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Casenotes and Statute Notes

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Casenotes and Statute Notes

FEDERAL COURTS—FORUM NON CONVENIENS—The Mere Possibility of Laws in an Alternative Forum Being Less Favorable to a Plaintiff Should Not Bar Dismissal of a Suit on the Grounds of Forum Non Conveniens. *Piper Aircraft Co. v. Reyno*, — U.S. —, 102 S.Ct. 252 (1981).¹

On July 27, 1976, a small chartered commercial aircraft crashed in the Scottish highlands, near the town of Talla.² The pilot and all five passengers were killed immediately. There were no eye-witnesses. The pilot and passengers were Scottish subjects and residents, as were their heirs and next of kin.³

The aircraft was operated by a Scottish air taxi service, McDonald Aviation Ltd., which leased it from another Scottish company, Air Navigation and Trading Co., which owned and maintained the aircraft.⁴ The British Department of Trade investigated the accident soon after it occurred and

¹ Piper Aircraft Co. and Hartzell Propeller, Inc. filed separate petitions for writ of certiorari. The Supreme Court granted these petitions and consolidated the two cases for argument. 101 S.Ct. 1347. In Hartzell's case, the Supreme Court limited the grant of certiorari to whether a motion to dismiss on grounds of *forum non conveniens* must be denied whenever the law of the alternate forum is less favorable. The three questions presented by Hartzell's petition which were not included in the grant of certiorari were as follows: (1) whether the choice of forum of a non-resident alien plaintiff is entitled to the same weight as that of a citizen or resident plaintiff in a *forum non conveniens* inquiry; (2) whether the district court's determination that public and private interest factors weigh in favor of dismissal on *forum non conveniens* grounds constitutes an abuse of discretion; and (3) whether a party seeking a *forum non conveniens* dismissal must identify with particularity witnesses and the substance of their testimony. Brief for Petitioner (Hartzell Propeller, Inc.) at (i), Piper Aircraft Co. v. Reyno, 102 S.Ct. 252 (1981).

² The aircraft involved was a seven-year-old twin engine Piper Aztec, model PA-23-250. *Id.* at 2. It was registered in Great Britain and bore British registration mark G-AYSF. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 729 (M.D. Pa. 1979).

³ Reyno v. Piper Aircraft Co., 479 F. Supp. at 730.

⁴ Piper Aircraft Co. v. Reyno, 102 S.Ct. 252, 257 (1981).

suggested in a preliminary report that mechanical failure in the plane or propeller was responsible for the crash.⁵ This report was reviewed by a British Review Board in an adversary proceeding attended by all interested parties.⁶ The Review Board found that the evidence of mechanical failure was inadequate to establish such failure as the cause of the accident and indicated that pilot error may have been a contributing cause.⁷ Gaynell Reyno,⁸ a California resident, was appointed administratrix of the estates of the five deceased passengers, and on July 27, 1977, commenced a wrongful death and survivor action on their behalf in the Superior Court of California.⁹ Reyno sued Piper Aircraft Company ("Piper"), a Pennsylvania corporation which manufactured the plane, and Hartzell Propeller, Inc. ("Hartzell"), an Ohio corporation which manufactured the propellers, under theories of strict liability and negligence.¹⁰ Scottish law does

⁵ *Id.* The wreckage was retained by the British Department of Trade and Industry. *Piper*, 429 F. Supp. at 730. The British Department of Trade and Industry has the general duty of organizing, carrying out and encouraging measures for the design, development and production of civil aircraft, promoting safety and efficiency in their use, and researching questions relating to air navigation. Civil Aviation Act 1949, § 1 (I).

⁶ *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 252, 257 (1981). In the United Kingdom, any person notified that his reputation is likely to be adversely affected by an Inspector's investigation report of an aviation accident may obtain a review of the findings which attribute any degree of blame to him. Civil Aviation (Investigation of Accidents) Regulations 1969, reg. 13 (1), (2). The review board consists of a person appointed by the Lord Chancellor, sitting with such technical advisors, if any, as may be appointed. *Id.* In this case, the Review Board studied the findings of the Investigator's report at Hartzell's request. *Piper Aircraft Co. v. Reyno*, 102 S.Ct. at 257.

⁷ Talla is located in a mountainous region of Scotland noted for severe air turbulence known as "mountain waves." The Review Board found that the pilot was flying at a much lower altitude than required by his company's regulations concerning minimum altitude in such areas. Brief for Petitioner at 3, n.4, *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 252 (1981).

⁸ Reyno was a legal secretary to the attorney who instituted this suit. She is not related to any of the decedents or their survivors. *Piper Aircraft*, 102 S.Ct. at 257.

⁹ Scottish law would not permit such a claim by the personal representative of the estate of a decedent. It allows wrongful death actions only when brought by a relative of the decedent and limits recovery to "loss of support and society." *Piper Aircraft*, 102 S.Ct. at 257.

¹⁰ The manufacturer of the plane's engine, Avco-Lycoming, Inc., was also named as a defendant but was later dismissed by stipulation of the parties. *Reyno v. Piper Aircraft Co.*, 630 F.2d. 149, 154 (3d Cir. 1980), *rev'd*, 102 S.Ct. 252 (1981).

not recognize strict liability in tort, and Reyno admittedly filed the action in the United States because its laws are more favorable to her position.¹¹

The pilot was not a party to the suit filed by Reyno. The survivors of the five deceased passengers brought a separate suit in the United Kingdom against the pilot's estate, Air Navigation, and McDonald Aviation.¹² The pilot's estate instituted a suit in the United Kingdom against Piper, Hartzell, Air Navigation and McDonald Aviation.¹³

In August of 1977, on motion by defendants,¹⁴ Reyno's action was removed to the United States District Court for the Central District of California.¹⁵ Subsequently, the District Court transferred the action to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).¹⁶

After the transfer, Hartzell moved to dismiss the case on the ground of *forum non conveniens* contending that the case should be heard in Scotland.¹⁷ Piper filed a similar motion.¹⁸

¹¹ *Piper Aircraft*, 102 S.Ct. at 257.

¹² *Id.*

¹³ *Id.* at 257 n.2.

¹⁴ Hartzell did not join in the petition for removal, which was made by Piper and Avco-Lycoming, Inc. Avco was later dismissed from the suit. *See supra* note 6.

¹⁵ The action was removed on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a) (1976), pursuant to 28 U.S.C. § 1441 (1976). Brief for Petitioner (Piper Aircraft) at 3, *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252 (1981).

¹⁶ 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Hartzell moved for dismissal for lack of personal jurisdiction or in the alternative for transfer pursuant to 28 U.S.C. § 1404(a). Piper joined in the motion to transfer. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. at 729. The District Court granted Piper's motion to transfer and Hartzell's motion to quash service for lack of personal jurisdiction. *Id.* The District Court did not dismiss the action as to Hartzell because valid service could be made on Hartzell in Pennsylvania. *Id.* Hartzell was validly served with process in Pennsylvania after the transfer. *Reyno v. Piper Aircraft Co.*, 630 F.2d at 155.

The significance of the quashing of service on Hartzell and the transferring of the action as to Piper becomes apparent when determining which choice-of-law rules apply to each defendant under *Van Dusen v. Barrack*, 376 U.S. 612 (1964) and *Klaxon Co. v. Stentor Elec. Manuf.*, 313 U.S. 487 (1941). *Reyno v. Piper Aircraft Co.*, 479 F. Supp. at 728-29. *See infra* note 135.

¹⁷ *Reyno v. Piper Aircraft Co.*, 630 F.2d at 155. The doctrine of *forum non conveniens* allows a court to refuse jurisdiction even if it is authorized by a general venue statute when it appears the action would more appropriately be tried elsewhere. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The District Court granted both motions in October, 1979.¹⁹

On appeal, the United States Court of Appeals for the Third Circuit reversed the District Court and remanded the action.²⁰ The Supreme Court of the United States granted *certiorari* to resolve the questions raised as to the proper application of the doctrine of *forum non conveniens*.²¹ *Held, reversed*: The mere possibility of laws in an alternative forum being less favorable to a Plaintiff should not bar dismissal of a suit on the grounds of *forum non conveniens*. *Piper Aircraft Co. v. Reyno*, ___ U.S. ___, 102 S.Ct. 252 (1981).

I. FORUM NON CONVENIENS IN THE FEDERAL COURTS

In 1947, in *Gulf Oil Corp. v. Gilbert*²² and *Koster v. (American) Lumbermen's Mutual Casualty Co.*,²³ the United States Supreme Court firmly established and set the standards for the power of a federal district court to dismiss an action on the ground of *forum non conveniens*.²⁴ The doctrine of *forum non conveniens*, however, was not original. Although its origins are somewhat uncertain, the doctrine, which allows a court to decline to exercise jurisdiction where the action would more appropriately be tried elsewhere, is believed to have originated in Scotland.²⁵ In the United States, the courts

¹⁹ *Reyno v. Piper Aircraft Co.*, 630 F.2d at 155.

²⁰ *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727 (M.D. Pa. 1979). The District Court ordered that the action "be dismissed on the conditions that Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts." *Id.* at 738.

²¹ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3rd Cir. 1980). See *supra* notes 132-137 and accompanying text.

²² 101 S.Ct. 1346 (1981). *Piper Aircraft Co. and Hartzell Propeller, Inc.* both submitted petitions for *certiorari*. The Supreme Court consolidated the two cases for argument.

²³ 330 U.S. 501 (1947).

²⁴ *Id.* at 518.

²⁵ See *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 157 (3rd Cir. 1980); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 927 (1947).

²⁶ The doctrine apparently arose in Scotland as a reaction against the process known as arrestment *ad fundandum jurisdictionem*, whereby "[t]he arrestment or attachment in Scotland of the goods of A in the hands of B suffice[d] to found [sic] jurisdiction against A, although he is not on any other ground subject to the jurisdiction of the courts of Scotland." A. Gibb, *THE INTERNATIONAL LAW OF JURISDICTION*

of several states had long been applying the doctrine, although rarely referring to it by name.²⁶ The doctrine had become an accepted component of admiralty law, having been used in admiralty since at least 1804.²⁷ It was readily adopted by admiralty courts partly because of the equitable nature of admiralty and partly because of the absence of the usual venue requirements.²⁸ In other areas, venue statutes performed the function of case distribution. However, in admiralty, there were no such venue requirements.²⁹ *Forum non conveniens* thus became a useful and necessary tool for admiralty courts to insure equitable allocation of cases.³⁰

A year before *Gulf Oil* and *Koster* were decided, Justice Cardozo had called the doctrine of *forum non conveniens* "an instrument of justice."³¹ The doctrine, as enunciated in *Gulf Oil* and *Koster*, allows a court to decline jurisdiction, even where jurisdiction is authorized by a general venue statute,³² when considerations of convenience and oppressiveness make trial in the chosen forum inappropriate.³³

The doctrine has been said to be "simple in enunciation but complex in application."³⁴ A *forum non conveniens* inquiry does not involve pure questions of law but rather demands the

212-30 (1926). See also Braucher, *The Inconvenient Federal Forum* 60 HARV. L. REV. 908, 909-10 (1947); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 881, 885-86 (1935).

²⁶ Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1-2 (1929); Braucher, *supra* note 31, at 911-12. See *Gulf Oil v. Gilbert*, 330 U.S. 501, 505 n.4 ("The doctrine did not originate in federal but in state courts.").

²⁷ See Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. REV. 12 (1949); Braucher, *supra* note 31, at 920-21. The earliest known admiralty case suggesting a court might decline jurisdiction was *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 143, 157 (1804).

²⁸ In 1873, the Supreme Court held that the venue provisions of the Judiciary Act have no application to admiralty. *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1873).

