

1987

Casenotes and Statute Notes

Recommended Citation

Casenotes and Statute Notes, 52 J. AIR L. & COM. 711 (1987)
<https://scholar.smu.edu/jalc/vol52/iss3/5>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

INTERNATIONAL AGREEMENT — LIABILITY LIMITATIONS — Liability Limitations Under the Universal Postal Union Convention Apply to Air Carriers Acting as Agents of the United States Postal Service. *Lerakoli, Inc. v. Pan American World Airways*, 783 F.2d 33 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986) (No. 85-2109).

The dispute between these parties centers around eleven packages of diamonds.¹ In 1980 the plaintiffs (collectively referred to as “Lerakoli”) sent the diamonds by United States Postal Service (USPS) registered mail from New York City to Antwerp, Belgium.² The USPS packaged the diamonds in three mail sacks and delivered them to Pan American World Airways (Pan Am), an air carrier for the USPS.³ Subsequently, the diamonds disappeared.⁴

Lerakoli filed suit in New York State Supreme Court against USPS and Pan Am in 1982.⁵ The defendants removed the action to federal court.⁶ Thereafter, USPS and

¹ *Lerakoli, Inc. v. Pan Am. World Airways*, 783 F.2d 33, 34 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986) (No. 85-2109).

² *Id.* The parties agreed in a Stipulation and Pre-Motion Order that the eleven packages at issue were all accepted, and separately receipted, by the USPS as registered mail. Appellant’s Brief at 4, *Lerakoli, Inc. v. Pan Am. World Airways*, 783 F.2d 33 (2d Cir. 1986) (No. 85-7503) [hereinafter Appellant’s Brief].

³ *Lerakoli*, 783 F.2d at 34. The parties also stipulated that postal records show that Lerakoli’s parcels were in three mail sacks and that Pan Am received these three mail sacks from the USPS. Appellant’s Brief at 4.

⁴ *Lerakoli*, 783 F.2d at 34. Two of the sacks never arrived in Belgium. *Id.* The third sack ended up in Germany, but without the plaintiff’s packages.

⁵ *Id.* at 34 n.2.

⁶ *Id.* Parties may remove actions to federal court pursuant to the following guidelines:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

Pan Am moved for summary judgment.⁷ The district court dismissed the claims against the USPS, but not the claims against Pan Am.⁸ Rather, the district court held that the liability limitations contained in the Universal Postal Union Convention apply to air carriers acting as agents for the USPS, and thus, limited Pan Am's liability.⁹ Lerakoli appealed to the United States Court of Appeals for the Second Circuit.¹⁰ *Held affirmed*. Liability limitations under the Universal Postal Union Convention apply to air carriers acting as agents for the United States Postal Service. *Lerakoli, Inc. v. Pan American World Airways*, 783 F.2d 33 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986) (No. 85-2109).

I. LEGAL BACKGROUND

An understanding of the *Lerakoli* decision requires a basic knowledge of some general legal procedures and propositions. For example, federal statutes set forth the procedure by which Pan Am became a mail carrier for the USPS.¹¹ In addition, Pan Am is an agent of the USPS so agency principles are important.¹² However, the relationship between a sender of mail, the USPS, and Pan Am is centered in bailment.¹³ Because this case revolves around liability limitations found in a section of the Universal Postal Union Convention known as the Lausanne Convention, the background and content of the Lausanne

28 U.S.C. § 1441(a) (1982).

⁷ *Lerakoli*, 783 F.2d at 34. The USPS argued that its liability was limited, while Pan Am claimed that it had the same immunity from liability as that enjoyed by the USPS. Appellant's Brief at 3.

⁸ *Lerakoli*, 783 F.2d at 34. The court dismissed the claim against the USPS because the USPS had tendered to Lerakoli its limit of liability under the Lausanne Convention, \$15.76 per registered item. *Id.* See also *infra* notes 88-98 and accompanying text for a discussion of the Lausanne Convention.

⁹ *Lerakoli, Inc. v. Pan Am. World Airways*, 17 Av. Cas. (CCH) ¶ 18,107 (E.D.N.Y. 1983).

¹⁰ *Lerakoli*, 783 F.2d at 35.

¹¹ See *infra* notes 17-22 and accompanying text for a discussion of the procedures by which the USPS transports the mail.

¹² See *infra* notes 23-54 and accompanying text for a discussion of agency law.

¹³ See *infra* notes 55-87 and accompanying text for a discussion of bailment.

Convention are important.¹⁴ Finally, English courts have addressed similar issues in light of their own statutes,¹⁵ while American courts have decided the liability limitation question in the context of the Warsaw Convention.¹⁶ Therefore, analogizing these holdings to *Lerakoli* is helpful.

A. *Transporting the Mail*

An initial issue in *Lerakoli* is the procedure by which the USPS transports mail. The United States Postal Service is responsible for carriage of the mail.¹⁷ One contemporary method of mail carriage is by air.¹⁸ An air carrier transports the mail based on either a contract with the government¹⁹ or as part of its certificate.²⁰ The statute

¹⁴ See *infra* notes 88-98 and accompanying text for a discussion of the postal liability limitations of the Lausanne Convention.

¹⁵ See *infra* notes 99-108 and accompanying text for a discussion of analogous English cases based on English statutory limitations.

¹⁶ See *infra* notes 109-138 and accompanying text for an analogy to liability limitations contained in the Warsaw Convention.

¹⁷ 39 U.S.C. § 101(a) (1982), provides that the USPS "shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities."

¹⁸ See generally *The Commercial Aviation Industry: Report of the Antitrust Subcomm. of the House Comm. on the Judiciary on the Airlines Industry*, 85th Cong., 2d Sess. (1958), reprinted in A. LOWENFELD, *AVIATION LAW* 1-2 - 1-8 (2d ed. 1981) (discusses the history of how air carriers became involved in the carriage of mail).

¹⁹ 39 U.S.C. § 5402 (a) (1982 & Supp. III 1985).

The postal service may contract with any certified air carrier, without advertising for bids, in such manner and under such terms and conditions as it deems appropriate for the transportation of mail by aircraft between any of the points in foreign air transportation between which the carrier is authorized by the Secretary of Transportation to engage in the transportation of mail.

Id.

²⁰ 49 U.S.C. § 1371 (l) (1982), states that "[w]henever so authorized by it certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the United States Postal Service. Such air carrier shall be entitled to receive reasonable compensation therefore as hereinafter provided." This statute section went out of effect on January 1, 1985, pursuant to 49 U.S.C. § 1551(a)(4)(A) (1982 & Supp. III 1985). This fact is not crucial to this case because the Second Circuit apparently intended for the *Lerakoli* holding to apply to both contract air carriers and certificate air carriers. This intention is evidenced by a footnote from the *Lerakoli* opinion which states that "[w]hile Pan Am alleges that it is a contract carrier for the USPS, the record is unclear as to whether Pan Am was carrying Ler-

governing the transportation of foreign mail provides that both United States regulations and international postal conventions govern air carriers involved in foreign air transportation and foreign mail transportation.²¹ Because Pan Am transports mail overseas for the USPS, this statute governs its actions.²²

B. Agency Law

Because Pan Am transports mail for the USPS, a special relationship exists between Pan Am and the USPS. Courts have traditionally considered a carrier of the mail to be an agent of the USPS.²³ The existence of an agency depends upon a number of factors including intent, control, benefit, and consent.²⁴ When one applies these fac-

akoli's mail pursuant to a contract with the USPS or pursuant to a provision in its certificate of necessity and convenience." *Lerakoli*, 783 F.2d at 36 n.6. Thus, because the Second Circuit did not rely on this fact in deciding the case, the distinction between the two types of carriers is unimportant.

²¹ 49 U.S.C. § 1375(f)(1) (1982).

Any air carrier holding a certificate to engage in foreign air transportation and transporting mails of foreign countries shall transport such mails subject to control and regulations by the United States. The United States Postal Service shall from time to time fix the rates of compensation that shall be charged the respective foreign countries for the transportation of their mails by such air carriers, and such rates shall be put into effect by the United States Postal Service in accordance with the provisions of the postal convention regulating the postal relations between the United States and the respective foreign countries, or as provided hereinafter in this section.

Id.

²² *Id.*

²³ *Atchison, Topeka & S.F. Ry. v. United States*, 225 U.S. 640, 649 (1912) (held a railway company to be an agent of the government because it transported mail, and, therefore, subject to government decisions as to what services it must perform as a mail carrier). See also *Atchison, Topeka & S.F. Ry. v. Summerfield*, 229 F.2d 777, 779 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956) (stating that although the Postmaster General had the right to start an air mail program there remained an agency relationship between the railroads and the United States); *United Fruit Co. v. United States*, 33 F.2d 664, 666 (5th Cir. 1929) (holding that United States could recover value of registered mail stolen while in the carrier's custody because the carrier was acting as an agent of the government).

²⁴ See, e.g., *In re Schulman Transp. Enter.*, 744 F.2d 293, 295 (2d Cir. 1984) (in determining if Pan Am was an agent of Shulman Air Freight, Inc. for purposes of priority in bankruptcy proceeding, the court emphasized the factors of consent and control); *Southern Pac. Transp. Co. v. Continental Shippers Ass'n*, 642 F.2d 236, 238 (8th Cir. 1981) (in an action brought by common carrier against shipper-

tors to the relationship between a mail carrier and the USPS, it is apparent that mail carriers truly are agents of the USPS.²⁵ The *intent* element is satisfied by both parties' intention to enter into a mail carriage contract. Federal statutes give the USPS *control* over the agent carrier.²⁶ Obviously, both parties *benefit* because the postal service gets its mail delivered, while the carrier receives compensation. Finally, *consent* is shown by the carriage contract itself. Therefore, the USPS-mail carrier relationship satisfies each of these factors and an agency results.

While the factors composing an agency are definite,²⁷ the courts have not settled other aspects of agency law. The agent's use of its principal's liability limitations is one such area. The First Restatement provided that an agent could utilize his principal's immunities.²⁸ Various courts

members of shippers' association for freight charges, the court examined all agency factors). See generally *Cordes v. Wooten*, 476 So. 2d 89, 91 (Ala. 1985) (in an action for damages brought against the driver and the owner of a hayrake for injuries sustained by a motorcyclist in a collision, the court held that whether the driver of the hayrake was an agent of the owner of the hayrake was a question properly submitted to the jury); *Salt River Valley Water Users' Assoc. v. Giglio*, 113 Ariz. 190, 549 P.2d 162, 169 (1976) (water users' association was not an agent of the United States government because the government did not have control over the association's day-to-day activities); *Holmes v. McKey*, 383 P.2d 655, 665-66 (Okla. 1963) (action to establish constructive trust as to property wherein spouse, children, and heirs of prior vendor intervened to set aside and cancel deeds under which bank officer-escrow agent asserted title); *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424, 426 (1982) (action to determine if assistant manager was apparent agent of franchiser); RESTATEMENT (SECOND) OF AGENCY § 1 (1958); Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 31, 33 (1979). "Agency is a question of intent and generally the agent must be acting under the control of the principal and for the principal's benefit." *Salt River Valley*, 549 P.2d at 167.

²⁵ See *supra* note 23 and accompanying text.

²⁶ See *supra* notes 19-21 for the text of the applicable statutes.

²⁷ See *supra* note 24 and accompanying text for a discussion of the factors included in an agency relationship.

²⁸ RESTATEMENT OF AGENCY § 347 (1933). "[A]n agent who is acting within his authority is entitled to the immunities of the principal which are not personal to the principal." *Id.* See *A.M. Collins & Co. v. Panama R.R. Co.*, 197 F.2d 893 (5th Cir. 1952), *cert. denied*, 344 U.S. 875 (1952) (stevedore, acting as an agent within his authority, was entitled to claim \$500 limitation of liability provided by the bill of lading); *Clark v. Rogers*, 137 Ill. App. 3d 591, 484 N.E.2d 867, 870 (Ill. App. Ct. 1985) (in an action brought by a horse trainer injured while at work, the court allowed the defendant ranch owner to share the defendant horse owner's employ-

have applied the original Restatement's position to numerous fact situations.²⁹ The drafters of the Second Restatement reversed this provision, by stating that the principal's immunities do not pass to the agent.³⁰

ment relationship defense because the ranch owner was an agent of the horse owner).

The comments to the Restatement provide the following:

Persons may have a personal immunity from liability with respect to all persons and for all acts, as in the case of the sovereign, or for some acts, as in the case of an insane persons, or as to some persons, as in the case of the immunity of a husband to the wife. Such immunities result from the personal qualities of the individual or the personal relationship of the parties. Unlike certain privileges . . . , such immunities cannot be delegated. On the other hand, when an immunity exists in order more adequately to protect the interests of a person in relation to his property, the agent may have the principal's immunities. Thus, the servant of a landowner while acting in the scope of his employment is under no greater duties to unseen trespassers than is the landowner; towards such he may, without liability, be guilty of injurious conduct which would create liability against him if done in a neutral place.

Illustrations:

1. A, the driver of a municipal fire wagon, drives recklessly to a fire, injuring T. A may be liable to T although the municipality is not.
2. P, the father of T, a minor child, directs his servant, A, to give T a severe beating. If A exceeds the privilege which a parent has to punish a child, A is subject to liability to T in an action of tort, although P would not be so liable.
3. P's chauffeur, A, drives on P's land on P's business without using care not to run over persons whom he has reason to know may be present. He runs over T, a trespasser, without being aware of his presence. A is no more liable to T than P would be had he injured T under the same circumstances.

RESTATEMENT OF AGENCY § 347 comment a and illustrations (1933).

²⁹ See, e.g., *Herzog v. Mittlemen*, 155 Or. 624, 65 P.2d 384, 388 (1937) (in an action to recover damages for injuries sustained in an automobile accident while plaintiff was riding as a gratuitous guest, the court allowed the driver of the car to share the car owner's immunity of gratuitous undertaking because the driver was the agent of the owner); *Harris v. State*, 115 Ga. 608, 41 S.E. 983 (1902) (mother's agent has the right to chastise child for disobedience and escape liability as the mother would).

³⁰ RESTATEMENT (SECOND) OF AGENCY § 347 (1958). "An agent does not have the immunities of his principal although acting at the direction of the principal." *Id.* This position is explained in the comments:

Immunities exist because of an overriding public policy which serves to protect an admitted wrongdoer from civil liability. They are strictly personal to the individual and cannot be shared.

Illustrations:

1. A, the driver of a municipal fire wagon, drives recklessly to a fire,

The United States Supreme Court addressed this same liability issue in 1922. In *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*,³¹ the Court addressed the issue of an agent's relationship to its principal's immunities. The United States Supreme Court consolidated three separate cases involving the United States Shipping Board Emergency Fleet Corporation (Fleet Corporation) into the *Sloan Shipyards* decision.³²

In the first two cases, the Fleet Corporation acted as defendant. One case involved a contract between the plaintiff, Sloan Shipyards, and the Fleet Corporation obligating the shipyard to build sixteen wooden vessels.³³ The plaintiff in the second case, Astoria Marine Iron Works, also had a contract with the corporation.³⁴ In these two cases,

injuring T. Aside from statute, A is liable to T, although the municipality is not.

2. P, the father of T, a minor child, directs his servant A, to give T a severe beating. If A exceeds the privilege which a parent has to punish a child, A is subject to liability to T in an action of tort, although P would not be so liable.

Id. at comment a, illustrations 1-2.

See, e.g., *Aungst v. Roberts Constr. Co.*, 95 Wash. 439, 625 P.2d 167 (1981) (because an agent who fraudulently misrepresents material facts is subject to liability even though the fraud occurs in a transaction made on behalf of the principal, the purchasers of memberships in Indian tribe's camping club could bring action alleging violation of the Consumer Protection Act and the Securities Act of Washington against the company which had a contract with the tribe to develop the club and sell its memberships, regardless of the company's status as an agent of the tribe).

³¹ 258 U.S. 549 (1922).

³² *Id.* Congress passed the Shipping Act of 1916 in contemplation of the possibility of World War I. The current version of the Act is codified at 46 U.S.C. §§ 801-42 (1982). The Shipping Act of 1916 established the United States Shipping Board. The Act gave the Board the power to form the Fleet Corporation. The purpose of the Fleet Corporation was to purchase, construct, and operate merchant vessels. *Id.* at 564.

The three cases consolidated in *Sloan Shipyards* were *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*; *Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corp.*; and, *United States Shipping Board Emergency Fleet Corp. v. Wood*. *Sloan Shipyards*, 258 U.S. at 549.

³³ *Id.* at 565. Two other complainants in this action, Capital City Iron Works and the Anacortes Shipbuilding Company, were subsidiaries of Sloan Shipyards. Sloan Shipyards organized the two subsidiaries for the purpose of carrying out the contract with the Fleet Corporation. *Id.*

³⁴ *Id.* at 569. The Court attached no importance to the fact that this contract was made with the Fleet Corporation "representing the United States of

the plaintiffs both alleged that the Fleet Corporation violated the terms of its contract.³⁵ Fleet Corporation argued that as an agent of the United States government, it was immune from suit.³⁶ The third case consolidated before the Supreme Court concerned a contract between Eastern Shore Shipbuilding Corporation and the Fleet Corporation for the building of six harbor tugs.³⁷ After signing the contract, Eastern Shore declared bankruptcy.³⁸ The Fleet Corporation filed suit to gain a priority claim against the estate of Eastern Shore.³⁹ In this case, the Fleet Corporation argued that because it was an agent of the United States, it should have a preferred claim just as the United States would.⁴⁰

The United States Supreme Court did not accept the Fleet Corporation's argument in any of the three cases.⁴¹ Instead, the Court ruled that the privileges and immunities of the government did not extend to its agents.⁴²

America." According to the Court, "[t]he Fleet Corporation was the contractor, even if the added words had any secondary effect." *Id.* at 568.

³⁵ *Id.* at 565, 569. Sloan Shipyards claimed the Fleet Corporation refused to make payments and then unlawfully took possession of Sloan Shipyards' property. *Id.* at 565. The specifics of Astoria's claim are not discussed in the opinion. *Id.* at 569.

³⁶ *Id.* at 566. The Fleet Corporation claimed they were given so much power that they were "put in place of the sovereign." *Id.*

³⁷ *Id.* at 570.

³⁸ *Id.*

³⁹ *Id.* Though the Fleet Corporation presented the claim in its own name, the Corporation represented itself as an instrumentality of the United States government. *Id.*

⁴⁰ *Id.* The referee, district court, and appellate court each denied the claim. *Id.*

⁴¹ *Id.* at 568, 570.

⁴² *Sloan Shipyards*, 258 U.S. at 567.

An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. . . . In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name.

Sloan Shipyards, 258 U.S. at 567-68. *Cf.* *Robertson v. Sichel*, 127 U.S. 507 (1888) (collector of customs is not personally liable for torts committed by subordinates). The Court in *Robertson* stated:

The government itself is not responsible for the misfeasances or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service. . . . A public officer or agent is not responsible for the misfeasances or positive wrongs,

Thus, an agent is answerable for his acts and cannot benefit from his principal's immunity.⁴³ Because the Fleet Corporation could not utilize the government's privileges, it was not immune to suit in the first two cases and could not gain a priority claim in the third.⁴⁴

The United States Supreme Court reaffirmed the *Sloan Shipyards* decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*⁴⁵ In *Herd*, the Court addressed the issue of whether an ocean carrier's statutory liability limitations applied to a stevedore hired to load cargo onto the ship.⁴⁶ The ocean carrier brought the action to recover for damage to its cargo allegedly caused by the negligent actions of the stevedore.⁴⁷ The defendant stevedore denied liability.⁴⁸ Alternatively, the stevedore, relying on *A. M. Collins & Co. v. Panama Railroad Co.*,⁴⁹ argued that, if liable, the carrier's liability limitations applied to it.⁵⁰ The *Herd* court, however, refused to accept this argument.⁵¹ It relied on *Sloan Shipyards* and other previous court opinions in holding that the stevedore could not utilize the ocean

or for the nonfeasances or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.

Robertson, 127 U.S. at 515-16.

⁴³ *Sloan Shipyards*, 258 U.S. at 567.

⁴⁴ *Id.* at 570.

⁴⁵ 359 U.S. 297 (1959).

⁴⁶ *Id.* at 298. At the time the Court decided *Herd*, the Carriage of Goods by Sea Act limited the liability of an ocean carrier to a shipper to \$500 per package of cargo or the parallel provisions of the bill of lading. *Id.* The Carriage of Goods by Sea Act is currently codified at 46 U.S.C. §§ 1300-15 (1982). In *Herd*, the parallel provisions of the bill of lading limited liability to \$500. *Herd*, 359 U.S. at 299 n.2.

⁴⁷ *Herd*, 359 U.S. at 298. While loading cargo onto the ship, the defendant's employees dropped a nineteen ton press, owned by the plaintiff, into the harbor. *Id.*

⁴⁸ *Id.* The district court, however, held that the defendant's negligence caused the damage to the press. *Id.* at 299. The United States Supreme Court did not address the negligence issue.

⁴⁹ 197 F.2d 893 (5th Cir. 1952), *cert. denied*, 344 U.S. 875 (1952) (stevedore, acting as an agent within his authority, was entitled to claim \$500 limitation of liability provided by the bill of lading).

⁵⁰ *Herd*, 359 U.S. at 300.

⁵¹ *Id.* at 303.

carrier's liability limitations.⁵² The *Herd* opinion also stated that courts should strictly construe statutory or contractual liability limitations.⁵³ In summary, the Court chose to follow precedent stating that an agent cannot utilize his principal's immunities and limitations.⁵⁴

C. *Bailment Law*

While the interaction between the USPS and Pan Am is based on agency principles, the relationship between the USPS and a sender of mail is a bailment contract.⁵⁵ Thus, Pan Am, as an agent of the USPS, is a sub-bailee of a sender of mail. In a bailment relationship, if the bailee fails to return or deliver the bailed object as instructed, the bailor has a prima facie case of negligence against the bailee.⁵⁶

The bailment relationship between the Post Office and

⁵² *Id.* at 303-05, 308. "From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged." *Id.* at 303.

