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THE WARSAW CONVENTION LIABILITY SCHEME: WHAT IT COVERS, ATTEMPTS TO WAIVE IT AND WHY THE WAIVERS SHOULD NOT BE ENFORCED UNTIL THE AIRLINES ARE FINANCIALLY STABLE

JEFFERY C. LONG*

I. INTRODUCTION

THE CONVENTION for the Unification of Certain Rules Relating to International Transportation by Air, commonly referred to as the Warsaw Convention (hereinafter "Warsaw Convention" or "Convention"), has undergone multiple alterations since its inception in 1929 to adapt to changes in the international airline industry.1 This article examines the elements of

* Associate, Hewitt & Prout, Sacramento, California. I would like to thank Professor Margaret Turano, St. John's University School of Law, for her invaluable guidance. I would also like to thank George P. McKeegan for the two years he spent teaching me about the intricacies of airline litigation.

1 See generally Larry Moore, The New Montreal Liability Convention, Major Changes in International Law: An End to the Warsaw Convention, 9 TUL. J. INT'L & COMP. L. 223 (Spring 2001) (describing general overview of the "Warsaw System"). Moore cites the evolution of the Warsaw Convention's liability scheme as follows:

the Warsaw Convention and, more specifically, the requirements that must be satisfied before a passenger's incident can fall within its purview. The scope of the Convention is important because an injury that is governed by the Convention can be compensated only pursuant to its terms. Therefore, a passenger involved in an occurrence that falls within the parameters of the Convention, but that is not compensable under its terms, is left with no remedy because of the preemptive effect given to the Convention.

Part II of this article discusses the attempts by airlines to enter into private agreements to waive the liability limitations of the Warsaw Convention. These waiver agreements were a response to pressure from the public to eliminate the $75,000 damage limit imposed by the Convention, which is grossly inadequate when compared to typical wrongful death and/or personal injury awards given by American juries. However, passengers or their heirs trying to use these agreements to avoid the harsh limits of the Convention have encountered resistance from the judiciary, and the future of these agreements is unknown.

Part III of this article focuses on the current struggles of the airline industry. The Gulf War of the early 1990s, the events of September 11, 2001, and the recent invasion of Iraq have all placed extreme pressure on an industry with little room for error built into its profit structure. Numerous airlines have already filed for bankruptcy protection and more have threatened to follow if wage negotiations with strong unions do not yield dramatic payroll cuts. Additionally, the bailout package issued by the United States Government was insufficient to save many

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Id. at 223 n.1.
struggling airlines and the current proposals to provide additional funding are only a fraction of what the industry claims it needs to survive. Further, the combination of fewer passengers, higher operating costs, and lower fare prices is threatening to drive more airlines into bankruptcy or liquidation. The airlines were in a stronger financial position prior to the first Gulf War than they were immediately before the recent invasion of Iraq and their ability to emerge from this crisis is still unknown.

Part IV analyzes my proposals to deal with the current crisis facing the airline industry. A narrow interpretation of the waiver agreements entered into by the various airlines will allow the limitations of the Warsaw Convention to remain in effect and maximize any bailout package approved by Congress for the airlines. The movement to waive the liability limits should be abandoned. Nobody believes $75,000 is adequate payment for the loss of life or most severe personal injuries, but, absent willful misconduct by the airline, it is not fair to place the additional burden of paying large judgments on an industry that is important to our national economy and is facing an urgent economic crisis. The general public is aware of certain known risks associated with flying and, unfortunately, the list of risks associated with flying has grown following the September 11th attacks. However, this does not mean that the airlines should be the party forced to absorb these new risks, especially if the money to satisfy these judgments will have to come from the federal government.

II. WARSAW CONVENTION OVERVIEW

The Warsaw Convention established a uniform set of rules for the determination of airline liability in the transportation of passengers, baggage, and cargo. Initially drafted in 1929, the Warsaw Convention has evolved to adapt to the myriad of changes within the airline industry throughout the twentieth century. The first change came in 1955 and aimed to update the Warsaw Convention following the large expansion of commercial airline travel that followed the conclusion of the Second World War. The rules remained static until changes were proposed at a se-

\footnotesize


3 See Moore, supra note 1 (outlining evolution of the Warsaw Convention and amendments).
ries of conventions held in Montreal in the late 1990s. The meetings, which culminated in the adoption of the Montreal Protocols,\(^4\) updated the Warsaw Convention and started the discussion among airlines regarding waiving the $75,000 liability limitation that had been the backbone of the Warsaw Convention for years.\(^5\)

The Warsaw Convention applies to claims arising out of international air transportation as defined in the Convention. Simply, international air transportation to which the Convention applies is transportation between two nations that are parties to the Convention or between two places in a single signatory nation if the transportation involves an agreed-upon stopping place in another nation.\(^6\) Determining whether transportation meets the definition of international and, therefore, falls within the purview of the Warsaw Convention, is based on the contract of transportation, which is generally, the passenger ticket and baggage check for passengers, and the airway bill for cargo.\(^7\)

The Warsaw Convention, as amended, imposes strict liability on an airline upon the happening of certain events. The majority of litigation brought under the Warsaw Convention involves whether a particular incident is within the scope of Article 17, which establishes the requirements that must be met to bring a plaintiff seeking damages for injuries suffered in connection with a qualified international flight, within the Warsaw Convention. The following is the complete text of Article 17:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\(^8\)

Any cause of action determined to fall within the parameters of Article 17 is governed solely by the Warsaw Convention, which, via supplemental agreements signed by the majority of international air carriers, imposes strict liability up to $75,000 on the airlines.\(^9\) However, many international airlines that serve the United States have filed tariffs with the Department of

\(^4\) Id.
\(^5\) Id.
\(^6\) Warsaw Convention, supra note 2, art. 1.
\(^7\) Id.
\(^8\) Id. art. 17.
\(^9\) See generally Carey v. United States, 255 F.3d 1044, 1047 n.9 (9th Cir. 2001).
Transportation that might effectively waive the $75,000 limit.\(^{10}\) The trend towards waiving the limitation resulted from growing concerns in the 1990s that the families of passengers who died in airline catastrophes were limited to the recovery of $75,000, despite the fact that wrongful death actions in the United States arising from accidents not involving international travel typically provided families of the deceased substantially greater amounts.\(^{11}\)

The key issues in potential Warsaw Convention cases are whether the plaintiff can establish that she suffered a “bodily injury” either onboard the aircraft or during embarking or disembarking. Purely psychological injuries are not considered “bodily injuries” under the Convention,\(^{12}\) but, if they occurred as the result of an “accident,” the Convention preempts all other potential claims and the passenger is left without a remedy.\(^{13}\)

Once the plaintiff establishes that she suffered a physical injury she must prove that it occurred either onboard the aircraft or during the process of embarking or disembarking. The preeminent case in this area was decided by the Second Circuit in 1975. *Day v. Trans World Airlines, Inc.*\(^{14}\) adopted a three-part test to determine whether the plaintiff was injured during the process of embarking or disembarking. The *Day* test evaluates (1) what the passenger was doing at the time the incident occurred, (2) the level of control exerted by the airline over the passenger at the time of the incident, and (3) the location of the incident.\(^{15}\) Application of the *Day* test allows the court flexibility

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\(^{10}\) Id.

\(^{11}\) *See generally* Bob Egelko, *Carrier Liability; Damage Pact Protects Airlines; Treaty Invoked in Recent Ruling on Alaska Airline Disaster*, S.F. Chron., May 13, 2001, at A8 (“Although times and air travel have changed drastically, the plan to protect the fledgling airline industry by limiting liability on international flights still governs modern-day air disasters. An anachronism to passengers’ lawyers and a haven of stability for airlines, the convention endures as a bar on the damages victims of international air disasters or their heirs can collect.”); Michael Skapinker, *Read the Small Print: Michael Skapinker Describes the Confusion Over Damages for Airline Accidents*, Fin. Times (London), Apr. 1, 1996, at 18.

\(^{12}\) *See generally* Turturro v. Cont'l Airlines, 128 F. Supp. 2d 170 (S.D.N.Y. 2001) (holding plaintiff could not recover for purely psychological injuries unless there was a physical manifestation of the injury).

\(^{13}\) *See generally* King v. Am. Airlines, Inc., 284 F.3d 352 (2d Cir. 2002) (stating plaintiff's only recovery was under the Warsaw Convention because the treaty preempted all state law claims); Fishman v. Delta Air Lines, Inc., 132 F.3d 138 (2d Cir. 1998) (same).

