Recent Developments in Aviation Case Law

Rod D. Margo

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RECENT DEVELOPMENTS IN AVIATION CASE LAW

ROD D. MARGO*

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I. INTRODUCTION

PRACTITIONERS OF WHAT is loosely called "aviation law" are sometimes hard-pressed to define the subject or to circumscribe the limits of the field. Some issues, such as those arising under the Warsaw Convention, are clearly issues of aviation law. Others, however, are not as obvious. Thus, lawyers representing air carriers in discrimination suits brought pursuant to Title VII of the Civil Rights Act of 1964 may be called labor lawyers or aviation lawyers, depending upon who makes the characterization.

For purposes of dividing the subject matter, this author distinguishes between "pure aviation law," "developed aviation law," and the "twilight zone." The first classification embraces those legal issues which belong exclusively in the realm of aviation, such as the Warsaw Convention, the Chicago Convention, aerial hijacking, and compliance with Federal Aviation Act and Federal Aviation Regulations. "Developed aviation law" refers to that branch

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of aviation law derived from other areas of the law which has undergone specific development in the aviation context. The field of aviation insurance is a good example. The third category involves those legal issues which are difficult, if not impossible, to characterize as belonging within the field of aviation law. Examples of these include labor problems, constitutional issues, and antitrust issues affecting aviation operations.

The preceding discussion illustrates the difficulty in attempting to report on recent developments in aviation case law. In many respects, what should be included within this survey depends on the leanings of those who review it. To discuss every decision of interest to all lawyers involved in cases with aviation elements would be impossible. The cases discussed hereunder have been selected primarily for their interest to lawyers involved in the liability aspects of aviation litigation.

II. Jurisdiction

A. Federal Subject Matter Jurisdiction

The question of subject matter jurisdiction in the federal courts is an important issue in aviation cases. Foreign defendants, in particular, nearly always prefer that litigation against them proceed in a federal court. Federal judges are usually of a higher caliber than state court judges; therefore, the standard of practice is usually higher in the federal courts. In addition, federal judges are invariably more experienced in international issues, such as the interpretation of treaties, that may arise in a dispute involving a foreign defendant.

An increasingly important aspect of federal subject matter jurisdiction is the Foreign Sovereign Immunities Act of 1976. Congress introduced this Act to provide a com-

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A comprehensive scheme under which actions could be brought in United States courts against "foreign states." A "foreign state" is defined to include a foreign corporation, the majority of whose shares are owned by the government of the state in which the corporation is organized.

A significant provision in the Act allows the removal to federal court of "[a]ny civil action brought in a state court against a foreign state." The United States Supreme Court has held that the language of the Act is wide enough to permit the removal to federal court of any action against a foreign state, even if the plaintiff is an alien, although there may be no diversity of citizenship or federal question jurisdiction. An important consequence of removal under the Foreign Sovereign Immunities Act is that the case will be tried by a judge sitting without a jury.

Under the Act, foreign states may be sued in the United States only when the action fits within specified exceptions to sovereign immunity, the most important of which is the "commercial activity" exception. According to this exception, a court in the United States may exercise jurisdiction over foreign states in any case where the action is based upon a "commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of a foreign state elsewhere; or upon an act committed outside of the territory of the United States in connection with commercial activity of the foreign state elsewhere which causes a direct effect in the United States."

A number of important decisions on the Foreign Sover-

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9 Id. § 1441(d).
12 Id. § 1605(a)(2).
13 Id. The latter exception is also known as the "direct effect" exception.
eign Immunities Act are directly relevant to the aviation field. In *Australian Government Aircraft Factories v. Lynne* the court affirmed the established principle that a foreign sovereign is immune from suit for its public acts but not for commercial acts causing a direct effect in the United States. Plaintiffs brought an action in the District Court for the Central District of California against Australian Government Aircraft Factories and the Commonwealth of Australia alleging causes of action arising out of the July 1979 crash of one of its aircraft in Indonesia with the accompanying death of the American pilot. The court found that the Australian Government did not fall within any exception to the general rule of sovereign immunity and was thus not subject to jurisdiction in a United States court.


In *Bryne v. Thai Airways International Ltd.* the court denied a motion to dismiss a claim against a carrier that was a foreign state under the Act on the grounds that the carrier conducted commercial activity in the United States by maintaining offices, selling tickets, and operating flights into and out of the country. Since the flight on which plaintiff was injured originated in the United States, such flight was connected with the carrier's commercial activity in the United States. The court held, therefore, that the United States could properly exercise jurisdiction under section 1605(a)(2) of the Foreign Sovereign Immunities

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14 743 F.2d 672 (9th Cir. 1984), cert. denied, 105 S.Ct. 1189 (1985).
15 743 F.2d at 674.
16 Id. at 675.
18 Id.
19 18 Av. Cas.(CCH) 18,363 (N.D. Ill. 1984).
Act.\textsuperscript{20}

In \textit{Boskoff v. The Boeing Co.}\textsuperscript{21} the court held that the provision in the Foreign Sovereign Immunities Act permitting the enlargement of a foreign state's time to remove an action beyond thirty days from receipt of the initial pleading "for cause shown" did not permit removal of an action more than five years after receipt of such initial pleading. The court noted that sustaining such a removal "would enable a litigant to hazard the chances of litigation in the state court indefinitely but to remove the action whenever it seemed advantageous to do so."\textsuperscript{22}

In \textit{Keller v. Transportes Aereos Militares Ecuadorianos}\textsuperscript{23} the District Court for the District of Columbia held that the owner and operator of an aircraft, which qualified as a foreign state under the Foreign Sovereign Immunities Act, did not waive its immunity from suit by entering into a credit agreement with certain United States banks and other institutions to finance the cost of the aircraft. The aircraft crashed in Ecuador, killing two American citizens. The court held that the crash did not relate to the agreement executed in connection with the financing of the aircraft. Further, the court held that the "commercial activity" exception to the Foreign Sovereign Immunities Act did not apply because the crash did not cause a "direct effect" in the United States.\textsuperscript{24}

In \textit{In re Korean Air Lines Disaster of September 1, 1983}\textsuperscript{25} the District Court for the District of Columbia dismissed several actions against the Soviet Union based on the shooting down of Korean Air Lines flight 007 on September 1, 1983, while the aircraft was allegedly in Soviet airspace. The court held that under the Foreign Sovereign Immunities Act the Soviet Union was entitled to sovereign immu-

\textsuperscript{20} Id.
\textsuperscript{21} 18 Av. Cas. (CCH) 18,483, (S.D.N.Y. 1984).
\textsuperscript{22} Id. at 18,485. The court noted that the removal procedure was not designed for duplication of judicial resources or delay. Id. at 18,486.
\textsuperscript{24} Id. at 789-90.
\textsuperscript{25} 19 Av. Cas. (CCH) 17,596 (D.D.C. 1985).
nity and that the shooting down of the Korean jetliner was military and political in nature, thus falling into the category of "governmental" acts for which sovereign immunity is granted. The court also denied jurisdiction pursuant to the Act of State doctrine, which was formulated to prevent judicial interference in sensitive areas of foreign relations.

*Beattie v. United States* is one of several cases arising out of the crash of an Air New Zealand aircraft into Mount Erebus, Antarctica on November 28, 1979. Plaintiff filed a complaint in the District Court for the District of Columbia seeking recovery against the United States for wrongful death under the Federal Tort Claims Act. The complaint alleged negligence on the part of the United States Navy air traffic controllers at McMurdo Naval Air Station, Antarctica, as well as negligence by officials of the Department of Defense in the selection, training, and supervision of the Navy personnel at the air base facility.

The Government filed a motion to dismiss, claiming, among other things, that the district court lacked subject matter jurisdiction. The Government's motion was based on the "foreign country" exception to the Federal Tort Claims Act. This exception removes from the scope of the Federal Tort Claims Act "any claim arising in a foreign country."

The district court was faced with a case of first impression which required it to determine whether Antarctica was a "foreign country" within the meaning of the Federal Tort Claims Act. The district court found that Antarctica was not subject to the sovereignty of any nation and,

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26 Id. at 17,600-01.
27 Id.
28 756 F.2d 91 (D.C. Cir. 1984).
29 Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (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. Id. § 1346(b).
30 756 F.2d at 93.
therefore, was not a "foreign country."\[^{32}\] Consequently, the court denied the government’s motion to dismiss.\[^{33}\]

The Court of Appeals for the District of Columbia affirmed the district court’s finding that Antarctica was not a "foreign country" and had no civil tort law to apply.\[^{34}\] Furthermore, since some of the alleged negligence occurred in government headquarters located in Washington, D.C., jurisdiction was proper in the district court.\[^{35}\]

B. Personal Jurisdiction

In a recent non-aviation case, *Asahi Metal Industry Co. v. Superior Court*,\[^{36}\] the California Supreme Court ruled that the State of California may constitutionally exercise personal jurisdiction over a component parts manufacturer that made no direct sales in California but knew that a substantial number of its parts would be incorporated into finished products sold in that state.\[^{37}\] The significance of this decision for foreign aircraft component part manufacturers cannot be underestimated.

*Asahi* arose in the context of a 1978 Honda motorcycle accident in California. The driver of the motorcycle was severely injured when he lost control of his motorcycle and collided with a tractor rig. His wife, a passenger on the motorcycle, was killed. The accident allegedly was caused by a sudden loss of air and an explosion in the motorcycle’s rear tire.\[^{38}\]

The surviving driver filed a products liability action alleging that the motorcycle tire, tube and sealant were defective. Among those named as defendants in the complaint were the Taiwanese manufacturer of the tube and the California retailer. The California retailer in turn


\[^{33}\] Id. at 785.

\[^{34}\] 756 F.2d at 94, 104-05.

\[^{35}\] Id. at 100.


\[^{37}\] Id. at 44-48, 702 P.2d at 549-50, 216 Cal. Rptr. at 391.

\[^{38}\] Id. at 40-41, 702 P.2d at 545, 216 Cal. Rptr. at 387.
filed a cross-complaint, seeking indemnity from its co-defendants and from Asahi Metal Industry Co., Ltd., the manufacturer of the tube's valve assembly. Asahi moved to quash service of summons, arguing that it could not be subject to personal jurisdiction in California because it lacked the requisite "minimum contacts" with the state. After the lower court denied the motion, Asahi appealed to the California Supreme Court, which ruled that personal jurisdiction over Asahi was proper under the decisions of the United States Supreme Court in *International Shoe Co. v. Washington* and *World-Wide Volkswagen Corp. v. Woodson*.

In this case, Asahi had no offices, property or agents in California. It solicited no business in California and made no direct sales there. The California Supreme Court nonetheless found that jurisdiction could be exercised over Asahi, relying in large part on the United States Supreme Court's holding in *World-Wide Volkswagen* that a forum state may assert personal jurisdiction over a corporate defendant if the corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state."

