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## **MANUFACTURERS' LIMITATIONS OF WARRANTIES: AIRCRAFT DAMAGE**

ROBERT S. HARKEY\*

**I**N MOST aviation litigation the attention centers around death and personal injury claims. There is, however, another aspect which must be dealt with—the damage or destruction of the aircraft. The purpose of this presentation will be to discuss, from the aircraft owner's standpoint, the effect and validity of manufacturers' limitations of warranties with respect to aircraft damage and to survey some of the theories and cases under which the effect and validity of such limitations may be determined.

The warranty provisions applicable to a particular aircraft may be negotiated and quite complex, as in the case of a contract between a manufacturer and an airline for the purchase of a large passenger aircraft. Or, the provisions may be unilaterally imposed and no more complicated than an automobile warranty, as in the case of the sale of small general aviation aircraft. In almost all cases, however, the warranty provisions will include: (1) an express warranty against defects in material and workmanship, (2) a statement of the extent or limit of the manufacturer's liability for any such defect, and (3) a disclaimer by the manufacturer of all other warranties, whether express or implied.

When an aircraft is damaged or destroyed by a defect which the owner believes to be the responsibility of the manufacturer, there are three basic theories of liability under which the owner may attempt to avoid the manufacturer's attempts at limiting its warranties: (1) express warranty, (2) implied warranty and (3) strict liability. Each of these theories is discussed below.

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### I. EXPRESS WARRANTY

After providing that the aircraft will be free from defects in material and workmanship (and possibly from other defects such as defects in design, defects arising from selection of material, or defects in the process of manufacture), the typical warranty provision will go on to provide that the extent of the manufacturer's liability for any such defect will be to repair or replace the defective part, or possibly to repair any such defect in the aircraft.

Assuming that the aircraft is either destroyed or substantially damaged as a result of a defect covered by the warranty, the initial question is whether the manufacturer is liable for the damage under the express warranty. Upon receipt of a claim, the manufacturer normally will deny the defect, but contend that in any event its liability is limited to replacement of the defective part or to repair of the defect. This, in effect, amounts to no remedy at all if the aircraft is destroyed or substantially damaged. Placing aside other theories of liability for the moment, does the plaintiff have any basis by which to proceed under an express warranty theory? It seems that the answer is yes. There are at least three approaches: (1) the warranty should be interpreted to include liability for damages resulting from covered defects, (2) if the warranty is not so interpreted it has failed "of its essential purpose" under section 2-719(2) of the Uniform Commercial Code (UCC), and (3) the limitation on damages is unconscionable under section 2-719(3) of the UCC.

#### *Warranty Interpretation*

The first approach is a matter of contract interpretation. The usual warranty provision does not specifically address itself to the question of the manufacturer's responsibility if the aircraft is substantially damaged or destroyed as a result of a defect. This may result in an ambiguity as to the meaning of the warranty. What was intended by the parties if the contract was negotiated, or what was the purchaser reasonably to have understood in the case of a provision unilaterally imposed by the manufacturer and/or dealer? The answer to this question will depend upon the circumstances of a particular case, the specific warranty language involved, and the law of the state under which the warranty must be interpreted. It may be feasible in many cases, however, to contend that the warranty should be interpreted to mean that the manufacturer is liable

for the entire cost of repairing or replacing the aircraft and possibly for other damages.

Perhaps the leading case utilizing this approach is *Rose v. Chrysler Motors Corporation*,<sup>1</sup> which involved a defect arising under a new automobile warranty. The automobile was substantially destroyed by a fire which apparently resulted from a defect in the wiring system. The warranty provided that the automobile would be free from defects in material and workmanship and limited the liability of the dealer to "making good at our place of business, without charge for replacement labor, any part or parts . . . which our examination shall disclose . . . to have been thus defective."<sup>2</sup>

Applying California contract interpretation principles, the court concluded that the warranty could not be intended to apply separately to "each of the thousands of connected and interdependent parts," as the defendants contended.<sup>3</sup> Instead, the court found that the warranty applied to the automobile as a whole.