²⁹ *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir.), (en banc), cert. denied, 449 U.S. 890 (1980), reh'g denied, 450 U.S. 1050 (1981).

³⁰ *Id.*

³¹ *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 554 (1946) (Cardozo, J., dissenting) (quoting *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 151 (1933)).

³² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

³³ See *Koster*, 330 U.S. at 524; *Gulf Oil*, 330 U.S. at 508-9.

³⁴ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 157 (3d Cir. 1980).

exercise of "structured discretion" by the district judge.³⁵ The standards set forth in *Gulf Oil* provide the framework within which the district judge exercises that discretion.³⁶ A *forum non conveniens* inquiry following the balancing test set forth in *Gulf Oil*, is a four-step process.³⁷ First, the district judge must determine whether an adequate alternative forum exists.³⁸ Second, once the existence of an adequate alternative forum is verified, the court must consider all the relevant factors of private interest,³⁹ weighing the "relative advantages and obstacles to a fair trial" in that forum.⁴⁰ Third, after considering the relative private interests of the parties, the district judge must then examine the public interest factors⁴¹ affecting the forum itself.⁴² If it is determined that there is an

³⁵ *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980). See *Gulf Oil*, 330 U.S. at 508.

³⁶ The question of whether under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal or state law should govern a *forum non conveniens* inquiry in a diversity case was left open in *Gulf Oil*, 330 U.S. at 509. The question remains unanswered. In *Piper*, all three parties agreed that federal law should be applied, but they also agree that it was unnecessary to make the choice because the law of *forum non conveniens* in both California and Pennsylvania was identical to federal law in every essential respect. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 157-58 (3d Cir. 1980). Thus, the Supreme Court in *Piper* said it did not need to decide the *Erie* question. *Piper Aircraft Co., v. Reyno*, 102 S.Ct. 252, 262 n. 13 (1981).

³⁷ *Pain v. United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980).

³⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-7 (1947). "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id.*

³⁹ The Supreme Court in *Gulf Oil* set forth the following as important private interest factors to consider: (a) relative ease of access to sources of proof; (b) availability of compulsory process for attendance of unwilling witnesses; (c) cost of obtaining willing witnesses; (d) possibility of view of the premises, if appropriate; (e) enforceability of a judgment if one is obtained; and (f) all other practical problems affecting the efficiency and fairness of the trial. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508.

⁴⁰ *Id.*

⁴¹ The Supreme Court in *Gulf Oil* set forth the following as important factors of public interest to consider: (a) administrative difficulties associated with court congestion; (b) the imposition of the burden of jury duty on people of a community unrelated to the litigation; (c) the local interest in having localized controversies decided near to home; (d) the avoidance of complex conflict of law problems; and (e) the appropriateness of having the trial in a forum familiar with the law governing the case rather than having some other forum untangle foreign law. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-9.

⁴² In *Koster*, the Supreme Court spoke of facts making trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and

adequate alternative forum and that the balance of the private and public factors favors dismissal, then the district judge must as his fourth and final step, consider whether the plaintiff could bring his suit in the alternative forum without "undue inconvenience or prejudice."⁴³

The doctrine of *forum non conveniens* seeks to prevent a plaintiff from vexing, harrasing, or oppressing a defendant by choosing an inconvenient forum which causes the defendant undue and unnecessary trouble and expense.⁴⁴ However, the Supreme Court stressed in *Gulf Oil* that unless the balance of conveniences strongly favors the defendant, a court should rarely disturb a plaintiff's choice of forum.⁴⁵

In *Koster*, decided the same day as *Gulf Oil*, the Supreme Court upheld a *forum non conveniens* dismissal of a derivative action brought in a New York federal district court by a New York plaintiff against an Illinois insurance company.⁴⁶ *Koster* was a pragmatic application of the principles set forth in *Gulf Oil*.⁴⁷ In *Koster*, the Supreme Court stated that "the ultimate inquiry is where the trial will best serve the convenience of the parties and the ends of justice."⁴⁸

One year after *Gulf Oil* and *Koster*, Congress enacted 28 U.S.C. § 1404(a)⁴⁹ which codified much of the basic doctrine

legal problems. *Koster*, 330 U.S. at 524.

⁴³ *Pain v. United Technologies Corp.*, 637 F.2d 775, 785 (D.C. Cir. 1980). To ensure that the plaintiff will not be unduly inconvenienced or prejudiced, the District Court may place certain conditions on dismissal. For example, the court might require that the defendants agree to submit to the jurisdiction of the alternative forum and/or waive any applicable statute of limitations. See, e.g., *Schertenleib v. Traum*, 589 F.2d 1156, 1166 (2d Cir. 1978); *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975).

⁴⁴ *Gulf Oil*, 330 U.S. at 508.

⁴⁵ *Id.* Defendants bear the burden of establishing that a plaintiff's choice of forum is inappropriate. See, e.g., *Pain v. United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980).

⁴⁶ 330 U.S. 518, 531-32 (1947).

⁴⁷ See *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir.) (*en banc*), cert. denied, 449 U.S. 890 (1980), reh'g denied 450 U.S. 1050 (1981).

⁴⁸ 330 U.S. at 527.

⁴⁹ 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

of *forum non conveniens*.⁵⁰ But because § 1404(a) allows transfer of actions rather than dismissal, it only partly supercedes the common law doctrine of *forum non conveniens*. The statute was not intended to supplant the federal courts' power to dismiss a case on *forum non conveniens* grounds where the terms of the statute do not apply.⁵¹ Thus, where no alternative federal forum is available and the more convenient forum is in a state court or foreign country, the common law doctrine of *forum non conveniens* is still applicable.⁵²

The doctrine of *forum non conveniens* remains a necessary and essential component of the law of federal courts.⁵³ *Gulf Oil* and *Koster* were decided in 1947, shortly after the end of World War II. After World War II, the world saw a tremendous growth in international commerce and interdependence.⁵⁴ Multi-national corporations multiplied and international transportation of people and products became relatively commonplace.⁵⁵ As a result, international litigation also increased.⁵⁶ As the personal jurisdiction of American courts over non-residents greatly expanded, defendants increasingly turned to the doctrine of *forum non conveniens* as a means of avoiding litigation of an international dispute in a U.S. federal

⁵⁰ See *Sullivan v. Behimer*, 363 U.S. 335, 363 n.14 (1960) (Frankfurter, J., dissenting) (quoting Historical & Revision Notes to § 1404(a)).

⁵¹ *Yerostathis v. A. Luisi, Ltd.*, 380 F.2d 377, 378-79 (9th Cir. 1967).

⁵² *Id.*; *Paper Operations Consultants Int'l, Ltd., v. S. S. Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 645-46 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956). It is more difficult to satisfy the standard for obtaining a dismissal on *forum non conveniens* grounds than it is to satisfy the standard for obtaining a transfer under § 1404(a). This is because a *forum non conveniens* dismissal has a harsher result than a transfer under § 1404(a). *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955).

⁵³ "[T]he doctrine of *forum non conveniens* is now well-established in federal practice." *Burt Isthmus Dev. Co.*, 218 F.2d 353, 356 (5th Cir. 1955).

⁵⁴ See Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L. J. 1257, 1258 (1981) [hereinafter cited as Note *Foreign Plaintiffs*]; Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 755-57 (1977) [hereinafter cited as Note, *Convenient Forum*]; Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 57-58 (1967) [hereinafter cited as Note *Forum Abroad*].

⁵⁵ Note, *Convenient Forum*, *supra* note 54, at 755.

⁵⁶ *Id.*

court.⁵⁷

II. CONFLICTS DEVELOP AMONG THE CIRCUITS

The Supreme Court in *Gulf Oil* had deliberately declined to set forth specific circumstances which would "justify or require either grant or denial" of a *forum non conveniens* dismissal.⁵⁸ Instead, the Supreme Court simply set forth the important factors to be considered and left the weighing of the factors to the discretion of the district judge.⁵⁹ The district courts began to apply the doctrine of *forum non conveniens*, examining and weighing the private and public interest factors set forth in *Gulf Oil*.⁶⁰ The district courts and the courts of appeals, however, failed to establish consistent and reliable guidelines for the exercise of their discretion. This lack of concrete standards made the outcome of a *forum non conveniens* motion in the federal courts difficult to predict.⁶¹

⁵⁷ *Id.* at 757; Note, *Foreign Plaintiffs*, *supra* note 54, at 1258. For a good general discussion of federal cases involving the doctrine of *forum non conveniens* in the three decades following *Gulf Oil*, see Note *Forum Abroad*, *supra* note 54 (covering development from 1947 to 1967) and Note *Convenient Forum*, *supra* note 54 (covering developments from 1967 to 1977).

⁵⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁵⁹ *Id.* "The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Id.* The Supreme Court thus entrusted the balancing of the factors to the discretion of the district judge. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, comment b (1971). The discretionary nature of the doctrine was well established in admiralty law prior to *Gulf Oil*. See, e.g., *The Mandu*, 102 F.2d 459 (2d Cir. 1939); Comment, *Admiralty Suits Involving Foreigners*, 31 TEX. L. REV. 889, 889 n.5 (1953). The question of whether to dismiss on *forum non conveniens* grounds was said by one court to be "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation." *J.F. Pritchard & Co. v. Dow Chem. of Can., Ltd.*, 462 F.2d 998, 1000 (8th Cir. 1972) (Clark, J., sitting by designation)(quoting *Lykes Bros. S. S. Inc. v. Sugarman*, 272 F.2d 679 (2d Cir. 1959)).

⁶⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The private and public interest factors set forth in *Gulf Oil* have generally been followed by all courts presented with the question of whether jurisdiction should be dismissed to a more convenient foreign forum. See, e.g., *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 450-51 (2d Cir. 1975); *J.F. Pritchard & Co. v. Dow Chem. of Can., Ltd.*, 462 F.2d 998, 1000 (8th Cir. 1972).

⁶¹ See A. EHRENZWEIG, CONFLICT OF LAWS § 41 (1959)(noting that lack of fixed standards results in the chaos of *forum non conveniens*); Note, *Foreign Plaintiff*, *supra* note 54, at 1261 ("[L]ower courts have failed to develop reliable standards with

Where the alternative forum was foreign, the problems associated with a lack of reliable guidelines were compounded by the need to consider additional policy factors.⁶³ One such consideration was that a plaintiff forced to litigate in a foreign forum might face an unfavorable change in the applicable law which would either totally erase one of the plaintiff's causes of action, or severely limit the amount of recovery.⁶³ Another policy consideration was the citizenship of the plaintiff. Decisions in the Second and Third Circuits were split as to whether the possibility of an unfavorable change in the law should preclude dismissal.⁶⁴ There was also disagreement among the circuits as to whether deference should be given to the citizenship of an American plaintiff, and if so, to what degree.⁶⁵

III. DISAGREEMENT AS TO WHETHER THE POSSIBILITY OF AN UNFAVORABLE CHANGE IN THE LAW SHOULD PRECLUDE A DISMISSAL

A. *The Second Circuit*

Prior to its decisions in *Gulf Oil* and *Koster*, the Supreme Court had decided a case arising out of a collision between two vessels in Lake Superior on the American side of the international boundary line. In *Canada Malting Co. v. Paterson*,⁶⁶ the plaintiffs invoked the jurisdiction of the United States because American law was more favorable to their posi-

which to balance the conflicting private and public interests."); Schlesinger, *Methods of Progress in Conflicts of Law: Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313, 323-24 (1960) ("The courts stress sometimes one and sometimes another of these uncoordinated factors. Thus, there has been a complete failure to develop a reliable standard."); Note, *Forum Abroad*, *supra* note 54, at 58 (Courts have not yet succeeded in developing predictable guidelines. "While some lack of predictability and certainty is a necessary and acceptable concomitant to any discretionary decision, it should not reach such proportions that a *forum non conveniens* motion becomes an expensive and time-consuming gamble that hinders . . . justice.").

