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U.S. Supreme Court Issues Safe Berth Warranty Decision

The final decision in the ATHOS I saga has recently been issued by the U.S. Supreme Court, upholding the decision of the U. S. Court of Appeals for the Third Circuit to the effect that a plain reading of the language found in the ASBATANKVOY charter form creates a warranty of safety rather than merely a duty of due diligence.

OPERATIVE FACTS

The facts were these: the voyage charterer of the fully laden tanker ATHOS I was also the owner of the refining complex in Paulsboro, New Jersey, which the vessel was approaching when its (single skin) hull was torn open by an anchor that had been lost/abandoned by some unknown vessel. The anchor was lying on the bottom of a federally-maintained anchorage ground through which the ship had to transit on its way to the berth from the federally-maintained ship channel. The anchor, which had not been previously discovered or removed by the U.S. Army Corps of Engineers, had evidently laid on the bottom with its flukes down for at least three years, during which time many ships had passed over it without incident. But, at some time prior to the ATHOS' arrival, the anchor was somehow flipped over so that its flukes could be in position to rake the ATHOS I's hull and tear open a number of its cargo tanks. ATHOS I's cargo was Venezuelan heavy crude oil, which the charterer/wharfinger was importing to use in making asphalt. Because the anchorage was maintained by the federal government, the charterer/wharfinger had never expected that the anchorage would have obstructions within it so, although passage through the anchorage en route the berth commonly involved passage through the anchorage, the charterer/wharfinger never took steps on its own to conduct sonar surveys. An estimated 263,000 gallons of Venezuelan crude oil was released into the Delaware River when ATHOS I was punctured, giving rise to enormous (U.S. $180 million+) cleanup and business interruption expenses.

The vessel was the subject of two charter parties. The first was a time charter between the vessel's owner and a fleet operating entity under which the latter agreed to exercise "due diligence" to ensure that the vessel was only sent to "safe places." The time charterer then subchartered the vessel under a voyage charter to the operator of the Paulsboro refinery on the ASBATANKVOY form, which contained a "safe berth" or "safe berth" warranty that was not expressly limited to the exercise of due diligence. The owner of the ship was not a direct party to this subcharter. The owner of the ship remained its operator and was therefore the responsible party for the consequences of the oil spill under the Oil Pollution Act of 1990.

The origin of the anchor being unknown, the shipowner sued the charterer/wharfinger for breaches of both the contractual "warranty of safe berth" (Charterer "shall select…always safely afloat") found in the ASBATANKVOY charter party and of the maritime law duty of care to properly maintain its berth and the approach(es) thereto. The United States was a party to the suit both for recovery of funds from the national Oil Spill Liability Trust Fund, which had made partial reimbursement payments to the innocent ATHOS I and her underwriters, and as the subject of a counterclaim for having failed to properly maintain the anchorage.

THIRD CIRCUIT DECISION

The case was originally tried for 41 days to the bench in the U.S. District Court for the Eastern District of Pennsylvania (Hon. John P. Fullam presiding), which found that the charterer/wharfinger was not liable for harm caused by the casualty on any theory. But the Third Circuit reversed in a precedential opinion (*In re Petition of Frescati,* 718 F 3rd 200 (3rd Cir. 2013). The Third Circuit held that the ship owner was a third-party beneficiary of the voyage charter warranty because that warranty was certainly intended for the benefit of the vessel. That contractual warranty had been breached as a matter of law irrespective of the amount of diligence exercised by the wharfinger/charterer under the circumstances because the approachway to the berth was in fact obstructed and the contractual warranty did not have a due diligence limitation. ("[The] safe berth warranty is an express assurance of safety." The ship's captain was not in a better position to ascertain the safety of the berth than the charterer because the charterer was itself on scene and "*had selected its own berth*.") It further held that the contractual warranty obligations were not avoidable, as had been argued by the charterer/wharfinger, as a result of the ship's captain having impliedly accepted the berth as safe when it had been nominated.

In its opinion, the Third Circuit declined to follow the *Fifth Circuit's decision in Orduna S.A. v. Zen-Noh Grain Corp.,* 913 F. 2d 1149 (5th Cir. 1990), which had adopted a due diligence limitation for the reasons suggested by notable admiralty law scholars Gilmore and Black, but instead followed the reasoning of a line of cases decided by the Second Circuit going as far back as 1935, citing *Venore Transportation Co. v. Oswego Shipping Corp.,* 498 F. 2d 469 (2ndd Cir. 1974) as the most recent in the line.

The ATHOS I case was remanded to the district court for findings as to causation. The district court (Hon. Joel H. Slomsky in place of the by-then-retired Judge Fullam), found that the breach of the charter party warranty—as defined by the Third Circuit opinion—was a proximate cause of the casualty and its resultant costs, entering judgment against the charterer/wharfinger.

SUPREME COURT DECISION

The U.S. Supreme Court, recognizing the split between the circuits as to the interpretation of the contractual safe berth language, granted the *writ of certiorari* and the case was argued in 2019. In an opinion by Justice Sotomayor issued on March 30, 2020, joined by all but two dissenters (Alioto and Thomas, JJ), the Court used the traditional contract analysis principles said to have been adopted by the general maritime law to find that no ambiguity existed in the ASBATANKVOY language as to the agreement or intent of the parties. "Our analysis begins and ends with the language of the safe-berth clause." The use in the charter of the words "shall…designate and procure" a "safe place or wharf" and "always safely afloat" created a strict contractual warranty obligation upon the Charterer as to the ship's safety, not a mere duty to exercise due diligence. "Due diligence" is a tort concept that has no place in the analysis because no such language is anywhere found in the charter form at issue. The Court found that the decisions of the Second Circuit, which had been followed by the Third in this case, were in tune with the longstanding contract interpretation rules; the contrasting decision of the Fifth Circuit relied upon by the charterer was based less upon contract language analysis and more upon considerations of public policy. According to the majority, the dissent's central pillar, the idea that the charter gave the charterer the right to select a berth rather than an obligation, was "atextual". "The word *shall* usually connotes a requirement," says the majority in a brief footnote.

The charterer had argued that unless a "due diligence" limitation was read into the charter, the charterer would be "strictly liable" for damage caused by the breach of contract. The Court showed little sympathy for this view because contract law does not consider notions of "fault." If a contractual promise is breached, damages are awardable whether or not the breach was in any sense the fault of the promisor. The parties could easily have agreed to limit or condition the charterer's safe berth promise if they had chosen to, according to the Court, citing examples of such

limits elsewhere in the charter. The Court also pointed to other forms of charter party that explicitly incorporate the "due diligence" limitation in their safe-berth clauses.

The Court in similar fashion rejected the argument that the charter somehow imposed a duty upon the ship's master to refuse to enter a berth chosen by the charterer, based upon the concept proposed by legal commentators that the master is usually in a better position than the charterer to learn whether or not a berth is safe. The Court holds that no such duty exists merely because the master has the admitted right of refusal and the existence of such a right does not relieve the charterer of its warranty obligation.

CONCLUSION

Freedom of contract is the basis of the Court's decision. In its concluding paragraph, the Court states that "our decision today 'does no more than to provide a legal backdrop against which future [charter parties] will be negotiated.' Charterers remain free to contract around unqualified language that would otherwise establish a warranty of safety, by expressly limiting the extent of their obligations or liability."

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