Recent Developments in Aviation Law

David N. Zeehandelaar

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RECENT DEVELOPMENTS IN AVIATION LAW

DAVID N. ZEEHANDELAAR*

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* This Article is adapted from a presentation delivered at the 30th Annual SMU Air Law Symposium.
CONSIDER MYSELF quite privileged to have been asked to present this year’s Recent Developments in Aviation Law Article at the 30th Annual SMU Air Law Symposium. This undertaking is both quite an honor and quite a large project. I hope that the Article which follows will provide the reader with a reasonably comprehensive report of aviation case law decisions which were issued between December 1, 1994, and November 30, 1995. We have attempted to uncover and report not only those opinions which were published, but some unpublished ones as well. However, it is inevitable that we missed some cases, which should be interpreted as inadvertence and not any type of reflection of the importance of the missing matter. Quite simply, we did the best we could.

Although the information contained in this Article is believed to have been current and accurate as of the date of the Symposium, it is entirely possible that subsequent events have occurred which call into question any of the information contained herein. As all prudent attorneys are well aware, any attempt to use case law as authoritative should be accompanied by a confirmation that the decision has not been changed, altered, rescinded, or subject to any other whim of the judicial system.

This Article is simply not a one-person project and would not have been possible without the extensive participation and efforts of an extraordinary attorney in my firm, Elaine D. Solomon. Elaine, who is known to many of you, approached this project in her usual diligent, comprehensive, and aggressive manner. She has spent many hours on this project and is entitled to my unending gratitude. Additional thanks go to my part-
ner Ellen Rogoff for assisting with the editing, paralegal Lisa Cabnet for helping with the cite checking, my secretary Kathy Nahill who managed to type and revise never ending drafts of this Article, and secretary Lorraine Hicks for pitching in to assist with those duties. To those persons, as well as others I may have omitted, my heartfelt thanks.

II. JURISDICTION AND VENUE

In 1995, the Second Circuit decided *Airlines Reporting Corp. v. S & N Travel, Inc.*\(^1\) This case involved an attempt by the Airlines Reporting Corp. (ARC) to recover the value of tickets issued to one of its member travel agencies for which payment had never been received. The tickets had been issued for numerous customers to travel on twenty-nine different air carriers, only one of which was individually owed more than fifty thousand dollars. ARC functioned as a clearing house and collection agent created by a consortium of domestic air carriers which acted as an intermediary between travel agents and the carriers. The defendants sought dismissal, arguing that the federal court lacked subject matter jurisdiction because the plaintiff was acting as a mere conduit for the claims of the various airlines.\(^2\) When viewed on an individual basis, the defendants argued that the only airline which met the minimum amount in controversy was incorporated in the same state as the defendants and, therefore, subject to dismissal for lack of diversity jurisdiction.\(^3\) In response, the plaintiff received assignments of the claims of several other defendants. However, the court rejected the assignments, stating that the “transfer of legal title to the claims between the parties can easily be arranged, increasing the potential for collusion and compounding the difficulty in detecting the true purpose for the assignment.”\(^4\) Since the plaintiff “paid no meaningful consideration for the assignments” and admitted that any recovery would be returned to the assignees, the court found that the assignments were motivated “by a desire to remain in federal court” and dismissed the case.\(^5\)

In *De Aguilar v. Boeing Co.*\(^6\), personal representatives of estates and relatives of persons who died in a 1986 Mexicana Airlines

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\(^1\) 58 F.3d 857 (2d Cir. 1995).
\(^2\) *Id.* at 860.
\(^3\) *Id.* at 860-61.
\(^4\) *Id.* at 863.
\(^5\) *Id.* at 864.
\(^6\) 47 F.3d 1404 (5th Cir. 1995).
crash first filed suit in a Texas state court, but the action was removed to federal court by the defendants. The case was then dismissed on *forum non conveniens* grounds.\(^7\) Plaintiffs then filed suit in an Illinois state court and a Washington state court with the same result. The Texas Supreme Court declared that the *forum non conveniens* doctrine was no longer recognized under Texas state law for wrongful death actions.\(^8\) Therefore, plaintiffs again filed suit in Texas state court without specifying the amount of damages sought. The action was removed and thereafter dismissed on estoppel and *forum non conveniens* grounds.\(^9\) The Fifth Circuit affirmed that decision, holding that defendants had produced evidence and precedents indicating that the matter in controversy exceed the federal jurisdictional requirement of fifty thousand dollars.\(^10\)

Plaintiffs filed a third Texas state court action, alleging, in violation of Texas law, that their claims did not exceed fifty thousand dollars.\(^11\) In order to make their argument, plaintiffs purported to be making their claims as heirs, and not as personal representatives of the various estates. Defendants again removed the action to Texas federal district court. In their notice of removal, defendants demonstrated that plaintiffs' purported limitation on the amount of the claims of the decedents' estates was meaningless and that without an effective limitation the amount in controversy exceeded fifty thousand dollars per decedent.\(^12\) The court noted that the plaintiffs had not shown that they had the authority to limit damages sought to be recovered by the estates.\(^13\) Shortly thereafter, the judge granted a motion by defendants to dismiss the action pursuant to the doctrine of *forum non conveniens*.\(^14\) Petitioners appealed the dismissal to the Fifth Circuit Court of Appeals which affirmed the district court's denial of petitioner's motion for remand and the dismissal on the ground of *forum non conveniens*.\(^15\)

The Fifth Circuit held that defendants had "easily" shown by a preponderance of the evidence that the actual amount in con-
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The court further held that the statements in plaintiffs' pleading will not control if made in bad faith, and plaintiffs acknowledged that their filing in state court violated Rule 47(b) of the Texas Rules of Civil Procedure. The court rejected plaintiffs' attempt to manipulate the pleadings and ruled that the prayer for damages in the original petition did not limit the amount in controversy. The court agreed with defendants' argument that plaintiffs, seeking to avoid federal court, had manipulated their pleadings to "create the illusion" that the amount in controversy was less than the jurisdictional minimum of fifty thousand dollars. On October 3, 1996, the U.S. Supreme Court declined to review the Fifth Circuit's final decision.

The plaintiff in *Ayrault v. Pena* entered the FAA's Cooperative Education Program in 1989 at the Cleveland Air Route Traffic Control Center. She was later removed from her position for allegedly disregarding her supervisor's direction and for being argumentative. Her suit in the U.S. Court for the Northern District of Illinois was dismissed, based upon the trial court's ruling that she was not an "employee" and therefore not entitled to various procedural protections accorded under the Civil Service Reform Act (CSRA). The Seventh Circuit held that the district judge lacked jurisdiction and remanded with instructions to dismiss the case. Plaintiff argued that although she was excluded from the definition of "employee" under the CSRA, she had served as a co-op student well over the two years required by another subsection of the CSRA. The Seventh Circuit ruled, however, that if the plaintiff was not an employee, then the statutory theme deprived the court of jurisdiction. Further, plaintiff had not filed a claim with the Merit System Protection Board and, therefore, had failed to exhaust administrative remedies, waiving a right to judicial review.

In *Machline v. National Helicopters*, suit was brought in New York regarding a helicopter crash in New Jersey in which plain-
tiff's decedents who were Brazilian citizens and residents were killed. The defendants were owners and operators of the helicopter which was headquartered and doing business in New York. The defendants filed a *forum non conveniens* motion and both parties submitted conflicting expert affidavits as to whether the Brazilian courts would entertain the lawsuit. The district court declined to resolve the issue definitively. However, it denied the defendants' *forum non conveniens* motion, noting that "no American Court has dismissed in favor of a Brazilian forum an action against an American defendant for an accident occurring in America." Therefore, the court concluded that it did not believe that the convenience of the parties or any equitable interest required that the plaintiff be compelled "to explore murky waters of Brazilian jurisprudence to pursue the claims asserted in the complaint."

*CREDIT LYONNAIS V. GETTY SQUARE ASSOCIATES*, a case involving the concept of "pooling" foreign interests under the Foreign Sovereign Immunities Act (FSIA) to create federal jurisdiction, a foreign mortgagee corporation brought a foreclosure action in the district court against the mortgagor partnership and its general partner. The defendants moved for summary judgment, alleging that the court lacked subject matter jurisdiction. The plaintiff mortgagee claimed that jurisdiction existed under 28 U.S.C. section 1332(a)(4), which grants original jurisdiction to district courts when the amount at issue exceeds fifty thousand dollars and is between a "foreign state," which is defined in section 1603(a) as plaintiff and citizens of a state or of different states as defendants.

Credit Lyonnais argued that it fit within the definition of "foreign state" because a majority of its shares were owned by the Republic of France. France directly owned 48.5% of the outstanding shares and the French government also had an ownership interest in a corporation which owned another percentage ownership. Therefore, plaintiff argued that after pooling the ownership interests, France was a 57.17% shareholder.

The court noted that there was no "direct authority allowing one foreign state to pool its ownership interests in different enti-

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26 *Id.* at *2.
27 *Id.*
29 *Id.* at 519.
30 *Id.* at 519-20.
ties to satisfy the requirements of section 1603(b)(2)."\textsuperscript{31} However, the court acknowledged that other courts had allowed pooling of ownership interests of several foreign states, although in this case, only one foreign state was attempting to pool its own ownership interests.\textsuperscript{32} Thus, the court held that “[i]f several states can pool their ownership interests, then so too should one foreign entity be allowed to pool its own ownership interests for the purposes of determining whether the litigant is a ‘foreign state’ under section 1603(b)(2).”\textsuperscript{33} The court did not feel that “[s]uch a result . . . [would] distort the plain meaning of the [FSIA].”\textsuperscript{34} Therefore, the court had subject matter jurisdiction over this case.

*Air Crashes At Katmandu, Nepal*\textsuperscript{35} are cases that arose out of the crash of Thai Airways International Flight 311 into a mountain after a missed approach procedure during a nonprecision approach to Katmandu on July 31, 1992. All individuals on board were killed, including ninety-nine passengers and fourteen crew members. The cases also involved a crash of Pakistan International Airlines Flight 268, which was an Airbus A300, striking a mountain during a similar approach to Katmandu in September 1992. As a result of that crash, all 148 passengers and 19 crew members were killed. The lawsuits arising from these two accidents were originally filed in two separate state courts, but were later consolidated, and Airbus removed them to federal court.

Airbus filed motions to dismiss based upon its foreign sovereign immunity status, *forum non conveniens*, lack of personal jurisdiction, and failure to add indispensable parties. The other co-defendants filed a motion to dismiss solely on the basis of lack of personal jurisdiction. U.S. District Court Chief Judge Norman W. Black of the Southern District of Texas dismissed all cases against Airbus on all grounds and dismissed the co-defendants for lack of personal jurisdiction. The court held that Airbus was owned by foreign states during the relevant time period, noting that a foreign state retains immunity even after a government’s interest is later transferred to private ownership. Therefore, foreign states may pool their interest in an entity for purposes of determining whether that entity is a foreign state under the Foreign Sovereign Immunity Act.

\textsuperscript{31} *Id.* at 520.
\textsuperscript{32} *Id.*
\textsuperscript{33} *Id.*
\textsuperscript{34} *Id.*
Judge Black also dismissed the cases on the basis of forum non conveniens, holding that private and public interests weighed in favor of dismissal. All the evidence in the suit, including most of the witnesses, was in countries and states other than Texas. The court further noted that the litigation clearly was not a local controversy, since the flights originated in Thailand or Pakistan, the aircraft was designed, assembled and sold in France, and was operated by pilots trained outside the United States. The court also held that the airline owners and operators of the aircraft were necessary and indispensable parties and that none of the defendants conducted business in Texas. Therefore, no personal jurisdiction existed over the defendants.

In *Katonah v. USAir, Inc.*, 36 U.S. District Judge Charles Norgle of the Northern District of Illinois, by Order dated February 15, 1995, again remanded eleven suits arising from the September 1994 crash of USAir Flight 427 near Pittsburgh to Cook County Illinois Circuit Court. USAir had argued that plaintiffs had fraudulently joined USAir mechanic supervisor Gerald Fox, a Chicago-based nondiverse defendant, who had received an anonymous phone call about an unusual noise on the aircraft several hours before the crash. The court did "not agree with USAir that it was not reasonably foreseeable that an accident would occur following an account of an errant noise not noted by the pilot." 37 In addition, the court found "other factors concerning the duty of care [were] in favor of imposing a duty on Fox." 38 Further, "the potential extent of injury resulting from a crash was so great as to outweigh all the burdens of prevention." 39

*Cheng v. United Airlines, Inc.* 40 involved a personal injury caused by turbulence. The court followed the Second and Fifth Circuits’ rulings on the exclusivity of the Warsaw Convention actions and preemption of state law when the Convention’s causes of action apply. 41 The court held that the Warsaw Convention cause of action preempted plaintiff’s parallel state law cause of action based upon negligence in connection with the turbulence incident. 42 Plaintiff also asserted additional claims for

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37 Id. at 988.
38 Id.
39 Id.
41 Id. at *2-3.
42 Id. at *3.
crew misconduct regarding delays in taking plaintiff to a hospital and other assorted claims relating to the treatment plaintiff received after disembarking. The court held that these other claims were not within the scope of the treaty, and, therefore, those state law causes of action were not preempted by the Warsaw Convention.\textsuperscript{48}

In Wahl v. Continental Airlines, Inc.,\textsuperscript{44} the court denied the Wahl's motion to remand a cargo lawsuit against Continental Airlines to state court, holding that the Warsaw Convention applied to keep the action in federal court. Wahl had filed suit in Pennsylvania state court alleging that Continental had failed to safeguard and secure his luggage.\textsuperscript{45} Continental filed a Notice of Removal to the Eastern District, and Wahl moved to remand. Plaintiff argued that the Convention did not apply because all of the occurrences giving rise to the action had taken place within the United States.\textsuperscript{46}

The court held, however, that "case law . . . establishes that a domestic leg of international transportation by aircraft for hire is considered international travel and is governed by the [Convention]."\textsuperscript{47} Plaintiff also contended that federal court lacked jurisdiction because the complaint contained only state law claims and a federal question did not appear on the face of the well-pleaded complaint.\textsuperscript{48} However, the court ruled that it is well established that certain federal statutes are so pervasively preemptive that any related state law action is deemed to be a federal claim from the start.\textsuperscript{49} The action is removable even though only a state law claim appears on the face of the complaint.\textsuperscript{50} The court also noted that the Third Circuit had held that when the Warsaw Convention applies, it is the exclusive remedy for actions against air carriers.\textsuperscript{51} Since the plaintiff's cause of action involved the loss of baggage on an international flight, it presented a federal question and properly belonged in federal court.

\textsuperscript{43} Id. at *4.
\textsuperscript{44} No. 95-0058, 1995 WL 263542 (E.D. Pa. May 2, 1995).
\textsuperscript{45} Id. at *2.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
Silver Hilton Steelhead Lodge v. Central Mountain Air, Ltd.\textsuperscript{52} and Central Mountain Air, Ltd. v. Superior Court\textsuperscript{53} arose out of the crash of a Central Mountain Air (CMA) Cessna 206 in Northern British Columbia. Petitioners had contended that the California courts did not have personal jurisdiction. The estates of three occupants killed in the crash on their way to Silver Hilton filed suit in San Francisco County Superior Court against CMA. Defendants moved to quash service of the summons in the litigation, which was denied.

On appeal, the court ruled that there was no basis for jurisdiction over CMA in California since the airline operated solely in Canada and did not own property, advertise, or bank in California. Furthermore, CMA had not contracted directly with one of the survivors of the crash, but rather with Silver Hilton. As to Silver Hilton, the appellate court found that it had sufficient California contacts through one of the survivors of the crash who had sold the fishing trip to Silver Hilton as well as serving as its agent throughout the state for purposes of booking lodging trips. However, the court concluded that Silver Hilton’s activities in California were not sufficient to warrant general jurisdiction in California for causes of action unrelated to California. The panel also applied a balancing test to determine whether there was sufficient nexus between the California activities and the cause of action, concluding that jurisdiction should be denied. The court stated that the evidence as to the cause of action was in Canada, the liability of both CMA and Silver Hilton was still to be determined, and California might not have the power to compel attendance of relevant witnesses. Further, to find jurisdiction over Silver Hilton in California where the liability of CMA could not be tried invited multiplicity of actions and conflicting adjudications. Finally, the court found that there was an insufficient nexus between defendants’ local activities and the State of California in that there was no close nexus between the promotion and sale of a fishing trip in California and the crash of an airplane in Canada, even though the fishing trip included the transportation.


\textsuperscript{53} \textit{Id.}
III. PREEMPTION OF STATE TORT CLAIMS

The Airline Deregulation Act includes a preemption clause at §1305(a)(1) as follows: "'[N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . .'"\(^{54}\) In 1992, the Supreme Court construed the "'relating to'" language as preempting state regulation having a "'connection with, or reference to airline rates, routes, or services.'"\(^{55}\) Despite this broad definition of "relating to," the prevalent view among the lower courts has been that state law tort claims for injuries sustained during flights are not preempted by the ADA. This latest Supreme Court decision is consistent with that view.

In *Wolens*, the plaintiffs challenged American Airlines's retroactive changes to its Frequent Flyer program under the Illinois Consumer Fraud Act and based upon breach of contract. The Court held that plaintiffs' claims could not be brought under the state Act because the statute would then have the effect of regulating the marketing practices of the airline.\(^{56}\) The Court did allow, however, plaintiffs' contractual claims. Plaintiffs' breach of contract claims were based not upon a violation of a state-imposed obligation, but rather the breach of a private, voluntary, contractual obligation.\(^{57}\) Therefore, the breach of contract claims were not preempted by the ADA. The Court felt that this construction was consistent with Congress's retention of the savings clause in the statute which preserves remedies existing at common law or by statute.\(^{58}\) The Court pointed out that counsel for the airline and the government in its *amicus curiae* brief independently agreed that plaintiffs' negligence claims were not preempted.\(^{59}\) Therefore, private tort actions based upon common law negligence or fraud, or on a statutory prohibition against fraud, were not preempted.

In *Johnson v. American Airlines, Inc.*,\(^{60}\) the Court, without issuing a written opinion, vacated an Illinois appellate court ruling

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\(^{55}\) *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992)).

\(^{56}\) *Id.* at 823-24.

\(^{57}\) *Id.* at 824.

\(^{58}\) *Id.*

\(^{59}\) *Id.* at 825 n.7.

