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Flying over Troubled Waters: The Collapse of DOHSA's Historic Application to Litigation Arising from High Seas Commercial Airline Accidents

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FLYING OVER TROUBLED WATERS: THE COLLAPSE OF DOHSA'S HISTORIC APPLICATION TO LITIGATION ARISING FROM HIGH SEAS COMMERCIAL AIRLINE ACCIDENTS

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I. INTRODUCTION

IN EARLY 1996, the United States Supreme Court unanimously held in *Zicherman v. Korean Air Lines Co.* that the Death on the High Seas Act ("DOHSA") provided the substantive United States law when an airplane crashes on the high seas.¹ The basic effect of this ruling reaffirmed earlier precedent holding that the recovery in DOHSA cases was limited to the pecuniary damages provided in DOHSA.² The *Zicherman* Court's ruling thereby restated the historical understanding that DOHSA prevents the recovery of nonpecuniary damages—i.e., "loss of society" damages—from defendants named in cases arising out of high seas aviation accidents.³

In early 2000, *Zicherman* was legislatively eviscerated by the enactment of Public Law 106-181, an aviation appropriations bill containing a proviso, section 404, which amended DOHSA.⁴ Section 404(a) of Public Law 106-181 prevents DOHSA from applying to commercial aviation accidents occurring on the high seas twelve nautical miles or closer to the shore of any State or Territory of the United States. While subsection (a) of section 404 represented a drastic departure from case law addressing DOHSA's application to high seas aviation accidents, the Congress did not stop there. Additionally, passage of section 404(b) of Public Law 106-181 allows recovery of nonpecuniary damages

¹ See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996). To reach this holding, the *Zicherman* Court determined that Articles 17 and 24(2) of the Warsaw Convention, which governed the case and allowed for recovery of only legally cognizable harm, left the specification of what damages are recoverable to the applicable domestic law under the forum's choice-of-law rules. See *id.* at 229; see also Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 127 L.N.T.s. 11, reprinted in 49 U.S.C. 40105 (1995) [hereinafter Warsaw Convention].

² See *Zicherman*, 516 U.S. at 231. For a discussion of DOHSA's specific provisions as they read prior to April 5, 2000, see *infra* Part II.A. Damages are "pecuniary" when they relate to money or can be valued in money. BLACK'S LAW DICTIONARY 1152 (Bryan A. Garner ed. 7th ed. 1999).

³ See *Zicherman*, 516 U.S. at 231. Other nonpecuniary damages include damages for grief and bereavement, anxiety, distress, and mental pain and suffering. See *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 587 n.17 (1974). Punitive damages are also nonpecuniary in nature. See *id.*

⁴ See *infra* Part IV.A.

arising from commercial aviation accidents occurring beyond the twelve nautical mile threshold.

Even before passage of section 404 of Public Law 106-181, DOHSA's applicability to high seas aviation accidents had come under attack when the United States District Court for the Southern District of New York ("SDNY") held that DOHSA did not apply to the ongoing litigation surrounding the crash of Trans World Airlines ("TWA") Flight 800.⁵ Just before publication of this article, the United States Court of Appeals for the Second Circuit affirmed the SDNY's ruling, with one of the three circuit judges dissenting.⁶ As will be discussed below, enactment of section 404 of Public Law 106-181 is an express approval of the SDNY's and the Second Circuit's unprecedented rulings in the TWA Flight 800 case. In essence, by enacting section 404 of Public Law 106-181, Congress has recreated the problem that DOHSA was designed to remedy: inconsistent recovery of damages arising from deaths occurring on the high seas.

This Article focuses on the legislative and judicial efforts to erode DOHSA's application to high seas aviation accidents. Specifically, the legal and social desirability of such erosion will be discussed. When one examines the effect of Public Law 106-181's amendment of DOHSA through section 404, certain aspects of the amended provisions reveal themselves as unworkable and out of sync with the uniformity principle of Federal maritime law; moreover, where the Second Circuit's opinion provides guidance in the interpretation of the amended DOHSA provisions, similar legal and public policy problems are encountered. This Article highlights these legal and social shortcomings.

Part II of this Article outlines the provisions of DOHSA as they existed prior to enactment of Public Law 106-181. Part III focuses on the ongoing TWA Flight 800 litigation and criticizes the SDNY's ruling in *In re Air Crash off Long Island, New York, on July 17, 1996* and the Second Circuit's affirming decision. Part IV addresses the practical effect of Public Law 106-181's amendment of DOHSA through section 404. Finally, Part V examines existing and future litigation arising from recent high seas commercial airline accidents, considering both the impact of Public Law 106-181's amendment of DOHSA through section 404, as

⁵ See *infra* Part III.C.

⁶ See *infra* Part III.D.

well as the decisions in *In re Air Crash off Long Island, New York*, where applicable.

II. DOHSA

A. THE STATUTE

This Article demonstrates that, historically, DOHSA's application to aviation accidents occurring over open waters has been the subject of controversy. Much of this controversy surrounded 46 U.S.C. § 761, which, before enactment of Public Law 106-181, read:

Whenever the death of a person shall be caused by wrongful act, neglect, or default *occurring on the high seas beyond a marine league from the shore of any State*, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.⁷

Other DOHSA provisions relevant to high seas aviation accidents include 46 U.S.C. §§ 762, 764, and 767. Before enactment of section 404 of Public Law 106-181, § 762 provided that recovery in a section 761 lawsuit "shall be a fair and just compensation for the *pecuniary loss* [only] sustained by the persons for whose benefit the suit is brought"⁸ Section 764, a provision unaltered by section 404, allows maintenance of a lawsuit in admiralty in Federal courts for deaths occurring on the high seas whenever a right of action is granted by a foreign law.⁹ The provision permits damages awards without a reduction of the recovery amount.¹⁰ Section 767, also unaltered by section 404 of

⁷ 46 U.S.C. app. § 761 (1994) (emphasis added).

⁸ *Id.* § 762 (emphasis added).

⁹ *See* 46 U.S.C. app. § 764 (1994) (emphasis added). Section 764 provides: Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Id.

¹⁰ *See id.* Case law has given § 764 various interpretations. *See* *Dooley v. Korean Air Lines Co.*, 117 F.3d 1477, 1483 (D.C. Cir. 1997), *aff'd*, 524 U.S. 116 (1998). Some cases have allowed plaintiffs to use an action under DOHSA and § 764 to

Public Law 106-181, provides that the provisions of any state statute regulating rights of action or remedies for wrongful death will not be affected by the enactment of DOHSA.¹¹

B. LEGISLATIVE HISTORY

The United States Constitution impliedly empowers Congress to revise and supplement the maritime law within constitutional limits.¹² Despite this implied power, Congress has rarely confronted the issue of maritime tort jurisdiction.¹³ One notable exception is DOHSA. In the years leading up to DOHSA's enactment, the Maritime Law Association and various admiralty scholars had been attempting to pass a bill that would provide for an admiralty right of action for deaths occurring on the high seas.¹⁴ The advantages of such a bill, according to these scholars, would be to provide these remedies on the high seas, where such remedies did not exist because the high seas were outside of the territorial limits and jurisdiction of the individual states.¹⁵ Certain members of the judiciary also supported enactment of such a bill, citing the need for a uniform federal law to correct the injustices arising from the non-uniform nature of state remedies.¹⁶

assert claims recognized under both United States and foreign law. *See id.* (citations omitted). Other courts have viewed §§ 761 and 764 to be mutually exclusive, thereby preventing plaintiffs from recovering under both foreign law and DOHSA. *See id.* (citations omitted). For a more in-depth discussion of the application of § 764 to commercial airline accidents, see *infra* note 229 and accompanying text.

¹¹ *See* 46 U.S.C. app. § 767 (1994). Section 767 also expressly provides that DOHSA will not apply to the Great Lakes, the Panama Canal Zone, or to any waters within the territorial limits of any State. *See id.*

¹² *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 56-57 (1987) (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959)).

¹³ *See id.* at 235.

¹⁴ *See* 52 CONG. REC. 284 (daily ed. Dec. 16, 1914) (quoting Jan. 26, 1914, letter from C.E. Kremer to Hon. James R. Mann).

¹⁵ *See id.*

¹⁶ *See id.* at 284-85 (quoting Aug. 22, 1913, letter from Judge Harrington Putnam to Hon. E.Y. Webb). Focusing on this non-uniformity, Judge Putnam's letter provided:

In some States, the recovery is limited to the conscious pain and suffering before death—a matter difficult of proof in case of drowning at sea. . . . Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. . . . Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone

III. TRANS WORLD AIRLINES FLIGHT 800 LITIGATION

A. INTRODUCTION

As will be further discussed below, the SDNY's decision and the Second Circuit's ruling in *In re Air Crash off Long Island, New York*, has been codified by enactment of section 404 of Public Law 106-181. This Article argues that the SDNY's decision and its appellate approval, along with its codification in section 404, will only bring confusion to the litigation of aviation accidents occurring on the high seas. To understand the level of confusion brought about by enactment of section 404 of Public Law 106-181, it is important to examine the background of its case law counterparts: the SDNY's and the Second Circuit's decisions in *In re Air Crash Off Long Island, New York*.

B. BACKGROUND

On July 17, 1996, approximately eight nautical miles off the coast of Long Island, New York, Paris-bound TWA Flight 800 exploded and crashed shortly after takeoff from John F. Kennedy International Airport, killing all 230 people aboard.¹⁷ While the NTSB has not released its final report, the agency theorizes that the explosion resulted from the ignition of volatile Jet A fuel vapors in the Boeing 747's center-wing fuel tank.¹⁸

C. MOTION TO DISMISS NONPECUNIARY DAMAGES—
SDNY'S DECISION

The first complaint relating to the TWA Flight 800 crash was filed on October 24, 1996, by Catherine Dadi as the personal representative of her late husband's estate.¹⁹ The case, filed in

can enact. The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty The right is made exclusive for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.

Id. at 284 (emphasis added).

¹⁷ See Statement by James Hall, Chairman, National Transportation Safety Board ("NTSB"), at the opening of the NTSB Investigative Hearing Into the Crash of TWA Flight 800; Baltimore, Maryland, Dec. 8, 1997 (visited June 11, 2000) <<http://www.nts.gov/speeches/jh971208.htm>>.

¹⁸ See Vernon S. Ellingstad, *The Pursuit of Fuel Flammability Issues in the TWA Flight 800 Accident Investigation*, October 20, 1998 (visited June 11, 2000) <<http://www.nts.gov/speeches/ve8981021.htm>>.

¹⁹ See *In re Air Crash Off Long Island, New York*, On July 17, 1996, No. 96 Civ. 7986, 1998 U.S. Dist. LEXIS 8044, at *3 (S.D.N.Y. June 2, 1998).

the SDNY, named TWA and The Boeing Company ("Boeing"), the manufacturer of the 747, as defendants.²⁰ Several other similar lawsuits were subsequently filed throughout the country, some of which named Hydro-Aire, Inc., the manufacturer of a boost fuel pump that was allegedly incorporated into the 747, as an additional defendant.²¹ In early 1997, the Judicial Panel on Multidistrict Litigation transferred all wrongful death cases brought by the family members or estate administrators of passengers ("Plaintiffs") to the SDNY for consolidated pretrial proceedings.²² As of June 1998, 145 cases had been consolidated before the SDNY.²³

On July 1, 1997, TWA, Boeing, and Hydro-Aire (the "Defendants") filed a motion to dismiss the Plaintiffs' claims for nonpecuniary damages and to exclude remedies under all law other than DOHSA.²⁴ In their motion, the Defendants asserted that DOHSA was the exclusive law governing claims for damages pleaded in Flight 800 lawsuits.²⁵ Boeing and Hydro-Aire maintained that DOHSA should apply because the deaths occurred more than three nautical miles "(a 'marine league') from the New York shoreline; therefore, the Defendants claimed, the deaths occurred over the 'high seas.'"²⁶ TWA made the same argument in its motion, additionally contending that DOHSA governed the claims against the carrier under the Warsaw Convention.²⁷ The Defendants essentially argued that, because DOHSA applied, nonpecuniary losses could not be recovered by the passengers' beneficiaries.²⁸ In other words, while the Defendants agreed that DOHSA authorized the beneficiaries' recovery for fair and just compensation, they proffered that application of 46 U.S.C. § 762 precluded damages for loss of society, survivor's grief, decedents' pre-death pain and suffering, and punitive damages.²⁹

²⁰ See *id.* at *2-3.

²¹ See *id.* at *3.

²² See *id.* at *3-4.

²³ See *id.* at *4.

²⁴ See *id.* at *2, *4.

²⁵ See *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *5.

²⁶ See *id.* at *5-6; see also 46 U.S.C. app. § 761.

