Emerging Trends in Handling Cargo Recoveries in The United States

David T Maloof
Partner,
Maloof Browne and Eagan LLC, New York

David T. Maloof

Present Position

Senior partner in Maloof Browne & Eagan LLC, a small international transportation law firm in New York, but handling cases across the United States.

We are known worldwide as among the most effective advocates for the rights of shippers in international disputes and are AV rated by Martindale-Hubbell, the highest rating in the legal field for both skill and integrity.

Our work has been written up in the magazine The American Shipper, August, 1998.

Published a variety of articles on maritime law and have been asked to lecture worldwide: including in Beijing, Singapore, Manila, Tokyo, London and at national conventions in Shanghai, Australia and in the United States including the Technology Asset Protection Association, the National Cargo Security Council, and the Transportation Consumer Protection Council.

Academics

Graduated m*agna cum laude* and *phi beta kappa* from Columbia College of Columbia University in 1980. B.A. degree with History and English majors.

I received my J.D. in 1983 from the University of Virginia School of Law.

At Columbia I was elected Student Council Charirman, the highest position in student government. I received a number of awards during my time in school, including the Alumni Prize (voted by the Class of 1980 to its most faithful and deserving member), the Pullman Award (awarded by the Student Government to the Class' outstanding member), the Milch Prize (awarded by the faculty to the outstanding member of the Junior Class), the Willen Prize (for the best history or political science essay) and the State Farm Exceptional Student Fellowship (awarded to 15 students in national competition).

I was also a New York State finalist for the Rhodes Scholarship and an intern in the Office of the Chief Justice of the United States Supreme Court.

MALOOF BROWNE & EAGAN LLC

FOUNDED IN 1993, MALOOF BROWNE & EAGAN LLC SPECIALIZES IN COMPLEX TRADE AND TRANSPORTATION LITIGATION, ACROSS THE U.S. AND ABROAD. THE FIRM'S GOAL IS TO PROVIDE WALL STREET QUALITY LITIGATION, WITH SMALL FIRM FRIENDLINESS AND VALUES. OUR FIRM IS "AV" RATED BY THE MARTINDALE-HUBBELL ATTORNEY RATING SYSTEM, WHICH REFLECTS THEIR "HIGHEST LEVEL OF SKILL AND INTEGRITY."

THE FIRM HAS ESTABLISHED RELATIONSHIPS WITH CORRESPONDING COUNSEL THROUGHOUT THE U.S., AS WELL AS IN LONDON, TOKYO, HONG KONG, BEIJING, PARIS, CAIRO, AND OTHER PRINCIPAL COMMERCIAL CENTERS.

PARTNERS OF THE FIRM HAVE PLAYED SUBSTANTIAL ROLES IN LITIGATIONS ARISING OUT OF:

- M.V. ELMA TRES SHIP SINKING ($15 MILLION RECOVERY)
- US STEEL TENDER OFFER LITIGATION ($26 MILLION RECOVERY)
- MULTI-MILLION DOLLAR TECHNOLOGY ASSET THEFT DISPUTES
- COMPLEX INSURANCE COVERAGE DISPUTES

THE FIRM'S APPROACH TO HANDLING INTERNATIONAL LITIGATION WAS FEATURED IN THE AUGUST 1998 EDITION OF *AMERICAN SHIPPER* MAGAZINE.

PRACTICE AREAS:
TRADE AND TRANSPORTATION LAW;
INSURANCE COVERAGE;
COMMERCIAL LITIGATION;
ARBITRATION;
VESSEL PURCHASE, FINANCE AND REGISTRATION.