⁵³ *Id.* at 304-05. Statutes limiting liability are in derogation of common law. Thus, they must be strictly construed so as not to make any alterations upon the common law which the statute does not fairly express. *Id.* at 304-05. "Similarly, contracts purporting to grant immunity from, or limitation of liability must be strictly construed and limited to intended beneficiaries for they are not to be applied to familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties." *Id.* at 305 (quoting *Boston Metal Co. v. The Winding Gulf*, 349 U.S. 122, 123-24 (1955)).

⁵⁴ *Id.* at 308.

⁵⁵ *United States Fidelity & Guar. Co. v. United States*, 246 F. 433 (9th Cir. 1917). U.S. Fidelity was the surety upon a mail clerk who was accused of stealing from the mails. The court stated, "It is well settled that the United States is a bailee for hire of registered packages and their contents and can maintain action against one who steals such mail and can recover full value of the property taken." *Id.* at 435. See also *United States v. Nat'l Sur. Corp.*, 309 U.S. 165, 174 (1940) (in a suit by private user of mail to recover for consequential damages resulting from misdelivery of mail, the court recognized that the postal service is considered to be a bailee of the mail).

⁵⁶ See *Picker v. Searcher's Detective Agency, Inc.*, 515 F.2d 1316, 1317-18 (D.C. Cir. 1975) (detective agency, as the agent of bailee, was not entitled to benefit from the contractual limitations on the liability of the bailee); *I.C.C. Metals, Inc. v. Mun. Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372 (1980) (where defendant lost the plaintiff's metal which was stored in the defendant's warehouse, the court held that proof of delivery of stored property to warehouse

the sender of mail is atypical because the sending of mail is a government function.⁵⁷ *Marine Insurance Co. v. United States*⁵⁸ exemplifies this special relationship. In *Marine Insurance*, the United States Court of Claims held that if mail is lost or damaged, the government's liability is regulated by law.⁵⁹ *Marine Insurance* attempted to recover emeralds lost in the Mail Division of the United States Customs Building.⁶⁰ Because the government confiscated the emeralds for use in a criminal investigation,⁶¹ the plaintiff claimed the taking an exercise of eminent domain.⁶² However, the court held that classifying the taking as an eminent domain did not circumvent statutory control of liability in postal matters.⁶³ Therefore, the plaintiff was

and its failure to return property upon proper demand suffices to establish a prima facie case of negligence).

⁵⁷ See *Taylor v. United States Post Office Dep't*, 293 F. Supp. 422, 423 (E.D. Mo. 1968) (in order to recover for damage to a mailed package, the plaintiff must show the insurance receipt for the parcel wrapper). See also *Twentier v. United States*, 109 F. Supp. 406, 408 (Ct. Cl. 1953) (corporation could not recover for the loss of or damage to a fourth class unprotected package sent to an overseas army post because the Postmaster General forbade the use of registered, insured or COD mail to this army post).

⁵⁸ 410 F.2d 764 (Ct. Cl. 1969).

⁵⁹ *Id.* at 766. The court stated that "the Government is not liable — assuming that an implied contract of bailment exists between the Government and a sender by virtue of a mailing — for loss of or damage to mail, except as may be provided in the postal laws and regulations." *Id.* at 765-66. Basically, "the United States is liable for lost or damaged mail only to the extent it consents to be liable." *Ridgway Hatcheries, Inc. v. United States*, 278 F. Supp. 441, 443 (N.D. Ohio 1968) (United States was not liable for the death of goslings shipped by mail because the delivery delays were due to emergency flood conditions).

⁶⁰ *Marine Ins.*, 410 F.2d at 765. The plaintiff, a British insurer, insured a package containing six emeralds valued at \$152,190. The plaintiff intended for the package to travel by international mail from Geneva, Switzerland to an importer in New York. The package routinely arrived at the Mail Division of the United States Custom Building for inspection and the assessment of import duties. *Id.* at 764-65.

⁶¹ *Id.* Because a number of small valuable packages had recently disappeared from the Mail Division, Customs officials decided to use the package to trap a thief. They treated the package with fluorescent powder and then placed it back in the normal stream of mail. *Id.* at 765.

⁶² *Id.* at 765. Therefore, the plaintiff argued that he was entitled to just compensation. *Id.*

⁶³ *Id.* If the plaintiff's classification did circumvent statutory control, a recovery would be possible where none was ever contemplated. *Id.* at 766 (quoting *Twentier v. United States*, 109 F. Supp. 406, 409 (Ct. Cl. 1953)).

unable to recover because the statutes granted no relief.⁶⁴ *Marine Insurance* illustrates the basic rule that the Postal Service is only liable for lost or damaged mail to the extent it consents to liability or as provided in the postal laws and regulations.⁶⁵

Prior to *Lerakoli*, the subject of this note, no American court had directly addressed whether a sub-bailee could take advantage of the liability limitations the Universal Postal Union Convention gives to government functionaries such as the USPS. One court, however, addressed this issue in dictum in an unpublished opinion. In *Caribe Diamond Works, Inc. v. Eastern Airlines*,⁶⁶ the plaintiff mailed diamonds from Puerto Rico to New York by United States registered mail, but the diamonds never arrived.⁶⁷ The court refused to hold the defendant air carrier liable because the plaintiff failed to prove the defendant's non-delivery of the diamonds by a preponderance of the evidence.⁶⁸ Though not argued by either side, the court hypothesized that any liability limitations of the USPS would apply to any agent of the USPS including air carriers.⁶⁹ The district court based its hypothesis on the theory that sub-bailees should enjoy all the original bailee's liability limits.⁷⁰ Because the court offered this discussion

⁶⁴ *Id.* at 766. There was no relief under the domestic rules because the package was not governmentally insured or otherwise protected. Additionally, the parcel post agreement between the United States and Switzerland provides no relief unless the parcel is publicly insured. Even if the parcel is publicly insured, the United States' liability extends only to Switzerland. *Id.* at 766.

⁶⁵ *Id.* at 766. The court's only rationale for this basic rule is "public policy." *Id.*

⁶⁶ No. 71 Civ. 2875 (S.D.N.Y. June 24, 1974).

⁶⁷ *Id.* at slip op. at 1. The plaintiff, a diamond merchant, mailed 147.41 carats of polished diamonds to a consigner in New York City. The district court held that the plaintiff had sufficiently proven both the contents of the package and the receipt of the package by the United States Postal Service at its office in San Juan, Puerto Rico. *Id.* at slip op. at 3-5.

⁶⁸ *Id.* at slip op. at 19. The burden is upon bailor (Caribe Diamond) to show non-delivery by the bailee (Eastern Airlines), according to the implied agreement of bailment. The court held that Caribe Diamond failed to prove that the package of diamonds was stolen at the airport while in Eastern Airlines' control. *Id.* at slip op. at 16.

⁶⁹ *Id.* at slip op. at 18-19.

⁷⁰ *Id.* at slip op. at 19. "[T]here seems to be no reason why this limitation should not inure to the benefit of all sub-bailees or successors in interest who

only in the form of dictum,⁷¹ it was not binding precedent. Thus, prior to *Lerakoli*, no federal court had “officially” decided this liability limitation issue.

New York courts, however, have examined the agency-principal question in a general, non-government bailment context.⁷² One such case is *Schoeffer v. United Parcel Services of New York*,⁷³ which concerned missing furs. The plaintiff bailed the furs to the John F. Morris Furs, Co. which then delivered them to UPS, the defendant contract carrier.⁷⁴ Subsequently, the furs were either lost or stolen.⁷⁵ The bailment agreement between the plaintiff and the fur company recited the worth of the furs at \$3,000.⁷⁶ UPS argued that it should be able to limit its liability to \$3,000.⁷⁷ The court allowed UPS to utilize this liability limitation because UPS was an agent of the bailee involved in the performance of the bailment agreement.⁷⁸ The New York appellate court accepted without explanation the original Restatement’s position on agency-principal liability limitations and held that UPS could use the fur company’s \$3,000 liability limitation.⁷⁹

The New York Court of Appeals also allowed a third party to utilize a bailee’s liability limitation. The third

acquired lawful possession from the original bailee to aid in accomplishing the purpose of the alleged bailment.” *Id.*

⁷¹ *Id.* “This point was not argued, and . . . it is unnecessary for us to reach it.” *Id.*

⁷² See *infra* notes 146-151 and accompanying text for a discussion of how the Second Circuit applied these New York cases to *Lerakoli*.

⁷³ 277 A.D. 569, 101 N.Y.S.2d 451 (N.Y. App. Div. 1950).

⁷⁴ *Id.* at 570, 101 N.Y.S.2d at 452.

⁷⁵ *Id.*

⁷⁶ *Id.* The plaintiff agreed that the value of the furs was \$3,000 for the purposes of pick-up, storage, and delivery. *Id.*

⁷⁷ *Id.* Plaintiff attempted to recover \$12,000 for the alleged negligent loss of the plaintiff’s furs by defendant. *Id.*

⁷⁸ *Id.* at 571, 101 N.Y.S.2d at 453. The court stated:

Defendant was not an interloper; it was not a stranger to the contract of bailment; it was not a tortious third party, indeed it was engaged in performing the bailment agreement when the furs were stolen “An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal.”

Id. (quoting RESTATEMENT OF AGENCY § 347 (1933)).

⁷⁹ *Id.*

party in *Berger v. 34th Street Garage*⁸⁰ owned a garage.⁸¹ The plaintiff was an expressman that picked packages up from shippers and delivered them to carriers for ultimate delivery outside New York City.⁸² The expressman regularly left packages at the garage when he was unable to deliver the packages to the carriers the same day he picked them up.⁸³ The bailment contract between the expressman and the shippers limited the expressman's liability to fifty dollars per shipment.⁸⁴ The expressman sued the garageman when the packages were stolen out of the garage.⁸⁵ The court allowed the garageman to limit his liability because he was an *ad hoc* agent of the parties to the bailment and not simply an interloper or a stranger.⁸⁶ The court explicitly accepted the original Restatement's position of allowing an agent to utilize its principal's liability limitations.⁸⁷ Thus, New York courts seem to follow the original Restatement's positions in bailment contexts.

⁸⁰ 3 N.Y.2d 701, 148 N.E.2d 883, 171 N.Y.S.2d 824 (1958).

⁸¹ *Id.* at 703, 148 N.E.2d at 884, 171 N.Y.S.2d at 825.

⁸² *Id.* at 703, 148 N.E.2d at 884, 171 N.Y.S.2d at 826.

⁸³ *Id.* On the day in question, the plaintiff picked up 55 packages from six different shippers. Because it was too late in the day to make delivery to the carrier's terminals, the plaintiff stored the truck and packages in the defendant's garage overnight. *Id.* At the trial, there was evidence establishing that the shippers knew of this practice and did not object. *Id.*

⁸⁴ *Id.* at 703, 148 N.E.2d at 884, 171 N.Y.S.2d at 825. The record does not indicate how the parties to the contract arrived at the fifty dollar liability limitation.

⁸⁵ *Id.* The plaintiff brought the suit on "behalf of the owners of the goods as bailee of the cargo." *Id.*

⁸⁶ *Id.* at 703, 148 N.E.2d at 884, 171 N.Y.S.2d at 826.

Upon such a showing, the defendant garageman was not an interloper or stranger to the original bailment, but was in truth and fact the plaintiff's chosen representative authorized to discharge for the time being their own responsibilities to the original bailor. Such being the fact, the garageman became an agent *ad hoc* and, while acting pursuant to his authority, was entitled to "such immunities of the principal as are not personal to the principal" which, in this instance, was the limited liability as fixed in the original shipping documents.

Id. (quoting RESTATEMENT OF AGENCY § 347 (1933)).

⁸⁷ *Id.* The Court of Appeals of New York affirmed the judgment of the trial court limiting the garageman's liability. *Id.*

D. The Lausanne Convention

The postal laws and regulations give the Postal Service the authority to negotiate postal treaties and conventions.⁸⁸ Though universal postal conventions and universal conventions in general are not treaties, they carry the same weight as law.⁸⁹ The aim of these conventions is the uniformity of legal rules within the participating countries.⁹⁰ An international convention should be interpreted by the plain and obvious meaning rule absent a clear indication that the parties intend otherwise.⁹¹

⁸⁸ 39 U.S.C. § 407 (1982), provides that:

(a) The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

(b) The Postal Service shall transmit a copy of each postal convention concluded with other governments to the Secretary of State, who shall furnish a copy of the same to the Public Printer for publication.

⁸⁹ *Four Packages of Cut Diamonds v. United States*, 256 F. 305, 306 (2d Cir. 1919) (in an action to determine if a package sent by registered mail from Cuba to the United States distinctly marked 'loose diamonds, dutiable' was part of a smuggling ring, the court interpreted a universal postal convention between Cuba and the United States). "Such conventions [universal postal conventions] are not treaties, because they are not made by and with the advice and consent of the Senate, and they are not laws, because not enacted by Congress . . . [W]e assume that as administrative regulations made by authority of Congress they have the force of law." *Id.* See also *Williams v. Blount*, 314 F. Supp. 1356, 1362 (D.D.C. 1970) (in a class action for injunction restraining the Postmaster General from impounding an issue of a newsletter sent from China, the court chose not to rely on the Universal Postal Union Convention). The Court of Claims in *Standard Fruit & S.S. Co. v. United States*, 103 Ct. Cl. 659, 682 (1945), a dispute as to whether the United States owed a Delaware corporation payment for the carriage of mail, stated: "[A convention] has the same force and effect as any other regulation issued by the Postmaster General under authority of law." *Standard Fruit*, 103 Ct. Cl. at 682.

⁹⁰ Munday, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450 (1978) (examined the problem of conflicting national interpretations of uniform conventions in the context of a recent English case — *James Buchana & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*, [1977] Q.B. 208 (C.A.); [1978] A.C. 141 (H.L.)).

⁹¹ *Airline Pilots Assoc., Int'l, AFL-CIO v. TACA Int'l Airlines*, 748 F.2d 965, 969 (5th Cir. 1984) (in an appeal from an order permanently barring the defend-

The Universal Postal Union adopted the section of the Universal Postal Union Convention dealing with liability limitations on July 5, 1974, at Lausanne.⁹² This section is known as the Lausanne Convention.⁹³ Article 44 of the Lausanne Convention sets forth the extent of the liability existing upon postal administrations.⁹⁴ This article limits a postal administration's liability to only registered items.⁹⁵ More importantly, a postal administration is only required to pay 40 francs for each registered item that is lost.⁹⁶

One open question in relation to Article 44 was

ant, an El Salvadoran airline, from relocating its pilot base and changing the employment terms of its pilot employees, the court interpreted the Air Transportation Agreement between the United States and El Salvador). *See also* Maximov v. United States, 373 U.S. 49, 54 (1963) (Court interpreted the Income Tax Convention in determining whether an American trust is subject to income tax).

The plain meaning rule precludes the use of extrinsic evidence to determine the meaning of a statute if the statute's language seems clear on its face. *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F. Supp. 1255, 1258 (D. Alaska 1981). Moreover, the plain meaning rule of statutory construction authorizes that words of a statute have the same meaning to those who authorized the statute and to those who read the statute. *People v. Gilbert*, 414 Mich. 191, 324 N.W. 834, 838 (1982).

⁹² Universal Postal Union Convention, *done* July 5, 1974, Additional Protocol, 27 U.S.T. 345, 348 T.I.A.S. No. 8231 [hereinafter Lausanne Convention].

The purpose of the Postal Union is to develop "communications between peoples by the efficient operation of the postal services, and to contribut[e] to the attainment of the noble aims of international collaboration in the cultural, social and economic fields. . . ." 27 U.S.T. at 786. The scope and objectives of the Convention are found in Article One of the Constitution of the Universal Postal Union. They include:

1. The countries adopting this Constitution comprise, under the title of the Universal Postal Union, a single postal territory for the reciprocal exchange of letter-post items. Freedom of transit is guaranteed throughout the entire territory of the Union. 2. The aim of the Union is to secure the organization and improvement of the postal services and to promote in this sphere the development of international collaboration. 3. The Union shall take part, as far as possible, in postal technical assistance sought by its member countries.

27 U.S.T. at 786.

⁹³ 27 U.S.T. at 348.

⁹⁴ 27 U.S.T. at 396.

⁹⁵ *Id.*

⁹⁶ *Id.* This amount may be raised to 200 francs per special bag of printed papers as defined therein. *Id.*

whether the liability limitations provided for in the Article applied to agents of the postal administration. Answering this question required interpreting the Lausanne Convention.⁹⁷ Prior to *Lerakoli*, no court had attempted such an interpretation.⁹⁸

E. *Related Decisions by the English Courts*

Previously, the English court system addressed the liability issue as it relates to the postal system and air carriers. In *Moukattaf v. British Overseas Airways*, the plaintiff lost currency carried in a mail sack.⁹⁹ The defendant mail carrier, British Overseas Airways (BOA), argued that the postal service's liability limitations should apply to it.¹⁰⁰ The court ruled that there was nothing present in the English statutes which allowed an agent of the Post Office to share the Post Office's liability limitations.¹⁰¹ Consequently, the court held BOA fully liable to the plaintiff.¹⁰²

⁹⁷ International agreements have the same force and effect as domestic statutory law. See *supra* note 89 and accompanying text. Therefore, courts should interpret these agreements according to statutory rules of construction. *Rucker v. Wabash R.R.*, 418 F.2d 146, 149 (7th Cir. 1969) (in an action for personal injuries resulting from a train-automobile collision, the court interpreted a regulation promulgated by the Illinois Commerce Commission). A basic rule of statutory construction is that statutes in derogation of common law rights are to be strictly construed. *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir. 1982), *cert. denied*, 459 U.S. 833 (court interpreted the Petroleum Marketing Practices Act in a contract dispute between a corporation and an oil company); *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (court interpreted the Civil Rights Act in an action against the county prosecutor for alleged denial of civil rights).

⁹⁸ See *supra* notes 66-71 and accompanying text for a discussion of *Caribe Diamond* which addressed this issue in dictum.

⁹⁹ *Moukattaf v. British Overseas Airways Corp.*, [1967] 1 Lloyd's Rep. 396 (Q.B.).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

There is nothing strange about a person being liable for his own fault, even if some other person has by contract successfully excluded his liability for the same damage or loss, especially if the latter was not personally at fault. . . . I have come to the conclusion that there is a complete and exhaustive statutory code regulating the rights and liability of everyone concerned with the sending and carriage of the mail. Apart from Sec. 9(1) of the Crown Proceedings Act, all the statutory provisions are dealing, and dealing only, with

Thus, without specific statutory authority, the English courts were unwilling to expand the application of liability limitations to include agents of the Post Office.¹⁰³

Soon after the court decided *Moukattaf*, the Parliament passed the Post Office Act.¹⁰⁴ Section 29(3) of this Act provides that carriers of the mail and their agents may take advantage of the Post Office's liability limitations.¹⁰⁵ Subsequently, an English court decided *American Express Co. v. British Airways Board*.¹⁰⁶ In *American Express*, the plaintiff filed a claim against a mail carrier.¹⁰⁷ The court dismissed the claim because the Post Office Act explicitly relieved the mail carrier from liability.¹⁰⁸ *American Express* demonstrates that after the passage of the Post Office Act, the English courts allowed the air carriers, as agents and independent contractors of the English Post Office, to utilize liability limitations because the carriers' arguments were based on statutory grounds.

F. *An Analogy to the Warsaw Convention*

Unlike the British court system, the United States

the liability of the Crown or the Postmaster-General or the Post Office, and do not purport to deal with those of anyone else. Section 9(1) deals also with the liabilities of "Officer of the Crown" and excludes their liability to senders of letters; but if I am right in my view that "Officer of the Crown" does not include independent contractors, the latter are excluded from the protection of the sub-section, presumably deliberately, and it cannot be said that any complete statutory code exists, because independent contractors (and any agents who are not servants) are left outside the statutory provisions.

Id.

¹⁰³ *Id.*

¹⁰⁴ Post Office Act, 1969.

¹⁰⁵ Post Office Act § 29(3) states:

No person engaged in or about the carriage of mail and no officer, servant, agent or subcontractor of such person shall be subject except at the suit of the Post Office to any civil liability for any loss of damage in the case of which liability of the Post Office therefore is excluded by subsection (1) of this section.

Id.

¹⁰⁶ *American Express Co. v. British Airways Bd.*, [1983] 1 W.L.R. 701 (Q.B.).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

courts, prior to *Lerakoli*, had not explicitly addressed the mail carrier-Post Office liability limitation issue. However, the American courts have examined this liability limitation issue in a different context: the liability limitations contained in the Warsaw Convention.¹⁰⁹ This Convention regulates the international air transportation of persons, baggage, and goods.¹¹⁰ Article 22 of the Warsaw Convention expressly limits an air carrier's liability for the injury or death of the passengers and for the damage or destruction of baggage or other goods.¹¹¹ In recent years, courts have allowed employees and agents of the air carriers to also take advantage of these liability limitations.¹¹²

The United States Court of Appeals for the Second Circuit faced the Warsaw Convention limitation issue in *Reed v. Wiser*.¹¹³ The plaintiffs in *Reed* were the personal representatives, heirs, and next of kin of nine airline passengers killed when a bomb exploded on a Trans World Airlines airplane.¹¹⁴ Rather than suing TWA, the plaintiffs filed suit against certain officers of the corporation.¹¹⁵ The

¹⁰⁹ The formal title of the Warsaw Convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1982) [hereinafter Warsaw Convention]. See generally DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell*, 49 J. AIR L. & COM. 71 (1983); Haskell, *The Warsaw System & The U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973); Johnson & Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System*, 52 J. AIR L. & COM. 93 (1986).

¹¹⁰ Warsaw Convention, *supra* note 109.

¹¹¹ Warsaw Convention, *supra* note 109, art. 22. Article 22 provides:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Id.

