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Current Legislation and Decisions

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CURRENT LEGISLATION AND DECISIONS

NOTES

Computer Application To Law — International Aviation Liability Analysis — Warsaw, Hague, Montreal Flight

I. INTRODUCTION

A legal analysis suitable for computer application is the determination of the applicability of the Warsaw Convention,[1] the Hague Protocol,[2] and the Montreal Agreement[3] to a series of contracts for carriage by air. This comment presents a program (see tables 1, 1-A, 1-B, 1-C) capable of performing such an analysis. The thrust of this article is purely academic, but possible commercial applications of a program such as the one presented herein include use of the program in connection with an airline reservation system. The air carrier would be able to give actual notice to the passenger of the very high probability of limitations of liability, rather than the generalized notice that is present on virtually all major airline tickets today, even on obviously domestic flight tickets. Other possible commercial applications include use by an insurance company to advise potential insurance buyers at an airport of the relation of international conventions limiting liability to their flights. Finally, if a nation decided to impose a compulsory insurance program for international flights, a program such as the one now presented could indicate precisely which passengers should pay added insurance costs; the indication could be made to the ticket reservationist at the time of purchase of the contract.

II. PROGRAM LOGIC

A. *Subroutines*

1. *Subroutine "Flight"* (See Table 1-A.)

The crux of the program logic is found in the flight subroutine which analyzes whether the criteria for an international flight under Warsaw and Hague are met. The logic is common to both Warsaw and Hague

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876 (text in CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIALS [hereinafter cited AERONAUTICAL STATUTES] 289 (1967).)

[2] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed at Warsaw, Poland, 12 Oct. 1929) (text in AERONAUTICAL STATUTES, *supra* note 1, at 283).

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18990, approved by CAB Order No. E-23680, 13 May 1966 (text in AERONAUTICAL STATUTES, *supra* note 1, at 324).

solutions. Accordingly, the flight subroutine is reused in order that both tests may be made according to their common logic.

Succinctly, a flight contract is Warsaw carriage *if and only if*

(1) The point of arrival and the point of departure are in High Contracting Parties to the Convention,

AND (2) *Either*:

(a) The point of arrival is not in the same High Contracting Party as the point of departure,

or

(b) if the point of arrival is in the same High Contracting Party as the point of departure, there is an intermediate agreed stopping point in a different power (not necessarily a High Contracting Party) from the point of arrival or destination.[4]

As noted above, the same logic applies to Hague, with Hague parties substituted for Warsaw parties as High Contracting Parties.

Subroutine Flight is used to test whether the criteria set forth above have been satisfied.

2. *Subroutine "Except"* (See Table 1-B.)

A significant problem is the failure of the United States to recognize the High Contracting Party status of the People's Republic of China, North Korea, and East Germany.[5] Accordingly, an exception subroutine is utilized to identify whether any of the agreed stopping places in a flight is one of these nations. People's China is designated RDCHIN; North Korea is designated RDKORE. It is also used to make it possible to rerun the program after the initial analysis, treating these nations as non-High Contracting Parties for the second analysis. A defect in the present program is that a test for East Germany was not included, although the print instructions indicate that one is present. Although a test for East Germany could be readily included, it is not. The tests for Mainland China and North Korea, however, have been included.

3. *Subroutine "Mont"* (See Table 1-C.)

If one of the agreed stopping places or the point of arrival or the point of departure is in the United States, the flight is a Montreal flight contract, and the limitation of liability is $75,000 instead of $16,580 for Hague contracts and $8,290 for Warsaw contracts.[6] Hence, a Montreal subroutine has been included to identify flights in which the U.S.A. is included.

A test to discover whether the United Kingdom is included in the flight contract is also present in the Montreal subroutine, although the United Kingdom is not at all involved directly in Montreal flight. The United Kingdom test is entirely unrelated, but is present to show that informational messages for given countries can be included in a program. The United Kingdom message indicates the nation's High Contracting Party status is unrelated to its colonies, protectorates, etc.

[4] AERONAUTICAL STATUTES, *supra* note 1, at 284,285.
[5] AERONAUTICAL STATUTES, *supra* note 1, at 319-23.
[6] AERONAUTICAL STATUTES, *supra* note 1, at 324.

B. *Integration Of Subroutines Into Main Program Logic*
(See Table 1.)

The main program first calls Subroutine Flight to test if the carriage is Hague carriage. Next, it recalls the same subroutine to analyze whether Warsaw flight criteria have been satisfied. Subsequently, the main program calls Subroutine Mont to test whether the flight is covered by the Montreal Agreement and whether the United States and/or the United Kingdom are included in the flight contract.

According to whether a flight satisfies the conditions for Hague, Warsaw, and Montreal, an appropriate message is printed noting the application of the appropriate conventions and agreements and the limitations of liability. If the flight contract is not covered by any of the above, a message is printed to that effect, but also warning the passenger that a local limitation of liability might apply since the flight is not covered by international agreement. If the United States or the United Kingdom was discovered by the Subroutine Mont, information messages are printed.

Finally, Subroutine Except is called to test for the presence of People's China and North Korea. (As noted above, the test for East Germany was omitted.) If either of the two specified "RD" nations are encountered, the subroutine changes these parties to non-High Contracting Parties and the program is rerun for a second time after the original analysis, treating them in the second run as High Contracting Parties. Appropriate messages are printed after the first analysis to indicate the nature and purposes of the rerun.

III. DATA

A. *Input*

The names of the Hague and Warsaw parties are chosen from lists in AERONAUTICAL STATUTES AND RELATED MATERIALS by the CAB (1967) at 319-323. It is important to note that an important assumption has been made that all Hague parties either are formal Warsaw parties or are implied members through their membership in Hague. Accordingly, Hague countries not mentioned in the lists of Warsaw countries have been included for purposes of this data input in the Warsaw matrix. The printout of this input of High Contracting Parties is shown in tables 2-A and 2-B.

All input, including that of the program itself, was done on punched cards.

Sample flight contracts are fed into the computer for processing according to the program. Abbreviations used for countries that are not Hague or Warsaw nations include LLLLLL, XXXXXX, ANYWHR.

B. *Output*

High speed printer output of the several sample flight contracts subjected to processing is shown in Table 3.

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TABLE 1

MAIN PROGRAM (LANGUAGE: FORTRAN V)

```
      EXTERNAL TYMCK
      INTEGER H,M,W,KU,NR,WRKMAT,WARMAT,HAGMAT,N,L
      DIMENSION HAGMAT (51), WARMAT (121)
      COMMON /A1/ N,WRKMAT (20,2)
      CALL TYMCK ( 15 ,$555)
      DO 880 I = 1,51
      READ 901 , HAGMAT (I)
      PRINT 902 , HAGMAT (I)
880   CONTINUE
      DO 881 I = 1,121
      READ 901 , WARMAT (I)
      PRINT 902 , WARMAT (I)
881   CONTINUE
901   FORMAT (A6)
902   FORMAT (1H ,A6)
001   CONTINUE
002   READ 202,N
202   FORMAT (15)
      DO 003 ICNT = 1,N
      READ 203,WRKMAT (ICNT,1),WRKMAT (ICNT,2)
203   FORMAT (A6,4X,A6)
003   CONTINUE
      DO 197 I=1,N
      PRINT 196 (WRKMAT(I,J),J=1,2)
196   FORMAT (1HO,2(A6,4X))
197   CONTINUE
101   L = 51
      H = 0
      M = 0
      W = 0
      KU = 0
      NR = 0
      CALL FLIGHT (H,HAGMAT,L)
      IF (H.NE. 1) GO TO 102
      W = 1
      GO TO 103
102   L = 121
      CALL FLIGHT (W,WARMAT,L)
      IF ( W .EQ. 0 ) GO TO 104
103   CALL MONT (M,KU)
104   I = H + 2 * W + 4 * M + 1
      GO TO  (105,106,107,106,105,108,109,108),I
105   PRINT 205
205   FORMAT (53H THIS IS NOT AN INTERNATIONAL FLIGHT. AC ,
     L/51H CORDINGLY, THERE IS NO LIMITATION TO THE LIABIL ,
     L/51H ITY. UNDER THE WARSAW, HAGUE, OR MONTREAL      ,
     L/51H AGREEMENTS. HOWEVER, LOCAL LAW MAY ESTABLISH A ,
     L/51H LIMITATION OF LIABILITY.                       )
      GO TO 150
106   PRINT 206
206   FORMAT (53H THIS IS AN INTERNATIONAL FLIGHT ACCORD ,
```

```
   L/51H ING TO THE WARSAW CONVENTION AND THE HAGUE ,
   L/51H PROTOCOL. HOWEVER, THE MONTREAL INTERIM    ,
   L/51H AGREEMENT DOES NOT APPLY, SO THE LIMIT OF  ,
   L/51H LIABILITY IS $16,580.                      )
     GO TO 110
107 PRINT 207
207 FORMAT (53H THIS IS NOT AN INTERNATIONAL FLIGHT AC ,
   L/51H CORDING TO THE WARSAW CONVENTION. HOWEVER,  ,
   L/51H NEITHER THE HAGUE PROTOCOL NOR THE MONTREAL ,
   L/51H INTERIM AGREEMENT APPLY, SO THE LIMIT OF    ,
   L/51H LIABILITY IS $8,290.                       )
     GO TO 110
108 PRINT 208
208 FORMAT (53H THIS IS AN INTERNATIONAL FLIGHT ACCORD ,
   L/51H ING TO THE WARSAW CONVENTION, THE HAGUE     ,
   L/51H PROTOCOL, AND THE MONTREAL AGREEMENT.       ,
   L/51H THEREFOR, THE LIMIT OF LIABILITY IS $75,000. )
     GO TO 110
109 PRINT 209
209 FORMAT (53H THIS IS AN INTERNATIONAL FLIGHT ACCORD ,
   L/51H ING TO THE WARSAW CONVENTION. THE HAGUE     ,
   L/51H PROTOCOL DOESN'T APPLY. HOWEVER, THE MONTREAL ,
   L/51H INTERIM AGREEMENT DOES, AND THE LIMIT OF    ,
   L/51H LIABILITY IS $75,000.                      )
110 IF ( NR .EQ. 1) GO TO 150
     IF ( KU .NE. 1) GO TO 111
     PRINT 210
210 FORMAT (53H NOT INCLUDING COLONIES, PROTECTORATES, ,
   L/51H TERRITORIES UNDER MANDATE, OR ANY OTHER     ,
   L/51H TERRITORY OF THE UNITED KINGDOM. THESE ARE  ,
   L/51H TREATED SEPARATELY.                        )
111 IF ( M .EQ. 0 ) GO TO 150
     PRINT 211
211 FORMAT (53H THIS IS SUBJECT TO THE RESERVATION THAT ,
   L/51H THE FIRST PARAGRAPH OF ARTICLE 2 OF THE WARSAW ,
   L/51H CONVENTION SHALL NOT APPLY TO INTERNATIONAL ,
   L/51H TRANSPORTATION THAT MAY BE PERFORMED BY THE ,
   L/51H UNITED STATES OR ANY TERRITORY OR POSSESSION ,
   L/51H UNDER ITS JURISDICTION.                    )
     CALL EXCEPT (NR)
112 IF (NR .EQ. 0) GO TO 150
     PRINT 212
212 FORMAT (53H THE UNITED STATES REGARDS THE ADHEREN ,
   L/51H CE TO THE WARSAW CONVENTION BY THE PEOPLE'S ,
   L/51H REPUBLIC OF CHINA, THE DEMOCRATIC PEOPLE'S  ,
   L/51H REPUBLIC OF KOREA, AND THE GERMAN DEMOCRATIC ,
   L/51H REPUBLIC AS BEING WITHOUT LEGAL SIGNIFICANCE. ,
   L/51H SO, DELETING THOSE COUNTRIES,              )
     GO TO 101
150 GO TO 001
555 STOP
     END
```

TABLE 1-A
SUBROUTINE "FLIGHT"

```
      SUBROUTINE FLIGHT(NES,HCPMAT,L)
      INTEGER ID,II,IA,WRKMAT,HCPMAT,N,NES,L
      DIMENSION HCPMAT (L)
      COMMON /A1/ N,WRKMAT (20,2)
      DATA ID/'DEPART'/,II/'INTERM'/,IA/'DSTNTN'/
      DO 107 J=1,N
      IF(WRKMAT(J.2).EQ.ID)GO TO 108
  107 CONTINUE
      GO TO 199
  108 DO 109 I=1,L
      IF (WRKMAT(J,1).EQ.HCPMAT(I))GO TO 110
  109 CONTINUE
      GO TO 199
  110 DO 111 K=1,N
      IF(WRKMAT(K,2) .EQ.IA)GO TO 112
  111 CONTINUE
      GO TO 199
  112 DO 113 I=1,L
      IF(HCPMAT(I) .EQ. WRKMAT (K,1))GO TO 114
  113 CONTINUE
      GO TO 199
  114 IF(WRKMAT (K,1) .EQ. WRKMAT(J,1))GO TO 115
      NES = 1
      GO TO 106
  115 IF(N .GT. 2)GO TO 116
      GO TO 199
  116 DO 118 I=1,N
      IF(WRKMAT (I,2) .NE.II)GO TO 118
      IF(WRKMAT (I,1) .EQ. WRKMAT (J,1))GO TO 118
      NES = 1
      GO TO 106
  118 CONTINUE
  106 CONTINUE
  199 CONTINUE
      RETURN
      END
```

TABLE 1-B
SUBROUTINE "EXCEPT"

```
      SUBROUTINE EXCEPT (NR)
      INTEGER RDC,RDK,WRKMAT,N,NR
      COMMON/A1/ N, WRKMAT (20,2)
      DATA RDC/'RDCHIN'/,XRC/'XRDCHI'/,RDK/'RDKORE'/,XRK/
     'XRDKOR'/
      DO 101 J = 1,N
      IF(WRKMAT(J,1) .NE. RDC) GO TO 102
      WRKMAT (J,1) = XRC
      NR = 1
  102 IF( WRKMAT (J,1) .NE. RDK ) GO TO 101
      WRKMAT (J,1) = XRK
      NR = 1
```

```
101 CONTINUE
    RETURN
    END
```

TABLE 1-C
SUBROUTINE "MONT"

```
    SUBROUTINE MONT ( M,KU )
    INTEGER USA,UNK,WRKMAT,N,M,KU
    COMMON /A1/N,WRKMAT(20,2)
    DATA USA/'USAUSA'/,UNK/'UNIKNG'/
    DO 101 J = 1,N
    IF ( WRKMAT (J,1) .NE. USA) GO TO 102
    M = 1
102 IF ( WRKMAT (J,1) .NE. UNK ) GO TO 101
    KU = 1
101 CONTINUE
    RETURN
    END
```

TABLE 2-A
HAGUE PARTIES

ALGERI	DENMAR	LIECHT	ROMANI
AUSTLA	EL SAL	LUXEMB	SENEGA
BELGUI	FRANCE	MALAGA	SPAIN
BRAZIL	GERDEM	MALI	SWEDEN
BULGAR	GERFED	MEXICO	SWITZE
BYELOR	GREECE	NEPAL	SYRIA
CAMERO	HUNGAR	NETHER	TUNISI
CANADA	ICELAN	NEW ZE	UKRAIN
COLUMB	IRELAN	NIGER	USSR
CONBRA	ISRAEL	NORWAY	UAR
CUBA	ITALY	PAKIST	VENEZU
CZECHO	IV COA	POLAND	YUGOSL
DAHOME	LAOS	PORTUG	

TABLE 2-B
WARSAW PARTIES

ARGENT	NIGERI	U SAZI	IRELAN
AUSTRI	PHILIP	U TONG	ISRAEL
BARBAD	RWANDA	U TURK	ITALY
BOTSWA	SI LEO	U WIND	IV COA
BURMA	SINGAP	USAUSA	LAOS
CEYLON	SO REP	UPVOLT	LIECHT
RDCHIN	SO AFR	WSAMOA	LUXEMB
CONKIN	TANZAN	VI-NAM	MALAGA
CONLEO	TRINID	ZAMBIA	MALI
CYPRU	UGANDA	ALGERI	MEXICO
ETHIOP	UNIKNG	AUSTLA	NEPAL
FINLAN	U ADEN	BELGUI	NETHER
GAMBIA	U BAHA	BRAZIL	NEW ZE
GHANA	U BERM	BULGAR	NIGER
GUINEA	U BR H	BYELOR	NORWAY

GUYANA	U BRUN	CAMERO	PAKIST
INDONE	U CHAN	CANADA	POLAND
JAMAIC	U FALK	COLUMB	PORTUG
JAPAN	U FIJI	CONBRA	ROMANI
KENYA	U GIBR	CUBA	SENEGA
RDKORE	U GILB	CZECHO	SPAIN
LATVIA	U HONG	DAHOME	SWEDEN
LEBANO	U LEEW	DENMAR	SWITZE
LESOTH	U MAUR	EL SAL	SYRIA
LIBERI	U N BN	FRANCE	TUNISI
MALAWA	U S RH	GERDEM	UKRAIN
MALAYS	U SHEL	GERFED	USSR
MALTA	U SARA	GREECE	UAR
MAURIT	U SEYC	HUNGAR	VENEZU
RDMONG	U SOLO	ICELAN	YUGOSL
MOROCO			

TABLE 3

USAUSA	DEPART
RDKORE	INTERM
AUSTLA	INTERM
ANYWHR	INTERM
ANYWHR	INTERM
JAPAN	DSTNTN

THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION. THE HAGUE PROTOCOL DOESN'T APPLY. HOWEVER, THE MONTREAL INTERIM AGREEMENT DOES, AND THE LIMIT OF LIABILITY IS $75,000.

