

ADMIRALTY LAW

Expert Analysis

## Supreme Court Dips Into Admiralty

*From a tugboat, on the river going slow.*

*A cement bag it is dropping on down*

...

—Frank Sinatra,  
“Mack the Knife”

Like Frank Sinatra, the U.S. Supreme Court loves all things maritime. So much so, that its first maritime contract dispute was decided in 1781. Now, 238 years after that first contract decision, with many in between, the Supreme Court has its radar set on resolving another important maritime contract dispute.

The case is not about a tugboat or cement bag dropping overboard, but a spill of 264,000 gallons of crude oil into the Delaware River. A nine-ton anchor sliced through the skin of an oil tanker while approaching its berth in Paulsboro, N.J. The anchor, long abandoned in the navigation channel, pierced the hull of the Motor Tanker (M/T) ATHOS I causing the oil spill. *U.S. v. CITGO Asphalt Ref. Co. (In re Frescati Shipping Co.)*, 886 F.3d 291 (3d Cir. 2018).

Admiralty is like a pleasure cruise for the Supremes. Wherever it takes them, they are happy to go! In 2004, the Supreme Court decided “a maritime case about a train wreck.” *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) (J.

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O'Connor). In 1995, a case to define who is a “seaman.” *Chandris v. Latsis*, 515 U.S. 347 (1995). In 2013, a case to define what is a “vessel.” *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). Hard to believe such terms need defining so many hundreds of years after the term “admiralty and maritime law” first appeared in the United States Constitution. (Article III, §2, “The judicial power shall extend ... to all cases of admiralty and maritime jurisdiction.”). Such other notable cases as the TITANIC, EXXON VALDEZ and the BP oil spill (DEEPWATER HORIZON) have been in the Supreme Court’s wheelhouse. Indeed, in just his third decision on the bench, Justice Brett Kavanaugh authored a maritime products liability case involving asbestos exposure to U.S. Navy personnel. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (March 19, 2019).

### What Is a Safe Berth?

M/T ATHOS I is a contract case stemming from the massive 2004 oil spill which is being taken up to resolve a split in the Circuits on another seemingly innocent question: What is a “safe berth”? *In re Frescati Shipping*, 139 S. Ct. 1599 (April 22, 2019). This is important because ‘uniformity’ in the Circuits is a primary mission of admiralty law in general and The

Maritime Law Association of the United States (MLA) in specific. The Supreme Court will decide a conflict between Second and Third Circuit rulings on the issue, versus the Fifth Circuit.

The ATHOS I had completed its 1,900-mile voyage laden with Venezuelan crude, and was only 900 feet (about a ship’s length) away from docking at Paulsboro, with a harbor pilot onboard, when the vessel struck the abandoned anchor in the channel. The spill polluted hundreds of miles of shoreline in New Jersey, Pennsylvania and Delaware, and was the second worst oil spill in U.S. waters at the time. The incident is one of several oil spills that sparked Congress to require the use of double-hull tankers. 33 C.F.R. §157.10(d). The oil spill cleanup cost the shipowner and the U.S. Government a combined \$143 million. Both sought to recoup the funds under the Oil Pollution

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Act (OPA) of 1990, 33 U.S.C. §2701, et al. from the voyage charterers (lessee) of the vessel CITGO Asphalt Refining Company, CITGO Petroleum Corp. and CITGO East Coast Oil Corp. (CARCO). The OPA ‘90 legislation resulted from the aftermath of the 1989 M/T EXXON VALDEZ oil spill in Prince William Sound, Alaska.

