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INTRODUCTION

THE YEAR 1990 has been marked by the usual assortment of court decisions, some lucid and some abstruse, on the various issues that make aviation law constantly interesting. This extensive survey covers those 1990 and late 1989 aviation law decisions that are considered most significant, along with some other decisions that may indirectly affect aviation law.

I. GENERAL LEGAL ISSUES

A. *In Personam Jurisdiction*

In *Charlie Fowler Evangelistic Association v. Cessna Aircraft, Inc.*,[1] the plaintiff Association instituted a diversity action, in a Florida federal district court, against the Cessna Aircraft Company and Dean Aircraft Service, Inc. (Dean), a Mississippi airplane repair facility, seeking damages arising from the crash of the plaintiffs' Cessna aircraft in Florida.

Charles A. Fowler flew the Association's Cessna airplane on a business trip from Florida to Key Field in Meridian, Mississippi. While preparing the aircraft for the return trip, Fowler discovered that the starboard engine would not start. Fowler was referred to Dean, and Dean repaired the engine so that it would operate. On the return trip, the starboard engine quit while Fowler was attempting to land at Bay County Airport in Panama City, Florida, and the Cessna crashed. The plaintiff alleged that Dean's negligent repairs caused the crash.

Dean was a Mississippi corporation with its principal place of business in Mississippi. It had no offices, employees, or agents in Florida and did not conduct any business in that state. Nevertheless, the plaintiff contended that

[1] 911 F.2d 1564 (11th Cir. 1990).

Dean was subject to personal jurisdiction in Florida because Fowler told Dean that he was from Florida and that the aircraft was heading back to that state and also because Dean was listed in "The Aviation Telephone Directory" for the Southeastern and Gulf States, which includes Mississippi and Florida.

The district court dismissed the action against Dean for lack of personal jurisdiction. The district court held that these two contacts were not enough to show that Dean "purposely directed" activities at Florida residents. Plaintiff appealed Dean's dismissal.[2]

The Eleventh Circuit affirmed the dismissal of Dean. In so doing, the court noted that Dean's limited contacts with Florida were principally the result of Fowler's actions and stated that, "unilateral acts by the plaintiff cannot supply the necessary minimum contacts, or show that a defendant has purposefully availed itself of the benefits and protections of the forum state's laws."[3]

In *Macario v. Pratt & Whitney Canada, Inc. and Beech Aircraft Corp.*,[4] plaintiff instituted a federal diversity action in Pennsylvania against Pratt & Whitney (Pratt) for breach of contract and against Beech Aircraft (Beech) for intentional interference with contractual relations. The plaintiff was the administrator for the estate of Matthew Macario, who was killed when his Beech King Air crashed in Cedarville, New Jersey.

This action was the third commenced against Pratt as the result of the crash. The first lawsuit, a wrongful death action, was settled after Pratt agreed to pay plaintiff $6,000,000 and to issue a service bulletin informing owners of aircraft equipped with PT-6 engines of the potential for engine rollback due to contamination of the automatic fuel control, along with the availability of filters that would prevent or reduce the likelihood of such contamination. In the present action, the plaintiff claimed that

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[2] *Id.*

[3] *Id.* at 1566.

[4] No. 90-3906 (E.D. Pa. Sept. 6, 1990) (LEXIS, Genfed library, Dist File).

Pratt had breached its obligation to issue a service bulletin.[5] Plaintiff also alleged that Beech had persuaded Pratt to renege on the settlement agreement and to refrain from issuing the service bulletin by threatening that Beech would inform owners of Beech aircraft equipped with PT-6 engines that the service bulletin would impair the operation of the aircraft.

Beech moved to dismiss, claiming that the court lacked personal jurisdiction over it because it did not do business in Pennsylvania. Beech claimed: (1) it was a Delaware corporation with its principal place of business in Wichita, Kansas; (2) it was not authorized, registered, or qualified to do business in any state other than Kansas and Colorado; and (3) it did not maintain any place of business in Pennsylvania or have any officers or employees in Pennsylvania. Beech also argued that the sale of its airplanes and parts is negotiated, completed, and performed in Kansas and that the delivery of all airplanes and parts occurs there. Finally, Beech contended that any contacts that it had with Pratt regarding the service bulletin in question occurred outside of Pennsylvania.

The plaintiff argued that the court had both specific and general jurisdiction over Beech because Beech did business in Pennsylvania and because the cause of action arose, or the harm occurred, in Pennsylvania. In support of his position, the plaintiff submitted several affidavits showing that Beech had continuous and substantial contacts with Pennsylvania sufficient to bring him within Pennsylvania's long-arm jurisdiction.

The district court agreed with the plaintiff, and denied Beech's motion to dismiss. The court held that it was not necessary to determine whether the court had "general" jurisdiction over Beech because there were sufficient facts to support "specific" jurisdiction. The court stated:

> The essence of plaintiff's (third) lawsuit is that Pratt has breached a settlement agreement entered into before this

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[5] *Id.* at 2.

> court in the first lawsuit, and Beech acted improperly in inducing Pratt to breach that agreement. The settlement agreement was made in the Commonwealth of Pennsylvania, the harm caused by Beech's alleged inducement of Pratt to breach that contract occurred in Pennsylvania and affects the plaintiff, a citizen of Pennsylvania. Accordingly, this Court clearly has personal jurisdiction over Beech pursuant to 42 Pa. C.S.A. § 5322 [Pennsylvania's long-arm statute] if Beech has minimum contacts with this Commonwealth.[6]

The court found that Beech had "minimum contacts" with Pennsylvania because the plaintiff's affidavits established that Beech sent its employees and aircraft into Pennsylvania for sales demonstrations and maintained an aviation center in Pennsylvania that sold and serviced Beech aircraft. Moreover, Beech admitted in an affidavit submitted by one of its officers that Beech had done business in Pennsylvania for over ten years. Based on these facts, the court determined that submitting Beech to personal jurisdiction in Pennsylvania would not offend due process.[7]

In *Nolan v. Boeing Co.*,[8] an action arising out of an accident in a England, the district court for the Eastern District of Louisiana addressed the issue of whether a state could assert personal jurisdiction over a foreign corporation on the basis that it held the Federal Aviation Administration (FAA) type certificate for the engine, which was also used in the United States.

The plaintiff in this wrongful death action was the personal representative of a foreign passenger killed in the crash of a British Midland Airways B-737-400 at Kegworth, England in January, 1989. The aircraft was on a domestic flight between two cities in the United Kingdom, and no U.S. passengers were on board. The Boeing aircraft involved in the accident was equipped with CFM-

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[6] *Id.* at 7-8.

[7] *Id.* at 8-9.

[8] 736 F. Supp. 120 (E.D. La. 1990).

56 series engines that were manufactured jointly by the General Electric Company (G.E.) and SNECMA, a French aircraft engine manufacturer. General Electric and SNECMA marketed the engine to Boeing through a jointly owned company known as CFM International, Inc. (CFMI Inc.).

The action was instituted in Louisiana state court against G.E. and Boeing. There was diversity of citizenship between plaintiff and these defendants, so, in an attempt to prevent removal of the action to a federal court, the plaintiff named as an additional defendant CFM International, S.A. (CFMI, S.A.), a French corporation that held the FAA Type Certificate for the CFM56-3C engines that were installed on the accident aircraft. The plaintiff contended that CFMI, S.A. was subject to personal jurisdiction in Louisiana, and was thus a proper defendant, because of its status and responsibilities as the holder of the FAA Type Certificate for the CFM56-3C engine. Arguably, the presence of CFMI, S.A. as a defendant in the lawsuit destroyed federal subject matter jurisdiction over the action because both the plaintiff and CFMI, S.A. were aliens. The defendants nevertheless removed the case to federal court on the ground that CFMI, S.A. had been fraudulently joined in that it was not subject to jurisdiction in Louisiana.

After the case was removed, CFMI, S.A. moved to dismiss for lack of personal jurisdiction because it did not conduct business in Louisiana. CFMI, S.A. contended that the mere fact that it was the FAA Type Certificate holder for the CFM56-3C engine was insufficient to subject it to personal jurisdiction in Louisiana.

After finding that CFMI, S.A. had absolutely no contacts with the State of Louisiana, the district court held that CFMI, S.A. was not subject to personal jurisdiction in Louisiana and granted the motion to dismiss. In dismissing CFMI, S.A. from the action, the court specifically noted that, by itself, the holding of an FAA Type Certificate is insufficient to subject the certificate holder to per-

sonal jurisdiction in a particular U.S. forum. Moreover, the court stated that a defendant must have some sort of presence in the forum in order to be subject to jurisdiction, either by doing business in the forum, by directing a product to the forum, or by such other conduct that indicates that the defendant purposefully availed himself of a forum's benefits and privileges.[9]

In *Cronin v. Eipper Aircraft, Inc.*,[10] a Rhode Island federal district court was faced with the issue of whether a successor corporation, which did not transact any business in the forum state (Rhode Island), could be subjected to personal jurisdiction in the forum because its predecessor purposely availed itself of doing business there. The case was pending before a U.S. Magistrate for Findings and Recommendation pursuant to 28 U.S.C. § 636.

In July, 1984, Walter Cronin purchased an Eipper Quicksilver MX ultra-light aircraft manufactured by defendant Eipper Aircraft, Inc. Cronin purchased the aircraft from a local authorized dealer in Rhode Island. In September, 1986, Cronin was operating the aircraft at an altitude of 3000 feet when the fabric of one of the wings tore and gave way, causing him to lose control and crash. Cronin and his spouse subsequently brought a personal injury action against Eipper, RPM Industries, and Quicksilver Enterprises, Inc. The plaintiffs asserted claims for product liability, negligence, and breach of contract.

At the time the plaintiffs filed suit, Eipper was a defunct Texas corporation that had liquidated its assets in 1985 pursuant to provisions of the Bankruptcy Code. Eipper maintained its principal place of business in Temecula, California. Defendant RPM was a Nevada corporation formed in 1985, with its principal place of business in Temecula, California. Defendant Quicksilver was a Delaware corporation formed in 1988, with its principal place of business in California. Quicksilver purchased all of RPM's stock after its formation and thus became RPM's

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[9] *Id.* at 127-28.

[10] No. 89-04838 (D. R.I. July 17, 1990) (LEXIS, Genfed library, Dist file).

parent. Lyle Byrum, the president of Eipper, was, at the time of the plaintiffs' suit, the president of both RPM and Quicksilver. Bruce Wilbanks, the majority stockholder of Eipper, purchased Eipper's assets following bankruptcy and continued to use these assets to manufacture the same ultra-light aircraft with Byrum through corporations that were eventually merged into RPM. Based on these facts, the plaintiffs alleged that Quicksilver and RPM continued to use the assets acquired from the Eipper bankruptcy in the continuous manufacture of ultra-light aircraft and were thus liable as successors-in-interest to Eipper.

The three defendants filed a joint motion to dismiss for lack of personal jurisdiction. In support of their motion, the defendants argued that Eipper was no longer in existence, and that RPM and Quicksilver lacked sufficient "minimum contacts" to support the assertion of personal jurisdiction over them because they never transacted any business in Rhode Island.

The Magistrate rejected the defendants' arguments that they were not subject to personal jurisdiction in Rhode Island. In reaching this conclusion, the Magistrate first found that, based on the facts, RPM was the "alter-ego" of its parent, Quicksilver. As such, the corporations were the same corporation for jurisdictional purposes. The Magistrate then determined that, despite the general rule that a corporation acquiring all or part of the assets of another corporation does not assume the predecessor's liabilities, the facts of this case came within both the "product-line" and the "mere continuation" exceptions to this rule. The Magistrate determined that, because RPM and Quicksilver continued to manufacture the same ultra-light aircraft as Eipper, using the same designs, equipment, advertising, and research and development as Eipper, these companies were essentially the same company as Eipper. As a result, the Magistrate ruled that personal jurisdiction existed over RPM and Quicksilver as the successors-in-in-

terest to Eipper.[11]

B. *Subject Matter Jurisdiction*

In *Von Anhalt v. Delta Airlines Inc.*,[12] the Princess Zsa Zsa Von Anhalt (a/k/a Zsa Zsa Gabor)(Gabor) brought a state court action for negligence, defamation, and assault and battery against Delta Airlines, Inc. The case was removed to federal court by Delta on the basis of diversity of citizenship.

The lawsuit arose out of another kind of removal, the involuntary removal of the plaintiff from Delta Flight 462, which originated in Los Angeles, California, and terminated in West Palm Beach, Florida, on January 6, 1989. After she refused to allow a flight attendant to stow away her carry-on bag, Gabor was escorted off the aircraft during an intermediate stop in Atlanta, Georgia, and denied permission to reboard. Gabor sought compensatory and punitive damages from Delta in excess of $10,000,000 for her alleged wrongful ejectment.

Following removal of the action to federal court, Delta moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction. Delta argued that plaintiff's state law claims were preempted by federal law, particularly section 1305(a)(1) of the Federal Aviation Act. Section 1305(a)(1) provides, in relevant part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.[13]

Based on the "savings clause" of the Federal Aviation Act, 49 U.S. App. § 1506, plaintiff argued that her claims were not preempted.[14]

After reviewing the law on the issue of federal preemp-

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[11] *Id.* at 13.
[12] 735 F. Supp. 1030 (S.D. Fla. 1990).
[13] Federal Aviation Act, 49 U.S.C. app. § 1305(a)(1) (1988).
[14] *Von Anhalt*, 735 F. Supp. at 1031.

tion, the district court held that § 1305(a) "unmistakably manifests the intent of Congress to preempt such state common law tort claims as related to the services of aircraft and the safety of passengers." Rejecting plaintiff's argument that her claims fell within the Federal Aviation Act's "savings clause," the court concluded that the clause only saves state law remedies and not state law claims. However, in dismissing the plaintiff's complaint, the court noted that the plaintiff could re-assert a claim against Delta under 49 U.S.C. App. § 1511(a), challenging the reasonableness of Delta's actions.[15]

In *Halmos v. Pan American World Airways*,[16] the plaintiff, a New York citizen, instituted a personal injury diversity action in a New York federal court against Pan American World Airways (Pan Am). The plaintiff alleged that he became ill due to the food served by Pan Am on a flight from New York to Paris.

Pan Am moved to dismiss the complaint for lack of subject matter jurisdiction. Pan Am argued that, since both the plaintiff and Pan Am were citizens of New York (Pan Am maintains its principal place of business in New York City), complete diversity was lacking.

The district court agreed and dismissed the complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1332. In so doing, the court restated the general rule that, "[w]here there is not complete diversity, the court does not have subject matter jurisdiction over the action, and the complaint must be dismissed."[17]

In *RLI Insurance Co. v. United States Aviation Underwriters*,[18] RLI Insurance Company (RLI) brought a declaratory judgment action against United States Aviation Underwriters, Inc. (USAU), as Aviation Manager for the United States Aviation Insurance Group (USAIG), arising out of an aviation accident.

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[15] *Id.*
[16] 727 F. Supp. 122 (S.D.N.Y. 1989).
[17] *Id.* at 124-25.
[18] 739 F. Supp. 1219 (N.D. Ill. 1990).

In September, 1989, a small aircraft piloted by John Haag crashed, killing Haag and his five passengers. USAIG insured the owner of the aircraft, the owner's employees, and permissive users of the aircraft. Haag's employer, Air Sinclair, Inc., was insured by RLI. RLI filed the declaratory judgment action in order to determine the priority of coverage with respect to wrongful death claims resulting from the crash.

The issue of the court's subject matter jurisdiction was first raised by USAU during a status conference. As a result, the court requested the parties to submit memoranda addressing the issue. RLI argued that the court possessed jurisdiction based upon diversity of citizenship of the named parties under 28 U.S.C. § 1332. RLI claimed that it was a citizen of Illinois and that USAU was a New York citizen; therefore, diversity existed.

USAU argued that USAIG, and not USAU, was the real party in interest because USAU was only the managing entity for USAIG, an unincorporated association of insurance companies. USAU argued that diversity was lacking because two of the member companies of USAIG were incorporated and had their principal place of business in Illinois. In support of its argument, USAU relied upon the rule that the citizenship of each and every member of an unincorporated association must be considered for diversity purposes.

Based upon an analysis of the insurance policy issued by USAIG, the district court determined that USAIG was the real party in interest and that, therefore, the citizenship of USAIG, not USAU, was controlling. The court stated:

> From the facts on the record, it is obvious that USAIG, and not USAU, is the entity that actually issued the insurance policy in question. In fact, the plain language of the policy indicates that, despite the fact that USAU plays a role in the administration of the policy, the obligation to pay or perform under the contract rests solely with USAIG. Therefore, we find that USAIG is a real party in interest whose citizenship must be considered for jurisdic-

tional purposes.[19]

Because the court deemed it necessary to consider the citizenship of USAIG, the court held that diversity of citizenship was lacking and dismissed RLI's claim.[20]

In *Grassi v. Ciba-Geigy, Ltd.*,[21] the Fifth Circuit addressed the issue of whether a federal district court, in considering a motion to remand, may disregard a partial assignment made for the purpose of destroying diversity jurisdiction.

The plaintiffs obtained a default judgment in a Texas state court against Ciba-Geigy PLC (Ciba-PLC) for personal injuries they sustained following the release of formaldehyde gas from urethane foam insulation, manufactured by Ciba-PLC, that had been installed in their home. After plaintiffs unsuccessfully tried to enforce the judgment against Ciba-PLC, the plaintiffs instituted a collection action in a Texas state court against Ciba-PLC's parent corporation, Ciba-Geigy, Ltd., a Swiss corporation. The plaintiffs alleged that Ciba-Geigy, Ltd. was liable to plaintiffs because it was the "alter-ego" of Ciba-PLC. On the same day that plaintiffs commenced the action against Ciba-Geigy, Ltd., plaintiffs had assigned a 2% interest in their claim to IRI Internacional Limitada (IRI), a Costa Rica corporation with its principal place of business in San Jose, Costa Rica. The plaintiffs alleged that the assignment was in consideration for investigative and collection work to be performed by IRI in relation to the judgment and award.

Ciba-Geigy removed the plaintiff's collection action to federal court, alleging diversity of citizenship between the plaintiffs and Ciba-Geigy. The plaintiffs subsequently filed a motion to remand. Plaintiffs alleged that IRI's interest in the suit destroyed diversity jurisdiction because complete diversity is lacking where aliens are parties on both sides of the litigation. The district court denied the motion to remand, finding that IRI had no legitimate and

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[19] *Id.* at 1221.

[20] *Id.*

[21] 894 F.2d 181 (5th Cir. 1990).

independent interest in the litigation because the assignment was essentially designed to prevent removal of the action to federal court.[22] The plaintiffs sought an immediate appeal of the district court's denial of the motion to remand, and the district court granted leave to appeal under 28 U.S.C. § 1292(b).[23]

On appeal, the plaintiffs argued that longstanding Supreme Court precedent prohibited inquiry into the motives behind assignments that defeated diversity jurisdiction. The defendants contended that recent federal decisions stood for the proposition that inquiry into the factors motivating partial assignments, as opposed to complete assignments, was not impermissible, particularly where the motive was to deprive the federal court of subject matter jurisdiction over the action.

The Fifth Circuit, after reviewing recent federal decisions evincing a trend against diversity-destroying devices, held that "federal district courts have both the authority and the responsibility, under 28 U.S.C. §§ 1332 and 1441, to examine the motives underlying a partial assignment which destroys diversity and to disregard the assignment in determining jurisdiction if it be found to have been made principally to defeat removal."[24] The court found that the plaintiffs' assignment was designed principally to defeat removal because: (1) the interest assigned was very small; (2) before the assignment, IRI had no interest in the litigation; (3) both the plaintiffs and IRI were represented by the same attorney, with the plaintiffs controlling the conduct of the litigation; (4) the assignment occurred shortly before the collection action was filed; and (5) the assignment to IRI was essentially a contingent-fee arrangement for collection work that could have been effectuated without an assignment. Consequently, the court denied the plaintiffs' motion to remand.[25]

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[22] *Id.* at 182.

[23] *Id.*

[24] *Id.* at 185.

[25] *Id.* at 186.

C. *Venue and Forum Non Conveniens*

The doctrine of forum non conveniens gives courts discretionary power to decline to exercise jurisdiction when convenience of the parties and the ends of justice would be better served if the action were tried in another forum. In *Nolan v. Boeing Co.*,[26] the district court granted the defendants' motion to dismiss on the ground of forum non conveniens in an action arising out of the crash of a U.K. aircraft during a United Kingdom domestic flight.[27] This motion to dismiss was conditioned upon reinstitution of the action in the United Kingdom by the plaintiffs. No Americans were on board the aircraft. Plaintiffs, through personal representatives, brought suit in Louisiana state court against the airframe manufacturers and engine manufacturers. The plaintiffs did not sue the British airline that operated and maintained the accident aircraft. As described in more detail in Section VI.B below, a third-party defendant engine manufacturer removed the action to federal court based on the Foreign Sovereign Immunities Act (FSIA).

The court applied the forum non conveniens analysis as set forth in *In Re Air Crash Disaster near New Orleans, Lousiana*,[28] and also as set forth in *Piper Aircraft v. Reyno*.[29] After finding that the United Kingdom was an adequate alternative forum, the court balanced the private and public interest factors.[30]

At the outset of its consideration of the private-interest factors, the court noted that a foreign national's choice of forum is given less deference than that of a resident or citizen plaintiff. The court also recognized the similarity of the *Nolan* case to *Piper Aircraft v. Reyno*, but found that the connection to the plaintiff's chosen forum was more attenuated in *Nolan* than in *Reyno*.

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[26] No. 89-3657 (E.D. La. Oct. 18, 1989) (LEXIS Genfed Dist File).
[27] *Id.* at 17,815.
[28] 821 F.2d 1147 (5th Cir. 1987).
[29] 454 U.S. 235 (1981).
[30] *Id.* at 247-61.

After determining that most of the relevant evidence was located in the United Kingdom, the court recognized that it was necessary for the defendants to obtain compulsory process over unwilling witnesses and to join potential third-party defendants. Since the airline had operated and maintained the accident aircraft were located in the United Kingdom and many of the witnesses were located in the United Kingdom, the court found that defendants' interests would be impaired if the case were to continue in Louisiana. After considering these and other private interest factors, the court concluded that the case should be dismissed.

Similiarly, the court reached the same conclusions with respect to the public interest factors. The court could find no reason to impose the burden of litigation on the courts of Louisiana because the action had no connection to that forum. In addition, the court determined that the United Kingdom had a great interest in the case because of the number of contacts the action had with the United Kingdom. The court also found that the interest of the United States in deterring the production of defective products did not outweigh the burdens that would be imposed on the United States judiciary and on United States citizens who would be called for jury duty if the cases were to proceed in this country. After determining that foreign law would probably govern the action through the operation of the Louisiana choice of law rules, the court held that the public-interest factors also weighed in favor of dismissal.

To safeguard plaintiffs' interests, the court conditioned its forum non conveniens dismissal on defendants' waiver of any objections to service of process in the United Kingdom, of any statute of limitations defense on defendants' agreement to satisfy any final judgment rendered by the United Kingdom court, and on defendants' agreement to make available in the United Kingdom all witnesses and documents within their control.

The plaintiffs appealed, but the forum non conveniens

dismissal was affirmed in all respects by the Fifth Circuit. The Fifth Circuit confirmed that federal law of forum non conveniens, not Louisiana law, was to be applied to this case even though it had been instituted in Louisiana state court. This case's genesis in state court also led plaintiffs to argue that, if the federal forum is inconvenient for this removed case, then the federal court should not dismiss this case on the ground of forum non conveniens but, instead, remand the case to state court. Rejecting this argument, the Fifth Circuit explained that dismissal was proper because it would be anomalous to remand the case to a state court forum that would be at least as inconvenient as the federal forum.

Louisiana has long been reputed to be one of the states that narrowly applies the doctrine of forum non conveniens. But an appellate court in northern Louisiana reached a different conclusion in *Fox v. Board of Supervisors*[31]. The *Fox* case arose out of an injury to a St. Olaf College rugby player during a rugby match at Louisiana State University (LSU). The rugby player and his parents instituted suit against LSU, St. Olaf College, and their respective insurance companies.

The trial court granted a motion for summary judgment in favor of LSU and its insurer. The trial court also dismissed the action against St. Olaf's College and its insurers for lack of *in personam* jurisdiction. Plaintiffs appealed these decisions.

The Louisiana Court of Appeals for the First Circuit affirmed the trial court's dismissal of plaintiff's claims against LSU, its insurer, and St. Olaf's College. The appellate court also dismissed the claim against St. Olaf's insurers, but for reasons other than those underlying the trial court's dismissal. The appellate court found that a stipulation entered into by one of St. Olaf's insurers prevented a finding that there was no personal jurisdiction over the insurer. However, the Court of Appeals held

[31] 559 So. 2d 850 (La. Ct. App. 1990), *cert. granted*, 565 So. 2d 930 (La. 1990), *aff'd in part, rev'd in part*, No. 90-C-1260 (La. March 11, 1991).

that the case against that insurer should be dismissed on the ground of forum non conveniens.

In order to support its position that the doctrine may be applied by Louisiana state courts, the court listed a number of Louisiana cases that had previously dismissed cases on that ground. The court then applied the *Gulf Oil Corp. v. Gilbert* factors to find that the doctrine of forum non conveniens mandated dismissal of this case. This case was appealed to the Louisiana Supreme Court, which reversed the forum non conveniens issue.

In another important state decision dealing with the doctrine of forum non conveniens, the Texas Supreme Court, in *Dow Chemical Co. v. Castro Alfaro*,[32] held that the doctrine had been statutorily abolished by the Texas State legislature in wrongful death and personal injury actions arising out of an incident in a foreign state or country.

In *Alfaro*, the named plaintiff and eighty-one other Costa Rican employees of the Standard Fruit Company brought suit against Dow Chemical and Shell Oil for injuries incurred as a result of their exposure to a pesticide manufactured by the defendants and supplied to Standard Fruit in Costa Rica.

The trial court granted defendants' motion to dismiss on the ground of forum non conveniens. Plaintiffs appealed, and the Texas Court of Appeals reversed. The defendants appealed, and the Supreme Court of Texas affirmed. In its decision, the Supreme Court noted that Section 71.031 of the Civil Practice and Remedies Codes provides that:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
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> (1) a law of the foreign state or country of this state gives

[32] 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S.Ct. 671 (1991).

> a right to maintain an action for damages for the death or injury;
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> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
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> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.[33]

The court, after examining the legislative history of § 71.031 and its predecessors, concluded that the legislature had statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031. The court affirmed the judgment of the court of appeals and remanded the case to trial for further proceedings.

The court issued a total of seven opinions, including four dissents. One dissenting judge expressed his fear that Texas would now become the courthouse for the world. The only current limitations on bringing an action in Texas are supposedly that it must be commenced within the Texas statute of limitations, the plaintiff's country of citizenship must grant equal treaty rights to United States citizens, and the court must have personal jurisdiction over the defendant.

In *Myers v. Boeing Co.*,[34] the Supreme Court of Washington upheld the forum non conveniens dismissal of the damages portion of a bifurcated cause of action. The *Myers* case arose out of a Boeing 747 accident in Japan in which five hundred twenty people died, most of them Japanese nationals. Through personal representatives, plaintiffs instituted eight actions against Boeing and Japan Airlines, in Washington state court. These actions were later consolidated for pretrial purposes. Boeing moved to dismiss these consolidated actions on the ground of forum non conveniens. In its motion papers, Boeing stated that, if the cases were dismissed and refiled in the dece-

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[33] Tex. Civ. Pract. & Rem. Code Ann. § 71.031 (Vernon 1989).

[34] 115 Wash. 2d 123, 794 P.2d 1272 (1990).

dents' own countries, Boeing would agree not to contest liability.

Based on this motion, the trial court bifurcated the liability and the damages issues in these cases. The court ruled that the issue of liability would be resolved in Washington and that the issue of where the damages portion of the trial would be held would be reserved pending resolution of the liability issues. During a pretrial conference, Boeing made admissions that led to the trial court's subsequent entry of a judgment against Boeing on the issue of liability. After the judgment was entered, JAL was dismissed from the suits on a motion by the plaintiffs. Boeing then renewed its motion to dismiss the suits of the Japanese nationals on the ground of forum non conveniens, which was granted by the trial court, subject to Boeing's compliance with the "usual" forum non conveniens conditions. Plaintiffs appealed from this decision, and the Court of Appeals affirmed.

The Supreme Court of Washington affirmed the dismissal. However, the analysis used by the Supreme Court of Washington was notable. First, although Washington state courts follow the federal forum non conveniens law laid down by the U.S. Supreme Court in *Gulf Oil v. Gilbert*,[35] the *Myers* court expressly declined to follow the subsequent United States Supreme Court decision in *Piper Aircraft v. Reyno*.[36] Second, the court expressly rejected plaintiff's argument that dismissing the cases involving Japanese nationals constituted a violation of a treaty granting "most favored nation" status to Japan.

In *Forsythe v. Saudi Arabian Airlines Corp.*,[37] the United States Court of Appeals for the Fifth Circuit approved the forum non conveniens dismissal of an action brought by a commercial airline pilot for wrongful discharge. The employment contract on which the pilot's cause of action was based specified that all disputes would be resolved by the

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[35] 330 U.S. 501 (1947).
[36] 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982).
[37] 885 F.2d 285 (5th Cir. 1989).

Labor and Settlement of Disputes Committee in Saudi Arabia and that the laws of Saudi Arabia would apply. The plaintiff never attempted to sue the defendant in Saudi Arabia but filed a petition in Texas state court.

Based on its status as a foreign state under the Foreign Sovereign Immunities Act (FSIA),[38] defendant airline removed the action to federal court and then moved to dismiss for failure to state a claim and for lack of subject-matter jurisdiction under the FSIA. In a supplemental motion, the airline moved for dismissal on the ground of forum non conveniens. The district court granted the defendant's motions and entered a final judgment dismissing Forsythe's case on the alternative grounds of FSIA immunity and forum non conveniens. Plaintiff appealed from this decision.

In affirming the district court's dismissal of the case, the court of appeals noted that, because it could dispose of the case on the basis of forum non conveniens, it would not review the district court's determination that it lacked subject-matter jurisdiction under the FSIA. In its review of the district court's forum non conveniens analysis, the court of appeals noted that a forum non conveniens dismissal may be reversed only for clear abuse of discretion.

In considering the district court's analysis of the private interest factors, the court of appeals found that Saudi Arabia was an adequate alternative forum for plaintiff to litigate this claim, noting that the parties had agreed in their contract to bring all disputes before the Labor and Settlement of Disputes Committee in Saudi Arabia. The court further stated that, although a court should be deferential to an American plaintiff's choice of home forum, that factor cannot be given dispositive weight.

After briefly weighing the *Gulf Oil* private interest factors, the court discussed public interest factors and found that the choice-of-law provision in the contract dictated that Saudi Arabian law be applied and the case be tried in

[38] 28 U.S.C. §§ 1602-1611 (1988).

Saudi Arabia. The court concluded that the contractual clause provision was not only a choice-of-law provision but also a choice-of-forum provision. Further, because Saudi Arabian Airlines is a corporation wholly owned by the Saudi Arabian government, the court found that public interest was served by having the case tried in Saudi Arabia.

After considering all of these factors, the court found that the district court was neither unreasonable nor arbitrary in dismissing the case on the alternative basis of forum non conveniens. Nevertheless, the court remanded the case to district court so that the district court would condition its judgment on the plaintiff's ability to reinstitute the action in the Saudi Arabian forum.

In *Wright v. McDonnell Douglas Helicopter Co.*,[39] the California Court of Appeals reversed the trial court's forum non conveniens dismissal of an Australian plaintiff's negligence, product liability, and breach of warranty action against the manufacturer of a helicopter that crashed in the Philippines. The helicopter had been manufactured in California and was owned and operated by Philippine entities. After the lawsuit was filed and prior to the forum non conveniens motion, the helicopter manufacturer had moved its principal place of business.

Rejecting plaintiff's argument that Australia was not an adequate alternative forum because plaintiff's wife could not recover for loss of consortium under Australian law, the appellate court nevertheless found that the trial court had underestimated California's interest in having the litigation proceed in that forum. In this connection, the court stated that California has a great interest in regulating defective products manufactured in the state even if the defendant no longer had its principal place of business there. The court concluded that the trial court had not balanced the interests properly and that reversal was appropriate.

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[39] No. BO45105 (Cal. Ct. App. May 9, 1990) (LEXIS, All States library, Cal. file) No. 3078 (Cal. July 18, 1990)(LEXIS, All States library, Cal. file).

In *Grunke v. Brinkerhoff Maritime Drilling Corp.*,[40] the California Court of Appeals affirmed the forum non conveniens dismissal of an action instituted by Singaporean, Australian, and British plaintiffs against the Indonesian owner of an aircraft and other defendants. The cause of action arose out of an air crash that occurred in Indonesia after the aircraft had taken off from Singapore.

In considering private interest factors, the Court found that the California courts could not exercise jurisdiction over the Indonesian owner of the aircraft or the Indonesian air traffic controllers. In addition, the Court affirmed dismissal despite the fact that some defendants maintained corporate offices in California.

In *Gazis v. John S. Latsis (USA) Inc.*,[41] a Greek citizen died from injuries sustained in the course of his employment on board a Greek flag vessel. The vessel was owned by a Panamanian corporation and was operated jointly by the Panamanian corporation and a United States corporation. The ship was managed by a Greek corporation, John Latsis Inc. Because John Latsis owned both the Panamanian corporation and the United States corporation, plaintiff contended that Mr. Latsis was the "beneficial owner" of the vessel.