MALOOF BROWNE & EAGAN LLC

AT

THE WESTCHESTER TECHNOLOGY CORRIDOR

411 THEODORE FREMD AVENUE

SUITE 190

RYE, NEW YORK 10580

TEL: (914) 921-1200

FAX: (914) 921-1023

E-MAIL:
DMALOOF@MALOOFANDBROWNE.COM

WWW.MALOOFANDBROWNE.COM

PRINCIPAL ATTORNEYS

DAVID T. MALOOF: Columbia University (B.A. *Magna Cum Laude*, Phi Beta Kappa, 1980); University of Virginia (J.D. 1983). Recipient, New Jersey Bar Association Media Award, 1984.

International Law Lectures: Transportation Consumer Protection Counsel, National Convention; National Cargo Security Counsel, National Convention; Technology Asset Protection Association, National Convention; London, Tokyo, Beijing, Shanghai, Singapore, Philippines, Melbourne.

LAWRENCE C. BROWNE: 1939-2000
(Harvard University, B.A. 1962; Harvard University, J.D. 1965).

THOMAS M. EAGAN: Fairfield University (B.A. *Cum Laude* 1979); George Washington University (J.D. with Honors 1982).

International Law Lectures: N.Y. Recovery Forum.

JEAN M. SWEENEY: College of the Holy Cross (B.A. *Cum Laude* 1978); St. John's Law School (J.D. 1982).

BARBARA SHERIDAN: State University of New York, Albany (B.A. *Magna Cum Laude*, Phi Beta Kappa, 1994); Fordham Law School (J.D. 1997).

HONORABLE JOHN R. LEWIS: Of Counsel. Former Justice of the Village of Sleepy Hollow, New York (1997-2001); Formerly Adjunct Professor at Cardozo Law School. Brandeis University (B.A. *Magna Cum Laude*, 1973); New York University Law School (J.D. 1977).

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Journalism

Work in both television and print journalism.

My reports, concerning New Jersey, were seen on WNET-13, and specialized in uncovering corruption and waste in government. Over a two year period, I prepared over twenty separate investigative reports concerning the New Jersey Division of Motor Vehicles, which led directly to the resignation of the New Jersey Director of Motor Vehicles, the convening of a special session of the state legislature, an investigation by the State Commission of Investigation, a criminal investigation and the revamping of the entire system of distributing licenses in New Jersey.

Also worked for NBC (WVIR – Virginia) and for WSMW (Worchester).

My investigative work in and of itself has been the subject of several articles including in The New Jersey Reporter. Received television journalism awards from the Associated Press, the Society of Professional Journalists, and the New Jersey Bar Association.

Academics

Graduated *magna cum laude* and *phi beta kappa* from Columbia College of Columbia University in 1980. B.A. degree with History and English majors.

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At Columbia I was elected Student Council Charirman, the highest position in student government. I received a number of awards during my time in school, including the Alumni Prize (voted by the Class of 1980 to its most faithful and deserving member), the Pullman Award (awarded by the Student Government to the Class' outstanding member), the Milch Prize (awarded by the faculty to the outstanding member of the Junior Class), the Willen Prize (for the best history or political science essay) and the State Farm Exceptional Student Fellowship (awarded to 15 students in national competition).

I was also a New York State semifinalist for the Rhodes Scholarship and an intern in the Office of the Chief Justice of the United States Supreme Court.

Personal

Reside in Darien, CT. and married to an attorney (Jean Sweeney), with two children, Julia (age 11) and David (age 9). Active in St. John's Church.

References

As a young man I worked on the Carnegie Commission on the Future of Public Broadcasting. Bill Moyers, the noted television journalist and one of the commissioners, wrote the following:

> "In government and journalism I have worked with scores of young people, and been interviewed by many more. None has impressed me more than David Maloof, who receives my highest recommendation... The style and accuracy of his writing revealed intelligence, integrity and maturity... We can use people like him in the public arena. He is a young man of intelligence, integrity and ideas, and I believe that you could not do better..."
>
> - Bill Moyers

A tale of two circuits

David T Maloof of New York-based Maloof Browne & Eagan looks at how liability for intentional acts by carrier employees differs in the US from the east coast to the west

IMAGINE leaving a $500,000 down-payment on a new home with your local bank, only to learn the next day that a bank employee has stolen the money. Then imagine that the bank claims that it only owes you $100 under the small print of a deposit contract that you signed.