²⁷ See *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *6. The Defendants further argued that DOHSA applied to all cases arising out of the Flight 800 accident, regardless of whether a decedent was a United States citizen or foreign domiciliary. See *id.*

²⁸ See *id.*

²⁹ See *id.*

In response to the Defendants' motion, the Plaintiffs claimed that DOHSA did not apply to their claims.³⁰ They argued that "‘high seas’ and ‘beyond a marine league from the shore’ are independent conditions, both of which must be satisfied before DOHSA may be applied."³¹ The Plaintiffs accepted the NTSB's finding that the accident occurred eight nautical miles off the New York shoreline.³² The Plaintiffs therefore acquiesced that the accident occurred more than three nautical miles from the New York shoreline, i.e., "beyond a marine league from the shore."³³ However, they contended that the deaths did not occur on the "high seas."³⁴ The Plaintiffs argued "that 'high seas' is the compliment to 'territorial seas,' and therefore the two cannot overlap."³⁵ The thrust of the Plaintiffs' "high seas" argument focused on the 1988 Presidential Proclamation No. 5928 ("Proclamation"), whereby President Reagan redefined the boundary of United States territorial waters to be twelve nautical miles from the shore.³⁶ According to the Plaintiffs, DOHSA did not apply to accidents occurring between three and twelve nau-

³⁰ See *id.* at *6-7.

³¹ *Id.* at *7.

³² See *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *7.

³³ See *id.*

³⁴ See *id.*

³⁵ *Id.*

³⁶ See *id.* In relevant part, the Proclamation reads:

The Territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

Now, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America . . . and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baseline of the United States determined in accordance with international law.

. . .

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

tical miles from the shore of a State.³⁷ Therefore, the Plaintiffs claimed that DOHSA did not govern their claims because the deaths occurred eight nautical miles from the shore.³⁸

The SDNY began its ruling on the nonpecuniary damages issue, which it recognized as one of “first impression” for the Second Circuit,³⁹ by seeking to determine whether DOHSA was applicable to the case.⁴⁰ First, focusing on the “plain meaning” of 46 U.S.C. § 761, the SDNY held:

The most natural reading of this text is that a death must occur both on the high seas and beyond a marine league from the shore for DOHSA to apply. If a death occurred (1) neither on the high seas nor beyond a marine league; (2) on the high seas, but not beyond a marine league; or (3) beyond a marine league, but not on the high seas, then DOHSA does not apply.⁴¹

The Defendants had interpreted § 761 to give “high seas” and “beyond a marine league” equivalent meanings.⁴² The SDNY rejected this argument, noting that such an interpretation of § 761 would essentially make the phrase “high seas” statutory surplusage.⁴³ The court determined, “[T]o comply with the language of the statute, a death must be on the high seas.”⁴⁴ The Defendants attempted to argue that other courts had utilized the “beyond a marine league” requirement without applying the alternative “high seas” test.⁴⁵ However, the SDNY determined that other courts deciding DOHSA cases had used the phrases “high seas” and “beyond a marine league” interchangeably, with-

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction. . . .

Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (emphasis added) [hereinafter Proclamation].

³⁷ See *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *7.

³⁸ See *id.*

³⁹ The SDNY also declared that only one other court, in the Eastern District of Louisiana, has addressed a similar issue. *Id.* at *7-8; see also *Francis v. Hornbeck Offshore (1991) Corp.*, No. 96-608, 1997 U.S. Dist. LEXIS 526 (E.D. La. Jan. 17, 1997) (holding that the wording of the Proclamation neither alters DOHSA’s applicability beyond one marine league from the shoreline nor extends the State’s jurisdiction).

⁴⁰ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *7-8.

⁴¹ *Id.* at *9.

⁴² *Id.*

⁴³ See *id.* at *9 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)).

⁴⁴ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *9.

⁴⁵ See *id.* at *10.

out expressly discussing the SDNY's newly crafted two-tiered inquiry.⁴⁶

In its ruling, the SDNY provided that the essential issues relating to DOHSA's applicability demanded consideration of: 1) the dependent or independent meanings of "beyond a marine league" and "high seas"; and 2) the definition of "high seas."⁴⁷ The SDNY then held that reading DOHSA in context gives "high seas" and "beyond a marine league" independent meanings.⁴⁸ First, the court found no textual basis for the Defendants' argument that § 767 defines the only waters not subject to DOHSA.⁴⁹ Second, the court noted that the Defendants' contention that the Congress intended DOHSA to apply everywhere except state territorial waters was inconsistent with § 761, which also excluded waters within a marine league of "the District of Columbia or the Territories or dependencies of the United States . . . " from DOHSA's reach.⁵⁰ Because those waters listed in § 761 are not listed in § 767, the SDNY held that § 767 cannot define all waters not subject to DOHSA.⁵¹

The SDNY next considered the appropriate definition for "high seas" under DOHSA.⁵² The court held that "[t]he weight of authority establishes that the term 'high seas' at the time DOHSA was enacted meant non-sovereign waters."⁵³ Once the

⁴⁶ See *id.*

⁴⁷ See *id.* at *10-11.

⁴⁸ See *id.* at *11 (citing *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 24 (2d Cir. 1989)).

⁴⁹ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *13. The issue of reading DOHSA in context to glean statutory interpretation was raised by the Defendants' use of 46 U.S.C. § 767 to argue that DOHSA applies to accidents occurring three nautical miles or more from the shoreline. See *id.* at *11-12. Section 767 provides, in relevant part, that DOHSA does not apply "to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U.S.C. § 767 (emphasis added). The Defendants asserted that the waters addressed in § 767 were the only waters not subject to DOHSA. See *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *12. To support their three-nautical mile threshold, the Defendants maintained that, at the time DOHSA was passed, the three-nautical mile limit—i.e., one "marine league"—defined State territory for most States. See *id.* Therefore, the Defendants argued "that interpreting [§ 761] to fix the definition of high seas for DOHSA purposes at a marine league[—three nautical miles—]is consistent with the purported Congressional intent to exclude merely state territorial waters." *Id.*

⁵⁰ See *id.* at *13 (quoting 46 U.S.C. app. § 761).

⁵¹ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *13.

⁵² See *id.* at *22.

⁵³ *Id.*

SDNY classified "high seas" as non-territorial (i.e., international) waters, it considered the Proclamation. The SDNY determined that the Proclamation redefined the "territorial sea" without expressly mentioning the term "high seas."⁵⁴ However, the court declared that "since the high seas is defined for DOHSA purposes to be international waters not subject to any sovereign, and the Proclamation extended the federal sovereign territory to twelve nautical miles, the effect of the Proclamation is to redefine high seas to lay seaward of twelve miles from the shore."⁵⁵ The court also noted that the Federal Aviation Administration (the "FAA") issued a rule following the Proclamation's release consistent with the court's interpretation.⁵⁶ Denying the Defendants' motion to dismiss the Plaintiffs' claims for nonpecuniary damages, the SDNY held:

In sum, since the "high seas" are the waters beyond the territorial sea, and since the Proclamation extends the territorial sea to twelve miles from the shore, then the deaths in the instant case occurring eight miles from the shore of New York occurred in the territorial sea, and not in the high seas.⁵⁷

D. MOTION TO DISMISS NONPECUNIARY DAMAGES— SECOND CIRCUIT'S DECISION

The Defendants appealed the SDNY's decision to the Second Circuit, which rendered a decision on March 29, 2000, seven days before Public Law 106-181 amended DOHSA through section 404.⁵⁸ The Second Circuit framed the issue as "whether DOHSA applies to an airplane crash in United States territorial waters roughly eight miles from the coast of the United States."⁵⁹ The Second Circuit affirmed the SDNY's decision, with two of the three circuit judges on the panel concluding that

⁵⁴ See *id.* at *25.

⁵⁵ *Id.* at *25-26.

⁵⁶ See *id.* at *26. Shortly after the signing of the Proclamation, the FAA issued a regulation expanding its jurisdiction over the "new United States territory." *Id.* Specifically, the rule amended Parts 71 and 91 of the Federal Aviation Regulations "to extend controlled airspace and the applicability of flight rules to the airspace overlying the waters between 3 and 12 nautical miles from the U.S. coast." 54 Fed. Reg. 264 (1989).

⁵⁷ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *32-33.

⁵⁸ See *In re Air Crash Off Long Island*, New York, On July 17, 1996, 209 F.3d 200 (2d Cir. 2000); cf. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, § 404 Pub. L. No. 106-181, 114 Stat. 61 (codified as amended 46 U.S.C. app. §§ 761, 762 (1994)) [hereinafter Pub. L. No. 106-181].

⁵⁹ *In re Air Crash Off Long Island*, 209 F.3d at 201.

the Plaintiffs' interpretation of DOHSA's language more aptly reflected the meaning and purpose of the statute.⁶⁰ The dissenting judge disagreed, stating that the pertinent remedial scheme for deaths occurring off the coast of the United States is a matter of legislative policy that should not be addressed by the courts.⁶¹ While the Second Circuit's decision has essentially been codified by Public Law 106-181's amendment of DOHSA through section 404, we must analyze its decision because, as provided below,⁶² the amended DOHSA provisions will prove problematic in application and as a matter of sound policy.⁶³ To resolve these problems, litigants will need to turn to case law. Because the Second Circuit's decision addresses problems created by Public Law 106-181's amendment of DOHSA through section 404, we will discuss those portions of the opinion that have not been superceded by enactment of Public Law 106-181.

1. *Majority Opinion*

The majority began its ruling by discussing the background of DOHSA, citing pre-DOHSA cases reaching drastically different results. The majority provided that the tension between these cases—i.e., *The Harrisburg*,⁶⁴ *The Hamilton*,⁶⁵ and *La Bourgogne*⁶⁶ “created jurisdictional fictions and serious problems in choice of law that sometimes denied recovery altogether.”⁶⁷ These problems, the majority stated, caused the Maritime Law Associa-

⁶⁰ See *id.* at 215.

⁶¹ See *id.* at 226 (Sotomayor, J., dissenting). While Judge Sotomayor stated that Congress was the appropriate body to provide the remedial scheme for the deaths at issue, we will demonstrate that section 404 of Public Law 106-181 fails to provide this remedial scheme, thus forcing courts to address the remedies available in federal waters. See *infra* Part IV.C.

⁶² See *infra* Part IV.C.

⁶³ The Second Circuit twice mentioned House Bill 1000, which would be signed into Public Law 106-181, once in the majority opinion and once in the dissent. See *In re Air Crash Off Long Island*, 209 F.3d at 215 n.24, 226 n.13.

⁶⁴ 119 U.S. 199 (1886). In *The Harrisburg*, which was later overruled by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the United States Supreme Court denied recovery to the widow of a seaman who sought recovery under the general maritime law because she did not bring suit within the applicable state statute of limitations. See *id.* at 213-14.

⁶⁵ 207 U.S. 398 (1907).

⁶⁶ 210 U.S. 95 (1908).

⁶⁷ *In re Air Crash Off Long Island*, 209 F.3d at 204 (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 235 (1986) (Powell, J., concurring in part and dissenting in part)).

tion ("MLA") to begin drafting a bill that would become DOHSA.⁶⁸

The majority gave significant attention to DOHSA's initial legislative history supporting the definition of "high seas" as those seas that lie beyond United States territorial waters.⁶⁹ As explained below, the enactment of section 404 of Public Law 106-181 did not focus on the definition of "high seas" as being determinative of the amended DOHSA's reach.⁷⁰ Instead, Congress created an express frontier at twelve nautical miles.⁷¹ While much of the majority's discussion was rendered mute by enactment of section 404 of Public Law 106-181 (i.e., the portion that solely addresses the definitions of "high seas" and "beyond a marine league" to analyze DOHSA's scope), our discussion below reveals that portions of the majority's opinion could apply to litigation arising after Public Law 106-181's enactment.

The majority's decision could be interpreted to allow the application of state remedies, in conjunction with the application of the substantive general maritime law, for commercial airline accidents occurring in Federal waters. In its ruling, the majority determined:

[A]pplying DOHSA to federal territorial waters would subvert DOHSA's purpose of creating a remedy where none existed before, *rather than displacing preexisting state or federal remedies*. The legislative history 'indicates that Congress intended to ensure the continued availability of a *remedy, historically provided by the States, for deaths in territorial waters*. . . .' Congress intended to exclude federal territorial waters from the scope of DOHSA because *federal and state common-law remedies already existed for deaths in those waters*.⁷²

In a footnote, the majority criticized the dissent's objection "that '[n]o clear remedies existed for wrongful death beyond state territorial waters after *The Harrisburg*, a gap in the law that DOHSA was designed expressly to fill.'"⁷³ "This argument," the majority contended, "simply ignores the cases in which the

⁶⁸ See *id.*

⁶⁹ See generally *id.* at 205-12 (focusing on the United States Supreme Court's understanding of "high seas" at the time of DOHSA's enactment, the structure and purpose of DOHSA, the meaning of "high seas" in the period from DOHSA's enactment to President Reagan's issuance of Proclamation 5928, and the application of DOHSA to foreign territorial waters).

⁷⁰ See *infra* Part IV.A.

⁷¹ See *id.*

⁷² *In re Air Crash off Long Island*, 209 F.3d at 209 (emphasis added).