Plaintiff instituted suit in New York federal district court against the Panamanian corporation, the United States corporation, and John Latsis Inc. based on the Jones Act[42] and general maritime law. Defendants moved to dismiss on the grounds of forum non conveniens, alleging that Greece would be a more convenient forum, and for lack of personal jurisdiction. Further, defendants requested a stay of the action pending the outcome of a declaratory proceeding commenced by the Greek corporation in Greece.

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[40] No. A045269 (Cal. Ct. App. May 8, 1990) (LEXIS, All States library, Cal. file), *review denied*, No. 5016091 (Cal. July 18, 1990) (LEXIS, All states library, Cal. file).

[41] 729 F. Supp. 979 (S.D.N.Y. 1990).

[42] 46 U.S.C. app. § 688 (1988).

In reaching its decision to deny the defendants' forum non conveniens motion, the court made several important determinations. Rejecting plaintiff's contention that dismissal would be improper because Greece would not apply the Jones Act, the court stated that courts in the Second Circuit no longer had to make a choice-of-law determination before dismissing a case on the grounds of forum non conveniens. In this connection, the court also noted that under *Piper Aircraft Co. v. Reyno*[43] the mere fact that the alternative forum would apply a substantive law less favorable to the plaintiff should not be given substantial weight.

The court used this rule to justify its finding that although the Jones Act contains a specific venue provision, cases brought under the Act may be dismissed on the ground of forum non conveniens. The court supported its finding by citing the Second Circuit's declaration that Congress did not intend to override the common law doctrine of forum non conveniens when it enacted statutes with specific venue provisions. Thus, the court held that it did have the authority to dismiss the case on forum non conveniens grounds.[44] Nevertheless, the court denied defendants' motion to dismiss the case, holding that further discovery was required before it could determine whether the public interest factors outlined in *Gulf Oil Corp. v. Gilbert* overcame the strong presumption in favor of plaintiff's choice of forum.[45]

In *Ginsberg v. Robinson Helicopter Co.*,[46] the Appellate Division of the Supreme Court of New York reversed the trial court's denial of defendant-appellants' motion to change venue. The case arose out of the crash of a helicopter in which the pilot and sole occupant of the aircraft was killed. Plaintiff brought suit in New York County. The defendants invoked CPLR 509, 510(3), and 511 to

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[43] 454 U.S. 235 (1981).

[44] 729 F. Supp. at 988.

[45] *Id.* at 988-90.

[46] 160 A.D.2d 237, 553 N.Y.S.2d 350 (N.Y. App. Div. 1990).

change venue from New York to Dutchess County, where the accident occurred, where the witnesses resided or were employed, and where the NTSB investigation took place. The only contacts that the litigation had with New York County was that the decedent resided there, his will was probated there, and one of his estate's executors lived there.

Reversing the lower court's decision, the Appellate Division employed the rule that transitory actions should be brought where the cause of action arose. The court noted that defendant had met the change of venue requirements of providing names and addresses of particular witnesses and the nature of their testimony, and the court ruled that a change of venue should have been granted.

D. *Choice of Law Cases*

In *Ferens v. John Deere Co.*,[47] a Pennsylvania farmer and his wife instituted a diversity action for personal injuries in the United States District Court for the Western District of Pennsylvania. Because the Pennsylvania tort statute of limitations had already run, the plaintiffs' sole claim was for breach of warranty. The farmer and his wife later filed a second diversity suit raising tort claims against the manufacturer in the United States District Court for the Southern District of Mississippi. The six-year statute of limitations for tort claims under Mississippi law, which governed the case under Mississippi choice-of-law rules, had not run.

Under the assumption that the Mississippi statute of limitations would still apply, the plaintiffs moved to transfer the action to the Western District of Pennsylvania via 28 U.S.C. 1404(a). The motion was granted, and the transferred suit was consolidated with the Feren's warranty action pending in the transferor forum. The manufacturer then moved for summary judgment. Invoking the two-year Pennsylvania statute of limitations, the District

[47] 494 U.S. 516 (1990).

Court granted the defendant's motion for summary judgment. On appeal, the Third Circuit affirmed, ruling that a transferor court's choice-of-law rules do not apply after a § 1404(a) transfer motion by a plaintiff.

Granting certiorari, the Supreme Court reversed and remanded the case to the Court of Appeals, holding that a District Court to which an action has been transferred pursuant to § 1404(a) must apply the law of the transferor court, including the choice-of-law rules of the transferor court, regardless of which party moved to transfer. The Court held that the utilization of § 1404(a) transfers should not deprive parties of state law advantages. Moreover, the Court noted that anti-forum-shopping policies, convenience, and judicial economy favored the application of the transferor law, regardless of which party initiated the transfer.

The case of *In Re Air Crash Disaster At Sioux City, Iowa on July 19, 1989*,[48] arose from the crash of a DC-10 carrying 296 people in Sioux City, Iowa. The passengers on board the DC-10 were from thirty states and two foreign countries. The Judicial Panel on Multidistrict Litigation ordered that eighteen federal court actions pending in ten states be transferred for pretrial purposes to the United States District Court of the Northern District of Illinois. In at least twelve cases originating in eight different states, plaintiffs' asserted claims for punitive damages.

The defendants, the airline, airframe manufacturer, and engine manufacturer, under Fed.R.Civ.Proc. 12(b)(6) moved for dismissal of all punitive damages claims or, in the alternative, for determination of the state law governing punitive damages in each of the eighteen actions before the court. After denying defendants' 12(b)(6) motion, the court engaged in the choice-of-law analysis.

At the outset of its analysis, the court recognized that when a case is transferred, the transferee court must apply the choice-of-law rules of the state where the transferor

[48] 734 F. Supp. 1425 (N.D. Ill. 1990).

sits.[49] Further, the court enunciated the rule in the Seventh Circuit that depecage applies for choice of law issues in consolidated multidistrict litigation. The court then addressed plaintiffs' argument that the choice of law issue was raised prematurely. After noting that the plaintiffs had not complied with the court's order regarding briefing of the choice-of-law issue and had not responded to defendant's arguments on this point, the court rejected plaintiff's contention, stating that the resolution of the issue would promote settlement.[50]

After addressing these preliminary issues, the court applied the choice-of-law analysis of eight states with respect to each defendant to determine the law governing the punitive damages claims against each defendant. For the three California claims, the court used the "comparative impairment analysis", under which the law to be applied where a true conflict exists is the law of the state whose interests would be more impaired were its law not applied. After applying this rule separately to the three defendants, the court concluded that the law of the airline's principal place of business governed the punitive damage claims against it.[51] For the airframe and engine manufacturers, the law of the states where the defendants designed and manufactured their respective products governed.[52]

For cases originating in Colorado, Iowa, New York, Georgia, and Illinois, the court applied the "most-significant-relationship test" as set forth in § 145 of the Restatement (Second) of Conflict of Laws. After applying this rule to each defendant, the court reached the same result as determined by California's choice-of-law rule: the law of the home state of the defendant would govern plaintiffs punitive damages claims.

The court then reviewed the choice-of-law rules used by

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[49] *Id.* at 1492 (citing Van Dusen v. Banack, 376 U.S. 612 (1964)).
[50] *Id.* at 1429-30.
[51] *Id.* at 1433.
[52] *Id.* at 1434.

the District of Columbia and Pennsylvania, which consist of a combination of governmental-interest analysis and the most-significant-relationship test. The court reasoned that because both tests led to the same result in its previous analysis, there was no need to engage in an additional analysis. Thus, the court reached the same conclusion using three different choice-of-law analyses. After summarizing its holding, the court stated that the plaintiffs may move to take expedited discovery as to any specifically identified disputed fact material to the choice of law analysis.

The case of *In Re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987*,[53] arose from the crash of a passenger aircraft en route from Denver, Colorado, to Boise, Idaho, during a snowstorm. Plaintiffs from Arizona, Colorado, Idaho, New Jersey, and Washington instituted personal injury and wrongful death actions against the airline, whose principal place of business was located in Texas. Plaintiffs brought suits in federal courts in Idaho, Colorado, and New Jersey. These suits were later consolidated for pretrial proceedings in Colorado by order of the Multidistrict Litigation Panel. The parties petitioned the court to determine the state whose law would apply to the issue of punitive damages.

In its choice of law analysis, the court recognized that the choice-of-law rules of the various jurisdictions in which the transferred actions were originally filed must apply. Thus, the court compared New Jersey's "governmental interest analysis" choice-of-law rule to the "most-significant-relationship" test employed by Colorado and Idaho. The Court stated that "because the latter test is a more formalized approach to the interests considered in the former", it would consolidate its analysis to identify the state with the most significant relationship to the parties and the occurrence.[54] The court also compared the laws of Idaho, Colorado, and Texas. After finding that an

[53] 720 F. Supp. 1445 (D. Colo. 1988).
[54] *Id.* at 1448.

irreconcilable conflict existed among the punitive damage laws of Idaho, Texas, and Colorado, the Court considered the contacts associated with each jurisdiction. It considered the place of injury, the domicile and principal place of business of the parties, and the center of the parties' relationships. Notably, the court found that in air-crash cases, the plaintiff's domicile and the center of the parties' relationship are of little significance with respect to the issue of punitive damages. Thus, the law of Idaho was found not to apply to that issue. The court found that Texas, the defendant's principal place of business, had the most significant relationship to the parties and the occurrence because the place of injury in an air crash is more fortuitous than the place of misconduct or the principal place of business.[55] At the end of its decision, the court urged Congress to enact a uniform federal statute for air-crash and mass-disaster litigation in order to avoid complex choice-of-law issues.

In *In Re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987*,[56] the Eastern District of Michigan held that an exculpatory clause in an agreement covering sale of an aircraft would be construed according to the law of the jurisdiction named in the agreement's choice-of-law provision. The case arose out of the crash of an MD-80 shortly after take-off. The defendant airline cross-claimed against the aircraft manufacturer for negligence, violation of law, negligent misrepresentation, gross negligence, breach of warranty, and strict liability. The manufacturer moved for partial summary judgment on the basis of an exculpatory clause within the agreement for the sale of the aircraft, which provided that the agreement was to be construed and performed according to the laws of the State of California.

The court applied Michigan law which requires the enforcement of choice-of-law provisions where (1) there is a reasonable relationship between the chosen state and the

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[55] *Id.* at 1454-55.

[56] 22 Av. Cas. (CCH) 18,063 (E.D. Mich. 1989).

transaction, and (2) enforcement of the choice-of-law provision would not offend public-policy considerations. Finding both requirements of the test satisfied, the court applied the law of California to construe the exculpatory clause and held that only claims of gross negligence asserted by the airline against the manufacturer could survive. The court therefore granted the manufacturer's motion for partial summary judgment against the airline, noting that this could not impair the passenger-claimants' rights to proceed against either defendant.[57]

With respect to personal injury claims arising from the same accident, the court was faced with a complex choice of law question.[58] One hundred fifty-seven cases that were originally filed in federal court in Michigan, Arizona, California, or Florida were consolidated for trial in the United States District Court for the Eastern District of Michigan. In general, these actions involved wrongful death claims seeking compensatory and punitive damages from the airframe manufacturer and the airline. The parties claimed that choice-of-law issues existed with respect to three issues: (1) the manufacturer's potential liability for alleged design defects; (2) liability for punitive or exemplary damages; and (3) plaintiff's individual claims for compensatory damages.

After recognizing that a transferee court must apply the law of the transferor forum, the court outlined the choice of law rules for Michigan, Arizona, California, and Florida. In Michigan, where courts have refused to adopt an established choice of law methodology, the test employed questions whether there exists a "rational reason" to displace the law of the forum in favor of that of another state. California courts use the "comparative impairment test", and Arizona and Florida use the most significant relationship test as set forth in the Restatement (Second) of Conflicts of Laws § 175 (1971). The court then applied these

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[57] *Id.* at 18,070.

[58] 750 F. Supp. at 793.

rules separately to the first two of the three issues listed above.

The court concluded that the design-defect claims filed against the manufacturer in Michigan would be governed by California law because that was the state where the alleged misconduct took place.[59] For similar reasons, the court found that the "most significant relationship" test adopted by Arizona and Florida compelled the same result, as did the "comparative impairment" approach of California.[60] Thus, California law governed all claims of design defect and compensation damages.

With regard to the punitive claims asserted by plaintiffs against the airline, the court recognized that Michigan, the place of injury, and Minnesota, the airline's principal place of business and place of alleged misconduct, were the two states with contacts to these claims. After finding a true conflict between the punitive-damage laws of these two jurisdictions, the court found no rational reason not to apply Michigan's law to those punitive-damage claims that originated in Michigan. It reached the same result for those punitive-damage claims originally brought in Michigan against the manufacturer. The court reasoned that the relevant jurisdictions' interests were equal, and, therefore, the law of the place of injury should govern. With regard to the punitive-damage claims filed in Arizona and Florida, the court held that its Michigan choice-of-law analysis in this case considered interests identical to those that would be considered under the Restatement approach. Thus, the court concluded that Michigan law governed these claims with respect to both defendants.

For the California punitive damage claims, the court found that the claims against the airline would also be governed by Michigan law. Michigan's corporate-protection policy, which prohibits punitive damages against corporations, would be more impaired if Michigan law did not apply than Minnesota's interest in deterring negligent

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[59] *Id.* at 802.

[60] *Id.* at 803-804.

behavior would be impaired if Minnesota law did not apply. The court found that the California punitive-damage claims asserted against the manufacturer would be governed by California law because that state was the site of the alleged misconduct. Because neither the law of California nor the law of Michigan allowed punitive damage claims in wrongful death cases, the court granted the defendants' motion for partial summary judgment dismissing all punitive and exemplary damage claims. Since the plaintiffs did not adequately brief the choice-of-law issues concerning compensatory damages issues, the court postponed the decision on this issue.

The only survivor of the air crash at Detroit Metropolitan Airport was Cecelia Cichan, a four year old girl. In *Cichan v. Northwest Airlines*,[61] the court permitted plaintiff Cichan to file separate papers regarding the choice-of-law issues with respect to punitive damages and to the defendants' motion to dismiss her punitive damage claims. The court reasoned that because the Plaintiffs' Steering Committee's (PSC) papers on these issues had focused exclusively on the wrongful death claims, Cichan's legal interests associated with her personal injury action were not satisfactorily represented by the PSC.

The court first determined that the Michigan choice-of-law rule would apply to the Cichan action because the case was originally filed in the Eastern District of Michigan. With regard to plaintiffs' punitive-damage claims against the defendant airline, the court found that Cichan's status as a personal-injury plaintiff resulted in a choice-of-law analysis identical to that for the other parties' wrongful-death claims. Thus, the court granted the airline's partial summary judgment motion, holding that Michigan law applied to prevent the survival of punitive-damage claims against the defendant airline.[62]

With respect to the punitive-damage claims asserted against the airframe manufacturer, the court's conclusions

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[61] 22 Av. Cas. (CCH) 18,010 (E.D. Mich. 1989).

[62] *Id.*

for the personal-injury claim differed from those for the wrongful-death claims. Although the court found that the law of California applied to both claims, that state's law permitted personal injury claimants to assert punitive damage claims. Thus, the court denied the manufacturer's motion for partial summary judgment.

Because the parties conceded that Michigan law governed Cichan's claim for exemplary damages, the court easily disposed of these claims against the airline and the manufacturer. The court found that the plaintiff's exemplary damage claim and plaintiff's claim for compensatory damages as a result of injury to her feelings to be redundant and that the former claim could not be presented to the jury under Michigan law. In conclusion, the court granted plaintiff's motion to sever her claim for punitive damages from the remaining issues at the joint liability trial.

Burgio v. McDonnell Douglas, Inc.[63] arose out of an airplane accident at Barksdale Air Base in Louisiana that killed plaintiff's decedent. Plaintiff initiated a wrongful-death action in New York state court against the aircraft manufacturer, and defendant removed the case to federal court. Defendant conceded liability, leaving only the issue of damages to be determined. Defendants moved the court to determine which state's law should apply to this issue.

The parties agreed that the wrongful death action was controlled by the Federal Reservations Act of February 1, 1928,[64] because the accident occurred on a federal military base. In wrongful death actions this Act requires application of the law of the state in which a federal enclave is located or to which a federal enclave is adjacent. In this case, the Act required that the law of the State of Louisiana apply.

The court then considered whether to apply the whole

[63] 747 F. Supp. 865 (E.D.N.Y. 1990).

[64] 16 U.S.C. § 457 (1988).

law of Louisiana, including that state's choice-of-law rule, or only the "internal" law of that state. Recognizing that the purpose of the Federal Reservations Act was to put tort victims injured on federal land on an equal footing with those injured outside the boundaries of the federal enclave, the court reasoned that this purpose would be best served by applying the whole law of the adjacent state to actions falling within the Act. It also found its interpretation closely analogous to interpretations of the Federal Tort Claims Act.[65]

The court then turned to the Louisiana choice-of-law rule. After comparing the law of New York with that of Louisiana, the court found that "true conflicts" existed with respect to a number of issues. The next step in the court's analysis was the application of Louisiana's "most significant contacts" test to the facts of the case. The court resolved the issue of the plaintiff's domicile by finding that plaintiff had resided in Louisiana only because her spouse was directed to do so by the U.S. government; hence, she was domiciled in New York. The plaintiff's return to New York after the decedent's death supported this result. Continuing its choice-of-law analysis, the court further held that Louisiana had little interest in the case because its only connection thereto was the fact that the accident occurred there. Thus, the court concluded that New York law should apply to plaintiff's damages claims.

The case of *Western Helicopter Services, Inc., v. Rogerson Aircraft Corp.*[66] was instituted in Oregon federal district court. The case arose from a helicopter crash resulting in the death of the pilot. Plaintiff Western Helicopter Services, the pilot's employer, along with decedent's estate, instituted a product liability action against the sellers, manufacturers and various component manufacturers, installers, and maintenance companies. Plaintiff Western Helicopter Services sought damages for the loss of the he-

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[65] 28 U.S.C. § 1346 (1988); *Burgio*, 747 F. Supp. at 869.

[66] 728 F. Supp. 1506 (D. Or. 1990).

licopter, while the decedent's estate sought damages arising from the wrongful death of the pilot.

Five defendants moved for summary judgment against plaintiff's claims. Two defendants contended that the law of Oregon applied to the successor liability issue and would relieve them of liability because they bought only the assets of the corporation that allegedly manufactured the defective helicopter. Plaintiffs contended that either the law of California or the law of Washington applied and that defendants were liable through operation of the "product-line exception" to the successor liability doctrine. In the alternative, plaintiffs argued that the court should find that the Oregon courts would adopt the product-line exception.

After recognizing that a federal court sitting in diversity must apply the choice-of-law rule of the forum state, the court enunciated Oregon's choice-of-law approach for tort actions.[67] First, an Oregon court will determine whether a true conflict of law exists. If so, it will apply the law of the jurisdiction with the most significant relationship to the action, as determined through utilization of the analysis set forth in the Restatement (Second) Conflict of Laws (1971).

After finding that Oregon's successor-liability law conflicted with that of California and Washington, the court compared the contacts of Oregon (place of injury, residence of the decedent and decedent's representative, and place of ownership and maintenance of the helicopter) with those of California (place of helicopter manufacture) and Washington (place of incorporation of the moving defendants). The court found that in wrongful death cases the most significant contact belonged to the place of injury, especially where the decedent had a settled relationship to that state.[68] Buttressing this conclusion was

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[67] *Id.* at 1510.

[68] *Id.* at 1510. *See also* Erwin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973) (holding that where once states interests are vitally involved, and the interests of the other state are minimal, then the law of the first state should apply).

the court's finding that the place of injury was not fortuitous in this case because the helicopter was owned and operated by a resident of the State of Oregon. Consistent with its choice-of-law determination, the court granted the two defendants' motions for summary judgment because they were not liable under Oregon's successor liability law.[69]

E. *Discovery*

A district court in Colorado refused to grant a preliminary or permanent injunction that would direct the FAA to permit inspection and copying of documents in the possession of the FAA in *Van Aire Skyport Corp. v. FAA*.[70] The plaintiff, a not-for-profit entity organized for the purpose of promoting air flight, presumably into and out of Van Aire Airport, was concerned about the impact that a planned airport in Denver would have on the Van Aire Airport. Plaintiff had requested documents from the FAA under the Freedom of Information Act. The FAA complied, but in the process it withheld approximately 214 documents. The documents in question were submitted to the district court for review. After reviewing the documents in camera the court refused plaintiff's request to see the documents because the documents were "deliberative process" and "predecisional" types of information which Congress did not intend to require federal agencies to release to the public under the Freedom of Information Act.[71]

In *National Transportation Safety Board v. Hollywood Memorial Hospital*,[72] the district court held that the NTSB was not entitled to production of documents concerning the psychiatric examination of a pilot involved in an airplane crash. The case grew out of the strange circumstances surrounding the crash of an airplane piloted by Thomas

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[69] *Id.*
[70] 733 F. Supp. 316 (D. Colo. 1990).
[71] *Id.* at 318.
[72] 735 F. Supp. 423 (S.D. Fla. 1990).

L. Root, who supposedly lapsed into unconsciousness while piloting his airplane. The airplane, which had been left on auto-pilot, crashed into the Atlantic after it ran out of fuel. The crash created nationwide interest, and film of the crash and Root's ultimate rescue received widespread attention.

In furtherance of its investigation of the accident, the NTSB subpoenaed all of the pilot's medical records from the defendant. All of the records were produced except those regarding the pilot's psychiatric treatment. The NTSB brought suit to enforce the administrative subpoena, and the pilot intervened in the action. The NTSB moved for judgment on the pleadings, and the pilot intervenor moved to quash the subpoena.[73]

In reaching its decision to deny the NTSB's motion for judgment on the pleadings and to grant the pilot's motion to quash subpoena, the court recognized that no psychiatrist-patient privilege exists in federal court for criminal cases where the patient relies on his condition as an element of his claim or defense.[74] The court determined that in civil cases, however, courts have recognized the importance of the psychiatrist-patient privilege.

Because the communications that the pilot sought to protect were not made in connection with a criminal case filed against the pilot, the court applied the following four-part test to determine whether the communications were privileged:

> (1) the communication must be one made in the belief that it will not be disclosed;
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> (2) confidentiality must be essential to the maintenance of the relationship between the parties;
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> (3) the relationship should be one that society considers worthy of being fostered; and
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> (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct dis-

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[73] *Id.*

[74] *Id.* at 423.

posal of litigation.[75]

The court found that the first three conditions were clearly met. In balancing the state and public interests as required by the fourth prong of the test, the court held that the specific injury to the psychiatrist-patient relationship that would follow disclosure in cases of this type is greater than the state's interest in determining the probable cause of the accident.[76]

In *Booker v. Helicopter Services of Jacksonville, Inc.*,[77] a metallurgist employed by the NTSB was deposed in connection with two actions arising out of a helicopter crash. The NTSB was not a party to either action. NTSB counsel instructed the deponent not to respond to several questions because they required him to give an opinion regarding the cause of the accident which, in his view, was prohibited by 49 U.S.C. § 1441(e) and 49 C.F.R. § 835.3(b). Plaintiffs moved to reconvene the deposition and to compel the deponent to respond to those questions left unanswered.

Following *Kline v. Martin*,[78] the court concluded that NTSB investigators are allowed to give testimony regarding their opinions as long as the opinion does not encompass the ultimate conclusion as to the cause of the accident.[79] Using this analysis, the court ordered the witness to answer six questions that dealt with facts of the accident that were determined by the NTSB.

The court denied plaintiff's request to compel answers to a series of questions that would be used to authenticate the witness' Analysis Report that contained NTSB opinion sections, holding that an Analysis Report need not be produced, identified, or authenticated.[80] Thus, even though the questions asked would not require improper

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[75] *Id.* at 424.
[76] *Id.* at 425.
[77] 22 Av. Cas. (CCH) 17,713 (D.D.C. 1989).
[78] 345 F. Supp. 31 (E.D. Va. 1972).
[79] 22 Av. Cas. (CCH) at 17,715.
[80] *Id.* at 17,715-16.

opinion testimony, answers to those questions were not compelled by the court.

In *Thomas Brooks Chartered v. Burnett*,[81] the Tenth Circuit reversed a federal district court decision from Colorado. The district court had held that the NTSB could not invite the manufacturers of a plane and its component parts to participate in an NTSB investigation without also allowing a representative of the individual killed in the crash to participate as an observer.

The case arose after the death of Thomas W. Brooks on August 2, 1988. A Beech Musketeer airplane he piloted crashed on takeoff from a farm near Cimarron, New Mexico. After the crash, the NTSB initiated its examination of the wreckage and named parties to participate in the investigation. The parties named included the aircraft manufacturer and the engine manufacturer, but did not include the decedent's corporation, the owner of the aircraft. The NTSB decided not to include the decedent's corporation after determining that Mr. Brook's records sufficed for purposes of the NTSB study.

Thereafter, an attorney for the decedent's family made a request to either be named a party or be granted observer status at the NTSB proceedings. After the NTSB refused this request the plaintiff sought, and was subsequently granted, a permanent injunction forbidding any disassembly, dismantling, or destructive inspection of the plane unless a representative of the plaintiff was present. The NTSB appealed this order.

On appeal, the NTSB argued that the decision as to who may attend an investigation is a matter entirely at the discretion of the agency and is, therefore, unreviewable in a district court. Furthermore, the NTSB contended that its decision was neither arbitrary nor capricious and was not an abuse of discretion.

The Court of Appeals first held that the NTSB decision barring the plaintiff from the accident investigation is ju-

[81] 920 F.2d 634 (10th Cir. 1990).

dicially cognizable and subject to judicial review by the district court.[82] In so holding, the court noted that, when an agency acts to enforce its regulations, that action provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. Under the Supreme Court's holding in *Heckler v. Chaney*,[83] such an action can be reviewed to determine whether the agency exceeded its statutory powers.

The *Burnett* court held that the NTSB's decision to exclude the plaintiffs' representative was neither arbitrary nor capricious.[84] In response to plaintiffs' assertions that having the manufacturer present without the plaintiff compromises the integrity of the NTSB factual report and that the manufacturer actually runs these investigations, the Court noted that NTSB reports are freely available; an NTSB probable cause determination is forbidden from being introduced as evidence in a related tort case, and after the NTSB investigation the aircraft and its component parts are returned to the owner so he may commence an independent investigation.[85]

In *In Re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987*,[86] during the discovery phase of an action arising from the crash of a passenger jet, defendant airline filed a motion to compel defendant airframe manufacturer to produce a nine-track computer tape of the Digital Flight Guidance Computer Flight Director Simulation runs. The U.S. District Court for the Eastern District of Michigan had previously granted the airline's request for the manufacturer to produce documents relating to the simulation runs that the manufacturer had conducted, and the manufacturer complied with the court order by producing the simulator material in hard copy printout form. Finding it overly burdensome to enter these printed pro-

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[82] *Id.* at 641-43.
[83] 470 U.S. 821, 832 (1985).
[84] *Burnett*, 920 F.2d at 643-47.
[85] *Id.*
[86] 130 F.R.D. 634 (E.D. Mich. 1989).

grams and data in its computer system, the airline requested the data and programs in tape format. In opposition to the motion, the manufacturer argued that it did not possess such a tape and that the Federal Rules of Civil Procedure do not require parties to create requested material but only to produce existing materials.

Granting the airline's motion, the district court adopted the rationale in *National Union Electric Corporation v. Matsuhita Electric Industrial Co., Ltd.*,[87] which held that, while a printout of information might be "reasonably usable" within the meaning of Rule 34, the production of a party's data in a form that is directly readable by the adverse party's computers is the preferred alternative. The court found that it would be more economically efficient for the manufacturer to convert the information to tape form. Because the computer tape did not exist, however, defendant airline was required to pay all reasonable and necessary costs associated with the manufacture of the tape.

F. *Evidence*

In *Puerto Rico Ports Authority v. M/V Manhattan Prince*,[88] a collision between a tanker and a pier in San Juan Harbor, Puerto Rico, resulted in the Ports Authority and the Puerto Rico Electric Authority suing the vessel *in rem* for damages to the pier. The owner of the tanker, in turn, sued the tugs for damages to the tanker's bow occurring during the crash. The court admitted an accident report prepared by the United States Coast Guard into evidence. The report drew three conclusions for the cause of the accident: (1) improper speed used by the pilot; (2) failure of the master of the tanker to take command of the vessel from the pilot; and (3) the action of the tug in dropping its lines.[89]

On appeal, the court held that, under *Beech Aircraft Corp.*

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[87] 494 F. Supp. 1257 (E.D. Pa. 1980).
[88] 897 F.2d 1 (1st Cir. 1990).
[89] *Id.* at 8.

v. Rainey,[90] the report was admissible because the Court of Appeals had "no serious question as to the trustworthiness of the report."[91]

Even if the report was inadmissible, the First Circuit ruled that its admission was harmless error because the District Court's opinion specifically held that the pilot was negligent based on the trial evidence, not merely on the report.[92] The First Circuit accepted the District Court's assertion, especially since the District Court's conclusions regarding negligence differed from the Coast Guard report except with regards to the pilot.

In re Aircrash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987,[93] involved the crash of Continental Airlines Flight 1713 during a heavy snowstorm. The DC-9 airplane overturned and crashed as it lifted off the runway. The passenger compartment broke into several pieces and a fireball moved through the cabin from front to back. The accident killed 28 people, most of whom were in the forward portion of the cabin, and injured 54 others. Among the dead were the pilot, the copilot, and a flight attendant.[94]

The court addressed the question of the extent of the admissability into evidence of the NTSB report, which included conclusions on the probable cause of the disaster and recommendations for preventing such accidents in the future. The final report also included data collected by investigators in public hearings on the crash, as well as information contained in reports of investigative teams established by the NTSB to look into specific areas that might have caused the crash.

The court noted the statutory limitation on the admissibility of NTSB reports as follows: "[n]o part of any report or reports of the Board relating to any accident or the in-

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[90] 488 U.S. 153 (1988).

[91] *Puerto Rico Ports Auth.*, 897 F.2d at 8.

[92] *Id.*

[93] 720 F. Supp. 1493 (D. Colo. 1989).

[94] *Id.* at 1495.

vestigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."[95]

The issue in *In re Aircrash Disaster at Stapleton* was whether the Court would apply, as urged by defendant, the complete bar to the admission of such government investigation reports as established by the Ninth Circuit in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*[96] and *Huber v. United States*.[97] The Tenth Circuit disagreed with the Ninth Circuit, holding that only the legal conclusions in NTSB reports are inadmissible. The court relied on *Keen v. Detroit Diesel Allison*,[98] *Mullan v. Quickie Aircraft Corp.*,[99] and *Murphy v. Colorado Aviation, Inc.*[100]

The issue of admissibility was not necessarily to be determined by Tenth Circuit precedent, because *In re Aircrash at Stapleton* was a multi-district litigation including cases filed in the District of Idaho. Idaho, in the Ninth Circuit, would have followed *Protectus* and completely precluded admission of the NTSB report.[101] The Colorado District Court decided that where the federal law of the transferee forum conflicts with the law of the transferor forum in a multi-district litigation, the transferee court is "required to give careful consideration to the law of the transferor forum, but is bound by the informed and reasoned opinions setting forth the law of its own Circuit."[102]

The Court accordingly held that the Tenth Circuit rule controlled the admissibility of the NTSB report and that the legislative history of the statute showed it was

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[95] *Id.* at 1496 (citing 49 U.S.C. app. § 1441(e) (1991)).

[96] 767 F.2d 1379, 1385 (9th Cir. 1985).

[97] 838 F.2d 398, 403 (9th Cir. 1988) (applying *Protectus* to reports issued by the United States Coast Guard).

[98] 569 F.2d 547, 549-51 (10th Cir. 1978).

[99] 797 F.2d 845, 848 (10th Cir. 1986).

[100] 41 Colo. App. 237, 588 P.2d 877, 881-82 (1978) (state law applies rule in *Keen*).

[101] 720 F. Supp. at 1496.

[102] 720 F. Supp. at 1496 (citing *In re* Korean Air Lines Disaster, 829 F.2d 1171, 1174-75 (D.C. Cir. 1987), *aff'd sub nom.* 490 U.S. 122 (1989), and 28 U.S.C. §§ 1404-1407 (1988)).

designed to prevent usurpation of the role of the jury by evidentiary use of the NTSB's conclusions on causation.[103] This holding did not result in a total prohibition of all of the NTSB report. Instead, the Court decided to distinguish between admissible facts and inadmissible factual inferences drawn by the Board or its staff.[104]

The Court then considered the public-records exemption to the hearsay rule contained in Federal Rules of Evidence 803(8)(C) in light of *Beech Aircraft Corp. v. Rainey*.[105] The issue was whether the NTSB Human Factors Report annexed to the final NTSB report as an appendix was "based principally on hearsay and so replete with inadmissible conclusions that the entire report should be excluded under the hearsay rules outlined in *Rainey*."[106]

The Court used a four-factor test to determine whether the Human Factors Report met the trustworthiness standard of *Rainey*:

> (1) the timeliness of the investigation; (2) the special skill or experience of the investigator; (3) whether a hearing was held and the level at which it was conducted; and (4) any possible motivation or bias in the preparation of the Report.[107]

The Court ruled that the Human Factors Report satisfied the trustworthiness rules of *Rainey* and was admissible, provided that, at trial, double-hearsay statements, triple-hearsay quotations of statements, and procedural and regulatory recommendations of the Board related to the probable cause were deleted.[108]

In *In re Aircrash in Bali, Indonesia*,[109] Pan American World Airways appealed a jury verdict in a litigation stemming from the crash of Pan Am Flight 812 in Bali on April 22, 1974, in which all passengers and crew were killed. Pan

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[103] 720 F. Supp. at 1496.
[104] *Id.* at 1497.
[105] 488 U.S. 153 (1988).
[106] 720 F. Supp. at 1497.
[107] *Id.* at 1498 (citations omitted).
[108] *Id.* at 1499.
[109] 871 F.2d 812 (9th Cir. 1989).