\(^{60}\) 115 S. Ct. 1247 (1995).
that suits filed against American Airlines and United Airlines challenging a ticket cancellation charge were preempted by the ADA. Plaintiff Arthur Johnson had instituted a class action breach of contract suit against American after being assessed a twenty-five percent penalty for canceling his ticket.\textsuperscript{61} The Baskins filed a similar suit against United Airlines. Both actions were dismissed by the trial court as preempted by the Act. The Illinois appellate court affirmed the trial court's ruling, citing the Court's 1992 decision in \textit{Morales}, which gave broad meaning to the phrase "relating to."\textsuperscript{62} Johnson and Baskins had filed a petition for Supreme Court review January 4, 1995, arguing that a decision should be deferred pending the Supreme Court's ruling in \textit{Wolens}. Since that decision was issued on January 18, 1995, the Court apparently decided no comment was necessary for this ruling.

In \textit{Fressie v. Trans World Airlines},\textsuperscript{63} the Court denied plaintiff's petition for certiorari on January 23, 1995. Fressie's claims against TWA had been held as preempted by the Airline Deregulation Act of 1978. Fressie had sued for false arrest, malicious prosecution, breach of contract, and damages due to TWA's refusal to honor his ticket and boarding pass for a flight from New York to Paris. The Third Circuit affirmed a summary judgment motion in favor of TWA and had argued that Fressie's action was preempted by section 1305 of the Act, which bars suits relating to an airline's rates, routes or services.\textsuperscript{64} TWA responded to Fressie's Supreme Court petition by arguing that no conflict existed among the courts on the preemptive effect of section 1305 with respect to ticketing, boarding, and seating claims. Fressie, however, cited the Court's 1992 ruling in \textit{Morales} which held that state actions affecting rates, routes, and services in too tenuous, remote, or peripheral a manner are not preempted. Accordingly, Fressie argued that suits grounded in common law theories of tort and contract do not directly affect the airline's ability to conduct its daily business.

\textit{Gay v. Carlson}\textsuperscript{65} arose out of claims filed by a Pan Am pilot who had been fired for allegedly allowing a flight attendant to control a Boeing 747 during a flight from New York to Los An-

\textsuperscript{62} Id. at 979.
\textsuperscript{63} 115 S. Ct. 955 (1995).
\textsuperscript{64} Fressie v. Trans World Airlines, 31 F.3d 1171 (3d Cir. 1994) (unpublished disposition).
\textsuperscript{65} 60 F.3d 83 (2d Cir. 1995).
geles. Pilot Harold Gay was found guilty of misconduct by Pan Am and fired December 31, 1988. He filed a grievance and was reinstated with full back pay and seniority rights due to a finding that he had been deprived of a full and fair investigation.\textsuperscript{66}

Gay then filed suit against Pan Am's vice president and twelve other employees, alleging they had conspired to fabricate official reports to have him fired.\textsuperscript{67} Most of the claims were dismissed. The court also ruled certain state law claims were preempted by the Railway Labor Act.\textsuperscript{68}

The Second Circuit held that Gay's state law defamation, prima facie tort, and conspiracy claims were not preempted, since no interpretation of the collective bargaining agreement was required to resolve those claims.\textsuperscript{69} The claims involved only factual questions concerning Gay's conduct and that of the fellow employees. The Second Circuit affirmed the dismissal of the intentional infliction of emotional distress claim, finding no basis for concluding that the conduct alleged went beyond all possible bounds of decency.\textsuperscript{70}

In \textit{Hodges v. Delta Airlines, Inc.},\textsuperscript{71} the court held that a passenger's state law tort claim for physical injury based upon negligent operation of the aircraft was not preempted by the ADA.\textsuperscript{72} The plaintiff had been injured when a fellow passenger opened an overhead compartment and dislodged a case of rum. The court held that the ADA was concerned solely with economic deregulation and not with displacing state tort law.\textsuperscript{73} In reaching its decision, the court also relied in part on the fact that federal law requires air carriers to maintain liability insurance. "A complete preemption of state law in this area would have rendered any requirement of insurance coverage nugatory."\textsuperscript{74}

In rendering its decision, the Fifth Circuit was careful to note, however, that not all state tort claims would survive ADA preemption. As an example, claims arising from the eviction of loud, boisterous, and intoxicated passengers would be preempted by the ADA, because to enforce such claims "would re-

\textsuperscript{66} Id. at 85-86.
\textsuperscript{67} Id. at 86.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 88.
\textsuperscript{70} Id. at 89.
\textsuperscript{71} 44 F.3d 334 (5th Cir. 1995) (en banc).
\textsuperscript{72} Id. at 340.
\textsuperscript{73} Id. at 338-39.
\textsuperscript{74} Id. at 338.
sult in significant de facto regulation of an airline's boarding practices and, moreover, would interfere with federal law granting the airlines substantial discretion to refuse to carry passengers."\textsuperscript{75} In addition, the Court noted that claims based upon the bumping of a passenger from a flight would also be preempted by its interpretation of "relating to" services.\textsuperscript{76}

\textit{Smith v. America West Airlines, Inc.}\textsuperscript{77} arose out of claims based upon an airline's failure to prevent a hijacker from boarding an aircraft. The Fifth Circuit held that such claims were not preempted by the ADA.\textsuperscript{78} The court held that neither the language nor history of the ADA implies that Congress was attempting to displace state personal injury tort law concerning the safety of the airline business. The court felt that it was reasonable to interpret the term "service" of boarding to be limited to economic decisions concerning boarding, such as overbooking or charter arrangements, or contractual decisions whether to board particular ticketed passengers.\textsuperscript{79}

\textit{Harris v. American Airlines, Inc.}\textsuperscript{80} involved claims by a black passenger on an American Airlines flight alleging that he was subjected to repeated racial slurs from a white male passenger known only as John Doe.\textsuperscript{81} Passenger Doe had been served several drinks both prior to and during the flight, despite at least one flight attendant declining to serve him additional drinks after takeoff. The plaintiff filed suit in Oregon state court, stating claims for intentional infliction of emotional distress, negligence, and violation of the State Public Accommodations Statute.\textsuperscript{82} American Airlines removed the case to federal court on the basis of diversity jurisdiction. American then sought summary judgment based upon preemption under section 1305(a)(1) of the Airline Deregulation Act and on the merits.\textsuperscript{83} In response to American Airlines's preemption argument, plaintiff argued that state tort claims concerning the flight crew's actions in continuing to serve alcoholic beverages to an already intoxicated en route passenger did not constitute a state regula-

\textsuperscript{75} Id. at 339.
\textsuperscript{76} Id. at 339-40.
\textsuperscript{77} 44 F.3d 344 (5th Cir. 1995).
\textsuperscript{78} Id. at 347.
\textsuperscript{79} Id.
\textsuperscript{80} 55 F.3d 1472 (9th Cir. 1995).
\textsuperscript{81} Id. at 1472.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
tion of an economic decision concerning what airline services to provide. Instead, plaintiff argued that her claim involved the airline's negligence in agreeing to provide liquor to passengers and in failing to protect plaintiff's safety.

The lower court granted summary judgment on the merits. The Ninth Circuit never reached the merits of the state law claims and held that the claims were preempted. The court held that the allegations related directly to the "service" of providing alcoholic beverages to passengers and the manner of treating intoxicated passengers, and the court also determined that plaintiff was unable to demonstrate that her claims came within the narrow preemption exclusion set forth by the Supreme Court in Wolens because plaintiff's claims were based on Oregon state law, rather than private contract terms as in the Wolens case.

The one dissenting opinion in Harris points out that the majority opinion creates an intercircuit conflict with two recent decisions in the Fifth Circuit: Hodges v. Delta Airlines, Inc. and Smith v. American West Airlines, Inc. The dissenting opinion also pointed out that the majority's reliance upon Wolens was misplaced since, among other things, "the Supreme Court suggested [in the Wolens decision] that personal injury claims against airline carriers were not preempted by the ADA.

In Lathigra v. British Airways PLC, plaintiffs had been flying on British Air from Seattle to Madagascar, with a connecting flight from Nairobi, Kenya, to their final destination. British Air had confirmed the reservations, but failed to mention the discontinuation of the connecting flight. The family filed suit for delay damages in state court, and British Air removed the action to the Western District of Washington where it was dismissed.

The Ninth Circuit reversed, holding that Washington state law governed the claim and that the district court had erred in applying the two-year Warsaw Convention limitation. British
Air’s liability was based upon negligence in reconfirming the reservations and not upon a delay in transportation by air. The Ninth Circuit also rejected British Airway’s federal preemption argument, citing the Supreme Court’s 1992 decision in *Morales*, holding that state law causes of action are allowed where there is “‘too tenuous, remote, or peripheral’ an effect on air carrier services for the FAA to preempt it.” In seeking reconsideration, British Air argued that the appellate court had erred in holding that because the plaintiffs characterized their claims as based upon negligent ticketing, the action was not subject to Article 19 of the Warsaw Convention, which holds a carrier liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods. British Air had argued, in part, that the Warsaw Convention applied because plaintiffs had failed to commence suit against British Air until the two-year limitation period for commencing a Warsaw action had expired. However, there was a three-year statute of limitations for their Washington state law claim, and, thus, plaintiffs’ claim was not time-barred.

In *Rowley v. American Airlines*, the court held that the ADA did not preempt plaintiff’s claim for intentional infliction of emotional distress arising from the airline’s failure to provide her with a special wheelchair aisle seat. Plaintiff also claimed that the airline failed to assist her to and from her seat during the flight and that it left her in a chair at the baggage claim area for over an hour. In reaching its holding, the court held that although the plaintiff’s claim involved her boarding and deplaning, it did “not impact general practice of American Airlines relating to the boarding, seating or deplaning of passengers, handicapped or otherwise, on airline flights.” In addition, “the claims [were not contravened for] the purpose of the ADA to promote competitive market forces.”

*Chukwu v. Board of Directors Varig Airlines* and *Chukwu v. Board of Directors British Airways* present two breach of contract cases brought against two airlines alleging that it wrongfully refused to board a passenger based upon a misunderstanding of immigration requirements. In *Varig*, the passenger had purchased a

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98 *Id.* at 540 (citing *Morales*, 112 S. Ct. at 2040).
95 *Id.* at 712.
96 *Id.*
ticket to fly from Nigeria to Grand Caymans with a stopover in Miami. The passenger did not have a U.S. visa, but claimed that such a document was not required for a stopover of less than eight hours. The airline refused to board the passenger and refunded the price of his ticket. However, the plaintiff brought suit for $3.5 million in damages, claiming a lost business opportunity in the Grand Caymans.99

The airline moved for summary judgment on the basis of preemption. However, the U.S. Magistrate Judge denied the motion, noting that the “plaintiff [was] seeking to enforce a private agreement with the airline for transportation” and that the case did “not involve any enlargement or enhancement based on state laws external to that agreement” for transportation.100 Therefore, the breach of contract claim was not preempted.

In British Airways, the same plaintiff filed suit in the same court alleging that his brother was denied boarding on this airline because the fare had already been refunded.101 A district court judge issued a decision six weeks after Varig, reaching the same conclusion as the magistrate judge, but with slightly different reasoning. Unlike Magistrate Judge Collings, District Judge Lasker held that the airline’s decision to deny boarding was a “service” of the airline and was therefore preempted from state tort law remedies by the Act.102 However, the court also held that the act of denied boarding may be able to be separated from the airline’s possible breach of a “duty to transport” the passenger.103 The court held that it was premature to decide if the contract claim could be enforced without resort to external laws and policies. If so, it would be merely an attempt to enforce the private agreement between these parties and, following the Wolens decision, not preempted.104

In Rombom v. United Airlines,105 the plaintiffs filed suit against United Airlines seeking damages for defamation, emotional distress, and punitive damages. The plaintiffs alleged that they had boarded a flight from Chicago to New York, but were treated in a rude and aggressive manor by the flight attendants.106 The

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100 Id. at 895.
102 Id. at 14-15.
103 Id.
104 Id.
106 Id. at 216.
airline, on the other hand, argued that the passengers were behaving in a rambunctious and inappropriate manner and were interfering with the flight attendants' safety instructions.\(^{107}\) When the plaintiff and her companions refused to comply with the flight attendants' requests to behave, the pilot returned the aircraft to the gate and had the plaintiff and her companions removed and arrested.\(^{108}\)

The airline moved for summary judgment, claiming that plaintiff's state tort claims were preempted. The court granted the motion in part and distinguished between the airline's actions in deciding to return the aircraft to the gate and in deciding to have the plaintiff arrested. The court held that the flight crew's decision to transport a passenger and, by extension, the decision to return to the gate are a "service" under section 1305 and were therefore preempted.\(^ {109}\) Similarly, plaintiff's claim for damages based upon the rude and aggressive conduct of the flight attendants was dismissed. However, the court permitted plaintiff's claims for false arrest to go forward, holding that the airline's decision to have someone arrested is not a "service" and therefore is not subject to preemption.\(^ {110}\)

In *Shupe v. American Airlines, Inc.*,\(^ {111}\) the passenger alleged that airline personnel failed to provide "meet and assist" services on a connecting flight. "The issue presented was whether the [passengers'] claims under the Texas Deceptive Trade Practices-Consumer Protection Act and causes of action under theories of negligence and breach of contract [were] preempted under federal law by the Airline Deregulation Act of 1978\(^ {112}\) (the "Act").\(^ {113}\) The district court held that all three causes of action were preempted by the Act. On appeal, the appellate court held that claims under the Texas Deceptive Trade Practices-Consumer Protection Act (the "DTPA") were preempted by the Act. However, claims for breach of contract and negligence in connection with the meet and assist services were not preempted. The court noted that the parents of the passenger had paid an additional charge above the normal ticket price for the meet and assist service. The purpose of the Act, which prohibits states

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\(^ {107}\) *Id.*

\(^ {108}\) *Id.*

\(^ {109}\) *Id.* at 223.

\(^ {110}\) *Id.* at 224-25.


\(^ {113}\) *Shupe*, 893 S.W.2d at 306.
from enforcing or enacting laws relating to air carrier rates, routes, and services, is to prevent states from controlling the selecting and design of marketing mechanisms appropriate to the furnishing of air transportation services.114 Since the Texas DTPA law could be used to guide and police the marketing practices of the airline, state enforcement of that law violated the preemption provision of the Act. Therefore, claims under the Texas DTPA were preempted.115 As for the breach of contract claims, however, the court held that the Act is not intended to regulate contracts between individual parties, nor is it intended to shelter airlines from suits alleging a violation of an airline’s self-imposed undertakings.116 In addition, claims for negligence arising from the meet and assist services would not affect competition for airline passengers, nor would they provide state regulators with additional power over airline rates, routes, or services.117 Therefore, the passenger’s breach of contract and negligence claims were not preempted.

In State v. Metropolitan Airports Commission,118 a group of non-profit organizations brought suit against the Minneapolis-St. Paul International Airport, seeking to enforce state noise pollution standards to the airport operations. The airport argued that the state standards were preempted. The Supreme Court of Minnesota agreed and found that the pervasive and extensive scheme of federal regulation of aircraft noise evidenced an intent by Congress to preempt the states in this area.119

IV. AIR CARRIER LIABILITY AND DAMAGES

A. WARSAW CONVENTION

1. Jurisdiction, Venue, and Limitations

In Sopcak v. Northern Mountain Helicopter Service,120 the plaintiffs included the survivor and relatives of several decedents who died in a February 7, 1990, helicopter crash. The aircraft was en route from a mining site in British Columbia to an airport in Alaska. At the airport, the passengers, who were all mine employees, planned to transfer to an airline flight to continue to

114 Id. at 307.
115 Id. at 308.
116 Id.
117 Id.
118 520 N.W.2d 388 (Minn. 1994).
119 Id. at 391-92.
120 52 F.3d 817 (9th Cir. 1995).
Vancouver, British Columbia. On a motion seeking dismissal due to lack of subject matter jurisdiction, the defendants argued that the destination of the passengers was Canada, not Alaska, and, therefore, there was no venue under the Warsaw Treaty in the federal courts of Alaska. Pursuant to Article 28(1) of the Treaty, there were four possible forums in which to bring a cause of action:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either (1) before the court of the domicile of the carrier, or (2) of his principal place of business, or (3) where he has a place of business through which the contract has been made, or (4) before the court at the place of destination.

The issue in Sopchak was the correct interpretation of the phrase “place of destination.” The travel arrangements in question included flights to Alaska, with subsequent connecting flights by a separate carrier to Canada. The accident took place on the first leg of the flight to Alaska. Appellants brought suit in Alaska, alleging that the city in Alaska was the “place of destination” of the helicopter that crashed. The Ninth Circuit was called upon to resolve a question of first impression within the Ninth Circuit as to how to determine “final destination” for purposes of the Warsaw Convention when multiple carriers are involved.

The Ninth Circuit joined the Second and Fifth Circuits in holding that “the intention of the parties as expressed in the contract of transportation, i.e., the ticket or other instrument, determines the final destination.” When there are multiple carriers, the total transportation provided by the carriers is considered to be one undivided trip, if regarded by the parties as such, even if the transportation is set forth in one contract or a series of contracts. If the parties intend the trip to be one undivided trip, the separate contracts are read together and the last ticket is the final destination. In this case, it was the employer of the passengers who arranged the flights, and, therefore, plaintiffs argued there was insufficient evidence to determine whether all parties considered the successive flights as one undivided trip with a final destination in Canada. Under the facts of this case, the court concluded that there was a sufficient basis

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121 Id. at 818.
122 Id.
123 Id. at 819.
for the trial court's conclusion that the parties intended Canada as their final destination and therefore affirmed the dismissal.\textsuperscript{124}

\textit{Pasinski v. LOT Polish Airlines,}\textsuperscript{125} arose out of the 1987 crash of a LOT Polish Airlines aircraft shortly after takeoff from Warsaw, Poland. Several passengers had round-trip tickets with a final destination of Poland. However, they argued that they should be entitled to relief despite the rule that the terms of the contract of transportation should apply in determining final destination. The reason for this argument by the passengers from Poland was that the government of Poland required them to purchase round-trip tickets. However, the plaintiffs argued that they never intended to return to Poland. The court held that the plaintiffs should be allowed to introduce evidence at trial of their intent to reside permanently in the United States and never return to Poland in order to rebut the presumption that there was any mutual consent to Poland as a final destination.\textsuperscript{126} This is consistent with prior decisions by the same court holding that the presumption that a ticket indicates the intended final destination can be rebutted with evidence that there is, in fact, no mutual consent to the final destination because the plaintiff never intends to return or, rather, to use the return ticket.