\(^{14}\) 528 F.2d 31 (2d Cir. 1975).

\(^{15}\) *See id.* at 33.
when determining whether a plaintiff not on board an aircraft fits within the Warsaw Convention under the "embarking or disembarking" clause.

A. UNITED STATES SUPREME COURT CASES

I. Physical Injury Requirement

The United States Supreme Court decided two cases in the 1990s dealing with whether an international passenger could recover for purely psychological injuries under the Warsaw Convention. The Supreme Court granted certiorari in *Eastern Airlines, Inc. v. Floyd*\(^6\) because a conflict had developed between the Eleventh Circuit and the influential New York Court of Appeals regarding the physical-injury requirement of the Warsaw Convention.\(^7\)

In *Floyd*, a group of passengers on board a flight from Miami to the Bahamas were told over the loudspeaker that the plane was going to be abandoned in the ocean because the engines had failed.\(^8\) After several minutes the crew was able to restart one of the engines and coast to a safe landing in Miami without any passengers sustaining physical injuries.\(^9\) Several passengers filed suits against the airline alleging claims under both the laws of Florida and the Warsaw Convention, but the state-law claims were not addressed by the district court.\(^10\) The district court concluded that the plaintiffs could not recover for their alleged psychological injuries because "[a]bsent an allegation of physical injury, the Complaints in this case do not state a cause of action under the Warsaw Convention."\(^11\) The court's decision was based on its interpretation of the French clause "lésion corporelle" in the original drafting of the Convention, which was held to mean "bodily injury" and not mental anguish.

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\(^6\) 499 U.S. 530 (1991) [hereinafter *Floyd III*].

\(^7\) See *Floyd v. E. Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989) [hereinafter *Floyd I*] (holding passengers could recover for purely mental injuries under Article 17 of the Warsaw Convention). *But see* Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385 (1974) (concluding passengers could not recover for "psychic trauma" unrelated to physical injury because Article 17 of the Warsaw Convention did not provide recovery for purely mental injuries).

\(^8\) *Floyd III*, 499 U.S. at 533.

\(^9\) *Id.*

\(^10\) *Id.* at 534 n. 2. *See also* In re E. Airlines, Engine Failure, Miami Int’l Airport, 629 F. Supp. 307 (S.D. Fla. 1986) [hereinafter *Floyd I*] (dismissing with prejudice the state-law causes of action).

alone. However, the Eleventh Circuit disagreed with the district court’s interpretation of the French phrase and reversed its decision. The Eleventh Circuit stated that its “study of [the phrase “lésion corporelle” in French law] convinced [it] that there [was] nothing in French law prohibiting compensation for any particular kind of damage, including emotional trauma, provided the damage [was] certain and direct.” This created the conflict between the New York Court of Appeals and the Eleventh Circuit Court of Appeals and led to the decision by the Supreme Court.

The Supreme Court focused on treaty-interpretation principles and the past practice of signatory States in concluding that the Eleventh Circuit should have upheld the district court’s conclusion that the Warsaw Convention did not provide relief for purely psychological injuries. The Supreme Court concluded “that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.” The decision was based largely on the fact that no French court had held “lésion corporelle” to include non-physical injuries. Further, no evidence before the Supreme Court established that any signatory State had interpreted Article 17 to allow recovery for the type of injuries alleged by the plaintiffs in Floyd.

The Supreme Court’s decision to not allow recovery for emotional distress and other non-physical injuries was a relief for international air carriers. Allowing causes of action based solely on psychological injuries would open the proverbial floodgates of litigation. Any aircraft that was faced with a potential emergency landing could face hundreds of lawsuits stemming from the fear passengers encounter in these situations regardless of whether the situation on board the aircraft actually caused physical injury. These situations are an unfortunate risk of flying, but requiring the airlines to pay damages for incidents generally beyond its control would place an undue burden on the airlines.

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22 Id. at 313-14.
23 Floyd II, 872 F.2d at 1489 (reversing the district court opinion).
24 Id. at 1472 (examining the meaning of “lésion corporelle” under French law).
25 See generally supra note 17.
26 Floyd III, 499 U.S. at 534-42.
27 Id. at 552.
28 Id. at 537-38.
29 Id. at 546-52.
and raise insurance rates, which would ultimately increase the cost of international travel for passengers. The only way an airline could avoid liability for psychological injuries in these instances would be to prove it had done everything possible to avoid the occurrence, which requires the airline to meet a high burden of proof.

Eight years later, the Supreme Court upheld its decision in *Floyd* and expanded its rationale for barring causes of action based on non-physical injuries when it decided *El Al Israel Airlines, Ltd. v. Tseng.* The plaintiff in *Tseng* was subjected to an intrusive security search while waiting for a flight from John F. Kennedy International Airport in New York to Tel Aviv, Israel. The allegations included a list of psychosomatic injuries but failed to name either a physical injury or a physical manifestation of the emotional injuries suffered by the plaintiff. Plaintiff's claims were not allowed under the Warsaw Convention pursuant to the Supreme Court's decision in *Floyd.* Additionally, the Court held that plaintiff's state-law causes of action were preempted, leaving plaintiff with no forum to seek recovery for the alleged injuries. The Court rationalized the harsh result to the plaintiff by discussing a situation where a different conclusion would defeat the purpose of the Convention.

Passengers physically injured in an emergency landing might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside of the Convention for potentially unlimited damages. The Supreme Court further stated that:

The Court of Appeals' construction of the Convention [which would allow suits against airlines under the Convention for non-physical injuries,] would encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty. Such a reading would scarcely advance the predictability that adherence to the treaty has achieved worldwide.

Therefore, the only conclusion that promotes the purpose of the Convention is that non-physical injuries are not compensable under the Convention's liability scheme and such claims are

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31 Id. at 160.
32 Id.
33 Id. at 176.
34 Id. at 171.
35 Id. (citations and footnote omitted).
also preempted by federal law, barring a plaintiff from resorting to state law causes of action for purely psychological injuries.

2. Warsaw Convention "Accident"

The accident requirement contained in Article 17 of the Warsaw Convention provided little guidance for courts trying to determine whether an incident should be covered by the Convention's liability limits. The distinction between what did and what did not qualify as an accident became increasingly important after it was determined that the Warsaw Convention provided the exclusive basis for relief for injuries sustained during an international flight.\textsuperscript{36} A narrow interpretation of what constituted an accident would bar passengers who sustained physical injuries during an international flight but who could not prove that the incident satisfied the accident requirement of Article 17 from recovering for their injuries. Conversely, a broad interpretation of the accident requirement could encompass every claim made by a passenger injured during an international flight and would defeat the purpose of the Convention by creating liability for incidents that are an ordinary risk of flying and are beyond the airlines' control. The Supreme Court ended the controversy in 1985 when it defined what constituted an accident under Article 17 of the Warsaw Convention in \textit{Air France v. Saks}.\textsuperscript{37}

The plaintiff in \textit{Air France} flew from Paris to Los Angeles without incident until the plane started its descent. Plaintiff claimed that during the descent the plane's pressurization system failed, which caused her to feel extreme pain in her left ear.\textsuperscript{38} She did not inform the crew on board the airplane about her pain and several days later she consulted a doctor. The doctor told her that she was permanently deaf in her left ear as a result of the change in pressure aboard the Air France flight. Plaintiff then commenced an action against the airline for negligent maintenance and operation of the pressurization system aboard the aircraft.\textsuperscript{39}

The Supreme Court chose between the two interpretations of the Article 17 accident requirement presented by the parties.

