Recent Developments in Aviation Case Law

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THIS YEAR THE courts have again been active in the aviation field, resulting in numerous significant decisions. This article surveys those decisions, as well as other aviation decisions addressing the following issues: jurisdiction, conflict of laws, governmental liability, air carrier liability, products liability and negligence, insurance, and damages.

I. Jurisdiction

A. Federal Subject Matter Jurisdiction

The United States Supreme Court, in *Verlinden v. Central Bank of Nigeria*,¹ considered whether the Foreign Sovereign Immunities Act, (the "Act")² in allowing a foreign plaintiff to sue a foreign state in a United States District Court on a non-federal cause of action, violates Article III of the United States Constitution. The Court held that Congress did not exceed the parameters of Article III by granting federal courts subject matter jurisdiction over certain civil actions by foreign plaintiffs against foreign states where the rule of decision is governed by state law.³ The Court stated that a suit against a foreign state under the Act necessarily involves application of federal law, and, therefore, "arises under" federal law within the meaning of Article III.⁴

The Court also affirmatively answered the question of whether the Act embodies the "restrictive theory"⁵ of foreign sovereign immunity. Although the Act does not include specific statutory language incorporating the "restrictive theory", the Court engrafted it onto the Act.⁶ Additionally, the Court held that the Act allows suits

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³ *Verlinder*, 461 U.S. at 492.
⁴ Id. at 497.
⁵ The "restrictive theory" of foreign sovereign immunity confines immunity to suits arising from a foreign sovereign's public acts and does not extend the foreign sovereign immunity to cases arising out of a foreign state's strictly commercial acts. *Id.* at 487.
⁶ *Id.* at 488.
against foreign states to be brought either in federal or state court.\textsuperscript{7}

Although \textit{Verlinden} involved letters of credit, it affects all cases, including aviation cases, where jurisdictional issues center on sovereign immunity. For example, following \textit{Verlinden}, the Ninth Circuit rendered an amended opinion in \textit{Olsen v. Government of Mexico}\textsuperscript{8} to recognize the incorporation of the restrictive theory into the Foreign Sovereign Immunities Act. \textit{Olsen} involved a wrongful death action filed by the children of two Americans who were killed in a California plane crash during an instrument approach to Tijuana Airport. The two Americans, who had been incarcerated in Mexico, were being transferred to the United States pursuant to the Prisoner Exchange Treaty between the United States and Mexico. Although recognizing the restrictive theory of foreign sovereign immunity, the Ninth Circuit Court of Appeals found Mexico not immune to subject matter jurisdiction. The court determined that Mexico's involvement in the crash did not include acts of a fundamentally governmental nature to bring the foreign sovereign within the restrictive theory.\textsuperscript{9}

Mexico also contended that its conduct leading to the crash was discretionary and, therefore, fell within the "discretionary function exception" to the Act.\textsuperscript{10} The court, however, determined that the conduct of Mexico which allegedly caused the crash, maintaining, directing and piloting the aircraft, did not constitute policy decisions but only acts taken to implement the broader plan to exchange prisoners.\textsuperscript{11} Thus, the acts of Mexico which allegedly caused the crash occurred at the operational level and did not fall within the discretionary function

\textsuperscript{7} Id. at 489. Section 1604 of 28 U.S.C. provides that the Act's standards control in the "courts of the United States and of the States."

\textsuperscript{8} 729 F.2d 641 (9th Cir. 1984).

\textsuperscript{9} Id. at 645.


\textsuperscript{11} \textit{Olsen}, 729 F.2d at 647.
Subject matter jurisdiction was found under the "direct effect" exception to sovereign immunity in *Australian Government Aircraft Factories and the Commonwealth of Australia v. Lynne*. Lynne arose from the crash in Indonesia of an airplane originally sold by an Australian company, Government Aircraft Factories (GAF), to Missionary Aviation Fellowship (MAF), a California corporation. Survivors of the American pilot killed in the crash filed a wrongful death action in the United States District Court for the Central District of California against GAF and the Commonwealth of Australia. MAF joined in the suit to recover for the loss of the aircraft. The defendants moved to dismiss the action under the Foreign Sovereign Immunities Act. The district court overruled the motion and found that subject matter jurisdiction existed under the "direct effect" exception to the Act, which removes immunity in cases based "upon an act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect to the United States." The alleged direct effect was the loss suffered by the survivors of the pilot and sustained by MAF. The Ninth Circuit reversed, relying in part on *Berkovits v. Islamic Republic of Iran*. The court of appeals held that the injury to the pilot’s family and the losses sustained by MAF were indirect consequences of the accident and could not support subject matter jurisdiction.

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12 *Id.*
14 743 F.2d 672 (9th Cir. 1984).
16 *Id.* § 1605(a)(2) (1982).
17 Lynne, 743 F.2d at 674.
18 735 F.2d 329 (9th Cir. 1984). In *Berkovits*, an action was brought against Iran to recover damages for the wrongful death of an American citizen murdered in Iran by an Iranian revolutionary group. In holding that Iran was protected by sovereign immunity, the Ninth Circuit stated that the "injury to the victim’s bereaved relatives living in the United States is not sufficiently ‘direct’ or ‘substantial’ to support the assertion of Federal jurisdiction." *Id.* at 332 (quoting Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980)).
jurisdiction.\textsuperscript{19}

The direct effect exception to immunity was also held to be inapplicable in \textit{Close v. American Airlines, Inc.}\textsuperscript{20} where a Connecticut resident filed suit in the United States District Court for the District of Connecticut following an injury sustained in Kingston, Jamaica. The injury occurred during a layover on an American Airlines flight from Montego Bay, Jamaica to New York when the plaintiff was struck by the jet wash of a British West Indian Airways, Ltd. (BWIA) aircraft. BWIA moved to dismiss the action alleging, that it was not subject to the court's jurisdiction. In response, the plaintiff raised the "direct effect" exception. The district court rejected the plaintiff's argument that the consequent economic losses she suffered in the United States as a result of her injury constituted a "direct effect".\textsuperscript{21} The court did leave open the question of whether corporations injured in their "American pocket-books by commercial activities" outside the United States would be entitled to invoke the "direct effect" exception.\textsuperscript{22} This question appears, however, to have been answered in the negative by \textit{Lynne}.\textsuperscript{23}

The United States District Court for the Eastern District of Illinois refused to dismiss on grounds of sovereign immunity a suit brought by a Canadian citizen against a foreign carrier for injuries sustained on a flight originating in Seattle, Washington and terminating in Bangkok, Thailand. The court held, in \textit{Bryne v. Thai Airways International Ltd.},\textsuperscript{24} that jurisdiction was proper under the "commercial activity" exception to the Foreign Sovereign Immunities Act\textsuperscript{25} since the carrier engaged in commercial activity in

\textsuperscript{19} \textit{Lynne}, 743 F.2d at 675.
\textsuperscript{21} \textit{Id.} at 1064.
\textsuperscript{22} \textit{Id.} at 1065.
\textsuperscript{23} \textit{Lynne}, 743 F.2d 672 (9th Cir. 1984).
\textsuperscript{24} 18 Av. Cas. (CCH) 18,363 (N.D. Ill. 1984).
\textsuperscript{25} Section 1605(a)(2) of the Act provides, in pertinent part:

(a) A foreign state shall not be immune from jurisdiction of courts of the United States or of the states in any case
the United States by maintaining offices and by originating flights in this country. Because the plaintiff's flight originated in the United States, the cause of action was necessarily connected with that commercial activity.

A motion to dismiss on grounds of immunity was denied on the grounds of untimeliness in *Aboujdid v. Singapore Airlines, Ltd.*, a case arising out of the well-known Entebbe hijacking incident. The plaintiffs, who were passengers on the hijacked aircraft, filed suit in 1978 alleging that the defendants, both instrumentalities of foreign governments, had failed to use proper security measures. The court, noting the tortured procedural history of the suit and the late date at which the defendant had moved for dismissal under the Foreign Sovereign Immunities Act, denied the motion as being unreasonable since it was filed several years after suit was initiated. The court read *Verlinden* as requiring the immunity issue to be resolved as a threshold inquiry and observed that "we are hardly 'at the threshold' of these suits." Further, the court held that the defendants had waived any claim of immunity by litigating the case since 1978.

A claim of sovereign immunity resulted in the dismissal of a suit filed by ten European air carriers against the United States and the Federal Aviation Administration (FAA) in *Balair, Ltd. v. United States*. The airlines had claimed damages as a result of the FAA's prohibition of DC-10 operations in the United States in the wake of the American Airlines' DC-10 crash in Chicago. The United

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(b) in which the action is based upon an activity carried on in the
United States by the foreign state; . . . .

26 *Byrne*, 18 Av. Cas. at (CCH) 18,363.
27 Id.
28 18 Av. Cas. (CCH) 18,059 (N.Y. Sup. Ct. 1984).
29 The suits had been filed in 1978 and 1979. The carriers apparently moved to
dismiss in 1983. *Id.*
30 *Id.* at 18,061.
31 *Id.*
32 *Id.*
34 The FAA, after the crash, issued Special Federal Aviation Regulation 40,
States moved to dismiss the suit on the grounds of sovereign immunity. The court determined that jurisdiction over the United States exists only where Congress has consented to a cause of action against the United States or where there is an explicit consent or waiver of immunity. Since the jurisdictional statutes asserted by plaintiffs did not contain an express waiver of sovereign immunity to a suit for damages, the court held that it did not have jurisdiction to hear the airlines' suit.

In *City of Alexandria v. Helms*, the Fourth Circuit Court of Appeals dismissed, on jurisdictional grounds, the issuance of a preliminary injunction against the FAA by a lower court. In August, 1983, an FAA administrator issued an order to begin conducting flight pattern tests at Washington's National Airport. A month later, a district court temporarily enjoined the FAA from conducting the tests. The FAA moved to dismiss the injunction on the ground that the district court did not have jurisdiction to issue a preliminary injunction pursuant to 49 U.S.C. § 1486(a), which vests review of FAA orders exclusively with courts of appeals. Since the plan to begin conducting flight pattern tests was a final order, the court determined that the district court lacked jurisdiction to issue such an injunction.

B. Personal Jurisdiction

The United States Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, held that a non-resident Colombian corporation sued in a wrongful death action which prohibited the operation of DC-10 aircraft in United States airspace. SFAR 40 was rescinded on July 13, 1979.

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35 *Balair*, 18 Av. Cas. (CCH) at 17,693.
36 The carriers based jurisdiction upon 28 U.S.C. § 1331 ("treaty jurisdiction") and 28 U.S.C. § 1350, which provides that the district courts have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*
37 *Balair*, 18 Av. Cas. (CCH) 17,693.
38 728 F.2d 643 (4th Cir. 1984).
39 *Id.* at 646.
arising from a helicopter accident in Peru, which did not arise from any contacts with Texas, did not have sufficient contacts with the State of Texas to make it amenable to in personam jurisdiction in Texas courts without violating the requirements of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{41} Texas had assumed jurisdiction over Helicol, a Colombian helicopter operator, in a suit filed by the survivors of four United States citizens killed in the Peruvian crash, even though Helicol had never maintained a place of business, been licensed, solicited business, signed a contract, based an employee or an agent in Texas, sold a product that reached Texas or conducted operations there.\textsuperscript{42} The factors which the Texas Supreme Court found supportive of jurisdiction were that Helicol had, in the past, purchased helicopters in Texas and had also sent prospective pilots and maintenance personnel to Texas for training and consultation.\textsuperscript{43}

The Court noted, relying on \textit{Perkins v. Benguet Consolidated Mining Co.},\textsuperscript{44} that due process is not offended when the cause of action does not arise out of or relate to the foreign corporation's contacts with the forum, so long as there are sufficient contacts between the foreign corporation and the state.\textsuperscript{45} However, these contacts must be of a continuous and systematic nature so as not to offend traditional notions of due process.\textsuperscript{46} After reviewing Helicol's contacts with Texas, the Court held that its contacts were not of a continuous and systematic nature so as to bring Helicol within the jurisdiction of the Texas courts.\textsuperscript{47} The Court reiterated that "purchases and related trips, standing alone, are not a sufficient basis for a

\textsuperscript{41} \textit{Id.} at 1873. The Texas long-arm statute had previously been held by the Texas Supreme Court to reach as far as due process permits. Hall v. Helicopteros Nacionales de Colombia, S.A. ("Helicol"), 638 S.W.2d 870, 872 (Tex. 1982).
\textsuperscript{42} \textit{Helicopteros Nacionales}, 104 S. Ct. at 1873.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} 342 U.S. 437 (1952).
\textsuperscript{45} \textit{Helicopteros Nacionales}, 104 S. Ct. at 1872.
\textsuperscript{46} \textit{Id.} at 1873.
\textsuperscript{47} \textit{Id.} at 1874.
State's assertion of jurisdiction.\textsuperscript{48}

The Court's decision indicates the need for more stringent prerequisites for the assertion of personal jurisdiction over foreign defendants, where their activities in the forum do not "give rise" or "relate to" the cause of action. This approach is contrary to the predicted trend which appeared to make less of a distinction between asserting general or specific jurisdiction. Furthermore, the resurrection of the Rosenberg analysis raises doubt as to the ease with which foreign corporations involved in commercial transactions in the United States can be subject to the jurisdiction of American courts.