⁶³ Note, *Forum Abroad*, *supra* note 54, at 58.

⁶⁴ Note, *Foreign Plaintiffs*, *supra* note 54, at 1258.

⁶⁵ See *infra*, notes 67-109 and accompanying text.

⁶⁶ See *infra*, notes 110-131 and accompanying text.

⁶⁷ 285 U.S. 413 (1932).

tion.⁶⁷ The Supreme Court affirmed the District Court's decision to dismiss the case despite the possibility that dismissal would result in an unfavorable change in the applicable law for the plaintiffs.⁶⁸

Forty-three years after *Canada Malting*, in *Fitzgerald v. Texaco, Inc.*,⁶⁹ the Second Circuit relied upon *Canada Malting* as support for its holding that a district court had discretion to dismiss an action on *forum non conveniens* grounds even where the law of the alternative forum was less favorable to the plaintiff.⁷⁰ To hold otherwise, reasoned the court, would "emasculate the doctrine" because a plaintiff would seldom choose to bring suit in a forum in which his chances of recovery were less favorable.⁷¹ The Second Circuit said the possibility of an unfavorable change in law was just one of the balancing factors to consider.⁷² Justice Oakes dissented, stating that "[l]imitation upon or denial of recovery is in and of itself grounds for *not* dismissing on *forum non conveniens* grounds."⁷³

In *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*,⁷⁴ the Second Circuit was again faced with a *forum non conveniens* question. The plaintiff in this action sought recovery for property damage sustained when defendant's vessel struck plaintiff's

⁶⁷ *Id.* at 418.

⁶⁸ *Id.* at 419-20. "We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline jurisdiction over the controversy . . . '[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.'" *Id.*

⁶⁹ 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). In this case, a German vessel had struck the wreckage of a Panamanian vessel, owned by Texaco Panama, Inc., a foreign subsidiary of Texaco, Inc., an American multi-national corporation, right off the coast of England. Suits were brought against Texaco and its foreign subsidiary in New York, Texaco's principal place of business, under general maritime law based on the defendants' alleged failure to properly mark the wreckage. The defendants filed and were granted a motion to dismiss under the doctrine of *forum non conveniens* in the district court. *Id.* at 449.

⁷⁰ *Id.* at 453.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 458 (citing Bickel, *supra* note 32, at 28-9).

⁷⁴ 654 F.2d 147 (2d Cir. 1978)(*en banc*), *cert. denied*, 449 U.S. 890 (1980), *reh'g denied*, 450 U.S. 1050 (1981).

pier in Trinidad. The Second Circuit rejected plaintiff's contention that it would be inequitable to dismiss and relegate the action to Trinidad where plaintiff's potential recovery would be severely limited.⁷⁶ Furthermore, the Second Circuit stated that it was "abundantly clear" that the possibility of a lesser recovery does not justify a refusal to dismiss on the grounds of *forum non conveniens*.⁷⁶

B. The D.C. Circuit

At least one other circuit has concurred with the position of the Second Circuit that a *forum non conveniens* dismissal is not automatically barred where the law of the alternative forum is less favorable.⁷⁷ In *Pain v. United Technologies Corp.*,⁷⁸ the District of Columbia Court of Appeals noted that in nearly every *forum non conveniens* inquiry the substantive law of one forum is more advantageous to one of the litigants than to the other.⁷⁹ The court stated that one of the purposes of conflict-of-laws principles is to aid courts in deciding which set of laws is most appropriate. The purpose of the *forum non conveniens* doctrine, however, is different. Its "central concern is furthering the just, speedy and inexpensive determination of the action."⁸⁰ Therefore, the court concluded that the comparative amount of recovery which might be obtained should never be a relevant consideration in a *forum non conveniens* inquiry.⁸¹

C. Admiralty Decisions

Several admiralty decisions, including a few decided by the Second Circuit, took a different approach to the possibility of

⁷⁶ *Id.* at 159. The Court noted that it was not unfair for the plaintiff to recover the lesser amount under Trinidad law because the plaintiff, familiar with the law of the place where its business was located, could have insured against any additional risk. *Id.*

⁷⁶ *Id.*

⁷⁷ *Pain v. United Technologies Corp.*, 637 F.2d 775, 794 (D.C. Cir. 1980).

⁷⁸ 637 F.2d 775 (D.C. Cir. 1980).

⁷⁹ *Id.* at 794.

⁸⁰ *Id.*

⁸¹ *Id.*

an unfavorable change in the law.⁸² This approach was articulated in 1949 by a commentator when he implied that a limitation upon or denial of recovery should be grounds for *not* dismissing for *forum non conveniens* reasons.⁸³

The jurisdiction of American admiralty courts over suits by or on behalf of foreign seamen is very broad.⁸⁴ It has been said that admiralty courts should accept jurisdiction "unless special circumstances exist to show that justice would be better subserved by declining it."⁸⁵ Suits by foreign seamen may be classified broadly into two categories according to whether the cause of action is based on American law or not.⁸⁶ It has been suggested that when the seaman's cause of action is based on American law the "retention of his suit . . . should be mandatory."⁸⁷

This approach was exemplified in *Fisher v. Agios Nicolaos V.*,⁸⁸ in which the Fifth Circuit Court of Appeals said that a court must retain jurisdiction rather than dismiss a case on *forum non conveniens* grounds once it has been determined

⁸² See, e.g., *Fisher v. Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980) (where surviving widow and dependents of a Greek seaman killed on a foreign vessel in a Texas port successfully brought a wrongful death action under the Jones Act, 46 U.S.C. § 688 (1976), and general maritime law; the court of appeals upheld the district court's refusal to dismiss on the basis of *forum non conveniens*); *Antypas v. Cia Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976) (Seaman injured while employed aboard a Greek flag ship on a roundtrip voyage from Europe to the Far East brought an action under the Jones Act. The Second Circuit reversed the District Court's dismissal on *forum non conveniens* grounds, holding that where the Jones Act applies, a district court has no power to dismiss on the grounds of *forum non conveniens*); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959) (A citizen of the British West Indies assaulted by a fellow crew member while working as a seaman aboard a Liberian vessel brought an action under the Jones Act and general maritime law).

⁸³ Bickel, *supra* note 33, at 28-9. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 458 (2d Cir. 1975) *cert. denied*, 423 U.S. 1052 (1976) (Oakes, J., dissenting).

⁸⁴ See Bickel, *supra* 33, at 20; Morrison, *The Foreign Seaman and the Jones Act*, 8 MIAMI L. Q. 16, 17 (1953).

⁸⁵ *The Belgenland*, 114 U.S. 355, 367 (1885).

⁸⁶ Comment, *A New Look at Lauritzen v. Larsen, Choice of Law and Forum Non Conveniens*, 38 LA. L. REV. 957, 958 (1978).

⁸⁷ *Id.* See *Antypas v. Cia Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), in which the Second Circuit stated that once it is determined that American law applies, "a district court has no power to dismiss on grounds of *forum non conveniens*" in an admiralty case. *Id.* at 310.

⁸⁸ 628 F.2d 308 (5th Cir. 1980).

that American law applies.⁸⁹ The Court seemed to suggest that because the determination that American law is applicable is so important, choice-of-law should be the first issue considered in a *forum non conveniens* inquiry in an admiralty case.⁹⁰ The *Fisher* court pointed out that the applicability of foreign law to the case is one of the factors favoring dismissal on *forum non conveniens* grounds,⁹¹ because it is less convenient for American courts to apply foreign law than it is for the courts of the foreign country to apply their own law.⁹² For similar reasons, the court stated that if American law is applicable, then jurisdiction should be retained rather than dismissed.⁹³

D. *The Third Circuit*

In a 1966 admiralty case, *Mobil Tankers Company v. Mene Grande Co.*,⁹⁴ the Third Circuit Court of Appeals refused to uphold a *forum non conveniens* dismissal where the plaintiffs would have been forced to litigate in a Venezuelan forum.⁹⁵ The Court retained jurisdiction because it concluded "the mode of trial, lack of adequate pre-trial procedures and limitation of the manner in which expert testimony may be offered in the alternative forum does not comport with our concepts of fairness."⁹⁶

In *Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.*⁹⁷ the court cited *Mobil Tankers* in support of its conclusion that dismissal under *forum non conveniens* requires that the alternative forum must provide relief for actions of a defendant which allegedly violate American law and procedural safeguards simi-

⁸⁹ *Id.* at 315.

⁹⁰ *Id.*

⁹¹ *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

⁹² 628 F.2d at 315.

⁹³ *Id.*

⁹⁴ 363 F.2d 611 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966).

⁹⁵ *Id.* at 614.

⁹⁶ *Id.*

⁹⁷ 78 F.R.D. 445 (D. Del. 1978). In this case, a Canadian corporation brought suit against two international oil and gas companies and their wholly-owned subsidiaries through which they did business in Ecuador. The suit concerned rights arising from oil exploration in Ecuador. *Id.* at 446-47.

lar to those provided by the American forum.⁹⁸ The *Phoenix* court found it unnecessary to compare procedural safeguards,⁹⁹ and instead considered the fact that there apparently was no generally codified legal remedy in Ecuador for two of the plaintiff's claims as a factor militating against dismissal.¹⁰⁰ Notably, the *Phoenix* court, as well as the courts in *Mobil Tankers* and *Fisher* did not mention *Canada Malting*, although it was also an admiralty decision.¹⁰¹

*DeMateos v. Texaco, Inc.*¹⁰² crystallized the Third Circuit's view that the possibility of an unfavorable change in the applicable law should preclude dismissal. In *DeMateos*, the Third Circuit cited *Van Dusen v. Barrack*¹⁰³ in which the Supreme Court had emphasized that a transfer pursuant to 28 U.S.C. § 1404(a) should not result in a change in the applicable law, regardless of convenience.¹⁰⁴ The *DeMateos* court stated that "[t]hat principle is no less applicable to a dismissal on *forum non conveniens* grounds."¹⁰⁵ Thus, under the reasoning of *DeMateos*, the appropriateness of a *forum non conveniens* dismissal would depend on one factor—whose law would apply.

In the 1980 decision in *Dahl v. United Technologies Corp.*,¹⁰⁶ the Third Circuit seemed to contradict its position in *DeMateos* by upholding a dismissal where the plaintiffs had argued that the alternative forum was not acceptable because it did not afford them remedies comparable to those offered in the United States.¹⁰⁷ However, despite the seeming contradic-

⁹⁸ *Id.* at 455.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 445-46. The court stated: "[T]his case may not simply be one in which a lesser remedy could be obtained elsewhere than in the United States, but rather one in which no remedy could be obtained for two of three legal theories advanced." *Id.*

¹⁰¹ *Canada Malting Co. Ltd. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), discussed *supra* at notes 67-68 and accompanying text. A possible explanation for this omission is that *Canada Malting* was decided prior to *Gulf Oil*.

¹⁰² 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

¹⁰³ 376 U.S. 612 (1964).

¹⁰⁴ *Id.* at 626-43.

¹⁰⁵ 562 F.2d at 899.

¹⁰⁶ 632 F.2d 1027 (3d Cir. 1980), *aff'g*, 472 F. Supp. 696 (D. Del. 1979).

¹⁰⁷ *Dahl v. United Technologies Corp.*, 472 F. Supp. 696, 699 (D. Del. 1979). In affirming the District Court, the Third Circuit stated that "the mere presence of a

tion, it could also be argued that the decisions in *Dahl* and *DeMateos* are consistent. The action in *Dahl* arose out of the crash of a Norwegian owned and operated helicopter in Norwegian waters in which four Norwegian citizens were killed.¹⁰⁸ The district court considered the plaintiffs' argument that Norway would not be an acceptable forum because it would not offer comparable remedies and procedural protections with those offered in the United States but rejected this argument, noting that the defendant would be subjected to unlimited liability under Norwegian law for any injuries or damages caused by its negligence, and that "Norway is in the process of developing case law built up around product liability cases."¹⁰⁹ Thus, it can be argued that the *Dahl* court found there would be no *unfavorable* change in the applicable law.

