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Armada Supply v. S/T Agios Nikolas was described as “no ‘run-of-the-mill’ cargo case,” but rather a case involving “charges of cargo hijacking and blackmail, ransom and deceit—all the elements of a good high seas drama, short of mutiny.” The United States District Court for the Southern District of New York, after awarding full compensatory damages, imposed $250,000 in punitive damages against the owners of the vessel because of reprehensible conduct in converting the cargo, and in blackmailing and deceiving the cargo owner. The court awarded punitive damages after it acknowledged that the Carriage of Goods by Sea Act (COGSA) governed the action, and despite language in section 4(5) of COGSA that “[i]n no event shall the carrier be liable for more than the amount of damage actually sustained.”

The court’s punitive damage award in a COGSA action creates a hole in the statute’s intended exclusive coverage. Further, the court failed to articulate a standard to guide the future imposition of punitive damages. In order to establish the boundaries of COGSA’s application, this Note proposes that courts focus on COGSA’s preemption of general maritime law remedies. Under this analysis, criminally culpable conduct—defined as conduct exhibiting reckless indifference to the rights of others coupled with intent to commit a criminal act—falls outside COGSA’s coverage, allowing the imposition of punitive damages in the extraordinary case. This proposal punishes the egregious conduct before the court in Armada Supply, yet protects both the integrity and exclusivity of COGSA.


3. Section 4(5) reads:

   Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . , or in the case of goods not shipped in packages, per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . .

   By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained . . . .


523
I. THE SCOPE OF DAMAGE RECOVERY UNDER COGSA

Congress enacted COGSA in 1936 to promote international shipping and commerce by ensuring uniformity in contracts of ocean carriage to or from the United States. COGSA achieved uniformity by realigning the rights and duties of carriers and shippers under general maritime law. Shippers gained restraints on carriers' freedom to contract for reduced levels of liability. In return, carriers received liability limitations and exceptions relieving their responsibility as insurers under general maritime law.

A. COGSA as an Exclusive Cause of Action

COGSA provides the exclusive cause of action for cargo loss and damage. Actions based on state law or general maritime law for breach of contract, negligence, or conversion cannot be brought when COGSA applies. Two principal grounds for this exclusivity can be identified. First, Congress often includes a "saving clause" when enacting remedial legislation in order to retain common law remedies, including punitive damages.


7. See 2a Benedict, supra note 5, §§ 11, 15, 16. Under general maritime law a carrier could escape liability only if it proved damage was caused by an act of God, the public enemy, the inherent nature of the property, the public authority, or the act or default of the shipper. G. Gilmore & C. Black, THE LAW OF ADMIRALT 140 (2d ed. 1975).

8. For example, the Carmack Amendment, section 20(11) of the Interstate Commerce Act, ch. 104, 24 Stat. 386 (1887) (codified as amended at 49 U.S.C.A. § 20(11) (West 1951) and repealed 1978), provided that a rail carrier is liable for the "full actual loss" caused by it. Section 20(11) also contained a saving clause. Id. See Reed v. Aaacon Auto Transp., 637 F.2d 1302, 1307 (10th Cir. 1981) (Carmack Amendment saves all common law remedies, including punitive damages); Hubbard v. Allied Van
Punitive Damages Under COGSA

COGSA, however, contains no such saving clause. Second, COGSA explicitly regulates both tortious and contractual behavior. Once a party establishes the applicability of COGSA, other claims and bases for recovery are void, even if the petition contains no reference to COGSA. Courts have ruled that the duties and liabilities of the carrier arise solely from the terms of the statute. Therefore, the cargo owner cannot bring additional or alternative claims for breach of contract, negligent handling of cargo, or common law tortious conversion under state law or general maritime law.


Two recent international conventions on the carriage of goods by sea clarify this point for foreign jurisdictions. Both specifically provide that the convention is exclusive, regardless of whether the action sounds in tort or contract. United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, art. 7, U.N. Doc. A/CONF. 89/5 (Hamburg Rules) (defenses and liability limitations apply "in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea . . . whether the action is founded in contract, in tort or otherwise"), reprinted in 6 BENEDICT, supra note 5, at 1-32.5; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, art. 3(1), Brussels, Feb. 23, 1968 (Visby Amendments) (defense and liability limitations apply "in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort"), reprinted in 6 BENEDICT, supra note 5, at 1-25. The United States has signed but not ratified the protocol. The Visby Amendments are in force for the 26 countries that have ratified the protocol. Only 10 nations have ratified the Hamburg Rules, scheduled to come into effect upon ratification by 20 nations. The United States has not signed the Hamburg Rules. See 2 S. SORKIN, supra note 4, § 1.20[1], cum. supp. at 35–37. For a discussion of these conventions and their effect on uniformity, see Yancey, The Carriage of Goods: Hague, COGSA, Visby, and Hamburg, 57 Tul. L. Rev. 1238 (1983).

10. See supra note 5.


13. Id.; see National Automotive, 486 F. Supp. at 1099 (the exclusive nature of COGSA dictates that a plaintiff cannot assert additional theories for recovery); see also Reisman v. Medafrica Lines, U.S.A., 592 F. Supp. 50, 52 (S.D.N.Y. 1984) (breach of contract, negligence, and conversion claims are the common law equivalents of actions for which COGSA was meant to be the exclusive definition of liability in the shipper-carrier context); B.F. McKernin & Co. v. United States Lines, 416 F. Supp. 1068, 1071 (S.D.N.Y. 1976) (supplemental claims for breach of contract, conversion, or negligence may not be brought when COGSA governs the relationship).
B. Recovery Under COGSA

1. Recovery for Loss or Damage to Goods Under COGSA

Under COGSA, a variance in the condition or quantity of the goods at destination from that described in the bill of lading establishes a prima facie case for recovery.\(^{14}\) If the carrier does not refute the prima facie case, the shipper may collect damages measured by market value upon arrival.\(^{15}\) Because section 4(5) limits recovery to "damage actually sustained," if more accurate means are available to determine actual loss, such as a resale contract, the cargo owner recovers that amount instead of market value.\(^{16}\)

Section 4(5) defines both a maximum and minimum level of damages under the two distinct types of contracts of carriage COGSA governs. First, in contracts where the shipper does not declare the value of the goods shipped, section 4(5) establishes maximum carrier liability of $500 per package or customary freight unit.\(^{17}\) Carriers are also prohibited from contracting for liability below this limit under any circumstances.\(^{18}\) Therefore, when loss is greater than $500 per unit, the cargo owner is guaranteed

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\(^{14}\) Section 3(4) of COGSA establishes the bill of lading as prima facie evidence of the condition of the goods at the time of delivery to the carrier. 46 U.S.C. § 1303(4) (1982). A cargo owner establishes a prima facie case when the cargo owner proves delivery of the goods to the vessel at port of shipment in satisfactory condition, and arrival of less cargo than was delivered and/or discharge of the goods in damaged condition. Westway Coffee Corp. v. M.V. Netuno, 675 F.2d 30, 32 (2d Cir. 1982); see also Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 812 (2d Cir. 1971) ("bailor makes out a prima facie case merely by showing delivery of the goods to the bailee and failure to return at the required time").

\(^{15}\) Intematio, Inc. v. M.S. Taimyr, 602 F.2d 49, 50 (2d Cir. 1979) (damages are measured by "the market value of the goods at destination, in like condition as they were shipped, on the date when they should have arrived").

\(^{16}\) See Illinois Cent. R.R. v. Crail, 281 U.S. 57, 64-65 (1930) (market value only a convenient means of determining the loss suffered). Where cargo is shipped on a resale contract, courts calculate damages to compensate for what the cargo owner would have received had the resale contract been performed. See Austracan (U.S.A.) v. Neptune Orient Lines, 612 F. Supp. 578, 587 (S.D.N.Y. 1985) (resale contract furnishes most accurate means to measure damages actually sustained in either rising or falling market). Thus, in a rising market the cargo owner cannot receive damages based on market price if such price leads to compensation in excess of the resale contract. Internatio, 602 F.2d at 50. The resale contract is also used to calculate damages when the cargo owner suffers no loss due to salvage. B.F. McKernin & Co. v. United States Lines, 416 F. Supp. 1068, 1071-72 (S.D.N.Y. 1976).

\(^{17}\) See supra note 3 (text of COGSA § 4(5)). The term "package" and "customary freight unit" as used in COGSA are terms of art. Their definitions are the subject of much litigation and beyond the scope of this Note. See generally 2 S. Sorkin, supra note 4, § 13.16[1][c], [2].

The limitation is only available if the shipper has an opportunity to set a higher limit by declaring a higher value and paying a higher rate. Circuits are split on whether the shipper must declare value or whether the carrier must offer. See id. § 13.16[1][d].