Conversely, in Maunder v. DeHavilland Aircraft of Canada, Ltd.\textsuperscript{49} the Illinois Supreme Court had no difficulty in reaching its determination that a foreign corporation had engaged in such a pattern of continuous and systematic activity that due process would not be offended by the assertion of \textit{in personam} jurisdiction over the corporation. Maunder arose out of the crash of a DeHavilland aircraft in Zambia which killed one Indian citizen and injured a British citizen. The aircraft had been designed and manufactured in Canada by DeHavilland, a Canadian corporation. Plaintiffs filed suit in Illinois against both DeHavilland and its wholly-owned subsidiary, DeHavilland of Canada, Inc., a Maryland corporation which has its principal place of business in Illinois. In subjecting the Canadian manufacturer to jurisdiction in Illinois, the court noted that the manufacturer's Illinois subsidiary had been established solely to facilitate the manufacturer's business in the United States. The court also observed that all of the subsidiary's stock was owned by the parent, that the subsidiary's directors were paid by the parent, that the parent guaranteed the subsidiary's lease in Illinois, and that the subsidiary's only business was the sale of parts in the

\textsuperscript{48} Id. (citing Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923)).

\textsuperscript{49} 102 Ill. 2d 342, 466 N.E.2d 217, cert. denied, 53 U.S.L.W. 3403 (U.S. November 26, 1984)(No. 84-512).
United States for its parent’s aircraft.  

The contacts between a British company and the State of Maryland were insufficient to confer jurisdiction in *Mathison v. McDonnell-Douglas Corp.* This suit arose out of the crash of a military aircraft in California in which the plaintiff’s decedent was killed. McDonnell-Douglas, a Maryland corporation with its principal place of business in Missouri, manufactured the airplane and installed an allegedly defective ejection seat manufactured by Martin Baker Aircraft Company, Ltd., (Martin Baker), a corporation organized and headquartered in Great Britain. Martin Baker moved to dismiss for lack of personal jurisdiction. The court, in dismissing the action against Martin Baker, found that the forum’s only connection with the lawsuit was that McDonnell-Douglas was incorporated in Maryland.

The Fifth Circuit, in *Growden v. Ed Bowling & Associates, Inc.*, also dismissed for want of jurisdiction a wrongful death action filed in Louisiana by the survivors of two Louisiana residents killed in an airplane crash in Louisiana. Ed Bowlin & Associates, Inc., one of the defendants, was a Georgia corporation which sold to plaintiffs’ decedents the used aircraft involved in the crash. Although decedent Growden had initially telephoned Bowlin from Louisiana, all other aspects of the sale took place out of the forum state. The fact that the sale was prompted by an advertisement the decedent saw in a national journal was not sufficient to confer jurisdiction, according to the court. Additionally, delivery in Louisiana was not signif-

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50 *Maunder*, 466 N.E.2d at 222.
51 18 Av. Cas. (CCH) 17,710 (D. Md. 1984).
52 *Id.* at 17,722. The court observed that Martin Baker had never been authorized, licensed or chartered to conduct business in Maryland. Further, it had never maintained an office in Maryland for manufacturing, distributing or storing its product, and it had never done any direct advertising or business soliciting in the state. *Id.*
53 733 F.2d 1149 (5th Cir. 1984).
54 *Id.* at 1151-52. Although the United States Supreme Court declared, in *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that jurisdiction may be founded upon advertising reasonably calculated to reach the forum state,
icant because the cited delivery was for tax purposes only. Actual delivery occurred in Georgia, with one of the decedents flying the craft to Louisiana.\textsuperscript{55} The fact that Bowlin knew the craft would be based in Louisiana was of no consequence, as was the fact that the aircraft was purchased with checks drawn from a Louisiana bank.\textsuperscript{56}

C. Forum Non Conveniens

In \textit{Irish National Insurance Co. v. Aer Lingus Teoranta},\textsuperscript{57} the Second Circuit Court of Appeals reversed a lower court's forum non conveniens dismissal of a subrogation action. The suit was brought in New York to recover damages allegedly sustained when a package containing integrated circuits flown by Aer Lingus from Shannon, Ireland, to New York was delivered in a damaged condition. The court held that a treaty between the United States and Ireland required the district court to apply the same forum non conveniens standards to the foreign parties that it would have applied to United States citizens.\textsuperscript{58} In addition to this error of law, the district court also erred in assuming that Shannon, rather than New York was the primary location of evidence. To correct these errors of law and of fact, reversal was required.\textsuperscript{59}

A Delaware court, in \textit{Siemer v. Bahri Aviation, Inc.},\textsuperscript{60} dismissed on grounds of forum non conveniens a wrongful death action filed in Delaware by survivors of a Norwegian citizen killed in a Greek air crash. Although the court in its original opinion had refused to dismiss the action because there was no pending action in Greece, the court determined, on rehearing, that the defendant's waiver of

\textsuperscript{55} Id. at 1152.
\textsuperscript{56} Id.
\textsuperscript{57} 739 F.2d 90 (2d Cir. 1984).
\textsuperscript{58} Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States - Ireland, art. VI(1)(C), 1 U.S.T. 785, 790-91, T.I.A.S. No. 2155 § 1 at 8.
\textsuperscript{59} \textit{Irish National Insurance}, 739 F.2d at 92.
\textsuperscript{60} 18 Av. Cas. (CCH) 18,087 (Del. Super. Ct. 1984).
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limitations and voluntary submission to the jurisdiction of Greek courts were sufficient to now require dismissal. Additionally, the court noted that the plaintiff’s only connection with Delaware and, in fact, the United States, was its incorporation in Delaware. On the other hand, the plaintiff’s principal place of business and all of its records relating to the operation and maintenance of the aircraft were readily available in Greece. In sum, the court held that the plaintiff would not be overly burdened if required to litigate in Greece, while the defendant faced a decided disadvantage if the trial were held in Delaware.61

A similar result was reached in Rubenstein v. Piper Aircraft Corp,62 a wrongful death action filed by citizens of West Germany in Florida against Piper, a Pennsylvania corporation, as a result of an air crash in West Germany. The plane had been designed and manufactured in Florida by Piper. The court held that an adequate remedy would be afforded the plaintiff if the case were tried in West Germany. The principal guidance for the court, in dismissing the action, was the rule that foreign plaintiffs should not be encouraged to initiate actions in forums other than in their homeland merely to increase the chance of reward or victory.63

Whether a wrongful death action filed in a Texas state court pursuant to the Texas Wrongful Death Act 64 is subject to dismissal on forum non conveniens grounds remains unsolved after the Texas Supreme Court’s decision in Couch v. Chevron International Oil Co.65 In Couch, a Jones Act66 suit was brought by Scottish survivors of a Scottish seaman who died of injuries sustained while working on a

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61 Id. at 18,088.
63 Id. at 462 (citing Piper Aircraft Corp. v. Reyno, 454 U.S. 235 (1981).
65 672 S.W.2d 16 (Tex. App. - Houston [14th Dist]) writ ref’d n.r.e. per curiam, 28 Tex. Sup. Ct. J. 181 (Dec. 19, 1984). Although the doctrine of forum non conveniens is recognized in Texas, the Texas Supreme Court had previously reserved ruling on whether the doctrine applies to wrongful death actions. Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962).
Scottish-owned diving support vessel in the North Sea. The trial court dismissed the action on the grounds of forum non conveniens.

On motion for new trials the plaintiffs asserted that in addition to their Jones Act suit, they were also seeking recovery under article 4678 of the Texas Wrongful Death Act to enforce their English causes of action. The trial court denied the motion for new trial because the plaintiffs failed to amend their pleadings to include their article 4678 cause of action. The plaintiffs appealed.

On appeal, the defendants argued that the plaintiffs' failure to timely plead their article 4678 cause of action foreclosed their right to recover under that statute. The defendants further contended that even if plaintiffs had properly raised article 4678 in their pleadings, the doctrine of forum non conveniens would still require dismissal. In affirming the trial court, the court of appeals chose not to base its decision on the plaintiffs' waiver of their article 4678 cause of action. Instead, the court held that even if plaintiffs' cause of action had been properly pleaded, the dismissal for forum non conveniens was correct.

The Texas Supreme Court initially refused without comment to review the appellate court's decision finding no reversible error. However, in its per curiam opinion rendered on motion for rehearing of the application for writ of error, the Texas Supreme Court stated:

We refused this writ application, finding no reversible error, because we agreed that the plaintiffs waived their Article 4678 cause of action. The Court of Appeals opinion,

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67 The Texas Wrongful Death Act provides, in pertinent part:

Death in foreign state.

Whenever the death of a [foreign] citizen . . . has been . . . caused by the wrongful act . . . of another in any foreign . . . country for which a right to maintain an action and recover damages thereof is given by . . . such foreign . . . country . . . such right of action may be enforced in the courts of this State.


69 Couch, 672 S.W.2d at 18.
however, does not mention this waiver. Although the Court of Appeals reached the correct decision, that part of its opinion pertaining to Article 4678 and forum non conveniens is dicta. Thus, the applicability of forum non conveniens to an Article 4678 cause of action is an open question. . . .

D. Death on the High Seas Act and Suits in Admiralty Act

In Miller v. United States, the Eleventh Circuit Court of Appeals determined that the Suits in Admiralty Act applies to airplane crashes in international waters caused by land-based negligence. In Miller, plaintiff's decedent died in the crash of an airplane in international waters while on a flight from Freeport, Bahamas, to Palm Beach, Florida. The accident occurred in May, 1976, and suit was filed in 1980 under the Federal Tort Claims Act. The defendants moved to dismiss the action, contending that admiralty jurisdiction applied rather than jurisdiction under the Federal Tort Claims Act. The plaintiff argued, however, that admiralty jurisdiction was not applicable since the negligence causing the crash occurred on land and that the acts bore no significant relationship to traditional maritime activity.

In rejecting this argument, the court of appeals noted that actions involving water vessels may be subject to the locality test, but that test alone is not dispositive of aviation cases. Relying on Executive Jet Aviation v. City of Cleveland, the court held that a wrongful death action arising out of an airplane crash on the high seas, a marine league or further from the shore of a state, may be brought under the federal court's admiralty jurisdiction.

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71 725 F.2d 1311 (llth Cir.), cert. denied, 105 S. Ct. 94 (1984).
74 Miller, 725 F.2d at 1313.
75 Id.
76 409 U.S. 249 (1972).
77 Miller, 725 F.2d at 1315.
In accordance with decisions from the Fifth and Ninth Circuits, the Eleventh Circuit determined that admiralty jurisdiction existed since the crash occurred more than one marine league from the shores of the continental United States. The court also found that a significant relationship to traditional maritime activity existed since a ship was the traditional mode of transportation between the Bahamas and the United States before the development of air travel. The court subsequently dismissed the actions because plaintiffs failed to bring suit within the two year limitations period provided by the Suits on Admiralty Act.

E. Federal Removal

In Elbaz v. The Port Authority of New York, the plaintiff moved to remand an action removed by an air carrier four years after suit was filed and just prior to commencement of trial. The carrier argued that the Verlinden decision had changed the law, establishing that aliens may sue foreign states in federal courts under the Foreign Sovereign Immunities Act. The court rejected this argument on the grounds that there had been no controlling authority prohibiting removal since the inception of the suit. Of further significance was the fact that no claim of sovereign immunity was involved in the suit nor were there issues on America's foreign relations. To avoid further delay, the court granted the motion to remand.

80 725 F.2d at 1314-15.
81 Id.
82 18 Av. Cas. (CCH) 17,462 (S.D.N.Y. 1983).
83 Id. at 17,463.
II. Conflict of Laws

The “most significant relationship test” embodied in the Restatement (Second) of Conflict of Laws and the “governmental interest” analysis continue to be the favored methodologies employed by the courts in resolving choice of law issues in air crash litigation. For example, in Saloomey v. Jeppesen & Co., the Second Circuit Court of Appeals refused to apply the Connecticut lex loci delicti rule, opting instead to employ the “most significant relationship” test to a wrongful death action arising from the crash of a small airplane during an instrument approach to a West Virginia airport. Suit was filed in Connecticut by a Connecticut resident alleging that Jeppesen, a Colorado company, either negligently or defectively designed the approach plate used by the pilot during the approach. Following the Restatement analysis, the Second Circuit determined that Colorado law, rather than the law of West Virginia or Connecticut, should apply to both the liability and damages issues because most of the significant contacts were centered in Colorado. Given the strong impact of the Colorado contacts, the court found that Connecticut law did not apply even though both decedents were domiciled in Connecticut. West Virginia law was also deemed inapplicable since the only significant contact with the parties and issues was the fortuitous circumstance of the crash occurring there.