\textsuperscript{36} See generally supra note 12.
\textsuperscript{37} 470 U.S. 392 (1985).
\textsuperscript{38} Id. at 394.
\textsuperscript{39} Id. at 394-95 (describing the undisputed facts leading to plaintiff's claim for relief under the Warsaw Convention).
Plaintiff argued that the accident requirement included any hazard of air travel that causes a passenger to suffer a physical injury.\textsuperscript{40} Whereas, Air France claimed that the normal operation of an aircraft cabin pressurization system is not an accident.\textsuperscript{41} The Court accepted the airline's argument and presented three rationales to support its decision. First, it noted that the drafters of the Convention intended there to be a difference between an "accident" and an "occurrence" because it used these remarkably different terms to describe covered incidents in Article 17 and Article 18 of the Convention.\textsuperscript{42} Second, the Court noted that "the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury."\textsuperscript{43} Finally, "the weight of precedent in foreign and American courts" favors a narrow interpretation of which incidents are within the purview of Article 17.\textsuperscript{44}

The decision to use "accident" in Article 17 and "occurrence" in Article 18 demonstrates that the drafters of the Convention did not intend for the two Articles to cover the same breadth of incidents. Article 18 makes recovery for lost luggage simple: if a passenger checks a piece of luggage and never gets it back, the airlines must compensate the passenger up to the statutory amount allowed under the Convention.\textsuperscript{45} The rationale for be-

\textsuperscript{40} Id. at 395.
\textsuperscript{41} Id. (emphasizing that "[a]ll the available evidence, including the postflight reports, pilot's affidavit, and passenger testimony, indicated that the aircraft's pressurization system had operated in the usual manner").
\textsuperscript{42} Id.
\textsuperscript{43} Id. (emphasis in original).
\textsuperscript{44} Id. at 400.
\textsuperscript{45} Warsaw Convention, supra note 2, art. 18. The full text of Article 18 states:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked luggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

\textit{Id.}
lieving that Article 18 was intended to be more inclusive than Article 17 is similar to the rationale behind the tort doctrine of *res ipsa loquitur.* If the passenger can demonstrate that the airline accepted the piece of luggage and the airline cannot prove that the luggage was returned, the exact incident that led to the lost luggage is irrelevant because whatever happened was the airline's fault. On the other hand, passenger injuries within the purview of Article 17 differ from the *res ipsa loquitur* situation because a passenger could suffer an injury for multiple reasons, not all of which are directly linked to the airline's negligence.

The distinction between an accident that causes an injury versus an injury that is an accident can be elusive, but the Supreme Court has attempted to explain the concept by referring to American tort law. If a flight attendant fails to properly secure a door prior to departure, causing the cabin to lose air pressure during the flight and leading to the passenger's loss of hearing, it is an accident that led to an injury. Conversely, if a passenger loses her hearing because of an internal reaction to the natural shifting of air pressure encountered during a flight, the injury is not *caused by* an accident but rather *is* the accident, and should not be the airline's liability.

The Supreme Court ultimately created a catch-phrase that courts have used when determining whether a plaintiff's claim falls within the definition of an accident adopted by the Court. It "conclud[ed] that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." The terminology employed by the Court limits the exposure of liability by airlines to events that are "external to the passenger" and, therefore, more likely to be within the control

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46 See generally Johnson v. United States, 333 U.S. 46, 48 (1948) ("The rule of *res ipsa loquitur* . . . means that the facts of the occurrence warrant the inference of negligence. . . .") (citations omitted).

47 For example, a passenger could place a suitcase in an overhead compartment that meets all the specifications for carry-on luggage and the suitcase could fall out of the overhead compartment after the flight concludes even though the airline never controlled the item. In this instance the airline is still liable for injuries suffered by a passenger as a result of this incident.


49 See generally Tseng, 525 U.S. at 166 n.9 (quoting Air France, 470 U.S. at 405, and applying the "unexpected or unusual event or happening that is external to the passenger" phrase adopted by the *Air France* court); Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002) (same).

50 Air France, 470 U.S. at 405 (emphasis added).
of the airlines' employees. The airlines will still be found liable for events that are arguably beyond their control, but limiting airline exposure to events external to the passenger provides a bright-line distinction between an incident for which the airline might be liable and an incident that was an internal reaction for which the passenger should be denied recovery because it furthers the purpose of the Convention.

B. SECOND AND ELEVENTH CIRCUIT CASES

1. Embarking/Disembarking Requirement

The Supreme Court has not interpreted the embarking or disembarking requirement of the Warsaw Convention. Although Warsaw cases have been decided in federal courts throughout the United States, the majority of influential decisions cited by the Supreme Court when it addresses a Warsaw Convention issue have been decisions from the Second and Eleventh Circuits. These circuits, which govern most of New York and all of California, respectively, are ideal for deciding these cases because of the importance of international air travel to the airports located in these jurisdictions. The cases discussed in this section are not binding on all circuits in the United States, but they provide a strong indication of what the Supreme Court may hold if it decides to address this requirement of the Convention.

The Second Circuit first addressed the embarking/disembarking issue in Day v. Trans World Airlines, Inc. The passengers in Day had checked in, had proceeded through passport control and customs, had spent time in a passenger-only waiting lounge, and were either standing in line waiting to be searched or were being escorted to the departure gate when terrorists attacked the area. The court discussed multiple issues that are important when determining whether a passenger was in the process of embarking and, therefore, within the purview of the Warsaw Convention. The court concluded that the passengers met the criteria for embarking. The Day test was later adopted by the Southern District of New York in Upton v. Iran National Airlines Corp.

51 See supra note 47.
52 528 F.2d 31 (2d Cir. 1975).
53 Id. at 32.
54 Id. at 33-34.
The Upton court stated that there were three important factors to analyze when deciding whether a passenger met the Convention’s embarking/disembarking requirement. The court must look at (1) the type of activity the passenger was involved in; (2) whether the airline exercised control over the passenger; and (3) the location of the passenger within the airport. These three factors were the court’s way of employing the analysis used by the Day court in a more structured manner.

The passenger in Upton had checked in, but the flight was delayed so he waited in a public area without proceeding with the other steps in the boarding process. Applying the Day factors, the court concluded that the passenger was not in the process of embarking. The court emphasized that there were four additional steps in the passenger-boarding process used by Iranian National Airlines at that particular airport and that the passenger was free to exit the building.

The Day test for embarking/disembarking is still the predominant test applied by courts in these types of cases, but two cases decided in 1990 refined the test. In Buonocore v. Trans World Airlines, Inc. the Second Circuit said, “The factors to be considered are: (1) the activity of the passengers at the time of the accident; (2) the restrictions, if any, on their movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passengers to the gate.” The Buonocore court used its expanded version of the Day test to conclude that a passenger who had checked in but was waiting in the public area of the airport near a snack cart was not in the process of embarking, regardless of whether he was in the area only because the airline instructed him to arrive two hours prior to his scheduled departure.

56 Id.
57 Id.
58 Id. (noting the four additional steps included passing through passport control, clearing international customs, waiting in the passenger-only lounge, and completing the security check process). See also Rolnick v. El Al Israel Airlines, Ltd., 551 F. Supp. 261, 263-64 (E.D.N.Y. 1982) (emphasizing the importance of airline control in determining whether a passenger was embarking by finding that a passenger was not embarking when she slipped on an escalator after checking in but before passing through passport control).
59 900 F.2d 8 (2d Cir. 1990).
60 Id. at 10 (citing Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975)).
61 Id. at 10-11.
The Eastern District of New York validated the Buonocore court’s changes to the Day test in 1990 when it decided Barratt v. Trinidad & Tobago Airways Corp., and also emphasized that the passenger was embarking because she was “actively engaged in preparations to board the plane.” The combination of the two additions to the embarking/disembarking analysis made by the Buonocore and Barrett courts cleared up the issue and led to less litigation over the embarking/disembarking requirement of the Warsaw Convention, which might be why the Supreme Court has not granted certiori to a case dealing with the issue.

Soon after Day, in Maugnie v. Compagnie Nationale Air France, the Ninth Circuit discussed the varied approaches used by the federal courts that have decided the embarking/disembarking issue before settling on an approach adapted from the Day factors. The Maugnie court stated that:

[S]ince the Convention drafters did not draw a clear line, this Court is also reluctant to formulate an inflexible rule. Rather, we prefer an approach which requires an assessment of the total circumstances surrounding a passenger’s injuries, viewed against the background of the intended meaning of Article 17. Location of the passenger is but one of several factors to be considered.