Few would expect a court to enforce such an outrageous agreement but, every day in the US, courts enforce exactly such small-print agreements - even when it is $500,000 of cargo that is deposited with an ocean or land-based carrier and it is their employee who did the stealing. In many cases, it can only be described as highway robbery. Whether or not a carrier has to pay for it depends, in a large part, on where in the US the lawsuit against the carrier is filed.

According to the National Cargo Security Council (NCSC), a private US group, cargo theft is a $12 billion a year industry, yet the criminal penalties are considerably less than those for selling drugs. One truckload of computer microprocessors can be worth millions of dollars. The high value-to-volume ratio of hi-tech goods has encouraged criminals previously involved in drug dealing to move into this area of activity, where they run less risk of detection and suffer less severe penalties if caught. The biggest problem areas are Los Angeles, Miami and New York, where the highest incidence of the crime occurs. A large portion of these thefts have been found to have an inside source.

A number of new options are being tried to prevent cargo theft, including GPS tracking, electronic and tamper-resistant seals and anti-theft devices that can disarm a truck's ignition. As a result, cargo theft is imposing costs on US consumers, with higher insurance premiums and deductibles for shippers, which translates into higher shelf prices. A wide range of groups, from the NCSC to the International Chamber of Commerce, have called for stiffer penalties for cargo thieves in the US.

Cargo theft is believed to be a $12 billion a year industry

But when it comes to recovering from the thieves' employer, the carrier, the results are anomalous at best. Consider, for example, that in one of the US's busiest maritime appeals courts, the Second Circuit Court of Appeals, which covers the east coast port of New York, a carrier is fully liable if its employee erroneously stows cargo on deck without notifying the shippers, but not liable if the same employee criminally misdelivers or even simply steals the cargo.

On the west coast, however, the position is now the opposite. By virtue of a 1999 Ninth Circuit decision, intentional acts by an ocean carrier or its employees are not subject to contractual limitation. In *Vision Air Flight Service Inc v M/V National Pride*, a case which involved reckless stevedoring conduct rather than cargo theft, the court set forth a simple principle that would apply to either eventuality,

> "The intentional destruction of cargo is not a risk any shipper bargains to undertake or should expect to bear. The essence of the contract of carriage is that the carrier will transport the shipper's goods from one place to another. Yet this contract is rendered pointless by the carrier's intentional destruction of the goods enroute. It is hard to conceive of a more fundamental breach going more to the essence of the contract, or one that more thoroughly frustrates the essential expectations of the parties. Having breached the contract of carriage so fundamentally, the carrier cannot be allowed to invoke the liability limitation it incorporates. *(See Nemeth, 1983 AMC at 890, 694 F 2d at 613).* Thus, we conclude that a carrier's intentional destruction of the very goods it contracts to transport constitutes an unreasonable deviation which renders inapplicable COGSA's limitation of liability provision."

The *Vision Air* viewpoint, it is worth noting, is also the viewpoint in the leading US treatise on maritime law. Thomas J Schoenbaum, *Admiralty and Maritime Law*, states:

> "A workable criterion for fundamental breach would be to reserve the doctrine for willful breaches of duty that subject the cargo to substantially increased risk of loss or damage."

While it is true that cargo owners normally take out insurance, the *Vision Air* court did not consider that to be the critical issue,

> "The availability of insurance

does not necessarily affect the question of who should bear the *costs of certain losses*. The argument for imposing unlimited liability on the carrier for certain fundamental breaches as presented in *Nemeth* is incentive-based. If a carrier is not immunised by a liability limitation, it will have more incentive to exercise care, or at least to not breach the contract of carriage in certain fundamental ways. If a certain cost is not borne by the carrier, it is irrelevant whether that cost is borne by the shipper or the shipper's insurance carrier. Either way, it is a cost to maritime commerce that COGSA seeks to avoid, and the carrier's incentive to avoid a fundamental breach will be reduced."