IV. DEFERENCE TO BE GIVEN PLAINTIFF'S CHOICE OF FORUM

As noted earlier,¹¹⁰ the Supreme Court in *Gulf Oil* established the standard for a *forum non conveniens* inquiry, a balancing of the interests of the plaintiff, the defendant, and the chosen forum.¹¹¹ The Court then qualified this balancing approach by stating that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."¹¹² The Supreme Court thus established a strong presumption in favor of the plaintiff's choice of forum.¹¹³ But since *Gulf Oil* was a diversity action brought by a Virginia plaintiff suing a New York defendant in a New York district court, there was no need to address what effect citi-

count pleaded under Connecticut law but which may have little chance of success does not warrant a different conclusion. If we were to hold otherwise, the plaintiffs could avoid dismissal on *forum non conveniens* grounds by the inclusion of a substantive count based on American law regardless of the merits of that claim." 632 F.2d at 1032.

¹⁰⁸ *Id.* at 1028.

¹⁰⁹ *Dahl v. United Technologies Corp.*, 472 F. Supp. 696, 699 (D.C. Del. 1979).

¹¹⁰ See *supra* notes 37-48(b) and accompanying text.

¹¹¹ Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 376 (1980)[hereinafter cited as Note, *American Plaintiffs*].

¹¹² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

¹¹³ Note, *American Plaintiffs*, *supra* note 111, at 376; Note, *Foreign Plaintiffs*, *supra* note 54, at 1263.

zenship or residence should have in a *forum non conveniens* inquiry where the plaintiff is foreign or where the plaintiff is American and the alternative forum is in a foreign country.

The degree of weight which should be given to the citizenship and residence of the plaintiff in a *forum non conveniens* inquiry was expressly left open by the Supreme Court in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*¹¹⁴ However, the Court did observe that "[a]pplication of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."¹¹⁵

Federal courts have been historically reluctant to relegate an American plaintiff to a foreign forum.¹¹⁶ Therefore, until recently, the federal courts unanimously placed a much heavier burden of showing inconvenience and public interest on a defendant seeking a *forum non conveniens* dismissal where such a dismissal would force an American plaintiff to litigate his claim abroad.¹¹⁷ This is reflected in the fact that there were no cases reported before 1970 in which a U.S. plaintiff, suing in his own right,¹¹⁸ was consigned to a foreign forum

¹¹⁴ 339 U.S. 684, 697 (1949). This was an action brought by the owners of cargo lost when the vessel transporting the cargo from Ecuador to Cuba sank off the island of Grand Cayman. The plaintiffs included an American corporation, Cuban corporations and individuals, and a Colombian citizen. *Id.* at 685.

¹¹⁵ *Id.*, (quoting *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947) where the Supreme Court stated: "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown").

The plaintiff's choice of forum has generally been given less weight when the forum selected is not the plaintiff's home jurisdiction. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

¹¹⁶ Note, *Convenient Forum*, *supra* note 54, at 779.

¹¹⁷ Note, *Foreign Plaintiffs*, *supra* note 54 at 1269; Note, *American Plaintiffs*, *supra* note 111, at 379.

¹¹⁸ Where the U.S. plaintiff has only a derivative right to sue, and the real parties in interest are foreign, the courts have not afforded any special deference to the plaintiff's choice-of-forum. See, e.g., *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392, 394 (2d Cir. 1933)(American plaintiff suing as subrogee of an alien); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 501-02 (2d Cir. 1966)(American plaintiff suing as alien's representative). But see *Bickel*, *supra* note 33 at 41-43 (noting that even if a constitutional right of access to federal admiralty courts was given to U.S. citizens, the right would not apply to U.S. plaintiffs having only a derivative right to sue; reasoning that otherwise, all discretion

under the *forum non conveniens* doctrine.¹¹⁹ Most federal courts followed a standard similar to that articulated by the Fifth Circuit in *Burt v. Isthmus Development Co.*,¹²⁰ which required "positive evidence of unusually extreme circumstances" as well as "material injustice" before a court would deny an American citizen access to an American court.¹²¹

In the seventies, it became apparent that courts were beginning to divide over the weight that should be attached to a plaintiff's citizenship in a *forum non conveniens* inquiry. Most courts continued to place a greater burden on defendants seeking to relegate an American plaintiff to a foreign forum;¹²² other courts began to give decreasing deference to the citizenship of American plaintiffs.¹²³

to dismiss cases between foreigners would disappear, because every such case would be assigned to an American, and dismissal would never be appropriate).

¹¹⁹ Note, *Convenient Forum*, *supra* note 54, at 779. See *Burt Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955).

The first unreversed decision granting a *forum non conveniens* dismissal against an American plaintiff was *Harrison v. Capivary, Inc.*, 334 F. Supp. 1141 (E.D. Mo. 1971). See Note, *Convenient Forum*, *supra* note 54 at 785.

¹²⁰ 218 F.2d 353 (5th Cir.) (*per curiam*), *cert. denied*, 349 U.S. 922 (1955).

¹²¹ *Id.* at 354.

¹²² See, e.g., *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 435 (D.C. Cir. 1976) (in dictum, the court observed that only in unusual circumstances should American plaintiffs be denied access to American courts); *Paper Operations Consultants, Int'l Ltd. v. S S Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975) (stating that one of the "foremost factors" favoring dismissal was the fact that the parties were foreign nationals); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (noting that the fact that the balance of conveniences favors trial in the foreign forum is not sufficient to warrant dismissing an American citizen's suit); *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972) (when a *forum non conveniens* dismissal must make a greater showing of inconvenience); *Hoffman v. Goberman*, 420 F.2d 423, 428 (3d Cir. 1970) (holding that an American's choice of forum "should not be disregarded without 'persuasive evidence' of 'manifest injustice' to the defendant"); *Farmanfarman v. Gulf Oil Corp.*, 437 F. Supp. 910, 923 (S.D.N.Y. 1977) (holding that the right of a foreign plaintiff to sue in American courts is "clearly of lesser magnitude than that of an American citizen"), *aff'd* 588 F.2d 880 (2d Cir. 1978); *Maybruck v. Haim*, 290 F. Supp. 721, 725 (S.D.N.Y. 1968) (holding that the *forum non conveniens* doctrine is rarely and reluctantly used to force an American plaintiff to litigate in a foreign forum).

¹²³ See, e.g., *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 157-58 (2d Cir.) (*en banc*) (No special deference should be shown to American plaintiffs), *cert. denied*, 449 U.S. 890 (1980), *reh'g denied* 450 U.S. 1050 (1981); *Pain v. United Technologies Corp.*, 637 F.2d 775, 796-99 (D.C. Cir. 1980) ("The factor of American citizenship *per se* proves largely irrelevant" to the *forum non conveniens* balancing of factors) *cert. denied*, 102 S. Ct. 980 (1981); *Mizokami Bros. of Arizona Inc. v. Baychem*

A leading case exemplifying the trend toward lesser deference to American plaintiffs was *Alcoa S.S. Co. Inc. v. M/V Nordic Regent*,¹²⁴ where the Second Circuit held that no special deference should be given to an American plaintiff.¹²⁵ An earlier Second Circuit decision, *Farmanfarmaian v. Gulf Oil Corp.*,¹²⁶ provided support for the court's opinion in *Alcoa*. In *Farmanfarmaian*, the Second Circuit had dismissed an action brought by an Iranian citizen in a New York District Court against the Iranian subsidiary of an oil company based in the United States.¹²⁷ The *Alcoa* court cited *Farmanfarmaian* for the proposition that "American citizenship is not an impenetrable shield against dismissal on the ground of *forum non conveniens*"¹²⁸. The Second Circuit reaffirmed its *Alcoa* holding in *Calavo Growers of California v. Gernerli Belgium*,¹²⁹ where it upheld a *forum non conveniens* dismissal of an action brought by a U.S. plaintiff against a Belgian underwriter for failure to pay a claim for reimbursement when figs which the plaintiff had contracted to import from Turkey failed to pass government inspection upon entry to a New York port.¹³⁰

The District of Columbia Circuit Court of Appeals also cited *Alcoa* with approval in *Pain v. United Technologies Corp.*,¹³¹ although it conflicted in principle with the court's earlier approach in *Founding Church of Scientology v.*

Corp., 556 F.2d 975, 978 (9th Cir. 1977)(per curiam)(noting that American citizenship of plaintiff standing alone, not sufficient ground for opposition to a motion to dismiss for *forum non conveniens*), cert. denied, 434 U.S. 1035 (1978); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A.*, Panama, 437 F. Supp. 331, 333-34 (S.D.N.Y. 1977)(stating that plaintiff-corporation's U.S. citizenship was a "factor" but not "controlling if the balance of factors tips heavily in favor of defendants").

¹²⁴ 654 F.2d 147 (2d Cir.)(en banc), cert. denied, 449 U.S. 890 (1980), reh'g denied, 450 U.S. 1050 (1981).

¹²⁵ *Id.* at 159. The court noted: "The trend of both common law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship of the parties." *Id.* at 154.

¹²⁶ 588 F.2d 880 (2d Cir. 1978).

¹²⁷ *Id.* at 880.

¹²⁸ 654 F.2d at 152 (emphasis in the original).

¹²⁹ 632 F.2d 963 (2d Cir. 1980), cert. denied, 449 U.S. 1084 (1981) reh'g denied, 451 U.S. 934 (1981)).

¹³⁰ *Id.* at 965-66.

¹³¹ 637 F.2d 775 (D.C. Cir. 1980).

Verlag.¹³² The *Pain* court said federal courts were starting to realize that their traditional reluctance to dismiss actions to foreign tribunals was merely due to over-protectiveness of American plaintiffs and insensitivity to the ability and competence of foreign courts.¹³³

The Ninth Circuit in *Mizokami Bros. of Arizona, Inc.*¹³⁴ articulated one reason why some courts had begun to give less deference to the American citizenship of a plaintiff:

In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a U.S. forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.¹³⁵

Despite the fact that these decisions departed from the traditional deference given to American plaintiffs, creating further uncertainty for courts applying the doctrine of *forum non conveniens*, the Supreme Court declined to grant the petitions for *certiorari* submitted in *Alcoa*, *Calavo*, *Pain*, and *Mizokami Bros.*. Amid the confusion, most courts, even those giving deference to American citizenship, did seem to agree on one thing: an American plaintiff does not have an "absolute right" to sue in a United States court.¹³⁶

V. PIPER AIRCRAFT V. REYNO

When *Piper* reached the Third Circuit Court of Appeals the district judge's decision to dismiss on *forum non conveniens*

¹³² 536 F.2d 429 (D.C. Cir. 1976).

¹³³ *Pain*, 637 F.2d at 797.

¹³⁴ 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

¹³⁵ *Id.* at 978.

¹³⁶ See, e.g., *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 646 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *John Fabrick Tractor Co. v. Penelop Shipping Co.*, 278 F. Supp. 182, 183 (S.D.N.Y. 1967). But see *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392, 394 (2d Cir. 1933)(Hand, J.)(holding that American citizenship should be conclusive against dismissal).

grounds was reversed and remanded.¹³⁷ The Third Circuit based its decision in part on its conclusion that dismissal on the ground of *forum non conveniens* is automatically precluded where the substantive law that would be applied in the alternative forum is less favorable to the plaintiff than the law of the chosen forum.¹³⁸ The district court had found that Scottish law, which does not recognize strict liability in tort, governed the case.¹³⁹

Applying its own choice-of-law analysis, the Third Circuit concluded that the district court had erred and that Pennsylvania law should govern.¹⁴⁰ The Third Circuit observed that if

¹³⁷ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 171 (3d Cir. 1980).