⁷³ *Id.* at 209 n.14.

courts, including the Supreme Court, provided remedies in an effort to ameliorate the harsh rule of *The Harrisburg*.⁷⁴ The majority then directed the reader to Section II.A. for a listing of those cases—*The Hamilton* and *La Bourgogne*.⁷⁵ The majority impliedly argues that *The Hamilton* and *La Bourgogne* may now stand for the proposition, given DOHSA's non-applicability, that state remedies may supplement the general maritime law in federal waters.⁷⁶

In *The Hamilton*, the United States Supreme Court held that one citizen of Delaware could bring a lawsuit in admiralty against another Delaware citizen under Delaware's wrongful death statute, even though the death had occurred on the high seas.⁷⁷ The case involved the collision of two vessels, both belonging to Delaware corporations.⁷⁸ The Court emphasized that the Delaware wrongful death statute at issue controlled the liabilities of the corporations, "existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the State, it is true, but within no other territorial jurisdiction."⁷⁹ Delaware would also have the authority to have its statute applied, the Court held, to citizens domiciled in the state, "even when personally on the high seas."⁸⁰ To accentuate its point, the Court determined, "No one doubts the power of England or France to govern their own ships upon the high seas."⁸¹

The majority also cited the United States Supreme Court's decision in *La Bourgogne* to suggest that state remedies may be available in claims arising out of an accident in federal waters. In *La Bourgogne*, the Court held that French law could be applied in a limitation of liability proceeding addressing an accident between French and British vessels where the collision

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ This implication is further indicated in other sections of the majority's opinion. Without providing a supporting citation, the majority determined that "[i]t would be particularly inappropriate to displace *preexisting state or federal remedies* where, as here, recovery could be more generous than under DOHSA." *See id.* at 209.

⁷⁷ *See The Hamilton*, 207 U.S. at 403.

⁷⁸ *See id.* at 402.

⁷⁹ *Id.* at 403.

⁸⁰ *Id.*

⁸¹ *Id.*

occurred on the high seas.⁸² Aside from this limitation of liability proceeding, the Court determined that, where the contesting vessels belonged to different nations having different laws, the maritime law would properly furnish the rule of decision, since "it would be unjust to apply the laws of either to the exclusion of the other."⁸³

2. *Dissenting Opinion*

Like the majority opinion, much of the dissent's opinion regarding the scope of DOHSA has been rendered moot by Public Law 106-181's amendments of DOHSA through section 404. However, the dissent does answer the majority's suggestion that state remedies can be applied in federal waters—an issue that remains relevant despite section 404 of Public Law 106-181's revision of DOHSA's scope.⁸⁴ In his dissenting opinion, Judge Sotomayor provided:

I am also unconvinced that a satisfactory remedy would exist for deaths occurring in the disputed zone if we were to supplant DOHSA's application in that zone with general federal maritime law. In the zero to three nautical mile zone, state statutory and state common law remedies are available to supplement general federal maritime law, but this would not necessarily be the case in the disputed zone, where state law is inapplicable.⁸⁵

⁸² See *La Bourgogne*, 210 U.S. at 115.

⁸³ *Id.* at 116 (quoting *The Scotland*, 105 U.S. 24, 29 (1881)); see also WILLIAM TETLEY, *INTERNATIONAL CONFLICT OF LAWS* 464 n.22 (1994).

⁸⁴ In a footnote, the dissent specifically took issue with the majority's use of *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), a case that will be discussed further below. See *In re Air Crash Off Long Island*, 209 F.3d at 219 (Sotomayor, J., dissenting). Addressing cases cited by the Defendants/Appellants regarding DOHSA's application to foreign territorial waters, the majority had provided that "[t]hese decisions do not require—or even suggest—the application of DOHSA to the territorial waters of the United States, where plaintiffs already have a state or federal remedy." *Id.* at 212 (citing *Yamaha*, 516 U.S. at 215-16 (emphasis added)). Despite the majority's suggestion that state remedies could be applied in federal waters, the dissent noted that *Yamaha* could not be read to allow such recovery. See *id.* at 219 n.6 (Sotomayor, J., dissenting). Instead, the dissent argued, *Yamaha* spoke to remedies available when deaths occur in the territorial waters of a state or state-like entity. See *id.*

⁸⁵ *In re Air Crash Off Long Island*, 209 F.3d at 225 (Sotomayor, J., dissenting). Judge Sotomayor defined the "disputed zone" as "the zone of waters lying between three and twelve nautical miles seaward of the U.S. Coast." *Id.* at 216. Of course, that disputed zone would be from nine to twelve nautical miles in Texas and Florida. See *infra* note 137 and accompanying text.

Judge Sotomayor also discussed the majority's undermining of the maritime law's uniformity principle.⁸⁶ The majority's opinion, according to the dissent, created four maritime zones wherein different laws control.⁸⁷ Uniformity, the dissent argued, would be better maintained under the two-zone regime that had historically governed wrongful death cases occurring on the high seas.⁸⁸

E. SECOND CIRCUIT'S DECISION ANALYZED

As discussed below, Public Law 106-181's amendment of DOHSA through section 404 has solidified DOHSA's boundaries, thus mooted the scope arguments made in the TWA litigation. However, the Second Circuit's decision in *In re Air Crash off Long Island, New York*, remains relevant to the litigation of two important issues. The first issue involves the majority's suggestion that state remedies may be applied to litigation arising out of deaths in federal territorial waters. The remaining, broader issue concerns the uniformity of the maritime law, a policy issue discussed by the dissent. Although section 404 of Public Law 106-181 puts the scope issue to rest, these issues will likely invoke an extensive analysis of the Second Circuit's decision in an attempt to ascertain the operation of the amended DOHSA provisions.

1. Majority's Suggestion—Borrowing of State Remedies Laws

When Congress enacted section 404 of Public Law 106-181, it failed to expressly provide what law would govern wrongful deaths occurring in federal territorial waters.⁸⁹ This failure will

⁸⁶ See *In re Air Crash Off Long Island*, 209 F.3d at 225 (Sotomayor, J., dissenting).

⁸⁷ See *id.*

⁸⁸ The dissent provided:

The applicable law in the majority's four zones would be: (1) zero to three nautical miles: state law and federal common law; (2) three to twelve nautical miles: federal common law; (3) beyond twelve nautical miles: DOHSA; (4) foreign territorial waters: ? (the majority leaves this open rather than confronting the abundant case law applying DOHSA in foreign territorial waters). Uniformity would be better promoted under the current two-zone regime: (1) zero—three nautical miles: state law and federal common law; (2) beyond 3 nautical miles: DOHSA.

Id.

⁸⁹ See *infra* Part IV.A. Congress' provision in 46 U.S.C. § 761, as amended, that DOHSA will not apply and "the rules applicable under Federal, State, and other appropriate law shall apply" is hardly an express legislative statement of what remedies standard will replace DOHSA. See *id.*

likely cause plaintiffs to cite the majority's opinion for the proposition that state remedies laws may be borrowed when a death occurs in federal waters. This proposition is soundly defeated by the United States Constitution and the inapplicability of the majority's cited United States Supreme Court precedent.

a. The Constitution Prevents the Application of State Law

In *The Lottawanna*, the United States Supreme Court addressed the concept of applying state laws to claims governed by the general maritime law.⁹⁰ In *The Lottawanna*, the Court held:

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.⁹¹

This language supports the argument that the uniformity of the maritime law is a constitutional requirement that cannot be ignored by courts interpreting the effect of the Second Circuit's decision. Application of state remedies laws to federal waters, where the general maritime law controls, would be a violation of this constitutional mandate.

b. United States Supreme Court Precedent Does Not Support the Application of State Law

The majority's opinion in *In re Air Crash Off Long Island, New York*, cited the United States Supreme Court's decisions in *The Hamilton* and *La Bourgogne* for the implicit proposition that state remedies may be borrowed, to be applied in conjunction with the general maritime law, for cases arising out of deaths occurring in federal territorial waters.⁹² However, in *Offshore Logistics, Inc. v. Tallentire*, the United States Supreme Court drastically limited these rulings, holding that state wrongful death statutes could be applied to fatal accidents occurring on the high seas in

⁹⁰ See *The Lottawanna*, 88 U.S. at 575. Below, we will explain that the general maritime law provides the applicable law in the area affected by the amendment of 46 U.S.C. app. § 761. See *infra* Part IV.C.2.a.ii.

⁹¹ *The Lottawanna*, 88 U.S. at 575; see also Comment, 51 CALIF. L. REV. 389 (1963).

⁹² See *supra* note 75 and accompanying text.

only "limited circumstances."⁹³ The *Tallentire* Court specifically addressed *The Hamilton* and determined that the case

has sometimes been understood to endorse a broader application of state law on the high seas than its holding suggested. Some courts came to rely on dicta in *The Hamilton* for the "questionable" proposition that if a state wrongful death statute was intended to extend to torts occurring on the high seas, then an action between citizens of that State for a wrongful death on the high seas could lie in admiralty. . . . There was continued doubt, in spite of *The Hamilton's* dicta, as to the States' competence to provide wrongful death relief for causes of action arising on the high seas.⁹⁴

The *Tallentire* Court determined that state wrongful death statutes that were historically held to apply to the high seas had limited legislative effectiveness under *The Hamilton's* dicta.⁹⁵ Under this dicta, the legislative jurisdiction to apply state laws beyond their borders had to rest upon one of two theories: "either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits."⁹⁶ When those theories were not invoked, recovery was often denied altogether.⁹⁷ Given the prospect that courts could choose to deny recovery altogether for deaths occurring on the high seas, where no law governed, DOHSA was enacted to provide a remedy.⁹⁸

The United States Supreme Court's decision in *Tallentire* clearly undermines the majority's suggestion that state remedies can be applied in federal territorial waters. The "limited circumstances" are not present in commercial airline accidents arising from international transportation and occurring on the high seas. In these cases, the parties are often from several different states and foreign countries. Therefore, unlike Delaware in *The Hamilton*, no state possesses the legislative jurisdiction to apply its remedies laws.⁹⁹

⁹³ *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986).

⁹⁴ *Id.* at 213.

⁹⁵ *See id.* at 214 (citing *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88 (N.D. Cal. 1954)).

⁹⁶ *Id.*

⁹⁷ *See id.* (citing *The Middlesex*, 253 F. 142 (D. Mass. 1916)).

⁹⁸ *See id.* (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970)).

⁹⁹ Like *The Hamilton*, *La Bourgogne* is equally inapplicable to cases arising out of commercial airline accidents occurring on the high seas. These cases do not

Of course, DOHSA had historically provided a remedy that is no longer available given Public Law 106-181's amendment of that statute through section 404. However, we are not arguing that no remedy is available. Before the *Tallentire* decision, the United States Supreme Court, in *Moragne v. States Marine Lines, Inc.*, had held that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act."¹⁰⁰ Therefore, in DOHSA's absence, *Moragne* directs that the applicable remedies standard is provided by the general maritime law. The majority did recognize the general maritime law's probable applicability.¹⁰¹ However, the majority's chosen language supporting the possible application of state remedies laws—"preexisting . . . state remedies," "remedy, historically provided by the states," and "state common-law remedies already exist[ing] for deaths in those waters"—says too much.¹⁰² Clearly, application of State laws to commercial airline accidents occurring in federal waters is contrary to the United States Constitution and is unsupported by United States Supreme Court precedent.

2. *Dissent's Argument—Uniformity of the Maritime Law*

Once Public Law 106-181's amendment of DOHSA through section 404 is fully discussed below, it will become clear that Congress has drastically undermined uniformity in the admiralty law, a principle grounded in constitutional law, by amending DOHSA as it has. The result obtained after the majority's decision on March 29, 2000, is the same result obtained by the amendment to DOHSA occurring seven days later. The dissent's uniformity discussion, therefore, retains force as a strong policy argument against the consequences of DOHSA's amendment.¹⁰³

involve limitation of liability proceedings, wherein State law may apply to cases arising on the high seas.

¹⁰⁰ *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 402.

¹⁰¹ *See In re Air Crash Off Long Island*, 209 F.3d at 209.

¹⁰² *See supra* note 72 and accompanying text.

¹⁰³ For further analysis of the constitutional uniformity principle, see *infra* Part IV.C.2.d.

IV. CONGRESSIONAL ACTIVITY

A. PUBLIC LAW 106-181, § 404

On April 5, 2000, President Clinton signed a bill into law that became Public Law 106-181.¹⁰⁴ Section 404 of the law substantially changed DOHSA's historic application to "commercial aviation accidents" occurring on the "high seas" through its amendment of 46 U.S.C §§ 761 and 762. With the new provisions italicized, § 761 now provides:

Right of action; where and by whom brought

(a) Subject to subsection (b), whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

*(b) In the case of a commercial aviation accident, whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas 12 nautical miles or closer to the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, this Act shall not apply and the rules applicable under Federal, State, and other appropriate law shall apply.*¹⁰⁵

With enactment of § 404 of Public Law 106-181, § 762 now provides:

Amount and apportionment of recovery

(a) The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

(b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for

¹⁰⁴ See *Bill Summary & Status for the 106th Congress* (visited June 18, 2000) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.01000:>>.

