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NOTES

DEVIATION THEN AND NOW—WHEN COGSA’S PER PACKAGE LIMITATION IS LOST

MARGARET M. LENNON†

INTRODUCTION

At common law, deviation referred to a “‘voluntary departure, without necessary or reasonable cause, from the regular and usual course’ of a voyage.”¹ The doctrine derived partly from the carrier’s duty to exercise his best efforts to safely transport the goods² and the “understanding between the shipper and carrier that the carrier would not stray from the customary course of the voyage it contracted to undertake.”³ Deviation from a contracted voyage deprived the carrier of many of its defenses to liability, in effect making the carrier the

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¹ Hostetter v. Park, 137 U.S. 30, 40 (1890).

² [When the carrier] receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the place and time agreed upon; .... After having set sail, he must proceed on the voyage, in the direct, shortest, and usual route, to the port of delivery, without unnecessary deviation, unless there has been an express contract as to the course to be pursued; and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, ....

³ C.A. Artículos Nacionales de Goma Gomaven v. M/V Aragua, 756 F.2d 1156, 1158 (5th Cir. 1985) (quoting The Propeller Niagara v. Cordes, 62 U.S. 7, 24 (1858)).

³ Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1171 (9th Cir. 1998) (citing The Wildomino v. Citro Chem. Co. of Am., 272 U.S. 718, 727 (1927) & The Sarnia, 278 F. 459, 464 (2nd Cir. 1921)).

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insurer of the goods it was carrying.\textsuperscript{4} Courts developed this rule because the shipper's insurance on its cargo was often voided when a carrier inexcusably deviated from its contract of carriage.\textsuperscript{5}

The doctrine of deviation has evolved considerably from its origins, both in rationale and scope. This Note will discuss this evolution in the wake of the enactment of The Carriage of Good by Sea Act ("COGSA"), the differing approaches taken by the circuits under COGSA, and the doctrine's vitality going forward, which, as this Note will argue, is important, but not ensured.

I. EXPANSION OF THE DEVIATION DOCTRINE: A SUMMARY

Courts did not want to impose upon shippers risks they had not bargained for, so "[t]he sort of activity that triggered invocation of the deviation doctrine... was determined largely by the extent, scope, and nature of the risk it imposed on the cargo."\textsuperscript{6} Although originally limited to geographic deviations from the contractually established route,\textsuperscript{7} American courts later

\textsuperscript{4} See generally Steven F. Friedell, The Deviating Ship, 32 Hastings L.J. 1535 (1981). When the carrier breached the contract of carriage by deviating from the agreed upon voyage, it was considered to have exposed the cargo to such additional and unanticipated risk as to amount to a fundamental breach of the contract. As a result, the carrier was not allowed to rely on exculpatory provisions in the bill of lading, such as limitations on liability. See M/V Nat'l Pride, 155 F.3d at 1171 (citing The Sarnia, 278 F. at 463–64 & Switz. Gen. Ins. Co. v. Navigazione Libera Triestina, S.A., 91 F.2d 960, 962 (2d Cir. 1940)); see also The St. Johns N.F., 280 F. 553, 556–57 (2d Cir. 1922), aff'd, 263 U.S. 119 (1923); Globe Navigation Co. v. Russ Lumber & Mill Co., 167 F. 228, 230–31 (N.D. Cal. 1908).

\textsuperscript{5} See, e.g., Norwich Union Fire Ins. Soc'y, Ltd., v. Lykes Bros. Steamship Co., 741 F. Supp. 1051, 1053 (S.D.N.Y. 1990); see also Friedell, supra note 4, at 1535 ("If a boat captain violated the itinerary to which it was committed and thereby brought about [a] loss... he shall measure out to its owner... "). A marine insurer was deemed to have assumed only those risks inherent in the contemplated voyage. "If [a] carrier [deviated]... then the insurance contract was 'busted' and the insurers relieved of their obligations with respect to any loss which might occur thereafter." Agfa-Gevaert, Inc. v. S/S "TFL Adams," 596 F. Supp. 338, 342 (S.D.N.Y. 1984) (citing Hearne v. Marine Ins. Co., 87 U.S. (20 Wall.) 488 (1874) & Oliver v. Md. Ins. Co., 11 U.S. (7 Cranch) 487 (1813)). "A vessel making a geographic deviation was considered to be on an entirely different voyage from the one originally contemplated. Since the underwriter did not undertake to insure the cargo on that different voyage, any insurance contract procured by the shipper was annulled." M/V Aragua, 756 F.2d at 1158 (citing Hearne v. Marine Ins. Co., 87 U.S. (20 Wall.) 488 (1874)); see also Grant Gilmore & Charles Black, The Law of Admiralty § 2-6, 66 (2d ed. 1975).

\textsuperscript{6} M/V Nat'l Pride, 155 F.3d at 1172.

\textsuperscript{7} Id.
broadened the concept of unreasonable deviation to cover other breaches of the contract of carriage deemed serious enough to warrant the harsh consequences imposed by deviation.\footnote{See \textit{Michael F. Sturley, Benedict on Admiralty} § 123, 12-12 (2002) ("In the United States ... the deviation doctrine has grown beyond the geographic context . . .").}

These other breaches became known as "quasi-deviations,"\footnote{See \textit{Sturley, supra} note 8, § 123, 12-6.} the most common example being the unjustifiable stowage of cargo on deck.\footnote{The Supreme Court applied the deviation doctrine to the unauthorized stowage of cargo on deck in \textit{St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janeiro}, 263 U.S. 119 (1923). In that case, the bill of lading for the shipment did not expressly state that the goods would be stowed below deck and a prior freight agreement entered into before the bill of lading was issued permitted shipment of the goods "on or under deck, ship's option." \textit{Id.} Nonetheless, the Court said that issuance "[of a] clean bill of lading amounted to a positive representation by [the ship] that . . . the goods would go under deck." \textit{Id.} at 124. The court held:

By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, [and] cannot escape [liability] by reason of the relieving clauses inserted in the bill of lading for her benefit . . . .