¹¹² See *infra* notes 113-138 and accompanying text for a discussion of cases dealing with the liability limitation issue and the Warsaw Convention.

¹¹³ 555 F.2d 1079 (2d Cir. 1977).

¹¹⁴ *Id.* at 1079-81. On September 8, 1974, the flight from Tel Aviv to New York crashed into the sea fifty nautical miles west of Cephalonia, Greece. All 79 passengers and nine crew members on board died. *Id.* at 1081.

¹¹⁵ *Id.* at 1081. The Warsaw Convention, as modified by the Montreal Agree-

court addressed the question of whether the liability limitations contained in the Warsaw Convention extended to employees of the airlines. Because *Reed* was the first federal appellate case dealing with this particular issue,¹¹⁶ the court performed an in-depth analysis of the Warsaw Convention and its legislative history.¹¹⁷ The Second Circuit held that the employees could utilize the Convention's liability limitations.¹¹⁸ The appellate court based its holding on the plain language meaning of the Warsaw Convention in its French-text form.¹¹⁹ In addition, the court's examination of the legislative history of the agreement revealed that some of the drafters intended for the limitations to protect not only the air carrier, but also its servants or agents.¹²⁰ Thus, the plaintiffs in *Reed* could not recover an amount from the defendant officers in excess of the liability limitations set forth in the Warsaw Convention.¹²¹

A New York appellate court adopted the *Reed* reasoning for the first time in *Julius Young Jewelry Manufacturing Co. v. Delta Air Lines*.¹²² In *Julius Young*, the plaintiff lost baggage containing jewelry during a flight from the Bahamas,

ment, limits TWA's liability to \$75,000 per passenger, unless plaintiff could show willful misconduct. *Id.* at 1081. Instead, the plaintiffs sued the President of TWA and the Vice-President of Audit and Security of TWA, alleging that the defendants were responsible for security on TWA flights and acted negligently in regards to this particular flight's security. *Id.*

¹¹⁶ *Id.* at 1081-82. The American trial courts addressing the issue split in their holdings. Compare *Pierre v. Eastern Air Lines*, 152 F. Supp. 486, 489 (D.N.J. 1957) (employees not protected) with *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (agents protected).

¹¹⁷ *Id.* at 1082-93. See *infra* notes 118-121 and accompanying text for details of the analysis.

¹¹⁸ *Reed*, 555 F.2d at 1093. "Accordingly, we hold that plaintiffs may not recover from an air carrier's employees or from the carrier and its employees together a sum greater than that recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols." *Id.*

¹¹⁹ *Id.* at 1087. The disputed French terms were "transporteur" (carrier) and "cas" (events or cases). *Id.* at 1083-84.

¹²⁰ *Id.* at 1083-87. The court relied on both minutes from previous conventions and outside articles written by delegates to the conventions. *Id.*

¹²¹ *Id.* at 1093.

¹²² 67 A.D.2d 148, 414 N.Y.S.2d 528 (N.Y. App. Div. 1979).

through New York City to Bermuda.¹²³ The plaintiff sought recovery from both Delta Air Lines (Delta) and Allied Aviation Service (Allied), an independent contractor that handled Delta's baggage transfers.¹²⁴ Allied argued that, as an agent of Delta, it should be allowed to utilize the liability limitations provided to Delta by the Warsaw Convention.¹²⁵ The defendant cited *Reed*¹²⁶ in support of its argument.¹²⁷ Finding no reason to deviate from *Reed*, the state appellate court accepted Allied's position and allowed Allied to limit its liability through the Warsaw Convention.¹²⁸ The court explained its holding by stating that any other decision would be unfair to the agent working for the air carrier and would contradict the purposes of the Warsaw Convention.¹²⁹ It is interesting to note that the *Julius Young* court expanded the *Reed* theory by allowing an independent contractor of the air carrier, not simply an employee of the air carrier, to utilize the liability limitations.¹³⁰

*Baker v. Lansdell Protective Agency*¹³¹ is similar to *Julius Young*¹³² in that it also involves an independent contractor. Baker instituted the action to recover the value of

¹²³ *Julius Young*, 414 N.Y.S.2d at 529. The jewelry was valued at \$55,000. *Id.*

¹²⁴ *Id.* The plaintiffs sought a recovery of \$55,000. *Id.* at 528.

¹²⁵ *Id.* at 529. "As an agent for the carriers, Allied contends it is merely an extension of the corporate enterprise and performs an enterprise function, a service each carrier itself would have to provide by its own employees." *Id.*

¹²⁶ See *supra* notes 113-121 and accompanying text for a discussion of *Reed*.

¹²⁷ *Julius Young*, 414 N.Y.S.2d at 529. Recognizing that the *Reed* holding applied only to employees or servants of the air carriers, Allied argued that the *Reed* rationale could readily be extended to agents of the air carrier. *Id.*

¹²⁸ *Id.* at 530. "Nor do we see a sufficient basis for departing from the principle of the *Reed* case. . . . Accordingly, we hold that the liability limitations of the Convention apply to an air carrier's agent performing functions the carrier could or would, as here, otherwise perform itself." *Id.*

¹²⁹ *Id.* "To allow an agent such as Allied, which is performing services in furtherance of the contract of carriage, and in place of the carriers themselves, to be liable without limit would circumvent the Convention's purposes of providing uniform worldwide liability rules and definite limits to the carriers' obligations." *Id.*

¹³⁰ *Id.*

¹³¹ 590 F. Supp. 165 (S.D.N.Y. 1984).

¹³² See *supra* notes 122-130 and accompanying text for a discussion of *Julius Young*.

jewelry allegedly stolen from her hand luggage during a security check prior to boarding a British Airways flight from New York to London.¹³³ The employees of the defendant, Lansdell Protective Agency, performed the check.¹³⁴ Relying on *Reed* and *Julius Young*, the protective agency sought to limit its liability under the Warsaw Convention because it was an agent of British Airways.¹³⁵ In accepting this argument, the district court noted that existing statutes required security checks to be performed by agents of the air carriers.¹³⁶ Thus, as an agent of British Airways, the defendant fell squarely within the protection of the Warsaw Convention as interpreted by the *Reed* and *Julius Young* courts.¹³⁷ Therefore, the court limited Baker's recovery from the protective agency.¹³⁸

¹³³ *Baker*, 590 F. Supp. at 167. Baker alleges that approximately \$200,000 worth of jewelry disappeared from her bag between the time she handed the bag to a security agent for passage through an X-ray scanner and the time the bag was returned to her on the other side of the screening area. *Id.*

¹³⁴ *Id.* British Airways contracted with Lansdell to perform the security checks. *Id.* at 170.

¹³⁵ *Id.* at 170.

¹³⁶ *Id.* See also 49 U.S.C. app. § 1356(a) (1982 & Supp. III 1985), which requires that:

The Administrator shall prescribe or continue in effect reasonable regulations requiring that all passengers and all property intended to be carried in the aircraft cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation. . . .

Id.

¹³⁷ *Baker*, 590 F. Supp. at 170. The plaintiff argued that she needed additional information about the nature of the relationship between Lansdell and British Airways. The court, however, was convinced that Lansdell was an agent of the airline. *Id.* at 170-71.

¹³⁸ *Id.* at 171. The court held:

Accordingly, . . . Lansdell's motion for partial summary judgment limiting its liability to \$400 is granted subject to plaintiff's opportunity to demonstrate at trial that her loss occurred as a result of Lansdell's willful misconduct or of the willful misconduct of one of Lansdell's employees acting within the scope of his employment.

Id.

II. *LERAKOLI, INC. v. PAN AMERICAN WORLD AIRWAYS*

The Court of Appeals for the Second Circuit did not use the traditional process of examining case law in deciding *Lerakoli, Inc. v. Pan American World Airways*.¹³⁹ Instead, the Second Circuit stressed the practical implications of its holding.¹⁴⁰ The significance of these practical implications, according to the court, outweighed the need to specifically follow precedent.

Initially, the court examined the Lausanne Convention's liability limitations.¹⁴¹ The Second Circuit then recognized that no federal court had directly addressed the extent of these liability limitations.¹⁴² However, it noted the *Caribe Diamond* decision and that court's analysis, though in dictum, of the liability issue.¹⁴³ The *Lerakoli* court accepted without explanation the reasoning set forth in *Caribe Diamond* which hypothesized that any liability limitations of the USPS would apply to any agent of the USPS.¹⁴⁴ Because the facts of the two cases were so similar, the court's acceptance of the reasoning is not surprising.¹⁴⁵

Next, the Second Circuit discussed the bailment relationship between the USPS, Pan Am, and the sender of mail.¹⁴⁶ The court relied on two New York cases, *Berger v. 34th Street Garage*¹⁴⁷ and *Schoeffer v. United Parcel Service of*

¹³⁹ 783 F.2d 33 (2d Cir. 1986).

¹⁴⁰ *Id.* at 36-37. See *infra* notes 156-163 and accompanying text for the court's discussion of the practical aspects of its holding. See also *infra* notes 181-184 and accompanying text for a discussion of the practical implications of *Lerakoli*.

¹⁴¹ See *supra* notes 92-98 and accompanying text for a discussion of the Lausanne Convention.

¹⁴² *Lerakoli*, 783 F.2d at 35. "Application of this liability provision to a carrier performing services for a postal administration has not yet been squarely addressed by the federal courts." *Id.*

¹⁴³ *Id.* See *supra* notes 66-71 and accompanying text for an analysis of *Caribe Diamond*.

¹⁴⁴ *Lerakoli*, 783 F.2d at 36. The court simply stated: "We agree with the reasoning in *Caribe* . . ." *Id.*

¹⁴⁵ See *supra* notes 1-10 and accompanying text for a discussion of the *Lerakoli* facts. See also *supra* notes 66-71 and accompanying text for the facts of *Caribe Diamond*.

¹⁴⁶ *Lerakoli*, 783 F.2d at 36.

¹⁴⁷ See *supra* notes 80-87 and accompanying text for a discussion of *Berger*.

New York,¹⁴⁸ in holding that a sub-bailee can utilize the liability limitations of the bailor and bailee.¹⁴⁹ The appellants argued that these two cases were distinguishable from *Lerakoli* because they contained express contractual liability limitations which *Lerakoli* did not.¹⁵⁰ The Second Circuit overcame this distinction by deciding that the terms of the Lausanne Convention constituted a contractual agreement.¹⁵¹

The appellate court continued its opinion by analogizing the Lausanne Convention to the Warsaw Convention.¹⁵² Courts have held that the liability limitations contained in the Warsaw Convention apply not only to the air carriers, but also to the employees and agents of the air carriers.¹⁵³ The Second Circuit ruled that the same reasoning made an expansion of the Lausanne Convention's liability limitations appropriate.¹⁵⁴ Because the wording of the liability limitations of the two conventions is similar, it is not surprising that the court borrowed the

¹⁴⁸ See *supra* notes 73-79 and accompanying text for a discussion of *Schoeffer*.

¹⁴⁹ *Lerakoli*, 783 F.2d at 36. "It is established common law doctrine that a sub-bailee may take advantage of a liability limitation contractually agreed upon between the original bailee and bailor." *Id.*

¹⁵⁰ Reply Brief of Plaintiffs-Appellants at 2-3, *Lerakoli, Inc. v. Pan American World Airways*, 783 F.2d 33 (2d Cir. 1986) (No. 85-7503) [hereinafter Appellant's Reply Brief]. *Lerakoli* argued:

Berger and *Schoeffer* are distinguishable from the present action because those cases involved limitations of liability to which the plaintiffs had agreed as a matter of contract. By contrast, in the matter at hand the only limitation that has been mentioned is that contained in Article 44 of the Lausanne Convention.

Id.

¹⁵¹ *Lerakoli*, 783 F.2d at 36. "These terms [of the Lausanne Convention] form the equivalent of a contractual agreement between the sender and the USPS limiting the liability of the USPS, and, pursuant to agency principles, that limitation is passed on to any party performing services for the USPS." *Id.*

¹⁵² *Lerakoli*, 783 F.2d at 36. See *supra* notes 109-138 and accompanying text for a discussion of the Warsaw Convention.

¹⁵³ See *supra* notes 112-138 and accompanying text for a discussion of the cases expanding the Warsaw Convention's liability limitations.

¹⁵⁴ *Lerakoli*, 783 F.2d at 36. "In addition, application of Article 44 to Pan Am is appropriate in light of the reasoning of this and other courts in decisions holding that the liability limitations for air carriers under the Warsaw Convention should be extended to employees and agents of such carriers." *Id.*

reasoning from the Warsaw Convention cases.¹⁵⁵

The proponents behind the expansion of the Warsaw Convention's liability limits argued that a practical chaos would result if the liability limitations did not include agents.¹⁵⁶ The same argument, in the context of the Lausanne Convention, dominates the majority of the Second Circuit's time in *Lerakoli*.¹⁵⁷ The court predicted that if the liability limitations of the Lausanne Convention did not apply to air carriers, the USPS's air mail program would be jeopardized.¹⁵⁸ In order to salvage the program, the USPS might be forced to raise postage fees¹⁵⁹ which would directly affect the consumers.¹⁶⁰ According to the court, such an increase would contradict the central purpose behind Article 44 of the Lausanne Convention: limiting the financial burden of international mail carriage on the postal system.¹⁶¹

Along with its concern about the effects on the USPS and the consumers, the court considered the air carriers' position. The air carriers are performing USPS's responsibilities.¹⁶² In all fairness, the court opined, they should

¹⁵⁵ Compare Warsaw Convention, art. 22, *supra* note 111 with Lausanne Convention, *supra* note 92, art. 44, at 396 which provides that:

1. Postal administrations shall be liable only for the loss of registered items. . . .

3. In case of loss of a registered letter, the sender shall be entitled to an indemnity the amount of which shall be fixed at 40 francs per item;. . . .

¹⁵⁶ See *supra* notes 112-138 and accompanying text.

¹⁵⁷ *Lerakoli*, 783 F.2d at 36. After discussing the practical implications of the Warsaw Convention cases, the court determined that "[t]he implications of failing to extend the Lausanne Convention provision to agents of the USPS are no less severe." *Id.*

¹⁵⁸ *Id.* The inability of the air carriers to utilize the USPS's liability limitations "would have a major influence on the USPS's ability to contract with airlines for the carriage of mail in the future." *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* "At the very least, air carriers would demand higher rates from the USPS for this service, with such added government costs then being passed on to the public in the form of higher postage prices." *Id.*

¹⁶¹ *Id.* at 36-37.

¹⁶² See *supra* notes 17-22 and accompanying text for a discussion of mail carriage procedures.

likewise be able to utilize USPS's liability limitations.¹⁶³

While the *Lerakoli* court carefully analyzed the practicalities of this case, it failed to consider other relevant arguments and case law. For example, the court did not cite one case dealing with agency law.¹⁶⁴ Notably absent from the appellate court's opinion is an analysis of the principles contained in *Sloan Shipyards* and *Herd* which held that an agent may not share his principal's immunities and liability limitations unless allowed by statute or valid contract.¹⁶⁵ Possibly the court omitted these decisions because they appear to contradict the *Lerakoli* holding.¹⁶⁶ The *Lerakoli* case involved neither a statute nor a valid contract.¹⁶⁷ (While the court attempted to characterize the terms of the Lausanne Convention as a contractual arrangement, it cited no authority for such an analogy.)¹⁶⁸ Thus, according to the *Sloan Shipyards* and *Herd* cases, the USPS's liability limitations should not apply to Pan Am. However, the Second Circuit failed to address these important precedents.

Another relevant area that the court did not discuss in its opinion was statutory interpretation.¹⁶⁹ It has been held that courts should strictly construe an international convention that is in derogation of common law rights.¹⁷⁰ Thus, the *Lerakoli* court should have strictly interpreted Article 44 of the Lausanne Convention. It did not do this. Instead, the court chose a broader interpretation by allowing agents of the USPS to share the liability limitations

¹⁶³ *Lerakoli*, 783 F.2d at 36. "It would be unjust indeed to require air carriers, as a condition of their operation, to perform services otherwise the responsibility of the USPS while at the same time denying them the benefit of the USPS's liability limitations." *Id.*

¹⁶⁴ See *supra* notes 23-54 and accompanying text for a summary of agency law.

¹⁶⁵ See *supra* notes 31-54 and accompanying text for a discussion of *Sloan Shipyards* and *Herd*.

¹⁶⁶ Compare *Lerakoli*, 783 F.2d at 37 with *Sloan Shipyards*, 258 U.S. at 567 and *Herd*, 359 U.S. at 303.

¹⁶⁷ *Lerakoli*, 783 F.2d at 33-37.

¹⁶⁸ *Id.* at 36.

¹⁶⁹ See *supra* note 97 for a discussion on construing international conventions.

¹⁷⁰ *Id.*

contained in the Article.¹⁷¹ The *Lerakoli* court not only chose to ignore the rules of statutory construction, but it also decided not to directly consider this issue.¹⁷² Rather, in a footnote the appellate court wrote that applying the rules of statutory construction would result in an unfavorable holding.¹⁷³ The manner in which the court dealt with the statutory construction issue is another illustration of the court's preoccupation with the practical effects of its decision.

The *Lerakoli* court dealt with another issue in a similar manner. In its brief, *Lerakoli* argued that Pan Am was an independent contractor for the United States government.¹⁷⁴ Thus, according to the appellants, the body of law dealing with independent contractors governed this

¹⁷¹ *Lerakoli*, 783 F.2d at 36-37.

¹⁷² *Id.* at 37 n.7.

¹⁷³ *Id.*

As to the limitations of statutory construction, a more restrictive approach than the one which we now take would not only affect Pan Am and other carriers, but, as we have stated, also would impact upon the USPS in the long term. The interpretation which *Lerakoli* would have us adopt, therefore, would be in direct contravention of the underlying intent of Article 44.

Id.

Lerakoli argued that the "significant point about . . . [Article 44 of] the Convention is that it does not mention postal administrations and *carriers*, but only postal administrations. By including independent contractors such as Pan Am within the scope of the Convention's coverage, Pan Am and the district court amend the treaty language." Brief for Appellant at 16, *Lerakoli, Inc. v. Pan American World Airways*, 783 F.2d 33 (2d Cir. 1986) (No. 85-7503) [hereinafter Appellant's Brief].

¹⁷⁴ Appellant's Brief at 18-19.

The second difficulty with Pan Am's position is that it violates established principles concerning the liability of independent contractors doing work for the government. See generally, [sic] *In re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1053-58 (E.D.N.Y. 1980) and 506 F. Supp. 762, 792-95 (E.D.N.Y. 1982); . . . While independent contractors may be immune while performing work for the Government, see [sic] *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), this immunity is not applicable when the work has been done negligently or in an intentionally wrongful way. See *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961); *Green v. I.C.I. America, Inc.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973).

Id.

case.¹⁷⁵ The Second Circuit, however, quickly dismissed this contention in a footnote without any explanation.¹⁷⁶

Likewise, the *Lerakoli* court ignored foreign court rulings on similar issues.¹⁷⁷ Because the Lausanne Convention is international in scope, the appellants decided that an analogy to similar English court cases was relevant to *Lerakoli*.¹⁷⁸ The court, however, apparently disagreed and did not even note this argument in its opinion.¹⁷⁹

In summary, the Court of Appeals for the Second Circuit held that the liability limitations of the Lausanne Convention apply not only to the USPS, but also to the air carriers which carry mail for the USPS. Throughout its decision, the *Lerakoli* court stressed the disastrous effects of a contrary holding.¹⁸⁰ Thus, in the court's opinion, no other decision was possible.

III. PRACTICAL IMPLICATIONS OF THE SECOND CIRCUIT'S RULING

The *Lerakoli* holding will effect the United States Postal Service, air carriers, and the public. In addition, the status of the relevant case law is unclear as a result of this ruling. Finally, the Second Circuit did not follow a traditional analytical approach in examining *Lerakoli*.

A major effect of the *Lerakoli* decision on the USPS is to ensure its continued ability to obtain carriers for overseas mail. If the court had refused to allow the agents to utilize the limitations, the USPS would have faced a distressing situation. Those air carriers that transport mail under specific contract with the USPS would probably not ex-

¹⁷⁵ Appellant's Brief, *supra* note 173, at 18-19.

¹⁷⁶ *Lerakoli*, 783 F.2d at 37 n.7. "Lerakoli's contentions relating to . . . principles governing the liability of independent contractors who deal with the government, are meritless As to the principles governing independent contractors, such cases, which deal with issues of sovereign immunity, have little application here." *Id.*

¹⁷⁷ See *supra* notes 99-108 and accompanying text for a discussion of the English court system's analysis of the liability issue in a similar context to *Lerakoli*.

¹⁷⁸ Appellant's Brief, *supra* note 173, at 21-23.

¹⁷⁹ *Lerakoli*, 783 F.2d at 36-37.

¹⁸⁰ *Id.*

tend their contracts for additional terms because the risk of liability would be too great.¹⁸¹ With the *Lerakoli* decision, the Second Circuit has assured the USPS that the future of its foreign air mail program is secure.

The Second Circuit's decision in *Lerakoli* is also a major victory for all air carriers who transport mail for the USPS. The monetary difference between paying the full value for a lost registered mail item and the reduced value set by the Lausanne Convention can be great. (For example, the respective values in this case were \$4.8 million as opposed to \$173.36).¹⁸² Obviously, the *Lerakoli* decision pleases the air carriers.

An additional group affected by this holding is the ordinary USPS patron — the public. From whom is the ordinary citizen supposed to recover if his registered foreign postal shipment is lost? The Lausanne Convention effectively limited the liability of the USPS. *Lerakoli* has limited the liability of the air carriers. Thus, a plaintiff has no recovery options other than private insurance. While the majority of individuals are probably already obtaining insurance, *Lerakoli* transforms insurance from an option to a practical requirement.¹⁸³ The *Lerakoli* decision concurrently pleases and distresses insurance companies which insure overseas shipments. On one hand, because postal patrons must obtain insurance to guarantee a full recovery in case of loss, insurance business on overseas shipments should increase. On the other hand, *Lerakoli* imposes a severe burden on insurance companies because they will bear the financial loss of the air carriers' limited liability. Though an insured individual will obtain full recovery of his loss from the insurance company, the insur-

¹⁸¹ See *supra* note 19 and accompanying text.