THIS IS SUBJECT TO THE RESERVATION THAT THE FIRST PARAGRAPH OF ARTICLE 2 OF THE WARSAW CONVENTION SHALL NOT APPLY TO INTERNATIONAL TRANSPORTATION THAT MAY BE PERFORMED BY THE UNITED STATES OR ANY TERRITORY OR POSSESSION UNDER ITS JURISDICTION. THE UNITED STATES REGARDS THE ADHERENCE TO THE WARSAW CONVENTION BY THE PEOPLE'S REPUBLIC OF CHINA, THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, AND THE GERMAN DEMOCRATIC REPUBLIC AS BEING WITHOUT LEGAL SIGNIFICANCE. SO, DELETING THOSE COUNTRIES, THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION. THE HAGUE PROTOCOL DOESN'T APPLY. HOWEVER, THE MONTREAL INTERIM AGREEMENT DOES, AND THE LIMIT OF LIABILITY IS $75,000.

THIS IS SUBJECT TO THE RESERVATION THAT THE FIRST PARAGRAPH OF ARTICLE 2 OF THE WARSAW CONVENTION SHALL NOT APPLY TO INTERNATIONAL TRANSPORTATION THAT MAY BE PERFORMED BY THE UNITED STATES OR ANY TERRITORY OR POSSESSION UNDER ITS JURISDICTION.

AUSTRI	DEPART
XXXXXX	INTERM
USAUSA	DSTNTN

THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION. THE HAGUE PROTOCOL DOESN'T APPLY. HOWEVER, THE MONTREAL INTERIM AGREEMENT DOES, AND THE LIMIT OF LIABILITY IS $75,000.

THIS IS SUBJECT TO THE RESERVATION THAT THE FIRST PARAGRAPH OF ARTICLE 2 OF THE WARSAW CONVENTION SHALL NOT APPLY TO INTERNATIONAL TRANSPORTATION THAT MAY BE PERFORMED BY THE UNITED STATES OR ANY TERRITORY OR POSSESSION UNDER ITS JURISDICTION.
XXXXXX DEPART
AUSTRI INTERM
MOROCO DSTNTN
THIS IS NOT AN INTERNATIONAL FLIGHT. ACCORDINGLY, THERE IS NO LIMITATION TO THE LIABILITY. UNDER THE WARSAW, HAGUE, OR MONTREAL AGREEMENTS. HOWEVER, LOCAL LAW MAY ESTABLISH A LIMITATION OF LIABILITY.
UNIKNG DEPART
INDONE DSTNTN
AUSTRI INTERM
THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION. HOWEVER, NEITHER THE HAGUE PROTOCOL NOR THE MONTREAL INTERIM AGREEMENT APPLY, SO THE LIMIT OF LIABILITY IS $8,290.
NOT INCLUDING COLONIES, PROTECTORATES, TERRITORIES UNDER MANDATE, OR ANY OTHER TERRITORY OF THE UNITED KINGDOM. THESE ARE TREATED SEPARATELY.
USAUSA INTERM
USAUSA DEPART
USAUSA DSTNTN
THIS IS NOT AN INTERNATIONAL FLIGHT. ACCORDINGLY, THERE IS NO LIMITATION TO THE LIABILITY. UNDER THE WARSAW, HAGUE, OR MONREAL AGREEMENTS. HOWEVER, LOCAL LAW MAY ESTABLISH A LIMITATION OF LIABILITY.
FRANCE DEPART
AUSTLA INTERM
AUSTLA INTERM
ALGERI INTERM
AUSTLA INTERM
XXXXXX INTERM
ALGERI INTERM
LLLLLL DSTNTN
THIS IS NOT AN INTERNATIONAL FLIGHT. ACCORDINGLY, THERE IS NO LIMITATION TO THE LIABILITY, UNDER THE WARSAW, HAGUE, OR MONTREAL AGREEMENTS. HOWEVER, LOCAL LAW MAY ESTABLISH A LIMITATION OF LIABILITY.
RDKORE DEPART
USAUSA INTERM
RDCHIN DSTNTN
THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION. THE HAGUE PROTOCOL DOESN'T APPLY. HOWEVER, THE MONTREAL INTERIM AGREEMENT DOES, AND THE LIMIT OF LIABILITY IS $75,000.
THIS IS SUBJECT TO THE RESERVATION THAT THE FIRST PARAGRAPH OF ARTICLE 2 OF THE WARSAW CONVENTION SHALL NOT APPLY TO INTERNATIONAL TRANSPORTATION THAT MAY BE PERFORMED BY THE UNITED STATES OR ANY TERRITORY OR POSSESION UNDER ITS JURISDICTION. THE UNITED STATES REGARDS THE ADHERENCE TO THE WARSAW CONVENTION BY THE

PEOPLE'S REPUBLIC OF CHINA, THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, AND THE GERMAN DEMOCRATIC REPUBLIC AS BEING WITHOUT LEGAL SIGNIFICANCE. SO, DELETING THOSE COUNTRIES, THIS IS NOT AN INTERNATIONAL FLIGHT. ACCORDINGLY, THERE IS NO LIMITATION TO THE LIABILITY. UNDER THE WARSAW, HAGUE, OR MONTREAL AGREEMENTS. HOWEVER, LOCAL LAW MAY ESTABLISH A LIMITATION OF LIABILITY.

FRANCE DEPART
ALGERI INTERM
XXXXXX INTERM
ALGERI INTERM
ANYWHR INTERM
ANYWHR INTERM
FRANCE DSTNTN

THIS IS AN INTERNATIONAL FLIGHT ACCORDING TO THE WARSAW CONVENTION AND THE HAGUE PROTOCOL. HOWEVER, THE MONTREAL INTERIM AGREEMENT DOES NOT APPLY, SO THE LIMIT OF LIABILITY IS $16,580.

Warsaw Convention — Liability Limitation — Constitutionality

On 4 March 1966, an aircraft owned by Canadian Pacific Airlines, enroute from Hong Kong to Tokyo, crashed, killing a United States citizen. The deceased had purchased his ticket in Singapore where he was residing at the time of the accident. A wrongful death action was instituted by the widow of the deceased against Canadian Pacific Airlines in the Cook County, Illinois, Circuit Court. The defendant airline moved for a dismissal of the complaint, arguing that the fatal international flight was governed by the provisions of the Warsaw Convention,[1] and that under the Convention the forum court lacked jurisdiction and proper venue. Implicit in defendant's contention was the argument that recoverable damages under Warsaw should be limited to that provided in the Convention, which is approximately $8,300.[2] *Held, motion for dismissal denied*: The Warsaw Convention is not applicable where a nation has neither adhered to nor ratified the Warsaw Convention at the time of the crash. Alternatively, if the Convention does apply, then the limited liability provision is inapplicable. *Burdell v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 18,151 (1968).

The instant court presented two alternative findings to uphold its decision; however, this paper is only concerned with the applicability of the limited liability provision.[3] In support of this alternative finding the court pursued two distinct lines of reasoning. The first declared the limitation inapplicable because the notice requirements of *Lisa v. Alitalia Airlines*[4] were not met; in its second approach the court developed a novel theory that the Warsaw limitation on liability is unconstitutional as a violation of the due process clause of the United States Constitution. This limitation was held "arbitrary, irresponsible, capricious, and indefensible, as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved in this case."[5] The judicial declaration holding this

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter cited as the Warsaw Convention), 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Poland, 12 Oct. 1929).

[2] Warsaw Convention, art. 22(1), 49 Stat. 3019, T.S. No. 876, provides in part: "(1) In the transportation of passengers, the liability for each passenger shall be limited to the sum of 125,000 Francs (approximately $8,300). . . ."

[3] An inquiry into the validity of the first finding requires an examination of Article 1 of the Convention; however, this is beyond the scope of this paper. It should be noted that the applicability of the Convention is not determined solely upon whether the country has ratified or adhered to the treaty. New countries may be bound by treaty obligations of the parent country.

[4] Lisi v. Alitalia - Linee Aeree Italiane S.P.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968). For a discussion of this case, *see* Note, 33 J. Air L. & Com. 698 (1967).

[5] Burdell v. Canadian Pacific Airlines, Ltd., 10 Av. Cas. 18,151, 18,161 (1968).

treaty provision unconstitutional has serious implications[6]—implications which necessitate a more thorough analysis of the constitutional issue than was offered by the *Burdell* opinion.

I. THE WARSAW CONVENTION

The Warsaw Convention provision limiting air carrier liability in cases of wrongful death to approximately $8,300 has been a point of considerable discussion since Warsaw was adhered to by the United States. At the time the Convention was established most of the discussion centered upon the proper amount for its limitation. The arguments for higher limits were based upon the theory that many of the developed countries had awards in personal injury and death actions which were much higher than the limit set forth in Warsaw.[7] Although the United States adhered to the Convention, "it has never been universally acclaimed here because of the low limitations it imposes. . . ."[8] The hostility prevalent in this country toward Warsaw's low limitation has been exhibited by the legal community,[9] in court opinions,[10] and in the attitude of the United States Government itself. In 1965 the United States officially expressed its dissatisfaction with the $8,300 limitation when it threatened to denounce the Warsaw Convention unless the maximum recovery limit was raised.[11] The threat resulted in the formulation of the Montreal Agreement,[12] in which the limit on liability was raised to $75,000 under certain circumstances.[13]

Prior to the present opinion, the courts did not base their decisions upon an *open* expression of displeasure with the Convention's limitation. Rather they sought principles by which to limit the applicability of Article 22. For example, courts have held that both the delivery of and the printing

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[6] The ramifications in international law of declaring a treaty unconstitutional are beyond the scope of this paper. However, it should be noted that courts will consider the international aspects in reaching a decision.

[7] Lowenfeld & Mendelson, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504 (1967).

[8] Moore & Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. & COM. 3, 28 (1967).

[9] Kreindler, *Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

[10] For a discussion of the courts' hostility toward the Warsaw Convention's liability limitation, *see* Note, 35 J. AIR L. & COM. 123 (1969).

[11] Dep't State Press Release No. 268, 15 Nov. 1965; *see also* N.Y. Times, 16 Nov. 1965, p. 82, col. 1 (city ed.); for a general discussion of the events leading up to the denunciation, *see* Kreindler, *supra* note 9; *see also* Cabranes, *Limitations of Liability in International Air Law: The Warsaw and Rome Conventions Reconsidered*, 15 INT'L & COMP. L.Q. 660 (1966); Kelliher, *The Draft Convention on Aerial Collisions: Some Textual Criticisms*, 32 J. AIR L. & COM. 564 (1966); Lacey, *Recent Developments in the Warsaw Convention*, 33 J. AIR L. & COM. 385 (1967); Miyagi, *"Applicable Limits of Liability" Under Article 8 of the 1964 Draft Convention on Aerial Collisions*, 32 J. AIR L. & COM. 195 (1966).

[12] The 1966 Agreement was formally approved by the CAB in 1966. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Docket No. 17325, CAB Order No. E-23680, CAB Agreement No. 18900 (13 May 1966). *See also The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243 (1966); Fitzgerald, *Liability Rules in the International Carriage of Passengers of Air and the Notice of Denunciation of the Warsaw Convention of the United States of America*, 4 CAN. Y.B. INT'L L. 194 (1966); Levine, *Warsaw Convention: Treaty Under Pressure*, 16 CLEV.-MAR. L. REV. 327 (1967); Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A.B.A. J. 1122 (1966).

[13] Generally the $75,000 limitation is applicable if the contract of carriage includes a point in the United States as a point of origin, point of destination, or agreed stopping place.

on the ticket must meet strict standards before the Convention's limitation will be applied.[14]

II. Wrongful Death Statutes—An Analogy

Although *Burdell* is the first attempt by a court to question, specifically, the constitutionality of the Warsaw liability limitation, the courts are well acquainted with the question of the constitutionality of limited liability as found in *statutes* involving recovery for wrongful death. A discussion of some of these statutes and the courts' constitutional treatment of limited liability provisions therein may provide a basis upon which to hold Warsaw's limitation constitutional. No right of recovery for the death of a human being was recognized at common law. Dissatisfaction in England with this inadequacy resulted in the passage of the Lord Campbell's Act in 1846[15] which provided a cause of action for wrongful death in circumstances in which the deceased could have sued for his injuries if he had not died.[16] The theory of this statute was adopted in the United States, and today there are wrongful death statutes in all of the states.[17]

Initially many of these statutes contained provisions restricting the amount of possible recovery. While most states abolished the maximum recovery provisions, eight states still have such limitations.[18] In Illinois, the forum for *Burdell*, and one of these eight states, the liability limitation was attacked as contravening the Constitution. In answering this contention, one Illinois Court[19] held that the constitutional issue did not create too difficult a problem since, at common law, there was no right of recovery for wrongful death. The court stated that:

> The legislature took away no right when it enacted the statute. It *created* both the right and the remedy and we think that *its power to limit the maximum recovery in the action that it created can not be questioned* [Emphasis added.].[20]

The court went on to say that the validity of the limitation, as well as the legislature's power to limit recovery, are not affected by an unduly low limitation; nor are they affected by the failure of most wrongful death statutes to provide a maximum limitation upon recovery.[21] In

[14] For a historical discussion of the requirements concerning notice and delivery, *see* Note, 35 J. Air L. & Com. 123 (1969).

[15] For the text of the Act *see* S. Speiser, Recovery for Wrongful Death 773 (1966).

[16] Speiser, *supra* note 15, at § 1:7.

[17] *Id.* at § 1:8.

[18] *Id.* at § 7:2 (Supp. 1968). The eight states and their limitations as of 1968 are as follows:
Colorado, $35,000
Kansas, $35,000
Massachusetts, $50,000
Minnesota, $35,000
Missouri, $50,000
New Hampshire, $60,000
Wisconsin, $35,000
Virginia, $40,000

[19] Hall v. Gillins, 13 Ill.2d 26, 147 N.E.2d 352, 354 (1958).

[20] *Id.* at 354.

[21] *Id.* at 354; A later Illinois court upheld the legislature's power to create the cause of action and limit the amount of recovery thereunder. Butler v. Chicago Transit Authority, 38 Ill. 2d 361, 231 N.E.2d 429 (1967).

Missouri, where the wrongful death statute also contains a limitation on liability,[22] a court held that the limitation was constitutional because the legislature "*created the right of action* where none existed before, and . . . *may condition the right as it sees fit* [Emphasis added.]."[23] The wrongful death statutes mentioned above illustrate that a statute which creates a right of recovery for wrongful death may constitutionally impose a limit on the amount of recovery thereunder.

If Warsaw's limitation on liability can be analogized to wrongful death statutes containing similar limitations, which have been held constitutional, there would seem to be sufficient legal precedent upon which to base the constitutionality of Warsaw. Although these limitations appear analogous there are two differences which require reconciliation before the analogy can stand. The constitutional attacks against the state wrongful death statutes involve the due process clause of the Fourteenth Amendment, whereas the attack against the Warsaw Convention involves the due process clause of the Fifth Amendent. The aforementioned cases attacking the liability limitations of state wrongful death statutes involved governmental regulation of economic interests.[24] Since the courts have determined that the Fifth and Fourteenth Amendments have almost the same meaning when concerned with such regulations,[25] the above distinction does not destroy the analogy.

The second difference is more difficult to reconcile. This difference stems from the decision in *Noel v. Linea Aeropostal Venezolana*[26] which held that the Warsaw Convention *does not create a cause of action for wrongful death.* The court stated:

> [W]e agree . . . that the Convention [Warsaw] did not create an independent right of action. . . . Secretary of State Hull's letter to President Roosevelt . . . indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action.[27]

Since the constitutionality of limited liability provisions in wrongful death statutes is based upon the statutes' creation of a right of recovery for wrongful death, and since Warsaw does not create such a right of action, it would appear that the analogy may not be valid.

However, upon closer examination resolution of this difference is possible. One method is to show that the *Noel* decision was improperly de-

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[22] SPEISER, *supra* note 15, at § 7:2 (Supp. 1968).