Given the "substantial nature of Asahi's indirect business with California, and its expectation that its product would be sold in the state," the court concluded that Asahi reasonably should have anticipated being sued in California. The court found that Asahi had knowledge that its valve assemblies would be used in California and that Asahi knew it would benefit from the sale of products in California. Asahi, therefore, availed itself of the benefits and protections of California's laws; moreover, it had

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39 Id. at 41-42, 702 P.2d at 545, 216 Cal. Rptr. at 387.
40 Id.
41 326 U.S. 310 (1945).
43 39 Cal. 3d at 40, 702 P.2d at 548, 216 Cal. Rptr. at 390 (quoting *Worldwide Volkswagen*, 444 U.S. at 298).
44 39 Cal. 3d at 48-49, 702 P.2d at 549-50, 216 Cal. Rptr. at 391-92.
contacts with the state which were sufficient for the California courts to constitutionally exercise jurisdiction.\textsuperscript{45}

Asahi argued that the "stream of commerce" theory approved in \textit{World-Wide Volkswagen} was not applicable unless the defendant actually attempted to exploit the forum's market. Such exploitation would include, for example, developing an indirect marketing scheme to serve the forum state or designing a product with an eye toward compliance with the forum's rules and regulations.\textsuperscript{46} The court rejected Asahi's argument, stating that \textit{World-Wide Volkswagen} did not require that the defendant market its products in the forum state, but only that the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."\textsuperscript{47}

After finding that Asahi's contacts with California satisfied the minimum contacts test, the court proceeded to the second aspect of the due process inquiry, namely, whether the exercise of jurisdiction would be fair and reasonable. In this inquiry, a court must balance "the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction."\textsuperscript{48} The court found that California's interest in asserting jurisdiction over Asahi was substantial and that assertion of jurisdiction over Asahi would be fair and reasonable.\textsuperscript{49}

C. \textit{Forum Non Conveniens}

The principle of \textit{forum non conveniens}, originally recognized by the United States Supreme Court in \textit{Gulf Oil

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} 39 Cal. 3d at 45, 702 P.2d at 548, 216 Cal. Rptr. at 390 (quoting \textit{Worldwide Volkswagen}, 444 U.S. at 298).
\textsuperscript{48} Id. at 44, 702 P.2d at 552, 216 Cal Rptr. at 394 (quoting Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 898, 458 P.2d 57, 62, 80 Cal. Rptr. 118, 123 (1969)).
\textsuperscript{49} Id. at 45, 702 P.2d at 553, 216 Cal. Rptr. at 395.
RECENT DEVELOPMENTS

Corp. v. Gilbert,\(^{50}\) permits a court to decline jurisdiction even though venue and jurisdiction are proper, on the theory that the action should be tried in another judicial forum for the convenience of the litigants and witnesses. In recent years several United States courts have dismissed cases arising from air crashes occurring abroad pursuant to the doctrine of forum non conveniens.\(^{51}\) The most significant of these is Piper Aircraft Co. v. Reyno,\(^{52}\) the facts of which are fairly typical of foreign air crash cases. In Piper, the court found that public interest factors favored trial in Scotland, even though the substantive law that would be applied would be less favorable to plaintiffs than the law of the chosen forum.\(^{53}\)

Two recent California cases on forum non conveniens deserve our attention. The first is Holmes v. Syntex Laboratories, Inc.\(^{54}\) a non-aviation products liability action brought by British citizens against three corporate defendants for damages allegedly caused by an oral contraceptive. The trial court granted the defendants' motion for dismissal on the ground of forum non conveniens.\(^{55}\) The Court of Appeal reversed, holding that the plaintiffs' choice of forum was entitled to substantial deference and that the action should not be dismissed absent a "suitable" alternative forum.\(^{56}\) The court noted that no cause of action for strict liability exists in Great Britain and that British negligence law provides inadequate remedies for those injured by defective products. The court concluded that litigation of

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\(^{50}\) 330 U.S. 501, 504 (1947).

\(^{51}\) See, e.g., Miskow v. Boeing Co., 664 F.2d 205, 207 (9th Cir. 1981) (court applied forum non conveniens to dismiss action that should have been brought abroad), cert. denied, 455 U.S. 1020 (1982); Dahl v. United Technologies Corp., 472 F. Supp. 696, 702 (D. Del. 1979) (court dismissed case on grounds of forum non conveniens where Norwegian law was to be applied); Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 589-90, 165 Cal. Rptr. 190, 197-98 (1980) (dismissal on grounds of forum non conveniens held proper where Canadian court could expedite resolution of plaintiffs' claims and allocation of damages among defendants).


\(^{53}\) Id. at 260.


\(^{55}\) Id. at 377, 202 Cal. Rptr. at 775.

\(^{56}\) Id. at 390, 202 Cal. Rptr. at 785.
the action in the United Kingdom would have denied plaintiffs a suitable alternative forum.\(^5^7\) In so holding, the court stated that California's law of *forum non conveniens* differed from the rule enunciated by the United States Supreme Court in *Piper* in at least two fundamental respects. First, the rule of substantial deference to the plaintiff's choice of forum is more important in California than in federal courts after *Piper*.\(^5^8\) In addition, California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a *forum non conveniens* dismissal.\(^5^9\)

More recently, in *Rehm v. Aero Engines, Inc.*\(^6^0\) the California Court of Appeal affirmed a *forum non conveniens* dismissal arising out of the crash of an aircraft in Canada, despite the fact that the defendant which rebuilt the aircraft engine was a California corporation. The court noted that the essential witnesses were in Canada, immediate medical treatment was given in Canada, the crash was investigated in Canada, the estate of the pilot was pending in Canada, and all maintenance and operating records relating to the aircraft were located in Canada.\(^6^1\) In affirming the dismissal, the court stated that although there was a temptation to explore some of the interesting questions raised by *Holmes* and its diversions from *Piper*, the case at bar was sufficiently distinguishable from *Holmes* not to require such a step.\(^6^2\) The court went on to list the following primary factors a court should consider in determining whether to dismiss an action pursuant to the doctrine of *forum non conveniens*: (1) the amenability of the defendant to personal jurisdiction in the alternative forum; (2) the relative convenience to the parties and wit-

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\(^5^7\) Id. at 383-88, 202 Cal. Rptr. at 780-82.

\(^5^8\) Id.

\(^5^9\) Id.

\(^6^0\) Id. at 381, 202 Cal. Rptr. at 779.

\(^6^1\) 210 Cal. Rptr. 594 (Ct. App. 1985). This decision of the Court of Appeal was originally published at 164 Cal. App. 3d 715 (1985). The California Supreme Court subsequently denied review and further ordered that the original opinion not be officially reported.

\(^6^2\) 210 Cal. Rptr. at 596-97.

\(^6^3\) Id. at 597.
nesses of trial in the alternative forum; (3) the differences in conflict of laws rules applicable in the forum state and in the alternative forum; (4) the defendant’s principal place of business; (5) whether the situation, transaction or events out of which the action arose, existed, occurred in, or had a substantial relationship to the forum; (6) whether any party would be substantially disadvantaged in having to try the action in the forum or in the alternative forum; (7) whether any judgment would be enforceable by process issued or other enforcement proceedings undertaken in the forum; (8) whether witnesses would be inconvenienced if the action were prosecuted (a) in the forum or (b) in the forum in which the moving party asserts it ought to be prosecuted; (9) the relative expense to the parties of maintaining the action (a) in the forum and (b) in the state in which the moving party asserts the action ought to be prosecuted; (10) whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case; (11) whether prosecution of the action will or may place a burden on the courts of the forum which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to the forum; (12) whether the parties participating in the action have a relationship to the forum which imposes upon them an obligation to participate in judicial proceedings in the courts of the forum; (13) the interest, if any, of the forum in providing a forum for some or all of the parties to the action; (14) the interest, if any, of the forum in regulating the situation or conduct involved; (15) the avoidance of a multiplicity of actions and inconsistent adjudications; (16) the relative ease of access to sources of proof; (17) the availability of compulsory process for attendance of witnesses; (18) the relative advantages and obstacles to a fair trial; (19) the public interest in the case; (20) whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by plaintiff; (21) whether imposition of jury duty is imposed upon a community
having no relation to the litigation; (22) the injustice to, and burden on, local courts and taxpayers; (23) the difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions; (24) availability of the forum claimed to be more appropriate; and (25) other relevant considerations.

Although the Rehm decision appears to be more consistent with the principles enunciated by the Supreme Court in Piper, it is significant to note that in California there are now differing interpretations of the requirements to be satisfied for a forum non conveniens dismissal at the state and federal levels.

In Byrne v. Japan Airlines, Inc. the District Court for the Southern District of New York dismissed an action for personal injuries brought by a United States citizen who resided in New York at the time of the accident. The accident occurred while the plaintiff was disembarking from an aircraft in Bangkok, Thailand. The court stated that plaintiff's choice of forum is normally deferred to under the doctrine of forum non conveniens. However, the plaintiff was born in Thailand and maintained a temporary residence there. The defendant airline had offices in Bangkok, and witnesses to the accident, persons who conducted the investigation into the aircraft accident, and the plaintiff's physicians all resided in Thailand. The court found that United States interests in the controversy were minimal compared to those of Thailand. Furthermore, the court stated that it was reluctant to put itself in a position of having to untangle Thai law. Therefore, for purposes of public policy and private convenience, the court held that Thailand was a more appropriate forum. As is usually the case, the court dismissed the action subject to

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63 Id. at 596-97.
64 See Holmes, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 773.
65 19 Av. Cas. (CCH) 17,104 (S.D.N.Y. 1984).
66 Id. at 17,105.
67 Id. at 17,107.
68 Id.
the defendant's agreement to submit to jurisdiction in Thailand, waive a statute of limitations defense that may have existed prior to the initiation of the lawsuit, and pay any judgment that might be rendered against it in Thailand.

In *Recumar Inc. v. KLM Royal Dutch Airlines* the District Court for the Southern District of New York dismissed two of three claims brought against KLM by foreign owners of lost cargo. The court determined that the Warsaw Convention applied to the first two claims since the goods were shipped internationally. Therefore, subject matter jurisdiction was improper with respect to these claims. The rights and obligations of the parties had to be determined by the provisions of the Convention, not in the District Court. However, the court denied the airline's motion to dismiss the third claim on the ground of *forum non conveniens*. The Warsaw Convention did not apply to the third claim because the transportation provided did not constitute "international transportation" as defined in Article 1(2) of the Convention. Since the carrier did not meet its burden of showing that an adequate alternative forum existed, the court was unable to dismiss the action under the *forum non conveniens* doctrine. While the airline suggested several alternative forums, it failed to specify which of the alternative forums was the more convenient. The court stated that it was impossible to weigh the relative advantages of the various forums and to designate a more convenient forum.

III. CONFLICT OF LAWS

In *Ramirez v. Pan American World Airways, Inc.*, a case

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69 Id. at 17,107-08.
71 Id. at 799.
72 Id.
73 Id. at 798.
74 Id. at 799.
75 Id.
76 19 Av. Cas. (CCH) 17,136 (N.Y. Sup. Ct. 1985).
arising out of the July 9, 1982 crash of a Pan American aircraft shortly after takeoff from New Orleans, the New York Supreme Court held that the law of New York applied to the issue of damages even though Louisiana was the place of the accident. The administrators of several decedents' estates brought actions in New York and sought to have the law of Louisiana, the lex loci delicti, applied to the issue of damages. The defendant sought to have New York law, the law of the forum, applied or, in the alternative, the law of the decedents' domiciles.\textsuperscript{77} Louisiana law permitted recovery of damages for grief, sorrow, and loss of consortium, whereas New York law limited damage recovery in wrongful death actions solely to pecuniary loss.\textsuperscript{78} The court held that the lex loci rule is no longer necessarily applied in airplane accidents because the place of the accident is purely fortuitous, and other states may have greater policy interests in having their law applied.\textsuperscript{79} In reaching its decision, the court stated that absent contacts between the place of an accident, the victims, and the tortfeasor, there is little reason to apply the law of the state where the airplane crashed.\textsuperscript{80} The court found that Pan Am was a corporation whose principal place of business was in New York and that New York's wrongful death damage law reflects the legislative policy regarding the rights of decedents' estates and exposure of negligent defendants.\textsuperscript{81} The court further noted that plaintiffs exercised their option to choose New York as the forum and that New York had an interest in applying its own law to the issue of damages.\textsuperscript{82}

In \textit{Kinnett v. Sky's West Parachute Center, Inc.}\textsuperscript{83} the United States District Court for the District of Colorado applied the law of the jurisdiction which had the "most significant
relationship to the occurrence and the parties" instead of the law of the situs of the accident.\textsuperscript{84} The decedent, a Wyoming resident, was killed when the airplane in which he was a passenger collided with an airplane operated by the defendant. The collision took place in Colorado near the Wyoming border. The decedent’s survivors, all residents of Wyoming, commenced an action for wrongful death in the District Court for the District of Colorado and moved the court to apply Wyoming’s wrongful death statute to the action.\textsuperscript{85} Wyoming law allowed prevailing plaintiffs in a wrongful death action to recover punitive damages for loss of probable future companionship, society, and comfort.\textsuperscript{86} Colorado’s wrongful death statute limited recovery to net pecuniary loss and allowed no punitive damages in a wrongful death action.\textsuperscript{87}

The court held that Colorado’s choice of law rules would apply because subject matter jurisdiction over the action was based on diversity of citizenship.\textsuperscript{88} The court further held that Colorado followed the \textit{Restatement (Second) of Conflict of Laws}, which provided that the law of the state where the injury occurred would apply in a wrongful death action unless some other state had a more significant relationship to the occurrence and the parties, in which event the law of the other state would apply.\textsuperscript{89} Colorado courts, therefore, apply the law of the state with the “most significant relationship to the occurrence and the parties.”\textsuperscript{90}

The court found that the most significant contacts in this case were that (1) the plaintiffs resided in Wyoming, (2) the decedent lived in Wyoming, (3) the decedent purchased his ticket in Wyoming from a corporation doing business there, (4) the decedent’s purpose was to

\textsuperscript{84} \textit{Id.} at 1040.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Restatement (Second) of Conflict of Laws} §§ 7, 175, 178 (1960).
\textsuperscript{90} 596 F. Supp. at 1041.
travel roundtrip, commencing and terminating in Wyoming, and (5) the accident occurred in Colorado airspace near the Wyoming border, while the airplane was returning to Wyoming. Further, the court stated that Colorado's contact with this action was merely fortuitous in that the Wyoming-bound airplane collided and crashed south of the Colorado-Wyoming border. The court concluded that Wyoming's interest in seeing that its citizens were fully compensated outweighed the tenuous contacts the accident had with the State of Colorado and ordered that Wyoming's law governing wrongful death damages be applied.