\(^{18}\) See Shinko Boeki Co. v. S.S. Pioneer Moon, 507 F.2d 342, 344-45 (2d Cir. 1974) (COGSA § 4(5) nullifies any provision in contract of carriage which reduces carrier's liability below $500 per package). See generally 2 S. Sorkin, supra note 4, § 13.16[1][c] (COGSA § 4(5) prevents carriers from using their superior bargaining power to compel shippers to accept limitations reducing carrier liability to insignificant amounts).
Punitive Damages Under COGSA

recovery of $500 per package or unit. When loss is less than $500 per unit, however, the package limitation has no practical effect because section 4(5) limits recovery to “damage actually sustained.”

The second type of COGSA contract is one in which the shipper declares the nature and value of the goods and contracts with the carrier for liability greater than $500 per package. Under this type of contract, the carrier charges extra and becomes liable for the value declared. Even under this type of bill of lading, recovery is limited to “damage actually sustained.”

2. Deviation and the COGSA Liability Limitation Provisions

Despite the exclusivity of COGSA, a carrier may lose the benefits of the damage limitations and become subject to liability under general maritime law by a geographic or other fundamental “deviation” from the contract of carriage.

a. Evolution of the Deviation Doctrine

Long before COGSA’s enactment, courts held that when a vessel deviated from its specified or customary route, a different voyage was created. The deviation voided any exculpatory provisions in the contract of carriage and thus subjected the carrier to liability under general maritime law as an insurer of the entire loss. Today, COGSA requires that carriers not engage in unreasonable deviations. Courts have expanded the definition of deviation.

19. General Motors Corp. v. Moore-McCormack Lines, 451 F.2d 24, 26 (2d Cir. 1971). See generally 2 S. Sorkin, supra note 4, § 13.16(1)(d) (when the shipper describes nature and value of cargo, the carrier is alerted of its potential liability and the opportunity to charge extra freight to cover its liability).

20. If loss is less than total, or the declared value is greater than actual value, or the cargo owner salvages part of the goods, the owner may only recover the actual damages sustained. See In re Internatio, Inc. v. M.S. Taimyr, 602 F.2d 49, 50 (2d Cir. 1979); B.F. McKernin & Co. v. United States Lines, 416 F. Supp. 1068, 1071 (S.D.N.Y. 1976).


22. COGSA § 4(4), 46 U.S.C. § 1304(4) (1982). See 2 S. Sorkin, supra note 4, § 13.13(1). Congress intended to limit carrier ability to create broad liberty clauses permitting stops in almost any port. See UNIFORM OCEAN BILLS OF LADING–HAGUE RULES, H.R. REP. NO. 2218, 74th Cong., 2d Sess. 1 (1936). Consequently, section 4(4) of COGSA provides that the carrier is liable only for “unreasonable deviations” and explains that “if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.” 46 U.S.C. § 1304(4) (1982); see General
tion, however, to include nongeographic breaches of the carriage contract so fundamental that a shipper could justifiably repudiate the contract. Such deviations are known as "quasi-deviations." The doctrine of deviation is presently under attack as inconsistent with COGSA and modern marine insurance. The trend is not to extend the quasi-deviation doctrine even upon proof of criminal conduct.

b. Effect of a Finding of Unreasonable Deviation

The circuits are split on the effect of a finding of unreasonable deviation. The dispute centers on whether the first paragraph of section 4(5), providing that neither the carrier nor the ship shall "in any event" become liable for loss exceeding $500 per package, alters the pre-COGSA consequences of unreasonable deviation. The Seventh Circuit has held that this "in any event" limitation indicates congressional intent to modify the general maritime law consequences of deviation, and thus the carrier retains the benefits of the COGSA liability limitations. The Second, Fifth, and Ninth

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23. Morgan, supra note 21, at 483; see also Spartus Corp. v. S.S. Yaho, 590 F.2d 1310, 1313 (5th Cir. 1979) (defining unreasonable deviation as "any variation in the conduct of a ship... whereby the risk incident to the shipment will be increased... [or] whereby the goods have been subject to greater risks").


25. The deviation doctrine is inconsistent because the first paragraph of section 4(5) provides that "in any event" a carrier shall not be liable for more than $500 per package. In addition, today a shipper's own insurance covers the risk of deviation. See Iligan Integrated Steel Mills, v. S.S. John Weyerhaeuser, 507 F.2d 68, 72 (2d Cir. 1974), cert. denied, 421 U.S. 965 (1975); G. GILMORE & C. BLACK, supra note 6, at 183.

26. B.M.A. Indus., v. Nigerian Star Line, 786 F.2d 90, 92 (2d Cir. 1986) (misdelivery of cargo does not warrant finding of deviation even if due to criminal receipt of bribe); Italia Di Navigazione S.p.A. v. M.V. Hermes I, 724 F.2d 21, 22 (2d Cir. 1983) (nondelivery of cargo due to systematic theft does not warrant finding of deviation which would void one-year statute of limitation specified in COGSA § 3(6)); Iligan Integrated Steel Mills, v. S.S. John Weyerhaeuser, 507 F.2d 68, 72 (2d Cir. 1974) (doctrine of deviation not applied to gross negligence or willful or wanton misconduct in tendering an unseaworthy ship because such a rule would "demand a further inquiry into the degree of the carrier's culpability, with enormous potential liability... riding on the decision of the fact finder"), cert. denied, 421 U.S. 965 (1975).

27. The "in any event" language of the first paragraph of section 4(5), limiting carrier liability to $500 per package unless the parties have specifically contracted for greater carrier liability, should not be confused with the "in no event" language in the second paragraph of section 4(5) limiting damages to those actually sustained. See supra note 3 (text of COGSA § 4(5)).

28. Atlantic Mut. Ins. Co. v. Poseidon Schifffahrt, 313 F.2d 872, 875 (7th Cir.) (because the
Circuits, however, interpret section 4(5) as not changing the long-standing maritime law regarding unreasonable deviations. Thus, a deviation in these jurisdictions subjects the carrier to liability under general maritime law as an insurer.29

C. Congressional Action and Preemption of Federal and State Law

When Congress has legislated in an area, courts apply a rebuttable presumption of preemption.30 Although neither courts nor commentators have expressly applied this presumption to COGSA, courts invariably decide that COGSA is the exclusive remedy for loss to cargo.31 In practice, then, courts have assumed that congressional action in the bills of lading area has preempted supplemental remedies under general maritime law.32

1. Presumption of Preemption

The Supreme Court has ruled that federal common law has been preempted as to every question to which the legislative scheme has "spoke[n] directly," and every problem that Congress has "addressed."33 While federalism concerns create a presumption against preemption of state law, the principle of separation of powers creates a presumption in favor of preemption of federal common law.34 Thus, where a federal statute regu-


31. See supra notes 7-13 and accompanying text.


lates federal common law, courts apply a very strong presumption of preemption.\textsuperscript{35} Although admiralty is governed exclusively by federal law,\textsuperscript{36} courts sometimes apply the presumption less forcefully to judge-made maritime law than to nonmaritime federal common law.\textsuperscript{37}

2. \textit{Factors Which May Overcome Presumption of Preemption}

Several factors may operate to overcome the presumption of preemption.\textsuperscript{38} First, any statutory terms explicitly preserving judge-made law are controlling.\textsuperscript{39} Second, a court must determine whether the common law merely fills a gap left by congressional silence, or rewrites rules that Congress has affirmatively and specifically enacted.\textsuperscript{40} The greater the scope of the legislative scheme, the less likely it is that judge-made law merely fills a gap left by Congress.\textsuperscript{41} Finally, the degree of acceptance of the principle at common law must be considered. Congress is less likely to have intended preemption of “long established and familiar principles” of the common law or general maritime law, without expressing that intention.\textsuperscript{42}