Am contended that the admission of an FAA Report and a Pan Am Report into evidence constituted reversible error. The court applied the abuse of discretion standard, under which reversal would be granted only if "the error affected the substantial rights of the parties."[110] The FAA Report was deemed admissible under Fed. R. Evid. 803(8)(C), the public document exception to the hearsay exclusion.[111]

Pan Am also argued that admission of a Pan Am Report on safety was reversible error under Federal Rule of Evidence 801(d)(2)(D) governing non-hearsay statements such as admissions of a party opponent. Admissions are defined as: "a statement by [the party's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."[112] The court admitted the Pan Am report because the authors were all Pan Am employees reporting on matters within the scope of their employment. The court also concluded that Pan Am had not satisfied its burden of demonstrating that the report was unduly prejudicial.[113]

As a third ground, Pan Am argued that the FAA and Pan Am Reports were inadmissible under Federal Rules of Evidence 407, which bars evidence of subsequent remedial measures to prove culpable conduct. The Pan Am report, which was dated one day after the crash, was not in response to the crash and therefore did not relate to subsequent remedial measures. The FAA Report, although a closer call, was deemed not to involve subsequent remedial measures because it was prepared by the FAA without Pan Am's voluntary cooperation.[114]

Jet Air, Inc. v. Epps Air Serv., Inc.,[115] involved an action by a lessor against a lessee for crash damage to a leased aircraft. After a jury verdict for the lessee, the lessor ap-

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[110] *Id.* at 816 (citation omitted).
[111] *Id.*
[112] FED. R. EVID. 801(d)(2)(D).
[113] 871 F.2d at 816.
[114] *Id.*
[115] 194 Ga. App. 829, 392 S.E.2d 245 (1990).

pealed. Plaintiff lessor argued in part that the trial court committed reversible error by refusing to admit a portion of an NTSB Report containing the entry "none" immediately after the heading "Part Failure/Malfunction."[116] One of the issues before the jury was whether a mechanical malfunction caused the accident. The court of appeals agreed with the trial court that, although the page at issue was entitled "Factual Report," the notation reflected the opinion of the preparer and was inadmissible without qualifying the preparer as an expert. The Court distinguished situations involving admissibility of exhibits to an official report that merely include data from the flight recorder.[117]

In *Abdulghani v. Virgin Islands Seaplane Shuttle, Inc.*,[118] the district court for the Virgin Islands granted the defendant's motion *in limine* to exclude the testimony of the plaintiff's business valuation expert after finding that the proposed testimony was woefully inadequate and extremely speculative.

The plaintiff, a doctor, brought suit alleging physical and psychological damage as a result of the crash of a seaplane owned and operated by the defendant. The defendant had conceded liability prior to the trial, so the remaining issue was compensatory damages. Prior to the crash, plaintiff had been employed as an emergency room physician by the Government of the Virgin Islands at an annual salary of about $37,000. He earned another $27,000 per year as a physician at a nursing home and methadone clinic. In addition, he maintained a small private practice. Plaintiff contended that, prior to the crash, he had begun preparations for the establishment of a private urgent care/walk-in clinic. Plaintiff hired an expert witness who intended to present testimony that the clinic, when opened, would have returned $260,000 in annual earnings to plaintiff in its second year of operation, bring-

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[116] *Id.* at 248.
[117] *Id.* at 249.
[118] 740 F. Supp. 371 (D. V.I. 1989).

ing the value of his lost earnings from the clinic, reduced to present value, to $8,458,012.

The district court, in granting the defendants motion, held that the factual foundation for expert testimony as to the valuation of the proposed clinic was inadequate, because the future success of the doctor's business plans were too speculative.[119] The expert doctor was not a hospital administrator and did not keep records of the number of patients admitted to any Island hospitals. Further, the estimate of the fees to be charged for services at the clinic and the expert's figure for the rate of collection of fees were too speculative.

In *Schultz v. American Airlines, Inc.*,[120] the Seventh Circuit held that the district court's jury instructions, that a common carrier has an enhanced duty to provide a safe flight, do not preclude a directed verdict in the face of flimsy evidence presented by the plaintiff.

In this case, the plaintiff brought a negligence action against American Airlines for injuries suffered as a result of turbulence. The plaintiff testified that the turbulence was so severe that he was thrown repeatedly against his seat belt partition, causing his spleen to bleed and eventually to rupture. The plaintiff's case was based almost entirely on his own "vitally interested" testimony.[121]

At trial, the district court judge denied American's motion for a directed verdict and allowed the case to go to the jury. One-and-a-half days later the jury announced that it was deadlocked. American's motion for judgment in accordance with its earlier directed verdict motion was then granted. The plaintiff appealed.

In affirming the district court decision, the Seventh Circuit noted that a common carrier has an enhanced duty to use due care and does not alter the standards under which a directed verdict motion would be decided. The fact that the plaintiff could provide virtually no corroboration for

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[119] *Id.* at 374.
[120] 901 F.2d 621 (7th Cir. 1990).
[121] *Id.* at 623.

his claim was dispositive. The Court took note of a point made in the oral argument that it would run contrary to all scientific knowledge to believe that the kind of violent turbulence claimed by the plaintiff would "strike only one seat on an airplane."[122]

A New York appeals court in *Haggerty v. Moran Towing & Transportation Co., Inc.*[123] affirmed the decision of a trial court excluding from evidence a Coast Guard report which concluded there was no evidence of "actionable misconduct, inattention to duty, negligence or wilful violation of law or regulation" on the part of a tugboat operator. Thus, the appellate court let stand a jury verdict which concluded the defendant was negligent and affirmed a judgment for $200,000 plus post-verdict interest.

The court, noting that the action had been brought under the Jones Act,[124] concluded that courts would apply federal laws of evidence and procedure when those matters are "outcome determinative" in order to provide a uniform body of maritime law.[125] Federal Rule of Evidence 803(8)(C) provided the proper rule for determining the admissibility of an investigative report by the United States Coast Guard. Federal Rule 803(8)(C) provides for the admission of "factual findings resulting from an investigation made pursuant to authority granted by law. . . ."[126]

The court, in affirming the decision not to admit the Coast Guard report, held that the report stated legal conclusions and not factual findings. Therefore, the report was inadmissible under the guidelines enunciated by the U.S. Supreme Court in *Beech Aircraft Corp. v. Rainey*.[127]

In *United States v. Fortenberry*,[128] the Fifth Circuit held

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[122] *Id.* at 624.

[123] 162 A.D.2d 189, 556 N.Y.S.2d 314, 316 (N.Y. App. Div. 1990).

[124] 46 U.S.C.a. app. § 688 (1988).

[125] 162 A.D.2d at 189, 556 N.Y.S.2d at 316 (citing Lerner v. Karageorgis Lines, Inc., 66 N.Y.2d 479, 488 N.E.2d 824, 497 N.Y.S.2d 894 (1985)).

[126] FED. R. EVID. 803(8)(c).

[127] 488 U.S. 153 (1988).

[128] 914 F.2d 671 (5th Cir. 1990).

that the trial court's finding that the defendant had transported an undeclared firearm on a commercial airliner was sufficiently supported by evidence that the gun was found in his bag after he had deplaned in a foreign airport.[129] The defendant was convicted of transporting an undeclared handgun on a commercial airliner. This was apparently carried out as part of the defendant's plan for revenge against his ex-wife's family following a bitter divorce.

On appeal, the defendant claimed that the evidence presented at trial was insufficient to support his conviction for transporting an undeclared gun on a commercial airliner. The defendant argued that there was no evidence to exclude the possibility that the gun found in his bag was placed there after he arrived at his destination. Noting that Fortenberry was under police surveillance from the time he arrived at his destination, the court of appeals held that a rational trier of fact was free to conclude that no one had an opportunity to place the gun in his bag after his arrival. The court refused to overturn the conviction.

In *Palmer v. Krueger*,[130] the Tenth Circuit held that res ipsa loquitur cannot be invoked until a plaintiff has established what caused the accident in question. In this case, a Beech Bonanza A-36, owned jointly by the husband/pilot and the wife/passenger, crashed shortly after taking off from Woodring Airport in Enid, Oklahoma. There was no direct proof of the cause of the crash.

The wife's daughter asserted a claim grounded in negligence against the husband/pilot's estate. Following the trial, the trial court refused plaintiff's request for a res ipsa loquitur instruction. The trial court proceeded to enter a judgment on a jury verdict in favor of the defendant, and the plaintiff appealed. The Tenth Circuit, in affirming the decision, noted that the plaintiff failed to introduce any evidence to establish causation and, there-

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[129] *Id.* at 674-75.

[130] 897 F.2d 1529 (10th Cir. 1990).

fore, was not entitled to a res ipsa instruction.[131]

II. LIABILITY OF AIR CARRIERS IN WARSAW CONVENTION CARRIAGE

A. *Exclusivity*

The United States District Court in the Southern District of Florida held that the Warsaw Convention, although providing an exclusive remedy for actions arising out of injuries occurring during international air transportation, did not supply an exclusive cause of action for such claims in *Calderon v. Aerovias Nacionales De Colombia*.[132]

The plaintiff, the personal representative of a passenger who died in the Cove Neck, New York crash of Avianca Flight 52 from Medellin, Colombia, to John F. Kennedy Airport, brought suit in a Florida state court under the state's Wrongful Death Statute. Defendant airline removed the suit to federal court, asserting that since the action involved a death arising from "international transportation" within the meaning of the Convention, it was removable under the Court's federal question jurisdiction. The plaintiff moved to remand.

The district court held that "the Warsaw Convention, rather than supplying an exclusive cause of action, provides only an exclusive remedy for" actions of this sort.[133] A plaintiff, therefore, is free to state his cause of action in terms of state law, without mentioning the Convention, but is subject to the liability limits imposed by the Convention.[134] The mere pleading of the Convention as a defense will not be enough to remove the case to federal court unless a federal cause of action appears on the face of the complaint. The court proceeded to grant the plaintiff's motion to remand.

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[131] *Id.* at 1536-37.
[132] 738 F. Supp. 485 (S.D. Fla. 1990).
[133] *Id.* at 486.
[134] *Id.*

The Southern District of Florida took a somewhat different approach five months later in *Velasquez v. Aerovias Nacionales De Colombia*.[135] This action also arose out of the crash of Avianca Flight 52 from Medellin to New York. The district court held that the Convention provided an exclusive cause of action to victims of international air disasters.[136] The court also held that, although a plaintiff may file an action under the Convention in either a federal or a state court, a plaintiff who files his action in state court provides the defendant the option of removal. The court, therefore, denied the plaintiffs' motion to remand to a Florida state court.[137]

In so holding, the court stated:

> The rapid evolution of air travel has provided a unique ability to quickly transcend national boundaries and the laws which pertain therein. Such a reality necessitates the existence of uniform regulation. To hold otherwise would remove the cause of action available to the international traveller from the rule of reason to the realm of mere fortuity.[138]

It concluded by noting that "[t]o hold that an international treaty such as the Warsaw Convention provides the exclusive cause of action in the context of international air disasters yet actions brought thereunder are not removable to federal court would be nothing more than sheer sophistry."[139]

The Southern District of New York adopted the position that the Convention provided an exclusive cause of action in *Eggink v. Trans World Airlines, Inc.*[140] The plaintiff brought suit against TWA in a New York state court following the loss and misdelivery of videotapes, shirts, and promotional materials en route from New York to Paris. TWA removed the case, premising removal upon the fed-

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[135] 747 F. Supp. 670 (S.D. Fla. 1990).
[136] *Id.* at 675.
[137] *Id.* at 677.
[138] *Id.*
[139] *Id.* at 679.
[140] 22 Av. Cas. (CCH) 17,731 (S.D.N.Y. 1990).

eral question jurisdiction of the district court under 28 U.S.C. § 1441(a) and (b). TWA argued that the plaintiff's complaints stated a federal claim under the Convention. However, the district court noted that the complaint did not mention the Warsaw Convention. Nevertheless, the court went on to consider whether it was a well-pleaded complaint that did not implicate a federal cause of action or simply an artful pleading intended to defeat removal by clothing a federal claim in state garb.

The court concluded that the complaint alleged damage to goods incurred during international air transport under Article 18 of the Convention.[141] The court pointed out that to the extent that the plaintiff's damages occurred during "transportation by air", the federal cause of action provided by the Convention is the exclusive cause of action.[142] Accordingly, removal to the federal court was proper since the plaintiff had pleaded what must, of necessity, be a federal claim.[143]

B. *Injuries and Events Within the Scope of the Convention*

The Second Circuit in *Buonocore v. Trans World Airlines, Inc.* [144] held that TWA was not liable for the murder of a passenger by terrorists while waiting in the public area of da Vinci Airport in Rome since the murder did not occur during any of the operations of embarking or disembarking as contemplated under Article 17 of the Convention.

John Buonocore III was murdered during the course of a terrorist attack at da Vinci Airport on December 27, 1985. He was travelling on a TWA flight from Rome to New York scheduled to depart at 11:00 a.m. Buonocore arrived at da Vinci Airport sometime before 9:00 a.m., pursuant to TWA's instructions. He checked his luggage, and received a seat assignment, boarding pass, and baggage claim ticket at the TWA departure counter. He then

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[141] *Id.* at 17,733.
[142] *Id.*
[143] *Id.*
[144] 900 F.2d 8 (2d Cir. 1990).

walked away from the departure counter, apparently towards a snack cart in the main concourse area of the airport. As he neared the cart, the terrorist attack, consisting of machine gun fire and hand grenades, began. Mr. Buonocore was killed in the attack.

Buonocore's parents brought a wrongful death action against TWA. They claimed TWA was liable under Article 17 of the Convention, which imposes liability on airlines for injuries that occur in "the course of any of the operations of embarking or disembarking".

The district court granted summary judgment in favor of TWA on the ground that Buonocore was not, as a matter of law, in the course of embarking and disembarking. The parents appealed. In affirming the decision, the Second Circuit expounded on its decision in *Day v. Trans World Airlines, Inc.*[145] In *Day*, the court looked to a number of factors in determining whether a passenger was in the course of any of the operations of embarking or disembarking. These factors are "(1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on their movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passengers to the gate."[146]

Based upon the facts, the court concluded that Buonocore was not in the process of embarking. He had checked his luggage and received his seat assignment, but he had not gone through any security inspection. In addition, he had not gone through immigration and was not under the immediate supervision of TWA, but in an area not open to the public.

In *De La Cruz v. Dominicana De Aviacion*,[147] the Southern District of New York held that a plaintiff who slipped and fell while on the way to a baggage claim area was not in the disembarkation process. The plaintiff had just arrived

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[145] 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

[146] *Buonocore*, 900 F.2d at 10.

[147] 22 Av. Cas. (CCH) 17,639 (S.D.N.Y. 1989).

on a Dominican flight from New York to Las Americas Airport in Santo Domingo.

The plaintiff descended a flight of steps from the aircraft to the ramp, entered the arrivals building, passed through immigration control, and was then directed down a hallway to the baggage claim area. While walking down this hallway, the plaintiff slipped and fell. He testified that he noticed a wetness on the floor that he contended was "shampoo."

The plaintiff spent eleven days in a Santo Domingo hospital and a month at his mother's house. When he returned to New York, the plaintiff had part of his left leg amputated. It was determined that plaintiff had been undergoing treatment in New York for a tumor found in his leg and had left for Santo Domingo against medical advice. The plaintiff alleged that the injuries he received at the airport prevented him from returning to New York in time to continue a limb-sparing course of treatment.

The plaintiff sought summary judgment on the grounds that Article 17 of the Convention made Dominicana absolutely liable for his injuries because they were incurred while he was in the process of disembarkation of an international flight. The defendant also sought summary judgment and requested that Rule 11 sanctions be imposed on the plaintiff's attorney for failing to conduct a reasonable inquiry into the facts and law of the case. The court granted defendant's motion for summary judgment but denied the Rule 11 sanctions. In granting summary judgment, the court noted that retrieving one's bags does not place a person in the disembarkation process. The court also noted that the plaintiff had left the aircraft, walked into the terminal, entered the arrival gate, and had undergone passport control by government employees. Thus, plaintiff was free to mix with any international travellers who had not yet cleared customs. Further, plaintiff introduced no evidence to contradict defendant's assertion that the hallway in which the plaintiff fell was not leased, occupied, or controlled by Dominicana. The court con-

cluded that holding the airline liable based upon these facts would make an airline an insurer for any injury occurring in an airport.

In *Rabinowitz v. Scandinavian Airlines*,[148] the Southern District of New York held that a person walking from one terminal to another, to catch a connecting flight on the same airline, is not in the process of embarking or disembarking from an aircraft.[149] The plaintiffs were travelling under an S.A.S. ticket from a flight from New York to Copenhagen to Moscow to New York. The flight arrived in Copenhagen, where the plaintiffs were to change to a flight departing for Moscow. The plaintiffs claimed that they were directed by an S.A.S. employee to take a moving sidewalk from Concourse C to Concourse B, where their connecting flight was scheduled to depart. While on the walkway, the plaintiff's foot became caught and was injured as a result. This occurred approximately five minutes after their arrival at Copenhagen.

S.A.S. moved for summary judgment on the ground that the plaintiff was not in the course of embarking or disembarking under Article 17 of the Convention. The District Court granted the motion. In concluding that Ms. Rabinowitz was not in the course of embarking or disembarking, the court noted that no S.A.S. employees had accompanied the connecting passengers through the airport to the departing flight. Passengers were free to roam freely within the terminal during the lay-over and could mingle with other international passengers. Therefore, the fact that an S.A.S. employee had directed the plaintiff to the moving sidewalk was not an indication that S.A.S. was in control of the plaintiff's movements.[150]

Plaintiffs had attempted to distinguish those cases cited by the defendant on the ground that in this case they were transferring (i.e., disembarking *and* embarking) between planes of the same carrier, thus predicating liability on the

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[148] 741 F. Supp. 441 (S.D.N.Y. 1990).
[149] *Id.* at 446.
[150] *Id.* at 446-47.

basis of a continuous trip between New York and Moscow. The court held that the fact that a trip might be deemed continuous was irrelevant to any statutory interpretation of the Convention. To impose liability on an airline for any injury that might occur in an airport terminal while en route would contravene the terms and purpose of Article 17.[151]

In *Denuna v. Northwest Airlines, Inc.*,[152] a federal district court in California held that the Convention was applicable to an accident involving a passenger travelling on a ticket indicating only a domestic flight with the point of origin and final destination in the Philippines. The plaintiff was injured when an anxious fellow traveller opened the plane's overhead storage bin before the plane taxied to a complete stop at Los Angeles Airport.

The plaintiff had purchased two tickets for her trip from a travel agent in the Philippines. One ticket contained an international itinerary while the other one covered only her domestic travel. The separate domestic ticket was purchased separately as part of the airline's promotional program which required that a domestic ticket be purchased in conjunction with travel beginning and ending outside of the United States.

Plaintiff made a motion for partial summary judgment on the ground that the Convention was applicable to plaintiff's claim for damages sustained on the domestic leg of the journey. The district court granted the motion and held that the Convention was applicable to an accident occurring during a domestic flight when the domestic ticket was purchased in conjunction with an international flight.

In *Sulewski v. Federal Express Corp.*,[153] the Southern District of New York held that the Warsaw Convention did not apply to a wrongful death action brought against an

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[151] *Id.* at 447.

[152] No. CV-89-5710-MRP (C.D. Cal. June 15, 1990) (LEXIS Genfed library, Dist file).

[153] 749 F. Supp. 506 (S.D.N.Y. 1990).

airline by the estate of an individual who was killed in the crash of a cargo airplane on which he was traveling from Singapore to Kuala Lumpur, Malaysia, because the individual was an employee and not a passenger of the airline.[154]

The cargo airplane, operated by Flying Tiger Line, crashed in Kuala Lumpur. The pilot, co-pilot, and flight engineer were killed, as was Leonard Sulewski, an aircraft mechanic employed by Flying Tiger. The plaintiff brought suit against Flying Tiger's successor in interest, Federal Express Corporation, for compensatory and wrongful death damages based upon the Warsaw Convention. The defendant moved for summary judgment, asserting that the decedent was not traveling as a passenger, as defined in the Convention, but was traveling on a scheduled flight pursuant to his contract of employment. According to the defendant's analysis, the plaintiff's exclusive remedy was worker's compensation.

The decedent was a fully qualified and licensed mechanic authorized to perform maintenance on and repairs to Flying Tiger aircraft. As a "maintenance representative" the decedent was assigned to various flights in order to perform necessary safety and maintenance work at airports around the world where no station or ground mechanics were employed by Flying Tiger. It was en route to one of these assignments that Leonard Sulewski died.

The court noted that the decedent was listed on the flight manifest as part of the crew and not a passenger. In addition, the carrier's employment contract with its mechanics called for the mechanics to be available to consult with crew members during a flight if the need arose.

Based on these facts, the court found that the decedent was aboard the flight primarily to perform his employment obligations so that he was not a passenger.[155] The

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[154] *Id.* at 512.

[155] *Id.* at 512. The court refused to consider various definitions of "crew" from

court granted the defendant's motion for summary judgment.

C. *Damages Recoverable*

A dispute in the Second Circuit over the availability of punitive damages under the Warsaw Convention was recently settled by the Court of Appeals, which ruled that these damages were not available.[156] On January 3, 1990, Judge Platt, of the Eastern District of New York, in *In re Air Disaster in Lockerbie, Scotland on December 21, 1988*[157] ("*Lockerbie 1*") held that the Warsaw Convention does not permit recovery of punitive damage claims.

On January 18, Judge Sprizzo, of the Southern District of New York, in *In re Hijacking of Pan American World Airways, at Karachi Int'l Airport, Pakistan on September 5, 1986*[158] ("*Pan Am Karachi*") held that the Convention does not preempt recovery of punitive damages. Judge Sprizzo implicitly criticized Judge Platt's decision, issued just 15 days beforehand. Consequently, the Lockerbie plaintiffs then filed a motion for reargument, based, in part, on the reasoning in *Pan Am Karachi*.[159]

The Lockerbie and Karachi plaintiffs had made identical arguments supporting the availability of punitive damages. The plaintiffs asserted that Article 24 of the Convention, when read together with Article 17, permits the recovery of punitive damage claims when it is permitted by local law. The plaintiffs went on to assert that, even if Article 17, when read in conjunction with Article 24, did preclude the recovery of punitive damages under normal circumstances, a finding of wilful misconduct under Arti-

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maritime, immigration, labor and insurance cases since none of them dealt with the Warsaw Convention provisions. *Id.*

[156] *Lockerbie*, No. 90-7388 (2d Cir. March 22, 1991) (LEXIS, Genfed library, US App. LEXIS 4779). This opinion consolidated both of the conflicting cases, affirming one and reversing the other.

[157] 733 F. Supp. 547, 554 (E.D.N.Y. 1990).

[158] 729 F. Supp. 17, 20 (S.D.N.Y. 1990).

[159] 736 F. Supp. 18, 19-20 (E.D.N.Y. 1990).

cle 25 would open the door for the recovery of punitive damages.

The Second Circuit rejected the plaintiff's arguments, holding that the Warsaw Convention did not permit the recovery of punitive damages either under Article 17 alone or when read in conjunction with Article 24. Moreover, the Second Circuit stated this is true even in the presence of wilful misconduct, regardless of the law of the state in which it is brought.[160]

In *Eastern Airlines, Inc. v. King*,[161] the Florida Supreme Court discussed the circumstances under which a plaintiff may recover for emotional distress under the Warsaw Convention. The court held that under the Warsaw Convention a plaintiff can recover for mental suffering and emotional distress, even in the absence of any physical injury. The court expressly adopted the reasoning of the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.* [162]

Like *Floyd*, this suit involved engine failure. On May 5, 1983, three engines on board Eastern Airlines Flight 855 from Miami, Florida, to Nassau, Bahamas, malfunctioned. The passengers and crew of the L-1011 prepared to ditch into the ocean, but, just before ditching, one engine was restarted, and the plane returned safely to Miami.

King, a passenger on board the flight, sued Eastern for intentional infliction of emotional distress and for damages under the Convention. Following the reasoning of the federal district court in *In re Eastern Airlines, Inc. Engine Failure, Miami International Airport on May 5, 1983*,[163] the Florida court entered a judgment for Eastern. A Florida court of appeals affirmed the dismissal of the claim for emotional distress under the Warsaw Convention.

The Florida Supreme Court reversed as to the availability of claims for emotional distress under the Warsaw

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[160] *Lockerbie*, No. 90-7388 at 7.

[161] 557 So. 2d 574 (Fla. 1990).

[162] 872 F.2d 1462, 1472 (11th Cir. 1989), *cert. granted*, 111 S.Ct. 1489 (1990).

[163] 629 F. Supp. 307 (S.D. Fla. 1986), *rev'd sub nom.* Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 111 S.Ct. 1489 (1990).

Convention. It agreed with the Eleventh Circuit in *Floyd* that Article 17 of the Convention provides for any damage, whether material or moral, including mental suffering unaccompanied by physical injury. The Court concluded by noting that the plaintiff's damages would be limited to $75,000.[164]

In *Morgan v. United Air Lines, Inc.*,[165] a federal district court in Colorado held that a plaintiff can recover for purely emotional injuries under the Warsaw Convention. The case arose in the aftermath of ill-fated Flight 811 from Honolulu, Hawaii to Auckland, New Zealand, on February 24, 1989. While the plane was en route, it experienced sudden decompression at 23,000 feet. The decompression occurred after the right forward lower lobe cargo door and part of the fuselage separated from the airplane. Five double-seat units in the lower business section were lost. The plane returned to Honolulu within twenty minutes of the decompression and the remaining passengers were evacuated. The plaintiffs, although not alleging any physical injuries, alleged mental distress due to their harrowing experience on board the aircraft.

Defendants moved to preclude the plaintiff's right to seek damages purely for emotional distress under the Warsaw Convention. In denying the motion, the court relied on the Eleventh Circuit's analysis of the same question in *Floyd v. Eastern Airlines*[166] which held that the term "lesion corporelle" of Article 17 of the Convention encompassed emotional injuries. The court echoed *Floyd* in holding that although the literal French translation to "lesion corporelle" was bodily injury, the French legal meaning for those words encompassed mental injury as well as bodily injury and, therefore, mental and emotional injuries were to be recoverable for under the Warsaw Convention. The court concluded its discussion of this issue by noting that there was no evidence that the drafters of

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[164] *Id.*
[165] 750 F. Supp. 1046 (D. Colo. 1990).
[166] 872 F.2d at 1466.

the Convention intended to preclude recovery for any particular type of injury.

The district court then considered what law should be used to determine whether any such mental or emotional injuries had occurred. Plaintiff first argued that under the Convention, "federal common law" governed this case and preempted any state law concerning mental injuries. Alternatively, plaintiffs argued that federal maritime law or the substantive law of Colorado should apply. Failing that, plaintiff argued that the substantive law of Colorado should be applied. Under Colorado law as stated in *Kimelman v. City of Colorado Springs*,[167] if there was no physical contact between the plaintiff and the alleged tortfeasor in an action for intentional infliction of emotional distress, then physical manifestations of the emotional injury must be proven in order to establish mental distress.

Plaintiff initially claimed that contact with insulation dust and loud noise after the decompression provided sufficient physical contact to preclude the need to prove any physical manifestation.

United Airlines took the position that if mental injuries are compensable under the Warsaw Convention, then, because jurisdiction was based on diversity of citizenship, the court should apply Colorado's choice of law rules. United Airlines further contended that plaintiff did not have any physical contact and that plaintiff had not asserted any physical manifestation of emotional distress.

The court held that federal maritime law did not apply, and that the choice of law determination in proving plaintiff's injuries would be governed by the Colorado rules for conflicts of law. Under Colorado's choice of law rules, the law of the state with the most significant relationship to the claims controls. As was noted in *Dorr v. Briggs*,[168] the court must consider the relevant factors included in section 6 of the Restatement (Second) Conflict of Laws.

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[167] 775 P.2d 51, 52 (Colo. Ct. App. 1989).

[168] 709 F. Supp. 1005 (D. Colo. 1989).

Using the Restatement analysis, the court found that Colorado bore the most significant relationship to the litigation since the plaintiff was a domiciliary of Colorado and the defendant had a place of business there. Therefore, the substantive law of Colorado governed the case.

In another case arising out of the same crash, *In re Air Crash Disaster Near Honolulu Hawaii, On February 24, 1989*,[169] the district court discussed:

> 1. Whether the plaintiffs have a right to a jury trial under the Warsaw Convention or the Death on the High Seas Act, 46 U.S.C. § 761 ("DOHSA");
>
> 2. Whether damages for emotional distress are recoverable under the Warsaw Convention in the absence of physical injury;
>
> 3. Whether plaintiffs are entitled to prejudgment interest pursuant to the Warsaw Convention, maritime law, or DOHSA, and, if so, what is the proper rate of interest and the effect of the damages limitation of the Warsaw Convention; and
>
> 4. Whether the jury should be informed of the $75,000 Warsaw Convention limit.

The court noted that the torts alleged by plaintiffs were maritime torts governed by general maritime law. According to *Southern Pacific Co. v. Jensen*[170] however, the "savings to suitors" clause of 28 U.S.C. § 1333 allows plaintiffs with claims cognizable both in law and in admiralty to invoke whichever jurisdiction the plaintiff chooses. When a plaintiff elects to bring a cause of action in law rather than admiralty, the plaintiff is entitled to a jury trial. Finally, under Rule 9(h) of the Federal Rules of Civil Procedure, a claim that could be brought in law or in admiralty will be deemed a law claim unless the plaintiff elects otherwise. Since none of the complaints before the court invoked its admiralty jurisdiction, the court concluded that the cases would be tried before a jury.

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[169] No. MDL-807 (N.D.Cal. Sept. 27, 1990).
[170] 244 U.S. 205 (1917).

As to the availability of emotional distress damages in the absence of physical injuries, the court noted that the Supreme Court's granting of *certiorari* in *Floyd* would ultimately resolve the issue. Until such time as a decision is rendered, the district court felt obligated to render a decision that would allow the *Floyd* litigation to proceed.

The district court, therefore, decided that it would ask the jury to make special findings regarding (1) the plaintiffs' damages from physical injury and emotional distress due to physical injury, and (2) emotional distress unaccompanied by physical injury. This would enable the parties to evaluate their position in light of the verdict. If *Floyd* is not reversed, the information produced as to the jury's valuation of the plaintiffs' physical and emotional injuries would, hopefully, assist the parties in any future settlement negotiations.

The court held that the plaintiffs were entitled to prejudgment interest on any damages awarded to them. The interest rate will be determined by United Airline's cost of funds during the pendency of the litigation. The court concluded that, even though damages will be limited to $75,000, the addition of prejudgment interest may result in an award exceeding that figure. The court noted that there is a split among the circuit courts as to whether prejudgment interest may be awarded over the $75,000 Warsaw limit. The court established the approach adopted by the Fifth Circuit in *Domangue v. Eastern Airlines, Inc.*[171]. The Fifth Circuit in *Domangue* held that one purpose of the Convention is to ensure the speedy resolution of claims. The denial of prejudgment interest would give carriers an incentive to delay cases involving large amounts of money. The court concluded that prejudgment interest does not compensate for injuries but for the failure of a defendant to promptly pay for the damages it inflicted. Finally, the court decided not to advise the jury of the Convention's $75,000 limit. The court stated that under

[171] 722 F.2d 256 (5th Cir. 1984).

Federal Rules Evidence 402, the prejudicial impact of the limit would significantly outweigh any probative value which it might have.

D. *Cargo and Baggage*

In *Hatzlachh Supply, Inc. v. Tradewinds Airways, Ltd.*,[172] the District Court for the Southern District of New York addressed the scope of Article 18 of the Convention. The plaintiff brought suit against the air carrier after the buyer/consignee failed to pay the seller/shipper for goods travelling under two air waybills issued by Tradewinds. The air waybills, evincing shipment of goods from New York to Kano, Nigeria, were consigned to the Savannah Bank of Nigeria. The air waybills stated that the goods were not to be released by the carrier until the bank guaranteed payment of a draft submitted to it for collection. The carrier allegedly failed to follow these instructions, the goods were released, and the shipper did not receive payment.

In denying the plaintiff's motion to dismiss Tradewind's affirmative defense that its liability was limited by the Warsaw Convention, the district court held that the loss took place during "transportation by air" within the meaning of Article 18 of the Convention. On the facts before it, the court concluded that "transportation by air" did not terminate until the goods left the carrier's custody and were released to the buyer. Even if the carrier acted wrongly in releasing the goods, the goods were released during the period of transport by air, and, as such, the Convention and its limitation of liability for cargo loss were applicable.

In *Arkwright Mutual Insurance Co. v. Pan American World Airways, Inc.*,[173] a district court in Massachusetts held that an insurance company, the subrogee of a shipper, was not entitled to recover damages for a cargo shipment that was

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[172] 738 F. Supp. 714 (S.D.N.Y. 1990).
[173] 739 F. Supp. 55 (D. Mass. 1990).

delayed 130 days. The shipper had arranged for the shipment of a lighting system from Tel Aviv to Connecticut. In the 130 days that it took Pan Am to deliver the lighting system, the shipper notified Pan Am that it would be seeking damages for non-delivery. After the actual delivery of the cargo, neither the shipper nor the plaintiff gave Pan Am written notice of a claim for delay damages. The court, in granting Pan Am's motion for summary judgment, cited Article 26(2) as mandating that in "the case of delay the complaint must be made at least within fourteen days from the date on which the . . . goods had been placed at his disposal." According to the court, the earlier correspondence from the shipper spoke only in terms of damages for non-delivery. Pan Am, therefore, was not properly notified under the terms of the Convention.

