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Batten Down the Hatches! There May be Rough Seas Ahead Following *Lozman v. City of Riviera Beach*

In establishing a "reasonable observer" test for determining whether a watercraft is a vessel and therefore subject to federal admiralty and maritime laws, the U.S. Supreme Court changed a decades-long, reliable method for determining vessel status, which evaluated a watercraft's ability to engage in maritime transportation or movement and had been developed by common law. In reversing the Eleventh Circuit Court of Appeals, the Supreme Court instituted what some have coined an "I know it when I see it" test that could cause inconsistent outcomes in future cases and confusion within the maritime industry.

On January 15, 2013, the U.S. Supreme Court decided that Fane Lozman's (Lozman's) ramshackle "floating home" was not a vessel as defined by 1 U.S.C. § 3 and therefore not subject to admiralty jurisdiction or a maritime lien against it to collect on debts owed. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). According to 1 U.S.C. § 3, a "vessel" includes, "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Eleventh Circuit had concluded that Lozman's home was a vessel because it could float, proceed under tow, and its shore connections did not prevent it from moving and therefore it was "capable of being used … as a means of transportation on water" even if Lozman intended for it to remain indefinitely moored.

However, the Supreme Court found that the appellate court's interpretation of § 3 was overly broad, rendering anything that floats a vessel. It also found that determining the watercraft's transportation function was essential and required a more practical analysis.

Lozman's floating home comprised a 60-foot by 12-foot house-like plywood structure with French doors on three sides, a sitting room, bedroom, closet, bathroom, kitchen and stairway leading to a second level with office space. The home was kept afloat by the bilge space underneath the main floor. Lozman had towed it on four occasions over a seven-year period over a distance of a combined total of 270 miles, ultimately mooring it at the Riviera Beach marina. Subsequently, a conflict developed between Lozman and the city (Lozman had challenged the city's plans to develop the marina), and after an unsuccessful attempt to evict Lozman from the marina, the city brought a federal admiralty lawsuit *in rem* against the floating home, seeking a maritime lien for unpaid dockage fees and trespass damages.

Focusing on the physical characteristics and activities of Lozman's floating home, the Court found that a "reasonable observer, looking to the [watercraft]'s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water." This was because it had: (1) no rudder or other steering mechanism; (2) an unraked hull; (3) rectangular bottom 10 inches below the water; (4) the inability to generate and store electricity; (5) small rooms reminiscent of ordinary non-maritime living quarters; (6) French doors in lieu of portholes; (7) to be towed in order to move; (8) it had travelled only four times in seven years, and during its longest tow trip, a second boat followed behind to prevent the home from swinging dangerously from side to side. Thus, the floating home was deemed not to have been designed to transport anything other than its furnishings and Lozman's personal effects.

The Court's opinion was guided by two earlier cases. In *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), the Supreme Court determined that a wharf boat

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used to transfer cargo from ship to dock and ship to ship, that was connected to the dock with cables, utility lines and a ramp, was not a vessel. It was not designed (to any practical degree) to serve a transportation function and did not do so. However, in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), the Court determined that a dredge—a massive floating platform from which a suspended clamshell bucket would remove silt from the ocean floor, depositing it onto one of two scows floating alongside the dredge, was a vessel. This was, in part, because the dredge had a captain, a crew, navigational lights, ballast tanks and a crew dining area. Additionally, it had been used and designed, in part, for transporting workers and equipment over water. The dredge was also incapable of being navigated without manipulating the anchors and cables or being towed.

"Lack of clarity in application of the reasonable observer test could lead to increased litigation and illogical or inconsistent outcomes."

Lack of clarity in application of the reasonable observer test could lead to increased litigation and illogical or inconsistent outcomes. For instance, barges lack rudders or steering mechanisms and cannot be self-propelled, and gondolas transporting passengers along city canals have bottoms that are less than 10 inches below the water, yet these watercrafts are typically classified as vessels. Further, schooners cannot store or generate electricity, and many of today's cruise ships lack portholes and have French windows and living quarters that are no different from those inside ordinary homes, yet they are commonly considered vessels. On the other hand, many vessels with raked hulls can hardly be considered vessels. Even the Supreme Court acknowledged that its approach was "neither perfectly precise nor always determinative," and that a watercraft, whose physical characteristics and activities objectively evidence a waterborne transportation function, could later become a non-vessel due to subsequent physical alterations. There has also been some concern that the *Lozman* decision will adversely affect the casino industry and marine financing. Admiralty and maritime laws may now apply to casinos, and financial lenders might experience increased difficulty in characterizing houseboats as collateral for financing agreements and determining their recourse in the event of a default.