Also, the Supreme Court of Texas, which had previously adopted the Restatement approach in tort cases, held, in Duncan v. Cessna Aircraft Co., that “in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the

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84 707 F.2d 671 (2d Cir. 1983).
85 Id. at 674. Although the Connecticut Supreme Court had endorsed the use of lex loci delicti, the Second Circuit noted that the endorsement was made in “motor vehicle cases,” and that the Connecticut courts had never had occasion to apply lex loci delicti to an aviation accident. Id.
86 Id. at 676.
87 665 S.W.2d 414 (Tex. 1984). For a further discussion of Duncan, see infra notes 293-298 and accompanying text.
state with the most significant relationship to the particular substantive issue will be applied to resolve that issue.\textsuperscript{88} In \textit{Duncan}, the court considered whether a liability release executed by a Texas resident in Texas discharged Cessna, a Kansas corporation, from liability to the plaintiffs stemming from a New Mexico plane crash even though it was not specifically named in the release. Cessna sought to have New Mexico law, which discharges any tortfeasor who is named or who comes within the general class of persons named in the release, applied to the release. Plaintiffs, however, contended that Texas law, which discharges only those tortfeasors specifically identified in the release, should have applied. The court found no legitimate reason for New Mexico to be concerned with the application of its statute to a Texas settlement to cut off a Texas resident's claim against a Kansas corporation and elected to apply Texas law to determine the effect of the release.\textsuperscript{89}

The Second Circuit Court of Appeals, in \textit{O'Rourke v. Eastern Air Lines, Inc.},\textsuperscript{90} refused to "wade into New York's choice of law quagmire,"\textsuperscript{91} and approved the lower court's use of the \textit{lex loci delicti} rule in applying New York law rather than Greek law to determine what damages were recoverable by the estate of a Greek seaman who died in the June, 1975, crash of Eastern Air Lines Flight 66 near John F. Kennedy Airport.\textsuperscript{92} The court noted that although New York was one of the first states to reject the \textit{lex loci} approach in favor of a more flexible methodology, recent state court decisions had signaled a return to \textit{lex loci}.\textsuperscript{93} Rather than add to the confusion, the court deferred to the district judge's interpretation of the New York choice of law rule.\textsuperscript{94}

\textsuperscript{88} \textit{Duncan}, 665 S.W. 2d at 421.
\textsuperscript{89} Id. at 421-22.
\textsuperscript{90} 730 F.2d 842 (2d Cir. 1984).
\textsuperscript{91} Id. at 847.
\textsuperscript{92} Id. at 849.
\textsuperscript{93} Id. at 847-48.
\textsuperscript{94} Id. at 849.
The United States District Court for the Southern District of New York, also interpreting New York's choice of law rules, applied the governmental interest approach in *Gregory v. Garret Corp.* Although the court recognized that *lex loci delicti* remains the general rule in tort cases pending in New York and is to be displaced only in "extraordinary circumstances," the court determined that extraordinary circumstances existed inasmuch as the site of the airplane crash was "to some extent fortuitous." The court held that New York law, rather than the law of Connecticut or North Carolina, should apply to allow third-party contribution claims against the employer of employees killed in the crash of a jet aircraft at Westchester County Airport, New York. The court observed that most of the contacts concerning the parties and their relationships were centered in New York and New York had stronger interests than Connecticut or North Carolina in advancing its policies of holding a co-tortfeasor responsible for its share of a claimant's injury and in deterring tortious conduct.

In *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, the United States District Court for the District of Columbia, applying the governmental interest methodology, determined that foreign jurisdictions have no interest in applying their law to issues regarding damages if it would result in less protection to their nationals in a suit against a United States corporation. The case arose out of the crash of a Lockheed C-5A military transport near Saigon, Vietnam, in which a number of foreign infants were injured. The court excluded from the jury's consideration collateral sources of payments to the foreign infants for medical services.

The United States District Court for the District of Co-

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96 Id. at 880.
97 Id. at 881.
99 Id. at 191.
100 Id.
lumbia, in *Felch v. Air Florida Inc.*, these cases applied the most significant relationship test under the District of Columbia’s choice of law rules to determine whether the law of the District of Columbia or Virginia should apply to a claim for loss of consortium by a Virginia resident for injuries to a spouse suffered before the marriage. The court, in holding that Virginia law should apply, determined that Virginia’s interest in the welfare of its residents was more relevant to a loss of consortium claim than the District of Columbia’s interest in punishing and deterring wrongful conduct.

The remaining cases illustrate the flexibility of modern approaches to choice of law determinations. *Kiehn v. Elkem-Spigerverket A/S Kemi-Metal* involved the crash of a small airplane in Norway which killed the plaintiff’s decedent, a Pennsylvania resident. The airplane was rented in Norway by a Norwegian pilot, who was also an employee of the defendant Norwegian corporation, for a trip solely within Norwegian airspace. The court determined that under Pennsylvania’s “hybrid” choice of law rule, which combines the approaches of the Restatement and “interest analysis”, Norwegian law should apply to the liability issues and the law of Pennsylvania should apply to the issue of damages. Norway was found to have a significant governmental interest in regulating air traffic within its borders and in deterring similar accidents. The court noted that these interests would be served by applying Norwegian law to liability issues. In applying Pennsylvania law to the issue of damages, the court found that Pennsylvania’s interest in compensating the heirs of Pennsylvania decedents and dependents was significantly greater than Norway’s interest in shielding its resident

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102 Id. at 385. This litigation arose out of the Air Florida disaster which occurred in Washington, D.C., on January 13, 1982.Id.
103 Id. at 386.
105 Id. at 416.
106 Id.
business from an excessive verdict.  

Finally, in *Aircrash Disaster at Mannheim, Germany on September 11, 1982*, the United States District Court for the Eastern District of Pennsylvania used Pennsylvania’s hybrid approach to apply Pennsylvania law to the liability issues in suits arising out of the crash in West Germany of a United States Army “Chinook” helicopter manufactured by a Pennsylvania corporation. The court stated that the interest of Pennsylvania in seeking to hold its manufacturers as guarantors of the safety of their product would be furthered by the application of Pennsylvania law. The court also determined that the Pennsylvania principles of placing the risk of loss on its manufacturers and of full compensation would be furthered by applying Pennsylvania damage law to the claims filed by European citizens. Finally, the court stated that it was not unfair to hold a defendant manufacturer to the damage laws of its own state, when acting in its own state, where that law provides greater protection to the plaintiff.

III. GOVERNMENTAL LIABILITY

A. Exceptions

In one of the most important cases decided during the period of this survey, the United States Supreme Court held, in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, that an action against the United States for the alleged negligence of the Federal Aviation Administration (“FAA”) in the certification of aircraft for use in commercial aviation was barred by the “discretionary
function exception” of the Federal Tort Claims Act.\textsuperscript{112} The Court, in reaching its decision, isolated several factors which it considered helpful in determining when a government employee’s acts are shielded from liability by Section 2680(a).\textsuperscript{113} First, the Court emphasized that the nature of the conduct, not the status of the actor, governs whether the exception applies.\textsuperscript{114} The “basic” inquiry, according to the Court, is whether the acts challenged are of the “nature and quality” meant to be shielded by Congress.\textsuperscript{115} Second, the Court found that the exception was plainly intended to include the discretionary acts of the government in its role as a regulator of private conduct since “Congress wished to prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”\textsuperscript{116}

In light of these factors, the Court scrutinized the statutory and regulatory authority creating the means by which the FAA certifies aircraft and found that the “FAA’s implementation of a mechanism for compliance review is plainly discretionary activity of the nature and quality protected by Section 2680(a).”\textsuperscript{117} The Court determined that judicial intervention in the FAA’s compliance review program, which is composed of a spot-check system, would not only affect the feasibility and practicality of the regulatory program, but could also usurp the FAA’s ability to

\textsuperscript{112} 28 U.S.C. §§ 1346(b), 2680(a) (1982). The Federal Tort Claims Act authorizes suits against the government for damages caused by the negligence of a government employee while acting within the scope of his employment. Congress, however, excepted from the Act’s waiver of sovereign immunity several classes of tort claims. The discretionary function exception provides that the Federal Tort Claims Act shall not apply to “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a) (1982).

\textsuperscript{113} Varig Airlines, 104 S. Ct. at 2765.

\textsuperscript{114} Id. According to the Court, the exception covers all government employees exercising discretion. Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 2768.
establish priorities for the accomplishment of its safety objectives. The Court found that such intervention would necessarily involve the judicial second-guessing which the discretionary function exception was designed to prevent.\textsuperscript{118}

In addition, the Court held that FAA employees, acting in accordance with FAA directives, were also protected by the discretionary function exception in electing not to inspect certain items during the course of certificating a particular aircraft.\textsuperscript{119} However, one issue which arguably remains after \textit{Varig Airlines} is whether the government, once it makes a decision to inspect certain items during the certification of an aircraft, is responsible if it negligently conducts the inspection. Two decisions rendered after \textit{Varig Airlines} have refused to hold the United States liable.

In \textit{Natural Gas Pipeline Co. of America v. United States},\textsuperscript{120} the Ninth Circuit considered the argument that the FAA failed to properly inspect a modification developed for the Sabreliner aircraft resulting in a delay in discovering the existence of defects in the modification. Finding \textit{Varig Airlines} controlling, the court held that the FAA’s failure to discover the defects in the Sabreliner modification sooner was activity protected by the discretionary function exception.\textsuperscript{121}

In \textit{Proctor v. United States},\textsuperscript{122} a subrogation suit against the United States for the hull loss of a Lockheed L-1011
aircraft and for indemnification arising out of the August 19, 1980, Saudia Arabian Airlines accident in Riyadh, Saudi Arabia, it was argued that the FAA negligently performed the certification inspection of the L-1011 rather than electing not to inspect as in Varig Airlines. The court dismissed the case holding that the Supreme Court had, in Varig Airlines, insulated from tort liability the entire FAA certification process. The court noted that a contrary result would lead to the situation where the FAA would be immune from liability under Varig Airlines if it certified an aircraft without inspection, but would be subject to liability for any certificated aircraft it did inspect.

In Colorado Flying Academy v. United States, a case decided by the Tenth Circuit Court of Appeals before the Supreme Court's decision in Varig Airlines, it was found that the discretionary function exception insulated the government from liability based on the FAA's alleged negligence in not designing the Denver terminal control area ("TCA") to fully contain within its confines an instrument approach. The court agreed with plaintiffs' contention that if the FAA's directives concerning TCA airspace design created a mandatory duty to contain the instrument approach within the TCA, then the FAA's negligent failure to carry out that duty would not fall within the exception. After carefully reviewing the various FAA regulations and directives, the court found no substantial evidence to demonstrate that such mandatory duty existed. Thus, the court of appeals upheld the trial court's finding that the claim of government negligence in designing the Denver TCA was barred by the discretionary function exception.

In a second case decided before the Court's decision in Varig Airlines, the United States District Court for the

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123 Id.
124 Id.
125 Id.
126 724 F.2d 871 (10th Cir. 1984).
127 Id. at 875.
128 Id. at 876.
Western District of Pennsylvania held, in *Rulli v. United States*,\(^{129}\) that claims involving communication deficiencies in navigational aids and the FAA's failure to increase communication efficiency leading to the crash of an airplane while on an instrument approach fall squarely within the discretionary function exception.\(^{130}\) However, the FAA's failure to inspect or commission navigational aids at the operational level consistent with federal regulations is not conduct insulated by the exception.\(^{131}\)

The United States District Court for the District of Columbia was presented with a unique issue in *Beattie v. United States*,\(^{132}\) a suit arising from the crash of an Air New Zealand DC-10 in Antarctica on November 28, 1979. The claimants brought the action under the Federal Tort Claims Act, claiming negligence by United States Navy air traffic controllers based at McMurdo Naval Station in failing to advise the DC-10 crew of hazardous meteorological conditions along the aircraft's route. The United States moved to dismiss, asserting that by virtue of Section 2680(k), "any claim arising in a foreign country" is exempt from the coverage of the Federal Tort Claims Act. The question before the court was whether Antarctica is a "foreign country" within the meaning of the statute. The district court denied the motion to dismiss, holding that "although the issue is not free from doubt," the foreign country exemption of the Federal Tort Claims Act does not bar the claimant's action.\(^{133}\) In reaching its determination that Antarctica is not a "foreign country", the court relied principally on the construction of other federal statutes which expressly or impliedly exclude Antarctica from the "foreign country" category and on the fact that the United States government is significantly involved in Antarctic activities, including the control of all air

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\(^{130}\) *Id.* at 1508.

\(^{131}\) *Id.* at 1512.


\(^{133}\) *Id.* at 784.
transportation and search and rescue operations in Antarctica. The court also noted that no one would be held liable for the alleged negligence of the United States if the government’s motion to dismiss were granted.134

B. General Cases

In *Nex v. United States*,135 a wrongful death action brought against the FAA arising out of the crash of an airplane during an instrument landing approach in instrument meteorological conditions ("IMC"), the court held that the plaintiffs failed to prove that the instrument landing system ("ILS") malfunctioned or in any manner guided the aircraft off the correct approach course.136 The court further held that the air traffic controller properly monitored the airplane’s progress in radar and that the controller’s failure to use a written checklist in accomplishing a controller change in the airport tower, though against FAA procedures, was not a proximate cause of the crash. The controller’s failure to give runway visibility value to the pilot was also found not to be a proximate cause of the crash since the runway visibility value was favorable and would have likely encouraged the pilot to have continued the approach.137

In *Stewart v. United States*,138 the United States District Court for the District of Idaho assessed a government air traffic controller with negligence in causing the mid-air collision of two aircraft operating in visual flight rules ("VFR") conditions near Mountain Home Air Force Base, Idaho, on the evening of June 21, 1981. The court found that the controller gave an erroneous radar traffic advisory to the pilot who had elected to use the VFR radar advisory service offered by Mountain Home Air Force Base.139 Although the court assessed each of the aircraft’s

134 *Id.* at 783-84.
135 18 Av. Cas. (CCH) 17,982 (S.D. Iowa 1984).
136 *Id.* at 17,984.
137 *Id.* at 17,986-87.
138 18 Av. Cas. (CCH) 18,047 (D. Idaho 1984).
139 *Id.* at 18,048.
pilots with twenty percent negligence for their failure to see and avoid the other aircraft, the controller was assessed with the remaining sixty percent negligence because his "incorrect advisories so diverted the Piper aircraft pilot's attention to the extent that he lost the opportunity to have seen and avoided the Cessna aircraft." The court also found that the pilot being given the advisories had a "high probability to see and avoid the other aircraft" due to existing light conditions and flight path had it not been for the erroneous advisories.

In Barber v. United States, a case twice appealed to the Ninth Circuit Court of Appeals and remanded, the United States District Court for the District of Oregon held the FAA sixty percent negligent for instructing an instrument rated pilot to use a non-directional radio beacon ("NDB") in his ILS approach to an airport without notifying him that two pilots had earlier reported that the beacon was not operating properly, the last report being only twenty-seven minutes before the pilot was cleared for the approach. The court further found the FAA negligent in failing to remove the NDB from service after receiving numerous complaints in the month before the crash concerning the beacon's reliability. The pilot was held to be forty percent negligent for deviating from his clearance and attempting a non-precision approach without requesting an amended clearance from the controller or declaring an emergency.