3. \textit{Preemption of Maritime Law}

The presumption of preemption remains a strong limitation on admiralty courts’ interstitial authority. In \textit{Mobil Oil Corp. v. Higginbotham},\textsuperscript{43} the Supreme Court held that the Death on the High Seas Act (DOHSA),\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{35} See \textit{City of Milwaukee}, 451 U.S. at 314.
\item \textsuperscript{36} See \textit{Southern Pac. Co. v. Jensen}, 244 U.S. 205, 214–15 (1917) (constitutional requirements and concerns for uniformity in admiralty mandate that although admiralty actions may be brought in state courts, general maritime law, not state law, applies).
\item \textsuperscript{37} \textit{Oswego Barge}, 664 F.2d at 335–37. Federal courts have a more expansive role to play in the development of maritime law than in the development of nonmaritime common law and consequently may be less bound by the presumption of preemption. \textit{But see Mobil Oil Corp. v. Higginbotham}, 436 U.S. 618, 625 (1978) (admiralty courts not free to supplement Death on the High Seas Act, providing for recovery of “pecuniary damages” for wrongful death with the loss of society remedy available under general maritime law). Preemption of maritime law is discussed \textit{infra} in text accompanying notes 43–47.
\item \textsuperscript{38} \textit{Oswego Barge}, 664 F.2d at 335.
\item \textsuperscript{39} Id. A “saving clause” retaining all common law remedies is an example of such language. \textit{See supra} note 8.
\item \textsuperscript{40} \textit{Higginbotham}, 436 U.S. at 625.
\item \textsuperscript{41} \textit{Oswego Barge}, 664 F.2d at 339.
\item \textsuperscript{42} \textit{Isbrandtsen Co. v. Johnson}, 343 U.S. 779, 783 (1952). The presumption of preemption may be stronger in those cases where the judge attempts to fashion a new remedy because of the lack of a long-established rule of common law. \textit{See Edmonds v. Compagnie Generale Transatlantique}, 443 U.S. 256, 271 (1979).
\item \textsuperscript{43} 436 U.S. 618 (1978).
\item \textsuperscript{44} Death on the High Seas Act (DOHSA) § 2, 46 U.S.C. § 762 (1982).
\end{itemize}
Punitive Damages Under COGSA

authorizing recovery of pecuniary damages for wrongful death on the high seas, speaks directly to the broad question of damages. Consequently, an admiralty court may not supplement the statute with the loss of society remedy available in general maritime law.45 DOHSA’s silence on the express question of loss of society damages did not provide grounds to grant such a remedy under general maritime law.46 Higginbotham supplies a test for evaluating the extent to which the statute prevents a court from adding remedies available under general maritime law or other common law: whether the statute speaks directly to the question.47

D. Punitive Damages in Admiralty and the Carriage of Goods

In 1936, the year Congress enacted COGSA, the Second Circuit stated that admiralty damages are not punitive, and consequently are limited to amounts necessary to return the injured party to their original condition.48 This 1936 opinion reflects a general reluctance to impose punitive damages in admiralty.49 Admiralty courts, however, recognized the availability of punitive damages in tort actions as early as 1818.50 Today, admiralty courts...

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45. Higginbotham, 436 U.S. at 625.

46. Id. at 625. Although the Court recognized that DOHSA does not address every issue of wrongful death law, the Court reasoned that awarding general maritime law remedies would make DOHSA meaningless because the statute spoke directly to damages and “[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.” Id.

47. Id. This test was reaffirmed in City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981).

48. The West Arrow, 80 F.2d 853, 858 (2d Cir. 1936) (admiralty damages governed by principle of restitutio in integrum); Note, Punitive Damages in Admiralty, 18 Hastings L.J. 995, 996 (1967).


50. The Amicable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818) (dicta in maritime trespass action acknowledged potential for punitive damages for “lawless misconduct”). The first award of punitive damages in admiralty came in Gallagher v. The Yankee, 9 Fed. Cas. 1091, 1093 (No. 5196) (N.D. Cal. 1859), aff’d, 30 Fed. Cas. 781 (No. 18,124) (C.C.N.D. Cal. 1859) (punitive damages in maritime tort action for unlawful deportation to the Sandwich Islands, a tort “high-handed and deliberate, in open and contemptuous violation of... inviolable rights of the citizen”). See generally Comment, supra note 49, at 224–26; Note, supra note 48, at 996–97 (summary of punitive damages in admiralty). Punitive damages were not awarded again in a reported admiralty case until the 1967 decision of In re Den Norske Amerika- linje A/S, 276 F. Supp. 163, 196–99 (N.D. Ohio 1967) (several seamen killed after collision in heavy fog because captain attempted to beach vessel rather than abandon ship), rev’d sub nom. United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) (implying that punitive damages could be assessed if given proper facts, reversed on grounds that defendant had neither ratified nor authorized acts justifying punitive damages), cert. denied, 398 U.S. 958 (1970). See also Note, supra note 48, at 1001–08 (citing no cases awarding punitive damages in maritime tort cases between 1859 and 1967, and noting that punitive damages have not yet achieved acceptance in admiralty as of 1967). See generally Comment, Punitive Damages in Admiralty for Bad Faith Refusal to Provide Maintenance and Cure: Robinson v. Focahontas, Inc., 15 San Diego L. Rev. 309, 314 (1978) (lack of any decision awarding punitive damages between 1859 and 1967 indicates that availability of punitive damages in admiralty was questionable).
have discretion\textsuperscript{51} to impose punitive damages for the maritime torts of wrongful death, maintenance and cure,\textsuperscript{52} and, according to a new body of case law, against insurance companies for outrageous conduct in the handling of claims.\textsuperscript{54} Nonetheless, admiralty courts have retained a restrictive view regarding punitive damages in actions arising from the contractual relationship between maritime shippers and carriers.\textsuperscript{55}

In a 1985 opinion by Judge Friendly, the Second Circuit in \textit{Thyssen, Inc. v. S.S. Fortune Star}\textsuperscript{56} reversed a trial court award of punitive damages for a willful quasi-deviation of on-deck stowage.\textsuperscript{57} The court concluded that deviation is nothing more than an intentional breach of contract.\textsuperscript{58} The court stated that in general maritime breach of contract actions, punitive damages are not recoverable unless the conduct constituting the breach is

\textsuperscript{51} Thyssen, Inc., v. S.S. Fortune Star, 777 F.2d 57, 62–63 (2d Cir. 1985) (even where the elements of punitive damages are established, the court is not bound to award such damages).

\textsuperscript{52} In re Marine Sulphur Queen, 460 F.2d 89, 105 (2d Cir.), cert. denied, 409 U.S. 982 (1972); In re Merry Shipping, Inc., 650 F.2d 622, 624–27 (5th Cir. 1981).

\textsuperscript{53} Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051 (1st Cir. 1973). “Maintenance and cure” refers to a seamen’s right under general maritime law to receive compensation and care for illness and injury occurring while in the service of a ship. It is not, however, the exclusive remedy for such injuries. See G. Gilmore & C. Black, supra note 6, at 281.


\textsuperscript{55} Prior to \textit{Armeda Supply v. SIT Agios Nikolas}, only one court had actually awarded punitive damages in an action arising out of a shipper-carrier contract. That award was reversed. Thyssen, Inc. v. S.S. Fortune Star, 596 F. Supp. 865, 866–67 (S.D.N.Y. 1984), aff’d in part and rev’d in part, 777 F.2d 57, 66 (2d Cir. 1985). The \textit{Thyssen} court was the first appellate court to extensively consider the availability of punitive damages in actions governed by maritime contracts. 777 F.2d at 62 (court unable to locate any admiralty decision awarding punitive damages for or arising out of a contract breach).

The reluctance to impose punitive damages in the context of shipper and carrier contract actions which are usually governed by statute may reflect the general desire not to impose such damages without express statutory authorization. See Dahlquist, Punitive Damages Under the Jones Act, 6 Mar. LAv 1, 27–28 (1981); see also Burris v. International Bhd. of Teamsters, 224 F. Supp. 277, 280 (W.D.N.C. 1963) (“absent express Congressional intention punitive damages [are] not recoverable . . . on a federally created cause of action;” recovery of punitive damages denied under the Labor Management Reporting and Disclosure Act). However, courts interpreting civil rights actions have held otherwise. See, e.g., Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965) (police officer’s improper arrest of plaintiff and subsequent denial of medical and legal assistance in jail warranted punitive damages despite a lack of authorization in the statute).

\textsuperscript{56} 777 F.2d 57 (2d Cir. 1985).

\textsuperscript{57} In \textit{Thyssen}, a cargo owner sought compensatory and punitive damages for loss to cargo brought about by the “quasi-deviation” of on-deck stowage. The cargo owner claimed that the on-deck stowage was an intentional fraud and deviation by defendants justifying punitive damages. \textit{Id.} at 59. The trial court found it inappropriate to limit the award to contract damages where the conduct and deviation of the vessel worked a fraud upon the owner of the cargo, and awarded $25,000 in punitive damages. \textit{Id.} at 60.

\textsuperscript{58} \textit{Id.} at 63–64. Judge Friendly refused to rule that a deviation was equivalent to the tort of conversion. \textit{Id.} at 64–65.
also an independent willful tort. Since mere deviation remains in the realm of contract, not of tort, punitive damages were precluded.