In *Risdon Enterprises, Inc. v. Colemill Enterprises, Inc.*, plaintiff, a Delaware corporation, brought an action in Georgia against defendants for loss of the services of a key employee who was killed in an airplane crash in South Carolina. Defendants moved to dismiss the complaint on the grounds, *inter alia*, that the law of South Carolina governed the substantive rights of the parties, and under South Carolina law the plaintiff corporation had no right of recovery. The court held that under Georgia law the lex loci delicti determines the substantive rights of the parties. The court stated that the law of the place where the tort or wrong has been committed is the law which will be used to determine liability. The place of the wrong was defined as the place where the last event occurs which is necessary to make an actor liable for an alleged tort. In this case, the last event necessary to make defendants liable for the alleged tort, the airplane crash, occurred in South Carolina. Under the common law of South Carolina, an employer had no right to sue a tortfeasor for injuries inflicted upon a key employee. Plaintiff's claim was accordingly denied.

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91 *Id.*
92 *Id.*
94 *Id.* at 903, 324 S.E.2d at 740.
95 *Id.*
96 *Id.* at 905, 324 S.E.2d at 741.
Under the Federal Tort Claims Act the liability of the United States for an injury is to be determined "in accordance with the law of the place where the act or omission occurred."97 In Richards v. United States98 the court held that the "law of the place where the act or omission occurred" includes the choice of law rules of that jurisdiction.99 Three recent cases involved a choice of law analysis in accordance with the provisions of the Federal Tort Claims Act.

In Foster v. United States100 the personal representatives of the decedents' estates brought an action against the United States. The claim arose out of an airplane crash in which the decedents were killed. Plaintiffs alleged that the accident resulted from the negligent provision of air traffic control services to the crew of the airplane by air traffic controllers in the Chicago Air Route Traffic Control Center.

The plaintiffs argued that the Illinois wrongful death statute governed, while the defendant argued that Florida's wrongful death law controlled.101 In Florida, unlike Illinois, the representative of a decedent's estate may recover on behalf of non-minor children only if such children are partly or wholly dependent on the decedent for support.102

Since Illinois was "the place where the act or omission occurred," the court found that Illinois law governed, including Illinois choice of law principles. Under Illinois choice of law rules, the "most significant relationship" test of the Restatement (Second) of Conflict of Laws is used.103 According to this test, the lex loci delicti will be applied unless another state has a "more significant relationship"

97 Federal Tort Claims Act, supra note 29, § 1346(b).
99 Id. at 11.
100 768 F.2d 1278 (11th Cir. 1985).
101 Id. at 1279.
102 Id.
103 Id. at 1280.
to the occurrence or to the parties.\textsuperscript{104} In determining whether another state has a more significant relationship to the occurrence or the parties, the Court should consider the following: the place of the injury; the place of the misconduct; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship, if any, between the parties is centered.\textsuperscript{105} Using the above criteria, the Court of Appeals for the Eleventh Circuit held that the law of Illinois should be applied to the case, reversing the ruling of the district court.\textsuperscript{106} According to the court, the State of Illinois had the most significant contacts with the parties. The alleged misconduct of the United States occurred in Illinois, the only lineal descendant of the decedents was a resident of Illinois at the time of the accident, and the relationship between the decedents and the United States was centered in Illinois. Although the estate was to be probated in Florida and any recovery would take place there, the court held that the interest of Illinois in deterring tortious conduct in Illinois and in compensating its citizens was greater than Florida’s interest in limiting recovery.\textsuperscript{107}

In Poindexter \textit{v. United States}\textsuperscript{108} a wrongful death action arising out of the crash of a B-17 aircraft in Nevada was filed against the United States under the Federal Tort Claims Act. The aircraft had been used in bombing forest fires with fire retardant chemicals. Plaintiff alleged that the accident occurred because the pilot had been permitted to fly the aircraft after a shortened rest period and a particularly long day’s work. The district court, finding that Arizona law applied because the heirs had received death benefits in Arizona, held that the United States was immune from suit as a statutory employer under Ari-

\textsuperscript{104} See \textit{Restatement (Second) of Conflicts of Laws} §§ 175, 178 (1960).
\textsuperscript{105} \textit{Id.} § 145.
\textsuperscript{106} 768 F.2d at 1284.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} 752 F.2d 1317 (9th Cir. 1984).
zona’s worker’s compensation law. The Ninth Circuit Court of Appeals reversed, holding that since the “place where the act or omission occurred” was Nevada, the law of Nevada, including its conflict of law principles, was to be applied pursuant to the Federal Tort Claims Act. Since Nevada applied the lex loci delicti principle in choice of law questions, the law of Nevada controlled in assessing the liability of the United States.

In *Texasgulf Inc. v. Colt Electronics Co.* the District Court for the Southern District of New York applied New York law in a case brought against the United States under the Federal Tort Claims Act, in which plaintiffs asserted negligence of air traffic controllers. The air traffic controllers were located in New York, and the crash occurred in New York when the aircraft was attempting to land in New York. The court found that New York was the place where the “act or omission occurred.”

In a significant decision of the District Court for the Eastern District of New York, *In re Aircrash Disaster at Warsaw, Poland, on March 14, 1980* , the court held that the rationale behind choice of law questions under the Federal Tort Claims Act should similarly be applied under the Foreign Sovereign Immunities Act, in view of the virtually identical “extent of liability provision” in both pieces of legislation. Accordingly, where the Foreign Sovereign Immunities Act provides that a foreign state shall be liable for wrongful death damages “in the same manner and to the same extent as a private individual under like circumstances”, the court is required to apply the law of the place where the event giving rise to liability occurred. The court found that where an Ilyushin 62 aircraft belonging to LOT Polish Airlines crashed on final approach

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109 Id. at 1318.
110 Id. at 1319.
111 Id.
113 Id. at 660.
114 No. CV-80-3317 (E.D.N.Y. Nov. 6, 1985) (mem.).
115 Id. at 7.
to the airport at Warsaw, Poland, including its choice of law principles, was to be applied in assessing LOT's liability. It was undisputed that LOT was a foreign state under the Foreign Sovereign Immunities Act and that Poland applies the lex loci delicti principle. Accordingly, since liability was presumed under the provisions of the Warsaw Convention, and the act which made LOT liable to plaintiffs was the crash of the airplane rather than any previous negligence on the part of LOT, the law of Poland was held to apply in determining the nature and extent of the damages recoverable from LOT. The ruling of the Eastern District of New York was recently followed by the Central District of California in *Palomino v. Polskie Linie Lotnicze*, another case arising out of the same accident.

IV. LIABILITY OF AIR CARRIERS

A. The Warsaw Convention

The Warsaw Convention continues to engage the attention of the Courts and attract the condemnation of the plaintiffs' bar. Surprisingly, perhaps, for the United States, two of the most significant recent decisions on the Convention, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, and *Air France v. Saks*, were favorable to the air transport industry. Time will tell whether these decisions will prompt more positive action on the part of the United States to deal with the general discontent over the limitation of liability under the Convention.

1. Status of High Contracting Party

In a recent ruling of the District of Columbia in *In re Korean Air Lines Disaster of September 1, 1983*, the court

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116 Id. at 14.
120 19 Av. Cas. (CCH) 17,584 (D.D.C. 1985).
held that the Republic of Korea had adhered to the Warsaw Convention of 1929 through its ratification of the Hague Protocol of 1955.\textsuperscript{121} Plaintiffs argued that the defendant air carrier should not be permitted to rely on the defenses provided by the Warsaw Convention because the Republic of Korea was not a party to the original Warsaw Convention, although it had ratified the Hague Protocol to amend the Warsaw Convention. Since the United States was a party only to the original Warsaw Convention and had \textit{not} ratified the Hague Protocol, plaintiffs argued that the United States and Korea were not in treaty relations with one another.\textsuperscript{122} The court rejected this argument, relying principally on Article XXIII of the Hague Protocol which provides that "[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol."\textsuperscript{123} Since Korea had ratified the Hague Protocol on July 13, 1967, the court held that it had likewise adhered to the Warsaw Convention as of that date.\textsuperscript{124}

2. \textit{The Cause of Action Under the Convention}

There is a line of authority in the Courts of Appeals for the Second,\textsuperscript{125} Fifth,\textsuperscript{126} and Ninth Circuits\textsuperscript{127} establishing that the Warsaw Convention is the basis of a right of action against an air carrier for personal injury and wrongful death occurring during international transportation to which the Convention applies. Accordingly, courts have

\textsuperscript{122} 19 Av. Cas. at 17,589.
\textsuperscript{123} Hague Protocol, \textit{supra} note 121, at 387.
\textsuperscript{127} \textit{In Re} Mexico City Aircrash, 708 F.2d 400 (9th Cir. 1983).
held that an action under the Warsaw Convention "arises under the treaties or laws of the United States" and is thus sufficient to ground federal question jurisdiction over the subject matter.\textsuperscript{128}

This line of authority was followed in \textit{Dorizas v. K.L.M. Royal Dutch Airlines},\textsuperscript{129} where the District Court for the Northern District of Illinois held that the Warsaw Convention creates its own separate cause of action for loss of baggage and does not merely establish conditions for a cause of action to be created under local law.\textsuperscript{130} A similar ruling was made in the case of \textit{Harpalani v. Air India, Inc.},\textsuperscript{131} in which the plaintiffs were denied boarding on an Air India flight in India. The plaintiffs sued for damages for delay, alleging causes of action under Article 19 of the Warsaw Convention, breach of contract, and violations of federal regulations and various consumer statutes. The District Court held that Article 19 of the Warsaw Convention provides the exclusive remedy for delays in international transportation by air and dismissed all of the plaintiffs' other causes of action.\textsuperscript{132}

3. \textit{Notice of Liability Limitation}

In \textit{In re Aircraft Disaster at Warsaw, Poland on March 14, 1980},\textsuperscript{133} the Court of Appeals for the Second Circuit held that an air carrier which did not comply with the type-size requirements for the notice of limitation of liability under the Montreal Agreement\textsuperscript{134} (the "Montreal Notice") could neither avail itself of the liability limits under the Warsaw Convention nor revoke its waiver of the Article 20 defense

\textsuperscript{128} See infra notes 129-132 and accompanying text.

\textsuperscript{129} 606 F. Supp. 97 (N.D. Ill. 1984).

\textsuperscript{130} Id. at 98.

\textsuperscript{131} 622 F. Supp. 69 (N.D. Ill. 1985).

\textsuperscript{132} Id. at 75.

\textsuperscript{133} 705 F.2d 85 (2d Cir.), cert. denied, 104 S. Ct. 147 (1983).

of "all necessary measures." The airline used 8.5 point type instead of 10 point modern type as required by the Montreal Agreement, a difference of $15/270$ of an inch!

