Journal of Air Law and Commerce

Volume 38 | Issue 3 Article 3

1972

Discovery Problems in Aviation Litigation

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DISCOVERY PROBLEMS IN AVIATION LITIGATION

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I. DISCOVERY IN GENERAL

THE DISCOVERY problems in aviation litigation necessarily involve discussion of the Federal Rules of Civil Procedure, since the vast majority of aviation litigation originates in the federal courts. As a consequence, the procedural aspects of discovery are, in large measure, controlled by the Federal Rules of Civil Procedure. Many states have adopted, however, or are contemplating adoption of, rules patterned after the federal discovery rules. This article will focus on discovery in general, with particular reference to aircraft cases on questions of privileged material and relevancy under general discovery procedures and will review the scope and application of the particular discovery techniques of interrogatories, production, including governmental documents and depositions, including depositions of FAA investigators.

Rule 26(b) of the Federal Rules of Civil Procedure articulates the standards governing discovery generally.[1] Rule 26(b) provides for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." Moreover, the scope of discovery under Rule 26(b) is not limited by a requirement of admissibility.[2]

Because of the volume and nature of reports, documents and memoranda generated in the investigation of an aircraft accident, the enumerated areas of limitations to discovery are particularly significant in aviation litigation. These are the areas of "Privilege,"

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[1] FED. R. CIV. P. 26(b).

[2] FED. R. CIV. P. 26(b)(1) provides, in part: "It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

"Relevancy" and "Work Product of Attorneys." Although certain privileges are recognized, such as attorney-client, the privilege is particularly important in the arena of discovery of military and government reports. Because of the complex and important nature of discovery of these reports in litigation involving military aircraft, the matter of privilege will be discussed in depth in connection with discovery of military accident reports. It is important to emphasize that a claim of privilege must be formally made by the party possessing the privilege and must be accompanied by adequate validation.[3]

Rule 26(b)(1) also requires that the matter discovered be relevant. An area of conflict developed early between the concept of "relevancy" and "work product of the lawyer." In the landmark case of *Hickman v. Taylor*,[4] the Supreme Court indicated that an attorney is judicially foreclosed from concealment of relevant facts on the basis that the material sought to be discovered was compiled in preparation for trial.

Relevancy, of necessity, is circumscribed by reasonable limitations. A party may be compelled to disgorge information reasonably expected to be available as matter of record or personal knowledge of his officers and agents.[5] Analysis or evaluation of information, however, is not encompassed within the ambit of discovery.[6]

The policy of discovery is also designed to formulate the issues involved in litigation. Therefore, relevancy within the meaning of Rule 26(b) includes discovery of the specific nature of the adverse party's claims and allegations.[7]

In the landmark decision on the status of work product, *Hickman v. Taylor*,[8] the Supreme Court rejected the claim of privilege against disclosure of trial preparation material. The Court declared that the attorney-client privilege did not extend to information that an attorney secures from a witness while acting for his client in

[3] 345 U.S. 1 (1953).

[4] 329 U.S. 495 (1947).

[5] McElroy v. United Air Lines, 21 F.R.D. 100 (W.D. Mo. 1957); Dusek v. United Air Lines, Inc., 9 F.R.D. 326 (N.D. Ohio 1949).

[6] *Id.*

[7] *Id.*

[8] 329 U.S. 495 (1947). *See also* Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

anticipation of litigation. The Court declined to order production, however, because of the failure of the plaintiff to establish a necessity for discovery.

The 1970 revision of the Rules does not abrogate the *Hickman*[9] requirement that justification must be established for incursions into the privacy of an attorney's trial preparation file. The new Rule 26(b)(3) specifically provides for discovery of trial preparation material, but imposes the requirement that the party seeking discovery show a substantial need of the materials by other means. Under Rule 26(b)(3), the trial preparation materials of an attorney are not given special status, except to the extent that the required showing has been made, the court shall protect against discovery of the mental impressions, conclusions, opinions and legal theories of an attorney or other representative of a party. Therefore, with the "mental impression and legal theory" and "expert witnesses" limitation, Rule 26(b) allows "discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. . . ." Again, it should be emphasized that discovery is significantly dependent upon a showing that the party seeking discovery has substantial need and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[10]

II. INTERROGATORIES

Interrogatories under Rule 33 are limited to parties. Formerly, interrogatories could be served only on *adverse* parties, but the 1970 amendments allow service of written interrogatories on any other party to the litigation.

In certain instances, however, interrogatories may be a totally unsatisfactory method for procuring discovery. This was recognized by the court in *Branyon v. KLM*,[11] which involved a wrongful death action originating from a Dutch airliner crash in India. The district court concluded that the plaintiffs had shown good cause to dispense with written interrogatories, and granted a rare order for letters rogatory to the Indian High Court to appoint a

[9] 329 U.S. 495 (1947).

[10] FED. R. CIV. P. 26(b)(3).

[11] 13 F.R.D. 425 (S.D.N.Y. 1953).

commissioner to take oral depositions of witnesses and compel the production of required documents. The court recognized the inadequacy of written interrogatories for examining witnesses concerning basic facts and causes of a major airplane disaster.

Written interrogatories to parties are an appropriate and effective vehicle for obtaining with greater specificity the contentions and claims of an adversary.[12] One of the purposes of discovery is to eliminate surprises and advance the stage at which disclosure can be compelled. But the courts have evidenced a rather flexible approach in permitting parties to enlarge on specific contentions because aircraft crash cases are a unique and complex type of litigation. As an example, the district court in *McElroy v. United Air Lines*,[13] sustained a motion to compel plaintiff to enumerate all alleged negligent acts but indicated that the plaintiff would not necessarily be relegated to these contentions at trial if continuing investigation disclosed new facts.

In *Lunn v. United Aircraft Corporation*,[14] the defendant moved for further and more specific answers to certain interrogatories that asked whether plaintiff contended defendant had violated a Civil Air Regulation. The plaintiff answered affirmatively, but stated he did not know the particular regulation violated. The court held that plaintiff was obligated to notify the defendant as soon as it ascertained the regulation and the alleged violation relied upon.