Judge Friendly identified a list of factors thought to justify punitive damages: punishing the defendant, deterring others, preserving the peace, inducing private enforcement of laws, compensating victims for otherwise noneconomic losses, and paying plaintiff’s attorneys’ fees. The court of appeals found that few of these factors apply to unauthorized on-deck stowage. More importantly, because mere deviation was left in the realm of contract, the court expressly declined to consider whether the “damage actually sustained” limitation in section 4(5) of COGSA bars punitive damages.

In addition to the Second Circuit’s opinion, several district courts have considered the availability of punitive damages in cargo claim cases. The United States District Court for the Southern District of New York declined to grant a shipper punitive damages for a carrier’s intentional delay in shipping. That court did not address punitive damages under COGSA, but relied on the lack of criminal indifference to civil obligations and the absence of intent to harm a public interest in refusing to award punitive damages. Only one court has considered whether COGSA prohibits punitive damages. A district court in the Ninth Circuit reasoned that because courts interpret the “in no event” language in the “damage actually sustained” provision according to its literal meaning, a plain reading of COGSA precludes punitive damages.

59. *Id.* at 63 (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 355 (1979)). An intentional or even malicious breach is insufficient for punitive damages. The breach itself must be a willful tort. 777 F.2d at 63.

60. 777 F.2d at 63–64.


62. 777 F.2d at 66 (citing Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3–12 (1982)).

63. 777 F.2d at 66. The court found that punitive damages would not deter undesirable conduct in deviations because deterrence is already obtained by disallowing exceptions in the bill of lading. *Id.* The court also noted that insurance for punitive damages would impose costs on all shippers to confer extraordinary benefits on a few. *Id.*

64. *Id.* at 68.


66. *Id.* (quoting numerous New York decisions on punitive damages); see also Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 861 (2d Cir. 1985) (trial court did not abuse discretion by refusing to award punitive damages on grounds that the carrier was not “guilty of gross negligence, or actual malice or criminal indifference”).


68. *Id.* at 1173. *See supra* note 3 (text of COGSA § 4(5)).

II. ARMADA SUPPLY V. S/T AGIOS NIKOLAS: A GO-AHEAD FOR PUNITIVE DAMAGES IN ACTIONS GOVERNED BY COGSA

The conduct of the owners of the Agios Nikolas, went far beyond the “mere deviation” in Thyssen. To punish the owners for their reprehensible conduct and to deter future carriers from similar conduct, the court expressly considered the issue left unanswered by Judge Friendly in Thyssen, finding that section 4(5) does not prohibit punitive damages. Consequently, the court considered itself free to award punitive damages under general maritime law according to the independent willful tort standard recited, but not relied on, in Thyssen.70

A. Facts of Armada Supply

Armada Supply was the consignee for 348,000 barrels of fuel oil shipped aboard the Agios Nikolas to New York from Rio de Janeiro under a clean bill of lading.71 Armada Supply intended to resell the cargo to Sun Oil Company. At Rio de Janeiro, a surveyor certified that the oil met the standards in the resale contract.72 A falling oil market, however, left Armada Supply in a precarious position.73 Any discrepancy with the terms of the resale contract would give Sun Oil grounds to demand new negotiations based on the lower spot market prices.

When the Agios Nikolas arrived in New York the cargo was short 8,000 barrels and its quality was well below the requirements of the resale contract.74 Armada Supply’s insurers demanded that the carrier’s agent post a bond to cover Armada Supply’s claim for shortage and contamination. The agent refused, and the insurers brought suit to arrest the vessel.75 Before the warrant could be executed, however, the Agios Nikolas

70. Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 62–63 (2d Cir. 1985), cited in Armada Supply v. S/T Agios Nikolas, 639 F. Supp. 1161, 1162 (S.D.N.Y. 1986). Thyssen reasoned that punitive damages are available in contract actions governed by general maritime law if the conduct constituting the breach is also an independent willful tort. However, Thyssen did not apply this standard to award punitive damages. This standard may therefore be considered dicta.


72. Id. at 1462. The resale contract specified delivery in New York before December 10, 1982, and set maximum bottom sediment, water content, and flow temperature standards. Id. Samples taken in Rio de Janeiro were well below these limits. Id.

73. Id. at 1463. Armada Supply’s precarious position was revealed to the owners of the Agios Nikolas when Armada Supply offered a $20,000 speed bonus for timely delivery. Id.

74. Id. at 1463. For example, the survey on arrival indicated that 1663 barrels of salt water had contaminated the cargo. Id. Sun Oil rejected the oil for nonconformity, although later agreed to a lower price for the entire shipment. Id.

75. Id. By filing a libel in rem in the district court where the vessel can be found, a party holding a lien against a vessel for outstanding claims may have a marshall “arrest” the ship. See generally G. Gilmore & C. Black, supra note 6, at 787–88.
Punitive Damages Under COGSA

fled New York harbor. The vessel's owner threatened to sail away and sell the cargo elsewhere unless Armada Supply promised to cancel the warrant and to pay all freight charges. For two weeks, while Armada Supply negotiated for the return of the cargo, the *Agios Nikolas* remained outside United States territorial waters, syphoning fuel from Armada Supply's cargo for the vessel's fuel tanks. Faced with a rapidly falling oil market, Armada Supply paid the freight charges and promised not to arrest the vessel.

**B. The Court's Reasoning**

The district court awarded the $4,130,900 in compensatory damages and expenses requested by Armada Supply. In a second opinion, the trial judge assessed $250,000 in punitive damages based upon the legislative history of COGSA and the *Thyssen* opinion. The trial court found no evidence that Congress intended to change the law of punitive damages by enacting COGSA in 1936. Accordingly, the court ruled that "where Congress has expressed no intention to change accepted principles of general maritime law, courts should apply those accepted principles." The court in *Armada Supply* found the conduct of the owners of the *Agios Nikolas* to be far more egregious than the "mere deviation" in *Thyssen*. The court determined that the owners intentionally converted Armada Supply's property in order to blackmail Armada Supply into canceling the arrest warrant. The court concluded that such a tortious conversion supplied the necessary independent willful tort to impose punitive damages under general maritime law.

According to the court, the "damage actually sustained" limitation does not prohibit punitive damages. Congress inserted the clause to address carriers' concerns that courts would construe the $500 package limitation

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76. *Armada Supply*, 613 F. Supp. at 1464. The freight charges had been prepaid in Brazil. *Id.*
77. *Id.* at 1462–63. The court found that the *Agios Nikolas* absconded with the cargo, converted the cargo for use in her own bunkers, and held it for ransom. *Id.* at 1464.
78. *Id.* at 1464.
79. *Id.* at 1470. The court calculated damages as the difference between the contract proceeds Armada Supply would have received from Sun Oil had the fuel oil been delivered at the quality specified in the contract, and the price Armada finally received on the open market. *Id.* at 1469 n.5. The court also assessed damages for Armada's expenses in connection with recovery, storage, reconditioning, and resale of the cargo, including charges for barging, pumping, demurrage, chemical analysis, and demulsification. *Id.* at 1470.
81. *Id.*
83. 639 F. Supp. at 1162–63.
84. *Id.* at 1163.
as liquidated damages and impose liability of $500 per package on carriers even where the loss was less. Consequently, in the court’s reasoning, the “damage actually sustained” limitation merely clarifies the package limitation and applies only where damage to cargo is less than $500 per package.

The court in Armada Supply rejected as “unpersuasive” the ruling of a district court in the Ninth Circuit that a plain reading of COGSA’s “damage actually sustained” limitation prohibits punitive damages. The court observed that the Second Circuit often looks beyond the literal terms of COGSA to firmly-entrenched rules of maritime law. Unreasonable deviations, the court noted, deprive a carrier of COGSA’s damage limitations despite equally strong language in the limitation of the first paragraph of section 4(5) that “in any event” a carrier shall not be liable for damages greater than $500 per package. Therefore, courts in the Second Circuit need not give literal effect to the “in no event” language in the “damage actually sustained” limitation in the second paragraph. Freed of any COGSA limits, the court decided that the independent willful tort of conversion could support punitive damages.