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63 Id. at *3 (quoting Buonocore, 900 F.2d at 10).
64 Two New York cases in which the embarking/disembarking issue played a major role after 1990 were Turturro v. Continental Airlines, 128 F. Supp. 2d 170 (S.D.N.Y. 2001) and King v. American Airlines, Inc., 284 F.3d 352 (2d Cir. 2002). Turturro dealt with a passenger who insisted on being let off the plane after the plane had left the terminal gate, but before the plane was ready to take off. When the plane was ordered to return to the gate by the police the passenger was escorted off the plane. She later filed charges against Continental and the court had to determine when the disembarking procedure had concluded and, therefore, at what point the plaintiff’s claims were no longer within the confines of the Warsaw Convention. Further, the main issue in the case was not when plaintiff had completed the disembarking process, but rather whether she could recover for solely emotional injuries that were not accompanied by physical manifestations of such injuries. King dealt with two passengers who claimed they were bumped from a flight they held tickets for because of their race. The preliminary question of whether the claims were within the purview of the Warsaw Convention required the court to apply the Day-Buonocore factors. The court determined that the passengers were in the process of embarking because they had checked in for their flight and boarded the vehicle that was to take them to their airplane.
65 549 F.2d 1256 (9th Cir. 1977).
66 Id. at 1262 (stating why the court rejected a test adopted by several courts that emphasized the location of the passenger above the other factors employed by the Day court).
The court ultimately concluded that the passenger did not satisfy the embarking/disembarking requirement, but contrasted the situation before it with the situation the Day court had faced. The impact of the Day holding was evident in the Maugnie court's use of a similar analysis and its decision to distinguish the Day facts before reaching a different conclusion.

Another court within the boundary of the Ninth Circuit, the California Appellate Court, acknowledged the Day and Buonocore decisions when it found in Aquino v. Asiana Airlines, Inc. in January 2003, that the Warsaw Convention did not apply and, therefore, that federal law did not preempt the issue. The court cited the Buonocore test in concluding that the plaintiff, who had not checked in or passed through the security check point, was not in the process of embarking. This decision was important because it demonstrated that the recent changes to the Day test were likely to be adopted in other areas, which may lead to a uniform definition of what the Warsaw Convention intended to include as "in the process of embarking or disembarking." The Aquino court's citation of Buonocore was also important because it showed that a lower state court was influenced by the decisions of the Second Circuit when faced with determining whether a potential Warsaw Convention case was within the parameters of the Convention and, therefore, preempted by federal law.

The Warsaw Convention, as interpreted by the United States Supreme Court and the federal courts, governs a great number of the claims against airlines operating internationally. The courts have broadly interpreted the definition of what falls within the purview of the Convention. In doing so, the courts have sought to maintain the goal of limiting the liability of international carriers by closing potential loopholes that would allow passengers to seek relief in state courts and bypass the liability limitation. However, the down-side of this broad definition is that most claims will be governed by the Convention, which provides limited recovery for injured passengers and, in some cases, precludes recovery for injuries that the state courts would recognize.

An understanding of the overall operation and effect of the Warsaw Convention is an integral part of any discussion regarding the present state of the international airline industry. After

67 Id. (agreeing with the Day approach, but distinguishing the decision).
68 130 Cal. Rptr. 2d 223 (Cal. App. 2003).
69 Id. at 228-29.
having laid out the scope of the Convention's liability scheme and the sometimes harsh results that flow from its application, the following portion of this article discusses recent developments in the airline industry and whether the industry will survive its current financial crisis.

III. INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

The International Air Transport Association (IATA) drafted and promoted the Intercarrier Agreement on Passenger Liability\(^7\) (hereinafter "Intercarrier Agreement" or "Agreement") in response to the overwhelming public belief that the current $75,000 liability limitation contained in the Warsaw Convention was insufficient to compensate the families of persons killed in an airplane crash or passengers suffering injuries aboard an aircraft.\(^7\) The Intercarrier Agreement states that:

[T]he undersigned carriers agree... [t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.\(^7\)

The effect of the Intercarrier Agreement, if enforced by the courts or adopted by Congress as part of the actual Warsaw Convention, would be a waiver of the current $75,000 liability limit and the adoption of a strict liability scheme for approximately the first $135,000\(^7\) in compensatory damages for passengers in-

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\(^7\) Intercarrier Agreement, supra note 70 (stating at the outset: "NOTING THAT The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers. . .").

\(^7\) Id.

\(^7\) The Intercarrier Agreement refers to Special Drawing Rights ("SDRs") when stating currency amounts. SDRs are currency units used by the International Monetary Fund as a universal point from which other currencies can be converted. The 100,000 SDRs listed as the amount for strict liability in the Intercarrier Agreement is approximately $135,000, but the exact conversion changes
jured or killed aboard a flight operated by a signatory airline.\textsuperscript{74} The airline would not have to pay any damages above the $135,000 strict-liability threshold if it could prove that it was not negligent, which requires proof that "all necessary measures to avoid the damage [were taken] or that it was impossible . . . to take such measures."\textsuperscript{75} The airline has the daunting burden in this instance of proving that there was nothing the airline could have reasonably done to prevent the injury in order to avoid unlimited liability for compensatory damages.

After the majority of international air carriers signed the Intercarrier Agreement, it appeared that the restrictive-liability regime of the Warsaw Convention was effectively waived. In an article in the New York Law Journal on December 13, 1999, two law professors discussed the only case decided at that time which addressed the issue of whether the Intercarrier Agreement was an effective waiver on its own or whether the signatory airlines were also required to submit new tariffs with the Department of Transportation before the new limits could be enforced against them.\textsuperscript{76} The professors briefly described the sole case dealing with the issue as follows:

A federal District Judge in Los Angeles, in one of the cases arising out of the crash of a Korean Airlines plane in Guam, held that the airline's signature of the agreement, and the proclamation by the Director General of IATA that the agreement had taken effect, were sufficient to constitute an effective waiver of the damage limitation by the airline, regardless of whether or not the airline filed a tariff with the Transportation Department incorporating the agreement.\textsuperscript{77}

The article continues: "We believe this is the right answer, and we would expect other courts to agree, but one cannot be sure."\textsuperscript{78} The next two cases to address the validity of the liability

\textsuperscript{74} A list of the over 100 international carriers that have signed the Intercarrier Agreement is available at www.condonlaw.com/newsletters/ialist.pdf (last updated April 2001) (last visited Nov. 12, 2003); Marshall, supra note 70, at 350 (citing Agreement on Measures to Implement the IATA Intercarrier Agreement, available at http://www.iata.org/legal (last visited Nov. 12, 2003)).

\textsuperscript{75} Warsaw Convention, supra note 2, art. 20(1).


\textsuperscript{77} Id.

\textsuperscript{78} Id.
waiver rejected the *In re Air Crash at Agana, Guam* court’s reasoning, and held that the $75,000 limit still applied. This demonstrated the uncertainty surrounding the issue mentioned by the professors in their article.

In *Price v. KLM-Royal Dutch Airlines*, the Northern District of Georgia concluded that the Intercarrier Agreement did not automatically waive the $75,000 liability limitation of the Warsaw Convention and that the new $135,000 strict liability scheme did not take effect until the airline filed a new tariff with the Department of Transportation. The plaintiff in *Price* was struck on the knee by a beverage cart while she slept aboard a flight from Amsterdam to Atlanta and she filed a cause of action against the airline pursuant to the Warsaw Convention. Both parties agreed that the incident was within the parameters of the Convention, but they disagreed about which limitation of liability was applicable to the airline. The plaintiff argued that the Intercarrier Agreement effectively waived the previous $75,000 limitation after the airline signed the agreement and the Department of Transportation stated that it would accept the limitations waiver. The airline countered that it never changed its tariff to incorporate the new liability limitations and, therefore, was not bound by the agreement between the airlines to increase its liability until it changed its tariff. The court ultimately concluded that the airline was not bound by the Intercarrier Agreement because it had not changed its tariff to state the new limitations. The court listed four reasons for its decision.

First, the court noted that, pursuant to the express language of the Warsaw Convention, the limitation can be altered only by agreement between the passenger and carrier, not among the carriers themselves. The Department of Transportation tariff represented an agreement between the airline and the passenger and the Intercarrier Agreement was only an agreement between airlines.

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80 *Id.* at 1374-75.
81 *Id.* at 1367.
82 *Id.*
83 *Id.* at 1369.
84 *Id.*
85 *Id.* at 1370-73.
86 *Id.* at 1370; see also Warsaw Convention, *supra* note 2, art. 22 (“the carrier and the passenger may agree to a higher limit of liability”).
Second, the court interpreted the text of the Intercarrier Agreement to require that tariffs had to be changed to alter the liability limits. The Agreement stated that "[t]he undersigned carriers agree to take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention." The court concluded that the Intercarrier Agreement was intended only as an agreement among the airlines that they would change their tariffs to accept increased liability, but it did not automatically alter the limitations.