¹³⁸ *Id.* at 164-65.

[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for *forum non conveniens*, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

Id. (footnote omitted) (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)).

The Third Circuit also held that the district court had abused its discretion in its application of the *Gulf Oil* factors. 630 F.2d at 160. However, the Third Circuit said that it would have reversed the district court's decision even if the lower court had properly balanced the *Gulf Oil* public and private interest factors. 630 F.2d at 163-64.

¹³⁹ *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 736-37 (M.D. Pa. 1979).

¹⁴⁰ 630 F.2d at 171. The Third Circuit agreed with the district court that California choice-of-law rules applied to Piper and that Pennsylvania choice-of-law rules would apply to Hartzell under the rules enunciated in *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that a court must generally apply the choice-of-law rules of the state in which it sits) and *Van Dusen v. Barrack*, 376 U.S. 612 (1946) (holding that where a case is transferred pursuant to 28 U.S.C. § 1404(a), it must apply the choice-of-law rules of the transferor-state). But the Third Circuit disagreed with the district court's conclusion that California uses a "governmental interests" analysis. 630 F.2d at 165-71. The Third Circuit said that California would use a "comparative impairment" approach, which the court defined as a "refinement of the governmental interest and false conflict methodology." 630 F.2d 166. This approach, however, said the court, comes into play only after a "true conflict of the governmental interests involved" is identified. 630 F.2d 166. The Third Circuit found that Pennsylvania's approach would be similar to that of California. It said "Pennsylvania first looks to identify and thus avoid false conflicts, and then when a true conflict is present, examines and compares competing governmental interests." 630 F.2d 169. Thus finding that both California and Pennsylvania would first employ the "false conflict" test, the Third Circuit concluded that Pennsylvania and Ohio had a greater policy interest in the dispute than Scotland, and therefore American law would be applied. 630 F.2d at

the case were tried in Scotland, the *lex loci delicti* choice-of-law rule for torts would have applied,¹⁴¹ causing Reyno to lose the strict liability cause of action which was recognized in Pennsylvania.¹⁴²

On appeal, the United States Supreme Court did not find the possibility of an unfavorable change in law decisive. It held that the Third Circuit had erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the law of the alternative forum would be less favorable.¹⁴³ The Court stated "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."¹⁴⁴

The Supreme Court re-affirmed the balancing test set forth in *Gulf Oil* as the appropriate test in a *forum non conveniens* inquiry.¹⁴⁵ The Court noted that *Gulf Oil* established convenience as the central focus of a *forum non conveniens* inquiry.¹⁴⁶ Giving substantial weight to the possibility of an unfavorable change in the law averts that focus, reasoned the Court, because dismissal might then be barred even where trial in the chosen forum was plainly inconvenient.¹⁴⁷

The Court stressed the value of flexibility in the doctrine of *forum non conveniens*, a quality which earlier Supreme Court decisions had also emphasized.¹⁴⁸ If substantial weight were to be given to a possibility of an unfavorable change in the law,

168, 170.

¹⁴¹ 630 F.2d at 163. *Lex loci delicti* is the traditional conflict-of-laws rule applicable to torts. 16 Am. Jur. 2d Conflict of Laws §98 (1979). It states that the law of the place where the acts giving rise to the action occurred is the law which should be applied. *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953).

¹⁴² *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

¹⁴³ 102 S. Ct. at 261.

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* notes 39-48 and accompanying text.

¹⁴⁶ 102 S. Ct. at 262.

¹⁴⁷ *Id.*

¹⁴⁸ In *Gulf Oil*, the Court refused to specify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S. 501, 508 (1947). In *Williams v. Green Bay & Western R.R. Co.*, 326 U.S. 549 (1946), the Court refused to lay down a rigid rule to govern discretion, stating that "each case turns on its facts." *Id.* at 557.

the Court said that the *forum non conveniens* doctrine would not only lose its valuable flexibility but would become virtually useless because plaintiffs will ordinarily choose the forum with the most advantageous choice-of-law rules.¹⁴⁹

The Court noted that giving substantial weight to the possibility of a change in the law would create considerable practical problems. One result of such an approach, said the Court, would be that choice-of-law analysis would be elevated in importance.¹⁵⁰ Because dismissal would only be appropriate where the court found that the law of the alternative forum to be at least as favorable to the plaintiff as the law in the chosen forum, courts would be forced to conduct complex exercises in comparative law,¹⁵¹ an inefficient activity which the *forum non conveniens* doctrine was in part designed to prevent.¹⁵² Another practical problem which the Supreme Court feared was a substantial increase in the flow of litigation into already congested United States courts.¹⁵³

Unlike the Third Circuit, which had partly based its decision on an analogy between *forum non conveniens* dismissals and § 1404(a) transfers, the Supreme Court said such dismissals and transfers were not comparable.¹⁵⁴ Thus, the ruling in *Van Dusen v. Barrack*,¹⁵⁵ which was relied upon by the Third Circuit¹⁵⁶ and which stated that a § 1404(a) transfer should not result in a change in the applicable law, would not extend to a dismissal on *forum non conveniens* grounds.¹⁵⁷

¹⁴⁹ 102 S. Ct. at 262-63.

¹⁵⁰ *Id.* at 263. Compare this approach with the Fifth Circuit's emphasis on the choice-of-law issue in *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), discussed *supra*, at notes 88-90 and accompanying text.

¹⁵¹ 102 S. Ct. at 263.

¹⁵² *Id.* In *Gulf Oil*, 330 U.S. at 509, one of the public interest factors which the Court sets forth as indicating dismissal was desirable was the necessity for the court to "untangle problems in conflict of laws, and in law foreign to itself."

¹⁵³ 102 S. Ct. at 264.

¹⁵⁴ *Id.* District courts have more discretion to dismiss under §1404(a) than under the doctrine of *forum non conveniens*. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

¹⁵⁵ 376 U.S. 612 (1964).

¹⁵⁶ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164 n.51 (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)).

¹⁵⁷ 102 S. Ct. at 265. The Second Circuit stated that rules governing §1404(a) transfers will not also govern *forum non conveniens* dismissals. *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978).

The Supreme Court did not, however, hold that the possibility of an unfavorable change in the law would never be a significant factor in a *forum non conveniens* inquiry.¹⁵⁸ The Court said in "rare circumstances," where the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," the initial requirement of an adequate alternative forum may not be satisfied.¹⁵⁹ In these rare cases, a district court *may* conclude dismissal would "not be in the interests of justice."¹⁶⁰

The Court provided no guidelines to assist a district court in determining whether the remedy in the alternative forum is essentially "no remedy at all,"¹⁶¹ but the Court made it clear that in *Piper* the remedies available in the Scottish courts did *not* fall within this category.¹⁶² The Court observed that while the strict liability claim would not be available in the Scottish courts and the potential damage award would be smaller than in America, there was no indication that the decedent's heirs and next of kin would not have *any* remedy or that they would be treated unfairly.¹⁶³

In Part III of its opinion, the Supreme Court also found that the district court's analysis of the public and private interest factors was not an abuse of discretion.¹⁶⁴ Because the

¹⁵⁸ 102 S. Ct. at 265.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The Court did, however, cite an example, *Phoenix Can. Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D.C. Del. 1978), in which the court refused to dismiss where the alternative forum was in Ecuador. It was unclear whether an Ecuadorian court would hear the case, and there was no generally codified legal remedy in Ecuador for the claims asserted. 102 S. Ct. at 265 n.22. In a case decided after *Piper*, a United States District Court for the Northern District of Ohio stated that the citation of *Phoenix* did not imply that the only situation in which a court might find there was no alternative forum was one in which the remedy was clearly inadequate. *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 270 n.12 (N.D. Ohio 1982).

¹⁶² 102 S. Ct. at 265.

¹⁶³ *Id.*

¹⁶⁴ 102 S. Ct. at 265-68. Justice White concurred in Parts I and II of the opinion, but said that he would not proceed to deal with the issues discussed in Part III. Instead, he agreed with the dissent as to that issue. 102 S. Ct. at 268-69. Justice Stevens, joined by Justice Brennan, dissented, stating that the court had limited its grant of certiorari to whether the plaintiffs could defeat a motion to dismiss on the ground of *forum non conveniens*, merely by showing that the law of the alternative forum was less favorable. Although he agreed that the question should be answered in

forum non conveniens inquiry is committed to the sound discretion of the district judge, it may be reversed only where the district judge has clearly abused that discretion.¹⁶⁵ The Supreme Court stated that the Third Circuit had ignored this standard of review and instead substituted its own judgment for that of the district judge.¹⁶⁶

Also, the Court indicated its agreement with the district judge that the presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiff or real parties in interest are foreign.¹⁶⁷ Thus, the Supreme Court settled a question which had previously divided the circuits.¹⁶⁸ The Court noted that in *Koster* it had stated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum.¹⁶⁹ Observing that convenience can be generally assumed when an American plaintiff has chosen an American forum, the Court stated that when a foreign plaintiff has chosen an American forum this assumption of convenience is much less reasonable.¹⁷⁰ Because the central focus of a *forum non conveniens* inquiry is convenience, the Supreme Court reasoned that a foreign plaintiff's choice of forum deserves less deference.¹⁷¹ However, the Court made it clear that although the choice of an American forum by an American citizen or resident should be given more deference than the foreign plaintiff's choice of an American forum, it should not automatically bar dismissal.¹⁷² The Court

the negative, he said he would remand the case to the Court of Appeals for further consideration. 102 S. Ct. at 269.

¹⁶⁵ 102 S. Ct. at 266.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 265.

¹⁶⁸ See *supra* notes 110-31 and accompanying text.

¹⁶⁹ 330 U.S. at 524. "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Id.*

¹⁷⁰ 102 S. Ct. at 266.

¹⁷¹ *Id.*

¹⁷² 102 S. Ct. at 266 n.23. See *Pain v. United Technologies Corp.*, 637 F.2d 775, 796-98 (D.C. Cir. 1980) ("American citizens and residents have no indefeasible right of access to the federal courts"); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) ("An American citizen does not have an absolute right under all circumstances to sue in an American court").

concluded that if the balancing of private and public interest factors indicates that trial in the chosen forum is then inappropriate, even if the plaintiff is an American citizen or resident, dismissal is proper.¹⁷³

The plaintiffs in *Piper* argued that by "bestowing upon the injured plaintiff the right to seek redress wherever he sees fit . . . the defendant accused of wrongdoing will always be held to the highest available standard of accountability for his actions and resulting injuries and damages."¹⁷⁴ The Court noted plaintiff's contention¹⁷⁵ but said that the deference traditionally accorded a plaintiff's choice of forum had never been a guarantee that the plaintiff could choose the law that would govern the case.¹⁷⁶ The Supreme Court recognized the possibility that defendants might engage in "reverse forum-shopping"—seeking a *forum non conveniens* dismissal not merely because of inconvenience but also because of a desire for a more favorable forum.¹⁷⁷ To discourage this, the Court emphasized that the possibility of a favorable change in the law to the defendant should not be given substantial weight.¹⁷⁸ This, the Court said, was a necessary corollary to its holding that substantial weight should not be given to the possibility of an unfavorable change in the law to the plaintiff.¹⁷⁹

VI. CONCLUSION

Piper is the first Supreme Court decision to squarely address the issue of *forum non conveniens* since the seminal decisions of *Gulf Oil* and *Koster* in 1947. Although the decision leaves some questions unanswered, such as what standards should be applied to cases involving U.S. resident plaintiffs¹⁸⁰ and how a district court can determine whether it is faced

¹⁷³ 102 S. Ct. at 266 n.23.