The 1970 addition of subdivision (3) to Rule 26 imposes a duty on the answering party to supplement responses to interrogatories. In addition Rule 26(e) requires a party by supplemental answers to identify any persons possessing knowledge of any discoverable matter; to identify persons expected to be called as expert witnesses at the trial; and the substance of the expected subject matter of the expert's testimony. Further, Rule 26(e) provides a duty to seasonably amend answers to interrogatories when a party discovers that the answers were incorrect when given or when subsequently developed information would indicate that the former answer, although correct when given, would constitute a knowing concealment. These additions were designed to resolve myriad

[12] Merrill v. United Air Lines, 151 F. Supp. 104 (S.D.N.Y. 1957); McElroy v. United Air Lines, 21 F.R.D. 100 (W.D. Mo. 1957).

[13] 21 F.R.D. 100 (W.D. Mo. 1957).

[14] 25 F.R.D. 186 (D. Del. 1960).

disparate holdings among the courts on the continuing duty to answer.[15] The continuing obligation to supplement responses to interrogatories is particularly appropriate in complex aviation litigation. Volumes of data coupled with periodic utilization of experts provide a need for updating responses to interrogatories.

The courts have consistently declared that opinion testimony is discoverable through the vehicle of interrogatories. Thus interrogatories are not objectionable merely because they seek to obtain the opinions and conclusions of experts regularly employed by the airlines.[16] In *Anderson v. United Air Lines*,[17] plaintiff's interrogatories sought expert opinions on malfunctioning of the fire warning and extinguishing system, settings of certain controls, the source of certain sooting and the type of hydrocarbon comprising the soot. The district court specifically noted that a party was obligated to respond to interrogatories calling for opinions or conclusions within the knowledge and possession of the party. The plaintiffs also requested information on the observations made by a United Air Lines captain flying over the crash site and the effect of these observations on the crew of the aircraft. The defendant was compelled to respond since the observations were within the knowledge of United Air Lines personnel and therefore the information was reasonably ascertainable.

Discovery of opinions of experts poses a special problem. It is essential to distinguish the three situations that arise in connection with experts utilized in litigation. The courts have consistently allowed discovery of experts in the regular employ of the adverse party.[18] An expert will not be compelled, however, to offer opinions and conclusions not already formulated at the time of discovery.

The second class of experts are those not regularly employed by a party but who are selected and employed only for the purpose of testifying at trial. Rule 26(b)(4)(A)(1) specifically provides that through interrogatories a party may require any other party to identify each person whom the party expects to call as an expert

[15] *E.g.*, Gorsha v. Commercial Transp. Corp., 38 F.R.D. 188 (E.D. La. 1965); Diversified Prods. Corp. v. Sports Center Co., 10 F.R. Ser. 2d 33.342 (D. Md. 1967); *Contra*, Lunn v. United Aircraft Corp., 25 F.R.D. 186 (D. Del. 1960).

[16] Kendall v. United Air Lines, Inc., 9 F.R.D. 702 (S.D.N.Y. 1949).

[17] 49 F.R.D. 144 (S.D.N.Y. 1969).

[18] Kendall v. United Air Lines, Inc., 9 F.R.D. 702 (S.D.N.Y. 1949); Moran v. Pittsburgh-Des Moines Steel Co., 6 F.R.D. 594 (W.D. Pa. 1947).

witness at the trial and to state the subject matter on which the expert is expected to testify, the substance of the facts and opinions of the expert and a summary of the grounds for each opinion.[19] In the absence of extreme circumstances, the permissible scope of discovery of these experts is stringently restricted.

The third class of expert is one specially retained for purposes of trial preparation but not expected to testify.[20] Under Rule 26(b)(4)(B) a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at the trial except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. In the absence of this showing, discovery of facts and opinions of consulting experts is precluded. Moreover, the consulting expert must be retained or specially consulted, and informal consultation is not discoverable under the circumstances.

These new rules, which provide that the party seeking discovery pay the expert a reasonable fee, indicate an attempt to resolve many earlier conflicting decisions. For example, in the case of *Lewis v. United Air Lines Transport Corp.*,[21] the district court denied discovery of an expert witness based on the unfairness of allowing the party seeking discovery to obtain opinion testimony without payment of a reasonable fee to the expert. In *Petroleum Helicopters, Inc. v. Republic Aviation Corp.*,[22] an action arising from an aircraft crash, the court would not allow the defendant to compel the plaintiff's expert witness to give his opinion based on his examination of the mechanical part alleged to have caused the accident because the defendant possessed the capacity to conduct an independent examination with its own expert witness. Although the amended rule now limits the extent of discovery of experts, a party may be required to disgorge the essential opinion and factual basis undergirding the opinions of experts.

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[19] FED. R. CIV. P. 26(b)(4)(A)(1). *E.g.*, Falk v. United States, 53 F.R.D. 113 (D. Conn. 1971).

[20] FED. R. CIV. P. 26(b)(4)(B).

[21] 32 F. Supp. 21 (W.D. Pa. 1940).

[22] 8 AV. CAS. 17, 973 (E.D.N.Y. 1963).

III. PRODUCTION

Rule 34, entitled *Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes*, has been completely changed by the 1970 amendments. The recent modifications were designed to accomplish four major purposes: (i) to eliminate the requirement of "good cause"; (ii) to make the rule operate extra-judicially; (iii) to include not only inspecting and photographing, but also testing and sampling of tangible things; and (iv) to clarify that an independent action for analogous discovery against persons who are not parties is not precluded by this rule. The requirement of good cause was made unnecessary by the additions of Rule 26(b) relating to trial preparation materials and to experts retained or consulted by the parties. The only limitations on production are incorporated in Rule 26(b)(3). If production of trial preparation material is sought, the party must show substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[23] In connection with production of reports of experts, no production is authorized with respect to experts who will testify at trial other than through interrogatories and with respect to experts who are specially retained for preparation but not to testify, the party must show exceptional circumstances under which it is impracticable to obtain facts or opinions by other means. The revised rule continues to apply only to parties. As an example, Rule 34 could not be employed to authorize the inspection of the land of a nonparty where an aircraft has crashed or production of reports in the custody and possession of third parties not involved in the litigation.