¹⁰⁵ 46 U.S.C. app. § 761 *as amended by* Act of Apr. 5, 2000, 46 U.S.C.A. app. § 761 (West. Supp. 2000) (emphasis added).

wrongful death of a decedent is recoverable. Punitive damages are not recoverable.

(2) In this subsection, the term 'nonpecuniary damages' means damages for loss of care, comfort, and companionship.¹⁰⁶

Section 404(c) of Public Law 106-181 provides that the aforementioned amendments to DOHSA will apply to any death occurring after July 16, 1996.¹⁰⁷

Congress had earlier considered exempting DOHSA from aviation altogether through the House's consideration of House Bill 603.¹⁰⁸ The difference between the effects of House Bill 603 and section 404 of Public Law 106-181 lies in section 404's statutory guarantee of a federal forum through admiralty jurisdiction for commercial airline accidents occurring beyond twelve miles from the shore of any State.¹⁰⁹

B. THE INITIATIVE

The passing of section 404 of Public Law 106-181 was fueled by the Congress' concern that TWA Flight 800 families, Swissair

¹⁰⁶ *Id.* § 762.

¹⁰⁷ Pub. L. No. 106-181, 114 Stat. 61, at § 404(c).

¹⁰⁸ On March 3, 1999, the United States House of Representatives voted 412-2 in favor of House Bill 603, a bill seeking to amend 49 U.S.C. § 40120(a) to exempt air crashes from DOHSA's provisions. Cecile Hatfield, *Recent Developments in Aviation Law*, 21 LAW-PILOTS B. ASS'N J. 18 (1999). If House Bill 603 had been enacted, the new relevant provision would have read:

§ 40120. Relationship to other laws

(a) Nonapplication. Except as provided in the International Navigational Rules Act of 1977 (33 U.S.C. 1601 et seq.), the navigation and shipping laws of the United States (*including the Act entitled 'An Act relating to the maintenance of actions for death on the high seas and other navigable waters', approved March 30, 1920, commonly known as the Death on the High Seas Act (46 U.S.C. App. 761-767; 41 Stat. 537-538)*) and the rules for the prevention of collisions do not apply to aircraft or to the navigation of vessels related to those aircraft.

Compare 49 U.S.C. § 40120(a) with H.R. 603, 106th Cong. § 1 (1999) (The emphasis indicates the new portion of § 40120(a) if H.R. 603 had been enacted.).

¹⁰⁹ Compare H.R. 603, 106th Cong. § 1 (1999) with Pub. L. No. 106-181, *supra* note 58, at § 404. If commercial airline accidents had been completely removed from DOHSA's ambit, admiralty jurisdiction would have likely governed these cases even without DOHSA's express grant of admiralty jurisdiction found in 46 U.S.C. app. § 761. See 46 U.S.C. app. § 761; see *infra* Part IV.C.2.d. While it may be difficult to conceptualize the practical difference between the probable effects of House Bill 603, had it become law, and the likely effects of section 404 of Public Law 106-181, one clear difference does arise. House Bill 603, had it become law, does not appear to be as problematic as section 404 of Public Law 106-181, considering the possible constitutional shortcomings of the latter provision's impact on the uniformity principle of the maritime law. See *infra* Part IV.C.2.d.

Flight 111 families, and families of future victims of high seas commercial airline accidents, would only be able to recover pecuniary damages under DOHSA.¹¹⁰ This concern was largely expressed in floor debate of House Bill 603, a preliminary bill to section 404 of House Bill 1000, the bill which would eventually be incorporated into Public Law 106-181. The Representatives were especially critical of the United States Supreme Court's decision in *Zickerman*.¹¹¹ The Representatives referred to the Court's application of DOHSA as "obviously unfair,"¹¹² a "bizarre inequity,"¹¹³ and an "injustice."¹¹⁴ Discussing the inequity of limiting damage recovery to pecuniary damages, Representative Sherwood stated:

If a plane crashed on land, family members can seek redress for losses in State courts for various different types of compensation. However, if a loved one crashed at sea, one can only seek compensation for loss of income in a U.S. District Court.

In the case of a child or a retired person lost at sea, the Supreme Court's application of this archaic maritime law makes that child valueless in the face of the law.

Clearly, the application of this law is patently unfair and cruel. Why are we standing here in 1999 and applying a 1920's maritime law to modern aviation disaster claims? *The time has come to create one level playing field and one process for all airline crash claims.*¹¹⁵

¹¹⁰ See 145 CONG. REC. H900-02 (daily ed. March 3, 1999). The text of Public Law 106-181, section 404(c), demonstrates a memorialization of the TWA accident through its effective date, July 16, 1996, the day before TWA Flight 800 crashed off of Long Island. See *supra* note 17 and accompanying text. Any death occurring after this date would be subject to the provisions of the new DOHSA. See 46 U.S.C. app. §§ 761, 762.

¹¹¹ See *id.* In debate, Representative Duncan stated, "[T]he Supreme Court really surprised everyone in deciding the case of Zickerman [sic] versus Korean Airlines in holding that the Death on the High Seas Act applies to lawsuits that arise out of an aircraft crash in the ocean that occurs more than [three] miles from land." *Id.* at H900 (statement of Rep. Duncan). Representative Duncan continued, "I think it is fair to say that almost no one in the aviation or legal communities believe that this Death on the High Seas Act would apply to the TWA crash until the recent decision in the Zickerman [sic] case." *Id.*

¹¹² See 145 CONG. REC. H900 (daily ed. March 3, 1999) (statement of Rep. Lipinski).

¹¹³ See *id.* (statement of Rep. Shuster).

¹¹⁴ See *id.* (statement of Rep. Duncan).

¹¹⁵ *Id.* at 901 (statement of Rep. Sherwood) (emphasis added). While Rep. Sherwood's statement does have some emotive appeal, removal of DOHSA application to high seas commercial airline accidents would in no way create "one level playing field" or "one process" for airline crash claims. In fact, as we have argued and will continue to argue, the opposite would likely be the result. If

C. THE EFFECT OF ENACTMENT

As of this Article's publication date, the effect of the new DOHSA provisions is far from clear. Some issues have been expressly resolved by the unambiguous text of 46 U.S.C. §§ 761 and 762, as amended by section 404 of Public Law 106-181. The text of section 761(b) makes it clear that DOHSA will not apply to "commercial aviation accident[s]" occurring within twelve nautical miles from the shore of any state or federal territory.¹¹⁶ For all other "commercial aviation accident[s]" occurring outside of the twelve nautical mile boundary, § 762(b)(1)'s text allows for recovery of "nonpecuniary damages," damages in addition to § 762(a) pecuniary damages.¹¹⁷

As discussed below, the application of DOHSA's new unambiguous text will prove onerous enough for courts in rendering just and equitable decisions. Moreover, applying these new provisions will raise new public policy concerns. Adding insult to injury, however, is certain textual ambiguity found in the new DOHSA provisions. While Congress clearly defined the geographical area in which DOHSA will and will not apply, it created new problems through its use of "commercial aviation accident" without expressly defining the term.

1. Problems Arising from Textual Ambiguity

DOHSA § 761(b) provides that DOHSA will not apply to deaths resulting from commercial aviation accidents occurring landward of twelve nautical miles of a state or territory.¹¹⁸ Beyond this twelve nautical mile threshold, DOHSA § 762(b) provides that nonpecuniary damages may be recovered for deaths resulting from commercial aviation accidents.¹¹⁹ Because Congress did not expressly define the term, litigation is sure to arise over the definition of "commercial aviation accident." This litigation is likely to stem from the multitude of instances where helicopters or charter aircraft for hire (i.e., aircraft other than those owned by commercial airlines) crash, causing death on

DOHSA's applicability is removed, passengers could experience drastically different recoveries through the application of various State laws instead of DOHSA's uniform law.

¹¹⁶ 46 U.S.C. app. § 761(b).

¹¹⁷ *Id.* § 762(a), (b). However, § 762(b)(1) expressly prohibits recovery of punitive damages. *Id.* § 762(b)(1).

¹¹⁸ *Id.* § 761(b).

¹¹⁹ *Id.* § 762(b)(1).

the high seas.¹²⁰ In these cases, two alternative approaches could resolve this interpretational issue.

a. Definition Utilizing the Federal Aviation Regulations

Under the first approach, “commercial aviation accident” is roughly defined by reference to the Federal Aviation Regulations (“FARs”).¹²¹ While the term is not expressly defined in the FARs, Part 1 defines a “commercial operator” as “a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property”¹²² “Air commerce” is further defined as “interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.”¹²³ Further, Black’s Law Dictionary defines an “accidental” event as an occurrence happening by chance or unexpectedly.¹²⁴ Under the first approach, therefore, “commercial aviation accident,” would be defined as *an unexpected or chance event that occurs during the operation or navigation of aircraft being operated for compensation or hire*. It is difficult to imagine any flight for compensation or hire that would be immune from this definition’s broad reach.

b. Definition Utilizing the Text and Legislative History

The second approach to defining “commercial aviation accident” occurs through analysis of the text and the legislative his-

¹²⁰ In this anticipated dispute over the definition of “commercial aviation accident,” there is little question—and we do not counter-argue—that “commercial aviation accident” would encompass major commercial airline accidents such as TWA Flight 800, Swissair Flight 111, EgyptAir Flight 990, and Alaska Airlines Flight 261. The contentiousness of this issue is not mere conjecture on our part. Although DOHSA has been amended for only a few months as of the date of this Article’s publication, our firm has been involved in a case whereby the plaintiff claims that the crash of a helicopter engaged in a ferrying operation—occurring well outside the DOHSA boundary—was a “commercial aviation accident” under the new DOHSA provisions. In this case, the plaintiffs are claiming entitlement to nonpecuniary damages under 46 U.S.C. §§ 762(b)(1) and (2) arising from the death of their decedent resulting from the helicopter’s crash.

¹²¹ See 14 C.F.R. § 1.1 (2000).

¹²² *Id.*

¹²³ *Id.* For purposes of this definition analysis, an occurrence is an “accident” when it happens by chance or unexpectedly. See BLACK’S LAW DICTIONARY 31 (4th ed. 1968).

¹²⁴ See *id.*

tory of 46 U.S.C. §§ 761 and 762, as amended by section 404 of Public Law 106-181. While the text of the amended DOHSA provisions does not expressly define "commercial aviation accident," certain implications arising from the text and its legislative history make it clear that DOHSA was amended specifically to address litigation arising out of commercial airline accidents occurring on the high seas. Section 404(c) of Public Law 106-181 provides a textual implication supporting the new provisions' limited application to these types of accidents only. Section 404(c) reads, "The amendments made by [§§ 404(a) and (b)] shall apply to any death occurring after July 16, 1996."¹²⁵ It is no coincidence that the effective date in section 404(c) is the day before TWA Flight 800 crashed on July 17, 1996.¹²⁶ The effective date outlined in section 404(c) of Public Law 106-181, therefore, strongly supports the argument that "commercial aviation accident" means *an unexpected or chance event that occurs during the operation or navigation of aircraft being operated by a commercial airline*.

The legislative history underlying the enactment of § 404 of Public Law 106-181 also supports the above-suggested definition of "commercial aviation accident." One noted legislative history scholar has suggested that when judges examine legislative history, they should attempt to determine how enacting legislators would have wanted the proposed statute to apply to the case at bar.¹²⁷ In determining legislative intent, often the structure and the language of the statute will supply a clue.¹²⁸ As discussed above, the effective date of the DOHSA amendments—July 16, 1996—provides a significant textual insinuation that the DOHSA amendments were meant to apply to commercial airline accidents such as TWA Flight 800 or other high seas accidents involving flights being operated by commercial airlines. Aside from this textual suggestion gleaned from a reading of the new DOHSA provisions, other legislative history supports our definition of "commercial aviation accident."

The legislative history underlying the passage of House Bill 603—an earlier provision that sought to remove DOHSA's applicability to high seas commercial airline accidents—supports our view that "commercial aviation accident" was targeted to apply

¹²⁵ Pub. L. No. 106-181, *supra* note 58, at § 404(c).

¹²⁶ See *supra* Part III.B.