¹⁷⁴ Brief for Respondent (Reyno) at 7, *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252 (1981).

¹⁷⁵ 102 S. Ct. at 266 n.24.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 264 n.19.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* notes 159-162 and accompanying text.

with one of those "rare circumstances" where the remedy in the alternative forum is so inadequate as to not be a remedy at all,¹⁸¹ the decision should help to clarify the doctrine of *forum non conveniens* and ease some of the confusion in its application in the lower courts.

Piper is a significant decision, particularly for the aviation industry. The United States has a strong interest in foreign aviation accidents. American manufacturers, such as Piper Aircraft Corp. and Hartzell Propeller, Inc. predominate in the manufacture of aircraft used in all parts of the world.¹⁸² American air carriers and aviation corporations are present and operate in nearly every country in the world.¹⁸³

The decision in *Piper* should prove to be a boon to defendants facing international litigation in federal courts, while a bane to many plaintiffs. The decision can be expected to make it much more difficult for a foreign plaintiff to sue in a U.S. federal court for accidents and injuries occurring abroad, since implicit in the *Piper* decision is a refusal to establish the federal courts as "super-court(s) of international jurisdiction."¹⁸⁴ This rejects the view that only American law can adequately protect rights and provide justice, and finds support in an earlier Supreme Court decision which observed that "[w]e cannot have trade and commerce in world markets and international

¹⁸¹ While the Supreme Court held that the choice of an American forum by an American citizen in his own behalf should be given more deference than a foreign citizen's choice of an American forum, it did little to clarify how much a court should defer to American citizenship. Thus, it can be expected that the controversy among the circuits on this issue will continue. See *supra* notes 124-136. In view of the conflict among recent cases dealing with the issue it is surprising that the Supreme Court did not attempt to delineate a rule broad enough to also provide guidance in cases involving American plaintiffs. See Paulsen, *Forum Non Conveniens in Admiralty*, 13 JOUR. MAR. L. & COM. 343, 360 (1982).

¹⁸² Miller, *Aviation Accident Investigation: Functional and Legal Perspectives*, 46 J. AIR L. & COM. 237, 283 (1981) "Ninety to ninety-five percent of the free world's air carrier aircraft bear the labels of American companies as do about eighty percent of the free World's general aviation aircraft." *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *Xerakis v. Greek Line, Inc.* 382 F. Supp. 774, 777 (E.D. Pa. 1974) in which the court noted: "[W]e live in an international community and by definition from the view of certain interests the laws of some other countries may be more or less favorable to the special interest. But we are not a super-court of international jurisdiction"

waters exclusively on our terms, governed by our laws, and resolved in our courts."¹⁸⁵

There are several facets of American law which appeal to foreign plaintiffs. As an English judge put it recently: "As a moth is drawn to the light, so is a litigant drawn to the United States."¹⁸⁶ Some of the reasons for this attraction include the American legal system's recognition of contingency fees, the right to a jury trial, higher damage awards, and the fact that the losing party is rarely forced to pay the prevailing party's attorney's fees.¹⁸⁷

American products liability law is particularly attractive to foreign plaintiffs. Strict liability originated in the United States, where it is a part of the law of all but a few states,¹⁸⁸ but it has been adopted by few countries.¹⁸⁹ As in Scotland, many countries prefer to encourage industry by being more protective of manufacturers, and thus have continued to rely on the negligence standard under which it is relatively more difficult for a consumer to recover.¹⁹⁰ If the Third Circuit's decision had been allowed to stand, a citizen of any country not recognizing strict liability could have sued in almost any U.S. district court without fear of a *forum non conveniens* dismissal, whether or not litigation in that forum would have been inconvenient and oppressive.

It could be argued that an American manufacturer choosing to sell products in other countries should still be held to the standard of care of the country in which its products are produced. Then in the event one of the products causes injury,

¹⁸⁵ *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 9 (1972).

¹⁸⁶ *Smith Kline & French Laboratories Ltd. and Another v. Bloch*, Court of Appeal (Civil Division), *The Times*, May 17, 1982.

¹⁸⁷ *Id.* See also *Piper Aircraft Co. v. Reyno*, 102 S. Ct. at 264 n.18.

¹⁸⁸ All but six states (Delaware, Massachusetts, Michigan, North Carolina, Virginia and Wyoming) recognize strict liability in tort. 1 PROD. LIAB. REP. (CCH) § 4016 (1982).

¹⁸⁹ France, Belgium and Luxembourg have laws similar to American strict liability, and West Germany and Japan have strict liability statutes pertaining to pharmaceuticals. 102 S. Ct. at 264 n.18. See generally Orban, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the E.E.C. Directive*, 8 GA. J. INT. & COMP. L. 342 (1978); Hollenshead & Conway, *An Overview: International Products Liability*, 16 Trial 50 (Nov., 1980).

¹⁹⁰ *Reyno v. Piper Aircraft Co.*, 630 F.2d at 167-8.

the manufacturer's liability should not depend on the fortuity of the injury occurring to a user who happens to reside in a country recognizing a lesser standard of care. The purposes of strict liability in tort include deterrence as well as equitable allocation of risk.¹⁹¹

But the *Piper* decision is not favorable to this line of reasoning. The decision can be expected to discourage foreign plaintiffs from seeking redress from American manufacturers in U.S. courts. The decision adds impetus to the current swing in the products liability pendulum back towards more protectiveness of the defendant, a subtle movement best evidenced by the growing number of states which have adopted comparative fault.¹⁹²

In summary, by its decision in *Piper*, the Supreme Court has indicated a desire to avoid burdening crowded federal courts with suits having little connection with the United States. The decision encourages district courts to exercise restraint in retaining jurisdiction over suits which more appropriately should be tried elsewhere. In so doing, the Supreme Court has rejected the parochial notion that the "liberal purposes" of American law must be exported to wherever (American) multi-national corporations are permitted to do business."¹⁹³

Sheryl Anne Self

AIRLINE DEREGULATION—ESSENTIAL AIR TRANSPORTATION FOR SMALL COMMUNITIES—Under the Small Community Air Service Program, the Civil Aeronautics Board May Postpone Service Suspensions Only at Points Served by One Certified Air Carrier, and Cannot Require Airlines to Give

¹⁹¹ See Calabresi, *Optimal Deterrence and Accidents*, YALE L.J. 656 (1975); Calabresi & Hirshoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1075-84 (1972).

¹⁹² See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

¹⁹³ *Demateos v. Texaco, Inc.*, 562 F.2d 895, 902 (2d Cir. 1977).

Notice of Any Service Suspension to a Community Served by More Than One Certified Air Carrier. *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 674 F.2d 1 (D.C. Cir. 1982).

Eastern Air Lines (Eastern) filed notice with the Civil Aeronautics Board (CAB) and the City of Montgomery, Alabama on February 22, 1980, of its intent to indefinitely suspend all service to Montgomery beginning on or after June 1, 1980.¹ In the notice filed pursuant to the Airline Deregulation Act of 1978² (Deregulation Act), Eastern stated that the proposed service termination would not deprive Montgomery of essential air transportation.³ The City of Montgomery, the City of Montgomery Airport Authority, and the Montgomery Area Chamber of Commerce filed a petition with the CAB asking that Eastern be required to continue air service until Montgomery's peak travel season was over on September 15, 1980.⁴

The CAB ruled that Eastern had to offer one daily round-trip flight between Montgomery and Atlanta until June, 1980.⁵ The CAB also ordered Delta Air Lines (Delta) and Republic Air Lines (Republic), the other two airlines serving Montgomery, to give ninety days notice of any reduction of service at Montgomery,⁶ and to submit weekly reports of passenger traffic at that city.⁷ Delta did not initially comply with the reporting requirements of the order.⁸ Based on Eastern's and Republic's first reports, the CAB found that "there will continue to be insufficient capacity at Montgomery without at least one daily round trip by Eastern" to Atlanta,⁹ and ruled to extend the order's requirements until July 30,

¹ *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 674 F.2d 1, 2-3 (D.C. Cir. 1982).

² § 401(j), Pub. L. No. 95-504, 92 Stat. 1705 current version at 49 U.S.C. § 1371(j) (Supp. III 1979).

³ Brief for Respondent at 11-12, *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 674 F.2d 1 (D.C. Cir. 1982) [hereinafter cited as Brief For Respondent].

⁴ *Id.* at 12.

⁵ In re Eastern Air Lines, Inc., CAB Order 80-5-170, 6 (May 23, 1980).

⁶ *Id.* at 7.

⁷ *Id.*

⁸ Brief for Respondent, *supra* note 3, at 15.

⁹ In re Eastern Air Lines, Inc., CAB Order 80-6-174, 1 (June 24, 1980).

1980.¹⁰ Delta began compliance with the CAB's reporting requirement on June 30, 1980.¹¹ Upon review of the passenger traffic reports, the CAB terminated Eastern's requirement of continuing service¹² and also terminated the requirements that Delta and Republic report traffic and reductions in service.¹³

Delta and Republic then filed petitions for reconsideration which asserted that the CAB had had no legal authority to require Eastern to maintain service or to regulate and monitor their own service.¹⁴ The CAB reconsidered its actions even though it held the petitions to be moot following termination of Eastern's requirement to maintain one daily round trip to Atlanta and Delta and Republic's notice and reporting requirements¹⁵ in *In re Eastern Air Lines, Inc.*¹⁶ The CAB also relied on the language of sections 419(a)(10)¹⁷ and 407(a)¹⁸ of the Deregulation Act to uphold its earlier action of

¹⁰ *Id.*

¹¹ Brief for Respondent, *supra* note 3, at 15.

¹² *In re Eastern Air Lines, Inc.*, CAB Order 80-7-75, 2 (July 11, 1980).

¹³ *Id.* at 3.

¹⁴ Brief for Respondent, *supra* note 3, at 15.

¹⁵ *In re Eastern Air Lines, Inc.*, CAB Order 80-8-180, 1 (Aug. 29, 1980).

¹⁶ CAB Order 80-7-75 (July 11, 1980).

¹⁷ Airline Deregulation Act of 1978 § 419(a)(10), 49 U.S.C. § 1389(a)(10) (Supp. III 1979) provides:

Unless the Board has determined what is essential air transportation for any eligible point pursuant to paragraph (2) of this subsection, the Board shall, upon petition of any appropriate representative of such point, prohibit any termination, suspension, or reduction of air transportation which reasonably appears to deprive such point of essential air transportation, until the Board has completed such determination.

Id.

¹⁸ International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 10, 94 Stat. 38 (1980) (current version at 49 U.S.C. § 1377(a) (Supp. IV 1980)) states:

The Board is empowered to require annual, monthly, periodical, and special reports from any air carrier; to prescribe the manner and form in which such reports shall be made; and to require from any air carrier specific answers to all questions upon which the Board may deem information to be necessary. Such reports shall be under oath whenever the Board so requires. The Board may also require any air carrier to file with it a true copy of each or any contract, agreement, understanding, or arrangement, between such air carrier or foreign air carrier . . . and any other carrier or person, in relation to any traffic affected by the provisions of this chapter.

suspending Eastern's termination of service¹⁹ and to uphold the passenger reporting requirement of its earlier orders.²⁰

On appeal, Delta argued that the CAB improperly invoked section 419(a) (10)²¹ by suspending Eastern's termination of service while Delta and Republic continued to serve Montgomery.²² In addition, Delta argued that because there had been no determination of essential air transportation for Montgomery,²³ nor was there one pending, the CAB did not have the power to require Delta and Republic to give ninety days notice of any reduction in service²⁴ under section 419(a) (3) (A).²⁵ *Held, reversed on all points except the reporting requirement:* Under the Small Community Air Service Program, the Civil Aeronautics Board may postpone service suspensions only at points served by one certified air carrier

Id.