### Circuit Split

The Third Circuit decided to follow Second Circuit law that a safe-berth clause in

a ship charter contract is a form of strict liability rule that guarantees a ship's safe arrival to the berth. The Second Circuit decided in *Cities Serv. Transp. Cop. v. Gulf Ref. Co.*, 79 F.2d 521 (2d Cir. 1935) that "the charter party was itself an express assurance, on which the master was entitled to rely, that at the berth 'indicated the ship would be able to lie always afloat.'" This rule was confirmed in *Venore Transp. Co. v. Oswego Shipping*, 498 F.2d 469 (2d Cir. 1974), wherein the Second Circuit held that a voyage charterer "had an express obligation to provide a completely safe berth, an obligation which was non-delegable." On the other hand, the Fifth Circuit rejects this strict liability standard and held in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), that "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port. In conclusion, we hold that a charter party's safe berth clause does not make a charterer the warrantor of the safety of a berth. Instead the safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth."

Procedurally, the shipowner (Frescati) fired the first shot by filing the standard vessel owner defense in federal court seeking Exoneration from or Limitation of Liability under 46 U.S.C. §30501, et al. This was followed by a claim against the shipowner by 'CARCO' for the loss of its oil cargo. Frescati counterclaimed against CARCO in tort and for breach of contract for its own unreimbursed clean-up costs of \$56 million. Br. for Petitioner, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 139 S. Ct. 1599 (2019) (No. 18-565).

Frescati's contract claim, which is the only surviving claim, asserted that CARCO breached the safe-berth provision in the voyage charter contract even though

Frescati was not a party to that maritime contract.

The safe berth clause in the voyage charter that will be scrutinized by the Supreme Court reads:

[t]he vessel shall load and discharge at any safe place or wharf ... which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage [cargo transfer] being at the expense, risk and peril of the Charterer ...

### Due Diligence or Bust?

The bottom line inquiry for the Supreme Court is how wide a net is cast, or scope of, the safe berth warranty. As mentioned, the Second Circuit view is strict that the clause effects an "express assurance that

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the berth will be as represented." The Fifth Circuit attaches a duty of "due diligence" on the charterer to select a safe berth. *Shipping Co. v. CITGO Asphalt Refining Co.*, 718 F.3d 184, 203 (3d Cir. 2013).

The charterers' position is that rigid adherence to a strict liability warranty is harsh and lacks consideration that the charterer may have done absolutely nothing to either create the hazardous situation or contribute to the damage. CARCO had nothing to do with the abandoned anchor left lying beneath the surface in the navigation channel many years before the M/T ATHOS I embarked on its voyage to the CITGO refinery in the Port of New Jersey. CARCO thereby argues that it was an 'innocent' party and should not be held accountable for the massive oil spill.

This was a case with no clear horizon. In 2011, the trial court cleared CITGO and placed blame instead on the owner of the abandoned anchor, *In re Frescati Shipping*

*Co.*, 2011 U.S. Dist. LEXIS 40020 (E.D. Pa. 2011), only to be vacated in 2016, when the same court found CITGO negligent and in breach of the charter contract warranty, for failing to provide a safe berth for the vessel. *In re Frescati Shipping Co.*, 2016 U.S. Dist. LEXIS 96761 (E.D. Pa. 2016). It's interesting to note that a bench trial took place with more than 20 witnesses over 41 days, as well as appeals and remands for over 15 years, when it would appear that all the Third Circuit would have required (now) was a motion for summary judgment on the 'warranted' safe berth as a pure breach of maritime contract. The contractual warranty does away with liability based on fault, or any evaluation of 'due diligence.' But, is that really the proper result in determining huge liabilities for such massive oil spills? Indeed, that is the difference between breach of contract and maritime tort principles.

### Conclusion

The impact the Third Circuit's ruling has had on commercial shipping and maritime charter contracts is hard to tell, but no doubt 'innocent' voyage charterers are keenly aware, if not wholly spooked by the tremendous exposure to strict liability posed by a safe-berth clause. The result presently depends on the venue of the litigation and what law applies. For this reason alone, the Supreme Court must weigh in.

The ball is now in the Supremes' court to decide yet another important issue facing commercial shipping and the affected parties. In the long run, it may boil down to the intent of the original drafters of the safe berth clause; and for that answer, the Supremes may have to look back hundreds of years!