¹⁸² Appellant's Brief, *supra* note 173, at 2.

¹⁸³ The appellants' briefs do not include any details as to whether the plaintiff privately insured the packages or, if insured, whether it recovered on the insurance policy. Appellant's Brief, *supra* note 173; Appellant's Reply Brief *supra* note 150. According to the appellant, the USPS does not offer insurance on international mail. Appellant's Reply Brief, *supra* note 150, at 4. Surprisingly, the Second Circuit did not address this insurance issue. *Lerakoli*, 783 F.2d at 33-36.

ance company's recovery is limited by *Lerakoli*. Therefore, by insuring overseas shipments, an insurance company assumes a great financial risk. In order to counteract this financial risk, it is possible that insurance companies will enact stricter guidelines for overseas shipments. These stricter guidelines will be detrimental to the USPS patron seeking insurance. Thus, *Lerakoli* does have negative implications for both insurance companies and the public.

The major effect of this case on the relevant case law relates to the *Sloan Shipyards* and *Herd* cases.¹⁸⁴ The *Lerakoli* court apparently decided this case without regard to these United State Supreme Court holdings. Surprisingly, the appellate court did not even discuss the *Sloan Shipyards* and *Herd* decisions in its opinion. Future courts must either (1) limit the *Sloan Shipyards* and *Herd* precedents or limit *Lerakoli* itself; (2) affirm *Lerakoli* and vacate *Sloan Shipyards* and *Herd*; or (3) reverse *Lerakoli*.¹⁸⁵

Finally, while this decision makes practical sense, the Second Circuit did not decide it on the basis of precedent. The American legal system is based on the principle that lower courts should follow higher court decisions and dissent from them only after showing good cause. In *Lerakoli*, though good cause for dissent was arguably present, the Second Circuit never officially dissented from the relevant United States Supreme Court opinions such as *Sloan Shipyards* and *Herd*. Instead, the court chose to ignore these case holdings and decide *Lerakoli* on practical grounds. If all courts decided cases in this manner, the present American system of following precedent would be effectively circumvented.

¹⁸⁴ See *supra* notes 31-44 and accompanying text for a discussion of *Sloan Shipyards*. See *supra* notes 45-54 and accompanying text for a discussion of *Herd*. See *supra* notes 164-168 and accompanying text for a discussion of *Lerakoli* in relation to *Sloan Shipyards* and *Herd*.

¹⁸⁵ The United States Supreme Court declined to review the *Lerakoli* holding. *Lerakoli*, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986) (No. 85-2109).

IV. CONCLUSION

The decision limiting the liability of air carriers acting as agents for the USPS creates two unsettled issues. The first question relates to the status of agency law. Under what circumstances an agent may share his principal's liability limitations is an open question. The current trend is toward allowing the agent to utilize his principal's immunities. This position justifiably benefits the agent. Unfortunately, until the courts clarify the status of agency law, an agent is not guaranteed this benefit. Such uncertainty works to the disadvantage of the parties involved. The courts must resolve the status of agency law in relation to the principal's liability limitations in order to bring clarity and consistency to the case law in this area. The second and more important question created by *Lerakoli* concerns the future of the overseas mail shipment program. As previously discussed, *Lerakoli* severely hampers an insurance company's ability to fully recover for a lost USPS registered mail shipment. As a result, the insurance company may impose more stringent requirements on the individual mailing the overseas shipment. These stricter requirements could deter many individuals from mailing packages overseas. Thus, the Second Circuit's decision may result in a restricted use of the postal services. Depending on the degree of restricted use, the role of the USPS in overseas shipping may be so severely reduced as to recharacterize the USPS as a whole. In the end, a USPS air carrier's ability to limit its liability may become insignificant because individuals who cannot obtain insurance will cease to use the USPS in mailing packages overseas. Thus, the issue in *Lerakoli* may become moot due to the *Lerakoli* holding itself.

Patricia L. Barrett

TORTS — CONTRIBUTION AND INDEMNITY — State law governs third-party claims by the United States for contribution from other defendants in aviation tort cases. *Overseas National Airways, Inc. v. United States*, 766 F.2d 97 (2d Cir. 1985).

On November 12, 1975, an Overseas National Airways (Overseas) jet crash-landed shortly after takeoff from John F. Kennedy International Airport (JFK) in New York when its engines ingested a number of seagulls.¹ The pilot safely stopped the aircraft on the runway and the passengers and crew deplaned without injury.² However, a fire resulting from the ingestion of the seagulls destroyed the jet and its contents.³ Overseas and Bank of America, owner of the jet, filed suit in the United States District Court for the Eastern District of New York under the Federal Tort Claims Act.⁴ The plaintiffs alleged that the Federal Aviation Administration (FAA) was negligent in certifying the plane's engines, in certifying the airport, and in clearing the plane for takeoff.⁵ The United States filed a third-party action against the Port Authority of New York and New Jersey (Port Authority), the entity that operates JFK, and against the City of New York (City), operator of two landfills near the airport.⁶

The Port Authority had used a bird control program at

¹ *Overseas Nat'l Airways, Inc. v. United States*, 766 F.2d 97, 98 (2d Cir. 1985).

² *Id.* at 99.

³ *Id.*

⁴ *Id.* See 28 U.S.C. §§ 1346(b), 2674 (1982).

⁵ *Overseas*, 766 F.2d at 99. Congress delegated sweeping authority to the Federal Aviation Administration to provide for safety in air commerce and to prevent aviation accidents. See 49 U.S.C. §§ 1421, 1432 (1982). An airport is eligible for certification if the FAA "after investigation, finds that the applicant is properly and adequately equipped and able to conduct a safe operation in accordance with this part, and approved the airport operations manual submitted with and incorporated in the application." 14 C.F.R. § 139.11(b) (1986).

⁶ *Overseas*, 766 F.2d at 99.

JFK to reduce the risk of accidents.⁷ The United States claimed that the Port Authority had negligently operated the program and sought contribution and indemnity in the event the court ultimately held the FAA liable for the damages.⁸ The landfills operated by the City attracted a large number of seagulls.⁹ The United States alleged that the City operated the landfills negligently thereby attracting the seagulls which caused the accident.¹⁰ The City, therefore, was liable for contribution and indemnity.¹¹ The Port Authority thereafter filed a third-party complaint against the City.¹²

Overseas also filed suit against the Port Authority and the City in the New York state courts stating that the parties were liable in the same manner as the United States claimed in the federal action.¹³ The defendants cross-claimed for contribution and indemnity against one another.¹⁴ In 1983 the state court approved a settlement including the non-defendant United States, the Port Authority, and Overseas.¹⁵ The City, although a defend-

⁷ *Id.* A requirement for preparation of an airport operations manual is that an applicant "must show that it has established instructions and procedures for the prevention or removal of factors on the airport that attract, or may attract, birds." 14 C.F.R. § 139.67 (1986).

⁸ *Overseas*, 766 F.2d at 99.

⁹ *Id.*

¹⁰ *Id.* Federal regulations governing sanitary landfills specifically provide that "The site should not be located in an area where the attraction of birds would pose a hazard to low flying aircraft." 40 C.F.R. § 241.202-2(e) (1986). Regulations further provide "All airports within the vicinity of the site should be identified to aid in assessing the potential hazard of birds to aircraft." 40 C.F.R. § 241.203-2(b)(2) (1986). In 1976 the FAA met with the City to call the City's attention to the bird hazard caused by the dump and suggested the use of shotgun patrols, shredders, covering the garbage or relocating the sites to correct the problem. Brief for Appellant at 8, *Overseas Nat'l Airways, Inc. v. United States*, 766 F.2d 97 (2d Cir. 1985).

¹¹ *Overseas*, 766 F.2d at 99.

¹² *Id.*

¹³ *Id.* The United States was not included in the state suit because jurisdiction under the Federal Tort Claims Act is vested exclusively in the federal courts. Neither a suit against the United States nor one of its employees, acting within the scope of his employment, may be maintained in a state court. 28 U.S.C. §§ 1346(b), 2679(d) (1982).

¹⁴ *Overseas*, 766 F.2d at 99.

¹⁵ *Id.* The United States paid three million dollars in the settlement. Brief for

ant, did not participate in the settlement.¹⁶ The final order of the court dismissed all claims with prejudice.¹⁷ However, the order stated that "any claims the defendant third-party plaintiff Port Authority may have against the third-party defendant City of New York in the Federal Court action shall be preserved."¹⁸

In the federal action, the court approved a stipulation that dismissed all claims except those of the United States and the Port Authority against the City.¹⁹ The City filed a motion for dismissal of the Port Authority's claim for lack of subject matter jurisdiction.²⁰ The City also moved for dismissal of the United States' and the Port Authority's actions for failure to state a claim on which relief could be granted.²¹ The court decided to look beyond the pleadings and treat the motions as a motion for summary judgment.²² After determining it did have jurisdiction over the Port Authority,²³ the court held that New York law

Appellee at 3, *Overseas Nat'l Airways, Inc. v. United States*, 766 F.2d 97 (2d Cir. 1985).

¹⁶ *Overseas*, 766 F.2d at 99.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* A court will grant a motion if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

²³ *Overseas*, 766 F.2d at 99. The district court exercised ancillary jurisdiction over the Port Authority's claims against the City. *Id.* The concept of ancillary jurisdiction allows a district court to acquire jurisdiction over a case or controversy in its entirety and adjudicate issues over which the court could not normally take cognizance. 13 C. WRIGHT A. MILLER & H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3523 (2d ed. 1984). Courts exercise ancillary jurisdiction to ensure judgments are given full effect and as a matter of judicial economy. *Dillon v. Berg* 347 F.Supp. 517, 519 (D. Del. 1972)(previous dispute involving false proxy statements did not give jurisdiction to issue order to produce corporate records). Ancillary jurisdiction attaches when:

- (1) the ancillary matter must arise from the same transaction which was the basis of the main proceeding, or arise during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through a ancillary order would not deprive a party of a substantial

governed the United States' and Port Authority's claims.²⁴ By New York statute a party released from liability cannot obtain contribution from another, thus precluding the contribution claims.²⁵ The court also determined that only vicariously liable parties may obtain indemnification.²⁶ Neither party could demonstrate liability solely through operation of law so the indemnity claim failed.²⁷ Therefore, because neither party could state a claim for relief, the court granted the motion for summary judgment.²⁸ The United States argued on appeal that the court should create a federal common law rule of decision, allowing a settling tortfeasor to recover from codefendants, whenever the United States seeks contribution in an aviation tort case.²⁹ *Held, affirmed*: State law governs third-party claims by the United States for contribution from other defendants in aviation tort cases. *Overseas National Airways, Inc. v. United States*, 766 F.2d 97, 100 (2d Cir. 1985).

I. LEGAL BACKGROUND

A. *The Federal Tort Claims Act of 1946*

In 1946 Congress passed the Federal Tort Claims Act (FTCA).³⁰ The FTCA waives, with some exceptions, the

procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

Id. Because the state court expressly preserved the claims res judicata did not apply. *Overseas*, 766 F.2d at 99.

²⁴ *Overseas*, 766 F.2d at 99.

²⁵ N.Y. GEN. OBLIG. LAW § 15-108(c) (McKinney 1978). See *Flood v. Re Lou Location Eng'r*, 487 F. Supp. 364, 366 (E.D.N.Y.), *aff'd, without pub. op.*, 636 F.2d 1201 (2d Cir. 1980) (prejudgment settling tortfeasor may not recover from codefendants).

²⁶ *Flood*, 487 F.Supp. at 367. The New York courts distinguish between "active" negligence and vicarious or "passive" negligence. *Id.* If the defendant is vicariously liable then he may only claim indemnity from the joint tortfeasor. *Id.*

²⁷ *Overseas*, 766 F.2d at 100.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pub. L. No. 79-601, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2671-2680 (1982)).

government's sovereign immunity from tort suits.³¹ Under the statute, the government is liable for any claim in the same manner as a private person under similar circumstances.³² The FTCA also contains a number of procedural directives, including which substantive law to apply, that a court must follow in litigation under the statute.³³ Liability attaches to the United States in accordance with the law of the place where the tort occurred.³⁴ However, the FTCA does not address issues of contribution generally, nor third-party claims by and against the United States for contribution specifically. Therefore, no express statutory directive exists regarding which law to apply in contribution cases.

In *United States v. Yellow Cab Co.*,³⁵ the United States Supreme Court held that the FTCA authorized contribution claims against the United States.³⁶ The Yellow Cab

³¹ *Feres v. United States*, 340 U.S. 135, 140-41 (1950) (United States is not liable under FTCA to servicemen injured in activity incident to military service).

³² 28 U.S.C. § 2674 (1982). The United States is liable "in the same manner and to the same extent as a private individual under the circumstances." *Id.*

³³ For example, under the FTCA the judge sits as the trier of fact in all claims. 28 U.S.C. § 2402 (1982).

³⁴ 28 U.S.C. § 1346(b) (1982). Liability attaches to the United States "in accordance with the law of the place where the act or omission occurred." *Id.* Many scholars strongly disagree with this directive:

Even if the state law requirement was warranted in 1946 when the FTCA was enacted . . . it is no longer defensible. The number of federal laws lacking any counterpart in the private tort law of the states has grown enormously since then. This growth, coupled with the expansion of federal constitutional rights for which direct tort remedies have been recognized, argues strongly that this requirement should be repealed and that the newer, distinctively federal law torts should be integrated into the remedial structure of the FTCA.

P. H. SCHUCK, *SUING GOVERNMENT* 115 (1983).

³⁵ 340 U.S. 543 (1951).

³⁶ *Id.* at 552. The Court also held that a plaintiff could sustain an action for contribution by a third-party claim. In fact, the FTCA expressly made the Federal Rules of Civil Procedure applicable, thus providing for third-party practice. *Id.* at 553. The original version of the FTCA stated "In actions under this part [suits on tort claims against the United States], the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (U.S. Stat. 1964) [Federal Rules of Civil Procedure]; and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts. . . ."

Company's passengers suffered injuries in a collision between a Yellow Taxicab and a mail truck.³⁷ The passengers brought suit against the cab company which filed a third-party complaint against the United States.³⁸ The Court reasoned that the United States consented to contribution claims by the sweeping language "any claim" contained in the FTCA.³⁹ Also, a contribution claim would not subject the government to a previously unrecognized obligation in light of the availability of contribution in pre-FTCA private bills of review.⁴⁰ In addition, the Court found that legislative history indicated that Congress intended to expand the government's waiver of sovereign immunity; therefore, limiting the scope of the FTCA regarding claims for contribution would be inconsistent with the statute's purpose.⁴¹

The Court did not directly address the choice of law question. However, in a hypothetical situation it indicated that the government could sue a joint tortfeasor "local substantive law permitting."⁴² The Supreme Court subsequently explained the scope and meaning of the phrase "law of the place where the act or omission occurred," present in the FTCA, in *Richards v. United States*.⁴³

In *Richards*, an American Airlines airplane crashed in Missouri during a flight traveling from Oklahoma to New

Id. at 553 n.9.

³⁷ *Id.* at 544.

³⁸ *Id.*

³⁹ *Id.* at 548.

⁴⁰ *Id.* at 548-49. See W. WRIGHT, THE FEDERAL TORT CLAIMS ACT 2 (1957). Previous to the enactment of FTCA the United States and its agents committed a number of wrongs that would have been actionable if the U.S. were an individual or corporation. *Id.* A system developed to compensate injured parties through private congressional bills of relief. *Id.* They were "not a matter of right but a matter of grace." *Id.*

⁴¹ See WRIGHT, *supra* note 40, at 2.

⁴² *Yellow Cab*, 340 U.S. at 550. In an early report on the bill that would become the FTCA, the House Judiciary Committee stated, in relation to a proportionate liability provision that did not become part of the Act, that "in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law." H.R. REP. NO. 2245, 77th Cong., 2d Sess. 12 (1942).

⁴³ 369 U.S. 1 (1961).

York.⁴⁴ The act of negligence occurred in Oklahoma, where plaintiffs brought suit, but the accident occurred in Missouri.⁴⁵ The case required the Court to determine if "the law" included state choice of law rules.⁴⁶ The Court held that the FTCA required application of the "whole law" of the state where the act or omission occurred.⁴⁷ Chief Justice Warren stated that Congress did not intend to disassociate state law from questions not directly addressed in a statute, like the FTCA, which is so closely related to state law.⁴⁸ Also, the Court commented that Congress is usually specific in the instances in which it intends federal courts to depart completely from state law.⁴⁹ Only by its broad interpretation that the "whole law" applied could the Court treat the United States like a private individual.⁵⁰

In almost all claims for contribution and indemnity, derived from the FTCA, federal courts apply state law.⁵¹ In at least two cases, however, the Supreme Court applied federal law to assess third-party claims by the United

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* The petitioners had each received \$15,000 in settlement from the airline, the maximum recoverable under the Missouri Wrongful Death Act. *Id.* In *Richards*, they sought an additional amount under the Oklahoma Wrongful Death Act which had no limit to recovery. *Id.* at 3-4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 11. See Brydges & Fagen, *The Federal Tort Claims Act As It Relates To Aviation Accidents*, 48 INS. COUNS. J. 244, 248 (1981). The parties originally argued three alternative applications of the statute: (1) the court should apply the internal substantive law of the place the negligence occurred; (2) the whole law, including choice of law rules, of the state where the negligence occurred; or (3) the internal law of the state where the operative effect of the negligence took place. *Richards*, 369 U.S. at 3.

⁴⁸ *Richards*, 369 U.S. at 11.

⁴⁹ *Id.* at 14.

⁵⁰ *Id.* at 11.

⁵¹ See, e.g., *United States v. G.E.I.C.O.*, 612 F.2d 705, 706 (2d Cir. 1980) (applying regulations of New York State Insurance Department in a suit by the United States for indemnity); *Rudelson v. United States*, 602 F.2d 1326, 1333 (9th Cir. 1979) (the United States is liable under California's comparative negligence system); *Certain Underwriters at Lloyd's v. United States*, 511 F.2d 159, 161 (5th Cir. 1975) (law of Louisiana governs United States duty to pay contribution after settlement); *Ingham v. Eastern Air Lines*, 373 F.2d 227, 240 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (state law applied to United States claims for indemnity).

States for indemnification. In *United States v. Seckinger*,⁵² the Supreme Court applied federal law to defeat a third-party claim for indemnity by the United States against a government contractor.⁵³ The case involved an employee of a government contractor who, after suffering a severe electrical shock and fall, filed a negligence suit against the United States under the FTCA.⁵⁴ After the employee received a judgment under the statute, the United States filed suit for indemnification from the contractor, basing its claim on a provision in the government contract.⁵⁵ The Supreme Court held that federal law controlling the interpretation of contracts applied because the contract "was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution."⁵⁶

The Court looked beyond a government contract exception to policy reasons to avoid applying state law in a FTCA related claim in *United States v. Gilman*.⁵⁷ In *Gilman*, federal law defeated a claim by the United States for indemnification against a government employee.⁵⁸ The plaintiff, a victim of a collision with a government vehicle, sued the United States.⁵⁹ The United States then insti-

⁵² 397 U.S. 203 (1970).

⁵³ *Id.* at 216. The Court held that each party was liable to the extent of its individual negligence. *Id.*

⁵⁴ *Id.* at 205.

⁵⁵ *Id.* at 205-06. The contract stated that the contractor "shall be responsible for all damages to person or property that occur as a result of his fault or negligence in connection with the prosecution of the work." *Id.* at 208 n.9. The Court found that the contractual provision could not be construed to hold the contractor responsible for the government's negligence. *Id.* at 212.

⁵⁶ *Id.* at 209-10; See *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944). The Court in *Allegheny* stated: "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the government's general authority were subject to local control." *Id.* at 183. *Seckinger* is most often cited in cases that deal with government contracts. See *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984) (claim of negligence was not a claim for interference with contract rights between the government and its contractor which would have afforded the government immunity under FTCA).

⁵⁷ 347 U.S. 507 (1954).

⁵⁸ *Id.* at 513.

⁵⁹ *Id.* at 508.

tuted a third-party action for indemnification against the government employee who caused the accident.⁶⁰ The district court found that state law applied and held the government employee liable for indemnity.⁶¹ The Supreme Court ultimately reversed the holding of the district court. The Court reasoned that because the claim was not against the United States, but against its employee, the FTCA did not cover the action.⁶² Some minimal legislative history also existed which showed that Congress did not intend to allow the government to sue its employees for contribution and indemnification.⁶³ In *Gilman*, the United States' claim involved relations between the government and its employees and presented a number of policy considerations not addressed by Congress concerning discipline, morale, and the financial interests of the government's employees.⁶⁴ The Justices indicated that appraising policy interests is a function more appropriate for Congress than for the judiciary.⁶⁵ Therefore, the Court declined to apply state law favoring indemnity and denied recovery by the United States on the claim.⁶⁶

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 509. See *infra* note 169 and accompanying text for example of other cases that do not arise under the FTCA.

⁶³ *Gilman*, 347 U.S. at 511 n.2. In hearings Assistant Attorney General Francis Shea explained that the government feared that employee morale would drop, and the government would incur additional financial liability through repetitive litigation if the FTCA did not shield employees from liability. *Id.* See also *Hearings on H.R. 5373 and 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 9-10 (1942).

⁶⁴ 347 U.S. at 510.

⁶⁵ *Id.* at 511-13.