\textit{Id.} The Court also recognized that if there were a port custom permitting on-deck
(carrying the goods beyond their intended destination port),\textsuperscript{11} reshipment (taking goods to the port of destination, back to the port of shipment, then sending them back to the destination port),\textsuperscript{12} discharge of goods at the wrong port,\textsuperscript{13} and shipment or transshipment of the goods on a different vessel from that named in the bill of lading.\textsuperscript{14} Non-delivery or delivery to the wrong person (or another variation of misdelivery), however, is not a deviation.\textsuperscript{15} Similarly, an unexplained disappearance of goods does not create a presumption of deviation; in order to invoke the doctrine, the shipper must prove a carrier’s affirmative wrongdoing, beyond mere negligent non-delivery.\textsuperscript{16}

\textsuperscript{11} See, e.g., Atl. Mut. Ins. Co. v. Poseidon Schiffahrts G.m.b.H., 313 F.2d 872, 873–74 (7th Cir. 1963) (finding deviation where the shipper delivered goods one and a half years after the agreed upon time); Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto, 282 F. 235, 237 (2d. Cir. 1922) (“The failure to deliver the goods at the port named in the bill of lading, and carrying them further to another port, is an overcarriage, and constitutes a deviation . . . .”); Hoskyn & Co. v. Silver Line, Ltd., 63 F. Supp. 452, 468 (S.D.N.Y. 1943) (same), aff’d, 143 F.2d 462 (2d. Cir. 1944).

\textsuperscript{12} See, e.g., Calderon v. Atlas Steamship Co., 64 F. 874, 877–78 (S.D.N.Y. 1894) (imposing liability for carrying goods beyond port), aff’d, 69 F. 574 (2d. Cir. 1895), rev’d on other grounds, 170 U.S. 272 (1898).

\textsuperscript{13} See, e.g., Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 336–39 (2d Cir. 1986) (noting that the deposit of goods at an unscheduled port is a deviation).

\textsuperscript{14} See, e.g., Smith, Kirkpatrick & Co. v. Colombian S.S. Co., 88 F.2d 392, 394–95 (5th Cir. 1937) (“Transhipment or forwarding by another carrier might be a deviation.”).

\textsuperscript{15} See Unimac Co. v. C.F. Ocean Serv., Inc., 43 F.3d 1434, 1437–38 (11th Cir. 1995) (“[W]e have held that a non-delivery is not a deviation.”); B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd., 786 F.2d 90, 92 (2d Cir. 1986) (per curiam) (holding that misdelivery does not constitute a deviation); C.A. Articulos Nacionales de Goma Gomaven v. M/V Aragua, 756 F.2d 1156, 1160 (5th Cir. 1985) (explaining that non-delivery was neither a deliberate act nor an unanticipated risk, and, therefore, did not seem to be in the class of conduct that historically constituted a deviation).

II. DEVIATION UNDER COGSA

A. COGSA's Origin and the per Package Limitation

Congress partially codified the general maritime law of deviation in 1936 when it enacted COGSA. COGSA was itself an implementation of the Hague Rules. COGSA was also enacted to carry over into the international sphere the uniform liability rules governing domestic voyages found in the Harter Act, which mitigated the common law liability of carriers as insurers. To that end, section 4(5) of COGSA provides that neither the carrier nor the ship will be liable for any loss or damage to goods exceeding $500 per package, unless the nature and value of the goods have been declared by the shipper and recorded in the bill of lading. COGSA's only provision on deviation provides:

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Unfortunately, COGSA does not define the term “unreasonable deviation,” and it does not clarify its relationship to the $500 per package limitation on carrier liability either.

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18 The International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233. The Hague Rules, which constitute an international maritime agreement, and COGSA are not identical because Congress added language to the Hague Rules when it enacted COGSA. See GILMORE & BLACK, supra note 5, § 3-24, 143-44 (arguing that other than “minor differences [COGSA] follows verbatim the Hague rules”).
20 See Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 30 (2d Cir. 1986).
22 46 U.S.C. § 1304(4) (1982). Congress added the last part of this section when it adopted the Hague Rules. "The intention was to provide that a deviation solely to increase the profit of the carrier would not be considered a reasonable deviation, even if the deviation were 'reasonable' as far as the carrier was concerned." SNC S.L.B. v. M/V Newark Bay, 111 F.3d 243, 248 n.11 (2d Cir. 1997).
23 Survival of the deviation doctrine "seemed uncertain for a while after the enactment of COGSA, . . . [as it] does not explicitly state the consequences, if any, of
Thus, in the very first case decided under COGSA, Judge Weinfeld refused to read the statute as eliminating a principle "so firmly entrenched in maritime law" without a clear expression of congressional intent to do so in either the language of the statute or in its scant legislative history.24 The court held, and the majority of courts have followed its lead,25 that the $500 limitation does not apply in the event of an unreasonable deviation, because it "so change[s] the essence of the agreement as to effect its abrogation."26

B. Liberty Clauses and Reasonableness

COGSA allows only reasonable deviations from the contracted voyage, regardless of the parties' agreement in the bill of lading.27 This has led courts to nullify contractual provisions allowing for deviation when the actual deviations were unreasonable.28 Such contractual provisions, commonly

an unreasonable deviation on the statute's $500 limitation of carrier liability." M/V Newark Bay, 111 F.3d at 248.