The scope of Rule 34 is the same as that of Rule 26(b). The extent of production allowed under Rule 34 is circumscribed by the same requirements of relevancy, nonprivileged matters and the attorney's work product.

IV. MILITARY REPORTS

Production is a peculiarly important discovery vehicle in litigation involving crashes of military aircraft. When a military craft

[23] Schuyler v. United Airlines, Inc., 10 F.R.D. 111 (W.D. Pa. 1950). *But see* Honeywell v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970).

is involved in a crash, an official investigation is vigorously pursued. When an Air Force aircraft crashes there will generally be an investigation by a Collateral Board as well as an Air Force Aircraft Investigation Board. Even the NTSB may conduct an investigation when a civilian aircraft is involved in a collision with a military craft.

Litigation frequently is instituted under the Federal Tort Claims Act arising from crash of military aircraft. Since the government is a party to an action under the Federal Tort Claims Act, the official investigation performed by a department of the government is discoverable. Rule 34 restricts production, however, to matters "not privileged." Invariably, attempts to compel production of the Aircraft Accident Investigation Report are met by refusal and a claim of privilege.

Generally, the government will assert a claim of privilege against disclosure of the Aircraft Accident Investigation Report on one of two bases: (i) disclosure would jeopardize military secrets, or (ii) disclosure would be inimical to the public welfare in determining causes of accidents and increasing the efficiency of flight safety programs through cooperation of private industry.

Inherent in an application of a claim of privilege are certain basic and controlling principles. The requirements for successfully invoking a claim of privilege were enumerated by the Supreme Court in *Reynolds v. United States.*[24] These general principles, succintly stated, are (i) the privilege belongs to the government and must be asserted by it; (ii) the privilege can neither be invoked nor waived by a private party; (iii) there must be a formal claim lodged by the head of the department; and (iv) the head of the department must determine the existence of and claim for a privilege from a personal inspection of the report. Unless these conditions exist, a claim of privilege against disclosure is unavailing. If the United States is a party, production under Rule 34 is usually invoked. In addition, production under Rule 34 is utilized in a suit against a private corporation when the Aircraft Accident Investigation Report has been furnished to private industry by the government for use in correcting or modifying equipment. When suit is initiated against a private corporation, efforts to obtain the Aircraft Accident Investigation Report are pursued by noticing the

[24] 345 U.S. 1 (1953).

oral deposition of an appropriate government official accompanied by a subpoena duces tecum to produce the report.

Of necessity, the court must determine the validity of the asserted privilege. For example, in *Cresmer v. United States*,[25] the plaintiff brought a wrongful death action under the Federal Tort Claims Act. The deceased was on the ground when a government airplane crashed. The plaintiff moved for an order directing the United States to produce for inspection and copying the report prepared by the Navy Board of Investigation. The district court granted the motion based on the failure of the United States to establish that a military secret or threat to the national security was involved.[26]

The government successfully asserted the privilege against revealing military secrets in *Reynolds v. United States*.[27] That case was instituted under the Federal Tort Claims Act by the widows of three civilian employees who were aboard a United States Air Force B-29 bomber that crashed in 1948 on a flight for the purpose of testing secret electronics equipment. The United States refused to answer the plaintiffs' interrogatories propounded under Rule 33 that requested a copy of any and all investigation reports of the accident. The plaintiffs moved under Rule 34 for production of the official investigation report prepared by the Air Force and the statements of the surviving crew members taken in connection with that investigation.

Since the United States was a party to an action under the Federal Tort Claims Act, and the official investigation was performed by a governmental agency, the plaintiffs would ordinarily have been entitled to production of the report, as well as statements of witnesses taken for the purpose of the investigative report. Rule 34 provided for production only of matters "not privileged," however, so that the question for the court was whether the United States could assert a valid claim of privilege. The Court articulated the nature and requirements of this privilege and the role of the

[25] 9 F.R.D. 203 (E.D.N.Y. 1949).

[26] *Id.* at 204: "In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to the National security, it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster."

[27] 345 U.S. 1 (1953).

court in determining whether the privilege would be allowed as follows:[28]

> The privilege belongs to the [g]overnment and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

In the trial court, the Air Force filed a "claim of privilege" and indicated to the court that the aircraft was engaged in a highly secret mission. The Judge Advocate General of the Air Force by affidavit affirmed that the material could not be furnished without hampering national security, flying safety and development of the secret equipment. The trial court then requested that the United States produce the documents in question for an in-camera examination and determination of whether disclosure would violate the government's privilege against disclosure of matters involving the national security or public interest. With regard to this request, the United States Supreme Court stated:[29]

> On the record before the trial court it appeared that this accident occurred to a military plane that had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.
>
> Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus, it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force under circumstances indicated a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.
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> In each case, the showing of necessity which is made will deter-

[28] *Id.*

[29] *Id.* at 10.

> mine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. When there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake.

It is reasonably clear from the decision that the report in *Reynolds* would divulge sensitive military secrets. This foreclosed the prerogative of the trial court to conduct an in-camera examination.[30]

The Supreme Court in the *Reynolds* case stressed the necessity of a formal claim of privilege by the United States. The importance of the formal claim is indicated by *United Air Lines, Inc. v. United States*,[31] in which an action was brought under the Federal Tort Claims Act because of a collision between an aircraft of the United States Government and an aircraft owned by United Air Lines. United Air Lines sought production from the United States of the report of two investigations by the Air Force, plus statements and exhibits from those two investigations. Because of the absence of a formal claim of privilege by the United States, the district court refused to consider the question of privilege and, instead, handled the question based on the former Rule 34 requirement of "good cause." Presumably, under the July 1, 1970, amendments to the Federal Rules of Civil Procedure, if the government did not formally claim its privilege, the reports, statements and exhibits requested by the litigant would be subject to discovery since Rule 34 no longer requires "good cause." In addition, the Court emphasized that because the government did not formally invoke a claim of privilege, privilege was not involved in the determination to order production of the reports.

Another change in Rule 34 is also noteworthy. That rule no longer contains a direct reference to privileged material but instead allows production of any designated documents within the

[30] The *Cresmer* case was decided prior to *Reynolds* and the general procedure employed by the court in determining the validity of the privilege would ostensibly be contrary to the procedure postulated by the Supreme Court in *Reynolds*. The nature of the privilege is important in determining the extent of judicial scrutiny. Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963).

