Journal of Air Law and Commerce

Volume 44 | Issue 1 Article 7

1978

Case Notes

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WARSAW CONVENTION—LIABILITY LIMITATIONS—The Warsaw Convention's Liability Limitations Extend to Air Carrier Employees As Well As The Corporate Carrier In An Action Brought For Damages Resulting From An International Air Crash. *Reed v. Wiser,* 555 F.2d 1079 (2d Cir. 1977), *cert. denied,* — U.S. —, 98 S.Ct. 399 (1977).

On September 8, 1974, a Trans World Airlines (TWA) flight enroute from Tel Aviv to New York crashed into the Ionian Sea killing all seventy-nine passengers and nine crew members aboard. The crash allegedly was caused by an explosion of a bomb placed on board the airplane in Athens. Subsequently, personal representatives of nine of the deceased brought suit against the president and staff vice-president of audit and security of TWA in the United States District Court for the District of New Jersey. Plaintiffs claimed that the defendants were responsible for security on TWA flights and were negligent in failing to institute or maintain a satisfactory security system to prevent placement of the bomb.[1]

The defendants denied liability and pled as an affirmative defense the liability limits of the Warsaw Convention[2] as modified by the Montreal Agreement of 1966,[3] which would have placed maximum recovery at $75,000.00 for each decedent. In most cases, the corporate carrier is made the defendant; here, however, by bringing an action against the employees of the carrier, apparently the plaintiffs hoped to avoid the Convention limitations.

The Judicial Panel on Multidistrict Litigation[4] transferred all

[1] 555 F.2d 1081 (2d Cir. 1977).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et seq.*, T.S. No. 876 (1934) [hereinafter cited as the Convention and referred to by article number]. The Convention was concluded at Warsaw, Poland, in October, 1929.

[3] 31 Fed. Reg. 7302 (1966). Both the Convention and the Montreal Agreement are found at 49 U.S.C. § 1502 (1970).

[4] 28 U.S.C. § 1407 (1970) provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial pro-

federal court cases regarding the crash to Judge Frankel of the Southern District of New York[5] where plaintiffs moved to strike the defense of limited liability. The court granted that motion[6] certifying[7] to the United States Court of Appeals for the Second Circuit the question of the availability to the defendants of the Convention limitations;[8] that court granted leave to appeal.

Held: *Reversed and remanded with instructions*: The Warsaw Convention's liability limitations extend to air carrier employees as well as the corporate carrier in an action brought for damages

ceedings. Such transfers shall be made by the judicial panel on multidistrict litigation . . . ."

[5] In Re Air Crash in the Ionian Sea, 407 F. Supp. 238 (1974).

[6] Reed v. Wiser, 414 F. Supp. 863 (1976).

[7] 28 U.S.C. § 1292(b) (1970).

[8] In granting the motion to strike, Judge Frankel noted "[The question] is by no means susceptible of a clear and entirely confident answer," 414 F. Supp. at 864; and that in looking to the treaty for textual support, he found no "indication . . . of deliberate attention to the question now confronted." 414 F. Supp. at 865.

Finding the Convention language silent and little aid available from legislative and case history, the court then turned to policy considerations in reaching a conclusion.

In support of servant limitation, the court cited the "well understood" aim to protect the then-infant air travel industry from perhaps fatal burdens of unlimited compensation; however, it saw that original purpose no longer very persuasive:

> It would be consistent with that policy to protect the young industry to extend the protection to employees and agents, who might otherwise press for insurance or other forms of indemnity. . . . It is not insignificant to note, however, that the original policy has lost a great deal of its persuasive force: air travel is no longer an infant industry.

414 F. Supp. at 865 (footnote omitted).

Policy arguments against extending the liability limitations were: (1) the court's recognition that a "powerful" national policy which favored compensatory damages from tortfeasors who cause personal injury, and a corollary "of equal importance," that American law was adverse to stipulations by common carriers, without congressional authority, against their negligence or that of their agents or servants. 414 F. Supp. at 865-66; (2) the absence of any express provision conferring on agents or servants the Convention limitations. *Id.* at 866. ("Without resting too heavily upon canons, we know this is not a case for loose interpretations. The limitation for agents and employees would have been easy enough to specify." 414 F. Supp. at 867); (3) domestic criticism about the Convention's liability limitations. 414 F. Supp. at 866. *See, e.g.*, remarks of Sen. Yarborough, 111 CONG. REC. 15,032 (1965); remarks of Sen. R. Kennedy, 111 CONG. REC. at 20,164; and Wright, *The Warsaw Convention's Damages Limitations*, 6 CLEV.-MAR. L. REV. 290, 293 (1957) (Convention limitations are "un-American"); (4) the Supreme Court's refusal to extend similar limitations of the Goods by Sea Act, 46 U.S.C. § 1304(5) (1970), to stevedores or other agents. 414 F. Supp. at 866; and (5) failure of the United States to ratify The Hague Protocol and its Article 25A. 414 F. Supp. at 867-68.

resulting from an international air crash. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, — U.S. —, 98 S.Ct. 399 (1977).

The Warsaw Convention, as a result of two international conferences held in Paris (1925) and Warsaw (1929), and the work of the interim Comité International Technique d'Experts Juridique Aériens (CITEJA),[9] contains a treaty embodying two main purposes: to provide uniform rules relating to air transportation documents, and to limit air carrier liability for accidents associated with air travel.[10] Liability originally was limited to 125,000 francs ($8,300.00) per passenger,[11] but a carrier would not be liable at all if it were proven that the carrier and his agents exercised "all necessary measures" to avoid the damage or it was impossible for him or his agents to take such measures.[12] In effect, the treaty established a presumption of carrier liability, thus shifting the usual burden of proof.[13] The Convention, however, contained no definition of "carrier";[14] that is, the Convention failed to explicitly define carrier as to include agents or employees within the terms of the treaty.

The United States was neither a representative to nor a signatory of the treaty, but in 1934, the Senate of the United States announced adherence,[15] thereby placing the country under the treaty terms as "the law of the land."[16] Discussion of the treaty began almost immediately and international conferences were held in Cairo (1946), Madrid (1951), Paris (1952), and Rio de Janeiro (1953). The 1955 Hague Conference produced amendments[17] to the Convention including a higher recovery limitation of almost

[9] Lowenfeld & Mendolsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

[10] Kennelly, *The Warsaw Convention Treaty*, 13 TRIAL LAWYERS GUIDE 213, 217 (1969).

[11] Convention, *supra* note 2, Article 22.

[12] Convention, *supra* note 2, Article 20.

[13] Block v. Compagnie Nationale Air France, 386 F.2d 323, 327 (5th Cir. 1967).

[14] 414 F. Supp. at 865. "[T]he treaty language includes separate, distinguishing references to carriers and their agents. There is no indication, however, of deliberate attention to the question now confronted." *Id.*

[15] 78 CONG. REC. 11,582 (1934). Adherence was agreed "without debate, committee hearing, or report. . . ." Lowenfeld & Mendelsohn, *supra* note 9, at 502.

[16] U.S. CONST. art. VI, § 2.

[17] The Hague Protocol, signed September 28, 1955.

$16,600.00 and Article 25A expressly extending that limitation to air carrier agents and employees;[18] Article 25A provides that in an action brought for damages against an employee or agent of the carrier arising from employment related duties, Convention limitations of liability apply. Due to dissatisfaction with the "inadequate" increase, the United States delegation did not sign The Hague Protocol at the conference, but later at the delegation's request the United States' ambassador to Poland did sign in 1956.[19] Because of events accelerating domestic dissatisfaction with the limitations, however, the Senate never ratified the Protocol;[20] thus, the United States is governed by the Convention, unamended by The Protocol.

In November, 1965, the State Department filed formal notice of denunciation of the treaty, effective in May, 1966. According to a State Department news release, however, the denunciation would be withdrawn if principal international air carriers would raise liability limitations to $75,000.00, and if there was like prospect that the Convention could be modified accordingly.[21] As a result, in May, 1966, the United States signed, with the major international airlines, the Montreal Agreement,[22] under which each signing carrier was bound to include in its tariff a special contract raising the liability limit to $75,000.00 and waiving the Convention's "due care" defense. In accepting the Agreement, the State Department with-

[18] Lowenfeld & Mendelsohn, *supra* note 9, at 502-7. Convention Article 25A provides:

> 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
>
> 2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case shall not exceed the said limits.
>
> 3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessness and with knowledge that damage would probably result.

[19] Lowenfeld & Mendelsohn, *supra* note 9, at 511-12. Failure of the United States to sign The Hague Protocol was not due to dissatisfaction with the Convention, but with the low liability limitations. *See* H. DRION, THE LIMITATIONS OF LIABILITIES IN INTERNATIONAL AIR LAW (1954) [hereinafter cited as H. DRION].

[20] Lowenfeld & Mendelsohn, *supra* note 9, at 512-16.

[21] Press Release No. 268, 53 DEPT. STATE BULL. 923, 924 (1965).

[22] The Montreal Agreement was approved by the United States through the Civil Aeronautical Board. 31 Fed. Reg. 7302 (1966). The agreement applies to those subscribers whose flights land or take off in the United States.

drew its denunciation.[23]

At the urging of the United States and in response to the Montreal Agreement, the Guatemala Protocol[24] was drafted in 1971. That Protocol, which would amend the Convention, raised the liability limitation to $100,000.00.[25] The Senate has yet to act on that document.[26]

While Convention history is well documented, case history defining whether agents or employees of the carrier are covered by the Convention unamended by Article 25A, is as sparse as it is nondefinitive. The case history generally follows two courses, as represented by the brief opinions in *Pierre v. Eastern Airlines, Inc.*[27] and *Chutter v. KLM Royal Dutch Airlines.*[28] In *Pierre*, the plaintiff sued to recover damages for injuries sustained from an aircraft crash. In addition to naming the corporate carrier as a defendant, the plaintiff also brought suit against the pilot. The district court rejected the pilot-defendant's Convention limitation defense; the court found support in the fact that the subsequently enacted Hague Protocol expressly provided extension of the liability limitations.[29] The court reasoned that because the terms of the Convention in effect at the time of the crash were unamended by Article 25A, the Convention

[23] 54 DEPT. STATE BULL. 955 (1966). A concurrent news release stated, "[T]he conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of . . . adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention." Press Release No. 111, 54 DEPT. STATE BULL. 956 (1966).

[24] The Guatemala City Protocol, signed March 8, 1971.

[25] Landry, *Yes or No on the Guatemala Protocol-Pro*, 10 FORUM 727, 735 (1975). Based on the current price of gold, that limit is now more than $400,000.00. The protocol also established a standard of absolute liability for the carrier. *Id.*

[26] On January 14, 1977, as one of the last acts of the outgoing President Gerald R. Ford, the President transmitted, for the Senate's advice and consent, the amending Protocol's "done at Montreal on September 25, 1975 entitled . . . Additional Protocol No. 3 [The Hague and Guatemala City Protocols] and the "Montreal Protocol No. 4. . . ." 13 WEEKLY COMP. OF PRES. DOC. 43-44 (Jan. 14, 1977).

[27] 152 F. Supp. 486 (D.N.J. 1957).

[28] 132 F. Supp. 611 (S.D.N.Y. 1955).

[29] 152 F. Supp. at 489. "The Warsaw Convention at the time of the accident (1953) applied to the carrier only. . . . Therefore, the general practice and rules prevalent in the trial of negligence cases unaffected by the terms of the Warsaw Convention, will control the trial of the plaintiff against the defendant Foxworth [pilot]." *Id.*

limitations applied only to the corporate carrier.[30] Thus, the court was of the opinion that if The Hague Protocol's Article 25A was needed to cover the carrier agents or servants, then they must not have been originally covered without such article.