For more information, please contact Stephanie Penninger at spenninger@beneschlaw.com or 317.685.6188.

American Transportation Research Institute (ATRI) Research Report Re: Large Truck Safety Trends

Our Partner, Rich Plewacki, serves on ATRI's Research Advisory Committee, which is instrumental in prioritizing research initiatives for the trucking industry. Recently, ATRI released its research findings regarding large truck safety trends.

Although truck crash statistics generally continue to improve year-to-year, the trucking industry is nevertheless exposed to inherent safety risks associated with travel on our nation's highways. This is a major transportation system concern. Public and private sector safety advocates study and interpret truck crash data in order to identify new trends and propose additional safety initiatives.

Previous research examined trends based on a common industry definition of "large trucks" being trucks with a gross vehicle weight greater than 10,000 lbs. However, within this group of large trucks, important distinctions exist between "Medium Duty trucks" (10,001–26,000 lbs.) and "Heavy Duty trucks" (26,001+ lbs.). Therefore, the analysis of data which distinguishes between Heavy Duty trucks and Medium Duty trucks is critical in determining factors that influence large truck safety trends and the industries overall safety condition.

The latest ATRI research confirms that overall large truck crash rates are decreasing; however, the rate of positive decline is offset, in part, by the opposite trend in the Medium Duty truck subgroup. As a result, large truck crash statistics *understate* the safety improvements realized in the Heavy Duty truck population, and the declines in Medium Duty truck safety are hidden because the two groups are not segregated. Thus, this may result in public and private sector safety advocates overlooking certain truck populations for crash reduction opportunities.

Specifically the analysis revealed that:

- Heavy Duty trucks had generally experienced a decline in crash rate index by approximately 25%, while Medium Duty trucks have seen nearly a 40% increase in the index.
- Non-Interstate carrier crashes exhibited a steep increase in crash rate index compared to interstate carriers, particularly among Medium Duty truck crashes.
- An increase in Medium Duty truck crashes on roads with full access control in urban core counties were responsible for much of the increase in Medium Duty truck crash rate index.

The fall report can be found at www.atri-online.org.

An American in . . . Mexico?

An American in Paris won the Academy Award for Best Picture in 1951. The film starred Gene Kelly, who was a pretty big name on the big screen for more than 50 years. What, you ask, do Gene Kelly and *An American in Paris* have to do with Mexico? Not a thing. However, the film and its musical numbers provide a lighter way to introduce a not-so-new program that provides U.S.-based motor carriers the opportunity to obtain operating authority in Mexico. Remarkably, many more Mexican carriers have successfully applied for operating authority in the United States than U.S.-based carriers have in Mexico.

It's Nice Work if You Can Get It

There are many ways for U.S.-based motor carriers to handle freight destined for Mexico. A majority of those loads are transported to the border where, pursuant to agreement, the loads are transferred to a Mexican motor carrier who completes delivery. Since Mexican motor carriers' liability for freight loss or damage is limited to a very modest amount per pound, this arrangement is not without significant risk to the origin carrier. Undoubtedly, the shipper will look to the origin (U.S.-based) motor carrier for recovery of the full amount of the loss or damage to the freight. Operating in Mexico with Mexican authority affords U.S.-based motor carriers qualifying under the program the ability to control transportation of the load from origin to destination.

I'll Build A Stairway to Paradise

In January 2011, the U.S. Department of Transportation and the Mexican Secretaria de Communicaciones y Transportes (the SCT) established a program to permit carriers in the international transportation of cargo to operate outside commercial border zones. Thus was born the Accord Creating a Temporary Modality for the Service of Cross-Border Motor Carrier Transportation of International Freight between the United Mexican States and the United States of America (the Program).

"Since Mexican motor carriers' liability for freight loss or damage is limited to a very modest amount per pound, this arrangement is not without significant risk to the origin carrier."

Under the Program, the first step is for the SCT to issue provisional authority to a qualified U.S. motor carrier for operations in Mexico. U.S.-based motor carriers apply for provisional authority by submitting application TFC-USA-01 and including, among other things: a copy of the carriers' bylaws or articles of incorporation translated into Spanish and certified by apostille; the identification of a legal representative with an address and email address for service of process; proof of legal ownership of the vehicle to be used for transportation and a letter of intent from an insurance company operating in Mexico; a list of drivers with copies of their CDLs and FMCSA reports showing satisfactory safety records; and form TFC-USA-02 requesting a Safety Conditions Review.

