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Latest Maritime Case Before US Supreme Court

Former Vincent C Immel Professor of Law at Saint Louis University School of Law, Joel Goldstein, has recently commented on the latest of several recent maritime cases before the Supreme Court of the United States via *SCOTUSblog*.

The following is the complete content of that October 29 blog, which is entitled – "Argument preview: Justices consider impact of safe-berth clause in maritime charter":

Having decided two maritime-law cases during its October 2018 term, the Supreme Court will consider its third admiralty case in just over a year when it hears argument in CITGO Asphalt Refining Company v Frescati Shipping Company on November 5. The case asks whether federal maritime law treats a standard safe-berth clause in a voyage charter as guaranteeing the ship's safety or as satisfied by the charterer's due diligence. Appellate circuits have divided, with the US Courts of Appeals for the 2nd and 3rd Circuits tending to treat such safe-berth clauses as warranties, as the 3rd Circuit did here, and the US Court of Appeals for the 5th Circuit applying a due-diligence requirement.

The case involves a dispute over who is financially responsible for more than US$140 million in damages from a spill of about 264,000 gallons of oil in the Delaware River on November 26, 2004, from the M/T Athos I, a single-hulled oil tanker, after it struck a submerged anchor that an unknown party had abandoned. The allision occurred when the vessel was about 900 feet from its destination after a 1900-mile journey from Venezuela to Paulsboro, New Jersey, and was being navigated by a local docking pilot and assisted by helper tugs through an anchorage area adjacent to the destination. Frescati, which here refers collectively to the owner and separate manager of the Athos, paid for the initial cleanup under the Oil Pollution Act (OPA) of 1990, administratively limited its liability under OPA for cleanup, and then obtained reimbursement from the federal Oil Spill Liability Trust Fund for about US$88 million for expenditures over that limit, with the federal government partially subrogated to Frescati's rights. After Frescati filed a Petition for Exoneration from or Limitation of Liability under a federal statute regarding claims not covered by OPA, CITGO Asphalt Refining Company (CARCO) filed a claim for its loss of cargo from the spill. Frescati counterclaimed in contract and tort for nearly US$56 million for the unreimbursed cleanup costs and additional damage relating to the vessel. The United States asserted the fund's subrogated rights and the suits were consolidated.

The argument before the Supreme Court relates to the contract claim advanced by Frescati and the United States. Frescati had chartered the Athos I in 2001 to non-party Star Tankers Inc in a standard time charter that allowed Star to subcharter the vessel for specific voyages while Frescati remained responsible for keeping the vessel staffed and serviceable. Three years later, Star subchartered the vessel to CARCO to carry cargo for the single voyage on which the spill occurred, using the ASBATANKVOY standard charter party form. It included the following clause:

> *The 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 being at the expense, risk and peril of the Charterer.*

The voyage charter also provided that the Athos I, once loaded, would proceed "to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo" and that

the "Discharge Port(s)" would be one or two "safe port(s)" along the Atlantic coast of the United States. The parties identify these clauses as safe-berth or safe-port clauses and describe the distinction in terminology as immaterial. CARCO directed the vessel to its Paulsboro facility.

After litigation spanning more than 13 years, including two trials that together lasted more than ten weeks and two trips to the 3rd Circuit, that court essentially held in part that Frescati was an implied beneficiary of the Star-CARCO safe-berth clause, which the court concluded warranted the safety of the berth without regard to the charterer's diligence. Accordingly, CARCO was deemed contractually liable to Frescati and the United States for damages in excess of US$143 million plus prejudgment interest. CARCO asked the Supreme Court to resolve the circuit split over the treatment of a safe-berth clause in a voyage-charter agreement.