In *Chutter v. KLM Royal Dutch Airlines*, a case involving non-employee agents of the carrier, the plaintiff was injured when she stepped from the plane as the boarding steps were being removed by the corporate carrier's agent who provided such equipment and services. The court found the damage limitiations of the Convention[31] applicable as "it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity."[32] The *Chutter* court found an analogy to the Carriage of Goods by Sea Act[33] persuasive.[34] The strength of that analogy was based on two cases[35] in which the courts reasoned that because the agents were performing part of the contract of carriage, those agents were covered by the liability limitations of that Act.[36] *Chutter* also cited *Wanderer v. Sabena*,[37] in which the New York Supreme Court without any elaboration or explanation, held the Convention to cover agents employed to perform part of the carriage contract.[38]

While case history supplies little legal fodder, the United States Supreme Court's opinions about treaty interpretation are more plentiful. Case law indicates that where the treaty abrogates some common law right or lacks any ambiguity, it is impermissible for a court to look beyond the document's four corners. The Court has stated, as a canon of construction, treaties in derogation of common law rights must be strictly construed.[39] In *The Amiable Isa-*

[30] *Id.*

[31] Convention, *supra* note 2, Article 25A.

[32] 132 F. Supp. at 613.

[33] 46 U.S.C. § 1300 *et seq.* (1970).

[34] 132 F. Supp. at 613.

[35] United States v. The South Star, 210 F.2d 44 (2d Cir. 1954); A.M. Collins and Co. v. Panama R.R., 197 F.2d 893 (5th Cir. 1952).

[36] 132 F. Supp. at 613.

[37] 1949 U.S. Av. Rep. 25 (Sup. Ct. N.Y. Co. 1949).

[38] *Id.* at 26.

[39] *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821), and Rocca v. Thompson, 223 U.S. 317 (1912).

In *Amiable Isabella*, Justice Storey stated:

> In the first place, this Court does not possess any treaty-making

bella,[40] the Court found "no room for interpretation, on account of the ambiguous language of the parties," because they have "expressed themselves in the clearest manner."[41] In *Rocca v. Thompson*,[42] the Court observed that treaty interpretation must take into account the "conditions and circumstances at the time of drafting and should be read in consideration of the purposes of those signing.[43] Absent the above mentioned situations, however, the Court has noted that treaties should be more "liberally construed" than private agreements, and to ascertain the meaning of a treaty, a court should "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[44]

The Second Circuit in *Eck v. United Arab Airlines, Inc.*,[45] which passed on the question of whether the contract for transportation

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> power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurption of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

19 U.S. (6 Wheat.) at 71.

In *Rocca*, the Court said framers of treaties carefully draft documents, and the framers are competent "to choose apt words in which to embody the purposes of the high contracting parties." 223 U.S. at 332.

Note that in Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959), relied on by the district court in *Reed*, the Supreme Court had found, in refusing to extend a law's limitations of liability of an agent, that the act defined "carrier" in a "clearly phrased" statute. *Id.* at 301.

[40] 19 U.S. (6 Wheat.) 1, 71 (1821).

[41] 19 U.S. at 69-70.

[42] 223 U.S. 317 (1912).

[43] 223 U.S. at 331-32. There the Court observed: "Like other contracts, [treaties] are to be read in the light of the conditions and circumstances existing at the time they were entered into with a view to effecting the objects and purposes of the States thereby contracting. *In re Ross, Petitioner*, 140 U.S. 453, 475." *Id.*

[44] Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943). *See, e.g.*, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1977), and Block v. Campagnie Nationale Air France, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) (question raised as to whether "carrier" under the Convention includes charterer).

[45] 360 F.2d 804 (2d Cir. 1966).

was made under the Convention's Article 28, laid down general guidelines for convention interpretation which provided a more "liberal" interpretational approach.[46] In *Block v. Compagnie Nationale Air France*[47] the court addressed the question of which entity other than the contracting carrier, *i.e.*, the owner or charterer of the aircraft, could be held liable in case of accident. The *Block* court noted that the "necessity for maintaining uniformity, even when the Convention is applied in a country, such as the United States, having a doctrinal basis for its legal system different from civilian systems, compels a broad construction of the Convention."[48]

In *Reed v. Wiser*, the Second Circuit was presented with the question of whether the Convention's liability limitations extend to the corporate carrier employees. In so deciding, the court looked to previous cases as well as treaty interpretation guidelines. In finding that those limitations extend to the employees, Judge Mansfield for a unanimous court noted the question to be of "great importance" and an issue "raised for the first time at the federal appellate level."[49] The American cases, he observed, have split[50] between

[46] *Id.* at 812. The court there stated:

> A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. . . . The inquiry may lead the court to conclude that the provision's language accurately reflects its purpose; in such a situation the court is most faithful to the purpose if the language is interpreted literally. Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer. It would be inconsistent with the "wise counsel to reject 'the tyranny of literalness'," if the court in the latter situations did not seek to interpret the provisions as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion. (citations omitted) *Id.*

[47] 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[48] *Id.* at 337-38. The court there likened a treaty to "a uniform law" within the United States, and thus a court has an obligation to keep interpretation as uniform as possible. *Id.*

In Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 158 (3d Cir. 1977), the court, in interpreting the Convention's Article 17 phrase, "in the course of embarking," utilized a "common sense" construction, and also concluded that, absent explicit language to the contrary, a CITEJA draft rejection did not manifest intention to exclude from interpretation a more inclusive meaning.

[49] 555 F.2d 1079, 1081-1082 (2d Cir. 1977).

[50] *Id.* at 1081-82.

Chutter and *Wanderer* on one hand and *Pierre* on the other.

The appellees argued that a distinction could be drawn between *Chutter*, upholding Convention limitations for carrier agents, and the present case involving carrier employees. The appellees further argued that even if the applicability of *Chutter* is assumed, the *Chutter* court's holding was based on two decisions[51] which the Supreme Court subsequently rejected.[52] The appellants argued while *Chutter* is not factually on point, the analogy drawn there, extending coverage of the Act to agents, is valid in the case of carrier employees. Without discussion of these arguments, the court turned to interpretation of the pertinent provisions of the Convention as the basis for its decision. The court, however, stated that "to the extent the decided cases indicate anything, they would support, on balance, the conclusion that employees should be covered,"[53] and that with the possible exception of the *Pierre* decision, there has never been a Warsaw Convention case in which a plaintiff has obtained, by suing the carrier's employees instead of the carrier itself, more than that amount for which the carrier would be liable under the Convention.[54]

With respect to interpretation of the treaty, the court noted the following provisions as pertinent to the decision:

> Article 17: The carrier shall be liable for damage sustained in the event of the death or wounding or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft. . . .
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> Article 22: In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . .
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> Article 24: (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention. (2) In the cases covered by article 17 the provi-

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[51] United States v. The South Star, 210 F.2d 44 (2d Cir. 1954); A.M. Collins & Co. v. Panama R.R., 197 F.2d 893 (5th Cir. 1952).

[52] Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959). In *Chutter*, the court found the relevant act covered the agent, an independent stevedoring company engaged by the carrier to load cargo.

[53] 555 F.2d at 1087, n.11.

[54] *Id.* at 1088, n.11.

sions of the preceding paragraph shall also apply. . . .[55]

The court said that the first question was whether, in the absence of an express definition of "transporteur" (carrier),[56] that term is limited to the corporate carrier, or whether it is intended to "embrace the group or community of persons actually performing the corporate entity's functions."[57] In other words, was the absence of such definition meant to restrict the Convention limitations only to TWA, or was the intent to include carrier employees as well? The second issue involved interpretation of the French text: specifically, whether the official English translation employed the proper definition of the French word "cas."

With respect to the first question, the appellees argued that because the Convention derogates a common law right, it should be strictly construed and not applied beyond the scope justified by its language and history[58] and, that the inclusion of Article 25A in The Hague Protocol showed that the unamended Convention did not extend to employees.[59] Thus, to expand the definition of carrier to include the employees would not be a justified reading of the treaty. The appellants, however, urged a liberal construction of the treaty so as to effectuate its purpose and to give it the proper meaning consistent with the expectations of the contracting parties to the Convention.[60] The appellants also asserted that the national policy expressed in a treaty permitting the limitation of liability is superior to any inconsistent common law rule.[61]

In answering the first issue, the court recognized, as did the district court,[62] that "the liability of the wrongdoing agent[63] is a separate and clear source of redress, distinct from and logically prior to that of the principal."[64] The court said that the Convention, taken

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[55] *Id.* at 1088.

[56] *Id.* at 1082. The official text, as mandated in Article 36 was drawn in French. *Id.* at n.6.

[57] 555 F.2d at 1083.

[58] Brief for Appellees at 6-8, 555 F.2d 1079 (2d Cir. 1977).

[59] *Id.* at 20-24.

[60] Brief for Appellants at 9, 555 F.2d 1079 (2d Cir. 1977).

[61] *Id.* at 28.

[62] 414 F. Supp. at 866.

[63] "Agent," as used here, is the employee agent, as distinguishable from the nonemployee agent of the carrier.

[64] 555 F.2d at 1083.

as an international uniform law,[65] must be read in context of national legal systems of Convention members; and, in at least some jurisdictions, the language of Article 22(1), limiting carrier liability to 125,000 francs per passenger, would limit employee liability under the Convention.[66] Thus, a purely common law interpretation of the article is thought inappropriate. In effect, the court, in the context of a world-wide treaty, recognized its duty to provide an interpretation as harmonious as possible with other legal systems. For each signatory country's courts to restrict its treaty interpretations, its system's legal principles alone would necessarily dilute if not destroy the purpose of such a treaty. Moreover, the court stated that the authors of the Convention intended Article 24 to prevent circumvention of the limitations of Article 22, as any other reading "would defeat the purpose of Article 24. . . ."[67]

The court noted that as to the second interpretational question, the district court, under the unofficial English translation, used "cas" in Article 17 to read "event," but where used again in Article 24(1) and (2), translated as "cases."[68] The use of "cases" instead of "events," according to the court, would be a more limiting reading of the Convention, prescribing application of the liability limitations to agents or employees. The court stated that a more accurate, less ambiguous translation would use, instead of "cas" (in a nonjuridical sense), "event" uniformly throughout because ordinarily "cas" is not used to refer to a lawsuit.[69] The court's interpretation of Article 24 would read: "(1) In the events anticipated in Articles 18 and 19, any action for damages, however founded, can only be brought subject to conditions and limits set out in this convention. (2) In the events covered by Article 17, the provisions of the preceding paragraph shall also apply. . . ."[70]

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[65] 386 F.2d at 337-38.

[66] *See, e.g.*, remarks of the Italian delegate, 1 International Conference on Private Air Law, The Hague, September, 1955, Minutes 220, ICAO Doc. 7686-LC/140 (1956); and later, 1 International Conference on Private Air Law, Guadalajara, August-September, 1961, Minutes 134, ICAO Doc. 8301-LC/149-1 (1962). *See also* remarks of the Norwegian delegate, 1 International Conference on Private Air Law, The Hague, September, 1955, Minutes 361, ICAO Doc. 7686-LC/140 (1956).

[67] 555 F.2d at 1084-85. *See*, H. DRION, *supra* note 19, § 136, at 158.

[68] 555 F.2d at 1084.