Without in any way attempting to set the limits of responsibility created by this warranty agreement it appears a reasonable interpretation thereof that . . . the responsibility of the warrantors extends to making all necessary adjustments and replacing all parts which are required because of defective workmanship or materials existing in the vehicle considered as a whole and without regard to whether or not an individual part was originally defective, *per se*.<sup>4</sup>

The trial court's award of the full amount of damages caused by the burning of the automobile was affirmed.<sup>5</sup> The *Rose* case has been followed by a number of courts in interpreting the express warranty to the automobile as a whole and imposing responsibility upon the warrantor for damages to the vehicle *flowing* from a defect.<sup>6</sup>

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<sup>1</sup> 212 Cal. App. 2d 755, 28 Cal. Rptr. 185, 99 A.L.R.2d 1411 (1963).

<sup>2</sup> *Id.* at 187.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 188.

<sup>5</sup> In the course of its opinion the court cited with approval *Allen v. Brown*, 181 Kan. 301, 310 P.2d 923 (1957); *Cobb v. Truett*, 11 So. 2d 120 (La. App. 1942); *Peterson Co. v. Parrott*, 129 Me. 381, 152 A. 313 (1930). See also *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

<sup>6</sup> See, e.g., *Ford Motor Car v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Cox Motor v. Car Co. Castle*, 402 S.W.2d 429 (Ky. 1966); *Russo v. Hilltop*

Interpretation of an express warranty, therefore, presents a possible basis for recovery for damage or destruction of an aircraft, even though the language of the warranty might at first appear to limit the manufacturer's responsibility only to replacement or repair of defective parts.

*Failure of Essential Purpose Under the UCC*

A second approach to express warranty limitations is provided by section 2-719 of the UCC. This section states that an agreement may provide for remedies in addition to or in substitution for those provided in the UCC and that the agreement may limit or alter the measure of damages recoverable, e.g., limiting the buyer's remedies to a return of defective goods and repayment of the price or to repair and replacement of non-conforming goods or parts. Section 2-719 further provides in subsection (2) that:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.<sup>7</sup>

The Official Comment to section 2-719 states, with respect to subsection (2), that "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either part of the substantial value of the bargain, it must give way to the general remedy provisions of this Article."<sup>8</sup>

Remedies provided under the UCC sales article include those specified in sections 2-714(3) and 2-715. Section 2-714(3) provides for both incidental and consequential damages following a breach by the seller. Section 2-715 defines incidental damages to include any "reasonable expense incident to a delay or other breach"<sup>9</sup> and defines consequential damages to include "injury to personal property proximately resulting from any breach of warranty."<sup>10</sup> Thus, where the circumstances show that a limited remedy fails of its essential purpose, the UCC provides alternative relief which may include damages for reasonable expenses and injury to

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Lincoln-Mercury, Inc., 479 S.W.2d 211 (Mo. App. 1972); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971). In the *Cox Motor Car Co.* case, the court considered a whole truck to be "one big defective part."

<sup>7</sup> UNIFORM COMMERCIAL CODE § 2-719(2).

<sup>8</sup> UNIFORM COMMERCIAL CODE § 2-719, Comment 1.

<sup>9</sup> UNIFORM COMMERCIAL CODE § 2-715(1).

<sup>10</sup> UNIFORM COMMERCIAL CODE § 2-715(2)(b).

personal property. In the case of damage to or destruction of an aircraft resulting from a defect covered under the typical warranty which limits the remedy to replacement or repair of defective parts, section 2-719(2) might often be applicable.