[31] 186 F. Supp. 824 (D. Del. 1960). *See* Danon v. United States, 8 Av. Cas. 18, 369 (S.D.N.Y. 1964) (army report excluded from production).

scope of Rule 26(b). Since Rule 26(b) states in part, however, that parties may obtain discovery regarding any matter which is not privileged, the privilege asserted by the government under Rule 34 remains intact.

In many cases involving military aircraft, the manufacturers and suppliers of the aircraft and its components are sued and discovery of governmental investigative reports is sought. The governmental claim of privilege in these cases is not based on protection of military secrets, but rather that disclosure would contravene the public welfare that encourages private industry to provide full and frank evaluation and cooperation in accident investigation to foster efficient flight safety programs.

In *In re Zuckert*,[32] an Air Force navigator who survived an aircraft accident brought a products liability suit against United Aircraft Corporation because it manufactured some components of the crashed aircraft. The plaintiff's request for a copy of the Aircraft Accident Investigation Report of the Air Force was refused by the Secretary of the Air Force; the plaintiff then sought to obtain the report by way of oral deposition and subpoena of the Secretary of the Air Force who moved to quash. The Secretary did not assert a privilege, but, instead, referred to Air Force Regulation 62-14 that indicated the accident investigation report was a privileged document. The court concluded from the legislative history of the statute that Congress did not intend information like the Air Force report to be withheld under the aegis of section 522 of Title 5.[33] After the ruling, however, the Secretary filed a formal claim of privilege, and the court promptly quashed the subpoena.

In *Machin v. Zuckert*,[34] the plaintiff appealed from the quashing of its subpoena after the trial court granted the formal claim of privilege by the Secretary of the Air Force. In a significant decision the court of appeals judicially acknowledged the validity of this qualified privilege as distinguished from the privilege against disclosure of military secrets. In adjudicating the scope of this privilege, the court observed:[35]

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[32] 28 F.R.D. 29 (D.D.C. 1961).

[33] 5 U.S.C. § 522 (1970).

[34] 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).

[35] *Id.* at 338.

> Insofar, therefore, as the subpoena sought to obtain testimony of private parties who participated in the investigation, we agree with the [d]istrict [c]ourt that such information in the hands of the [g]overnment is privileged. The privilege extends to any conclusions that might be based in any fashion on such privileged information. Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued. [Citations omitted.]
>
> The parties, in argument before us, have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed. From our review of the case, however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations. We refer to the factual findings of Air Force mechanics who examined the wreckage. Their investigations and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigation, and their findings may well be of utmost relevance to the litigation now pending between appellant and United Aircraft. Moreover, we have in the past suggested that information of this sort would ordinarily be subject to subpoena for use in connection with litigation to which it is relevant. [Citations omitted.] Since the reasons given by the [g]overnment for holding the investigative report privileged do not, on their face, apply to information of this sort, we consider that, to this limited extent, the subpoena should have been enforced.

Following the decision, however, the Secretary of the Air Force attempted to limit the mechanics' reports to facts as distinguished from opinions. The court of appeals in a supplemental opinion stated:[36]

> If the mechanics expressed any 'opinions' or 'conclusions' as to possible defects in the propellors or propellor governors that might have been due to the negligence of United Aircraft, we do not consider that such expressions would come within the privilege enunciated in our opinion.

Under the decision, the Air Force mechanics' reports, including opinions concerning defects in the propellors, were not privileged. But if an in-camera examination of the reports revealed that the opinions were predicated in measure on data and opinions received from representatives of private industry, this qualified privilege would foreclose disclosure.

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[36] *Id.* at 341.

When a private party, such as a manufacturer of military aircraft, is involved in litigation, the privilege involved in *Machin* constitutes a viable protection for the integrity of military air safety programs and related activities. Accordingly, the court in *Machin*[37] acknowledged that data supplied by representatives of private industry and opinions based on the data was privileged and nondiscoverable. This privilege extended to encompass final conclusions and policy recommendations of the Military Board. But the court of appeals carefully delineated the limits of this particular privilege and held that *facts* and *opinions* of individual government personnel are discoverable. The circumscribed ambit of this privilege as announced in *Machin*[38] meshes with the rationale supporting the privilege. It protects the integrity of candid and frank participation of private industry in military investigations.

This particular privilege was again considered in *O'Keefe v. Boeing Co.*,[39] which involved a suit against the manufacturer of a bomber for wrongful death and injuries of members of the flight crew that occurred in a crash of the aircraft. The Air Force had provided Boeing Aircraft with the Aircraft Accident Investigation Report, and the plaintiff then sought production from Boeing. The Air Force intervened to oppose production of this document. Upon a claim of privilege by the Secretary of the Air Force, accompanied by an appropriate affidavit, the district court divided the subject documents into two general classes:

> (1) records of facts made in the course of the investigations and contained in the statements of Air Force personnel, group reports and 'formal reports' to which the claim of privilege is directed; and, on the other hand, (2) opinions, speculations, recommendations, and discussions of Air Force policy contained in the same statements, reports, and 'formal reports'.

Based on this division, the court then concluded: "It seems reasonable and appropriate that a privilege be sustained as to papers in the class (2) and denied as to papers in the class (1)."

The district court purported to follow the *Machin* rationale in distinguishing between "facts" and "conclusions or opinions." The

[37] *Id.*

[38] *Id.* The public policy of encouraging frank evaluations of causes of accidents is pertinent. Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

[39] 38 F.R.D. 329 (S.D.N.Y. 1965).

court stated, however, that the privilege was waived by the Air Force when it voluntarily released the documents to Boeing. A determination that the privilege had been waived ostensibly foreclosed further inquiry. The court, however, then stated:[40]

> Under the circumstances here present, it does not seem fair that an executive privilege should be available against discovery and inspection of the papers in the hands of Boeing so far as they deal with facts. Any privilege as to that part of the papers appears to have been waived. (The same balancing of interests as between considerations of fairness and of the public interest leads to a different conclusion as to waiver of privilege respecting opinions, conclusions, etc.; there is not the same necessity for plaintiffs to secure these parts of the papers and at the same time the public interest in sustaining the privilege is greater.)