In a significant contrary ruling, the District Court for the District of Columbia in In re Korean Air Lines Disaster of September 1, 1983 held that an air carrier was entitled to avail itself of the limitation of liability under Article 22 of the Warsaw Convention, notwithstanding the fact that the carrier issued airline tickets in which the Montreal Notice appeared in 8 point type instead of the 10 point modern type required by the Montreal Agreement. Plaintiffs argued that the carrier's failure to print the Montreal Notice in 10 point type constituted "nondelivery" of a passenger ticket under Article 3(2) of the Convention, and that accordingly the carrier should not be entitled to rely on the limitation of liability established in Article 22 of the Convention. In a carefully reasoned analysis, Judge Robinson rejected plaintiffs' argument, holding that the Montreal Agreement did not and cannot operate as an amendment to the Warsaw Convention. The Montreal Agreement is merely a private agreement between the Civil Aeronautics Board and those air carriers operating into and out of the United States, and any breach thereof could be redressed by appropriate means. In reaching its conclusion, the court refused to apply the reasoning adopted by the United States Supreme Court in Lisi v. Alitalia-Linee Aeree Italiane. In Lisi the Supreme Court found that delivery of a ticket containing notice of the liability limitations printed in "microscopic type" constituted non-delivery of a ticket under Article 3(2) of the Convention, thus depriving the carrier of the limitation of

155 705 F.2d at 87.
136 19 Av. Cas. (CCH) 17,584, 17,591 (D.D.C.1985).
137 Id. at 17,591.
138 Id. at 17,596.
139 Id. at 17,594-95.
liability under the Convention.\textsuperscript{141}

In \textit{In re Aircraft Disaster at Warsaw, Poland on March 14, 1980}\textsuperscript{142} the Court of Appeals for the Second Circuit held that the carrier could not avail itself of the liability limitation provisions of the Warsaw Convention and Montreal Agreement where notice of such limitation had been provided only in the domestic passenger tickets issued by other airlines to members of the U.S. Amateur Boxing Team who intended boarding an international flight to Poland at New York's J. F. Kennedy Airport. In distinguishing \textit{Stratis v. Eastern Air Lines, Inc.}\textsuperscript{143} the court found that when the passengers received their domestic airplane tickets, none of them had any reason to believe they were departing on a flight which was so integrally related to their international flight that they should have heeded the liability limitation provisions contained in those tickets and acted accordingly, by purchasing insurance or making alternative arrangements.\textsuperscript{144}

In \textit{Exim Industries, Inc. v. Pan American World Airways, Inc.}\textsuperscript{145} the Second Circuit held that an air carrier need not include in the air waybill every item of information called for in Article 8 of the Warsaw Convention in order to rely on the limitation of liability established under Article 22. The court found that the items missing from one of the subject waybills, including the method of packing and the numerical markings, were technical and insubstantial omissions of little commercial significance that did not prejudice the shipper.\textsuperscript{146} Accordingly, their omission did not preclude reliance on the limitation of liability. With respect to the second of the subject waybills, while information was provided on the weight and number of packages, nothing was said about their volume and dimensions or the number of items in each package. The Second Cir-

\textsuperscript{141} Id. at 243.
\textsuperscript{142} 748 F.2d 94 (2d Cir. 1984).
\textsuperscript{143} 682 F.2d 406 (2d Cir. 1982).
\textsuperscript{144} 748 F.2d at 96.
\textsuperscript{145} 754 F.2d 106 (2d Cir. 1985).
\textsuperscript{146} Id. at 108.
cuit held that the applicable provision in Article 8 of the Convention should be read disjunctively, and only those particulars having practical commercial significance with respect to the shipment involved need be incorporated in the waybill.\(^{147}\) Since no United States authority was directly on point, the court relied, \textit{inter alia}, on the decision of the Queen’s Bench Division of the High Court of England in \textit{Corocraft, Ltd. v. Pan American Airways, Inc.}\(^{148}\) The court also found that use of the term “may be” in informing shippers of the potential applicability of the Warsaw Convention was an acceptable manner of giving reasonable notice that the Warsaw Convention might be applicable to the subject transportation.\(^{149}\) The Second Circuit rejected the final contention by the appellant that prejudgment interest should be awarded.\(^{150}\)

In \textit{Jalloh v. Trans World Airlines}\(^{151}\) the District Court for the District of Columbia held that the standard form of notice of limitation of liability contained in passenger tickets satisfied the Warsaw Convention notice requirements, even where the carrier did not enter the specific weight of luggage on the passenger’s ticket. TWA’s ticket contained terms which stated that the weight of each piece of checked baggage would be presumed to be 62 pounds (28 kilograms) unless otherwise stated on the baggage check. The court held that this notice was sufficient and limited TWA’s liability accordingly.\(^{152}\)

4. \textit{The Meaning of “Accident”}

Article 17 of the Convention imposes liability on a carrier if the “accident” causing injury to a passenger takes

\(^{147}\) \textit{Id.}
\(^{149}\) 754 F.2d at 108.
\(^{150}\) \textit{Id.} at 109. The court relied on the reasoning of O’Rourke v. Eastern Air Lines, Inc., 730 F.2d 842 (2d Cir. 1984). In \textit{O’Rourke} the Court of Appeals for the Second Circuit held that to award prejudgment interest in excess of the $75,000 limitation imposed by the Montreal Agreement would be contrary to the purpose of that agreement and the Warsaw Convention. \textit{Id.} at 852-53.
\(^{151}\) 19 Av. Cas. (CCH) 17,804 (D.D.C. 1985).
\(^{152}\) \textit{Id.} at 17,807.
place on board the aircraft or while the passenger is "in the course of any of the operations of embarking or disembarking." Several cases have considered what constitutes an "accident" for purposes of Article 17 and when a passenger is "in the course of any of the operations of embarking or disembarking".

In *Air France v. Saks* the United States Supreme Court held that to be an "accident" under Article 17 of the Warsaw Convention, a passenger's injury must be caused by "an unexpected or unusual event or happening that is external to the passenger." Where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, such injury has not been caused by an accident under Article 17, and there is no right of action against the air carrier.

In *Saks* the plaintiff was a passenger on an Air France flight from Paris to Los Angeles. During the descent the plaintiff felt severe pressure and pain in her left ear, which continued after the aircraft landed. Shortly thereafter plaintiff consulted a doctor, who found that she had become permanently deaf in her left ear. Plaintiff filed suit in a California State Court, alleging that her hearing loss had been caused by the negligent maintenance and operation of the aircraft's pressurization system. The action was removed to federal court, and Air France moved for summary judgment on the ground that plaintiff could not establish that her injury was caused by an "accident" within the meaning of Article 17, since all the evidence indicated that the pressurization system of the aircraft had operated at all times in a normal manner. The district court granted summary judgment, relying on precedent defining the term "accident" in Article 17 as an unusual or unexpected happening. The Ninth Circuit reversed,

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153 Warsaw Convention, *supra* note 1, art. 17.
155 Id. at 1345.
156 Id. at 1346.
157 Id. at 1340.
holding that the language, history, and policy of the Warsaw Convention and Montreal Agreement impose absolute liability on airlines for injuries proximately caused by the risks inherent in air travel. The court indicated that a normal cabin pressure change qualifies as an “accident” under Annex 13 to the Convention on International Civil Aviation, which defines “accident” as “an occurrence associated with the operation of an aircraft . . .”\(^{158}\)

In rejecting the rationale of the Ninth Circuit, the Supreme Court pointed to two significant features of the wording of the Convention. First, Article 17 imposes liability for injuries to passengers caused by an “accident,” whereas Article 18 imposes liability for destruction or loss of baggage or goods caused by an “occurrence.” According to the Supreme Court, this difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention intended that the word “accident” mean something different than the word “occurrence,” otherwise they would have used the same word in each article.\(^{159}\) Second, the text of Article 17 refers to an accident which caused the passenger’s injury, and not an accident which is the passenger’s injury. It was thus clear that the drafters of the Convention attempted to distinguish between the cause and the effect, specifying that air carriers would be liable only if an accident caused the passenger’s injury. Thus an injury that was itself an accident was insufficient to satisfy the requirements of Article 17 of the Convention.\(^{160}\)

Another important decision concerning Article 17 of the Convention is *Abramson v. Japan Airlines*.\(^{161}\) In that case an airline passenger suffered an attack from a pre-existing hiatal hernia shortly after takeoff from Anchorage on a flight to Tokyo. The passenger had been under medical

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\(^{158}\) Id.

\(^{159}\) Id. at 1341-42.

\(^{160}\) Id. at 1346.

\(^{161}\) 739 F.2d 130 (3d Cir. 1984), cert. denied, 105 S. Ct. 1776, reh’g denied, 105 S Ct. 2350 (1985).
care for this condition for approximately six years but had not informed the air carrier of his condition before the flight. According to the passenger, he could have alleviated the attack by lying down and massaging his stomach, but he claimed that he was not permitted to do this because there were no empty seats. It was subsequently revealed, however, that there were nine empty seats in the first class section of the aircraft. The passenger alleged that the hernia attack on board the aircraft constituted an “accident” for purposes of Article 17 of the Convention, for which the carrier should have been liable. The Court of Appeals for the Third Circuit rejected this argument, however, and held that the plaintiff’s difficulty was not related in any way to his transportation by air. Accordingly, there was no “accident” under Article 17. More significantly, the court found that since there was no accident to invoke application of the Warsaw Convention, the claimant was not barred from pursuing his state law remedies. It was improper, therefore, for the court to grant summary judgment dismissing the claim under the Warsaw Convention since the plaintiff could still pursue a state law claim against the air carrier.

Abramson represents yet another attempt by the courts to avoid the effect of the Warsaw Convention. On one hand, the courts appear to be saying that the Warsaw Convention is inapplicable because there has been no “accident” pursuant to Article 17. On the other hand, the carrier is being exposed to liability without limitation under local state law essentially because of the conduct of an airline employee on board the aircraft. The court’s reasoning in Abramson contradicts the Warsaw Convention and leads to a logical absurdity. The intention behind the Convention was to provide a uniform system of compensation for passengers bringing claims against air carriers engaged in international transportation. To suggest that

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162 Id. at 133.
163 Id at 134.
164 Id.
there is a manner in which a passenger suffers injury on board for which the carrier is responsible, but which is not covered by the Convention, is completely at odds with the Convention's stated aims and is not supported by the law.

In *Salce v. Aer Lingus Air Lines*\(^{165}\) the District Court for the Southern District of New York dismissed an action for personal injuries the plaintiff allegedly suffered after a hard landing in Dublin, Ireland. The plaintiff claimed that the neck injuries he suffered as a result of the landing satisfied the "accident" requirement of the Warsaw Convention. The court disagreed and dismissed the complaint, stating that the plaintiff failed to prove that the hard landing was anything other than a routine landing.\(^{166}\) The court also stated that even if the aggravation to the plaintiff's prior condition resulted from the landing, the landing was not an "unexpected or unusual event" that would satisfy the requirements of an "accident" under the Warsaw Convention.\(^{167}\)

In *Salerno v. Pan American World Airways, Inc.*\(^{168}\) the District Court for the Southern District of New York held that knowledge of a bomb threat which subsequently caused a passenger's miscarriage is an "accident" within the meaning of the Warsaw Convention.\(^{169}\) The incident giving rise to this lawsuit involved the plaintiff and her two children who were passengers aboard a Pan Am flight from Miami to Uruguay. After the aircraft left Miami, the ground personnel notified the cockpit crew that they had received a bomb threat. The pilot radioed for permission to land in the Bahamas, but the request was denied since the runway in the Bahamas was undergoing repairs. The aircraft then returned to Miami International Airport. During the return flight to Miami, the crew notified the passengers of the change of flight plans. Several passen-

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165 19 Av. Cas. (CCH) 17,377 (S.D.N.Y. 1985).
166 Id. at 17,380.
167 Id.
169 Id. at 657.
gers, including the plaintiff, became aware that the flight attendants were searching the aircraft for a bomb. The plaintiff subsequently exhibited symptoms which led to her miscarriage approximately 24 hours later. The court held that an “accident” within the meaning of the Warsaw Convention caused the plaintiff’s injuries because a bomb threat is “external to the passenger” and is an unexpected and unusual event outside the usual, normal, and expected operation of the aircraft.\(^\text{170}\)

5. Embarking and Disembarking

In *Seidenfaden v. British Airways*\(^\text{171}\) a passenger arrived at one terminal of London’s Heathrow Airport and was allegedly injured while being pushed in a wheelchair by personnel employed by the carrier to another terminal at Heathrow for purposes of departing on a domestic flight to Manchester. The District Court for the Northern District of California held that the passenger was at all times in the course of the operations of disembarking or embarking for purposes of Article 17, based on the fact that the carrier was constantly in control of the passenger’s movements.\(^\text{172}\) This decision appears to be consistent with the three-part test established in *Day v. Trans World Airlines, Inc.*\(^\text{173}\) and with the Convention’s purpose to limit the carrier’s liability for injury wherever the actions of the carrier are involved.