It seems clear that the "essential purpose" of the warranty is to protect the purchaser from defects covered under the warranty. The limited remedy of replacement or repair of a defective part is perfectly adequate when a defective part is discovered, or should be discovered, prior to causing any other damage. This is the situation addressed by most warranties. On the other hand, when the defect is not reasonably discoverable by the purchaser and it results in damage to or destruction of the aircraft, the remedy is totally inadequate and amounts to no remedy at all. Indeed, there may have been no defective part at all, but only a failure to properly assemble the aircraft, *i.e.*, a defect in workmanship or process of manufacture. Under these circumstances, if the contract is interpreted to limit the liability of the manufacturer to replacement of defective parts, the "essential purpose" of providing protection to the purchaser from defects has failed. Moreover, if the limited remedy is applied, the purchaser would be deprived of the "substantial value of the bargain" referred to in the Official Comment<sup>11</sup> because the purchaser may have lost the entire value of the airplane.

While I found no cases which apply section 2-719(2) to aircraft warranties, there are several cases in which this section has been construed; the principles of section 2-719(2) relied on in those cases would seem to have equal application to limited or exclusive remedies in connection with aircraft warranties.

In *Neville Chemical Company v. Union Carbide Corporation*,<sup>12</sup> the court dealt with damages resulting from a chemical contaminant which had been introduced into the product of the seller, but which was not reasonably discoverable until after the product had been processed by the purchaser, furnished to manufacturers and further processed into consumer goods. The contract for the sale of the product required the purchaser to advise the seller of any defects within 15 days and limited the remedy for any defect to return of the purchase price. The court concluded that this remedy was designed to cover a situation where the defect is discoverable

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<sup>11</sup> UNIFORM COMMERCIAL CODE § 2-719, Comment 1.

<sup>12</sup> 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd*, 422 F.2d 1205 (3rd Cir. 1970).

upon receipt of the product, but that the remedy was ineffective when the defect is not ordinarily discoverable, saying that under the latter circumstances "such a remedy is far below a bare minimum in quantity, and is ineffective under the Uniform Commercial Code, §2-719(2)."<sup>13</sup> Similarly, in the case of a latent defect in an aircraft which is not discoverable until the defect has caused damage or destruction to the aircraft, the limited remedy of replacing or repairing a defective part is of no value, and unless a remedy is provided under the UCC, the purchaser would be deprived of "the substantial value of the bargain."<sup>14</sup>

In two other cases,<sup>15</sup> both arising in Illinois, section 2-719(2) was held applicable where the seller allegedly repudiated its obligation under an exclusive or limited remedy. This repudiation was considered to have caused the restricted remedy to fail of its essential purpose, opening to the plaintiff the general array of remedies under the UCC. In *Adams v. J. I. Case Company*,<sup>16</sup> the court said:

It should be obvious that they [the seller] cannot at once repudiate their obligation under their warranty and assert its provisions beneficial to them. Thus, the allegations . . . of plaintiff's complaint invoke other provisions of the Uniform Commercial Code. Section 2-719(2) provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."<sup>17</sup>

The court stated further that failure of the exclusive remedy was easily found where the seller had willfully failed to honor its obligation under the exclusive remedy and that the plaintiff could recover damages under UCC section 2-714, including incidental and consequential damages as defined in section 2-715, if appropriate circumstances were proved.

*Jones & McKnight Corp. v. Birdsboro Corporation*<sup>18</sup> involved a similar question resulting from the seller's alleged failure to honor its obligations under a contract to manufacture and deliver certain

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<sup>13</sup> *Id.* at 655.

<sup>14</sup> See UNIFORM COMMERCIAL CODE § 2-719(2), Comment 1.

<sup>15</sup> *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970).

<sup>16</sup> 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

<sup>17</sup> 261 N.E.2d at 8.

<sup>18</sup> 320 F. Supp. 39 (N.D. Ill. 1970).

equipment. Following the rationale of the *Adams* case, the court said:

If the plaintiff is capable of sustaining its burden of proof as to the allegations it has made, the defendant will be deemed to have repudiated the warranty agreement so far as restricting plaintiff's remedies, and the exclusive remedy provision of the contract will be deemed under the circumstances to have failed of its essential purpose, thus allowing plaintiff the general array of remedies under the Code.<sup>19</sup>

In disposing of the defendant's contentions that the exclusion of consequential damages is authorized under section 2-719(3), the court said:

However, §2-719(2) refers in all cases to the failure of an exclusive remedy, irrespective of the fact that the remedy may be generally authorized under the Code. The fact that the exclusion of consequential damages is authorized under §2-719(3) does not lead to the conclusion that §2-719(2) was not intended to cover the situation where, as here, a seller limits his liability to one exclusive albeit authorized remedy. On the contrary, the Official Comment on this Section speaks in broad and general terms.<sup>20</sup>

Thus the court clearly distinguished the UCC's authorization of exclusive remedies from the failure of an exclusive remedy to meet its essential purpose, and found that utilization of an exclusive remedy does not preclude recovery as provided for in section 2-719(2).

*Koehring Co. v. A.P.I. Incorporated*,<sup>21</sup> followed the *Adams* and *Birdsboro* cases and contains a discussion of several other cases construing section 2-719(2). A lower court applied section 2-719(2) to an automobile warranty limitation in *Riley v. Ford Motor Company*.<sup>22</sup> In *Riley*, the Fifth Circuit found that excessive damages had been awarded by the jury, but found no error in the application of section 2-719(2) to the fact situation. In *Reynolds v. Preferred Mutual Insurance Co.*,<sup>23</sup> it was held that the section was applicable when a contractor had installed defective gutters which

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<sup>19</sup> *Id.* at 44.

<sup>20</sup> *Id.* See text accompanying note 8 *supra*.

<sup>21</sup> 319 F. Supp. 882 (E.D. Mich. 1974).

<sup>22</sup> 442 F.2d 670 (5th Cir. 1971).

<sup>23</sup> 11 U.C.C. REP. SERV. 701 (Mass. 1972).



resulted in damage to the purchaser's house. The court concluded that if damages were limited to replacement of the gutters as provided in the warranty, without remedy for damages to the house, the purchaser would be deprived of the substantial value of the bargain. It was held, therefore, that the exclusive remedy had failed and that plaintiff could recover for damage to the house.

While these cases did not involve aircraft warranties, the principles involved would apply equally whether the product involved were an automobile, a gutter, or an aircraft. Thus it seems clear that section 2-719(2) could and should be applied to aircraft warranties when the circumstances show that a limited or exclusive remedy has failed of its essential purpose.

### *Unconscionable Limitations Under the UCC*

A third approach to attacking the validity of a warranty limitation on damages arises under section 2-719(3) of the UCC. That section provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Section 2-302 of the UCC also is relevant and provides generally that a court may refuse to enforce contract provisions which the court finds to be unconscionable as a matter of law.

It would seem clear that under appropriate circumstances the limitation of a manufacturer's liability to replacement of parts or a similar limitation could be unconscionable and, therefore, unenforceable. In determining unconscionability, the courts can be expected to weigh all of the circumstances, including the commercial setting, the relative bargaining positions of the parties, the availability of alternative sources of the product, and other similar considerations. The statement of a Massachusetts court in *Reynolds v. Preferred Mutual Insurance Company*,<sup>24</sup> probably demonstrates the typical factors which would be considered in applying section 2-719(3). There the court said:

Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of a

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<sup>24</sup> *Id.*

contract's commercial setting, purpose and effect. [Citation Omitted] "The principle is one of prevention of oppression and unfair surprise." [Citation Omitted] Unfair surprise is determined by many factors. "These factors include the relation of the parties, whether the seller sought out the customer or whether the customer sought out the seller, the sales techniques involved, whether all form contracts in this industry contain the same clause, thereby preventing this buyer from shopping on better terms, and how unexpected the clause is in this type of transaction." R. J. Nordstrom, *Handbook of the Law of Sales*, 1970, at p. 128.<sup>25</sup>

When the totality of circumstances indicates essential unfairness which the purchaser could not have been reasonably expected to avoid, it seems likely that unconscionableness will be found. The chances of finding unconscionability would appear to decrease as the size and sophistication of the purchaser increases. An individual faced with a standard contract certainly would be in a better position to advance unconscionability as a basis for voiding a limitation on damages than a large corporation which is on a relatively equal footing with the seller.