It is incongruous to split a privilege into "fact" and "opinion" for purposes of ruling whether a privilege has been waived since the focal issue is whether the report is discoverable. The only legal proscription against production is the privileged status of the document based on a policy to encourage private industry to continue full and open cooperation with the military in improving flight safety. If providing circulation of the report beyond government circles constitutes a waiver of the privilege, then the entire report is discoverable. It is unimportant for purposes of the policy supporting the privilege whether facts or conclusions are disgorged since factual data probably represents equally incriminating material against the interests of private industry as the final opinion and conclusions of the Board.

Privilege was again reviewed extensively in *McFadden v. Avco Corp.*[41] This action was brought for death resulting from a helicopter crash. The defendant, rather than the plaintiff, filed a motion to compel answers from certain military members of an Army investigation board, and to produce certain documents that consisted of statements made by two Army personnel in connection with the helicopter crash. The Army custodian of records was instructed by the Secretary of the Army not to produce these statements because the Secretary felt that the production would have an adverse effect on the Army's vigorous and vital Aircraft Safety

[40] *Id.* at 335.

[41] 278 F. Supp. 57 (N.D. Ala. 1967).

Program. With respect to the persons who made the statements sought by the defendant, the court found that an offer by the Army to produce the witnesses for oral depositions was insufficient. The district court observed:[42]

> The Army is willing to make those same persons available for depositions. The litigants should have the benefit of the information available when it was fresh and which only a statement contemporaneous with the accident can provide. The courts and the litigants are entitled to accurate information in their search for truth, just as the Army is, and there seems little reason for denying them access to it, when, as here, the chance of interfering with the Army's future investigations is slight.

Moreover, it was further determined that the statements involved were not the subject of a valid privilege, since representatives of the private industry were not involved as in *Machin*. The court implied that the order of the Secretary of the Army to the custodian to withhold the statements was not a lawful order since no privilege existed. The court then ordered production of documents that included conclusions as well as facts by military or government personnel. The court stated:[43]

> Mr. Gaines' Motion to Quash, etc. is denied and the documents called for by the subpoena are ordered produced, including conclusions of any witness or person who is asked an opinion predicated on facts of the investigation provided such witness or other persons, including a Board member, is qualified as an expert with reference to the particular conclusions requested. This order applies only to military or U.S. Government personnel.

In *Kropp v. Douglas Aircraft Co.*,[44] the plaintiff filed a motion under Rule 34 against the United States for production of the Aircraft Accident Investigation Report. The district court, purportedly following *Machin*, ordered production of all factual portions of the investigative report prepared by government personnel but suppressed discovery of those portions containing opinions and conclusions. This particular privilege was not designed, however,

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[42] *Id.* at 60.

[43] *Id.*

[44] 10 Avi. Cas. 17,507 (E.D.N.Y. 1967). The court specifically noted that no claim of military secrets was urged.

to protect personnel employed by the government who participate in the investigative process.

The privilege against disclosure of reports from private agencies is recognized and is accorded the status of a privilege. When the United States is the only party, disclosure of the report would do no violence to the policy and rationale of this privilege. The purpose is to protect confidentiality of data and reports from private industry relating to the causative factors of an accident. When the report is prepared by members of a governmental agency, the basis for protection against disclosure is absent. On the other hand, when a party other than the United States Government is involved, the privilege is viable. All information supplied by private industry must be excluded and any opinions based on information supplied by representatives of private industry would likewise be excluded along with final conclusions and policy recommendations of the Board. The only reason that sustains the action of the government in refusing production is the privileged nature of the report. When the policy that sired the privilege is adopted and the confidentiality of the report of private industry is judicially protected, no valid basis exists for further judicial suppression of production.

In addition, the parties are afforded an opportunity to seek discovery through injunctive process.[45] In *Soucie v. David*,[46] the court determined that the Freedom of Information Act was designed to broaden rather than restrict disclosure of governmental reports and that a suit for injunctive relief was a proper vehicle to compel disclosure. It is certainly apparent there is an emerging trend to force disclosure. Injunctive relief to obtain military reports, particularly when the government is not a party to litigation, may be a versatile weapon in the arsenal of discovery.

V. NTSB Reports

The investigative function of aircraft disasters, not involving military aircraft accidents, is now carried out by the National

[45] *See* 5 U.S.C. § 522 (1970). *But see* Farrell v. Ignatius, 283 F. Supp. 58 (S.D.N.Y. 1968) (recognizing injunction action to enforce disclosure of information).

[46] 448 F.2d 1067 (D.C. Cir. 1972). The court noted at p. 1076: "The chief purpose of the new act was to increase public access to governmental records by substituting limited categories of privileged material for these discretionary standards, and providing an effective judicial remedy." *See also* Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971).

Transportation Safety Board. Previously these functions were handled by the Civil Aeronautics Board. The report of both the NTSB and the CAB are inadmissable into evidence since they constitute hearsay.[47] Section 1441(e) of the Federal Aviation Act of 1958 provides in part:

> No part of any report or reports of . . . the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

In addition the proscription is applicable to individuals participating in the investigation. Section 431.5(a) of the Federal Regulations provides:[48]

> *Testimony of employees and former employees.* Employees may serve as witnesses for the purpose of testifying to the facts observed by them in the course of accident investigations in those suits or actions for damages arising out of aircraft accidents in which an appropriate showing has been made that the facts desired to be adduced are not reasonably available to the party seeking such evidence by any other method, including the use of discovery procedures against the opposing party. Employees and former employees shall testify only as to facts actually observed by them in the course of accident investigations and shall respectfully decline to give opinion evidence as expert witnesses, their evaluations and conclusions, or testify with respect to recommendations resulting from accident investigations on the grounds that [section] 701(e) and this part prohibit their giving such testimony. Litigants are expected to obtain their expert witnesses from other sources.

The intent of the prohibitions of section 1441(e) and section 431.5 is to preserve the functions of court and jury uninfluenced by the findings of the Board or its investigators. The ultimate conclusion and opinion of probable cause of an accident by the NTSB represents a composite of all data and opinions gleaned from the investigation. The ultimate conclusion would directly affect the ultimate issues involved in civil litigation arising from the accident without the parties being afforded an opportunity of testing the conclusions by a full and fair cross-examination.