In *Knoll v. Trans World Airlines, Inc.*\(^\text{174}\) the District Court for the District of Colorado held that an airline passenger was not in the course of any of the operations of embarking or disembarking when, upon arrival at London’s Heathrow Airport, she walked some 300 yards from the

\(^{170}\) Id.


\(^{172}\) Id.

\(^{173}\) 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). The three-part test requires an examination of plaintiff’s activity (what plaintiff was doing), control (under whose direction), and location to determine whether an accident is governed by Article 17 of the Warsaw Convention. Id. at 33.

arrival gate toward the immigration area before falling in an area which was not leased by or under the control of the carrier. The court found that the plaintiff was not under the control of the air carrier but was involved in the immigration process when she fell. The activities of clearing immigration and customs were conditions imposed by the host country for the passenger's disembarkation and were not imposed by the airline. Thus, the plaintiff was not disembarking when the accident occurred and could not invoke the provisions of the Warsaw Convention.

6. Limits of Liability

The most significant recent development affecting the liability of air carriers engaged in international transportation is the decision of the United States Supreme Court in Trans World Airlines, Inc. v. Franklin Mint Corp. The Supreme Court held that the limits of liability under Article 22 of the Convention, which are expressed in French gold francs, are to be converted into United States currency by using the last official price of gold. Franklin Mint sought damages of $250,000 for the loss of numismatic materials delivered to TWA for transportation from Philadelphia to London. The Court of Appeals for the Second Circuit took the unusual step of holding that Article 22 of the Warsaw Convention limited TWA's liability but that the liability limits of the Convention were prospectively unenforceable. The Supreme Court found the Convention limits enforceable and the decision of the Civil Aeronautics Board to use the last official price of gold as the conversion basis within the authority of that agency and consistent with the Convention.

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175 Id. at 846-47.
176 Id.
178 Id. at 1784-89.
179 Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303, 304 (2d Cir. 1982).
180 104 S. Ct. at 1784-89.
Since *Franklin Mint* was a cargo case, the question remained whether the Supreme Court's ruling would apply to personal injury and death cases. The United States District Court for the Central District of California resolved the issue in *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*,\(^{181}\) holding that the rationale of the *Franklin Mint* decision also applied to personal injury and wrongful death claims.\(^{182}\) Accordingly, the limitation of liability of $75,000 established by the Montreal Agreement of 1966 has been held to be valid and enforceable.\(^{183}\)

*Franklin Mint* marked a significant victory for the air transport industry and resolved an important area of dispute concerning the Warsaw Convention and its applicability. In view of the United States Senate's failure to ratify the Montreal Protocols, which would have increased the liability limitation to 100,000 Special Drawing Rights in respect of personal injury and wrongful death, the effect of *Franklin Mint* is to establish firmly the limits of liability of air carriers in international transportation. In personal injury and wrongful death actions, the limits are $58,000 if the award excludes legal costs, and $75,000 if the award is inclusive of legal costs.\(^{184}\) With respect to baggage and cargo, the limit remains at $20 per kilogram or $9.07 per pound.\(^{185}\)

As a result of the *Franklin Mint* decision, plaintiffs must now seek other methods to avoid the Convention's limitation of liability. Thus, one might expect that plaintiffs will attempt to establish improper delivery of travel documentation or seek to prove that the loss or damage suffered resulted from wilful misconduct on the part of the carrier or its employees.

\(^{181}\) MDL-482 (C.D. Cal. 1984), reversing the Court's earlier opinion at 558 F. Supp. 72 (C.D. Cal. 1983).

\(^{182}\) *Id.*

\(^{183}\) *See* O'Rourke v. Eastern Air Lines, Inc., 730 F.2d 842, 852 (2d Cir. 1984).

\(^{184}\) Montreal Agreement, *supra* note 134.

\(^{185}\) 104 S. Ct. at 1787.
7. Wilful Misconduct

While the Supreme Court's holdings in *TWA v. Franklin Mint* and *Air France v. Saks* may strengthen the resolve of plaintiffs to attempt to establish wilful misconduct on the part of a carrier or its employees for purposes of avoiding the limitation of liability under Article 22 of the Convention, the courts have returned findings of wilful misconduct in only a few cases. The only such case involving an aircraft accident is *Butler v. Aeromexico*, in which the Eleventh Circuit Court of Appeals affirmed a finding of the District Court for the Southern District of Alabama that the carrier was guilty of wilful misconduct. The court found that the actions of the Aeromexico flight crew, including failure to monitor weather conditions and failure to execute a missed approach when they lost visual contact with the airport, constituted intentional performance of acts with knowledge that under the circumstances injury might result.

In *Piano Remittance Corp. v. Varig Brazilian Airlines, Inc.* the court held that the failure of an air carrier's night shift cargo supervisor to inform the day shift supervisor orally of the anticipated arrival of valuable cargo, and the shipping of such cargo without packaging it in a value pack, did not constitute wilful misconduct. It was not the practice of the carrier, nor was it required by regulation, that the night shift supervisor orally inform the day shift supervisor of the anticipated arrival of such cargo, or that valuable cargo be shipped in special packaging.

On the other hand, in *Westway Metals Corp. v. Lan-Chile Airlines* the court found an air carrier guilty of wilful misconduct and hence liable for the full value of lost cargo. The carrier failed to notify its stations of the arrival of the plaintiff's valuable cargo, and an employee of the

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186 774 F.2d 429 (11th Cir. 1985).
187 Id. at 431.
188 18 Av. Cas. (CCH) 18,381 (S.D.N.Y. 1984).
189 Id. at 18,383.
190 18 Av. Cas. (CCH) 18,556 (S.D.N.Y. 1984).
carrier intentionally failed to accord the cargo the special attention to which it was entitled, in contravention of the carrier's own regulations. There was also evidence that the carrier left the shipment unprotected on board the aircraft in the presence of an unauthorized person, which the court held constituted reckless indifference to the safety of the cargo.\footnote{191}

In Perera Co. v. Varig Brazilian Airlines, Inc.\footnote{192} the Southern District of New York found that the carrier's handling of a shipment of gold bars violated all of its own rules and procedures and familiar norms for the handling of high value cargo, so as to justify a finding of wilful misconduct on the part of the carrier.\footnote{193} However, the Second Circuit Court of Appeals reversed the District Court's decision, holding that the record did not support a finding of wilful misconduct.\footnote{194} In Perera the shipper declared a value of $22,500 for its goods and subsequently filed a claim in the amount of $150,000. The Second Circuit stated that a shipper who ships goods at a declared value substantially below the worth of the goods in order to receive a reduced freight rate is gambling that the goods will not be lost.\footnote{195} If the loss occurs, the shipper or consignee is not entitled to recover the full value by misdescribing as "wilful misconduct" acts which, at most, are questionably negligent.\footnote{196}

8. Notice of Claim

Under Article 26(2) of the Convention, in cases of damage, the person entitled to delivery must complain to the carrier forthwith after discovery of the damage. Such complaint must be made within three days from date of receipt in the case of baggage and seven days from date of

\footnote{191} Id. at 18,559.
\footnote{192} 18 Av. Cas. (CCH) 18,554 (S.D.N.Y. 1984).
\footnote{193} Id. at 18,556.
\footnote{194} 775 F.2d 21, 24 (2d Cir. 1985).
\footnote{195} Id. at 24.
\footnote{196} Id.
receipt in the case of goods.\textsuperscript{197}

In \textit{Insurance Co. of North America v. Yusen Air \& Sea Service (U.S.A.), Inc.}\textsuperscript{198} the court denied summary judgment in favor of an air carrier and freight forwarder under Article 26 of the Convention. The court found questions of fact as to when delivery took place, and whether a letter addressed to the freight forwarder stating that "there was very substantial damage caused to one of the items" constituted written notice of a claim.\textsuperscript{199}

A Florida court recently affirmed the established principle that written notice of loss is not required in a case of complete loss of goods, as opposed to damage or delay.\textsuperscript{200}

9. \textit{Treaty Jurisdiction}

With respect to treaty jurisdiction under Article 28 of the Convention, the majority of circuits have held that, in the case of a roundtrip ticket, the point of destination for purposes of both Articles 1 and 28 is the "ultimate destination", that is, the point of departure.\textsuperscript{201} The only contrary cases in any jurisdiction are the California cases \textit{Aanestad v. Air Canada, Inc.}\textsuperscript{202} and \textit{Hurley v. KLM Royal Dutch Airlines}.\textsuperscript{203} These cases suggested, in the face of overwhelming authority to the contrary, that there could be more than one place of destination in a roundtrip ticket, depending on the passenger's intentions and length of stay in a particular place.\textsuperscript{204} The decision of the Central District of California in \textit{Hurley} has now been vacated, however, and can no longer be regarded as

\textsuperscript{197} Warsaw Convention, \textit{supra} note 1, art. 26(2).

\textsuperscript{198} 18 Av. Cas. (CCH) 18,271 (S.D.N.Y. 1984).

\textsuperscript{199} \textit{Id.} at 18,272.


\textsuperscript{202} 390 F. Supp. 1165 (C.D. Cal. 1975), \textit{dismissed}, 549 F.2d 806 (9th Cir. 1977).


\textsuperscript{204} 562 F. Supp. at 261.
In Petrire v. Spantax, S.A. the Second Circuit again addressed the issue of jurisdiction under Article 28(1) of the Warsaw Convention in the context of a roundtrip ticket. Petrire involved a wrongful death action brought by the widow of a passenger killed in the crash of a Spantax aircraft in Malaga, Spain. The decedent had purchased a ticket for travel from Madrid to New York via Malaga with a return flight from New York to Madrid. The ticket provided for the decedent’s return to Madrid five days after his arrival in New York and consisted of two booklets. The plaintiff asserted that the United States was a destination because New York was listed as a destination in the first booklet. The plaintiff also argued that an air traveller should not be deprived of the option of purchasing “two one way tickets for the purpose of assuring Article 28 jurisdiction and a desired national venue.” The airline asserted that the passenger’s destination was not the United States for purposes of the Warsaw Convention’s jurisdictional provision. The Second Circuit affirmed the dismissal of the action by the District Court and stated that a single contract had been made with Madrid as the final destination, regardless of the number of booklets issued. Accordingly, Spain was the proper place for jurisdiction under Article 28(1).

The Court of Appeals for the Second Circuit reached a similar result in In re Alleged Food Poisoning Incident, March 1984, holding that for Warsaw Convention purposes “the place of destination” of a passenger’s journey in cases of roundtrip carriage is the ultimate destination, that is, the place from which the journey originated. Accordingly, when a passenger flying on a roundtrip jour-

205 602 F. Supp. at 1249.
206 756 F.2d 263 (2d Cir. 1985).
207 Id. at 265.
208 Id. at 266.
209 Id.
210 770 F.2d 3 (2d Cir. 1985).
211 Id. at 4-5.
ney originating and terminating in Riyadh, Saudi Arabia purchased and paid for a ticket in Saudi Arabia, and a carrier domiciled in Great Britain performed the transportation, a United States court had no jurisdiction over the matter.\textsuperscript{212} The passenger had purchased one ticket in two booklets for a roundtrip journey from Riyadh with agreed stopping places in the United States. The court held that the destination of a journey, for Convention purposes, is determined by reference to the intent of the parties, and that when different carriers are involved the pertinent unit of travel to determine the destination is the entire undivided transportation as stated in the contract of transportation.\textsuperscript{213} Thus, in cases involving roundtrip travel on successive carriers, the place of destination is the place where the journey originated.\textsuperscript{214}

\textit{In re Korean Air Lines Disaster of September 1, 1983} \textsuperscript{215} involved one of three separate actions arising out of the destruction of Korean Air Lines Flight 007 by Soviet military aircraft over the Sea of Japan. The United States District Court for the District of Columbia held that if treaty jurisdiction under Article 28 of the Warsaw Convention did not exist, plaintiffs could not bring wrongful death actions arising out of the destruction of Flight 007 in the United States.\textsuperscript{216} Plaintiffs made no showing that jurisdiction existed in the United States pursuant to the requirements enumerated in Article 28 of the Warsaw Convention. The United States was neither the domicile nor the principal place of business of Korean Air Lines, the decedents did not purchase their tickets in the United States, and the United States was not the final destination of the decedent's travel.\textsuperscript{217} The court also found that the decedent's break in transportation in the United States was

\textsuperscript{212} \textit{Id.} at 5.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.} at 4-5.
\textsuperscript{215} \textit{19 Av. Cas. (CCH) 17,578 (D.D.C. 1985)}.
\textsuperscript{216} \textit{Id.} at 17,580.
\textsuperscript{217} \textit{Id.} 17,581-84.
insignificant.\(^\text{218}\)

In *Sabharwal v. Kuwait Airways Corp.*\(^\text{219}\) the United States District Court for the Eastern District of New York dismissed an action for damages for lost luggage. The court discussed the requirements of Article 28(1) of the Convention, which requires that a plaintiff bring its action at either (1) the domicile of the carrier, (2) the carrier's principal place of business, (3) the carrier's place of business where the contract was made, or (4) the place of destination. The court found that none of the specified locations were in the United States and dismissed the complaint for lack of subject matter jurisdiction.\(^\text{220}\)

10. Limitation of Actions

In *Darghouth v. Swiss Air Transport Co.*\(^\text{221}\) the District Court for the District of Columbia held that the two year time limitation specified in Article 29 of the Warsaw Convention was intended to be absolute, barring any action not commenced within the two year period.\(^\text{222}\) According to the Court, the minutes of the Warsaw conference clearly indicate that the delegates did not intend to have the two year period interrupted or suspended by local tolling statutes. The tolling provisions of the District of Columbia's statute of limitations thus had no effect on a suit brought more than two years after the date of the accident on behalf of a child injured by a falling food service cart during a flight.\(^\text{223}\)

In *H. S. Strygler & Co. v. Pan American Airlines, Inc.*\(^\text{224}\) the Southern District of New York confronted a statute of limitations issue under Article 29 of the Warsaw Convention. The action involved the loss of a shipment of fresh water pearls between China and New York City. The airline ad-

\(^{218}\) Id. at 17,583-84.

