

# Article

## Reviewing the Implications of Differing Vessel Classifications

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In its recent opinion in *Lozman v. City of Riviera Beach*, the US Supreme Court revised the legal definition of "vessel" to mean a structure that a reasonable observer, looking to its physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. This legal definitional revision is a significant change to the prior understanding of "vessel" as, essentially, "anything that floats."

For more than a decade, the issue of vessel status relating to offshore structures was relatively stable. The class of "vessels" included the obvious entrants (such as offshore supply vessels, drillships, barges, tankers, pipelay vessels, and other traditional watercraft) and the not quite as obvious but nevertheless typically well-settled entrants (with some limited exceptions) of mobile offshore drilling units (MODUs) such as jackup and semisubmersible drilling rigs. The class of "non-vessels" or work platforms included those structures typically installed or affixed to the seabed in some relatively permanent fashion (including fixed-base platforms, gravity-based platforms, TLP, and spar platforms). The Supreme Court in *Lozman*, however, may have rung the bell signaling a class change in some instances. *Lozman's* "reasonable observer" may question whether a semisubmersible drilling rig, looking to its physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

Given the court's position, the general industry understanding concerning the vessel or non-vessel/platform classification of offshore structures is arguably now in dispute, raising important questions for the owners and operators of these structures. Offshore craft operating as vessels will continue to be governed by the maritime law, whereas those structures potentially now classified as non-vessels/platforms will fall under the Outer Continental Shelf Lands Act (OCSLA). This constitutes a material departure from the maritime law in several respects including classification of workers as "seamen" or "longshoremen" and enforceability of certain contract terms. Similarly, insurance considerations must be considered, including whether or not protection and indemnity (P&I) vessel coverage is appropriate, or whether an energy package policy for a non-vessel/platform is now required. Additionally, operational and safety regulation and compliance must be addressed as the US Coast Guard (USCG) regulation of vessels often varies from non-vessel/platform regulations administered by the Bureau of Safety and Environmental Enforcement (BSEE). Finally, legal rights and remedies may be affected, including the vessel owner's ability to seek exoneration from or limitation of liability or a claimant's ability to proceed in rem against the vessel directly.

### MARITIME LAW OR OCSLA

While those craft traditionally viewed as vessels will continue to be governed by the maritime law and all that it entails, including special protections for those aiding and contributing to the mission of the vessel, the special-purpose craft such as jackups and semisubmersibles, until recently viewed as vessels, may in light of *Lozman*, now fall under OCSLA. Importantly, OCSLA contains several departures from the maritime law, including the re-classification of workers as "longshoremen" and, in many instances, borrowing the law of the adjacent state were consistent with federal law.

The change in worker classification is potentially significant. In particular, special rights and remedies are available to those workers assigned to vessels and who otherwise meet the definition of "seaman." For example, the Jones Act provides a "seaman" with the ability to file suit directly against his or her employer for negligence, and the doctrine of maintenance and cure places a duty upon the seaman's employer to provide a daily living stipend and cover medical care costs and expenses for a seaman who falls ill or who is injured in the course and scope of employment, regardless of fault. Longshoremen, on the other hand, are covered by a workers' compensation-type scheme under the Longshore and Harbor Workers' Compensation Act, which provides benefits for the worker according to a defined benefit scheme and generally precludes direct legal action against the employer. As a result, the change in classification from vessel to non-vessel/platform and resulting change from maritime law to OCSLA may have a significant impact on the owner or operator's risk management program with respect to injury claims and casualties.

Just as the change in worker classification may result in a significant risk management shift relating to injury claims, the change from maritime law to OCSLA may have an equally important impact on the owner or operator's contractual risk management program. The maritime law allows for the enforcement of defense and indemnification agreements, even broad-form agreements calling for indemnification for one's own negligence where such intent is expressed in clear terms in the agreement itself. Under OCSLA, however, the very same provision may ultimately fail if the law of the adjacent state borrowed under OCSLA would not allow for enforcement of such an agreement. This scenario is often encountered in connection with MODU's where state anti-indemnity acts relating to oil field operations may render void and unenforceable broad-form indemnity provisions pertaining to a well.

#### VESSEL OR PLATFORM INSURANCE

Insurance policies and coverage must also be considered where vessel classification may change. Although P&I coverage is appropriate for vessel operations and assigned crewmembers, a classification change from vessel to non-vessel/platform may require modification of coverage for both property and injury claims. Insurance coverage for property damage claims for non-vessels/platforms would likely be provided under an energy package policy, providing cover for, among other things, physical damage, business interruption/loss of production, operator's extra expense, general liability, and pollution. Coverage for bodily injury claims for non-vessel/platform operations may be provided under a similar energy package, or under a Maritime Employer's Liability or similar policy, which typically provides cover for seaman on non-owned vessels and for platform workers.

The regulatory environment for offshore exploration and production has changed significantly in the last four years. Today, the USCG remains the primary agency overseeing vessel operations and is charged with providing both regulatory guidance and enforcement activities, while the BSEE is the primary agency overseeing actual exploration and production activities. However, both the USCG and BSEE share regulatory and enforcement responsibilities over MODU's and non-vessel/platforms. Thus, a change in vessel or non-vessel/platform classification following Lozman may well have a significant impact on the regulatory and compliance issues affecting the owners and operators of such structures.

Finally, vessel classification changes prompted by Lozman may also affect the legal rights and remedies of owners, operators, and claimants alike. For example, questions concerning the vessel classification of jackup or semisubmersible drilling rigs may jeopardize the owner's ability to seek exoneration or limitation of liability under the Shipowner's Limitation of Liability Act, which can provide a valuable tool in defense of certain claims. Similarly, from the claimant's perspective, a change to non-vessel/platform classification would eliminate a potential claimant's right to proceed with legal action directly against the vessel in an in rem action, which, in turn, may necessitate changes in financing agreements as preferred ships mortgages and other vessel-related financing options and remedies may no longer be available.

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