For example, a statement in a Georgia case involving an individual consumer indicates that a clause in an automobile warranty which limits the seller's liability in any event to replacement or repair of defective parts is unconscionable *per se*.<sup>26</sup> On the other hand, in *Southwest Forest Industries, Inc. v. Westinghouse Electric Corporation*,<sup>27</sup> where both parties were sizable corporations, a warranty provision limiting damages to repair or replacement of parts was upheld.<sup>28</sup>

Unconscionableness thus may be a basis for striking down a limitation of a manufacturer's warranty in the case of an individual purchaser of a small general aviation aircraft. In theory it should also apply, under appropriate circumstances, to corporate purchasers, but as a practical matter it would not appear to be as viable when the aircraft purchaser is an airline or other sizeable corporation.

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<sup>25</sup> *Id.* at 707.

<sup>26</sup> *Jacobs v. Metro-Chrysler Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

<sup>27</sup> 422 F.2d 1013 (9th Cir. 1970).

<sup>28</sup> See also *Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc.*, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965), a pre-UCC case which did not deal specifically with unconscionableness, but which did discuss related concepts.

## II. IMPLIED WARRANTY

It is in the area of the second basic theory of liability—implied warranty—that manufacturers most specifically attempt to limit their liabilities. The actions of manufacturers result, no doubt, from the specific UCC provisions relating to implied warranties. Section 2-314 of the UCC provides for an implied warranty of merchantability, and section 2-315 provides for an implied warranty of fitness for a particular purpose. Section 2-316, however, sets out rules under which these warranties may be excluded or disclaimed. The question which normally will arise when an aircraft is damaged or destroyed is whether the manufacturer successfully has utilized the disclaimer rules.

The most pertinent portions of section 2-316 of the UCC provide as follows:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;

Questions often arise as to the validity of an attempted disclaimer because of ambiguity in the disclaimer language, failure of the language to comply with the specific requirements of section 2-316, or for a variety of reasons which might be present in any particular case.

A typical case is *Boeing Airplane Co. v. O'Mally*.<sup>29</sup> In that case the court found that an implied warranty of fitness for a particular purpose resulted from the negotiations of the parties with respect to the sale and purchase of a used helicopter. The seller had actually pointed out and demonstrated particular uses to which the

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<sup>29</sup> 329 F.2d 585 (8th Cir. 1964).

helicopter could be put. The warranty provision of the contract contained no specific warranty against defects and provided that a warranty of title was "accepted in lieu of any and all other warranties, expressed or implied, arising out of the sale of the helicopter."<sup>30</sup> The seller contended that this exclusion of warranties covered any implied warranty of fitness. Applying Pennsylvania's 1958 version of the UCC, the court concluded that the disclaimer did not exclude the implied warranty of fitness because the disclaimer was not in "specific language" and was ambiguous, contrary to the requirements of the UCC for an effective disclaimer. The court went on to say that the result would have been the same under the 1959 version of the UCC because the writing was not "conspicuous" as required under the later version. The court noted that the type was of the same color and size as that of other provisions of the contract.<sup>31</sup>

In *Holcomb v. Cessna Aircraft Company*,<sup>32</sup> a similar result was reached. The warranty involved was quite typical. It covered defects in material and workmanship, limited the manufacturer's obligation to replacement of defective parts, and provided that:

This warranty is expressly in lieu of any other warranties, expressed or implied, including any implied warranty or [of] merchantability or fitness for a particular purpose. . . .<sup>33</sup>

Relying only upon the language of the UCC itself, the court concluded that since the disclaimer language was in the same size type as the rest of the agreement, implied warranties were not excluded by the disclaimer. The court specifically relied on section 1-201 of the UCC in interpreting the "conspicuous" requirement of section 2-316. Section 1-201 provides, in pertinent part, that language is conspicuous "if it is in larger or other contrasting type or color."<sup>34</sup>

Other questions can arise in connection with the validity of a disclaimer, such as whether it was actually part of the agreement between the parties. When, for example, the disclaimer is contained in a warranty which is not delivered to the purchaser until after the

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<sup>30</sup> *Id.* at 588.