¹²⁷ See Judge Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

¹²⁸ See *id.* at 818.

to commercial airline accidents occurring on the high seas. Representative Sherwood, House Bill 603's sponsor, provided during the bill's floor debate that he rose "in strong support of H.R. 603, The *Airline Disaster Relief Act*."¹²⁹ During his floor debate, he maintained that one level playing field must be established for "all *airline* crash claims."¹³⁰ Representative Sherwood also stated that House Bill 603 should be passed to provide "equitable treatment for the families who lost loved ones in *airline* disasters over international waters."¹³¹ Representative Duncan, during the same debate, discussed House Bill 603's effect on the TWA Flight 800 litigation and stated that House Bill 603 "will help people all over the Nation and it could help families years from now if, God forbid, we have another similar crash in the ocean."¹³² Representative Forbes further discussed House Bill 603's importance, adding that the Act "would allow full compensation for the families of victims of aviation disasters *like TWA 800*."¹³³

Consideration of this floor debate clearly indicates that Congress intended to have DOHSA's amendments apply to "commercial aviation accident[s]" like TWA Flight 800, Swissair Flight 111, EgyptAir Flight 990, and Alaska Flight 261. Application of these amendments to other accidents occurring on the high seas is clearly unsupported by the legislative history. Therefore, the broad definition supported by the FARs under the first approach to defining "commercial aviation accident" is inconsistent with the purpose of the DOHSA amendments.

Support for the FARs' broad definition of "commercial aviation accident" is further undermined by reference to the Senate Conference Report discussing House Bill 1000, the bill that would be signed into Public Law 106-181. In this report, Senator Specter stated:

The Death on the High Seas Act states that where the death of a person is caused by wrongful act, neglect, or default occurring more than one marine league—three miles—from U.S. shores, a personal representative of a decedent can only sue for pecuniary loss sustained by the decedent's wife, child, husband, parent, or dependent relative. Therefore, the families of the victims of avia-

¹²⁹ 145 CONG. REC. H901 (daily ed. March 3, 1999) (statement of Rep. Sherwood) (emphasis added).

¹³⁰ *Id.* (emphasis added).

¹³¹ *Id.* (emphasis added).

¹³² *Id.* at H900 (statement of Rep. Duncan).

¹³³ *Id.* at H902 (statement of Rep. Forbes) (emphasis added).

tion accidents, *such as TWA 800, Swissair 111 and EgyptAir 990*, all of which occurred more than three miles offshore, were precluded from recovering non-pecuniary damages such as loss of society or punitive damages, no matter how great the wrongful act or neglect by an airline or airplane manufacturer.¹³⁴

Senator Specter provided that enactment of House Bill 1000 effectively removed the TWA Flight 800 litigation from DOHSA coverage.¹³⁵ The Senator also stated, “[W]hile the Death on the High Seas Act will still apply to other aviation accidents which occurred beyond twelve miles, *such as Swissair 111 and EgyptAir 990*, non-pecuniary damages will now be recoverable for the first time.”¹³⁶

Senator Specter’s statement certainly supports the second, narrower approach to defining “commercial aviation accident.” A broader reading of “commercial aviation accident” lacks foundation in light of the textual suggestion resulting from and the legislative history of Public Law 106-181’s amendment of DOHSA. Senator Specter’s specific reference to notable major airline crashes indicates that Congress intended to have the DOHSA amendments apply only in very limited circumstances: where a commercial airline crashes on the high seas.

2. *Problems Arising from the Application of DOHSA’s Unambiguous Text*

Unfortunately, the ambiguity surrounding the definition of “commercial aviation accident” is only the beginning of the problem. Public Law 106-181’s amendment of DOHSA through section 404 will create unparalleled mass confusion in the litigation of cases arising from commercial airline accidents occurring on the high seas. In this section of the article, we examine the likely effects of the amendment considering 46 U.S.C. §§ 761 and 762 separately, analyzing the amended provisions with the case law likely to govern pending and future cases. Further, we will discuss the admiralty jurisdiction’s continued viability in cases arising out of commercial airline accidents occurring on the high seas; interestingly, admiralty jurisdiction is likely to govern whether or not DOHSA applies. We will also address the amendment’s impact on a bedrock constitutional principle: the

¹³⁴ 146 CONG. REC. S1265 (daily ed. March 8, 2000) (statement of Sen. Specter) (emphasis added).

¹³⁵ *See id.*

¹³⁶ *Id.* (emphasis added).

uniformity of the admiralty law. We conclude this section of the article by suggesting that Congress would have been better-served, considering the amendment's impact on §§ 761 and 762, to exempt DOHSA's application to aviation altogether instead of haphazardly legislating in a manner which raises uniformity and constitutional concerns under admiralty jurisdiction.

a. 46 U.S.C. § 761—DOHSA Inapplicable

If 46 U.S.C. § 761 is invoked to exclude DOHSA's application, Congress provided that "the rules *applicable* under Federal, State, and other appropriate law shall apply."¹³⁷ Use of the word "applicable" in this provision clearly indicates that the rules existing before enactment of section 404 of Public Law 106-181 will continue to govern in place of DOHSA, depending on whether the crash occurs within or outside state territorial waters.

i. *Inside State Territorial Waters—Within Three or Nine Nautical Miles from a State Shoreline*¹³⁸

If § 761(b) applies because the crash occurred "12 nautical miles or closer to the shore of any State,"¹³⁹ thereby excluding DOHSA's applicability, the next logical question becomes whether the crash occurred in state territorial waters. If the crash occurred within state waters, the United States Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun*¹⁴⁰ governs whether state or federal law should apply.

Yamaha involved the death of twelve-year-old Natalie Calhoun, who was fatally injured on a jet ski manufactured by Yamaha.¹⁴¹ The girl was killed when the jet ski slammed into an anchored vessel in the waters off a hotel frontage in Puerto Rico.¹⁴² Natalie's parents subsequently brought a lawsuit against Yamaha in the United States District Court for the Eastern District of Penn-

¹³⁷ 46 U.S.C. app. § 761(b) (emphasis added).

¹³⁸ State territorial waters, in all States except Texas and Florida, extend to three nautical miles from the shore of that State. *See* United States v. Louisiana, 363 U.S. 1, 64 (1960). The territorial waters of Texas and Florida extend to nine nautical miles from their respective shores. *Id.*

¹³⁹ 46 U.S.C. app. § 761(b).

¹⁴⁰ 516 U.S. 199 (1996).

¹⁴¹ *See id.* at 202.

¹⁴² *See id.*

sylvania, seeking damages pursuant to Pennsylvania tort law.¹⁴³ Yamaha moved for partial summary judgment, alleging that the federal maritime wrongful death action recognized by the United States Supreme Court in *Moragne v. States Marine Lines, Inc.* provided the exclusive basis for recovery, displacing all remedies afforded by state law.¹⁴⁴ While the district court agreed with Yamaha's contention that a *Moragne* wrongful death action displaced state remedies, it nonetheless held that Natalie's parents could recover certain non-pecuniary damages.¹⁴⁵ The United States Court of Appeals for the Third Circuit affirmed, ruling that state law remedies applied in the case.¹⁴⁶

The United States Supreme Court also affirmed, holding that the damages available in the case were properly governed by state law.¹⁴⁷ In so ruling, the Court determined that Congress "ha[d] not prescribed remedies for the wrongful deaths of non-seafarers in territorial waters."¹⁴⁸ The Court defined "non-seafarers" as "persons who are neither seamen covered by the Jones Act . . . nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act"¹⁴⁹ For wrongful death cases involving nonseafarers perishing in state territorial waters, the Court ruled, state law should govern the remedies issue.¹⁵⁰

If an aircraft being operated by a commercial airline were to crash within state territorial waters, DOHSA obviously would not apply because no state's territory extends beyond the twelve-mile DOHSA boundary. Moreover, *Yamaha* would be applied to wrongful death claims arising out of such hypothetical accidents, allowing beneficiaries to recover pursuant to state remedies laws.¹⁵¹ Inside state territorial waters, the operation of § 761, as amended by section 404 of Public Law 106-181, is effective and logical. However, if an aircraft being operated by a commercial airline crashes between the boundary of state terri-

¹⁴³ See *id.* The Calhouns sought damages for lost future earnings, loss of society, loss of support and services, funeral expenses and punitive damages. See *id.*

¹⁴⁴ See *id.* at 203 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)).

¹⁴⁵ See *id.*

¹⁴⁶ See *Yamaha*, 516 U.S. at 204.

¹⁴⁷ See *id.* at 216.

¹⁴⁸ *Id.* at 215.

¹⁴⁹ *Id.* at 205 n.2 (citations omitted).

¹⁵⁰ See *id.* at 216.

¹⁵¹ *Yamaha* would apply because airline passengers are "nonseafarers."

torial waters and the twelve-mile boundary created by section 404 of Public Law 106-181, the logic of § 761 ends.¹⁵²

ii. *Outside State Territorial Waters—Between Three or Nine Nautical Miles to Twelve Nautical Miles from a State Shoreline*¹⁵³

Section 761 was amended by section 404 of Public Law 106-181 to prevent DOHSA from applying to damage claims arising out of commercial airline accidents, thereby allowing beneficiaries to recover nonpecuniary damages.¹⁵⁴ In this section, we argue that in federal waters (i.e., outside of state boundaries yet inside the twelve-mile boundary created by section 404 of Public Law 106-181), the general maritime law governs the remedies available in damages claims arising from these accidents. Moreover, we assert that in federal waters, state law nonpecuniary remedies may not supplement remedies available under the general maritime law. Although contrary to § 761's design, the amended provision's operation prevents recovery of nonpecuniary damages, as these damages are unavailable under the general maritime law. By failing to provide a federal remedies standard to replace DOHSA, Congress has forced courts into applying the general maritime law to these accidents, thus placing damage claimants in the same situation they were in prior to Public Law 106-181's amendment of DOHSA through section 404.

Interestingly, this choice-of-law situation in the remedies context was expressly addressed in the brief of the Plaintiffs/Appellees to the Second Circuit in *In re Air Crash Off Long Island, New York*.¹⁵⁵ In their brief, the TWA Flight 800 Plaintiffs/Appellees ("Plaintiffs/Appellees") argued that "[t]he applicable law in these cases is general maritime law, which may be supplemented by state law."¹⁵⁶ To support the applicability of the general maritime law in this zone, the Plaintiffs/Appellees cited the United

¹⁵² Unfortunately, as will be explained further below, this zone is precisely where TWA Flight 800 and Alaska Airlines Flight 261 crashed. For a discussion addressing how this could impact the Alaska Airline litigation, see *infra* Part V.A.

¹⁵³ Discussion in this section is limited to the area outside of state territory, but within the twelve-mile boundary found in DOHSA.

¹⁵⁴ See *supra* Part IV.A.

¹⁵⁵ See Brief for Appellees at 47, *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200 (2d Cir. 2000) (No. 98-9622) [hereinafter Appellees' Brief].

¹⁵⁶ *Id.*

States Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*, which acknowledged that some maritime death situations would not be covered by DOHSA.¹⁵⁷ In *Moragne*, the Court recognized the existence of a wrongful death action under general maritime law and held that "'Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters. . . .'"¹⁵⁸

In their brief to the Second Circuit, the Plaintiffs/Appellees further asserted that the general maritime law applicable in federal waters should be supplemented by state law.¹⁵⁹ The Plaintiffs/Appellees cited *Yamaha* to further their argument that a "general maritime law action [does] not preclude supplementation by state law."¹⁶⁰ The Plaintiffs/Appellees provided, "[*Yamaha*] held that state law could apply, because 'Congress has not prescribed remedies for the wrongful deaths of non-seafarers in territorial waters.'"¹⁶¹

The Plaintiffs/Appellees were correct regarding the governing remedies standard in federal waters, absent DOHSA's applicability. The general maritime law should apply to provide the appropriate remedies standard. However, the Plaintiffs/Appellees—and the majority in the Second Circuit's opinion for that matter—completely misread *Yamaha*. In *Yamaha*, the United States Supreme Court specifically addressed deaths occurring in the "territorial waters" of states or state-like entities (i.e., Puerto Rico). The reference to "territorial waters" was not meant to indicate the territorial waters of the United States.¹⁶²

¹⁵⁷ See *id.* (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397 (1970)).

¹⁵⁸ *Id.* (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397 (1970)). The Plaintiffs/Appellees, quoting *Moragne*, maintained, "[T]he Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law *in situations not covered by the Act.*" Appellees' Brief, *supra* note 155, at 47 (emphasis in Appellees' Brief).

¹⁵⁹ See *id.* As we have discussed, the Majority in the Second Circuit's decision in the TWA case implicitly adopted this proposition made by the Plaintiffs/Appellees in that case. See *supra* Part III.D.1.

¹⁶⁰ Appellees' Brief, *supra* note 155, at 47 (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996)).

¹⁶¹ *Id.* at 48 (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996)).

¹⁶² It is true that the Congress has not prescribed remedies for the wrongful deaths of nonseafarers in federal territorial waters. However, the United States Supreme Court in *Yamaha* did not discuss this specific situation. Instead, the Court's allowance of state law supplementation was limited to the situation where the death occurred in the territorial waters of a state or state-like entity.