In Air Service, Inc. v. United States, it was held, in an action arising out of a mid-air collision between an aircraft departing the Greenville, Mississippi airport and an airplane entering the airport traffic area unannounced, that

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140 Id. at 18,049.
141 Id. at 18,050.
142 Id.
143 18 Av. Cas. (CCH) 18,053 (D. Or. 1984).
144 Id. at 18,057.
145 Id.
146 Id. at 18,058.
147 18 Av. Cas. (CCH) 17,556 (N.D. Miss. 1983).
the plaintiffs had not met their burden of proving that the controller was negligent in failing to see the arriving airplane and in failing to tell the pilot of the departing aircraft of the conflicting traffic. The court found that the proximate causes of the crash were the failure of the pilots to “see and avoid” each other in VFR conditions, the failure of the arriving pilot to inform the tower of his presence in the traffic pattern and of his intentions, and the failure of the departing aircraft to avoid the landing traffic pattern.

The United States District Court for the Northern District of Oklahoma, in Kanner v. Ross School of Aviation, Inc., held that the plaintiffs failed to meet their burden of proving that the air traffic controller was negligent in causing the collision between two student pilots in an airport traffic pattern shortly after the controller made several repetitions of an instruction in rapid succession to one of the student pilots without the inclusion of the airplane’s call sign. Since the call sign was included in the first of the series of rapid transmissions, the court found that the controller had given a continuous transmission which did not violate the air traffic control manual and that the transmission was an adequate response to an emergency situation.

In an action to recover damage to a corporate jet on takeoff after its engines ingested sea gulls, the United States District Court for the District of Connecticut, in Insurance Co. of North America v. City of New Haven, held that air traffic controllers at the Tweed-New Haven Airport were not negligent in failing to advise the crew of the aircraft that sea gulls were on or near the runway on the morning of the accident. The court found that air traf-
fic controllers have a duty to warn the crew of an airplane of dangers apparent to the controllers, but the evidence presented showed that the controller on duty neither saw nor was informed that sea gulls were in the vicinity of the runway prior to the takeoff. The court further found that the cause of the accident was the co-pilot's failure to report his sighting of the sea gulls to the pilot.  

Finally, the United States District Court for the Eastern District of Michigan, in *In re Air Crash Disaster at Metropolitan Airport, Detroit, Michigan on January 19, 1979*, reaffirmed the premise that, under VFR conditions, the primary responsibility for safe operation of an airplane rests with the pilot, regardless of traffic clearance. The court refused to find the air traffic controller's alleged negligence in not maintaining adequate separation between a departing aircraft and a landing Learjet to be a proximate cause of the crash because the controller was not required to anticipate or foresee the negligent act of the Learjet pilot in decreasing his speed to the point of stalling the aircraft in an effort to maintain adequate separation. The court also held that the judge, not the jury, must determine the liability of the United States under the Federal Tort Claims Act, even in situations where the United States has settled with the original plaintiff and it then brings an action against its co-defendants for contribution and indemnity for the purpose of allocating fault among the litigants.

IV. AIR CARRIER LIABILITY

A. Warsaw Convention: Jurisdiction

Several courts addressed the issue of subject matter jurisdiction of the Warsaw Convention (the "Convention for the Unification of Certain Rules Relating to International
tion”) during the past year. In *Camacho v. Aerovias Nacionales de Colombia, S.A.*, the United States District Court for the Southern District of New York dismissed an action against a foreign carrier on the grounds of subject matter jurisdiction because the court where the action was filed was not located in one of the places specified in Article 28 of the Convention for bringing suit. The United States District Court for the Eastern District of New York, in *In re Air Crash Disaster at Malaga, Spain, on September 13, 1982*, also dismissed an action against a foreign carrier on the grounds that the court lacked subject matter jurisdiction under Article 28. The court determined that the passenger’s “ultimate destination” was Spain, since the passenger had simultaneously purchased two one-way tickets for a round-trip between Spain and the United States, and the crash occurred while he was traveling from Spain to the United States. The court, however, refused to dismiss for lack of subject matter jurisdiction an action of another passenger where she proved that her “ultimate destination” was, in fact, the United States even though a round-trip ticket had been issued for a destina-


161 18 Av. Cas. (CCH) 17,870 (S.D.N.Y. 1984).

162 Id. Article 28 of the Convention provides that an action against an air carrier for personal injury or death of a passenger must be brought in one of the following locations:

a. the carrier’s domicile;
b. the carrier’s principal place of business;
c. the carrier’s place of business through which the contract has been made; or,
d. the passenger’s destination.

163 18 Av. Cas. (CCH) at 17,591 (E.D.N.Y. 1984).

164 Id. at 17,592.


166 Air Crash Disaster at Malaga, 18 Av. Cas. (CCH) 17,593.
tion outside the United States. The court stated that either a passenger or the carrier may present evidence that certain terms in the contract of carriage arose by mutual mistake.

In *In re Air Crash Disaster at Covington, Kentucky of June 2, 1983*, the United States District Court for the Central District of California likewise dismissed on Article 28 grounds actions filed against a foreign carrier by passengers who, at the time of the accident, were on the return portion of a round-trip originating in Canada.

The United States District Court for the Northern District of California, in *Hernandez v. Aeronaves de Mexico*, held that when a single contract for travel has not been issued by successive carriers, and one of the parties did not regard the transportation as a single operation but as two distinct domestic flights, the Convention did not apply. The court stated that the "unilateral expectation" of one of the parties does not determine the applicability of the Convention.

B. Applicability of the Warsaw Convention

Two Courts of Appeal were presented during the survey period with the question of what constitutes an "accident" within the meaning of Article 17 of the Warsaw Convention, with interesting results. The Ninth Cir-

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167 *Id.*
168 *Id.*
169 M.D.L. No. 569 (C.D. Cal. Oct. 3, 1984). This litigation arose out of the Air Canada Flight 797 fire which occurred on June 2, 1983, while the aircraft was en route from Dallas to Toronto.
170 *Id.*
171 18 Av. Cas. (CCH) 18,227 (N.D. Cal. 1984).
172 *Id.* at 18,119.
173 *Id.* See also P. T. Airfast Serv., Indonesia v. Superior Court, 139 Cal. App. 3d 162, 168, 188 Cal. Rptr. 628, 633 (1983).
174 Article 17 of the Convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
cuit, in the surprising decision of Saks v. Air France, found an air carrier engaged in international transportation responsible under the Warsaw Convention for a passenger's permanent hearing loss caused by normal cabin pressurization changes during landing. The court held that an injury caused by an air carrier's normal operation is an "accident" within the meaning of Article 17 of the Convention. In reversing the decision of the lower court, which had dismissed the passenger's action on the basis that she could not show that her injuries resulted from some malfunction or abnormality in the aircraft's operation, the court stated:

[A] showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention. Imposition of such a requirement is not supported by either the language and history of the Warsaw Convention, the contractual modification to the Warsaw system known as the Montreal Agreement, or the decision of many courts, including this one, which now interpret the Convention as imposing absolute liability for injuries proximately caused by the risks inherent in air travel.

The effect of this holding, the dissent argued, is to impose liability upon an air carrier for any occurrence that results in injury to a passenger, making the carrier an absolute insurer of a passenger's health. The dissent also noted that a conflict now exists between decisions of the Ninth Circuit and the Third Circuit; a conflict which continues in light of the Third Circuit's post-Saks decision of Abramson v. Japan Airlines Co.

In Abramson, the Third Circuit held that the alleged ag-

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175 Id. 724 F.2d 1383 (9th Cir. 1984), cert. denied, 105 S. Ct. 80 (1984).
176 Id. at 1384.
177 Id.
178 Id. at 1389.
gravation of a passenger's pre-existing hiatal hernia during the course of a routine and normal flight was not an "accident" within the meaning of the Convention.\textsuperscript{181} The court rejected the Ninth Circuit's analysis of the term's meaning and reaffirmed its previous holding in \textit{DeMarines v. KLM Royal Dutch Airlines},\textsuperscript{182} requiring proof of an "unusual or unexpected happening" before it can be said that an "accident" has occurred.\textsuperscript{183} The court also distinguished its holding from the decision in \textit{Saks} on the grounds that Abramson's injury, unlike the pressurization injury of Saks, was not "proximately caused by the risks inherent in air travel."\textsuperscript{184}

\textit{Baker v. Lansdell Protective Agency},\textsuperscript{185} involved an action by a passenger against a security agency for the loss of jewelry valued at approximately $200,000 which the passenger claimed was removed from her hand luggage as she passed through a security screening area at Kennedy Airport in New York. The United States District Court for the Southern District of New York, applying the tripartite test of \textit{Day v. Trans World Airlines, Inc.},\textsuperscript{186} held that the passenger was engaged in the operation of "embarking" at the time her jewelry was allegedly stolen, bringing the case within the terms of the Warsaw Convention.\textsuperscript{187} Finally, the court held that where the Warsaw Convention is found to be applicable to the plaintiff's cause of action, claims brought on other grounds are preempted.\textsuperscript{188}

\textsuperscript{181} \textit{Id.} at 133.
\textsuperscript{182} 580 F.2d 1193 (3d Cir. 1978).
\textsuperscript{183} \textit{Abramson}, 739 F.2d at 132.
\textsuperscript{184} \textit{Id.} at 133.
\textsuperscript{185} 590 F. Supp. 165 (S.D.N.Y. 1984). For a further discussion of the \textit{Baker} decision, see \textit{infra} notes 213-215 and accompanying text.
\textsuperscript{186} 528 F.2d 31 (2d Cir. 1975), \textit{cert. denied}, 429 U.S. 890 (1976). The three factors considered by the \textit{Day} court to determine when a passenger is embarking are: (1) the nature of the activity the passenger was engaged in; (2) under whose control or at whose direction the passenger was acting; and (3) the location of the activity. \textit{Id.} at 33.
\textsuperscript{187} \textit{Baker}, 590 F. Supp. at 170.
\textsuperscript{188} \textit{Id.} at 171. \textit{See also} Boehringer-Mannheim Diagnostics, Inc., v. Pan Am. World Airlines, Inc., 737 F.2d 456 (5th Cir.) \textit{appeal filed} 53 U.S.L.W. 3510 (U.S. Nov. 16, 1984 (No. 84-907)) (holding that the Convention is the exclusive liability
1. Notice of Claims

In *Denby v. Seaboard World Airlines*, the issue of whether to characterize claims for shortages in the contents of cargo containers as damage or loss for the purpose of timely notice of claim under Article 26 of the Convention was presented to the Court of Appeals for the Second Circuit. The court reversed a lower court decision which granted summary judgment in favor of the carrier on the grounds that the shipper's claim for the loss of thirty-six out of forty cartons of silver shipped by the airline in a single container was barred because the shipper failed to give timely notice of the loss. After reviewing the summary judgment evidence, the court determined that unresolved factual questions remained which bore on the question of whether the shipment was damaged or lost and, consequently, whether timely notice was required. Because of the increased use of the containerization technique in air transportation, characterization of the shipment for purposes of applying the timely notice requirement will likely be a significant issue in future cases.

Remedy for international air carriers, thereby preempting state law. For a further discussion of *Boehringer*, see infra notes 234-237 and accompanying text.

189 737 F.2d 172 (2d Cir. 1984).

190 Article 26 of the Convention provides that in case of damage to goods, the carrier must be notified within seven days after discovery of the damage. In case of loss, however, no notice is required. See *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978); *Butler's Shoe Corp. v. Pan American World Airways*, 514 F.2d 1283, 1285 (5th Cir. 1974).

191 The district court had analyzed the evidence in light of the House of Lords' decision of *Fothergill v. Monarch Airlines, Ltd.*, [1980] 2 Lloyd's L.R. 295 (H.L.)(Q.B.), which held that the loss of part of the contents of a passenger's suitcase constituted damage to baggage rather than loss requiring notice under Article 27(2) of the Convention. *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1140-41 (E.D.N.Y. 1983). The Second Circuit, however, considered *Fothergill* as "simply the beginning of an inquiry" requiring additional facts concerning what was actually to be delivered to the consignee the container including the contents or merely the contents without the container. *Denby*, 737 F.2d at 179.

192 As stated by the court: "We prefer not to decide how far to extend *Fothergill* to container shipments - an issue of importance not simply to these parties but to many others, in the absence of a complete record with respect to the facts of this case and the custom of the trade." *Denby*, 737 F.2d at 182.
In *Highlands Insurance v. Trinidad and Tobago Airways Corp.* the Eleventh Circuit held that a shipper’s failure to give written notice of claim to the carrier for goods totally destroyed barred its claim to recover damages for the loss. The court refused to extend the holding of *Dalton v. Delta Airlines, Inc.* beyond situations where the destruction of the goods is both total and obvious to the carrier. The court also held that the failure to give timely written notice also barred the shipper’s claim for wilful misconduct under Article 25 of the Convention.

The Ninth Circuit was faced with a similar issue in *Stud v. Trans International Airlines.* The Ninth Circuit affirmed an order granting summary judgment in favor of the airline on the ground that the shipper of a horse, which became ill after delivery and subsequently died, failed to give written notice of the loss within fourteen days of the horse’s arrival at its destination pursuant to the Convention as modified by the Hague Protocol. The court, following the reasoning of *Dalton*, noted that the condition of the goods at the time they leave the carrier’s hands should determine whether notice of claim is a prerequisite to recovery. Since the horse was alive and in apparent good health when it left the carrier’s possession, but subsequently became ill and died, timely notice of the loss was required.