Careful and accurate completion of all forms, along with submission of all required documents and records, is critical to ensuring timely receipt of provisional authority. Provisional authority is valid for a period of 18 months, during which time the carrier can register additional vehicles and drivers. If vehicles and drivers pass inspections at the border during an initial three-month term, inspections will be random for the remainder of the provisional period. Between 13 and 17 months of provisional operation, the carrier must submit to a compliance audit by the Direccion General de Autotransporte Federal.

Our Love Is Here To Stay

If the result of the carrier's compliance audit is positive, the carrier may apply for permanent authority to operate in Mexico. The permanent authority process requires, among other things, submission of proof of liability insurance, emissions certificates for each vehicle, and appearance before the Direccion General de Autotransporte Federal in Mexico City. A decision should be made within 30 days.

Not surprisingly, carrier authority granted pursuant to the Program is subject to many additional requirements and regulations beyond the scope of this brief summary. Nevertheless, a new lane hauling cargo in and out of Mexico could result in additional revenue that leaves you *Singin' in the Rain* (that's an ending worthy of Hollywood even though it is the wrong movie).

For more information, please contact J. Allen Jones at ajones@beneschlaw.com or 614.223.9323.

NVOCC Bond Coverage Increased in U.S. Dollar Amount

Recently, the Federal Maritime Commission of the United States (FMC) and the Ministry of Transport of the People's Republic of China (MOT) served notice respectively that, effective November 23, 2012, the amount of bond coverage as proof of financial responsibility for Non-Vessel-Operating Common Carriers (NVOCCs) serving in the U.S.-China trade will be increased from US$96,000 to US$125,000. The increase in the U.S. Dollar amount is intended to reflect fluctuations in the exchange rate between the U.S. Dollar (US$) and the Chinese Renminbi (RMB).

"To help U.S. NVOCCs secure the appropriate amount of financial coverage, FMC had made available the revised form of the "Optional Rider for Additional NVOCC Financial Responsibility" in advance of the November 23rd effective date.

Historically, according to the Regulations of the People's Republic of China on International Ocean Shipping (the China Regulations), which came into force on January 1, 2002, all NVOCCs must provide a cash deposit in a Chinese bank in the total amount of RMB800,000 to secure the debts and fines incurred due to the non-performance or inappropriate performance of their obligations. However, under an agreement entered by the U.S. and China in 2004, an FMC-licensed NVOCC may register in China without paying the cash deposit otherwise required by the China Regulations if it can provide a surety bond in the total amount of RMB800,000 or US$960,000 issued by a U.S. surety company. During the last decade, the exchange rate of US$ to RMB has been increased from roughly 1:8.3 to 1:6.3. So, from the Chinese government's view, even though the US$ amount of the bond coverage is increased to US$125,000, it shows no difference to the RM 800,000 standard at the current exchange rate.

No doubt, U.S. NVOCCs may see the increase of bond coverage differently. Does it impose upon U.S. NVOCCs an additional burden to serve in the U.S.-China trade? To help U.S. NVOCCs secure the appropriate amount of financial coverage, FMC had made available the revised form of the "Optional Rider for Additional NVOCC Financial Responsibility" in advance of the November 23rd effective date. However, it may be helpful only to those FMC-licensed NVOCCs who apply for NVOCC registration in China after November 23, 2012. MOT officials advise that a U.S. NVOCC who already registered in China before November 23, 2012, with a submitted surety bond in the amount of US$96,000 need not take any action at this moment. It is unclear whether it is still true when an NVOCC's registration certificate with MOT expires after November 23, 2012, and needs to be renewed. We will keep following the development of rules regarding NVOCC financial responsibility requirements.

For more information, please contact Leo Pan at lpan@beneschlaw.com or 021-3222 0388

Congratulations!

Marc Blubaugh and Stephanie Penninger

The Transportation Lawyers Association (TLA), an independent, international organization of attorneys serving the transportation community since 1937, announced that Marc Blubaugh was elected as the TLA President-Elect at its Annual Membership Meeting held on May 2, 2013 in Napa, California.

The Board of Directors of The Maritime Law Association of the United States (MLA) approved Stephanie Penninger's membership as an Associate Lawyer of the MLA at its recent meeting in New York City from May 1–3, 2013.

NLRB Notice Posting Struck Down

The United States Court of Appeals for the D.C. Circuit recently issued a ruling striking down the National Labor Relations Board's (NLRB's) notice of employee rights posting requirement in its entirety. This ruling impacts over 6 million employers nationwide who would have been subject to the posting requirement.