The parties' arguments take up more than 170 pages in four briefs. In essence, CARCO argues that the safe-berth clause is not an implied warranty imposing strict liability on charterers for unknown risks, but instead simply allows the charterer to suggest the place of discharge subject to the vessel's right to reject an unsafe berth. It contends that the parties did not intend to impose absolute liability on CARCO. In numerous other provisions, the voyage charter used the term "warrant," but that word did not appear regarding the berth or port, CARCO argues. Moreover, Star warranted in the voyage charter that it would carry US$1 billion in oil-pollution insurance and provided that the charterer was not liable for perils of the sea, provisions inconsistent with treating the safe-berth clause as a warranty covering an oil spill under these circumstances.

Frescati and the United States, by contrast, argue that the safe-berth clause constituted an express assurance of the safety of the designated berth and that decisions have long treated such clauses as warranting the safety of the charterer's chosen port absent qualifying language. Under industry custom, Frescati and the United States contend, charterers who wish to assume a lesser due-diligence burden or eliminate a safe-port clause can do so contractually. CARCO's unqualified safe-port clause accordingly was a warranty. Frescati dismisses CARCO's reliance on the perils-of-the-sea clause, arguing in part that the agreement subordinated that clause to the safe-port provision, an assertion that CARCO denies. The United States, which will share argument time equally with Frescati, rejects the oil-pollution-insurance argument, arguing that a spill might have occurred anywhere along the vessel's voyage, whereas the safe-berth clause applies to a limited location. CARCO pushes back, finding the government's distinction unpersuasive.

CARCO contends that the Supreme Court has never interpreted safe-berth clauses as warranties, and that earlier cases involved disputes over expenses the vessel incurred when the designated discharge venue was rejected due to known or knowable perils. Frescati and the United States, by contrast, interpret Supreme Court precedent to support their position that a clause like that in the voyage charter constitutes a warranty. CARCO characterises adverse 2nd Circuit precedent as inconsistent with Supreme Court decisions and lacking any supporting reasoning. Frescati and the United States argue that longstanding 2nd Circuit precedent supports their interpretation and that the clarity of the contractual language or custom made additional explanation unnecessary. CARCO invokes "The Law of Admiralty," the often-cited treatise by Grant Gilmore and Charles L Black Jr in support of its interpretation and of the 5th Circuit's approach. Frescati contends that Gilmore and Black's treatise is an outlier on this issue, that it is outdated, and that it simply regarded the due-diligence interpretation as the better view while recognising that industry custom supports the warranty interpretation.

Frescati argues that charter disputes are generally arbitrated in New York or London, that New York arbitrators have viewed unqualified safe-port clauses as warranties, and that although English arbitration awards are unpublished, English judicial decisions treat safe-berth clauses as warranties. CARCO's reply brief disputes Frescati's interpretation of some New York arbitration decisions and denies that custom is as unified as Frescati suggests. CARCO contends that most of America's largest ports, including Houston, are in the 5th Circuit, and that Houston arbitrators tend to follow that circuit's due-diligence approach. In response to the argument that CARCO should have negotiated narrower

language, CARCO asserts that the terms of the form, the 5th Circuit's interpretation and Gilmore and Black's treatise all support its position that the safe-berth language did not constitute a warranty and that further language to that effect was not required.

As a policy matter, CARCO contends that maritime commerce would be best served by construing safe-berth clauses as requiring that charterers exercise due diligence rather than subjecting them to strict liability, and that the warranty interpretation produces an inequitable result. Frescati and the United States respond in part that contracting parties should be able to allocate the risk based on negotiations. Moreover, Frescati claims that English cases treat safe-berth clauses as warranties and that international uniformity of maritime law would be advanced by following that approach. CARCO replies that the English doctrine is more nuanced; that English law does not automatically receive deference in maritime matters, especially when United States law governs, as is the case here; and that it is not clear that English law would be inconsistent with the 5th Circuit's due-diligence approach.

[Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among the counsel to the respondents in this case. The author of this post is not affiliated with the firm.]

The case was heard on November 5 and, at the time of publication, a decision was still pending.

The Supreme Court of the United States case docket file can be viewed here.

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