Third, the agreement between the airlines that increased the Warsaw Convention liability amount to $75,000 in 1966 was not self-executing and required the airlines to change their tariffs before the new amount was binding on the airline. The court quoted Day v. Trans World Airlines, Inc. for the proposition that the earlier liability increase was a multi-step process. The court stated that:

The world's major airlines, virtually without exception, signed what became known as the Montreal Agreement [and increased the Warsaw Convention's liability in 1966]. Under the terms of this agreement, each airline filed a special contract with the Civil Aeronautics Board raising the liability limit to $75,000 on all flights to, from, or stopping over in the United States. The increase to the $75,000 liability limit in 1966 required the airlines to submit a new tariff with the Civil Aeronautics Board, which was the 1966 equivalent of the Department of Transportation, and there is no reason to interpret the Intercarrier Agreement as adopting a different approach than that previously used by the airlines.

Finally, the Department of Transportation gave the airlines the authority to waive the limitation amount; however, it did not waive the limitations for the airlines or state that signing the Intercarrier Agreement was the same as changing the applicable tariff currently on file with the Department. This reason is further evidenced by the court, which noted that:

87 Intercarrier Agreement, supra note 70 (emphasis added); Price, 107 F. Supp. 2d at 1370.
88 Price, 107 F. Supp. 2d at 1370.
89 Id. at 1371.
90 528 F.2d 31, 36 (2d Cir. 1975).
91 Price, 107 F. Supp. 2d at 1371 (quoting Day, 528 F.2d at 36).
92 Id. at 1372-74.
The [Department of Transportation] stated, 'By limiting our conditions to those clearly contemplated by the IATA, we leave no basis for the carriers to withhold immediate implementation of the Agreements proposed.' That the carriers possessed the power to withhold immediate implementation of the Agreements suggests the [Department of Transportation] recognized further action on the part of the carriers was required before the changes in liability limits became effective.\(^9\)

The *Price* court's emphasis on the statements made by the Department of Transportation demonstrates how imperative the interpretation of the Intercarrier Agreement by the implementation body is, because its stance would likely shape the actions of the signatories to the waiver. The court relied on the fact that the order issued by the Department of Transportation noted "implementation through tariffs provides all parties or litigants with certainty as to the content of the applicable waivers, and will prevent needless litigation over the lack of such clarity."\(^9\)

The *Price* court acknowledged that the decision in *In re Air Crash at Agana, Guam*\(^9\) was counter to its conclusion but refused to follow the unpublished decision issued as part of the multi-district litigation proceeding.\(^9\) The *In re Air Crash at Agana, Guam* court did not cite a single case to support its conclusion and relied on parts of the Intercarrier Agreement instead of viewing the document as a whole.\(^9\) "The problem with this analysis is that the carriers did not expressly waive anything" in the Intercarrier Agreement, and the history of the Warsaw Convention, including waivers thereto, does not support the conclusion that the waiver was intended to be self-executing.\(^9\)

The *Price* court's decision questioned the validity of the liability waiver and severely weakened the first decision issued on the subject, which held that the Intercarrier Agreement did not require an airline to file a new tariff before the new limits took effect. The independent significance of the Agreement was in limbo following the *Price* decision and was further weakened by the Northern District of Texas when it decided *Verdesca v. Ameri-

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\(^9\) Id.
\(^9\) Id. at 1373.
\(^9\) *Price*, 107 F. Supp. at 1374 (refusing to follow the first decision interpreting the applicability of the Intercarrier Agreement liability waiver and upholding the $75,000 contained in the Korean Air Lines Department of Transportation tariff).
\(^9\) Id.
\(^9\) Id.
can Airlines, Inc.\textsuperscript{99} in 2000, which has been interpreted as standing for the proposition that an airline might not be subject to the increased liability of the Intercarrier Agreement regardless of whether it changed its Department of Transportation tariff to comply with the provisions of the Agreement.\textsuperscript{100}

The plaintiff in Verdesca was descending a metal stairway from an airplane after an international flight to Paris when she slipped and fell down the stairs, sustaining severe head injuries that ultimately led to her death.\textsuperscript{101} The decedent’s husband commenced this action on behalf of himself and his wife’s estate to recover from the airline.\textsuperscript{102} The complaint included claims under state law and a claim for strict liability under the Warsaw Convention, and the defendant moved for summary judgment dismissing the state-law causes of action on the ground that the incident was governed by the Convention.\textsuperscript{103} The court granted the airline’s motion for partial summary judgment but failed to provide an in-depth discussion on the issue of the damages available to the plaintiff: was the claim governed by the old Warsaw Convention liability scheme and subject to the $75,000 limit, or, was the $135,000 strict liability scheme found in the Intercarrier Agreement, as incorporated in the airline’s recently updated Department of Transportation tariff, the appropriate liability limit?

The Verdesca court discussed the $75,000 Warsaw Convention limit and also acknowledged the Intercarrier Agreement’s intent to raise the limitation amount to $135,000.\textsuperscript{104} However, the court did not expressly adopt either approach in its opinion. The only discussion regarding damage amounts was in a footnote; it recognized that it was not deciding the issue of which elements of damages would be available to the plaintiff: The Verdesca court cited the United States Supreme Court’s decision in Zicherman v. Korean Air Lines Co.\textsuperscript{105} in the footnote that addressed the damage-elements issue. The Zicherman Court never

\begin{itemize}
  \item Id.
  \item Id. at *2.
  \item Id. at *1-2.
  \item Id. at *2, 7.
  \item Id. at *6.
  \item Id. at *9 n.5 (contrasting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224-28 (1996) (stating available damages are determined by the applicable domestic law)).
  \item 516 U.S. 217 (1996).
\end{itemize}
addressed the issue of whether an airline could waive the Convention's limitation amount by filing a new tariff and, therefore, it would be illogical to conclude that the Verdesca court was addressing the waiver issue when it discussed damages because it only cited the Zicherman case for authority. The Zicherman case only held that the type of damages, not the amount of damages, available to a successful plaintiff in a Warsaw Convention case would be decided by domestic law.  

The most natural reading of [the Convention] is that, in an action brought under Article 17, the law of the Convention does not address the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the Contracting States.

The belief that the court was not endorsing the new, higher limitation amount in Verdesca was supported by Tamara Marshall's article in the Northern Illinois University Law Review, which summarized the Verdesca holding as follows: "[e]ven though the accident occurred on May 10, 1998, after American Airlines had submitted changes to its tariffs, the carrier still claimed, and the court agreed, that the Warsaw Convention provided the exclusive remedy for the plaintiff." It is also relevant that the Verdesca court did not cite the unpublished decision in In re Air Crash at Agana, Guam because that was the only case that would have supported a decision to apply the new liability limitations.

The case law dealing with the Intercarrier Agreement liability waiver does not establish a clear answer to guide an airline that wants to assess the potential for damages stemming from airline accidents. A court could follow the In re Air Crash at Agana, Guam decision and conclude that an airline that has signed the Intercarrier Agreement has effectively waived the $75,000 limit and is subject to the $135,000 strict liability limit adopted in the Agreement. Conversely, a court could follow the well-reasoned opinion issued by the Price court and conclude that the Intercarrier Agreement is valid, but that it is only an agreement between the airlines to change their tariff to comply with the new liability limits. This approach applies the rationale that the Agreement

107 Id. at 225, 231.
108 Id. at 225 (acknowledging that the Convention left the issues of personal jurisdiction and the types of damages available to the domestic courts to decide).
109 Marshall, supra note 70, at 354 (citations omitted).
was not self-executing and takes effect only when the airline changes its Department of Transportation tariff. Finally, a court could choose to draw on the *Verdesca* decision and interpret it to support a number of different outcomes.

I believe the *Price* decision will be applied by the majority of courts faced with the liability limitation issue. The decision is the only one that blatantly and coherently states the basis for its conclusion. Further, the holding protects the airline industry by offering a way to avoid the Intercarrier Agreement's higher liability that can be supported by the text and history of the Agreement and the Convention. If the *Verdesca* decision stands for the theory that changing an airline's tariff to incorporate the higher liability limits does not waive the Warsaw Convention limits, the court essentially ignored the express terms of the Convention that allow airlines to change some terms of the Convention by private agreement, which is what the tariff is intended to be. It is unlikely that this approach will gain momentum. The most palatable of the three decisions issued since the Intercarrier Agreement was adopted is *Price*, but the issue will remain open until the Supreme Court, or at least the influential Second or Ninth Circuits, are forced to take a stance on the issue.