[69] *Id.*

[70] *Id.*

Thus, an expanded reading of Article 24 would imply that the limits contained therein would apply to the present case because the suit is an "action for damages, however founded," due to damages sustained "in the event of the death . . . of a passenger . . . on board the aircraft. . . ." The court found support for this reading in post-Convention comments.[71]

The court also noted the lack of documented discussion concerning employee liability limitations at the Paris and Warsaw conferences, and stated that "[a]lthough the legislative history of the Convention does not affirmatively or expressly support the foregoing interpretation, it contains nothing indicating a contrary intention."[72] While post-Convention commentators were split on the issue,[73] the Association of Airline Pilots pressed for resolution of the issue, and The Hague Conference adopted Article 25A "if only to resolve the controversy."[74]

The court found the trial court's reliance on the United States' failure to ratify The Hague amendments as "misplaced," observing that the history of attempted ratification of The Hague Protocol makes clear that the only reason for refusal to ratify was dissatisfaction with the low level of the carriers' liability limitations, and not the other provisions of the Protocol.[75] The court also noted the otherwise supportive comment of Federal Aviation Administrator Halaby to the Senate Foreign Relations Committee,[76] as well as the fact that the notice of Warsaw denunciation was withdrawn after the Montreal Agreement was signed.[77]

The court followed *Eck v. United Arab Airlines, Inc.*,[78] where it looked to the Convention purpose in aid of interpretation.[79] As

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[71] *Id. See, e.g.*, H. DRION, *supra* note 19.

[72] 555 F.2d at 1085.

[73] *Id.*

[74] The court notes the necessity for the article was doubted by some of The Hague delegates. See the comments by delegates. 555 F.2d at 1085-86, and n.8 at 1085.

[75] *Id.* at 1087.

[76] *Id.* at 1086. Halaby commented that the FAA approved of "just about everything" in The Hague but the "central defect": the low limit of liability. *Hague Protocol to Warsaw Convention: Hearings Before the Committee on Foreign Relations*, 89th Cong., 1st Sess. 15, 19 (1965).

[77] 555 F.2d at 1087.

[78] 360 F.2d 804 (2d Cir. 1966).

[79] 555 F.2d at 1088. *See* Day v. Trans World Airlines, Inc., 528 F.2d 31, 36-37

stated by Secretary of State Hull in transmitting the Convention to the Senate in 1934, the Convention would provide for a "more definite basis on which to obtain insurance rates. . . ."[80] As the court viewed the Convention, that purpose has not since changed, as evidenced by subsequent history.[81] To subject the carriers to unlimited recoveries through their employees would defeat that purpose. In response, appellees asserted that contentions concerning indemnification overlooked the plain meaning of the Convention.[82]

The court likewise took notice of indemnification as a modern-day reality, and of the fact that airlines would not long be able to operate without indemnifying employees for liabilities incurred as a carrier agent.[83] Thus, absent proof to the contrary, the court sought to carry out the framers' intent, *vis a vis* application of the liability limitations to carrier employees.[84]

Recognizing yet another purpose for imposing the liability limitations, the court stated that the district court decision would allow plaintiffs to subject parties and courts to a "jungle-like chaos" if the Convention's uniform system of liability rules governing "fundamental aspects" of international air disaster litigation were circumvented.[85] A decision more contrary to the "acknowledged pur-

(2d Cir. 1975), *cert. denied*, 429 U.S. 89 (1978) and Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 511-12 (2d Cir. 1966), *aff'd by divided court*, 390 U.S. 455 (1968).

[80] SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, S. EXEC. DOC. NO. G., 73d Cong., 2d Sess. 3-4 (1934).

[81] 555 F.2d at 1089. The court sees the Montreal Agreement and the Guatemala Protocol as indicative of the fact that the limitations per se have not been in question, but, rather, the extent of those limits: "Nevertheless, at no time has this country ever abandoned the basic principal that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters." (footnote omitted.) *Id.*

[82] Brief for Appellees at 34, 555 F.2d 1079 (2d Cir. 1977).

[83] 555 F.2d at 1090.

[84] *Id.*

[85] *Id.* at 1092-93. If agents or employees are not covered by the liability limitation of the Convention, they are likewise not subject to the litigation rules of the Convention. Those rules are: Article 28 (venue); Article 20 (burden of proof); Articles 20 and 25 (standards of negligence); Articles 18(3) and 26 (presumptions); Article 23 (contractual liability limitations); Article 27 (suits against estate of tortfeasor); Article 29 (statute of limitations); Article 30 (liability in event of carriage by more than one carrier; and Articles 22 and 25 (damage awards).

poses" of the Convention would be "difficult to imagine."[86]

As for other contentions advanced,[87] Judge Mansfield found "no merit" in those arguments in support of the district court's decision.[88] Primarily, he held that reliance on *Robert C. Herd & Co. v. Krawill Machinery Corp.*[89] was misplaced as the Carriage of Goods by Sea Act[90] "explicitly defines the term 'carrier' and lacks the Article 24 requirement that " . . . any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention."[91] That is, the Act in *Herd* has a definition which does not include agents and does not restrict legal actions solely to the terms of the act. Likewise, evidence does not show that Acts-covered carriers are called on to reimburse independent agents' employees, as are Convention-governed carriers. Accordingly, the Court's interpretation in *Herd* did not operate to circumvent carrier liability limits and did not "reverse a 40-year interpretational course of practice. . . ."[92] Again, the court places emphasis on the effects of a noninclusive reading of the Convention.

As a matter of policy in reaching his decision, Judge Mansfield also asserted that if he did not grant the expanded definition of "carrier," the entire nature of international air disaster litigation will be "radically changed" where American airlines were involved, noting that the liability limitations of the Convention could then be circumscribed by the simple device of a suit against the pilot or employees. The corporate carrier would be forced to indemnify against higher recoveries as the cost of services by key employees. This cost, of course, would be passed on to the passengers.[93]

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[86] 555 F.2d at 1092.

[87] *Id.* To the arguments the airline industry is no longer in need of protection, and the limitations are too low, arbitrary and inadequate, the court recognized its duty only to enforce the Constitution, laws and treaties of the United States. The court stated: "These arguments misconceive our function. We do not sit to decide whether laws are no longer necessary. . . . The Warsaw Convention is not a treaty that has mouldered on the books. On the contrary, it has had agonizing reappraisal. . . ." *Id.*

[88] *Id.*

[89] 359 U.S. 297 (1959). *See* note 49, *supra*, and accompanying text.

[90] 46 U.S.C. § 1304(5) (1970).

[91] 555 F.2d at 1092.

[92] *Id.*

[93] *Id.* at 1082.

The court's refusal to follow *Pierre* seems justified: though the case is in point factually, that decision foregoes any analysis of the framers' intent or of the treaty's purpose and involves only a literal reading of the Convention's provisions. Whether the court's hesitant reliance on *Wanderer* or *Chutter* is justified seems immaterial due to the same analytical failure found in *Pierre*. That is, the cases supporting both parties are irrelevant because they fail to examine the intent and purposes behind the Convention. The important considerations are those emphasized by the court in *Reed*: the effects of a contrary reading on the paying public, the airlines, and their employees.

Were the limitations not applicable to airline employees, logic dictates that suits would be brought against the employees in order to circumvent what would seem to some plaintiffs as inadequate recoveries. The results necessarily would follow two courses: either risk-bearing employees would not assume their jobs at such a potential economic hardship (these would be, in most cases, key operational personnel), or the employer, at a higher per passenger cost, would have to indemnify those employees.

Either course, obviously, does little to protect and promote the airline industry, an underlying purpose of the Convention. In light of the results of a contrary reading, and the acknowledged purpose of the Warsaw Convention, Judge Mansfield's decision appears correct in its interpretation and analysis. It is rather dubious that the Convention framers could have considered such a circumvention of the treaty available. Whether a broader reading is also extended to agents, as opposed to employees, is a question which must await further judicial consideration.

Stuart W. King

REMEDIES—IMPLIED PRIVATE ACTION—No Implied Private Action Exists For a Violation of Safety Regulations Promulgated by the Federal Aviation Administration Resulting Only in Economic Injury. *Rauch v. United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976).

This action was originally brought in the Federal District Court for the Eastern District of Pennsylvania[1] as a class action suit by the owners of a Cessna aircraft on behalf of themselves and all others similarly situated against United Instruments, Inc. (United Instruments) and Tokyo Aircraft Instrument Company (Tokyo Aircraft). The plaintiffs' aircraft was equipped with an altimeter manufactured by Tokyo aircraft and distributed by United Instruments. The Federal Aviation Administration, by directive issued December 6, 1974,[2] had required the plaintiffs to replace or modify the altimeter to conform with the Administration's standards. This action was brought to recover each plaintiff's cost of removing, repairing, and reinstalling the defective altimeter, which cost approximately seventy-five dollars. The district court granted jurisdiction on the basis of 28 U.S.C. § 1337,[3] which gives the United States District Courts jurisdiction over civil actions arising under an Act of Congress regulating commerce. The defendants appealed when the district court included in its order granting jurisdiction the statement required by 28 U.S.C. § 1292(b)[4] for

[1] Rauch v. United Instruments, Inc., 405 F. Supp. 435 (E.D. Pa. 1975). For a full discussion of this decision *see* 42 J. AIR L. & COM. 625 (1976).

[2] Airworthiness Directive No. 74-24-13.

[3] "The district courts shall have jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337 (1970).

[4] When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
28 U.S.C. § 1292(b) (1970).

an interlocutory appeal. *Held, reversed*: An implied right of action does not exist for a violation of safety regulations promulgated by the FAA resulting only in economic injury.

The plaintiffs contended that they were entitled to a federal private remedy based strictly upon a statutory violation. The basis for the district court's grant of jurisdiction in *Rauch* was the implication test enunciated by the Supreme Court in *Cort v. Ash.*[5] In that case, the Court held that the decision of whether to imply a private remedy for the violation of a federal statute could be made on the basis of the answer to four quesions: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted;[6] (2) whether there is any indication of congressional intent to create or deny a private remedy;[7] (3) whether the implication of a private remedy is consistent with the underlying purpose of the legislative scheme;[8] and (4) whether it would be inappropriate to imply a cause of action based solely on federal law in that the matter is one traditionally of state concern and the remedy ordinarily relegated to the states.[9] This test was primarily a restatement of principles which had previously been employed by the federal courts,[10] except perhaps for the fourth question of whether the matter is traditionally of state concern.[11] Finding that the matter is traditionally of state concern tends to limit the implication of remedies by federal courts.[12]

Three days prior to the district court's grant of jurisdiction in *Rauch*, the Third Circuit employed the *Cort* test in *Polansky v. Transworld Airlines, Inc.*[13] In *Polansky*, the court refused to imply a private right of action on behalf of passengers who were furnished

[5] 422 U.S. 66 (1975).

[6] This test was first employed in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

[7] This test was first employed in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers [Amtrak], 414 U.S. 453 (1974) [hereinafter cited as [Amtrak]].

[8] This test was employed in [Amtrak], 414 U.S. 453 (1974).

[9] This test was employed in Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

[10] *See* McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976).

[11] *Id.*

[12] The Burger court made consistent efforts to reduce the load of the federal judiciary. *Id.*

[13] 523 F.2d 332 (3d Cir. 1975).

allegedly inferior ground accommodations on a tour sponsored by a Civil Aeronautics Board (CAB) regulated air carrier.[14] The court based its decision solely on the third and fourth factors of the *Cort* test, finding that the plaintiffs were not entitled to a private right of action.[15] The district court in *Rauch* followed the decision in *Polansky* insofar as it also applied the third and fourth factors of the *Cort* test, but reached a different conclusion, namely, that a federal private remedy existed.

