



## Recovery of Attorneys' Fees in Maritime Matters - Episode #101

Posted: Thu., Jan. 29, 2015



**Hosted by:** John Czuba, Managing Editor

**Guest Attorneys:** Edward Radzik and Lori Quinn of [Marshall Dennehey Warner Coleman & Goggin](#)

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**John Czuba:** Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*. Joining me is Brendan Noonan from our Communications team.

We're pleased to have with us attorneys Edward Radzik and Lori Quinn from the law firm of [Marshall Dennehey Warner Coleman & Goggin](#), with offices in Pennsylvania, New York, New Jersey, Connecticut, Delaware, Ohio and Florida.

Ed has practiced maritime law for more than 30 years and is a shareholder in the Maritime Litigation Practice group in the New York City office of the firm. As a former marine engineer and graduate at the Massachusetts Maritime Academy, his practice focuses on the prosecution of claims for cargo loss and damage.

He's active in the Maritime Law Association of the United States, where he served as Chairman of the Carriage of Goods Committee. Edward has also taught admiralty law at the University of New Hampshire School of Law.

Lori Quinn is also a shareholder in the Maritime Litigation Practice group at the firm, where she manages the firm's maritime subrogation practice. She has represented multiple insurance carriers and their insureds in matters involving cargo recovery and subrogation, property damage, aviation and maritime related personal injury cases.

She is an active member of the Maritime Law Association in the United States, the National Association of Subrogation Professionals and the Claims and Litigation Management Alliance, where she serves on the Subrogation Committee.

Thank you both very much for joining us today.

**Lori Quinn:** It's our pleasure.

**Edward Radzik:** Thank you, Brendan. Thank you, John.

**John:** Today's podcast is on the recovery of attorney's fees in maritime matters, and Brendan Noonan will lead off with our first question.

**Brendan Noonan:** Ed, what is the American rule on the allocation of attorney's fees? How does it apply in maritime cases?

**Ed:** The American rule provides that each party pays its own attorney's fees absent an exception, such as a statute, an enforceable contractual provision, or a finding that the non prevailing party engaged in bad faith conduct.

Courts generally will not apply inconsistent state law because the application of state law would frustrate the need for uniformity and poverty in the admiralty jurisdiction.

In a recent case, for example, a court rejected, or refused to apply a state statute which allowed for the recovery of attorney's fees where an offer of judgment was rejected and the amount awarded after trial turned out to be less than the offer.

Under the American rule, attorney's fees are ordinarily incidents of litigation and may not be awarded to the prevailing party unless authorized by agreement, statute, or court rule.

The American rule traces its origin to the colonial period in the United States, and is a byproduct of anti lawyer sentiment. In the early 1600s, courts in Great Britain regularly awarded attorney's fees to the prevailing party as part of the cost of civil litigation. For a while, this practice carried over to the American colonies.

Because there was much distrust and resentment of lawyers, most or all of the colonies passed legislation designed to restrict both chargeable fees, that's fees that lawyers could charge his client, and taxable fees, those that could be taxed against the losing party.

During these times, the citizens believe that the law consisted of fairly simple rules that could be understood by most people of normal intelligence. Many judges were laymen and not trained in the law.

Admiralty courts during this period routinely awarded full attorney's fees to the winning litigant. Sometimes it's costs, sometimes it's damages. One exception was a 1796 decision in the Supreme Court, an admiralty prize case in which the court disallowed an award of \$1600 in attorney fees to the winning party.

Shortly thereafter, without even citing the prior case, the Supreme Court upheld an award of attorney's fees as part of damages to victims of piracy. That case was the *Amiable Nancy*.

In 1853, Congress enacted legislation which limited taxable costs and civil litigation to \$20 inclusive of attorney's fees. However, even after the passage of the 1853 statute, admiralty courts continued to award fees as a matter of discretion.

**John:** Ed, what is the rationale of the American rule and what are the exceptions to its application?

**Ed:** The rationale of the American rule is that it strikes a balance between the early legislative penchant to regulate attorney's fees and the bar's desire for adequate compensation. The American rule allows free access to the courts, and that it does not put a damper on creative legal theories.

Many commentators have criticized the English rule, stating that it favors established and seasoned litigants, intimidates inexperienced litigants, and puts a chilling effect on novel legal theory.