⁶⁶ *Id.* Scholars often prefer a balancing approach similar to the reasoning in *Gilman*, stating:

Although the cases have assumed that state law will determine whether the United States has a right of contribution these decisions did not, we believe, adequately weigh the need for a uniform rule. If the federal court refers to state law the court necessarily determines that the matter of liability or no-liability is properly one for it to establish, rather than to wait for congressional action. And since a private tort-feasor does not rely upon state law relative to contribution before committing the negligent tort, and although it is a mere coin-

In summation, most courts apply state law in claims by the United States for contribution and indemnity under the FTCA.⁶⁷ However, *Seckinger* and *Gilman* demonstrate that strong federal governmental interests in the construction of government contracts and the interpretation of federal statutes sufficiently preempted the application of state law directed in the FTCA.⁶⁸ What other governmental interests may override the state law directive is an open question. The courts have not clearly indicated whether the FTCA state law directive governs third party claims by the United States not *against* the United States.⁶⁹ A third-party claim by the government conceivably may not fall under the statute.⁷⁰ If a third-party claim does not fall under the statute the federal courts may then create a federal common law rule of decision.

B. Federal Common Law

Mr. Justice Brandeis' opinion in *Erie Railroad Co. v. Tompkins*⁷¹ seemed to be the death knell for the federal common law in diversity cases.⁷² The Court's opinion stated that no general federal common law exists.⁷³ The Supreme Court declared that because Congress has no power to declare substantive common law rules applicable in the states, the Constitution does not confer that power

cidence that his joint tort-feasor is the United States, he is not deprived of any vested right if a federal rule allows contribution from him even though, under local law, he would not be subject to contribution if his joint tort-feasor were not the United States.

3 J. MOORE, W. TAGGERT & J. WICKER, *MOORE'S FEDERAL PRACTICE* 14.29 (2d ed. 1985).

⁶⁷ See *supra* note 51 for applications of state law to contribution and indemnity claims.

⁶⁸ See *supra* notes 52-56 and accompanying text for a discussion of *Seckinger* and *Gilman*.

⁶⁹ See *supra* notes 52-56 and accompanying text for a discussion of *Seckinger* and *Gilman*.

⁷⁰ See *infra* note 169 and accompanying text for a discussion of third-party claims not arising under the FTCA.

⁷¹ 304 U.S. 64 (1938).

⁷² *Id.* at 78.

⁷³ *Id.*

on the federal courts.⁷⁴ After *Erie*, however, federal courts continued to promulgate uniform federal common law rules of decision in other contexts.⁷⁵ The most notable post-*Erie* case dealing with the power of federal courts to fashion rules of decision is *Clearfield Trust Co. v. United States*.⁷⁶

In *Clearfield Trust* the United States mailed a check to a Works Progress Administration employee for work performed.⁷⁷ However, a third party received the employee's check.⁷⁸ The party that received the check transferred it to J.C. Penney, which transferred it to Clearfield Trust Company.⁷⁹ The United States discovered the problem but failed to promptly notify the bank.⁸⁰ The government subsequently sued Clearfield Trust for reimbursement.⁸¹ A question arose whether federal or state law controlled the government's failure to promptly notify the bank.⁸² The Supreme Court held that federal law governed the rights and duties of the United States on commercial paper which it issued.⁸³ *Erie* did not apply because the authority to issue the check came from the Constitution and

⁷⁴ *Id.*

⁷⁵ On the same day as the *Erie* decision the Supreme Court applied federal common law to govern a dispute concerning apportionment of an interstate stream. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). The numerous issues raised by *Erie* and its predecessor, *Swift v. Tyson*, are beyond the scope of this article. For a complete discussion, see FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981).

⁷⁶ 318 U.S. 363 (1943).

⁷⁷ *Id.* at 364-65.

⁷⁸ *Id.* at 365.

⁷⁹ *Id.*

⁸⁰ *Id.* Neither Clearfield Trust nor J.C. Penney had any knowledge nor reasonable suspicion of the forgery. *Id.*

⁸¹ *Id.* The check was originally drawn on April 28, 1936, however, the government did not give notice until January 12, 1937.

⁸² *Id.* at 366.

⁸³ *Id.* Commentators have criticized the *Clearfield Trust* decision for its reliance on federal function, defined as activities in which the federal government is involved. Federal function alone will not remove the presumption that state law governs. Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1526 (1969). For example, the issuing of money is a federal function, however, no one would claim that federal common law governs all transfers of cash. *Id.* at 1527.

statutes of the United States.⁸⁴ The Court observed further that, in the absence of an applicable act of Congress, the federal courts may fashion a governing rule according to their own standards.⁸⁵ Lastly, the application of various state laws would subject the United States to "exceptional uncertainty"⁸⁶ because identical transactions could end with different results.⁸⁷

The *Clearfield Trust* holding created two questions for courts to answer in subsequent suits which raise a federal-state choice of law question. First, may a court exercise its federal power and create a rule of decision.⁸⁸ Second, if the case warrants exercise of federal power, should the court fashion a federal common law rule or judicially adopt state law.⁸⁹ Subsequent cases clarified the broad language in *Clearfield Trust*. Two of the most notable cases dealt with acts of Congress that created comprehensive legislative programs.

In *United States v. Little Lake Misere Land Co.*,⁹⁰ the Supreme Court held that federal law governed a United States land acquisition agreement.⁹¹ The United States obtained land in Louisiana by condemnation and purchase pursuant to the Migratory Bird Conservation Act.⁹² The government reserved mineral rights for a period of ten years in the vendor-condemnee Little Lake Misere Land Co.⁹³ The government would extend the

⁸⁴ *Clearfield Trust*, 318 U.S. at 366.

⁸⁵ *Id.* at 367 (citing, *United States v. Guaranty Trust Co.*, 293 U.S. 340, 345-46 (1934) (foreign law applied to foreign check)).

⁸⁶ *Clearfield Trust*, 318 U.S. at 367. Justice Holmes noted that "the tendency of the law must be to narrow the field of uncertainty." O.W. HOLMES, *THE COMMON LAW* 127 (1881).

⁸⁷ *Clearfield Trust*, 318 U.S. at 367. However, inconsistency of result was not an overriding concern in *Erie*. In *Erie* Justice Brandeis felt that general federal law had caused forum shopping by individuals who used diversity of citizenship to avail themselves of more advantageous federal rules. *Erie*, 304 U.S. at 76.

⁸⁸ See Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 886 (1986).

⁸⁹ *Id.*

⁹⁰ 412 U.S. 580 (1973).

⁹¹ *Id.* at 591.

⁹² 16 U.S.C. § 715 (1982).

⁹³ *Little Lake Misere*, 412 U.S. at 582-583.

reservation so long as mineral production or drilling did not stop for a consecutive sixty day period.⁹⁴

Though Little Lake Misere Land Company did not meet the conditions of extension, it refused to relinquish the mineral rights.⁹⁵ The company relied on a Louisiana statute that could extend the reservation indefinitely.⁹⁶ The government brought suit to quiet title and urged application of federal law.⁹⁷ In its opinion the Court reasoned that in activities that arise out of and bear heavily upon a federal regulatory program the choice-of-law decision is a federal task for the federal courts.⁹⁸ Further, in many cases, no particular provision exists in legislation controlling the government's activity.⁹⁹ Silence in federal legislation, however, does not necessarily limit the reach of federal law.¹⁰⁰ Common law rules by necessity must "fill in interstitially" and effectuate statutory patterns created by Congress.¹⁰¹ The Court noted that such reasoning sat-

⁹⁴ *Id.* at 583.

⁹⁵ *Id.*

⁹⁶ *Id.* at 584. The statute stated:

"When land is acquired by conventional deed or contract, condemnation or expropriation proceeding by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible."

LA. REV. STAT. ANN. § 9:5806 (West Supp. 1973)(repealed 1974).

⁹⁷ *Little Lake Misere*, 412 U.S. at 584.

⁹⁸ *Id.* at 592. The opinion stated that a corollary to *Erie* raised the assumption that dealings between private citizens that are "ordinary" or "local" raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision, especially when the Federal Government is involved in the case. *Id.*

⁹⁹ *Id.* at 593.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)). Professor Mishkin found that complete reliance on statutory provisions for the solution of all problems is futile. *Id.* at 800. Political realities often cause Congress to by-pass issues, leaving their resolution open for the federal courts. *Id.* Congress is also limited by shortness of time and the severe limits of human foresight. *Id.*

ified the first holding related to the power to create a uniform rule in *Clearfield Trust*.¹⁰² Also, *Clearfield Trust* stated that the right of the United States to seek legal redress in its proprietary transactions is a federal right so a federal court may fashion a rule of decision.¹⁰³

In discussing the second part of the *Clearfield Trust* holding, the Court stated that the federal courts would not adopt hostile state rules that do not provide appropriate federal standards.¹⁰⁴ The opinion noted that when the outcome of a case bears some relationship to a federal program a court may apply no rule which is not completely in accord with the program.¹⁰⁵ Because the Louisiana statute contradicted federal interests, state law did not apply.¹⁰⁶ Six years later the Court reached a slightly different result in a similar question.

In *United States v. Kimbell Foods, Inc.*,¹⁰⁷ the United States Supreme Court held that federal law governed the priority of liens in a federal lending program, but adopted state law as the proper rule of decision.¹⁰⁸ In *Kimbell Foods*, the United States had obtained a lien as security on a loan guaranteed by the Small Business Administration under the Small Business Act (Act).¹⁰⁹ Kimbell Foods had previously obtained an interest in the same collateral to secure advances made by the corporation.¹¹⁰ The Act does not

¹⁰² *Little Lake Misere*, 412 U.S. at 593.

¹⁰³ *Id.* See also Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 410 (1964). Friendly went on to say the crucial issue is "what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid. . . ." *Id.* at 410. He also stated, however, that in the non-proprietary tort area application of federal law is usually prevented by the FTCA. *Id.*

¹⁰⁴ *Little Lake Misere* 412 U.S. at 595-604.

¹⁰⁵ *Id.* at 604.

¹⁰⁶ *Id.*

¹⁰⁷ 440 U.S. 715 (1979).

¹⁰⁸ *Id.* at 740.

¹⁰⁹ *Id.* at 718. O.K. Super Markets, the original debtor, obtained a \$300,000 loan from Republic National Bank of Dallas secured by business equipment and merchandise. *Id.* The Small Business Administration guaranteed ninety percent of the loan *Id.* The loan was guaranteed pursuant to 15 U.S.C. § 636(a)(1) (1984).

¹¹⁰ *Kimbell Foods*, 440 U.S. at 719. O.K. Super Markets borrowed \$27,000 before the federal interest arose from Kimbell Foods who took the stores equip-

specify rules to govern the priority of liens.¹¹¹ In dealing with the choice-of-law issue, Justice Marshall's opinion incorporated the bulk of the reasoning in *Little Lake Misere*.¹¹² He reached the same conclusion as in *Little Lake Misere*; federal law governed.¹¹³ However, under the second part of the *Clearfield Trust* test, the Court adopted state law as the rule of decision.¹¹⁴ A three step analysis controls the choice between a federal or state rule. First, the judiciary must consider the need for uniformity.¹¹⁵ The Supreme Court previously stated that some programs, by their nature, require a uniform character throughout the nation.¹¹⁶ Some programs, however, may operate efficiently without a uniform character.¹¹⁷ Second, state law must not frustrate the objectives of a federal program.¹¹⁸ Finally, a court must consider the effect on state interests if it adopts federal law.¹¹⁹ Ultimately, the Court chose a state law rule of decision in *Kimbell Foods* because the Small Business Act referred to state

ment and merchandise as collateral. *Id.* at 719. Kimbel protected its interest by filing a financing statement. *Id.*

¹¹¹ *Id.* at 720 n.6. The district court determined that federal law applied and analogized federal principles that afford federal statutory tax liens priority over other interests. The lien first in time is first in right. *Id.* at 720.

¹¹² *Id.* at 726-32.

¹¹³ *Id.* at 726.

¹¹⁴ *Id.* at 731-32.

¹¹⁵ *Id.* at 728.

¹¹⁶ *Id.* See *United States v. Yazell*, 382 U.S. 341, 354 (1966) (state law applies to government contracts negotiated with reference to state law). *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947) (federal law controls government-soldier relationship).

¹¹⁷ *Kimbell Foods*, 440 U.S. at 728. Courts balance the need for uniformity with other policy considerations. See, *U.A.W. v. Hoosier Cardinal Corp.* 383 U.S. 696 (1966). In a labor dispute the court stated "The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote . . ." *Id.* at 702. See also *United States v. Brosnan* 363 U.S. 237 (1960). The Court found the need for uniformity outweighed by "the severe dislocation to local property relationships which would result from our disregarding state procedures." *Id.* at 242.

¹¹⁸ *Kimbell Foods*, 440 U.S. at 728.

¹¹⁹ *Id.* 728-29. See *Wallis v. Pan Am. Petroleum Corp.* 384 U.S. 63, 68 (1966) (extending *Clearfield Trust* to diversity cases).

law,¹²⁰ and state law did not burden federal interests.¹²¹ Moreover, the private parties involved in the case justifiably relied on state law.¹²² By 1981, however, the Supreme Court used an extremely different standard to analyze the creation of a federal common law right.

In 1981 the Supreme Court declined to imply a common law right of contribution from federal antitrust statutes in *Texas Industries, Inc. v. Radcliff Materials, Inc.*¹²³ Importantly, unlike previous cases, the United States was not a party to this case and its proprietary interests were not at stake. The decision is noteworthy because of the very narrow language it uses to describe the power of the courts to create federal common law. In *Texas Industries*, a construction company filed suit against a cement manufacturer and several other concrete firms, claiming antitrust violations under the Sherman and Clayton Acts.¹²⁴ Defendant Radcliff Materials filed third-party claims for contribution against the other defendants.¹²⁵ In its opinion, the Court stated that federal common law existed only in: (1) matters concerning the rights and obligations of the United States, (2) interstate and international disputes, and (3) in admiralty cases.¹²⁶ The power to create common law in those areas falls into two categories: when a federal rule of decision is "necessary" to "uniquely" federal interests, and when Congress has given the courts the power to develop substantive law.¹²⁷ The terms "nec-

¹²⁰ 440 U.S. at 730-31. The SBA Financial Assistance Manual indicates the agency assumes its security interests are controlled by state law. *Id.* at 730.

¹²¹ *Id.* at 733. Agencies may easily adjust transactions to state priority rules. *Id.*

¹²² *Id.* at 739. Businessmen depend on state commercial law to provide the stability that is necessary for evaluation of risk. *Id.*

¹²³ 451 U.S. 630 (1981).

¹²⁴ *Id.* at 632. The Sherman Act is codified at 15 U.S.C. § 1-7 (1982). The Clayton Act is codified at 15 U.S.C. § 12-27,44 (1982).

¹²⁵ *Texas Indus.*, 451 U.S. at 633.

¹²⁶ *Id.* at 641. The approach taken by Chief Justice Burger has been called the "enclave approach." See Field, *supra* note 188, at 911-13. The Supreme Court has spoken of creating enclaves of federal judge-made law. *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964) (validity of foreign sovereign's acts a matter of federal law).

¹²⁷ 451 U.S. at 640. A necessity standard creates a presumption against the cre-

essary" and "unique" create a very high standard to meet in arguing a case for the creation of a uniform rule. The Court further stated that the right to contribution could arise in two ways: either by an express or implied right of action created by Congress, or by the limited power of federal courts to fashion a common law rule.¹²⁸ Congressional intent to create a right of action is found in legislative history, by identifying the class intended to benefit from the statute, in the overall legislative scheme, or the traditional role of states in providing relief.¹²⁹ Also, the Court found the presumption that Congress deliberately omitted a remedy from a statute is strongest when Congress has enacted a comprehensive legislative scheme, including a complete set of procedures for enforcement.¹³⁰ This comment indicated an apparent step back from the statement in *Little Lake Misere* that silence in federal legislation does not limit the reach of federal law.

Several cases have dealt with the federal common law in the aviation context. Most of the cases have expressed the federal courts' limited view of their power to create federal common law rules in aviation accidents. In *Executive Jet Aviation v. City of Cleveland*,¹³¹ the Supreme Court held federal admiralty jurisdiction does not automatically ex-

ation of federal common law. Most cases assume that a court can create a common law rule when desirable. See Field, *supra* note 88, at 945-46.

¹²⁸ *Texas Indus.*, 451 U.S. at 638. Many courts do not take such a limited view of this power. Factors in the creation of a common law rule include: the subject matter basis for the suit, the strength of state interests, the interstate nature of the controversy, the presence of a federal party, strength of federal interest, existence of relevant federal constitutional, treaty or statutory law, and expediency. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject or a New Role for Federal Common Law*, 54 FORDHAM L. REV. 167, 190 (1985).

¹²⁹ *Texas Indus.*, 451 U.S. at 639. See also *Cort v. Ash* 422 U.S. 66, 78 (1975) (Federal Election Campaign Act does not imply private right to damages to stockholders of a corporation for violation of the statute).

¹³⁰ *Texas Indus.*, 451 U.S. at 645. The Supreme Court stated in one case:

In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 (1981).

¹³¹ 409 U.S. 249 (1972).

ist over aviation torts occurring in flights over navigable waters. In *Executive Jet* an aircraft struck a flock of seagulls on take-off from Burke Lakefront Airport in Cleveland.¹³² The airplane, on a charter from Cleveland to Portland, Maine, crashed into the navigable waters of Lake Erie a short distance from the airport.¹³³ The plaintiffs invoked admiralty jurisdiction and brought suit in the United States District Court for the Northern District of Ohio.¹³⁴ The bulk of the opinion deals with the problems caused by aircraft under admiralty jurisdiction and the formation of a "significant relationship to traditional maritime activity" test to bring a small number of aircraft accidents occurring at sea within admiralty jurisdiction.¹³⁵ The Court met the argument that admiralty jurisdiction would serve the advisable goal of a uniform law for all aviation torts occurring over navigable waters with the view that Congress could enact applicable legislation under the Commerce Clause.¹³⁶ Outside such legislation, federal courts would not use admiralty jurisdiction to create a uniform rule for aviation torts.¹³⁷ The Court, in sweeping language, stated that Congress may only limit powers constitutionally reserved to the states to adjudicate controversies by acts which conform to the judiciary section of the Constitution.¹³⁸ Also, a due regard for the rightful independence of state courts requires federal courts to limit their jurisdiction to that defined by federal statute.¹³⁹

¹³² *Id.* at 250.

¹³³ *Id.*

¹³⁴ *Id.* at 250-51. The admiralty jurisdiction statute is codified in, 28 U.S.C. § 1333(1) (1982). Admiralty jurisdiction is limited to maritime transportation, navigation, employment, or commerce on navigable waters. *Swift & Co. Packers v. Compania Transmaritima Colombiana*, 83 F.Supp. 273, 277 (Canal Zone 1948), *aff'd*, 175 F.2d 513 (5th Cir. 1949).

¹³⁵ *Executive Jet*, 409 U.S. at 250-73. Unless the wrong bears a significant relationship to traditional maritime activity, claims arising from aircraft crashes are not covered by admiralty jurisdiction. *Id.* at 272.

¹³⁶ *Id.* at 274.

¹³⁷ *Id.*

¹³⁸ *Id.* at 272-73.

¹³⁹ *Id.* at 272. The court stated:

The Court also took a limited view of its power to create federal common law in *Miree v. DeKalb County*.¹⁴⁰ In *Miree*, the Supreme Court refused to apply federal law in an aviation disaster. An aircraft ingested a number of birds from a nearby landfill shortly after takeoff from the DeKalb County Georgia Airport.¹⁴¹ Diversity of citizenship formed the basis for federal jurisdiction.¹⁴² The plaintiffs sued on a third-party beneficiary theory, based on six contracts between the County and the FAA.¹⁴³ In these contracts the County agreed to use land adjacent to the airport for activities compatible with normal airport operations; however, the County allegedly breached the agreement by maintaining a garbage dump near the airport.¹⁴⁴ The District Court held that the County's governmental immunity barred the contract claims.¹⁴⁵ The Supreme Court noted it may apply federal common law, even in diversity cases, when a uniform national rule is necessary to further the federal government's interests.¹⁴⁶ Nevertheless, the Court held that state law applied because the litigation raised no questions regarding the liability of the United States.¹⁴⁷ The fact that the United

The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

Id. at 272-73 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

¹⁴⁰ 433 U.S. 25 (1977).

¹⁴¹ *Id.* at 27.

¹⁴² *Id.* at 26. The diversity statute is, 28 U.S.C. § 1332 (1982).

¹⁴³ *Miree*, 433 U.S. at 27.

¹⁴⁴ *Id.* See 40 C.F.R. § 241.202-2(e) (1986) (airports must be located away from bird hazards).

¹⁴⁵ *Miree*, 433 U.S. at 27.

¹⁴⁶ *Id.* at 29; See *Bank of Am. Nat'l Trust & Sec. Ass'n v. Parnell*, 352 U.S. 29 (1956) (United States interests too speculative and remote to justify application of federal law in a suit involving private parties only).

¹⁴⁷ *Miree*, 433 U.S. at 28. Federal common law often, though not invariably, results when the United States is a party. *Little Lake Misere*, 412 U.S. at 591. When the United States is a party it has two interests, an interest in uniformity for its own sake, which is content neutral, and an interest in a rule whose content favors

States has a substantial interest in the regulation of air travel and promoting air safety was not dispositive in such a narrow question.¹⁴⁸ In fashioning common law rules, the Court asserted that a significant conflict must exist between a federal policy or interest and the use of state law.¹⁴⁹ Justice Rehnquist noted that the right to sue as third-party beneficiary of the government contract could possibly advance FAA policy encouraging compliance with FAA regulations.¹⁵⁰ Assuming that this notion was correct, Justice Rehnquist nevertheless found that Congress must make the decision to displace state law on such an issue, and that Congress had not chosen to do so.¹⁵¹ He pointed out that Congress, in the late 1960's, failed to give serious consideration to a bill providing a federal cause of action in aircraft disasters.¹⁵² One noteworthy case, however, deviated from this strict, limited view of federal judicial power.

The Seventh Circuit Court of Appeals fashioned a uniform federal common law rule of decision for contribution and indemnity in *Kohr v. Allegheny Airlines, Inc.*¹⁵³ At the time of the decision, the legal community viewed the

government interests. *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 993-94 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (state law governs claims in Agent Orange tort cases).