[23] Glick v. Ballentine Produce Inc., 396 S.W.2d 609, 615 (Mo. 1965):

> We find nothing in plaintiff's citations or arguments which indicate any constitutional infirmity in a limitation on the amount of recovery in a death action. The legislature *created* the right of action where none existed before, and it may condition the right as it sees fit. It is worthy of note that we have not been cited a single case nor have we found any where this limitation on recovery has been questioned in Missouri as unconstitutional.

See also Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146, 151 (1967).

[24] *See* p. 264 *infra.*

[25] W. LOCKHART, Y. KAMISAR & J. CHOPE, THE AMERICAN CONSTITUTION 361 (1964).

[26] 247 F.2d 677 (2d Cir. 1957).

[27] *Id.* at 679.

cided.[28] One article[29] in attacking *Noel*, has stated that there was no rational basis for the decision. The authors doubted whether another United States court would be willing to follow that decision if the wrongful death occurred during a flight which was governed by the Convention limitation, but which occurred in a place where there was no local statute creating a right of recovery for that death. In that situation, under *Noel*, there could be no recovery at all. The authors stated that:

> Logic, reason, and analogous legal precedence compel a contrary result and a holding that the Convention . . . does create a substantive right even though it looks to the forum subsequently chosen to provide much of the procedural mechanization for enforcing that right.[30]

Although the *Noel* opinion may be subject to meritorious criticism, the decision is still controlling. Accordingly, any serious attempt to analogize Warsaw's liability limitation and similar limitations in wrongful death statutes must be done within the context of the *Noel* decision.

Two arguments, based upon the *Noel* decision, can be made which will reconcile the problem created by it. Under *Noel*, Warsaw's limitation upon recovery is only applicable where there is a local wrongful death statute.[31] It is the local wrongful death statute which creates the right of recovery; therefore, Warsaw's failure to create such a right is not fatal to the analogy. Furthermore, if a legislature can constitutionally limit recovery under a wrongful death statute, then since Warsaw's limit is only applicable under a local wrongful death statute (*Noel*), it seems constitutionally permissible for Warsaw, as international legislation, to likewise limit the recovery.

Implicit in the above arguments is the doctrine that a treaty such as the Warsaw Convention can preempt state law. This doctrine was enunciated by the Supreme Court in 1880[32] when it stated that under Article Six of the Constitution[33] which declares that treaties shall be the supreme law of the land, if state legislation could prevail over a treaty, then such a treaty could not be the supreme law of the land. The Court stated:

> It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual states. . . .[34]

[28] For an excellent discussion supporting the theory that *Noel* was improperly decided, *see* Calkins, *The Cause of Action Under The Warsaw Convention*, 26 J. Air L. & Com. 217, 223 (1959); *see also*, Lowenfeld & Mendelson, *supra* note 7; Moore & Pelaez, *supra* note 8.

[29] Moore & Pelaez, *supra* note 8.

[30] *Id.* at 31.

[31] Noel v. L.A.V., 247 F.2d 677, 679 (2d Cir. 1957):

> [W]e agree . . . that the Convention [Warsaw] did not create an independent right of action. . . . Secretary of State Hull's letter to President Roosevelt . . . indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action.

[32] Hauenstein v. Lynham, 100 U.S. 483 (1879).

[33] U.S. CONST. art. VI states in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[34] Hauenstein v. Lynham, 100 U.S. 483, 489 (1879). *See also*, Missouri v. Holland, 252 U.S. 416 (1920).

If a treaty is superior to state law, then one may presume that the liability provision of Warsaw can preempt any provision similar to that of the treaty existing under local wrongful death statutes. The above mentioned differences between Warsaw's limitation and similar limitations in wrongful death statutes do not seem to affect the logic of the analogy for the reasons given above; therefore, by analogy, there appears to be ample case law to support the constitutionality of the limited liability provision of Warsaw.

III. Due Process and Regulation of an Economic Interest

Even if the above analogy is inappropriate, it would appear that there is a second, and perhaps more fundamental, theory which undermines the basis upon which the *Burdell* court held Warsaw's limitation to be a deprivation of due process. The instant court correctly stated that the treaty power of the United States is not free from all restraints. In *Reid v. Covert*[35] the Supreme Court said that the prohibitions of the Constitution were designed to apply to all branches of the government, and these prohibitions could not be nullified by an agreement with foreign nations. No treaty could confer upon Congress power the exercise of which was prohibited by the Constitution. The Court went on to say:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the actions of the government or its departments. . . .[36]

The rule implicit in the reasoning of the *Reid* opinion is that treaties are subject to the express prohibitions of the Federal Constitution and are to be treated the same as Acts of Congress with regard to these prohibitions.

One such prohibition is found in the Fifth Amendment which provides in part that "no person shall be deprived of life, liberty or property without due process of law."[37] It is upon this due process clause that the *Burdell* court found Warsaw's liability limitation unconstitutional. Accordingly, an examination of the Supreme Court's attitude toward this due process clause is necessary, for an analysis of the Court's rules concerning due process and governmental regulation of economic interests will reveal the instant court's fallacious reasoning for declaring Warsaw's limitation to be unconstitutional. At the outset it should be noted that, as mentioned previously, the Warsaw Convention's limitation is a regulation of an economic interest[38]—an interest in recovery of money damages, as distinguished from a fundamental interest such as freedom of the person.[39]

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[35] 354 U.S. 1 (1957).

[36] *Id.* at 16-17.

[37] U.S. Const. amend. X.

[38] For an excellent discussion of the due process clause and governmental regulations of economic and property rights, *see generally*, 2 B. Swartz, The Rights of Property, Chap. 12 & 13 (1965).

[39] The courts apply a different test when speaking of legislation intended to regulate certain fundamental rights than they do when viewing legislation concerned with economic or property rights. The Supreme Court has stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. . . . We mention these matters . . . in emphasis of our view that strict scrutiny . . . is essential . . . .

The Supreme Court's attitude toward due process and governmental regulation of economic rights has developed over a period of years virtually into a "hands-off" policy. Courts have found that the due process clause is not violated so long as the governmental regulation is reasonably calculated to promote a valid end.[40] However, few limitations are placed upon the ends the government wants to achieve through regulation. Generally, the courts have found that the government, in exercise of its power, can regulate to promote the general welfare, which includes such concepts as the economic interest of the society, the social interest in general progress, and other equally broad principles.[41] Similarly, the courts have liberally construed the legal definition of what constituted a reasonable regulation in relation to the end sought to be achieved. In *Nebbia v. New York*[42] the Court stated that the Fifth and Fourteenth Amendments' due process clauses did not prohibit governmental regulation for the general welfare. It held that due process merely conditions the governmental regulation "by securing that the end shall be accomplished by methods consistent with due process."[43] The court set down the classic definition of due process in this situation when it stated:

> [T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a substantial relation to the object sought to be obtained.[44]

The rule derived from the *Nebbia* decision is that so long as governmental legislation passes the reasonableness test—so long as there is a reasonable relation between the ends sought and the means employed—such legislation will not violate the due process clause.

The Supreme Court opinions cited indicate the standard to be used in determining due process, but do not explain "how the reasonableness test itself is to be *applied* in specific cases. More particularly, whose conception of reasonableness with regard to . . . valid legislation is to control—that of the legislator or that of the judge [Emphasis added.]?"[45] In response to this question, the Supreme Court has developed the notion that the *courts should not substitute their opinions of the regulation's reasonableness for that of the legislature.* Mr. Justice Holmes, dissenting in *Lochner v. New York*,[46] first introduced this policy when he stated that a statute

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The Supreme Court illustrated the distinction between fundamental and economic rights when it stated:

> The right of a State to regulate, for example, a public utility may well include, so far as due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly . . . may not be infringed on such slender grounds. *They are susceptible of restrictions only to prevent grave and immediate danger* to interests which the State may lawfully protect . . . [Emphasis added.].

Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

[40] *See generally*, Tregle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); Nebbia v. New York, 291 U.S. 502 (1934); Leggett Co. v. Baldridge, 278 U.S. 105 (1928); Clutter v. Blankenship, 144 S.W.2d 119 (Mo. 1940).

[41] SWARTZ, *supra* note 38, at 94.

[42] 291 U.S. 502 (1934).

[43] *Id.* at 525.

[44] *Id.*

[45] SWARTZ, *supra* note 38, at 53.

[46] 198 U.S. 45 (1905).

should not be declared invalid "unless it can be said that a rational and fair man necessarily would admit that the statute . . . would infringe fundamental principles as . . . understood by . . . our people and our law."[47] Holmes' dissent was adopted by the majority in subsequent Supreme Court decisions including *Olsen v. Nebraska Western Reference & Bond Ass'n*[48] in which the court said that it was not concerned with the "wisdom, need or appropriateness of the legislation."[49] The court felt any changes which may be needed should be left to the states and to Congress. The Supreme Court's attitude concerning due process and governmental regulation has been perhaps best expressed by Mr. Justice Douglas.[50] He stated that the courts are not a super-legislature, and should not determine the constitutionality of legislation on the basis of any particular economic theory.[51]

In view of the Supreme Court decisions it appears that the court in *Burdell* did not apply the correct due process standard to be used in determining the constitutionality of Warsaw's limited liability provisions. The instant court found that Warsaw's liability limitation violated the due process clause because it was "arbitrary, irresponsible, capricious, and indefensible as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved in this case." The court used the correct words to declare this provision unconstitutional, but failed to consider the correct *application* of these words. The Supreme Court, as stated in *Nebbia*, requires that the law be "unreasonable, arbitrary, and capricious" in relation to the ends sought to be obtained. The *Burdell* court found the law "unreasonable, arbitrary, and capricious" in relation to what it thought should be the correct measure of recovery for wrongful death.

In determining that the limitation on liability was too low, the *Burdell* court failed to follow the rulings that courts should not substitute their own determination of what is reasonable for that of the legislature. This substitution is clearly contrary to the above mentioned Supreme Court rulings.

Hostility toward Warsaw's liability limitation has never been more evident. While in the past the courts have found a variety of ways to

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[47] *Id.* at 76.

[48] 313 U.S. 236 (1941).

[49] *Id.* at 246. *See also*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). In 1959 the Supreme Court stated:

> [W]e must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification utterly lacking in rational justification.

Flemming v. Nestor, 363 U.S. 603, 611 (1959).

[50] W. DOUGLAS, WE THE JUDGES 282 (1956).

[51] The most recent case upholding the view that Courts should not substitute their views for that of the legislature is Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1962):

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." . . . We refuse to sit as a "super-legislature to weight the wisdom of legislation."

circumvent this limitation, it seems evident that the provision cannot validly be attacked on constitutional grounds. Should an appellate court reach the issue of constitutionality,[52] it is unlikely that it would find Warsaw's limited liability provision violative of due process and therefore unconstitutional.

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[52] It is unlikely that higher courts, on appeal, will reach the constitutionality of Warsaw since the rule of constitutional construction is that a court will not reach a constitutional question unless absolutely necessary. Light v. United States, 220 U.S. 523, 538 (1911); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909); Berea College v. Kentucky, 211 U.S. 45, 53 (1908).

Administrative Law — Ashbacker Doctrine — CAB Discretion

National Airlines and Delta Air Lines petitioned the United States Court of Appeals, District of Columbia Circuit, to review several orders of the Civil Aeronautics Board (hereinafter CAB or Board). The case arose out of the CAB's commencement, in 1967, of an evaluation of the need for additional air service in the South where the petitioning carriers had held principal southern transcontinental routes since 1961. The Board limited its investigation to eighteen specific geographic points. Petitioners' motion to consolidate their applications involving service to southern cities other than those specified was denied, and the Board set separate comparative area route making proceedings to consider these excluded applications. On appeal, petitioners contended that the challenged orders were an abuse of agency discretion and deprived them of their rights under the *Ashbacker* doctrine. The Board defended on the grounds that its main objective in delineating five comparative area hearings was to prevent expansion of the proceedings to unmanageable proportions. *Held*: While it must remain cognizant of the necessity for a fair comparative hearing on mutually exclusive applications, the CAB is free to exercise a considerable measure of discretion in defining the scope of air route cases. The Board is not necessarily prohibited by *Ashbacker* from considering, in a separate proceeding, an area that borders on, or even lies wholly within, the area covered in a proceeding then before it. The orders in the instant case, not being final without an effective deprivation of the applicants' rights, are denied review. *National Airlines, Inc. v. CAB*, 392 F.2d 504 (D.C. Cir., 1968).

Dealing with administrative law, the Supreme Court held in *Ashbacker Radio Corp. v. FCC*[1] that where two bona fide applications for the same radio frequency are filed, the grant of one without a hearing on both deprives the loser of an opportunity to be heard. The deprivation of an applicant's right to be heard is considered a breach of procedural due process.[2]

I. Background of the Ashbacker Doctrine

Prior to *Ashbacker*, judicial acquiescence to administrative discretion had been affirmed in *FCC v. Pottsville Broadcasting Co.*[3] The FCC had denied an application on a ground which the reviewing court found unsupported, and the court had remanded. The Commission set the case for

[1] 326 U.S. 327 (1945).

[2] *See* Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956). Persons who are licensed for "the public convenience and necessity" have no proprietary rights in their license. Substantive due process will insure fairness where Congress has chosen to confer upon an applicant the opportunity to be heard.

[3] 309 U.S. 134 (1940).

argument with two rival applications for the same facilities. On a second appeal the court of appeals granted a writ of mandamus commanding the Commission to hear the original application on the original record. The Supreme Court, in reversing, held that it was obligated to follow the Commission's interpretation of its rules of practice as to the manner in which applications should be considered.[4]

On the question of the Commission's function, the Court noted that the agency had been created to serve as an expert body in executing Congressional legislative policy. By the terms of the Federal Communications Act the Congress intended for the FCC to be a "supple instrument for the exercise of discretion."[5] Rules of procedure in such areas as the scope of an inquiry, the hearing of applications and the rights of intervention are to be formulated by the Commission. In promulgating these rules the agency's discretion is to be restricted only by the basic concept of protecting private and public interests—a concept of fundamental fairness.

The *Ashbacker* case involved an application to the FCC for authority to construct a new radio station to operate on 1230kc filed by Fetzer Broadcasting Co. Subsequently Ashbacker Radio Corp. filed its application to change the frequency of its existing station to 1230kc. Before Ashbacker filed, the Commission had taken no action on the Fetzer application. In an *ex parte* proceeding Fetzer's application was unconditionally granted by the FCC. Such grant, the Commission noted, did not preclude it from taking subsequent action on Ashbacker's application.[6]

The Supreme Court held that the Ashbacker application was effectively denied by the granting of Fetzer's application. Congress had expressly guaranteed the right to a hearing before an application is denied.[7] The applications were mutually exclusive, and the Court held that the Commisson exceeded its authority by granting the Fetzer application without hearing Ashbacker's. The Court reasoned that a subsequent hearing, as the FCC suggested was possible, would amount to a hearing on the revocation or modification of an outstanding license. Because of the difficulty in displacing an established licensee, granting the Fetzer petition imposed a greater burden on Ashbacker.[8] Under the circumstances this increased burden was unwarranted—Ashbacker should have been allowed a hearing for an *available* frequency.

II. Ashbacker and the CAB

A. *Problems Of Mutual Exclusivity*

The problem of mutual exclusivity, though easily seen in cases before the FCC (because two applications obviously cannot broadcast on the same frequency), is less clear in air route certification cases before the CAB. Physical exclusiveness is generally not present in certification proceedings, aside from questions of safety and terminal facilities. When con-

[4] *Id.* at 143.
[5] *Id.* at 138.
[6] 326 U.S. at 330.
[7] 78 Stat. 194, 47 U.S.C. § 309(b) (1964).
[8] 326 U.S. at 332.

sidering applications, the Board's determination is necessarily an economic choice.[9] Although it is possible for more than one air carrier to serve the same route, economic considerations can make air route applications mutually exclusive since the public interest requires that only one application be approved if the predicted traffic can support only one carrier economically.[10] Should the Board determine that traffic warrants only one carrier, the certification of an applicant for service over this route precludes a similar grant to any other applicant in the near future. Thus, if there are two qualified applicants for this same service, their applications are mutually exclusive.

Even before *Ashbacker*, the CAB had recognized the necessity for a fair hearing on mutually exclusive applications.[11] However, since economic factors form the basis of the test for the existence of mutual exclusivity, the determination of which applications are mutually exclusive is often a time-consuming task. Applications are not necessarily mutually exclusive even though submission of valid applications for the same types of service have been made by equally qualified carriers. A prerequisite of mutual exclusivity is that the grant of one application must absolutely preclude the grant of the other.[12] But the fact that a subsequent grant of authority might cause some diversions of traffic[13] or result in economic injury to a competitor,[14] does not make the application mutually exclusive *per se*.