In *Hill v. American Airlines, Inc.*,[174] American Airlines was not able to avail itself of the $9.07 per lbs limitation of liability provided by the Convention when it failed to include the weight of the lost luggage on the claim check. The plaintiffs' luggage was lost en route from New York to Montego Bay, Jamaica. American claimed that, since the plaintiffs did not know the weight of their luggage, there was no basis on which to calculate damages and asked for the claim to be dismissed.

The plaintiffs, appearing pro se, produced their claim checks in opposition to the motion. The court cited Article 4(4) of the Warsaw Convention, which states that, if a baggage check does not contain the number and weight of packages, it cannot avail itself of those provisions of the Convention that limit or exclude his liability. The court, as a result, denied American's motion for summary judgment.

In *Arkin v. New York Helicopter Corp.*,[175] a New York appellate court reached a similar conclusion. In *Arkin*, the plaintiff, an attorney, checked two pieces of luggage at a New York heliport while on his way to board a British Air-

[174] 239 N.J. Super. 105, 570 A.2d 1040 (1989).
[175] 149 A.D.2d 5, 544 N.Y.S.2d 343 (N.Y. App. Div. 1990).

ways flight from New York to London. The defendants provided the plaintiff with a baggage check that did not include the number and weight of the plaintiff's baggage. As sometimes happens, the luggage was lost. The plaintiff brought suit, and the defendants moved for summary judgment to the extent that the damages sought exceeded the limitations provided for in the Convention.

The trial court granted the defendant's motion, and the plaintiff appealed. The appellate court reversed the trial court's finding and granted the plaintiff's motion to dismiss the affirmative defenses arising from the Warsaw Convention.

In so holding, the court noted that Article 4 (4) requires an international air carrier to provide a passenger with a baggage check that includes the number and weight of luggage checked. Failure to do so precludes the carrier from limiting its liability to the $20.00 per kilogram provided for in the Warsaw Convention. It was not overly demanding, said the court, to require a carrier to note the number and weight of a passenger's bags. Given that the Convention, by limiting the carrier's liability, shifts a greater part of the responsibility and risk of loss to the passenger, these minimal requirements should be strictly construed.

This strict construction of the wording of the Convention was said to be in accord with the Supreme Court's decision in *Chan v. Korean Air Lines*.[176] The Supreme Court in *Chan* held that the Warsaw Convention liability limitation for passenger death or injury was not voided by the failure to provide at least 10-point type for passenger tickets. The court compared Article 3's lack of a sanction with Article 4's inclusion of a sanction — the loss of the limitation of liability. The text of Article 4 was said to be unambiguous, and as such it was to be strictly construed.

In *Victoria Sales Corp. v. Emery Air Freight, Inc.*,[177] the Sec-

[176] 490 U.S. 122 (1989).

[177] 917 F.2d 705 (2d Cir. 1990).

ond Circuit held that the provisions of the Warsaw Convention do not apply to a loss of cargo occurring in a carrier's warehouse not located at an airport. The case involved a shipment from Amsterdam to J.F.K. in New York. The consolidated cargo was off-loaded at the airport and then taken to Emery's off-airport warehouse. When one consignee arrived at the warehouse to claim its goods, the goods could not be found.

At trial the district court held that liability limitations of the Warsaw Convention governed Victoria's recovery of money damages. The Court of Appeals reversed, holding that because Emery had stipulated that the loss occurred at its warehouse outside the airport, any presumption favoring Convention coverage was rebutted and the Convention did not apply to the claim.[178]

E. *Limitations of Actions*

In *Halmos v. Pan American World Airways, Inc.*,[179] the district court discussed Article 29 of the Warsaw Convention's two-year statute of limitation as it applied under both federal and New York law. The plaintiff, Halmos, while travelling on Pan Am flight 119 from New York to Paris on July 29, 1987 became ill after eating an inflight meal.

Article 29(1) of the Warsaw Convention provides that an action must be brought within two years of the aircraft's arrival at its destination. Article 29(2) expressly leaves the calculation of the limitations period to the court in which the case is filed.

On July 27, 1989, the plaintiff filed an action against Pan Am in the district court. Service of process upon Pan Am was not accomplished until October 10, 1989. Under the federal rules, "a civil action is commenced by filing a complaint with the court".[180] Under New York law an action is not commenced until service of process upon the

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[178] *Id.* at 707-08.
[179] 727 F. Supp. 122 (S.D.N.Y. 1989).
[180] FED. R. CIV. P. 3.

defendant is completed.[181] Plaintiff, then, would be time barred if the New York rule applied but could go forward under the federal rule.

The district court concluded that, as a matter of federal law, state statutes of limitation govern the timeliness of claims brought under federal diversity jurisdiction. State law also determines when an action is commenced and when the statute of limitations is tolled. The plaintiff's action, therefore, was dismissed on the ground that the action was not commenced until October 10, 1989, more than two years after the incident at issue.

In *Eggink v. Trans World Airlines, Inc.*,[182] the plaintiff had commenced his action for cargo damage after the Convention's two-year limitation period had expired but within the three-year limitation period of New York law.[183] The plaintiff contended that, since his claims were based only on state law, the state's three-year period should be applicable. The court held that the Convention provided the applicable framework for these claims because all of the plaintiff's causes of action were deemed to have occurred during the "transportation by air" of the damaged goods. The court granted TWA's motion for summary judgment on the ground that plaintiff's claims were time-barred.

III. Liability of Operators of Aircraft in Non-Warsaw Carriage

A. *General Airline Liability*

In *Aboujdid v. Singapore Airlines, Ltd.*,[184] a case arising from the "Entebbe Affair," a New York Supreme Court held that Gulf Aviation did not breach a duty owed to passengers on an Air France flight from Tel Aviv to Paris. The plaintiffs alleged that Gulf failed to identify and pre-

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[181] N.Y. Civ. Prac. L. & R. 304 (McKinney 1988).
[182] 22 Av. Cas. (CCH) 17,731 (S.D.N.Y. 1990).
[183] N.Y. Civ. Prac. L. & R. 214 (3) (McKinney 1990).
[184] 22 Av. Cas. (CCH) 17,707 (N.Y. Sup. Ct. 1991).

vent skyjackers from boarding and subsequently skyjacking the Air France flight.

The skyjackers flew on Gulf from Qatar and the United Arab Emirates to Bahrain and then on Singapore Airlines from Bahrain to Athens. On July 4, 1976, they boarded the ill-fated Air France flight from Tel Aviv to Paris during its stopover in Athens. They then skyjacked the plane and diverted it to Entebbe airport in Uganda, where almost all of the passengers were later rescued by Israeli troops.

The court held that Gulf had no legal duty to intercept the skyjackers because the governments of Bahrain, Qatar, and the United Arab Emirates had exclusive responsibility and control of aviation security at the airports from which the skyjackers began their journey to Athens.[185]

The court further found that if any security lapse was the proximate cause of the skyjacking, it was due to the failure of either Athens or Air France authorities, or both, to properly screen passengers and their belongings. Moreover, any such negligence would be independent, intervening acts that would supercede any alleged negligence claims against Gulf.[186]

The passengers' actions against Air France had been dismissed much earlier in *Karfunkel v. Air France*,[187] because they did not meet the jurisdictional requirements of Article 28 of the Warsaw Convention. Subsequent claims against Singapore Airlines had been dismissed pursuant to the Foreign Sovereign Immunities Act.[188]

In *United States v. American Airlines, Inc.*,[189] a district court in Massachusetts upheld an FAA fine of $25,000 against

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[185] *Id.* at 17,708.

[186] *Id.* at 17,709-10.

[187] 427 F. Supp. 971 (S.D.N.Y. 1977).

[188] Aboujdid v. Singapore Airlines, Ltd., 108 A.D.2d 330, 489 N.Y.S.2d 171 (N.Y. App. Div. 1985), *aff'd*, 67 N.Y.2d 450, 494 N.E.2d 1055, 503 N.Y.S.2d 555 (1986).

[189] 739 F. Supp. 52 (D. Mass. 1990).

American Airlines for failing to implement a security system to screen pasenger's carry-on luggage for weapons.

In June of 1987, special agents of the FAA observed 25 instances where individuals, with carry-on luggage, passed through a security checkpoint without their luggage being monitored. On the same day, the agents passed two pieces of luggage through the monitor. One piece contained a pipe bomb and a hand grenade, and the other an encapsulated gun.

The U.S. then filed a complaint against American Airlines seeking $1,000 for each separate and distinct violation of § 901(a)(1) of the Federal Aviation Act of 1958, which states that "any person who violates [the regulation requiring a security program] shall be subject to a civil penalty not to exceed $1,000 for each such violation. . . ."[190]

American admitted the violation but argued that, since the passengers not checked were boarding a single flight, there was only one violation and not twenty-five. The court concluded that, if American's position were adopted, it would only serve to undermine Congress' intent in promulgating federal safety regulations. The regulation at issue specifically mandated the inspection of each person, and to hold otherwise would contravene Congress' intent.[191]

In *Haley v. United Airlines*,[192] a district court addressed the issue of whether a carrier is liable when a passenger ignores an announcement to remain seated, opens the overhead storage bin, and allows a briefcase to fall out and injure another passenger. The plaintiff, a passenger on United Flight 899 from Chicago to Kansas City, was sitting one row in front of the over-eager passenger. The plaintiff charged United with four counts of negligence. The court, in granting United's motion for summary judgment, noted that, although as a common carrier United

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[190] 49 U.S.C. § 1471(a)(1) (1987)
[191] 739 F. Supp. at 53.
[192] 728 F. Supp. 374 (D. Md. 1989).

was responsible for exercising the highest degree of care toward its passengers, it was not an insurer of its passengers' safety. Consequently, United should not be liable for personal injuries of a passenger resulting from an accident absent any fault on the part of United.

United's duty of care was satisfied when its employees made all the standard safety announcements warning passengers to remain seated. The court observed that a flight attendant attempted to prevent the offending passenger from opening the storage bin. The court also took extensive note of assistance United provided to the plaintiff after the accident.

In a similar case, a New York appellate court in *Ginter v. Trans World Airlines, Inc.*[193] affirmed a trial court's decision to set aside a plaintiff's jury verdict and order judgment in favor of the defendant. In that case, the lead plaintiff suffered injuries when a fellow passenger opened the overhead storage compartment, striking the plaintiff on the head with falling bags. The plaintiff, along with her husband, commenced this action asserting that TWA was negligent in permitting the storage of this type of luggage in an overhead compartment, failing to warn passengers of the potential danger of suitcases falling on their heads, and violating their own regulations and industry custom in the carriage of baggage. At trial, a jury awarded both plaintiffs money damages. Upon defendant's motion, the trial court set the verdict aside on the ground that plaintiffs had failed to prove any negligence on the part of defendant that was the proximate cause of the plaintiffs' injuries. The plaintiffs appealed.

The appellate court affirmed, based in part on plaintiffs' failure to prove that there was a custom in the industry as to what is permitted to be stored in the overhead compartments of planes.[194] The only regulations adduced were FAA regulations as to the dimensions and total

[193] Ginter v. Trans World Airlines, Inc., 148 A.D.2d 787, 538 N.Y.S.2d 638 (N.Y. App. Div. 1989).

[194] 538 N.Y.S.2d at 639.

weight of packages or baggage stored in the compartments. As an example, the court noted that bowling balls would not be permitted.

Furthermore, TWA presented evidence that an announcement was made about proper storage prior to every flight and that the flight attendants checked to ensure that all overhead racks were closed prior to take off. The court could not find any breach of duty owed to the plaintiffs by the defendant. The court concluded by noting that the trial court was correct in its conclusion that, as a matter of law, plaintiffs had failed to establish negligence on the part of the defendant and that there was no valid line of reasoning or permissible inference which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial.[195]

In yet another case involving overhead storage compartments, *Plagianos v. American Airlines, Inc.*,[196] the Second Circuit Court of Appeals considered the appropriateness of a jury instruction providing that the defendant, a common carrier, should be held to a "high standard of care, requiring the exercise of the highest or utmost caution for the safety of the passengers."[197] In that case, the plaintiff injured his knee during the takeoff of an American flight from New York to Puerto Rico. The injury occurred when an overhead storage compartment opened on takeoff. The plaintiff, who was wearing a seat belt, quickly stood up to push luggage back into the compartment. According to the plaintiff, the act of standing up against the seat belt caused him to suffer a complete avulsion of the anterior cruciate ligament and a tear of the medial meniscus in his left knee, requiring surgery.[198]

Ruling that the case would have to be remanded for a new trial, the court stated that a common carrier is held to

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[195] *Id.* 558 N.Y.S.2d at 640.
[196] 912 F.2d 57 (2d Cir. 1990).
[197] *Id.* at 59.
[198] *Id.* at 58-59.

the same standard of care as any other alleged tort feasor: ordinary care commensurate with the existing circumstances.[199] Furthermore, the court held that the instruction was prejudicial insofar as it may have confused the jury and caused them to believe that American's proportion of fault should be determined using a different standard than that applied to the plaintiff.[200]

In *Kleiner v. Qantas Airways, Ltd.*,[201] the Southern District of New York dismissed an action brought against Qantas Airways for injuries received by a plaintiff who suffered an adverse reaction when the cabin of the plane was sprayed with an aerosol intended to prevent the introduction of harmful insects into Australia.[202] The plaintiff alleged that she slept through an announcement that, in accordance with Australian health and agriculture requirements, the cabin was to be sprayed with a non-toxic insecticide. Passengers were told to remain seated and place a handkerchief over their mouth and nose if aerosol spray caused them discomfort. The plaintiff experienced some discomfort that caused her to be confined to her hotel room for a number of days. The plaintiff then flew on to New Zealand, where she was sprayed again. Her reaction this time was more severe and required a trip to a local hospital. When told that they would be sprayed again upon arrival in Tahiti, the plaintiff cut short her trip and returned to the United States, where she was not sprayed upon arrival.

In dismissing the case, the district court noted that Qantas was merely observing government regulations and used a spray that had been approved by the World Health Organization, which states in its publications that the compound was safe for use on aircraft. According to the court, whatever affirmative duty Qantas had towards its passengers was satisfied by its announcement prior to

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[199] *Id.* at 59.

[200] *Id.*

[201] No. 88 8642 RO (S.D.N.Y. June 4, 1990) (LEXIS Genfed Library, Dist file).

[202] *Id.*

spraying.[203]

In an action that apparently inspired an episode of L.A. Law, the Court of Appeals for the District of Columbia in *Abourezk v. New York Airlines, Inc.*[204] affirmed the decision of the district court granting summary judgment in favor of an airline that had allegedly falsely imprisoned a former United States Senator who insisted on leaving the plane after it sat on the taxiway at Washington National Airport for over three hours.

Abourezk, a former U.S. Senator from South Dakota, boarded New York Air Flight 30, which was scheduled to depart at 4:30 p.m. from Washington, D.C., to New York. The airplane left the gate at 4:30 but sat on the runway for three hours. The plane finally arrived in New York at 8:35 p.m. As a result, Mr. Abourezk missed a reception at the United Nations being given in honor of one of his clients.

While sitting on the taxiway in Washington D.C., Abourezk asked the pilot three times to allow him to deplane. The request was denied each time. Abourezk filed suit, asserting that New York Air was liable to him for false imprisonment and infliction of emotional distress. The district court granted the defendant's motion for summary judgment. Abourezk appealed.

The Court of Appeals affirmed the decision of the district court. The decision is noteworthy more for the concurring opinion of Justice Harry Edwards than the majority's discussion of the proper application of District of Columbia law. Justice Edwards noted that the district court and the majority had failed to address the federal preemption issue. Justice Edwards contended that section 1305(a)(1) of Title 49 of the United States Code, which provides that no State shall enforce any law which has the force and effect of law relating to "rates, routes, or services of any air carrier", preempted any suit such as the one before it.[205]

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[203] *Id.*

[204] 895 F.2d 1456, 1457 (D.C. Cir. 1990).

[205] *Id.* at 1459.

In *Vantassell-Matin v. Nelson*,[206] a district court in Illinois dismissed a complaint by two airline passengers against two other passengers and the airline for slander, libel, and intentional infliction of emotional distress after a defendant passenger complained that plaintiffs were engaged in oral sex and other indecent activities in view of her 13-year old daughter.

The court, appropriately enough, noted that the facts of this case were "bizarre" but "simple."[207] On March 14, 1988, the Matins and Nelsons were fellow passengers on an American Airline flight from Munich, West Germany, to San Diego, California, with a stop-over in Chicago, Illinois. During the movie portion of the flight, Jeannie Nelson complained to crew members that the Matins were engaged in oral sex and other indecent activities in the view of her 13-year old daughter. The lead flight attendant moved the Nelsons to a different part of the plane and notified the Captain. The Captain consulted with an off-duty FBI agent and husband of one of the other flight attendants on board the flight. The agent advised the captain and crew to make a discreet investigation. The in-flight investigation apparently turned up nothing unusual. The court, however, in a footnote added that this would seem to be a matter of interpretation since one flight attendant did say in her incident report that she had seen a blanket over the lap of the plaintiff-husband and that "I thought I saw him zip up his fly underneath the blanket."[208]

When the plane landed in Chicago, the plaintiffs were arrested by the police and the FBI. Two other non-parties were arrested on charges stemming from a fracas that erupted when a flight attendant tried to stop the plaintiffs. They were described by police as "voyeurs", and they had become incensed when a flight attendant tried to stop the

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[206] 741 F. Supp. 698 (N.D. Ill. 1990).

[207] *Id.*

[208] *Id.* at 701 n.3.

couple and had pelted her with food and drink.[209] The incident was reported by the wire services and local newspapers. One police officer was quoted as saying this was not an unprecedented incident on the airline whose slogan is "something special in the air."[210]

As a result of the publicity, the plaintiffs brought actions against the complaining passengers and the airlines. In dismissing the action, the court, held that: (1) Illinois law applied to claims of privilege; (2) statements by defendant passengers to police upon landing of the aircraft were subject to absolute privilege; (3) statements to flight attendants and to off-duty FBI agent during flight were subject to, at least, qualified privilege; (4) factual allegations that the alleged sexual conduct did not occur were insufficient pleading of specific facts to show existence of actual malice; and (5) statements by airline which did not identify plaintiffs were not "of and concerning" plaintiffs so as to support libel action by reason of the fact that, in newspaper reports of those statements, plaintiffs were identified by information which reporters obtained from other sources.[211]

In *Morris v. Northwest Airlines, Inc.*,[212] a Michigan federal district court held that, under federal common law, an exculpatory clause contained in an employee's free airline pass was valid. The suit grew out of the crash of Northwest Flight 255 just after take-off from Detroit Metropolitan Airport on August 16, 1987. The decedent, an off-duty flight attendant, was travelling from her work base in Detroit to her home in Phoenix. The decedent was travelling on a free travel pass issued by the airline. The pass contained a clause that stated that the holder assumed all risks incidental to the flight and exonerated the airline from liability for any loss, damage, injury, or death. The personal representative of the decedent's estate moved to

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[209] *Id.* at 701 n.4.

[210] *Id.* at 712.

[211] *Id.* at 703-07.

[212] 737 F. Supp. 422 (E.D. Mich. 1989).

invalidate the clause to the extent that it exonerated Northwest from liability for any ordinary negligence that caused decedent's death.

In making its decision, the court first noted that the validity of the exculpatory clause would be governed by federal law.[213] The court noted that the deregulation of the airlines has not modified a long line of pre-deregulation cases that established that federal law preempted state law in this area.[214]

The court then held the clause in question valid as a matter of federal common law.[215] Passes such as this, said the court, are gratuitous and inure to the employee's benefit. An employee using such a pass is, therefore, a gratuitous licensee, and the sole duty of the airline was to neither wantonly nor willfully injure her. After citing to a long line of Supreme Court and Sixth Circuit cases, the court stated that it would decline "to ignore forty years of precedent" and would not invalidate the exculpatory clause, as requested.[216]

In another action arising out of the crash of Northwest Flight 255, the district court held that the Michigan Wrongful Death Act did not allow the husband of an airline employee to recover damages for the death of a fetus in the crash.[217] Roberta Rademacher died while working as a flight attendant on Flight 255. The facts established that she was pregnant and had a due date of January, 3, 1988. The decedent's husband brought an action as the personal representative of the unborn child under the Michigan Wrongful Death Statute.[218] Northwest moved to dismiss the claim on the theory that the Act did not allow recovery in this case because the fetus was not viable when it was fatally injured.

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[213] *Id.* at 428-29.

[214] *Id.*

[215] *Id.* at 424.

[216] *Id.*

[217] *In re* Air Crash at Detroit Metropolitan Airport on August 16, 1987, 737 F. Supp. 427 (E.D. Mich. 1989).

[218] MICH. COMP. LAWS ANN. § 600.2922 (West 1990).

The case presented the court with the difficult task of deciding the impact of the Supreme Court's recent abortion decisions, *Roe v. Wade*[219] and *Webster v. Reproductive Health Services*[220] on wrongful fetal death actions. The case was further complicated by the plaintiff's attempt to admit evidence from a Dr. John C. Wilke, the President of the National Right to Life Committee, on the viability of a fetus.[221]

The court noted that *Roe* established that a fetus is viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[222] The Supreme Court in *Webster*, however, noted that a state regulation that required viability testing at twenty weeks was not unreasonable.[223] What *Webster* did not do was overturn *Roe* with respect to viability, nor did it find as a matter of law that viability occurs at twenty weeks.

The plaintiff's attempted submission of a letter from Dr. Wilke that he knew of "twenty tiny survivors" whose chronological age fell into the twentieth, twenty-first, twenty-second and twenty-third weeks of gestational age was not sufficient to create genuine issues of fact sufficient to defeat a motion for summary judgment.

Expert evidence offered in support of a motion for summary judgment under Federal Rules of Civil Procedure 56(e) must be admissible as evidence at trial. The court found that Dr. Wilke's proffered evidence was "so lacking in probative value and reliability that no reasonable expert could base an opinion on the data. . . . Further, when an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and

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[219] 410 U.S. 113 (1973).

[220] 492 U.S. 490 (1989).

[221] *In re* Air Crash at Detroit Metropolitan Airport on August 16, 1987, 737 F. Supp. at 430.

[222] *Roe*, 410 U.S. at 160.

[223] *Webster*, 109 S.Ct. at 3057.

misleading."[224] The court therefore accepted the *Roe* proposition that a fetus does not become viable until it reaches twenty-five weeks. Since the evidence of a sonogram taken of Mrs. Rademacher shortly before her death indicated that the fetus could not be more than 22.8 weeks old, the court ruled the fetus was non-viable as a matter of law. The court therefore granted defendants motion for summary judgment.[225]

The Fifth Circuit, in *Douglas v. Delta Airlines*, applied a Texas common-law rule that allows the families of air-crash victims to recover for loss of future inheritance.[226] The court held that such damages are permissible only upon a showing that the decedent would have managed the family's assets in such a way as to create a "premium" value over and above that which the family could create themselves through conservative financial investments. Under the Texas rule, the damages available for the loss of future inheritance are to be calculated by noting the difference between what the decedent's estate would have been worth in the future if the passenger was a talented and aggressive investor and the estate's future worth is calculated by estimating growth gained through risk-free investments. The court added, however, that this was not simply a matter of subtracting one interest rate from another but also involved a calculation of the effects of compounding the higher rate of return that an aggressive investor was likely to generate.

The district court awarded future inheritance damages based on a finding that the decedent possessed remarkable financial skill, but the court of appeals reversed the method the district court used in calculating those damages because that court failed to subtract the rate of return likely to be generated by the survivors. The court

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[224] *In re* Air Crash at Detroit Metropolitan Airport, 737 F. Supp 427, 430 (E. D. Mich. 1989), *aff'd mem.*, 917 F.2d 24 (6th Cir. 1990).

[225] 737 F. Supp. at 430.

[226] No. 89-5545 (5th Cir. April 9, 1990), *reported in* Air Safety Wk., Volume 4, Number 30, July 30, 1990.

concluded by upholding the district court's award of $3,531,615 for loss of future earnings. In upholding the district court on this point, the court of appeals rejected the defendants' contention that the decedent would have received no promotions for the rest of his professional life.

In a motion for summary judgment, the court in *Charnalia v. Piedmont Aviation, Inc.*[227] was faced with the issue of whether the doctrine of *res ipsa loquitur* could be invoked by a passenger on a Piedmont Airways flight to sustain his claim of negligence against the airline.

The plaintiff was a passenger on a Piedmont flight from Washington, D.C. to Kalamazoo, Michigan, via Dayton, Ohio. After takeoff, the Boeing 737-200 aircraft experienced rudder difficulty, causing the aircraft to yaw violently from side to side. The plaintiff, who was not in his seat at the time of the event, alleged that he was injured when he was thrown to the floor as a result of the yaw. The district court granted summary judgment in favor of Piedmont. A key requirement of *res ipsa loquitur* is that the event causing the plaintiff's injuries be "of a kind which ordinarily does not occur in the absence of negligence."[228] The court rejected the plaintiff's attempt to sustain his negligence claim on the basis of *res ipsa loquitur* because the plaintiff could offer no proof that the cause or causes of the aircraft's mid-air yaw was most likely the result of negligence on the part of the defendant.

B. *Denied Boarding, Exclusion, or Removal from Aircraft*

In *Shinault v. American Airlines, Inc.*,[229] a quadriplegic, returning to Jackson, Mississippi, from a trip to the White House as the National Easter Seals representative, missed a connecting flight from Nashville to Jackson when an American Airlines flight crew would not allow him to leave the plane until every other passenger had departed.

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[227] No. 89-1620-Z, slip op. at 5 (D. Mass. Sept. 21, 1990).
[228] *Id.* slip op. at 6.
[229] 738 F. Supp. 193 (S.D. Miss. 1990).

Prior to landing in Nashville the plaintiff, Walt Shinault, had advised the flight crew that it was important that he make his connecting flight since he had a press conference scheduled in Jackson regarding his efforts on behalf of the National Easter Seals campaign for the medically disadvantaged. The flight crew explained that it was the policy of the airline to not allow "handicapped" passengers to deplane until all of the plane's "able bodied" passengers had left. He was then denied permission to board the connecting flight even though that flight had not yet departed. As a result, the plaintiff spent five hours in a strapless, backless wheelchair provided by the airline, with his neck propped against a wall since his personal wheelchair had been forwarded with the connecting flight. The plaintiff complained to the carrier's executive office without satisfactory results, and therefore, filed suit.

A Mississippi district court held that monetary damages were not available to the plaintiff for American Airline's alleged violations of the Air Carrier Access Act (ACAA).[230] The court noted that the ACAA states that:

> (1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation. (2) For the purpose of paragraph (1) of this subsection the term "handicapped individual" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.[231]

When the Act was passed in 1986, the Secretary of Transportation intended to promulgated specific regulations for airlines.

The court pointed out that Congress intended to provide the same remedies under the ACAA as were available under § 504 of the Rehabilitation Act.[232] Case law under the Rehabilitation Act provides that compensatory, emo-

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[230] *Id.* at 197.
[231] *Id.*
[232] *Id.*

tional distress, and punitive damages are not available and hence will not be available under the ACAA.[233]

The court, however, denied plaintiff's demand for equitable relief under the doctrine of primary jurisdiction. This doctrine applies where the enforcement of a claim requires the resolution of issues under a regulatory scheme and where Congress has made an administrative body responsible for developing that regulatory scheme. The court found that it would be improper to draft its own regulations to govern American Airline's dealings with physically challenged people when the Secretary of Transportation is in the process of drafting those same regulations. Accordingly, the district court granted the defendants motion to dismiss the complaint.

A passenger who was bumped from an overbooked flight to Cancun brought an action against the airline seeking compensatory and punitive damages in *Semrod v. Compania Mexicana De Aviacion, S.A. Corp.*.[234] The plaintiff and his teenage children were booked on a flight from Philadelphia to Cancun, Mexico. The flight on which they were booked was late, and the plaintiff was forced to stand on a long line at the terminal for hours before being told that he and his family were being bumped. Following its own priority rules for boarding, the airline asked each passenger if they would volunteer to take another flight and compensated each bumped passenger for denied seating, thus adhering to all D.O.T. regulations pertaining to overbooking.

The court found that the carrier did not violate its priority rules or fail to offer compensation to the plaintiff. It further found that the defendant airline did not engage in misrepresentation by failing to provide a flight pursuant to a confirmed representation. The court did find, as defendant had conceded, that defendant breached its contract to transport the plaintiff to his destination.[235] The

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[233] *Id.* at 197.
[234] 22 Av. Cas. (CCH) 17,747 (D.N.J. 1990).
[235] *Id.*

court awarded compensatory damages to the plaintiff but found that the plaintiff did not establish any wantonly reckless or malicious conduct on the part of the defendant. The court awarded the plaintiff $3,000 for the intangible pleasure of a lost vacation day in Cancun, a food allowance of $300, and a room allowance of $250.

In *West v. Northwest Airlines, Inc.*,[236] a case that may have a somewhat more significant impact upon the airlines, the Ninth Circuit held that a passenger may sue a carrier under state law after being bumped from an overbooked flight.

On September 3, 1986, plaintiff West had purchased a non-refundable, non-changeable ticket from Great Falls, Montana, to Arlington, Virginia, on a Northwest flight scheduled to depart at 1:30 p.m. on October 7, 1986. West confirmed his flight with his travel agent on October 6, 1990. Northwest, in the meantime, substituted a DC-9, with a 78-passenger capacity, for a Boeing 727, which seats 146 passengers. Apparently, there was an almost unanimous desire on the part of the 146 passengers to leave Great Falls immediately, for only 3 passengers volunteered to deplane. Mr. West was bumped from the flight. Northwest offered West a later flight to Dulles, instead of Arlington, that would arrive at 3:00 a.m. the following morning, six hours later than originally scheduled. Mr. West declined the offer and flew to Arlington two weeks later.

West filed suit, claiming that Northwest breached its covenant of good faith and fair dealing under Montana law, alleging unjust discrimination under § 404(b) of the Federal Aviation Act. The district court granted Northwest's summary judgment motion on the grounds that § 404(b) was no longer in force and that West's state law claim was preempted by federal law. West appealed on the latter ground. The Court of Appeals, in reversing the district court's grant of summary judgment, held that

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[236] No. 89-35820 (9th Cir. Sept. 11, 1990) (LEXIS, Genfed library, App. file).

West's claim was neither explicitly nor implicitly preempted by federal law. In addition, West's state law claim did not conflict with federal law. As to the lack of any explicit preemption, the court noted that in the "instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption."[237] The court went on to note that there was no indication that Congress intended that federal law occupy the specific field covered by state law. As to any conflict with federal law, the court stated that Northwest had offered no reason to believe that requiring it to conform to Montana's duty of good faith would prevent it from following federal regulations. The case was reversed and remanded.

C. *Cargo and Baggage*

In *Reece v. Delta Air Lines, Inc.*,[238] a bereaved family initiated an action against Delta for negligent infliction of emotional distress brought on by the mishandling of a corpse flown from Maine to North Carolina. The airline delivered the corpse 15 hours late, and both the corpse and casket were in a damaged condition when finally delivered to the consignee.

The district court granted Delta's motion for summary judgment limiting Delta's liability to fifty cents per pound as noted by the contract terms in the air waybill. There was no evidence as to the decedent's weight at the time of shipment. Under the "released value doctrine", an air carrier may limit its liability if the shipper has reasonable notice of the rate structure and is given the option of paying a higher freight rate upon a greater declaration of value. A plaintiff who has been properly notified of the opportunity to declare a higher value cannot avoid having the de-

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[237] *Id.*

[238] 731 F. Supp. 1131 (D. Me. 1990).

fendant's liability limited merely by bringing an action that sounds in tort rather than in contract. The limitation provisions in the air waybill cover all cargo shipments, including shipments of human remains. The notice provision in the air waybill was deemed to provide reasonable notice to the plaintiffs, particularly in view of the fact that their agent, the Maine funeral home, was experienced in the shipping of human remains.

In *Hampton v. Federal Express Corp.*,[239] the survivors of a 13-year-old cancer patient who died while awaiting a bone-marrow transplant operation sued Federal Express for negligent failure to deliver blood samples required for matching her with a potential bone-marrow donor. The sample was lost, the infant cancer patient never obtained a bone-marrow transplant, and she subsequently died. The pertinent air waybill contained a clause limiting liability for loss or damage to $100. The child's family sued, seeking damages in the amount of $3,081,000. The trial court granted Federal Express' motion for partial summary judgment on the basis of the released value doctrine and entered judgment in favor of plaintiff for $100.

The court of appeals affirmed. In so holding the court noted that the "released value doctrine" of federal common law requires that in order to successfully limit its liability the carrier must present the shipper with a reasonable opportunity to declare a value for the shipment above the maximum value set by the carrier, to pay an additional fee, and thereby to be insured at a higher rate should the shipment go awry.[240] In this case, the contract of carriage between the shipper, the patient's hospital, and Federal Express, clearly limited the liability of the carrier to $100 and provided the shipper with an opportunity to declare a higher value. The court of appeals then turned to the question of whether the released value doctrine applies in a suit brought by a plaintiff who was not a party to the contract of carriage. The court held

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[239] 914 F.2d 1119 (8th Cir. 1990).