Nor is the position in the Second Circuit uniform. One judge in the Southern District of New York, where decisions are appealed to the Second Circuit, has referred to the Second Circuit's position as 'an unjust paradox.' Another judge in the same circuit has held that an intentional misrepresentation by a carrier's employee in issuing a clean bill of lading that goods have been received and loaded on board, when they were not, voided any limit of liability. *(See Mitsui Marine Fire & Ins Co v Direct Container Line, Inc)*. Yet a third judge in the Southern District of New York has held that conduct evidencing 'affirmative wrongdoing or a reckless indifference' voids any limitation of a carrier under New York law - the state where the Second Circuit sits.

Whether the Ninth Circuit decision or the Second Circuit's decisions are based upon more sound legal principles is of same debate. Allowing for a limitation of liability in the face of intentional damage or theft of cargo would seem to run in the face of US Supreme Court precedent. As far back as 1927, the US Supreme Court held that willful misconduct by an ocean carrier voided any package limitation. In the case involving *The Wildomino*, the court held that where a carrier intentionally started a voyage short on fuel - thus necessitating a course deviation - that *voided* any package limit.

Outside of maritime law it is well established in the US that 'when a bailee commits the intentional act of conversion, courts will not enforce limitation of liability provisions on the grounds of public policy.' However, citing an older Ninth Circuit case, numerous courts have held that to break the limitation the conversion must be shown to be done for the carrier's own gain, not that of its employees. *(See Glickfeld v Howard Van Lines)*. Under this requirement, the president of the carrier's company would have to be the thief.

The *Vision Air* decision would appear to cast the continued viability of *Glickfield* into doubt, and yet it continues elsewhere to be followed. However, under New York law, applicable to warehousemen, a presumption that the goods were stolen for the warehouse owner's benefit arises from the mere mysterious disappearance of the goods. Without such a presumption, proof of that would seem to often be an insuperable burden.

Outside of US maritime law, at least one of the present US Supreme Court Justices, Justice Stephen G Breyer, has written broadly with respect to a broadening of the material deviation doctrine as against carriers generally for the intentional, and perhaps even the negligent, breach of a separate safety-related contractual promise. In *Hill Construction Corp v American Airlines*, Justice Breyer explained that a limit of liability should be avoided when,

"...the carrier made [and breached] a special, separate promise to the shipper about special conditions of carriage designed to lessen the risk of harm to the shipper's particular cargo.""

Judge John G Koeltl in the Southern District of New York, when reviewing all of the cases up to 1996, has found Judge Breyer's theory of the law to be consistent with the law nationwide in most modes of transport:

"On review, and when organised in accordance with Justice Breyer's observations in *Hill*, the case law establishes that in cases of shipment by air, rail, and truck where the shipper paid an additional charge to ensure specialised safety measures to reduce the risk of damage to its cargo, the carrier's failure to perform those very measures which resulted in damage to the cargo has been found to be a sufficient basis upon which the liability limitation provision in the shipping agreement may be rescinded. The parties have not cited, and the court has not found any contrary authority in this circuit, and the decisions of the Courts of Appeals for the First and Ninth Circuits are persuasive on the proposition. Indeed, at oral argument, counsel for the defendant said that essentially there would be no consequences for simply failing to supply to provisions that the plaintiff had paid for. This would be contrary to the reasoning of the decisions which I have already mentioned."