Procedurally the Board first determines whether the proposed services will be in the public interest and necessary for public convenience, safety, or security. After a public hearing to make such a determination, the Board may consolidate the applications it has on file to find which applicant is "fit, willing, and able" to perform the services in the public interest.[15] Of course, only mutually exclusive applications are required to receive this comparative consideration. The CAB must determine mutual exclusivity as of the time the applications are considered and the authority awarded.[16] When mutual exclusivity and the right to an *Ashbacker* hearing have been established, consolidation is necessary to achieve a hearing similar to an adversary proceeding. The opportunity must be given applicants to have "all the give-and-take of contesting parties."[17] It will not suffice to have only a "simultaneous hearing" where each application is considered in separate unconsolidated proceedings.[18]

In effect, *Ashbacker* allows mutually exclusive applicants judicial relief when denied a comparative hearing by the CAB. Normally interstate route

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[9] National Airlines, Inc. v. CAB, 249 F.2d 13, 15 (D.C. Cir. 1957).

[10] *See e.g.*, Delta Air Lines, Inc. v. CAB, 275 F.2d 632 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960).

[11] Colonial Air Lines, Inc., 4 C.A.B. 552 (1944).

[12] Eastern Airlines, Inc.—Removal of Pittsburgh Restriction, CAB Order No. E-6,235 (20 March 1952).

[13] West Coast Case, 8 C.A.B. 636 (1947).

[14] FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[15] *See* Westwood, *Procedure in New Route Cases Before the CAB*, 14 J. AIR L. & COM. 267 (1947).

[16] Northwest Airlines, Inc. v. CAB, 194 F.2d 339 (D.C. Cir. 1952).

[17] Delta Air Lines, Inc. v. CAB, 228 F.2d 17, 22 (D.C. Cir. 1955).

[18] *Id.*

orders of the CAB are not final and, therefore, not reviewable. Review can be obtained, however, when the orders "impose an obligation, *deny a right* or fix some legal relationship [Emphasis added.]."[19] To deny an appropriate *Ashbacker* hearing is to withhold a right from the parties,[20] and the courts will have jurisdiction to review the CAB action.

B. *When An Ashbacker Hearing Becomes Appropriate*

The question of primary concern, then, is at what point the right to an *Ashbacker* hearing arises. The dominant view, as espoused by the Court of Appeals for the District of Columbia Circuit, which hears the vast majority of appeals from CAB orders, is that any *Ashbacker* right must be satisfied before a certificate is granted. The *Ashbacker* rule is concerned with the right to a comparative hearing in general and the issue of mutual exclusivity in particular. In *Delta Air Lines v. CAB*,[21] (hereinafter *Delta*) the court held that the issue of mutual exclusivity must be considered and decided by the Board at an early stage and upon a proper record. Each applicant claiming mutual exclusivity must be given the opportunity to substantiate such claim.

The court in *Delta* gave the Board three possible procedural channels for disposing of alleged mutually exclusive applications: (1) Set for hearing and thereupon decide the issue of exclusivity as a separate and preliminary issue; (2) proceed to a comparative hearing upon the two applications without further ado; (3) set for hearing and thereafter decide the merits of *both* applications and also the issue of exclusivity.[22] Because of strenuous opposition to this procedural mandate by the CAB, the courts have given it a narrow construction. Recognizing the complexities of CAB proceedings, the D.C. Circuit relaxed what appeared in *Delta* to be a mandatory requirement for comparative hearings whenever mutual exclusivity is alleged. Two years after *Delta* the court in *National Airlines, Inc. v. CAB*[23] (hereinafter *First National*) approved the CAB intervention policy saying this could lead to a comparative hearing (satisfying *Ashbacker*) when mutual exclusivity is alleged.[24] So the requisite of determining mutual exclusivity before grant of application may be satisfied by allowing one applicant to intervene and present evidence in the separate hearing begun upon another's application.[25] Although this is a satisfactory alternative to costly litigation, there is no immediate opportunity for obtaining the grant, and intervention may be restricted to only those issues in which the applicant has a direct interest.[26]

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[19] Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[20] Pan American-Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 934 (1965).

[21] 228 F.2d 17 (D.C. Cir. 1955).

[22] *Id.* at 22.

[23] 249 F.2d 13 (D.C. Cir. 1957).

[24] *Id.* at 15.

[25] 14 C.F.R. § 302.14 (1968).

[26] Seaboard & W. Airlines, Inc. v. CAB, 181 F.2d 515 (1949), *cert. denied*, 339 U.S. 963 (1950).

III. CAB Discretionary Powers

Through its delegated powers the CAB must insure the orderly development of the air industry in a geographic area. To do so the Board must be free to exercise broad discretion in limiting the scope of air route certification cases.[27] Congressional assent to this principle lies in section 1001 of the Federal Aviation Act which gives the CAB the authority to conduct its "proceedings in such a manner as will be conducive to the proper dispatch of business and to the ends of justice."[28] It is intended that the Board freely determine application procedures reasonably adapted to the fair administration of its complex responsibilities.[29] The scope of an inquiry was specifically left by Congress for the administrative agency's own determination,[30] and the courts have recognized that the CAB must have a measure of discretion in limiting the scope of a given proceeding regardless of *Ashbacker*.[31]

Where expanding the proceeding by consolidation will transform significant cases into nationwide monstrosities, CAB discretion is upheld.[32] In the absence of a clear abuse of discretion the courts do not interfere with the manner in which the CAB controls its operations.[33] *Ashbacker* is a rule of substance, not a "mere prescription of form," and it is founded on practicalities.[34] The courts tend not to review the details of agency procedure. The rule that an order of an administrative agency should not be reviewed unless it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process was laid down by the Supreme Court in *Chicago So. Air Lines, Inc. v. Waterman S.S. Corp.*[35] Therefore, although it has been held that "the Board cannot, either intentionally or by the demonstrable effect of an order avoid * * * the *Ashbacker* doctrine,"[36] where the denial of a consolidated hearing is to prevent an unworkable expansion of proceedings and is not inherently arbitrary, review has been denied on the basis that such an order is interlocutory.[37]

IV. National Airlines v. CAB

In the instant case, the United States Court of Appeals was asked to review several CAB orders. The orders in question dealt with comparative hearings concerning air service in the South. National Airlines and Delta

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[27] Delta Air Lines, Inc. v. CAB, 275 F.2d 632, 637 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960).

[28] The Federal Aviation Act of 1958, § 1001, 72 Stat. 788 (1958), 49 U.S.C. § 1481 (1964).

[29] CAB v. State Airlines, Inc., 338 U.S. 572 (1950).

[30] FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[31] Eastern Air Lines, Inc. v. CAB, 247 F.2d 562, 565 (D.C. Cir. 1957).

[32] North Am. Airlines, Inc. v. CAB, 241 F.2d 445 (D.C. Cir. 1957); United Air Lines, Inc. v. CAB, 228 F.2d 13 (D.C. Cir. 1955).

[33] Western Air Lines, Inc. v. CAB, 184 F.2d 545 (9th Cir. 1950).

[34] Delta Air Lines, Inc. v. CAB, 228 F.2d 17, 21 (D.C. Cir. 1955).

[35] 333 U.S. 103, 112-13 (1948).

[36] Delta Air Lines, Inc. v. CAB, 275 F.2d 632, 637 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960).

[37] *See e.g.*, National Airlines, Inc. v. CAB, 249 F.2d 13 (D.C. Cir. 1957); Eastern Air Lines, Inc. v. CAB, 243 F.2d 607 (D.C. Cir. 1956).

Air Lines, petitioners, principally held southern transcontinental routes prior to 1967. In March, 1967, the CAB instituted an evaluation of the need for additional services competitive with existing services in the southern markets.[38] The Board restricted the investigation to certain specified cities, and refused to consolidate or consider the petitioners' applications to other southern cities in the same proceeding. The Board recited its purpose in considering some of the excluded applications in separate proceedings as keeping "the investigation within the manageable proportions and to focus on those markets where additional unrestricted authority may be justified."[39] The Court of Appeals held the CAB orders were not final and dismissed the petition for lack of jurisdiction to review such orders.

The judiciary will not superintend agency judgment concerning control of its own calendar.[40] The determination of what areas are to be included in a route proceeding, *Ashbacker* aside, is particularly within the Board's discretion.[41] Thus, the CAB was within its authority in *National* to order hearings for investigating service to one city before investigating service to another absent a deprivation of rights which would make the matter reviewable. The court stressed the fact that it would not accept jurisdiction except when a substantial *Ashbacker* claim had been presented.

The CAB has denied motions to consolidate several pending cases where simultaneous consideration of mutually exclusive applications would unduly expand the proceeding.[42] Reviewing courts have stressed that *Ashbacker* does not require the Board to conduct a comparative hearing when cases are pending.[43] Separate or simultaneous hearings are available to the Board in the handling of its responsibilities before final grant. The court in the instant case said that the simultaneous investigation of contiguous areas did not violate *Ashbacker*. The court took notice of the fact that the Board in making the award had considered the fundamental fairness rule of *Ashbacker* and the criteria of a true area proceeding.[44] In addition, the court accepted the Board's stated purpose of limiting the scope of the proceedings as being within CAB discretion and necessary in complex route certification cases. The action taken by the Board in the instant case did not deny the right of an applicant to submit evidence or present arguments to establish the need for more or different restrictions to be applied to any authorizations which the Board might issue or to show the existence of mutual exclusivity. The Board merely kept the proceedings within manageable proportions through an interlocutory order while observing the fairness requisites of the *Ashbacker* doctrine. Thus, *Ashbacker*, as refined by the court, does not necessarily require the Board to expand proceedings to include abutting segments or prohibit the Board from considering

[38] Southern Tier Competitive Nonstop Investigation, CAB Doc. No. 18257, CAB Order No. E-24,847 (10 March 1967).

[39] *Id.* at 3.

[40] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

[41] City of San Antonio v. CAB, 374 F.2d 326, 329 (D.C. Cir. 1967).

[42] Western Air Lines, Inc. v. CAB, 184 F.2d 545 (9th Cir. 1950).

[43] *But cf.*, Radio Cincinnati, Inc. v. FCC, 177 F.2d 92 (D.C. Cir. 1949).

[44] *See* Delta Air Lines, Inc. v. CAB, 275 F.2d 632 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960).

in a separate proceeding an area that borders on, or even lies wholly within, the area covered in another proceeding.

V. Conclusion

It appears that the principles of *Delta*[45] have been effectively overruled by the decision in the instant case. The Court of Appeals has in the past refused to enforce the mandates of *Delta* as proper procedural rules but instead upheld CAB denial of consolidation by distinguishing the factual situation in *Delta* and that of the particular case under review. In the *Delta* case the Board's basic consideration was the east-west route system between the Atlantic seaboard and the central United States; Delta's proposed route application was directly within the area under consideration. In the *First National*[46] case the court had refused to allow a petition to review on the basis that, first, the Board, by its intervention procedure, had granted the applicant a fair opportunity to establish mutual exclusivity and, second, that National's route application was *not* directly within the geographical area under consideration. Therefore, consolidation would unduly expand the proceedings into a transcontinental hearing. The courts have succesfully avoided review by approving the CAB intervention policy concerning mutual exclusivity; they have gone further in the instant case by indicating that they would not necessarily review even if the CAB refused to enlarge proceedings to include abutting segments or set separate proceedings for an area that borders on, or even lies wholly within, the area considered in another proceeding.

The court has seen what inequitable results *Delta* can bring about after the Board is stripped of a great deal of its discretionary powers. In a dynamic industry such as air transportation, it is quite clear that there must be some limitation to the *Ashbacker* doctrine. As traffic requirements vary, a measure of flexibility is needed to set limits on the extent of a given proceeding. Furthermore flagrant misuse of the *Ashbacker* doctrine for tactical purposes ought to be discouraged. Limited inquiries must not be expanded into massive conglomerates involving the entire air transportation system. Rather agency judgment exercised under delegated powers must be given room to operate. In the final analysis the court ought not to interfere if the Board is not unmindful of *Ashbacker* rights and has not placed an unreasonable limitation upon a proceeding.

Joseph H. Lazara

[45] *Supra* note 21.
[46] *Supra* note 23.

Administrative Law — Agreements No Longer in Force — Primary Jurisdiction

Appellant, Allied Air Freight International Corporation,[1] alleging that Pan American World Airways, Inc. had engaged with Allied's competitor, Add Airfreight Corporation, in activities violative of the antitrust laws, claimed treble-damages under Section 4 of the Clayton Act.[2] In the alternative, appellant asked for actual damages for discrimination pursuant to Section 404(b) of the Federal Aviation Act (FAA).[3] Allied and Add were air freight forwarders,[4] consolidating freight in New York and Puerto Rico and delivering the goods from the destination terminal. Pan American operated an air carrier service between New York and Puerto Rico, flying shipments collected by forwarders such as Add and Allied. Appellant charged that Add and Pan American conspired to damage its established business by agreeing to exclude its consolidations and favor Add's, with the result that appellant became insolvent. The agreement had never been filed with the Civil Aeronautics Board (CAB) for approval and, at the time of suit, Add and Pan American were no longer acting under it. The federal district court ordered that Allied's suit be suspended until the plaintiff "exhausts its available remedies before the Civil Aeronautics Board."[5] Instead of appearing before the CAB appellant waited until the district court dismissed the case for want of prosecution and brought this appeal. *Held, reversed*: When the CAB is unable to give the relief requested and there is no "arguably lawful" conduct involved, the doctrine of primary jurisdiction is inapplicable and plaintiff can be heard by the district court without prior Board action.[6] *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).

Historically, federal district courts have been reluctant to review agree-

[1] Originally there were two complaints: Allied Air Freight International Corporation and Allied Air Freight, Inc. Allied Air Freight was declared bankrupt in 1964 and did not appeal the decision of the lower court. Both corporations had common ownership, officers and operations. 393 F.2d at 441.

[2] Clayton Act § 4, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 15 (1964). *See also*, Sherman Act §§ 1 & 2, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §§ 1 & 2 (1964).

[3] Federal Aviation Act of 1958, § 404(b), 72 Stat. 760 (1958), *as amended*, 49 U.S.C., § 1374 (1964).

[4] Air freight forwarders, like their surface counterparts, are common carriers who consolidate individual shipments into bulk lots for transportation. In addition, they perform certain other services, such as picking up freight at the point of origin, delivering it to its ultimate destination from air terminals, and planning the routing of shipments. Forwarders do not themselves perform the basic transportation; this is done by an underlying air or surface carrier. National Air Freight Forwarding Corp. v. CAB, 197 F.2d 384 (D.C. Cir. 1952). *See also*, 34 J. AIR L. & COM. 298 (1968).

[5] 8 Av. Cas. 18,356 (1964).

[6] The court also held that even though Allied intentionally obtained a dismissal from the lower court in order to procure review by the appellate court, the dismissal for want of prosecution without prejudice was not a voluntary dismissal that would prohibit appeal. *See* 393 F.2d at 445.

ments allegedly involving violations which deal with subjects that could fall within the jurisdiction of an administrative agency. This reluctance reflected the judicial policy that, where possible, litigants should obtain agency rulings, thereby obtaining the benefit of administrative expertise and being subjected to a uniform system of administration.[7] The practice of referring a case to an agency before further judicial action became known as the doctrine of primary jurisdiction,[8] a practice whereby:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[9]

The need for uniformity is especially strong in areas where there may be an inconsistency between the antitrust laws and the economic regulatory laws.[10] Antitrust laws encourage a policy of free competition, whereas some of the regulatory laws empower agencies to exempt regulated industries from such a policy.[11] When an antitrust violation is alleged by a party subject to agency regulation, the court is inclined to invoke the primary jurisdiction doctrine to determine the extent to which the regulatory agency may have already granted immunization from free competition policies.[12]

The Supreme Court, in interpreting the intent of the regulatory laws, has indicated a preference for initial recourse to the regulatory agencies in antitrust suits,[13] stating in *United State Nav. v. Cunard S.S. Co.* that "Congress undoubtedly intended that the [Shipping] Board should possess the authority primarily to hear and adjudge the matter."[14] Federal appellate courts have held that initial recourse should be to the administrative agency when the defendants have made no attempt to obtain Board approval prior to activity under their restrictive agreements.[15] This rule has been followed even though the agency had no authority to give the plaintiff the relief requested.[16]

The recent decision by the Supreme Court in *Carnation Co. v. Pacific*

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[7] Texas & Pacific Ry. Co. v. Abelene Cotton Oil Co., 204 U.S. 426 (1907); Baltimore & Ohio R.R. v. United States ex rel Pitcairn Coal Co., 215 U.S. 481 (1910).

[8] *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19 (1958); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 121 (abr. student ed., 1965); Note, 31 J. AIR L. & COM. 47 (1965).

[9] Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

[10] *See* 3 K. DAVIS, *supra* note 8, at § 19.05; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 141 (abr. student ed., 1965).

[11] L. JAFFE, *supra* note 10, at 142.