\textit{Salamanca v. Avianca Airlines}\textsuperscript{127} involves the two-year limitations period in the Warsaw Convention. The plaintiff brought suit on January 3, 1994, to recover for a loss of property transported on an Avianca flight from New York to Columbia. Article 29 of the Warsaw Convention provides that an action against an international carrier must be commenced within two years from the date of the arrival of the cargo. Avianca filed a motion for summary judgment. The court stated that the time limit in the Warsaw Convention is more than a statute of limitations which may be tolled; it is a strict condition for the filing of a lawsuit. Although the plaintiff in \textit{Salamanca} had engaged in settlement discussions before the limitations period ran out, the court held that plaintiff's delay in filing was not excused, and the suit was dismissed.

On January 6, 1995, a justice of the Ontario Canada Court of Justice ruled in \textit{Lee v. Korean Air Lines Co., Ltd.}\textsuperscript{128} that three of

\begin{itemize}
\item Id.
\item Id. at *4-5.
\item No. 5513-85 (Ontario Ct. of Justice Jan. 6, 1995).
\end{itemize}
five cases involving Flight 007 may proceed in the Canadian court but that two remaining suits which involved plaintiffs who had filed suit in Japan as well could not proceed. Korean Air Lines had moved to dismiss or stay the five lawsuits, arguing that the Ontario court lacked jurisdiction under Article 28 of the Warsaw Convention, which requires an action to be brought in a "territory" in which the defendant "has an establishment by which the contract has been made." The Ontario court ruled that by maintaining an office in Toronto through which the sales of airline tickets to all of the deceased victims were ultimately effected through a pyramid of agents and subagents, the defendants provided a basis for Canadian jurisdiction. The judge ordered a stay on the two suits in which identical actions were proceeding in Japan. However, should it be determined that the Japanese court does not have jurisdiction, the judge held that the plaintiffs can pursue their action in Canada. The judge also noted the "awkward and ambiguous" language of Article 28, since in improper English usage, one would not normally contemplate "an establishment by which the contract has been made . . . ."

2. Applicability

Article 17 of the Warsaw Convention establishes three requirements for carrier liability: (1) an "accident" which causes (2) physical injury, death, or physical manifestation of injury to a passenger (3) during embarkation, disembarkation, or during the flight itself. The issue on appeal in McCarthy v. Northwest Airlines, Inc. was "whether plaintiff was injured while "embarking" the aircraft within the meaning of Article 17."

The plaintiff had arrived late at the ticket counter in Tokyo for a flight. The ticket agent rushed the plaintiff to the gate, and, in the process, the plaintiff fell and was injured on an escalator. The court held that the plaintiff was not in the process of embarkation within the meaning of Article 17 because (1) she was not close to the plane; (2) she was still in the common area of the airport and had not taken even preliminary steps to boarding; (3) she was a considerable distance from the departure gate; and (4) she "was not under the airline's 'control' in

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129 See Martinez Hernandez v. Air France, 545 F.2d 279, 283 (1st Cir. 1976).
130 56 F.3d 313 (1st Cir. 1995).
131 Id. at 316.
any meaningful sense.”  The fact that there was no cause of action under the Warsaw Convention does not mean that the plaintiff may be without a remedy. That is, the plaintiff could possibly assert a common law claim against the airline for negligence in rushing the plaintiff to the terminal to board an aircraft.

The Supreme Court has defined an “accident” under Article 17 as an unexpected or unusual event or happening that is external to the passenger. In *Craig v. Compagnie Nationale Air France*, the court declined to apply Article 17 to an incident where a plaintiff tripped over a passenger’s shoes onboard the aircraft. The court held that it was not unexpected or unusual to find shoes on the floor between seats on an aircraft, and, therefore, there was no “accident” for which the carrier was liable.

*Pittman v. Grayson* concerned the term “accident” as used in Article 17 of the Warsaw Convention. The plaintiff brought suit against an airline seeking damages for the alleged false imprisonment of his minor daughter who was taken on a one-way international flight from Kennedy Airport in New York to Reykjavik, Iceland, in apparent violation of a child custody order issued by a Florida state court. Plaintiff also sought money damages for emotional distress and interference with his custodial rights. The defendant airline moved to dismiss the complaint for lack of subject matter jurisdiction under Article 28 on grounds of improper venue.

Article 28(1) requires the claim be brought in any of the following locations: (1) the domicile of the carrier; (2) the principle place of business of the carrier; (3) the place where the contract of transportation was made; or (4) the place of destination. However, the court side-stepped the issue and found that this action did not arise from “an accident,” and, therefore, the Warsaw Convention did not apply at all. The court held that the state law claims were actionable.

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132 Id. at 317-18.
135 Id. at *9.
137 Id. at 1069.
138 Id. at 1069-71.
139 Id. at 1074. This decision seems to fly in the face of other decisions holding that the Warsaw Convention provides the exclusive remedy for plaintiffs supposedly injured during international air travel.
3. Damages

Zicherman v. Korean Air Lines Co., Ltd.,\textsuperscript{140} involved the death of a passenger in the Soviet shoot-down of Korean Air Lines Flight 007 in the Sea of Japan in September 1983. Consistent with previous case law, federal law applied to the plaintiff’s claims. The issue was whether the federal common law of torts was displaced and preempted by the Death On the High Seas Act (DOHSA). DOHSA was enacted before the United States became a signatory to the Warsaw Convention. The Supreme Court has consistently interpreted DOHSA as the exclusive remedy for death on the high seas and has held that it preempts both state and federal law to the contrary. Lower federal courts had also commonly applied DOHSA to aviation accidents occurring on or over the high seas. Until this decision, the Supreme Court, however, had not determined whether DOHSA applies to aviation accidents.

When the Zicherman case was before the Second Circuit, the court followed what is now the generally accepted rule that the cause of action created by the Warsaw Convention is exclusive and that federal common law decides issues concerning which the Convention is silent, such as damages. The Second Circuit rejected Korean Air Lines’s argument that the applicable federal law is DOHSA, which limits damages to pecuniary losses.\textsuperscript{141} In making this determination, the Second Circuit reasoned that the congressional goal of uniformity in Warsaw Convention cases would be defeated by applying DOHSA to high seas accidents and federal common law to land accidents.\textsuperscript{142} In addition, awarding pecuniary damages alone under DOHSA would be inconsistent with the emphasis in Article 17 of the Warsaw Convention on full compensation to victims.\textsuperscript{143}

In Alcabasa v. Korean Air Lines Co., Ltd.,\textsuperscript{144} also stemming from the Korean Airlines disaster, the United States Court of Appeals for the District of Columbia Circuit held that DOHSA applied to a passenger death action.\textsuperscript{145} This holding was contrary to the Second Circuit ruling in Zicherman, but ultimately consistent with the U.S. Supreme Court. The court of appeals rejected

\textsuperscript{140} 43 F.3d 18 (2d Cir. 1994), cert. denied, 115 S. Ct. 1689 (1995).
\textsuperscript{141} Id. at 22.
\textsuperscript{142} Id. at 21.
\textsuperscript{143} Id. at 21-22.
\textsuperscript{144} 62 F.3d 404 (D.C. Cir. 1995).
\textsuperscript{145} Id. at 408.
\textsuperscript{146} Id. at 407.
the plaintiff’s request to “ignore DOHSA and... fashion a common law rule that would permit his suit.”

The plaintiff in this case was the widower of Korean Air Lines Flight 007 crash victim Lilia Bayona and had filed a wrongful death suit in a District of Columbia federal court in his individual capacity in 1984. In 1985, Bayona’s brother was appointed personal representative of the estate by a New Jersey state court, and he filed suit in a New Jersey federal district court. Korean Air Lines agreed to a settlement with the brother, and the case was dismissed in 1993. Korean Air Lines was granted summary judgment in Alcabasa's suit, and the D.C. Circuit Court affirmed, holding that the district court had applied the wrong law, but reached the correct conclusion. The D.C. Circuit Court held that the husband lacked standing to file a wrongful death suit because he had not been appointed the decedent’s personal representative. The court stated that the novel legal question before it was not whether standing must be determined by reference to the laws of the Warsaw Convention’s “contracting states,” but rather what that law is in this particular context. Korean Air Lines had argued that the question of Alcabasa’s standing was controlled by DOHSA. Under DOHSA, only the personal representative of the decedent may bring a wrongful death suit. The D.C. Circuit Court held that because the function of the flight—ferrying passengers across the Pacific Ocean—was one traditionally performed by waterborne vessels and because Alcabasa did not claim that the wrongful act that caused his wife’s death did not occur on the high seas, DOHSA was the applicable law of the United States in this particular case. Therefore, the trial court had erred in ruling that District of Columbia law applied. Pursuant to the Warsaw Convention, the court held that “[w]hen courts... determine that an international treaty leaves a certain policy determination to ‘contracting states,’ they refer to the laws of the nations that are signatories to the agreement, not the political subdivisions thereof.” “Under Article 24(2) of the Warsaw Convention, it is the ‘contracting states’ [who] decide the standing... of the claimants... The relevant ‘contracting state’ in this case is the United States.” The D.C. Circuit Court further noted that

147 Id.
148 Id. at 407-08.
149 Id. at 407.
150 Id.
151 Id. at 408.
"[i]f . . . Alcabasa [had] not received proper compensation for the death of [his wife], he might have a cause of action against the personal representative, but he [could] not force the airline to litigate a claim it had a right to believe was settled in 1993."152

The plaintiff in Rothschild v. Tower Air, Inc.153 was a passenger on an international flight who alleges that she reached into the magazine pouch adjacent to her seat and was stabbed in her finger by a hypodermic needle that had been left behind earlier. She brought suit for the physical injury of the needle prick as well as emotional distress which she claims to have suffered due to a fear of contracting AIDS.154 The court held that the Warsaw Convention does not allow damages for emotional distress and, therefore, precluded testimony regarding plaintiff's fear of contracting AIDS. The jury returned a verdict of $10,000 without the emotional distress testimony.

Initially, the district court declined to rule on whether state or federal law applied under the Warsaw Convention. Rather, the court concluded that under either law, the plaintiff could recover for pain and suffering resulting from being pricked by a needle and having to undergo tests to detect AIDS and hepatitis. However, the court held that plaintiff could not recover for the mental anguish for AIDS phobia without proof of actual exposure to the virus.155

Pescatore v. Pan American World Airways, Inc.156 is another case construing damages recoverable under the Warsaw Convention. In this matter, the decedent was 33 years old and a vice president with British Petroleum Chemicals of America. He had reported earnings of $118,901 in 1988 and was survived by his wife. On April 18, 1995, a jury awarded compensatory damages of over $19 million, and the court sustained the jury's award for loss of support, societal damages to the spouse, and prejudgment interest.157

In accord with Alcabasa, Mahalek v. Korean Air Lines Co., Ltd.158 was another Korean Air Lines Flight 007 lawsuit in which the California District Court found DOHSA applied to damages and granted Korean Air Lines's motion for judgment as a matter of

152 Id.
154 Id. at *1-3.
155 Id. at *2-3.
157 Id. at 72-74.
law on the ground that the plaintiff was not dependent on his sister for financial support and was entitled to no recovery. In making this decision, the district court distinguished another general maritime law case, *Sutton v. Earles*,\(^{159}\) which was a general maritime law case that allowed a nondependent parent to recover for societal damages on the ground that parents, whether dependent or not, are always "common law" wrongful death beneficiaries. However, siblings are only common law wrongful death beneficiaries if they were dependent on the decedent.

*Ramachandran v. Thai Airways International*\(^{160}\) arose out of the 1992 crash of a Thai Airways plane near Katmandu, Nepal, resulting in the death of ninety-nine passengers and fourteen crew members. Thai Airways had filed a motion for a determination of applicable law. The federal district court judge ruled that federal maritime law applied to the recoverability of damages in this case, which was governed by the Warsaw Convention. On the issue of which plaintiffs had standing to sue concerning the death of the decedent, the court held that the plaintiffs would not be limited to the representatives of the decedent's estate. Although DOSHA and the Jones Act only allow the personal estate representative to bring a wrongful death suit, the Warsaw Convention affirmatively states that there shall be no prejudice with regard to who brings a suit. With respect to the proper beneficiaries, the court cited the lack of any specific language in the Warsaw Convention and therefore applied DOHSA, the Jones Act, and general maritime law to hold that the proper beneficiaries were the decedent's spouse, children, parents, and dependent relatives.

On the issue of damages, the court held that the plaintiffs could not recover for loss of future wages because of a concern over the possibility of a double recovery, due damages for loss of support, inheritance, and services. The court also ruled that plaintiffs were entitled to loss of inheritance if partial or full dependency was established. The court also stated that it would allow recovery for loss of society, but that such recovery would be limited to spouses and dependents who must prove pecuniary dependency. The court noted that the Warsaw Convention was silent on the issue of damages and does not expressly limit the relief available. However, actions under the Warsaw Con-

\(^{159}\) 26 F.3d 903 (9th Cir. 1994).

vention were found to be more analogous to deaths on the high seas than accidents in territorial waters, and, therefore, the court gave the provisions of DOHSA more consideration. Damages for mental anguish and grief were held to be not recoverable in light of the fact that there exists a general prohibition of such recovery in general maritime law and that the Warsaw Convention is silent on the issue. The damages for loss of parental care are recoverable as pecuniary losses, the court held, but they must be limited to the period of a child's minority absent a showing that the parent's guidance had a pecuniary value beyond the irreplaceable values of companionship and affection.

4. Article 25—Unlimited Compensatory Liability for Willful Misconduct

In *Pagnucco v. Pan American World Airlines, Inc.*, the United States Supreme Court has denied the petition of Pan Am to review lower court liability findings in the crash of Pan Am Flight 103 at Lockerbie, Scotland. The jury in the liability trial in the U.S. District Court for the Eastern District of New York had found Pan Am guilty of willful misconduct, and the Second Circuit affirmed the ruling on January 31, 1994. The Appeals Court denied Pan Am's petition for reconsideration and issued a revised opinion on September 12, 1994, vacating certain damage awards. Pan Am again moved for reconsideration, but the motion was denied October 28, 1994.

At the Supreme Court level, Pan Am argued that a carrier's state of mind was the critical ingredient for a finding of willful misconduct under Article 25 of the Warsaw Convention. Pan Am had been precluded from presenting evidence that it believed x-ray screening would not create a likelihood of death or injuries, because such screening had been approved by the FAA as complying with the Air Carriers Standard Security Program and also with British regulations on the detection of terrorists' bombs. In reply, the plaintiffs argued that the trial court and appeals court had applied the standard definition of willful misconduct in Warsaw cases with sufficient factual evidence to support that finding.

*Korean Air Lines Disaster of September 1, 1983* involved Korean Air Lines Flight 007, a Boeing 747, which strayed into Soviet airspace and was shot down on September 1, 1983. All 269 persons

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162 No. 94-5325 (D.C. Cir. Apr. 6, 1995).
onboard were killed, and approximately 190 wrongful death cases were filed in various states. Korean Air Lines was found liable for the willful misconduct of the crew, which therefore opened the airline up for compensatory damages notwithstanding the $75,000 limitation found in the Warsaw Convention. The finding of willful misconduct was based upon the apparent conclusion that the plane was off-course for a number of hours. The District of Columbia Circuit Court affirmed the liability verdict. The various individual cases were transferred back to their originating districts for damages trials.

In 1993, Korean Air Lines moved to vacate the liability judgment, arguing that new evidence had recently been obtained from the Russian government by the International Civil Aviation Organization. This included new “black box” evidence. However, the U.S. District Court for the District of Columbia disagreed and ruled that the new evidence supported the jury’s original finding. In a one-page order issued on April 6, 1995, the District of Columbia Circuit Court affirmed that ruling, thus permitting the damages trials to proceed undisturbed.

Under the Warsaw Convention, there is a limitation of liability for lost or stolen goods at $9.07 per pound. The limit does not apply if willful misconduct is proven against the carrier. The New York district courts have held that losses due to theft by airline employees do not constitute willful misconduct under the Warsaw Convention.

In *Uzochukwu v. Air Express International, Ltd.*, the court held that theft by an employee is not an act within the scope of employment, and the willful misconduct exception to limited liability does not apply, nor has it ever applied, to employee theft. The same conclusion was reached by the court in *Brinks’s Ltd. v. South African Airways*.

In *Iyegha v. United Airlines, Inc.*, David Iyegha appealed from summary judgment entered in favor of United Airlines in Iyegha’s action alleging conversion and willful, wanton conduct. In the summer of 1991, Iyegha had purchased two airline tickets for himself and his two-year old daughter to travel to Nigeria. The flights from Washington, D.C. to London’s

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164 Id. at *3-4.
166 659 So. 2d 45 (Ala. 1995).
167 Id. at 46.
Heathrow Airport were uneventful, but upon arrival in London, Mr. Iyegha was delayed approximately forty-five minutes to an hour to go through immigration. When he finally picked up his baggage, two of the suitcases had been damaged, and a significant number of clothes were missing from the damaged cases. The passenger attempted to show that the Warsaw Convention liability limits of $9.07 per pound did not apply because the damage to the luggage could only have occurred as a result of the deliberate acts of one or more of United’s employees based upon the fact that United had exclusive possession of the luggage and the damaged luggage had been set to the side of the baggage conveyor, presumably by United employees at London Airport.\(^{168}\) However, testimony by United Airlines representatives showed that the most likely explanation for the damage was that it was caused by the baggage conveyor belts and not through any willful misconduct on the part of the carrier.\(^{169}\) Therefore, summary judgment in favor of United was granted. The court held that the Warsaw Convention preempted any state common law causes of action or remedies relating to the damaged luggage and missing items and that its liability limitations controlled the case.\(^{170}\) However, plaintiffs had also made certain allegations that a United Airlines agent had improperly ripped out his tickets for a flight from London to Nigeria. The court held that United did not properly support its summary judgment motion with respect to those allegations, and, therefore, the summary judgment on that claim that had been entered by the lower court was reversed and remanded.\(^{171}\)

5. Article 26—Notice

In Aerolineas Argentinas, S.A. v. Maro Leather Co.,\(^{172}\) the United States Supreme Court declined to review a New York Court of Appeals ruling against Aerolineas Argentinas, S.A., which contended that a New Jersey leather company did not timely notify the airline of a cargo loss claim and should not have recovered damages and prejudgment interest. Maro Leather Company had received less cargo than expected and filed a written notice of claim with the airline eight days after receiving the incomplete shipment. The Warsaw Convention limit on damages

\(^{168}\) Id. at 48.
\(^{169}\) Id. at 48-49.
\(^{170}\) Id. at 51.
\(^{171}\) Id.
based upon the weight of the missing goods was $24,000. The airline denied the claim, citing its standard cargo tariff and the Warsaw Convention requirement of notice within seven days.