[240] *Id.* at 1121.

that the plaintiff failed to cite any authority that supported his position that the released value doctrine did not apply.[241]

In addition, since the carrier had no knowledge that the packages shipped contained blood samples of a cancer patient in need of a bone-marrow transplant, the nature and extent of the damages to be suffered by the patient due to the carrier's failure to deliver the packages were not reasonably foreseeable and, hence, were not recoverable in a breach-of-contract action.[242] Moreover, the plaintiff could not recover on a negligence theory since the lack of foreseeability precluded any finding that Federal Express owed a duty to the patient.[243]

In *Feature Enterprises, Inc. v. Continental Airlines, Inc.*,[244] the district court granted summary judgment limiting Continental's liability to $1,250 for the loss of a suitcase allegedly containing jewelry worth $175,000. The plaintiff, a national jewelry manufacturer based in New York, sent out its sales force with suitcases full of jewelry to be delivered to stores in other cities. It was the standard practice of the plaintiff to transport all its jewelry as regular luggage without notifying the airline of the value of the luggage. It was also the practice of the plaintiff not to have its employees send its jewelry by air freight and not to pay a fee to increase the airline's liability limitation. The plaintiff's salesman arrived at Newark airport, checked his bags at curbside, turned around, and then turned back to find the jewelry missing.

The applicable Continental tariff provided that it would not be liable for jewelry loss and its liability would be limited to $1,250 for all other cargo. The court rejected defendant's contention that the exculpatory clause as to the jewelry was enforceable but held that Continental's liabil-

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[241] *Id.* at 1122.

[242] *Id.* at 1124.

[243] *Id.* at 1126.

[244] 745 F. Supp. 198 (S.D.N.Y. 1990).

ity could effectively be limited to $1,250.[245] In addition, specific notice of the carrier's limitation was provided in large print on the sales person's ticket. The court found that the ticket's language and type size provided reasonable notice to the passenger of the limitation. In addition, the plaintiff provided no evidence that the carrier appropriated the jewelry for its own use, which could have been another ground for not enforcing the limitation.[246]

In *Welliver v. Federal Express Corp.*,[247] a shipper brought an action against Federal Express to recover for the loss of goods entrusted to the carrier. Finding that Federal Express did not give the shipper adequate notice of limitation of liability in its air waybill, the district court dismissed defendant's motion to limit plaintiffs' damages to $500.[248]

In 1987, the plaintiff, an artist, had his printer ship two original watercolors from Philadelphia to New York. The printer contacted Federal Express to arrange for shipment of the paintings. When the Federal Express courier arrived at the printer's office, he advised the printer that he did not have time to wait for the printer to fill out the appropriate waybills. The printer agreed to let the courier fill out the waybill and provided the courier with the necessary particulars on a separate piece of paper. When the printer requested a receipt, the courier provided her with a blank shipper's copy of the air waybill. The front of the waybill limited Federal Express' liability to $100. The back of the waybill provided that the shipper could declare a higher value and have his/her freight rate increased accordingly. In the case of items of "extraordinary" value, such higher declaration could not exceed $500.[249]

The paintings were lost in transit. Plaintiffs (the printer

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[245] *Id.* at 199-202.

[246] *Id.* at 200.

[247] 737 F. Supp. 205 (S.D.N.Y. 1990).

[248] *Id.* at 208.

[249] *Id.* at 206.

and the artist) sought to recover the full value of the artwork. In their complaint, the plaintiffs stated four causes of actions alleging (1) a breach of the contract of carriage; (2) negligence based on the loss of the package; (3) negligence based on the courier's promise to fill out the waybill and his failure to do so; and (4) fraud based on the courier's knowledge that his promise to fill out the waybill was false when he made it. Federal Express sought to limit its damages to $500.[250]

The district court began its discussion by noting that the declared-value limitation has survived the deregulation of the airline industry and has become established as part of the federal common law of air carrier liability. The court then went on to note that the declared-value limitation applies whether the action sounds in tort or contract.[251] Defendant had argued that shipper had reasonable notice of the limitation provision of its waybill because she had requested that the package be shipped pursuant to a waybill and had received a copy of it. Further, the shipper had shipped with Federal Express previously using waybills with identical language.

The court explained that the enforceability of any such limitation of liability depends on whether the limitation represents a fair, open, just, and reasonable agreement between the carrier and the shipper for the purpose of obtaining shipments at rates proportional to the degree of risk involved. Further, the shipper must be given an opportunity to increase liability limits in return for the payment of higher freight charges. In deciding whether these threshold requirements are met, the court will consider whether the carrier has given the shipper adequate notice of any limitation, the commercial sophistication of the parties, and the availability of 'spot' insurance for the increased coverage.[252]

Based on the facts, the court found that the shipper did

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[250] *Id.*

[251] *Id.* at 207.

[252] *Id.*

not have adequate notice. The facts indicated that the courier never did give the shipper the opportunity to fill out or review the waybill. In addition, the shipper was not even given a chance to read the terms of the blank waybill until after the departure of the courier, who absolutely, positively had to be somewhere else. The shipper therefore did not have the opportunity to declare a higher value. The district court remanded the proceedings to the Magistrate for an inquest on the value of the lost watercolors.[253]

In *St. Paul Fire & Marine Insurance v. Federal Express Corp.*,[254] the court denied a defendant air cargo company's motion for summary judgment to limit its liability to $100 where cargo was lost due to its failure to provide constant surveillance services. Although the shipper did not declare value for the parcel, the shipper had insured the package with the plaintiff insurance company and had purchased the "constant surveillance service" from the defendant cargo company for an additional fee.[255]

The court found that a provision limiting liability of the cargo company that appeared on the air waybill and in the Federal Express Service Guide did not operate to limit liability because the limitation of liability did not appear under the heading of "Constant Surveillance Services", and, thus, no language in the Federal Express Service Guide limited the defendant's liability with regard to such services. The court also held that the breach of defendant's promise to provide surveillance and the frustration it caused the plaintiff in its efforts to recover the merchandise created a separate cause of action not limited by the contractual agreement to limit defendant's general liability to $100.00.[256] In *Transatlantic Marine Claims Agency v. KLM Royal Dutch Airlines*,[257] the Civil Court for the City of

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[253] *Id.* at 207-08.

[254] 145 Misc. 2d 801, 548 N.Y.S.2d 422 (N.Y. Civ. Ct. 1989).

[255] *Id.*

[256] *Id.*

[257] 22 Av. Cas. (CCH) ¶ 18,143 (N.Y. Civ. Ct. 1990).

New York granted defendant's motion to dismiss on the ground that the KLM Cargo Rules Tariff barred plaintiff's recovery. Plaintiff sought to recover $11,388.69 for loss allegedly caused by defendant's failure to ship in a timely fashion and to care for flowers sent from Holland to the United States.

In reaching its decision to dismiss the case, the court noted that a shipper is deemed to have notice of tariffs filed with the Department of Transportation (DOT) even in the wake of deregulation. Because KLM's tariff contained a provision that placed the risk for damage to perishable shipments on the shipper, the court held that KLM was not liable.

In *United States Gold Corp. v. Federal Express Corp.*,[258] the U.S. District Court for the Southern District of New York granted defendant's motion for partial summary judgment to limit its liability for lost cargo to $100.00. Plaintiff had shipped a package containing gold valued at $101,761.16 that was never received at its final destination. Federal Express paid plaintiff $100.00 plus $18.50 as a freight reimbursement. The shipper instituted suit for the remainder of its damages.

In assessing whether defendant's liability limitation was enforceable, the court considered (1) whether the limitation of liability was the result of a fair, open, just, and reasonable agreement between the carrier and the shipper, entered into by the shipper for the purpose of obtaining the lower of two or more rates of charges proportional to the risk, and (2) whether the shipper was given the option of a higher recovery upon payment of a higher rate.[259] The court found that the first test was satisfied because both the shipper and the carrier were sophisticated commercial entities that had done business together in the past. Further, the court noted that, because the defendant had previously lost a package shipped by plaintiff, plaintiff was well aware of defendant's liability limitation.

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[258] 719 F. Supp. 1217 (S.D.N.Y. 1989).
[259] *Id.* at 1224.

The court also recognized that plaintiff had obtained insurance for the shipment from an outside insurer. The second test was also satisfied because plaintiff had a clear opportunity to obtain full loss coverage from defendant by declaring value.[260]

In *Gin v. Wackenhut Corp.*,[261] the federal district court in Hawaii held that an airport security company, which was sued for negligent bailment following the loss of a traveler's bag at a security checkpoint, was not protected by the limitation of liability found on the back of the traveler's airline ticket. The court held that the ticket tariff applied only to an airline's liability and not to the liability of an agent of the airline.

D. *Limitation of Actions*

In *Ocasio-Jurabe v. Eastern Airlines, Inc.*[262] the Court of Appeals for the First Circuit, acting pursuant to responses to certified questions presented to the Supreme Court of Puerto Rico, held that an action brought against Eastern Airlines sounded in tort rather than in contract and that Puerto Rico's one year statute of limitations governed the action.

The plaintiff was travelling on a San Juan-to- California round-trip ticket purchased from Eastern. During the Miami-to-San Juan leg of the return journey on August 4, 1985, Eastern received a telephone call indicating that a bomb had been placed on board the plane. In response to this call, the plane was ordered to make an emergency landing on Caicos Island. Upon landing, the passengers were evacuated from the plane using the plane's emergency chutes. The plaintiff was injured during the evacuation procedure.

Plaintiff filed suit against Eastern on August 20, 1987, two years after the incident, in the United States District

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[260] *Id.* at 1225.

[261] No. 89-00-0097-SPR (opinion published in the Advance Sheets at 741 F. Supp. 1454 but withdrawn from bound volume at the court's request).

[262] 902 F.2d 117 (1st Cir. 1990).

Court for the District of Puerto Rico. The court granted Eastern's motion to dismiss on the ground that the action was time barred under Puerto Rico's one-year statute of limitation for tort action. The Court of Appeals affirmed the dismissal.

E. *General Liability of Other Operators and Owners of Aircraft*

The Eleventh Circuit, in *Hiatt v. United States*,[263] held that the United States' allegations of pilot negligence were sufficient to state an indemnity or contribution claim against the owner of an aircraft in a wrongful death action. Shirley Hiatt brought an FTCA action against the United States, alleging that air traffic controller negligence was the proximate cause of a mid-air collision of a Cessna 421 and Cessna 172 over Fort Lauderdale, Florida, that killed her husband. The United States filed a third-party complaint seeking indemnity or contribution from the owner and from the personal representative of the pilot of the airplane in which Mr. Hiatt was a passenger.[264]

At trial, the pilot in question was found to be 75% at fault for the collision and the controllers 25%. The court, therefore, granted contribution to the U.S. from the pilot but refused to grant contribution against the airplane's owner. The trial court rejected the government's position that Florida's dangerous instrumentality doctrine should hold the owner vicariously liable for the negligence of the pilot on the ground that the government never properly briefed the issue.[265]

The court of appeals reversed the holding that the government failed to allege or brief the dangerous instrumentality doctrine and therefore, remanded for reconsideration.[266] The doctrine, the court noted, imputes an operator's negligence to the owner when the op-

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[263] 910 F.2d 737 (11th Cir. 1990).
[264] *Id.* at 739-40.
[265] *Id.*
[266] *Id.* at 740.

erator is using an inherently dangerous product with the consent of the owner.

IV. Liability of Manufacturers and Suppliers

A. *General*

In *Commander Properties Corp. v. Beech Aircraft Corp.*,[267] the dispute arose between the plaintiff, an owner/purchaser of a Beech King-Air Model 90, and its manfacturer Beech Aircraft, over the airworthiness of the design of the aircraft. The defendant's answer contained an affirmative defense that the question of airworthiness was a question subject to the exclusive jurisdiction of the FAA. The U.S. District Court in Kansas held that this was not a valid defense but noted that the FAA had primary jurisdiction over many of the issues before the court, including whether the design was defective and whether a proposed modification would correct the defect.

Based on *United States v. Western Pacific R.R.*,[268] the court stated that the doctrine of primary jurisdiction applies in cases "where a claim, originally cognizable in the courts, requires the resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body."[269] In cases where the doctrine of primary jurisdiction applies, the judicial process must be suspended pending referral of such issues to the administrative body for its views.

To determine whether the doctrine applies in a given case, the court must decide whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. The primary purpose of the doctrine is to attain uniformity in decisions regarding administrative and technical issues by an agency having expertise and specialized knowledge in the area. The court determined

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[267] 745 F. Supp. 650 (D. Kan. 1990).
[268] 352 U.S. 59, 63-64 (1956).
[269] 745 F. Supp. at 652.

that the questions of whether the wing design of the aircraft was defective and whether a proposed wing modification would correct the defect were particularly appropriate for resolution by the FAA. Thus, the court found that the doctrine of primary jurisdiction applied to this claim and placed the burden of pursuing an administrative remedy on the plaintiff.[270]

In *Palmer v. Borg-Warner Corp.*,[271] the Alaska Supreme Court held that Alaska's two-year statute of limitations for wrongful-death actions was not tolled pending an NTSB investigation into the cause of the crash. The action brought by the personal representative of a passenger killed in an airplane crash against the manufacturer of the aircraft was properly time-barred by the trial court.

The case arose in the aftermath of the crash of a Piper aircraft in the Brooks Range of mountains in Alaska. Both the pilot, Kenneth Swanson, and his passenger, Merrett Palmer, were killed. The crash occurred on September 8, 1986. The plaintiff's widow was informed of her husband's death on September 11, 1986. The NTSB removed the aircraft's engine on October 1, 1986, and commenced an investigation into the cause of the crash. The NTSB issued its findings in July of 1987. The report concluded that there was probable cause to believe the crash occurred due to pilot error.

On July 30, 1987, the personal representative of Palmer's estate filed a wrongful death action against the estate of the pilot. On September 7, 1988, one day before the second anniversary of the crash, the pilot's estate filed suit against the plane's manufacturer, Borg-Warner. The Palmer estate followed suit and filed an identical action against Borg-Warner on September 20, 1988, two years and nine days after having learned of the accident.

Borg-Warner moved for, and the trial court granted, summary judgment on the ground that the action against

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[270] *Id.*

[271] No. 3646 (Alaska Nov. 16, 1990) (LEXIS, All States library, Alaska file).

the manufacturer was barred by the two-year statute of limitations. The Alaska Supreme Court, in upholding the trial court's decision, noted that the Alaskan statute of limitations normally begins to run on the date the plaintiff suffers the injury. Alaska has adopted the so-called discovery rule, which tolls statutes of limitation in cases where the plaintiff lacks immediate notice of a claim. Under this rule, the trigger date for the limitation period is the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights.

The Alaska Supreme Court held that the trial court rightfully decided that the trigger date was September 11, 1986, when the potential plaintiffs were notified of the death as well as the discovery of the wreckage. The potential plaintiffs had an obligation from that point in time to investigate in a meaningful manner to determine whether they had claims against any potential defendants. The court, however, rejected plaintiff's contention that it did not have reasonable notice of its claim against the manufacturer until after the issuance of the NTSB report. The NTSB investigation was not undertaken for the benefit of the estate, and its purpose was not to identify potential tortfeasors.

Similarly, the court rejected the argument that, because the estate did not have access to the wreckage, the statute must have been tolled while the NTSB was conducting its investigation. The court held that, even if the NTSB investigation precluded the estate's own investigation efforts, the estate still had fourteen months after the NTSB released the wreckage to conduct its own investigation into the cause of the crash before the limitations period expired.

In *J & B Co. v. Bellanca Aircraft Corp.*,[272] the plaintiffs instituted a product liability action against the defendant for

[272] 911 F.2d 152 (8th Cir. 1990).

injuries arising out of a crash of an airplane owned by the plaintiffs. The airplane had been manufactured in 1973 by the Bellanca Aircraft Corporation ("Bellanca") in 1973. Bellanca had undergone a Chapter 11 bankruptcy reorganization in 1981, and a new company bearing the same name was created. The plaintiff's airplane crash-landed in Maryland in 1985, allegedly due to a design defect that allowed water to collect in the fuel system. The United States District Court for the District of Minnesota granted summary judgment in favor of defendant on the ground that under either Minnesota law or FAA regulations the defendant was not liable as a successor corporation. The plaintiff appealed.

The Eighth Circuit Court of Appeals, affirming the district court's decision, noted that the district court was obligated to follow the choice-of-law rules of the state of Minnesota and that under Minnesota's choice-of-law rules (a five-factor interest analysis) the substantive law of Minnesota was correctly applied.[273] Based on Minnesota law, the court of appeals rejected plaintiff's argument that, because it had serviced the predecessor's product, the successor corporation is obligated to a customer for defects in that product of its predecessor. Summary judgment was permissible since, on the evidence submitted, a reasonable jury could not have found that Bellanca had succeeded to any of its predecessor's service contracts.[274] In closing, the court noted that the plaintiff had asserted that FAA regulations preempted Minnesota law. The court agreed with the trial court's analysis that there was nothing within relevant FAA regulations that preempted Minnesota law.[275]

In *Sapp v. Beech Aircraft Corp.*,[276] a pilot was killed when an airplane he was piloting crashed at an airport after hitting some tall pine trees on its approach to the runway.

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[273] *Id.* at 153.

[274] *Id.* at 154.

[275] *Id.*

[276] 564 So. 2d 418 (Ala. 1990).

The crash also resulted in damage to the right wing and right propeller of the aircraft. The co-pilot had stated that, during the second impact of the plane with the trees, the decedent pilot's seatbelt became unfastened. In the opinion of an expert witness, the seatbelt would have had to have failed since it would not have become unfastened in the absence of a defect in the buckle.

The administrator of the estate brought an action against the manufacturer, contending that the seat belt, a component part manufactured by Beech, was defective within the meaning of the Alabama Extended Manufacturer's Liability Doctrine. Under this doctrine, a plaintiff must show that the injury was caused by one who sold a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user.

The court stated that the fact of an injury does not establish the presence of a defect and that the test is met only by showing that the product's failure to conform is causally related in fact to the product's defective condition at the time of sale.[277] The burden of proving that the product was defective at the time it left the hands of the seller is on the plaintiff. The evidence before the court showed that, during the second impact, the decedent's seatbelt failed. That did not show that the seatbelt was defective at the time the airplane left the hands of Beech Aircraft Corp. The court affirmed the lower court's summary judgment in favor of the defendant.[278]

In *Karstetter v. Midstate Aviation, Inc.*,[279] the court granted summary judgment to a component-part manufacturer who contended that the faulty part was not his product. The action grew out of the crash of a Cessna 150 on January 8, 1987. During a preflight check immediately prior to the flight, everything, including the faulty part, functioned normally. Examination of the wreck revealed that a car-

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[277] *Id.* at 419 (quoting Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991 (Ala. 1981)).

[278] *Id.* at 420.

[279] Av. L. Rep. (Andrews) 11,766 (May 8, 1990).

buretor heat control lever was not securely fastened to the shaft and that the lug nut was not tight. Both the lever and the shaft showed excessive wear.

The component part manufacturer, Teledyne Continental Motors, asserted that the lever in question was not its part but a replacement part. In granting Teledyne's motion for summary judgment, the court noted that

> [t]he only direct evidence the plaintiffs have is the control lever and shaft. That is not sufficient where the manufacturer says it is not a control lever and shaft manufactured, designed, or distributed by it, produces demonstrable evidence showing the differences between its parts and the subject parts, and there is evidence that such control levers and shafts are manufactured, designed, and distributed by others.[280]

B. *Allocating Fault*

In *Cleveland v. Piper Aircraft Corp.*,[281] the court was faced with questions regarding design negligence and "indivisible injuries." The plaintiff had attempted to take off from a local New Mexico airport in a Piper Super Cub aircraft while towing a glider attached to the tail of the aircraft. The plaintiff was piloting the aircraft from the rear seat and was secured in the seat by a seatbelt but not a shoulder harness. The front seat had been removed and replaced by a camera and camera mount.

During its takeoff run, the aircraft collided head-on with a van. The van had been deliberately parked at the end of the runway by the airport owner to prevent the plaintiff from taking off. The airport owner had blocked the runway after numerous warnings to the plaintiff's employer that the glider operations were being conducted in violation of numerous FAA regulations. In fact, the owner had notified the FAA the day before the accident that he was closing the airport. A hearing had been scheduled for the

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[280] *Id.* at 11,771.

[281] 890 F.2d 1540 (10th Cir. 1989).

morning of the flight. On impact, the fuselage broke in two, and plaintiff's head struck the camera. The plaintiff received serious head and brain injuries.

The plaintiff (the pilot's conservator) brought suit against Piper alleging inadequate rear-seat visibility, which allegedly caused the collision with the van, and a lack of a rear-seat shoulder harness, which allegedly caused the injuries. The district court characterized the first claim as one sounding in "design negligence," while the second one was characterized as one sounding in "crashworthiness negligence." The district court entered a judgment on a jury verdict that found that (1) Piper's design negligence was a proximate cause of plaintiff's injuries and damages; (2) Piper's crashworthiness negligence was a proximate cause of plaintiff's injuries; and (3) 100% of plaintiff's injuries could be attributed to the crashworthiness negligence.

In establishing the percentage of fault for the design negligence claim, the court compared the negligence of four parties to the suit. In establishing the percentage of fault for the crashworthiness claim, the court only compared the plaintiff's actions to Piper's. Both parties appealed.

The Court of Appeals, applying New Mexico law, held that "crashworthiness liability with its attendant burden of proximate cause . . . necessarily precludes a cause of action for crashworthiness liability based upon an indivisible injury."[282] The court noted that the standard of proof of crashworthiness causation requires a plaintiff to prove (1) that the design caused injuries over and above those which otherwise would have been sustained, absent the defect, and (2) the degree of enhancement of injuries by proof of what injuries, if any, would have resulted had an alternative, safer design been used.[283]

As to the district court's decision to compare the fault

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[282] *Id.* at 1546.

[283] *Id.*

of only Piper and the plaintiff in the crashworthiness claim, the Court of Appeals ruled that New Mexico's pure comparative negligence system requires that the fault of all concurrent tort-feasors be apportioned, including any and all original tort-feasors and crashworthiness tort-feasors.[284] Further, both the original tort-feasors and crashworthiness tort-feasors may be found liable for any enhanced injuries suffered by the plaintiff.[285]

In *Huffman v. Caterpillar Tractor Co.*,[286] the Tenth Circuit held that in product liability cases, the term "fault" in Colorado's Comparative Fault Statute was not restricted to assumption of risk and/or product misuse.[287] A widow instituted a product liability action for the death of her husband, who had been killed while operating a pipe-laying machine. The accident had occurred when the deceased was operating the pipe-layer on a ski slope. A colleague shouted something to him, and unable to hear, he turned off the engine. The machine began to roll down the slope. Unable to stop the machine as it rolled down the slope and began to pick up speed, Hoffman rose from his seat and tried to climb off. He became tangled in the cable works of the machine, fell on the tracks, and was crushed to death.

After entry of judgment in favor of plaintiff, the plaintiff appealed, arguing that the court erred when it instructed the jury that under Colorado law ordinary negligence constitutes "fault." Plaintiff contended that under the correct interpretation of the term "fault" her damages would be increased by 100%. Plaintiff urged that the term "fault" as used in the comparative fault statute should not subsume ordinary negligence. Instead, she argued a jury should consider only plaintiff's assumption of risk and/or product misuse in deciding the extent to which a judgment should be reduced after a finding of lia-

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[284] *Id.* at 1549-50.

[285] *Id.*

[286] 908 F.2d 1470 (10th Cir. 1990).

[287] *Id.* at 1475.

bility on the part of the manufacturer. The court found that the term "fault" is a general term encompassing a broad range of comparable behavior including, but not limited to, negligence.[288]

In *Mendez v. Honda Motor Co.*,[289] a district court in Florida held that a manufacturer's failure to make it impossible for an untrained, inexperienced person to mount shock absorbers on a motorcycle incorrectly is not, as a matter of law, a design defect.

The plaintiff sued Honda for injuries received as a result of an accident on a third-hand Honda motorcycle. The accident occurred because the shock absorbers fractured while plaintiff was riding at high speed along a dirt trail. Prior owners of the bike had removed the factory shocks, and when the plaintiff re-installed them he positioned them upside down. The plaintiff did not consult the owner's manual before installing the shocks. At trial, plaintiff advanced four theories of liability: (1) Honda negligently manufactured or designed the motorcycle so that the shocks could be installed upside down. (2) Honda negligently manufactured or designed the shocks. (3) As a distributor, Honda was strictly liable for the design defect or manufacture of the motorcycle that allowed the shock to be installed upside down. (4) As a distributor, Honda was strictly liable for defects in the shock absorbers.

In response to defendant's motion to dismiss and to move for partial summary judgment, the district court held that a distributor need not inspect for latent defects unless the product is inherently dangerous.[290] The Florida Supreme Court has defined inherently dangerous products as those products burdened with a latent danger that derives from the very nature of the article itself. The district court did not believe that a shock absorber was burdened, by its very nature, with danger.

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[288] *Id.*

[289] 738 F. Supp. 481 (S.D. Fla. 1990).

[290] *Id.* at 483.

The court also found that the manufacturer's failure to make it possible for an untrained, inexperienced person to mount shock absorbers correctly is, as a matter of law, not a design defect. Further, knowlingly misusing a product is clearly an affirmative defense to strict liability, but the burden of proof is on the defendant to show such misuse. Since the plaintiff misused the shock absorbers by reinstalling them without referring to the owner's manual, the court granted defendant's summary judgment motion regarding the plaintiff's first three theories of liability.

In *Craigie v. General Motors Corp.*,[291] the Eastern District of Pennsylvania held that a vehicle manufacturer, that plaintiffs sought to hold liable on a theory of strict liability, was entitled to seek contribution from the driver. The manufacturer could implead the driver as a third-party defendant, notwithstanding the fact that claims against the driver arose out of his alleged negligence as opposed to strict liability.

The case arose out of an accident that occurred when seven young men driving in a 1973 Chevy collided with another vehicle. The driver was injured, and four passengers were ejected from the car upon impact and killed. Tests showed that the blood alcohol level of the driver and the decedent passengers well exceeded the legal limit.

Representatives of the estates of the dead passengers brought suit against General Motors (GM), claiming that the design of the vehicle was defective and that GM was negligent in designing the vehicle. Plaintiffs alleged that had the occupants remained inside the vehicle they would have received only minor injuries; claiming that the vehicle was not crashworthy. GM filed a third-party complaint against the intoxicated driver.

The court stated that in a crashworthiness case under Pennsylvania law, the plaintiff must show that the design of the vehicle was defective and that, when the design was

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[291] 740 F. Supp. 353 (E.D. Pa. 1990).

made, an alternative, safer design practicable under the circumstances existed.[292] Plaintiff must also show what injuries, if any, would have resulted to the plaintiff had the alternative design been used.[293] Finally, there must be some method available to establish the extent of the plaintiff's enhanced injuries attributable to the defective design.[294] The law requires that a designer take reasonable steps to design and produce a vehicle that will minimize unavoidable danger, but it does not require the designer to design an accident-proof or fool-proof vehicle or one that would withstand even the most bizarre of accidents.[295]

Regarding the question of whether the negligent driver may be impleaded in a strict liability crashworthiness case, the court stated that in a normal product-liability case the defendant has the right to implead a negligent defendant, and this right is not altered by the fact that a crashworthiness claim is being made.[296]

C. *Disclaimers*

Several recent cases involve the interpretation of contractual exculpatory clauses limiting remedies available to purchasers of aircraft. In *Continental Airlines v. McDonnell Douglas*,[297] the California Court of Appeals held that McDonnell Douglas (MDC) was liable for fraud in the sale of a DC-10 aircraft despite an exculpatory clause in the purchase agreement. MDC filed a complaint in federal court seeking a declaration that the exculpatory provision of the Purchase Agreement with Continental Airlines (Continental) barred a cause of action by Continental for negligent misrepresentation.

Continental's claim arose from an accident that oc-

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[292] *Id.* at 358.
[293] *Id.*
[294] *Id.*
[295] *Id.* at 361.
[296] *Id.*
[297] 216 Cal. App. 3d 388, 264 Cal. Rptr. 779 (1989).

curred on March 1, 1978, at Los Angeles International Airport. During a takeoff, the aircraft ran off the end of the runway at 85 miles per hour. During the abort, the landing gear broke through the tarmac, and was ripped from the wing, making a hole which allowed fuel to pour from the wing tanks. Subsequently, the fuel ignited, destroying the aircraft.

Continental claimed that in sales brochures and briefings MDC misrepresented to the airline the design of the landing gear and the wing. Apparently, MDC sales brochures and statements by sales personnel indicated that the landing gear of the DC-10 in question was designed to "wipe-off without rupturing the wing fuel tank." The Detail Specification ultimately incorporated into the Purchase Agreement used more qualified language with respect to the landing gear breakaway characteristic, stating that the landing gear "shall be designed" so that, under certain specified load conditions failure of the gear "is not likely" to rupture the wing fuel tanks or fuel lines.

MDC argued that Continental's cause of action for negligent misrepresentation was barred by the Purchase Agreement in which Continental expressly agreed to waive all claims for negligence. The California Court of Appeals rejected MDC's argument. According to the court, California Civil Code § 1668, which prohibits all contracts exempting anyone from responsibility for his own fraud, also applies to contracts purporting to exempt a party from negligent misrepresentation.[298] Specifically disagreeing with the holding of the Second Circuit in *Tokio Marine and Fire Ins. Co. v. McDonnell Douglas Corp.*,[299] the California Court of Appeals ruled that under California law, negligent misrepresentation is a form of fraud and deceit and is included within the meaning of the word "fraud" in Section 1668.[300]

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[298] *Id.* at 786.
[299] 617 F.2d 936 (2d Cir. 1980).
[300] 264 Cal. Rptr. at 786.

In *Velasquez v. Northwest Airlines, Inc.*,[301] an action arising from the air crash disaster at Detroit Metropolitan Airport on August 16, 1987, the District Court for the Eastern District of Michigan was called upon to construe an exculpatory clause contained in the Purchase Agreement between Northwest Airlines (Northwest) and McDonnell Douglas Corporation (MDC). The exculpatory clause provided that:

> THE WARRANTY AND SERVICE LIFE POLICY PROVIDED IN PART I. OF EXHIBIT "C" AND THE OBLIGATIONS AND LIABILITIES OF SELLER UNDER SAID WARRANTY AND SERVICE LIFE POLICY ARE EXCLUSIVE AND IN LIEU OF, AND BUYER HEREBY WAIVES, ALL OTHER REMEDIES WARRANTIES, GUARANTEES OR LIABILITIES, EXPRESS OR IMPLIED, WITH RESPECT TO EACH AIRCRAFT, PRODUCT AND ARTICLE DELIVERED HEREUNDER OR ACQUIRED OR OBTAINED IN ANY MANNER FROM ANY OTHER OPERATOR OR SOURCE, ARISING BY LAW OR OTHERWISE (INCLUDING, WITHOUT LIMITATION, ANY OBLIGATION OR LIABILITY OF THE SELLER ARISING FROM NEGLIGENCE OR WITH RESPECT TO FITNESS, MERCHANTABILITY, LOSS OF USE, REVENUE OR PROFIT OR CONSEQUENTIAL DAMAGES). THE WARRANTY AND SERVICE LIFE POLICY SHALL NOT BE EXTENDED, ALTERED OR VARIED, EXCEPT BY A WRITTEN INSTRUMENT SIGNED BY THE SELLER AND BUYER.[302]

In connection with the plaintiff's claim for damages arising from injuries sustained in the accident, Northwest asserted cross-claims against MDC claiming contribution or indemnity based upon MDC's negligence, violation of law, negligent misrepresentation, gross negligence, breach of warranty and strict liability in tort. Applying California law, the court held that under *Philippine Airlines, Inc. v. McDonnell Douglas Corp.*[303] the exculpatory clause

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[301] 22 Av. Cas. (CCH) 18,063 (E.D. Mich. 1989).
[302] *Id.* at 18,065 n.4.
[303] 189 Cal. App. 3d 234, 234 Cal. Rptr. 423 (1987).

barred Northwest's right to recover indemnity from MDC under a theory of negligent conduct.[304] The Michigan court also went on to hold that, under the *Philippine* decision, California courts would also interpret the exculpatory clause to preclude contribution for claims sounding in negligence, breach of warranty or strict liability.[305] The court stated "[w]hile there are important legal distinctions between the concepts of contribution and indemnity, these differences are insignificant to the determination of the legal effect of the exculpatory clause at issue."[306]

Northwest also claimed that MDC violated FAA regulations in connection with its design of the accident aircraft. Relying on California Civil Code section 1668, which precludes a party from creating a contractual provision that protects it from "responsibility for his . . . own violation of law."[307] Northwest argued that its claims for contribution arising from violations of FARs could not be barred by the exculpatory clause. Rejecting this argument, the court held, "To the extent that MDC violated any federal aviation regulations, it may be held accountable in the form of civil judgments and/or FAA sanctions. The mere fact that Northwest is contractually precluded from similarly pursuing MDC does not violate the spirit of Section 1668."[308]

Northwest further argued that the disclaimer language of the contract would not preclude its claim of negligent misrepresentation against MDC. Once again the court rejected Northwest's argument, ruling that a claim for negligent misrepresentation is based upon negligent conduct and that the literal terms of the exculpatory clause barred claims based upon the negligence of MDC.[309] According to the court, Northwest's claim of negligent misrepresentation, like other claims of misfeasance or malfeasance

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[304] *Valesquez*, 22 Av. Cas. (CCH) 18,068.

[305] *Id.*

[306] *Id.*

[307] CAL. CIVIL CODE § 1668 (West 1989).

[308] *Valesquez*, at 18,069.

[309] *Id.* at 18,070.

sounding in negligence, was barred by the exculpatory clause contained within the purchase agreement.