[12] Judicial recognition of the power of the CAB to immunize agreements from the operation of the antitrust laws is exemplified in Putnam v. Air Transport Ass'n of America, 112 F. Supp. 885 (S.D.N.Y. 1953). For statutory authority under the Federal Aviation Act of 1958, see § 414, 72 Stat. 770 (1958), *as amended*, 49 U.S.C. §§ 1382 & 1384 (1964).

[13] United States Nav. Co. v. Cunard S.S. Co., 50 F.2d 83 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932); 342 U.S. 570.

[14] 50 F.2d at 91.

[15] S.S. W., Inc. v. Air Transport Ass'n, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).

[16] Apgar Travel Agency v. International Air Transp. Ass'n, 107 F. Supp. 706 (S.D.N.Y. 1952).

Westbound[17] uses language that seems to circumscribe the use of the doctrine of primary jurisdiction. The defendant was an association of shipping companies that increased its rates on items shipped by the plaintiff. After five years of compliance with these rates, plaintiff brought an action for treble damages under the Clayton Act because defendant had failed to obtain approval of the rate schedule from the Federal Maritime Commission. The Supreme Court held that prior approval of an earlier agreement could be interpreted as approval of the agreement in question;[18] therefore, since the instant agreement was "arguably lawful," the plaintiff would first be required to obtain a Board ruling on whether immunity had been granted before the district court could decide the case.[19] The Court, in dictum, indicated that, had the agreement been "clearly unlawful," the doctrine of primary jurisdiction would not have applied, and the district court could have heard the case.[20]

The present court distinguished between antitrust suits in which an injunction is the requested relief, and the instant situation in which the plaintiff seeks only monetary relief for injuries resulting from the illegal agreement between Add and Pan American.[21] Referring to *S.S.W., Inc. v. Air Transport Ass'n*[22] and *Apgar Travel Agency v. International Air Transportation Ass'n*[23] as cases exemplifying the usual result where injunction is a part of the relief requested, the court pointed out that since an injunction would not be appropriate in the instant case, the usual result need not be reached. Both *S.S.W.* and *Apgar* involved claims for injunction and for treble damages, and the result was an application of the doctrine of primary jurisdiction. Since there is no element of currency to Allied's claim, the present court held, relying on the *Carnation* decision, that if "plaintiff does not seek injunctive relief, we see no reason why the antitrust action should not proceed."[24]

The court also reasoned that the agreement between Add and Pan American did not meet the "arguably lawful" distinction set out in *Carnation*, thereby making resort to the CAB futile.[25] Pan American urged that the "arguably lawful" distinction was inoperative in the instant case since it applies only to cases arising under the Federal Shipping Act—the act under which the *Carnation* case arose—which differs essentially from the Federal Aviation Act. Section 15 of the Federal Shipping Act reads, in pertinent part, as follows:

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[17] 383 U.S. 213 (1966).

[18] In holding that the Commission is to determine whether it has granted immunity or has withheld it, the Court holds contra to the decision by the Second Circuit that "When all that remains is for the Court to say what plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply." River Plate and Brazil Conference v. Pressed Steel Car Co., 277 F.2d 60, 63 (2d Cir. 1955).

[19] 383 U.S. at 224.

[20] ". . . Therefore, the Far East and Cunard principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act." *Id.* at 222.

[21] 393 F.2d at 446.

[22] 191 F.2d 658 (D.C. Cir. 1951).

[23] 107 F. Supp. 706 (S.D.N.Y. 1952).

[24] 393 F.2d at 448.

[25] 393 F.2d at 447.

> The Board may by order disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers . . . or between exporters from the United States . . . and shall approve all other agreements, modifications, or cancellations.
> All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, *and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation* [Emphasis added.].[26]

Carnation holds that this language prohibits retroactive validation of an agreement by the Federal Maritime Commission. Thus, Section 15, *in haec verba*, makes any agreement that is implemented prior to approval by the Board "clearly unlawful" and thereby subject to the operation of the antitrust laws.

In contrast are sections 412 and 414 of the Federal Aviation Act:

> . . . .
> (b) The Board shall by order disapprove any such contract or agreement, *whether or not previously approved by it*, that it finds to be the adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter . . . [Emphasis added.].[27]
> . . . .
> Any person affected by any order made under sections . . . 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws," as designed in section 1 of the act . . . , and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary *to enable such person to do anything authorized, approved, or required by such order* [Emphasis added.].[28]

Section 412 clearly gives the CAB the power to approve an agreement even though there was no attempt made by the parties operating under agreement to obtain immunity from the antitrust laws.[29] Pan American argued that the CAB should be given an opportunity to approve the agreement between Pan American and Add. Approval would immunize them from operation of the antitrust laws and thereby defeat plaintiff's treble-damage claim.[30]

Even though Allied conceded that the CAB does have the power to retroactively approve or disapprove existing agreements and immunize past as well as future activities,[31] the instant court stated:

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[26] Shipping Act of 1916, 39 Stat. 733 (1916), *as amended*, 46 U.S.C. § 814 (1964).
[27] Federal Aviation Act of 1958, § 414, 72 Stat. 770 (1958), *as amended*, 49 U.S.C. § 1382 (1964).
[28] Federal Aviation Act of 1958, § 414, 72 Stat. 770 (1958), *as amended*, 49 U.S.C. § 1384 (1964).
[29] *Cf.*, FMB v. Isbrandtsen Co., 356 U.S. 481 (1958).
[30] The language of the statute refers to agreements already in effect, *i.e.*, "The Board shall by order disapprove any such contract or agreement . . . that it finds to be adverse to the public interest . . . [Emphasis added.]."
[31] For cases holding that the CAB can immunize past activities, *see* Pan American World Airways, Inc. v. U.S., 371 U.S. 296 (1963); 191 F.2d 658 (D.C. Cir. 1951); 107 F. Supp. 706 (S.D.N.Y. 1952).

> [T]his case is distinguishable from those where the doctrine of primary jurisdiction has been applied to antitrust actions . . . because plaintiffs did not seek injunctive relief and it is conceded that the alleged agreement is no longer in effect.[32]

The *Carnation* case therefore is still important to the determination of the plaintiff's course of action in obtaining relief for the alleged conspiracy of the defendants; if some previously filed agreement between Add and Pan American could reasonably have extended immunity from the antitrust laws to the active embargo of Allied's shipments, then the action was "arguably lawful" and *Carnation* requires that the CAB rule to clarify the status of the agreement. If the agreement is "clearly unlawful" because of the failure of Add and Pan American to obtain CAB approval, then recourse to the CAB would be futile since the agency cannot retroactively approve an agreement that is no longer in effect.

Pan American also argued that narrowing the field of primary jurisdiction by excluding cases such as the instant one would hamper the orderly administration of the regulatory scheme. Agreements could be approved by the Board as being in the "public interest" under section 412 of the FAA[33] while similar agreements could be held in violation of antitrust laws simply because they are completed acts not exempted by agency action. In rejecting this contention, the court pointed out that "this is not a case where the past is a prologue to present problems."[34] Stressing that there was no need for uniformity in this instance the court cited Judge Clark's statement: "[T]he outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of the business between themselves and the agencies."[35]

The *Allied* court also held that its decision in *Maddock & Miller, Inc. v. United States Lines*[36] did not require a result different from that reached. In *Maddock* the court referred all three counts of alleged misconduct to the Federal Maritime Commission, even though two of the charges were antitrust allegations which the court found would not require consideration by the agency. The instant court reasoned:

> Although we found that decision of the two antitrust counts by the district court would not seem to interfere with the Commission's exercise of its powers, the action was nonetheless stayed to permit the Commission to consider in the first instance whether or not the agreement in question constituted a rebate, in order to take advantage of the Commission's special ability to handle this factual issue, common to all counts.[37]

Here, rules the court, "the Board has no special abilities which it could bring to bear on the problems" to be resolved.

In ruling that Allied need not appear before the CAB, the instant court

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[32] 393 F.2d at 446.

[33] Federal Aviation Act of 1958, § 414, 72 Stat. 770 (1958), *as amended*, 49 U.S.C. § 1384 (1964).

[34] 393 F.2d at 448.

[35] CAB v. Modern Air Transport, 179 F.2d 622 (2d Cir. 1964).

[36] 365 F.2d 98 (2d Cir. 1966).

[37] 393 F.2d at 448, 449.

has presented an interesting tactical consideration for future plaintiffs facing hit and run acts of unfair competition. If any type of injunctive relief is requested in addition to treble-damage for antitrust violation, then *S.S.W.* and *Apgar* point to initial recourse to the CAB. Other cases affirm that with the element of continuity implicit in the request for injunctive relief, subsequent approval of a previously unfiled agreement will carry immunization backward as well as forward, thereby giving the defendant a defense of immunity in an unfair competition suit.[38] If some prior act of the CAB raises a question that immunity may already have been granted by implication, then *Carnation* shows the desirability of initial recourse to the CAB to resolve whether the "arguably lawful" agreement has in fact been approved. The *Maddock* case and others[39] illustrate that the technical complexities of the subject matter may result in the invocation of the primary jurisdiction rule if a court feels it necessary to take advantage of the "special abilities" of a federal administrative agency.[40] But if the agreement has been terminated and the allegation is for money damages only, then the instant decision permits the district court to hear the case without invoking the doctrine of primary jurisdiction.

The second circuit in the present case circumscribes the use of the primary jurisdiction doctrine by requiring that there be an element of currency in the plaintiff's claim. This would seem to place the plaintiff in the position of being able to evade the jurisdiction of the CAB by merely delaying his action until the unfiled agreement is no longer in effect and by limiting his claim to past damages, even though there may be "currency" involved. This situation is mentioned in Footnote 3 of the court's opinion, which states:

> While paragraphs 30 *et seq.* of plaintiffs' complaint alleged that defendant had continued a course of conduct calculated to destroy plaintiffs' credit up to the moment of filing of the complaint, on motion for rehearing before Judge Palmieri plaintiffs announced that they would amend their complaint to delete these paragraphs and limit themselves to causes of action based upon the agreement between Pan American and Add Airfreight which allegedly had terminated. Plaintiffs may amend the complaint without leave pursuant to Fed. R. Civ. P.15 (a). Therefore, we assume that Allied will so amend its complaint and that the amended complaint will relate exclusively to transaction and occurrences which terminated prior to the time that the complaint was filed.[41]

Depending upon whether a plaintiff complains only of past injury or also alleges current harm, inconsistent regulation of the practices and dealings of air carriers will result. It is entirely conceivable that the CAB could approve as in the public interest, an agreement between air carriers which, if the plaintiff only requested damages for past injuries, might be the basis for a district court judgment for treble-damages. However, this possibility

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[38] McManus v. CAB, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961); McManus v. Lake Central Airlines, Inc., 327 F.2d 212 (2d Cir.), *cert. denied*, 377 U.S. 943 (1964).

[39] *See also*, 342 U.S. 570 (1952); 356 U.S. 481 (1958); L. JAFFE, *supra* note 10, at 133.

[40] 393 F.2d at 448, 449.

[41] *Id.* at 446.

is perhaps more speculative than realistic. What the present case effectively does is pose a warning to those who make agreements in restraint of trade without obtaining immunization from the appropriate regulatory agency. Failure to obtain agency approval gives the plaintiff the power to invoke the severe penalties of the antitrust laws by basing his claim on past acts, thereby barring the subsequent immunization by the agency as a saving device for the defendant.

K. Mark Pistorius

Default Judgment — Collateral Attack — Laches As A Defense

In June 1962, a Pennsylvania resident was killed in the crash of a private plane manufactured by the defendant, a Texas corporation. Decedent's administrator brought suit against the corporation in a United States district court in Pennsylvania for negligence and breach of warranty. Federal jurisdiction was based on diversity of citizenship;[1] and service of process on the defendant was sought under Federal Rule 4(d)(7),[2] which permits service "in the manner prescribed by the law of the state in which the district court is held." Initially plaintiff attempted personal service on a Pennsylvania distributor of aircraft manufactured by the defendant;[3] subsequently he made substituted service on the Secretary of the Commonwealth under the state "long-arm" statute.[4] Upon defendant's failure to appear, the federal district court in Pennsylvania rendered default judgment for the plaintiff who thereafter sought to register the judgment[5] in a federal district court in Texas. Asserting that the district court in Pennsylvania had not acquired in personam jurisdiction, defendant filed a Motion to Quash Registration and to Quash Execution. The federal court in Texas denied the motion and the defendant appealed. *Held, reversed*: When service of process is defective, a court does not acquire in personam jurisdiction; any judgment rendered by the court is void and subject to attack; and a defendant's failure to attack the judgment in that court does not operate, under a doctrine of laches, as an estoppel which prevents the defendant from asserting a lack of jurisdiction in a later action on the judgment. *Mooney Aircraft, Inc. v. Donnelly*, 402 F.2d 400 (5th Cir. 1968).

Because federal "subject matter" jurisdiction rests in part on "diversity of citizenship,"[6] how one goes about acquiring valid in personam jurisdiction over a "non-resident" corporation looms as a problem of considerable consequence in federal suits. In order to acquire the requisite jurisdiction, process must be served utilizing either the procedure outlined in Rule 4 of the Federal Rules of Civil Procedure or state process as provided in Rule 4(d)(7).[7] So long as the local rule incorporated under Rule 4(d)(7) conforms to the constitutional requirements of due process, and complies with the general requirement of actual notice to a "party not an inhabitant of or found within the state" as set forth in Rule 4(e),[8] the

[1] 28 U.S.C. § 1332 (1964).
[2] FED. R. CIV. P. 4(d)(7).
[3] PENNA. R. CIV. P. 2180(a).
[4] § 1011B, PENNA. BUS. CORP. LAW OF *1933, as amended*, 15 PENNA. STAT. ANN. § 2852-1011B, (Purdon 1967).
[5] 28 U.S.C. § 1963 (1964).
[6] 28 U.S.C. § 1332 (1964).
[7] FED. R. CIV. P. 4(d)(1) through (7).
[8] FED. R. CIV. P. 4(e).

local procedure can be utilized to acquire valid jurisdiction over both resident and non-resident defendants.

Consistent with procedural due process, a court may acquire in personam jurisdiction over a foreign corporation when the corporation has sufficient "contacts" with the forum state.[9] Announcing its decision in *International Shoe Co. v. Washington*,[10] the Supreme Court held that due process "requires only that in order to subject a defendant to judgment *in personam* [Court's italics.], if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend *traditional notions of fair play and substantial justice* [Emphasis added.]."[11] Under this rule, a single act might be sufficient to permit valid service if the two basic requirements are met: (1) There must be "minimum contacts" between the forum state and the corporation; and (2) subjecting the corporation to the state's jurisdiction must meet the test of "fair play and substantial justice." It should be noted that the "contacts" required are between the corporation and the state, not merely between the subject matter of the activity in question and the state.[12] Since the decision in *International Shoe*, the reach of state judicial processes has been extended through state "long-arm" statutes which codify the "minimum contacts" rule.[13]

It takes only a mildly overworked imagination to see that, because of the possibilities of extending a state's jurisdiction outside its boundaries under a long-arm statute, non-resident corporations often will attempt to show that the courts purporting to enter judgment against them did not have the requisite jurisdiction. A valid money judgment can only be rendered when the court has properly acquired jurisdiction over the defendant.[14] If it does not have such jurisdiction, its judgment is void.[15] Theoretically, the judgment never existed; it is a legal nullity and, therefore, has no legal force. The defendant may thereafter attack the judgment on jurisdictional grounds without regard to the merits of the plaintiff's claim.[16]

A void judgment can be attacked in one of several ways. In the strict sense, attack on the jurisdiction of a court after a judgment has become res judicata is a collateral attack.[17] But because there are different criteria for the types of attack, different terminology is used in referring to them. A "direct" attack is made by motion in the court which entered the judgment.[18] It may be collateral in the sense that it is an attack on the underlying jurisdiction of the court, but it is considered direct because of the court where it is made. For reasons which will be discussed below, the

[9] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[10] *Id.*
[11] *Id.* at 316.
[12] F. JAMES, CIVIL PROCEDURE, § 12.8 (1965).
[13] *See, e.g.*: § 210 *et seq.* N.Y. GEN. CORP. LAW, *as amended*, N.Y. CONSOL. LAWS (McKinney 1943); 15 PENNA STAT. ANN. § 2011 (Purdon 1967); TEX. REV. CIV. STAT. art. 2031, 2031a, & 2031b, (Vernon 1926).
[14] Pennoyer v. Neff, 95 U.S. 714 (1878).
[15] *Id. See also* Williams v. North Carolina, 325 U.S. 226 (1944) and McDonald v. Mabee, 243 U.S. 90 (1917).
[16] *Id.*
[17] *See* JAMES, *supra* note 12, at § 11.5-11.6.
[18] *Id.*

direct attack is considered an "offensive" tactic. What is commonly labeled a "collateral" attack is made in a court other than the one in which judgment was rendered.[19] It may be classified either as "offensive," when the defendant seeks a declaratory judgment that the original judgment is void, or "defensive," when the defendant sets up voidness as a defense in an action on the judgment.