¹⁹ In re Eastern Air Lines, Inc., CAB Order 80-8-180, 7 (Aug. 19, 1980).

²⁰ In re Eastern Air Lines, Inc., CAB Order 80-8-180, 8 (Aug. 29, 1980). The CAB stated:

We must closely monitor the remaining traffic and service at the point so that we may allow the incumbent carrier to suspend service as soon as possible. For this reason, we often require all carriers serving the point to submit weekly traffic data for their operations at that point. Our authority to require these filings is found in section 407(a), which empowers us to require periodic and special reports from any carrier.

Id.

²¹ Airline Deregulation Act of 1978 § 419(a)(10), 49 U.S.C. § 1389(a)(10) (Supp. III 1979). See *supra* note 16.

²² Reply Brief for Petitioner at 25, *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 674 F.2d 1 (D.C. Cir. 1982) [hereinafter cited as Reply Brief for Petitioner].

²³ *Id.* at 26.

²⁴ *Id.*

²⁵ Airline Deregulation Act of 1978 § 419(a)(3)(A), 49 U.S.C. § 1389(a)(3)(A) provides:

(3) No air carrier shall terminate, suspend, or reduce air transportation to any eligible point below the level of essential air transportation established by the Board under paragraph (2) unless such air carrier-

(A) if such air carrier—(i) holds a certificate issued under section 1371 of this title, or (ii) does not hold such a certificate, but is receiving compensation pursuant to paragraph (5) of this subsection for service to such eligible point,

has given the Board, the appropriate State agency or agencies, and the communities affected at least ninety days notice prior to such termination, suspension, or reduction.

Id.

and cannot require airlines to give ninety days notice of any service suspension to a community served by more than one certified air carrier. *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 674 F.2d 1 (D.C. Cir. 1982).

I. HISTORY

A. Federal Aviation Act of 1958

Under the Federal Aviation Act of 1958 (Act),²⁶ the philosophy of government regulation was one of controlled entry into and departure from the air service industry.²⁷ Section 401(a) of the Act²⁸ prohibited all air carriers from engaging in air transportation unless they had received a CAB-issued certificate authorizing air transportation.²⁹ Each certificate specified the routes the air carrier was authorized to fly,³⁰ and could only be issued if the CAB found that public convenience and necessity required the air carrier's service.³¹

In addition the Federal Aviation Act of 1958³² strictly regu-

²⁶ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. §§ 1301-1542 (1976)).

²⁷ *Frontier Air Lines, Inc. v. CAB*, 621 F.2d 369, 371 (10th Cir. 1980).

²⁸ 49 U.S.C. §§ 1301-1542 (1976).

²⁹ 49 U.S.C. § 1371(a) (1976) provides that, "No air carrier shall engage in any transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

³⁰ 49 U.S.C. § 1371(e)(1) (1976), provides:

Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

Id.

³¹ 49 U.S.C. § 1371(d)(1)(1976) states:

The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Id.

³² 49 U.S.C. §§ 1301-1542 (1976).

lated an air carrier's withdrawal from a route.³³ The carrier could petition the CAB to amend its certificate to allow removal of a point from a route³⁴ or to authorize the complete abandonment of a route.³⁵ However, the only way a carrier could terminate service to a market was with the CAB's permission.³⁶ Both methods required the CAB to authorize the withdrawal only after notice and hearings and a finding that the withdrawal was in the public interest.³⁷

The Act did not, however, regulate an air carrier's service beyond entry into and total withdrawal from a market.³⁸ While the CAB could take an air carrier's schedule, equipment, accommodations and facilities into account when approving a certificate for an air carrier,³⁹ it could not directly regulate such factors.⁴⁰ An air carrier could choose to route a passenger in any fashion as long as the passenger eventually

³³ 49 U.S.C. §§ 1371(g), 1371(j) (1976).

³⁴ 49 U.S.C. § 1371(g) (1976) provides in part: "The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require."

³⁵ 49 U.S.C. § 1371(j) (1976), provides in part: "No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest."

³⁶ 49 U.S.C. §§ 1371(g), 1371(j) (1976), *discussed supra* at notes 32-33 and accompanying test.

³⁷ *Id.*

³⁸ 49 U.S.C. § 1371(e)(4) (1976), which provides:

No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

Id.

³⁹ 49 U.S.C. § 1371(e)(1) (1976), states:

Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

Id.

⁴⁰ 49 U.S.C. § 1371(e)(4) (1976), *discussed supra* at note 38.

reached the authorized destination.⁴¹ Thus, entry into and exit from a market were closely regulated by the CAB under the Federal Aviation Act of 1958, but the type and extent of service to a market by an air carrier was not.⁴²

B. *Airline Deregulation Act of 1978*

The Deregulation Act, meant to be a legislative mandate to the CAB as to both the direction and limitations of its future powers,⁴³ represents a major change in the government's philosophy.⁴⁴ The Deregulation Act was designed to create a gradual transition to deregulation of the industry in order to make it subject to competitive market forces.⁴⁵ To facilitate deregulation between 1978 and December 31, 1981, the Deregulation Act eased several requirements so that an air carrier's entry into a market need only be "consistent" with public convenience and necessity⁴⁶ rather than "required" by public

⁴¹ Phoenix-Des Moines/Milwaukee Route Proceeding, CAB Order 78-1-116, 27 (Jan. 27, 1978). The CAB did not require that an air carrier provide nonstop flights for all markets for which it had nonstop authority. An air carrier could fulfill its certificate service requirements by routing a passenger in any manner as long as the passenger reaches the authorized destination.

⁴² See *supra* notes 31-39 and accompanying text.

⁴³ H. R. Rep. No. 1779, 95th Cong. 2d Sess. 56 (1978) [hereinafter cited as Conference Report] (cited in *Delta Air Lines, Inc. v. CAB*, 674 F.2d 1, 7 (D.C. Cir. 1982)). The Conference Report reads in part:

In adopting this new, comprehensive legislation which entirely overhauls the aviation regulatory system, Congress was mindful of recent activities of the CAB. This new charter is intended as a legislative mandate to the CAB both as to the direction and policy of aviation regulation and also, it should be noted, the limits of such policy. In short, Congress expects the deregulation of the aviation industry to move in accordance with the legislation and not in accordance with the perhaps differing concepts of some members of the CAB. The legislation establishes specific programs for increased competition. The legislation also includes a new policy statement which gives the CAB broad discretion to establish other programs to encourage competition, such as the multiple permissive authority program recently established by the Board. Such programs are needed in the gradual and phased transition to a deregulated system. However, we expect that in developing these programs the Board will pay heed to the provisions of the policy statement giving specific directions to the Board.

Id.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ International Air Transportation Competition Act of 1979, Pub. L. No. 96-192,

convenience and necessity, as it was under the Federal Aviation Act of 1958.⁴⁷ The Deregulation Act continued the transition toward deregulation by ending the CAB's regulatory power over domestic passenger fares as of December 31, 1981,⁴⁸ and by providing for the dissolution of certain CAB authority on January 1, 1985.⁴⁹

The Deregulation Act also liberalized the procedure for terminating air carrier service.⁵⁰ Rather than applying to the Board for permission, as required by the Federal Aviation Act of 1958,⁵¹ an air carrier must simply notify the CAB, the community affected, and the affected state agency of its intent to withdraw from a market.⁵² In recognition of the potentially harmful effects of deregulation and withdrawal on small communities, Congress has created a new program in section 419

94 STAT. 37 (1980) (current version at 49 U.S.C. § 1371(d)(1) (Supp. IV 1980) provides:

The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is consistent with the public convenience and necessity; otherwise such application shall be denied.

Id.

⁴⁷ § 401(d)(1), Pub. L. No. 85-726, 72 STAT. 731 (1958) (current version 49 U.S.C. § 1371(d)(1) (1976)). *See supra* note 31 and accompanying text.

⁴⁸ Airline Deregulation Act of 1978 § 1601(a)(1)(F), Pub. L. No. 95-504, 92 STAT. 1705 (1978) (Current version at 49 U.S.C. § 1551(a)(1)(F) (Supp. III 1979)).

⁴⁹ 49 U.S.C. § 1551(b)(2) (Supp. III 1979).

⁵⁰ 49 U.S.C. § 1371(j)(1) (Supp. III 1979) provides in part:

No air carrier holding a certificate issued under this section shall—
(A) terminate or suspend all air transportation which it is providing to a point under such certificate . . . unless such air carrier has first given the Board, any community affected, and the State agency of the State in which the community is located, at least 90 days notice of its intent to so terminate, suspend, or reduce such air transportation. The Board may, by regulation or otherwise, authorize such temporary suspension of service as may be in the public interest.

Id.

⁵¹ Federal Aviation Act of 1958 § 401(j), 49 U.S.C. § 1371(j) (1976). *See supra* note 35.

⁵² Airline Deregulation Act of 1978 § 401(j)(1), 49 U.S.C. § 1371(j)(1) (Supp. III 1979). *See supra* note 50.

of the Deregulation Act,⁵³ the Small Community Air Service Program,⁵⁴ designed to guarantee that small communities will receive air service for up to ten years, at government expense if necessary.⁵⁵ This program is to remain in effect until October 24, 1988.⁵⁶

Section 419(a)(2) gives the CAB the power to determine what constitutes essential air transportation in order to see if a community fits within the scope of the Small Community Air Service Program.⁵⁷ The Deregulation Act allotted the CAB one year from the time of passage to make an essential air transportation determination for all communities not served

⁵³ 49 U.S.C. § 1389 (Supp. III 1979).

⁵⁴ *Id.*

⁵⁵ 49 U.S.C. §§ 1389(a)(4)(B), 1389(a)(5) (Supp. III 1979). Section 419(a)(4)(B), provides that "the Board shall establish, in accordance with the guidelines promulgated under subsection (d) of this section a rate of compensation to be paid for providing such essential air transportation." 49 U.S.C. § 1389(a)(4)(B) (Supp. III 1979) Section 419(a)(5) provides:

The Board shall make payments of compensation under this section at times and in a manner determined by the Board to be appropriate. The Board shall continue to pay compensation to any air carrier to provide essential air transportation to an eligible point only for so long as the board determines it is necessary in order to maintain essential air transportation to such eligible point.

49 U.S.C. § 1389(a)(5) (Supp. III 1979).

⁵⁶ 49 U.S.C. § 1389(g) (Supp. III 1979) provides that "this section shall cease to be in effect after the last day of the ten-year period which begins October 24, 1978." During this ten year period, pursuant to section 419(b)(2), the authority to provide compensation for air transportation to small communities is transferred from the CAB to the Department of Transportation effective on January 1, 1985. 49 U.S.C. § 1551(b)(1)(A) (Supp. III 1979).

⁵⁷ 49 U.S.C. § 1389(a)(2) (Supp. III 1979). *See supra* note 25. Section 1389(f) defines essential air transportation as:

[S]cheduled air transportation of persons to a point provided under such criteria as the Board determines satisfies the needs of the community concerned for air transportation to one or more communities of interest and insures access to the Nation's air transportation system, at rates, fares, and charges which are not unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial, and—

(1) with respect to air transportation to any point (other than in the State of Alaska), in no case shall essential air transportation be specified as fewer than two daily round trips, 5 days per week, or the level of service provided by air carriers in effect for calendar year 1977, whichever is less.