\(^{219}\) 18 Av. Cas. (CCH) 18,380 (E.D.N.Y. 1984).

\(^{220}\) Id. at 18,381.

\(^{221}\) 18 Av. Cas. (CCH) 18,536 (D.D.C. 1984).

\(^{222}\) Id. at 18,537.

\(^{223}\) Id. at 18,536-38.

\(^{224}\) 19 Av. Cas. (CCH) 17,280 (S.D.N.Y. 1985).
mitted liability as limited by Article 22 of the Warsaw Convention. More than two years after the date of the arrival of the pearls in New York, however, the shipper commenced suit to recover the amount of the loss in excess of the limits of liability under the Convention. In accordance with Article 29(2) of the Convention, the court applied New York law to determine the method of calculating the treaty limitation period. Under New York law the statute of limitations period commences at the time the action accrues, in this case the date the shipment was delivered. Since the shipper filed suit more than two years after the date of delivery, the court dismissed the action.

In *Johnson v. Allied Eastern States Maintenance Corp.* the court found that Article 29 of the Warsaw Convention barred an action against an independent contractor acting as a skycap service for an airline when the plaintiff commenced the action more than two years after the accident. The court stated that the test to determine the applicability of the Warsaw Convention was whether the particular activity of the agent which resulted in injury was in furtherance of the contract of carriage. If the response is in the affirmative, the independent contractor is entitled to the same protection as the airline under the Warsaw Convention.

**B. Denied Boarding and Discrimination**

Carriers in the United States frequently face claims for denied boarding resulting from the oversale of flights. Allegations of discrimination on the part of the carrier in violation of section 404(b) of the Federal Aviation Act often accompanied these claims when the incident giving

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225 *Id.* at 17,281. Liability was based upon a formula of price per kilogram because no value had been declared by the shipper. *Id.*

226 *Id.* at 17,282.


228 *Id.* at 1345.

229 *Id.*

rise to the claim occurred prior to January, 1985. Section 404(b) provides that no air carrier shall give any undue or unreasonable preference or advantage to any person in any respect whatsoever, or subject any person to unjust discrimination or undue or unreasonable prejudice or disadvantage.\(^{231}\)

For many years the Civil Aeronautics Board (CAB) administered a denied boarding compensation scheme for flights originating in the United States. The functions of the CAB with respect to denied boarding compensation passed to the Department of Transportation (DOT) upon entry into force of the CAB Sunset Provisions on January 1, 1985.\(^{232}\) In summary, the present regulations provide that if oversales occur on a flight originating in the United States, the airline must offer cash, free flights, or both in an attempt to persuade volunteers to relinquish their seats. In the absence of enough volunteers, passengers may be involuntarily denied boarding in accordance with the carrier's established boarding priority. The carrier must pay a bumped passenger the face value of his ticket, up to $200, if alternate transportation is not scheduled to arrive within one hour of the originally scheduled time of arrival. This figure doubles if the arrival time exceeds two hours on domestic flights or four hours on international flights. The regulations also include requirements relating to the provision of notice to passengers of their rights. While acceptance of denied boarding compensation may relieve the carrier of further liability, many passengers choose not to accept this compensation and to bring a private lawsuit against the carrier.\(^{233}\)

Several recent cases have established the rights of bumped passengers to compensation and have discussed the interrelationship between denied boarding and sec-


RECENT DEVELOPMENTS

A New York federal court held that section 404(b) of the Federal Aviation Act (the "Act") provided a private right of action to a passenger who was bumped from a flight in an allegedly discriminatory manner. The plaintiff alleged that the airline removed her from the aircraft because she was a woman during a stopover at Dallas-Fort Worth on a flight from Austin, Texas to New York. The court held that it was not significant that the passenger did not have a confirmed reservation at the time of the incident. Accordingly, a passenger needed only demonstrate a violation of the statute in order to establish a right of action. Any recovery, however, would depend on the extent of damages proved by the passenger.

In *Goranson v. Trans World Airlines* a New York state court held that the denied boarding compensation scheme established under the Act and its regulations was not intended to be the sole remedy available to a passenger. Thus, the denied boarding compensation scheme did not immunize an air carrier from a common law action for breach of contract arising out of the bumping of a passenger. The significance of this case is that a carrier may still face a lawsuit by a passenger based on a breach of the contract of transportation, even if the passenger is denied boarding in a non-discriminatory manner in accordance with the boarding priority established by the carrier.

In *Mendelson v. Trans World Airlines* a New York state court held that an air carrier had no duty to disclose its overbooking policy in advertisements or in any other manner and accordingly, dismissed an action against the

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234 18 Av. Cas. (CCH) 17,205 (S.D.N.Y. 1983).
235 Id. at 17,207.
236 The Ninth Circuit Court of Appeals affirmed the existence of a private right of action under 404(b) of the Act for passengers who suffer unjust discrimination or prejudice. Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984).
237 467 N.Y.S.2d 774 (City Ct. White Plains 1983).
238 Id. at 779.
239 Id.
carrier based on fraudulent misrepresentation. The court further held that a confirmed reservation did not amount to a warranty of boarding, when the tickets expressly stated that a passenger holding a confirmed reservation might be denied passage. The court did find, however, that a plaintiff could state a cause of action for discrimination under section 404(b) of the Act when a carrier violated its own boarding priority rule.

In *Biswas v. British Airways* the court struck plaintiffs' claim for punitive damages based on denied boarding when the passenger was unable to demonstrate that the carrier had acted with fraud, oppression, or malice as required by section 3294 of the California Civil Code.

In *Jacobson v. Delta Air Lines, Inc.* the Ninth Circuit Court of Appeals held that to require handicapped passengers to sign a release prior to boarding, acknowledging that they may be refused passage or removed at any point upon medical advice or if it became necessary for the comfort and safety of other passengers, was discriminatory and in violation of section 404(b) of the Act. The court acknowledged that the carrier had the right under its tariffs and the Act to remove passengers if necessary for the safety of the flight or other passengers. However, the discrimination lay in requiring only handicapped passengers to sign the release while not requiring the same from other passengers.

In *Hinden v. Eastern Air Lines, Inc.* the court granted summary judgment to a carrier that was sued for refusing to allow the plaintiff, who was confined to a stretcher, to board one of its L-1011 aircraft. The Federal Aviation

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241 Id. at 170.
242 Id. at 171.
243 18 Av. Cas. (CCH) 17,104 (N.D. Cal. 1983).
244 Id. at 17,105.
245 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 105 S. Ct. 2129 (1985).
246 Id. at 1206.
247 Id.
248 Id.
Regulations applicable to the L-1011 provided that the aircraft could be used only for transportation of persons able to sit in an upright position during takeoff, landing, and emergency operations and was not designed or approved for the transportation of passengers in a horizontal position.\textsuperscript{250} Under the circumstances, the court held that the carrier did not abuse its discretion in denying passage to the plaintiff and dismissed the action.\textsuperscript{251}

The outcome of this case does not appear to give an unqualified right to an air carrier to deny boarding to any passenger confined to a stretcher. The carrier should be aware of and comply with the applicable Federal Aviation Regulations relating to the carriage of such passengers in the particular type of aircraft in question.

In \textit{Drakos v. Trans World Airlines, Inc.}\textsuperscript{252} plaintiff sued TWA for unjust discrimination because TWA removed his 92 year old father from a flight from Athens to New York. The court found that the removal of the passenger, who could only walk using a walker and had to be carried onto the airplane, was not an abuse of discretion, in view of TWA's decision that he might require excessive assistance from the flight attendants and thereby pose a danger to the flight.\textsuperscript{253} The court found that TWA was acting in accordance with its tariff and, as a matter of law, did not abuse its discretion in removing Mr. Drakos from the airplane.\textsuperscript{254}

C. Tariffs and Incorporated Terms

Since the deregulation of domestic transportation, domestic carriers are no longer required to file their tariffs with the Civil Aeronautics Board. Instead, the applicable regulations now permit carriers to incorporate by refer-

\footnotesize{\textsuperscript{250} Id. at 990.} \\
\footnotesize{\textsuperscript{251} Id.} \\
\footnotesize{\textsuperscript{252} 19 Av. Cas. (CCH) 17,866 (S.D.N.Y. 1985).} \\
\footnotesize{\textsuperscript{253} Id. at 17,870.} \\
\footnotesize{\textsuperscript{254} Id. at 17,869-70.}
ence terms and conditions in the contract of carriage.\(^{255}\)
The regulations require that the ticket or other written instrument given to a passenger contain a conspicuous notice that any terms incorporated by reference are part of the contract and that passengers may inspect the full text of each term incorporated by reference at the carrier’s airport or city ticket offices.\(^{256}\) While the regulations permit carriers to incorporate terms which limit a carrier’s liability for personal injury or death of passengers, the validity of such clauses has yet to be determined.