As noted, the third factor of the *Cort* test is whether the implication of a private remedy is consistent with the underlying purpose of the legislative scheme.[16] The district court in *Rauch* decided that implication was consistent with the legislative scheme. Before reaching this conclusion, however, the court was faced with one of the most familiar arguments against implication, the doctrine of statutory construction *expressio unius est exclusio alterius.*[17] This doctrine provides that where explicit statutory remedies have been provided, it is inconsistent with the legislative scheme to imply any further remedies.[18] This doctrine dissuaded another district court, in *Moungey v. Brandt*,[19] from implying a remedy for a violation of the Federal Aviation Act (the Act).[20] *Moungey* was an action by an airplane passenger against the owner of the airplane for injuries sustained in a collision. The District Court for the Western District of Wisconsin concluded that the national interest in safety in civil aeronautics was adequately protected by the network of statutory and administrative remedies created by the federal aviation program, and thus no remedy was implied.[21]

The district court in *Rauch* was persuaded neither by *expressio unius* nor by its application in *Moungey* and concluded that the explicit provision of administrative remedies does not of necessity pre-

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[14] *Id.*

[15] *Id.*

[16] *See* [Amtrak], 414 U.S. 453 (1974).

[17] "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1968).

[18] *See* [Amtrak], 414 U.S. at 457-58 (1974).

[19] 250 F. Supp. 445 (W.D. Wis. 1966).

[20] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et. seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[21] 250 F. Supp. 445 (W.D. Wis. 1966).

clude the judicial implication of further remedies.[22] The court based its decision on the advancement of "substantive social policy goals" embodied in the Act.[23] Unlike the Third Circuit in *Polansky*, the district court in *Rauch* held that authorizing private suits for damages based on violations of safety regulations would aid in the clear congressional policy of enhancing safety for passengers.[24]

Having thus disposed of the third question of the *Cort* test, the court considered the fourth question of "whether it would be inappropriate to infer a cause of action based solely on federal law in that the matter is one traditionally of state concern and the remedy ordinarily relegated to the states."[25] In a rather brief treatment of the matter, the court decided that it would not be inappropriate and granted the plaintiffs an implied right of action.[26] In order to reach this conclusion, the court was again faced with the task of distinguishing the Third Circuit's holding in *Polansky*.[27] In *Polansky* the court held that "only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy already exists."[28] In order to avoid the clear effect of this language upon the plaintiff's cause of action,[29] the district court cited several cases supporting the proposition that safety in aviation is an area of pervasive national interest and thus should not be left to the state courts.[30] The court "respect-

[22] 405 F. Supp. at 445. The court cited Meyers v. Pennsylvania, 416 U.S. 946, 950 (1974), to support this proposition and quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 402-03 n.4 (1971), stated: "where the primary purpose behind a statute is to promote safety and save lives, any method of enforcement which will encourage compliance with its terms should be viewed as consistent with the legislative scheme."

[23] 405 F. Supp. at 445.

[24] 405 F. Supp. at 445. The court "respectfully disagreed" with the holding in Moungey v. Brandt, 250 F. Supp. 445 (W.D. Wis. 1966), which held that implication of a private remedy would not further the statutory purpose.

[25] *See* Cort v. Ash, 422 U.S. 66 (1975).

[26] 405 F. Supp. 442 (1975).

[27] 523 F.2d 332 (3d Cir. 1975).

[28] *Id.* at 337.

[29] Obviously, state remedies were adequate, as the court seems to admit. 405 F. Supp. at 447.

[30] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, 644 (1973); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 402 (7th Cir. 1974); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 747 (C.D. Cal. 1975); Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972).

fully disagreed"[31] with the decision in *Moungey v. Brandt*[32] that no benefit to the government's air safety program would result from the implication of a private remedy and concluded that the furtherance of the primary statutory purpose of providing safety in air travel justified the implication of a private remedy despite the availability of adequate state remedies.[33]

On appeal, the Third Circuit reversed and denied the plaintiffs a federal remedy.[34] Its decision was also based on the *Cort* test but instead of applying the third and fourth questions of the test, as it had in *Polansky* and as the district court had, the Third Circuit relied exclusively on the first and fourth questions of (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; and (4) whether it would be inappropriate to imply a cause of action based solely on federal law in that the matter is one traditionally of state concern and the remedy ordinarily relegated to the states.[35]

A. *The Protected Class*

In order to determine whether the plaintiffs were in the class to be protected, the court examined the legislative history of the Federal Aviation Act and concluded that the "whole purpose" of the Act was to create an agency to handle the problems of air safety.[36] The court concluded that the especial class protected by section 601 of the Act[37] consists of all potential passengers or crew members of civil and military aircraft and those on the ground who might be endangered by accidents resulting from unsafe aircraft, and further, that those potential beneficiaries of the Act who have not suffered any actual injury can never be the intended beneficiaries of an im-

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[31] 405 F. Supp. at 446.

[32] 250 F. Supp. 445 (W.D. Wis. 1966).

[33] 405 F. Supp. at 447.

[34] This was an appeal from an interlocutory order. The district court included in its order the statement required by 28 U.S.C. § 1292(b) (1970) for certification, thus allowing the plaintiffs to appeal the order immediately before further proceedings in the district court.

[35] 548 F.2d 452 (3d Cir. 1976). For an extended discussion of the first prong of the *Cort* test see Piper v. Chris Craft Industries, Inc., ___ U.S. ___, 97 S.Ct. 926 (1977).

[36] 548 F.2d at 457.

[37] 49 U.S.C. § 1421 (1970).

plied federal cause of action.[38] Contrary to the district court, the Third Circuit concluded that since it was the primary purpose of Congress to protect passengers and crew members, it could not have been the primary purpose of Congress to protect the owners of aircraft from mere economic loss.[39]

Trying to place themselves in the class to be protected, the plaintiffs advanced the argument that there was a "pervasive legislative scheme" governing their relationship as owners of the aircraft with the manufacturers of the aircraft appliances similar to the scheme apparent in section 14(a) of the Securities & Exchange Act of 1934.[40] Section 14(a) governs the relationship between corporate management and stockholders in connection with proxy solicitation.[41] This pervasive legislative scheme prompted the Supreme Court to imply a remedy on behalf of stockholders for a violation of proxy solicitation regulations in *J.I. Case Co. v. Borak*.[42]

In *Rauch*, the court held that if there was a pervasive legislative scheme, it governed only the relationship between the owners and manufacturers of aircraft and the passengers and crew members and that this scheme did not govern the relationship between owners and manufacturers.[43] The injury which the Act was intended to prevent was injury to passengers occasioned by the negligence of owners and manufacturers, not the economic injury suffered by owners having to replace defective appliances.[44] Even if the protection of owners was within the intention of the legislature, the court held that this does not give the plaintiffs a private right of action because they were not the *primary* beneficiaries and thus are not part of the protected class. This technique of limiting the protected class to *primary* beneficiaries only was employed in the leading case, *Cort v. Ash*.[45]

B. *State Versus Federal Law*

The Third Circuit also considered the fourth question of the

[38] 548 F.2d at 457.
[39] 548 F.2d at 458.
[40] 15 U.S.C. § 78n (1970).
[41] *Id.*
[42] 377 U.S. 426 (1964).
[43] 548 F.2d at 460.
[44] *Id.*
[45] 422 U.S. 66 (1975).

Cort test, which is whether the matter is one ordinarily of state concern and the cause of action one traditionally governed by state law so that it would be inappropriate to infer a federal cause of action.[46] Unlike the district court, the Third Circuit was unimpressed with the argument that there is a "countervailing national interest" in aviation, and held that this action is one traditionally of state concern and should, therefore, be relegated to the state courts.[47] The court found that the action was based on tort or contract law, the type of case with which the state courts are familiar and concerning which a large body of state law has already developed.

The Third Circuit rejected the district court's holding that the plaintiff's claim involved a concern with safety in aviation, a matter of national interest, holding that this was merely a matter of breach of contract or warranty, concerning economic injury only.[48] The national interest in safety was adequately served when the owners of the aircraft were forced to comply with the FAA directive to repair the defective altimeter.[49] Once this interest was served, the court found the cause of action of the owner against the manufacturer to be one traditionally of state concern and thus inappropriate for the implication of a federal remedy. The Third Circuit also rejected the argument that implying a federal private right of action would serve to deter further violations, noting that the Supreme Court rejected such a deterrence argument in *Cort v. Ash*.[50] Without considering whether an implied remedy would help effectuate the statutory purpose of safety,[51] the court concluded that more evidence of congressional intent to create such a deterrent was necessary.[52]

C. *Conclusion*

The practical implication of the Third Circuit's decision in *Rauch* is that the owners of aircraft are without remedy in the federal courts for economic injury caused by violations of safety regu-

[46] 548 F.2d at 460.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 458.
[50] *Id.* at 460.
[51] *Id.*
[52] *Id.*

lations promulgated pursuant to the Act. In addition, the federal judiciary will not be burdened by the potentially large number of cases which could have arisen had the court upheld a private remedy. *Rauch* has demonstrated the potential of the fourth question of the *Cort* test to reduce the case load of the federal courts. If followed, this opinion means that causes of action based on traditional state remedies cannot be extended to become federal claims merely because they are grounded on violations of federal statutes. This does not mean, however, that there will be a complete ban on private remedies implied for violations of the Act. The Third Circuit expressly excluded from consideration the situation where physical injury has already occurred.[53]

The court reached the proper conclusion. There is no reason the plaintiffs need a federal remedy to redress their grievances in this case. The strongest argument the plaintiffs could make in favor of implication was that the implication of a private remedy would serve to deter future violations of the Act, but the plaintiffs never established that a traditional state remedy would be insufficient to serve this purpose.

Richard E. Miller

ENVIRONMENTAL LAW—ENVIRONMENTAL IMPACT STATEMENTS—The Revision of the National Airport System Plan by the Secretary of Transportation is a Report on a Proposal for Major Federal Action Requiring Preparation of an Environmental Impact Statement. *Environmental Defense Fund, Inc. v. Brock Adams, Secretary of Transportation*, 434 F. Supp. 403 (D.D.C. 1977).

Plaintiffs[1] brought suit seeking a mandatory injunction against the Secretary of Transportation[2] requiring him to file an Environmental Impact Statement (EIS),[3] with his revision of the National

[53] The court postponed consideration of this situation, and cited several cases which dealt with this problem. *See* 548 F.2d 452, 457-58 n.10 (1976).

[1] Environmental Defense Fund, Inc. and the City of Boston, Mass.

[2] Brock Adams.

[3] National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (1970).

Airport System Plan[4] (revised Plan). The revised Plan was required to be completed by January 1, 1978[5] by the Airport and Airway Development Act of 1970 (AADA).[6] The AADA requires that the National Airport System Plan predict the type and estimated cost of airway development needed to adequately serve the needs of the United States during the next decade.[7] The Plan is required to be sufficiently accurate for use in future appropriations.[8]

The National Environmental Policy Act of 1969 (NEPA)[9] requires that an EIS be prepared concomitant with every proposal for major federal action.[10] The plaintiffs argued that the revised Plan constituted such a proposal and moved for summary judgement. The defendant[11] contended that the revised Plan would not sufficiently resemble the implemented Plan to be considered a proposal because many contingencies outside of the defendant's control effect final implementation of the revised Plan.[12] *Held*: The revision of the National Airport System Plan by the Secretary of Transportation is a proposal for major federal action requiring preparation of an environmental impact statement. *Environmental Defense Fund, Inc. v. Brock Adams, Secretary of Transportation,* 434 F. Supp. 403 (D.D.C. 1977).