Language from the opinion supports this: "Yamaha argues that *Moragne*—despite its focus on 'maritime duties' owed to maritime workers—covers the waters, creating a uniform federal maritime remedy for all deaths occurring in *state territorial waters*, and ousting all previously available state remedies."¹⁶³ Later in the opinion, the *Yamaha* Court noted, "Federal maritime law has long accommodated the *States' interest* in regulating maritime affairs *within their territorial waters*."¹⁶⁴ Therefore, *Yamaha* allows the general maritime law to be supplemented with the law of a state or state-like entity *only* when the death occurs in the territorial waters of that state or state-like entity.¹⁶⁵

As we have discussed, *Yamaha* controls the determination of which remedies standard, federal or state, will apply when a nonseafarer dies in the territorial waters of a state or state-like

¹⁶³ *Yamaha*, 516 U.S. at 209 (emphasis added).

¹⁶⁴ *Id.* at 215 n.13 (emphasis added).

¹⁶⁵ The Third Circuit's decision in *Calhoun v. Yamaha Motor Corp.*, which was later affirmed by the United States Supreme Court, further supports the view that "territorial waters," as used in the Court's affirming opinion, are state or state-like entity territorial waters. Framing the question presented, the Third Circuit provided, "These consolidated interlocutory cross appeals before us . . . present an interesting and important question of maritime law: whether state wrongful death and survival statutes are displaced by a federal maritime rule of decision concerning the remedies available for the death of a recreational boater *occurring within state territorial waters*, which are explicitly excluded from the reach of [DOHSA]." *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 624 (3d Cir. 1994), *aff'd*, 516 U.S. 199 (1996) (emphasis added). The Third Circuit further supported our argument by expressly defining "state territorial waters" as "waters within the territorial limits of a state, as well as 'the coastal waters less than three nautical miles from the shore of a state.'" *Id.* at 624 n.1. (quoting William C. Brown, III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 TUL. L. REV. 577, 581 (1994)). Other cases advance the proposition that "territorial waters," as used in *Yamaha*, were territorial waters of a state or state-like entity. See, e.g., *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209, 212 (4th Cir. 2000) (citing *Yamaha* for the proposition that "federal courts began to recognize the application of state wrongful death statutes to fatal accidents that occurred in *state territorial waters*") (emphasis added); *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala.*, on Sept. 22, 1993, 121 F.3d 1421, 1424 (11th Cir. 1997) (citing *Yamaha's* ruling that *Moragne* did not provide the exclusive remedies in cases involving the deaths of non-seamen in *state territorial waters*); *In re Goose Creek Trawlers, Inc.*, 972 F. Supp. 946, 949 (E.D.N.C. 1997) (citing *Yamaha* for the proposition that, where the decedent is not a seaman, longshore worker, or person otherwise engaged in maritime trade, and is killed in *state territorial waters*, federal maritime law does not supplant State wrongful death remedies); *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805, 809 (S.D. Tex. 1996) (citing *Yamaha* for the proposition that states' wrongful death and survival statutes are not preempted by federal law in cases involving the death of a non-seaman in *state territorial waters*).

entity.¹⁶⁶ While *Yamaha* itself does not expressly discuss the circumstance of a nonseafarer perishing in federal waters (i.e., those waters outside of state territorial waters but inside DOHSA's twelve-mile boundary), its application to nonseafarers indicates that the decision will provide courts with the most relevant guidance to unravel the convoluted choice-of-law issues created by the new DOHSA provisions. In other words, because courts have not previously faced this situation, *Yamaha's* ruling must be examined. The decision supplies the most germane legal scenario available: remedies available for deaths of nonseafarers in the maritime context.¹⁶⁷

Clearly, cited precedent in *Yamaha* supports our argument that state law may not supplement the general maritime law for damage claims arising from commercial airline accidents occurring in federal territorial waters. The *Yamaha* Court cited *Western Fuel Co. v. Garcia* for the proposition that extending state wrongful death statutes to fatal accidents in state territorial waters was compatible with substantive maritime policies.¹⁶⁸ In *Western Fuel*, the United States Supreme Court held that its previous rulings

support the right to recover under a local statute in an admiralty court for death occurring on navigable waters *within the state when caused by tort there committed*.

...

As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters *within a state whose statutes give a right of action on account of death by wrongful act*, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.¹⁶⁹

Western Fuel thus demands that the tort be committed within a state's territorial waters before a litigant utilizes that state's remedial regime. Applying *Western Fuel* to claims arising out of deaths in federal waters, claimants have no right to borrow rem-

¹⁶⁶ See *supra* Part IV.C.2.a.i.

¹⁶⁷ Of course, one key element is missing from the *Yamaha* decision that would make it directly on point: the death in that case occurred in the territorial waters of a state-like entity, Puerto Rico. However, support of our argument—that state law may not be borrowed for cases arising out of federal waters—arises from precedent cited by the United States Supreme Court in *Yamaha*.

¹⁶⁸ See *Yamaha*, 516 U.S. at 207 (citing *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921)).

¹⁶⁹ *Western Fuel*, 257 U.S. at 241-42 (emphasis added).

edies standards provided by the states. The opinion demonstrates that the locality of the tort in state waters is a *necessary* condition to the supplementation of the general maritime law with state remedial statutes. Citing *Western Fuel*, the United States Supreme Court therefore would not allow state remedy supplementation of the general maritime law for cases arising from deaths in federal waters.

The *Yamaha* Court also cited the Court's decision in *Romero v. International Terminal Operating Co.*,¹⁷⁰ where the Court determined that the principle has remained that

a state, in the exercise of its police power, may establish rules applicable on land and water *within its limits*, even though these rules incidentally affect maritime affairs, provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations."¹⁷¹

Romero therefore provides that a state's remedies standard may not apply outside of its police power limits.¹⁷² Although the *Yamaha* Court determined that state remedies could be used in damage claims arising from the death of nonseafarers in state territorial waters, the general maritime law must exclusively supply the remedies standard in the case of a nonseafarer's death in federal waters, where no state has the police power to act.¹⁷³

We have argued that the general maritime law will apply to cases arising out of commercial airline accidents occurring in the waters outside state territory yet inside DOHSA's twelve-mile boundary. While the general maritime law and most state laws afford recovery of certain nonpecuniary damages, damage awards under state remedial regimes usually exceed damage awards provided under the general maritime law by a significant

¹⁷⁰ 358 U.S. 354 (1959).

¹⁷¹ *Romero*, 358 U.S. at 375 n.42 (quoting *Just v. Chambers*, 312 U.S. 383, 389 (1941) (emphasis added)).

¹⁷² Our argument against state law supplementation is not supported merely by citation to *Yamaha*'s cited precedent, which reveals that the tort's occurrence within state territory is a necessary prerequisite for supplementation. Such supplementation could be contrary to the Constitution's demand for a uniform maritime law. See *supra* Part III.E.1.

¹⁷³ It is arguable that a federal court, sitting in admiralty, could choose to apply federal choice-of-law rules and determine that a state's remedies law applies. However, a court doing so would be ignoring the necessary implication from *Yamaha*: that state remedial supplementation presupposes the death occurring in territorial waters of states or state-like entities.

measure.¹⁷⁴ As Second Circuit Judge Sotomayor stated in his dissent in *In re Air Crash Off Long Island, New York*, we are also “unconvinced” that an adequate remedy would exist for deaths occurring outside state waters yet within the twelve-mile zone.¹⁷⁵ Public Law 106-181’s amendment of § 761 through section 404 has supplanted DOHSA’s application in Judge Sotomayor’s “disputed zone” with the federal general maritime law. Until Congress decides to legislate to provide a federal remedies standard in the absence of DOHSA, certain nonpecuniary damages should be denied to those claims arising from commercial airline accidents occurring outside of state waters yet within DOHSA’s twelve-mile boundary. The amendment of § 761 wholly fails to allow recovery of certain nonpecuniary damages for claims in this Federal zone, where the general maritime law is invoked to the exclusion of state laws providing more generous recoveries.

b. 46 U.S.C. § 762—DOHSA Applicable

If a commercial airline crashes beyond twelve nautical miles from the shore of any state or state-like entity, 46 U.S.C. § 762 retains DOHSA’s applicability.¹⁷⁶ However, § 762(b)(1) allows for recovery of nonpecuniary damages in addition to § 762(a)’s pecuniary damages, yet denies the availability of punitive damages.¹⁷⁷ Section 762(b)(2) limits “nonpecuniary damages” to damages for loss of care, comfort, and companionship.¹⁷⁸ In applying § 762, courts are sure to address the extent of “nonpecuniary damages” available, even though § 762(b)(2) expressly defines the term.

¹⁷⁴ This explains why the defendant in *Yamaha* advocated for the application of the general maritime law to the exclusion of state law. The difference in federal-state recovery likely results from the state-law availability of damages focusing on the “deleterious effect[s]” of the death on the damage claimants—a class of damages disallowed by general maritime law wrongful death actions. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). For example, recovery for the beneficiaries’ mental anguish is not permissible under the general maritime law, because it focuses on the negative aspects of the loss. *See id.*; *see also infra* Part IV.C.2.b.

¹⁷⁵ *See supra* note 86 and accompanying text.

¹⁷⁶ 46 U.S.C. app. § 762.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* § 762(b)(2).

The nonpecuniary damages—damages for loss of care, comfort, and support—of § 762(b) are “loss of society” damages.¹⁷⁹ While section 762(b) allows for recovery of “loss of society” damages, those do not include damages for mental anguish or grief, which are not compensable in a maritime wrongful death action.¹⁸⁰ “Loss of society” damages are concerned with “loss of positive benefits,” while mental anguish damages “represent an emotional response to the wrongful death.”¹⁸¹ Narrowing the class of nonpecuniary damages which will be available with the amendment of § 762 is important because plaintiffs in these admiralty cases often seek damages for survivor’s grief and pre-death pain and suffering.¹⁸²

¹⁷⁹ See *Gaudet*, 414 U.S. at 585-86. *Gaudet* defined “loss of society” damages as “embrac[ing] a broad range of mutual benefits each family member receives from the others’ continued existence, including love, affection, care, attention, companionship, comfort, and protection.” *Id.* at 585.

¹⁸⁰ See *id.* at 585 n.17.

¹⁸¹ *Id.* The Court, discussing “loss of society” damages, favorably cited the following:

When we speak of recovery for the beneficiaries mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. This requires a somewhat negative approach. The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have contributed in terms of support, assistance, training, comfort, consortium, etc. . . .

. . . .

The great majority of jurisdictions, including several which do allow damages for other types of non-pecuniary loss, hold that the grief, bereavement, anxiety, distress, or mental pain and suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action.

Id. (quoting S. SPEISER, RECOVERY FOR WRONGFUL DEATH 223 (1966)).

¹⁸² For example, while § 762 will not govern the damage claims in the TWA Flight 800 litigation, the SDNY, in its opinion certifying its order for immediate appeal to the Second Circuit, noted that the effect of its decision may allow plaintiffs to recover damages for loss of society, survivor’s grief, pre-death pain and suffering, and punitive damages. See *In re Air Crash Off Long Island, New York*, on July 17, 1996, 27 F. Supp. 2d 431, 433 (S.D.N.Y. 1998). However, *Gaudet* does not allow for such recovery in the TWA case. Application of the general maritime law to these cases, arising out of a commercial airline accident occurring over Federal waters, will prevent recovery of all nonpecuniary damages except “loss of society” damages.

c. Continued Viability of Admiralty Jurisdiction

For cases arising under 46 U.S.C. § 762(b), jurisdiction is guaranteed "in admiralty" through the operation of § 761(a). In this article, however, we must also briefly discuss why admiralty jurisdiction continues to apply to commercial airline accidents occurring pursuant to § 761(b). We are required to address this scenario because some litigants might seek to use the amendment as a vehicle to argue that cases arising from commercial airline accidents landward of the twelve-mile boundary are not "admiralty cases" necessitating the application of the substantive general maritime law. However, section 404 of Public Law 106-181's amendment of DOHSA does not provide a method to avert the governance of admiralty jurisdiction. Therefore, cases arising under § 761(b) will likely remain "in admiralty."

The law is well-settled that, in all admiralty cases, the applicable substantive law is the general maritime law.¹⁸³ Historically, a two-part test governs whether admiralty jurisdiction is proper in any given case: (1) the wrong must occur in navigable waters and (2) the wrong must bear a "significant relationship to traditional maritime activity."¹⁸⁴ The United States Supreme Court extensively discussed this test in *Executive Jet Aviation, Inc. v. Cleveland*,¹⁸⁵ where the Court determined:

[T]he mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.¹⁸⁶

At first glance, this holding appears to indicate that very few aviation accidents would come under admiralty jurisdiction. However, the Court proceeded to define "significant relationship to traditional maritime activity" in a manner which would invoke the admiralty jurisdiction for accidents resulting from in-

¹⁸³ See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 123 (1987).

¹⁸⁴ See *id.* at 74 (quoting *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 268 (1972)).

¹⁸⁵ 409 U.S. 249 (1972).