IV. FINANCIAL VULNERABILITY OF THE AIRLINE INDUSTRY

A. THE GULF WAR

The late 1980s and early 1990s was a turbulent period for the major American airlines. The weak economy led to a decrease in business and recreational travel, and the commencement of the Gulf War in Iraq and Kuwait resulted in both higher fuel prices and more passengers avoiding air travel. These conditions combined to create an environment where six large airline companies were forced to file for bankruptcy protection and several were eventually forced to liquidate their assets. The following is a brief summary of effects on the airlines that were hit the hardest by the economic conditions prior to and during the Gulf War:

- Eastern Airlines filed for Chapter 11 bankruptcy protection in 1989 and was forced to cease operations in the beginning of 1991 after its bankruptcy plan failed;¹¹⁰

¹¹⁰ See generally Ronald Rosenberg, *America West Airlines Files for Bankruptcy*, *Boston Globe*, June 29, 1991, at 13 (describing recent airline bankruptcies); Nikki
Mohawk Airlines, the largest independent regional airline operating in the northeast, filed for bankruptcy protection in August 1991. The president of Mohawk, Robert Peach, blamed the need to file for bankruptcy partly on "higher fuel prices caused by the Persian Gulf War";\(^{111}\)

Midway Airlines, a large regional airline based in Illinois, filed for bankruptcy protection in March 1991, but was forced to abandon its efforts to reorganize and liquidate the airline's assets because it was unable to recoup the losses it sustained in part as a result of the Gulf War;\(^{112}\)

Continental Airlines filed for bankruptcy protection at the beginning of 1991 after reporting a three-month loss of $2.2 billion, which was "one of the biggest quarterly financial losses recorded by an American corporation." The loss was compounded by the fact that the airline only generated $1.4 billion in revenue during the same three-month period. Continental executives blamed "the industry's widespread troubles stemming from the recession and the Gulf War" for its poor economic performance;\(^{113}\)

Pan Am sought bankruptcy protection in 1991 and struggled until August 1992, when it was forced to hold a liquidation auction to sell off its remaining assets;\(^{114}\) and

America West filed for bankruptcy protection in June 1991 and stated that "it was forced to seek Chapter 11 bankruptcy protection by a series of financial troubles stemming from rising fuel prices and the dramatic decline of air traffic due to the Persian Gulf War and the recession."\(^{115}\)


\(^{112}\) See generally AP, Midway Air Liquidation, N.Y. Times, Nov. 28, 1991, at D2 (announcing Midway's change from Chapter 11 reorganization to Chapter 7 liquidation).


\(^{115}\) See generally Ronald Rosenberg, America West Airlines Files for Bankruptcy, Boston Globe, June 29, 1991, at 13 (announcing airline's bankruptcy plans); Nikki Tait, America West Files for Chapter 11, Fin. Times (London), June 29, 1991, at D8 (same); Agis Salpukas, America West's Fight to Survive, N.Y. Times, June 26, 1991, at D8 (detailing final moves by America West to avoid bankruptcy).
The airlines that avoided bankruptcy did not necessarily emerge unscathed. Even financially sound airlines like American Airlines were hit hard during the Gulf War period, suffering losses in excess of $400 million during a six-month period spanning from the end of 1990 to the beginning of 1991. Trans World Airways (TWA), the sixth largest carrier in the United States, also suffered major setbacks and was eventually forced to join the list of airlines seeking bankruptcy protection in 1992 when it filed for Chapter 11 protection.

The impact of the Gulf War and the recession of the early 1990s were reiterated constantly by airline executives when explaining why so many airlines were forced into bankruptcy in such a short period of time. The chairman of America West, Edward Beauvais, made a statement that summarized the Gulf War period succinctly when he described the early 1990s as "the most difficult time in the airline industry’s history." An industry that had seen growth every year since it began after World War I was all of a sudden faced with a contracting passenger base, which, coupled with an excessive expansion during the 1980s, was a recipe for financial disaster. The Air Transport Association recently issued a report entitled Airlines In Crisis: The Perfect Economic Storm (hereinafter ATA Report or Report). The Report addressed the current financial state of the airline industry and began with a summary of the Gulf War years and the part they played in leading to the current crisis. The Report summarized the overall impact of the Gulf War on the commercial airline industry in the following chart:

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117 See generally Philip Robinson, AP, TWA Files into Chapter 11 Protection, THE TIMES (London), Feb. 1, 1992, at B19 (reporting TWA bankruptcy plans); TWA Loss Triples in Quarter; Recession and Gulf War Cited, L.A. TIMES, Nov. 9, 1991, at D2 (discussing financial losses suffered by TWA during the time period when other major airlines were filing for bankruptcy).

118 AP, America West Airlines Files for Chapter 11 Bankruptcy, N.Y. TIMES, June 28, 1991, at D1 (reporting statements made regarding America West's decision to file for bankruptcy).


121 Id. at 8.
Traffic | Down 8 percent systemwide, 15 percent internationally
---|---
Daily Flights | Cut by 350, reducing service to hundreds of communities
Employment | 25,000 total lost jobs
Fuel Costs | Up 45 percent for increased costs of $1.5 billion
Net Losses | $13.1 billion over four years
Bankruptcies | Seven carriers filed for bankruptcy, four liquidated

The difficult conditions gave way to a period of great economic potential in the mid to late-1990s when the economy recovered, war fears subsided, and the remaining airlines were in a position to compete for an increasing number of passengers in a market that had recently lowered its capacity when several airlines closed down operations.

B. THE RECOVERY

The years following the Gulf War were extremely prosperous for many American businesses, including the airlines. The dramatic difference between the early 1990s and the latter half of the decade was summarized in a news bulletin released in the Orlando Sentinel newspaper:

Passenger traffic on the world’s airlines increased 8 percent in 1994, raising hopes the carriers turned a collective profit for the first year since 1989, the international Air Transport Association said [on February 14, 1995]. Airlines lost $15.6 billion over the previous four years, suffering from recession and a sharp decline in air travel during and after the Gulf War. IATA said combined freight and passenger traffic grew 10 percent in 1994 while capacity increased 5 percent, continuing a favorable trend that began in 1993. Total revenue for the world’s airlines was $107 billion.122

The financial rebound of the airline industry was not atypical of the industry, which is known for having extreme cycles in its profits and losses over the years.123 What was surprising about the recovery following the Gulf War was that it followed such a drastic downturn in the airline industry. In the five years be-

123 Richard Tomkins, Airlines Heading Off a Fall: US Carriers Better Prepared for Downturn, FIN. TIMES (London), Nov. 11, 1998, at 24 ("Airlines stocks are notoriously cyclical. At the first whiff of hard times, companies tend to slash travel budgets, sharply reducing the number of journeys made by business travelers, who account for the bulk of airline profits.").
tween 1989 and 1994, U.S. airlines suffered losses totaling $13 billion, which is more than all the profits U.S. airlines had made in their history. The years immediately following this five-year period that erased all profits made by the airlines in the past six decades were filled with record-setting profits and growth. "[T]he 100 biggest airlines in the world posted a combined net profit of $5.7 billion [in 1995]. Many U.S. carriers are reporting record results [in 1996]. With passenger traffic soaring, the seven largest U.S. airlines showed an average 34 percent gain in second-quarter profits [in 1996]." Continental Airlines, which was forced to file for bankruptcy following the Gulf War, earned $224 million in 1995, one year after sustaining a $619 million loss. Additionally, Delta Air Lines managed to earn $200 million in a three-month period in 1997, after suffering $2 billion in losses between 1990 and 1994.

Factors used to predict the long-term stability of airline profits were also strong in the post-Gulf War years. In 1996, an average aircraft was 67 percent full, which was the highest percentage since World War II. United Airlines flew the highest number of passengers in one month, 8.3 million, in its seventy-year history.

A major reason that the airline industry was able to recover quickly from the historic downturn following the Gulf War was the changing mindset of the airline executives. In the past, airlines had suffered through down times only to emerge with a business plan focusing on expansion and obtaining a larger market share when the economy improved. Following the Gulf War, airlines suffered severe financial setbacks and no longer had access to the cash needed to expand quickly and, therefore, focused on making the airplanes it currently had

124 Id.
125 Id., Airline Profits Rising Again, but Future is Cloudy, PLAIN DEALER (Cleveland, Ohio), Sept. 10, 1996, at 7C.
126 Id.
127 Roger Roy, Airline Workers Want to Share in Boom: The Airline Industry is Thriving, and Employees are Pushing to Get a Bigger Slice of the Pie, ORLANDO SENTINEL, Oct. 4, 1997, at Cl.
The airlines hoped this new approach would help it prepare for future changes in the economic condition of the country and the industry; however, the new approach was placed under extreme strain following the September 11th terrorist attacks.