NEPA is an attempt to force fundamental reform in the national strategy toward management of the environment.[13] By passage of this act Congress hoped to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."[14] At the same time, Congress sought to "achieve a balance between population and resource use"[15] and to "enhance the quality

[4] Airport and Airway Development Act of 1970, 49 U.S.C. § 1712(a) (1970 & Supp. V 1975).

[5] 49 U.S.C. § 1712(i) (Supp. 1975).

[6] 49 U.S.C. §§ 1701-1762 (1970).

[7] 49 U.S.C. § 1712 (1970).

[8] 49 U.S.C. § 1712(i) (Supp. V 1975).

[9] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4375 (1970).

[10] 42 U.S.C. § 4332(c) (1970).

[11] Brock Adams, Secretary of Transportation.

[12] Environmental Defense Fund, Inc. v. Adams, 434 F. Supp. 403, 406 (D.D.C. 1977).

[13] 42 U.S.C. § 4321 (1970); F. Anderson, Jr., *The National Environmental Policy Act*, FED. ENVT'L L. 239 (1974) [hereinafter cited as Anderson].

[14] 42 U.S.C. § 4331(b)(2) (1970).

[15] 42 U.S.C. § 4331(b)(5) (1970).

of renewable resources."[16] In order to effectuate such lofty goals, the provisions of NEPA provide for a Council on Environmental Quality,[17] charged with development and recommendation of appropriate national policies consistent with NEPA's stated goals. In addition, NEPA requires the President of the United States to prepare an annual Environmental Quality Report.[18] More significantly, the provisions of NEPA require preparation of an EIS in certain cases.

An EIS is a detailed statement discussing the environmental consequences of proposed major federal actions and is required only if the proposed actions significantly affect the quality of the human environment.[19] The EIS must consider not only the environmental impacts, but also the alternatives to the proposed action, relationships between short term local uses and long term productivity, and the effects of irretrievable and irreversible commitments of resources should the proposed action be implemented.[20] The federal official responsible for the action determines if an EIS should be prepared,[21] and if so, it must be completed when the proposal is submitted for formal legislative or executive approval.[22] If no EIS has been prepared at that time, or if the pre-

[16] 42 U.S.C. § 4331(b)(6) (1970).

[17] 42 U.S.C. § 4342-4347 (1970); *see generally* Note, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 CATH U.L. REV. 547 (1974). The Council's guidelines have been held advisory and not mandatory, not having the force of law. *See also* Sierra Club v. Lynn, 502 F.2d 43, 58 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1974); Continental Ill. Nat. B. & T. Co. of Chicago v. Kleindeinst, 382 F. Supp. 107, 114 (D.C. Ill. 1973); *but see* Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army, 325 F. Supp. 728, 743-44 (D.C. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972) (giving guidelines great deference).

[18] 42 U.S.C. § 4341 (1970) requires that the report set forth the status and condition of major man-made and natural classes of the environment, the current and foreseeable trends of such classes, the adequacy of available natural resources, a review of the governmental programs with an impact on the environment, and recommendations to remedy any deficient programs.

[19] 42 U.S.C. § 4332(c) (1970); *see generally* Greis, *Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URB. LAW. 264 (1973); Lapping, *Environmental Impact Assessment Methodologies: A Critique*, 4 ENVT'L AFF. 123 (1975); Felton, *NEPA: Full of Sound and Fury . . . ?* , 6 U. RICH. L. REV. 116 (1971).

[20] 42 U.S.C. § 4332(c) (1970); *see generally* Deutsch, *The National Environmental Policy Act's First Five Years*, 4 ENVT'L AFF. 3, 16 (1975) [hereinafter cited as Deutsch].

[21] Anderson, *supra* note 13, at 364.

[22] Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976).

pared EIS is considered inadequate, injunctive relief may be sought.[23]

The requirement for preparation of an EIS has been called the "action-forcing" section of NEPA[24] and has dominated litigation concerning NEPA,[25] producing considerable comment.[26] Much of the litigation has focused on what constitutes major federal action,[27] or what makes a significant impact on the human environment.[28] In addition, courts have considered what standard of review is to be used when reviewing the refusal by a federal agency to prepare an EIS or when reviewing the sufficiency of an EIS.[29]

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[23] *See e.g.*, Morgan v. United States Postal Service, 405 F. Supp. 413, 424 (D.C. Mo. 1975); Brooks v. Volpe, 350 F. Supp. 269, 282 (D.C. Wash. 1972).

[24] The EIS requirement received the term "action forcing section" because it is the section of NEPA which forces federal agencies to consider environmental problems. *See, e.g.*, Deutsch, *supra* note 20, at 6; S. REP. No. 91-296, 91st Cong., 1 Sess. 9 (1969); 115 CONG. REC. 40415, 40419 (1969); Yannacone, Jr., *National Environmental Policy Act of 1969*, 1 ENVT'L L. 8 (1970).

[25] Cases in which courts have been asked to decide if an EIS is required include: Sadler v. 218 Housing Corp., 417 F. Supp. 348, 357 (D.C. Ga. 1976), (Housing and Urban Development plans for demolition projects in urban areas); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1974), (highway projects); Sierra Club v. Hodel, 544 F.2d 1036, (9th Cir. 1976), (power projects); Simmans v. Grant, 370 F. Supp. 5, 21 (D.C. Tex. 1974), (water works project); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975), (expansion of airports); Virginians for Dulles v. Volpe, 344 F. Supp. 573, 578 (D.C. Va. 1972), (introduction of the "sretch jet," a Boeing 727-200, into an airport); Sierra Club v. Hardin, 325 F. Supp. 99, 125 (D.C. Alas. 1971), (issuance of construction permits for a pulp mill); Hanly v. Kleindeinst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1972), (issuance of construction permits for jail); Concerned Residents of Buck Hill Falls v. Grant, 388 F. Supp. 394, 398 (D.C. Pa. 1975), (issuance of a construction permit for a dam); SCRAP v. United States, 346 F. Supp. 189, 198-200 (D.D.C. 1972), (approval of a temporary surcharge to freight tariffs); Sierra Club v. Mason, 351 F. Supp. 419, 426 (D.C. Conn. 1972), (discharge of waste into navigable waterways); Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 788-89 (D.C. Me. 1972), (United States Marine Corps training exercises).

[26] *See* note 19, *supra*.

[27] *See* Deutsch, *supra* note 20, at 19; *see also* F. ANDERSON, JR., NEPA IN THE COURTS (1973) 275-92; YANNACONE & COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES 83-89 (1977 Supp.) [hereinafter cited as YANNACONE & COHEN].

[28] Deutsch, *supra* note 20, at 23-27; YANNACONE & COHEN, *supra* note 27, at 84-89.

[29] The standard of review has been held to be the arbitrary and capricious standard in Kleppe v. Sierra Club, 427 U.S. 390 (1976). This standard had been previously adopted by the Second Circuit in Hanly v. Kleindeinst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1972). In so deciding, the Supreme Court in *Kleppe* settled an issue over which the various circuits were sharply divided.

Courts, however, have paid little attention to what constitutes a "recommendation or a report on a proposal."[30]

Environmental Defense Fund, Inc. v. Adams[31] was the first case to attempt to define "proposal." Judge Sirica in *Adams* relied on the holding in *Kleppe v. Sierra Club*[32] to determine at what point, along the continuum between the original genesis of an idea and its implementation, a court may enjoin a project pending preparation of an EIS.

Kleppe was a landmark holding that narrowed those circumstances in which an EIS is required. In *Kleppe*, the Department of Interior was issuing coal leases and right of ways in order to develop federally owned or controlled coal reserves.[33] The plaintiffs[34] in *Kleppe* urged that preparation of a regional EIS dealing with the environmental impacts to the area known as the Northern Great Plains region of these federal activities was required.[35] The Court, however, decided that a regional EIS was not required because no project was proposed which dealt exclusively with the Northern Great Plains region.[36] The Court said that the only projects proposed were either for action on a local scale, not including the entire region, or for nationwide action encompassing far more than just the region.[37] Consideration of the environmental consequences to the region, therefore, should be considered in both the EIS dealing with the local project and the EIS dealing with the national project.[38] Because there was no regional proposal, there could be no

[30] *See generally* Deutsch, *supra* note 20.

[31] 434 F. Supp. 403 (D.D.C. 1977).

[32] 427 U.S. 390 (1976). In *Kleppe* the Supreme Court interpreted its 1975 holding in Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320 (1975), that an EIS is not required until such time as a "proposal" is made.

[33] 427 U.S. at 395.

[34] Plaintiffs, several environmental organizations, brought suit on behalf of themselves and their members. Standing to do so may be granted if members are "users" of the affected area and will therefore be injured by implementation of the proposed agency action; Sierra Club v. Morton, 405 U.S. 727, 734 (1972); United States v. SCRAP, 412 U.S. 669, 689 (1973); Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).

[35] 427 U.S. at 395.

[36] *Id.* at 400-401.

[37] *Id.* at 399.

[38] *Id.* at 399-400. The local actions included issuance of leases and right-of-way pemits and approval of mining plans. The Coal Programmatic EIS was prepared together with the national coal-leasing program.

regional EIS.[39]

The plaintiff in *Kleppe* asserted and the court of appeals agreed that even though not formally recommended, a regional plan had been contemplated by the Department of Interior in addition to the local and national programs.[40] Therefore, plaintiffs argued, an EIS dealing with the contemplated regional plan was required prior to formal recommendation.[41] The Court answered by stating that only when a proposal is formally submitted for legislative or executive approval without an appropriate EIS may a court intervene and order preparation of an EIS.[42] Implicit is a recognition that the purpose of judicial review of such agency decisions was to insure the agency had carefully considered the environmental consequences.[43]

Thus, the Court in *Kleppe* attempted to determine when an EIS should be prepared, but in doing so, it created new definitional problems. It appears from *Kleppe* that contemplation of a project is not sufficient to give rise to the EIS requirement, regardless of the likelihood of implementation.[44] A recommendation or a report on a proposal must be formally submitted for approval before an EIS is required.[45] The Court in *Kleppe*, however, left undefined the phrase "recommendation or a report on a proposal."

Judge Sirica determined that the issue in *Adams*[46] was whether the revised Plan required by AADA was a "proposal" for major federal action for purposes of NEPA and application of the EIS requirements.[47] Defendant conceded that the revised Plan would significantly affect the quality of the environment and he did not

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[39] *Id.* at 401.

[40] *Id.* at 403.

[41] *Id.*

[42] *Id.* at 405-406. In so stating, the Court expressly rejected a balancing of factors to determine when an EIS was required; see *infra*, note 60.

[43] *See* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 D.C. Cir. 1972). The Court in *Kleppe* noted that questions of environmental impacts are often highly technical questions best dealt with by the federal agencies with their considerable expertise and, therefore, courts should be extremely cautious to substitute their judgment for that of federal agencies.

[44] 427 U.S. at 406.

[45] *Id.*

[46] 434 F. Supp. 403 (D.D.C. 1977).

[47] *Id.* at 407.

question that it would be a major federal action.[48] Defendant did argue, however, that the revised Plan was not a recommendation or a report for which an EIS is required.[49] He argued that too many contingencies outside his control stood between the revised Plan as conceived and the revised Plan as implemented to make it a proposal.[50] Defendant explained that before implementation of the revised Plan would occur, several things might happen which were not present in other contexts in which an EIS might be required.[51] First, application for planning grants might be received from local airport administrators or planners.[52] These grants are used to finance research and development of construction or expansion projects.[53] If the project appears feasible, then application may be made for a development grant which is used to finance the actual construction.[54] The research could indicate that the original idea is not feasible in its current state and must be either revamped or eliminated altogether. As a result of this process, the project as implemented might vary substantially from the project described in the revised Plan.[55]

An additional contingency which may alter the revised Plan is the requirement for annual funding for the Plan by Congress.[56] If Congress refuses to appropriate sufficient funds, projects may never be implemented.[57] If the revised Plan is not implemented as formu-

[48] *Id.* at 406. This is obviously a major federal action since 49 U.S.C. § 1714(b)(1) (1970 & Supp. V 1975) authorizes the Secretary to incur obligations not to exceed 1.46 billion dollars over a five year period. It clearly has significant impact on the environment, as Congress has specifically required the Secretary to consult with various federal officials responsible for preservation of the environment and implement their recommendations if feasible. 49 U.S.C. § 1712(f) (1970 & Supp. V 1975).

