides:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392.

Because of the repeal of § 1392, a change to Rule 82 is required. The Advisory Committee seeks advice on how best to change the Rule to conform to the statutory change and admiralty practice.

Last month, Chair Powers appointed a Working Group of the Committee to address the issue. The Working Group consisted of Chair Powers; Past Chairs of the Committee James W. Bartlett III, Joshua Force, and Robert J. Zapf (current Chair of the Committee's Subcommittee on Federal Rules & Statutes); Professor Robert Force of Tulane University School of Law; and Committee Member, Samuel P. Blatchley.

The Working Group considered the statutory language and the language in Rule 82. New 28 U.S.C. § 1392(b) speaks of "civil actions" in which the district court "exercises" admiralty jurisdiction; Rule 82 speaks of an "admiralty or maritime claim" designated as such under Rule 9(h) of the Federal Rules of Civil Procedure as not being a "civil action for the purposes of 28 U.S.C. §§ 1391-1392."

28 U.S.C. § 1391 is the general venue provision addressing venue for federal civil actions that generally would apply should a plaintiff not make a Rule 9(h) designation of a claim falling within both admiralty and another basis of federal jurisdiction. New 28 U.S.C. § 1390(b) is a statutory recognition that admiralty has its own venue rules and requirements, but that admiralty and maritime claims can be transferred to other districts.

The Working Group was in agreement that a district court exercises admiralty jurisdiction over a civil action (and therefore 28 U.S.C. §1390(b) applies) when the only basis for the district court's jurisdiction is admiralty (e.g., a purely *in rem* action), whether or not there is a specific designation under Rule 9(h). However, the Working Group also recognized that a district court "exercises" other jurisdiction when there is an admiralty and maritime claim which would be cognizable under a separate basis of federal jurisdiction but there is no Rule 9(h) election. The Working Group recognized that in such cases, the general venue provisions of Chapter 87 would apply (e.g., § 1391, or in the cases of interpleader, § 1397).

Accordingly, the Working Group concluded that the simplest "fix" to the required change to Rule 82 was the best: change the identification of the statutory provisions in Rule 82 from "28 U.S.C. §§ 1391 – 1392" to "28 U.S.C. §§ 1390 - 1391." Thus, the revised Rule 82 would read:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

This leaves intact the distinction between a "admiralty or maritime claim" and a "civil action." It maintains the conformity of the use of the term "civil action" in the rule and the statute. It recognizes the distinction made in the new 28 U.S.C. § 1390(b) between when a district court "exercises" admiralty jurisdiction (in which civil actions the venue provisions other than the transfer provisions of Chapter 87 will not govern), and when a district court simply has admiralty jurisdiction but doesn't "exercise" it (in which civil actions the venue provisions including the transfer provisions of Chapter 87 will govern). The recognition in Rule 82 that an "admiralty or maritime claim" designated as such under Rule 9(h) is not a "civil action" to which the general venue provisions of Chapter 87 will apply is preserved. It also permits those general venue provisions to apply when the district court does not "exercise" admiralty jurisdiction in situations where a Rule 9(h) designation is not made. It also permits the transfer provisions of Chapter 87 to apply even when a Rule 9(h) designation is made (and thus the district court "exercises" admiralty jurisdiction). The proposed change does not affect so called "hybrid" cases involving multiple claims or multiple parties where no Rule 9(h) designation is made.

The Working Group then submitted its report and recommendation for consideration of the full Practice & Procedure Committee. Mr. J. Dwight LeBlanc of New Orleans moved to approve the proposed amendment for submission to the MLA for consideration. The motion was seconded and carried unanimously, upon which the following Resolution was to be reported by Chair Powers to the Board of Directors and to be submitted the General Membership Meeting on Friday, May 3, 2013:

> RESOLUTION CONCERNING A PROPOSED CHANGE TO RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE
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> WHEREAS, Public Law 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 of Title 28 of the United States Code by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392; and
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> WHEREAS, Rule 82 of the Federal Rules of Civil Procedure currently provides:
>
>> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392; and

WHEREAS, the statutory change makes necessary a revision to Rule 82 to reflect, *inter alia*, the repeal of 28 U.S.C.§ 1392,

NOW, THEREFORE, BE IT RESOLVED that, to conform to changes to the venue provisions of Chapter 87 of 28 U.S.C., specifically, the adoption of 28 U.S.C. § 1390(b) and the repeal of 28 U.S.C. § 1392, The Maritime Law Association of the United States recommends that Rule 82 of the Federal Rules of Civil Procedure be amended to read:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

Should such a resolution be adopted by The Maritime Law Association, the President will be asked to forward the Resolution to Professor Cooper for consideration by the Advisory Committee.

3. **Local Admiralty Rules in Puerto Rico**

Alberto Castañer of San Juan, who was not in attendance at the committee meeting, had previously raised an issue with Chair Powers prior to the meeting concerning a new standing order issued by the chief judge of the District of Puerto Rico. The standing order addresses what is described as "restricted filings" which include any filing sought to be filed under seal as well as any ex parte application. Under the standing order, a party must file a motion for restriction along with the pleading that it wishes to file on a restricted basis. While the underlying pleading remains restricted pending action by the court on the motion for restriction, the actual motion for restriction is filed on the public docket. As such, there is a concern that the implementation of this standing order could adversely affect the effectiveness of Rule B and Rule C applications as the ex parte nature of those mechanisms could be comprised.

