THE SAGA OF THE ATHOS I LITIGATION CONTINUES: RECENT DECISION ON SAFE BERTH WARRANTY AND WHARFINGER'S NEGLIGENCE

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In a meticulous 174-page Opinion handed down on July 25, 2016, following an 8-week trial held in the spring of 2015, Judge Joel H. Slomsky of the U.S. District Court for the Eastern District of Pennsylvania awarded Frescati Shipping Company, Ltd. and Tsakos Shipping & Trading S.A., the owner and operator of the tanker *M/V Athos I*, their claim in full, plus accrued interest, for a total judgment in the amount of $71.5 million against Citgo Asphalt Refining Company and related companies ("CITGO") in a case arising from a catastrophic 2004 oil spill at Paulsboro, New Jersey, just across the Delaware River from Philadelphia. [1]

We refer to our article on this case appearing in the Club's newsletter of May, 2014 for the full details of the prior history of this litigation, but in brief:

The Casualty

On November 26, 2004, while the *Athos I* was attempting to dock at CITGO's Paulsboro refinery on the Delaware River, her hull was punctured by a 9-ton anchor abandoned on the river bed. The anchor punched a hole in a cargo tank allowing over 264,000 gallons of heavy crude oil to spill into the river, closing the port while emergency responders scrambled to contain the spill under difficult tidal and weather conditions. The oil spill cleanup cost in excess of $143 million. The vessel also suffered millions of dollars in damages and was out of commission for many months. The owners sued CITGO for breach of a maritime "safe berth" warranty, and for negligence in failing to ensure that the approach to its terminal's berth was clear of obstructions to navigation.

The Fund Claim and First Trial

Frescati also had submitted a claim to the National Pollution Fund Center for reimbursement of its response costs in excess of its $45 million limitation cap under the Oil Pollution Act of 1990. In 2006, the Fund determined that the owner was entitled to limit its liability and ultimately reimbursed it in the amount of $88 million. The owner then proceeded with a lawsuit against CITGO seeking damages of $55 million, including its unreimbursed oil spill response costs, cost of hull repairs, detention and related expenses on the grounds of breach of the safe berth warranty under the ASBATANKVOY sub-charter and wharfinger's negligence. The first trial was held in 2010, and ran for approximately eleven weeks at which 64 fact and expert witnesses testified. The trial judge held that Frescati, as the head owner, was not a third-party beneficiary of the safe berth warranty that CITGO gave in the sub-charter and, moreover, that the berth was safe based on an accident free track record with other ships. The Judge also denied the wharfinger's negligence claim on the ground that CITGO did not control the federal anchorage through which ships had to transit to arrive at its berth and, therefore, CITGO was not responsible for conditions in the anchorage.

[1] The Opinion may be found at In re Petition of Frescati Shipping Co., Ltd., 2016 WL 4035994 (E.D. Pa. 2016); 2016 A.M.C. (E.D. Pa. 2016), or contact the author at eoconnor@mmwr.com.

The Appeal

The owner appealed his Decision to the Third Circuit Court of Appeals who, in 2014, reversed these holdings by the trial court. The Court of Appeals instead held that indeed the shipowner, although not a party to CITGO's sub-charter, was a third-party beneficiary of its safe berth warranty. It also held that the warranty was an absolute warranty that the berth was safe for the *Athos I* provided her draft was no more than 37 feet [2]. In addition, the Appellate Court held that CITGO had a wharfinger's duty to insure that the approach to its dock was safe for incoming vessels, even though it was through a federal anchorage[3].

With these holdings now "law of the case"[4], the Third Circuit remanded the case to the district court to make findings of fact relating to the vessel's draft on arrival at Paulsboro, the standard of care that should apply to CITGO as wharfinger, and whether a defense for navigational negligence or unseaworthiness should apply. If CITGO was found liable on either of these claims, the court would also determine Frescati's damages.

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The Second Trial on Remand

The second trial was complicated by the fact that the judge who presided over the first trial retired, so the case was reassigned to another trial judge who first had to certify familiarity with the mountainous record from the first trial[5] at which 64 fact and expert witnesses testified. Judge Slomsky certified the requisite familiarity with the prior record in late 2014 and the second trial, at which 24 witnesses were recalled to testify again, carried through approximately eight weeks in the spring of 2015. This lengthy opinion was issued just over a year later.

The "Athos I"

The second trial court found in favor of Frescati on all counts. First, it found that the vessel's arrival draft was less than 37 feet which, based on the Third Circuit's prior ruling, meant that CITGO was in breach of the safe berth warranty. The court went on to consider Frescati's claim of wharfinger's negligence and held that the appropriate standard of care for CITGO, under the circumstances of this case, was to scan the approach to its berth periodically using readily available and relatively inexpensive side-scan sonar to search for any obstructions to navigation, and either remove or warn vessels utilizing its berth if any such obstructions were detected. The court also found that there was no negligent navigation or unseaworthy condition on the ship that was a contributing cause of the casualty.

[2] It was undisputed that CITGO's voyage instructions were for the ATHOS to load its cargo at Puerto Miranda, Venezuela to a draft of no more than 37 feet.

[3] Evidence at trial established that CITGO was not prohibited from surveying the federal anchorage for obstructions to navigation and the technology to locate objects like the anchor was readily available.

[4] Meaning these holdings by the Court of Appeals could not be re-argued in the District Court.

[5] Fed. Rule Civ. Proc. 63.

The court then turned to the quantum of Frescati's damages, and awarded it the full amount of its claim of $55 million plus another $16 million of accrued interest, for a total award of $71 million. CITGO has appealed this judgment.