Aerolineas Argentinas had sought Supreme Court review, arguing that state and federal courts are in conflict with courts abroad as to the Warsaw Convention rule of notice for a partial loss of cargo. Article 26 of the Warsaw Convention requires written notice of claim as a condition precedent to suit based upon "damage" to air cargo. However, this term requiring notice has been subject to conflicting rulings in cases in which part of the goods never arrived. In addition, Maro had been awarded $41,182, including interest. Aerolineas Argentinas challenged the award of prejudgment interest, arguing that it should not have been awarded in excess of the Convention's cargo-lost weight limitation.

B. DISCRIMINATION CLAIMS

1. Handicapped Passengers/Americans with Disabilities Act

In Gottlieb v. American Airlines, Inc.,173 Daniel H. Gottlieb, a radio talk show host and clinical psychologist, brought a civil suit against American Airlines under the Air Carrier Access Act. Mr. Gottlieb, who is paralyzed from the chest down, claimed that the airline failed to give cargo room priority to his electric wheelchair on a flight from San Antonio to Philadelphia and damaged the chair during handling. Gottlieb also contended that the airline did not have an appropriate wheelchair to transport him between his connecting flights when he landed at the Dallas-Fort Worth International Airport (DFW) despite his advanced requests for such an accommodation. When Mr. Gottlieb arrived in Philadelphia, his electric wheelchair was not there, but arrived later on another flight.

The case was tried in front of a jury in the U.S. District Court for the Eastern District of Pennsylvania. A verdict was returned in March 1995, finding that the airline did not violate the federal statute with regard to the accommodations it provided to Mr. Gottlieb during his layover at DFW, but the airline was liable for failing to transport Mr. Gottlieb's wheelchair on the same flight in which he was a passenger. Following the liability verdict, the parties settled for a confidential amount.

In *Campbell v. Delta Air Lines, Inc.*,\(^{174}\) a woman was allegedly injured while being pushed in a wheelchair to her car after having arrived on a Delta flight. The wheelchair attendant was an employee of a ground handling company, International Total Services, which was under contract with Delta. The plaintiff alleged that her foot was jammed against the back wall of an elevator due to the negligent handling of the wheelchair attendant. A jury verdict was entered for the two defendants in 1993. On May 10, 1995, the First District California Court of Appeals affirmed the defense verdict and ruled that the doctrine of *res ipsa loquitur* did not apply because the evidence failed to eliminate causes of the injury other than the negligence of the defendant, which is one of the required prongs of the doctrine.

2. *Sex Discrimination*

In *Novack v. Northwest Airlines, Inc.*,\(^{175}\) a group of flight attendants filed suit against Northwest Airlines claiming that Northwest Airlines refused to hire them as flight attendants because they did not meet the minimum height requirement (five foot, two inches) imposed by Northwest Airlines.\(^{176}\) Flight attendants argued that this policy had a disparate impact on women in violation of the Minnesota state statute prohibiting discrimination on the basis of sex. The flight attendants "presented statistical evidence showing that women were [sixty-six] times more likely to be excluded by the height requirement than men," and the flight attendants "also argued that Northwest’s proffered business justification of passenger safety, customer service, and reduced flight attendant injury failed to rationalize the resulting discrimination."\(^{177}\) On the other hand, Northwest had numerous experts testify in support of its height requirement.\(^{178}\)

The court held that Northwest did not violate the state law prohibiting discriminatory business practices because it showed that the height requirement was “manifestly related” to the job.\(^{179}\) State law applicable in this case authorized an employer to justify an otherwise discriminatory practice by showing that it is manifestly related to the job or that it significantly furthers an


\(^{175}\) 525 N.W.2d 592 (Minn. Ct. App. 1995).

\(^{176}\) *Id.* at 594.

\(^{177}\) *Id.* at 595.

\(^{178}\) *Id.*

\(^{179}\) *Id.* at 498.
important business purpose. In this case, Northwest presented testimony of flight attendants and medical experts and an ergonomic study showing that height requirements were not only manifestly related to the job but also furthered important business purposes, including customer service, passenger safety and reduced flight attendant injury. The court felt that the fact that some flight attendants under the minimum height were able to perform their jobs was not conclusive proof that the requirement was not related to the job. In addition, the fact that the height requirement was subsequently lowered did not show that it was not related to the job because Northwest presented evidence demonstrating that the policy change came about as a result of severe financial difficulties and the threat of impending bankruptcy. Therefore, the lower court’s finding that Northwest’s requirement did not violate state law was affirmed by the Minnesota Court of Appeals.\(^{180}\)

3. Age Discrimination

In *Equal Employment Opportunity Commission v. American Airlines, Inc.*,\(^{181}\) the United States Equal Employment Opportunity Commission (EEOC) brought a class action age discrimination suit on behalf of pilots age forty and over who had applied and were denied employment by American Airlines. The EEOC charged that American Airlines’s policy of hiring only pilots who will progress to the rank of captain before age sixty (the mandatory retirement age for airline pilots) discriminated against applicants on the basis of age and also that American Airlines intentionally discriminated as proved by its pattern and practice against applicants age forty and over who were not excluded by the “years to captain” policy. The district court had granted partial summary judgment to American Airlines on the first claim, holding that it was barred by a collateral estoppel, and later dismissed the second claim for insufficient statistical evidence to create a genuine issue of disputed fact.

On appeal, the Fifth Circuit held that American Airlines’s policy of only hiring pilots who, because of age, are projected to become captains before reaching age sixty did not violate federal age discrimination laws because the carrier’s policy was reasonably necessary to ensure the safest operation of its planes.\(^{182}\)

\(^{180}\) Id. at 600.

\(^{181}\) 48 F.3d 164 (5th Cir. 1995).

\(^{182}\) Id. at 171.
The pilots' claims were rejected because American Airlines's hiring practices had already been decided to be legitimate in an earlier case.\textsuperscript{183} Although that earlier case had been premised on a policy of hiring only persons over age thirty for the beginning position of flight officer, both policies had as their purpose ensuring that the carrier's staff of captains had the longest possible record of experience in a carrier's cockpit. The court in the earlier case had found that the maximization of pilot experience was reasonably necessary to the normal and safe operation of American Airlines and that pursuant to federal law, the age-based policy did not improperly discriminate against older pilots. Since the policy of hiring only those pilots who could become captain by age sixty accomplished the same purpose of ensuring that the cockpit was staffed with the best possible experienced pilots, the pilots' claims were not materially different from those made in the earlier case. Therefore, summary judgment was properly granted in favor of American Airlines.

\textit{Stamm v. United Airlines, Inc.}\textsuperscript{184} arose out of an age discrimination lawsuit filed against United Airlines by pilot Robert Stamm who had unsuccessfully applied for a job with United Airlines in January 1992 when he was fifty-six years old and suffering from permanent high frequency hearing loss.\textsuperscript{185} Stamm had filed a discrimination charge with the Colorado Civil Rights Division (CCRD), claiming to be a victim of age and handicapped discrimination.\textsuperscript{186} He also filed a charge with the EEOC, which deferred to the CCRD for investigation of the claim. The CCRD dismissed the charges, and Stamm subsequently filed suit in Colorado State Court, contending that United Airlines had violated the state's anti-discrimination law.\textsuperscript{187}

United Airlines subsequently successfully moved for a dismissal arguing that the suit was preempted by the Airline Deregulation Act of 1978.\textsuperscript{188} The EEOC subsequently notified Stamm that they would take no action on the charges, but that he could file a civil suit under the Age Discrimination in Employment Act within ninety days.\textsuperscript{189} Consequently, Stamm filed suit in the Maryland District Court, which held that the case should be dis-

\textsuperscript{183} \textit{Id.}
\textsuperscript{184} No. 95-1059, 1995 WL 564360 (4th Cir. Sept. 25, 1995).
\textsuperscript{185} \textit{Id.} at *1.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.} at *2.
missed on grounds of res judicata since the action was barred by the Colorado judgment.\textsuperscript{199} The court held that Stamm's federal suit violated Colorado's rule against "claim-splitting," since Stamm could have presented his federal claims along with the state claim.\textsuperscript{191}

The Fourth Circuit Court affirmed, holding that Colorado law clearly provides that res judicata bars reassertion of matters that could have been advanced in a previous action, even if the claims are not actually asserted.\textsuperscript{192} The Colorado state court had jurisdiction over both of Stamm's claims, and, therefore, he was required to bring both claims in one lawsuit or risk losing the claim that he failed to assert. The court also noted that Stamm failed to meet his burden to prove that the state court would have refused to exercise jurisdiction over his federal age discrimination claim.\textsuperscript{198} Therefore, the Fourth Circuit held that the Maryland district court had properly dismissed Stamm's federal action on the basis on the doctrine of res judicata.\textsuperscript{194}

\textbf{C. Other}

On April 17, 1995, the U.S. Court of Appeals for the Second Circuit ruled in \textit{Stagl v. Delta Airlines, Inc.}\textsuperscript{195} that an airline could be held liable for failing to supervise the conduct of individuals at its baggage claim area. \textit{Stagl} involved a seventy-seven-year-old woman who alleged she was knocked down and injured when a suitcase fell off a baggage carousel at New York's Laguardia Airport.\textsuperscript{196} The airline filed a motion for summary judgment, arguing that it did not have a duty to control the crowd at the baggage carousel.\textsuperscript{197} The Second Circuit reversed the summary judgment that had been granted below and held that the airline owed a duty to take reasonable steps in maintaining the safety of its baggage claim area.\textsuperscript{198} The case was remanded to the trial court for a jury determination in accordance with that holding.

\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at *3.
\textsuperscript{194} Id. at *4.
\textsuperscript{195} 52 F.3d 463 (2d Cir. 1995).
\textsuperscript{196} Id. at 465.
\textsuperscript{197} Id. at 466.
\textsuperscript{198} Id. at 472.
In *O'Hern v. Delta Airlines, Inc.*, O'Hern, a passenger on a Delta Airlines flight, claimed that Delta negligently caused air pressurization changes on the subject flight which resulted in the rupture of his right eardrum and inner ear membrane. In support of his claim, O'Hern attempted to rely upon the doctrine of *res ipsa loquitur*. Delta argued that no crew member had reported any abnormalities in the flight, and no other passengers experienced ear pain or hearing loss. In addition, the aircraft maintenance logs and records show no abnormal pressure changes during the flight or for a period of four weeks before and after the alleged incident.

The district court judge granted summary judgment in favor of Delta, holding that O'Hern was attempting to rely almost exclusively on the facts of his injury to support the theory of sudden, abnormal change in air pressure. The fact of the injury alone is not sufficient evidence that the event occurred. With respect to the duty to warn, the court ruled that because there was no probative evidence that a pressure bump had occurred, Delta could not be held liable for failing to warn passengers of a hazardous condition that did not exist. The court also noted that the plaintiff had stated that he often had to chew gum, swallow, or pop his ears on earlier flights because of changes in cabin pressure. However, he had not informed Delta of what could be construed as a preexisting condition and did not mention to anyone on board that he was having trouble with his ears on the flight in question.

With respect to the doctrine of *res ipsa loquitur*, the court agreed with Delta that plaintiff could not invoke the doctrine without showing that an abnormal pressure change had actually occurred. The court held that *res ipsa loquitur* was meant to allow a plaintiff to circumstantially establish an inference of negligence, but was not meant to allow a plaintiff to circumstantially establish the occurrence of the injury-causing event.

In *Hassanein v. Avianca Airlines*, the court granted summary judgment to Avianca Airlines on the emotional distress and property damage claims of the plaintiff, whose home was within one hundred yards of the 1990 plane crash impact zone. Mrs. Hassanein had gone to the crash scene and assisted with rescue work by directing emergency vehicles and allowing police to use

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201 Id. at 1185.
her home as an emergency center until the following morn-
ing.202 Mrs. Hassanein filed suit against Avianca Airlines for se-
vere psychological injuries stemming from her "own fear
associated with her rescue attempt" and her "witnessing the
human tragedy and suffering at the crash site." 203 She also al-
leged that stairway damage as a result of the crash caused her to
t fall and injure herself three months after the crash. Mrs. Has-
sanein's husband filed claims for loss of consortium and loss of
his wife's services as a business assistant.204

The court ruled that Mrs. Hassanein's rescue efforts fell short
of the qualification needed for Avianca to owe her a duty of care
under the "danger invites rescue" doctrine.205 The court felt
that although "she may have been helpful that night, . . . her
actions appear to be more like those of a bystander, who clearly
[could] not recover under New York law." 206 Her behavior was
voluntary and, thus, not compensable under the doctrine of
"danger invites rescue." Because plaintiff was not in the "zone
of danger" and not physically injured, "no special duty could
attach to her efforts."207

The plaintiffs in Tissenbaum v. Aerovias Nacionales De Columb,
S.A., 208 seventy-six-year-old Samuel Tissenbaum and his seventy-
one-year-old wife Nettie, were at their home in Cove Neck, New
York, on the night of January 25, 1990, when Avianca Airlines
Flight 52 ran out of fuel and crashed in their backyard.209
Although fire fighters secured their house from possible fire
damage, rescue workers used the house all night long asking for
various supplies, water, and use of the bathroom. The Tis-
 senbaums' garage was used as a makeshift morgue. The plain-
tiffs had no electricity, telephone service, or running water,
could not leave their home for several days due to rescue vehi-
cles, and continued to have wreckage from the aircraft and sal-
vage equipment on their property for weeks. The Tissenbaums
received a settlement from their own property insurer in an
amount which they claimed did not cover all of their property

202 Id.
203 Id. at 1185-86.
204 Id. at 1186.
205 Id. at 1187-88.
206 Id. at 1188.
207 Id.
209 Id. at 437.
Plaintiffs brought suit against the airline seeking damages for intentional infliction of emotional distress, intentional trespass, and property damages.

On March 28, 1995, the U.S. District Court for the Eastern District of New York granted, in part, Avianca Airlines’s motion for summary judgment dismissing the claims for intentional infliction of emotional distress and intentional trespass. The motion was denied with regard to the property damages. In reaching its finding, Chief Judge Platt noted that a prerequisite for liability for emotional distress to a bystander of an accident is some type of relationship between the observers and the tortfeasor. After finding that there was no relationship other than the unfortunate coincidence of having the aircraft crash in their backyard, Judge Platt dismissed the claims for emotional distress. With regard to the intentional trespass claim, the court ruled that the necessary element of “intent to invade unlawfully” was missing inasmuch as the aircraft did not intend to either run out of gas or crash into the Tissenbaum’s yard.

The court let stand the Tissenbaum’s claims for property damage to the extent that those claims had not already been resolved between Avianca Airlines and the Tissenbaums’ insurer. Since there was a significant amount of property damage for which the insurer did not provide coverage, a release from the insurer could not also release those aspects of the claim.

In one of the two remaining aspects of the litigation stemming from the July 19, 1989, crash of United Airlines Flight 232, the state court granted summary judgment in Air Crash at Sioux City, Iowa to Titanium Metals Corporation (Timet). A similar granting of summary judgment had been issued by the federal court in 1991.

The damages-only trial in Shemezis v. McDonnell Douglas Corp. followed defendants’ agreement not to contest liability in exchange for an agreement by all plaintiffs not to seek puni-

\[210\] Id. at 438.
\[211\] Id. at 442.
\[212\] Id.
\[213\] Id. at 438-40.
\[214\] Id. at 440-41.
\[215\] Id. at 441-42.
\[216\] Id. at 442.
\[217\] No. 93-L-4325 (Ill. Cir. Ct. Apr. 5, 1995).
\[218\] No. 94-L-13660 (Ill. Cir. Ct. Feb. 9, 1995).
RECENT DEVELOPMENTS

The plaintiff in *Shemezis* was a forty-four-year-old man with a wife and two children, earning approximately $50,000 per year. The family had asked the jury to award $3.03 million for lost income and services, $18 million for loss of society, and unspecified millions for decedent's conscious pain and suffering. Plaintiffs claimed that Shemezis survived the crash, but died several minutes later from burn injuries. On the other hand, defendants argued that Shemezis was rendered unconscious by the crash impact, based upon the high carbon monoxide levels in his blood. Plaintiffs had requested that the jury award $935,000 for lost income, $2 million for loss of society, $25,000 for Shemezis's experiences during the 45 minutes preceding the crash, and zero damages for post-crash conscious pain and suffering. The jury awarded $935,000 for lost income and services, $2.75 million for loss of society, $500,000 for preimpact pain and suffering, and no damages for post-crash pain and suffering.

*Jackson v. Trans World Airlines, Inc.*

arose out of Trans World Airlines (TWA) Flight 843, which ran off the runway after an aborted takeoff at Kennedy Airport in New York in 1992. The cases of the Jackson family went to trial on the issue of damages. The family had been uninjured, and their damages claims were based mainly upon emotional distress during and after the accident. The wife was awarded $25,000 in noneconomic damages, and the husband was awarded $25,000 in noneconomic damages and $4,200 in economic damages consisting of lost wages. The Jacksons had two children, including a nine-month-old infant. Two of the children’s cases were settled. The trial court had granted a nonsuit as to the nine-month-old infant.

The state appellate court affirmed the nonsuit for nine-month-old Leyna Jackson. The court stated that although Leyna was “capable” of suffering pain and fear during the crash, there was no evidence she in fact suffered those emotions to the degree necessary to support an award of damages in this case. The court further stated that “a jury cannot infer that a nine-month-old infant will suffer emotional distress in the confusion and panic that follows an aborted landing.”

The plaintiffs had also claimed damages with respect to future air travel and changed lifestyle due to their “hastened” move from California to Vermont following the incident. The panel felt that plaintiffs’ allegations as to future limited travel opportu-

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nities with respect to the infant were too conjectural, speculative, and not reasonably certain to occur. As for the changed lifestyle, the court found no evidence of any detriment to the infant. Rather, the court found that the parents simply considered Vermont a better place to raise their children than California.