C. September 11, 2001

On October 3, 2001, a London newspaper published a list of airlines, including American carriers, and the immediate impact the events of September 11th had on their operations. The article stated the following regarding five of the largest American carriers:

<table>
<thead>
<tr>
<th>American</th>
<th>Lost two planes in the US attacks and is to lay off 20,000 employees.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continental</td>
<td>The US carrier announced that 12,000 staff would be put on unpaid leave. Top executives are to forgo salary for the rest of the year.</td>
</tr>
<tr>
<td>Delta</td>
<td>The US carrier said it would axe 13,000 jobs and slash operations by 15 per cent [sic]. Top executives [are] to forgo salary for the rest of the year.</td>
</tr>
<tr>
<td>Northwest</td>
<td>The group will cut 10,000 jobs, a fifth of its workforce, and slash services.</td>
</tr>
<tr>
<td>United</td>
<td>United owned two of the planes crashed by highjackers in September 11. It is to cut 20,000 jobs and capacity by 26 per cent [sic].</td>
</tr>
</tbody>
</table>

The attempts by the airlines to be better prepared for the next economic downturn could not prepare them for the devastating effects of the terrorist attacks in the United States. The impact was compounded by the fact that four of the industry’s airplanes were used in the attacks. The airlines were experiencing a decline in use and profits prior to the attacks, but the attacks magnified the problem and added new issues that the industry was not prepared to address. The following chart, based on information in the ATA Report, demonstrates the immediate impact that the attacks had and the slow recovery over the months following the attacks by illustrating passenger traffic, capacity, and income yield trends for the industry as a whole.

131 Id. ("Instead of ... customary cuts, airlines are slowing the pace of acquiring new jets, identifying expenses that can be trimmed without irritating customers, and relying more on computers to get the biggest yield possible from each seat in order to weather any economic downturn.").
133 The information in the chart is approximate and based on information found in the ATA Report, supra note 120, at 10.
The most important factor for an airline when analyzing its financial situation is the amount of revenue earned for every seat mile flown. For example, a plane with 10 seats that flies 100 miles and charges $10 per passenger would earn $0.10 per seat mile flown on that flight if it is full. However, if the flight only has five passengers, the airlines will only earn $0.05 per seat mile. The comparison nationally from July 2001 to July 2002 shows that the airlines were earning 8.7 percent less per mile nearly a year after the attacks than they had been earning just prior to the attacks, which was an amount already affected by the start of an economic downturn.\textsuperscript{134} Even a year after the attacks, the airlines had not recovered from the impact on the entire industry. Marilyn Adams wrote in August 2002, that the "[a]irlines suffered a record $1.4 billion combined loss in the second quarter [of 2002], with American Airlines, the world's largest carrier, posting the industry's biggest loss: $495 million."\textsuperscript{135} Further, even the small budget carrier Southwest, the only airline to not suffer extreme losses following the attacks, experienced a 42 percent drop-off in its net income.\textsuperscript{136} This was in addition to another airline, US Airways, America's seventh-largest airline, filing for bankruptcy protection.\textsuperscript{137}

During a six-month period in 2002, US Airways lost $517 million, Delta lost $583 million, United lost $851 million, and American lost over $1 billion.\textsuperscript{138} The losses sustained by the industry were cushioned by the money provided by the federal government to help the airline industry following the September 11th attacks. The federal government immediately approved $5 billion in aid to the airlines following the incident

\textsuperscript{134} AP, \textit{July Figures Provide No Relief for Airlines}, \textit{Houston Chron.}, Aug. 22, 2002, at 9 (reporting July airline figures).

\textsuperscript{135} Marilyn Adams, \textit{Losses Continue for Carriers}, \textit{USA Today}, Aug. 19, 2002, at 3B.

\textsuperscript{136} \textit{Id.}


\textsuperscript{138} \textit{Id.}
and promised an additional $10 billion in emergency loans for airlines that qualified.\textsuperscript{139} This helped to keep the losses sustained by the airlines in 2001 to just over $7.7 billion, which was over four billion dollars more than the pre-attack estimates, but less than the twelve billion dollars that the airlines would have lost without the emergency government aid.\textsuperscript{140} The ideal scenario would be for the airlines to use the money to overcome the immediate impact of the attacks and transition into the new, higher cost security regime that was implemented in the months following the attacks. However, the airlines continued to struggle with reported losses exceeding $10 billion in 2002,\textsuperscript{141} which was compounded by demanding new security measures that needed to be funded by the airlines, and, with the threat of an impending war with Iraq, increased fuel prices.\textsuperscript{142} Further, passengers' concerns regarding travel provided an additional obstacle for the airlines.

D. THE SECOND GULF WAR

The ATA Report was released in March 2003, just weeks before the United States invaded Iraq and commenced the second war in that region in just over a decade. A large portion of the Report was aimed at outlining the potential devastating effects this war may have on the struggling airline industry. Ignoring the possibility of a war, the airlines were predicted to lose in excess of $6.7 billion in 2003.\textsuperscript{143} Using the $6.7 billion figure as a starting point, the ATA Report presented four scenarios for war and the possible effects of each on the American airline industry. The first scenario contemplates no war, which consists of a straight comparison between the industry's 2002 numbers with the predictions for 2003 without factoring in the effects of a war or another terrorist attack. The second factors in a war that is the equivalent of the 1991 Gulf War. The scenario labeled "Most Likely" contemplates a fall in passenger demand that surpasses the Gulf War decline and is based on future passenger bookings available at the time of publication. Finally, the devastating scenario of a war equivalent to the Gulf War, in addition

\textsuperscript{139} ATA Report, supra note 120, at 15.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 22.
\textsuperscript{142} Every one cent per gallon increase in the price of fuel costs the airline industry $180 million annually. See ATA Report, supra note 120, at 19.
\textsuperscript{143} Id. at 29.
to another major terrorist attack in the United States, is analyzed.\textsuperscript{144}

\begin{tabular}{|c|c|c|c|c|}
\hline
2003 Scenarios\textsuperscript{145} & No War & Gulf War Equivalent & Most Likely Prediction & Gulf War Equivalent Plus Terrorism \\
\hline
Net Profit/(Losses) & $(6.7)B$ & $(7.6)B$ & $(10.7)B$ & $(13.0)B$ \\
\hline
Traffic & $+5\%$ & $-3\%$ & $-8\%$ & $-12\%$ \\
\hline
Passengers & $+28M$ & $-18M$ & $-52M$ & $-75M$ \\
\hline
Daily Flights & $+500$ & $-700$ & $-2,200$ & $-3,800$ \\
\hline
Employment & $+11,000$ & $-31,000$ & $-70,000$ & $-98,000$ \\
\hline
Fuel Cost (per gallon) & $0.83$ & $0.78$ & $0.93$ & $1.10$ \\
\hline
Airfares & $+0.2\%$ & Stable & $-4\%$ & $-9\%$ \\
\hline
Load Factor & $73\%$ & $72\%$ & $73\%$ & $75\%$ \\
\hline
Breakeven Load Factor & $80\%$ & $80\%$ & $85\%$ & $92\%$ \\
\hline
\end{tabular}

\textsuperscript{144} Id. (outlining the scenarios presented in the remaining pages of the report).
\textsuperscript{145} Id. The chart is based on the following assumptions:

1. In all cases, the war is expected to last for one quarter (90) days. Obviously, the impacts would be magnified if the war were to last longer.

2. The Base Case [- No War scenario] assumes there is no war and shows how the airline recovery might continue after two years of losses following the 9/11 terrorist attacks. It assumes a growing economy, which would be the principal driver for increased traffic levels.

3. The Gulf War Equivalent scenario is based on domestic travel falling 5 percent while international traffic falls 15 percent. The overall traffic decline would be 7.8 percent and recovery to pre-war levels would take about six months. Fuel prices would fall sharply following a quarter in which they have spiked higher. Airfares are assumed to rise by 3 percent during the war but fall slightly during the recovery.

4. The Most Likely scenario is based on information from the airlines on advance bookings for March and April compiled specifically for this report. These advance bookings suggest that traffic will fall more sharply than during the Gulf War I. Further, the Most Likely scenario assumes that an Iraqi war on top of the already depleted crude oil inventories will continue to see high but modestly declining crude prices [, which is the basis for determining fuel costs]. As after the 9/11 terrorist attacks, airlines are expected to try and attract travelers with lower prices.