[49] *Id.* at 406.

[50] *Id.* at 407.

[51] *Id.*

[52] 49 U.S.C. § 1713 (1970 & Supp. V 1975); *See generally* 41 J. AIR L. & COM. 550 (1975).

[53] *Id.* Planning grants are designed to promote effective location and development of airports in furtherance of the Plan.

[54] 49 U.S.C. § 1714 (1970 & Supp. V 1975); development grants may be used for land acquisition or for the construction, improvement, or repair of an airport.

[55] 434 F. Supp. 403, 407 (D.D.C. 1977).

[56] 49 U.S.C. § 1714 (1970); funding was provided in the original act until 1975. Thereafter, Congress is required to pass new legislation.

[57] An additional problem may be caused by a larger number of applications than was expected. *See* City of Los Angeles v. Coleman, 397 F. Supp. 547 (D.D.C. 1975).

lated, the revision will have proved to be little more than a starting point for discussion and not a proposal for major federal action. Defendant argued, in effect, that the revised Plan was no more than a statement of intention pursuant to which future proposals would be presented.[58]

Judge Sirica rejected Defendant's arguments, concluding that the revised Plan was a proposal.[59] In doing so, he set forth a two pronged test required by *Kleppe*, as he interpreted that case.[60]

> (1) The document must contain a "proposal"—that is, a goal toward which the responsible federal official intends to direct his energies. . . .
>
> (2) The proposal must have well enough defined geographic, temporal, and subject matter limits so that the official can meaningfully address the questions posed in 42 U.S.C. § 4332(2)(c).[61]

While Judge Sirica propounded this standard, he did not apply it during his analysis of the case. Instead, he considered the alleged contingencies and concluded that they were not likely to have a significant impact on the implementation of the revised Plan.[62] Judge Sirica's method of analysis implicitly considered the question: Was the planning of the project to a point that significant change was unlikely? In concluding that it was, Judge Sirica pointed out that the revised Plan was, in large part, based on the needs of the localities as they, themselves, perceived those needs.[63] Given

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[58] 434 F. Supp. at 407.

[59] *Id.*

[60] *Id.* at 406. The Supreme Court, however, rejected a test used by Judge Skelly Wright who, writing for the court of appeals in *Kleppe*, suggested four questions which should be considered:

> 1) How likely is the program to come to fruition, and how soon will that occur?
> 2) To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects?
> 3) To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses?
> 4) How severe will be the environmental effects if the program is implemented?

514 F.2d 856, 880 (D.C. Cir. 1975). *Cf.* the dissenting opinion of Justice Marshall who endorsed Judge Wright's four factor test at 427 U.S. 415.

[61] 434 F. Supp. at 406.

[62] *Id.* at 407.

[63] *Id.*

that, it was unlikely that they would deviate from the revised Plan.[64] Additionally, Judge Sirica cited the highly attractive subsidies to municipalities provided through AADA as substantial incentives to implement the revised Plan as it exists.[65]

While the conclusion reached in *Adams* is appropriate in light of the policies of NEPA,[66] the standard suggested by Judge Sirica, is not required by the *Kleppe* case, and does not conform to that holding. The first part of the test, the definition of proposal,[67] is too broad to comply with the *Kleppe* standard when standing alone. When applied to the facts in *Adams*, the potential for overreach in the definition becomes apparent. In *Adams*, the defendant published a document which contained a goal—airport development—towards which he intended to direct his energies. Using Judge Sirica's definition of proposal, that alone was sufficient to require an EIS. The possible contingencies involved would not be relevant. The Supreme Court's holding in *Kleppe* indirectly rejects such a definition stating: "A court has no authority to . . . determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*"[68]

While the second half of Judge Sirica's standard[69] appears to respond to this statement by the Supreme Court, it fails under analysis. A federal official may have developed a "potential proposal" to the point that it is sufficiently limited in terms of subject matter for him to respond in an EIS analysis and yet still be within the "germination process." A logical conclusion from the above analysis is that the official preparing the statement must be willing to urge an irretrievable commitment to the project. Not until then

[64] *Id.*

[65] *Id.*

[66] Few clear trends have emerged from the six years of litigation NEPA has provoked. *See* Deutsch, *supra* note 20 at 18; ANDERSON, NEPA IN THE COURTS 275-292 (1973). The observation has been made, however, that on close issues, courts seem to favor requiring preparation of an EIS. ANDERSON, *Id.* at 279. This is consistent with the language of NEPA stating that federal officials shall comply with the requirements contained therein to the "fullest extent possible." 42 U.S.C. § 4332 (1970); *See generally* S. REP. No. 91-296, 91st Cong., 1st Sess. and 115 CONG. REC. 40415 (1969) for part of the legislative history. Moreover, AADA requires consideration of environmental factors, although not to the same degree that NEPA requires with an EIS.

[67] 434 F. Supp. 406.

[68] 427 U.S. 406 (emphasis in original).

[69] 434 F. Supp. 406.

will the "germination process" be complete. To suggest that the project must have sufficiently defined limits to allow a meaningful EIS begs the question of when that occurs.

The actual analysis used by Judge Sirica in *Adams* suggests a different standard than the one propounded by him which may well conform to tests required by *Kleppe*. Judge Sirica considered the alleged contingencies which might affect the final implementation of the revised Plan and decided that they were not likely to significantly alter that final implementation.[70] As previously suggested, Judge Sirica implicitly considered whether the planning of the project was to a point that significant change was unlikely.[71] That standard would seem to comport with the holding in *Kleppe*, whereas the tests suggested by Judge Sirica do not.[72] When change is unlikely, it is logical to assume that the "germination process" is complete and also, that the official is now ready to urge an irretrievable commitment to the project.

While the proffered standard by Judge Sirica does not conform to the *Kleppe* holding and should therefore not be used, his opinion suggests a standard which does adhere to *Kleppe* when the project under attack is assailed as not being sufficiently complete as to subject matter to actually constitute a proposal. The proper inquiry becomes whether the planning of the project has reached a point at which significant change is unlikely. Assuming that the responsible official is also ready to urge an irretrievable commitment to the project, then it is properly characterized as a proposal under NEPA.[73]

Thomas J. Terkel

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[70] *Id.* at 407.

[71] *Id.*

[72] This test does not overstep the *Kleppe* limits in that it is addressed solely to whether a proposal has yet been formulated. Judge Wright's test, *see* note 60, *supra*, failed because the first factor was the only one which addressed the issue of whether a proposal had yet been formulated. To that extent, the focus of the entire standard was misplaced.

[73] The case was not appealed by the government which, through a spokesman from the Justice Department, explained that its failure to appeal should not be considered indicative of acquiescence. It would appear that the pressing time element, (AADA required submission of the revised Plan by January 1, 1978), combined with the preliminary stage of the litigation, (the appeal would have been taken from a judgment granting a motion for summary judgment) played a significant role in the government's decision.

PRODUCT LIABILITY—DAMAGE TO THE PRODUCT ITSELF—When a Defect in a Product Causes Damage Only to the Product Itself, the Resulting Loss Is an Economic Loss Not Recoverable Under the Tort Concept of Strict Product Liability. *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 21 Tex. Sup. Ct. J. 481 (July 12, 1978).

Bobby Shivers, doing business as Shivers Flying Service, acquired a wrecked single engine aircraft for repair and sale. Shivers repaired the airframe, and Robert D. Hawkins, under contract to Shivers, repaired the engine. Shivers sold the repaired aircraft "as is" to Mid Continent Aircraft Corporation (Mid Continent), who resold it "as is" to Curry County Spraying Service (Curry). When Curry had clocked approximately thirty hours of engine time, the engine quit in flight during a spraying operation. The resulting forced landing caused several thousand dollars damage to the fuselage and wings, but no damage to any other property, and no personal injury to the pilot.

Curry brought action against Mid Continent, Shivers, and Hawkins for, *inter alia*, the cost of repairing the aircraft. Curry based the action on implied warranties of merchantability and fitness, on negligence in failing to discover and correct or warn of the defect, and on strict liability in tort for an unreasonably dangerous defect in the engine.

The trial court decreed that Curry and its insurer recover jointly and severally from Mid Continent, Hawkins, and Shivers not only for repair costs but also for the cost of renting a replacement aircraft while repairs were being made. The liability of Hawkins was grounded in negligence, while the liability of Mid Continent and Shivers was based on strict liability. Only Mid Continent appealed the judgement. The Texas Court of Civil Appeals affirmed, holding that damage to a product caused by a defect in the product itself is within the protection of modern strict product liability, and further, that merely by conditioning a sale upon acceptance of an "as is" provision, the seller has not avoided this strict liability.[1] Again, Mid Continent perfected its appeal;

[1] Mid Continent Aircraft Corp. v. Curry Spraying Service, Inc., 552 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977), *rev'd*, 21 Tex. Sup. Ct. J. 481 (July 12, 1978).

this time to the Texas Supreme Court. *Held, reversed*: When a defect in a product causes damage only to the product itself, the resulting loss is an economic loss not recoverable under the tort concept of strict product liability. *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 21 Tex. Sup. Ct. J. 481 (July 12, 1978).

The exact extent of coverage under the strict product liability concept, set out in the Restatement (Second) of Torts, Section 402A[2] [hereinafter referred to as Section 402A], has yet to be determined. The existence of doctrinal interstices within the concept is hardly surprising, in light of the relative infancy of this strict product liability approach. Although the concept of strict liability in the abstract is not new,[3] its application in the modern sense did not begin until 1962.[4] Since that time a large majority of states has embraced the concept.[5]

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[2] RESTATEMENT (SECOND) OF TORTS § 402A (1965). Special Liability of Seller of Product for Physical Harm to User or Consumer.

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

[3] Dean Prosser traces strict liability in food cases to the year 1431. Prosser, *Assault on the Citadel*, 69 YALE L.J. 1099, 1104 (1960).