[47] Universal Airlines v. Eastern Airlines, 188 F.2d 993 (D.C. Cir. 1951). The court made the observation that "It is quite clear that § 701(e) reveals the intention to preserve the functions of court and jury uninfluenced by the findings of the Board of Investigators." 188 F.2d at 1000.

[48] 14 C.F.R. § 431.5(e) (1970).

Unfortunately, the NTSB investigation provides crucial data for purposes of a tort suit arising from the accident. Successful discovery frequently depends on obtaining deposition testimony from investigators responsible for examining, investigating and interpreting data from the wreckage following an accident. In numerous instances, the predicate for obtaining independent expert opinions on reconstruction of the causes of aircraft mishaps is exclusively dependent on data and opinions supplied by FAA investigators.

Though the statute on its face appears to prohibit use of any reports or conclusion of CAB or the present NTSB investigations, the courts have given a very restrictive interpretation to the statute. *Universal Airline v. Eastern Airlines, Inc.*,[49] involved a midair collision of two passenger aircrafts. The court of appeals ordered the personal appearance of a CAB investigator to testify to his observations in connection with investigation of the accident. The court stated that it was incumbent on the Board to make the investigators' testimony available by deposition or in person, and if depositions were not forthcoming, the court would order his personal attendance at trial. This policy is now codified in the regulations.[50]

Lobel v. American Airlines[51] further eroded the general prohibition announced in section 1441(e). The report of a CAB investigation of the wreckage of the aircraft was admitted into evidence because the entire report was the investigator's observations about the condition of the plane after the accident, and contained no opinions or conclusions about possible causes of the accident or defendant's negligence. The Second Circuit significantly restricted the limitations of section 1441(e) to opinions and conclusions of the Board.

The Second Circuit again considered the effect of section 1441 in *Israel v. United States.*[52] In that case, the court approved the admission by the trial court into evidence of part of the CAB accident investigation report that contained an investigator's opinion regarding the probable effect of the condition of the airfield on an aircraft attempting to take off. The Second Circuit also approved the admission of the testimony of an inspector concerning the results

[49] *Id.*

[50] 14 C.F.R. § 431.5 (1970).

[51] 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952).

[52] 247 F.2d 426, 429 n.2 (2d Cir. 1957).

of an investigation of the surface condition of the airfield. The defendant apparently waived any objection to this testimony because of a concession during trial that the CAB report was competent, and a later introduction of portions of the investigator's statement relating to probable cause that had been deleted from the plaintiff's exhibit.

Testimony of witnesses examined by the CAB in the course of its investigation into an aircraft accident is unaffected by the mandate of section 1441(e).[53] Moreover, reports made by the employees of an airline in the course of a CAB investigation are not governed by the provisions of section 1441(e).[54]

More recent cases confirm the limited effect accorded by section 1441(e). The case of *Berguido v. Eastern Airlines, Inc.*,[55] involved a wrongful death action by the plaintiffs against Eastern Airlines. The Third Circuit concluded that the deposition testimony of two members of the CAB structures committee concerning calculations of an aeronautical engineer who worked under the chairman's supervision was hearsay and constituted prejudicial error. Though the case was reversed and remanded for new trial, however, the case is significant for its implications with respect to what evidence would be allowed in only slightly different circumstances. The plaintiff proceeded on the theory of one or more acts of willful misconduct on the part of the defendant to avoid the limitations of the Warsaw Convention. The plaintiff attempted to establish its theory through two expert witnesses who were permitted to give conclusions and opinions regarding the behavioral conduct of the pilot of the fatal flight based on certain crucial assumed facts framed in hypothetical questions. These facts were placed into evidence by the testimony of the two chairmen of the Operations and Structures Committees of the CAB that investigated the crash. These investigators testified regarding perimeters of angle and rate of descent of the aircraft prior to the crash.

The Third Circuit found no error in the procedure that allowed one of the two CAB men to refresh his memory from the report of

[53] Ritts v. American Overseas Airlines, Inc., 97 F. Supp. 457 (S.D.N.Y. 1947).

[54] Tansey v. Transcontinental & Western Air, Inc., 97 F. Supp. 458 (D.D.C. 1949). *Accord* Aviation Enterprises Inc. v. Cline, 395 S.W.2d 306 (Mo. App. 1965) (report of pilot of crashed aircraft is not excluded by terms of 49 U.S.C. § 1441(e)).

[55] 317 F.2d 628 (3d Cir. 1963).

the other and to testify to facts and figures upon which the plaintiff's experts later based conclusions. The testimony was read to the jury from the oral depositions of the two CAB men. The court noted that this policy was suggested in *Universal Airline v. Eastern Airlines.*[56]

Moreover, the Third Circuit found that this testimony was not barred by the prohibition of section 1441(e). Instead the court reversed and remanded because the calculations contained in the deposition testimony of the CAB investigator were premised in large measure on mathematical computations performed by an aeronautical engineer working under the investigator's supervision. Since the aeronautical engineer was compelled to make certain sophisticated assumptions and choices relative to the physical facts found at the crash scene before tabulation of final computations, the testimony was based on hearsay. The court noted that the defendant was not afforded an opportunity to cross-examine the engineer and to ascertain from him the basis of his computations. It is reasonably clear, however, that if the investigator had performed the computations, his testimony with respect to his computations that were later used by the plaintiff's experts as the basis of their opinions and conclusions concerning pilot misconduct, would have been permissible. The Third Circuit apparently defined the prohibition of section 1441(e) as limited to official Board and investigator conclusions of probable cause.

Fidelity & Casualty Co.[57] rejected the liberalized rule announced in *Berguido.* The court amended its own prior ruling that would have allowed discovery by deposition of conclusions and opinions of a CAB investigator unrelated to probable cause of the crash.[58]

In the very recent case of *American Airlines, Inc. v. United States,*[59] the Fifth Circuit approved the *Berguido* rule and expressly

[56] 188 F.2d 993 (D.C. Cir. 1951). *Accord* Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953); McCutcheon v. Larsen, 333 P.2d 1013 (Mont. 1959).