III. THE RESULT-ORIENTED ANALYSIS OF ARMADA SUPPLY

The court in Armada Supply reached the proper result. COGSA should not shield the extremely culpable defendant merely because a shipper’s goods remain on board the vessel. Nonetheless, the court failed to offer a sound legal basis or a persuasive public policy rationale for its action. The analysis employed by the court to award punitive damages relies on three faulty premises: (1) precedent not applicable to punitive damages under COGSA; (2) a faulty analogy to other maritime doctrines; and (3) an excessively restrictive reading of COGSA’s legislative history. None of these rationales justifies disregarding the exclusivity of COGSA’s remedies or the plain effect of the “damage actually sustained” limitation as

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85. Id. at 1164–65. The “damage actually sustained” language, the court noted, was one of the few changes made by Congress from the text adopted at the Brussels Convention. See Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Comm. on the Merchant Marine and Fisheries, 74th Cong., 2d Sess. 124 (1936) (letter from Secretary of State Cordell Hull to Rep. Bland on changes to the Brussels Convention of 1924).
88. 639 F. Supp. at 1163–64.
89. Id.; COGSA § 4(5), 46 U.S.C. § 1304(5) (1982); see supra note 3 (text of COGSA § 4(5)).
90. 639 F. Supp. at 1163–64.
91. Id. at 1163.
Punitive Damages Under COGSA

prohibiting punitive damages. The court also failed to establish a standard for the imposition of punitive damages sufficient to protect the integrity and exclusivity of COGSA.

A. The Court’s Faulty Analysis

The starting point for the court’s resort to general maritime law was congressional silence in 1936 on punitive damages. The court stated that this silence indicates that Congress did not intend to change “accepted principles of general maritime law.” Therefore, courts could use those principles to award punitive damages. To support this proposition, the court cited a 1959 Supreme Court decision refusing to apply COGSA’s liability limitations to a stevedore or to a carrier’s agent. The Court had held that because agents have historically been subject to full liability for their actions, COGSA could not limit stevedore or agent’s liability without express congressional language overruling the common law.

The court in Armada Supply misapplied this principle. The Supreme Court had focused on whether COGSA altered prior accepted common law. The issue in Armada Supply, however, was whether a new principle in general maritime law ought to apply to a preexisting, exclusive statutory scheme. If punitive damages had been available to cargo claimants before COGSA, and COGSA had failed to address the issue, the court could apply such an antecedent principle of general maritime law. At the time of COGSA’s adoption, however, punitive damages had never been awarded in an admiralty contract action or in an action related to the carriage of goods. In fact, only one admiralty decision had awarded punitive

92. Id. at 1165. We are, however, left to assume that the “accepted principle” lies in the availability of punitive damages in contract actions under general maritime law as explained by Judge Friendly’s 1985 decision in Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57 (2d Cir. 1985). See supra notes 56–64 and accompanying text. It seems that the court in Armada Supply is not referring to the availability of punitive damages for maritime torts since the court cites no cases on this point and explicitly refused to allow an independent action for tortious conversion. In addition, since the court refers to an “accepted principle at general maritime law,” it is clear that the court is not referring to accepted principles of common law.

93. Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304–05 (1959) (“[n]o statute is to be construed as altering the common law, farther than its words import”), quoted in Armada Supply, 639 F. Supp. at 1165. Whether the Supreme Court was referring to state and federal common law or general maritime law by use of the phrase “common law” in Herd is not clear. The court in Armada Supply clearly had general maritime law in mind. See 639 F. Supp. at 1165.

94. Herd, 359 U.S. at 304–05.

95. Punitive damages are a recent development in admiralty. See supra notes 48–55.

96. See supra notes 50, 55. In Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 62 (2d Cir. 1985), the court recited the independent willful tort standard, but could find no admiralty decision awarding punitive damages in a contract-related action.

Although not cited in Armada Supply or Thyssen, an admiralty decision, in a suit based on a contract
To state that punitive damages were available based on any principle of general maritime law accepted before the enactment of COGSA was thus inaccurate.

The court's second justification for punitive damages was an analogy to deviation. Section 4(5) contains an "in any event" limitation (the package limitation) and an "in no event" limitation (the damage actually sustained limitation).98 The court in Armada Supply began by noting that the Second Circuit disregards the literal effect of the "in any event" limitation in deviation cases. The court then reasoned by analogy that it need not give literal effect to the "damage actually sustained" limitation in awarding damages.99

The court's analogy is improper for two reasons. First, the analogy is based on precedent which addressed whether the enactment of COGSA in 1936 altered the long-standing doctrine of deviation. The issue in Armada Supply, however, was whether the theory of punitive maritime damages, developed in the last few years, may be introduced into the supposedly exclusive legislative scheme of COGSA.100 The ancient general maritime law doctrine of deviation permits courts to ignore the natural effect of the

97 of passenger carriage, had previously considered whether a passenger could collect punitive damages for misrepresentations made by the carrier that no steerage passengers would be on board during a cholera outbreak. The Normanna, 62 F. 469 (S.D.N.Y. 1894). That court found that the defendant lacked the requisite wrongful intent to deceive necessary to impose punitive damages. Id. at 480. This decision should not be seen as implicitly recognizing the availability of punitive damages in admiralty for contract actions since the court analyzed the claim as a separate maritime tort with liability turning on whether the deception was the proximate cause of the injury. Id. at 472, 480. Moreover, unlike COGSA actions, no statutory scheme prevented a separate, independent action for tort recovery.

Although not discussed by the court in Armada Supply, in theory courts might impose punitive damages based on independent torts such as conversion and misrepresentation. However, admiralty courts have consistently refused to permit separate tort actions when COGSA governs the relationship of the parties. See supra notes 7–13 and accompanying text.

98. See supra note 3 (text of COGSA § 4(5)).


100. The Second, Fifth, and Ninth Circuits disregard the literal meaning of the "in any event" language in deviation cases because of the long-standing general maritime law rule depriving the carrier of liability limitations for a deviation. See supra notes 27–29 and accompanying text. In contrast, punitive damages in admiralty actions—contract or tort—are a recent development. In fact, Armada Supply is the first decision to award punitive damages in the contract of carriage context that has not been reversed on appeal. See supra notes 48–69 and accompanying text (punitive damages in admiralty). Armada Supply was not, however, appealed. Although there is historical precedent for punitive damages for maritime torts, only since 1972 have such damages been awarded with regularity. See supra notes 52–54 and accompanying text.
Punitive Damages Under COGSA

"in any event" limitation. No long-standing maritime principle of punitive damages exists, however, which might prevent a court from invoking the plain effect of the "damage actually sustained" limitation as prohibiting punitive damages.\(^{101}\) Second, the entire doctrine of deviation itself may be inconsistent with COGSA\(^{102}\) and expansion of the doctrine is disfavored in most jurisdictions, including the Second Circuit.\(^{103}\) Relying on an inconsistent exception, whose further expansion has been expressly limited, to create a new and also inconsistent exception to the damage limitations defies logic.

As a third rationale to a punitive damage award, the court in Armada Supply looked to COGSA's legislative history. The court found that the "damage actually sustained" limitation does not prohibit punitive damages but merely allays carrier fears that the limitation might be applied as liquidated damages.\(^{104}\) However, the court's review of COGSA's legislative history was too narrow. Although the limitation clearly addresses such carrier concerns,\(^{105}\) it also establishes a carrier's maximum liability. Additionally, the court's restricted interpretation ignores extensive precedent and the logical structure of COGSA's remedial scheme.

Legislative history not cited by the court in Armada Supply indicates that Congress fully understood the broad implications of the "in no event" language in the "damage actually sustained" limitation.\(^{106}\) In addition, the court's narrow reading of section 4(5) ignores congressional intent to reduce the carriers' extensive liability under general maritime law in exchange for restrictions on their ability to disclaim liability in the bill of

\(^{101}\) The circuits following the majority rule of the Second Circuit are applying the principle from the 1959 Supreme Court decision cited but misapplied by Armada Supply: for COGSA to overturn a long-held general maritime rule (such as insurer liability for deviations) it must do so expressly. Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304-05 (1959); see supra notes 93-94 and accompanying text.

\(^{102}\) See supra note 25 and accompanying text.

\(^{103}\) See id.

\(^{104}\) Armada Supply, 639 F. Supp. at 1164; see supra notes 85-86 and accompanying text ("damage actually sustained" limitation inserted to deny recovery of entire $500 if value less than $500).

\(^{105}\) Carriers did express such concerns. See Uniform Ocean Bills of Lading: House Hearings on S. 1152 Before the House Comm. on the Merchant Marine and Fisheries, 74th Cong., 2d Sess. 24-25 (1935) (statement of A.B. Barber, Manager, Transportation and Communications Dept., United States Chamber of Commerce: the $500 per package limitation in section 4(5) "does not mean they [shippers] will get $500 for every package, but they will get the value, if it is within $500")

\(^{106}\) A memorandum prepared for Congress by the State Department to explain COGSA's effect on present law indicates that Congress understood the full implications of section 4(5): "[section 4(5)] permits the fixing by contract of a higher, but not a lower, maximum value than $500, provided that in no event shall the carrier be liable for more than actual value." Uniform Ocean Bills of Lading: House Hearings on S. 1152 Before the House Comm. on the Merchant Marine and Fisheries, 74th Cong., 2d Sess. 14 (1935) (emphasis added).
The court's narrow interpretation of section 4(5) is inconsistent with this broader intent.