V. GENERAL AVIATION

A. PRODUCT LIABILITY CLAIMS

_Vadala v. Teledyne Industries, Inc._\(^2\)\(^2\) involved engine failure in a twenty-year-old Cessna Twin. Plaintiffs sued Cessna and Teledyne for negligence and breach of warranty. Teledyne won summary judgment on grounds that plaintiffs had failed to present evidence to support their theory of causation.\(^2\)\(^2\)\(^1\) The aircraft had experienced a loss of oil pressure in the right engine. Plaintiffs claimed the damper silicone on both engines had polymerized during the flight, causing a ball bearing to fail which, in turn, caused bolts to loosen on the right engine starter adapter, thus compromising the oil seal.\(^2\)\(^2\)\(^2\) Teledyne argued in response that the polymerization occurred during the fire and would not in any event lead to ball bearing failure.\(^2\)\(^2\)\(^3\) Vadala relied upon testimony of their expert, Roy Bourgault, who testified that the O-rings and rubber oil seal rings adjacent to the damper showed no signs of damage from the ground fire.\(^2\)\(^2\)\(^4\) He, therefore, inferred that polymerization must have occurred during flight, but he admitted he had no idea of what temperature would be required to alter the appearance of the O-rings and oil seal.\(^2\)\(^2\)\(^5\)

The First Circuit Court held that his admission was especially damning because it had to be clear to the plaintiffs that fairly persuasive testimony from the expert was needed to cope with the inference that the right engine damper had polymerized after the crash.\(^2\)\(^2\)\(^6\) There was evidence that there had been a severe post-crash fire and that the left engine damper was found to be polymerized to approximately the same extent as the right,

\(^2\)\(^2\) 44 F.3d 36 (1st Cir. 1995).
\(^2\)\(^1\) Id. at 37.
\(^2\)\(^2\) Id. at 38.
\(^2\)\(^3\) Id.
\(^2\)\(^4\) Id.
\(^2\)\(^5\) Id.
\(^2\)\(^6\) Id. at 39.
but there was no claim that it had been damaged in the flight. The appellate court also held that Teledyne Service Bulletins and test results presented by Bourgault did not indicate that heat-caused damper failure was a recurrent problem and did not support his opinion sufficiently to permit reasonable fact finders to conclude that the damper on the aircraft had, more probably than not, failed in flight.227

Farley v. Cessna Aircraft Co.,228 a product liability case, included an allegation of enhanced injury due to the lack of shoulder harnesses as well as product liability allegations of defective design of the fuel and stall warning systems. The aircraft involved was a Cessna 140 built in 1946. Immediately before trial, the court granted Cessna’s motion in limine to exclude evidence of prior accidents, finding that the plaintiff had not shown substantial similarity to the crash at issue. After a three-week trial, the jury returned a verdict for the defendant.

Frosty v. Textron, Inc.229 was a wrongful death case against Bell arising out of the crash of a Bell 206BII helicopter at Mount St. Helens. The helicopter was first sold over fifteen years prior to the crash, and the lawsuit was filed two to three years after the crash. Bell moved for summary judgment because Oregon had an eight-year statute of repose for product liability actions and because the case was filed more than two years after the accident. The plaintiff argued that the claim had been timely filed and that the court should apply both the statute of limitations and repose from the State of Washington, which had a three-year statute of limitations for product liability actions and a twelve-year statute of repose. Plaintiff submitted affidavits of a helicopter pilot and mechanic, stating that the useful life of a Bell 206B helicopter was in excess of fifteen years if the product was properly maintained and inspected.

The court held that the affidavits were inadmissible under Daubert v. Merrell Dow Pharmaceuticals230 because they provided no information of any engineering analysis or testing required by the FAR to determine the safe life of the helicopter or even the fact that the affiants were capable of performing such tests. The court also rejected plaintiff’s argument that the limitations period was governed by Washington law. Oregon’s Uniform

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227 Id.
229 No. 94-6296-TC (D. Or. May 23, 1995).
Conflict of Law-Limitations Act provided that if a claim was substantively based upon the law of one state, the limitation period of that state applied. Since the plaintiff had filed a claim under Oregon law, on behalf of an Oregon claimant seeking damages (such as punitive damages) not recoverable under Washington law, Oregon's substantive law and limitations period applied. Therefore, plaintiff's claims were time-barred.

In *Brooks v. Beech Aircraft Corp.*, the Supreme Court of New Mexico issued a decision on crashworthiness issues on June 28, 1995. This case arose from an August 2, 1988, crash of a 1968 model Beech Musketeer which occurred near Cimarron, New Mexico. Although the aircraft was equipped with seatbelts, it was neither designed nor equipped with shoulder harnesses. The FAA requirement for shoulder harnesses in general aviation aircraft such as the Musketeer was not adopted until 1977 and was applicable only to aircraft manufactured subsequent to July 18, 1978. At no time did the FAA ever require retrofitting of shoulder harnesses into aircraft that had been manufactured before that date.

The issue before the court was whether Beech's conduct was to be measured against a negligence standard so that the reasonableness of its design decisions could be considered by a jury or whether the lack of shoulder harnesses should be considered on a product liability standard, such that the only question was whether the design was defective even if the conduct creating the design was reasonable. The Supreme Court of New Mexico chose the latter and held that the plaintiffs may pursue design defect claims sounding in strict liability based upon the absence of the shoulder harnesses. After reversing the summary judgment that had been granted by the trial court, the Supreme Court returned the case for further proceedings.

B. GOVERNMENT CONTRACTOR DEFENSE

In *Tate v. Boeing Helicopters*, a case involving a death action arising from the training mission crash of an Army helicopter in July 1990, plaintiffs alleged that there were design flaws in the

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231 902 P.2d 54 (N.M. 1995).
232 Id. at 55.
233 Id.
234 Id. at 56.
235 Id. at 64.
236 Id.
237 55 F.3d 1150 (6th Cir. 1995).
hook and sling system, and that defendants had failed to pro-
vide adequate warnings concerning the system under Kentucky
law. The court granted summary judgment in favor of the
defendants based upon the government contractor defense.
The Sixth Circuit affirmed the summary judgment in favor of
the defendants with respect to plaintiffs' design defect claim.
However, it vacated summary judgment and remanded the case
with respect to plaintiffs' failure to warn claim. In doing so,
the court concluded that the defendants' successful use of the
government contractor defense on the design claim did “not by
itself establish a defense to the plaintiffs' failure to warn
claim.” This is because the third condition required by Boyle
v. United Technologies Corp. “does not encompass or state a fail-
ure to warn claim.” The court held that the defendant had to
establish each of the three Boyle factors with respect to a failure
to warn claim. That is, the defendant had to show the following:
(1) the government exercised its discretion and approved the
defendant's warnings; (2) the contractor provided the approved
warnings; and (3) the contractor warned the government about
all dangers of which it knew. Because that particular analysis
was not conducted by the district court concerning the failure to
warn claim, the case was remanded for further analysis.

Gray v. Lockheed Aeronautical Systems Co. was a wrongful
death case arising from the crash of a Navy S-3 Viking jet aircraft
seconds after takeoff from an aircraft carrier. Following a
bench trial, the court accepted plaintiff's allegation that design
defects had contributed to the accident and ruled that the de-
fendant had failed to establish the first and second prongs of
the government contractor defense: “(1) the United States ap-
proved reasonably precise specifications; [and] (2) the equip-

238 Id. at 1151.
239 Id. at 1151-52.
240 Id. at 1156.
241 Id. at 1158.
242 Id. at 1156.
243 487 U.S. 500 (1988) (wrongful death action against an independent gov-
ernment contractor in which the United States Supreme Court concluded that
suppliers of military equipment must be protected from state tort liability for
design defects under certain circumstances).
244 Tate, 55 F.3d at 1156.
245 Id. at 1153.
247 Id. at 1561-62.
ment conformed to those specifications." Although there was a close working relationship between Lockheed and the Navy during the design and creation of the S-3, the defendant failed to establish government approval of the particular defective feature. In addition, the court held that even assuming the Navy had approved reasonably precise specifications for the defective feature, Lockheed did not conform to those specifications. Therefore, the Boyle second element was not established, and judgment was entered in favor of the plaintiffs.

Pack v. AC & S, Inc. involved a number of asbestos cases brought by workers alleging asbestos exposure had caused various diseases. Defendant Westinghouse wished to assert the government contractor defense to these state law product liability claims because the exposure allegedly occurred while workers were manufacturing marine turbines for the U.S. Navy. The issue presented to the court was whether the raising of the government contractor defense was sufficient to create federal question jurisdiction such that a case filed in state court could be removed to federal court. The U.S. District Court for the District of Maryland sustained defendant's position and held that "Westinghouse has raised a colorable claim to such a defense, the validity of which should be judged by federal standards in a federal district court."

Miller v. United Technologies Corp. arose out of the crash of an F-16B jet fighter aircraft supplied to the Egyptian Government by the United States and flown by two Egyptian airforce pilots. The issue was whether the government contractor defense could apply if the aircraft in question was purchased by the U.S. Government for resale to Egypt. The F-16B crashed during a training mission, killing both pilots. An investigation showed that the main fuel pump was damaged by cavitation erosion, causing the engine to fail.

Plaintiffs commenced suit against United Technologies Corp., Chandler-Evans, and General Dynamics, alleging improper de-

\[\text{Id. at 1566.}\]
\[\text{Id. at 1567.}\]
\[\text{857 F. Supp. 26 (D. Md. 1994).}\]
\[\text{Id. at 27.}\]
\[\text{Id. at 28.}\]
\[\text{660 A.2d 810 (Conn. 1995).}\]
\[\text{Id. at 814-15.}\]
\[\text{Id. at 815.}\]
sign, manufacture, and assembly of the fuel pump, as well as failure to warn of the dangers of the pump. Defendants claimed that the pilots' deaths were caused by their failure to properly execute a flameout landing and by their failure to initiate the ejection sequence in a timely manner. The contractors also contended that the government contractor defense shielded them from liability. The trial court granted the contractors' summary judgment motion based upon the government contractor defense set forth in Boyle. Plaintiffs appealed to the state appellate court, and the case was transferred to the Connecticut Supreme Court. Plaintiffs argued that the trial court had improperly applied the government contractor defense because the aircraft was purchased by the U.S. Government for resale to the Egyptian Government. Plaintiffs also claimed that the contractors did not meet the Boyle requirements and that the court incorrectly held that the government contractor defense precluded plaintiffs' failure to warn claim.

The Connecticut Supreme Court held that the Boyle defense applies regardless of what the government intends to do with the military equipment. The court also stated that "judicial inquiry into the United States government's intended use or disposition of military equipment would be an improper intrusion into the discretion of the executive and legislative branches of the federal government." In addition, "if the defense applied only to contracts for equipment designated for use directly and exclusively by the United States government, contractors [could] . . . refuse to manufacture products according to the government's specifications." However, the court did find that there were issues of material fact requiring a remand to the trial court for further deliberation. Furthermore, contrary to the Sixth Circuit's holding in Tate, the Connecticut Supreme Court held that the government contractor defense does preclude failure to warn claims as a matter of law.

Anzalone v. Westech Gear Corp. involved a civilian employee of the United States Navy who was injured while aboard a Navy

257 Id.
258 Id. at 816.
259 Id. at 818.
260 Id.
261 Id. at 820.
262 Id. at 821.
263 Id. at 837.
264 661 A.2d 796 (N.J. 1995).
ship. The plaintiff was using a component of a fuel replenishment system which was allegedly defective due to a lack of a safety device. The mid-level appellate court in New Jersey reversed the trial court's granting of a government contractor motion for summary judgment, holding that the government specifications were silent with respect to safety devices, thus failing to fulfill one of the requirements of this defense under the Boyle case.

In Allison v. Merck & Co., the Nevada state court was faced with an opportunity to expand the government contractor defense to a nonmilitary situation. Although the Seventh Circuit had done so in Boruski v. United States, the court in this case declined to do so. The product was a vaccine which allegedly caused a child to become blind, deaf, and mentally retarded. The Nevada Supreme Court fell short of totally rejecting the government contractor defense to a nonmilitary situation, but nevertheless found that "[t]his defense is very ill-defined" and was inapplicable to a case where the government failed to provide "precise designs and specifications."

In Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., a civilian logging operation purchased a used military helicopter which was subsequently involved in a crash. Plaintiffs alleged that the crash was caused by the failure of a pinion gear which was critical to control the tail rotor. Bell had previously provided warnings to purchasers of the civilian model of this helicopter, but did not forward those warnings to purchasers of the models that were originally manufactured for the military. The trial court had granted Bell's motion under the government contractor defense, but was reversed by the Washington Supreme Court.

C. Economic Loss Doctrine

American Eagle Insurance Co. v. United Technologies Corp. arose out of the 1987 crash of a Cessna Caravan. There were no per-

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265 Id. at 797.
266 Id. at 805.
267 878 P.2d 948 (Nev. 1994).
268 803 F.2d 1421 (7th Cir. 1986).
269 Id. at 951.
270 Id. at 959-60.
271 884 P.2d 920 (Wash. 1994).
272 Id. at 934.
273 48 F.3d 142 (5th Cir.), reh'g granted in part, 51 F.3d 468 (5th Cir. 1995).
sonal injuries; however, Martinaire, Inc. (the plane’s owner) and American Eagle Insurance Company were legally responsible for damage to the aircraft and ground property. Pratt & Whitney-Canada, Ltd. (P&WC) manufactured and sold the aircraft’s PT-6 engine to Cessna in 1985. Martinaire and American Eagle had filed suit in federal court, and all claims were dismissed. 274

The Fifth Circuit affirmed the trial court’s holding that Texas law does not permit recovery under a negligence theory for economic loss resulting from damage to a defective product. 275 In addition, “strict tort liability [is] not . . . applied when economic loss alone [is] asserted.” 276 The court also found that there was no evidence supporting the appellate’s argument that the parties bargained separately for individual components of the aircraft. Therefore, the aircraft hull did “not qualify as ‘other property’ damaged by the defective engine component.” 277 The court held that the damage to ground property, since it was suffered by a third party, did not qualify Martinaire or American Eagle for strict liability recovery. 278 This was based upon the 1978 Texas Supreme Court ruling in Signal Oil & Gas Co. v. Universal Oil Products 279: “One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . .” 280

The court initially reversed summary judgment, however, for P&WC on the breach of implied warranty claims, holding that summary judgment was inappropriate because the trial court did not evaluate the effectiveness of defendants’ written disclaimer of implied warranties. 281 However, upon rehearing, the court concluded that there was a sufficient basis for the trial to rule on this issue and that the disclaimer was “conspicuous” so as to fulfill the requirement under the Texas Deceptive Trade Practices Act. 282 The rehearing, combined with the original ruling, resulted in a full affirmance of the trial court. 283

274 Id. at 144.
275 Id.
276 Id.
277 Id. at 145.
278 Id.
279 572 S.W.2d 320 (Tex. 1978).
280 Id. at 325 (emphasis in original).
281 Id. at 147.
282 American Eagle Ins. Co., 51 F.3d at 469.
283 Id.
Trans States Airlines v. Pratt & Whitney Canada, Inc., a case arising under Illinois law, was brought to recover personal injury, property damage, loss of revenue, and repair costs stemming from the failure of a Pratt & Whitney engine which led to an inflight fire and emergency landing. In applying the economic loss doctrine as enunciated in Illinois by the case of Moorman Manufacturing Co. v. National Tank Co., the court drew a distinction between sudden malfunctions as opposed to those which occur from a gradual deterioration. The Moorman case permits broad tort law recovery for the former, but not the latter. In this case, the court held that there was sufficient evidence for the jury to consider whether the occurrence was "sudden" or "gradual."

In Bocre Leasing Corp. v. General Motors Corp., the New York Court of Appeals barred tort recovery of economic damages caused by a defective product purchased in a commercial transaction. This was a helicopter crash case against Allison Gas Turbine Division of General Motors Corporation. The majority of the New York Court of Appeals held that "tort recovery in strict products liability and negligence against a manufacturer should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract." The question had been certified to the New York Court by the Second Circuit U.S. Court of Appeals. The Bell helicopter in question was manufactured in 1972 with an Allison engine and had been sold to a used aircraft broker in 1986. Bocre Leasing then bought it for $214,000 "as is." As a result of a crash in 1989, there was minor damage to the helicopter. However, further damage resulted when the aircraft was being transported by truck to Bocre's hangar. Bocre received $371,000 in insurance payments and sued GM for $450,000 in lost profits and repair costs. The majority of the New York Court of Appeals noted that Bocre could have protected itself by negotiating a seller's warranty with the used aircraft broker under the Uniform Commercial Code. Since Bocre

285 435 N.E.2d 443 (Ill. 1982).
286 Trans States Airlines, 875 F. Supp. at 525.
287 Id.
289 Id. at 1199.
290 Id.
291 Id. at 1197.
purchased the helicopter in “as is” condition, plaintiff assumed
the risk of loss.  

In Palau International Traders, Inc. v. Narcam Aircraft, Inc., plaintiff Palau International Traders purchased an aircraft from defendant International Airlines Holdings Corp., which it intended to use for hauling cargo for its own commercial purposes. Six months after Palau took delivery, corrosion cracks were discovered in the landing gear, and Palau sued the maintenance company that had certified the aircraft as airworthy prior to purchase. Palau sought damages for the repair costs, loss of use, and consequential damages. On March 15, 1995, the Third District Florida Court of Appeals ruled that state law bars tort recovery when a product damages itself and causes economic loss without personal injury or damage to property other than the product itself. “[A]lthough the buyer’s expectations of the airplane were not met, any damages could have been remedied if the buyer had purchased insurance, paid for a warranty, or directly contracted with the airplane mechanic.”

The court also stated that “[t]o expand negligence laws under the facts of this case would result in providing the buyer with a remedy against Narcam without consideration, that is of longer duration and greater financial impact than the remedy the buyer contracted for with the seller in the first place.” This “would be contrary to the well established policy of limiting recovery in contract actions to damages which were within the contemplation of the parties.”