In the federal courts, "direct" attack against a judgment which cannot be appealed—either because the time for appeal has elapsed or because the judgment has been affirmed on appeal—is permitted under Federal Rule 60(b).[20] It is recognized that even when the judgment has become final, the defendant may still petition the court which rendered the judgment to rescind it because of the lack of jurisdiction.[21] Such an attack must be brought within a reasonable time.[22] It is generally held that the lapse of an unreasonable amount of time, especially in the case of a default judgment, can act as a bar to the attack.[23]

In a direct attack the party asserting lack of jurisdiction does so in an affirmative way; he initiates the attack either by bringing an appeal or by petitioning that the judgment be set aside. But the so-called "collateral attack," which is made in a court other than the one in which the judgment was rendered, can be (and often is) used as a defense to an action on the judgment brought by the winning plaintiff. Especially in a case in which the parties are residents of different states, the plaintiff who has been awarded judgment seeks to have it enforced in another action (normally in the state where the non-resident defendant has property on which execution can be levied). In this second action the defendant sets up as a defense the voidness of the first judgment in attacking the first court's jurisdiction.

This distinction between the offensive and defensive use of attack can become especially important. As noted, the direct attack, under, for example, Federal Rule 60(b),[24] must be brought within a reasonable time or the defendant will be estopped by his own inaction from asserting the voidness of the judgment.[25] But in the case of a defensive attack, since the defendant does nothing, since he merely awaits action by the plaintiff, he may attack whenever the plaintiff brings his action on the judgment. An estoppel cannot be worked on the defendant merely because he failed to act, for it is up to the plaintiff to initiate the execution of the judgment. The consequences of applying a rule of laches in the case of a defensive attack can well be imagined. Under such a rule there would be a point at which it would be "unreasonable" to attack the judgment and the defend-

[19] *Id.*

[20] FED. R. CIV. P. 60(b). It should be noted that 60(b) concerns only personal and not subject matter jurisdiction.

[21] *See* JAMES, *supra* note 12, at § 11.5-11.6.

[22] *Id.*

[23] *Id.*

[24] FED. R. CIV. P. 60(b).

[25] *Id.* Rule 60(b) reads, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) . . . . The motion shall be made within a *reasonable time*, and for reasons (1), (2), and (3) not more than one year after the judgment . . . was entered . . . [Emphasis added.]."

ant would be estopped from raising the defense of lack of jurisdiction in the original forum. The plaintiff, then, would merely wait until that point had been reached before he initiated his action on the judgment. When the defendant pleaded the defense of voidness, the plaintiff could defeat the plea by showing that a reasonable time had passed. Such a rule would require the defendant to come into court in the first forum, and this is clearly contrary to the generally accepted notion that a defendant can refrain from appearing if he is willing to suffer the consequences or is certain that the plaintiff cannot get a valid judgment.

A recent Pennsylvania case has recognized the general rules just mentioned. *Myers v. Mooney Aircraft*[26] was the combination on appeal of two cases arising out of the same incident (the other being *Wilhere v. Mooney Aircraft*). Because of the similarity between these cases and *Mooney Aircraft v. Donnelly*,[27] a third action based on the same facts, it is important that *Myers* be discussed in some detail. An airplane manufactured by defendant Mooney Aircraft, a Texas corporation, had crashed killing the pilot, the owner of the plane, and a passenger, all of whom were Pennsylvania residents. The respective plaintiffs, personal representatives of the pilot and the passenger, brought suit in Pennsylvania state courts. Defendant failed to appear or answer in either case. In *Wilhere* the defendant filed a motion in the trial court, over two and a half years after the suit was initiated, to "strike off" the default judgment which had been rendered against it. The motion was denied and Mooney appealed. At the same time, Mooney filed a "preliminary objection" in the second case, the *Myers* suit, alleging a lack of in personam jurisdiction. When this motion was overruled, Mooney again appealed. The appeals were consolidated in the Pennsylvania Supreme Court.

In each case service of process was attempted under Pennsylvania rules of procedure. Both plaintiffs attempted service under the rule permitting service on a corporation's agent within the state.[28] In *Myers* substituted service was also attempted under the state long-arm statute.[29] As to the substituted service, the Pennsylvania Supreme Court found that Mooney was "doing business" within the state under the terms of the statute.[30] But Mooney was able to demonstrate in both *Myers* and *Wilhere* that the supposed agent served with process was an independent contractor who bought aircraft from Mooney and thereafter sold them to his own customers. Since the distributor was not an agent, Mooney was not constructively within the state, and service under the rule was ineffective for acquiring personal jurisdiction. Service in *Myers*, then, was held to be valid on the basis of the long-arm statute, thus giving the trial court jurisdiction. But because of the defect in service in *Wilhere*, it would appear that the default judgment had to be reversed. Nevertheless the court affirmed the

[26] 429 Pa. 177, 240 A.2d 505 (1967).
[27] 402 F.2d 400 (1968).
[28] PENNA. R. CIV. P. 2180(a).
[29] § 1011B, PENNA. BUS. CORP. LAW OF *1933, as amended*, 15 PENNA. STAT. ANN. § 2852-1011B, (Purdon 1967).
[30] Myers v. Mooney Aircraft, 240 A.2d at 509.

judgment, holding that, although Pennsylvania had not acquired in personam jurisdiction because of the defect in service, the defendant nonetheless could not attack the judgment. "[W]hatever rights [the defendant] might have had to attack this judgment have been lost by its own carelessness and the passage of time."[31] The court applied the doctrine of laches, recognizing the general rule in the case of offensive attack, that the defendant will be estopped by his own apparent inaction. The defendant could not be heard to deny that the trial court lacked jurisdiction.

Several major points distinguish the *Donnelly* case from *Wilhere* and *Myers* even though the cases arose from the same incident and had some procedural similarities. Indeed, from a procedural viewpoint the underlying incident is immaterial. *Donnelly* was brought in a federal district court in Pennsylvania whereas *Myers* and *Wilhere* were in the state courts. Service in *Donnelly* was attempted under the same rules utilized in *Myers*, pursuant to Federal Rule 4(d)(7),[32] except that service under the long-arm statute in *Donnelly* was made before the amendments applicable in *Myers* had gone into effect.[33] Default judgment was rendered in Pennsylvania, but then the plaintiff took his judgment to Texas for registration in federal district court. Mooney, therefore, made a defensive attack on jurisdiction in Texas rather than an offensive one in Pennsylvania.

On appeal from the denial of Mooney's motion to quash the registration for want of jurisdiction, the plaintiff contended that under the *Erie* doctrine the federal courts were bound by the opinion of the Pennsylvania Supreme Court in *Myers*. That is, the federal courts must look to the holding in *Myers* for a proper interpretation of the Pennsylvania rules of procedure. The Court of Appeals analyzed the *Myers* decision at some length and with considerable care inasmuch as its analysis was "founded upon the . . . statutes as interpreted by the Pennsylvania opinion."[34] Service under the long-arm statute had been found to be invalid by the Texas district court. The statute applicable in *Myers*, by which Pennsylvania had acquired jurisdiction in that case, was not in force when service was attempted in *Donnelly*.[35] Therefore, the holding in *Myers* that Pennsylvania had acquired jurisdiction under its long-arm statute was of no relevance. Relying on another Pennsylvania opinion which had interpreted the earlier statute,[36] the Texas district court found that Mooney's actions did not fall within the scope of the statute and Pennsylvania had not acquired jurisdiction. This portion of the district court opinion was affirmed by the Court of Appeals. On the question of service on Mooney's putative agent, it reversed

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[31] FED. R. CIV. P. 4(d)(7).

[32] FED. R. CIV. P. 4(d)(7).

[33] Prior to 13 Aug. 1963, § 1011B, PENNA. BUS. CORP. LAW OF 1933, *as amended*, 15 PENNA. STAT. ANN. § 2852-1011B, (Purdon 1967), provided for service of process "in any action arising out of *acts or omissions* of such corporations within [Pennsylvania] [Emphasis added.]." In both *Wilhere* and *Donnelly* service was made under the statute as it read before 13 Aug. 1963. After that date the italicized language in the above quotation was amended to read "in any action arising within [Pennsylvania]." Service was made in *Myers* after 13 Aug. 1963 under the statute as amended.

[34] 402 F.2d at 402.

[35] *Id.* at 402-3.

[36] Rufo v. Bastian-Blessing Co., 405 Pa. 12, 173 A.2d 123 (1961).

the lower court. Even though the Mooney distributor served in *Donnelly* was not the same as that served in *Myers*, the Court of Appeals found that the two had substantially the same relationship with the defendant. Since the "agent" served in *Donnelly* was in reality an independent contractor, under the interpretation rendered in *Myers* the attempted service was defective.

Had it not been for the plaintiff's insistence that the federal courts were bound by the entire *Myers* decision, it would have been an easy matter for the court to hold that because both attempts at service were ineffective the judgment was void. The Court of Appeals refused, however, to follow the Pennsylvania court's view of laches. Rather it stressed that "no authority . . . demands that we regulate our court appearances . . . by means of sanctions utilized in Pennsylvania,"[37] even though it had "accept[ed] the Pennsylvania Supreme Court's analysis of the state's long-arm statute by authority of Federal Rule 4(d)(7)."[38] Because of the holding in *Hanna v. Plumer*,[39] the court found that it was not required to follow a strict "outcome determination" test.[40] As to the laches argument itself the court said:

> If we were to accept the administrator's argument here, we would deny Mooney's right to remain silent and would make a mockery of jurisdictional safeguards. . . . Inaction as a response to non-authorized action cannot render such action valid. *The doctrine of laches has never been jurisdiction creating* [Emphasis added.].[41]

It then concluded its opinion by stating:

> [We are not convinced] that Mooney, by risking default judgment, should lose its legal rights. Our role is not to reward legal courage or to penalize legal cowardice.[42]

While undoubtedly correct in its conclusion, it appears that the Court of Appeals missed the point of the *Donnelly* case. In rejecting the laches argument, the distinction between direct and collateral attack, between offensive and defensive use of attack, is not mentioned in the opinion.[43] To be

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[37] 402 F.2d at 406.

[38] *Id.*

[39] 380 U.S. 460 (1965).

[40] Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960) announced a decision which would seem to be contrary to the "outcome determination" test of Guaranty Trust in allowing a federal court to decide matters of state procedure for itself. However, barely three years later the same court seemed to overrule its Jaftex decision in Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963, *en banc*) wherein it held that the federal court must apply state standards for determining the validity of Rule 4(d)(7) service. The problem has been compounded by the decisions in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958) (holding that a federal court is not necessarily bound automatically by the "outcome determination" test) and in Hanna v. Plumer, 380 U.S. 460 (1965) (holding that the Erie rule cannot void application of the Federal Rules of Civil Procedure).

[41] 402 F.2d at 406.

[42] *Id.* at 407.

[43] In 402 F.2d at 407 the *Donnelly* court cites Williams v. Capital Transit Co., 215 F.2d 487 (D.C. Cir. 1954) to the effect that "*No lapse of time can serve the plaintiff*. The lack of jurisdiction of the court cannot be cured by the running of months or even years where the court had no jurisdiction . . . in the first place [Court's emphasis.]." The Williams case involves a *direct* attack made three years after purported service. It would seem that by the quoted language the Williams and Donnelly courts both take the view that laches cannot act to bar attack under any and all circumstances. A further reading of the Williams opinion, however, indicates that the

sure at one point there is some skirting of the distinction when it is noted that the holding in *Myers* rendered

> Mooney subject to the jurisdiction of the Pennslyvania courts because of its improper entrance into the state proceedings. To the contrary, Mooney's method of challenging the federal proceedings was beyond question. Mooney made no entrance during the extent of litigation in Pennsylvania and entered in due course when the locus of action moved to Texas.[44]

But there is no further mention of the essentially different procedural situations involved in *Myers* and *Donnelly*. Aside from a rather superficial attitude towards the "outcome determination" doctrine,[45] the opinion fails to recognize that while laches can be "jurisdiction creating" in the case of direct attack, the instant case was not such an attack. It was, instead, a defensive "collateral" attack, the rules of which differ from those for direct attacks. Mooney had a "right to remain silent" only because of the nature of the action. In a certain sense, Mooney gambled that Pennsylvania had not acquired jurisdiction. Since prosecution of all affirmative acts is up to the aggrieved party, Mooney could continue to gamble, could continue to ignore the Pennsylvania action, until the plaintiff sought registration. At that point, if the Pennsylvania court lacked personal jurisdiction, Mooney could have avoided the judgment no matter how long the plaintiff had waited.

Although the court's analysis can be criticized, *Mooney Aircraft v. Donnelly* is a case of no little significance. In reaching the result it did, the opinion serves to dispel any doubt which could still be entertained that a defendant may gamble in the procedural dice game. The value of this decision rests, if not on its legal precision, on the holding that a lapse of time will not prejudice the defendant in a defensive attack on a void judgment.

Bruce L. Ashton

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court there merely found no prejudice in allowing the attack. Since avoiding a judgment in a direct attack is an equitable remedy, the Williams case represents nothing more than the exercise of the court's discretion in granting the remedy.

[44] 402 F.2d at 406.

[45] The Supreme Court, in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), first announced the "outcome determination" test when it held that a federal court under the *Erie* doctrine was required to follow the state rule, regardless of whether it could be classed as substantive or procedural, in order to reach the same result in both courts. In a strict sense, then, under this test and the general *Erie* doctrine, the court here should have been concerned with how a *Texas state* court would have viewed the problem of enforcing the default judgment against Mooney and not—at least at the outset—with what the Pennsylvania state courts had done. That is, the federal district court in Texas, under the *Erie* doctrine, is obliged to follow the rules of Texas state courts. Only if the Texas state courts would follow the Pennsylvania decision would the federal courts in Texas be concerned with it. As indicated in n. 40, *supra*, however, even granting this theoretical approach, the question may be moot.

Collateral Estoppel — Choice of Laws — A New Approach to Multi-Passenger Accident Litigation

As a consequence of the adversary system as well as of the traditional Anglo-American view of the role of the judiciary and the limited function of appellate courts, the initiative for new developments in the law rests with attorneys. It is true that modern procedural law has abandoned the so-called sporting theory of justice and the courts have repeatedly declared that a lawsuit should not just be a "battle of wits between the attorneys"[1] and that the outcome should not depend on the observance of procedural niceties. Nevertheless, the initiative for the development of the law—apart from legislative action—is left largely to the ingenuity and creative imagination of attorneys in their attempts to convince the courts to apply legal doctrines and general principles to situations which were not contemplated in the case from which original doctrines and principles are derived. In order to achieve the best result for his client, it is sometimes the duty of an attorney to try new approaches and to attempt to persuade a court to adopt new theories for the solution of the controversy.

Recently this creative legal thinking produced an attempt to combine the two modern doctrines of collateral estoppel and the most significant relationship test for choice of laws in tort cases, in order to bring a quick adjudication within minimum efforts and assure a more favorable choice of law rule to the plaintiffs, the heirs of a plane crash victim.[2] By offensively pleading the decision of a Texas federal court between a different plaintiff against the same defendant involving the same fact issue, the attorneys tried to establish, in a new action brought in a New York state court, the defendant's liability for a plane crash which occurred in Kentucky. However, the judge of the special term of the Supreme Court of New York refused to accept the plaintiffs' view because he felt it would be presumptious to enter into "hitherto unexplored territory."[3] In denying plaintiffs' motion for summary judgment based on the theory that the Texas judgment had established the liability of the airline company for the new action in New York, the judge passed the responsibility for the decision to the regular term of the Supreme Court.

In order to appreciate the full sweep of the plaintiffs' plea, this note will (1) discuss the development of the two doctrines, (2) examine the application of the two doctrines in this New York case, and (3) consider the possibilities of conjunctive use of the two doctrines in the future.

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[1] Guilford National Bank v. Southern Railway, 297 F.2d 921, 924 (4th Cir. 1962).

[2] Hart v. American Airlines, 10 Av. Cas. 17,894 (1968), *aff'd per curiam*, 297 N.Y.S.2d 587 (1969).

[3] *Id.* at 17,896.