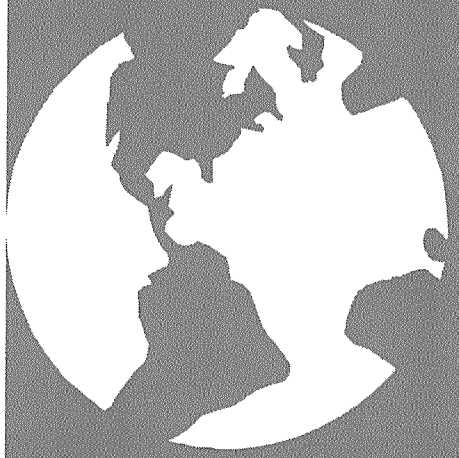
Indeed, an expansion of US maritime law to void limitations of liability in the case of 'willful misconduct' would be a step toward international uniformity. After all, the Warsaw Convention and its amendments void limits of liability for willful misconduct, which was recently held to include airline employee conduct. Similarly, the Hague-Visby rules provide for no limitation where:

"... the damage resulted from an act or omission of the carrier done with intent to cause damage ... recklessly and with knowledge that damage would probably result."

Therefore, a court in the Second Circuit has voided the per-package limitations where the Hague-Visby Rules applied.

When it comes to US maritime law, it can be said that there is currently a tale of two circuits, and completely different justice, depending on which one of America's coasts the employee's intentional acts or theft of cargo occurs.

MARITIME LAW ASSOCIATION OF AUSTRALIA & NEW ZEALAND 31ST ANNUAL CONFERENCE



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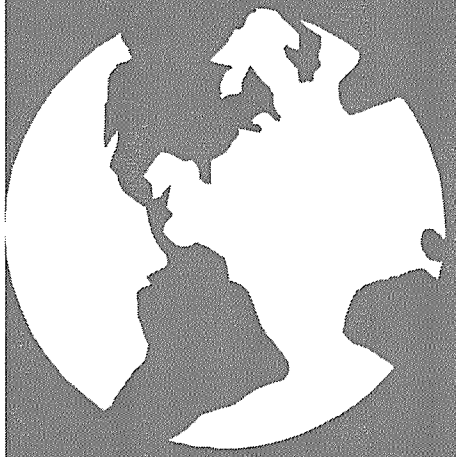
MARITIME LAW ASSOCIATION OF AUSTRALIA & NEW ZEALAND 31ST ANNUAL CONFERENCE

October 1, 2004

David T. Maloof

Maloof Browne & Eagan LLC
411 Theodore Fremd Avenue-Suite 190
Rye, New York
(914) 921-1200



NOTE: Information herein is simplified and provided for discussion purposes only – not to be construed or utilized as legal advice. Counsel should be consulted for specific claims.

U.S. Law: Time to Sue*

1.	International Ocean:	1 year from delivery
2.	International Air:	2 years from delivery
3.	Interstate Trucking:	2 years from claim declination, or less by contract
4.	Interstate Rail:	2 years from claim declination, or less by contract
5.	Interstate Air:	50 states law or by contract
6.	Interstate Water:	50 states law or by contract
7.	Instrastate Trucking:	50 states law or by contract
8.	Warehousing:	50 states law or by contract
9.	Terminal Services:	50 states law or by contract
10.	Multimodal:	Unclear

* The Time to Claim: Always Immediately!

New Decisions: By Subject

I. First Trend: Problems in Extending Time Limits

II. Second Trend: Most But Not All Forum Selection Clauses Apply

III. Third Trend: It's Faster and Easier to Prove the Case

IV. Fourth Trend: More Exceptions to Package Limits

V. Fifth Trend: Air Law Now Varies By Route

I. First Trend: Problems in Extending Time Limits

Extension predicated on submission in 30 days of complete claim documents and B/L requiring suit in actual port must be strictly complied with.

Continental Ins. Co. v. M/V Daviken, 2003 AMC 346 (N.D. Ill. 2003).