In an appeal from an order granting the carrier’s motion for summary judgment based on the shipper’s failure to give written notice of its claim for delay, the Texas

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193 739 F.2d 536 (11th Cir. 1984).
194 570 F.2d 1244 (5th Cir. 1978). *Dalton*, which involved a shipment of greyhounds that were discovered dead by the carrier at their destination, held that no notice was required under Article 26 of the Convention for destroyed goods where the carrier has actual notice of their destruction. *Id.*
195 *Highlands Ins.*, 739 F.2d at 539.
196 *Id.* at 540.
197 727 F.2d 880 (9th Cir. 1984).
198 *Id.* at 881, 882. Using the choice of law rules of California, the court determined that the contract of carriage was made in Canada, a Hague Protocol country, and therefore, applied the longer limitation period provided in the Protocol. *Id.*
199 *Id.* at 883.
Court of Appeals, in Hewlett Knitting Mills, Inc. v. Flying Tiger Line, Inc.\textsuperscript{200} held that Article 9 of the Convention did not operate to defeat the carrier’s notice of claim defense. The court interpreted Article 9, which provides that a carrier cannot avail itself of Convention provisions that “exclude or limit” its liability if the waybill does not contain the specified information set forth in Article 8, to apply exclusively to the Convention terms expressly limiting the carrier’s liability and the amount of damages a shipper may recover and not to provisions pertaining to notice or limitations. Additionally, the court rejected the shipper’s argument that Article 13(3) does not require notice to the carrier if the goods fail to arrive after seven days from the date they are scheduled to arrive and held that this provision only applies to goods lost or destroyed and not to goods damaged or delayed.\textsuperscript{201}

2. Limitation on Liability

In In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980,\textsuperscript{202} the United States District Court for the Eastern District of New York held that an airline, which could not invoke the Convention’s liability limitation because of a defect in the type size requirement in its own ticket,\textsuperscript{203} also could not avail itself of the liability limitation provisions contained in the domestic round-trip tickets issued to members of a United States boxing team in their own home cities for connection with their international flight. The court determined, based on the separate handling of the reservations, payment, issuance and delivery of the tickets for the domestic and overseas flights, that neither the carriers nor the passengers regarded the flights as a “single operation” under Article 1(3) of the Convention.\textsuperscript{204} Since the carriers did not meet the terms of Arti-

\textsuperscript{200} 669 S.W.2d 412 (Tex. App.-Dallas 1984, no writ).
\textsuperscript{201} Id. at 415.
\textsuperscript{202} 18 Av. Cas. (CCH) 18,387 (2d Cir. 1984).
\textsuperscript{204} In re Air Crash Disaster at Warsaw, 18 Av. Cas. (CCH) 18,389.
cle 1(3), the court concluded that the overseas carrier could not take advantage of the domestic carriers’ Convention notices.\textsuperscript{205}

In \textit{Marlen Stamps & Coins, Ltd. v. Rapp},\textsuperscript{206} an air carrier successfully limited its liability under Article 22(2) of the Convention\textsuperscript{207} for the loss of a shipment of postage stamps even though the air waybill erroneously listed the stamps as “fabrics.” The court stated that neither the Convention nor the terms of the waybill imposed any legal obligation upon the carrier to certify the contents or value of specific parcels accepted for shipment. The factual questions surrounding the information on the waybill were not material to a determination of the carrier’s entitlement to the Convention’s liability limits.\textsuperscript{208}

In \textit{Exim Industries, v. Pan American World Airways Inc.},\textsuperscript{209} the United States District Court for the Eastern District of New York held that a carrier need not include all of the information contained in Article 8 of the Convention in its waybill to take advantage of the Convention’s liability limitation, so long as the waybill contains sufficient information to adequately identify the goods. Failure to state whether the goods were “drums, bales or cartons” or to note that the “cartons were marked 1-7” were insubstantial and technical omissions, according to the court. Such failure did not prejudice the shipper or extend the carrier’s liability.\textsuperscript{210} Additionally, the court held that the waybill need not list all of the particulars required by Article 8(i), so long as one of the items is included on the waybill.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} 18 Av. Cas. (CCH) 17,810 (E.D.N.Y. 1984).

\textsuperscript{207} Article 22(2) of the Convention provides, in pertinent part:

\textit{In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .}

\textit{Id.}

\textsuperscript{208} \textit{Marlen}, 18 Av. Cas. (CCH) at 17,811.

\textsuperscript{209} 18 Av. Cas. (CCH) 17,803 (E.D.N.Y. 1983).

\textsuperscript{210} \textit{Id.} at 17,805.
In Baker v. Lansdell Protective Agency, the United States District Court for the Southern District of New York found that where a passenger only briefly relinquished possession of her hand luggage for a required security check, but retained responsibility for the transportation of the property, Article 4 of the Convention requiring the issuance of a baggage check did not apply, and the passenger’s recovery was limited to the Convention’s liability limitation pertaining to carry-on luggage. Additionally, the court held that a security agency which had contracted with the carrier to perform the required passenger security screening was an agent of the carrier and was permitted to take advantage of the Convention’s liability limits.

In Martin v. Pan American World Airways, Inc., the United States District Court for the District of Columbia determined, in an action to recover damages for the loss of “checked baggage”, that the liability limitations pertaining to checked baggage applied even though the carrier failed to attach an issued baggage check to the piece of baggage and also failed to record the weight of the baggage on the claim check. Additionally, the court found that the refusal of the baggage handler to check whether the passenger’s bag had been tied, despite the passenger’s request that he do so, did not constitute “willful misconduct.”

3. Damages Recoverable

In perhaps the most important judicial pronouncement impacting the international aviation community since the signing of the Convention, the United States Supreme

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211 Id.
213 Id. at 170.
214 Id. at 170-71. For a further discussion of Baker, see supra notes 185-188 and accompanying text.
216 Id. at 141.
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Court, in Trans World Airlines, Inc. v. Franklin Mint Corp., held that the Convention's cargo liability limit remains enforceable in the United States. Thus, the Court rejected the Second Circuit Court of Appeals' declaration that the 1978 repeal of the Par Value Modification Act, legislation which had set an "official" price of gold in this country, rendered unenforceable the liability limits of the Convention.

The Court noted that a treaty cannot be abrogated or modified by a later statute unless Congress' intent to do so has been clearly expressed. Since there was no mention of the Convention in any legislative material concerning the Par Value Modification Act or its repeal, the Court found no intent by Congress to abrogate or modify the Convention's liability limits. Additionally, the Court observed that the Convention is self-executing, requiring no domestic legislation to give it legal effect. Therefore, if no domestic legislation is necessary to give the Convention the force of law, no such legislation, the Court reasoned, could implicitly abrogate it. In further support of its rejection of the Second Circuit's holding, the Court observed that no steps were taken by either Congress or the Executive Branch to notify other Convention signatories of the United States' intent to withdraw from the treaty. The Court, therefore, concluded that "the erosion of the international gold standard and the 1978 repeal of the Par Value Modification Act cannot be construed as terminating or repudiating the United States' duty to abide by the Convention's cargo liability limit."

The Court also approved the continued use of the $9.07 per pound liability limit set by the Civil Aeronautics

217 104 S.Ct. 1776 (1984). The suit involved the loss of four packages of numismatic materials with a total weight of 714 pounds, which were accepted by TWA from Franklin Mint for transportation from Philadelphia to London on March 23, 1979. Id.
218 Id. at 1783.
219 Id.
220 Id.
221 Id. at 1784.
Board ("CAB"), which has the task of converting the Convention's liability limit into United States currency. The Court found that the CAB's choice of a liability limit does not contravene any domestic legislation. Also, the $9.07 per pound liability limit represents a limit consistent with the Convention's purposes of establishing a stable, predictable, and internationally uniform limit on an air carrier's liability and in establishing a link between the Convention and a constant value which would remain equitable for both carriers and shippers. The Court recognized, however, that periodic adjustments by the CAB of the liability limit might be required to effectuate the Convention's objectives. Consequently, if the CAB fails to make the necessary adjustments in light of the dollar's changing value or for changes in other Convention signatories' conversion rates, a court may find that the liability limit is no longer consistent with the Convention's purposes and refuse to sanction its further use.

Two circuit courts of appeals, in cases arising out of the same aircraft accident, have reached opposite results concerning the issue of whether prejudgment or postjudgment interest may be recovered when the interest award would exceed the liability limit established by the Convention, as modified by the Montreal Agreement. In Domangue v. Eastern Airlines, Inc., the Fifth Circuit Court of Appeals held that the Convention and Montreal Agreement objectives of maintaining a fixed and definite level of liability while also encouraging speedy compensation for damages and the maximum recovery for injured parties or their survivors would be well served.

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222 Id. at 1785-86.
223 Id. at 1787.
224 The accident occurred on June 24, 1975, when Eastern Airlines Flight 66, enroute from New Orleans to New York, crashed on its approach to John F. Kennedy International Airport, Queens, New York.
226 722 F.2d 256 (5th Cir. 1984).
by allowing the recovery of both prejudgment and postjudgment interest above and beyond the $75,000 limit established by the Montreal Agreement.\textsuperscript{227} The Fifth Circuit also affirmed the lower court decision of Mahfoud v. Eastern Airlines, Inc.,\textsuperscript{228} which held that the liability limit of the Montreal Agreement may be exceeded by an award of prejudgment and postjudgment interest because "it is unconscionable to let an airline delay litigation to an extent that a smaller amount of money may be invested in order to pay a $75,000 claim."\textsuperscript{229}

However, in O'Rourke v. Eastern Airlines, Inc.,\textsuperscript{230} the Second Circuit Court of Appeals held that prejudgment interest may not be awarded on a Convention/Montreal Agreement judgment if the effect is to exceed the $75,000 liability limit. The court stated that "[a]lthough the $75,000 limitation may be anachronistic, the awarding of prejudgment interest in excess of this amount would be contrary to the purposes of the two agreements. . . ."\textsuperscript{231} namely, to establish a uniform body of worldwide liability rules to govern international aviation and to fix at a definite level the cost to airlines of damages sustained by their passengers.\textsuperscript{232}

Finally, in Boehringer-Mannhein Diagnostics, Inc., v. Pan American World Airways, Inc.,\textsuperscript{233} the Fifth Circuit Court of Appeals considered whether attorneys' fees and prejudgment interest may be awarded in a Convention case involving the loss of cargo. Although the court disallowed

\textsuperscript{227} Id. at 264.
\textsuperscript{228} 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982), aff'd 729 F.2d 777 (5th Cir. 1984), cert. granted, 105 S. Ct. 78 (1984).
\textsuperscript{229} Id. at 17,717.
\textsuperscript{230} 730 F.2d 842 (2d Cir. 1984).
\textsuperscript{231} Id. at 853.
\textsuperscript{232} Id. at 852. The court expressly disagreed with the Fifth Circuit's reasoning for allowing an award of interest in excess of the liability limit. After reviewing the developments leading up to the Montreal Agreement, the court determined that the "speedy resolution of claims" objective relied upon by the Fifth Circuit in reaching its decision was not a significant United States objective at the conference which led to the Montreal Agreement. Id. at 853, n. 20.
\textsuperscript{233} 737 F.2d 456 (5th Cir. 1984), appeal filed, 53 U.S.L.W. 3510 (U.S. Nov. 16, 1984)(No. 84-807).
an award of attorneys' fees under Texas law, it determined that attorneys' fees may be recoverable under federal law if it is shown that the "losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." The court also upheld the lower court's award of prejudgment interest based on its previous holding in Domangue.

C. Other Air Carrier Cases

In an action arising out of the Pan Am crash near New Orleans, Louisiana, in 1982, the Fifth Circuit Court of Appeals, in LeConte v. Pan American World Airways, Inc. upheld the trial court's dismissal of an action brought by two police officers against Pan Am for the mental anguish they suffered as a result of their presence at the crash scene. The court, applying Louisiana law, held that bystanders may not recover for mental anguish suffered as a result of another's injury or death.

The Ninth Circuit, in Hingson v. Pacific Southwest Airlines, ruled that there was no private cause of action under section 404(a) of the Federal Aviation Act for discriminatory seating of handicapped individuals. How-

234 Boehringer-Mannheim, 737 F.2d at 459. Earlier in its opinion, the court had held that the Convention is the exclusive liability remedy for international air carriers thereby preempting state law. Id. at 458. Accord, In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983); Benjamin v. British European Airways, 572 F.2d 913 (2d Cir. 1978).
235 Boehringer-Mannheim, 737 F.2d at 459-60 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 258-59 (1975)).
236 Id. at 460.
237 736 F.2d 1019 (5th Cir. 1984).
238 Id. at 1021.
239 18 Av. Cas. (CCH) at 18,263 (9th Cir. 1984).
240 49 U.S.C. § 1374(a) (1982). At the time of suit this section provided:

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and. . . . to provide safe and adequate service, equipment, and facilities in connection with such transportation. . . .

Id.

The Airline Deregulation Act of 1978 provided that § 404(a) ceased to be in effect on January 1, 1983, except insofar as the section requires air carriers to provide safe and adequate service. 49 U.S.C. § 1551(a)(2)(B) (1982).
ever, 404(b) of the Federal Aviation Act \(^{241}\) does create a private cause of action for passengers who suffer unjust discrimination or unreasonable prejudice. \(^{242}\) Accordingly, handicapped passengers who are injured by unreasonable discrimination or prejudice on the part of air carriers may recover compensatory damages under section 404(b).

In *O'Leary v. American Airlines*, \(^{243}\) a New York appellate court held that an alleged breach of a federal aviation regulation prohibiting an air carrier from allowing a passenger to board an airplane if the passenger appears to be intoxicated does not give rise to a private cause of action because the passenger, who died from asphyxiation when he choked on a piece of food while intoxicated, was not a member of the class that the regulations were designed to protect. \(^{244}\) The court, however, found that an action for common-law negligence should not have been dismissed, since a carrier who knows or in the exercise of reasonable care should have known of a passenger's disability, such as intoxication, is required to exercise the care reasonably required by the passenger's disability and the existing circumstances. \(^{245}\) Thus, a carrier may be held liable for personal injuries or death suffered by a passenger who chokes to death as a result of his own intoxication.