I. COLLATERAL ESTOPPEL

Collateral estoppel is a segment of that area of law called res judicata. Res judicata in its broad sense asserts that once an action is tried to a final judgment, that judgment affects subsequent litigation brought on the same issues or facts and later actions on the judgment.[4] Within this large area falls collateral estoppel which operates only on the fact issues[5] and should be distinguished from res judicata in its narrow sense which operates as bar and merger on the same cause of action between the same parties.[6] The traditional rule of collateral estoppel is that once the fact issues have been litigated to a conclusion, the issues as between the parties to the prior suit are closed and cannot be relitigated in a later action. Thus, collateral estoppel operates even in later actions involving causes of action different from that in the first suit; the doctrine prevents the relitigation of issues already decided. The purpose of the doctrine is to secure the finality of litigated fact issues and thus economy of judicial effort.[7]

Generally the requirement of mutuality is necessary for the collateral estoppel doctrine to be exercised. Mutuality restricts the utilization of a prior court determination in a subsequent suit to those who were parties to the prior suit or those in privity with them.[8] Although in most jurisdictions the doctrine is still a requisite for the use of collateral estoppel,[9] a growing minority of states have denounced the mutuality requirement as outmoded and not in the best interests of justice.[10] In recent years the trend has been to increase the persons who may avail themselves of the doctrine.[11]

For the most part, the retreat from the requisite of mutuality results from discontent with the rigidity of the rule.[12] The 1942 Restatement of Judgments had recognized exceptions to the general rule.[13] This discontent was openly revealed in 1942 by the *Bernhard v. Bank of America*[14] decision of the California Supreme Court. Justice Traynor in *Bernhard* stated that mutuality is not a prerequisite for collateral estoppel to operate. That court applied collateral estoppel without its mutuality element in a defensive use and did not identify, distinguish, or mention the differences between its possible offensive and defensive uses. The *Bernhard* decision

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[4] RESTATEMENT OF JUDGMENTS § 45(c) (1942); Cromwell v. County of Sac, 94 U.S. 351 (1876); *see generally* F. JAMES, CIVIL PROCEDURE § 11.9 (1965).

[5] Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948).

[6] JAMES, *supra* note 4, at § 11.9.

[7] 34 J. AIR L. & COM. 304 (1968).

[8] JAMES, *supra* note 4, at § 11.31.

[9] Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 27 (1965).

[10] DeWitt v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967); Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364, 54 A.L.R.2d 316 (1955); DePolo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954); Cantrell v. Burnett & Henderson Co., 187 Tenn. 552, 216 S.W.2d 307 (1948); Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); Coca Cola Co. v. Pepsi Cola Co., 6 W.W.Harr. 134, 36 Del. 124, 172 A. 260 (1932).

[11] JAMES, *supra* note 4, at § 11.32.

[12] *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 862-65 (1952). *See also* JAMES, *supra* note 4, at § 11.34.

[13] Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1015 (1967).

[14] 19 Cal. 2d 807, 122 P.2d 892 (1942).

was not followed even in California until a number of years later.[15] But recently the *defensive* use of the collateral estoppel doctrine without the mutuality requirement has been extended to the point of being a significant minority rule.[16] Even more recently the *offensive* use of the doctrine has been accepted in some jurisdictions[17] although questioned by others. The offensive use of the doctrine has been criticized on the basis that it creates more problems than its solves.[18] For instance, prospective plaintiffs might be reluctant to join the first suit of a multi-passenger accident litigation[19] since they might find themselves bound by findings of fact in a suit in which they did not fully participate. If the plaintiffs in the first suit won, then the subsequent plaintiffs could naturally use the judgment for settlement purposes. More important, the offensive use of the doctrine would allow them to establish the facts in accordance with the findings in the first judgment. Also a problem arises if in a suit, a judgment is rendered in a close decision for a small award. Because the award is small, the defendant satisfies the judgment rather than appeal. Later, a subsequent plaintiff files suit against defendant and moves for summary judgment on the basis of the prior adjudication. However, the claimant in the subsequent suit is praying for a tremendous award compared to the prior suit. Would the granting of the motion be violative of due process or against public policy?

Most recently the New York Court of Appeals has brought that state into the increasing number of states applying the new doctrine with its 1967 decision in *DeWitt v. Hall.*[20] The action arose as a result of a collision between defendant Hall and a truck driver employee of DeWitt, Inc., owner of the truck. In the first suit against Hall the driver-employee recovered for personal injuries; then, two months later, suit was brought by DeWitt against the same defendant for the property damage to the truck. Motion for summary judgment against Hall was made on the basis of collateral estoppel, and was ultimately granted. The court in *DeWitt* went even further than other jurisdictions which have adopted the non-mutuality collateral concept by specifically accepting the offensive use of the doctrine: There is "no reason in policy or precedent to prevent the 'offensive' use of a prior judgment by a non-party."[21] As a result of this 1967 decision, New York is now theoretically willing to permit offensive use of findings of fact previously litigated in subsequent suit where only one party to the subsequent suit also participated in the earlier action.

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[15] Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[16] *Supra* note 9.

[17] Notably New York, DeWitt v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967); and Wisconsin, McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1958).

[18] Reardon v. Allen, 88 N.J. Super. Ct. 560, 213 A.2d 26 (1965); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). *See also* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party, supra* note 13, at 1036.

[19] Reardon v. Allen, 88 N.J. Super. Ct. 560, 571-72, 213 A.2d at 32.

[20] 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).

[21] *Id.* at 143, 278 N.Y.S.2d at 597, 225 N.E. at 196.

II. Choice of Laws in Tort Actions

The time honored theory on choice of law in tort actions in the United States has been *lex loci delicti*, the law of the place of the tort.[22] This was the doctrine accepted in the first Restatement.[23] But like most rules, this area of law has also gone through change largely because the problems of modern day society have not been fairly solved by rigid concepts. *Lex loci* promoted a uniform application of a single law in all jurisdictions, but it was often not flexible enough to do justice in individual cases. For this reason exceptions to the rule were developed and accepted.[24] But even developing numerous exceptions to a general rule did not offer the fundamental fairness which the more progressive courts were requiring.

New York once again played a major role in the demise of an unsatisfactory legal concept. After first engrafting exceptions to the *lex loci* doctrine, the New York courts finally began to develop a new concept. *Kilberg v. Northeast Airlines*[25] was the first case in which the New York Court of Appeals revealed the changing philosophy. Therein the court approached the choice of law problem in a surprising manner, reaching its result by what later would be known as the most significant relationship test. The suit resulted from an airplane crash at Nantucket, Massachusetts, on a flight from New York. The court used the Massachusetts statute for the issue of liability but used New York law for the damages issue. To reach this result, the issue of damages was declared to be procedural in order to evade the Massachusetts maximum damages statute for wrongful death.[26] Yet, the court apparently did not want to go so far as to apply the New York wrongful death statute because it would frustrate the plaintiffs, as the statute had no provision for out-of-state application. In *Pearson v. Northeast Airlines*,[27] a suit in federal court arising out of the same accident, the Second Circuit decided that the procedure employed in *Kilberg* was not a violation of the full faith and credit clause of the United States Constitution.[28] Finally, in 1963, in *Babcock v. Jackson*,[29] a case involving an Ontario guest-rider statute, New York broke with the indirect approaches and determined that since New York had more interest in the issues than the jurisdiction of the place of the tort, New York law should govern. The Court of Appeals stated that "where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling, but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of

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[22] R. Leflar, American Conflicts of Law, § 132 (Revised ed. 1968).

[23] Restatement of Conflict of Laws § 384 (1934).

[24] Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[25] 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

[26] Mass. Ann. Laws ch. 229, § 2 (1955); however, since this case the maximum recovery has been raised.

[27] Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

[28] U.S. Const. art. IV, § 1.

[29] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

the jurisdiction which has the *strongest interest in the resolution of the particular issue presented* [Emphasis added.]."[30]

Babcock climaxes the the evolution of the most significant relationship of governmental interest test in the choice of laws in tort actions. This new theory on choice of laws in torts is now largely made up of many concepts which have different names but which are basically the same.[31] While the shift to these choice of laws rules has been slow, once again California[32] and New York[33] are taking the lead in the move. A stimulus to the shift was added when the second Restatement of Conflicts of Laws adopted the most significant relationship test.[34] The Restatement now sets out guidelines for determining what contacts are significant.[35]

This new doctrine gives the courts more flexibility in order to deal with issues fairly and still keep some uniformity. Basically, the courts will determine which jurisdiction has the most significant contact with the issues of the litigation and will apply the law of that jurisdiction. This procedure does not limit the court to applying the law of the place of the tort or that of the forum. The court considering all the factors may very well find a third state to have the paramount interest and apply that state's law.

III. Combining the Two Doctrines

Since, as we have seen, New York has recently adopted modern theories of both collateral estoppel and choice of laws, it was only a matter of time before an attempt was made to use the two conjunctively to produce the result the attorneys were seeking.

In 1968 such an attempt was made in *Hart v. American Airlines.*[36] The litigation was a result of an airline crash at the Cincinnati, Ohio, airport which is located across the Ohio River in Kentucky. In the first suit tried to a conclusion, the defendant, American Airlines, was held liable for negligence.[37] The court rendering that judgment was a federal district court in Texas which strictly adheres to *lex loci delicti*[38] as well as the doctrine of mutuality in collateral estoppel.[39] Aware of the modern legal

[30] *Id.* at 484, 191 N.E.2d at 285.

[31] *See generally*, Leflar, *supra* note 22, at 97.

[32] Reich v. Purcell, 63 Cal. Rep. 31, 432 P.2d 727 (1967).

[33] Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965).

[34] *Infra* note 35.

[35] "(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

(a) The place where the injury occurred,

(b) The place where the conduct occurred,

(c) The domicile, nationality, place of incorporation, and place of business of the parties, and,

(d) The place where the relationship, if any, between the parties is centered.

(3) In determining the relative importance of the character of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states." Restatement (Second) of Conflict of Laws § 379 (Tent. Draft No. 9, 1964).

[36] 10 Av. Cas. 17,894 (1968), *aff'd per curiam*, 297 N.Y.S.2d 587 (1969).

[37] Creasy v. American Airlines, CA3-1680 (N.D. Tex. Jan. 8, 1968).

[38] Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (1968).

[39] Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S.W.2d 387 (1946); Swilley v. McCain, 374 S.W.2d 871 (1964).

attitudes that New York has toward collateral estoppel and choice of laws in tort actions, the plaintiffs in *Hart* filed suit in New York even though the decedents' domiciles had been in New Jersey and Connecticut. Its principal place of business being New York, defendant American was subjected to service of process in that state. At the proper time, plaintiffs moved for summary judgment upon the issue of defendant's liability on the basis of the findings of fact in the prior Texas litigation.

Since the court accepted the case,[40] New York procedural law applied to the litigation. Through the doctrine of *DeWitt* the court could in this suit allow the plaintiffs' attorneys the offensive use of another court's findings in order to establish fact issues. By applying New York's offensive collateral estoppel rule to the previously litigated issue of American Airlines' negligence, plaintiffs would eliminate the bulk of the litigation and eliminate the necessity of retrying this issue.

However, because the prior litigation was in a federal court in Texas, the problem of full faith and credit to the prior judgment might arise. New York must give full faith and credit to a sister state's judgment[41] or judgments of federal courts,[42] but the nature and extent of the judgment is measured by the usage of the state rendering the judgment.[43] Hence, "a litigation once pursued to judgment shall be conclusive of the rights of the parties in every other court as in that [state] where the judgment was rendered."[44] Texas' usage of collateral estoppel is limited strictly by the mutuality doctrine.[45] The full faith and credit clause requires the second state to give *at least* as much weight to the judgment as the rendering state gave.[46] Therefore, New York must give at least the extent of effectiveness that Texas gives the judgment. But can it use the Texas judgment for the benefit of a non-party while Texas maintains a strict mutuality requirement? The question, then, is whether the Texas judgment could be given greater effect in one state than it would have been given in Texas.

While the U.S. Supreme Court cases show that the judgment must give at least as much effect in the second court as was given in the rendering court, the decisions have not stated specifically whether more effect can be given to the judgment. The Supreme Court in *Durfee v. Duke*[47] seems to suggest the possibility of giving greater weight to a judgment than the rendering court attached. "Full faith and credit . . . *generally* requires every state to give to a prior judgment at least the res judicata effect which

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[40] Since the plaintiffs were non-domicilaries, they had to face the possibility that the court might refuse to take jurisdiction under the doctrine of *forum non conveniens*. *Forum non conveniens* simply gives the court the authority to refuse jurisdiction in a case even though the venue is correct if in "the interest of justice" the suit should be brought in another forum. LEFLAR, *supra* note 22, at § 53. The court in Hart made no mention of this issue so it should be assumed that the court recognized a sufficient relation to the state of New York.

[41] U.S. CONST. art. IV, § 1.

[42] Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935).

[43] 28 U.S.C. 1738; Kloeb v. Armour & Co., 311 U.S. 199 (1940).

[44] Magnolia Petroleum v. Hunt, 320 U.S. 430, 439 (1943); *see also* Morris v. Jones, 329 U.S. 545, 548 (1946).

[45] *Supra* note 38.

[46] Durfee v. Duke, 375 U.S. 106 (1963).

[47] *Id.*

the judgment would be accorded in the state which rendered it."[48] In some state court decisions the question has been answered in the affirmative; that is, a court can give greater effect to another court's decision.[49] In the situation in *Hart* the court could probably give more weight to the judgment than Texas does.

Assuming that the attorneys could effectively use the Texas judgment in New York in a way in which it could not be used in Texas, the last barrier to the attorneys' maneuver was establishing New York as the state with the paramount interest in the issues, so that New York will be applied. Since New York follows the most significant relationship or governmental interest test, all the attorneys needed to accomplish was to persuade the court that the case contained enough points of contact with New York so as to justify that state's governmental interest. Even though the plaintiffs were domiciliaries of New Jersey and Connecticut, it could reasonably be argued that domicile was not as strong a factor in New York as in other states. In New York City many of the businessmen and employees commute from New Jersey or Connecticut. The single most determinative factor to plaintiffs can be that the decedents had been permanently and gainfully employed in the state. Other factors justifying New York's governmental interests were also presented: The decedents contracted in New York for transportation to Cincinnati and back to New York, the decedents boarded the ill-fated airplane in New York, and the defendant had its principal place of business in New York. This should be sufficient to create New York's "predominant interest in the protection and regulation of the rights of the persons involved"[50] in order to compel the court to rule that the New York law should apply.

The judge at Special Term, however, declined to grant the motion for summary judgment and declined ". . . an invitation, on a purely *ad hoc* adventure, to leave behind the most recent and most advanced landmark decisions in New York on 'choice of laws in conflict' and 'collateral estoppel'."[51] The complicated legal issues involved apparently confused the judge. He wished to follow the cautious path and defer the acceptance of the combined application of the two doctrines. He avoided decision in the case involving the non-domiciliary plaintiff and non-domiciliary dependent survivors because he seemingly felt that the other points of contact did not create such "predominant interest of the persons involved."[52]

IV. Future Application of the Doctrines

In this consideration of a motion for summary judgment, the judge was reluctant to venture so far as to accept such an important innovation in tort litigation. Yet, from an analysis of the trends and cases in New York

[48] *Id.* at 109.

[49] Reynolds v. North Dakota Childrens Home Society, 85 N.W.2d 553 (1957); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

[50] Hart v. American Airlines, 10 Av. Cas. 17,894 (1968), *aff'd per curiam*, 297 N.Y.S.2d 587 (1969).

[51] *Id.* at 17,896.

[52] *Id.* at 17,895.

on the subject, the procedure of applying both the offensive use of collateral estoppel and the most significant relationship test in choice of laws in tort actions is an open avenue for the courts of that state to pursue in determining multi-passenger accident litigation.

Since New York has established itself as a leader in modern procedural theory and practice, the state should be benefited by faster disposition of cases subject to its determination than would have been possible in the past. Nevertheless, New York may find itself in the position of facing problems that were not considered in the shift to the modern procedural devices. When any new doctrine is accepted, imaginative attorneys will once again attempt to find and utilize the weak points which potentially exist in each theory or practice. Inasmuch as the conjunctive use of the relatively new doctrines is only presently being tendered to the court, the shortcomings of the concept will be determined in the future by progressive attorneys similar to those who espoused the doctrines.

John D. Jackson

RECENT DECISIONS

Insurance — Constructive Fraud — Reformation

The decedent made reservations to fly from Kansas City, Missouri to Lubbock, Texas. The reservations were made for Friday, 25 January 1963, but the return flight was left open. Prior to departure, the decedent's husband, plaintiff, decided that the decedent should have insurance to cover her during the trip. They approached a machine dispensing insurer's policy T-20 which provided coverage for accidents while aboard an airplane for the duration of the round-trip or for twelve months, whichever occurs first. Not having the proper change, they proceeded to a booth of the insurer and purchased policy T-18, a general accident policy that covered almost all risks during the term of the policy. The representative of the insurer failed to mention any of the other available policies. The term of the policy purchased was four days. The policy expired at 11:00 a.m. on Tuesday, 29 January 1963, and the decedent was fatally injured at 10:45 p.m. that night when the airplane crashed while attempting to land at the Kansas City airport. The insurer denied liability, but the United States District Court held that as a matter of equity the policy should be reformed to cover the accident. *Held, reversed*: The issuer of the flight insurance policy does not have a duty to tell the assured that several policies are available and to explain fully the provisions and limitations of the various policies; and accordingly, there is no basis for reformation of the contract actually issued, a general accident policy, to conform to a regular straight flight policy which insurer also offered for sale. *Mutual of Omaha Insurance Co. v. Russell*, 402, F.2d 339 (10th Cir. 1968), *cert denied*, 37 U.S.L.W. 3399 (U.S. April 22, 1969) (No. 1037).

