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CURRENTS: Keeping in Tow with Maritime Legal Updates
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The Party Is Over for Some Charters

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On November 26, 2004, the *M/T Athos I* allided with an abandoned anchor in the Delaware River while attempting to dock in Paulsboro, New Jersey. The nine-ton anchor punctured the vessel's hull, spilling 264,000 gallons of heavy crude oil into the Delaware River and nearby tributaries, traveling no fewer than 115 miles downriver into Pennsylvania, New Jersey, and Delaware.[1]

The *M/T Athos I*, a 748-foot oil tanker, was owned by Frescati Shipping Company, Ltd. (Frescati). Frescati chartered the *M/T Athos I* to Star Tankers Inc., an operator of tanker vessels, which in turn entered into a subcharter agreement (charter party) with CITGO Asphalt Refining Company (CARCO), and it was CARCO that chose the berth at Paulsboro, New Jersey.[2] Through its charter party with Star Tankers, CARCO contractually agreed to a "safe-berth clause" drawn nearly verbatim from a template agreement known as the ASBATANKVOY form.

Following nearly 15 years of litigation and approximately $143 million in cleanup costs, a host of parties arrived at the United States Supreme Court for a determination of whether a "safe-berth clause" is a warranty of safety in selecting a berth. Last week, on March 30, 2020, the Court held that it is.

Rejecting CARCO's arguments that the "safe-berth clause" imposed only a duty to exercise due diligence in selecting a berth (invoking tort law concepts), Justice Sotomayor, writing for the majority, held that the "safe-berth clause" at issue was so clear and unambiguous that the Court need look no further than Webster's Collegiate Dictionary to resolve the matter pursuant to fundamental rules of contract construction. Specifically, the "safe-berth clause" provided, in relevant part, that CARCO "shall ... designat[e] and procur[e]" a "safe place or wharf," "provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat."

In analyzing that clause, the Court found the inclusion of the words "safe" and the phrase "always safely afloat," with no limiting language, required the charterer to select a berth that was "free from harm or risk" in which the vessel would, "at all times," remain afloat. The selection of any berth that does not meet such qualifications is a breach of the clause.

Despite the fact that the clause does not expressly use the word "warranty," the majority reasoned that it is well-settled maritime law that "[s]tatements of fact contained in a charter party agreement relating to some material matters are called warranties,"[3] and that the safe-berth clause in the CARCO charter party contained a statement of material fact as to the safety of the selected berth.

The Court's March 30 decision resolves a split between the Second and the Fifth Circuit Courts. The Second Circuit had previously held a safe-berth clause establishes a warranty of safety, whereas the Fifth Circuit had held that such a clause imposes only a duty of due diligence. In the proceedings before the Third Circuit, the appellate court followed the reasoning of the Second Circuit, which the Supreme Court has now affirmed.

The Supreme Court was quick to point out that parties are still able to negotiate contract terms to limit liability based upon tort law concepts, as the parties in fact did here, but in other clauses of the charter party agreement. The majority concluded, quoting Kirby, 543 U.S. 14, in part, "[w]e emphasize [ ] that our decision today does no more than provide a legal backdrop against which future charter parties will be negotiated."[4] [Internal punctuation omitted.]

While it may seem as though the Court's decision could be narrowly construed

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to apply solely to the safe-berth clause ASBATANKVOY form, charterers would be well advised to review the safe-berth language of any prospective charter party agreements to ensure they understand the obligations undertaken prior to setting sail.

For more information

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[1]U.S. Department of Commerce, National Oceanic and Atmospheric Administration report https://darrp.noaa.gov/oil-spills/mt-athos-i.

[2]CARCO was both the shipping customer and the wharfinger who operated the berth. In re Frescati Shipping Co., Ltd., 886 F.3d 291 (3d Cir. 2018), cert. granted sub nom. CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019), and aff'd sub nom. CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd., No. 18-565, 2020 WL 1496603 (U.S. Mar. 30, 2020).

[3]CITGO Asphalt citing 22 Williston § 58.11, at 40-41.

[4]CITGO Asphalt at *9 citing Norfolk Southern R. Co. v. James N. Kirby, Pty. Ltd., 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004).

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