The United States District Court for the Southern District of New York, in *Monzo v. American Airlines*, \(^{246}\) dismissed an action for negligent and malicious representation arising out of the arrest of a passenger for illegally possessing a loaded weapon at an airport. The court found that the passenger failed to show that the information given by the carrier's employees concerning the carriage of a weapon onboard an airplane was incorrect, that the relationship between the passenger and the

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\(^{242}\) *Hingson*, 18 Av. Cas. at 18,264.


\(^{244}\) *Id.* at 17,874.

\(^{245}\) *Id.*

\(^{246}\) 18 Av. Cas. (CCH) 17,742 (S.D.N.Y. 1984).
carrier was such that the passenger had the right to rely on the information and that the employee had a duty to give the information with care.\textsuperscript{247} In addition, the court dismissed the passenger's action for malicious prosecution and false arrest against the airport operator because there was probable cause for the passenger's arrest.\textsuperscript{248}

In \textit{Feuer v. Value Vacations, Inc.},\textsuperscript{249} a New York court refused to grant plaintiff's motion for class certification in an action against a charter tour operator seeking damages for breach of contract in failing to provide air transportation since there appeared to be no interested litigants, other than the plaintiff, regarding the delayed flight.

In \textit{Cantor v. Piedmont Aviation, Inc.},\textsuperscript{250} the District of Columbia Court of Appeals held that a carrier's liability for lost baggage was limited to the sum set forth in the carrier's tariff even though the passenger had exchanged her ticket for that of another airline after her bags were airborne.\textsuperscript{251} The court held that the only contract between the passenger and the airline was the passenger's first ticket which necessarily incorporated the carrier's tariff.\textsuperscript{252}

In \textit{Bella Boutique Corp. v. Venezolana Internacionais de Aviaci\'on, S.A. (VLASA Airlines)},\textsuperscript{253} a Florida court held that the shipper failed to comply with the terms of the carrier's tariff when it sent written notice of its claim to the carrier seven months following the loss of the goods.\textsuperscript{254} The court interpreted the carrier's tariff to require written notice of claim to be presented to the carrier within thirty days following the issuance of the waybill.\textsuperscript{255} In addition, the shipper's oral notice of non-delivery to the carrier within three weeks after the issuance of the waybill was

\textsuperscript{247} Id. at 17,744.
\textsuperscript{248} Id. at 17,745.
\textsuperscript{249} 18 Av. Cas. (CCH) 18,045 (N.Y. Sup. Ct. 1984).
\textsuperscript{250} 18 Av. Cas. (CCH) 18,360 (D.C. Cir. 1984).
\textsuperscript{251} Id. at 18,361.
\textsuperscript{252} Id.
\textsuperscript{253} 18 Av. Cas. (CCH) 18,137 (Fla. Dist. Ct. App. 1984).
\textsuperscript{254} Id. at 18,138.
\textsuperscript{255} Id.
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held to be ineffectual in the face of the controlling tariff.\textsuperscript{256}

The Third Circuit, in the case of First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.,\textsuperscript{257} considered the post-deregulation viability of the "released value doctrine," under which a carrier may limit its liability to the agreed value of the goods so long as the shipper has the option of obtaining coverage for the full value of its goods, is advised of the option, and chooses to pay a lower price for lesser coverage. The suit involved the loss of a shipment of bank checks totaling in excess of four million dollars. The court, applying federal common law, held that the air carrier was allowed to limit its liability for the loss of the goods in its care under the released value doctrine. The court stated that the deregulation of air carriers has no effect upon the applicability of the doctrine. In addition, the court found that because the bank's first shipment of checks was made before deregulation, the bank had constructive notice of the carrier's rate schedules referenced in the contract of carriage even though the shipment was lost almost one year after the bank's first shipment with Eastern.\textsuperscript{258}

Finally, in Arkwright-Boston Manufacturers Mutual Insurance Co. v. Great Western Airlines, Inc.,\textsuperscript{259} the United States District Court for the Northern District of Iowa, applying common law principles, upheld a contracting carrier's liability limitation contained in its air waybill because the shipper had an opportunity to either declare a higher value for the shipment or obtain insurance. Additionally, the court determined that a connecting carrier, though not named in the waybill, is entitled to benefit from the contracting carrier's liability limitation since the waybill governs the entire transportation of the shipment, and it

\textsuperscript{256} Id.
\textsuperscript{257} 751 F.2d 1113 (3d Cir. 1984).
\textsuperscript{258} Id. at 1122.
\textsuperscript{259} 18 Av. Cas. (CCH) 17,668 (N.D. Iowa 1984).
establishes the obligations of all participating carriers.\footnote{260}

V. PRODUCTS LIABILITY AND NEGLIGENCE CASES

A. Strict Liability

\textit{McKay v. Rockwell International Corp.},\footnote{261} a case which appeared prominently in last year’s survey article, extended the “government contractor defense” to insulate a manufacturer from being held strictly liable where the government had approved the manufacturer’s detailed design specifications and the manufacturer had warned the government of known defects in the product. \textit{McKay} has spawned a number of cases during the current survey period in which manufacturers of military aircraft have urged the government contractor defense in product liability and negligence cases. A weakening of that defense has recently been appearing, however.

Two courts have recently declined to follow \textit{McKay} on the issue of whether the government’s approval of a contractor’s design specifications is sufficient to invoke the government contractor defense. In \textit{Schoenborn v. Boeing},\footnote{262} the United States District Court for the Eastern District of Pennsylvania, adopting the approach set out in the earlier case of \textit{In re Agent Orange Product Liability Litigation},\footnote{263} held that the government contractor defense was not available to Boeing because the United States Army merely provided Boeing with performance specifications and did not “establish” the design specifications for Boeing’s helicopter.\footnote{264} That multidistrict case arose from the crash of a

\footnote{260} \textit{Id.} at 17,669.
\footnote{261} 704 F.2d 444 (9th Cir. 1983), \textit{cert. denied}, 104 S. Ct. 711 (1984). The \textit{McKay} court held that the manufacturer of a military aircraft ejector seat could not be held liable under strict liability since the manufacturer had shown that the seats were designed to government specifications, that the manufacturer had warned the government about patent defects and that the government had reevaluated the product after several accidents had occurred. \textit{McKay}, 704 F.2d at 451.
\footnote{263} 534 F. Supp. 1046 (E.D.N.Y. 1982).
\footnote{264} \textit{Schoenborn}, 586 F. Supp. at 716-17. The \textit{Agent Orange} court set out three requirements for a contractor to successfully invoke the government contractor defense: (1) that the government established the specifications; (2) that the product
United States Army "Chinook" helicopter that killed all 46 persons on board the helicopter. The accident was caused by a failure of the helicopter's tandem rotor system. Although the Army approved Boeing's design specifications, the court expressly declined to follow the extension of the government contractor defense articulated in *McKay*. The court in *Schoenborn* held that the reasons set forth in *McKay* for that court's approach to the government contractor defense do not support application of the defense in situations where the government merely approves the design specifications.265

Citing *Schoenborn*, a federal court in Florida refused, in *Shaw v. Grumman Aerospace Corp.*,266 to apply the government contractor defense to a defense contractor whose design specifications had received government approval. Grumman's efforts to apply the defense arose out of the crash of a Navy aircraft which was catapult-launched from the aircraft carrier Constellation and pitched into the sea. The court found that Grumman failed to warn the Navy about a defect in the aircraft flight control system and that the Navy was unaware of the defect at the time it approved Grumman's detailed design specifications.267 The court reasoned that "because the design decisions material to the defect alleged required no military expertise, there is no justification for insulating a contractor from liability where the government merely approves the decision."268

In *Tozer v. LTV Corp.*,269 a Maryland federal court refused manufactured by the supplier met the governmental specifications in all material respects; and (3) that the government knew as much as or more than the defendant about the hazards to people that accompanied the use of the product. *Agent Orange*, 534 F. Supp. at 1055.

Because the trial court found that Boeing had established the specifications for the CH-47 helicopter, the remaining two criteria of the *Agent Orange* test were not addressed. *Schoenborn*, 586 F. Supp. at 717.

265 *Schoenborn*, 586 F. Supp. at 717.
267 *Id.* at 1072-73.
268 *Id.* at 1074.
269 18 Av. Cas. (CCH) 18,212 (D. Md. 1984).
to extend the government contractor defense to insulate a government contractor that was found negligent in the design of a military product, even though the design specifications for the product had been approved by the government. The court in Tozer distinguished McKay on the basis that the court in the latter case applied the defense in a strict liability context. The Tozer court noted that the government contractor defense was intended to shield an innocent contractor from the government's negligence or protect the contractor that is simply complying with specific government specifications, but that no public policy exists for protecting a government supplier from his own negligent acts.270

In McLaughlin v. Sikorsky Aircraft,271 a California court of appeals reversed a jury verdict in favor of Sikorsky aircraft, holding that the trial court erred in permitting the introduction of evidence showing that Sikorsky had complied with the Navy's specifications in manufacturing helicopters, and in refusing to instruct the jury that building a product in accordance with government specifications was not a defense to plaintiff's strict liability claim. The appellate court stated that evidence of Sikorsky's compliance with Navy specifications constituted no evidence of whether or not the helicopter was defective and the introduction of such evidence improperly focused the jury's attention on the manufacturer's conduct rather than on the adequacy of the product itself. The court also rejected the notion that compliance with Navy specifications was relevant to the issue of "feasibility of alternative design." Rather, the court explained, such compliance merely showed "administrative or bureaucratic feasibility," as opposed to "physical or mechanical feasibility."272

Because the trial court's error required a reversal of the decision and remand for trial, the appeals court also addressed the question of whether Sikorsky could avail itself

270 Id. at 18,216.
272 Id. at 209, 195 Cal. Rptr. at 767.
of the government contractor defense. The court observed that California had not addressed the issue of the circumstances under which a government contractor could avail itself of the government contractor defense. Therefore, the court of appeals instructed the trial court to follow the Ninth Circuit's opinion in *McKay*, and held that the defense would be available to Sikorsky if it could demonstrate the following elements enunciated in *McKay*: first, that the United States was immune from liability under *Feres v. United States*[^273] and *Stencil Aero Engineering Corp. v. United States*[^274]; second, that the United States established or approved reasonably precise specifications for the allegedly defective military equipment; third, that the military equipment met the specifications; and fourth, that the supplier warned the government of any defects or dangers which it knew of but were unknown to the government.[^275]

In *Kanaf Arkia Airlines v. Fairchild Aircraft Corp.*,[^276] the plaintiff sought recovery for consequential damages arising out of the delivery of an allegedly defective aircraft. Of the several theories advanced by plaintiff, the District Court for the Southern District of New York granted defendant's summary judgment on the plaintiff's strict liability and negligence claims. The court distinguished situations where an unduly dangerous product causes damage to persons or property from situations where a product simply does not function properly, as was the case in *Kanaf*. Accordingly, the court held the case properly cognizable under commercial law not tort law.[^277] The result would have been the same, according to the court in *Kanaf*, under the law of Texas, where the aircraft was delivered, and the law of Arizona, where the aircraft

[^275]: 273 McLaughlin, 148 Cal. App. 3d at 210-11, 195 Cal. Rptr. at 768 (citing McKay, 704 F.2d at 451).
[^276]: 276 18 Av. Cas. (CCH) 17,661 (S.D.N.Y. 1984).
[^277]: 277 Id. at 17,662.
engines were made.\textsuperscript{278}

In \textit{American Airlines, Inc. v. National Automatic Products Co.},\textsuperscript{279} the Connecticut Supreme Court construed a Connecticut statute to authorize the recovery of punitive damages in a products liability case based solely on property damage to an aircraft.

\section*{B. \textit{Res Ipsa Loquitur}}

In \textit{Stubbs v. Hooks},\textsuperscript{280} an Indiana appellate court held that the rental of tie-down space by a local aviation service company did not create a bailment relationship requiring the service to provide safe storage for the aircraft. Because the service company owed no duty to the aircraft owner, the doctrine of \textit{res ipsa loquitur}, which provides a mechanism for proving breach of duty, was not applicable.\textsuperscript{281}

\section*{C. Persons Liable}

In \textit{Torchia v. Fisher},\textsuperscript{282} an airplane owner was held liable under a New Jersey statute for injuries and property damage resulting from the crash of his stolen airplane. The statute, which provided that aircraft owners are absolutely liable for damages caused to persons or property on the ground by their aircraft, was challenged by the aircraft owner on grounds that it violated the due process clauses of the New Jersey Constitution and the United States Constitution. The New Jersey Supreme Court upheld the statute's constitutionality, stating that an aircraft owner, as opposed to an innocent third-party, is "the better risk bearer" and that the legislature could rationally decide to place the loss on the owner who receives the benefits of using the aircraft.\textsuperscript{283}

\footnotesize{\begin{itemize}
\item \textsuperscript{278} Id.
\item \textsuperscript{279} 18 Av. Cas. (CCH) 18,156 (Conn. 1984).
\item \textsuperscript{280} 18 Av. Cas. (CCH) 18,162 (Ind. Ct. App. 1984). For a further discussion of \textit{Stubbs}, see infra notes 290-291 and accompanying text.
\item \textsuperscript{281} Id. at 18,163-64.
\item \textsuperscript{282} 95 N.J. 43, 468 A.2d 1061 (1983).
\item \textsuperscript{283} Torchie, 468 A.2d at 1063-64.
\end{itemize}}
In *Aetna Casualty and Surety Co. v. Kittitas County*, the Washington Supreme Court held that the owner and fixed base operator of a county airport were not liable to the insurer of an aircraft that landed on a closed runway and was damaged when it hit snow berms on the edge of a plowed taxi-way. The court found that the defendants were not negligent for closing one of two runways since a NOTAM had been filed with the FAA warning pilots of the runway closure, and no feasible means of marking the snow-covered, closed runway existed. The fixed base operator was not negligent in failing to inform the pilot by means of the UNICOM that a runway was closed, the court reasoned, because the UNICOM is an advisory service which creates no duty to volunteer information that is not requested and no responsibility to direct air traffic.

