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MARINE EMPLOYERS' LIABILITY COVERAGE: WHAT IS IT, AND DO YOU NEED IT? PART 2

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Click here to read Part 1

In Part 1 of this article, we dove into several aspects of marine employers' liability (MEL) coverage that are worth reviewing. First, maritime employers have no legal requirement to carry MEL, unlike U.S. Longshore and Harbor Workers' Compensation Act (USL&H) or State Act workers' compensation coverage. Second, no state or federal agency regulates or administers MEL coverage or approves forms and rates. Third, the damages recoverable to an injured seaman under the Jones Act (or other seamen's remedies) would be determined by a settlement between the parties or through the courts.

This differs from USL&H and State Act workers' compensation, which both have statutorily defined benefits. This all points to tremendous uncertainty for maritime employers. Again, it's extremely prudent for any person or organization that employs persons on or around the navigable waters of the United States to determine if they have an MEL exposure, because getting it wrong could have dire financial consequences.

How To Determine If You Have An MEL Exposure

This is a two-part test. If you pass both tests, you may have an MEL exposure. However, if you fail to pass either test, that doesn't mean you don't have any obligation to the injured worker – it just means you don't have an MEL exposure.

We will discuss the question, "Was the injured worker a seaman?" in the next installment of this article series. First, we need to tackle, "Did the injury happen on a vessel?"

Did The Injury Happen On A Vessel?

This may seem like a straightforward question, but it's not. First, you need to define a "vessel." The Rules of Construction Act defines a vessel as including,

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"Every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (1 U.S. Code § 3). This definition is simple, but its interpretation and application have been left to the courts. The U.S. Supreme Court case Lozman v. City of Riviera Beach, Florida provides the most recent interpretation of this definition. The specifics of this case are interesting.

Lozman v. City Of Riviera Beach

In 2002, Mr. Lozman purchased a 60-foot by 12-foot floating home. The structure was made of plywood, included living accommodations and a staircase leading to a small office space, and was built with an empty bilge space underneath the main floor to keep the structure afloat. It was not capable of propulsion on its own and was towed to two different marinas, including a marina owned by the City of Riviera Beach, Florida, where Mr. Lozman intended to keep it docked indefinitely.

Mr. Lozman and the City had several disputes, including an incident in which Mr. Lozman was arrested for disorderly conduct at a City Council meeting following a verbal disagreement with a council member. In addition, the City tried several times unsuccessfully to evict Mr. Lozman from the City-owned marina. Ultimately, the City filed suit against the vessel in District Court, seeking a maritime lien for dockage fees and damages for trespass under the authority of the Federal Maritime Lien Act (46 U.S.C. §31342).

Mr. Lozman petitioned the Court to dismiss the lawsuit, citing a lack of admiralty jurisdiction. The question at hand was whether Mr. Lozman's floating home should be considered a "vessel" for the purposes of admiralty law. The Court held the floating home to be a vessel and awarded the City damages. Furthermore, the Court ordered the home to be sold to satisfy Mr. Lozman's obligation to the City. The City subsequently purchased the home at a public auction and had it destroyed.

At the time of the District Court's decision, Mr. Lozman appealed. The Eleventh Circuit Court of Appeals agreed with the lower Court's finding that the home should be considered a vessel. A key component of the Appeals Court's decision to uphold this finding hinged on language in 1 U.S. Code § 3, specifically the notion the home was "capable of being used, as a means of transportation on water." Because the home floated and had previously been towed between several marinas, the Appeals Court concurred with the lower Court's ruling that the home was a vessel. However, when the case found its way to the U.S. Supreme Court, the highest court in the land felt otherwise.

In reviewing the case, the Supreme Court disagreed with the lower Courts' findings and found fault in the logic used in their ruling. While the lower Courts relied on the theoretical possibility the home could be used for transportation, the higher Court took a more practical view of the matter and felt the lower Court's interpretation was too broad. Specifically, the Court noted, "A reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on the water."

Based on this "reasonable observer" standard, the Court ruled the floating home not to be a vessel. To illustrate that point, the Court cited the examples of, "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 the are 'artificial contrivances' capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so."

Practical Implications Of Lozman

While the Supreme Court ruled the floating home was not a vessel based on the reasonable observer standard, the ruling was not unanimous. Justices Sotomayor and

Kennedy offered a dissenting opinion. Among other things, they question the Court's use of the reasonable observer standard, noting, "Despite its seemingly objective gloss, effectively (and erroneously) introduces a subjective component into the vessel-status inquiry."

They question the relevance of several of the floating home characteristics the majority cited in its ruling. They assert that the outcome may have been different with a more developed record, thus supporting the opinion that the case should have been remanded for additional fact-finding. They note the need for regulatory certainty in the maritime industry and acknowledge that this ruling "frustrates these ends." Most importantly, the dissenting opinion asserts that the analysis used by the majority in its ruling "will confuse the lower courts and upset our longstanding admiralty precedent."

So now that we've discussed the legalese, let's bring this back to risk management, insurance, and specifically MEL. As the Lozman case illustrates, the courts can be unpredictable, their views change over time, and juries are even more of a wildcard! As a business owner, you might be returning to the first question of whether you have an MEL exposure – a decision you do not want to leave up to the courts. Parker, Smith & Feek's Marine Practice Group can help you answer that question by identifying and describing your exposures and building a toolbox to match.

For the second question of whether the injured worker was a seaman, stay tuned for Part 3 of this article series on MEL exposures.