Checkers Drive-In Restaurants, Inc. v. Ryder Airline Services, Inc. is in accord with Palau. Plaintiff had purchased a used Cessna Citation which it claimed had been negligently serviced in 1988 by the defendants. The plaintiff took ownership of the aircraft in 1992 and claimed that substantial overhaul work had to be performed in 1994 due to the negligent maintenance of six years earlier. The plaintiff tried to avoid the economic loss doctrine, which had been enunciated in the Pennsylvania case of

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292 Id.
293 653 So. 2d 412 (Fla. Ct. App. 1995).
294 Id. at 413.
295 Id.
296 Id. at 418.
297 Id. at 416.
298 Id.
299 Id.
**D. AGENCY AND VICARIOUS LIABILITY**

_Huddleston v. Union Rural Electric Ass'n_302 was filed by the surviving minor children of a victim of a 1987 crash of a single-engine plane in the mountains near Nucla, Colorado.303 The plaintiffs attempted to establish the vicarious liability of the Union Rural Electric Association for the negligence of the pilot even though the pilot was an independent contractor and not an employee of the Association. Plaintiffs argued that the general rule of nonliability for an employer of an independent contractor was inapplicable in a situation involving an "inherently dangerous" activity and that this determination should be left to the jury.304 The original jury verdict in 1991 found in favor of the plaintiffs on this issue. The verdict was reversed by the Colorado Court of Appeals, but again reversed and remanded by the Colorado Supreme Court.305 During the retrial, the court, once again, permitted the jury to determine whether the activity was "inherently dangerous" and thus circumvent the usual rule of nonliability for an independent contractor, and, once again, the jury found in favor of the plaintiffs.306 On April 6, 1995, the Colorado Court of Appeals affirmed the decision of the trial court to permit the jury to rule on this issue.307

_Estate of Dean v. Air Exec, Inc._308 dealt with the issue of whether an aircraft owner was vicariously liable to a co-employee of the pilot whose negligence caused the crash.309 The subject crash of a Cessna 172 took place on August 6, 1991, when the pilot and his co-employee were directed by their common employer to fly to another city to pick up another employee and continue on to

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303 Id. at 866.
304 Id.
305 Id.
306 Id.
307 Id. at 868.
308 534 N.W.2d 103 (Iowa 1995).
309 Id. at 103-04.
Kansas City. The plane crashed on approach, killing both occupants. The co-employee's estate filed suit, alleging that the pilot's negligence caused the crash and that their common employer, Air Exec, was liable for the negligence of the lessee. Air Exec filed for summary judgment, arguing that absent gross negligence, the co-employee immunity granted to the lessee under the state's worker's compensation laws should also cover parties vicariously liable for the co-employee's negligence. The trial court denied Air Exec's summary judgment motion.

On appeal, the Iowa Supreme Court held that the worker's compensation remedy is only exclusive as to claims against the injured party's employer or co-employees who are not grossly negligent. The court held that the Act does not provide immunity to third parties. In addition, because the immunity provided to employers and co-employees is based upon a quid pro quo not applicable to parties in the position of Air Exec, there was no basis for implying a similar immunity on their behalf.

The court also held that the aircraft owner's liability statute applied in the case, and the question to be determined was whether there was any indication that the broadly stated liability which that statute imposes turns on the negligence of the operator or the liability of the operator. The court concluded that it turned on the negligence of the operator. In making its decision, the Iowa Supreme Court stated that the 1944 California Supreme Court ruling in Baugh v. Rogers was on point. The Baugh decision had held that the special defense of the negligent operator, based on the business relationship and the status of the operator and the plaintiff, as well as the provisions of the worker's compensation law, is not available to the owner. It is the negligence of the operator, and not his liability or status, which is imputed to the owner.

\begin{itemize}
\item Id. at 104.
\item Id.
\item Id. at 106.
\item Id. at 105-06.
\item Id.
\item Id.
\item Id.
\item Id.
\item 148 P.2d 633 (Cal. 1944).
\item Estate of Dean, 534 N.W.2d at 105.
\item Id. (citing Baugh, 148 P.2d at 640-41 (citations omitted)).
\item Id.
\end{itemize}
E. WAIVER AND RELEASE FROM LIABILITY

In *Johnson v. Paraplane Corp.*, the owner of the aircraft, seeking damages for injuries, commenced a negligent design defect claim against Paraplane Corporation, the manufacturers of an Ultralight aircraft in which he was injured. Prior to the flight, he had signed a waiver and release, as well as viewed a video tape which explained the waiver in detail. Paraplane had filed a summary judgment motion, arguing that the circuit court lacked jurisdiction because of a forum selection clause in the waiver, which specified that any lawsuit be filed in New Jersey state court. On appeal, the South Carolina Court of Appeals held that the liability release signed by the plaintiff barred him from pursuing the design defect claims alleged. The appeals court held that this was true even though the waiver did not contain a phrase specifically for “negligent design.” The waiver was, however, broad enough to release Paraplane from all liability, since it stated that “[t]he waiver cover[ed] hidden, latent, or obvious defects in the equipment.” The court found that negligent design defects are one type of defect, whether they are hidden, latent, or obvious. Therefore, the court held that “defects arising from the negligent design of the equipment clearly come within the exclusion, as would design defects based on strict liability or warranty theories.”

F. OTHER

In *Joyce v. Boeing Helicopter Co.*, Boeing Helicopter Company agreed to pay a total of $2 million to settle lawsuits filed in the 1992 crash of an experimental V-22 Osprey tilt-rotor aircraft. The lawsuits had been filed after U.S. Marine Master Gunnery Sergeant Gary Leader and Gunnery Sergeant Shawn Joyce died as a result of the crash. The aircraft had crashed as it was converting from wing to helicopter mode flight entering the traffic pattern at Quantico Marine Corps Airstrip Station. Plaintiffs

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322 Id. at 399.
323 Id.
324 Id.
325 Id. at 402.
326 Id.
327 Id.
328 Id.
329 Id.
contended in their complaint that the crash was caused by the negligence of Boeing, which was responsible for the maintenance of the aircraft, in failing to properly install a seal in the right nacelle. Plaintiffs also contended that the Boeing pilot was grossly negligent by failing to land immediately upon illumination of caution and warning lights prior to the scheduled stop at Charlotte, North Carolina. Plaintiffs further allege that if the pilot had made the interim stop at Charlotte as scheduled, the leak in the nacelle would have been discovered.

VI. AIRPORTS AND FIXED BASE OPERATORS

In Norris v. Cessna Aircraft Co.,331 the plaintiffs were the representatives of those killed when a Cessna 177 Cardinal crashed in September 1992. The corporate owner of the airport as well as the airport manager were named as defendants on a theory of vicarious liability, with the plaintiffs claiming that they could be held liable for the actions of the pilot who rented the aircraft from them. It was alleged that the pilot misfueled the aircraft, parked it on a slope, allowing fuel to leak out, and failed to perform an adequate preflight inspection. On April 26, 1995, summary judgment was granted in favor of the airport owner and manager. The court held that the manager of the airfield had no authority with respect to the operation of the plane flown by the pilot and that the airport could not be held liable for the misconduct of the independent contractor pilot.

The issue in Bostrom v. County of San Bernardino332 was whether the County could be held liable for the actions of an employee of the airport lessee where the county owned the airport. Like Norris, these allegations concerned a misfueling, but this time by the lessee's employee. The Fourth District of the California Court of Appeals ruled that the County of San Bernardino could not be liable for failing to enforce FAA fueling recommendations, for negligent selection and hiring of the lessee, or for failing to properly supervise the lineman who performed the fueling.333

333 Id. at 676.
VII. INSURANCE COVERAGE

In *U.S. Aviation Underwriters, Inc. v. Fitchburg-Leominster Flying Club, Inc.*, the United States Supreme Court declined to review a First Circuit ruling that a woman injured when she walked into a spinning propeller after disembarking from an aircraft was a "passenger" under the terms of an insurance policy issued by United States Aviation Underwriters (USAU). The plaintiff had been struck by the propeller of a single engine Cessna after she got off the plane at Toronto International Airport. The insurance coverage on the aircraft was for one million dollars with a per-passenger limit of one hundred thousand dollars. USAU commenced a declaratory judgment action to determine whether Deborah Crocker's status as a passenger continued to the time of her injury. The district court had held that passenger status continues until the person reaches a zone of safety, particularly where the person is still engaged in an activity associated with the flight. In this case, Deborah Crocker was on her way to obtain aircraft parking information. The First Circuit agreed with the district court judge that passenger status continues until a person reaches a "zone of safety."

*Fireman's Fund Insurance Co. v. Thien,* was a coverage dispute case involving a fatal 1989 plane crash. The aircraft had been owned by Mid-Planis Corp. and resulted in the death of the pilot and an employee, Charles Benedict. Benedict's family filed suit in state court against Mid-Planis, its director of operations (Michael Thien), and Richard Lund (defendant ad litem). Fireman's Fund, who was Mid-Planis's insurer, denied coverage to Thien and Lund because Benedict was a Mid-Planis employee falling within an exclusionary clause of the policy. Fireman's Fund then filed a declaratory judgment action arguing that the exclusionary clause applied to liability coverage of Thien and Lund for Benedict's death. Under the terms of the exclusion in the policy, Thien and Lund were not covered if Benedict was a Mid-Planis employee at the time of the crash acting within the scope of his employment.

The district court granted Fireman's Fund summary judgment. However, the Eighth Circuit reversed, holding that an issue of material fact existed as to whether Benedict was acting

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534 No. 94-1741 (U.S. May 22, 1995).
535 63 F.3d 754 (8th Cir. 1995).
536 Id. at 756.
537 Id.
within the scope of his employment at the time of the crash. A district court jury found for the insurance company and the Benedicts again appealed. The Eighth Circuit affirmed the jury award, rejecting the Benedicts' argument that payroll records offered into evidence to prove that Benedict was a Mid-Planis employee when the plane crashed were not admissible under the business records exception to the hearsay rule.\(^\text{388}\) The Benedicts also argued that the trial judge had erred in excluding FAA reports that Thien did not accurately perform his duties as pilot log bookkeeper and had falsified certain entries. The Benedicts argued that this evidence cast doubt on the veracity of the payroll records.\(^\text{389}\)

However, the Eighth Circuit held that the FAA reports were of only marginal probative value and their attenuated relevance was not sufficient to outweigh unfair prejudice, confusion, and the waste of time that would result from the admission of those documents.\(^\text{390}\) The Eighth Circuit also held that admission of certain evidence to show the untrustworthiness of Mid-Planis's recordkeeping would violate Federal Rule of Evidence 404(b).\(^\text{391}\) Furthermore, although allegations that Thien falsified logs may be probative of his truthfulness, the decision to admit the evidence on cross-exam was within the trial court's discretion and subject to the limitations of Federal Rule of Evidence 403.\(^\text{392}\)

North American Specialty Insurance Co. v. Litco Brokers, Inc.\(^\text{393}\) arose out of the November 1992 crash of a Cessna 177B in West Virginia which resulted in the death of the pilot and his two passengers. The pilot possessed a student pilot certificate, but he had never achieved a private pilot's certificate. The estate of the deceased passenger filed a wrongful death action against the pilot's estate alleging that he was negligent in the operation of the aircraft. The pilot's estate tendered the defense of the case to its insurer, North American Specialty Insurance Company. North American filed a declaratory judgment action alleging that the policy did not provide coverage because it specifically required at least a private pilot's certificate for the carrying of passengers. The estates of the pilot and the deceased passen-

\(^{388}\) Id. at 757-58.
\(^{389}\) Id. at 758-59.
\(^{390}\) Id. at 759.
\(^{391}\) Id. at 760.
\(^{392}\) Id.
gers argued that the policy failed to define "private pilot certificate" and "student pilot certificate," thus creating an ambiguity in the policy. Therefore, they argued, the pilot's expectation of coverage for the occurrence was reasonable. The court granted North American's motion for summary judgment, holding that the policy language was not ambiguous.

In North American Specialty Insurance Co. v. Myers, John Myers, who was the named insured under an aviation liability policy issued by North American Specialty Insurance Company (NAS), was killed in the crash of a Piper PA-24-180 on December 19, 1992, along with flight instructor Arthur Huffman. NAS filed a declaratory judgment action arguing that it had no duty to defend or indemnify the flight instructor's estate against the wrongful death claim filed by Myers's estate. The Eastern District of Michigan granted partial summary judgment to NAS, holding that Huffman was working as an independent flight instructor at the time of the crash and that the flight instructors were clearly excluded from the class of insureds under the policy. The court also noted that the policy excluded coverage for bodily injury to any named insured, including the pilot. Another issue dealt with by the court was the fact that physical delivery of the policy to the insured occurred after the accident. The court held that the "delay" in issuing the policy did not preclude its application.

Insurance Co. of North America v. American Eagle Insurance Co., arose out of a declaratory judgment action concerning a 1991 crash of a Piper PA-24-250. Owner William Jaeck amended his American Eagle Insurance Policy to cover a three-day period in which his wife, Nancy, was onboard the aircraft for a "flying companion—pinch hitter course" at Portage County Airport. The course had been designed to train nonpilots in the handling of aircraft during emergencies. Jaeck's wife was killed as well as the pilot. Jaeck filed a proof of claim with American Eagle, who paid $29,734 for loss of the aircraft, although it found that the pilot had no flying experience in that particular Piper model. Jaeck then filed suit in Ohio state court, seeking $1.2 million in damages for his wife's emotional distress, her death, and his loss of consortium. Jaeck sued the 99's (an international organization of women pilots), the Lake Erie 99's, the organizer of the pinch-hitter course, the FBO at Portage County

345 No. 94-P-0115 (Ohio Ct. App. 1995).
Airport, and the executrix of the pilot’s estate. Insurance Co. of North American (INA) was the insurance carrier for the 99’s and the Lake Erie 99’s, which acted as primary insurer in defending the complaint. INA attempted to tender this defense to American Eagle based upon the company’s certificate of insurance and payment to Jaeck for physical damage to the aircraft. However, American Eagle did not respond to the defense tender, and INA continued to provide a defense. Subsequently, INA filed a declaratory judgment action against American Eagle, claiming that it owed a primary and underlying duty to defend and indemnify defendants in the wrongful death action. In response, American Eagle argued that INA was the insurer for any loss over the one million dollars in underlying coverage provided by American Eagle. The two actions were consolidated, and INA was granted summary judgment. A jury awarded Jaeck $612,434.

On appeal, the Ohio Court of Appeals ruled that American Eagle had no duty to defend and, therefore, reversed summary judgment for INA. The court held that the policy did not provide coverage for any person or organization that provides aviation instruction, pilot, or flight services where an occurrence arises out of those activities. In addition, the appellate court disagreed with the trial court’s ruling that American Eagle’s payment on the property loss claim to Jaeck constituted a waiver of its right to deny coverage under the policy. The court held that a court cannot create a new contract for the parties to extend coverage beyond the scope the insurer intended to cover or for which the insurer did not charge a premium.

VIII. U.S. GOVERNMENT TORT LIABILITY AND DEFENSES

A. DISCRETIONARY FUNCTION EXCEPTION

Black Hills Aviation, Inc. v. United States\(^{346}\) arose from the crash of a civilian Lockheed P2V Neptune firefighting aircraft on the White Sands Missile Range in White Sands, New Mexico.\(^{347}\) The plaintiffs claimed that the United States shot down this aircraft, failed to properly investigate the accident, and tortiously interfered with their investigation by denying them access to the crash site and by not preserving the wreckage.\(^{348}\) The United

\(^{346}\) 34 F.3d 968 (10th Cir. 1994).
\(^{347}\) Id. at 969.
\(^{348}\) Id. at 970.
States Court of Appeals for the Tenth Circuit affirmed the decision of the trial court that the various actions taken by the United States Army concerning the investigation were policy judgments protected by the discretionary function exception and that there was no evidence the Army was responsible for the removal of airplane parts or for the crash.\textsuperscript{449}

\textit{AIG Aviation Insurance Services, Inc. v. United States}\textsuperscript{350} arose when a Bell 206 helicopter struck an unmarked power line approximately thirty feet above the ground and then crashed while hovering over a taxiway at the Brigham City Airport.\textsuperscript{351} The operator of the helicopter and its insurer filed suit against the United States under the Federal Tort Claims Act (FTCA) for loss of use and the resulting hull damage to the helicopter, alleging that the FAA was negligent in failing to report the power lines as an obstacle after airport inspections and that airport owner Brigham City was negligent for allowing the obstruction to exist.\textsuperscript{352}

"[P]laintiffs argued that the FAA violated FAA Airport Safety Data Program Order 5010.4 . . . [which] instructs FAA inspectors . . . to [l]ook for and report all items from the airport that could be hazardous, such as unmarked obstructions . . . and other safety hazards on or near the runway."\textsuperscript{353}

The court granted motions to dismiss both claims based upon the discretionary function exception to the FTCA. The district court held that the United States was entitled to dismissal because the decisions of the FAA inspectors were judgment calls based upon the discretion vested in the agency by the relevant regulatory schemes.\textsuperscript{354} The court cited \textit{United States v. Varig Airlines},\textsuperscript{355} for the proposition that "[t]he FAA has a statutory duty to promote safety in air transportation, not to insure it."\textsuperscript{356}

With respect to Brigham City's motion for summary judgment, like the FTCA, the Utah Governmental Immunity Act has a discretionary function exception. The court held that the City's operation of the airport fell within the discretionary function section of the Act.\textsuperscript{357}

\textsuperscript{449} Id. at 975-78.
\textsuperscript{350} 885 F. Supp. 1496 (D. Utah 1995).
\textsuperscript{351} Id. at 1497.
\textsuperscript{352} Id. at 1497-98.
\textsuperscript{353} Id. at 1498-99 (citations omitted).
\textsuperscript{354} Id. at 1500.
\textsuperscript{355} 467 U.S. 797 (1984).
\textsuperscript{356} AIG Aviation, 885 F. Supp. at 1502 n.5 (citing Varig Airlines, 467 U.S. at 821).
\textsuperscript{357} Id. at 1502-04.
B. AIR TRAFFIC CONTROL NEGLIGENCE

_Beech Aircraft Corp. v. United States_\(^{358}\) involved consolidated cases arising from the crash of a twin engine Beech Baron aircraft into a crowded shopping mall in Concorde, California, on December 23, 1985.\(^{359}\) The aircraft's pilot attempted a nighttime missed approach from nearby Concorde Airport. During the approach, the pilot apparently became disoriented and lost control of the aircraft. There were seven deaths and seventy ground injury victims, including serious burn injury cases. Damages in the cases were estimated to be in the range of thirty-five to forty million dollars.