In *Stubbs v. Hooks*, an Indiana appellate court ruled that a bailment relationship was not created by a local aviation service company's agreement to rent tie-down space to an aircraft owner because the aviation service company did not retain exclusive control of the aircraft. The left wing of the aircraft was allegedly damaged by a ground vehicle while the aircraft was secured in the tie-down space. Absent a bailment relationship, the court opined that the service company had no duty to provide safe storage for the aircraft nor did it have a duty to control ground traffic at the airport. Accordingly, the service company was not liable for damages to the aircraft.

In *Weast v. Festus Flying Service Inc.*, a Missouri wrong-
ful death case that arose from an airplane crash during icy conditions, the aircraft owner was found negligent for failing to warn the aircraft's pilot and passenger that the anti-ice pump had been removed and for failing to note its removal in the pilot's log.292

D. Contribution and Indemnity

In *Duncan v. Cessna Aircraft Co.*,293 the Texas Supreme Court adopted the system of comparative causation for all products liability cases and cases combining products liability claims and negligence claims. Under the comparative causation system, the jury compares the degree to which the various parties contributed to the plaintiff's damages.294 The court in *Duncan* adopted a "pure" comparative system, allowing the claimant to recover the percentage of damages caused by each defendant, regardless of the extent of the claimant's own percentage of causation.295

The theory of joint and several liability for each defendant found to have been a cause of plaintiff's injuries was retained in *Duncan*, although the court modified the theory in ruling that all defendants are to be held jointly and severally liable regardless of whether the percentage of causation attributable to each of the defendants is greater or lesser than that of the plaintiff.296 The court noted in this regard that the share of an insolvent defendant should be imposed upon the remaining defendants. Furthermore, the court stated that the percentage of causation attributable to each settling tortfeasor shall be submitted to the jury and shall reduce pro rata the liability of all the non-
settling defendants. Finally, the Texas Supreme Court in *Duncan* abolished the common-law doctrine of indemnity between joint tortfeasors in a strict liability context except for a product seller who is a mere conduit in the marketing chain and who is not independently culpable.

E. Evidence

In *United States v. Weber Aircraft Corp.* the United States Supreme Court ruled that confidential statements obtained during an Air Force investigation of an air crash and sought by plaintiffs pursuant to the Freedom of Information Act (the FOIA) were protected from pre-trial discovery by exemption 5 of the FOIA. The Court observed that since the case of *Machin v. Zuckert*, confidential statements taken by aircrash safety investigators have been privileged and not subject to pre-trial discovery in civil cases. Although the subsequent enactment of the FOIA has made available to litigants numerous government agency records and documents, the Court found that Exemption 5 of the FOIA retains the *Machin* privilege and other civil discovery privileges.

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297 Id. at 429-32.
298 Id. at 432.
301 Section (5)(b) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), is one of nine exemptions to disclosure under this federal statute requiring government agencies to disclose records. Section (b)(5) provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency" are not required to be disclosed. See *Weber Aircraft*, 104 S. Ct. at 1490.
302 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). *Machin* held that confidential statements taken by aircrash safety investigators were privileged and therefore not subject to pretrial discovery. See *Weber Aircraft*, 104 S. Ct. at 1491.
303 Id. at 1492. The Ninth Circuit Court of Appeals construed the phrase "would not be available by law" found in exemption 5 as being limited only to those privileges explicitly recognized in the legislative history of the FOIA. "It read [the] history as accepting an executive privilege for pre-decisional documents containing advice, opinions or recommendations of government agents, but not extending to the *Machin* civil discovery privilege for official government information." Id.
In reversing the Ninth Circuit Court of Appeals, the Court in *Weber* found that the confidential statements obtained by the Air Force were "intra-agency memorandums or letters" under the plain language of Exemption 5 and, since the *Machin* privilege normally protects such statements from discovery in civil litigation, the statements could not be obtained by a private litigant through the FOIA.\(^{304}\) The Court explained its holding by stating that an anomaly would be created if private litigants could supplement civil discovery and obtain normally privileged material through the FOIA. The Court also based its decision on government agencies' need for confidentiality to "insure frank and open discussion."\(^{305}\)

A California appellate court held, in *Loftleidir Icelandic Airlines, Inc. v. McDonnell-Douglas Corp.*\(^{306}\) that the opinion testimony of a former National Transportation Safety Board ("NTSB") employee concerning the cause of a crash of a commercial flight should not have been excluded by the trial court since he did not actively participate in the NTSB's investigation of the accident while employed by the NTSB, and since his opinions concerning the cause of the crash were based on his independent investigation after being retained by the airline.\(^{307}\)

In a personal injury action arising out of the forced off-field landing of a Cessna 340, a pivotal issue arose as to whether or not the impact of landing exceeded FAA required design strength for the Cessna aircraft. The Tenth Circuit held that the plaintiff did not commit reversible error in cross-examining the defendant's experts on that issue with a diagram and deposition not admitted in evidence.\(^{308}\)

Several cases during the survey period addressed the admissibility of post-accident remedial measures. In *Moe*

\(^{304}\) *Id.* at 1492-93.

\(^{305}\) *Id.* at 1494.


\(^{307}\) *Id.* at 91, 204 Cal. Rptr. at 364.

\(^{308}\) Blevins v. Cessna Aircraft Co., 18 Av. Cas. (CCH) 17,656 (10th Cir. 1984).
v. Avions Marcel Dassault-Breguet Aviation, the Tenth Circuit held that Rule 407 of the Federal Rules of Evidence is substantive as opposed to procedural in nature, thus requiring a federal court in a diversity action to apply the state rules pertaining to admissibility of post-accident remedial measures. The Moe case was a product liability and negligence action arising out of an airplane crash allegedly caused by a defectively designed autopilot and flight control system. Some time after the crash occurred, the French manufacturer of the aircraft issued a "newsflash" warning pilots of the possibility of the autopilot's failure to disengage.

Although the Tenth Circuit in Moe found that Colorado law at the time the case was tried allowed admission of post-accident warnings in products liability actions, exclusion of the "newsflash" was upheld because the trial court also found the evidence to be inadmissible under Rule 403 of the Federal Rules of Evidence. The court observed that subsequent to the trial, the Colorado legislature had addressed the issue of admissibility of post-accident remedial measures in product liability actions, and such evidence is now to be excluded under Colorado law except for the sole purpose of showing a duty to warn.

In a non-aviation case, Schelbauer v. Butler Manufacturing

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310 Moe, 727 F.2d at 920.
311 FED. R. EVID. 407 reads:
"When, after an event, measures are taken, which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

Id.
312 727 F.2d at 934. The trial court expressly found that Rule 403 considerations of prejudice and jury confusion outweighed the probative value of admitting the "newsflash." Id.
Co., the California Supreme Court held that a post-accident warning about the danger of excess oil on roofing panels was admissible in a products liability action. The court reasoned that public policy reasons for excluding evidence of post-accident remedial measures in negligence cases are not applicable in a strict liability context because it is unlikely that product manufacturers will forego improvements of their products, and risk enumerable lawsuits, simply because evidence of such improvements might be admitted against them.  

VI. INSURANCE

A. General Exclusions

In National Union Fire Insurance Co. v. Carib Aviation, Inc., the issue presented to the United States District Court for the Southern District of Florida was whether the loss of an aircraft at sea during a smuggling attempt was excluded from coverage under the "conversion" exclusion of the aircraft policy. The court held that the good faith rental of an airplane to a pilot who lied about his intended use to smuggle marijuana into the United States was effective to avoid the "conversion" exclusion and afford coverage to the insured for the loss of the aircraft. The court observed that Florida law requires limiting the effectiveness of exclusionary language in an insurance policy to only those exclusions that are clearly delineated by the express language of the policy.

In Hartford Fire Insurance Co. v. Superior Court of California, 4
County of Los Angeles, a California appellate court held that neither a homeowner’s policy nor an excess indemnity policy provided coverage for or a duty to defend the pilot’s estate in an action brought as a result of an airplane crash. The insured contended that both policies provided coverage because the pilot worked on his pre-flight planning for the flight resulting in the accident at home the night before flying, he was under the influence of alcohol at the time of the accident, and he made representations before the flight concerning his piloting experience. The court determined, however, that coverage was excluded under both policies because no independent cause of the accident, unrelated to causes arising out of the “use or operation” of the aircraft, existed.

The Nevada Supreme Court, in National Union Fire Insurance Co. v. Reno’s Executive Air, Inc., interpreted Exclusion 5(e) of the Standard Air Taxi Endorsement authorized by Part 298 of the Economic Regulations with regard to damage to property carried on board a charter flight by a passenger. The court determined that the clause was ambiguous because it did not specify in whose possession the property being “carried in or on [the] aircraft” had to be before the exclusion applied. Although the court noted that the insurer did not draft the statutorily mandated exclusion, the court determined that the insurer could have put the insured on notice that

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319 Both policies excluded any liability arising out of the “ownership, maintenance, operation, use, loading or unloading of . . . any aircraft . . .” Id. at 410-11, 191 Cal. Rptr. at 39-40.
320 Id. at 415, 191 Cal. Rptr. at 42-43.
321 Id. at 417, 191 Cal. Rptr. at 44.
323 The endorsement provided: Unless otherwise provided in the policy of insurance, the liability insurance afforded under this policy shall not apply to: Loss of or damage to property owned, rented, occupied or used by, or in the care, custody or control of the Named Insured, or carried in or on any aircraft with respect to which the insurance afforded by this policy applies.
324 Id. at 1382.
325 Id. at 1383.
little or no coverage was provided for damage to a passenger's property.\textsuperscript{325}

In \textit{Bellefonte Underwriters Insurance Co. v. Alpha Aviation, Inc.}\textsuperscript{326} a renter pilot sued by his passengers injured in an airplane accident sought coverage under the rental company's airport liability policy and its aircraft liability policy. Finding that the hazard insured against in the airport liability policy was the rental company's "ownership, maintenance or use" of its premises at the airport, the North Carolina Supreme Court held that there was no liability coverage to the renter pilot.\textsuperscript{327} Also, since the pilot was operating the airplane under the terms of a rental agreement for which he had paid a fee to the rental company, the court found that the pilot was not an "insured" as defined by the aircraft liability policy.\textsuperscript{328}

B. Compliance with Pilot Qualification and Airworthiness Certificate Exclusions

In \textit{Potter v. Ranger Insurance Co.}\textsuperscript{329} the Ninth Circuit Court of Appeals considered whether a policy provision excluding coverage if the aircraft was operated in flight with an ineffective airworthiness certificate was ambiguous under Alaskan law.\textsuperscript{330} The court determined that a lay person after reading the exclusion would reasonably conclude that he would be denied coverage if the airworthiness certificate was not in effect, regardless of whether or not he had actual knowledge of the certificate's status.\textsuperscript{331}

The New Mexico Supreme Court, in \textit{Security Mutual Cas-
ualty Co. v. O'Brien, also considered whether the policy language concerning the need for an effective airworthiness certificate was ambiguous. The court found the exclusion unambiguous even though the policy failed to define the terms “airworthiness certificate”, “airworthiness certification” and “full force and effect”. Construing the terms in light of the context in which they were used, the court held that it was not necessary for the policy to either define the terms or refer to the FAA regulations which define the terms.

In Threlkeld v. Ranger Insurance Co., the insured contended that the language of the exclusion which required the airworthiness certificate to be in “full force and effect” while the aircraft was in flight was ambiguous because the phrase might be construed to include all FAA regulations relevant to aircraft operation. The court rejected this argument and held that the words, given their commonly understood meaning, refer only to the effectiveness of the airworthiness certificate and not to all potential FAA regulation violations.

In Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc., the Alaska Supreme Court held that the lack of an airworthiness certificate for a surplus military aircraft destroyed in a crash did not defeat coverage under the policy. The policy implied that the plane was insured when it carried freight for hire in the only legal manner it could have been expected to do so, as a public aircraft and without an airworthiness certificate and therefore the insurance was still in force. The court found that the insurer, by subsequently issuing a policy that denied liability when the aircraft was flown under these conditions without an effective airworthiness certificate, impermissibly altered

Id.
Id. For a further discussion of the O’Brien decision, see infra notes 349-350 and accompanying text.
Id. at 18,330.
the nature of the bargain. The court also found that the insurer could not defeat coverage on the grounds that the pilots were not type-rated for the airplane since the aircraft operator was led to believe by FAA employees that no type-rating was necessary, that the insurance binder made no mention of the requirement for a type-rating and that the agent was aware of the pilots’ qualifications. In *Guyre v. United States Fire Insurance Co.*, a New York appellate court held that an insurer was not entitled to summary judgment based on the pilot clause of the policy which required that the aircraft only be operated by a pilot holding a valid and effective medical certificate, even though the insurer proved that the pilot of the aircraft at the time of the crash had made several false statements on his application for a FAA medical certificate. The court determined that since the policy did not include specific language that any misrepresentation made in the application for a medical certificate would void the policy, the policy remained effective.