<sup>31</sup> *Id.* at 593.

<sup>32</sup> 439 F.2d 1150 (5th Cir. 1971).

<sup>33</sup> *Id.* at 1157.

<sup>34</sup> UNIFORM COMMERCIAL CODE § 1-201.

sale is complete, the disclaimer may be held to have no effect.<sup>35</sup>

There are literally scores of cases dealing with the validity of disclaimers and they are by no means consistent. It is necessary, therefore, with respect to any particular case to examine the decisions applicable to the specific circumstances of the case.

### III. STRICT LIABILITY

While strict liability in tort, by definition, is not a warranty theory of recovery, its application has the practical effect of emasculating any attempt by a manufacturer to limit its warranty obligations, or at least of making them unimportant. As provided in section 402A of the Restatement of Torts (Second), strict liability applies to one who sells a product in a defective condition unreasonably dangerous to the user of his property, whether or not the seller has exercised all possible care.

The doctrine of strict liability, of course, now has become well-established in American jurisprudence, although it is not consistently accepted and applied in all jurisdictions. While the cases are not consistent, it would appear that at least in many jurisdictions strict liability may be applied to aircraft damage or destruction, even though no personal injuries are present.

In *Manos v. Trans World Airlines, Inc.*<sup>36</sup> a federal court in Chicago held that the doctrine of strict liability as expressed in section 402A of the Restatement had been adopted in the state of Washington, citing *Ulmer v. Ford Motor Company*.<sup>37</sup> The court then applied the doctrine to Boeing, the manufacturer of an aircraft which had crashed in Rome, Italy, because of a defect in a thrust reverser system. Although the *Manos* case did involve deaths and personal injuries, the rationale of that case and of the Restatement does not depend upon personal injury being involved. Indeed, the Restatement refers to physical harm "caused to the ultimate user or consumer, or to his property."<sup>38</sup>

The reasons for the doctrine of strict liability apply equally to

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<sup>35</sup> *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969); See also *Trane Co. v. Gilbert*, 267 Cal. App. 2d 720, 73 Cal. Rptr. 279 (1968). It would seem that these cases might be applicable to some sales of general aviation aircraft.

<sup>36</sup> 324 F. Supp. 470 (N.D. Ill. 1971).

<sup>37</sup> 75 Wash. 2d 522, 452 P.2d 729 (1969).

<sup>38</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

physical harm to the person and physical harm to property and it was so recognized in *Seely v. White Motor Co.*<sup>39</sup> In *Seely* the California Supreme Court said: "Physical injury to the property is so akin to personal injury that there is no reason for distinguishing them."<sup>40</sup>

The basis for the initial development of strict liability was to keep defective products from making their way to the market place where they become a menace to the public and part of the rationale of the doctrine is to discourage the marketing of such products. In the landmark strict liability case of *Greenman v. Yuba Power Products, Inc.*,<sup>41</sup> the California Supreme Court relied, *inter alia*, on the rationale set out in a concurring opinion in the earlier case of *Escola v. Coca Cola Bottling Co.*<sup>42</sup> In *Escola* the court said:

It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.<sup>43</sup>

In *Vandermark v. Ford Motor Company*,<sup>44</sup> it was held that contractual attempts to limit liability through warranty disclaimers are immaterial. Justice Traynor explained the logic of the holding, saying:

Since Maywood Bell is strictly liable in tort, the fact that it restricted its contractual liability is immaterial. Regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved defective.<sup>45</sup>

A similar result was reached in *Greeno v. Clark Equipment Co.*,<sup>46</sup> where the court said "the seller cannot disclaim or by contract alter

<sup>39</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, 13 A.L.R. 3d 1049 (1962).

<sup>40</sup> 24 Cal. 2d 453, 150 P.2d 436 (1944).

<sup>41</sup> *Id.* at 461, 150 P.2d at 441.