24 Jones v. The Flying Clipper, 116 F. Supp. 386, 389 (S.D.N.Y. 1953). The court reasoned that without an exception to COGSA's liability limitation, a carrier would be free to "reckless[ly] . . . violate the terms of [a] bill of lading, knowing that it cannot be called upon to pay more than $500 per package." Id. at 390.


26 The Flying Clipper, 116 F. Supp. at 390. "Such a drastic change in the existing law . . . would have been expressed in clear and unmistakable terms." Id. at 389.


28 COGSA generally provides that provisions designed to escape liability are not enforceable:
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referred to as "liberty clauses," are attempts by carriers to protect themselves from the serious consequences of deviation. These clauses typically permit carriers to travel by any route they see fit so that a deviation from the established route will not constitute a breach of the contract. Utilized long before the enactment of COGSA, liberty clauses were often drawn so broadly that, if taken literally, there could be no application of the deviation doctrine at all, because almost anything was allowable under the contract. Liberty clauses have been interpreted, however, to authorize only reasonable or necessary voyages, having "due regard to the rights of both the shipper and the carrier."

Now that COGSA statutorily permits reasonable deviations, liberty clauses may seem less valuable than they once were, but they are still useful because a reasonable interpretation of the clause will help determine what a reasonable deviation is in a particular case. In Hellenic Lines, Ltd. v. United States, the Second Circuit rejected a liberty clause that allowed the carrier

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. 46 U.S.C. § 1303(8) (1982); see also Berkshire Fashions, Inc., 954 F.2d at 885 (finding that "[a] liberties clause that allows for any deviation imaginable allows for unreasonable deviations and, consistent with COGSA and the decisions of other courts in cases assessing liability, would be unenforceable"); S.S. Nancy Lykes I, 536 F. Supp. at 693 (stating that a carrier may not word a contract so as to make a finding of deviation impossible).

29 See Yang Mach. Tool Co. v. Sea-Land Serv., Inc., 58 F.3d 1350, 1353 & n.3 (9th Cir. 1995); Hellenic Lines, 512 F.2d at 1203 n.12, 1206 n.16.
30 See, e.g., W.R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha, 7 F.2d 889, 892 (N.D. Cal. 1925) (finding that the liberty clause controlled even when the carrier took a route that was far from direct), aff'd, 12 F.2d 519 (9th Cir. 1926).
31 See Yang Mach. Tool Co., 58 F.3d at 1353; GILMORE & BLACK, supra note 5, § 3-40, 178 ("It would seem hard to 'deviate' from such a voyage" where there is a broad liberties clause).
32 STURLEY, supra note 8, § 125, 12-28; see also The San Giuseppe, 122 F.2d 579, 582–83 (4th Cir. 1941) (dictating that a broad liberty clause should not be interpreted to allow serious departures from the general course); Swift & Co. v. Furness, Withy & Co., 87 F. 345, 348 (D. Mass. 1898) (noting that a liberty clause allows for only reasonable departures).
33 A liberty clause will not give a carrier "any deviation rights beyond those allowed by § 4(4) of COGSA." S.S. Nancy Lykes II, 706 F.2d 80, 84 (2d Cir. 1983).
34 STURLEY, supra note 8, § 125, 12-28.
35 512 F.2d 1196 (2d Cir. 1975).
to deliver its cargo to any port it deemed safe, making the shipper accept the cargo there, at the shipper's own risk and expense. The court said that the liberty clause "must be construed in light of the carrier's basic [statutory] duty, § [130]3(2), to 'properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried' in line with the agreement of the parties."36 The Third Circuit relied on this rationale in *Berkshire Fashions, Inc. v. M.V. Hakusan II*37 when it too concluded that a liberty clause allowing for unreasonable deviation was unenforceable under COGSA, which permits deviation only to the extent that it is reasonable.38

Although section 4(4) of COGSA creates the presumption of unreasonableness with regard to deviation, courts have not formulated a clear definition of what constitutes a "reasonable deviation," resulting in ambiguity as to the standard for rebutting COGSA's presumption. Many courts have looked to the surrounding circumstances in order to determine reasonableness.39 Other courts have decided that any deviation undertaken solely for the economic self-interest of the carrier is unreasonable.40 Several U.S. courts41 have applied a test

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36 Id. at 1206.
37 954 F.2d 874 (3d Cir. 1992).
38 Id. at 883, 885; see also 46 U.S.C. § 1304(4) (1982) ("[A]ny reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage."); *S.S. Nancy Lykes I*, 536 F. Supp. 687, 692 (S.D.N.Y. 1982). On appeal in *S.S. Nancy Lykes II*, the Second Circuit, using the same reasoning employed by both *Hellenic* and *Berkshire*, also cited legislative history, which indicated that a policy consideration behind the enactment of COGSA was to prevent carriers (who traditionally held a better bargaining position than shippers) from setting "their own standards of proper carriage" by inserting broad liberty clauses into bills of lading. *S.S. Nancy Lykes II*, 706 F.2d at 84 (citing H.R. REP. No. 74-2218 (1936)).
39 In *S.S. Nancy Lykes II*, 706 F.2d at 85–86, the Court held that the reasonableness of a deviation will "depend[] on an assessment of all the surrounding circumstances" and that "a deviation is unreasonable . . . when, in the absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable dangers that would have been avoided had no deviation occurred." In that case, the Nancy Lykes took a more dangerous route for the sole purpose of obtaining cheaper fuel bunkers, and was ultimately deemed to have made an unreasonable deviation. *Id.* at 82–84.
40 See Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 30–31 (2d Cir. 1986); see also *Gilmore & Black*, supra note 5, § 3-40, 179. The authors explain the provision's rationale:

[It] seems to be that the carrier ought not to be allowed to deviate with no other motive than the increase of his own revenues; thus, the proof required to overcome the *prima facie* unreasonableness of such a deviation
formulated in an older House of Lords decision\textsuperscript{42} that applied the British COGSA.\textsuperscript{43} The House of Lords considered several definitions, but finally concluded:

The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.\textsuperscript{44}

For the purposes of deviations under the U.S. COGSA, "reasonableness" currently remains up to the discretion of the courts, in light of the unique facts and circumstances of a particular case. Discretion in this area is a good thing. In light of the advent of containerization and other advances in applicable technology, what may be unreasonable aboard one carrier will not, and should not, be considered unreasonable aboard another.\textsuperscript{45}

C. Causation

Before COGSA, when an unreasonable, but voluntary, deviation occurred, no showing of causation was required because the deviation "displaced" the bill of lading.\textsuperscript{46} COGSA, however, suggests that a causal relationship between the deviation and subsequent damage to cargo is now required to

\begin{itemize}
\item would have to show something more than mere reasonableness from the point of view of the carrier.
\end{itemize}

\textit{Id.}


\textsuperscript{43} Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, c. 22 (U.K.), superseded by Carriage of Goods by Sea Act, 1971, c. 19 (U.K.). The 1924 British COGSA is substantially the same as the U.S. COGSA. Section 4(4) does not appear, but the section was widely considered to be one inserted for clarification purposes, rather than as altering the meaning of the Hague Rules. See STURLEY, supra note 8, § 124, 12-23.

\textsuperscript{44} \textit{Stag Line, Ltd.}, [1932] A.C. at 343–44.

\textsuperscript{45} See Du Pont de Nemours Int'l v. S.S. Mormacvega, 493 F.2d 97, 99–100 (2d Cir. 1974).

\textsuperscript{46} Hellenic Lines, Ltd. v. United States, 512 F.2d 1196, 1209 (2d Cir. 1975); \textit{see also} The Malcolm Baxter, Jr., 277 U.S. 323, 331 (1928) (noting that if a deviation was voluntary the shipper cannot claim the benefit of the bill of lading clause).
displace the bill of lading. This issue has not yet been clearly resolved by the courts. In fact, in a recent unpublished opinion, the Second Circuit held that “causation is presumed if... the deviation was unreasonable.” Elsewhere, the Second Circuit has also suggested that “if lack of causal relation is to be allowed as a defense[,]... a point we do not decide [here], the burden of establishing this should be on the deviator.” This issue remains unclear, as there has not been much post-COGSA authority that has addressed the apparent causation requirement necessary to establish liability for a deviation. A more fundamental question, however, is whether unreasonable deviation doctrine has survived the enactment of COGSA in any form.

III. THE CIRCUIT SPLIT

A. The Effect of COGSA’s per Package Limitation on Deviation

Since COGSA’s passage, U.S. courts have split over whether deviation ousts the $500 per package limitation contained therein, in effect abrogating the contract of carriage and making the carrier an insurer. The Second Circuit has held that COGSA was not intended to change the existing law and that unreasonable deviation does deprive a carrier of the benefit of COGSA’s liability limitation. While the Fifth, Ninth, and

48 The Fifth Circuit post-COGSA case, Searoad Shipping Co. v. E.I. duPont de Nemours & Co., 361 F.2d 833 (5th Cir. 1966), held that insurer liability results from an unreasonable deviation when the deviation is causally related to the resulting damage. Some commentators have agreed with this interpretation and argued that COGSA abolished the harsh doctrine that put the carrier in an “insurer’s” position after deviation and imposed liability for only that damage causally connected to the deviation. See GILMORE & BLACK, supra note 5, § 3-41, 180. The “issue remains open,” due to a “surprising dearth of post-COGSA authority.” Hellenic Lines, Ltd., 512 F.2d at 1209 & n.26.
50 Hellenic Lines, Ltd., 512 F.2d at 1209–10.
51 See supra notes 24–26 and accompanying text.
52 See Vistar, S.A. v. M/V Sea Land Express, 792 F.2d 469, 472 (5th Cir. 1986) (holding that deviation ousts carrier’s contractual defenses); C.A. Articulos Nacionales de Goma Gomaven v. M/V Aragua, 756 F.2d 1156, 1158–59 (5th Cir. 1985) (holding that deviation deprives defendant of COGSA’s package limitation); Searoad Shipping Co. v. E.I. duPont de Nemours & Co., 361 F.2d 833, 838 (5th Cir.
Eleventh circuits have agreed with this interpretation, the Seventh Circuit reached the opposite conclusion when it held that COGSA's language does change the effect of deviation, whereby the package limitation applies regardless of any unreasonable deviation.