In August 2011, the NRLB promulgated a rule requiring all employers subject to the National Labor Relations Act (NLRA) to post a prescribed "Notification of Employee Rights under the National Labor Relations Act." The Notice would have advised employees of their rights to organize a union, form, join or assist a union; bargain collectively through representatives; discuss wages, benefits and union organizing; take action with others regarding working conditions; strike or picket; or choose not to engage in any of these activities. The Notice was widely supported by labor unions and assailed by most employer groups as one-sidedly pro-union. The National Association of Manufacturers and other trade groups brought suit against the NLRB seeking to have the posting requirement vacated. In a unanimous decision, the D.C. Circuit ruled that the Notice posting requirement violated section 8(c) of the NLRA, which protects employers' free speech rights. In a concurring opinion, two judges of the three judge panel also expressed the view that the rule requiring the Notice posting exceeded the NLRB's rule-making authority under the NLRA.

While the NLRB may attempt to take the matter to the Supreme Court, for now no notice posting requirement exists.

Benesch is proud to have served as lead counsel to the National Association of Manufacturers in this case. If you have any questions regarding this Court decision or its impact, please contact any member of Benesch's Labor & Employment Practice Group.

Recent Events

International Warehousing Logistics Association, Annual Convention
Marc Blubaugh
March 10–12, 2013 | Orlando, FL

Supply Chain Game Changers
Council of Supply Chain Management Professionals, Annual Spring Forum
Marc Blubaugh served as Co-Chair of the event and moderator of a panel entitled "Profiles in Success: Local Senior Leadership."
April 19, 2013 | Columbus, OH

Joint Annual Conference of the Transportation Logistics Council & Transportation Loss Prevention & Security Association
Marc Blubaugh presented *Everything You Wanted to Know about FAAAA Preemption But Were Afraid To Ask.*
April 22–24, 2013 | San Diego, CA

Nicholas J. Healy Lecture, Spring General Meeting
Maritime Law Association of the United States
Stephanie Penninger
May 1–3, 2013 | New York, NY

Transportation Lawyers Association's Executive Committee Meeting
Marc Blubaugh, Eric Zalud
May 1, 2013 | Napa Valley, CA

Transportation Lawyers Association's Annual Conference
Martha Payne and **Allen Jones** attended while **Marc Blubaugh** presented *Transportation Contracting: Vocabulary Vinification* and **Eric Zalud** presented *The Shifting Role and Status of Freight Intermediaries in Cargo Claim Litigation Will the Exceptions Swallow the Rule?*
May 1–5, 2013 | Napa Valley, CA

TSA Cargo Security
Columbus Importers and Brokers Association
Thomas Kern
May 8, 2013 | Columbus, OH

Central Ohio Logistics and Big Data
Columbus Region Logistics Council
Thomas Kern, Marc Blubaugh and **Allen Jones**
May 21, 2013 | Columbus, OH

Terralex Annual Conference
Eric Zalud
May 29–June 1, 2013 | New Orleans, LA

On the Horizon

Driverless Car Summit 2013
Association for Unmanned Vehicle Systems International
Thomas Kern
June 11–12, 2013 | Detroit, MI

Conference of Freight Counsel, Semi-Annual Meeting
Eric Zalud
June 15–17, 2013 | Washington, DC

International Warehousing Logistics Association's Legal Symposium
Marc Blubaugh will be presenting *Caution Ahead! Top Ten Transportation Topics of 2013*.
June 20, 2013 | Chicago, IL

American Trucking Associations' General Counsel's Forum
Eric Zalud is attending and **Marc Blubaugh** will be presenting *Freight Transportation Contracting Tips: The Evolution of Freight Claims in the Multimodal System*.
July 14–17, 2013 | Coeur d'Alene, ID

Transportation Lawyers Association, Summer Executive Committee Meeting
Marc Blubaugh and **Eric Zalud**
July 26–27, 2013 | Detroit, MI

Unmanned Systems 2013
Association for Unmanned Vehicle Systems International
Thomas Kern
August 12–15, 2013 | Washington, DC

Oregon Trucking Association Annual Convention
Martha Payne
August 23–24, 2013 | Redmond, OR

International Warehousing Logistics Association's Safety and Risk Conference
Marc Blubaugh will be speaking on Transportation Law.
September 12, 2013 | Forth Worth, TX

PE Investing in Transportation, Distribution & Logistics Companies
Capital Roundtable Conference
James M. Hill, Eric Zalud, Marc Blubaugh and **Peter Shelton**
October 24, 2013 | New York, NY

For further information and registration, please contact Megan Pajakowski, Client Services Manager, at mpajakowski@beneschlaw.com or (216) 363-4639.

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please email Sam Daher at sdaher@beneschlaw.com.

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