Plaintiff's argument was based upon equitable or constructive fraud on the part of the insurer in failing to fulfill a duty to tell the assured that several policies were available and to explain fully the provisions and limitations of these policies.[1] In overruling the district court, the United States Court of Appeals for the Tenth Circuit applied a more traditional and much narrower concept of the remedy of reformation.[2] This concept has always been very limited, allowing a written contract to be reformed only when there has been mutual mistake or unilateral mistake by one party coupled with inequitable conduct on the part of the other party.[3] In applying the narrower interpretation to this case, the instant court reduced the case to one basic question: Whether, under these facts, the insurer had a duty to explain fully the provisions and limitations of the various policies

[1] Stern v. National City Co., 25 F. Supp. 948 (D. Minn. 1938).
[2] 3 A. CORBIN, CONTRACTS § 614 (1960).
[3] Prudential Insurance Co. of America v. Strickland, 187 F.2d 67 (6th Cir. 1951).

available. Moreover, to justify a decision of reformation in favor of the insured, the evidence supporting such a determination must be clear, unequivocal and decisive.[4]

Although reformation has been allowed in cases similar in many respects to the present case,[5] the evidence in this case failed to establish a duty on the part of the insurer which would effectively relate to the doctrine of equitable fraud. In so holding, the court reasoned "that imposing a duty to offer such explanations under circumstances of this kind—requiring as it does an effort by lay persons to interpret the legal meaning of the proposed contract as well as others available—would be fraught with great danger to the stability of contracts."[6]

R.N.P.

Insurance—Aviation Exclusion—Statute of Limitations

In 1960 the insured was killed while serving as a United States Air Force navigator on a military aircraft that was disabled by gunfire from Russian aircraft while over international waters. The crew was forced to bail out, and the body of the insured was never found. The life insurance policy in question contained the following exclusionary language:

> Death of the Insured occurring as a result of operating, riding in or descending from any kind of aircraft (1) operated for military or naval purposes . . . is a *risk not assumed* under said Policy [Emphasis added.].[1]

The appellant, wife of the insured and beneficiary of the insurance policy, sought recovery (1) under the written policy and (2) through reformation of the policy based on the fraud of the insurer's agent in representing the policy as one providing coverage to the insured while flying. *Held, affirmed*: The trial court did not err in granting summary judgment because the circumstances of death fall within the aviation exclusion provision of the insurance contract, and the claim of reformation, because of fraud, was barred by the statute of limitations. *Goforth v. Franklin Life Insurance Company*, 202 Kan. 413, 449 P.2d 477 (1969).

Appellant conceded that numerous cases have held that death by exposure or drowning after the descent of a land-based aircraft is a risk clearly intended by the parties to be excluded under aviation exclusion clauses,[2] but asserted that death resulted from Russian gunfire which was an outside or intervening cause. Citing *Knouse v. Equitable Life Ins. Co.*[3]

[4] Yablon v. Metropolitan Life Insurance Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

[5] Rosen v. Fidelity & Cas. Co. of N.Y., 162 F. Supp. 211 (E.D. Pa. 1958); Stevens v. Fidelity & Cas. Co. of N.Y., 58 Cal. 2d 862, 27 Cal. Rptr. 172, 377 P.2d 284 (1962); Lachs v. Fidelity & Cas. Co. of N.Y., 306 N.Y. 357, 118 N.E.2d 555 (1954).

[6] 402 F.2d at 346.

[1] Goforth v. Franklin Life Insurance Company, 202 Kan. 413, 414, 449 P.2d 477, 479 (1969).

[2] Order of United Commercial Travelers of America v. King, 161 F.2d 108 (4th Cir.), *aff'd*, 333 U.S. 153 (1947); Green v. Mutual Ben. Life Ins. Co., 144 F.2d 55 (1st Cir. 1944).

[3] 163 Kan. 213, 181 P.2d 310 (1947).

and *McKanna v. Continental Assurance Co.*,[4] the court rejected the argument that death resulting from a hostile party was a war risk and not excluded by the aviation clause in the insurance contract. The court held that the specific wording of the aviation exclusion was a conscious effort by the insurance company to "exclude the risk of an insured being killed as a result of military aircraft being shot down by the aggressive act of an unfriendly power";[5] for in *Knouse* and *McKanna* Kansas courts have reasoned that the phrases, "in any species of aircraft" and "any device for aerial navigation," are applicable to risks of military flights although neither policy made specific reference to military aircraft.

Moreover, the instant court held that the lower court was correct in sustaining summary judgment for the insurer since the appellant's claim for reformation based on fraud was clearly within the scope of Kansas' statute of limitations.[6] Although interrogatories had not been answered by the insurer on the merits of the claim, the lower court had before it appellant's discovery deposition bearing directly on the statute of limitations question.

C.C.C.

Criminal Law — Stolen Aircraft — The National Motor Vehicle Act

Defendant rented a Cessna aircraft in Sarasota, Florida, stating that he wanted to fly to Key West. Instead, he flew to Birmingham, Alabama, and later to Dubuque, Iowa, where he was arrested. He admitted that his original intention had been to leave Florida, but alleged that he intended to return the aircraft when he got enough money to pay the rental fee. In district court, the defendant was convicted of interstate transportation of an aircraft "knowing the same to have been stolen."[1] He appealed to the Court of Appeals for the 8th Circuit. *Held, affirmed*: When a person obtains use of an aircraft by false pretense and crosses state lines, he violates the Dyer Act. His intention to return the aircraft is immaterial since "stolen" requires something less than permanency and something less than a deprival of the totality of ownership. *Stewart v. United States*, 395 F.2d 484 (1968).

The Dyer Act (The National Motor Vehicle Act) was passed in 1919 to prevent the interstate transportation of "stolen" automobiles and amended in 1945 to protect aircraft.[2] The 8th Circuit had originally

[4] 165 Kan. 289, 194 P.2d 515 (1948).
[5] 449 P.2d at 484 (1969).
[6] Kan. Stat. Ann. § 60-513 (1968 Supp.). *See*, Collins v. Richardson, 168 Kan. 203, 212 P.2d 302 (1949) (reformation).

[1] 18 U.S.C. § 2312 (1964). "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."
[2] 18 U.S.C. § 2312 (1964). The original Act, sponsored by Representative L. C. Dyer of Missouri,

construed "stolen" very narrowly, that is, statutory larceny as defined by the state where the taking occurred.[3] The Supreme Court, in *Turley v. United States*,[4] adopted a broader definition that included any felonious taking of a motor vehicle with the intent to deprive the owner of the rights and benefits of ownership. Reasoning that the distinctions of the crime of larceny have no relevance to the Congressional intent to prevent the interstate transportation of illegally obtained motor vehicles,[5] the Court refused to give the statute the narrowest possible interpretation that would limit it to situations which at common law would be considered larceny.

Prior to the instant case, the Eighth Circuit applied the reasoning of the *Turley* decision to *Schwab v. United States*.[6] Rejecting the defendant's contention that permanent deprivation must be intended, the court held that *Turley* establishes a broad standard that may be satisfied with less than permanency and something less than a deprival of the totality of ownership.[7] Thus, the *Schwab* decision set the precedent in interstate transportation of automobiles that was applied to aircraft in *Stewart*. In sum, "stolen" within the meaning of the Dyer Act is the taking of a vehicle, "for one's use without right."[8] Any wrongful taking, whether or not it constitutes common law larceny, is sufficient to satisfy this standard, *i.e.*, if the rental of an aircraft is accompanied by cheating, interstate transportation of that aircraft is a violation of the Dyer Act.

G.R.B.

Negligence—Federal Tort Claims Act—Government Liability

Plaintiffs' decedents were passengers in a Cessna aircraft en route to San Antonio from Texarkana. During the flight, the Radar Approach Control Facilities (RAPCON) at Waco relayed inexact, incomplete, and misleading weather information to the pilot. Lacking information that weather conditions were so severe that he should land immediately, the pilot, at his discretion, proceeded into the storm and crashed while attempting a landing at Easterwood Airport. Alleging various acts of negli-

became law in 1919. 41 Stat. 324. It was amended, in 1945, to include aircraft, 59 Stat. 536, and was re-enacted in 1948, as part of the Criminal Code, 62 Stat. 806.

[3] Abraham v. United States, 15 F.2d 911, 912 (8th Cir. 1926), and Carpenter v. United States, 113 F.2d 692, 696 (8th Cir. 1940). Later, the Eighth Circuit joined the Fifth and Tenth Circuits in the view that "stolen" should be restricted to common law larceny. Murphy v. United States, 206 F.2d 571 (5th Cir. 1953); Hite v. United States, 168 F.2d 973 (10th Cir. 1948); Stewart v. United States, 151 F.2d 386 (8th Cir. 1945). The Second, Fourth, Sixth and Ninth Circuits favored the view that "stolen" meant "felonious taking." Boone v. United States, 235 F.2d 939 (4th Cir. 1956); Smith v. United States, 233 F.2d 744 (9th Cir. 1956); Breece v. United States, 218 F.2d 819 (6th Cir. 1954); United States v. Sicurella, 187 F.2d 533 (2d Cir. 1951). *See also*, 56 ALR.2d 1300 (1957).

[4] United States v. Turley, 352 U.S. 407 (1957).

[5] *Id.* at 417.

[6] 327 F.2d 11 (8th Cir. 1964).

[7] *Id.* at 13.

[8] 235 F.2d 939.

gence in weather reporting by government personnel, the plaintiff brought suit under the Federal Tort Claims Act.[1] *Held*: When government personnel are negligent in weather reporting and such negligence is responsible for placing a pilot and his passengers in a perilous position which is the proximate cause of their deaths, the government is liable under the FTCA.[2] *Gill v. United States*, 285 F. Supp. 253 (E.D. Tex. 1968).

Although several acts of negligence were alleged,[3] the court narrowed it down to the variance between the report received from the Austin RAPCON by the Waco RAPCON and that relayed by the Waco RAPCON to the pilot, and the apparent approval by the Waco RAPCON of the route of continued flight suggested by the pilot. Finding that the incomplete and inaccurate weather reports were responsible for placing the pilot in the perilous position of having to attempt a landing of a light plane at night during a severe storm, the court concluded that the crash was the natural and probable result to be expected from an attempted landing of a light plane in the conditions prevailing at Easterwood during the time of the accident.

In holding the government liable under the FTCA, the court relied primarily on *Ingham v. Eastern Air Lines*[4] which held that the failure to report weather conditions promptly and accurately constitutes negligence on the part of government personnel. *Ingham* is distinguishable from the instant case in that *Ingham* involved a regulation specifically controlling the personnel. However, it is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently.[5]

L.L.C.

Warsaw Convention — Air Carrier Substitution — Successive Carriers

Plaintiff purchased, from a New York agent of Air France, a round-trip ticket for a trip from New York to Belgrade. The major legs of the trip were flights (1) from New York to Paris on a specific flight on 31

[1] Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671 *et. seq.* (1946).

[2] Damages are to be assessed under the wrongful death act of the state where the cause of action arose, *i.e.*, Tex. Rev. Civ. Stat. Ann. art. 4677 (1952).

[3] Alleged acts of negligence were the omission of the San Antonio SIGMET No. 2 from the report given by the operator at the Gregg County Airport in Longview and delay of personnel at Easterwood Airport in responding to calls from the plane.

[4] 373 F.2d 227, 236 (2d Cir. 1967).

[5] Supporting this ruling is United States v. Brown, 348 U.S. 110 (1954). *See also*, United States v. Union Trust Company, 350 U.S. 907 (1955), where the Supreme Court relied on Indian Towing v. United States, 350 U.S. 61 (1955), in affirming the lower court's judgment that a suit could be maintained under the Federal Tort Claims Act for the negligence of the control tower personnel in regulating the flow of traffic at the airport. In *Indian Towing* the Supreme Court reversed the Fifth Circuit by holding the government liable under the FTCA when it failed in its duty to keep the lighthouse functioning properly.

August, (2) from Paris to Belgrade on a specific flight on 1 September, (3) from Belgrade back to Paris on an unspecified flight and (4) from Paris to New York also on an unspecified flight. This contract was thus incomplete to the extent that the return flights were not yet agreed upon. On the ticket there appeared the initials "AF" indicating the air carrier to be Air France for all legs of the trip. When plaintiff wished to return from Belgrade on Thursday, 14 September 1967, there were no Air France flights scheduled to Paris. In order to permit the plaintiff to start her return flight on Thursday, Air France in Belgrade changed her ticket to substitute Yugoslav Airways as the carrier from Belgrade to Paris, by attaching a "revalidated form" to her original ticket.[1] Plaintiff suffered injuries while disembarking at Munich, an intermediate stop on the way to Paris, and sued Air France for those injuries. Both parties to the suit stipulated that the Warsaw Convention was applicable to the flight. Whether Air France was liable to the plaintiff depended upon whether Yugoslav Airways was a "successive carrier" within the meaning of Article 30 of the Convention.[2] If Yugoslav Airways was a successive carrier, the plaintiff could sue only Yugoslav, otherwise Air France could be liable in the action. *Held*: Since the completion and amendment at Belgrade was within the contemplation of the parties when the incomplete contract was made in New York, it is fair and reasonable to treat the completion and amendment as relating back to the time of the making of the contract in New York making Yugoslav Airways a successive carrier under the Warsaw Convention. Plaintiff's motion for summary judgment on the issue of liability is therefore denied, and the court grants summary judgment to Air France without a motion. *Briscoe v. Campagnie National Air France*, 290 F. Supp. 863 (S.D.N.Y. 1968).

The plaintiff argued that the contract of transportation made at New York did not provide for transportation to be performed by various successive carriers, and therefore, Article 30 was inapplicable. The court felt that this argument ignored what had happened in Belgrade, that is, the passenger and Air France agreed to complete and amend the original New York made contract by designating Yugoslav Airways for one leg of the return trip, Belgrade to Paris.

The court asserted by analogy that since in other hypothetical situations in which Yugoslav Airways could have become the carrier for the Belgrade-Paris leg it would have been a successive carrier, there should not be a different result in this case:

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[1] Yugoslav Airways, flight number 249, 14 Sept. 1967.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 29 Oct. 1934, art. 30, 49 Stat. 3014 T.S. No. 876.

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

> If she [the plaintiff] had known in New York that she wished to leave Belgrade, as she did, on September 14, 1967, then the ticket at New York would there have been written to provide that transportation from Belgrade to Paris was "to be performed" by Yugoslav Airways. In that event, clearly plaintiff could proceed only against Yugoslav Airways as a "successive carrier." If plaintiff had not arranged at New York for transportation from Belgrade but had gone to Air France in Belgrade and had made *an original contract* there for the same transportation as was in fact provided under her New York ticket, then transportation from Belgrade to Paris under such contract would have been provided "to be performed" by Yugoslav Airways. In that event also, clearly plaintiff could proceed only against Yugoslav Airways as a "successive carrier." It would be strange and illogical to reach a different result merely because of the circumstance that the contract incomplete in New York was completed and amended in Belgrade [Emphasis added.].[3]

But the plaintiff did not tell Air France she wanted to leave Belgrade on 14 September when she made her contract in New York, nor did she buy a one way ticket to Belgrade and then try to buy a ticket from Belgrade back to Paris with Yugoslav Airways designated as the carrier. Plaintiff purchased a round-trip ticket without having the return flights designated beforehand. Different facts do provide for different results, and the argument by analogy did not bolster the court's decision.

The court cited cases mentioned in Shawcross and Beaumont on Air Law for the proposition that if the original contract had a clause permitting the airline or the passenger to substitute another carrier, there would be successive carriers. Shawcross and Beaumont are themselves critical of these cases:

> [I]t is difficult to see how substitution of a carrier made after the carriage has commenced can amount to successive carriers, because, instead of being carriage which at the time of the contract was *to be performed* by successive carriers, it would instead be carriage which *might* be performed by successive carriers.[4]

The court differentiates the treatise's reasoning by saying Shawcross and Beaumont were talking of unilateral substitution by the carrier or by the passenger, under a contract provision giving such rights of substitution, and not where the two parties mutually agreed to change carriers and the original contract was incomplete. It is submitted that this reasoning attempted to use the treatise for what it did not say.

The court was in a difficult situation because no authority on the question had been cited or could be found. Nevertheless, the court had an excellent opportunit yto make a clearly reasoned analysis unhampered by precedent. Its opinion, however, was not clear.

J.H.G.

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[3] Briscoe v. Compagnie Nationale Air France, 290 F. Supp. 863, 866 (S.D.N.Y. 1968).
[4] *Id.* at 866-67.