In 1967, the United States Supreme Court, in *Fleischmann Distilling Corp versus Maier Brewing company*, stated, since litigation is at best uncertain, one should not be penalized for defending or prosecuting a lawsuit. That the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included fees of their opponent's counsel.

As far as the exceptions to the rule, as I stated before, a contract can provide for the award for attorney's fees to the prevailing party in a litigation. A court will uphold these contractual agreements so long as they don't violate public policy.

In the maritime context, it's common to see charter party provisions allowing for the award of fees, because charters and vessel owners are usually on equal footing from an economic standpoint.

The second exception is bad faith, conduct exhibited by a party or a party's attorney, which is unwarranted, baseless or vexatious. This kind of conduct warrants the assessment of attorney's fees against either the party or the attorney.

Finally, statute and rules of procedure. There's more than 200 federal statutes and almost 2,000 state statutes that provide for the award of attorney's fees to the prevailing party in civil litigation.

**Brendan:** Lori, when may attorney's fees be awarded in maritime litigation?

**Lori:** Attorney's fees can be awarded in maritime litigation at the judge's discretion. The traditional rule, as Ed mentioned earlier, in the United States is to disallow awards for attorney's fees, therefore, it's not done too often. However there has been a gradual evolution and trend to allow for the application for attorney's fees.

Very often, attorney's fees are awarded under that bad faith exception to the American rule. The exception enables the courts to award attorney's fees against the losing party when they have acted in bad faith.

For example, the use of the bad faith exception was utilized in a decision by the United States District court for the Southern District of New York in a case called *Orient Overseas Container versus Crystal Cove Seafood*.

In that case, the court awarded attorney's fees to the plaintiff, where the defendant contested liability despite evidence from the onset of the case that the reefer container used in transporting Crystal Cove Seafood products had malfunctioned. The court used its discretion and the bad faith exception to the American rule to award reasonable attorney's fees and costs to Crystal Cove. In that case, the court awarded Crystal Cove \$50,000 in attorney's fees and costs.

**John:** Lori, when may attorney's fees be awarded in maritime arbitration?

**Lori:** Whether attorney's fees are awarded in maritime arbitration depends on whether the arbitration is governed by the Society of Maritime Arbitrators' rules, also known as SMA, the American Arbitration Association rules, commonly known as AAA arbitration, or by contract, where arbitration is agreed to as a contractual term.

There's generally a lack of clarity under the United States law and practice whether arbitrators can award attorney's fees, where the arbitration clause is lacking any specific reference to the award of attorney's fees.

However, despite the lack of clarity, both the SMA and the AAA rules provides for the award of attorney's fees. Specifically, if both parties to an arbitration proceeding demand or request an award of attorney's fees, the arbitration panel may grant those reasonable attorney's fees.

An example of a contract that allows for arbitration and the award of attorney's fees is a charter party for a charter of oil tankers, known as the ASBATANKVOY. These charter parties traditionally include boilerplate language and they include what's known as clause 23 and clause 24.

Clause 23 governs breaches of these charter parties and include all provable damages, costs and attorney's fees. Clause 23 has been interpreted to allow for fees where a court proceeding is used. Generally, there would be a court proceeding brought to either confirm an arbitration award, or to defend a motion to vacate an arbitration award.

In those cases where the court is utilized to confirm or defend a motion to vacate an arbitration award, the fees are determined by the court.

Clause 24 specifically speaks to an arbitration provision included within the contract or here where we're talking about the ASBATANKVOY charter party. It's specifically known as and used interchangeably as the ASBTANKVOY arbitration clause, or clause 24.

The clause allows for awards to be made onto the application of clause 24 to include costs including reasonable attorney's fees. Clause 24 pertains to fees that are incurred during the handling of the arbitration and they're awarded by the arbitrators.

There are many cases involving the ASBATANKVOY clause, where firms have obtained arbitration awards with significant recovery of attorney's fees.

**John:** Ed and Lori, thanks so much for joining us today.

**Lori:** Thank you very much.

**Ed:** Thank you, John. Thank you, Brendan.

**John:** That was Edward Radzik and Lori Quinn from the law firm of [Marshall Dennehey Warner Coleman & Goggin](#). Special thanks to Brendan Noonan, from our Communications team and to our producer, Brian Cohen.

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If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at [lawpodcast@ambest.com](mailto:lawpodcast@ambest.com). I'm John Czuba, joined by Brendan Noonan and now this message.

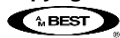
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