A copy of the standing order was provided at the meeting. It was agreed that the standing order appears not to have been directed at maritime procedures, but since the maritime procedures often involve ex parte application, they have been caught in the scope of the standing order.

It was suggested that Mr. Castañer monitor the situation in the District of Puerto Rico including any maritime filings and to report back to the committee during the Fall 2013 meeting in Puerto Rico as to any impact being felt in the maritime context. It was agreed that depending on what Mr. Castañer reports, the Committee can consider whether a local rules committee needs to be created to address the issue with the chief judge.

4. **Rhode Island Local Admiralty Rules**

Mr. Sam Blatchley of Boston reported on the adoption in Rhode Island of local admiralty rules. Mr. Blatchley explained that a local *ad hoc* committee was formed in Rhode Island in addition to

the local rules committee to draft a set of local admiralty rules. The district court adopted those rules in January 2013.

5. **U.S. Marshal Fees and Commission**

It was reported that the DOJ has proposed increases in the U.S. Marshal's service fee from $55 per hour per person to $65 per hour per person. The DOJ is accepting comments to the proposal by June 11, 2013. It was agreed that there is no basis to submit any comments to the proposal.

The issue of the Marshal's commission was also discussed because there appears to be some inconsistency in the various districts and how the commission on sales is applied. It was confirmed that the limits on the commission fee are set forth in the Marshal's handbook.

6. **Service by Facebook**

Mr. Keith Heard of New York, who was not present at the meeting, relayed through the Chair that the decision in *FTC v. PC Care 247, Inc.*, No. 12-cv-7189 (S.D.N.Y.), is interesting as it apparently discusses the concept of effective service of process by Facebook. All were encouraged to read.

7. **Choice of Law and Alter Ego Context**

Mr. Michael J. Frevola of New York, Chairman on the Joint Sub-Committee on Martime Liens and Vessel Foreclosures, who attended by telephone, brought to the Committee's attention recent developments in the Southern District and Second Circuit concerning the question of choice of law as applied to an ego case filed in the U.S. Mr. Frevola explained that in the case *Blue Whale Corp. v. Grand China Shipping Development, et. al.* the district court had decided, *inter alia*, that the alter ego allegations were governed by the English choice of law provision contained in the primary contract. The decision has been appealed and is pending before the Second Circuit. Mr. Frevola filed an amicus brief and also was granted permission to participate in the oral argument which was held in April 2013. The argument seemed to have shifted somewhat to focus on the question of whether, even if the English choice of law provision did not apply, the court should apply the *Lauritzen* factors to determine which law governs the alter ego analysis. The Second Circuit requested additional briefing following oral argument which has just been completed.

It was agreed that this is one to watch as it could change the complexion of alter ego actions in the context of maritime cases.

8. **Other Business**

Mr. Zapf raised an issue concerning an item of old business that was discussed in 2003/2004 concerning changes to the notice provisions of 45 USC 31325(d). Mr. Zapf explained that the statue, which applies in the context of actions to enforce preferred ship mortgages and other maritime liens, does not on its face require notice to be provided to the vessel owner. Rather, the section requires notice to be provided to the master or other individual in charge of the vessel, other mortgagees, and other lien holders. In 2003/2004, a committee was formed to discuss

whether the statute should be changed along with Federal Rule of Civil Procedures C(4) so as to ensure that the owner is also provided notice to comply with due process. The committee was formed and apparently prepared a report for consideration by the MLA. It is believed that the proposal was submitted to the membership but it is not clear what eventually happened with the proposal. It was confirmed that neither 46 USC §31325(d) nor Rule C(4) has been changed from the language that became the subject of the discussion. The Chair will investigate the status of this proposal.

The meeting was adjourned at noon on May 1, 2013.

In Attendance:

Olaf Aprans, Boston, MA

James W. Bartlett, III, Baltimore, MD

Samuel P. Blatchley, Boston, MA

John C. Cleary, New York, NY

George Cornell, New York, NY

Daniel J. Cragg, Minneapolis, MN

Joshua S. Force, New Orleans, LA (via telephone)

Michael J. Frevola, New York, NY (via telephone)

Shari L. Friedman, Chicago, IL

Alexander M. Giles, Baltimore, MD

Stephen B. Johnson, Seattle, WA

Donald M. Kennedy, New York, NY

J. Dwight LeBlanc, New Orleans, LA

Richard Ottinger, Norfolk, VA

Edward J. Powers, Norfolk, VA

David B. Sharpe, New Orleans, LA (via telephone)

David J. Sharpe, Hudson, NY

Rick A. Steinberg, Hackensack, NJ

Alan Swimmer, Ft. Lauderdale, FL

G. Robert Toney, Ft. Lauderdale, FL

Gina M. Venezia, New York, NY

David R. Walker, Houston, TX

Brian D. Wallace, New Orleans, LA (via telephone)

Robert J. Zapf, Los Angeles