Finally, Northwest argued that its claims based on gross negligence would not be barred by the disclaimer. Similarly rejecting this argument, the court ruled that California courts had abolished the distinction between gross negligence and ordinary negligence. The claims of gross negligence would be subsumed within the terms of the clause that preclude claims of negligence.[310]

The issue in *Learjet Corp. v. Spenlinhauer*[311] was whether the plaintiff purchaser of an aircraft could maintain an action for fraudulent misrepresentation when he relied indirectly on the misrepresentations of the defendant although actual words were never conveyed directly to the plaintiff. The defendant purchased a Lear 24F from the manufacturer in 1977. In 1981, the FAA issued an airworthiness directive reducing the permissible ceiling of the aircraft from 51,000 to 45,000 feet. In 1983, the directive was revised to permit use at altitudes up to 51,000 feet provided that certain modifications were made to the aircraft. Subsequently, the FAA issued an airworthiness directive in 1984 which required that the modifications be made to all Model 24F aircraft.

In July, 1986, the defendant had the necessary modifications performed on his aircraft by the plaintiff-manufacturer to comply with the FAA's 1984 airworthiness directive. After completing the modifications, the plaintiff billed the defendant $39,253.00 for the work. The defendant refused to pay. In 1988 Learjet initiated an action against the defendant to recover the amounts charged for the modification of the aircraft along with interest. The defendant denied that he was liable for the modification fees and asserted a counterclaim alleging negligence, breach of warranty, fraudulent and negligent misrepresentation, and violation of FAA regulations. The defendant sought a judgment against Learjet for the cost of

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[310] *Id.*

[311] 901 F.2d 198 (1st Cir. 1990).

complying with the FAA directive. The district court granted Learjet's motion for summary judgment on its claim and on all of the defendant's counterclaims. The district court held that the defendant could not recover on the theory of negligent or fraudulent misrepresentation because he had not personally relied on misrepresentations allegedly made by Learjet to the FAA in connection with the certification of the aircraft.[312] In reversing the district court holding, the First Circuit ruled that a defrauded party need not rely on direct misrepresentations where he is within the class of persons that the defrauding party had reason to expect would be influenced by the misrepresentations.[313]

The First Circuit held that it is not necessary that the fraudulent statement be communicated to the defrauded party by an intended intermediary.[314] Instead, the court stated it is enough that the person to whom the statements were made is one whom the defrauded party would be expected to rely.[315] In this case, the First Circuit found that the defendant was within the class of persons whom Learjet would have reason to expect would act in reliance on any misrepresentations made to the FAA in obtaining certification for Model 24F.[316] The defendant can recover if he can demonstrate at trial that (1) Learjet made fraudulent misstatements or concealments to the FAA; (2) the FAA relied on these in certifying the Model 24F aircraft; (3) the defendant could not or would not have purchased the aircraft absent FAA certification; and (4) that the repairs mandated by the airworthiness directive would not have been required had the Model 24F been as Learjet represented it to be to the FAA.[317]

In *Appalachian Insurance Co. v. McDonnell Douglas Corp.*[318]

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[312] *Id.* at 200.
[313] *Id.* at 201.
[314] *Id.* at 202.
[315] *Id.*
[316] *Learjet*, 901 F.2d at 202.
[317] *Id.* at 203.
[318] 214 Cal. App. 3d 1, 262 Cal. Rptr. 716 (1989).

a subrogation action led by Applachian Insurance Company was initiated by several insurers against the McDonnel Douglas Corporation, Morton Thiokol, and Hitco in a California state court. This action arose out of an unsuccessful launch of the Westar VI communications satellite into geosynchronous orbit from the payload bay of the Space Shuttle Challenger in February, 1984. Shortly after deployment of the satellite from the Challenger's cargo bay, a malfunction in the exit cone attached to the solid rocket motor of the satellite's payload assist module. This caused the satellite to remain in a low-earth orbit, thereby rendering it useless.

After paying Western Union (the insured) approximately $5,000,000 (out of a total claim for $105,000,000) for their share of the loss of the satellite, the insurers sought to recover this amount from the defendants on the basis of negligence and strict product liability. The trial court initially granted summary judgment against the insurers on their strict liability claim and thereafter granted summary judgment in favor of all of the defendants on the negligence claim because of exculpatory clauses contained in the contract between McDonnell Douglas and Western Union. The insurers appealed the dismissal of their claims.[319]

A California appellate court affirmed the granting of summary judgment for the defendants. The court determined that the exculpatory clauses at issue contained in the contract between McDonnell Douglas and Western Union were not ambiguous[320] in their disclaimer of all liability, were conscionable,[321] and were not contrary to the public interest.[322] Moreover, the court held that, in light of the specific language used, the exculpatory clauses also barred the insurers' claims against Morton Thiokol and

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[319] *Id.*

[320] *Id.* at 725.

[321] *Id.* at 731.

[322] *Id.* at 734.

Hitco, subcontractors of McDonnell Douglas.[323]

The court applied California law to the strict liability claim and held that strict tort liability may be disclaimed in a commercial contract setting.[324] Since strict liability was properly disclaimed in this contract, the court dismissed the strict liability claims.

In a related action involving the unsuccessful deployment of the Indonesian Palapa B-2 communications satellite during the same Space Shuttle mission, *Lexington Insurance Co. v. McDonnell Douglas, Corp.*,[325] a California jury returned a verdict in favor of several other insurers in May 1990 against Morton Thiokol for breach of warranty[326] but limited the insurers' damages to their proportionate share of the value of the solid rocket motor ($39,000 plus interest).

D. *Government Contractor Defense*

The Fourth Circuit analyzed the government contractor defense in *Kleemann v. McDonnell Douglas Corp.*[327] In that case, the surviving spouse and children of a Navy pilot who died in the crash of an F-18 fighter aircraft brought suit against McDonnell Douglas, the plane's designer and manufacturer. Plaintiff alleged that the accident had been the result of a defectively designed landing gear. McDonnell Douglas moved for summary judgment, asserting the government contractor defense.[328]

In affirming the lower court's decision, the Fourth Circuit Court of Appeals held that the government had approved reasonably precise specifications for the aircraft. Beginning with the bidding process, the court found that teams of Navy engineers met with contractors for extended discussions regarding their submissions. When

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[323] *Id.* at 727.

[324] *McDonnell*, 262 Cal. Rptr. at 736.

[325] No. 48173 (Cal. Super. Ct. 1990).

[326] A verdict was rendered in favor of all three defendants on a negligence claim. *Id.*

[327] 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2219 (1990).

[328] *Id.* at 700.

McDonnell Douglas was awarded the project, the contract incorporated McDonnell's original proposals as modified by the government during extensive negotiations between the parties. Thereafter, McDonnell was required to submit detailed drawings as well as all changes to the Navy for approval. In addition, an extensive staff of Navy engineers were stationed at McDonnell Douglas' plant in St. Louis.[329] All of these facts constituted government approval of the design.

The Fourth Circuit Court of Appeals also held that a product conforms to reasonably precise specifications if it satisfies an intended configuration, even if it produces unintended or unwanted results.[330] Failure of a product to perform does not constitute failure to conform to specifications.[331] The court found that the alleged defect was inherent in the unique design of the landing gear itself, and not as a result of any deviation from the military specifications.[332] The court also recognized that the government had a very active role in the design of the aircraft and had maintained an extensive staff of aircraft engineers at the McDonnell Douglas facility in St. Louis. Thus, governmental participation, involving the reservation of power to approve or disapprove design modifications, enhanced the likelihood of product conformity.[333]

In *Ramey v. Martin-Baker Aircraft Co.*,[334] the Fourth Circuit faced the applicability of the government contractor defense with respect to military contractors. In that case, the plaintiff, a civilian maintenance employee, sued Martin-Baker, the manufacturer of the ejection seat on an F-18 fighter aircraft, which was manufactured by McDonnell Douglas pursuant to a government contract. Plaintiff claimed that he was injured when the seat inadvertently

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[329] *Id.* at 701-02.

[330] *Id.* at 703.

[331] *Id.* at 700.

[332] *Kleeman*, 890 F.2d at 703.

[333] *Id.* at 701.

[334] 874 F.2d 946 (4th Cir. 1989).

fired while he performed maintenance.[335] Martin-Baker asserted the military contractor defense as a subcontractor to McDonnell Douglas.

In affirming the District Court's dismissal of Martin-Baker, the Fourth Circuit examined the three elements of the government contractor defense.[336] With respect to the first prong of the test, the Court found that, indeed, the government had approved reasonably precise specifications. The court held that Martin-Baker could satisfy the first prong of the *Boyle* test by demonstrating that the military had used the product for an extensive period of time or by demonstrating that the government's approval of the product consisted of more than a mere "rubber stamp."[337]

The court found that Martin-Baker demonstrated that the Navy's participation in the design of the weapon system amounted to more than a mere rubber stamp. According to the record, the Navy issued the original performance design specifications for the ejection seat, tested its components, and examined a mock-up of the seat displaying the components in question. In addition, the court found that the Navy had become aware of possible hazards the seat posed to maintenance personnel well before the plaintiff's accident, but the Navy continued to use it. The court concluded that, based on previous decisions, the evidence clearly established the requisite Navy approval of the design.[338]

In *Smith v. Xerox Corp.*,[339] an injured soldier brought suit against Xerox Corporation, the manufacturer of a weapon simulator that malfunctioned and burned his arm and upper chest. Defendant manufacturer filed a motion for summary judgment on the basis of the government contractor defense. In affirming the decision of the lower

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[335] *Id.* at 947.

[336] *Id.* at 950 (citing Boyle v. United Technologies Corp., 487 U.S. 500 (1988)).

[337] *Id.* at 950.

[338] *Id.*

[339] 866 F.2d 135 (5th Cir. 1989).

court, the Fifth Circuit Court of Appeals found approval of reasonably precise specification in the unrebutted deposition testimony of a Xerox employee. The employee testified that the government reviewed and approved Xerox' final drawings and specifications for the weapons system. In addition, the Court found that the product was manufactured in accordance with the reasonably precise specifications because government inspectors were present on the assembly line to inspect the final product. Every product was given a functional test. If it did not pass the test, the product would not be used. Moreover, the product worked for many years without any problems. Finally, the Court noted that no evidence was produced demonstrating that Xerox knew or had reason to know that corrosion might cause the weapon system to fire inadvertently, thereby satisfying its duty to warn under the defense.[340]

In *Galik v. Lockheed Shipbuilding Co.*,[341] the plaintiff was the administratrix of the estate of a Coast Guardsman who died from injuries he sustained when his ship encountered a violent storm. The vessel rolled approximately fifteen degrees and caused the decedent to be thrown down into the pilot house, fatally injuring him. Plaintiff brought suit against Lockheed, the designers of the ship, alleging that the handrails adjacent to the fathometer were improperly designed. Defendant Lockheed moved for summary judgment on the basis of the government contractor defense. In granting defendant's motion for summary judgment, the court found that the Coast Guard had formulated and drawn up the plans and specifications for the ship. In addition, a full scale mock-up was constructed before the contract was awarded to Lockheed. The court also found that the ship conformed in every way to the specifications approved by the government and that the Coast Guard had accepted the ship as being in conformance upon delivery. The court also held that there was no

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[340] *Id.* at 139.

[341] 727 F. Supp. 1433 (S.D. Ala. 1989).

aberrational manufacturing defect as the plaintiff charged nor were there any hidden or latent manufacturing defects that the Coast Guard could discover when inspecting and accepting the ship for service. Finally, the court held that a government contractor does not have a duty to warn the government of any product-related dangers of which the government already has knowledge.[342]

In *Maguire v. Hughes Aircraft Corp.*,[343] plaintiff, a helicopter pilot in the Army National Guard, brought suit seeking damages for personal injuries he allegedly sustained during the forced landing of his helicopter after the aircraft experienced engine failure. Plaintiff sued Hughes, Allison, and MPB, the respective manufacturers of the helicopter, engine, and a component bearing. Plaintiff claimed that the engine failure was caused by a defect in the bearing design. The bearing had not been part of the original engine, but had been incorporated at a later stage. Because the engine was developed by Allison under contract with the United States Army, Allison and MPB moved for summary judgment, asserting the government contractor defense. Plaintiff challenged all three elements of the defense.

In affirming the grant of summary judgment in favor of the defendants, the Third Circuit held that no material issues of fact existed with respect to the first and third prongs of the defense. The court focused on the fact that, during the construction of the original engine, Allison worked closely with Air Force officials. The Air Force's senior project engineers reviewed and approved every element of the proposed design and every proposed assigned change. Similarly, the court found that the interaction between Allison and the Army at the time of the engine modification showed that the government approved reasonably precise specifications. The plaintiff failed to meet his burden to establish that the defendants did not disclose safety risks to the Army regarding the

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[342] *Id.* at 1435.

[343] 912 F.2d 67 (3d Cir. 1990).

modification to the engine. Interestingly, the decision of the court below expressly stated that, although MPB was a subcontractor and dealt with Allison, rather than directly with the government, it was nevertheless entitled to the government contractor defense.

In *Deniston v. Boeing Co.*,[344] plaintiffs brought suit to recover wrongful death damages arising out of the crash of a Marine helicopter manufactured by Boeing and other co-defendants. Plaintiffs asserted that a failed potentiometer that was part of the helicopter's stabilizing system caused the crash. Boeing moved for summary judgment, contending that plaintiffs could not demonstrate that any wrongful act of Boeing proximately caused the accident and that Boeing did not install the defective potentiometer. Boeing also argued, in the alternative, application of the government contractor defense. Although the district court granted Boeing partial summary judgment because it did not install the potentiometer that allegedly failed, the court denied application of the government contractor defense.[345]

The court addressed the issue of "approval" under the *Boyle* test and found that Boeing had failed to meet its burden. More specifically, the Court found that the *Boyle*[346] test is satisfied if the defendant demonstrates "back and forth" communications between the government and the contractor.[347] In addition, the "reasonably precise specifications" referred to in the first element of the test refer to only the detailed, quantitative specifications, not to general performance specifications relied upon by Boeing. The court observed that little or no indication of the size or shape of the elements to be employed in the helicopter was contained in the portions of the record cited by Boeing. The record presented was not sufficient for the court to hold the defense applicable as a matter of law. Finally,

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[344] No. 87-CV-1205 (N.D.N.Y. Mar. 28, 1990) (LEXIS, Genfed library, Dist file).

[345] *Id.*

[346] Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[347] *Id.*

the court held that the mere fact that a contract provision requires government approval of subsequent modifications does not mean that approval was actually given. Actual government approval is required, and "constructive notice will not suffice." [348] In *Skyline Air Serv. v. G.L. Capps Co.*,[349] the insurer of a helicopter brought a subrogation action against Bell to recover insurance proceeds it paid on the hull of a helicopter. In August of 1985, a military surplus Bell model UH-1B helicopter owned by Skyline Air Service, Inc. crashed during a log-hauling operation. Bell had built the helicopter for the United States government pursuant to a government contract in 1963. Consequently, Bell moved for summary judgment, asserting the government contractor defense. Although Bell produced evidence supporting application of the defense, it failed to produce the actual contract for construction of the helicopter. Plaintiffs argued that the government contractor defense was not available in instances where the defendant fails to produce the actual contract pursuant to which the product is manufactured.

In affirming the district court's decision granting summary judgment to Bell, the court found that Bell had delivered the helicopter to the Air Force in 1963 and that upon delivery a military inspector inspected the aircraft and certified that the helicopter complied with all military specifications. In addition, the court found that the government contracts required Bell to adhere strictly to previously established, government-approved detailed specifications for helicopters and that Bell strictly followed these procedures. The government closely reviewed, revised, and approved each of the detailed specifications for the subject helicopters, and no deviations were allowed without specific written governmental approval. The court further found that plaintiffs' sole reliance upon the fact that the actual contract had not been produced was misplaced. Bell had presented sufficient ev-

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[348] *Id.*

[349] 916 F.2d 977 (5th Cir. 1990).

idence to demonstrate that the equipment conformed to government-approved specifications, that the product conformed to those specifications, and that there was no issue as to whether Bell warned of any dangers unknown to the government.

In *Dorse v. Eagle-Picher Industries*,[350] an asbestos case, the Eleventh Circuit Court of Appeals addressed the question of whether the government contractor defense under *Boyle* applied to a "failure to warn case." The facts established that during World War II Eagle-Picher had manufactured and sold asbestos to the Navy pursuant to a government contract and in "strict compliance with mandatory government contract specifications."[351] The defense was held inapplicable in this particular case because there was no conflict between the "state tort duty" to warn and the "federal contract duty."

On the one hand, the court agreed with the defendant that *Boyle* is not strictly limited to design defect cases. On the other hand, the court agreed with the plaintiff that the three-part test of *McKay v. Rockwell International Corp.*,[352] required a " 'significant interest' of federal policy" sufficient to justify displacement of state tort law.[353] In applying *Boyle* to a failure to warn case, the court applied *Boyle's* two-pronged analysis.

First, the court found that the procurement of asbestos in World War II for naval ships was an area of unique federal interest. Second, the court had to determine whether a significant conflict existed between a federal law and the operation of state law. The court found that the "state imposed duty of care" (to warn of a danger) was not "precisely contrary" to the duty imposed on the contractor by the government contract. The court found that no conflict existed between state tort duty and the federal contract duty because the contract did not contain any

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[350] 898 F.2d 1487 (11th Cir. 1990).

[351] Dorse v. Armstrong, World Indus., 798 F.2d 1372, 1374 (11th Cir. 1986).

[352] 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

[353] Dorse v. Eagle-Picher Indus., 898 F.2d at 1489.

prohibition against health warnings on the product. Accordingly, the court granted summary judgment for the plaintiff on the government contractor defense issue.[354]

In *Nielsen v. George Diamond Vogel Paint Co.*,[355] the Ninth Circuit held that the government contractor defense under federal law did not significantly conflict with and did not displace Idaho law in a products liability action brought by a civilian painter for the Army Corps of Engineers (ACE) seeking to recover for injuries received from exposure to paint products at a Corps work site. The plaintiff had been employed by the ACE as a painter for eight years was later diagnosed as having solvent-induced brain damage resulting from the inhalation of toxic paint fumes used at a dam project in Idaho on which he worked exclusively.

The district court granted summary judgment for the defendant paint company on the ground that under Idaho law any design defects of the paint were attributable to government specifications and that the manufacturer would not be liable on either negligence or strict liability principles. The plaintiffs appealed. The defendants, on appeal, argued that the Supreme Court's intervening decision in *Boyle* entitled them to summary judgment as a matter of federal law because the paint used at the site was produced in accordance with government-approved specifications.

The Ninth Circuit examined the facts in light of the *Boyle* decision. The court noted that the uniquely federal interest in all federal government contracts is a starting point in examining whether state law should be displaced by federal law. Such displacement, however, will only occur when "a significant conflict exists between an identifiable federal policy or interest and the [operation] of law."[356] The court noted that the policy behind the government contractor defense as delineated in *Boyle* is

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[354] *Id.* at 1490.
[355] 892 F.2d 1450 (9th Cir. 1990).
[356] *Boyle*, 487 U.S. at 510.

rooted in considerations peculiar to the military. The case at bar involved a civilian worker injured in the course of a civilian job involving the painting of a dam rather than the construction of military equipment. The application of Idaho law on these facts would not significantly interfere with any uniquely federal interest.[357]

The court then went on to affirm the district court's decision that under Idaho law a government contractor is not liable in negligence or in strict liability if the contractor follows plans and specifications prepared by the government. The case was remanded, however, because questions of fact precluded summary judgment on the plaintiff's claim that defendant failed to warn of the dangers of using the paint.

In *In re Joint Eastern and Southern District New York Asbestos Litigation*,[358] former Brooklyn Navy Yard workers brought suit to recover for alleged injuries they sustained from exposure to asbestos-based cement during their years of service. The action was brought against Eagle-Picher, the company that manufactured the cement for the Navy. According to the record, "the Navy subjected the cement to fairly precise design and testing specifications, with the most important such specification mandating that the product contain a substantial concentration of asbestos. . . . "[359] The Navy also provided specific guidelines regarding the product's packaging, packing, and labeling, although it did not require warnings on the bags of cement to alert the user of the effects of inhaling asbestos.[360] Defendant Eagle-Picher moved for summary judgment, arguing that the military contractor defense recognized in *Boyle* precluded recovery by the workers in this case. The workers cross-moved for summary judgment striking the defense, and the District Court granted it.

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[357] *Neilson*, 892 F.2d. at 1455.

[358] 897 F.2d 626 (2d Cir. 1990).

[359] *Id.* at 627.

[360] *Id.*

On appeal, the Second Circuit focused on the fact that a state law requirement existed that such warnings had to be placed on the packages of cement. Although the contract with the U.S. government did not require these warnings, it did not expressly preclude them. Under the circumstances, state law could not be displaced or set aside pursuant to the *Boyle* defense. The court further held that in order for the defense to apply, state law duties must be in conflict with the duties imposed by the military contract.[361] The Second Circuit found that although the *Boyle* defense applies to failure to warn cases as well as to design defect cases, the record established below did not warrant application of the government contractor defense. In order for a state law requirement regarding warnings to be displaced, the language of the contract must be in conflict with the state requirements. The defendant must demonstrate that the government had full control or dictated the nature and content of the product warnings; otherwise, the *Boyle* defense does not preempt a state law duty to warn.[362]

The Second Circuit affirmed the district court's ruling denying Eagle-Picher's motion for summary judgment on the government contractor defense but vacated the court's ruling granting the workers' motion for summary judgment striking the defense. The case was remanded to the district court for reconsideration of whether the various Navy packaging and labeling requirements might have precluded Eagle-Picher from including any product warnings with the goods alleged to have injured the workers.

In *In re Aircraft Crash Litigation, Frederick Maryland*,[363] plaintiffs brought suit against several aircraft and component manufacturers to recover wrongful death damages arising out of the crash of a U.S. Air Force EC-135 aircraft. On board the aircraft was a crew of seventeen and

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[361] *Id.* at 630.

[362] *Id.*

[363] 752 F. Supp. 1326 (S.D. Ohio 1990).

four authorized observers, including two wives of crew members. At the time of the crash, the left pilot seat was occupied by one of the participant's spouses and the right seat was occupied by the woman's husband, the pilot. The Air Force's analysis of possible causes for the crash led them to conclude that for undetermined reasons, the aircraft pitch trim moved to the full nosedown position, which resulted in loss of control of the aircraft. Plaintiffs contended that the aircraft's sudden pitch-over was the result of a flight control system malfunction that most probably was initiated in the autopilot. Defendants contended, on the other hand, that the aircraft's pitch-over was caused by the spouse sitting in the left pilot seat, who inadvertently activated the trim stabilizer switch, thus causing the accident. All three defendants, Boeing, McDonnell Douglas, and Lear, moved for summary judgment on the basis of the government contractor defense.

In granting summary judgment to all of the defendants, the District Court engaged in a thorough analysis of the underpinnings of the government contractor defense and the subsequent cases following the *Boyle* decision. The court then analyzed the record with respect to each defendant and methodically applied the government contractor defense as set forth in *Boyle* to each. Among the many arguments raised by the plaintiffs was that the defense was inapplicable because the Air Force relied upon the defendants' expertise and higher knowledge as aircraft designers and manufacturers. The court rejected this argument, however, by holding that such an assertion is irrelevant to the *Boyle* defense and cannot be used to raise a material issue of fact to defeat a motion for summary judgment. "The Air Force's reliance is in fact besides the point for *Boyle* fully contemplates such reliance as necessary to the military procurement process."[364] According to the district court, *Boyle* sought to "encourage the active involvement of military contractors in the de-

[364] *Id.* at 1341.

sign process, and held that such contractors are immune from suit under state tort law, as long as the design features at issue had been considered by the government and not *solely* by the contractor."[365] The court further held that the record demonstrated the required "back and forth" between the Air Force and the defendants to establish the requisite approval of reasonably precise specifications.

With respect to conformity, the court also held that the contractual provisions to which the plaintiffs pointed to demonstrate nonconformity were not the specifications relevant to the *Boyle* defense. Citing *Kleeman*, the court found that the specifications with which a military contractor's product must conform under *Boyle* are not the general qualitative specifications emanating from the initial stages of the procurement process, but rather the precise quantitative specifications that evolve out of the continuous exchange between the government and the contractor.[366]

E. *Damages*

In *Germanio v. Goodyear Tire & Rubber Co.*,[367] a federal district court in New Jersey has held that provisions in the New Jersey Products Liability Act, permitting punitive damages are not unconstitutionally void for vagueness and that punitive damage awards were not subject to the New Jersey Constitution's prohibition on excessive fines. Further, the statutory scheme allowing punitive damages does not deny a defendant's due process rights, nor is the consideration of a defendant's financial status a denial of equal protection.

The statute in question, the punitive damages section of the New Jersey Products Liability Act of 1987,[368] provides

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[365] *Id.*

[366] *Id.* at 1369.

[367] 732 F. Supp. 1297 (D. N.J. 1990).

[368] N.J. Stat. Ann. § 2A:58C-5(a) (West 1987).

that punitive damages may be awarded to a claimant upon proof, by a preponderance of the evidence:

> that the harm suffered was the result of the product manufacturer's or seller's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of product users, consumers, or others who foreseeably might be harmed by the product.[369]

This action was instituted after the explosive separation of a truck-tire rim manufactured by the defendant caused serious injuries to the plaintiffs. At trial the defendant moved for summary judgment dismissing plaintiffs' punitive damages claim; defendant argued that New Jersey's statutory provision allowing punitive damages in product liability cases violated both the state and federal constitution.

In rejecting defendants' claim that the law should be held void for vagueness, the court noted that under the Act a jury may award punitive damages only where the defendant's conduct is found not to have met a defined standard and only after a jury weighed several mitigating and aggravating factors. These factors are more specific than those previously approved by the U.S. Supreme Court in *Smith v. Wade*[370] and *Gertz v. Robert Welch, Inc.*[371]. Further, the fact that the Act does not provide for maximum awards does not, standing alone, cause the statute to be impermissibly vague.

The court rejected the defendant's due process claim by noting that it saw no reason to extend protections generally enjoyed only by criminal defendants to defendants in tort actions merely because punitive damages are involved. Moreover, the court rejected the defendant's claim that the Fourteenth Amendment's guarantee of equal protection should preclude a jury from examining the financial status of a defendant before making an award

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[369] *Id.*

[370] 461 U.S. 30 (1983).

[371] 418 U.S. 323 (1974).

of punitive damages. The court could find no case law indicating that damage awards against the wealthy should be subject to heightened levels of scrutiny.

In *National Consumer Co-Op. Bank v. Madden*,[372] a federal district court in Hawaii concluded that, under Hawaii state law, punitive damages may be awarded in product liability actions, even in cases based on strict liability. In so holding, the court recapped the guidelines for punitive damages under Hawaiian law. In order to recover punitive damages, a plaintiff must:

> prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.[373]

The district court went on to explain that "clear and convincing evidence" is that degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.[374] The finders of fact must focus upon the defendant's mental state and, to a lesser degree, the nature of his or her conduct. Further, there must be some positive element of conscious wrongdoing and a showing of aggravated or outrageous conduct. Punitive damages are not awarded, in Hawaii for mere inadvertence, mistake, or errors of judgment.[375]

Since these issues are to be determined by the finders of fact, the defendant's pre-trial summary judgment motion on the issue of the availability of punitive damages was denied.

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[372] 737 F. Supp. 1108 (D. Haw. 1990).

[373] *Id.* at 1114 (citing Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566, 575 (1989)).

[374] 737 F. Supp. at 1114.

[375] *Id.* at 1115.

V. LIABILITY OF THE UNITED STATES: THE FEDERAL TORT CLAIMS ACT

A. *General*

In *Tiffany v. United States*,[376] the United States was held liable for a coastal interception and collision that killed seven people. Negligence on the part of military controllers and the interceptor pilot was the proximate cause of the collision between a McDonnell Douglas F-4C and a Beech Baron, which had penetrated the Air Defense Identification Zone off Cherry Point, North Carolina. The case was brought under the Death on the High Seas Act.[377]

The deceased pilot had submitted a flight plan at the Nassau, Bahamas Airport on January 9, 1983, calling for a flight to Norfolk, Virginia, via Wilmington, North Carolina. The flight plan was then amended to list Fort Pierre, Florida, as his initial touchdown point. The pilot never activated the plan after departing Nassau. Instead of heading for Florida, he turned north and was detected by a government radar tracking system based in Virginia and known as FERTILE. Two F-4C Phantoms were scrambled. The Baron pilot then contacted Washington Air Route Traffic Control Center, identified himself, and requested radar assistance in avoiding weather cells. During the intercept that followed, the Baron and one of the fighters collided.

The district court held that FERTILE had sufficient information, within ample time, to have terminated the intercept. The F-4C continued a mission designed for visual identification in weather effectively precluding such an identification. The F-4C pilot misidentified the position of the Baron, failed to follow proper procedures, and failed to maintain the proper amount of vertical separation. According to the court, the Baron pilot's knowledge that his actions would lead to an intercept did not serve to protect the government from liability. While decedent

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[376] 726 F. Supp. 129 (W.D. Va. 1989).

[377] 46 U.S.C.A. app. § 761 (1991).

should have anticipated the intercept, he should not have been expected to have foreseen the inappropriate actions of FERTILE control and the F-4C crew.[378]

In *Budden v. United States*,[379] a federal court found that the failure of a FAA flight service station employee to inform a helicopter pilot of a forecast calling for light, occasionally moderate rime icing was not the proximate cause of the subsequent fatal accident.

The action arose from the crash of a helicopter ambulance travelling from Kearney to Ainsworth, Nebraska. The pilot requested reported weather for Broken Bow and Ainsworth, Nebraska. The parties to the action agreed that the station specialist's response to this request was sufficient. At issue was the FAA Flight Service Station specialist's failure to include information of a rime icing condition that appeared on an older area forecast that had not been requested by the pilot.

The court found that the specialist was negligent in failing to provide information as to the icing condition, and that the specialist's failure to inform the pilot of the condition contributed to the pilot's decision to commence the flight. The court held that this failure was not, however, the proximate cause of the crash. The facts indicated that the helicopter was not weighed down with ice and that the rotor was operating at normal speed upon impact. The court found that the proximate cause of the accident was the pilot's decision to continue to fly into deteriorating weather conditions that consisted of sharply decreasing cloud ceilings and visibility.[380]

The Second Circuit Court of Appeals recently reversed the District Court for the Eastern District of New York, by holding that Aviation Medical Examiners (AMEs) are not employees of the federal government for purposes of the FTCA. In *Leone v United States*,[381] the plaintiffs argued that

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[378] 726 F. Supp. at 137.
[379] 748 F.Supp. 1374 (D. Neb. 1990).
[380] *Id.* at 1385-88.
[381] 910 F.2d 46 (2d Cir. 1990).

the federal government could be held liable for an AME's failure to detect a pilot's heart disease and other medical conditions. Some three months after having undergone a flight physical, Irwin Small had a heart attack while piloting his personal aircraft. The aircraft crashed, killing all of the passengers on board.

In concluding that the AME was not an employee of the federal government, the Second Circuit held that to be an employee for purposes of the FTCA, the alleged employee's day-to-day operations must come under the direct supervision and control of the federal government. Although the federal government issues detailed guidelines for the performance of AMEs' duties, the government does not maintain control over the AMEs' detailed physical performance of these duties. The court also emphasized that most AMEs are licensed physicians engaged in private practice. Furthermore, AMEs schedule their own appointments, set their own fees, collect their fees directly from applicants, and provide their own instruments, tools, and workplace. Finally, the Second Circuit noted that the federal government provides neither insurance nor workers' compensation payments on behalf of the AMEs.[382]

The plaintiffs also argued that the AMEs should be considered government employees because they act "on behalf of" the FAA. Section 2671 of the FTCA provides that "persons acting on behalf of" a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, are to be considered employees of the government. The court held, however, that this language was intended to cover special situations such as government officials who serve without pay, or an employee of one government agency who is loaned to and works under the direct supervision of another government agency. The court held that to uphold this language which provides for

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[382] *Id.* at 50.

FTCA liability would seriously undermine the independent contractor exemption.[383]

In *Largent v. United States*,[384] the Court of Appeals for the Eighth Circuit held that, under the Comparative Negligence Statute of South Dakota, the estate of the decedent pilot could not recover for the negligence of two Flight Service Station specialists employed by the United States.

The estate's action arose from the crash of the decedent's aircraft shortly after take-off from the Hot Springs Airport in Hot Springs, North Dakota. After a bench trial and several appeals, it was determined that although both FSS specialists had been negligent in failing to warn the decedent about icing conditions on the morning of his flight, the negligence of the decedent was more than "slight" compared to that of the FSS specialists. Therefore, under the South Dakota Statute, the decedent's recovery would be barred.