¹⁴⁸ *Miree*, 433 U.S. at 31.

¹⁴⁹ *Id.* (citing *Wallis v. Pan American Petroleum Corp.* 384, U.S. 63, 68 (1966)).

¹⁵⁰ *Miree*, 433 U.S. at 32.

¹⁵¹ *Id.*

¹⁵² *Id.* at 32 n.5. Senator Tydings introduced legislation for a comprehensive body of federal law governing aviation activity, but, after the Senator failed to be re-elected, the measure died. See Sanders, *The Tyding Bill*, 36 J. AIR L. & COM. 550, 551 (1970). There have been more recent moves to create a uniform national tort law. In 1985 Congress considered a substantial change in the entire body of products liability law including preemption of state law by federal causes of action. See *Product Liability Act: Hearings on S. 100 Before the Subcomm. on the Consumer of Senate Comm. on Commerce, Science and Transportation*, 99th Cong. 1st Sess. 3-10 (1985). Also, in 1986, the executive branch sought similar reforms. The Reagan Administration's Tort Policy Working Group proposed a broad set of reforms including: elimination of joint and several liability in cases where the defendants did not act in concert, limiting of attorney's contingency fees and encouragement of the use of alternative dispute resolution. Willard, *Restore Balance to the Tort System*, A.B.A.J., July 1, 1986 at 36.

¹⁵³ 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

case as one of the most important decisions in aviation law in recent years.¹⁵⁴ The case arose out of a mid-air collision between an Allegheny Airlines DC-9 and a private aircraft.¹⁵⁵ Eighty-three occupants died in the crash.¹⁵⁶ The decedent's survivors brought wrongful death actions in eight different United States District Courts.¹⁵⁷ The Judicial Panel on Multidistrict Litigation assumed jurisdiction over the suits and transferred them to the United States District Court for the Southern District of Indiana for the supervision of discovery.¹⁵⁸ Allegheny Airlines and the United States filed cross-claims and third-party claims for contribution and indemnity.¹⁵⁹ The United States and Allegheny settled with the passengers and proceeded for contribution against the other defendants in the case.¹⁶⁰ The district court applied Indiana law and dismissed the contribution claims; however, the Seventh Circuit reversed, holding that a federal law of contribution and indemnity applied in actions arising from mid-air collisions.¹⁶¹ The Court of Appeals primarily sought to eliminate the inconsistency of results among similar air-

¹⁵⁴ The case was called "one of the most momentous decisions in aviation law in the last several decades." S. SPEISER & C. KRAUSE, *AVIATION TORT LAW* § 6.1 (1978).

¹⁵⁵ *Kohr*, 504 F.2d at 401.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 401-02. The case was moved pursuant to 28 U.S.C. § 1407 (1982). The Judicial Panel on Multidistrict Litigation consists of seven district or circuit judges. *Id.* at 1407(d). The Panel may transfer to any district, for coordinate or consolidated proceedings, any civil action involving one or more common questions of fact pending in different districts. *Id.* at 1407(a). Either the Panel or a party in an action appropriate for transfer may initiate consolidation proceedings. *Id.* at 1407(c). The Judicial Panel may make the transfer upon its determination that the proceedings will be convenient for the witnesses and the parties and will promote just and efficient conduct of the actions. *Id.* at 1407(a). The proceedings usually deal with discovery, non-discovery pre-trial motions, and settlement. See Note, *Mass Exposure Torts: An Efficient Solution To A Complex Problem*, 54 U. CIN. L. REV. 467, 522-26 (1985).

¹⁵⁹ *Kohr*, 504 F.2d at 402.

¹⁶⁰ *Id.* The other defendants included the estate of Robert Carey, pilot of the private aircraft, Forth Corporation, owner of the plane and Brookside Corporation, owner of Forth Corporation. *Id.* at 401.

¹⁶¹ *Id.* at 402.

craft collisions.¹⁶² A uniform air law was necessary because the Federal Aviation Act created a uniform system of flight rules and centralized authority in the FAA Administrator to issue regulations for safety in the national airspace.¹⁶³ The Seventh Circuit found the argument for federal preemption advanced because the plaintiff sued the government under the FTCA, and the Judicial Panel on Multidistrict Litigation had supervised the litigation since its inception.¹⁶⁴ The court then adopted a rule allowing a settling tortfeasor to seek contribution and indemnity, thus encouraging settlement.¹⁶⁵

Language in more recent Seventh Circuit opinions, however, appears to severely limit or completely disfavor the holding in *Kohr*. In *Bowen v. United States*,¹⁶⁶ the Seventh Circuit refused to extend *Kohr* to cases arising under the FTCA.¹⁶⁷ In *Bowen*, a pilot sued the FAA for negligence in failing to warn of icing conditions that caused his aircraft to crash.¹⁶⁸ The court first distinguished *Kohr*

¹⁶² *Id.* at 403.

¹⁶³ *Id.* at 404. The only Federal Aviation Act section that the court cited is entitled "Declaration of National Sovereignty in Air Space, Operation of Foreign Aircraft" and concerns the United States' sovereignty over aircraft from other countries in United States airspace. 49 U.S.C. § 1508 (1982). The court pointed to no other section from which preemption can be inferred. See Note, *Federal Common Law in Aviation*, 41 J. AIR L. & COM. 347, 352-53 (1975).

¹⁶⁴ *Kohr*, 504 F.2d at 404. The court did not deal with the *Erie* doctrine even though jurisdiction was based on diversity of citizenship and the Federal Tort Claims Act. Presumably, the impact of the *Erie* doctrine should be "explained or distinguished." Prewitt, *Federal Common Law of Aviation and the Erie Doctrine*, 40 J. AIR L. & COM. 653, 659 (1974). The presence of the Judicial Panel on Multidistrict Litigation may, in part, explain the holding. Before the Panel's creation, problems arose in aircraft disaster litigation as to venue, difficult conflict-of-law questions, and application of different sets of law in the same courtroom. The Panel's scope, however, is limited to pre-trial proceedings. This judicial frustration with the Panel was manifest in *Kohr*. See, Comment, *The Case For A Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U.L. REV. 231, 237-42 (1976).

¹⁶⁵ *Kohr*, 504 F.2d at 405. The FTCA encourages settlement. See 28 U.S.C. § 2677 (1982). Section 2677 states, "The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after commencement of an action thereon." *Id.*

¹⁶⁶ 570 F.2d 1311 (7th Cir. 1978).

¹⁶⁷ *Id.* at 1316.

¹⁶⁸ *Id.* at 1314.

from *Bowen* by stating that because *Kohr* involved a United States third-party claim for contribution and indemnity it did not "arise" under the FTCA.¹⁶⁹ Also, recent Supreme Court dictum limited the Seventh Circuit's power to extend *Kohr*.¹⁷⁰ The previously cited language in *Miree* and *Executive Jet* persuaded the court to reject federal law.¹⁷¹ In *In re Air Crash Disaster Near Chicago, Ill On May 25, 1978*,¹⁷² the Seventh Circuit went as far as to say recent Supreme Court cases suggested that the court could not depart from state law in air crash cases.¹⁷³

II. OVERSEAS NATIONAL AIRWAYS V. UNITED STATES

On appeal, the United States requested the creation of a federal common law rule of decision applicable when the United States seeks contribution from joint tortfeasors in an aviation torts case.¹⁷⁴ A divided panel of the Court of Appeals for the Second Circuit affirmed. The court relied mainly on three sources for its opinion: the Federal Tort Claims Act, *Executive Jet Aviation v. City of Cleveland*, and *United States v. Yellow Cab Co.*¹⁷⁵ At the outset, the majority conceded that the petitioners set forth persuasive policy arguments for a uniform federal rule of decision.¹⁷⁶ The court noted the national government has almost an exclusive interest in regulation of the nation's airways.¹⁷⁷ Congress had authorized the FAA to certify airports and aircraft and insure the safety of air travel.¹⁷⁸ A uniform rule would also eliminate inconsistency of results.¹⁷⁹

¹⁶⁹ *Id.* at 1316 n.6.

¹⁷⁰ *Id.* at 1316-17.

¹⁷¹ *Id.* See *supra* notes 140-152 and accompanying text for a discussion of *Miree* and notes 131-139 for a discussion of *Executive Jet*.

¹⁷² 644 F.2d 633, (7th Cir. 1981).

¹⁷³ *Id.* at 637 n.6.

¹⁷⁴ *Overseas Nat'l Airways, Inc. v. United States*, 766 F.2d 97, 100 (2d Cir. 1985).

¹⁷⁵ *Id.* at 100-102.

¹⁷⁶ *Id.* at 100.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* In the majority's opinion, the presence of the United States in particular made the argument compelling for the creation of an aviation tort rule.

The Court of Appeals, however, felt constrained by the FTCA and previous Supreme Court decisions.¹⁸⁰ The FTCA provides that a trier of fact must judge the United States' liability in accordance with the law of the state where the act or omission occurred.¹⁸¹ The court cited *United States v. Yellow Cab Co.*, stressing that the Supreme Court had indicated, albeit in dictum, that state law governs claims by the United States in FTCA cases.¹⁸² The panel also distinguished as *sui generis* the two cases in which the Supreme Court used federal law, in indemnification claims by the United States, when liability derived from the FTCA.¹⁸³ The court stated that *United States v. Seckinger* held only that federal law clearly controlled the interpretation of government contracts.¹⁸⁴ The Court of Appeals also dismissed *United States v. Gilman* on two grounds. First, Congress did not fully address the question of indemnity from government employees when it enacted the FTCA.¹⁸⁵ Second, the legislative history that did exist showed that Congress probably did not intend to allow the government a right of action against its employees.¹⁸⁶

The majority found that *Executive Jet v. City of Cleveland* controlled in *Overseas*. *Executive Jet* presented to the Supreme Court the same policy arguments that *Overseas* presented to the Second Circuit.¹⁸⁷ In the majority opinion, *Executive Jet's* language that a due regard for the independence of state governments should cause the federal courts to limit their jurisdiction found a broad applica-

¹⁸⁰ *Id.* See *supra* notes 30-34 for a discussion of FTCA.

¹⁸¹ *Overseas*, 766 F.2d at 101. See 28 U.S.C. 1346(b) (1982).

¹⁸² *Overseas*, 766 F.2d at 101. See *supra* notes 35-42 and accompanying text for a discussion of *Yellow Cab*.

¹⁸³ *Overseas*, 766 F.2d at 102.

¹⁸⁴ *Id.* See *supra* notes 52-56 and accompanying text for discussion of *Seckinger*.

¹⁸⁵ *Overseas*, 766 F.2d at 102. See *supra* notes 57-66 and accompanying text for a discussion of *Gilman*.

¹⁸⁶ *Overseas*, 766 F.2d at 102.

¹⁸⁷ *Id.* at 100. See *supra* notes 131-139 and accompanying text for a discussion of *Executive Jet*.

tion.¹⁸⁸ *Executive Jet* did not apply exclusively to admiralty jurisdiction but to all aviation cases.¹⁸⁹ The court pointed out that Congress was free, under the Commerce Clause, to enact legislation to deal with aviation litigation.¹⁹⁰ In sum, the Second Circuit stated that a fair reading of *Executive Jet* would not permit a court to form a federal rule of decision to preempt state tort law.¹⁹¹ Lastly, the court stated that, as a practical matter, because the United States has no greater interest when it seeks contribution than when it is sued for contribution state law should apply.¹⁹² The majority then stated that New York law barred the United States' claims for contribution and indemnity.¹⁹³

The dissent agreed with the majority's reading of New York law, but almost nothing else. Justice Oakes, the lone dissenter, found neither the FTCA nor *Executive Jet* barred the application of federal law. He noted that the FTCA clearly states that the law of the state where the act or omission occurred governs claims against the United States.¹⁹⁴ The instant case, however, is a claim *by* the United States not *against* it.¹⁹⁵ The dissent also stated that *Yellow Cab* held only that contribution claims against the United States were cognizable; the dictum "local substantive law permitting" should not limit the application of federal law.¹⁹⁶ Justice Oakes cited both *Seckinger* and *Gilman* as demonstrating that the FTCA does not govern third-party claims by the government.¹⁹⁷ He also noted

¹⁸⁸ *Overseas*, 766 F.2d at 102.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 101.

¹⁹¹ *Id.*

¹⁹² *Id.* The court stated "it adds nothing in cases such as this to assert that 'application of state laws . . . would subject the rights and duties of the United States to exceptional uncertainty.'" *Id.*

¹⁹³ *Id.* at 102-103. Neither appellant (Port Authority nor the United States) offered a theory where it was liable to plaintiff solely because of the City's negligence, therefore, neither could receive indemnification. *Id.* at 103.

¹⁹⁴ *Id.* at 103.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Justice Oakes described the phrase as "parenthetical." *Id.*

¹⁹⁷ *Id.*

Executive Jet dealt exclusively with the extension of admiralty jurisdiction to aviation cases.¹⁹⁸ A subject-matter jurisdiction problem did not exist in *Overseas*, therefore, *Executive Jet* could not limit the choice of rules of decision.¹⁹⁹ The two questions to answer were: first, does the court have power to create a federal rule and second, should the court fashion a uniform rule or adopt a state rule.²⁰⁰ The underlying action in the suit was predicated on federal law, namely the FTCA. Therefore, he relied on the *Kimbell Foods* holding that government activities arising from and bearing on federal interests warrant the use of federal law.²⁰¹ The analysis that ultimately lead to the adoption of state law in *Kimbell Foods* was that the statute expressly referred to the state law, would not burden federal interests, and the private parties relied on the law did not apply in *Overseas*.²⁰² The FTCA does not address the United States' ability to seek contribution of what law to apply.²⁰³ The Supreme Court, in other contexts, held that a federal rule of decision governs the third-party claims of the United States for indemnity when primary liability derived from the FTCA.²⁰⁴ The dissent also noted that a state law rule that a settling tortfeasor cannot recover a voluntary payment burdens the government's interests favoring settlement and uniformity of FAA obligations.²⁰⁵ Also, he found no evidence indicated that any of the parties relied on state law.²⁰⁶

Justice Oakes analogized the present case with *Little Lake Misere*, in which the Supreme Court stated that fed-

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* The Court also cited *In Re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 990 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). See *supra* notes 107-122 and accompanying text for a discussion of *Kimbell Food*.

²⁰² 766 F.2d at 105. See *supra* notes 107-122 and accompanying text for a discussion of *Kimbell Food*.

²⁰³ *Overseas*, 766 F.2d at 105.

²⁰⁴ *Id.*

²⁰⁵ *Id.* See 28 U.S.C. § 2677 (1982).

²⁰⁶ *Overseas*, 766 F.2d at 105.

eral courts could not borrow hostile state law rules.²⁰⁷ The dissent cited *Kohr v. Allegheny Airlines, Inc.* and *Texas Industries v. Radcliff Materials, Inc.* as evidence that a court would create a common law right of contribution in the proper circumstances.²⁰⁸ Lastly, Justice Oakes would limit the holding in *Kohr* to third-party claims by the United States.²⁰⁹ Citing *Miree v. DeKalb County*, Justice Oakes stated case law clearly distinguishes between the rights of the United States and private parties.²¹⁰

III. PRACTICAL IMPLICATIONS

Overseas is noteworthy, not only for its precedential value, but also as an illustration of a subtle shift in attitude by the federal judiciary about its powers to create federal common law and extend that power into areas traditionally reserved to the states. Comparing *Little Lake Misere*, *Kimbell Foods*, and *Texas Industries*, *Overseas* is the culmination of an increasingly strict reasoning limiting the courts power to create federal common law. Justice Rehnquist most persuasively stated this new attitude in *Miree v. DeKalb County*. He stated that there must exist a significant conflict, specifically shown, between a federal interest and state law before a court may create a federal rule.²¹¹ He stressed that the displacement of state law is a task for representative legislative bodies, not for the judiciary.²¹²

The trend for such reasoning will probably continue. Justice Rehnquist's elevation to Chief Justice and the appointment of Antonin Scalia strengthens the conservative block on the court. Both Justices are known for their belief in limited judicial power and the court's limited role in

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 104. The court also cited *Cooper Stevedoring v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (creating a right of contribution in admiralty cases).

²⁰⁹ *Overseas*, 766 F.2d at 105. See *supra* notes 140-152 and accompanying text for a discussion of *Miree*.

²¹⁰ *Id.* The court also cited *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981) (no contribution for violation of Equal Pay Act).

²¹¹ See *supra* notes 140-152 and accompanying text for a discussion of *Miree*.

²¹² See *supra* notes 140-152 and accompanying text for a discussion of *Miree*.

setting public policy.²¹³ Thus, *Congress* must create a uniform rule that the courts may apply in aviation accidents. The legislature branch has made attempts to create a uniform aviation law, all failures.²¹⁴ Congress, however, in future legislation may, under the guise of tort reform, create a uniform body of tort law when the United States is a party.²¹⁵ Until that time, the judiciary appears have no choice but to follow state law.

Overseas is also noteworthy for its apparent departure from the holding in *Kohr v. Allegheny Airlines, Inc.* Arguably, the facts in *Overseas* may be fundamentally different. The Seventh Circuit limited the *Kohr* decision to mid-air collisions between aircraft flying in the national air-space. The decision primarily appeared as response to frustration with the procedural complexities of mass-tort litigation. The jurisdiction of the Judicial Panel for Multidistrict Litigation also played a large role in the decision.²¹⁶ In *Overseas* the accident only involved a single aircraft and the Panel never exercised jurisdiction over the case. The majority opinion, however, took little notice of the *Kohr* opinion, perhaps illustrating its lack of probative value. The Seventh Circuit has also retreated from its own holding in *Kohr* in subsequent cases, bringing into question the validity of the opinion.²¹⁷

Whether the Supreme Court will extend the extremely narrow reasoning of *Texas Industries* to cases involving the United States is an open question. *Texas Industries* and *Miree* did not directly involve the government as a party. Naturally, the presence of the United States as a party may increase the presumption that Federal interests are endangered.²¹⁸ However, the narrow question in *Overseas* which directly involved the United States clearly failed to preempt state law.

²¹³ Marcotte, *New Kid On the Block*, A.B.A.J., Aug. 1, 1986 at 20.

²¹⁴ See *supra* note 152 for a discussion of the Tyding's Bill.

²¹⁵ See *supra* note 152 for a discussion of tort reform.

²¹⁶ See *supra* notes 153-165 and accompanying text for a discussion of *Kohr*.

²¹⁷ See *supra* notes 153-165 and accompanying text for a discussion of *Kohr*.

²¹⁸ See *supra* note 147 for a discussion of suits where the United States is a party.

In sum, the Court in *Overseas* followed the generally accepted premise that the FTCA requires the application of state law in suits involving the United States. A court will only deviate from the directive when the vital interests of the United States are at stake. The desire of the United States to recover for a voluntary settlement is not sufficient reason to displace the power of the states to control the disposition of tort suits. Therefore, state law governs third party claims by the United States for contribution in aviation tort cases.

IV. CONCLUSION

The majority in *Overseas* reached the correct conclusion but through rather confused reasoning. Both the majority and minority opinion focused on extensive regulation under the Federal Aviation Act. However, the opinion should have concentrated on the provisions of the Federal Tort Claims Act. There exists a significant gap in this seemingly "comprehensive" legislation. Congress clearly intended state law to apply in claims against the United States but there is a real question whether this directive applies to third party claims by the United States. The Second Circuit should have gone through the two step analysis of *Clearfield Trust*. When there is a gap in a comprehensive legislative scheme, a court may fill in provisions interstitially to effectuate statutory patterns created by Congress. This fact satisfies the first portion of the *Clearfield Trust* holding that a federal court must determine whether it may exercise its federal power to create a rule of decision. Secondly, the court must determine whether to adopt a uniform federal rule or judicially adopt state law. Allowing settling tortfeasors to seek contribution from other tortfeasors may encourage settlement. The various states that do not allow a settling tortfeasor to recover may financially burden the United States' interests. State rules of contribution, however, do not burden the FAA's ability to operate and protect the safety of airline passengers. As a practical matter the United States could

present no cogent reason why it suffers more than a private individual or a company doing business in several states who cannot seek contribution. In *Overseas*, if the United States could have shown such a reason the court might have decided the case differently.

Mark Allen Cooper

AGE DISCRIMINATION IN EMPLOYMENT ACT — JUDICIAL INTERPRETATION OF THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION — In an action brought under the Age Discrimination in Employment Act, a bona fide occupational qualification defense is available only if the defendant can establish, by a preponderance of the evidence, that the age qualification is reasonably necessary to the normal operation of the particular business. *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985).

Western Air Lines, Inc. (Western) is a federally certified commercial air carrier engaged in the business of providing safe transportation of passengers by air.¹ Western operates a variety of aircraft, including the Boeing 727 and the McDonnell-Douglas DC-10.² For operation these aircraft require three crew members in the cockpit: a Captain, a First Officer, and a Second Officer.³ The Captain functions as the pilot in command and is responsible for all phases of operation.⁴ The First Officer performs the duties of copilot and assists the Captain; the Second Officer acts as the flight engineer.⁵ The flight engineer usually monitors an instrument panel facing the side of the aircraft; he does not operate the controls of the aircraft unless both the Captain and the First Officer become incapacitated.⁶

¹ Brief for Petitioner, *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985) [hereinafter Brief for Petitioner].

² *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743, 2746 (1985).

³ Brief for Petitioner, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Western Air Lines*, 105 S. Ct. at 2746. Western's philosophy of flying is a coordinated crew concept. Each crew member performs specific duties throughout the flight based upon this position in the cockpit. Although only the Captain and First Officer actually manipulate the flight controls, under Western's system, all crew members take active roles in the operation of the aircraft. Brief for Petitioner, *supra* note 1.

In 1978, respondents Charles Criswell and Rulon Starley were Captains operating DC-10's for Western.⁷ In July of 1978 both men reached their sixtieth birthdays.⁸ In order to avoid mandatory retirement in accordance with a Federal Aviation Administration (FAA) regulation, both men applied for reassignment as flight engineers.⁹

⁷ *Western Air Lines*, 105 S. Ct. at 2747.