[57] 227 F. Supp. 948 (D. Conn. 1964).

[58] *Id.* at 949. "A more workable and better rule is entirely to exclude all evaluation, opinion and conclusion evidence. This is the only practical way to give adequate affect to and fulfill the purpose of the provisions of § 1441(e)." Although the court comments that its decision is more in line with Berguido v. Eastern Air Lines, 317 F.2d 628 (3d Cir. 1963), it apparently is more restrictive and accords controlling effect to the literal provisions of 49 U.S.C. § 1441(e) (1970). *Contra* Falk v. United States, 53 F.R.D. 113 (D. Conn. 1971).

[59] 418 F.2d 180 (5th Cir. 1969).

rejected the limited *Frank* rule that separated fact from opinion. That case arose as an action for the death of a passenger brought against the airline that crashed on landing in Connecticut. With regard to the plaintiff's claim against American Airlines, the trial court allowed introduction into evidence of graphs and a readout of the flight recorder obtained from the CAB report. The argument was urged that this data was prohibited by the mandate of section 1441(e). The two exhibits consisted of a graph plotting the indicated altitude of the flight, and a document explaining the readout from the flight recorder of the aircraft. The opinion of the Fifth Circuit initially characterized these exhibits as factual data distinguishable from opinions and conclusions. The court candidly acknowledged, however, that interpretative readout involved such a sophisticated process that it really was opinion, and then stated:[60]

> American Airlines' position on the reach of section 1441(e) seems thoroughly at variance with the prevailing interpretation of the statute. As stated in *Berguido v. Eastern Airlines, Inc.* [Citation omitted.] 'the primary thrust of the provision is to exclude CAB reports which express agency views as to the probable cause of the accident'. Exhibits 58 and 89 are not the report of the CAB and do not reflect the Board's evaluation of the data they contain or the emphasis placed on that data in reaching a decision on probable cause. To the contrary the exhibits merely display and explain the data derived from the flight recorder foil itself, which was admitted without objection.
>
> Appellant vigorously stresses the opinion nature of the testimony. However, *Berguido* established that qualified testimony going beyond merely personal observations is admissible provided such testimony does not presume to be official agency opinion. Although purporting to follow *Berguido, Fidelity & Casualty Company of New York v. Frank* [Citation omitted] distinguishes between 'factual' testimony by investigations and evaluation, opinion or conclusion evidence' that is objectionable. In the context of this case it would perhaps be suitable to say that the attempt to derive information about the altitude, speed, heading, and vertical acceleration of Flight 383 was a factual inquiry. However, a very sophisticated evaluation of the data had to be made. Because of the uncertainty which the Frank rule would introduce in sorting fact from opinion, it would be better to exclude opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant.

[60] *Id.* at 196.

The holding of the Fifth Circuit may extend beyond *Berguido*.[61] The Third Circuit opinion in *Berguido* modified that sentence in the first paragraph quoted above by the Fifth Circuit, by subsequently stating: "Of necessity, the opinion testimony of the CAB's investigators would also come within this rule."[62] Yet, if the exhibits, which merely display and explain the data derived from the flight recorder foil, are opinion testimony as the court seems to admit, then the Fifth Circuit is further liberalizing the holding in the *Berguido* case and allowing the opinion testimony of the CAB's investigators.

The Fifth Circuit in *American Airlines*[63] ostensibly limited the applicability of section 1441(e) to the conclusions of the Board. Technically, this is consistent with the rationale of section 1441(e) since the Board's conclusion of probable cause represents a composite conclusion gleaned from the myriad data and opinions of numerous investigators. The conclusions of the Board are not subject to a full and fair opportunity of cross-examination to test the validity of the opinions provoked by the various investigative data.

Under the rationale of *American Airlines, Inc.*,[64] opinions and conclusions of individual investigators are limited only to the extent that these opinions or conclusions are based on hearsay, or that the investigator is not qualified to express an opinion. Arguably, the parties are afforded on deposition a full and fair opportunity for a comprehensive cross-examination to test the opinions of the investigator.

Frequently, the testimony of individual FAA investigators provids the critical data necessary to establish a claim or defense to a claim that is not available through other sources. Under *American Airlines*[65] it is arguable that the witness will be compelled to provide not only factual information but also to respond with opinions and conclusions even though the opinion may involve possible causes of the crash.

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[61] 317 F.2d 628 (3d Cir. 1963).

[62] *Id.* at 632.

[63] 418 F.2d 180 (5th Cir. 1969).

[64] *Id.*

[65] *Id. See also* Falk v. United States, 53 F.R.D. 113 (D. Conn. 1971) (section 1441(e) does not preclude opinion of an F.A.A. investigator on the cause of a crash).

If the policy underlying suppression of opinions of FAA investigators relating to the causative factors of aircraft accidents is properly premised on a desire to preserve the functions of the courts and juries uninfluenced by findings of the Board, the opportunity of all parties to a full and fair cross-examination to test the opinions and conclusions preserves inviolate this policy. It has been suggested that this rule contravenes the clear purpose of the FAA investigation and violates the functions and roles assigned to this organization. But until the courts are willing to recognize that the Board's sole function is to investigate accidents to prevent similar occurrences and not to provide expert witnesses for the benefit of private litigants, then opinions and conclusions of FAA investigators may theoretically be available for use in litigation. Clearly, an FAA investigator cannot be compelled to formulate an opinion for purposes of discovery, but there appears no technical impediment to providing opinions already formulated under the rationale suggested by recent cases.

VI. DEPOSITIONS

Rule 30 of the Federal Rules of Civil Procedure provides for the taking of oral depositions. In aviation litigation oral depositions are widely used as effective discovery tools and are perhaps the only real means of probing in depth for the causative factors underlying a major aircraft disaster.

Generally, an aircraft disaster produces multiple claims. Accordingly a frequent problem encountered in the early stages is a determination of the extent to which deposition discovery is usable in cases other than the case in which particular depositions were taken. An attempt to utilize a deposition taken in separate suit arising from the same accident generally provokes an objection that the testimony is hearsay. The courts that have wrestled with this problem have caused much confusion. In *Rice v. United Air Lines, Inc.*,[66] the airline objected to plaintiff's rather novel requests for admission of the genuineness of answers to interrogatories and testimony by oral depositions taken in another action arising from the same accident. The district court overruled the objection and held that no burden or prejudice would result to the defendant in

[66] 10 F.R.D. 161 (N.D. Ohio 1950).

answering these requests for admissions subject to the right to interpose permissible objections at trial.

