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Safe Berth Warranty Revisited

By Marilyn Raia

A recent decision from the Third Circuit Court of Appeals, *In Re Petition of Frescati Shipping Company, Ltd.*, 2013 WL 2099746 (2013) should be of interest, if not concern, to many in the maritime industry. Addressing multiple claims with an incomplete factual record, the Third Circuit revisited the intent and scope of the safe berth warranty in a charter agreement.

The Facts of the Case

At all relevant times, Frescati was the owner of the ***Athos 1***, an oil tanker. It time chartered the vessel to Star Tankers. Star Tankers, in turn, voyage chartered the vessel to a group of affiliated oil companies, CARCO.

The time charter between Frescati and Star Tankers required Star Tankers to "exercise due diligence to ensure the vessel is only employed between and at safe places." The voyage charter between Star Tankers and CARCO provided "the vessel shall load and discharge at any safe place or wharf..." That is, the safe berth obligations in the charters were different. The time charter required only the exercise of due diligence to direct the vessel to a safe berth; the voyage charter required a safe berth.

CARCO owned a terminal on the Delaware River. It was inshore of an anchorage area, which was inshore of the navigation channel. The anchorage's border ranged from 130 to 670 feet off CARCO's dock. CARCO maintained a triangular-shaped area of waters adjacent to the berth up to the border of the anchorage. It inspected the area for depth but did not search for debris.

CARCO provided the master of the ***Athos 1*** with a copy of its port manual. It stated the maximum allowable draft at the terminal was 38 feet but was subject to change. CARCO understood the ***Athos 1*** would have a 37-foot draft. The master claimed to have loaded the vessel to a draft of 36 feet, 7 inches. Four days before the ***Athos 1*** was to dock, the maximum berth draft was changed to 36 feet but this change was not communicated to the vessel's master.

Vessel of the size of the ***Athos 1*** customarily came up the Delaware River, and made a 180-degree starboard turn into the anchorage. Then, they were pushed through the anchorage to CARCO's dock by tugs. The ***Athos 1*** began to follow this procedure. When the vessel was approximately 900 feet from CARCO's dock and halfway through the anchorage, it suddenly listed to port and oil became visible on the water. It was later determined that an abandoned anchor lying on the bottom of the river punched two holes in the ***Athos 1's*** hull through which 263,000 gallons of crude oil spilled into the river.

The anchor, whose presence was unknown to the parties until the accident investigation, had been in the same position for at least three years. Its owner was never identified.

Frescati was designated the "responsible party" under the Oil Pollution Act of 1990 and incurred \$180 million in cleanup costs and repair of the damage to the ***Athos 1***.

The Lawsuits and Trial

Frescati filed an admiralty action in federal district court seeking to limit its liability for the spill. It was able to limit its liability to \$45.474 million because it had cooperated in the cleanup effort. It was also able to recover \$88 million of its cleanup costs from the Oil Spill Liability Trust Fund established under the Oil Pollution Act, because it had complied with the Act's terms.



CARCO filed a claim in the limitation proceeding to recover the value of the oil lost in the spill. Frescati filed a cross claim against CARCO seeking to recover its non-reimbursed clean up costs, alleging CARCO violated the safe berth warranty in the voyage charter. The United States filed a separate lawsuit against CARCO to recover the amount it had paid to Frescati from the trust fund.

The district court found in favor of CARCO. It held Frescati was not a beneficiary of the voyage charter between CARCO and Star Tankers, and could not recover from CARCO if CARCO breached the safe berth warranty in that agreement. The district court also held CARCO was not negligent when it did not search for debris in the anchorage outside its berth. The district court attributed sole fault to the unknown party that had dropped the anchor. Frescati and the United States appealed the district court's judgment to the Third Circuit Court of Appeals.

The Appeal

The Third Circuit disagreed with the district court's analysis of the legal issues and remanded the case to the district court for further factual findings. However, it provided guidelines for the district court to follow.