With respect to international tariffs, the CAB Sunset Act of 1984 provides that in the future these will be filed with the Department of Transportation and will continue to be applied essentially in the same manner as under the CAB.\(^{257}\)

*Hopper Furs, Inc. v. Emery Air Freight Corp.*\(^{258}\) was an action for breach of contract and negligence brought by a fur company whose shipment of furs had been lost by Emery. At the end of the trial, the carrier moved for a directed verdict limiting liability to the amount set forth in its service guide. The service guide, incorporated in the air waybill, stated that the carrier’s liability was limited to $10.00 per pound or $22.05 per kilogram of cargo damaged or lost, plus the amount of the carrier’s transportation charges applicable to the part of the shipment lost or damaged, unless the shipper declared a value for carriage in excess of the $10.00 per pound limitation at the time the shipper tendered the shipment to the carrier and paid a proportionately higher fee.\(^{259}\) The Court of Appeals for the Eighth Circuit held that the express terms of the contract, which limited the carrier’s liability, were controlling. The court modified the judgment limiting the damages to $10.00 per pound of lost cargo.\(^{260}\) The plaintiff claimed

\(^{256}\) Id. § 253.5.
\(^{258}\) 749 F.2d 1261 (8th Cir. 1984).
\(^{259}\) Id. at 1262.
\(^{260}\) Id. at 1265.
that its mistake in filling out the air waybill should void the contract, including the limitation of liability. The court, however, stated that the plaintiff's mistake in placing figures in the air waybill box entitled "zip code" instead of in the box entitled "declared value" was a unilateral mistake, unrecognized by the shipper, and as such could not form the basis for reformation of the contract.\textsuperscript{261}

In \textit{Madla v. Austin Travel}\textsuperscript{262} the United States District Court for the Northern District of Illinois held that an airline was not responsible for insuring that passengers carried the proper travel documents to allow them to enter the foreign country that was the destination of their air travel. In reaching its decision, the court stated that the tariff which an air carrier has on file with the Civil Aeronautics Board (now the Department of Transportation) forms part of the contract between the carrier and the passenger.\textsuperscript{263} The tariff of the subject airline placed responsibility for carrying the proper travel documents on the passenger and expressly absolved the carrier from any liability for damages resulting from the passenger's failure to carry proper travel documents.\textsuperscript{264} The plaintiffs alleged that the tariffs related only to rates, fares, and charges, and that one of the provisions of the airline's tariff required that the airline refuse carriage to any passenger whose travel documents were not complete. This implied, the plaintiffs argued, that the air carrier should have refused transportation to the passengers whose documents were incomplete. The court rejected this argument and stated that the tariff merely allowed the airline the \textit{option} of refusing to transport a passenger whose travel documents were incomplete.\textsuperscript{265} The court further stated that the tariff gave the passengers constructive no-

\begin{flushleft}
\textsuperscript{261} Id.
\textsuperscript{262} 19 Av. Cas. (CCH) 17,277 (N.D. Ill. 1984).
\textsuperscript{263} Id. at 17,280.
\textsuperscript{264} Id. at 17,279-80.
\textsuperscript{265} Id. at 17,280.
\end{flushleft}
tice that the air carrier did not undertake to help passengers comply with documentation requirements of the countries of their destination.\textsuperscript{266}

In \textit{Ragsdale v. Airborne}\textsuperscript{267} the Georgia Court of Appeals affirmed the trial court’s summary judgment in favor of an air carrier that had failed to timely deliver plaintiff’s government bid.\textsuperscript{268} The plaintiff brought an action for breach of contract, negligence, and fraud based on the carrier’s failure to deliver, on time, its government bid to a United States Army base in Virginia. The plaintiff alleged that it would have been awarded the contract if its bid had been delivered as contracted. The bid reached the base ten minutes after the bidding closed. The Appellate Court stated that the executed air waybill did not indicate a declared value, and accordingly, the carrier’s liability was limited to the amount indicated in its tariff as set forth in the language on the air waybill.\textsuperscript{269} The court rejected the plaintiff’s argument that the liability limitation set forth in the air waybill was inapplicable due to the elimination, under the Airline Deregulation Act of 1978, of an air carrier’s obligation to file tariffs.\textsuperscript{270}

\textit{Bernstein v. Cunard Line}\textsuperscript{271} involved a suit in which several travellers on a combination cruise and air vacation trip alleged breach of contract and negligence and sought recovery of damages from both the shipping line and the air carrier when their return trip by air was delayed due to a blizzard that closed the destination airport. The shipping line moved for summary judgment, alleging that its contract with the passengers provided for only the cruise portion of the trip and that it was not responsible for anything that took place after the completion of the cruise. The court denied the shipping line’s motion, stating that there existed questions of fact as to the extent of the ship-

\textsuperscript{266} Id.
\textsuperscript{267} 19 Av. Cas. (CCH) 17,321 (Ga. Ct. App. 1984).
\textsuperscript{268} Id. at 17,322.
\textsuperscript{269} Id. at 17,323.
\textsuperscript{270} Id. at 17,322.
\textsuperscript{271} 19 Av. Cas. (CCH) 17,485 (S.D.N.Y. 1985).
ping line's responsibilities for the entire journey. However, the court granted the airline's summary judgment motion, holding that the airline ticket constituted the contract between the airline and the passengers and that the contract clearly stated that the airline was not responsible for any delay caused by weather.

In *Neal v. Republic Airlines, Inc.* the District Court for the Northern District of Illinois granted summary judgment in favor of an airline that had been sued for damages arising from its failure to deliver human remains by a designated time. The complaint alleged counts in tort, bailment, and breach of contract. The court held that the complaint failed to state a claim upon which relief could be granted. In reaching its decision, the court stated that the plaintiffs could only pursue a cause of action for breach of contract and could not avoid the liability limits imposed by the contract of transportation by framing their complaint in terms of tort and bailment. The court further noted that Republic's air waybill stated on its face that the transportation was subject to the conditions of the contract, which included specific liability limitations. Since the shipper was afforded notice of Republic's rate and liability structure, it had adequate opportunity to declare a higher value for the shipment in excess of the contract liability limits. The court also dismissed plaintiffs' breach of contract action against Republic on the grounds that plaintiffs were neither parties nor third party beneficiaries to the contract with Republic, but at most incidental beneficiaries.

The District Court for the District of Oregon in *Deiro v. American Airlines, Inc.* found that the notice contained on the passenger ticket limiting the carrier's liability for bag-
gage loss to $750.00 was adequate to both inform the passenger of the limitation and afford him the opportunity to protect himself by choosing a higher liability and paying a higher rate.\textsuperscript{279}

In \textit{Arkwright-Boston Manufacturers Mutual Insurance Co. v. Great Western Airlines, Inc.}\textsuperscript{280} the Eighth Circuit Court of Appeals reversed a district court judgment which held that Great Western, as an agent or connecting carrier for Federal Express under a wet lease agreement, was entitled to benefit from the limitation of liability contained in the Federal Express airbills. The goods in question had been destroyed in the crash of a Great Western airplane. The Eighth Circuit agreed that federal law was controlling and assumed that Federal Express could limit its liability pursuant to its contract of transportation. The court, however, found that under federal common law the carrier's agent is liable for the full value of goods damaged by the agent unless statute or contract expressly extends the limitation of liability to the agent.\textsuperscript{281} In \textit{Arkwright-Boston} no contract extended the liability limitation to Great Western, and it was therefore liable for the value of the goods.

In \textit{Clemente v. Philippine Airlines}\textsuperscript{282} the District Court for the Southern District of New York held that a carrier was not liable for breach of contract for refusing transportation to passengers who failed to reconfirm their return reservations at least 72 hours prior to departure, as required by the terms of the ticket and the annexed advice to international passengers. The court held that even if the airline's employee who sold the ticket told the passengers they did not need to reconfirm the reservation 72 hours in advance, the carrier was not liable for breach of contract because the annexed advice to the ticket indicated that such confirmation was needed.\textsuperscript{283} The court

\textsuperscript{279} \textit{Id.} at 17,780.
\textsuperscript{280} 767 F.2d 425 (8th Cir. 1985).
\textsuperscript{281} \textit{Id.} at 428.
\textsuperscript{283} \textit{Id.} at 1199.
determined that the airline's tariff filed with the CAB constituted part of the contract of carriage between the passenger and the airline, and the terms of the tariff and the contract of transportation governed the rights and liabilities of the parties.\textsuperscript{284}

Similarly, the United States Court of Appeals for the Eleventh Circuit in \textit{Arango v. Guzman Travel Advisors}\textsuperscript{285} held that an airline is not liable for the damages suffered by passengers when they are refused entry into a foreign country. The court also held that the airline is not liable for its failure to warn the passengers that they might be turned away by immigration officials.\textsuperscript{286} Upon plaintiffs' arrival at Santo Domingo Airport, the Dominican Republic immigration officials refused to permit the plaintiffs to enter because their names were on a list of "undesirable aliens." The court held that the airline had no duty to provide food and lodging for the passengers after officials ordered the airline to transport the passengers out of the country on the next flight. Since the airline had no control over the circumstances and there was no evidence that the passengers could not pay for their own subsistence, the airline was not in breach of its contract of carriage.\textsuperscript{287} Furthermore, the court found that the airline was not in breach of its contract for failing to return the passengers to the United States after they had voluntarily decided to vacation in Haiti instead of immediately returning to Miami.\textsuperscript{288}

D. Duty to Warn

In \textit{Kohler v. Aspen Airways}\textsuperscript{289} a California Court of Appeal held that an airline does not have a duty to warn passengers of possible turbulent weather. This action involved a plaintiff who was aboard a 45 minute Aspen Airways flight

\textsuperscript{284} Id.
\textsuperscript{285} 761 F.2d 1527 (llth Cir.) \textit{cert. denied}, 106 S.Ct. 408 (1985).
\textsuperscript{286} Id. at 1536.
\textsuperscript{287} Id. at 1536-37.
\textsuperscript{288} Id. at 1537.
from San Jose, California to Lake Tahoe. The weather forecast for the flight indicated clear weather with occasional moderate turbulence at 5,000 feet. While in the Lake Tahoe area, the airplane hit a pocket of severe clear air turbulence and dropped 500 feet in a matter of seconds. As a result, the plaintiff injured her neck. The airplane landed safely at South Lake Tahoe Airport without further problems. In reaching its decision, the court also rejected the application of *res ipsa loquitur* to the facts of the case and found that injuries resulting from such an encounter with turbulence cannot be said to ordinarily occur only because of negligence.\(^{290}\)

V. LIABILITY OF MANUFACTURERS

In *Elsworth v. Beech Aircraft Corp.*\(^{291}\) the heirs of four people who were killed in the crash of a Beech Travelair aircraft in 1974 during a demonstration flight sued Beech Aircraft Corporation on a variety of theories including negligence per se, alleging that the aircraft did not comply with various safety regulations adopted by the FAA. The California Supreme Court found that although the FAA had certified that the design of the aircraft complied with all applicable safety regulations, nothing prevented the plaintiffs from proceeding against Beech under state law for negligence in the design of the aircraft on the basis of its violation of the FAA’s safety regulation.\(^{292}\) The court found that the trial court’s negligence per se instruction to the jury did not intrude into a field preempted by federal law. Congress intended to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of aircraft, even though federal law may have completely occupied the field of regulation of aircraft safety and certification. Accordingly, the court reached the curious result that

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\(^{290}\) Id. at 1201-02, 214 Cal. Rptr. at 723-25.


\(^{292}\) Id. at 548-55, 691 P.2d at 634-37, 208 Cal. Rptr. at 878-83.
although the manufacturer had complied with the FAA's requirements with respect to certification, it was still held liable on a negligence per se theory on the grounds that the aircraft did not, in fact, comply with such regulations at the time of its certification.293

In *Brocklesby v. United States*294 survivors of crew members of a World Airways aircraft that crashed near Cold Bay, Alaska in 1973 brought suit against the Government and against Jeppesen and Company, the publisher of an allegedly defective instrument approach chart. The Court of Appeals for the Ninth Circuit determined that instrument approach charts are "products" for product liability purposes and that a chart manufacturer must bear the costs of accidents that are proximately caused by an approach chart's defects.295 The Court of Appeals denied Jeppesen's petition for reconsideration of the court's prior decision affirming Jeppesen's liability in the amount of $12,785,580.81 for deaths and property damage arising out of the crash.296 The court held Jeppesen liable on the ground that an instrument approach procedure developed by the Government and published in chart form by Jeppesen caused the accident.297 In rejecting Jeppesen's petition for rehearing, the Ninth Circuit reaffirmed its prior determination that the approach chart is a "product" and that a defect in the Jeppesen chart properly resulted in the imposition of strict product liability even though all of the defects in the chart stemmed from the Government's alleged failure to establish a safe instrument approach procedure.298

In the amended opinion accompanying the August 2, 1985 decision, the court noted Jeppesen's argument that to hold a chart manufacturer strictly liable for accurately

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293 *Id.*
294 *753 F.2d 794* (9th Cir.), *vacated*, *767 F.2d 1288* (9th Cir.), *cert. denied*, 106 S.Ct. 882 (1985).
295 *753 F.2d at 800.*
296 *767 F.2d 1288* (9th Cir. 1985).
297 *Id.* at 1296.
298 *Id.* at 1295-96.
republishing a government regulation was unfair. While the Ninth Circuit agreed that Jeppesen should not be held liable for accurately republishing a government regulation, the court found that the charts were more than a mere republication of the government procedures. Jeppesen converted them into a new form, a distinct product. Jeppesen was responsible, as manufacturer and marketer, for insuring that the charts were not unreasonably dangerous in their intended use.299

In *Fluor Corporation v. Jeppesen & Co.*,300 a death action arising out of an aircraft crash in New York, the California Court of Appeal recognized that no California state court had yet decided whether Jeppesen Navigation Charts or similar charts may be deemed to constitute “products” for purposes of determining the applicability of strict liability principles. The aircraft struck the side of a hill at 2,140 feet as the pilot was attempting a landing. The hill was not designated on the Jeppesen Instrument Approach Chart for the airport, despite the fact that it represented the highest point in the crash area. The chart showed a hill of only 1,991 feet in elevation as being the highest hill in the area.301