The trial court held that there was no negligence on the part of air traffic controllers at the airport in Concorde contributing to the crash.\(^{360}\) The Ninth Circuit affirmed the judgment entered in favor of the defendant by the district court.\(^{361}\) In doing so, the Ninth Circuit found that there was ample evidence to support the district court's finding that the controller's brief glimpse of the aircraft did not show it off the normal flight path.\(^{362}\) The evidence established that after the controller saw the aircraft and communicated to the pilot the correct procedure for a missed approach, their duty was fulfilled. They had no reason to expect that the pilot would execute an improper approach. The Ninth Circuit held that the plaintiffs had established neither breach of duty nor proximate causation. Plaintiffs "cannot recover if there is a mere possibility that defendant's actions caused the wrong."\(^{363}\)

_Thurston v. United States_\(^{364}\) arose out of a 1993 accident in which a single engine Stinson aircraft collided with a mountainous terrain near Salt Lake City, Utah. The pilot and sole occupant of the aircraft was killed, and his widow and three children sued for wrongful death under the FTCA, alleging that the air traffic controllers at the Salt Lake City Airport contributed to the cause of the accident.

The pilot was licensed and qualified for flight only in visual meteorological conditions.\(^{365}\) He encountered inclement

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\(^{358}\) 51 F.3d 834 (9th Cir. 1995).

\(^{359}\) _Id._ at 836.

\(^{360}\) _Id._ at 838.

\(^{361}\) _Id._ at 842.

\(^{362}\) _Id._ at 839.

\(^{363}\) _Id._ at 838.


\(^{365}\) _Id._ at 1102, 1106.
weather during a mid-day flight, but did not declare an emergency. Rather, he radioed controllers with a series of requests for "vectors," repeatedly stating that he could not see objects on the ground. By the time the controllers realized that the flight was in need of emergency assistance, the plane was less than thirty seconds from ground impact. The controllers had radioed a suggested heading. However, the pilot did not commence a turn promptly, and the accident resulted.

At the end of the liability case, after the court heard testimony from thirteen witnesses and visited the Salt Lake City radar facility, the court ruled that the air traffic controllers had acted reasonably. The court noted that the controllers are not omniscient and must rely upon the pilot's reports in order to know what is going on in the airplane. The pilot's request for vectors and his response to air traffic controller questions did not indicate an emergency situation. The pilot failed to communicate his emergency situation until the last moment, and there was no basis for the air traffic controllers to realize that he was in peril and in need of additional services. Therefore, the court found no negligence by the air traffic controllers since they had given the pilot reasonable guidance based upon their understanding of his situation.

In Paquette v. United States, after a five-day trial, the district court rendered a bench decision in favor of the United States on a case involving the crash of a Cessna 182. The aircraft had encountered severe "mountain wave" turbulence and crashed in the Sierra Nevada mountains. The plaintiffs claimed that the air traffic controllers failed to properly brief the pilot concerning the possibility of the turbulence and negligently vectored the pilot so as to become fatally caught in this atmospheric problem. The court held that there was no negligence proven on the part of the FAA personnel and that the sole proximate cause of the accident was the pilot's negligence.

In Giraldo v. United States, U.S. District Judge Thomas C. Platt ordered the United States to pay $1.2 million in damages

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566 Id. at 1103, 1105.
567 Id. at 1103.
568 Id. at 1105.
569 Id. at 1110.
570 Id.
571 Id.
to plaintiff Mauricio Giraldo who had been injured in the crash of Avianca Airlines at Cove Neck, New York. Giraldo had been trapped in the wreckage for several minutes and was not taken to a hospital until nearly four hours later. He suffered significant injuries that required eight operations and also suffered from post-traumatic stress disorder. Giraldo's suit against Avianca had been dismissed for lack of jurisdiction under the Warsaw Convention. This left the United States as the sole defendant with respect to a Federal Tort Claims Act suit in connection with plaintiff's claim that the crash was due to the negligence of air traffic controllers.

The government did not contest liability. In fact, a nonjury damages trial commenced in February 1995. With respect to damages, the United States had argued that the plaintiff was a Columbian domiciliary at the time of the crash and that, therefore, the court should consider Columbian monetary factors in calculating the damages.

Judge Platt, however, found that the plaintiff was a New York domiciliary when the plane went down and that he remained domiciled in that state. "The physical presence requirement for the purpose of domicile is met as his injuries were sustained while he was physically present in New York. This requirement is met regardless of the fact that Mr. Giraldo's injuries occurred at the same time as his uncomfortable arrival in New York." Accordingly, Judge Platt based plaintiff's damages awards upon the U.S. Life Expectancy Tables and Economic Conditions, awarding damages of $297,960 for future medical care, $417,000 for diminution of future earning capacity, $1.2 million for past pain and suffering, and $200,000 in future pain and suffering.

C. OTHER GOVERNMENT LIABILITY

In Miller v. United States, the plaintiff, who was a midshipman at the U.S. Naval Academy, was injured during a training session. Furthermore, he alleged that his injuries were exacerbated by improper medical care received at a government medical center who attempted to treat his injuries. The federal government raised the Feres doctrine, which "is a judicially created exception to the broad waiver of immunity established

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574 42 F.3d 297 (5th Cir. 1995).
575 Id. at 299.
576 Id. at 300.
by the FTCA. The Fifth Circuit held that the plaintiff was to be considered a member of the Armed Forces, and, therefore, his initial injury was incident to his service as a midshipman regardless of whether he was on active duty at the time. Furthermore, the medical treatment he received thereafter flowed directly from the training accident, and, therefore, assuming there was any medical malpractice committed, it was equally barred.

*Borden v. Veterans Administration* was brought by a member of the United States military who brought a FTCA claim against the United States, alleging medical malpractice that occurred when he was treated for an injury sustained on active duty. The plaintiff was injured playing basketball “off duty.” The medical treatment was provided at a military hospital, but included treatment from both military and civilian medical personnel. The United States argued that plaintiff’s action was barred based upon the *Feres* doctrine, which precludes personal injury tort liability of the United States to military personnel. In the case at bar, the First Circuit Court of Appeals agreed, stating that the doctrine was applicable regardless of the medical condition treated or the fact that some of the treating medical personnel were civilian employees.

In *County Commission of Morgan County, West Virginia v. United States*, the Morgan County West Virginia Commission sought to recover expenses of approximately ten thousand dollars, which it incurred when an Air National Guard C130 struck power lines and crashed, releasing jet fuel at the crash site. Morgan County asserted causes of action under the FTCA, the Air National Guard Act, CERCLA, and contract principles. The court granted the motions to dismiss of both the state and federal defendants, holding that the state was immune under the Eleventh Amendment and that the federal claim was not compensable as “money damages for injury or loss of property” under the FTCA.

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377 Id. (recognizing the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950)).
378 Id. at 304-05.
379 Id. at 307.
380 41 F.3d 763 (1st Cir. 1994).
381 Id. at 763.
382 Id.
383 Id. at 764.
384 No. 3:93CV64 (N.D.W.V. Nov. 23, 1994).
IX. PRACTICE AND PROCEDURE

A. CONTRIBUTION AND INDEMNITY

*U.S. Fire Insurance Co. v. California Superior Court*\(^{385}\) arose out of the crash of a twin engine DeHavilland aircraft after takeoff from Perris Valley Airport, killing sixteen and injuring six persons onboard. U.S. Fire, on behalf of the airport, settled with plaintiffs for the policy limit of ten million dollars, reserving its right to restitution and indemnification from nonsettling co-defendants. Three other defendants settled for $1.125 million and received a good-faith settlement approval, which immunized DeHavilland from further exposure from those defendants. The only remaining suit was U.S. Fire’s cross-complaint against DeHavilland for partial equitable indemnification.

The trial court held: (1) California law after Proposition 51 (the Fair Responsibility Act of 1986) does not allow for indemnity for non-economic damages; and (2) to recover for economic damages in an indemnification action, a party must prove the actual damages incurred by the plaintiff with whom the settling party reached agreement. In its petition for review filed with the California Supreme Court, U.S. Fire contended that it should be able to recover noneconomic damages in the indemnity action against DeHavilland in an amount proportionate to DeHavilland’s fault. It also argued that it should not be required to prove the plaintiffs’ actual economic and noneconomic damages before recovering indemnification. In settling, U.S. Fire argued that it relied on the long history of case law which provides that it is sufficient for an indemnification action for the settlement to be “reasonable.”

B. CONFLICTS OF LAW

*Palischak v. Allied Signal Aerospace Co.*\(^{386}\) arose from the January 13, 1992, crash of a Cessna 421 which departed from Milville, New Jersey, en route to Sebastian, Florida.\(^{387}\) Approximately four hours after takeoff, radar contact with the aircraft was lost while the pilot was flying over the Atlantic Ocean off the coast of Florida. The wreckage was eventually discovered twenty-two nautical miles off the coast.\(^{388}\)

\(^{387}\) *Id.* at 343.
\(^{388}\) *Id.* at 344.
Plaintiff filed a claim against the United States under the Federal Tort Claims Act alleging negligent handling by the air traffic controllers. Plaintiff also brought suit against Allied Signal, the manufacturer of the radar system installed in the aircraft, on theories of products liability. The parties disagreed regarding the applicability of the Death On The High Seas Act (DOHSA), which, if applicable, would preempt state wrongful death remedies outside the territorial waters of that state. The court noted that a decision one year earlier from the Third Circuit clearly addressed the question in *Calhoun v. Yamaha Motor Corp.* and, thus, held that DOHSA applied and plaintiff's claims under the New Jersey Wrongful Death Act were preempted. The court noted that this ruling precluded plaintiff's claims for nonpecuniary wrongful death damages since such damages are not permitted under DOHSA. However, after a review of the case law, the court found that the New Jersey survival action, which permits claims for predeath pain and suffering, was not precluded by DOHSA, and those claims were permitted to proceed.

**X. PUNITIVE DAMAGES**

In *BMW of North America, Inc. v. Gore*, the United States Supreme Court reversed a punitive damages award of two million dollars against BMW for failure to inform plaintiff that his new car had been repainted before delivery. Compensatory damages in the case had totalled only four thousand dollars. Plaintiff had sued for fraudulent suppression of material fact under Alabama state law and won an award of four thousand dollars in a jury trial. The jury awarded four million dollars in punitive damages, arriving at that figure by multiplying the four thousand dollars by the approximately one thousand cars BMW had refinished and sold throughout the United States in the past ten years. The Alabama Supreme Court cut the award to two million dollars, noting that a jury had punished BMW for hundreds of transactions which had occurred outside of Alabama. BMW argued that the decision represented a blatant

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389 Id.
390 40 F.3d 622 (3d Cir. 1994).
391 Palischak, 893 F. Supp. at 346.
392 Id. at 350-51.
394 Id. at 621.
395 Id.
violation of due process. Plaintiffs responded that a constitutional argument similar to BMW's was rejected by the Supreme Court in *TXO Production Corp. v. Alliance Resources Co.* The *TXO* decision rejected an approach concentrating entirely on the relationship between actual and punitive damages in favor of a focus on the potential harm of a defendant's continued conduct. *TXO* also specifically held out-of-state evidence as relevant to the amount of punitive damages awarded. On November 6, 1995, the Supreme Court entered an order allowing supplemental briefs to be filed, but on May 20, 1996, the Court entered a judgment reversing the Supreme Court of Alabama's decision.

In *Santesson v. Travelair Insurance Co.*, the First District Court of Appeals of California reversed a forty-seven million-dollar punitive damages award against Travelair Insurance Company, which had been assessed based upon an alleged bad-faith violation of California's Insurance Code for failure to seek a settlement of a wrongful death action against the insured, Beech Aircraft Company. A wrongful death lawsuit had been filed by the families of four men killed in a 1974 crash of a 1958 Beechcraft Travelair 95 twin engine plane. This resulted in a $1.8 million verdict against Beech, which was affirmed by the California Supreme Court in 1984. In 1985, Beech and Travelair were sued for bad-faith violation of the Insurance Code for failure to seek a settlement despite Beech's "reasonably clear" liability. Plaintiffs were awarded $550 in compensatory damages and $57 million in punitive damages for malice, fraud, and oppression in "stonewalling" discovery requests. The trial judge had granted Beech a new trial, and plaintiffs appealed.

The state appeals court panel reversed the punitive damages, stating that although Travelair and its attorneys acted too aggressively in defending Beech's interests, their actions in no way met the necessary standard for such an award. The appeals court felt that there was no clear and convincing evidence that the defendants acted with the necessary evil intent, dishonesty, or cruel indifference to plaintiffs' rights so as to qualify as "despicable conduct." Plaintiffs filed a petition for review with the California Supreme Court.

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396 *Id.* at 629.
Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co. involved the review of a jury’s award of $1.75 million in punitive damages in a breach of contract, unjust enrichment, and conversion of software case. Plaintiff Management Computer Services, Inc. (MCS) and defendants entered into a contract for licensing of MCS software. MCS alleged that defendants conspired to copy, use, and sell MCS’s proprietary software without its authorization. The jury found that defendants breached the contract and awarded damages of more than $2.5 million for breach of contract and unjust enrichment, as well as $5140 to defendants on a counterclaim. The jury also awarded MCS $65,000 for the defendants’ conversion of the software and added $1.75 million in punitive damages for the conversion. The trial court reduced several of the awards and ordered MCS to either accept only $50,000 in punitive damages or opt for a new trial on the issue. MCS opted for a new trial, after which the judge dismissed MCS’s claim for punitive damages.

A divided panel of the Wisconsin Court of Appeals held that the jury’s award of $1.75 million was excessive. However, it rejected the trial court’s decision to reduce the award to $50,000. The court held that the punitive damages award was too high and should be reduced to $650,000—ten times the award of actual damages. The court stated that the reduced punitive damages award of $50,000 was insufficient to punish defendants and deter others in the future from similar wrongdoing.

XI. FAA ENFORCEMENT REGULATIONS

A. Certificate Actions

In Gilliland v. FAA, the pilot admitted a conspiracy to distribute cocaine, to engage in interstate travel in the aid of racketeering, and to avoid the filing of currency transaction reports.

399 539 N.W.2d 111 (Wis. Ct. App. 1995).
400 Id. at 116.
401 Id. at 116-17.
402 Id. at 117.
403 Id.
404 Id. at 124-25.
405 Id. at 124.
406 Id. at 125.
407 Id.
However, the pilot claimed that his admissions were made in response to threats on his life. He noted his guilty plea on an application for an FAA medical certificate, and the FAA responded by revoking his pilot certificate. An FAA administrative law judge granted the agency's motion for summary judgment, and the NTSB upheld the order. The pilot, Gilliland, then appealed to the Eighth Circuit.

The circuit court ruled that Gilliland, in opposing summary judgment, had failed to show evidence of mitigating circumstances or present facts to support his allegation that at the criminal prosecution stage it had been promised that a guilty plea would not affect his pilot status. The appeals court did caution that when an agency has the discretion to choose between suspension and resignation, and the respondent presents material issues of fact, the agency must hold a hearing and articulate why it has chosen the more severe penalty, especially when the respondent's livelihood is at stake. In the present case, however, the court could not say that the agency abused its discretion in revoking Gilliland's certificate without affording him an evidentiary hearing in view of his failure to prove his claims.

In *Reno v. NTSB*, the FAA had made an unauthorized intrusion into the San Diego terminal control area during an August 1988 flight. An FAA safety inspector had determined that he did not have the proper endorsement on his student pilot certificate, had made solo flights without an authorized instructor endorsing his log book within the required ninety days preceding the flight, and had made cross-country flights without log book endorsements indicating that his instructor had reviewed his preflight preparation. The FAA suspended his certificate for twenty days. On appeal, an FAA administrative law judge reduced the suspension to ten days, finding that Reno was competent and qualified to make flights and had not actually compromised aviation safety. The NTSB upheld the suspension, and the Ninth Circuit affirmed. The Ninth Circuit noted that the NTSB's interpretation of the relevant FAR was not arbitrary and capricious. The Ninth Circuit felt that Reno's failure to comply with the regulations on endorsements and log books constituted sanctionable violations.

In *Grillo v. NTSB*, the FAA had revoked pilot Marco Grillo's ATP and CFI certificates for falsifying airman certification

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409 45 F.3d 1375 (9th Cir. 1995).
410 No. 93-70935, 1995 WL 295305 (9th Cir. May 11, 1995).
records in violation of the applicable FARs. Grillo had falsely reported to the FAA that three pilots he had tested failed their flight checks when they had actually passed. His explanation was that his actions were an attempt to meet what he perceived as the FAA’s “required” failure rate. Grillo also argued that the FAA Administrator violated his due process rights by finding that his actions were detrimental to aviation safety, arguing that safety could not be affected because the three pilots were qualified airmen. The NTSB affirmed the revocations, and Grillo appealed to the Ninth Circuit.

The Ninth Circuit affirmed, holding that Grillo’s argument—that the impact of his conduct on air safety should be judged solely by reference to the qualifications of the three airmen—ignores the FAA’s larger interest in the integrity of its airman certification system. The NTSB had pointed out that inaccurate record keeping may prevent the FAA from making a timely discovery of a designated pilot examiner’s (DPE) inadequate testing practices, thus calling into question the qualifications of both the DPE’s and the individuals they certificate. Grillo did not dispute that his “false failures” allowed him to avoid stepped-up monitoring of his performance as a DPE. In consideration of this evidence, the Ninth Circuit felt that there was substantial evidence supporting the NTSB’s finding that Grillo’s conduct had a negative impact on air safety. Furthermore, the court held that the NTSB did not violate Grillo’s constitutional rights by finding that he compromised air safety.

In Borregard v. NTSB, a Mechanic’s Certificate and Inspection Authority had been revoked by the FAA due to alleged falsification of a log book and an attempted coverup. The FAA had revoked Borregard’s certificates, and the full NTSB affirmed. On appeal to the Ninth Circuit, Borregard claimed he had not intended to defraud the FAA, but merely to mislead those who would rely on the records in question. However, the Ninth Circuit affirmed the revocation, finding substantial evidence in support of the FAA’s actions and also holding that the penalty

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411 Id. at *1.
412 Id.
413 Id. at *5.
414 Id. at *4-5.
415 Id.
416 Id. at *1-2.
417 46 F.3d 944 (9th Cir. 1995).
418 Id. at 946.
was appropriate in light of the gravity of the infraction. The court noted that there was substantial evidence that Borregard intended to defraud the FAA, having knowingly presented false information and incorrect inspection dates.