Id.

or served by only one certified air carrier,⁵⁸ and empowered the CAB to make such determinations for communities that subsequently receive notice of the termination of service by all but one air carrier.⁵⁹

The other vital portion of the legislation is section 419(a)(10).⁶⁰ This subsection allows the CAB, upon petition of an appropriate party, to prohibit any downgrading of air service by a certified air carrier until a determination of essential air transportation has been completed.⁶¹ The applicability of section 419(a)(10) formed the major question of law in *Delta Air Lines, Inc. v. Civil Aeronautics Board*.⁶²

II. DELTA AIR LINES, INC. v. C.A.B.

In this case of first impression,⁶³ the District of Columbia Court of Appeals was faced with four issues of law. The initial issue was whether the case was moot.⁶⁴ The second issue was whether the CAB had the authority to suspend Eastern's termination of service.⁶⁵ The third issue was whether the CAB had the authority to require Delta and Republic to give ninety days notice of any reduction in service.⁶⁶ The final issue was whether the CAB had the authority to require Eastern, Delta and Republic to make weekly passenger traffic reports.⁶⁷

A. Mootness

The threshold issue faced by the court was whether the substantive issues of law had been rendered moot by the CAB terminating its orders.⁶⁸ The court agreed with Delta's position that the legal issues were "capable of repetition, yet evad-

⁵⁸ 49 U.S.C. § 1389(a)(2)(A) (Supp. III 1979).

⁵⁹ 49 U.S.C. § 1389(a)(2)(B) (Supp. III 1979).

⁶⁰ 49 U.S.C. § 1389(a)(10) (Supp. III 1979). See *supra* note 17.

⁶¹ *Id.*

⁶² 674 F.2d 1, 4-5 (D.C. Cir. 1982).

⁶³ *Id.* at 2 n.3.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.*

⁶⁶ *Id.* at 6.

⁶⁷ *Id.*

⁶⁸ *Id.* at 4.

ing review”⁶⁹ and determined that the case was not moot.⁷⁰ Noting that the CAB had asserted the disputed authority three times since enactment of the Deregulation Act,⁷¹ the court reasoned that Delta might be subjected to the same type of requirements again.⁷²

B. *CAB Power to Prohibit Suspension of Service Under Section 419(a)(10)*

After reversing the CAB on the mootness issue,⁷³ the court dealt with the CAB’s authority to postpone Eastern’s suspension of service.⁷⁴ The CAB had based such authority on section 419(a)(10),⁷⁵ arguing that the Congressional intent of the section was to guarantee essential air transportation to “any eligible point,” including Montgomery,⁷⁶ and that the essential air service program was not limited in scope to communities fitting within the description contained in section 419(a)(2).⁷⁷ The CAB argued that because Congress did not specifically limit section 419(a)(10) to those communities fitting within section 419(a)(2), the CAB could suspend any reduction of service to any community eligible to receive air service until a determination of essential air service had been

⁶⁹ *Id.* The court held that the case was not moot based on the doctrine that the legal issues were “capable of repetition, yet evading review.” This doctrine was first pronounced by the Supreme Court in the case of *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911), and was also used in *Roe v. Wade*, 410 U.S. 113, 125 (1973). The court cited the case of *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), in which the Supreme Court held that “the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.” The court in *Delta Air Lines, Inc. v. C.A.B.* 674 F.2d 1, 4 (D.C. Cir. 1982) agreed with Delta’s position that because of the short term nature of the orders and the fact that the CAB had asserted the same disputed authority three times before, the case was not moot.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 49 U.S.C. § 1389(a)(10) (Supp. III 1979). See *supra* note 17.

⁷⁶ Brief for Respondent, *supra* note 3, at 21.

⁷⁷ *Id.* at 21-23. Communities that fit within the section 419(a)(2) category are those “eligible communities” as described in section 419(a)(1) which are now receiving air service from just one certified air carrier. 49 U.S.C. § 1389(a)(2) (Supp. III 1979).

completed.⁷⁸ The CAB stated that this was consistent with Congressional intent, because Congress was concerned with guaranteeing essential air service to all small communities during the transition to deregulation.⁷⁹

In opposition, Delta contended that although Montgomery was an eligible point for air service as described by section 419(a)(1),⁸⁰ the CAB was not authorized to make an essential air service determination because Montgomery, serviced by two certified air carriers, did not fit within section 419(a)(2).⁸¹ Delta argued that the CAB is specifically limited in making essential air transportation determinations to communities that fit within the latter section, and that, because Montgomery was not included in that category, the CAB had no authority to suspend Eastern's termination of service.⁸²

The court, in interpreting the language of section 419(a)(10), accepted Delta's argument as being the position most consistent with Congress' intent to deregulate the air industry.⁸³ The court held that acceptance of the CAB's position on this issue would subvert the goal of deregulation by allowing the CAB to suspend termination of service to any community no matter how many remaining air carriers were serving it.⁸⁴ The court acknowledged that some small communities might suffer severe disruptions in service even though they are still served by more than one air carrier,⁸⁵ but held that in view of the policy of deregulation, Congress intended to allow

⁷⁸ Brief for Respondent, *supra* note 3 (cited in *Delta Air Lines, Inc. v. C.A.B.*, 674 F.2d 1, 5 (D.C. Cir. 1982)).

⁷⁹ Brief for Respondent, *supra* note 3, at 24.

⁸⁰ 49 U.S.C. § 1389(a)(1) (Supp. III 1979) defines an "eligible point" as, any point in the United States to which, on October 24, 1978, any air carrier—

(A) is providing service pursuant to a certificate issued to such carrier under section 1371 of this title; or

(B) is authorized pursuant to such certificate to provide such service, but such service is suspended on October 24, 1978.

Id.

⁸¹ Brief for Petitioner at 29, *Delta Air Lines, Inc. v. C.A.B.*, 674 F.2d 1 (D.C. Cir. 1982).

⁸² *Id.* at 31-32.

⁸³ 674 F.2d at 6.

⁸⁴ *Id.* at 5-6.

⁸⁵ *Id.* at 6.

such disruptions, as evidenced by the language of section 419(a)(10).⁸⁶ The court's rationale for this interpretation is based on the incongruency between the CAB's position and the overall goals of deregulation.⁸⁷ If the CAB's view was to be carried out to its logical extreme, the court stated that the CAB could suspend any termination of service at any airport eligible to receive air service, and still maintain service at present levels by preventing exit from a market or subsidizing air carriers to provide equivalent service.⁸⁸

C. *CAB Power to Require Ninety Days Notice of Any Reduction of Service Under Section 401(j)*

The third legal issue faced by the court was whether the CAB had authority under section 401(j)⁸⁹ of the Deregulation Act to require Delta and Republic to give ninety days notice of any reduction in service.⁹⁰ As the CAB interpreted section 401(j), a formal essential air transportation determination was not required to have been completed. Rather, the CAB had the power to require air carriers to give ninety days notice of any reduction in service during the period in which the CAB was undertaking an essential air transportation determination.⁹¹ The CAB completed its argument by relying on section 419(a)(10) for authority to make an essential air transportation determination, thus giving it the power to require notice of reductions in service in the interim period before the determination was completed.⁹²

Delta based its argument solely on the fact that the CAB had not made a determination of essential air transportation.⁹³ Delta contended that the language of section 401(j) requires that notice be given only when an air carrier is going to reduce service "below that which the Board has determined to

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 5-6.

⁸⁹ 49 U.S.C. § 1371(j)(1) (Supp. III 1979). *See supra* note 35.

⁹⁰ 674 F.2d at 6.

⁹¹ Brief for Respondent, *supra* note 3, at 34.

⁹² *Id.* at 34-35.

⁹³ Brief for Petitioner, *supra* note 81 at 36.

be essential air transportation for such a point."⁹⁴ Emphasizing that even if the CAB were empowered to require notice during the period in which an essential air transportation determination is being made, Delta argued that in this case the CAB had no authority to require notice because it had no authority to make an essential air transportation determination.⁹⁵

The court agreed with Delta's position. Section 401(j) requires that there be a reduction in service below the point which the CAB has determined to be essential air transportation before notice of a reduction in service is required.⁹⁶ Taking notice of the fact that the CAB had not made an essential air transportation determination,⁹⁷ the court held that the CAB had neither the power to make such a determination⁹⁸ nor to require Delta to give notice of a reduction in service.⁹⁹

D. CAB Power to Require Weekly Passenger Traffic Reports

The final legal issue the court faced was whether the CAB had the authority to require Delta to submit weekly reports on passenger traffic to and from Montgomery.¹⁰⁰ The CAB is empowered under section 407(a)¹⁰¹ to require air carriers to file "special reports" and "specific answers to all questions upon which the Board may deem information to be necessary."¹⁰² The court held that although the CAB had no authority to determine what constitutes essential air transportation for Montgomery,¹⁰³ the CAB did have the power to require weekly passenger traffic reports under Section 407(a) in preparation for a time when the CAB may have to make an essential air transportation determination for Montgomery

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Delta Air Lines, Inc. v. C.A.B.*, 674 F.2d at 6 (D.C. Cir. 1982).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 49 U.S.C. § 1377(a) (Supp. III 1979). *See supra* note 19.

¹⁰² *Id.*

¹⁰³ 674 F.2d at 7.

under section 419(a)(10).¹⁰⁴

III. CONCLUSION

The potential impact of *Delta Air Lines, Inc. v. C.A.B.*¹⁰⁵ is substantial considering that the Small Community Essential Air Transportation Program will be in effect until October 24, 1988,¹⁰⁶ with the Department of Transportation assuming the CAB's authority on January 1, 1985.¹⁰⁷ Under this program, the CAB and its successor have the authority to maintain what are determined to be essential levels of air transportation for small communities within the scope of the program. The CAB may take such action even at the cost of paying a government subsidy to air carriers required under the program to maintain service.¹⁰⁸

The major effect of this case is to limit the applicability of the program to communities served by only one air carrier, as specified in section 419(a)(2) of the Deregulation Act. The narrow scope of the program will give air carriers the necessary flexibility to exit markets in response to competitive market factors as Congress had envisioned.¹⁰⁹ Had the court subscribed to the CAB's interpretation of section 419(a)(10), the Board could have prohibited the withdrawal of air carriers from any market in the United States until the CAB had completed an essential air transportation determination,¹¹⁰ and could have maintained service at the level it determined to be essential air transportation.¹¹¹ The impact of this possibility cannot be overstated today in view of the increased price of fuel which can turn once-profitable markets into financial drains on air carriers. The potential for profits resulting from shifts in service in response to market changes such as the Braniff bankruptcy would also be greatly reduced if the CAB

¹⁰⁴ *Id.*

¹⁰⁵ 674 F.2d 1 (D. C. Cir. 1982).

¹⁰⁶ 49 U.S.C. § 1389(g) (Supp. III 1979).

¹⁰⁷ 49 U.S.C. § 1551(b)(2) (Supp. III 1979).

¹⁰⁸ 49 U.S.C. § 1389(a)(5) (Supp. III 1979).

¹⁰⁹ Conference Report, *supra* note 43, at 56.

¹¹⁰ See *supra* notes 74-88 and accompanying text.

¹¹¹ *Id.*

were able to suspend any air carrier's withdrawal from any domestic market. This circuit court decision will thus allow an air carrier to determine where it can fly its airplanes most economically and efficiently, except for that narrow range of markets which fall within the scope of the Small Community Essential Air Transportation Program.

The court's ruling on the CAB's authority to require notice before a reduction in service is also very important for air carriers. By not requiring ninety days notice of a reduction in service, the court has greatly facilitated the airlines' ability to react readily to market changes. Unless the air carrier is serving a small community which the CAB has previously determined to be essential air transportation, and service is reduced below levels established by the CAB,¹¹² airlines may now reduce service without notice in certain locations in order to increase operations in more profitable markets.

Daniel G. Yoe

¹¹² *Delta Air Lines, Inc. v. C.A.B.*, 674 F.2d 1, 6 (D.C. Cir. 1982).

Current Literature