The Second Circuit maintains that COGSA should be read in accordance with established principles of maritime law, such that an unreasonable deviation undertaken by the carrier abrogates any contractual or statutory liability exemption. This position is contained in section 4(4) of COGSA, which states that any reasonable deviation by the carrier is not a "breach of this Act or of the contract of carriage." Logically, an unreasonable deviation would produce the opposite result; it would entail a breach of both COGSA and the contract of carriage. COGSA does not expressly address the effect that a breach of its provisions or of the contract of carriage will have upon the per package liability limitation. The Seventh Circuit argues that there is clear congressional intent to modify the

1966) (holding that deviation ousts the contract of carriage and COGSA's package limitation).

See, e.g., Nemeth v. Gen. S.S. Corp., 694 F.2d 609, 612-13 (9th Cir. 1982) (holding that COGSA did not alter pre-COGSA law).

The Eleventh Circuit has said in dicta that an unreasonable deviation breaches the contract of carriage and nullifies COGSA's $500 per package limitation. See C.A. La Seguridad v. Delta S.S. Lines, 721 F.2d 322, 324 (11th Cir. 1983) (citing Spartus Corp. v. S.S. Yafo, 590 F.2d 1310 (5th Cir. 1979)).

See S.S. Nancy Lykes II, 706 F.2d 80, 87 (2d Cir. 1983).

46 U.S.C. § 1304(4) (1982). Section 4(4) "seems to assume that the unreasonable deviation rule survives . . . [because it] implies that an unreasonable deviation is a breach by the carrier of COGSA, thereby depriving the carrier of COGSA's protection." Nemeth, 694 F.2d at 613.

Donna F. Grandy, Note, Unreasonable Deviations and the Applicability of COGSA's limitation of Liability Provision: The Circuit Split—General Electric Company International Sales Division. v. S.S. Nancy Lykes, 9 MAR. LAW. 114, 120 (1984). As the language of section 4(4) "is pregnant with the positive meaning that an unreasonable deviation is 'an infringement and breach of this act,' it seems logical . . . that when a departure from the contractual voyage is an unreasonable deviation, the carrier is not entitled to any of the exemptions or limitations provided by that Act." Nemeth, 694 F.2d at 613 (quoting 2A BENEDICT ON ADMIRALTY § 128, 12-32 (7th ed. 1981)). "The obvious corollary implied by Section 4(4) is that an unreasonable deviation does violate the act and the contract of carriage, and that the carrier is liable, at least to some extent, for loss or damage resulting from an unreasonable deviation." STURLEY, supra note 8, § 128, 12-34.
traditional rule.\textsuperscript{59} It interprets the placement of the limitation of liability provision immediately after the deviation section, coupled with the wording "neither the carrier nor the ship shall \textit{in any event} be or become liable for any loss or damage," to mean that the $500 per package limitation applies to any loss or damage, regardless of the cause.\textsuperscript{60} Advocates of the Second Circuit's position reject the literal interpretation of "in any event" and argue instead that liability limitations are forfeited when there is an unreasonable deviation, offering "a comparison between COGSA and earlier statutes dealing with carrier liability as proof that COGSA's silence on this issue indicates an adherence to the traditional view [of deviation]."\textsuperscript{61}

The Seventh Circuit seems to ignore the original purpose of the deviation doctrine in its interpretation of COGSA. Deviation subjects the cargo to risks that the shipper did not anticipate and should, therefore, deprive the carrier of the protection of any liability limitations. As the Fourth Circuit stated in \textit{Nemeth v. General Steamship Corp.},\textsuperscript{62} "There is nothing in COGSA to indicate that shippers should anticipate the additional risks associated with unreasonable deviations."\textsuperscript{63} That court also

\textsuperscript{59} See \textit{Atl. Mut. Ins. Co.}, 313 F.2d at 875. One proponent of the Seventh Circuit's approach also urges that the majority of American courts have improperly interpreted COGSA by failing to acknowledge the international framers' intent and the need for worldwide uniform standards in shipping. See J. Hoke Peacock III, Note, \textit{Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts}, 68 Tex. L. Rev. 977, 980. (1990). The author makes the less than compelling argument that American courts, by looking to American pre-COGSA case law to oust the per package limitation in the case of an unreasonable deviation, "undermine the goal of international uniformity and fail to do their part to fulfill the promise of COGSA and the Hague Rules." \textit{Id.} at 980.


\textsuperscript{61} Grandy, \textit{supra} note 58, at 121. "Both the Harter Act, 46 U.S.C. §§ 190–196 (1982), and the Limited Liability Statute, 46 U.S.C. §§ 183–189 (1982), have been interpreted to provide that unreasonable deviations eliminate any liability exemption the carrier previously enjoyed." \textit{Id.} at 121 n.51.

\textsuperscript{62} 694 F.2d 609 (9th Cir. 1982).

\textsuperscript{63} \textit{Id.} at 613. The court went on:

Indeed, in deciding whether to be bound by the liability limitation in COGSA Section 4(5) or pay for such higher liability, a shipper is entitled to assume that his goods will not be subjected to additional risks. The
questioned the Seventh Circuit's rationale because treating the liability limitation as absolute would allow a carrier to violate the terms of the bill of lading at will.\textsuperscript{64} For this reason, this Note agrees with the majority of the circuits that have held that deviation has survived the enactment of COGSA, adopting the reasoning first articulated by the Second Circuit in The Flying Clipper.\textsuperscript{65}