[4] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[5] Since strict product liability was adopted in Greenman v. Yuba Power Products, Inc., in 1962, at least thirty-eight states have either adopted 402A or an approach substantially similar to it. They are as follows:

1965: Illinois, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Kentucky, Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Michigan, Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); New Jersey, Santor v. A and M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965);

1966: Mississippi, State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); Ohio, Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Pennsylvania, Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Tennessee, Ford Motor Company v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966);

1967: Oregon, Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); Texas, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Wisconsin, Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967);

1968: Arizona, O. S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968);

1969: Alaska, Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); Minnesota, Kerr v. Corning Glass Works, 284 Minn. 115, 169

Modern strict tort liability had as its first concern, and today has as its primary concern, physical injury to the plaintiff himself.[6] At the other end of the spectrum lies the purely economic losses such as disappointment of the expectancy interest and lost profits, about which there is uniform agreement that no recovery lies in strict tort liability.[7] The area between these two extremes causes considerable trouble, with the courts often stumbling over semantics while attempting to sort the equities. The issue of the degree of coverage afforded by Section 402A where there is no bodily injury to the plaintiff, and the only property damage occurring is to the defective product itself, is one of the troublesome questions in this area.[8] It has been squarely met in only a few juris-

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N.W.2d 587 (1969); New Hampshire, Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); Washington, Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969);

1970: Connecticut, Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970); Hawaii, Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Indiana, Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970); Iowa, Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Nevada, Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); Vermont, Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970);

1971: Louisiana, Weber v. Fid. & Cas. Ins. Co. of New York, 259 La. 599, 250 So.2d 754 (1971); Nebraska, Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Rhode Island, Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971);

1972: New Mexico, Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972);

1973: Colorado, Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 33 Colo. App. 99, 517 P.2d 406 (1973); Montana, Brandenburger v. Toyota Motor Sales, 162 Mont. 506, 513 P.2d 268 (1973); New York, Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); South Dakota, Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973); Utah, Julander v. Ford Motor Co., 488 F.2d 839 (10th Cir. 1973);

1974: Idaho, Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Missouri, Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Oklahoma, Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974);

1976: Alabama, Atkins v. American Motors Corp., 335 So.2d 134 (Ala. 1976); Florida, West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976); Maryland, Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976);

1977: Ohio, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

[6] *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (Plaintiff injured due to defect in a power tool).

[7] *See* Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966).

[8] *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:21 (2d ed. 1974).

dictions, with no unanimity of opinion.[9] A few courts have disallowed strict tort recovery regardless of whether the damage suffered was due to the mere discovery of a defect in the product, or rather, to a defect in a part of the product which in turn caused damage to the remainder.[10] Other courts indicate an inclination

[9] Included in the courts which have explicitly sanctioned recovery for damage to the product itself are Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1953) (Damage to product itself recoverable under strict liability), and Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1976) (Inclusion of damage to the product sold said to be "wiser view").

Among the courts which have expressed a disinclination toward allowing recovery are the following: Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973) (Property damage held not to be within scope of strict products liability where scaffolding self-destruction caused by defect in scaffolding); Long v. Jim Letts Oldsmobile, Inc., 135 Ga.App. 293, 217 S.E.2d 602 (1975) (Damage to product itself not contemplated as interest protected by products liability negligence rule); West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) (Strict liability held to be applicable only where the defective product causes injury to a human being).

Where the question has arisen only as part of a collateral issue, the courts have been inclined to allow recovery. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (Implicit that damage to truck recoverable in strict liability where the truck's brakes had failed); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966) (Damage to automobile in fire caused by defect in wiring of the automobile held recoverable in strict liability); Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968) (Dicta indicating that product itself no different from other property of plaintiff within 402A); MacDougall v. Ford Motor Co., 214 Pa. Super. Ct. 384, 257 A.2d 676 (1969) (Implicit that steering defect in auto gives rise to recovery in strict liability for damage to the auto); Brownell v. White Motor Corp., 260 Or. 251, 490 P.2d 184 (1971) (Implicit that damage to truck recoverable in strict liability where truck ran off roadway because of defect in the truck); Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973) (Implicit that damage to auto caused by defect recoverable where the plaintiff was also physically injured); Southwire Co. v. Beloit Eastern Corp., 370 F. Supp. 842 (E.D.Pa. 1974) (Interpreting Pennsylvania law, implicit that damage to "tubular strander" caused by a defect in it would have been recoverable had the other conditions of 402A been met); Forsyth v. Cessna Aircraft Co., 520 F.2d 608 (9th Cir. 1975) (Interpreting Oregon law, implicit that damage to aircraft itself recoverable in strict liability where crash landing necessitated by faulty landing gear); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977) (Expressed that damage to a mobile home caused by a defect in the mobile home is recoverable within the meaning of 402A).

There is conflicting authority within the state of Georgia. Long Mfg., N.C., Inc. v. Grady Tractor Co., 140 Ga.App. 320, 231 S.E.2d 105 (1976) (Disallowing recovery for damage to the defective product); Mike Bajalia v. Amos Constr. Co., 142 Ga.App. 225, 235 S.E.2d 664 (1977) (Allowing recovery for damage to the defective product).

[10] *See, e.g.*, Air Products and Chem., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414 (Wis. 1973), where the court stated:

> [T]he trial court reasoned that before a cause of action for strict liability could be started . . . , it must be alleged that the defective product actually caused *physical harm* to property of the plaintiff,

toward allowing recovery in either case.[11] Still others have made a distinction, allowing recovery in the latter case but not in the former.[12] In Texas the issue had not previously arisen, although some cases contained dicta which indicated sympathy with the concept of allowing the recovery.[13]

The non-resolution of the product-damage question has been affected by at least two considerations. First, the tort-contract dichotomy in the development of the concept of strict liability has rendered this an area which some believe is better governed by the Uniform Commercial Code.[14] This approach is particularly

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> and that the property harmed must be property *other than itself*; to put it another way, the complaint must set forth damages for something other than pure economic loss.

Id. at 425 (emphasis in original). The court relied on the Pennsylvania law review comment which defined economic loss as the "diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *See* note 7 *supra*, at 541.

[11] *See, e.g.*, A-Leet Leasing Corp. v. Kingshead Corp., 150 N.J. Super. 384, 375 A.2d 1208, 1210, (App. Div. 1977) (The liability of a manufacturer for economic losses, as opposed to personal injury or property damage, said to be possible under strict tort liability). *See also* Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (Seller of carpet held strictly liable for consumer's cost where carpeting proved to be defective).

[12] The court in Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977), drew a fairly logical distinction, relying on Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966). "[W]e note that sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss." 563 P.2d at 251.

[13] Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (While denying recovery for defects in a trailer, the court added, in response to motions for rehearing, "In the absence of evidence from which it can be inferred that defects in existence when the trailer was sold by the manufacturer caused physical harm to the trailer, as opposed to economic loss to the purchaser, the doctrine of strict liability is not applicable. . . ." *Id.* at 828); O. M. Franklin Serum Co. v. C. A. Hoover & Son, 418 S.W.2d 482 (Tex. 1967) (Extended strict liability protection to the property of the ultimate consumer generally). *But see* Thermal Supply of Texas, Inc. v. Asel, 468 S.W.2d 927 (Tex. Civ. App.—Austin 1971, no writ) (The doctrine of strict liability in tort held not to apply to purely economic losses).

[14] *See, e.g.*, Sales and Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 143 (1977) [hereinafter cited as Sales and Perdue]; Hiigel v. General Motors Corp., 544 P.2d 983, 990 (Colo. 1976) (dissenting opinion); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973). Also *see generally*, Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Comment, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law To Be Applied*, 54 CAL. L. REV. 1681 (1966).

well-grounded where the parties are business persons in a commercial setting, rather than the merchant "engaged in the business of selling" and the unsuspecting "consumer" which Section 402A seems to envision.[15] Second, the issue simply has not been litigated. Not only are equipment problems normally covered by the highly refined manufacturers' warranties, but also the self-destruction of a piece of machinery is just not as fertile ground for litigation as is, for example, the loss of, or the impairment of, anatomical appendages by the more "fortunate" personal injury plaintiff.

If a decision is made that product damage is within the ambit of Section 402A coverage, a court will still likely be faced with a defense such as disclaimer of warranties. Notwithstanding the judicial disapproval of disclaimers of liability found in *Henningsen v. Bloomfield Motors, Inc.*,[16] in a commercial transaction between parties of comparable bargaining power, it is not deemed unreasonable that they should be allowed to negotiate the allocation of risk and liability.[17] Section 402A is explicit, however, in stating that it is not governed by the Uniform Commercial Code nor affected by limitations on scope and content of warranties.[18]

Two cases tried in federal court represent current judicial thinking on the topic. In the first, *Keystone Aeronautics Corporation v. R. J. Enstrom Corporation*,[19] a buyer of used helicopters sued his

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[15] *See* note 2 *supra*.

[16] 32 N.J. 358, 161 A.2d 69 (1960).

[17] *See generally*, McNichols, *Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494 (1975); Sales and Perdue, *supra* note 14, at 84-88; and Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966). *See also* Delta Air Lines, Inc. v. Douglas Aircraft Co., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965); Keystone Aeronautics Corp. v. R. J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974); and Turner v. Int'l Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (Law Div. 1975).

[18] Comment m to 402A states, in part,

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. . . . The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands.

[19] 499 F.2d 146 (3d Cir. 1974).

seller. One of the purchased helicopters sustained substantial damage during a crash landing occasioned, according to Keystone, by a defect in the helicopter. Keystone brought an action grounded in negligence, and in strict liability under Section 402A. The warranty exclusion, besides declaring the sale to be " 'as is' " without warranties," also provided that "[t]he R. J. Enstrom Corporation will be held harmless of any liability in connection with this sale."[20] This was held not to express the clarity of intent necessary to exculpate Enstrom from either strict liability or negligence under Pennsylvania law.[21] The second case, *Sterner Aero AB v. Page Airmotive, Inc.*,[22] involved damage to an aircraft resulting from engine failure on takeoff. The warranty on the aircraft stating that it was "expressly in lieu of any and all other warranties or representations express or implied"[23] was held inadequate, under Oklahoma law, to relieve Page from liability in negligence. As to Sterner's action in strict liability, the court ruled that Comment m to Section 402A[24] precluded any defense based on a contractual disclaimer.[25]

Nevertheless, sellers are allowed more freedom when dealing with commercial entities than when dealing with consumers. In *Delta Air Lines, Inc. v. Douglas Aircraft Co.*,[26] a malfunctioning nose wheel caused extensive damage to the aircraft which Douglas had sold to plaintiff Delta. Douglas, in defense of the action in negligence and implied warranty, relied on exculpatory language in the sale contract which expressly negated implied warranty and negligence as basis for recovery. In holding for Douglas, the court drew a contrast between the plaintiff Delta and the more vulnerable "consumer" plaintiff protected by the recent judicial disfavor of exculpatory clauses and disclaimers.[27] This reasoning seems equally

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[20] *Id.* at 148.

[21] *Id.* at 150.

[22] 499 F.2d 709 (10th Cir. 1974).

[23] *Id.* at 711.

[24] *See* note 18 *supra* for the text of Comment m.

[25] Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 711 (10th Cir. 1974).

[26] 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965).

[27] Said the court,

> Delta, bargaining for the purchase and delivery of an airplane yet to be built, is hardly the painwracked sufferer seeking admission to

applicable to strict tort liability. While other recent cases generally support the *Delta Air Lines* case with similar holdings,[28] perhaps the most succinct statement to date concerning the disclaiming of Section 402A liability was made by the Oregon Supreme Court. In *K-Lines, Inc. v. Roberts Motor Company*,[29] that court said,

> Comment *m.* to Restatement (Second) §402A was meant to explain that such garden variety disclaimers were not sufficient to disclaim the strict liability established by 402A because 402A was not based on warranty. It means simply that a disclaimer of "*warranties*" is not sufficient to affect strict liability in tort.[30]

The Oregon court then proceeded to hold that an unambiguous limitation of liability between parties, once again, of equal bargaining power, was not invalid as circumventing 402A.

In Texas, even as the Supreme Court approached consideration of *Mid Continent Aircraft Corp. v. Curry Spraying Service, Inc.*,[31] the jurisprudence of the state was resounding the effect of three other product liability decisions of the court. The first, *General Motors Corp. v. Hopkins*,[32] saw the court fashion product misuse into a partial defense to a strict product liability action, using a principle of comparative causation.[33] The second, *General Motors Corp. v. Simmons*,[34] found a right to contribution among tortfeasors whose liabilities are grounded respectively, in strict liability and fault-based torts.[35] The third, *Nobility Homes of Texas, Inc.*

> the hospital . . . it was not faced . . . with an industry wide stock contract not open to negotiation; it is not now faced with a "fine print" clause not known to it when it signed the contract; and it did not stand as a single inexperienced individual purchaser vis-a-vis with a large seller relatively indifferent to the making or not making of a single purchase.