Moreover, the court's qualified version of the "damage actually sustained" limitation is contrary to accepted maritime precedent and fundamental contract principles. Under the court's restrictive interpretation, the "damage actually sustained" limitation in section 4(5) would operate as a ceiling on carrier liability only in those contracts governed by the package limitation. However, courts consistently interpret the "damage actually sustained" limitation as an ultimate ceiling on carrier liability in all bills of lading. The placement of the "damage actually sustained" limitation directly after the provision permitting the parties to contract for greater carrier liability strongly supports this conclusion. Without a uniform and final "damage actually sustained" limit on carrier liability in both the $500 package and the value-declared situations, the cargo owner declaring value gains an opportunity for recovery greater than actual value. Such recovery would represent a windfall to the shipper and would violate the fundamental principle of actual loss which governs contracts between shippers and carriers.

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107. See supra notes 6, 18 and accompanying text.
108. See Armada Supply, 639 F. Supp. at 1164-65. Under the Armada Supply analysis, the "damage actually sustained" limitation would have effect only in those cases in which the $500 package limitation applies and loss is less than $500.
109. Internatio, Inc. v. M.S. Taimyr, 602 F.2d 49, 50 (2d Cir. 1979) ("damage actually sustained" provision limits shipper's recovery to what the cargo owner would have received had the resale contract been performed); Mitsui & Co. v. American Export Lines, 636 F.2d 807, 824 (2d Cir. 1981) (to award prejudgment interest from before the time goods should have been delivered violates "damage actually sustained" limitation); Marcraft Clothes, Inc. v. M/V Kurobe Maru, 575 F. Supp. 239 (S.D.N.Y. 1983) (ruling that $500 package limitation applies, but denying summary judgment because defendant failed to prove extent of "damage actually sustained").
110. Although courts could invoke common law damage principles to limit damages, under Armada Supply logic, the statute itself would permit recovery of full market price in the event of delay regardless of whether the shipper incurred any actual loss at all. No problem arises when value is greater than $500 because the package limitation still provides a final ceiling. When parties contract for the full value of the goods, however, there would be no ceiling on recovery. If the cargo was only partially damaged, the carrier would still be liable for the amount in the contract. Such damages are void under the presently accepted, broader interpretation of the "damage actually sustained" limitation. See Holden v. S.S. Kendall Fish, 395 F.2d 910, 912 (5th Cir. 1968) ("damage actually sustained" limitation requires that damages be measured by fair market value at destination and not agreed damages based on invoice price); B.F. McKernin & Co. v. United States Lines, 416 F. Supp. 1068, 1073 (S.D.N.Y. 1976); supra note 3 (text of COGSA § 4(5)).
111. See D. Dobbs, HANDBOOK ON THE LAW REMEDIES § 5.10, at 377-78 (1973) (although a variety of standards exist to measure loss of goods on a contract of carriage, the basic goal is compensation for actual loss).
Punitive Damages Under COGSA

B. Armada Supply Creates an Excessively Low Standard for Imposition of Punitive Damages in Actions Governed by COGSA

Even if the Armada Supply court had properly analyzed the issues, a more serious error lies in the court's unacceptable standard for imposing punitive damages. In setting this standard, the court relied on dicta from Judge Friendly's decision in Thyssen, Inc. v. S.S. Fortune Star,112 which stated that punitive damages might be available in a contract action only if the contract breach is also a willful tort.113 By thus exempting willful torts, the court drilled a hole in the intended exclusivity of COGSA that could sink the entire Act.114

The court did not define "willful"115 and thus did not articulate whether a court may resort to general maritime law only for intentional torts, for willful, wanton, and reckless torts, or on some other basis.116 This provides no guidance as to either the degree of culpability required or the kinds of general maritime law remedies available under this exception.117

The court's willful tort standard is inconsistent with the purposes and goals of COGSA. The Armada Supply requirement for identifying an independent willful tort is foreign to the concept that COGSA encompasses both tort and contract principles.118 The imposition of punitive damages in COGSA governed actions must be based on culpability, rather than on the

112. The decision in Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57 (2d Cir. 1985), is discussed supra in text accompanying notes 56-64.
114. COGSA is the exclusive remedy for both contract and tort actions. See supra notes 7-13 and accompanying text.
115. No accurate or consistent definition of "willful" exists. See Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 34-35 (1982) (referring to terms such as "willful" and "wanton" as the "recklessness group"). Willful conduct can mean either intentional or reckless disregard of the law. See, e.g., United States v. Murdock, 290 U.S. 389, 394-96 (1933). Prosser defines willful and wanton as a state of mind lying between actual intent to do harm and the mere unreasonable risk of harm to another involved in ordinary negligence, or as conscious indifference to the rights of others. Prosser & Keeton, supra note 54, § 34, at 212.
116. See generally Prosser & Keeton, supra note 54, § 34, at 212. A variety of standards exist for the imposition of punitive damages in contract actions. See, e.g., Art Janpol Volkswagen, Inc. v. Fiat Motors of N. Am., 767 F.2d 690, 696 (10th Cir. 1985) (punitive damages not recoverable for breach of contract unless breach is maliciously intentional, fraudulent or oppressive, or committed recklessly or with a wanton disregard of rights); see also Splitt v. Deltona Corp., 662 F.2d 1142, 1145 (5th Cir. 1981) (punitive damages available if act causing breach of contract also amounts to intentional tort); see generally Sebert, Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation, 33 UCLA L. Rev. 1565 (1986).
117. By failing to define the conduct which permits resort to general maritime law, or the remedies available in general maritime law under the exception, the court may have created a COGSA general maritime "saving clause." See supra note 8 and accompanying text.
118. See supra notes 7-13 and accompanying text.
general reference to a class of torts. The court’s standard would permit an award of damages under general maritime law for willful torts such as conversion even though COGSA clearly governs and prohibits such an award. To impose punitive damages on a carrier for conduct within the intended scope of COGSA, while continuing to allow a shipper to collect compensatory damages under a favorable presumption of carrier liability, upsets the balance of interests that Congress accepted in 1936. The court’s low standard would inevitably make the outcome under COGSA unpredictable and increase the cost of suits under COGSA for all parties.

In ordinary contract situations, the rule that punitive damages are available for breaches where the conduct constituting the breach is also a willful tort may be appropriate. However, because COGSA regulates both tortious and contractual behavior, determining what conduct permits use of general maritime law to impose punitive damages requires more.

IV. AN ALTERNATIVE BASIS FOR ANALYSIS: PREEMPTION AND CRIMINALLY CULPABLE CONDUCT

The better analysis focuses on whether and to what extent congressional action in the bills of lading area preempts general maritime law. Such a preemption analysis provides a firm analytical foundation for a standard to impose punitive damages which preserves the integrity of COGSA. The court’s analysis in Armada Supply depended extensively on a lack of express congressional intent to prohibit punitive damages. Such analysis does not consider the substantial scope and exclusive nature of COGSA and therefore cannot be used to define the limits of the conduct to which the statute was intended to apply. A preemption analysis considers this scope and delineates the conduct that COGSA controls. Criminally culpable

119. Generally, the conduct of the party, not the classification of the conduct, should provide the basis for punitive damages. Prosser & Keeton, supra note 54, § 2, at 11.
120. See supra notes 7–13.
121. See supra text accompanying notes 6, 14.
122. The COGSA burden of proof provisions attempt to clarify and simplify recovery. See generally G. Gilmore & C. Black, supra note 6, at 183–85. See also supra note 14 and accompanying text. Yet, after Armada Supply, plaintiffs would have incentive to present additional claims for punitive damages in virtually every action based on lost or missing cargo, causing an increase in the length and cost of litigation. Conceivably, the availability of punitive damages at trial could distort if not prevent settlement of claims.
123. Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985); Restatement (Second) of Contracts § 355 (1979). But see, e.g., Split v. Deltona Corp., 662 F.2d 1142, 1145 (5th Cir. 1981) (finding an independent tort alone is sufficient to support punitive damages in a contract action; it need not be willful).
124. See supra notes 81–82, 92–97 and accompanying text.
Punitive Damages Under COGSA

... falls outside of COGSA’s control and is thus within the court’s law-making role and properly subject to the imposition of punitive damages.

A. COGSA Bars Supplemental Remedies Under General Maritime Law

Had the court in Armada Supply used a preemption analysis based on the Mobil Oil Corp. v. Higginbotham “speak to the question” test for preemption,\(^\text{126}\) the presumption of preemption,\(^\text{127}\) and the factors which might overcome that presumption,\(^\text{128}\) it would have concluded that the legislative scheme of COGSA prevents courts from supplementing the statute with remedies from general maritime law.\(^\text{129}\) A finding of preemption, however, does not end the inquiry. The second step must be to define the limits of preemption and the conduct to which courts retain authority to impose remedies under general maritime law.