¹⁸⁶ *Id.* at 268.

ternational flights and occurring beyond state waters.¹⁸⁷ The *Executive Jet* Court stated, "It could be argued . . . that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims *even absent a specific statute*."¹⁸⁸ This situation clearly would cover those federal waters between state territorial boundaries and the twelve-mile DOHSA boundary. In these waters, the "specific statute" that traditionally covered these waters—DOHSA—is now "absent" after enactment of section 404 of Public Law 106-181. Therefore, admiralty jurisdiction continues to govern these waters.¹⁸⁹

Certain language used by the *Executive Jet* Court is particularly relevant to litigation arising out of the TWA Flight 800 and Alaska Airlines Flight 261 accidents, both of which resulted from international travel and both of which occurred in the ambiguous zone outside of state waters yet within the twelve-mile boundary.¹⁹⁰ The Court observed that the application of admiralty jurisdiction to cases arising from accidents involving international travel was supported by various factors, including possible choice-of-forum problems, choice-of-law problems, international law problems and problems involving multi-nation conventions and treaties.¹⁹¹ The Court provided:

Were the maritime law not applicable, it is argued that the recovery would depend upon a confusing consideration of what sub-

¹⁸⁷ See *id.* at 269-72.

¹⁸⁸ *Id.* at 271 (emphasis added).

¹⁸⁹ Immediately following the "absent a specific statute" language in *Executive Jet*, the Court determined, "An aircraft [engaging in international travel] might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels." See *Executive Jet*, 409 U.S. at 271. Arguably, international travel in the modern day is conducted by use of aircraft in lieu of waterborne vessels. Nonetheless, courts have continued to cite *Executive Jet* and apply admiralty jurisdiction to accidents occurring on international flights and on the high seas. See *Preston v. Frantz*, 11 F.3d 357, 359 (2d Cir. 1993); *In re Air Disaster Near Honolulu, Hawaii* on February 24, 1989, 792 F. Supp. 1541, 1543-44 (N.D. Cal. 1990).

¹⁹⁰ See *supra* Part III.B. (TWA); see also *infra* Part V.A.1. (Alaska Airlines). Obviously, if a commercial airline accident occurred beyond the twelve-mile limit, 46 U.S.C. § 762, as amended by section 404 of Public Law 106-181, continues to vest admiralty jurisdiction for cases arising from those accidents through § 761(a). Therefore, there will be no argument that admiralty jurisdiction is inapplicable to those cases arising out of the Swissair Flight 111 and EgyptAir Flight 990 accidents. However, other litigants—i.e., the plaintiffs in the TWA and Alaska Airlines cases—are likely to argue *Executive Jet* for the proposition that, landward of the twelve-mile DOHSA boundary, admiralty jurisdiction does not govern.

¹⁹¹ See *Executive Jet*, 409 U.S. at 271-72.

stantive law to apply, i.e., the law of the forum, the law of the place where each decedent [or injured party] purchased his ticket, the law of the place where the plane took off, or perhaps, the law of the point of destination.¹⁹²

This language supports admiralty jurisdiction over cases arising out of the TWA Flight 800 and Alaska Airlines Flight 261 accidents, both of which involved "an aircraft transporting people from several nations [which met] a tragic end in federal territory not belonging to any state."¹⁹³

d. Uniformity of the Maritime Law

Once admiralty jurisdiction is found to govern a lawsuit, either by statute—46 U.S.C. § 761(a)—or by the case's "significant relationship to traditional maritime activity," the principles of uniformity in the admiralty law must be considered. In this section of the article, we discuss this uniformity canon in light of the amendment of §§ 761 and 762 through section 404 of Public Law 106-181.

i. 46 U.S.C. § 761

Uniformity of the maritime law is a constitutionally-based axiom providing that the federal admiralty law should operate consistently throughout the country.¹⁹⁴ In *The Lottawanna*, the United States Supreme Court determined that the uniform operation of the federal admiralty law is constitutionally required.¹⁹⁵ Specifically, the Court in *The Lottawanna* held that the framers of the United States Constitution did not intend to

¹⁹² *Id.* at 272 n.23 (quoting 7 A.J. Moore, Federal Practice, Admiralty para. 330 [5], p. 3774 (2d ed. 1972)).

¹⁹³ *In re Air Crash Off Long Island*, 1998 U.S. Dist. LEXIS 8044, at *33. Indeed, if admiralty jurisdiction did not govern these cases, courts considering the "law of the forum" would come up empty handed in looking at federal waters where no state law controls. Moreover, application of the law where each decedent purchased his or her ticket would result in drastically different recoveries across the board. Finally, application of the law of departure or destination would often result in the application of a law lacking cognizable relation to the parties.

¹⁹⁴ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) (citing *The Lottawanna*, 88 U.S. 558, 575 (1875)).

¹⁹⁵ See *The Lottawanna*, 88 U.S. at 575. Analysis of *The Lottawanna* further supports our argument that state laws may not be borrowed for application in federal waters by considering the nexus between uniformity and constitutionality. For an analysis of the constitutional consequences of the application of state laws in federal waters, see generally Comment, 51 CALIF. L. REV. 389, 404 (1963).

place the maritime law's rules and limits under the command and regulation of the individual states.¹⁹⁶

The original DOHSA Congress recognized this uniformity principle grounded in constitutional law. When DOHSA was initially contemplated, certain members of the judiciary supported DOHSA's enactment, citing the need for a uniform federal law to correct the injustices arising from the non-uniform nature of state remedies.¹⁹⁷

Despite our assertion that state remedies may not constitutionally apply to deaths in federal waters, Congress has invited courts, when the time comes to apply the amended 46 U.S.C. § 761, to supplement the general maritime law with state remedies.¹⁹⁸ In doing so, today's Congress has re-created the problem the original DOHSA Congress sought to remedy: the non-uniform and constitutionally-questionable application of state laws to deaths occurring on the high seas. While the original DOHSA Congress sought to remedy the non-uniformity that existed before DOHSA was enacted, today's Congress has resurrected the uniformity problem. This non-uniformity will likely cause injustice to occur, as beneficiaries' recovery will vary substantially, depending on which state law is borrowed to supplement the general maritime law. The amendment of § 761, therefore, undermines the uniformity principal of the maritime law and could very well be unconstitutional as a result.¹⁹⁹

ii. 46 U.S.C. § 762

The maritime law's uniformity principle is further undermined by Public Law 106-181's amendment to 46 U.S.C. § 762 through section 404. One of DOHSA's defining and historical characteristics has been that recovery is limited to the pecuniary

¹⁹⁶ See *The Lottawanna*, 88 U.S. at 575; see also *supra* note 91 and accompanying text.

¹⁹⁷ See 52 CONG. REC. 284 (daily ed. Dec. 16, 1914) (quoting Aug. 22, 1913, letter from Judge Harrington Putnam to Hon. E.Y. Webb).

¹⁹⁸ This invitation arises from Congress' provision that, when DOHSA is inapplicable to a commercial aviation accident occurring landward of the twelve-mile mark, "the rules applicable under Federal, State, and other appropriate law shall apply." 46 U.S.C. app. § 761(b).

¹⁹⁹ Uniformity is further undermined by exempting DOHSA from application to deaths arising from "commercial aviation accidents" while retaining applicability to all other forms of maritime death. For all other types of maritime death occurring in Federal waters, DOHSA remains applicable. If uniformity of the maritime law means anything, it means that recovery should be consistent and should not depend on whether the event was a "commercial aviation accident."

loss suffered as a result of the maritime death.²⁰⁰ However, Congress has provided that this characteristic does not apply to commercial aviation accidents.²⁰¹ Cases brought under § 762(b) continue to be cases brought under the admiralty jurisdiction;²⁰² as a result, the constitutional uniformity mandate discussed in *The Lottawanna* continues to apply to these cases. The operation of § 762(b) therefore violates this constitutional mandate and any constitutional attack against its operation could be upheld.

e. Aggregate Effect of DOHSA's Amendment

When the aggregate effect of Public Law 106-181's amendment to DOHSA through section 404 is considered, it becomes clear that Congress would have been better served to remove DOHSA's application to aviation altogether.²⁰³ However, we do not suggest that Congress should have left the families of commercial airline accident victims without remedial recourse. Instead, we argue that Congress would be well-served to replace the non-uniform and constitutionally-suspect new DOHSA provisions with a federal remedies standard for the beneficiaries of commercial airline accident victims. While the United States Supreme Court in *Executive Jet* limited its holding—i.e., that admiralty jurisdiction does not apply—to domestic aviation accidents, we find that the following language from the opinion is particularly applicable here:

It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts as to avoid divergent results and duplicitous litigation in multi-party cases. But for this Court to uphold federal admiralty jurisdiction in a few wholly fortuitous aircraft cases would be a most quixotic way of approaching that goal. If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.²⁰⁴

²⁰⁰ See 46 U.S.C. app. § 761(a).

²⁰¹ See *id.* § 762(b).

²⁰² See *id.* § 761(a).

²⁰³ In fact, such a removal was initially contemplated by the draft bills leading up to House Bill 1000, which was signed into Public Law 106-181. See *supra* Part IV.B.

²⁰⁴ *Executive Jet*, 409 U.S. at 273-74.

The legislative history underlying DOHSA's amendment reveals an apparent congressional—and therefore national—concern for beneficiaries' ability to recover in these cases. While we understand this concern, it should not be addressed in an admiralty setting, wherein the United States Constitution demands adherence to uniformity. Instead of haphazardly legislating around DOHSA, it is time for Congress to supply a federal remedies standard to provide the needed uniformity these cases—arising from high seas commercial airline accidents—demand. Without such legislation, courts will reach bizarre and unjust results after engaging in a convoluted choice-of-law analysis. More importantly, courts risk the possibility of unconstitutionally subverting the maritime law by continued application of admiralty principles to cases arising out of commercial airline accidents occurring on the high seas.

V. ALASKA AIRLINES FLIGHT 261/EGYPTAIR FLIGHT 990/SWISSAIR FLIGHT 111 EXISTING OR FUTURE LITIGATION

Passage of section 404 of Public Law 106-181 will drastically change the disposition of existing or future litigation arising from commercial airline accidents occurring on the high seas. Below, we discuss post-TWA Flight 800 cases in light of Public Law 106-181's amendment of DOHSA and the Second Circuit's decision in *In re Air Crash Off Long Island, New York*, where the opinion remains applicable.²⁰⁵

A. ALASKA AIRLINES FLIGHT 261

1. Background

On January 31, 2000, Alaska Airlines Flight 261, a Boeing (McDonnell Douglas) MD-83 bound from Puerto Vallarta, Mexico, to San Francisco, California, crashed into the Pacific Ocean off the California coast, killing all eighty-eight passengers aboard.²⁰⁶ While the cause of the crash is currently under investigation, NTSB preliminary reports indicate that the jackscrew/gimbal nut assembly from the aircraft's horizontal stabilizer failed, caus-

²⁰⁵ While we will not expressly consider the possible judicial disposition of the TWA Flight 800 cases, Flight 800's crash location—8 nautical miles from the New York shoreline—places it in the same 46 U.S.C. app. § 761(b) waters as Alaska Airlines Flight 261, discussed below.

²⁰⁶ See *NTSB Identification: DCA00MA023* (visited June 20, 2000) <<http://www.ntsb.gov/Aviation/DCA/00A023.htm>>, at 1.

ing the plane to nose-dive into the Pacific.²⁰⁷ Some initial reports indicated that the plane crashed eleven miles off Point Mugu, California.²⁰⁸ However, other reports noted that the plane crashed approximately three miles from Anacapa Island in the Channel Islands National Marine Sanctuary.²⁰⁹

2. *Judicial Disposition*

As of the date of this writing, at least one lawsuit has been filed relating to the crash of Alaska Airlines Flight 261 and more are certain to follow.²¹⁰ With the amendment of DOHSA through section 404 of Public Law 106-181, DOHSA will not apply to Flight 261 litigation, considering either the three-mile (Anacapa Island) or eleven-mile (California) distance between the crash site and a territory or state of the United States. While § 761(a) can no longer vest admiralty jurisdiction with a federal court, the continued viability of *Executive Jet* will nonetheless invoke the admiralty jurisdiction's applicability in these cases. *Executive Jet* applies to litigation arising out of the crash of Flight 261, considering the international nature of the flight. Flight 261 admiralty courts, facing the need to further the constitutional uniformity of the admiralty law, will encounter difficult choice-of-law issues arising from Congress' removal of DOHSA's application. These admiralty courts must not be tempted to cite the Second Circuit's decision and apply state law remedies to cases arising out of the crash, which occurred in federal waters. Such application is unsupported by precedent and poses constitutional concerns by undermining the admiralty law's uniformity axiom.

B. EGYPTAIR FLIGHT 990

1. *Background*

EgyptAir Flight 990 crashed approximately fifty-two nautical miles off the coast of Nantucket Island, Massachusetts on Octo-

²⁰⁷ See *Statement by Chairman Jim Hall: Update on Investigation of the Crash of Alaska Airlines Flight 261* (visited June 20, 2000) <<http://www.nts.gov/pressrel2000/000218.htm>>.

²⁰⁸ See Jennifer Auther, et al., *Hope lessens for Alaska Airlines crash survivors* (visited June 20, 2000) <<http://www.cnn.com/2000/US/02/01/alaska.airlines.06/index.html>>.