In reaching this conclusion, the district court held that the decedent was negligent in (1) failing to equip his aircraft with deicing equipment; (2) failing to anticipate icing conditions and to inquire about cloud ceilings and temperatures aloft; (3) failing to plan for an alternative flight path should an emergency strike; and (4) flying without the necessary IFR recency of flight experience.[385]

On appeal, the Eighth Circuit agreed with the plaintiff's argument that, where it had been previously determined that spacial disorientation did not contribute to the accident, the pilot's lack of IFR currency could not be considered in determining whether the pilot's negligence was "slight." The court of appeals affirmed the decision of the district court, however, on the ground that the error had been harmless. According to the court of appeals, even if the district court had not considered the decedent's decision to fly without the appropriate level of IFR experience, it still would have determined that the dece-

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[383] *Id.* at 51.
[384] 910 F.2d 497 (8th Cir. 1990).
[385] *Id.* at 499.

dent's negligence was more than "slight" in comparison to that of the defendants.[386]

The Court of Appeals for the Ninth Circuit has held that a claim against the government for intentional infliction of emotional distress is not excluded as a matter of law by the FTCA. In *Sheehan v. United States*,[387] the plaintiff, an army civilian employee, claimed that she was sexually harassed and slandered by her supervisor, also a government employee. The plaintiff sued the United States under the FTCA alleging that the supervisor caused the plaintiff humiliation and emotional distress. The district court granted summary judgment against the plaintiff, holding that her cause of action for intentional infliction of emotional distress fell within the express exclusion in 28 U.S.C. § 2680(h) of "any claim arising out of assault."[388]

In reversing the lower court, the Ninth Circuit ruled that the district court had erroneously relied on the Ninth Circuit's decision in *United States v. Hambleton*,[389] which held that a claim for intentional infliction of emotional distress was found to be precluded by § 2680(h). According to the court, the Supreme Court decisions of *Block v. Neal*[390] and *United States v. Neustadt*[391] direct courts to inquire whether the conduct upon which the plaintiff's claim is based constitutes one of the torts accepted by § 2680(h). The appellate court reversed and remanded the case to the district court to determine whether the plaintiff's allegations would permit proof of conduct that is not within the definition of the excluded torts and that would support the plaintiff's claim that she suffered injury from the intentional infliction of emotional distress independently of injury suffered from excluded conduct.[392]

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[386] *Id.* at 500.
[387] 896 F.2d 1168 (9th Cir. 1990).
[388] *Id.*
[389] 185 F.2d 564 (9th Cir. 1950).
[390] 460 U.S. 289 (1983).
[391] 363 U.S. 696 (1961).
[392] 896 F. 2d at 1173-74.

In *In re Air Crash Disaster at Dallas/Fort Worth on August 2, 1985*,[393] the Court of Appeals for the Fifth Circuit affirmed the district court decision resulting from one of the longest trials in the history of aviation litigation.[394] The case arose from the crash of an airplane during final approach. The flight crew attempted landing despite their knowledge of the presence of a thunderstorm between their aircraft and the runway on final approach. The airplane crashed when it encountered windshear while passing through a thunderstorm cell.

The widows of the pilot and the second officer brought separate actions against the United States under the Texas Wrongful Death Act and Texas Survivors Act. The widows' actions were consolidated with personal injury suits that were brought against the airline. In addition, the airline sued the United States, alleging negligence on the part of FAA employees and the National Weather Service arising from their failure to relay weather information to the crew. All actions against the United States were brought pursuant to the Federal Tort Claims Act.

The Fifth Circuit applied the "clearly erroneous" standard to affirm the district court's holding that the crew's attempt to land in a thunderstorm and its failure to execute a missed approach proximately caused the aircraft accident.[395] Although the district court had found that the air traffic controllers and weather personnel breached their duties to provide the accident aircraft with adequate weather information, it held that their negligent acts were not the proximate cause of the crash because the pilot had possessed substantially all of the weather information potentially available from the government employees. In this connection, the court of appeals also recognized the district court's determination that the crew was aware of additional conditions unknown by the government sources. The appellate court rejected the claimants' argu-

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[393] 919 F.2d 1079 (5th Cir. 1991).
[394] 720 F. Supp. 1258 (N.D. Tex. 1989).
[395] *In re Air Crash Dallas/Fort Worth*, 919 F.2d at 1085.

ment that, in reaching this decision, the district court had applied the "last clear chance" doctrine, which is inapplicable in Texas.[396]

B. *Discretionary Function Exception*

The Fifth Circuit upheld the decision of the District Court for the Western District of Texas that a FAA aviation flight safety inspector was negligent for ordering an applicant seeking certification to try a failed maneuver again. When the maneuver was attempted a second time, the plane crashed. In *Hayes v. United States*,[397] the Court rejected the FAA's defense that the FTCA's discretionary function exception applied to the facts before it. Although the FAA inspector's decision to have the applicant retry the maneuver implied some discretion on the inspector's part, his actions were part of his day-to-day operational functions and were not policy-related.[398]

In *Sewell v. United States*,[399] a federal district court in Colorado held that the decision as to whether to include power lines on sectional navigational charts was a discretionary function of the National Oceanic Atmosphere Administration (NOAA).[400] This holding immunized the agency from suit for the death of Christopher Sewell, who was killed in 1986 when the plane in which he was a passenger hit a power line near Redcliffe, Colorado. The power line did not appear on the navigational chart for the area. The decedent's widow sued the United States, basing her claim on the negligence of NOAA in omitting the power line from the chart.

The chart had been prepared by the NOAA under guidelines issued by the Inter-Agency Air Cartography Committee. The general guidelines stated that any feature more than 200 feet above the ground should be con-

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[396] *Id.* at 1087.
[397] 899 F.2d 438 (5th Cir. 1990).
[398] *Id.* at 451.
[399] 732 F. Supp. 1103 (D. Colo. 1990).
[400] *Id.* at 1108.

sidered a vertical obstruction. The specific guidelines, however, called for the omission of transmission lines in built-up areas since they lose whatever landmark value they have and serve to clutter the chart.[401] The parties stipulated that the line in question extended more than 200 feet above the ground in a built-up area, did not serve any navigational purpose, and had not been determined by the FAA to pose a hazard to navigation. The plaintiff stated that the part of the guidelines pertaining to general obstructions called for the line's inclusion on the chart. The government argued in rebuttal that the specific power line guidelines were applicable.

If the general guidelines applied, the government would have been negligent for failing to chart the power lines. If the specific power line guidelines applied, the decision to chart the power lines would be deemed discretionary. The district court held that the "NOAA's interpretation that the specific power-line section transcends the ground obstruction section is not clearly erroneous".[402] NOAA's decision not to include the power lines on the chart was, therefore, a discretionary act. The court granted the government's motion for summary judgment.[403]

C. *Procedural Requirements*

In *Transco Leasing Corp. v. United States*,[404] the Fifth Circuit held that an administrative claim form submitted by the executor of a deceased pilot's estate satisfied the FTCA's jurisdictional notice requirements.[405] The case arose out of a midair collision between two private airplanes near Addison, Texas, in 1982. The two airplanes, one a Piper Navaho approaching Dallas's Love Field and the other a Cessna Skymaster taking off from Addison Air-

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[401] *Id.* at 1105.
[402] *Id.* at 1106.
[403] *Id.* at 1108.
[404] 896 F.2d 1435 (5th Cir. 1990).
[405] *Id.* at 1444.

port, collided shortly after a Dallas-Fort Worth (DFW) controller misunderstood the Cessna's position and allowed the pilot to enter DFW's Terminal Control Area.

A number of claims, cross-claims, counterclaims, and third-party complaints for contribution and indemnity were asserted by the various parties. The district court granted summary judgment motions, finding that (1) there was no evidence of contributory negligence on the part of the two pilots, and (2) the wrongful death claim asserted by one of the decedent's estate did not satisfy the jurisdictional notice requirements of the FTCA.[406] Both the government and the estate appealed.

The court of appeals reversed the district court's summary judgment dismissal of the claims of the estate. The government contended on appeal that the administrative claim form, which had been submitted by a bank as the duly appointed executor of the late pilot's estate, was defective in that it did not encompass the claims of the pilot's surviving wife and child. The government's claim was based on its interpretation of 28 C.F.R. § 14.3(e), which provides:

> "[a] claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative."[407]

The form submitted by the bank was not presented in the name of the claimant.

The court of appeals noted that, under the Texas Wrongful Death Act, an action for wrongful death is reserved for the exclusive benefit of the surviving spouse, children, and parents of the deceased.[408] Although the Act provides that any of those individuals may pursue a

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[406] 28 U.S.C. §§ 1346(b), 2675(a) (1988).
[407] 28 C.F.R. § 14.3(e) (repealed 1987).
[408] *Transco*, 896 F.2d at 1443.

wrongful death claim, the executor or administrator of the estate is also authorized to pursue a wrongful death action. Further, under Texas law, the actual claimants are the statutory beneficiaries even though the executor has authority to pursue a claim. Since 28 C.F.R. § 14.3(c) was promulgated pursuant to 28 U.S.C. § 2672, which gives an agency the power to settle claims, the failure to comply with the strict letter of the regulation was not a jurisdictional bar to the survivors' claims. The jurisdictional notice requirement of § 2675(a) was independent of any regulations issued under § 2672.[409]

The claim as submitted satisfied the FTCA's jurisdictional notice requirement because the agency was given sufficient written notice to commence an investigation and a value was placed on the claim.[410]

In *Schmidt v. United States*,[411] the court affirmed a district court's dismissal of the complaint under the FTCA for lack of subject matter jurisdiction. The action was brought by an Ozark Airline flight attendant who was injured on December 20, 1983, when her plane struck a snow removal vehicle that had been left on a runway in Sioux Falls, South Dakota. The plaintiff filed an administrative claim for damages with the FAA on November 1, 1985. The FAA issued a final denial of the claim on November 19, 1986. The plaintiff's attorney received the letter on November 24, 1986. The plaintiff then filed the FTCA complaint on May 21, 1987.

The United States moved to dismiss on the ground that the plaintiff had failed to commence the action within six months of the mailing of the FAA's final denial as required by 28 U.S.C. § 2401(b). The plaintiff contended that the denial was not posted until November 21, 1986, and that she thus avoided default by commencing the ac-

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[409] *Id.*

[410] *Id.* at 1444.

[411] 901 F.2d 680 (8th Cir. 1990), *vacated*, 111 S.Ct. 944 (1991) (judgment vacated and remanded for further consideration in light of Irwin v. Department of Veterans Affairs, 111 S. Ct. 453 (1990)).

tion by May 21, 1987. Neither party produced direct evidence establishing the actual date the final denial was mailed. The district court granted the government's summary judgment motion on the ground that the plaintiff failed to satisfy the burden of establishing the date of mailing.[412]

The court of appeals affirmed the district court's finding that the plaintiff failed to meet the burden of establishing facts necessary to support subject matter jurisdiction.[413] The court rejected the plaintiff's alternative claim that the failure of the FAA to procure a sender's receipt indicated that it failed to comply with the statute's requirement that denial letters be sent by certified or registered mail. The court noted that the private contractor who handled the FAA's outgoing mail kept logbooks. The pages of the logbook thus became sender's receipts under U.S. Postal Service regulations, and, therefore, the statutory requirement of 28 U.S.C. § 2401(b) was satisfied.

In *Hiatt v. United States*,[414] the Eleventh Circuit construed § 2675(a) of the Federal Tort Claims Act, which requires that:

> An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.[415]

Hiatt involved a wrongful death action brought by Shirley Hiatt as personal representative of the Estate of Dale Hiatt, her husband, who was killed in a midair collision. The issue presented was whether John Hiatt, the minor son of the decedent, would be permitted to pursue his claim for non-economic damages even though he had failed to

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[412] *Id.* at 682.
[413] *Id.* at 683.
[414] 910 F.2d 737 (11th Cir. 1990).
[415] 28 U.S.C. § 2675(a) (1988).

present his claim to the FAA pursuant to § 2675(a). The district court ruled that, since no administrative claim had been filed pursuant to 28 U.S.C. § 2675(a), it did not have subject matter jurisdiction to award damages for John's loss.[416]

On appeal, the Eleventh Circuit reversed, holding that it was clear in the administrative claim filed by the decedent's personal representative, Shirley Hiatt, that damages would be sought for all beneficiaries of the estate.[417] The court distinguished the holding of the D.C. Circuit in *Jackson v. United States*[418]. According to the Eleventh Circuit, the *Jackson* case involved an administrative claim filed by the decedent's parents alleging wrongful death and seeking $100,000 in damages. After that claim was denied, the decedent's widow filed a wrongful death and survival claim. The district court dismissed the widow's suit, reasoning that the parents' administrative claim for wrongful death could not be used by the widow to satisfy the requirement that she file an administrative claim. According to the Eleventh Circuit, the administrative claim and the FTCA suit in *Hiatt* involved virtually the same claims — wrongful death — while the claim sought in *Jackson* was different.[419]

In *Allgeier v. United States*,[420] the Sixth Circuit held that a complaint, amended to name the United States after the limitations period had run, would not relate back to the original complaint that incorrectly named the United States Post Office and an individual mail carrier as defendants.[421]

The claim in *Allgeier* arose from an automobile accident involving a truck driven by a United States Postal Service carrier and a truck driven by the plaintiff, Richard Allgeier. The plaintiff filed a timely administrative claim with

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[416] *Hiatt*, 910 F.2d at 739.
[417] *Id.* at 741-42.
[418] 730 F.2d 808 (D.C. Cir. 1984).
[419] *Hiatt*, 910 F.2d at 742.
[420] 909 F.2d 869 (6th Cir. 1990).
[421] *Allgeier*, 909 F.2d at 874.

the postal service seeking compensation for damage to his truck. The postal service denied the claim on January 18, 1985. On July 17, 1985, two days prior to the end of the six-month limitations period set forth in 28 U.S.C. § 2401(b) for initiation of tort actions against the United States, Allgeier filed a complaint in the district court. The complaint, which erroneously named the United States Post Office and the postal carrier as defendants, was served on the defendants as well as on the United States Attorney by certified mail. The United States Attorney's office did not receive a copy of the complaint until July 22, 1985, four days after the end of the six-month limitation period.

Under the FTCA, the United States is the only proper defendant in a suit alleging negligence by a federal employee.[422] Apparently realizing this oversight, the plaintiff amended his complaint on September 27, 1985, to name the United States as the sole defendant. The United States moved to dismiss the action. According to the government, the United States was not named as a party to the suit until well after the six-month limitations period had past. The government also argued that the amended complaint did not "relate back" to the timely but flawed original complaint under Fed. R. Civ. P. 15(c). The district court held that the amended complaint did relate back to the original complaint and, after a trial, entered a final judgment for the plaintiff against the United States in the amount of $1,360.[423] On appeal, the Sixth Circuit reversed the district court, holding that the amended complaint did not relate back.[424] The court of appeals observed that, pursuant to Fed. R. Civ. P. 15(c), where an amendment seeks to change the party against whom the claim is asserted, the new party must have had sufficient notice of the institution of the action for the amended complaint to relate back. The court of appeals further ob-

[422] 28 U.S.C. § 2679(a) (1988).
[423] *Allgeier*, 909 F.2d at 871.
[424] *Id.* at 870-71.

served that, with respect to the United States, sufficient notice would require, in the words of Rule 15(c), "[t]he delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named. . . ." According to the court, a common-sense interpretation of the notice requirements for the United States contained in Rule 15(c) would seem to permit delivery *or* mailing of process to the United States Attorney, which apparently was accomplished in this case. The court went on, however, to consider the Advisory Committee Note on the rule, which observes that the notice requirement is satisfied when the government has been notified in the manner set forth in Fed. R. Civ. P. 4(d).[425] Rule 4 provides that service on a federal officer or agency is accomplished only by serving the United States and by sending processed documents by registered or certified mail.

While conceding that the common-sense reading of Rule 15 would permit relation back in situations where service by mail upon the United States Attorney was accomplished, and that the "consequences of imprecise drafting should not fall upon "hapless" claimants against the government," the court ruled that such considerations were insufficient to override its duty to strictly construe any waiver by the United States of its sovereign immunity.[426] The court held that, where an amendment naming the United States as the proper party seeks to relate back under Rule 15(c), the United States is deemed to have been properly notified where, within the statutory limitation, there has been either (1) delivery of process to and receipt by the United States Attorney or (2) mailing of process to the Attorney General. Merely mailing process to the United States Attorney within the statutory period, as occurred in this case, does not suffice.

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[425] *Id.* at 872-73.
[426] *Id.* at 873.

D. *Liability of States of the United States*

The Supreme Court of Hawaii discussed the State's discretionary function exception to the State Tort Liability Act in *Nakahira v. State*.[427] The plaintiff, while on National Guard duty, was injured by a helicopter that went out of control on the ground while being "run-up" for maintenance purposes. The "run-up" was conducted by a non-aviator under a Hawaii program that certified non-aviators to conduct such maintenance.

The Hawaii Army National Guard is an agency of the State of Hawaii. The plaintiff filed suit against the State, alleging negligence in the implementation of the program that authorized non-aviators to "run-up" helicopters. The State moved to dismiss plaintiff's claim against it on the ground that the Hawaii Tort Liability Act precluded the action. The lower court granted the motion and the plaintiff appealed. The Supreme Court of Hawaii reversed.

The court, in reversing, held that the State retained immunity from any claim that is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved was abused.[428] The Court noted that, normally, only aviator personnel were authorized to operate helicopters both on the ground and in the air. In recognition of the fact that there are often shortages of aviator personnel, the federal Bureau of the National Guard authorizes state National Guard units to adopt a program allowing non-aviator personnel to be certified to conduct ground "run-ups" of helicopters. Although the decision to adopt such a program is discretionary, the court held that once that decision has been made, the implementation of such program was an operational and not a discretionary function.[429]

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[427] 799 P.2d 959 (Haw. 1990).

[428] *Id.*

[429] *Id.*

VI. LIABILITY OF FOREIGN STATES: THE FOREIGN SSOVERIGN IMMUNITIES ACT

A. *General*

In *Filus v. LOT Polish Airlines*,[430] the Second Circuit held that a plaintiff was entitled to have a defendant answer interrogatories that might establish whether the defendant came within the commercial activity exception to the FSIA. The case arose from the crash of an Ilyushin 62-M aircraft, owned by LOT airlines, shortly after takeoff from Warsaw on a flight to the United States. Survivors of passengers killed in the crash brought suit in the Eastern District of New York against the airline and against the U.S.S.R., alleging that the U.S.S.R. negligently designed, manufactured, assembled, sold, inspected, overhauled, and serviced the airplane.[431]

The plaintiffs asserted subject matter jurisdiction over the U.S.S.R. on the basis of the commercial activity exception to the FSIA, which provides that a foreign state shall not be immune in any case "in which the action is based on a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . ."[432]

The Soviet Union defended on two grounds. First, they asserted that the U.S.S.R. did not manufacture, service, or sell the aircraft in question, but that the aircraft was manufactured by organizations that are juridical persons distinct and separate from the State and its Ministries. Second, the U.S.S.R. argued that there was not a sufficient nexus between any commercial activity in the United States and the plaintiff's cause of action to justify the commercial activity exception.[433] The district court

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[430] 907 F.2d 1328 (2d Cir. 1990).

[431] *Id.* at 1330.

[432] 28 U.S.C. § 1605(a)(2) (1988).

[433] *Filus*, 907 F.2d at 1331.

granted the U.S.S.R.'s motion to dismiss on the grounds of sovereign immunity.

The court of appeals reversed the dismissal, noting that, in general, a plaintiff may be allowed limited discovery in order to establish a jurisdictional basis. The fact that the FSIA was involved did not change the availability of limited discovery.

In *Forsythe v. Saudi Arabian Airlines Corp.*,[434] John Forsythe, an airline pilot, brought a wrongful discharge action in a Texas state court against the Saudi Arabian Airlines Corporation (SAAC), which was "an agency or instrumentality" of Saudi Arabia under section 1603(b) of the FSIA.

Forsythe was an American citizen who entered into an employment agreement with the SAAC to provide services as a commercial airline pilot. The agreement contained a provision specifying that all disputes would be governed by the laws of Saudi Arabia and resolved by the Saudi Arabia Labor and Settlement of Disputes Committee. After less than a year, the SAAC discharged Forsythe for allegedly failing proficiency and evaluation checks. Forsythe did not contest the discharge in the manner permitted by his employment agreement but returned to the United States and brought suit in the State of Texas.

SAAC removed the case to federal court based on its status as a "foreign state" under the FSIA. Following removal, SAAC moved to dismiss, claiming failure to state a claim and lack of subject matter jurisdiction under the FSIA. SAAC added an alternative ground of forum non conveniens. In a supplemental motion, Forsythe did not challenge SAAC's FSIA immunity. In December, 1988, the district court granted SAAC's motion to dismiss, finding that SAAC was a "foreign state" and that none of the exceptions to immunity provided in the FSIA applied. Alternatively, the court concluded that the doctrine of for-

[434] 885 F.2d 285 (5th Cir. 1989).

eign non conveniens required that the suit be prosecuted in Saudi Arabia.

On appeal, the Fifth Circuit chose not to review the district court's determination that it lacked subject matter jurisdiction under the FSIA. That court disposed of the case on the basis of the doctrine of forum non conveniens.

In *Barkanic v. The General Administration of Civil Aviation of the Peoples' Republic of China (CAAC)*,[435] plaintiffs brought suit to recover wrongful death damages for two American passengers who perished in an airline crash in the Peoples' Republic of China. The lawsuit arose from the crash of an Antonov 24 aircraft operated by CAAC, the state-owned carrier, on a purely internal flight between Nanjing and Beijing on January 18, 1985. The suit was originally dismissed for lack of subject matter jurisdiction under the FSIA. That decision was later reversed by the Second Circuit Court of Appeals, which found a sufficiently significant nexus for exercising jurisdiction. On remand to the Eastern District of New York, defendants moved for application of the $20,000 per passenger limitation under Chinese law, pursuant to the choice of law provision found in § 1606 of the FSIA. Defendants' motion was granted.

On appeal, plaintiffs sought to overturn the lower court's decision and argued that the FSIA required application of the choice-of-law rules of the forum state, New York. Under New York choice-of-law analysis, the law of the decedents domicile (District of Columbia and New Hampshire) would govern the action. In opposition, defendants/appellees argued for affirmance of the district court's decision on the basis of the choice-of-law provision under the FSIA. In the alternative, defendants argued that, under federal common law choice-of-law rules or New York choice-of-law rules, the law of China should be applied to the case.

In affirming the decision of the lower court, the Second

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[435] 923 F.2d 957 (2d Cir. 1991).

Circuit held that, unlike similar provisions of the FTCA relating to choice-of-law rules, the FSIA did not dictate application of the law of the place where the action or omission occurs. It found that the intent of Congress in holding foreign states to the same standards of liability as private individuals is best carried out by applying the choice-of-law rules of the forum state — in this instance, New York choice of law rules. The court found also that, under New York choice-of-law rules as set forth in the landmark decision in *Neumeier v. Kuehner*,[436] the law of China limiting wrongful death damages in an air disaster to $20,000 per passenger should be recognized and applied by United States courts.

Significantly, the Second Circuit also held that the seminal decision rendered by the New York Court of Appeals in *Kilberg v. Northwest Airlines, Inc.*,[437] which thirty years ago had refused to recognize the damage limitations provisions of Massachusetts law, is "no longer good law" and that under current law New York courts would apply the law of the place of the accident under the facts presented. Similarly, the court overruled its prior decision rendered in *Rosenthal v. Warren*,[438] because it no longer reflected an accurate interpretation of New York law. Finally, the court held that application of the limitation of liability under the laws of China did not contravene important policies of the United States federal government. As an example, the court observed that while some courts have criticized limitations under the Warsaw Convention, the Convention is a treaty to which the United States is bound and the federal courts regularly enforce its damage limitations.

B. *Subject Matter Jurisdiction*

In *Nolan v. Boeing Co.*,[439] the Fifth Circuit addressed the

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[436] 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972).
[437] 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961).
[438] 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).
[439] 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991).

scope of removal jurisdiction under the Foreign Sovereign Immunities Act (FSIA). In that case, a British Midland Airways B-737-400 crashed on January 1989 while en route from London, England, to Belfast, Northern Ireland. The aircraft was on a domestic flight between these two cities in the United Kingdom and contained no U.S. passengers.

Relatives of persons injured and killed in the accident filed personal injury and wrongful death actions in the United States.[440] These actions were brought in a Louisiana state court through non-diverse New York and Washington representative plaintiffs in an attempt to prevent removal of the actions to federal court. Altogether, sixteen individual lawsuits on behalf of a total of 207 claimants were commenced in Louisiana state court against The Boeing Company, the manufacturer of the aircraft; the General Electric Company, a co-manufacturer of the aircraft's engines; and CFM International, Inc., which marketed the engines. Louisiana was chosen by the plaintiffs because it was one of the few jurisdictions in the United States that supposedly did not recognize the doctrine of *forum non conveniens*. Moreover, the plaintiffs initiated the actions just before the effective date of legislation that amended the diversity jurisdiction statute,[441] making the citizenship of representative parties irrelevant in determining diversity of citizenship.

The defendants removed the actions to a federal district court in Louisiana. The plaintiffs successfully persuaded the federal court to remand the cases to the state court because complete federal diversity jurisdiction was lacking among all of the representative plaintiffs and the defendants. In reaching its decision to remand, the court relied on the Supreme Court's decision in *Mecom v. Fitzsimmons Drilling Co.*,[442] which interpreted the pre-amendment diversity jurisdiction statute.

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[440] *Id.* at 1060.
[441] 28 U.S.C. § 1332 (1988).
[442] 284 U.S. 183 (1931).

Following remand, defendant Boeing impleaded as a third-party defendant the Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. (SNECMA), a foreign corporation that is 97% owned by the government of France. SNECMA, in turn, removed the cases to the Louisiana federal district court, pursuant to the Foreign Sovereign Immunities Act (FSIA) of 1976.[443]

The plaintiffs again moved the federal district court to remand the cases back to state court on the basis that SNECMA's removal applied only to defendant Boeing's third-party claims against SNECMA and not to the plaintiffs' claims against the main defendants. Relying on several federal district court decisions narrowly interpreting FSIA, the plaintiffs argued that when a foreign state is sued as a third-party defendant, the language in the statute which permitted the removal of "civil actions" against foreign states, applied only to the third-party claims against the foreign state.

The district court rejected the plaintiffs' argument and held that removal by a third-party foreign state defendant under FSIA removed the entire civil action involving the foreign state defendant, including all claims made by all parties. Following the denial of the plaintiffs' motion to remand, the federal district court dismissed all sixteen cases on the ground of forum non conveniens.

On appeal, the plaintiffs contended, *inter alia*, that in light of the Supreme Court's decision in *Finley v. United States*,[444] which narrowly construed the scope of federal supplemental jurisdiction in cases brought under the Federal Tort Claims Act, only Boeing's third-party claims could be removed and not the main claims brought by the plaintiffs. The plaintiffs also contended that the federal district court lacked subject matter jurisdiction over the main claims because they had been previously found to be nonremovable.

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[443] 28 U.S.C. § 1441(d) (1988).

[444] 490 U.S. 545 (1989).

The Fifth Circuit affirmed the decision of the district court and rejected the plaintiffs' argument.[445] First, the court determined that at the time the actions were removed by SNECMA there existed independent federal subject-matter diversity jurisdiction over the main claims because the amendment to the diversity jurisdiction statute had by then become effective. The court next reviewed the language contained in FSIA and its history and determined that the statute "grants a foreign state defendant, even if it is a third-party defendant, a broad right of removal under section 1441(d)."[446] Thus, "when a third party defendant avails itself of removal jurisdiction under section 1441(d), at least where minimal diversity exists between the parties to the main claims, it removes not just the third-party claims but the main claims as well." [447]

In *Teledyne, Inc. v. Kone Corp.*,[448] the Ninth Circuit had earlier addressed the issue of the scope of removal jurisdiction under the FSIA when the removing party was a defendant rather than a third-party defendant. In 1980, Teledyne Canada, Ltd., a Canadian corporation, entered in an agreement with Kone Corporation, a Finnish company, granting Teledyne an exclusive distributorship in the United States for hydraulic breakers manufactured by Kone. In early 1986, shortly after the parties negotiated a new exclusive distribution agreement, Kone sold its hydraulic breaker division to Rammer Oy, a subsidiary of Outokumpu Oy, an 81% state-owned Finnish corporation. After Teledyne learned of the sale, Teledyne Canada and an American subsidiary, Teledyne, Inc., brought suit in a California state court alleging that Kone, Outokumpu, and Rammer conspired to hide the details of the sale during the negotiations leading to the new agree-

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[445] *Nolan*, 919 F.2d at 1066.
[446] *Id.*
[447] *Id.* at 1069.
[448] 892 F.2d 1404 (9th Cir. 1990).

ment in order to prevent Teledyne from, *inter alia*, finding an alternative supplier.

Outokumpu, as an instrumentality of a foreign state, removed the case to federal court under the FSIA. The district court later dismissed the claims against Kone on the ground they were governed by an arbitration provision in the distribution agreement. The court also dismissed the claims against Outokumpu and Rammer, holding that there was no personal jurisdiction and that California was an inconvenient forum.

On appeal, Teledyne contended that the district court erred in dismissing its claims against Kone because the district court lacked subject matter jurisdiction. Although there might be federal jurisdiction over Teledyne's claims against Outokumpu under the FSIA, in light of the *Finley* decision, Teledyne realized there was no subject-matter jurisdiction over its claims against Kone because the parties were not diverse and the FSIA did not provide for federal jurisdiction over "pendent parties" such as Kone.

The Ninth Circuit rejected Teledyne's argument and held that removal of a civil action by a foreign state defendant under the FSIA effects removal of, and provides federal jurisdiction over, the entire civil action and not just the claims against the foreign state.[449] The Ninth Circuit determined that the *Finley* decision, which limited federal jurisdiction over so-called "pendent parties", was inapplicable because both the statutory language and legislative history of the FSIA indicated that Congress intended to grant "federal jurisdiction over entire cases where a foreign state is a party."[450] The court reasoned that the term "action" in 28 U.S.C. § 1441(d) was "broad enough to cover the entire suit as brought by Teledyne since it was an action brought, in part, against a foreign state."[451] After ruling that the district court had subject matter jurisdiction, the court affirmed the district court's

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[449] *Teledyne*, 892 F.2d at 1407.
[450] *Id.* at 1409.
[451] *Id.*

determination that the claims against Kone should be dismissed in favor of arbitration.[452]

C. *Forum Selection Clauses*

In *In re Delta America Re Insurance Co*,[453] a state insurance commissioner, as liquidator of an insolvent insurer, brought a state court action against the insurer's parent company for fraud and mismanagement in the operation of the insurer and against foreign retrocessionaires who entered into reinsurance contracts with the insolvent insurer. It was undisputed that each of the retrocessionaires qualified as a "foreign state" as that term is defined under the Foreign Sovereign Immunities Act, codified in part at 28 U.S.C. §§ 1603(a) and (b).

After being joined as defendants in the state court action, the retrocessionaires, with the exception of one, Banco de Seguros del Estado (Seguros), removed the case to federal court on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1441(c). Subsequently, Seguros filed a petition joining in the removal based on its status as foreign state under the FSIA. Seguros predicated removal upon 28 U.S.C. § 1441(d).

Following removal, the liquidator moved to remand, claiming that the retrocessionaires had waived their right to remove by operation of a forum selection clause contained in their reinsurance contracts with the insolvent insurer. The district court agreed and remanded the cases to state court. The district court reasoned that "[a]lthough the statutes make special concessions to agencies of foreign governments with regard to removal, the court does not see any reason why they should not be able to waive that right, the same as any other litigant."[454]

On appeal, the Sixth Circuit was required to decide whether the forum selection clause constituted a waiver of the right of removal by the retrocessionaires. The clause

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[452] *Id.* at 1410.

[453] 900 F.2d 890 (6th Cir.), *cert. denied*, 111 S.Ct. 233 (1990).

[454] *Id.* at 892.

at issue stated that the reinsurers "will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court."[455]

The Sixth Circuit, after considering the language of the clause, as well as the language and purpose of the FSIA held that the forum selection clause was ambiguous and, therefore, did not constitute a waiver of the retrocessionaires removal right under 28 U.S.C. § 1441(d).[456] The court stated that, in order for a forum selection clause to result in a waiver of the right of removal by a foreign state defendant, the claimed waiver "must be explicit."[457] The court observed that more precise contract draftsmanship would eliminate waiver issues altogether.

D. *Jury Trial*

In *Urbanski v. Eagle-Picher Industries, Inc.*,[458] the plaintiffs filed a personal injury action in state court against several defendants arising out of exposure to asbestos. One of the defendants, Alliancewall Corporation, joined Atlas Turner, Inc. pursuant to Pennsylvania law for contribution and indemnity. Atlas Turner, a corporation owned by the Canadian government, removed the action to federal court pursuant to 28 U.S.C. § 1441(d), asserting its status as a "foreign state" under the Foreign Sovereign Immunities Act.

The plaintiffs moved to remand the case to state court. One argument in support of remand was that because suits involving foreign states are tried before the court and not a jury, the claims against Atlas Turner should be severed and placed in the civil suspense file until plaintiffs' claims against other parties were resolved. Once At-

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[455] *Id.* at 892.
[456] *Id.* at 892-93.
[457] *Id.* at 894.
[458] No. 89-8310 (E.D. Pa. Mar. 16, 1990) (LEXIS, Genfed library, Dist file).

las Turner's claims were severed, plaintiffs further argued, the claims against the other defendants should be remanded to state court.

Atlas Turner opposed the motion to remand and argued that severing the case and remanding part of it to state court would not promote judicial efficiency because all the claims involved the same operative facts. Atlas Turner also argued that plaintiffs would not be deprived of their right to a jury trial in federal court because the plaintiffs' claims against the other defendants could be tried to a jury, and, if liability was established, then the claims against Atlas Turner could be tried by the court.

The district court denied the motion to remand. The court rejected the plaintiffs' argument that they would lose their right to a jury trial if the case remained in federal court. The court stated that the plaintiffs' concern about their loss of the right to trial by jury was "unwarranted" because 28 U.S.C. § 1441(d) requires only that the claims against the foreign state be tried to the court.