In *Avemco Insurance Co. v. Clark*, the Tenth Circuit considered whether coverage was afforded to a pilot not specifically named in the pilot clause of the policy. The pilot clause provided that the policy only applied when the aircraft was in flight and was being operated by one of two specifically named pilots. The printed portion of the policy, however, defined “insured” to include any person using the aircraft with permission of the named insured. The court construed this provision to refer to a pilot of the aircraft while in flight and to require reference to the pilot clause to determine the pilots covered by the policy. Since the pilots flying the aircraft at the time of the accident were not named in the pilot clause, coverage was not afforded.

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338 Id. at 1117.
339 Id. at 1118.
341 97 A.D.2d 964, 468 N.Y.S.2d at 819.
342 1984 Fire & Casualty Cas. (CCH) 789 (10th Cir. 1983).
343 Id. at 790.
Whether a VFR pilot is properly rated for a flight into instrument meteorological conditions when the flight departs in VFR conditions was the issue before the Texas Supreme Court in *United States Fire Insurance Co. v. Marr’s Short Stop of Texas, Inc.* The court held that a determination of whether a pilot is properly rated for the flight must be made by examining the flight as a whole rather than in segments. The characterization of a flight as either IFR or VFR must be determined by examining the weather at the commencement of the flight. Thus, where a VFR pilot knew at the inception of the flight that he would encounter IFR conditions, he was not properly rated for the flight under the terms of the policy.

The courts continue to disagree on the issue of whether causation is required for an insurance company to avoid liability on the basis of a breach of a condition in an aviation policy. The Texas Supreme Court was faced with this issue in *Puckett v. United States Fire Insurance Co.*, which involved the crash of an airplane that had not undergone an annual inspection voiding its airworthiness certificate. The insurer filed a declaratory judgment action relying on a policy provision suspending coverage if the airworthiness certificate was not in “full force and effect.” The court held that “an insurer cannot avoid liability under an aviation liability policy unless the failure to inspect is either the sole or one of several causes of the accident.”

The court further held that a policy which does not require a causal connection between the breach of the policy and the accident violates public policy. Conversely, the New Mexico Supreme Court, in *Security Mutual Casualty Co.*, a suit involving similar facts and an identical policy

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545 Id. at 312.
547 Id. at 56. The court specifically disapproved the holding to the contrary in *Schepps Grocer Supply, Inc. v. Ranger Ins. Co.*, 595 S.W.2d 13 (Tex. Civ. App. - Dallas 1976, writ ref’d n.r.e.).
exclusion, held that a causal connection between an exclusion clause and the accident is not essential before coverage can be denied.\(^{350}\)

C. Lienholders

In *American National Bank & Trust Co. v. Young*,\(^{351}\) the Minnesota Supreme Court held that a breach of warranty endorsement which contained the phrase that the insurance “as to the . . . mortgagee . . . shall not be invalidated by any act or neglect of the lessee, mortgagor or owner . . .”\(^{352}\) was, in effect, a separate contract between the lienholder and the insurer, protecting the lienholder against loss even though the terms of the policy were violated by the insured mortgagor. Thus, where the aircraft was seized in Colombia by the Colombian government after the insured mortgagor became involved in drug trafficking in violation of the policy terms, the lienholder was not precluded from recovery under the breach of warranty endorsement.\(^{353}\)

An Oregon appellate court, in *The Bank of California,*


\(^{351}\) 329 N.W.2d 805 (Minn. 1983).

\(^{352}\) Id. at 808.

\(^{353}\) Id. at 811.
N.A. v. Livingston,354 considered whether the language of a breach of warranty endorsement required the lienholder to "use all reasonable means to collect" the unpaid balance on the lien from the insured before proceeding against the insurer or only "amounts more than ten days overdue on the date of loss."355 Finding the endorsement unambiguous, the court required the lienholder to show that it had used reasonable efforts to collect the balance of its outstanding lien from the insured before proceeding against the insurer.356

The United States District Court for the Western District of Pennsylvania, in General Electric Credit Corp. of Tennessee v. Southeastern Aviation Underwriters Inc.,357 had an opportunity to interpret a breach of warranty endorsement in light of the terms of the physical damage coverage provided in the aircraft policy. The suit arose after a Cessna 404 aircraft owned by the insured disappeared while it was leased to a third party. Although the insurer agreed to pay for losses resulting from physical damage to the aircraft, including its disappearance, under the terms of the basic policy, the insurer refused to pay the lienholder based on a policy provision excluding coverage for "damage due to conversion, embezzlement or secretion by any person in possession of the aircraft under a lease . . . ."358 The lienholder, however, contended that the endorsement excluded from coverage only those conversions, embezzlements or secretion which were "by or at the direction of the Named Insured." Since the disapp-

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355 The breach of warranty clause provided in part:
2. The liability of the Company to any Lienholder . . . shall not exceed: (a) the unpaid balance due on liens pertaining to the aircraft less unearned interest and unpaid installments more than 10 days overdue on the date of loss or damage if any balance remains after the Lienholder has used all reasonable means to collect amounts due from the Named Insured; . . .
356 Id. at 387.
357 18 Av. Cas. (CCH) 17,827 (W.D. Pa. 1984).
358 Id. at 17,828.
pearance was not by or at the direction of the insured, the lienholder sought payment under the policy.\textsuperscript{359} The court disagreed and held that the endorsement did not extend any coverage beyond that which was contained in the basic policy. Rather, the language in the endorsement was inserted to make it clear that while the insurance company was relieving the lienholder from the coverage invalidating consequences of certain acts and neglects of the insured, conversion by or at the direction of the named insured was not being excused.\textsuperscript{360}

Finally, the United States District Court for the Eastern District of Missouri held, in \textit{First Missouri Bank and Trust Co. v. Bayly, Martin & Fay Aviation Insurance Services, Inc.},\textsuperscript{361} that the effective date of cancellation of an insurance policy with respect to a lienholder as a result of the insured's non-payment of premiums is measured from the date of actual receipt of the cancellation notice by the lienholder rather than the date of mailing by the insurer of the notice.\textsuperscript{362}

\textbf{VII. Damages}

\textbf{A. Constitutional Restrictions}

In \textit{Johnston v. Stoker},\textsuperscript{363} the Utah Supreme Court held that the Utah aircraft guest statute, just as its sister automobile guest statute, was unconstitutional under the Utah constitution. The court reasoned that because the statute failed to operate uniformly upon all persons, and because it lacked a rational relationship to its intended objectives, it could not pass constitutional muster. Consequently, the court determined that no impediment existed to the guest bringing a negligence cause of action against his host.\textsuperscript{364}

\begin{footnotes}
\item[359] Id.
\item[360] Id. at 17,829.
\item[362] Id. at 637.
\item[363] 685 P.2d 539 (Utah 1984).
\item[364] Id. at 542-43.
\end{footnotes}
B. Elements

In litigation arising out of the American Airlines DC-10 tragedy in Chicago, the Second Circuit concluded, in Shu-Tao Lin v. McDonnell-Douglas Corp.,\(^6\) that New York law permits recovery for a decedent's pre-impact fear and apprehension of impending death. The court held that sufficient evidence was introduced to support a $10,000 award for the decedent's pain and suffering before impact. The evidence indicated that the decedent had been assigned a seat over the left wing of the aircraft. The court concluded that a jury might find that during the thirty seconds between take-off and impact the decedent, by virtue of his seat assignment saw the left engine and a portion of the left wing break away.\(^6\)

In contrast with Lin, yet arising out of the same accident, the Second Circuit held, in Shatkin v. McDonnell-Douglas Corp.,\(^6\) that there was insufficient evidence to support a jury finding that a passenger seated on the right side of the plane suffered any pre-impact pain and suffering. The distinction appears to be in the relative seat assignments of the victims. Since the passenger in Shatkin was on the opposite side of the aircraft from where the damage occurred there was no evidence that he was even aware of the impending disaster until about three seconds before the crash.\(^6\)

The Fifth Circuit held, in Haley v. Pan American World Airways, Inc.\(^6\) that Louisiana law also permits recovery for a decedent's pre-impact fear and apprehension of impending death.\(^6\) Additionally, the court found that sufficient evidence was presented to support an award of $15,000 for the decedent's mental anguish prior to im-

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\(^6\) 742 F.2d 45 (2d Cir. 1984). For a further discussion of the Lin decision, see infra notes 384-388 and accompanying text.

\(^6\) Id. at 53.

\(^6\) 727 F.2d 202 (2d Cir. 1984).

\(^6\) Id. at 206-07.

\(^6\) 746 F.2d 311 (5th Cir. 1984). This suit arose from the crash of Pan Am Flight 759 near New Orleans, Louisiana, on July 9, 1982. Id.

\(^6\) Id. at 315.
The court concluded that, based on expert testimony describing the aircraft's flight, a jury could reasonably infer that the decedent was aware, for at least four to six seconds prior to impact, of the impending disaster. The court, also reduced the jury's award of $350,000 to each parent for the loss of love and companionship of the twenty-five year old decedent, noting that the largest judgment in Louisiana for the loss of an adult child was $150,000.

In *Piper Aircraft Corp. v. Yowell*, a Texas appellate court held that damages for loss of society, companionship and affection suffered by the surviving parents, spouses, and children of adult passengers killed in the mid-air disintegration of an airplane are not recoverable under the Texas Wrongful Death Statute. The court concluded that the Texas statute allows recovery by a parent for only the intangible emotional losses associated with the death of a minor child. The court also held that prejudgment interest may not be awarded in wrongful death cases.

In *Bullard v. Barnes*, the Illinois Supreme Court defined the *pecuniary injuries* suffered as a result of the death of a minor child under the Illinois Wrongful Death Act to include the loss of the child's society. However, the child rearing expenses which the parents would have in-

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371 *Id.* at 317.
372 *Id.* at 318-319. The court reduced the award to $200,000 to each parent. *Id.*
375 *Yowell*, 674 S.W.2d at 461-62. Currently, Texas law only allows the recovery of non-pecuniary damages in a suit by a parent for the death of a minor child. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). The Texas Supreme Court, however, when faced with the issue raised in *Yowell*, will likely expand the Act to allow recovery of non-pecuniary damages in all death cases brought under the Texas Act. In fact, one Texas court has already interpreted *Sanchez* to allow the recovery of non-pecuniary losses in all death cases. *See Missouri Pac. R.R. v. Dawson*, 662 S.W.2d 740 (Tex. App.-Corpus Christi 1983, writ requested).
376 *Yowell*, 674 S.W. 2d at 462-63.
378 ILL. REV. STAT. ch. 70 §§ 1-2.2 (1979). The Act provides, in part: "*[I]*n every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person." *Id.* § 2.
curred had the child lived, are to be deducted by the jury from any amount awarded for the loss of society.\textsuperscript{379}

C. Calculation of Damages

In \textit{Sosa v. M/V Lago Izabal},\textsuperscript{380} the Fifth Circuit held that the district court was correct in increasing a claimant’s award for lost future wages by the amount of tax the claimant would pay on the interest accrued by the lump sum awarded. The court ruled that this adjustment was appropriate under the rule enunciated by the United States Supreme Court in \textit{Norfolk & Western Railway Co. v. Liepelt}.\textsuperscript{381} Under that rule, a wage earner’s income tax is a relevant factor to be considered in calculating an award for estimated future earnings.\textsuperscript{382} The Fifth Circuit added that it “will approve any reasonably safe arrangement that will produce an after-tax income equivalent to that lost by the plaintiff.”\textsuperscript{383}

In \textit{Lin v. McDonnell-Douglas Corp.},\textsuperscript{384} the Second Circuit also addressed the effect of income taxes on determining an award for lost future earnings. The court ruled that a defendant had been denied the practical effect of the \textit{Liepelt} ruling\textsuperscript{385} when the trial court allowed the jury to consider that a decedent’s future income stream would have been subject to income tax in conjunction with evidence that the income stream produced by the damage award would also be subject to that tax. In assuming that the taxes on decedent’s future income stream and the taxes paid on the income stream produced by the damage

\textsuperscript{379} Bullard, 468 N.E.2d at 1234-35 (1984).
\textsuperscript{380} 736 F.2d 1028 (5th Cir. 1984). Although \textit{Sosa} is not an aviation case, its holding will probably affect the calculation of lost future earnings in aviation cases.
\textsuperscript{381} 444 U.S. 490 (1980).
\textsuperscript{382} 736 F.2d at 1033-34.
\textsuperscript{383} Id. at 1034 n. 5.
\textsuperscript{384} 742 F.2d 45 (2d Cir. 1984). For a further discussion of the \textit{Lin} decision, see supra notes 365-366 and accompanying text.
\textsuperscript{385} The court chose not to address the issue of whether the district court was correct in holding that New York would apply the \textit{Liepelt} ruling in wrongful death cases. \textit{Id.} at 50-51.
award would equal one another, the district court had erred in not allowing for the decedent’s potential income tax liability in computing damages.\textsuperscript{386} The court further found that the trial court had improperly concluded that taxes would likely be paid on the income produced by the award when no evidence of the future tax was introduced.\textsuperscript{387} The Second Circuit also established that prejudgment interest, under New York law, is limited to losses suffered between the date of death and entry of judgment. Thus, prejudgment interest is not to be applied to postjudgment losses which are discounted to their present value.\textsuperscript{388}

Finally, the courts have considered the impact of income taxes on damage awards. The United States District Court for the Western District of Kentucky, in \textit{Calarie v. United States},\textsuperscript{389} concluded, based on \textit{Liepelt}, that income taxes should be considered in awarding damages under the Federal Tort Claims Act.\textsuperscript{390}

\begin{footnotes}
\footnote{Id.}
\footnote{Id. at 51.}
\footnote{Id. at 52.}
\footnote{No. C 79-0357-L(B) (W.D. Ky. July 25, 1984).}
\footnote{Id.}
\end{footnotes}