<sup>42</sup> 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

<sup>43</sup> *Id.* at —, 403 P.2d at 152, 45 Cal. Rptr. at 24.

<sup>44</sup> 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

<sup>45</sup> *Id.* at —, 391 P.2d at 172, 37 Cal. Rptr. at 900. The court also held that the doctrine applies to dealers as well as manufacturers.

<sup>46</sup> 237 F. Supp. 427 (N.D. Ind. 1965).

a duty which the law would impose upon him."<sup>47</sup> And in the *Seely* case the court said, "Moreover, this liability could not be disclaimed, for one of the purposes of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products."<sup>48</sup>

In several other cases, strict liability has been held applicable to property damage, including the defective product itself,<sup>49</sup> and to property damage as between commercial entities.<sup>50</sup>

It seems clear then that strict liability is a viable basis for recovery for damage to aircraft resulting from defects which might also be breaches of warranty, even if the manufacturer has disclaimed its warranty liability or limited it to replacement or repair of defective parts. There are two recent cases, however, which seem to run contrary to *Vandermark*, *Greeno* and *Seely* because they hold that a manufacturer may by contract relieve itself from strict liability obligations to an aircraft purchaser. These cases are *Keystone Aeronautics Corp. v. R. J. Enstrim Corp.*,<sup>51</sup> and *Delta Air Lines, Inc. v. McDonnell Douglas Corporation*.<sup>52</sup> In both of these cases the courts relied heavily on the prior case of *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*,<sup>53</sup> in which the doctrine of strict liability was not truly before the court.

The *Keystone* court, applying Pennsylvania law, made a policy decision that in a commercial setting corporate parties should be allowed to allocate the risks and that it would be unwise to hold that strict liability applies in those circumstances. In the second *Delta* case the Fifth Circuit applied California law, but did not attempt to distinguish cases such as *Vandermark*, *Greeno* and *Seely*. Instead, it noted that while the court in the first *Delta* case did not expressly mention strict liability, it had discussed *Greenman v. Yuba Power Products*, the leading case on strict liability, and nevertheless held that Douglas could exculpate itself of tort

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<sup>47</sup> *Id.* at 429.

<sup>48</sup> 63 Cal. 2d at —, 403 P.2d at 150, 45 Cal. Rptr. at 22.

<sup>49</sup> *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

<sup>50</sup> *Dealers Transport Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. Ct. App. 1965); *Lamphiear v. Skagit Corp.*, 6 Wash. App. 350, 493 P.2d 1018 (1972).

<sup>51</sup> 364 F. Supp. 1063 (W.D. Pa. 1973).

<sup>52</sup> 503 F.2d 239 (5th Cir. 1974).

<sup>53</sup> 47 Cal. Rptr. 518 (1965).

liability.<sup>54</sup> The court thus concluded that under California law strict liability could be disclaimed as between two large commercial entities.

I represented Delta in the second *Delta* case, and I must respectfully disagree that this is a correct interpretation of the law of California. I believe it is clear that on the question of strict liability the law of California is set out in *Vandermark* and *Seely* and not in the first (or second) *Delta* case. The first *Delta* case was decided by an intermediate appellate court which did not squarely consider the question of whether a manufacturer may by contract relieve itself of strict liability imposed by law. In the second *Delta* case, however, the Fifth Circuit relied on the first *Delta* case instead of *Vandermark* and *Seely*, cases in which the California Supreme Court had dealt specifically with this issue and held that strict liability may not be negated by contract. It would seem that *Vandermark* and *Seely* are more authoritative on the issue than the first *Delta* case, and that a forceful argument still can be made that strict liability may not be disclaimed by contract.

#### CONCLUSION

The cases show that there are a number of possibilities for recovery for damage to an aircraft, despite the manufacturer's attempts to limit its warranties. Much depends, however, upon the particular language of the warranty, the circumstances of the case, the decisions of the applicable jurisdiction, the status of the parties, and any other factors which may be important in a particular case.

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<sup>54</sup> 503 F.2d at 245.