The court also addressed the claim of the U.S., as subrogee of Frescati, for the $88 million the National Pollution Fund had reimbursed Frescati on its response costs. Although the court found that the government had never represented that it would search for obstructions in federally maintained waterways, it found that the government had "created the impression" that it maintained the anchorage free of obstructions (although it did not). Applying the doctrine of "equitable recoupment," the court reduced the government's damages by 50%, i.e., from $88 million to $44 million.

Commentary

It cannot be predicted with any degree of certainty whether courts in other circuits or arbitrators who are called upon to interpret a safe berth warranty in a charter party with wording similar to the ASBANTANKVOY warranty at issue in the *Athos I* case will follow the Third Circuit's holding that the safe berth warranty is an absolute warranty. However, a charterer need not depend on judicial or arbitral interpretations to have the warranty limited by a "due diligence" qualifier that CITGO argued should be implied in the ASBATANKVOY's safe berth warranty provision. Instead, this "due diligence" qualifier can be included in the safe berth warranty provision itself, as some charters already have. For example, the SHELLTIME 4 time charter provides in relevant part of its "Period Trading Limits" clause (¶4) as follows:

"Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places…where she can safely lie always afloat…. Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid…" (emphasis added).

A safe berth warranty worded in this fashion eliminates the notion that the warranty is absolute. Instead, the charterer will be held to a reasonable standard of care to provide a safe berth, including the approach to the berth. This standard of care will vary with the factual circumstances of a given berth.

The question of whether the safe berth warranty is intended to cover third parties not in privity to the charter can also be dealt with by careful drafting. A simple disclaimer can state that, "this safe berth [and/or port] warranty is intended for the benefit of the named parties to this agreement only, and not for the benefit of any third parties." Wording such as this expressly eliminates the question that third parties not party to the charter might be covered under the warranty by implication.

Turning to the court's finding of CITGO's negligence as a wharfinger, the Third Circuit had already found that CITGO had a duty to maintain a safe approach to its berth, even though that approach was through a federal anchorage. The district court then went on to determine the standard of care required of CITGO and in doing so, considered a specific set of facts. First, the approach from the navigation channel to the berth was only about 2100 feet. The court considered the possibility of the ship striking an unchartered submerged hazard, the potential injury to the environment if this happened, and the relatively inexpensive cost ($8,000 – $11,000) to conduct a side-scan sonar survey designed to detect such obstructions. It concluded that the standard of care required of CITGO was to scan the approach through the anchorage "periodically" using side-scan sonar and remove or warn vessels invited to its dock of any obstructions to navigation.

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It should be emphasized that this Decision did not necessarily set a new standard of care that will generally apply to all wharfingers. The case was decided on the specific set of facts applicable to CITGO's berth. The area constituting the approach to the berth was relatively small and the cost of using side-scan sonar to detect obstructions to navigation was inexpensive when considered in the context of the revenue CITGO was generating at its terminal. It should also be noted that in 1999, at CITGO's request, the local docking pilots expanded the docking window for CITGO's terminal to commence at the start of the flood current and run until one hour after high water which, in effect could reduce the under keel clearance of ships with a draft like the *Athos I* by up to four feet, bringing the hull much closer to objects on the river bottom. CITGO expanded the docking window to minimize the waiting time for ships calling at its terminal and avoid demurrage charges. If the docking window had remained at its pre-1999 parameters, the *Athos I* would have passed over the anchor without incident.

Regarding damages, the court gave Frescati wide discretion about how to deal with the emergency of the oil spill, and did not require it to hire the least expensive response contractors for it to have exercised reasonable business judgment. In this case, Frescati, as the designated "Responsible Party" by the U.S. Coast Guard, hired as many as 1,800 workers to clean up the spill in order to avoid "federalization" by the Coast Guard, which would have increased response costs dramatically. Eventually, as the crisis eased, some responders and equipment were sent home and for others, contracts were renegotiated at lower rates.

Conclusion

One purpose of the remand was for the trial court to make factual determinations regarding the vessel's draft, allegations of negligent navigation and unseaworthiness and damages which the first trial court did not reach, but which became relevant in light of the conclusions of law made by the Third Circuit Court of Appeals. However, Judge Slomsky also made significant legal determinations, particularly in his evaluation of how the standard of care for a wharfinger should be determined and his reduction of the government's claim by 50% based on the doctrine of equitable recoupment because the U.S. government "created the impression" that it searched federal waterways for obstructions, even though it was not required to do so and never represented to anyone that it did so[6].

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[6] The Plaintiffs, Frescati Shipping Company, Ltd. and Tsakos Shipping & Trading S.A., were represented by Montgomery McCracken Walker & Rhoads LLP. Please feel free to contact us if you have questions or comments.

The Anomalies of Bunker Sampling

BY STEPHEN J. FINDLAY, MANAGING DIRECTOR OF FINDLAY MARINE, LIVERPOOL

There are many in the shipping and bunkering industries who argue that the quality of bunker fuels remains as good now as it did 5 or 10 years ago, and there are of course many who subscribe to an alternative view. Perhaps, unsurprisingly, it is generally the view of bunker suppliers that the quality of fuels delivered is entirely satisfactory whilst ship owners and charterers are finding that the quality is deteriorating. Indeed, the deteriorating trend in fuel quality seems to be the view of a number of fuel analysis laboratories, some who say an increasing number of samples are found to be 'off-spec'. As a consequence the number of bunker quality claims is increasing. However, matters related directly to the quality of fuel oils, is for another day.

It is the case that for a significant proportion of bunker quality disputes, the problem is often exacerbated by the manner in which samples are collected during the bunkering process. It is widely accepted that sampling should be carried out using automatic samplers or continuous in-line drip sampling equipment. More