\subsection*{B. Fair Opportunity}

COGSA's per package limitation may not become effective unless the shipper is afforded a "fair opportunity" by the carrier to declare a higher than $500 liability rate by paying a greater charge.\textsuperscript{66} Although there is agreement on this general principle, there is disagreement as to what constitutes a fair opportunity to declare a higher value.\textsuperscript{67} The Second Circuit has held that fair opportunity requires that a shipper have notice of COGSA's liability limitation and a fair opportunity to declare a higher value for the cargo.\textsuperscript{68} A carrier seeking to enforce the $500 limitation must establish that notice was given to a shipper through language contained in the bill of lading and that the shipper was given the opportunity to opt out of that limitation.\textsuperscript{69} Once this is established, the burden shifts to the shipper to show

\begin{footnotes}
\footnote{rationale behind the unreasonable deviation rule is sound and has not been undermined by enactment of COGSA.}
\footnote{Id. \textquotedblleft The carrier would be immunized even from the consequences of a fundamental breach going to the essence of the contract. There is nothing in COGSA or its history to warrant such a result.\textquotedblright Id. (citing Jones v. The Flying Clipper, 116 F. Supp. 386, 390 (S.D.N.Y. 1953)). As a recent unpublished Second Circuit opinion noted, \textquoteleft{}[T]o allow carriers to limit their liability when an unreasonable deviation causes damage to cargo not only would weaken the carrier's primary duty of care to cargo under § 3(2) of COGSA..., but would render meaningless the § 4(4) distinction between reasonable and unreasonable deviations." Nat'l Starch & Chem. Co. v. Atl. Mut. Cos., 00-9500, 2001 U.S. App. Lexis 14460, at *57–58 (2d Cir. June 27, 2001) (quoting S.S. Nancy Lykes II, 706 F.2d 80, 87 (2d Cir. 1983)).}
\footnote{See supra notes 24–26 and accompanying text.}
\footnote{Id. \textquotedblleft The carrier would be immunized even from the consequences of a fundamental breach going to the essence of the contract. There is nothing in COGSA or its history to warrant such a result.\textquotedblright Id. (citing Jones v. The Flying Clipper, 116 F. Supp. 386, 390 (S.D.N.Y. 1953)). As a recent unpublished Second Circuit opinion noted, \textquoteleft{}[T]o allow carriers to limit their liability when an unreasonable deviation causes damage to cargo not only would weaken the carrier's primary duty of care to cargo under § 3(2) of COGSA..., but would render meaningless the § 4(4) distinction between reasonable and unreasonable deviations." Nat'l Starch & Chem. Co. v. Atl. Mut. Cos., 00-9500, 2001 U.S. App. Lexis 14460, at *57–58 (2d Cir. June 27, 2001) (quoting S.S. Nancy Lykes II, 706 F.2d 80, 87 (2d Cir. 1983)).}
\footnote{Laurence B. Alexander, Comment, \textit{Containerization, the Per Package Limitation, and the Concept of "Fair Opportunity."} 11 MAR. LAw. 123, 134 (1986).}
\footnote{See Chester D. Hooper, \textit{The Current State of Some Perpetually Litigated Admiralty Cargo Issues,} 18 FORUM 37, 44 (1982).}
\footnote{Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing, 167 F.3d 99, 101 (2d Cir. 1999); MacSteel Intl USA Corp. v. M/V IBN Abdoun, 154 F.2d 826, 832 (S.D.N.Y. 2001).}
\footnote{See Gen. Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1024 (2d Cir. 1987).}
\end{footnotes}
there was no fair opportunity.\textsuperscript{70}

Similarly, in the Ninth Circuit, "[i]f the bill of lading contains an express, legible recitation of the $500 limitation, and of the opportunity to declare a higher value, the bill of lading will constitute prima facie evidence that the shipper was given the requisite fair opportunity."\textsuperscript{71} The most recent Ninth Circuit decisions, however, suggest that the requirement is less stringent than earlier cases suggested.\textsuperscript{72} In the Fifth Circuit, "if the carrier provides evidence that the shipper could have declared a higher value, . . . then the requirement is satisfied."\textsuperscript{73}

Following the Fifth Circuit,\textsuperscript{74} the Eleventh Circuit has also held that either a "clause paramount"\textsuperscript{75} in the bill of lading, or a valid tariff filed with the Federal Maritime Commission that offers a choice of rates, will constitute fair opportunity,\textsuperscript{76} making it clear that a space on the bill of lading itself to make a value declaration is not necessary.\textsuperscript{77} The Fourth Circuit has never stated a rule establishing a minimum fair opportunity standard, but has consistently concluded that the shipper did have fair opportunity based on the specific facts of each case.\textsuperscript{78}

\textsuperscript{70} Id. at 1029. Only after establishing a prima facie showing of fair opportunity may the defendant present evidence that plaintiff had cargo insurance and thus was aware of COGSA's liability limitation. \textit{See MacSteel Int'l USA Corp.}, 154 F.2d at 832 (discussing in detail the fair opportunity doctrine as it currently stands in the Second Circuit); \textit{see also Nippon Fire \\& Marine Ins. Co.}, 167 F.3d at 102.

\textsuperscript{71} \textit{Yang Mach. Tool Co. v. Sea-Land Serv., Inc.}, 58 F.3d 1350, 1354 (9th Cir. 1995) (citing Travelers Indem. Co. v. Vessel Sam Houston, 26 F.3d 895, 898 (9th Cir. 1994)).

\textsuperscript{72} See, e.g., \textit{Vision Air Flight Serv., Inc. v. M/V Nat'l Pride}, 155 F.3d 1165, 1168–69 (9th Cir. 1998); \textit{Yang Mach. Tool Co.}, 58 F.3d at 1354–55.

\textsuperscript{73} \textit{STURLEY}, supra note 8, § 166, 16-29; see, e.g., \textit{Wuerttembergische v. M/V Stuttgart Express}, 711 F.2d 621, 622 (5th Cir. 1982) (per curiam) ("T]he shipper carries the burden of proving that an opportunity for choice . . . did not in fact exist.").