II. Second Trend: Most But Not All Forum Selection Clauses Apply

1. Exceptions:
   - England, Japan, if COGSA won't apply to bill of lading issuers. See, e.g., *Central National-Gottesman, Inc. v. M.V. Gertrude Oldendorff,* 204 F.Supp. 2d 675 (S.D.N.Y, 2002)
   - China, sometimes
   - Inland losses (sometimes, if Carmack Amendment applies): *Kyodo U.S.A. Inc v. Cosco,* 2001 WL 1835158 (C.D. Calif. 2001)

III. Third Trend: It's Faster and Easier to Prove the Case

1. Most Courts now set 3-12 month case schedules
2. Packing Lists and Invoices Now Prove Both Quantity and Value – *Levi Strauss & Co. v. Sea-land*, 2003 AMC 1447 (SDNY 2003)
3. Telephone Depositions Avoid Travel and Pay For Themselves
4. 902 Declarations Avoid Trial Testimony

III. Third Trend: It's Faster and Easier to Prove the Case (Continued)

5. *Hartford Fire Ins. Co. v. Novocargo U.S.A. Inc.*, 2003 AMC 851 (SDNY 2003) (surveyors unchallenged percentage estimate of causes of loss is acceptable to Court) (citing cases).
6. Last carrier rule applies if there is no seal breach. *American Home Assurance Co. v. Maersk*, 2003 AMC 216 (S.D. Fla. 2003) (Door handle rivets replaced). (Citing *Madow Co. v. U.S.S. Liberty Exporter*, 1978 AMC 425, 569 F. 2d 1183 (2d Cir. 1978).

III. Third Trend: It's Faster and Easier to Prove the Case (Continued)

7. Hijacking Claims: Q-type clause does not protect carrier from theft if any negligence exists. *Levi Strauss & Co. v. Tropical Shipping*, 2003 AMC 283 (S.D. Fla. 2003).

   Safety Options:

   1. Secure depot overnight
   2. Park with doors locked
   3. Pilferage alarms
   4. Driver sleeps in truck

IV. Fourth Trend: More Exceptions To Package Limits

1. Ship Manager: Parties besides bill of lading issuer/himalaya clause beneficiaries do not benefit from U.S. COGSA. *Steel Coils, Inc. v. M/V Lake Marion*, 331 F. 3d. 422 (5th Cir. 2003); *See also Nedlloyd Europa* decision, below.
2. Fraudulent Bills of Lading: No limitation where fraudulent on-board bill of lading is issued, but goods are not yet so loaded. *Delphi-Delco Electronics Systems v. M/V Nedlloyd Europa,* 324 F. Supp. 2d 403 (SDNY 2004).
3. Wilful Misconduct: Quasi-deviation, as per *Vision Air,* 1999 AMC 1168 (9th Cir. 1998), applies to break package limit where "substantial certainty" exists of cargo damage; particularized circumstantial evidence applies. (Here, cargo not stowed as promised; crew then jury-rigs lashings). *Jindo v. Tolten*, 2003 AMC 1312 (CD Calif. 2003).

IV. Fourth Trend: More Exceptions To Package Limits (Continued)

4. Under *State Law, recklessness breaks limits for Intrastate and some Multimodal claims.* *Note:* New York breaks package limit for recklessness. (see *Abn Amro v. Geologistics*, 2003 AMC 834 (SDNY 2003)); Illinois law breaks package limit for gross negligence (also Ohio); Ga. Law does not allow limitations in bills of lading (see *Mitsui v. Hanjin*, 2004 AMC 577 (Ga. 2004)).

V. Fifth Trend: Air Law Now Varies by Route

1. Overview of International Air Claims to or from the United States – U.S. ratified MP4 (and possibly Hague) on March 4, 1999 and Hague (again) on December 14, 2003.
2. Summary of Status of the Law By Country:
   - Warsaw Convention (1934) – About 16 countries (was 130 countries)
   - Hague Protocol (1959) – About 82 countries
   - Montreal Protocol (MP4) (1975) – About 53 countries
   - Contract Terms – Off-airport