*Echo, Inc. v. FAA,* involved a helicopter flown by petitioner Echo, Inc., which ran out of fuel and lost engine power during an emergency medical evacuation flight. Prior to the crash, a weather emergency had developed, and the pilot obtained IFR clearance, accepted a higher altitude, and flew on for another thirty minutes. However, the pilot failed to advise air traffic control concerning the weather emergency or that he, his company, and his aircraft were unauthorized to fly under IFR conditions. Three passengers were killed, while the pilot, John Rafter, survived the ensuing crash. The FAA charged Echo and Rafter with numerous violations and revoked the pilot’s certificate and Echo’s operating certificate. The NTSB reduced Rafter’s penalty to a 180-day suspension but upheld the Echo certificate revocation. The NTSB stated that once Rafter was no longer able to fly under VFR rules, he should have asked air traffic control for assistance in landing as soon as possible, and the emergency weather conditions which developed did not excuse the violations caused by sustained IFR operation.

On appeal, Echo argued that revocation is appropriate only upon a finding of lack of qualifications manifested by deliberate, repeated, or flagrant violations. The First Circuit panel rejected this argument and also rejected the pilot’s argument that the NTSB had abused its discretion in finding that his conduct during the flight was relevant to his qualifications to manage Echo’s operations. The First Circuit held that Rafter was not excused from his managerial misconduct because he was piloting the aircraft at the time of the crash.

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419 *Id.* at 946-47.
420 *Id.*
421 48 F.3d 8 (1st Cir. 1995).
422 *Id.* at 9-10.
423 *Id.*
424 *Id.* at 10.
425 *Id.*
426 *Id.* at 10-11.
427 *Id.* at 11.
428 *Id.* at 12.
429 *Id.*
B. CIVIL PENALTY ADMINISTRATIVE ASSESSMENT ACT

The Civil Penalty Administrative Assessment Act of 1992 (the "1992 Act"), for the first time, gave the FAA the power to petition a federal court of appeals for a review of an adverse NTSB decision if the Administrator determines that the decision will have a "significant adverse impact on carrying out" his responsibilities.430 The Act also required for the first time that the Board defer to the FAA's regulatory interpretations, unless the Board finds an interpretation arbitrary, capricious, or otherwise not according to law.431 FAA v. NTSB & Rolund432 was the first case decided pursuant to the FAA's exercise of the petition power.

In this case, the FAA had suspended the ATP certificate of a Wings West pilot for ninety days for making a VFR departure from an airport, allegedly when ground visibility was below three miles, and for descending his aircraft below its assigned altitude. The pilot appealed to the NTSB. An administrative law judge affirmed the FAA's suspension order.433 The full Board reversed, finding that the FAA had not borne its burden of proving that the visibility was less than three miles at the time of takeoff.434 The NTSB also accepted Rolund's explanation that he had not heard the controller instruct him to stay at or above 2500 feet.435

The FAA petitioned the United States Court of Appeals for review, arguing that its regulations require a pilot to obtain and rely upon an official report of ground visibility if it is available and to make ground visibility "as reported by an accredited observer" conclusive in determining whether a VFR takeoff is permitted.436 The FAA further contended that the NTSB's decision to the contrary was based upon a novel interpretation of FAA regulations rather than upon the FAA's reasonable interpretation of its own regulations.437

The D.C. Circuit Court denied the FAA's petition, holding that the issue of deference was never clearly raised before the Board, citing 49 U.S.C. § 1153(b)(4).438 The court found it dis-

431 Id. § 44709(d)(3).
432 57 F.3d 1144 (D.C. Cir. 1995).
433 Id. at 1146.
434 Id.
435 Id.
436 Id. at 1147.
437 Id.
438 Id. at 1149.
turbining that the NTSB did not inquire into or consider itself bound by the FAA's interpretation of the applicable regulations.\textsuperscript{439} However, the D.C. Circuit Court found it equally disconcerting that the FAA had at no time stepped forward to articulate its own interpretation of the regulations to which it expected deference.\textsuperscript{440} Therefore, the appellate court declined to entertain the FAA's objections raised for the first time in a petition for review. The D.C. Court of Appeals noted that based upon the evidence, a reasonable Board might conclude that the FAA had not shown that ground visibility was less than three miles when Rolund took off.\textsuperscript{441} The court felt that the Board's findings were supported by substantial evidence in the record.\textsuperscript{442}

With respect to proper procedure for an FAA review petition under the Act, the court decided that the NTSB, which had filed a brief in this case, is not a proper party to an FAA petition for review.\textsuperscript{443} The court stated that "the Board's role is purely adjudicatory," and that the real parties in interest, the FAA and the respondent who won the case before the Board, are before the court with no need for the Board to participate.\textsuperscript{444}

The 1992 Act also requires that the Board give deference to "written agency policy guidance available to the public related to sanctions."\textsuperscript{445} Prior to the 1992 Act, the FAA had distributed to its inspectors and lawyers an enforcement Sanction Guidance Table as an appendix to its Order 215.3. Since the 1992 Act, it has been questionable whether anyone has seriously considered the Table in the internal FAA Order to be considered as "available to the public." However, the Board has now determined that it is bound by the FAA Sanction Guidance Table contained in the FAA Internal Order.

This issue arose in Administrator v. Hans-Jorn Stange,\textsuperscript{446} a case in which the FAA revoked the pilot certificate of an airman who operated an aircraft while his certificate was suspended. The pilot was confused about when or where to surrender his suspended certificate and assumed that as long as he had the certif-

\textsuperscript{439} Id. at 1148.
\textsuperscript{440} Id.
\textsuperscript{441} Id. at 1151.
\textsuperscript{442} Id. at 1151-52.
\textsuperscript{443} Id. at 1147.
\textsuperscript{444} Id.
\textsuperscript{445} 49 U.S.C. § 44709(d)(3).
\textsuperscript{446} NTSB Order No. EA-4375, available in WESTLAW, 1995 WL 416156 (June 29, 1995).
icate in his possession, he was authorized to operate an aircraft. Upon appeal of the revocation, the judge reduced the sanction to a one-year suspension and the FAA appealed the reduced sanction to the full Board. The NTSB remanded the case to the law judge, stating as follows:

Although not raised by the Administrator on appeal, we must acknowledge that, while, by law, the Board may amend, modify, or reverse the Administrator's order, the Board is bound by the Administrator's written sanction policy guidance, as well as all validly adopted interpretations of laws and regulations. The Administrator's sanction guidance table, which represents the range of sanction for a single violation of a particular regulation, lists only emergency revocation as the sanction for “operation while pilot certificate is suspended.”

In Administrator v. Edwards, a pilot had his ATP certificate revoked on an emergency basis for failure to submit to a drug test. He appealed the revocation to the NTSB, and the FAA moved to dismiss the appeal as untimely. An appeal of an emergency order must be filed within ten days after service of the order. The period provided for appeal in nonemergency cases is twenty days. In this case, the pilot filed his appeal six days after the expiration of the ten-day time period, but within the twenty-day period. The pilot waived the applicability of the emergency rule, then argued that the time provided in the nonemergency cases applied. The Board disagreed, holding that an airman's ability to waive the applicability of the emergency rules does not mean that an airman's failure to comply with the time limit established by the emergency rules will be treated as a waiver of those rules or as an election to proceed under the nonemergency rules.

In Administrator v. Beauchemin, the FAA revoked a pilot's certificate based upon his conviction of knowingly engaging in a continuing criminal enterprise to import and distribute marijuana for economic gain. On appeal to the Board, one of the arguments raised by the respondent was that the case should have been dismissed pursuant to the Board's Stale Complaint Rule, Rule 3. The case had been initiated more than six months

447 Id. at *2 (citation omitted).
449 Id. at *3.
after the FAA first became aware of respondent's conviction. There is one exception to the Complaint Rule, in that it does not apply to cases where the allegations of the complaint present a legitimate issue of lack of qualifications. Accordingly, the Board rejected the respondent's argument, holding that any conviction involving the sale of drugs, even if it does not involve the use of an aircraft, warrants revocation based on a lack of qualification. Therefore, the Stale Complaint Rule did not apply.

In Administrator v. Chaparral Inc., the FAA refused to produce in discovery certain portions of the FAA Enforcement Investigative Report (EIR), claiming that the information was protected by either a work product or deliberative process privilege. A law judge dismissed the FAA's Emergency Order against respondents' certificates because of the failure to produce. The full Board upheld the claim of privilege, reversing and remanding the case for hearing on the merits. The decision does not explain how or why the information is protected from discovery. However, apparently, the FAA will not be forced to disclose on discovery the following portions of the EIR: Block Items 18, 25, 26, 29, 30, and 31 of Section A and the analysis portion of Section D.

In Thompson v. Administrator, the applicant was successful in getting the Administrator's complaint against him dismissed as stale under the Board's rules. The applicant then sought and received an award under EAJA for attorneys' fees and expenses. The Administrator, on appeal, challenged the amount awarded, including an award of $1,502.50 for photocopying. The Board disallowed the photocopying expense, indicating that a conclusory invoice which only identified a lump sum of $1,502.50 for photocopying was not enough to permit reimbursement, given the unusually large sum billed for this service. The Administrator also argued that the judge should have denied recovery of attorneys' fees for preparation of several motions and a supplemental brief which contained arguments that were moot and would not have prevailed. The Board indicated that it would not second-guess the strategy employed by applicant's

451 Id. at *2-3.
453 Id. at *1.
counsel and that it could not find that the motions and brief were frivolous.\textsuperscript{455}

\textbf{XII. BANKRUPTCY}

In \textit{Epstein v. Official Committee of Unsecured Creditors},\textsuperscript{456} plaintiff David Epstein had been appointed as legal representative of a class called the “Future Claimants,” a group that had been defined by the U.S. Bankruptcy Court for the Southern District of Florida as “[a]ll persons . . . who may . . . [in the future] assert a claim or claims . . . against Piper or its successor arising out of or relating to aircraft or parts manufactured and sold, designed, distributed, or supported by Piper . . .”\textsuperscript{457} In July 1993, Epstein filed a one hundred million-dollar proof of claim on behalf of the future claimants. The bankruptcy court disallowed the proof of claim, and the district court affirmed.\textsuperscript{458} Pursuant to the Bankruptcy Code, only those parties holding preconfirmation claims have the legal right to share in payments under a Chapter 11 plan.\textsuperscript{459}

Epstein contested the district court’s application of the prepetition relationship test, arguing that the relevant conduct giving rise to the alleged liability was Piper’s prepetition manufacturer design, sale, and distribution of allegedly defected aircraft.\textsuperscript{460} The Eleventh Circuit Court affirmed the district court, holding that Epstein’s interpretation of “claim” and application of the conduct test would enable anyone to hold a claim against Piper by virtue of their potential exposure to any aircraft in the existing fleet.\textsuperscript{461} The court also found, however, that the district court’s tests unnecessary restricted the claimant’s class to those who could be identified prior to filing of the petition.\textsuperscript{462}

The court adopted what it called the “Piper test” pursuant to which an individual had a Section 101(5) claim against a debtor manufacturer if “(i) events occurring before the confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor’s product; and (ii) the basis for liability is the debtor’s prepetition conduct in design-

\textsuperscript{455} \textit{Id.} at *2-3.
\textsuperscript{456} 58 F.3d 1573 (11th Cir. 1995).
\textsuperscript{457} \textit{Id.} at 1575.
\textsuperscript{458} \textit{Id.} at 1575-76.
\textsuperscript{459} \textit{Id.} at 1576.
\textsuperscript{460} \textit{Id.} at 1577.
\textsuperscript{461} \textit{Id.} at 1577-78.
\textsuperscript{462} \textit{Id.}
ing, manufacturing and selling the allegedly defective or dan-
gerous products." The court then held that it was clear that
the future claimants failed the minimum requirements of the
Piper test. There was no preconfirmation exposure to a specific
identifiable defective product or any other relationship between
Piper and the broadly defined class of Future Claimants.

XIII. TAXATION

In *Northwest Airlines, Inc. v. County of Kent, Michigan,* seven
airlines brought suit against the owner and operator of Michigan's Kent County International Airport, challenging the valid-
ity of airport user fees imposed by the airport owner as being
discriminatory and unreasonable, violative of the Commerce
Clause and in violation of the Federal Anti-Head Tax. The
airport collected charges from airlines, as well as general avia-
tion and nonaviation concessionaires such as rental car, restaur-
ant, and gift shop operators. The U.S. Supreme Court granted
certiorari to resolve a conflict between the decision of the U.S.
Court of Appeals for the Sixth Circuit which upheld the charges
and a previous decision from the Seventh Circuit in the case of
*Indianapolis Airport Authority v. American Airlines, Inc.* The
Court held that these types of fees are reasonable and, thus, not
violative of the Anti-Head Tax "if it (1) is based on some fair
approximation of the facility's use, (2) is not excessive in relation
to the benefits conferred, and (3) does not discriminate
against interstate commerce."

*American Airlines, Inc. v. Commonwealth of Pennsylvania, Board of
Finance and Revenue* involved an appeal by USAir and Ameri-
can Airlines concerning the issue of whether food, nonalcoholic
beverages, and related nonfood supplies furnished by airlines
during commercial flights are subject to the state's use tax.
Both USAir and American had been assessed use taxes and had
appealed to the Department of Revenue Board of Appeals and
Board of Finance and Revenue. The airlines had unsuccessfully

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463 Id. at 1577.
464 Id. at 1578.
466 Id. at 857.
467 733 F.2d 1262 (7th Cir. 1984).
468 *Northwest Airlines,* 114 S. Ct. at 864 (citing Evansville-Vanderburgh Airport
Authority Dist. v. Delta Air Lines, Inc., 405 U.S. 707, 716-17 (1972)).
470 Id. at 418.
sought a refund with the Board of Appeals, and the petition for review with the Board of Finance and Revenue was denied.

The decision was reversed by the Commonwealth Court, but the Pennsylvania Supreme Court reversed in turn. The majority noted that section 7201(o) of the Tax Code excluded tangible personal property from the use tax if it is used "directly" in the operation of a public utility in rendering the public utility service.\footnote{471} The court stated that the items which Pennsylvania was seeking to tax (food, beverages, and related nonfood items) are unquestionably not necessary and integral to directly delivering a public utility service to the public, namely the provision of transportation by air. The court felt that its holding was corroborated by the fact that not all flights provide food and beverage, thus demonstrating that food and beverage are not necessary or integral for the airlines to perform their operations in rendering transport by air of passengers. Since the subject items were not directly used in the supply of a public utility service, they were not subject to the state's use tax.\footnote{472}

In \textit{Alaska Airlines, Inc. v. Department of Food and Agriculture},\footnote{473} a petition for review was filed with the California Supreme Court by five airlines contesting California's eighty-five-dollar charge for every international flight arriving in the state. The charge was made pursuant to the California Airport and Maritime Plant Quarantine Inspection and Plant Protection Act and was instituted in 1990 as part of a program to eradicate the Mediterranean fruit fly. The airlines argue that the state Act violates the Federal Anti-Head Tax Act (AHTA). California's Second District Court of Appeals had previously held that the fee was not subject to the AHTA because it was imposed on all international commercial flights arriving in California not just those carrying passengers.\footnote{474} Therefore, the fee was based on criteria other than "persons or the carriage of persons traveling in air commerce" and thus not prohibited by the AHTA.\footnote{475}
In *United States v. Bocook*, Rodney Bocook pled guilty to wilfully communicating false information and thereby endangering aircraft for events which took place between August 1, 1993 and September 22, 1993. During that time, Mr. Bocook allegedly broadcast unauthorized radio messages to aircraft and air traffic controllers in the area of Roanoke, Virginia. On numerous occasions, he pretended to be an air traffic controller at the Roanoke Regional Airport and gave instructions to pilots who were preparing to land. At other times, he instructed incoming pilots to change frequencies or to break off their approach, told pilots they were not clear to land after they had been cleared to land by the tower, told pilots their runway was closed because of a disabled aircraft on the runway, and told landing pilots to hold short of a runway intersection. He instructed a departing plane to climb to 12,000 feet after it had been cleared to go to 10,000 feet. Bocook repeated the instruction four times when the pilot requested clarification. Bocook also transmitted distress signals supposedly coming from aircraft and briefly pretended to be the medivac helicopter based at Roanoke Memorial Hospital on two occasions. In addition, Bocook used obscene language, harassed a female air traffic controller, made threats to shoot down aircraft, and transmitted recorded music, weather reports, and warnings about his own activities.

After his guilty plea, he was sentenced to a total term of 124 months. He then appealed his sentence, contending that the district court erred in finding that his conduct involved “intentionally endangering the safety of aircraft” and, therefore, should not have enhanced his sentence pursuant to the Federal Sentencing Guidelines. On June 21, 1995, the United States Court of Appeals for the Fourth Circuit affirmed the sentence. In rejecting Bocook’s argument, the court held that “[a] reasonable person would under no circumstances transmit false instructions to pilots under the pretense of being an air traffic controller because of the obvious risks involved.”

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477 *Id.* at *1.
478 *Id.* at *1-2.
479 *Id.* at *2.
480 *Id.*
court concluded that Mr. Bocook's conduct did, indeed, recklessly endanger an aircraft.

*United States v. Holtz*\(^{481}\) is another case in which the court considered a sentence above that which would normally be imposed under the 1987 Guidelines Manual for Federal Criminal Sentencing. In this case, the defendant was the principal of Northeast Jet Airlines. After a four-week trial, he was found guilty of conspiracy to defraud the United States.\(^{482}\) The standard range of sentences would have been zero to six months. In this case, the judge considered whether there existed "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."\(^{483}\)

The court noted the testimony of several witnesses concerning Mr. Holtz's operation of the company, including a 1979 incident where he ordered a pilot to have an illegal mach override switch installed in a Leer Jet (known as a "go fast" switch).\(^{484}\) The pilot refused, but Mr. Holtz had it installed anyway. The jet eventually crashed and killed two other pilots.\(^{485}\) The NTSB linked the crash to the mach override switch. In 1986, Mr. Holtz allegedly ignored the co-pilot's calculation of a fuel shortage and refused to make an intermediate landing on a trip to England. The aircraft eventually landed with five minutes of fuel remaining. Holtz ordered the co-pilot to falsify the flight manifest.\(^{486}\) The court noted that double sets of maintenance logs were kept and cited other examples of conduct it considered to be sufficient to justify a departure from the Sentencing Guidelines.\(^{487}\) The court imposed a sentence of forty-one months of imprisonment followed by three years of supervised release and a $250,000 fine.


\(^{482}\) Id. at *1.

\(^{483}\) Id.

\(^{484}\) Id.

\(^{485}\) Id.

\(^{486}\) Id. at *2.

\(^{487}\) Id. at *3.