5. The Gulf War Equivalent scenario coupled with a terrorist attack within the U.S. is expected to bring even more difficult circumstances. During the 1991 Gulf War, airline traffic across the Atlantic initially declined by 43 percent. In this case
The "No-War" scenario is obviously no longer possible and two of the three remaining scenarios appear to underestimate the length and impact of the second Gulf War. The "Gulf-War-Equivalent" and "Most-Likely" scenarios estimated a 90-day war and a six-month recovery period. Both of these estimates seem inadequate as hopes for a quick and smooth operation within Iraq fade. Further, it is difficult to compare the first and second Gulf Wars because the airlines were in different financial situations prior to the commencement of each. Before the first Gulf War, the airlines were experiencing a minor drop-off in profits but were emerging from a strong decade that saw expansion and unprecedented growth. Whereas the situation leading up to the second Gulf War was plagued with the aftermath of September 11th. Such findings are evidenced by the following excerpt from an article in USA Today:

Since September 11, 2001, airlines have suffered $18 billion in losses, have piled up $100 billion in debt and have virtually no access to the capital markets. As we engage in war with Iraq, airlines are the weakest they have ever been. Airlines have been devastated, not by competition or the structure of the industry, but by a doubling of fuel prices and lack of demand resulting from war and terrorism threats.

Either prior to or within the first few weeks of the new Iraqi conflict, US Airways, United, and Hawaiian airlines were all operating under bankruptcy protection. The impact of the war was immediately felt industry-wide as "most major U.S. airlines... cancel[led] flights, especially overseas, as passenger loads... dropped and soaring fuel prices... hit hard." Standard and Poor issued an analysis of the airline industry, which stated that the "airline industry is in dire condition." The air-

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146 David Nicklaus, Airlines Look for Emergency Exits as Industry Dives, St. Louis Post-Dispatch, Mar. 16, 2003 (outlining the struggling airline industry in the run up to military action).
147 James C. May, Cost of 'Survival' Is Too High, USA Today, Mar. 24, 2003, at 18A.
149 Id.
lines have responded by seeking $9 billion in aid from the federal government to bail out the industry, which would be in addition to the nearly $15 billion already committed to the industry in the wake of the September 11th attacks.\textsuperscript{151} However, the government is only expected to approve between $1.5 and $3 billion in aid.\textsuperscript{152} Further, $3 billion will not completely relieve the pressure of the more than $10 billion in losses that the ATA conservatively estimated that the airlines will lose in the wake of another Gulf War.

V. CONCLUSION

Sometimes lost in the debate regarding the financial stability of the airline industry is the fact that passengers have valid reasons for avoiding airlines. The unprecedented attacks in the United States demonstrated that Americans are vulnerable to attack even within their own country, which is something that Americans never had to fear before September 11th. The procedures required to make flying safe for the public also make flying an inconvenience and decrease passengers’ willingness to take the risks associated with flying. For instance, a two-hour flight can take four hours or more once the new security measures and longer lines are implemented. A traveler, especially a business traveler whose time is extremely valuable, might decide it is more economical to take a train or drive in order to avoid the increased security.

The combination of September 11th, a second Gulf War, a struggling economy, and less incentive for passengers to choose to fly, might prove to be the death of the airline industry. There is no simple answer to solving the airline dilemma, but taking every step to protect the airlines, which are vital to the American economy, is a necessity during these turbulent times. One step that the federal government can take is to nullify the liability waivers airlines entered into during the boom years of the mid to late 1990s by requiring airlines to reiterate the previous $75,000 liability limit in their tariffs prior to receiving federal aid.


\textsuperscript{152} Sevastopulos, \textit{supra} note 151, at 6; Daniel, \textit{supra} note 151, at 20.
There are two ways the waivers entered into by the airlines in the late 1990s can be avoided. The courts can continue to interpret the agreement to require either a new tariff to be filed with the Department of Transportation as the Price court did or, alternatively, the courts could go a step further and expand on the rationale in the Verdesca case and refuse to implement the liability waiver even if the airline has filed a new tariff incorporating the new limits. Additionally, the federal government could condition all further financial assistance to the airlines upon the filing of a new tariff that effectively reinstates the old $75,000 limit which was waived by the Intercarrier Agreement. Reinstating the old liability limit would require the airlines to breach their obligations under the Intercarrier Agreement, but this is a small price to pay to avoid bankruptcy and/or liquidation. This is especially true considering that breaching an international private agreement would only give the other airlines the option to breach the agreement and there would be no punishment for an American airline withdrawing from the agreement.

The approach used is not necessarily important. Ultimately, the airline industry will rebound, even if only a few of the airlines emerge from the crisis financially sound. As soon as the airlines are profitable again, the public will resume its outcry regarding the inadequacy of the low liability limits, but until then, the airlines need a reprieve from the potential for high jury awards that would essentially be paid out of federal aid funds. For example, if an international airline catastrophe occurs with one hundred passengers on board, the airline's liability would be $7.5 million under the old Warsaw Convention regime. This amount is not small, but the set liability would save the airline millions in litigation expenses and provide some recovery for the families of the victims. Conversely, if the Intercarrier Agreement were applied to the same incident the airline would have liability of at least $13.5 million. This is in addition to the litigation costs of proving that the airline took all necessary measures to avoid the incident. A failure to prove the airline took such measures would open it up to unlimited liability. It is conceivable that a plaintiff could prove that the airline did not take all reasonable measures to assure that the terrorist did not board the plane and, therefore, the airline could be liable for hundreds of millions of dollars in awards. In essence, it is possible that one international airline catastrophe with a large number of injured passengers or fatalities could eliminate a sig-
significant portion of the $3.5 billion aid package that the federal government may provide the airlines.

It is imperative to protect the airline industry because its impact permeates beyond convenient travel for businesses and vacation seekers. The airline industry is responsible, either directly or indirectly, for over eleven million jobs in the United States.\(^{153}\) Continuing to allow the airlines to sustain severe ups and downs financially is not beneficial to the economy as a whole because it can quickly raise unemployment rates, as well as harm numerous companies that depend heavily on contracts with airlines to sustain their profitability.

It is also important to recognize that a smaller percentage of the lower airfares being charged by airlines actually reaches the airlines' profit margin. The percentage of a $200 roundtrip airline ticket that is attributed to taxes and fees grew over 250 percent since 1972, and taxation of the airline industry as a whole increased seventy-six percent between 1992 and 2002.\(^{154}\)

The larger percentage lost to taxes was not a huge problem during the late 1990s when the airlines were performing well, but following September 11th, when additional taxes were added for increased security, the taxes started eating away at the already-low profits airlines were making from each ticket because the market demanded low airfares without compensating for the increase in taxes on each ticket.

The airlines are facing an extremely difficult situation and some of the airlines that were previously considered the strongest will undoubtedly fail to emerge from the crisis. The combi-

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\(^{153}\) ATA Report, supra note 120, at 25 (summarizing the direct and indirect impact of civil aviation in Table H, Employment Impact of Civil Aviation by Sector, 2000).

\(^{154}\) Id. at 17.
nation of lower passenger fares, fewer people flying for both business and personal excursions, the higher costs of operating an airline because of increased taxes, security requirements, rising fuel costs, the uncertainty of the second Gulf War, and the potential for more terrorist attacks might prove to be devastating to the industry. The federal government and the American people rely on the stability of the airline industry and the airlines must be protected from extensive losses during the war and its aftermath. Federal aid will play an important part in the recovery of the airlines, but it is not sufficient to protect the airlines alone. The federal government or the judiciary need to assure that the aid will be used to help the airlines emerge from its crisis and not to pay for a large damage award. The most effective way to accomplish this is to reinstate and/or reinforce the $75,000 liability limit contained in the Warsaw Convention until the airlines have a stronger financial base. Enforcing the higher limits of the Intercarrier Agreements would place a strong burden on the airlines that could be avoided. There is no guarantee that limiting the liability on international flights would help the airlines survive the current situation, especially since the Warsaw Convention does nothing to limit liability on domestic flights, but in the current environment, the airlines need all the predictability possible. Limiting the liability on international flights has the potential to save the airlines billions if there is another terrorist attack and, regardless of whether there is another attack, it will continue to save the airlines millions in litigation costs by imposing strict liability, capped at $75,000, for the everyday litigation that arises in the airline industry.