\textsuperscript{74} The Eleventh Circuit holds itself bound by decisions of the "old" Fifth Circuit—decisions delivered prior to the division of the circuit into the Fifth and the Eleventh on October 1, 1981. \textit{See Bonner v. City of Prichard}, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc).


\textsuperscript{75} \textit{Unimac Co. v. C.F. Ocean Serv., Inc.}, 43 F.3d 1434, 1438 (11th Cir. 1995); \textit{Ins. Co. of N. Am. v. M/V Ocean Lynx}, 901 F.2d 934, 939 (11th Cir. 1990).

\textsuperscript{76} \textit{Ins. Co. of N. Am.}, 901 F.2d at 941; \textit{Heri v. Fritz Cos.}, 841 F. Supp. 1188, 1192 (N.D. Ga. 1993).

\textsuperscript{77} \textit{See STURLEY}, supra note 8, § 166, 16-30.
the Sixth Circuit has held that a bill of lading that incorporates the relevant language of section 4(5)\(^79\) is enough to constitute fair opportunity to a shipper.\(^80\) All in all, it appears that most circuits are moving away from an inquiry into a shipper's opportunity to declare a higher value. That is, they seem to be allowing any suggestion of an opportunity to declare a higher value to suffice as "fair opportunity," perhaps reflecting the current reality that most shippers are very experienced, are well aware of liability limitations, and, more often than not, purchase their own cargo insurance.

IV. CIRCUMSCRIBING DEVIATION

A. Quasi-Deviation Today

The notion of unreasonable deviation expanded even after the enactment of COGSA. In Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer,\(^81\) the Second Circuit held that placement of metal containers on the deck of a ship constituted an unreasonable deviation that ousted the carrier’s defenses, including the package limitation.\(^82\) The majority in Encyclopaedia Britannica, however, carefully narrowed their decision to include only ships not specially suited for carrying containers on deck.\(^83\) Soon thereafter, a district court within the Second Circuit held that it was not an unreasonable deviation to carry container cargo on the deck of a container ship specifically built, designed, and constructed to do so.\(^84\) Carrying cargo on the

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\(^79\) See supra note 21 and accompanying text.

\(^80\) See Acwoo Int’l Steel Corp. v. Toko Kaiun Kaish, Ltd., 840 F.2d 1284, 1288–89 (6th Cir. 1988).

\(^81\) 422 F.2d 7 (2d Cir. 1969).

\(^82\) Id.; cf. Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 31 (2d Cir. 1986) (accepting application of the quasi-deviation doctrine to unauthorized on-deck stowage, although finding carrier’s deviation reasonable under the particular facts).

\(^83\) See Encyclopaedia Britannica, 422 F.2d at 18 n.12.

\(^84\) See Du Pont de Nemours Int’l S.A. v. S.S. Mormacvega, 367 F. Supp 793, 800 (S.D.N.Y. 1972), aff’d, 493 F.2d 97 (2d Cir. 1974) (concluding that deck stowage was a reasonable deviation, because, among other facts, the containers stored on deck were not subject to greater risks); see also English Elec. Valve Co. v. M/V Hoegh Mallard, 814 F.2d 84, 89 (2d Cir. 1987) (holding that stowage of an open top container on the deck of a cargo ship was not a deviation but, if it had been, it would have been reasonable, due to industry custom and the implicit consent of the shipper); Ins. Co. of N. Am. v. Blue Star (N. Am.), Ltd., 1997 AMC 2434, 2452 (S.D.N.Y. 1997).
deck of container ships is now generally accepted as reasonable, but the quasi-deviation doctrine still applies to non-containerized cargo.

Although shippers have tried to expand the doctrine even further to include, amongst other things, instances of negligence, criminal and willful misconduct, releasing cargo to a person not holding the necessary documents, and failing to provide a seaworthy vessel, the Second Circuit has since strictly curtailed its application to geographic deviations and the unauthorized on-deck stowage of cargo.

This trend began in *Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser*, which found that the principle of quasi-deviation is arguably inconsistent with COGSA and is “not one
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to be extended."\textsuperscript{94} About a decade later, the Second Circuit’s
decision in \textit{Sedco, Inc. v. S.S. Strathewe} clearly limited deviation
to its original scope of geographic deviation and unauthorized on-
deck storage,\textsuperscript{95} reiterating the view expressed by Gilmore &
Black in their admiralty treatise that “it would seem unwise to
extend analogically and by way of metaphor a doctrine of
doubtful justice under modern conditions, of questionable status
under COGSA, and of highly penal effect.”\textsuperscript{96} Other circuits have
demonstrated similar hostility toward the doctrine, especially in
the context of quasi-deviation.\textsuperscript{97}

\textbf{B. Insurance Concerns}

The doctrine of deviation may be traced to the pre-COGSA
law of marine insurance, which held that insurers only accepted
the risks reasonably contemplated by the parties.\textsuperscript{98} Since a
carrier’s unreasonable deviation voided the shipper’s insurance,
courts forced the carrier to assume the liabilities of the insurer.\textsuperscript{99}
Currently, however, deviation clauses\textsuperscript{100} are commonly included
in modern cargo insurance contracts,\textsuperscript{101} lending credibility to the
argument that the basis for the traditional rule is no longer
viable. In other words, since a shipper’s insurance policy will
insulate the cargo from all deviations, carriers should be entitled
to the statutory liability limitation provided by COGSA.\textsuperscript{102}