E. *Damages*

In *Cimino v. Raymark Industries*,[459] workers in Texas who were exposed to asbestos-containing products during their employment brought a class action suit against, *inter alia*, ACL, a corporation owned in part by the government of Quebec, Canada. The plaintiffs' claims included claims for gross negligence, misrepresentation, and deceit. Based on these claims, the plaintiffs sought punitive damages from all defendants, including ACL. The plaintiffs sought punitive damages from ACL because "ACL knew or should have known as early as 1935 that asbestos workers and household members of asbestos workers were at risk of getting an asbestos-related injury or disease from the . . . use of [ACL's] asbestos-containing insulation products."[460] After noting that ACL was an instrumental-

[459] 739 F. Supp. 328 (E.D. Tex. 1990).
[460] *Id.* at 337.

ity of a foreign sovereign and was thus entitled to have the claims against it tried to the court pursuant to the FSIA, the court found that the evidence supported a finding of liability against ACL for compensatory damages. The court, however, refused to find ACL liable for punitive damages. The court declined to assess punitive damages against ACL because "[u]nder the Foreign Sovereign Immunities Act, a foreign state and its instrumentalities are immune from claims arising out of misrepresentation or deceit. . . . As any claim for gross negligence against ACL would necessarily involve misrepresentation or deceit, the Court declines to assess punitive damages against ACL in this action."[461]

VII. Liability of Airports

In *Stryker v. City of Atlanta*[462] a federal district court held that the City of Atlanta was not immune from suit as the owner and operator of Hartsfield Atlanta International Airport, for negligently failing to provide adequate police service at the airport.

The plaintiff Stryker, en route from Florida to Maryland, was delayed at Hartsfield Airport due to inclement weather conditions. He and two fellow passengers he met on the flight decided to have a drink in one of the airport's lounges. The weather worsened and all flights were canceled. Therefore, hotel vouchers were issued for the night. While visiting another lounge at the airport, the plaintiff and his companions were harassed by two strangers, the Johnson brothers. At one point the Johnsons grabbed the breast of one of Stryker's companions. Stryker came to the aid of his companion, but this only escalated the abuse by the brothers Johnson. Stryker began yelling for help, but there were no policemen within shouting distance. The Johnsons gave Stryker a severe beating while holding rescuers at bay with a knife. As a

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[461] *Id.* at 338.

[462] 738 F. Supp. 1423 (N.D. Ga. 1990).

result of the beating, Stryker required two operations: one to remove his right testicle and another to replace it with an artificial transplant.

Stryker filed suit against the City of Atlanta and a number of other defendants. All defendants agreed to a settlement with Stryker except the City of Atlanta, which claimed immunity from suit. At trial, the City of Atlanta moved for summary judgment on that ground. The district court denied the motion on the ground that the city owned and operated the airport in its ministerial capacity rather than its governmental capacity and that it could therefore be held liable for compensatory damages for the alleged negligent provision of adequate police services at the airport.

The court, in so holding, looked to the essential character of the airport to determine "whether the facility was designed to 'maximize revenues' or to be operated primarily for the general good of the public".[463] The court noted that the City of Atlanta had leased 100% of the terminal building area to contracting airlines and outside concessions. These leases were a source of revenue for the municipality. The fact that this revenue was kept separate from the city's general fund was not important to the court's decision.

In noting that the plaintiff went beyond the pleadings and produced competent evidence that permitted a jury to conclude that the level of police protection was insufficient, the court concluded that a genuine issue of material fact existed as to whether Atlanta breached its duty to provide for the safety of the plaintiff. The court, in discussing the issue, noted that violations of federal laws or regulations can provide evidence of both state law negligence and negligence per se.[464] (The regulations require an owner and operator of an airport to provide for the protection of persons in the airport against acts of crimi-

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[463] *Id.* at 1426 (quoting Cleghorn v. City of Albany, 184 Ga. App. 732, 735, 362 S.W.2d 386 (1987)).

[464] Id. at 1428 n.6.

nal violence.)[465]

In *Screaming Eagle, Ltd. v. Airport Commission of Forsyth County*,[466] an aircraft owner sued the County Airport Commission for negligence due to its failure to prevent dogs from entering the runway area of the airport. This alleged negligence resulted in damage to the owner's airplane when the landing gear collapsed after striking a dog during an attempted take-off.

The trial court found that the owner of the aircraft was, as a matter of law, an invitee because the owner leased its plane to a lessee who paid rent to the airport. The court held that the Commission owed a duty to invitees to maintain the premises in reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which the Commission had knowledge. The jury thus awarded the plaintiff $109,000, the amount required to repair the airplane.

The North Carolina Court of Appeals affirmed the trial court's denial of defendant's motion for a directed verdict. Evidence of dog sightings by airport personnel and of the insufficiency of the fencing around the airport perimeter was sufficient to allow the case to go to the jury. The jury could reasonably infer from this evidence that the Commission's lack of prudent conduct in failing to keep the dogs off the property was a proximate cause of the damage to the plaintiff's aircraft.

In *Nally v. City of Chicago*,[467] the appellate court affirmed the trial court's dismissal of plaintiff's complaint seeking damages for hearing loss due to exposure to ground aircraft noise at Chicago's O'Hare airport. The plaintiff, a telephone repairman, was on his way to an assignment on airport premises when a large jet revved its engines on the main taxi strip. The noise caused the repairman to suffer a partial hearing loss. The court held that the city, as operator, had no duty to warn of the danger to the repair-

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[465] 14 C.F.R. § 107.3(a) (1988).
[466] 97 N.C. App. 30, 387 S.E.2d 197, 201 (1990).
[467] 190 Ill. App. 3d 218, 546 N.E.2d 630, 633 (1989).

man's hearing or to take steps to protect him from such danger when he worked on or near the airport runways. The noise constituted an obvious danger, and the city could not anticipate that the repairman would not take precautions to protect his hearing in light of the obvious danger.

A California Court of Appeals, in *Bethman v. City of Ukiah*,[468] held that the Federal Aviation Act of 1958 preempted a state tort claim premised upon the allegedly dangerous condition of airport navigational facilities. The complaint stated that the airport's instrument approach system, by requiring pilots to switch from one frequency to another when attempting an instrument landing, created confusion and a dangerous condition. This condition allegedly caused a small plane to crash during an instrument landing at Ukiah Municipal Airport that killed the pilot and the two passengers.

The Court of Appeals affirmed the trial court's dismissal of the complaint, ruling that airport navigational facilities are regulated, approved, and controlled by the FAA and its corresponding regulations under the Federal Aviation Act of 1958, thus preempting the state tort action against the city and county. The Court stated that navigational facilities found to be adequate under FAA standards could not be found inadequate under state standards because such a holding would be inconsistent with the FAA's exclusive authority to regulate airport navigational facilities.

VIII. LIABILITY OF INSURERS

A. *Coverage*

In *American Continental Insurance Co. v. Estate of Gerkins*,[469] the plaintiffs, American Continental Insurance Company and Southern Aviation Insurance Group, instituted a de-

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[468] 216 Cal. App.3d 1395, 265 Cal. Rptr. 539, 547-48 (1989).

[469] No. 11-88-15 (Ohio Ct. App. Oct. 25, 1990) (LEXIS, All States library, Ohio file).

claratory judgment action requesting the court to declare an aviation insurance policy issued to John Maxcy rescinded and void because of a misrepresentation of material fact regarding the qualifications of pilot covered in the policy.

In May 1985 John Maxcy contacted an insurance agent seeking liability coverage for his Cessna 310 twin-engine aircraft. During a telephone conversation with the agent, Maxcy answered questions concerning the qualifications and hours of flying time of his pilot, Marvin Gerkins. Gerkins had told Maxcy, who in turn informed the agent, that he was a twin-engine-rated pilot with 400 hours. On the basis of these representations and others, American Continental Insurance subsequently issued an insurance policy containing a Pilot Clause Endorsement which stated, in relevant part, that the pilot would be "Marvin Gerkins, a Private Multi-Engine rated Pilot."

In January, 1986, the Cessna 310 crashed, killing Gerkins and three passengers. The post-crash investigation revealed that Gerkins had never been issued a pilot certificate of any type by the FAA. John Maxcy did not know of Gerkins' misrepresentations concerning his qualifications.

In April, 1988, an Ohio court refused to declare that the policy did not cover the accident involving Gerkins. The court held that, even though the insurers established that they would not have extended coverage to the aircraft had they known that Gerkins was not a certified pilot, they failed to establish by preponderance of the evidence that Gerkins' lack of appropriate certification and rating as a pilot was a proximate cause of the crash. The insurers appealed.

The Ohio Court of Appeals reversed the decision of the lower court and held that, since Gerkins' qualifications were relevant and material to the issuance of insurance coverage to Maxcy, and since Gerkins misrepresented his qualifications to both Maxcy and the insurers, the insurance policy was void. The Court of Appeals further held

that the lower court erred in placing the burden on the plaintiff insurers to establish by a preponderance of the evidence that a breach of the policy terms in the insurance contract was the proximate cause of the accident.

In *Certain Underwriters of Lloyds v. General Accounting Insurance*,[470] Certain Underwriters of Lloyds (Underwriters) instituted a federal diversity action against General Accident Insurance Company of America (General Accident) to recover Underwriters' contribution to the settlement of a judgment entered against C.F.E. Air Cargo, Inc. (CFE) in a personal injury action. General Accident provided primary liability insurance coverage to CFE, an air cargo company operating out of Indianapolis International Airport, for CFE's potential liability to third parties up to the policy limit of $300,000. Underwriters provided CFE with excess insurance coverage for the same risk for amounts in excess of the primary policy limit up to a total of $5,000,000.

The accident out of which this lawsuit arose involved a pilot who slipped and fell on an ice-covered aircraft ramp under the control of CFE. After the pilot instituted a personal injury action against CFE, General Accident assumed control of CFE's defense, and Underwriters retained counsel to advise them as to their excess exposure in the lawsuit. Despite repeated requests from Underwriters' counsel to General Accident that they be kept apprised of the case and receive all relevant documents, Underwriters received little information from General Accident and its defense counsel. Finally, at the close of the trial of the personal injury action, General Accident contacted counsel for the Underwriters and stated that the plaintiffs were demanding $450,000 to settle the case. General Accident also stated that it believed the case could be settled for the policy limits of $300,000. Counsel for Underwriters demanded that General Accident tender the policy limits to the plaintiff. This was never

[470] 909 F.2d 228 (7th Cir. 1990).

done because General Accident only authorized its defense counsel to make a settlement offer of $75,000, which was refused by the plaintiff. A jury subsequently returned in verdict against CFE for $818,000. After the Underwriters learned of the verdict, they demanded that General Accident settle the action without contribution from Underwriters because of its failure to tender the primary policy limits to plaintiff. Eventually, the action was settled for $650,000, of which Underwriters contributed $332,000.

Underwriters subsequently sought to recover that portion of the settlement that was in excess of the primary policy limits from General Accident on the theory that General Accident wrongfully, negligently, and in bad faith failed to settle the personal injury action within the primary policy limits. After a jury trial, the district court returned a verdict in favor of Underwriters, and General Accident appealed.

On appeal, General Accident argued that, under the doctrine of equitable subrogation, which governed the rights and liabilities between General Accident and the Underwriters in this case, Underwriters could not recover against it. General Accident contended that, because the insured, CFE, could not have recovered the excess judgment from General Accident for negligence and bad faith in handling the personal injury action, neither could Underwriters, who were merely subrogated to the insured's rights against it.

The Seventh Circuit rejected General Accident's argument and affirmed the judgment against it. The court found that General Accident had failed to inform and misinformed not only Underwriters but also CFE about the conduct of the litigation. As a result, the Court held that Underwriters could recover from General Accident. The court also affirmed the jury's determination that General Accident was negligent in handling the case because there was sufficient evidence to establish that the personal injury plaintiff would have accepted a settlement within

the primary policy limits.[471]

In *United States Aviation Underwriters v. Olympia Wings, Inc.*,[472] United States Aviation Underwriters, Inc. (USAU) brought a declaratory judgment action seeking to determine whether coverage existed under a policy that it had issued to Olympia Wings, Inc. Olympia Wings owned and operated a Merlin aircraft and procured a USAU liability insurance policy covering the maintenance and operation of the aircraft. In September 1983, Ronald Marney, one of the owners of Olympia Wings, was flying in a Baron aircraft when it crashed, killing Marney and the pilot. Marney's estate subsequently brought a wrongful death action against Olympia Wings, and the pilot's estate. Olympia Wings sought coverage for operation of the Baron aircraft under a clause in the USAU policy covering any aircraft temporarily used by Olympia Wings as a substitute aircraft when the Merlin was in need of servicing or repair.

In late 1984, USAU received information suggesting that the Merlin was operational at the time of the accident. Consequently, USAU notified Olympia Wings that it would provide a defense in the wrongful death action only under a reservation of its rights to challenge coverage after the conclusion of the wrongful death litigation. Olympia Wings rejected USAU's offer, and USAU then instructed its counsel to withdraw from the representation of Olympia Wings. USAU then filed the declaratory judgment action.

Shortly after USAU's action was filed, Olympia Wings settled the wrongful death actions and agreed to the entry of a consent judgment against it for $25,000,000. USAU was not a party to the consent judgment and later contended during trial that it was not bound by the judgment for this reason and also because the judgment was unreasonable and collusive.

At the trial in the district court, a jury found that the

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[471] *Id.* at 235.

[472] 896 F.2d 949 (5th Cir. 1990).

Baron aircraft was being used as a replacement for the out-of-service Merlin aircraft and that, therefore, coverage existed. The district court rejected USAU's contention that USAU was not bound by the consent judgment and ruled that USAU could not collaterally attack the judgment in the declaratory judgment action. The district court entered judgment against USAU for $20,000,000, the amount of USAU's policy limits. USAU appealed, contending that the district court erred in finding that USAU was bound by the amount of the consent judgment and that USAU covered the operation of the Baron aircraft.

The Fifth Circuit affirmed the district court's determination that USAU covered the Baron aircraft but concluded that USAU was entitled to challenge the reasonableness of the consent judgment. The Court, applying Texas law, held that an insurer that tenders a full defense under a reservation of rights agreement, unlike an insurer who flatly refuses to defend its insured, is not bound by an unreasonable settlement that is reduced to a consent judgment. Therefore, the Fifth Circuit remanded for trial the question of whether Olympia Wings acted as an prudent uninsured in settling the wrongful death action.

In *First Pennsylvania Bank, N.A. v. National Union Fire Insurance Co.*,[473] a Pennsylvania appellate court decided the issue of which of two insurance policies covered an accident at a heliport on the roof of the First Pennsylvania Bank in Philadelphia (Bank). The accident victim was injured while standing in a rooftop doorway adjacent to the heliport. At issue was the fact that the Bank had two potentially applicable insurance policies. One, issued by Aetna, covered the building but excluded the heliport on the roof. The other, issued by National Fire Insurance Company (National), covered the heliport but excluded the building. Both insurance companies denied coverage

[473] 580 A.2d 797 (Pa. 1990).

to the Bank but later settled with both the accident victim and the Bank.

Aetna subsequently commenced a declaratory judgment action against National seeking a determination that National's policy covered the accident in question. Aetna also sought to recover its share of the settlement with the victim and the Bank, as well as its attorney's fees. The trial court granted summary judgment in Aetna's favor and also awarded Aetna its attorney's fees. National appealed.

The appellate court affirmed the granting of summary judgment. The court held that the clear wording of the National policy, which provided for coverage over a "way adjoining" the helipad, covered the action in question. The court also noted that Aetna, in its policy, specifically excluded coverage for "liability arising out of the maintenance, operation, or use of the heliport." However, the court reversed and remanded on the issue of attorney's fees because the lower court had not specifically found that National "acted in bad faith" in denying coverage.

B. *Exclusions*

In *Wilkins v. American Motorists Insurance Co.*,[474] an insured under a homeowners' policy brought a declaratory judgment action against his insurer, American Motorists Insurance Company. The insured sought damages for breach of contract based on the insurer's refusal to provide liability coverage, along with legal defense, in a lawsuit against the insured arising out of an aircraft accident.

Mountain Scenic Aero, Inc. owned the aircraft involved in the accident. The plaintiff in this action, James Wilkins, owned an interest in that corporation. In June 1985 the aircraft crashed, killing two passengers and injuring the pilot and a third passenger. In April 1986, an action was commenced against Wilkins for the wrongful death of the two passengers and for the injuries suffered by the third

[474] 97 N.C. App. 266, 388 S.E.2d 191 (1990).

passenger. The complaint alleged that Wilkins was liable because he: (i) negligently damaged the engine of the aircraft; (2) failed to warn the pilot or passengers of such damage; (3) negligently failed to maintain the aircraft; and (4) negligently failed to properly instruct the pilot as to the operation of the airplane.

Wilkins' homeowners' insurance policy, while providing liability coverage for bodily injury and property damage to third persons, contained an exclusion for bodily injury or property damage "arising out of the ownership, maintenance, use, loading or unloading of . . . an aircraft." Based on the language of this exclusion, the insurer denied coverage for any liability and refused to provide Wilkins with a defense. The trial court granted summary judgment in favor of the insurer, and Wilkins appealed.

On appeal, Wilkins contended that, although the policy excluded liability coverage for negligent damage to and improper maintenance of the aircraft, the policy did not clearly exclude coverage for liability based upon failure to warn and negligent instruction and, that, therefore, the trial court erred in granting summary judgment for the insurer. The Court of Appeals cited two well-established principles. First, that ambiguous terms and standards of causation in exclusion provisions of homeowners' policies must be strictly construed against the insurer and, and second, that homeowners' policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. The court then held that the clause in Wilkins homeowners' policy was not ambiguous and did not provide coverage for any liability that might result from the underlying lawsuit.[475] The Court reasoned that the injuries arose solely from the use of aircraft, and, therefore, coverage was clearly excluded under the terms of the policy.[476]

In *Southern General Insurance Co. v. Boerste*,[477] the executor

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[475] *Id.* at 195.

[476] *Id.*

[477] 195 Ga. App. 665, 394 S.E.2d 566 (1990).

of the estate of a pilot killed in an aircraft accident brought a declaratory judgment action against Southern General Insurance Co. (Southern General), seeking to have Southern General declared primarily responsible for defending the estate in a personal injury suit arising out the accident.

The pilot, Francis J. Boerste, was killed in June 1987 while operating an airplane owned by Allgood Healthcare, Inc. (Allgood). A passenger, Philip Clark, was injured in the accident. Allgood had requested Boerste to fly its business aircraft. Southern General had insured the aircraft against liability for bodily injury and property damage.

Following the accident, Clark brought a personal injury action against Boerste's estate and Augusta Aviation. Southern General refused to provide any defense to Boerste's estate and denied liability for any judgment that might be entered against the estate. Southern General contended that Boerste was excluded from coverage by the terms of its policy with Allgood because he was not an employee of Allgood but was an employee of Augusta Aviation, which was an independent contractor to Allgood. The insurance policy at issue excluded coverage to "any person . . . other than an employee of the Named Insured [Allgood] while acting within the course of his employment for the Named Insured." The trial court held that Boerste was an insured at the time of the accident and determined that Southern General had the primary obligation to defend his estate in Clark's personal injury action. Southern General appealed.

On appeal, the Court of Appeals was required to determine whether Boerste was an "employee" for purposes of the Southern General coverage exclusion. The Court of Appeals affirmed the trial court's determination that Boerste was an insured under the policy. The Court determined that Boerste was an "employee" of Allgood and was not excluded from coverage because "when Allgood Healthcare obtained Francis J. Boerste's services as a pilot

from Augusta Aviation it retained the right to control and direct him in the accomplishment of his assigned task."[478] The Court added that "[t]he fact that [Boerste] was also an employee of [Augusta Aviation] is not controlling. Under the common law of master and servant, a servant can at one time be generally the employee of his general employer and specially the employee of a special employer." The Court determined that the term "employee" must be liberally construed to extend coverage to Boerste, who was serving as a temporary employee operating Allgood's aircraft at the time of the accident.[479]

In *Certain Underwriters at Lloyds v. Evans*,[480] Certain Underwriters at Lloyds of London (Underwriters) brought a federal declaratory judgment action against Lee Ann Evans, the personal representative of the estate of Andrew Evans, and Harvey Young Airport, Inc., seeking a declaration that Evans' claim for the wrongful death of one Andrew Evans was not covered under an insurance policy issued by the Underwriters for the 42nd Annual Fly-In at the Harvey Young Airport. The policy in question excluded coverage of "passengers" of aircraft "used directly" in the Fly-In. The district court granted summary judgment in the Underwriters' favor.

Andrew Evans died as the result of a plane crash while riding with Richard Hamm, the owner and pilot of the aircraft and a participant in the Fly-In. Hamm was giving rides to purchasers of tee shirts he sold at the show. The decedent did not purchase a tee shirt for his ride in Hamm's aircraft.

The issue on appeal was whether the decedent was a "passenger" in Hamm's aircraft for purposes of the exclusionary provision in the insurance policy. Evans contended that the district court erred in ruling that the unambiguous language of the insurance policy excluded coverage for the decedent's death. Evans argued that the

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[478] *Id.* at 569.
[479] *Id.*
[480] 896 F.2d 1255 (10th Cir. 1990).

exclusory language in the policy did not apply because the ride given to Andrew Evans by Hamm was gratuitous, such that the decedent was a "guest" and not a "passenger".

The Tenth Circuit rejected Evans' argument, stating that "[w]hile it is clear that one who pays for his transportation is a 'passenger,' it does not necessarily follow that one is a 'passenger' only if payment for the transportation is made."[481] Consequently, the Tenth Circuit upheld the district court's determination that Andrew Evans was a "passenger" in Hamm's aircraft; accordingly, the exclusionary provision of the Underwriters' policy was applicable.[482]

IX. MISCELLANEOUS

A. *Airport Airspace and Eminent Domain*

In *Alevizos v. Metropolitan Airports Commission*,[483] the Minnesota Court of Appeals held that, in an action for inverse condemnation, a state trial court properly had the jury determine whether a direct and substantial invasion of property had taken place.[484] In *Alienos*, landowners alleged that the noise from aircraft landing and departing was an unreasonable invasion of their property rights and represented an unconstitutional taking of a navigational easement by the airport commission. The jury concluded that there was no direct and substantial invasion of the owner's property rights.

The appellants argued that whether a substantial invasion of property had occurred was a question of law to be determined by the court and not by a jury. The Court of Appeals held that appellants had not only failed to object to the submission of this issue to the jury, but had actually affirmed the submission of questions to the jury. The

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[481] *Id.* at 1259.
[482] *Id.*
[483] 452 N.W.2d 492 (Minn. Ct. App. 1990).
[484] *Id.* at 502.

court further concluded that the evidence of record supported the jury's factual determination. The trial court's ruling that evidence of noise control standards of the Minnesota Pollution Control Agency was not admissible was upheld by the Court of Appeals because the evidence was found to be irrelevant and because the state standards were preempted by federal law.

In *County of Westchester v. Town of Greenwich, Conn.*,[485] a district court held that § 104 of the Federal Aviation Act of 1958,[486] which recognized a public right of freedom of transit through the navigable airspace of the United States, did not create a private right of action in favor of the owner of an airport to bring suit to compel adjoining landowners to trim trees that allegedly interfered with takeoffs and landings at the airport.[487]

The County of Westchester, New York, operated the Westchester County Airport (WCA). The airport has two runways, but Runway 11/29 was an alternative that was used only during certain prevailing wind conditions made its use appropriate. In 1989, the FAA ordered a reduction in the usable length of Runway 11/29 due to the incursion of certain trees into the mandatory clear zone. These trees grew in Connecticut and were not within its County line. Neither the County, nor the State of New York, could use powers of eminent domain to insure that the requisite clear zone was available. The plaintiffs thereupon instituted this action for injunctive and declaratory relief against the Connecticut homeowners and the Town of Greenwich, Connecticut.

The court held that Greenwich did not violate the commerce clause by growing trees in Connecticut that allegedly interfered with commerce in New York. The court also held that the Federal Aviation Act did not create a private right of action for the WCA. The court, therefore granted defendants' motions to dismiss these claims.

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[485] 745 F. Supp. 951 (S.D.N.Y. 1990).
[486] 49 U.S.C. app. § 1304 (1988).
[487] 745 F.Supp. at 956-57.

Moreover, the court declined to dismiss the airport's claim that it had acquired a prescriptive easement under Connecticut law.

In *Harrison v. Schwartz*,[488] a federal preemption case, a county zoning board had limited the frequency of takeoffs of glider-towing aircraft at a privately owned airport which had established a curfew for the operation of such aircraft. The frequency restriction and curfew, designed to reduce aircraft noise near residential properties were found to be invalid by the Maryland Court of Appeals. The appellate court stated that these were intrusions into a field that had been implicitly preempted by federal law under *City of Burbank v. Lockheed Air Terminal*.[489] The Federal Aviation Act, enacted by Congress pursuant to its power to control air traffic under the commerce clause, granted the FAA authority to adopt standards for the control and abatement of aircraft noise. On appeal, the Court of Appeals held that the frequency of takeoffs and the curfew fell directly within the preemption rule of *City of Burbank*.

In *Budget Rent-A-Car Systems, Inc. v. County of Wayne*,[490] the United States district court for the Eastern District of Michigan held that a provision in the concession contract between Budget and Wayne County, the operator of Detroit Metropolitan Airport, which required Budget to pay Wayne County 9.5% of its gross revenues derived from its operations within three miles of the airport, violated neither the United States Constitution nor Michigan law.[491]

Budget brought an action seeking declaratory and equitable relief from this provision. The court granted the county's motion for summary judgment on the grounds that the provision was rationally related to the state's le-

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[488] 319 Md. 360, 572 A.2d 528 (1990).

[489] 411 U.S. 624 (1973).

[490] 742 F. Supp. 947 (E.D. Mich. 1990).

[491] *Id.* at 951.

gitimate interest in discouraging in-terminal concessionaires from diverting rentals to off-airport facilities.

The court also found that the 9.5% requirement did not violate the plaintiff's substantive due process rights. The County's system of access fees was not the functional equivalent of a tax; the plaintiff therefore was not deprived of his property without due process of law.

The court, in conclusion, noted that the contract did not violate a Michigan statute which prohibits political subdivisions from discriminating in the grant of airport concession stands. The court noted that the terms of the statute did not apply to the case at bar. The plaintiff was an in-terminal concessionaire. The statute applied only to off-Airport rent-a-car companies.

In *O'Connell Management Co. v. Massachusetts Port Authority*,[492] a federal district court held that the section of the Federal Aviation Act which provides for federal preemption did not establish a private right of action or create a federal right enforceable under § 1983 of the federal civil rights statute.[493] Nor did the Federal Aviation Act section governing airspace and control of facilities provide a private right of action. The Due Process Clause of the Fourteenth Amendment, however, did provide private carriers with a cause for monies wrongfully taken from them by the Port Authority.

On March 16, 1988, the Massachusetts Port Authority (Massport) announced a revised schedule of landing fees for aircraft landing at Logan Airport in Boston. The new fees increased the cost of landing aircraft at Logan and had a drastic effect on small carriers using the airport. The new fees were rescinded in December 1988 after the First Circuit had held the new fees to be invalid. A small group of carriers seeking to recover additional fees paid to Massport subsequently commenced this action. Massport sought to dismiss on the grounds that the aviation

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[492] 744 F. Supp. 368 (D. Mass. 1990).

[493] 42 U.S.C. § 1983 (1990).

statutes upon which the carriers predicated their claims, specifically 49 U.S.C. App. § 1305 and § 1348, did not provide a private right of action. Second, it argued that the civil rights laws, specifically 42 U.S.C. § 1983, does not provide a remedy for violation of the aviation statutes. Finally, Massport asserted that no cause of action existed under the United States Constitution.

The district court agreed with defendants' contention that the Federal Aviation Act did not create a private right of action enforceable by air carriers adversely affected by landing fees.[494] It allowed the case to continue on the ground that the plaintiffs did have a right of action under the fourteenth amendment's due process clause. The court found that Massport's refusal to delay implementation of the proposed fees pending an adjudication of their validity by the DOT constituted a potential deprivation of plaintiffs' procedural due process rights. Massport hindered plaintiffs' ability to meaningfully challenge the validity of the new fees. The plaintiffs, therefore did not have access to adequate pre-deprivation procedures before the implementation of the new fees.[495] The court concluded by holding that, where challenges to the validity of an exaction plan have not yet run their full course, a post-deprivation proceeding and remedy must be provided.

In *United States v. City of Berkeley*,[496] the district court granted the government a permanent injunction enjoining the City of Berkeley, Missouri, from interfering with the construction of a radar system at an airport located within the city limits. The court noted that "[f]ederal regulation of airspace management, air navigation facilities and air safety is pervasive."[497] By virtue of the nature of the regulations, federal law occupies the field and preempts any local law that might thwart any

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[494] *O'Connell*, 744 F. Supp. at 371.

[495] *Id.* at 378.

[496] 735 F. Supp. 937 (E.D. Mo. 1990).

[497] *Id.* at 940.

federal regulations on the subject.[498]

B. *Drug and Alcohol Testing*

The Ninth Circuit upheld a lower court's decision that an FAA order requiring random, unannounced drug testing of all airline personnel having responsibility for safety did not violate those employees' fourth amendment rights in *Bluestein v. Skinner*.[499]

In 1988, the FAA issued a final rule that provided for the random drug testing of (a) flight crew members; (b) flight attendants; (c) flight instructors or ground instructors; (d) flight testing personnel; (e) aircraft dispatchers; (f) maintenance personnel; (g) aviation security or screening personnel; and (h) air traffic controllers. The tests were to discover any use of marijuana, cocaine, opiates, PCP, and amphetamines.[500]

The rule provided that, in order to ensure that there was no supervisory discretion in selecting those to be tested, selection would be made by a computer at random using an employee's social security, payroll, or other identification number used by the airline. However, various groups representing the employees to be tested petitioned for a review of the rule, asserting that the drug tests constituted unreasonable searches in violation of the fourth amendment.

The Ninth Circuit, relying on the guidelines established by the Supreme Court in *National Treasury Employees Union v. Von Raab*[501] and *Skinner v. Railway Labor Executives Assoc.*,[502] upheld the FAA's ruling. The court held that the special interest of the federal government in securing safe airline travel for the American public overcame any violation of an employee's expectation of privacy in being sub-

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[498] *Id.*

[499] 908 F.2d 451 (9th Cir. 1990).

[500] 53 Fed. Reg. 47,058 (1988). *See also* 53 Fed. Reg. 47,024 (1988).

[501] 489 U.S. 656 (1989).

[502] 489 U.S. 602 (1989).

jected to urine testing.[503]

C. *Advertising*

The Fifth Circuit addressed the issue of whether state laws proscribing deceptive advertising by airlines are preempted by the Federal Aviation Act in *Trans World Airlines v. Mattox*.[504]

In 1988, the Attorney General of Texas, and the attorney generals of four other states notified TWA, Continental, and British Airways (BA) that their advertisements violated both the guidelines adopted by the National Association of Attorneys General (NAAG) and Texas' false advertising and deceptive practices law. The Texas Attorney General charged that these airlines had attempted to make their fares appear lower than their competitors by prominently advertising the ticket prices while less prominently disclosing taxes, surcharges, and fees. The Attorney General threatened prosecution.

TWA, BA, and Continental filed suit to enjoin any prosecution. The District Court for the Western District of Texas granted the injunction.[505] The Fifth Circuit affirmed. The Court noted that § 105(a)(1) of the Act, added by the Deregulation Act in 1978, expressly preempts state laws affecting the rates, routes, or services of any air carrier authorized under the Act.[506] The Attorney General argued that Texas was merely attempting to affect advertising and not the underlying fare structure of the carriers, but the Court held that state laws against deceptive advertising practices are sufficiently related to airline rates and fares to warrant preemption.[507]

The Supreme Court of New York County agreed with the Fifth Circuit's decision. The New York court, in *People*

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[503] *Bluestein*, 908 F.2d at 457.

[504] 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 307 (1990).

[505] *Id.*

[506] *Id.* at 779.

[507] *Id.* at 782-83.

v. Trans World Airlines,[508] held that Congress intended to preempt and exclude state law in the field of deceptive advertising, and, accordingly, the Court denied New York's application for injunction relief against certain TWA newspaper advertisements.[509]

In *State of Kansas v. Trans World Airlines*,[510] a district court in Kansas came to the conclusion that § 105(a)(1) of the Act, relating to the preemption of any state's regulation of "rates, routes or services" did not include advertising. The facts in this action were similar to the facts before the Fifth Circuit in *Mattox*. Here, the Attorney General of Kansas filed suit alleging that TWA had engaged in "deceptive and unconscionable acts and practices in violation of the Kansas Consumer Protection Act."[511] The action was originally filed in a Kansas state court. TWA removed the action, and Kansas moved to remand to the state court. The court, in granting the state's motion to remand, rejected TWA's argument that the Federal Aviation Act completely preempts actions of this type as part of the "complete preemption" exception to the well-pleaded complaint rule. The court found that the language of the preemption section does not, by its own terms, include advertising. The case was remanded to the state courts.

D. *Other*

In *Davila v. Banco Central Corp.*,[512] an action was instituted to foreclose on a security interest in four Aviocar aircraft and to recover damages allegedly caused to the aircraft. The district court held that the applicable federal regulations determined whether the plaintiff had a valid and enforceable security interest in the airplanes rather than by California law as indicated by the security agreements. In so holding, the court noted that, when an air-

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[508] 147 Misc. 2d 697, 556 N.Y.S.2d 803 (N.Y. Sup. Ct. 1990).
[509] *Id.* at 702-03.
[510] 730 F. Supp. 366 (D. Kan. 1990).
[511] *Id.* at 367.
[512] 749 F. Supp. 28 (D. P.R. 1990).

craft is registered in accordance with Section 501 of the Federal Aviation Act,[513] all secured transactions which relate to that aircraft fall within FAA regulations. As a result, in order for the plaintiff to maintain a secured interest in the aircraft, the security agreement must comply with the relevant FAA regulations.[514]

[513] 49 U.S.C. app. § 1401 (1976).
[514] *Davila*, 740 F. Supp. at 31.