Among other issues, the Third Circuit analyzed: 1) whether Frescati was a beneficiary of the safe berth warranty in the charter between Star Tankers and CARCO; 2) what the scope of the safe berth warranty was; 3) whether CARCO breached the safe berth warranty; and 4) whether CARCO could be liable for negligence.

Did the Safe Berth Warranty Benefit Frescati?

The voyage charter between Star Tankers and CARCO required CARCO to send the *Athos 1* to a safe berth. Frescati was not a party to that charter. Nonetheless, it argued that as the *Athos 1*'s owner, it was a beneficiary of the safe berth warranty, and could sue CARCO if it sent the *Athos 1* to an unsafe berth.

The Third Circuit agreed with Frescati. It relied on two United States Supreme Court cases involving a stevedore's warranty of workmanlike service. In 1959, the Supreme Court held vessels are "automatic" third party beneficiaries of the warranty of workmanlike service given by stevedores to charterers. A year later, the Supreme Court held the vessel owner, in addition to the vessel itself, was a beneficiary of the warranty of workmanlike service. Because a safe berth warranty, like the stevedore's warranty of workmanlike service, benefits the vessel itself, the Third Circuit reasoned it would be "nonsensical" to deprive the vessel's owner of the benefit of such warranty. Accordingly, it held Frescati was a beneficiary of the safe berth warranty in the voyage charter between Star Tankers and CARCO, and could sue CARCO if the warranty were breached.

The Scope of the Safe Berth Warranty

A port or berth is deemed safe if a vessel can "proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship." Stated another way, a port is unsafe if a particular vessel cannot get to it or leave it without harm, absent abnormal or unavoidable conditions.



The Third Circuit noted the determination of whether a berth is safe must take into consideration the particulars of the vessel entering it. That is, a berth may be safe for one type of vessel but not for another type. Further, the "safe" area is more than the immediate area of the berth, and includes the adjacent areas the vessel must pass through to enter or leave. Finally, the court held the safe berth warranty was not limited to known hazards because that would undermine the strict nature of the warranty.

Was the Safe Berth Warranty Breached?

CARCO agreed if the safe berth warranty applied, it would include the area in and around the terminal including the anchorage. However, the Third Circuit held the district court erred in determining CARCO had not breached the warranty. It reasoned the district court should not have concluded the berth was safe merely because numerous other ships had entered and left it without incident. It sent the case back to the district court for further factual findings including the determination of the actual draft of the **Athos 1** and the depth of the water. It stated if the Athos 1 had a draft of 37 feet or less, then in the absence of bad navigation or seamanship, the warranty was breached. It also noted if the draft of the **Athos 1** cannot be determined or is found to be more than 37 feet, then it will be necessary to determine the amount of clearance above the abandoned anchor to confirm whether CARCO provided 37 feet of water. If it did, the warranty was not breached.

Can CARCO be Held Liable for Negligence?

As readers may recall from "A Wharfinger's Duties" [*Pacific Maritime Magazine*, September 2009] a wharfinger does not guarantee the safety of a ship using its dock. Instead, it must use due diligence to determine the condition of the berth, and if possible remove known obstacles on the approach to the berth. The Third Circuit considered how far the approach to a berth might extend. It held "in most instances the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal." It concluded the **Athos 1** was well within the approach to CARCO's terminal when striking the abandoned anchor. Accordingly, it held CARCO had a duty to exercise reasonable diligence to provide a safe approach to the terminal. It rejected CARCO's argument that it should not be liable because it did not have control over the area where the anchor had been abandoned. The court noted that limiting a wharfinger's duty to areas over which it had assumed responsibility would allow the wharfinger to "define the scope of its liability regardless of the port's actual approach."

The holdings in *In Re Frescati Shipping* should not be overlooked by terminal operators or those engaged in vessel chartering. Doing so can result in unanticipated liabilities.