The traditional rule provides that depositions taken in a prior action are inadmissible in the absence of an identity of issues and parties.[67] The liberal view on the other hand, requires only an identity of issues with the adverse party possessing the same motive of cross examination in the prior action.[68] But in the absence of an identity of issues and the same motive and interest in cross examination by an adverse party, the courts have generally denied use of the depositions taken in a prior suit even under the liberal rule requiring only identity of interests rather than identity of interests and parties. Moreover, a mere showing that the depositions were taken in an action arising from the same accident is insufficient to establish identity of issues.[69] In *Wolf v. United Air Lines*,[70] the decedent was fatally injured in a crash of an aircraft owned and operated by the defendant. The plaintiff filed a motion to permit use of depositions taken in actions by other persons arising from the same accident. The district court noted that many courts require identity of issues and parties with a right to a full cross-examination by the adverse party. Even in the face of the liberal rule requiring only an identity of issues with the adverse party possessing the same motive in cross-examination, the depositions were excluded. The court stated:[71]

> The important distinguishing feature in this case is that United Airlines and Douglas were both defendants of record in the actions in which the depositions in question were taken, and furthermore there was a cross-claim by United Airlines against Douglas in each of the actions . . . .
>
> Though many of the depositions were probably relevant to the question of defendants' liability to the plaintiff in this action, under the prevailing circumstances the interest and motive of United Airlines in its direct and cross-examination of deponents may very well not have been the same at that time as it is now in an action in which Douglas is not a party.

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[67] Metropolitan St. Ry. Co. v. Gumby, 99 Fed. 192 (2d Cir. 1900); United States v. Aluminum Company of America, 1 F.R.D. 48 (S.D.N.Y. 1938).

[68] 5 J. WIGMORE, EVIDENCE, § 1388 (3d ed. 1940).

[69] Wolf v. Curtiss-Wright Corp., 8 Av. Cas. 17,726 (E.D.N.Y. 1963).

[70] 12 F.R.D. 1 (M.D. Pa. 1951).

[71] *Id.* at 3.

An exhaustive review of this problem was undertaken in *First National Bank v. National Airlines.*[72] There the plaintiffs filed a motion to direct that all depositions taken in a prior cause of action would be usable in the present suit. The cause of action was instituted against National Airlines and Douglas Aircraft Corporation for the crash of an aircraft in the Gulf of Mexico. The plaintiffs alleged negligence of National in intentionally flying in inclement weather and of Douglas for a product defect. The prior suits in which depositions were taken involved only National Airlines but not Douglas. After reviewing the authorities that considered the admissibility of depositions taken in prior actions, the court adopted the liberal identity of interests rule rather than identity of parties rule. But the court denied use of the depositions even under the liberal rule because: (i) Douglas was not a party in the prior action; (ii) Douglas as a party undoubtedly would want to depose the witnesses whose depositions were previously taken; (iii) a number of depositions in the prior action were taken by attorneys for National other than those representing National in the present action; and (iv) an issue of negligence in connection with an alleged wing defect not raised in the prior action would distort to some extent National's motive in cross-examination of the witnesses.

One of the cases referred to by the court was *Scotti v. National Airlines.*[73] The plaintiff filed a motion to direct that all depositions taken in a prior suit arising from the same accident would be usable and admissible in the present suit. Relying on *Rivera v. American Export Lines, Inc.*, the district court granted the motion and specifically noted:[74]

> The defendant in this action had the same motive to question or cross question the deponents in the earlier actions as it would have in the instant one. In view of the fact that there was another defendant in the earlier cases, certain portions of the depositions may be inapplicable; those portions should be eliminated.

It is rather obvious, in the context of aviation litigation within the federal court system, that the more liberal view of admissibility based on identity of interests and a comparable motive to cross examine represents the prevailing trend. A close scrutiny of the

[72] 22 F.R.D. 46 (S.D.N.Y. 1958).

[73] 15 F.R.D. 502 (S.D.N.Y. 1954).

[74] *Id.* at 503.

cases involving the issue of admissibility, however, quickly demonstrates the proclivity of the courts to deny admissibility when confronted with any disparity that tends to make suspect the quality of the motive of the adverse party in pursuing cross-examination. Factors that have been catalogued by the courts include (i) exact duplication of factual issues; (ii) identical legal theories; (iii) relative posture of the parties in the prior causes; (iv) presence or absence of additional parties in the prior action; (v) identity of counsel for the adverse party in the prior litigation; (vi) necessity for further depositions of the witnesses in the present action; and (vii) confusion engendered by the use of the prior depositions. It should be noted that even in the event the court permits use of depositions taken in prior actions, the adverse party retains the right to the further deposition testimony from the witnesses.

Perhaps the problems presented in the use of depositions taken in earlier lawsuits is now more academic than real because of the general adoption and use of Multidistrict Consolidation for pretrial discovery.[75] Litigation arising from major air disasters undoubtedly played an important part in the promulgation of Multidistrict Consolidation procedures. Certainly, Multidistrict Consolidation for pretrial discovery comprehends avoidance of duplication of discovery efforts. Parties, however, should be cognizant of the problems involved in using depositions taken from earlier actions involving common air disasters.

VII. CONCLUSION

Litigation arising from aircraft disasters involve a myriad of complex and unique problems. The difficulties inherent in pretrial discovery are directly proportionate to the complexities of establishing the causative factors of the accident. Particularly important in the discovery process is the technical evaluation undertaken by various governmental agencies, both independently and in conjunction with private industry. It is imperative that the attorney fully understand and maximize his use of the invaluable sources

[75] 28 U.S.C. § 1407 (1970). Section (a) provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings . . . ."

of technical information compiled on an aircraft disaster. Unquestionably, the imaginative use of the liberalized Rules of Procedure plays a significant role in the ultimate results of litigation.