⁸ *Id.*

⁹ *Id.* The FAA prohibits any person from serving as a pilot or copilot on a commercial flight after reaching the age of sixty. 14 C.F.R. § 121.383(c) (1986). The regulation states:

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

Id. The FAA justified its adoption of a mandatory retirement for pilots and copilots on the theory that "the risks of suffering incapacitating medical events and of adverse psychological, emotional, and physical changes rise" with advancing age. 49 Fed. Reg. 14,695 (1984). Although the rule is arbitrary in that it will exclude some pilots who would not be afflicted by any physical or mental problems if allowed to continue flying, the rule itself represents the FAA's recognition that there is "a present inability to distinguish those pilots who, as a consequence of aging, present a threat to safety from those who do not." *Id.* The courts have upheld the FAA's age sixty retirement rule. *See, e.g., Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979) (holding that FAA's denial of pilot's petition for exemption from the age-sixty retirement rule was not arbitrary and capricious because medical tests proposed by pilot were not sufficiently reliable to compel his employment in a position of great stress and responsibility where sudden incapacitation could jeopardize many lives).

The FAA adopted the age sixty rule on March 15, 1960, and it has been the subject of considerable controversy ever since. 14 C.F.R. § 121.383(c) (1986); *see also* Brief for Petitioner, *supra* note 1. Despite extensive examination, however, the FAA has reaffirmed the rule as recently as April 12, 1984. 49 Fed. Reg. 14,692 (1984). Although many individual pilots have sought exemptions from this rule, and although some pilots seeking exemptions have had outstanding medical records, the FAA has never granted an exemption. *See, e.g., Keating*, 610 F.2d at 613. Despite this rule, the FAA has refused to adopt a similar mandatory retirement age for flight engineers:

After review of all the comments, the FAA is unable to determine that flight engineers should be subject to the same age limits as pilots in command and seconds in command. While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command. In the event of the incapacitation of the pilot in command, the second in command would be expected to assume command of the aircraft.

49 Fed. Reg. 14,694 (1984).

The FAA went on to note that available statistics demonstrate that flight engi-

Western denied both requests, apparently because both employees participated in the company's retirement plan which required all crew members to retire at the age of sixty.¹⁰ Respondent Albert Ron, a career flight engineer, was also forced to retire in 1978 after his sixtieth birthday.¹¹

neers have rarely been a contributing cause or factor in commercial aircraft accidents or incidents. *Id.* Based upon insufficiently available data, the FAA decided not to propose an age beyond which flight engineers should not be permitted to serve. In deciding against imposing a mandatory retirement age for flight engineers, the FAA partially relied upon air carrier accident/incident data provided by the National Transportation Safety Board (NTSB). From 1962 through 1981, out of a total 1,616 accidents/incidents, the NTSB cited a flight engineer as a cause in only thirteen cases and as a factor in only four cases. All flight engineers involved in these accidents/incidents were younger than sixty years of age. *Id.*

¹⁰ *Western Air Lines*, 105 S. Ct. at 2747. Western rejected Captain Criswell's bid solely because he was approaching age sixty and because Western had a policy which required all flight deck personnel to retire at age sixty. His bid was not rejected on the basis that there were no flight engineer openings, or because no openings were contemplated, or for any other reason normally associated with consideration of bids by flight deck personnel. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 388 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *aff'd*, 105 S. Ct. 2743 (1985).

Western also involuntarily retired Captain Starley in July of 1978 when he reached the age of sixty. He had been employed by Western as a pilot or copilot for thirty-two years and had been a DC-10 Captain for the five years prior to his retirement. One year prior to his sixtieth birthday, Captain Starley learned that Western would soon have several positions available for flight engineers on DC-10 aircraft as a result of the acquisition of some new planes. In September of 1977, Captain Starley submitted a bid for a DC-10 flight engineer position after discussing the bid with Western's Vice President for Flight Operations. The next month, Western actually accepted Starley's bid and awarded him the position of flight engineer. In addition, Starley discussed with Western personnel the training normally given by Western to flight engineers who transfer from one position to another. In February of 1978, however, Western informed Starley that the position was no longer available to him, claiming that Western had awarded the position in error, and requiring that Starley retire upon reaching his sixtieth birthday in accordance with the normal retirement policy set forth in its pilot pension plan. *Criswell*, 514 F. Supp. at 388.

The Western official who was responsible for the decision to retire Criswell and Starley stated to the court that the sole basis for the denial of the transfer applications was the provision in the pension plan regarding retirement at age sixty. He also admitted that he had no personal knowledge of any safety rationale for the age sixty retirement of all flight engineers. *Western Air Lines*, 105 S. Ct. at 2747 n.4.

¹¹ *Western Air Lines*, 105 S. Ct. at 2747. In June of 1978, Albert Ron reached the age of sixty. He was a career Second Officer, never choosing to advance to Captain or First Officer. He had worked for Western since 1945, and had served as a flight engineer since 1954. He, as well as Starley, had discussed continued employment with Western's management personnel, and in December of 1977, gave

Criswell, Starley and Ron filed suit against Western on June 6, 1979, alleging that the under-age-sixty qualification for the position of flight engineer violated the Age Discrimination in Employment Act (ADEA).¹² All three plaintiffs sought preliminary injunctions to prevent Western from enforcing its mandatory retirement policy.¹³ The court denied the applications of Criswell and Starley, who were then Captains, but the court granted the application of Ron, the flight engineer.¹⁴ Consequently, Western forced Criswell and Starley to retire shortly after the commencement of the action, but allowed Ron to continue his employment as a DC-10 flight engineer.¹⁵ In September of 1979, the district court denied Western's motion for summary judgment against Criswell and Starley.¹⁶ A jury heard the case in October and November of 1980.¹⁷ The jury returned a verdict for the plaintiffs, finding that Western had willfully violated the ADEA, and awarded damages to Criswell, Starley and Ron.¹⁸ The dis-

Western written notice of his intention to remain in his position as DC-10 flight engineer past his sixtieth birthday. In February of 1978, Ron was informed that, in accordance with the pilot pension plan, he would be retired at age sixty. *Criswell*, 514 F. Supp. at 388.

¹² *Western Air Lines*, 105 S. Ct. at 2747. The ADEA provides in pertinent part:

It shall be unlawful for an employer —

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1982).

¹³ *Criswell*, 514 F. Supp. at 387.

¹⁴ *Id.* The district court did not explain why Ron's application for preliminary injunction was granted while those of Criswell and Starley were denied.

¹⁵ *Id.*

¹⁶ Brief for Respondent at 3, *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985) [hereinafter Brief for Respondent].

¹⁷ *Id.* at 4.

¹⁸ *Criswell*, 514 F. Supp. at 387. The jury awarded damages in the amounts of \$60,393.87, \$52,088.94, and \$5,000.00 to Criswell, Starley and Ron respectively.

strict court also granted equitable relief, finding no merit in Western's "reasonable factors other than age"¹⁹ or "bona fide occupational qualification" (BFOQ)²⁰ defenses.

Western appealed the decision of the district court, but the court of appeals affirmed in all respects.²¹ In particular, the court of appeals rejected Western's argument that the trial court's jury instruction on the BFOQ defense failed to sufficiently defer to the airline's legitimate concern for the safety of its passengers.²² The United States Supreme Court granted certiorari in order to examine the applicability of the BFOQ defense.²³ *Held affirmed*: In an action brought under the ADEA, an age-related employment criterion may qualify as a BFOQ only if the defendant can establish, by a preponderance of the evidence, that the age qualification is reasonably necessary to the normal operation of the particular business. *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985).²⁴

I. LEGAL BACKGROUND

Congress initially enacted the ADEA "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment."²⁵ In enacting the ADEA, Congress clearly

Id. The jury concluded that Western's mandatory retirement at age sixty for flight engineers did not qualify as a BFOQ even though it was purportedly adopted for safety reasons. *Id.* at 398.

¹⁹ *Id.* at 391-93.

²⁰ *Id.* at 389-92.

²¹ *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 559 (9th Cir. 1983).

²² *Id.* at 549-51.

²³ *Western Air Lines*, 105 S. Ct. at 2749.

²⁴ The Supreme Court held that the trial court properly stated the BFOQ jury instructions in light of the ADEA and the airline's interest in protecting public safety. *Id.* at 2754-55.

²⁵ 29 U.S.C. § 621(b) (1978). President Lyndon B. Johnson, in his Older American Message of January 23, 1967, recommended that the ADEA of 1967 be enacted. This message was presented to Congress in February of 1967 by the Secretary of Labor. The President's message, in part, stated that:

Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent

recognized that the sincerity of an employer's belief in stereotypical views of the value of older workers, rather than providing a defense to the ADEA, was a significant part of the employment problem.²⁶ Congress enacted the

average of 850,000 people age 45 and over who are unemployed. Today more than 3/4 of the billion dollars in unemployment insurance is paid each year to workers who are 45 and over. They comprise 27% of all the unemployed. . . . In economic terms, this is a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well being, which joblessness imposes on these citizens and their families. Opportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring.

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 229 (5th Cir. 1976) (quoting 113 CONG. REC. 34,743-44 (1967)).

²⁶ See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Respondents, *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985) [hereinafter Brief for EEOC]. See also *Western Air Lines*, 105 S. Ct. at 2749-51. The congressional findings underlying the purpose of the ADEA are stated in section 2(a) as follows:

The Congress hereby finds and declares that—

- (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
- (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
- (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
- (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a)(1982).

The Director of the Office of Aging of the Department of Health, Education and Welfare, when testifying before the Subcommittee on Employment and Retirement Incomes of the Special Committee on Aging of the United States Senate, stated:

It is one of the anomalies, that every time we go in [sic] an employer and we say to him, 'Tell us who are your most valuable employees,' he will almost invariably name his older employees, the people who have been with the company for many years. But if for some reason or another, because of automation or because of change in techniques, those people are thrown out of work, the older person finds the greater difficulty in being employed.

Tamiami, 531 F.2d at 229 n.11. (citing *Hearings of Subcomm. on Employment and Retirement Incomes of the Special Comm. on Aging*, 88th Cong., 1st Sess. 21 (1963) (state-

ADEA to correct many mistaken, though sincere, beliefs which employers often hold regarding the effects of aging on a person's ability to perform effectively.²⁷ In 1965, the Secretary of Labor reported to Congress that, despite modern medical information, there "is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."²⁸ As a consequence, the ADEA focuses on the objective requirements of the job, and not on the subjective beliefs of the employer.²⁹ The ADEA established as its primary objectives research and education to correct these widespread inaccurate beliefs about the productivity of older workers.³⁰

Despite the ADEA's strong opposition to age discrimination in employment, it does recognize that there are some instances in which age is relevant to job performance.³¹ Although the ADEA normally prohibits mandatory retirement before age seventy, it provides for an exception in the case of a bona fide occupational qualification. The ADEA provides, in pertinent part:

It shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification *reasonably necessary* to the normal operation of the

ment of the Director of the Office of Aging of the Department of the Health, Education and Welfare)).

²⁷ See Brief for EEOC, *supra* note 26. See also *Western Air Lines*, 105 S. Ct. at 2749-51.

²⁸ *Western Air Lines*, 105 S. Ct. at 2749 (quoting Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21 (1965); EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 37 (1981)).

²⁹ See 29 U.S.C. § 623(f)(1) (1982). See also Brief for EEOC, *supra* note 26.

³⁰ See Brief for EEOC, *supra* note 26.

³¹ Age qualifications are relevant to job performance when they are "reasonably necessary to the normal operation of the particular business," or when they are based upon other reasonable factors in addition to age. 29 U.S.C. § 623(f)(1) (1982). See also 113 CONG. REC. 2467 (1967); Brief for EEOC, *supra* note 26.

particular business³²

Although Congress created an exception to permit age distinctions in the case of a BFOQ reasonably necessary to the normal operation of the particular business,³³ Congress intended to narrowly limit the scope and application of this exception.³⁴ The Equal Employment Opportunity Commission (EEOC), which was charged with enforcing the ADEA, also adopted the same narrow construction of the BFOQ defense.³⁵ A narrow construction of the ADEA finds further support in the analogous statutory language

³² 29 U.S.C. § 623(f) (1982) (emphasis added).

³³ *Id.*

³⁴ 29 C.F.R. § 860.102(a) (1986). The Department of Labor defined the scope of the BFOQ defense in the following way:

Whether occupational qualifications will be deemed to be 'bona fide' and 'reasonably necessary to the normal operation of the particular business', will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a [BFOQ] will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

Id. at 860.102(b). Possible BFOQ exceptions include federal statutory and regulatory requirements which provide compulsory age limitations for hiring, or compulsory retirement, without reference to the individual's physical condition, when such conditions are clearly imposed for the safety and convenience of the public.

Id. at 860.102(d). An example of such an exception would be the FAA age-sixty retirement rule for pilots and copilots. *Id.* See *supra* note 9 and accompanying text for an explanation of the FAA's mandatory retirement regulation. The Department of Labor also noted that a BFOQ exception exists in certain special, individual occupational circumstances (e.g., actors required for youthful or elderly characterizations or roles, and persons used to advertise or promote the sale of products designed for, and directed to appeal exclusively to, either youthful or elderly consumers). *Id.* at 860.102(e).

³⁵ 29 C.F.R. § 1625.6 (1986). The EEOC interpreted the BFOQ exception to be very limited in scope and application. Because it is an exception to the ADEA, it must be narrowly construed. *Id.* at 1625.6(a). The EEOC defined the BFOQ requirements in the following way:

An employee asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that

contained in Title VII of the Civil Rights Act of 1964, which also uses the words "reasonably necessary."³⁶ Congress intended the BFOQ, like its Title VII counterpart, to be "an extremely narrow exception to the general prohibition" of age discrimination contained in the ADEA.³⁷

The case history surrounding the enforcement of the ADEA, and the BFOQ defense in particular, also supports a narrow construction of the statutory language. In *Western Air Lines*,³⁸ the Supreme Court wholeheartedly supported the BFOQ defense standard adopted in *Usery v. Tamiami Trail Tours, Inc.* and consistently followed by other lower courts.³⁹ In *Tamiami*, the Fifth Circuit evaluated the merits of a BFOQ defense to a claim of age discrimination.⁴⁰ *Tamiami Trail Tours, Inc.* had a policy of refusing to hire intercity bus drivers over the age of forty on the theory that it was necessary to hire low-risk drivers in order to ensure the safety of its passengers.⁴¹ The

goal and that there is no acceptable alternative that would better advance it or equally advance it with less discriminating impact.

Id. at 1625.6(b). The EEOC also noted that the language of the BFOQ closely tracks that of the BFOQ in Title VII of the Civil Rights Act of 1964. In using similar language, the EEOC concluded that Congress evidently intended the ADEA's BFOQ provision to be interpreted in a similarly narrow manner. Brief for EEOC, *supra* note 26; see *infra* notes 36-37 and accompanying text for further explanation of the similarities between Title VII's BFOQ and the ADEA's BFOQ.

³⁶ 42 U.S.C. § 2000e-2(e)(1) (1964). Title VII states that:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

Id.

³⁷ See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (state of Alabama required that all applicants in employment as "correctional counselor[s]" (prison guards) meet a minimum weight of 120 pounds and a minimum height of five feet two inches. The Court held that although the plaintiff had established a prima facie case of employment discrimination based upon the policy's disproportionate impact on women under Title VII of the Civil Rights Act of 1964, the policy did fall within the narrow ambit of Title VII's BFOQ exception).

³⁸ 105 S. Ct. at 2754.

³⁹ *Tamiami*, 531 F.2d at 236.

⁴⁰ *Id.* at 233-38.

⁴¹ *Id.* at 227-28. *Tamiami Trail Tours, Inc.* carries both passengers and baggage in intrastate and interstate commerce. It operates under certificates of public con-

court ultimately held that if an employer uses age as an employment criterion, it must be "reasonably necessary" to the employer's business.⁴² In reaching this conclusion, the court established a two-prong test. The first prong required the employer to demonstrate that it had set out certain job qualifications for the position in question that were "reasonably necessary" to the essence of the employer's business.⁴³ The second prong required the employer to demonstrate either that everyone over the age

venience and necessity issued by the Interstate Commerce Commission and the Florida Public Service Commission. As a regulated common carrier, Tamiami operates innumerable scheduled runs, sight-seeing tours, and other special pleasure excursions. *Id.* at 227. The drivers' schedules are often unpredictable, demanding, and physically exhaustive. *Id.* at 231. Tamiami attempted to demonstrate that the protection of public safety necessitated a strict hiring policy based upon age. Tamiami introduced statistical evidence indicating a correlation between age and accident frequency. *Id.* at 237. Tamiami also introduced testimony from both medical and transportation experts. Dr. Harold Brandalone, a recognized medical expert in the field of transportation and motor vehicle accidents, testified that while chronological age did not automatically indicate that individuals could not adjust to the rigors of certain bus-driving schedules, medical science could not accurately separate chronological from functional or physiological age. *Id.* He concluded that certain physiological and psychological changes which accompany advancing age decrease a person's ability to drive safely, and that even the most refined medical examinations could not detect all of these changes. *Id.* He expressed an opinion that forty years of age was not an arbitrary hiring cutoff, and that such a policy could validly be used to screen out these physiological and psychological impairments. *Id.*

Dr. Ernest G. Fox, a recognized expert in the transportation field, explained the strains on intercity bus drivers and the importance of the driver's relationship to traffic safety. *Id.* Dr. Cox unequivocally stated that the maximum age qualification was essential to the normal and safe operation of intercity bus lines. *Id.*

The Department of Labor, on the other hand, relied primarily upon the rebuttal testimony of other transportation experts. Dr. Abraham J. Mirkin dismissed any relationship between age and a person's ability to drive a vehicle safely. *Id.* at 238. Kenneth Pierson, Deputy Director of the Bureau of Motor Carrier Safety of the Department of Transportation, testified that Tamiami's physical examination, training program, and road test sufficiently screened out those new applicants of any age who would not be qualified as safe bus drivers. *Id.*

⁴² *Id.* at 236.

⁴³ *Id.* The origins of this first prong can be found in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). In that case Pan American had a female-only qualification for the position of in-flight cabin attendant, alleging that it was a BFOQ under Title VII of the Civil Rights Act of 1964. The district court upheld the qualification as a BFOQ on the basis that airline passengers preferred the "pleasing environment" and the "cosmetic effect" provided by female attendants, qualities which male flight attendants were not able to duplicate. The court of appeals, however, rejected the BFOQ defense,

limit lacked the qualification, or that some individuals over the age limit lacked the qualification and those individuals could not be identified on an individualized basis.⁴⁴ The *Tamiami* court ultimately held that the district court's determination that the bus company's policy of refusing to hire persons over age forty for initial employment as intercity bus drivers was a BFOQ reasonably necessary to the normal operation of its business was not clearly erroneous, and, therefore, affirmed the decision.⁴⁵ The *Tamiami* standard has been followed by every circuit that has addressed this issue.⁴⁶

The effectiveness of the ADEA in preventing age dis-

holding that these considerations were merely "tangential to the essence of the business involved." *Id.* at 389.

⁴⁴ *Tamiami*, 531 F.2d at 235-36. The second prong of this test derives from *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969). Southern Bell had a male-only qualification for the position of switchman, asserting that it was a BFOQ under Title VII of the Civil Rights Act of 1964. The court noted that: "It may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule." *Id.* at 235 n.5. A mere factual basis for believing that individual evaluations cannot practically separate the qualified from the unqualified is insufficient to meet this standard. *Id.*

⁴⁵ *Tamiami*, 531 F.2d at 238.

⁴⁶ See, e.g., *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 753 (7th Cir. 1983) (city policy requiring all "protective service" employees including firefighters to retire at age fifty five did not constitute valid BFOQ under ADEA); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844-45 (6th Cir. 1982) (holding that genuine issue of material fact existed with respect to whether corporate employer's mandatory age-sixty retirement policy for its private corporate pilots was reasonably necessary to essence of its business in accordance with ADEA requirement); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982) (holding that Bureau of Prison's policy of refusing to consider any applicant over the age of thirty-four for jobs within correctional facilities qualified as valid BFOQ within meaning of ADEA); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982) (holding that unsubstantiated assumptions that older people are unable to adequately perform tasks of particular job are condemned by ADEA; and that where an employer merely asserts that job involves safety considerations, absent any evidence as to the effects of age on safe performance, summary judgment on the existence of a BFOQ is inappropriate); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (holding that court must provide plaintiff, police officer applicant, with opportunity to rebut city's affidavit stating reasons in support of thirty-five year age limit for original appointees to police force pursuant to city's asserted BFOQ defense under the ADEA); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977) (holding that age does not constitute BFOQ exception to ADEA with respect to test pilot where employer's evidence related to changes that accompany aging process in general population,

crimination in employment has centered around the first prong of the BFOQ test: the "reasonably necessary" standard. Various parties have argued that the "reasonably necessary" prong of the test set forth in *Tamiami*⁴⁷ actually requires only a "reasonable" basis for imposing age restrictions in employment in order to establish a valid BFOQ defense.⁴⁸ In *Harriss v. Pan American World Airways, Inc.*,⁴⁹ a case brought under Title VII, the court adopted the two-prong test set forth in *Tamiami*⁵⁰ and rejected a less stringent "reasonable" standard in applying the BFOQ.⁵¹ The trial court found that Pan American had formulated "a reasonable general rule" by which it excluded all female flight attendants from work during pregnancy on the ground of their possible disability during an inflight emergency.⁵² The Ninth Circuit, however, stated that:

The flaw in the district court's standard as it applies to the BFOQ defense is that it requires only that the policy be 'reasonable' in light of the safety factor rather than 'reasonably necessary'. . . . Adoption of such a standard here would unnecessarily broaden the BFOQ defense which the Supreme Court characterized in *Dothard v. Rawlinson*, 433 U.S. 321, 334 . . . (1977), as 'an extremely narrow ex-

while employee's evidence tended to show that aging process occurs more slowly and to lesser degree among pilots and that accident rate decreases with age).