The decision in Mobil Oil Corp. v. Higginbotham states that supplemental remedies under general maritime law are not available if the statute speaks directly to the question.\(^\text{130}\) COGSA speaks directly to the broad question of liability for damages or loss in connection with the transport of goods by sea.\(^\text{131}\) Consequently, Higginbotham mandates the presumption that COGSA prevents resorting to general maritime law to award punitive damages for all conduct within its scope.

Moreover, the factors which might rebut this presumption only reinforce the conclusion of preemption.\(^\text{132}\) First, COGSA lacks any express term or “saving clause” to retain general maritime law remedies.\(^\text{133}\) Second, the

\(^{125}\) As used herein, “criminally culpable conduct” is defined as conduct exhibiting reckless indifference to the rights of others and the intent to commit criminal acts.

\(^{126}\) 436 U.S. 618, 625 (1978); In re Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981); see supra notes 33, 40, 43–47 and accompanying text (federal common law has been preempted as to questions to which a congressional statute “speaks directly”).

\(^{127}\) City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981); see supra notes 30–37 and accompanying text.

\(^{128}\) Three factors will be applied: any specific language in COGSA retaining general maritime law remedies and principles, whether an examination of the scope of the statute indicates that the principle fills a gap or rewrites the statute, and the degree of acceptance of the principle under general maritime law. See supra notes 38–42 and accompanying text.

\(^{129}\) See National Automotive Publications v. United States Lines, 486 F. Supp. 1094, 1102 (S.D.N.Y. 1981) (given the exclusive nature of the remedies under COGSA, whatever common law theories plaintiff may assert are preempted by virtue of COGSA).

\(^{130}\) Higginbotham, 436 U.S. at 625.

\(^{131}\) Higginbotham applied this “speak to the question” test to prohibit the award of loss of society damages at general maritime in an action governed by the Death on the High Seas Act. See supra notes 43–47 and accompanying text.

\(^{132}\) See supra notes 38–42, 128 and accompanying text.

\(^{133}\) See supra note 39 and accompanying text; see also note 8 and accompanying text (saving
scope of COGSA reinforces the conclusion of preemption. Although COGSA may be silent on the question of punitive damages, the scope of the statute establishes an extensive legislative scheme for recovery of damages based on both contract and tort principles. In addition, all courts recognize COGSA as the exclusive action for recovery. Therefore, permitting courts to supplement COGSA remedies with general maritime law merely on the finding of a tort, willful or otherwise, does not "fill a gap left by Congress’ silence," but instead rewrites the statute. Finally, no long-standing general maritime principle of punitive damages in contract or tort actions operates to rebut the presumption that COGSA preempts such remedies. Punitive damages arising from the contract relationship between shippers and carriers were never incorporated from general maritime law into the regulatory scheme of COGSA.

B. Limits on Preemption

COGSA represents the exclusive legislative scheme for recovery of damages and preempts supplemental remedies for recovery in connection with the shipment of goods by sea. Therefore, punitive damages would be permissible in only two situations: a congressional amendment weaving punitive damages into the COGSA balance of interests, or a judicial ruling that the legislative scheme does not speak to the conduct in question.

Even if COGSA preempts general maritime law remedies for some conduct, remedies for other conduct may not have been preempted.
Punitive Damages Under COGSA

Where conduct is beyond the scope of what Congress reasonably could have intended a statute to govern, remedies for that conduct are not preempted. A statute such as COGSA, enacted to guarantee compensation for economic losses arising from the "run-of-the-mill" commercial breach, does not address, regulate, or provide a remedy for the deceit and extortion found by the court in Armada Supply. Even though COGSA provides an exclusive remedy for both contract and tort claims, Congress could not have intended that this kind of egregious conduct fall within the scope of the statute and its "damage actually sustained" limitation.

C. A Proposal for a Criminal Culpability Exception to the Remedies in COGSA

Preemption analysis leads to the conclusion that certain conduct is beyond the scope of COGSA. Nevertheless, a clearly articulated standard is necessary to draw the line between conduct for which COGSA is the exclusive remedy, and conduct to which courts may apply principles of general maritime law. A standard requiring proof of criminally culpable conduct—defined as conduct exhibiting reckless indifference to the rights of others and the intent to commit criminal acts—to impose punitive damages under general maritime law, provides a reasonable and workable standard. This standard would uphold the exclusivity and integrity of COGSA, while allowing the imposition of punitive damages in egregious cases like Armada Supply.

1. COGSA and Criminal Culpability

COGSA does not speak to the type of criminally culpable conduct before the court in Armada Supply. Breach of society's norms may be classified as contractual, tortious, or criminal, with criminal conduct generally thought to be the most blameworthy. For purposes of delineating COGSA's scope, conduct classified as criminally culpable can be defined as that which exhibits reckless indifference to the rights of others, coupled with language in the LWHCA, 33 U.S.C. § 905(a) (1982), that the employer's liability for compensation for worker's injuries under the statute "shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty."

144. See W. LaFAVE, CRIMINAL LAW § 1.3, at 12 (2d ed. 1986).
145. "Reckless indifference to the rights of others" is a more accurate state of mind standard since it emphasizes the effect of the conduct on others as well as the state of mind of the wrongdoer. See RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979) (punitive damages awarded for conduct that is outrageous because of the defendant's reckless indifference to the rights of others). See, e.g., Dorsey v. Honda Motor Co., 635 F.2d 630 (5th Cir. Unit B Sept. 1981) (five million dollars in punitive damages

545
the intent to commit criminal acts. COGSA was enacted to ensure compensation for economic losses due to commercial breaches of duty. COGSA expressly provides remedies for contractual, negligent, and even intentional or willful conduct such as conversion. The deceit, extortion, and blackmail before the court in Armada Supply, however, falls into the category of criminally culpable conduct. Such conduct is beyond the commercial scope of COGSA. Congress could not have intended that the criminally culpable carrier be allowed to use the COGSA liability limitations as a shield from full accountability. In short, the recovery of punitive damages under general maritime law lies not in the commercial bill of lading to which COGSA applies exclusively, but rather in the criminally culpable conduct which COGSA does not address.

2. Criminal Culpability Exception Is Consistent With Existing Law

A narrow criminal culpability exception to COGSA merely delineates the boundaries of COGSA's application. This exception maintains COGSA's exclusive role in regulating recovery on ocean bills of lading, but does not rewrite the statute, nor even contradict judicial precedent.

approved against car manufacturer for reckless indifference to the rights of others), modified, 670 F.2d 21 (5th Cir. Unit B Mar. 1982); Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980) (conduct indicating reckless disregard for the rights or property of others justifies punitive damages).

"Reckless indifference to the rights of others" as used herein is defined as:

- Conduct involving a conscious choice of a course of action entailing a disproportionately great risk of harm to the rights or property of others, and undertaken with knowledge of the potential for such harm.

Adapted from definition in Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 21 (1982).

146. Criminal conduct is often cited as a standard for imposing punitive damages, although not an exclusive standard. See Prosser & Keeton, supra note 54, § 2, at 9 (punitive damages serve the punishment and deterrence functions of criminal law and are available where defendant's wrongdoing has the character of outrage frequently associated with crime); see also RESTATEMENT (SECOND) OF TORTS § 908(2) comment b (1979) (purpose of punitive damages is to punish and deter; "these damages can be awarded only for conduct for which this remedy is appropriate—... conduct involving some element of outrage similar to that usually found in crime").

One court has defined the "moral culpability" required for punitive damages as recklessness that is close to criminality, and cited the New York criminal definition of recklessness. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967).

147. See supra note 5 and accompanying text.

148. See supra notes 7–13 and accompanying text.

149. See W. LAFAVE, CRIMINAL LAW § 8.12, at 789–90 (2d ed. 1986) (extortion and blackmail are crimes against the administration of justice).

150. The availability of punitive damages in commercial settings for intentional wrongdoing coupled with criminal intent has been recognized by courts. See, e.g., B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651, 665 (M.D.N.C. 1979) (punitive damages for tortious breach of contract should be assessed when defendant's wrongdoing is intentional and deliberate and rises to a degree of outrageousness frequently associated with crime).
Punitive Damages Under COGSA

COGSA does not speak directly to criminally culpable conduct. Consequently, COGSA’s scheme for recovery remains exclusive for all other conduct. COGSA’s legislative scheme operates equitably in all situations except the rare case such as Armada Supply. COGSA applies to govern damages caused by levels of culpability which the statute could reasonably remedy.