47 Cal. Rptr. at 523.

[28] *See, e.g.*, Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) (Held that in Illinois less specificity required in commercial transactions than in consumer dealings in order to effect a limitation of liability for negligence); Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974) (Exculpatory clause in negligence upheld absent a showing "that these giant industrial organizations were of unequal bargaining power." *Id.* at 525).

[29] 541 P.2d 1378 (Or. 1976).

[30] *Id.* at 1381.

[31] 21 Tex. Sup. Ct. J. 481 (July 12, 1978).

[32] 548 S.W.2d 344 (Tex. 1977).

[33] *Id.* at 349.

[34] 558 S.W.2d 855 (Tex. 1977).

[35] *Id.* at 862.

v. Shivers,[36] declared that strict liability does not apply to mere economic losses, as opposed to physical damage.[37] These decisions effect a substantial reduction in the potential liability of a Section 402A defendant. This reduction may have been premised in part on a need for simplification and reduction of coextensive coverage by the various bases of product liability.[38]

That the court took its opportunity in *Mid Continent* to further reduce the perimeter of 402A liability thus came as no surprise. It defined the problem presented by the case as simply "whether injury to the product itself is a type of loss that requires contract language explicitly allocating the loss to the buyer before the seller can avoid liability,"[39] or whether a general contract of purchase "as is" should "be sufficient to place the loss on the buyer."[40] After noting the wide split of authority on the issue, the court made brief mention of various cases of import, including *Keystone Aeronautics*[41] and *Sterner Aero*.[42] The court's actual reasoning, however, seemed to center on the historical role of Section 402A in relation to that of the Texas version of the Uniform Commercial Code.[43] Since Section 402A arose "to compensate consumers for personal injuries," and damage to the product itself is "essentially a loss of the benefit of the bargain," the court found such a loss to be mere economic loss.[44] Because the "as is" terms of the sale eliminated any possibility of recovery in implied warranty,[45] and because Mid Continent had not been found negligent by the trial court, recovery could only be had in strict tort liability. However, since *Nobility Homes* held that 402A does not include liability for pure

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[36] 557 S.W.2d 77 (Tex. 1977).

[37] *Id.* at 80.

[38] According to Dean Page Keeton, "Products liability law has become unnecessarily complex, primarily because recovery for a particular kind of loss may often be obtained under three separate theories: negligence in tort, strict liability in tort, and strict liability for breach of warranty." Keeton, *Torts*, 32 Sw. L.J. 1, 1 (1978).

[39] 21 Tex. Sup. Ct. J. at 482.

[40] *Id.*

[41] 499 F.2d 146 (3d Cir. 1974).

[42] 499 F.2d 709 (10th Cir. 1974).

[43] 21 Tex. Sup. Ct. J. at 483.

[44] *Id.*

[45] *Id.* at 484.

economic loss,[46] respondent Curry was in short order found to be without remedy.[47]

The significance of the court's holding that strict liability does not lie for damage to the product itself can best be considered in terms of the opinions of the lower court and the dissent in the Supreme Court, which directs attention to the Pandora's box of inconsistencies leading to, and resulting from, a contrary holding. The lower court, in holding damage to the product itself to be within Section 402A, relied in part on *Santor v. A and M Karagheusian, Inc.*,[48] a New Jersey decision.[49] In doing so, it made the wrong decision for the wrong reason. *Karagheusian* created a strict liability doctrine conceptually alien to the Section 402A "unreasonably dangerous" approach. A carpet seller was held strictly liable for the cost of certain defectively woven carpet which he had sold to the plaintiff. The court found liability arising from the mere presence of the carpeting on the market.[50] Although the *Karagheusian* court quoted at length from *Greenman v. Yuba Power Products, Inc.*,[51] the California decision which set the pace in applying strict liability to dangerously defective goods, *Karagheusian* nowhere made reference to any dangerous quality in the carpeting.[52] Texas, on the other hand, has never had a strict tort liability theory except of the Section 402A variety.[53] Thus any reliance on *Karagheusian* is tenuous at best, a fact recognized by the court in *Nobility*

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[46] 557 S.W.2d at 80.

[47] 21 Tex. Sup. Ct. J. at 484.

[48] Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc., 553 S.W.2d 935, 940 (Tex. Civ. App.—Amarillo 1977), *rev'd*, 21 Tex. Sup. Ct. J. 481 (July 12, 1978).

[49] Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[50] 207 A.2d at 312.

[51] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[52] In Seely v. White Motor Co., 61 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), the California Supreme Court chided the New Jersey court for misapplying the *Greenman* strict liability approach. "Only if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort." 403 P.2d at 151.

[53] Section 402A was expressly embraced by the Texas courts in McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967), in which the court said, "Insofar as foodstuffs for human consumption are concerned, this section [402A] states the law as followed in Texas. We are further of the opinion that as a logical proposition the rule . . . should be held applicable to defective products which cause physical harm to persons." *Id.* at 789 (citations omitted).

Homes.[54] The *Mid Continent* dissenting opinion avoided entirely the *Karagheusian* inconsistency. Relying instead on the specific words of 402A, the dissent reasoned:

> The majority opinion adds a word to the existing rule and to section 402A by requiring that the physical harm be to "other" property. Section 402A does not contain that limitation. It says that strict liability applies when there is "physical harm thereby caused to the ultimate user or consumer, *or to his property*. . . ."[55]

That a product, although defective, nevertheless is property of the consumer is obvious. Said the Pennsylvania Supreme Court, "[T]he defective product itself is as much 'property' as any other possession of the plaintiff that is damaged as a result of the manufacturing flaw."[56] The fact neglected by the Pennsylvania court, as well as by the *Mid Continent* dissent, is that the adoption of Section 402A is for the most part judge-made law.[57] As such, its interpretation, expansion, and limitation depends only upon the interpretations given it by the courts. A policy decision is involved in determining whether the Uniform Commercial Code should have sole authority over this area of the sale of goods, or if the strict tort concept should be retained as an additional tool.[58] This decision should be made consciously after study of the various jurisprudential considerations in the particular jurisdiction, rather than by black letter adherence to a standard which at worst may be arbitrary, and at best is artificially self-imposed.

The Texas Supreme Court has now made that policy decision. In holding that damage to the product itself does not fall within Section 402A, the court set policy in favor of simplicity and predictability, and against ambiguity and duplicative remedies. Determining just what was the "product" will generally be straightforward.[59] This done, the plaintiff can categorize his losses according

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[54] 557 S.W.2d at 79.

[55] 21 Tex. Sup. Ct. J. at 486 (emphasis in the opinion).

[56] Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848, 854-55 n.7 (1968).

[57] *See, e.g.*, Sales and Perdue, *supra* note 14, at 1-25; W. PROSSER, LAW OF TORTS 98 (4th ed. 1971).

[58] *See* Keeton, *Torts*, 32 Sw. L.J. 1, 5 (1978).

[59] There certainly will arise situations requiring judicial clarification, such as when all the component parts (each a product) of a larger machine (itself arguably a product) are purchased from the same vendor. The courts may be required to determine on a case-by-case method whether 402A will apply when for

to whether they involved the product, his other property, or personal injury. Losses concerning the product itself, whether due to conspicuous failure resulting from a defect, or diminution in value due to the mere existence of the defect,[60] will be governed by the Uniform Commercial Code and policed by the fault based torts. Losses relating to other property and personal injury will retain those remedies while receiving added judicial protection in the form of Section 402A strict liability.

The state of affairs in Texas is not, however, without some serious uncertainty after *Mid Continent.* The express holding in the case is limited in its terms to transactions between commercial entities, and to situations in which absolutely no injury occurred to persons or property other than the product.[61] In view of consumer protection arising not only from the Uniform Commercial Code and fault based torts, but also from deceptive trade practices laws[62] and federal warranty legislation,[63] the extension of the holding in this case to consumer transactions seems logical but not at all certain. Of greater concern than the consumer protection question, moreover, is the implication that, in cases where there is damage other than to the product itself, the product damage may be folded back into the general recovery possible under Section 402A. In a bit of disturbing dicta in *Signal Oil & Gas Co. v. Universal Oil Products,*[64] a companion case to *Mid Continent,* the Texas Supreme Court indicated that where the product causes damage to other property, the product has become an "accident risk," and as such is properly includable in property damage, rather than economic

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example a component causes damage to another component. *See generally* Signal Oil & Gas Co. v. Universal Oil Prods., 21 Tex. Sup. Ct. J. 472 (July 12, 1978).

[60] The court drew no distinction between these two kinds of damage.

[61] 21 Tex. Sup. Ct. J. at 483.

[62] *See, e.g.,* Belobaba, *Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection,* 15 OSGOODE HALL L.J. 327 (1977); and Comment, *Breach of Warranty and Treble Damages under the Texas Deceptive Trade Practices and Consumer Protection Act,* 28 BAYLOR L. REV. 395 (1976).

[63] *See generally,* Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties,* 27 MERCER L. REV. 1111 (1975); and Note, *Consumer Product Warranties under the Magnuson-Moss Warranty Act and the Uniform Commercial Code,* 62 CORNELL L. REV. 738 (1977).

[64] 21 Tex. Sup. Ct. J. 472, 475 (July 12, 1978).

loss.[65] If by this the court meant to announce that any non-product damage is sufficient to remove the product damage from the category of economic loss, then the rule embraced in *Mid Continent* is fraught with inconsistency and difficulty of application. It seems inconceivable that Mid Continent's Section 402A liability for damage to the aircraft could turn on whether the Curry pilot managed also to break his wristwatch in the forced landing.[66] Yet, this seems to be the logical extension of the *Signal Oil* dictum. Unquestionably the *Mid Continent* dissent did not place such a paradoxical interpretation on the majority holding,[67] and the scholarly writing upon which the court relied certainly does not require it.[68] Nevertheless, only time and litigation will tell whether the court will choose to confirm the unsettling implications of *Signal Oil.*

Assuming that the *Mid Continent* holding may be taken in its broader sense, the Texas court's determination that damage to the product itself is economic damage not within Section 402A is eminently reasonable. Instead of leaving its lower courts another series of questions with which to contend, the supreme court has endorsed the simplest test of all for ascertaining the extent to which recovery will lie under Section 402A for damage to the product itself. The courts and, more importantly, merchants should now be able to rely on commercial law as embodied in the Uniform Commercial Code to govern the obligations of the parties concerning goods sold. If the Texas Supreme Court solidifies its holding in *Mid Continent* as standing for the proposition that recovery for damage to a product caused by a defect in the product must be had outside of Section 402A, then *Mid Continent* may prove to be a milestone in the development of product liability law. If, however, the court decimates the *Mid Continent* rule with exceptions and narrowing construction, then this area of product law will lose not only a valuable precedent, but also a crucial concept.

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[65] *Id.*

[66] If the watch took a licking, but it kept on ticking, then there would lie no 402A liability for the aircraft damage.

[67] In *Mid Continent* the dissent recited a hypothetical concerning a defective jet aircraft which crashes into an assortment of other aircraft and personnel. The dissent predicted that the owner of the jet would be without a tort remedy. 21 Tex. Sup. Ct. J. at 487.

[68] *See* Keeton, *Torts,* 32 Sw. L.J. 1, 5 (1978).

It is to be hoped that the Texas court, as well as other state courts, are aware of this and will use time in the interest of simplicity and predictability, by affirming the rule which is at once fair and understandable.

H. Michael Warren

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