⁴⁷ See *supra* notes 41-46 and accompanying text for an explanation of the *Tamiami* BFOQ test.

⁴⁸ See, e.g., *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), *reh'g denied*, 74 F.R.D. 24 (1981).

⁴⁹ *Id.*

⁵⁰ See *supra* notes 41-46 and accompanying text for an explanation of the *Tamiami* BFOQ test.

⁵¹ *Harriss*, 649 F.2d at 676.

⁵² *Id.* The district court specifically determined that passenger safety was the essence of Pan Am's business. *Pan American World Airways*, 437 F. Supp. 413, 434 (1980). The district court recognized a valid BFOQ defense under Title VII based upon the court's findings that it was "highly impractical" to deal with pregnant flight attendants on an individualized basis, and that Pan Am had applied a "reasonable general rule." *Id.* at 435. The district court appeared to reason that the safety factor was so significant that any policy which was "reasonably calculated to further safety" was also "reasonably necessary" in light of Pan Am's strict safety obligations to the public. *Harriss*, 649 F.2d at 670. See also *Criswell*, 709 F.2d at 550.

ception to the general prohibition of discrimination on the basis of sex.⁵³

The *Harriss* court held that applying a "reasonable" standard as opposed to a "reasonably necessary" standard to BFOQ defenses in ADEA cases would significantly weaken the force and effectiveness of the ADEA, contradicting the spirit of the law as set out by Congress and enforced by previous courts.⁵⁴ Although the *Tamiami* test requires employers to demonstrate that age-related employment criteria are "reasonably necessary" to the essence of an employer's business, an employer must also satisfy the second prong of the *Tamiami* BFOQ defense by demonstrating that there is a factual basis for believing that all or substantially all persons over a specified age would be unable to perform the duties of the job safely and efficiently, or that it is impossible or impracticable to distinguish on an individualized basis those older workers who could perform adequately from the older workers who could not.⁵⁵ "Reasonableness" or "factual basis for believing" are acceptable standards to apply only when evaluating the second prong of the *Tamiami* test.⁵⁶ In

⁵³ *Harriss*, 649 F.2d at 677. Despite its rejection of the district court's "reasonable general rule" standard, the Ninth Circuit held that in light of the district court's factual findings regarding the significance of the safety risk involved in allowing pregnant flight attendants to continue flying, Pan Am's pregnancy policy was "reasonably necessary" to passenger safety. *Id.* See *Harriss*, 437 F. Supp. at 420-23 and nn. 10-15.

⁵⁴ *Harriss*, 649 F.2d at 676-77. The mere fact that an employment policy is "reasonable" does not necessarily justify the conclusion that such a policy is "reasonably necessary" to the essence of a particular business. *Id.* at 677. The "reasonably necessary" standard requires a narrower scope and application, and more closely aligns itself with the congressional intent surrounding the adoption of the BFOQ exception. *Id.*

⁵⁵ *Tamiami*, 531 F.2d at 236.

⁵⁶ See, e.g., *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1043 (9th Cir. 1983) (holding that court's maximum hiring age of thirty five for the jobs of deputy sheriff and fire helicopter pilot did not constitute a BFOQ under the ADEA); *County of Santa Barbara*, 666 F.2d at 376; *Harriss*, 649 F.2d at 676; *Tamiami*, 531 F.2d at 236.

One possible reason why the second prong of the BFOQ test is less stringent than the first prong may be that, if the ADEA requires an employer to establish the "reasonable necessity" of an age-related employment criterion to the essence of his business, the ADEA has sufficiently narrowed the scope and application of

sum, in order to establish a valid BFOQ, an employer must, without exception, demonstrate that any age-related employment criterion is "reasonably necessary" to the essence of his business.⁵⁷

II. WESTERN AIR LINES, INC. v. CRISWELL

In *Western Air Lines, Inc. v. Criswell*,⁵⁸ the United States Supreme Court addressed the issue of whether the "reasonably necessary" standard was appropriate in evaluating a BFOQ defense to an age-sixty retirement policy for flight engineers.⁵⁹ Western first defended its policy on the ground that reasonable factors other than age mandated its decision to retire the respondents.⁶⁰ Western also defended by claiming that its policy of retiring flight engineers at age sixty constituted a BFOQ reasonably necessary to the normal operation of its business.⁶¹ Both sides submitted conflicting evidence regarding the nature of the flight engineer's tasks, the physiological and psychological traits required to perform them, and the occurrence of those traits in persons over the age of sixty.⁶² On

the BFOQ defense in accordance with congressional intent. This enables the second prong of the test to focus on the justifications asserted for establishing such an employment policy — in particular — public safety. A mere "factual basis for believing" that certain safety-threatening conditions may go undetected if dealt with on an individual basis will satisfy the second prong of the BFOQ test. See *County of Los Angeles*, 706 F.2d at 1043 (fear of undetected heart disease); *Harris*, 649 F.2d at 675 (fear of pregnant flight attendant's inability to perform safely and efficiently during an unexpected emergency).

⁵⁷ See *supra* notes 41-56 and accompanying text for a thorough discussion of the "reasonably necessary" standard.

⁵⁸ 105 S. Ct. 2743.

⁵⁹ *Id.* at 2747.

⁶⁰ *Criswell*, 514 F. Supp. at 388. Western claimed that it based its rejection of the *Criswell* and *Starley* bids upon the neutral operation of a bona fide seniority system which permitted downbidding (transferring from Captain to First or Second Officer) only in very limited and exceptional circumstances. See *id.* at 392-93 for a thorough discussion of the downbidding issue. Based upon the evidence presented, the district court rejected Western's argument that its seniority system and downbidding policy constituted reasonable factors other than age which could justify Western's mandatory retirement policy for flight engineers. *Id.*

⁶¹ *Id.* at 388.

⁶² *Id.* at 389. Western's expert witness, a former FAA Deputy Federal Air Surgeon, expressed concern with the possibility of a cardiovascular event such as a

appeal, however, Western Air Lines specifically challenged the trial court's jury instruction on the BFOQ defense, claiming that it was insufficiently deferential to the airline's legitimate concern for the safety of its passengers. Instead, Western claimed that a "rational basis in fact" rather than "reasonably necessary" standard should have been used in evaluating the first prong of the BFOQ defense.⁶³

In reaching its decision, the Supreme Court first examined whether the trial court's standards for raising the BFOQ defense properly reflected the requirements of the ADEA⁶⁴ and whether those requirements were consistent with the safety responsibilities of public carriers.⁶⁵ In doing so, the Court analyzed the legislative history and prior case law surrounding the ADEA and the BFOQ exception.⁶⁶ The Court then addressed the issue of whether the

heart attack. He testified that "with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur." *Id.* That same expert, however, also testified that during the period that he was the Deputy Federal Air Surgeon, he never recommended or advocated that the FAA age-sixty rule be applied to flight engineers. *Id.* at 390. The medical experts, on the other hand, testified that physiological deterioration is caused by disease, not aging, and that "it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to continue to fly." *Id.* at 389. The district court went on to state:

The record also reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis. Pilots who have been grounded because of alcoholism or cardiovascular disease have been recertified by the FAA and allowed to resume flying. Pilots who were unable to pass the necessary examination to maintain their FAA first class medical certificates, but who continued to qualify for second class medical certificates were allowed to 'downgrade' from pilot to [flight engineer]. There is nothing in the record to indicate that these flight deck crew members are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated.

Id. at 390.

⁶³ *Western Air Lines*, 105 S. Ct. at 2749. See also *Criswell*, 709 F.2d at 549-51.

⁶⁴ See *infra* notes 69-74 and accompanying text for a discussion of the trial court's presentation of the issues in *Western Air Lines*.

⁶⁵ *Id.*

⁶⁶ See *infra* notes 75-84 and accompanying text for a discussion of the legislative history and intent of the ADEA and BFOQ exception.

statutory language "reasonably necessary" should be specifically enumerated in the jury charge.⁶⁷ Finally, the Supreme Court addressed the issue of whether a "rational basis in fact" standard is sufficient for establishing a BFOQ defense.⁶⁸

The primary questions presented to the Court were whether the trial court's BFOQ standards properly reflected the requirements of the ADEA, and whether those requirements were consistent with the safety responsibilities of public carriers.⁶⁹ The trial judge instructed the jury that the defendant must establish, by a preponderance of the evidence, that the age-related employment criterion was reasonably necessary to the normal operation of the defendant's business in order for the defendant to prevail on its BFOQ defense.⁷⁰

Western argued that, because the potential for loss of life as a result of aircraft accidents was so great, the Court

⁶⁷ See *infra* notes 85-90 and accompanying text for a discussion of appropriate jury instructions in BFOQ cases.

⁶⁸ See *infra* notes 91-96 and accompanying text for a discussion of the "rational basis in fact" standard.

⁶⁹ Brief for EEOC, *supra* note 26.

⁷⁰ *Criswell*, 514 F. Supp. at 389-90 n.7. The trial judge instructed the jury as follows:

BFOQ Defense. If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a 'bona fide occupational qualification' for its Second Officers (flight engineers). This defense is usually abbreviated 'BFOQ'. The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.

The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.

One method by which defendant Western may establish a BFOQ in this case is to prove

- (1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
- (2) that some Second Officers (flight engineers) over age 60 possess traits of a physiological, or other nature which preclude safe and effi-

must afford commercial airlines a degree of flexibility and discretion in setting job qualifications for employees in positions affecting passenger safety.⁷¹ Western argued that the jury instructions failed to adequately recognize this overriding interest in safety.⁷² Western proposed instructions which would have told the jury that a mere "rational basis in fact" was sufficient to justify an age-related BFOQ.⁷³ In essence, Western objected to the inclusion of the statutory language "reasonably necessary to the normal operation of a particular business" in the jury instruction on the ground that such an instruction failed to properly recognize Western's interest in protecting public safety.⁷⁴

In reaching its decision, the Supreme Court analyzed

cient job performance that cannot be ascertained by means other than knowing their age.

In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

Id.

⁷¹ Brief for Petitioner, *supra* note 1. Western argued that the federal "duty . . . to perform Western's services with the highest possible degree of safety in the public interest" required the court to exercise great deference toward any employment policy designed to promulgate flight safety standards. *Id.* See 49 U.S.C. § 1421(b)(1982).

⁷² Brief for Petitioner, *supra* note 1. Western challenged the trial court's BFOQ instruction on several grounds. First, Western alleged that the charge failed to even mention the deference due to Western's selection of job qualifications for the position of flight engineer that are reasonable in light of the safety risks. *Id.* Second, Western objected that the charge placed the burden of proof upon Western to establish that it is impossible or impracticable to determine, on an individual basis, which persons over age sixty do and do not possess the qualifications Western has determined are necessary for the safe and efficient operation of the duties of flight engineer. *Id.* Western also alleged that the jury charge failed to allow it to conduct its operations with the highest degree of safety possible. *Id.*

⁷³ Brief for Respondent, *supra* note 16, at 5. Western proposed jury instructions which would have enabled the jury (1) to consider that the underlying rationale of the FAA age-sixty retirement rule for pilots constitutes a rational basis in fact for a BFOQ, and to find for defendant Western on the BFOQ issue without considering any other evidence; and (2) to disregard medical testimony and simply decide whether an airline such as Western with its duty to maintain the highest possible safety for its passengers had on the basis of the totality of that evidence a rational basis in fact for believing that use of flight engineers over age sixty would increase the risk of harm or death to any one of its passengers. *Id.*

⁷⁴ Brief for Respondent, *supra* note 16, at 5-6.

the legislative history behind the enactment of the ADEA and the BFOQ exception.⁷⁵ The Court noted that, "[t]hroughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual."⁷⁶ Additionally, the Court recognized that the BFOQ exception to age-related employment criteria has only "limited scope and application" and "must be construed narrowly."⁷⁷ The Court, citing *Dothard*, stated that:

The restrictive language of the statute, and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that, like its Title VII counterpart, the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA.⁷⁸

In analyzing prior case law regarding the enforcement of the BFOQ exception, the Court, in a unanimous decision,⁷⁹ analyzed the *Tamiami*⁸⁰ rule and adopted it wholeheartedly,⁸¹ concluding that Western's age-sixty mandatory retirement of flight engineers was in violation of the ADEA and did not qualify as a BFOQ exception.⁸² In order for Western's retirement policy to have qualified as a BFOQ, it would have had to be (1) "reasonably necessary" to further the overriding interest in public safety, and (2) (a) the employer must have had reasonable cause to believe (i.e., a factual basis for believing) that all or substantially all persons over the age qualification would be unable to perform safely and efficiently in light of the du-

⁷⁵ *Western Air Lines*, 105 S. Ct. at 2749-51.

⁷⁶ *Id.* at 2749. The court noted "that there is a wide range of individual physical ability regardless of age," emphasizing that many older American workers perform at levels equal or superior to the levels of their younger counterparts. *Id.*

⁷⁷ *Id.* at 2750. See 29 C.F.R. § 860.102(b)(1986); 29 C.F.R. § 1625.6 (1986).

⁷⁸ *Western Air Lines*, 105 S. Ct. at 2751 (citing *Dothard*, 433 U.S. at 334).

⁷⁹ Justice Powell did not participate in the decision. *Id.* at 2756.

⁸⁰ See *supra* note 39-46 and accompanying text for a discussion of the *Tamiami* decision.

⁸¹ *Western Air Lines*, 105 S. Ct. at 2753.

⁸² *Id.* at 2756.

ties involved or (b) the employer must have established that it is impossible or highly impractical to deal with older employees on an individualized basis.⁸³ The Court concluded that:

Considering the narrow language of the BFOQ exception, the parallel treatment of such questions under Title VII, and the uniform application of the standard by the federal courts, the EEOC and Congress, we conclude that this two-part inquiry properly identifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety.⁸⁴

At trial Western preserved an objection to any jury instruction which mirrored the language of the *Tamiami* two-part inquiry, claiming that any instruction including the phrase "reasonably necessary" to the normal operation of the employer's business confuses the jury and is irrelevant to their deliberations.⁸⁵ The court of appeals rejected Western's proposed instruction that would have allowed the airline to succeed on a BFOQ defense merely by establishing a "rational basis in fact" for believing that the use of flight engineers over age sixty would increase the likelihood of risk to its passengers.⁸⁶ In argument before the Supreme Court, however, Western acknowledged that the *Tamiami* standard identifies the relevant general inquiries that must be made in evaluating the BFOQ defense, but Western claimed that the trial court's instructions were, nevertheless, insufficiently protective of public safety.⁸⁷ The Supreme Court, however, rejected

⁸³ *Id.* at 2751-52 (citing *Tamiami*, 531 F.2d at 235).

⁸⁴ *Id.* at 2753. The Court recognized that age qualifications must be more than merely convenient or reasonably related to some public safety interest. The age qualifications must be "reasonably necessary" to the essence of the particular business. An age-related employment policy satisfies this "reasonably necessary" standard only when the employer is *compelled* to rely on age as a proxy for the safety-related job qualifications. *Id.* at 2751.

⁸⁵ *Id.* See *supra* note 73 and accompanying text.

⁸⁶ *Criswell*, 709 F.2d at 549-51.

⁸⁷ *Western Air Lines*, 105 S. Ct. at 2753. Western also argued that the airline's public safety interest requires that flight engineers meet the same stringent qualifications as pilots, and that, therefore, the Court should extend the FAA age-sixty retirement rule to flight engineers. *Id.* at 2754. See *supra* note 9 and accompany-

this proposal, stating that Western's public safety argument was:

plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness.⁸⁸

The Court reasoned that, in adopting the BFOQ standards, Congress did not ignore the public interest in

ing text for a discussion of the FAA retirement rule. The Court rejected this argument, stating that the extent to which the FAA's policy for pilots should also apply to flight engineers depends upon the weight of the evidence supporting its safety rationale and the congruity between the positions of pilot and flight engineer. *Western Air Lines*, 105 S. Ct. at 2754. The Court held that the evidence clearly established that the FAA, Western, and other airlines all recognized the less rigorous nature of qualifications necessary for the position of flight engineer. *Id.* Western, for instance, allows Captains under the age of sixty, who for medical reasons cannot continue flying as a pilot or copilot, to downbid to the position of flight engineer. *Criswell*, 709 F.2d at 552. In addition, over half the pilots flying in the United States are flying for major airlines which do not require flight engineers to retire at the age of sixty, and there are over 200 such flight engineers currently flying on widebodied aircraft. *Id.*

The FAA, in refusing to adopt a mandatory retirement age for flight engineers, also noted the differences between the duties and responsibilities of pilots and flight engineers. 49 Fed. Reg. 14,693-95 (1984). Flight engineers are subject to the same risks of diminishing health and performance to which pilots are subject. *Id.* at 14,693. Although flight engineers perform many important tasks (i.e., monitoring the electrical, fuel, pneumatic, and hydraulic systems), they are not as critical to the safety of the airplane as are pilots. *Id.* at 14,693-94. Flight engineers serve in a secondary support position. They generally never operate the primary controls of the aircraft. Due to their physical location in the cockpit, they are unable to make substantial contributions to the critical, complex tasks of flight control. Flight engineers' duties require considerably less skill and reaction time than the duties of pilots. *Id.* at 14,694. Increasingly, various planes no longer require the use of flight engineers. *Id.* The FAA found that the evidence available did not justify imposing an age-sixty limit on the position of flight engineer. *Id.*

⁸⁸ *Western Air Lines*, 105 S. Ct. at 2754. The Court reasoned that when an employer establishes that an age-related job qualification has been carefully designed to respond to documented concerns for public safety, the "unreasonably necessary" standard will not unduly burden the employer in his efforts to persuade the trier of fact that the qualification constitutes a valid BFOQ. *Id.* The Court noted that "[t]he uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close call." *Id.* A "reasonably necessary" standard does not require the employer to establish with certainty that there is a risk of an airline accident because such a standard would mandate permitting the risk until a tragic accident did eventually occur. *Id.*

safety.⁸⁹ The Court found that the “reasonably necessary” test adequately reflects such an interest since, in light of the airlines’ interest in safety, it would be “reasonably necessary” for an airline to err on the side of caution in cases such as this.⁹⁰

The Supreme Court also addressed the issue of whether a “rational basis in fact” standard sufficiently establishes a BFOQ.⁹¹ The Court concluded that because such a standard deviates significantly from the meaning conveyed by the statutory phrase “reasonably necessary,” a “rational basis in fact” standard is an inappropriate basis for applying age-related employment criterion and, consequently, such a standard was properly rejected by the trial court defense.⁹² The Court further noted that the “rational basis” standard does not comport with the preference for an individual evaluation of an employee’s merits as expressed in the language and legislative history of the ADEA.⁹³ The Court recognized that the purpose of the ADEA is to require employers to evaluate employees on their merits rather than their age,⁹⁴ and the purpose of the BFOQ is to provide only a limited exception to this general rule by requiring employers to establish that any age-related employment standards are “reasonably necessary to the normal operation of the particular business.”⁹⁵ The Court concluded that the application of any standard

⁸⁹ *Id.*

⁹⁰ *Id.* The Court concluded that:

When the employer’s argument has a credible basis in the record, it is difficult to believe that a jury of lay persons—many of whom no doubt have flown or could expect to fly on commercial air carriers—would not defer in a close case to the airline’s judgment. Since the instructions in this case would not have prevented the airline from raising this contention to the jury, we are satisfied that the verdict is a consequence of a defect in Western’s proof rather than a defect in the trial court’s instructions.

Id.

⁹¹ *Id.* at 2755.

⁹² *Id.*

⁹³ *Id.* at 2756.

⁹⁴ *Id.*

⁹⁵ *Id.*

less stringent than the "reasonably necessary" standard would undermine the intent of the legislature in adopting the ADEA and would abandon the path set forth by previous case law in enforcing the ADEA in general, and the BFOQ defense in particular.⁹⁶

III. CONCLUSION

In *Western Air Lines* the Supreme Court manifested its recognition of and support for the legislative intent behind the adoption of the ADEA. If the Court had replaced the "reasonably necessary" standard with a milder "factual basis for believing" criterion, the new criterion would have greatly circumscribed the effectiveness of the ADEA in combatting age discrimination. The Supreme Court demonstrated its intention to accept a BFOQ defense only in very limited and exceptional circumstances: when the age qualification is "reasonably necessary" to an employer's business, and when individualized testing would be highly impractical. Rather than changing the "reasonably necessary" standard previously utilized by the lower courts, the Supreme Court fully endorsed it.

The *Western Air Lines* decision clearly and unequivocally emphasized the objective, rather than subjective, nature of the BFOQ test. If the Court had applied a subjective standard (i.e., "factual basis for believing"), as Western desired, the decision would have greatly minimized the beneficial effects of the ADEA and would have conflicted with the purpose of the ADEA's enactment—to overcome the erroneous subjective beliefs held by many employers regarding the productivity level of older workers. As a result of the decision, the airline industry, as well as other industries in general, must carefully scrutinize all age-based qualifications in light of a "reasonably necessary" standard. In concluding its opinion, the Court stated:

⁹⁶ *Id.* The Court recognized that, while it may be "rational" to require all employees to retire at any age less than 70, that result would be inconsistent with Congress' direction that employers must justify the rationale for the age chosen. *Id.*

When an employee covered by the Act is able to point to reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70, when the employer itself relies on individualized testing in similar circumstances, and when the administrative agency with primary responsibility for maintaining airline safety has determined that individualized testing is not impractical for the relevant position, the employer's attempt to justify its decision on the basis of the contrary opinion of experts—solicited for the purposes of litigation—is hardly convincing on any objective standard short of complete deference. Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision.⁹⁷

As a result of the Supreme Court's wholehearted endorsement of the "reasonably necessary" objective standard for evaluating a BFOQ exception to age-based hiring criteria, employers face a very difficult challenge in justifying a below-age-seventy mandatory retirement policy.

Marie D. DiSante

⁹⁷ *Id.*