Awarding punitive damages in the rare case where the party’s conduct violates all commercial norms does not conflict with precedent. A shipper or cargo owner remains without a right to a separate action for conversion, negligence, or breach of contract. COGSA still speaks to conversion accompanied by or resulting from less blameworthy behavior because such conduct remains within the commercial scope of COGSA. This standard can be reconciled with existing precedent because intentional delay and willful deviation lack the requisite intent to commit criminal acts.

3. Criminal Culpability Exception Better Serves the Purposes of COGSA and Punitive Damages

The use of a criminal culpability standard to impose punitive damages properly focuses the inquiry on the primary basis for punitive damages: culpability. Courts are properly concerned that investigation into culpability for a determination of deviation might lead to uncertainty. The uncertainty arises, however, from the doctrine of deviation, not from the issue of culpability. The inquiry into culpability should be to determine the availability of punitive damages, not to classify the conduct.

151. See supra notes 144–50 and accompanying text.
152. See infra notes 153–55 and accompanying text; see also supra notes 7–13 and accompanying text.
153. Under the proposed standard, simple conversion exhibiting low levels of culpability would lack the “reckless indifference” necessary to resort to general maritime law for punitive damages since this kind of conversion of cargo can be compensated fully under COGSA.
155. See Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57 (2d Cir. 1985); see also supra notes 56–64 and accompanying text. The result in Thyssen is reached not because quasi-deviation remains in the realm of contract, but because the conduct does not exhibit criminal intent. A conscious decision to sacrifice a cargo owner’s goods by stowage on deck would, however, satisfy the definition of “reckless indifference.” In short, COGSA generally speaks to the conduct of deviation and the level of culpability normally present.
156. See D. Dobbs, supra note 111, § 3.9, at 204–06 (punitive damages are to be awarded because of the defendant’s culpable state of mind, not because of extreme conduct standing alone).
157. See supra note 26 and accompanying text.
158. The deviation doctrine has fallen into disfavor. See supra notes 25–26 and accompanying text.
Regardless of the standard applied, a court must consider culpability at some point in awarding punitive damages.\(^{159}\) Under the reasoning in *Armada Supply*, however, courts would be forced to examine culpability and classify the conduct. The difficulties behind such a dual analysis led courts to exempt criminal conduct from the deviation doctrine.\(^{160}\) In COGSA actions, a court’s inquiry into egregious conduct should focus solely on culpability. Such a focus would simplify administration of punitive damages by eliminating the need to classify conduct as a tort, a breach of contract, or a deviation.\(^ {161}\)

COGSA’s failure to provide a remedy for criminally culpable conduct has led plaintiffs to seek relief through extension of the deviation doctrine.\(^ {162}\) However, courts have refused to extend the doctrine to encompass such conduct.\(^ {163}\) Under present analysis, stowage of goods on deck deprives the carrier of the liability limitation provisions in COGSA, but a carrier guilty of systematic theft or accepting bribes receives the full protection of COGSA’s liability limitations.\(^ {164}\) In short, egregious tortfeasors currently receive favored treatment under COGSA.\(^ {165}\) A standard based on criminally culpable conduct would impose punitive damages in such circumstances.\(^ {166}\)

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\(^{159}\) If a court does find a “willful” tort which is not in the realm of contract, it must still determine whether the party committing the willful tort was sufficiently culpable to award punitive damages. See *Armada Supply v. S/T Agios Nikolas*, 639 F. Supp. 1161, 1162–63 (S.D.N.Y. 1986).

\(^{160}\) See supra notes 25–26 and accompanying text. The *Armada Supply* analysis requires a court to first determine whether the conduct is in the realm of contract, or a vaguely defined “willful” tort. See also *Thyssen*, 777 F.2d at 63–65.

\(^{161}\) Classification of conduct as tort or contract is not essential to an award of punitive damages. See B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651, 665 (M.D.N.C. 1979).

\(^{162}\) See supra note 26 and accompanying text.

\(^{163}\) See, e.g., B.M.A. Indus. v. Nigerian Star Line, 786 F.2d 90, 92 (2d Cir. 1986) (misdelivery of cargo does not warrant finding of deviation even if due to criminal receipt of bribe); Italia Di Navigazione S.P.A. v. M.V. Hermes I, 724 F.2d 21, 22 (2d Cir. 1983) (non-delivery of cargo due to systematic theft does not warrant finding of deviation to oust one-year statute of limitation specified in section 3(6) of COGSA).

\(^{164}\) See supra note 26. Punitive damages may be especially appropriate to punish defendants for conduct, such as criminal conduct in COGSA, which often goes unpunished. See Kink v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789, 798 (1965) (punitive damages appropriate to punish types of conduct that although oppressive and harmful to the individual almost invariably go unpunished by the public prosecutor); see also Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1195–98 (1931).

\(^{165}\) The independent willful tort standard of *Armada Supply* would also encompass such conduct. However, the court’s standard is over-inclusive, permitting punitive damages for conduct that COGSA clearly governs. A criminally culpable conduct standard reserves exemplary damages for the rare case beyond COGSA’s scope.

\(^{166}\) In such cases, the carrier or his agents have engaged in a conscious course of conduct to disregard the rights of the cargo owner and to injure the goods. Even if the conduct might not be provable beyond a reasonable doubt or satisfy the mens rea element for criminal prosecution, a jury or judge in a civil action could make a finding of intent to commit criminal acts.
The purposes of punitive damages\textsuperscript{167} are not served in the context of carriage of goods by sea unless a party’s conduct reaches criminal culpability. To promote economic efficiency, carriers willing to compensate for losses to goods should be free to breach the contract of carriage where the breach is economically efficient.\textsuperscript{168} Recognizing this principle, the \textit{Thyssen} court determined that punitive damages were not available for a deviation. Since neither the goals of deterrence nor punishment would be served, such damages would only impose added costs on all shippers to confer extraordinary benefits on a few.\textsuperscript{169} Recognizing the efficiency of some contract breaches, however, does not mean that carriers may simply compensate for loss and engage in any conduct with impunity. The criminally culpable parties in \textit{Armada Supply} violated all commercial norms. Such criminally culpable conduct denies the public the benefits from the expansion of commerce that COGSA’s regulatory scheme promotes.\textsuperscript{170} Deterring conduct which injures the public provides the proper grounds for imposing punitive damages. In such circumstances, punitive damages no longer benefit the few, but deter and punish conduct presently not addressed by COGSA without impinging on the statute’s valid commercial purposes and scope.

\section*{V. CONCLUSION}

The district court in \textit{Armada Supply} attempted to adapt a fifty-year-old maritime statute to the needs of today by tearing a small hole in its application. In this case, however, only the finest craftsman could keep this hole from sinking the ship. The integrity and exclusivity of COGSA require that analysis of punitive damages focus on COGSA’s purposes and not on the common law concept of a willful tort. COGSA’s coverage, however, is not unlimited, and thus punitive damages should be available under general

\textsuperscript{167} \textit{See supra} notes 62–63 and accompanying text.

\textsuperscript{168} E. Farnsworth, \textit{Contracts} § 12.3, at 817–18 (1982). Thus, to a great extent, carriers willing to compensate the cargo owner for all losses should be free to breach the contract of carriage.

\textsuperscript{169} Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d. 57, 75 (2d Cir. 1985).

\textsuperscript{170} In \textit{Armada Supply} two types of criminally culpable conduct can be identified. First, the \textit{Agios Nikolas} intentionally evaded legally-obtained judicial orders for arrest of the vessel. Second, extortion and deceit were employed by the owners of the \textit{Agios Nikolas} to blackmail the vulnerable Armada Supply into dropping the warrant. Armada Supply v. S/T Agios Nikolaos, 613 F. Supp. 1459, 1470 (S.D.N.Y. 1985). The public has an interest in deterring both types of criminally culpable conduct in order to uphold the sanctity of law and the courts, and to ensure that disputes be settled through legal means. One commentator has proposed that courts impose punitive damages in breach of contract actions if the breach was intentional and the breaching party knew that there was no legal justification for lack of performance or where the party breached in reckless disregard of whether a justification existed. Sebert, \textit{Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation}, 33 UCLA L. Rev. 1565, 1657 (1986).
maritime law in the rare case where a party's conduct escapes COGSA's boundaries. Preemption analysis, focused on the scope of COGSA, provides a test for determining whether particular conduct exceeds the boundary of the statute's application. Criminally culpable conduct—that conduct which exhibits reckless indifference to the rights of others and the intent to commit criminal acts—is precisely such conduct: rare and clearly identifiable.

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