²⁰⁹ See *NOS Support in Alaska Airlines Flight 261 Incident Response* (visited June 20, 2000) <<http://www.nos.noaa.gov/news/flt261/flight261.html>>.

²¹⁰ See *Alaska Flight 261 Crash Triggers Suit* (visited June 20, 2000) <<http://www.claimsmag.com/Issues/March00/Alaska.asp>>.

ber 31, 1999, killing all 217 people aboard.²¹¹ Information obtained from Flight 990's Flight Data Recorder indicate that the plane dove from 32,800 feet to 16,400 feet in a matter of forty-two seconds.²¹² Air Force radar then showed the Boeing 767 climb to 24,000 feet for at least twenty-nine seconds before crashing into the Atlantic Ocean.²¹³ Although the NTSB's investigation of EgyptAir Flight 990's crash is still ongoing, James Hall, Chairman of the NTSB, stated—after the NTSB examined the Cockpit Voice Recorder (“CVR”)—that “‘no sounds have been detected [from the CVR] that would be consistent with mechanical failures or an explosion.’”²¹⁴ Rumors abound that the NTSB, suspecting that the “uneventful flight” was internally sabotaged by a crew member, will eventually hand the investigation over to the Federal Bureau of Investigation to launch a full criminal probe.²¹⁵

2. *Judicial Disposition*

The first of many EgyptAir Flight 990 lawsuits has been filed against the airline and Boeing.²¹⁶ The suit, while not addressing the possible cause of the crash, alleges that EgyptAir breached its responsibility to passengers to provide adequate psychological screening of pilots when they are selected for employment.²¹⁷ The complaint also implicates Boeing for alleged negligent manufacture, maintenance, inspection, and repair of the 767.²¹⁸ Because Flight 990 crashed fifty-two nautical miles off the coast of Massachusetts, 46 U.S.C. § 762(b) is clearly applicable to this lawsuit and other Flight 990 lawsuits. While DOHSA continues to provide admiralty jurisdiction and a cause of action for the passengers' beneficiaries, Public Law 106-181's amendment through section 404 now allows recovery of nonpecuniary damages. This grant of nonpecuniary damages, how-

²¹¹ See James T. McKenna, *EgyptAir FDR Data Puzzles Investigators*, AVIATION WEEK & SPACE TECH., Nov. 15, 1999, at 36.

²¹² See *EgyptAir Flight 990 Timeline* (visited June 20, 2000) <<http://www.nts.gov/events/EA990/timeline.htm>>.

²¹³ See *id.*

²¹⁴ Matthew Brelis, *No Bomb, Malfunction Found on EgyptAir 990*, AUSTIN AMERICAN-STATESMAN, Dec. 11, 1999, at A27.

²¹⁵ See McKenna, *supra* note 211, at 36; see also James T. McKenna, *U.S., Egyptians Split On Suicide Theory*, AVIATION WEEK & SPACE TECH., Nov. 22, 1999, at 41.

²¹⁶ See *First Suit Filed in Crash* (visited June 20, 2000) <http://www.abcnews.go.com/sections/us/DailyNews/egyptair_suit991117.html>.

²¹⁷ See *id.*

²¹⁸ See *id.*

ever, has limitations grounded in United States Supreme Court precedent. Arguably, the deaths that occurred as a result of Flight 990's crash were preceded by psychological trauma resulting from the extreme altitude vacillations of the 767. Nonetheless, litigants and courts hearing Flight 990 cases must be mindful that damages for a decedent's pre-death pain and suffering are not recoverable pursuant to *Gaudel*'s limitation of "loss of society" damages.²¹⁹

In practical application, Public Law 106-181's amendment of DOHSA through section 404 raises public policy concerns. If a passenger traveling from New York to Cairo aboard a commercial cruise ship were to die as a result of an accident in the middle of the Atlantic Ocean, DOHSA would apply in its traditional form and prevent the recovery of nonpecuniary damages. However, the passenger's beneficiaries would be allowed nonpecuniary recovery if the accident occurred aboard an aircraft operated by a commercial airline. By legislating as it has, Congress has determined that beneficiaries of vessel-going passengers are less valuable in the eyes of the law. If Congress believes that beneficiaries of air crash victims should be afforded special consideration, it should pass such legislation *outside of* Title 46 of the United States Code—the title that governs "Shipping."²²⁰ However, the constitutional uniformity principles of the maritime law cannot allow the shipping laws to provide a limited, *ad hoc* grant of nonpecuniary damages for beneficiaries of commercial airline accident victims.

C. SWISSAIR FLIGHT 111

1. Background

On September 2, 1998, Swissair Flight 111, a McDonnell Douglas MD-11 bound from New York to Geneva, Switzerland,

²¹⁹ Moreover, while the beneficiaries likely suffered grief and anguish arising from contemplating how their loved ones perished, such damages are not compensable under the amended DOHSA provisions or United States Supreme Court precedent. Our discussion of the unavailability of damages arising from pre-death pain and suffering and survivor's grief is consequential because some beneficiaries of Flight 990 decedents are likely to seek these damages, as the TWA Flight 800 plaintiffs did.

²²⁰ For example, if Congress wishes to carve out an exception for the beneficiaries of commercial airline accident victims, it should do so in an independent and constitutionally sound legislative provision grounded in Title 49 of the United States Code. Title 49 addresses provision of transportation other than railroad transportation, governed by Title 45, and shipping transportation, governed by Title 46.

crashed in Canadian waters off Peggy's Cove, Nova Scotia, killing all 229 people aboard.²²¹ While the cause of the accident is still unknown, Canadian investigators suspect faulty wiring sparked a fire that ultimately led to the crash.²²² Several lawsuits have been filed by the families of the deceased, naming Swissair, Delta Airlines (Swissair's code-sharing partner for Flight 111), Boeing (acquirer of McDonnell Douglas), DuPont (manufacturer of the Mylar insulation that allegedly fueled the fire), Hollingsead International (aircraft maintenance company), Interactive Flight Technologies (manufacturer of a high-tech in-flight entertainment system), and other defendants.²²³ Against Swissair, the plaintiffs have claimed that the airline knew of safety hazards associated with the insulation used to protect the MD-11's electrical wiring.²²⁴

2. *Judicial Disposition*

Like the TWA consolidation, the Judicial Panel on Multidistrict Litigation transferred all wrongful death cases to the United States District Court for the Eastern District of Pennsylvania ("EDPA") for consolidated pretrial proceedings.²²⁵ On August 5, 1999, Swissair and Boeing offered jointly to pay compensatory damages to the families of the deceased in exchange for the families' agreement not to seek punitive damages.²²⁶ However, the families asked the EDPA to reject this settlement offer, stating that it could prevent recovery of an estimated one billion dollars in punitive damages.²²⁷

On September 13, 1999, before the DOHSA amendments became effective, Swissair filed a motion asking the EDPA to determine whether DOHSA would apply to the case, thus eliminating

²²¹ See Richard Dooley, *Flight 111: A Year in Review*, HALIFAX DAILY NEWS (Sept. 2, 1999) <<http://www.hfxnews.southam.ca/Crash/swissair312.html>>.

²²² See Richard Dooley, *Swissair Probe Seeks Mylar Ban*, HALIFAX DAILY NEWS (Aug. 12, 1999) <<http://www.hfxnews.southam.ca/Crash/swissair296.html>>.

²²³ See Richard Dooley, *Swissair Families Sue Du Pont*, HALIFAX DAILY NEWS (Aug. 17, 1999) <<http://www.hfxnews.southam.ca/Crash/swissair300.html>>.

²²⁴ See *Swissair Knew Risk, Says Suit*, HALIFAX DAILY NEWS (Sept. 22, 1999) <<http://www.hfxnews.southam.ca/Crash/swissair328.html>>.

²²⁵ See Larry Fish, *Companies Offer to Pay Damages in Deadly Swissair Crash*, PHILADELPHIA INQUIRER, Aug. 6, 1999, at A16.

²²⁶ See *id.*

²²⁷ See *Swissair Argues Against Damages*, HALIFAX DAILY NEWS (Sept. 14, 1999) <<http://www.hfxnews.southam.ca/Crash/swissair326.html>>. The families also argued that acceptance of the settlement would prevent them from learning the full extent of Swissair's and Boeing's alleged misconduct. See *id.*

the plaintiffs' claims for nonpecuniary damages.²²⁸ Historically, courts have held that DOHSA applied in foreign territorial waters because the territorial waters of foreign nations are considered part of the "high seas" for purposes of applying DOHSA.²²⁹ If the EDPA rules that DOHSA does apply, Public Law 106-181's amendment through section 404 will allow recovery of nonpecuniary damages.²³⁰ However, § 762, as amended by section 404 of Public Law 106-181, will expressly disallow recovery of punitive damages in *Swissair* cases, unless such damages are available under some other law.²³¹

²²⁸ See *id.*

²²⁹ See *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529 (9th Cir. 1994) (quoting 2 ELLEN M. FLYNN, ET AL., *BENEDICT ON ADMIRALTY* at 7-11 (7th ed. 1993)) (providing that "'the term 'High Seas' within the meaning of DOHSA is not limited to international waters, but includes the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore'"); *Sanchez v. Loffland Bros. Co.*, 626 F.2d 1228, 1229 n.4 (5th Cir. 1980) (providing that DOHSA has been applied "when the cause of action arises outside of United States territorial waters and within the territorial waters of a foreign country"); *Moyer v. Rederi*, 645 F. Supp. 620, 623 (S.D. Fla. 1986) (providing that "maritime incidents occurring within the territorial waters of foreign states fall within the ambit of DOHSA").

²³⁰ These nonpecuniary damages will be limited by *Gaudet*, as discussed above. See *supra* note 173 and accompanying text.

²³¹ If the EDPA rules that DOHSA does apply to the *Swissair* litigation, an interesting question arises through consideration of 46 U.S.C. § 764's effect on the litigation—i.e., whether or not Canadian/Nova Scotian law will be allowed to supplement DOHSA. While an extensive review of this issue is beyond the scope of this article, we will briefly discuss § 764's probable application. As provided above, the United States Supreme Court in *Zicherman* held that DOHSA provides the federal substantive law for deaths occurring on the "high seas." See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229 (1995). While the portion of the decision confirming the unavailability of nonpecuniary damages under DOHSA has been legislatively overruled by section 404 of Public Law 106-181, *Zicherman*'s holding that DOHSA provides the substantive United States law for deaths occurring on the high seas arguably remains valid. Therefore, the application of foreign law would appear to be precluded by *Zicherman*. However, federal courts are split on the effect § 764 has on DOHSA litigation where a foreign law also grants a right of action in any given lawsuit. See *Dooley v. Korean Air Lines Co.*, 117 F.3d 1477, 1483 (D.C. Cir. 1997), *aff'd* 524 U.S. 116 (1998). Some courts have held that § 764 allows plaintiffs to use an action under DOHSA to assert claims recognized under foreign law. See *id.* (citing *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986)); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1004-06 (S.D.N.Y. 1966); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96 (S.D.N.Y. 1957); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619, 622 (S.D.N.Y. 1952)). Other courts have held that §§ 761 and 764 are mutually exclusive and that plaintiffs therefore may not simultaneously advance claims under both United States and foreign law. See *Dooley*, 117 F.3d at 1483 (citing *In re Air Crash Disaster Near Bombay, India* on Jan. 1, 1978, 531 F. Supp. 1175, 1185-88 (W.D. Wash. 1982)); *Bergeron*

The operation of the amended § 762 in the Swissair litigation will undermine the uniformity principle of the maritime law in the same manner as the EgyptAir litigation, discussed above. Had Flight 111 decedents met their death utilizing an alternative method of transportation to Europe—i.e., a commercial cruise vessel—the recovery afforded their beneficiaries would not be the same. If Congress wishes to make this distinction, it should do so in an area outside of the federal shipping laws found in Title 46 of the United States Code.

VI. CONCLUSION

It is time for Congress to remove DOHSA's haphazard application to cases resulting from commercial airline accidents occurring on the high seas. Certainly, Congress' amendment of DOHSA through section 404 of Public Law 106-181 has revealed a national interest in favor of beneficiaries' recovery for the deaths of their family members in a high seas commercial airline accident. Whether or not this national interest is justified, it should not be conveyed through *ad hoc* legislation which subverts the constitutionally-based uniformity principle of the admiralty law.

v. Koninklijke Luchtvaart Maatschappij, N.V., 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941)). In *Dooley*, the Third Circuit refused to allow the plaintiffs "to pick and choose among provisions of U.S. and [foreign] law in order to assemble the most favorable package of rights against the defendant." *Dooley*, 117 F.3d at 1483-84. Likewise, the EDPA might refuse to allow the Swissair plaintiffs to pick and choose between various foreign laws as they mount their case against the defendants. Such a ruling would be consistent with DOHSA's uniformity purpose, as it would not result in drastically different recoveries based on which substantive foreign law happens to apply.



Comments