Another commentator argues that the burden to fully insure
the goods is on the shipper, who can easily do so under section

\textsuperscript{94} Id. at 72.
\textsuperscript{95} 800 F.2d 27, 31–32 (2d Cir. 1986).
\textsuperscript{96} GILBERT & BLACK, supra note 5, § 3-42, 183; see also Sedco, Inc., 800 F.2d at
31–32.
\textsuperscript{97} See Vision Air Flight Serv., Inc. v. M/V Nat’l Pride, 155 F.3d 1165, 1173 (9th
Cir. 1998); Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima
Netumar, 993 F.2d 414, 417 (4th Cir. 1993) (declining to extend the ‘unreasonable
deviation’ doctrine beyond its current boundaries’); SPM Corp., 965 F.2d at 1304
(“We agree with our sister circuits that the doctrine of quasi-deviation should not be
viewed expansively in the post-COGSA era.”).
\textsuperscript{98} See Sedco, Inc., 800 F.2d at 31.
\textsuperscript{99} Id.
\textsuperscript{100} WILLIAM D. WINTER, MARINE INSURANCE 169 (3d ed. 1952) (noting that a
deviations clause “holds the assured covered in the event of deviation or change of
voyage”).
\textsuperscript{101} LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE
\textsuperscript{102} Grandy, supra note 58, at 121.
4(5) of COGSA by paying a higher freight rate.\textsuperscript{103} This will not necessarily increase what the shipper must normally spend to insure his goods—the gross cost will be the same whether the shipper insures through an independent underwriter or the carrier.\textsuperscript{104} It is not unduly burdensome “to require the shipper to bear the cost of sufficient insurance . . . [and this] is, in fact, what the trade custom requires”; moreover, given the highly punitive nature of deviation doctrine, “shifting the burden of insuring the cargo onto the carrier would also be grossly inequitable.”\textsuperscript{105} These arguments in favor of limiting the deviation doctrine suggest that the doctrine is outmoded because modern insurance now covers all losses resulting from deviation.

\textbf{C. Continuing Viability of Deviation Today}

The arguments for curtailing deviation seem to ignore that, historically, applying the deviation doctrine did not depend on whether the goods were insured.\textsuperscript{106} The Ninth Circuit, in \emph{Vision Air Flight Service, Inc. v. M/V National Pride}, explained, “[T]o the extent the deviation doctrine is concerned with providing an incentive for carriers not to undertake certain actions that impose unreasonable risks on cargo, insurance is irrelevant.”\textsuperscript{107} The court suggested that Congress, when enacting COGSA, deliberately failed to allocate every conceivable risk of misconduct by carriers, knowing that some egregious and unreasonable conduct would simply never be contemplated by the parties.\textsuperscript{108} COGSA was not intended to allow carriers to grossly deviate from the contract of carriage without facing increased liability. As the court in \emph{General Electric Company International Sales Division v. S.S. Nancy Lykes}\textsuperscript{109} stated, allowing carriers who unreasonably deviate to escape full liability “not only would weaken the carrier’s primary duty of

\begin{footnotes}
\item[104] \textit{See id.}
\item[105] \textit{Id.} at 859, 860.
\item[106] \textit{See Vision Air Flight Serv., Inc. v. M/V Nat’l Pride, 155 F.3d 1165, 1174 n.10 (9th Cir. 1998).}
\item[107] \textit{Id.}
\item[108] \textit{See id.} at 1174 (“Congress . . . may never have intended that extraordinarily culpable misconduct fall within the terms of the compromise it struck between the interests of shippers and carriers.”).
\item[109] 706 F.2d 80 (2d Cir. 1983).
\end{footnotes}
care to cargo under § 3(2) of COGSA, but would render meaningless the § 4(4) distinction between reasonable and unreasonable deviations.”\footnote{Id. at 87 (citation omitted).} Clearly, Congress meant to keep deviation alive, or else it would not have distinguished between reasonable and unreasonable. A district court within the Second Circuit perhaps best summed up the problem with the current limitations on the doctrine:

[T]he law of this Circuit seems to have created an unjust paradox: a carrier who stowes [sic] cargo on deck without the shipper’s authorization loses COGSA’s per package limitation; and yet, a carrier who recklessly tenders an unseaworthy ship which consequently sinks with all its cargo and crew, gets the benefit of the package limitation. In addition, a carrier who misrepresents the onboard status of the cargo in its bill of lading will lose COGSA’s package limitation, regardless of whether the misrepresentation was fraudulent; and yet, a carrier who fraudulently misrepresents that its ship is seaworthy can successfully benefit from the package limitation.\footnote{Mitsui Marine Fire & Ins. Co. v. Direct Container Line, Inc., 119 F. Supp. 2d 412, 415 n.31 (quoting In re Complaint of Tecomar S.A., 765 F. Supp. 1150, 1185 n.95 (S.D.N.Y. 1991)).}

Although the insurance rationale behind the deviation doctrine is less compelling than it once was, deviation is still vital as an incentive to ensuring that carriers behave properly.

**CONCLUSION**

Based upon the foregoing, this Note concludes that the doctrine should not just be limited to geographic deviations and unauthorized on-deck stowage of cargo, but it should also encompass other egregious departures from the contemplated voyage that cause damage to the cargo. Furthermore, because Congress has never fully clarified what effect deviation was intended to have on COGSA’s per package limitation, there is no compelling reason for courts to so drastically curtail such a long-standing doctrine of Admiralty Law when the reasons supporting it remain valid today.