The California Court of Appeal stated that characterizing Jeppesen Instrument Approach Charts as “products” serves the paramount policy to be promoted by the strict tort liability doctrine, the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.302 The court noted that “it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site.”303 The

299 Id. at 1298.
301 Id. at 473, 216 Cal. Rptr. at 70.
302 Id. at 475, 216 Cal. Rptr. at 71.
303 Id. at 476, 216 Cal. Rptr. at 71-72.
court further noted that the issue of the crew's alleged negligence at the trial may have determinative significance but cautioned that while comparative fault principles have been extended to actions founded on strict liability, the conduct of the injured party is to be compared not to the manufacturer's conduct but to its product for the purpose of apportionment.\(^{304}\) The court followed prior decisions of United States Courts of Appeals holding that Jeppesen charts are "products", such as *Brocklesby v. United States*,\(^ {305}\) *Saloomey v. Jeppesen & Co.*,\(^ {306}\) and *Aetna Casualty And Surety Co. v. Jeppesen & Co.*\(^ {307}\)

In *In re Korean Air Lines Disaster of September 1, 1983*\(^ {308}\) Boeing and Litton (manufacturers of the aircraft and its navigation equipment) filed motions for summary judgment. For purposes of the motions, Boeing and Litton assumed that a defect existed in the navigation equipment and that the defect caused the aircraft to deviate from its course. Boeing and Litton argued that even if the aircraft did deviate from its course because of defective equipment, the defect was not a proximate cause of the accident because (1) it was not reasonably foreseeable that a Russian aircraft would shoot down a civilian passenger aircraft, and (2) the actions of the Russians constituted an independent and intervening cause of plaintiffs' damages.\(^ {309}\) The court agreed, finding that Boeing and Litton had no duty to anticipate or guard against the attack because it was not foreseeable and that without such duty there could be no legal responsibility or liability for plaintiffs' harm. The court accordingly granted summary judgment in favor of Boeing and Litton.\(^ {310}\)

\(^{304}\) *Id.* at 480, 216 Cal. Rptr. at 74.

\(^{305}\) 753 F.2d 794, 800 (9th Cir.), vacated, 767 F.2d 1288, 1298 (9th Cir.) cert. denied, 106 S. Ct. 882 (1985).

\(^{306}\) 707 F.2d 671, 676 (2d Cir. 1983).

\(^{307}\) 642 F.2d 339, 343 (9th Cir. 1981).

\(^{308}\) 19 Av. Cas. (CCH) 17,853 (D.D.C. 1985).

\(^{309}\) *Id.* at 17,855.

\(^{310}\) *Id.* at 17,857-58.
In *Koutsoubos v. Boeing Vertol*\(^{311}\) the Court of Appeals for the Third Circuit outlined the three requirements that a manufacturer of military products must satisfy in order to avail itself of the "government contractor defense" in a products liability action. The manufacturer must establish that (1) the government established the specifications for the product, (2) the product met the government specifications in all material respects, and (3) the government knew as much or more than the manufacturer about the hazards of the product.\(^{312}\) In *Koutsoubos* a helicopter manufactured by the defendant crashed, killing its crew. The Appellate Court affirmed the judgment of the District Court, which had found that the manufacturer satisfied the requirements of the government contractor defense.\(^{313}\)

The Court of Appeals for the Eleventh Circuit recently recognized the availability of a "military contractor defense" if the contractor meets the court's standard for establishing the defense. *Shaw v. Grumman Aerospace Corp.*\(^{314}\) was an action for wrongful death resulting from the crash of a Grumman A-6 aircraft piloted by a lieutenant in the United States Navy. The Eleventh Circuit expressed its dissatisfaction with the "government contractor defense" adopted in cases such as *Koutsoubos* and established its own test.\(^{315}\) It found that as a general rule the military contractor will be liable for injuries to servicemen caused by defective products designed by the contractor. The contractor may escape liability only if it affirmatively proves (1) that it did not participate, or participated minimally, in the design of the products or parts shown to be defective, or (2) it timely warned the military of the risks of the design and notified it of alternative designs reasonably known to the contractor, and (3) the military, even though


\(^{312}\) *Id.* at 354.

\(^{313}\) *Id.* at 354-55.

\(^{314}\) 778 F.2d 736 (11th Cir. 1985).

\(^{315}\) *Id.* at 744-45.
forewarned, clearly authorized the contractor to proceed with the dangerous design. The court stated that the overriding objective of the test was to determine whether a military decision to go ahead with the product was actually made; if so, the contractor would be absolved from judicially imposed liability.

VI. LIABILITY OF THE UNITED STATES GOVERNMENT

The Federal Tort Claims Act (FTCA) authorizes actions against the United States Government for damages caused by the negligence of a government employee while acting within the course and scope of his employment. An important exception to the Government's liability states that the FTCA shall not apply to claims based upon the exercise or performance of, or the failure to exercise or perform, a "discretionary function" or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved is abused.

In Murff v. United States the District Court for the Eastern District of Texas found that the failure of air traffic controllers to watch, warn, and maintain separation of two aircraft that were involved in a mid-air collision constituted negligence for which the United States was liable under the FTCA. In Murff a Cessna 172 operating under visual flight rules (VFR) collided in mid-air with a Fairchild F-27 operating under instrument flight rules (IFR). The trial court found that the controllers had an "earlier" duty to direct the aircraft operating under IFR and only a secondary duty to the aircraft operating under VFR. According to the record, the controllers on duty at the time of the accident had the time and ability to direct the crew of the VFR aircraft, and their failure to do so was

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316 Id. at 746.
317 Id.
318 Federal Tort Claims Act, supra note 29, § 2672.
319 Id. § 2680(a).
321 Id. at 294.
a breach of their duty.\textsuperscript{322} On appeal,\textsuperscript{323} the Fifth Circuit reversed, holding that the conduct of the pilot and instructor in choosing to maneuver in the traffic area at a dangerous altitude, without landing lights, was the primary cause of the midair collision. The court held the greater fault lay with the pilot and the instructor because their duty to avoid the accident was primary while the controllers’ duty was secondary. Consequently, the survivors were entitled to no recovery under Texas comparative law.\textsuperscript{324}

VII. Damages

A. Generally

*Freeman v. World Airways, Inc.*\textsuperscript{325} involved two actions that arose out of the crash of a World Airways aircraft at Boston’s Logan International Airport on January 23, 1982. Plaintiffs brought actions for personal injuries suffered in the crash and sought both compensatory and punitive damages. World Airways and the Massachusetts Port Authority moved for partial summary judgment on the issue of punitive damages. The District Court dismissed the claims for punitive damages, stating that the law of Massachusetts controlled the passengers’ claims for punitive damages and that Massachusetts law does not allow such damages in personal injury cases.\textsuperscript{326} Although the parties involved had contacts with several other states that would allow punitive damages in personal injury cases, the court held that Massachusetts had the most significant interest in the punitive damages issue. The court stated that the location of the injury, most of the allegedly negligent conduct, and the physical conditions surrounding the crash gave Massachusetts the most significant rela-

\textsuperscript{322} Id.
\textsuperscript{323} 785 F.2d 552 (5th Cir. 1986).
\textsuperscript{324} Id. at 555.
\textsuperscript{326} Id. at 848-49.
tionship to the parties and the injuries suffered.\textsuperscript{327}

In \textit{Metz v. United Technologies Corp.}\textsuperscript{328} the Court of Appeals for the Second Circuit determined that damages for future lost wages, pain and suffering, and medical expenses should be reduced to present value. \textit{Metz} involved a personal injury action resulting from the crash of a helicopter at Newark International Airport in 1979. The plaintiff had been awarded damages in excess of two million dollars. The trial court had refused to instruct the jury regarding present value calculations. The appellate court stated that the law is concerned with not only the pain and suffering of the individual but also the loss society would have to bear, including the increased cost of insurance. The court further stated that after an adequate provision has been made for the injured plaintiff, the goal is to achieve a fair and reasonable allocation of loss by discounting the awards of future damages to present value.\textsuperscript{329}

Although the Second Circuit Court of Appeals in \textit{Metz} held that damages for future lost wages were to be discounted to present value, the court indicated that if a jurisdiction whose law applied to the issue of damages provided a rule with regard to the discounting of future damages, the rule of law of the jurisdiction would prevail.\textsuperscript{330} In \textit{Metz} the applicable law (Louisiana) did not address the issue of discounting future damages.

In \textit{Morgan Guaranty Trust Co. v. Texasgulf Aviation}\textsuperscript{331} the United States District Court for the Southern District of New York denied a motion \textit{in limine} by the executor of an estate to exclude evidence of the effect of prospective income tax liability on a future earnings award in a wrongful death action. New York law based the calculation of damages for wrongful death on the amount of future assist-

\textsuperscript{327} \textit{Id.} at 846-49.
\textsuperscript{328} 754 F.2d 63 (2d Cir. 1985).
\textsuperscript{329} \textit{Id.} at 67.
\textsuperscript{330} \textit{Id.}
ance the survivors could reasonably have expected if the decedent had not died. Although it stated that calculating the effect of the income tax on future earnings would be speculative to some extent, the court noted that the monetary support a wage earner contributes to a family is affected by taxes that he must pay. Thus, since there are comprehensible methods of calculating the effect of these taxes on future earning awards, the court held that the effect of income taxes is not too speculative for a jury to consider.

B. Mental Anguish and Emotional Distress

An increasingly difficult aspect of aviation litigation in the United States concerns claims for mental anguish and emotional distress. These claims are often asserted in the context of a claim for bodily injury, but more and more these claims are being made when baggage has been delayed or lost, when a passenger is denied boarding, or when a passenger is on board an aircraft during a rejected take-off or forced landing.

The traditional rule in most jurisdictions in the United States has prevented a person from recovering damages for mental anguish or emotional distress unless accompanied by some form of bodily injury. In some jurisdictions, notably California, the law has changed in recent years to permit the recovery of damages for mental anguish and emotional distress in circumstances where the claimant has not suffered injury to his or her body. The case which changed the law in California is Molien v. Kaiser Foundation Hospitals, in which the California Supreme Court held that a hospital and a doctor were liable to a husband for his emotional distress when he and his wife were divorced after the doctor negligently mis-

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332 Id. at 700.
333 Id. at 702.
335 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
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diagnosed that the wife was suffering from a venereal disease.

Another area in which liability for mental anguish and emotional distress has been expanded, again in states such as California, concerns the witnessing of injury to another person. Traditionally, the law did not permit a bystander to recover damages for injuries suffered by another person. However, the California Supreme Court held in *Dillon v. Legg* that an immediate relative of a victim who contemporaneously observed the accident in which the victim was injured, and thereby suffered emotional distress, could recover damages for such distress from the person causing the injury to the victim.

In *LeConte v. Pan American World Airways, Inc.* the Fifth Circuit, applying Louisiana law, denied a claim for mental anguish on behalf of two law enforcement officers who suffered nausea, insomnia, and other symptoms after handling bodies of passengers who died in the crash of a Boeing 727 at Kenner, Louisiana, on July 9, 1982. Louisiana law does not permit recovery for mental anguish suffered by a bystander because of injury or death to another person.

In *Quill v. Trans World Airlines, Inc.* the Minnesota Court of Appeals upheld a trial court’s denial of a motion for judgment notwithstanding the verdict and held that the nature of an accident in which an aircraft spun uncontrollably downward 34,000 feet resolved all doubts of the genuineness of the claim for negligent infliction of emotional distress although the passenger’s accompanying physical symptoms were not severe. During a TWA flight from New York to Minneapolis, the aircraft was

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537 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
538 Id. at 741, 441 P.2d at 925, 69 Cal. Rptr. at 85.
539 736 F.2d 1019 (5th Cir. 1984).
540 Id. at 1021.
541 361 N.W.2d 438 (Minn. Ct. App. 1985).
542 Id. at 439-40.
cruising at an altitude of 39,000 feet when it suddenly rolled over and plunged downward. The tailspin continued for 40 seconds at speeds just below the speed of sound, causing the plane to shake violently. The pilots regained control of the airplane only five seconds before it would have struck the ground.\footnote{\textit{Id.} at \textit{440}.}

In \textit{In re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982},\footnote{764 F.2d 1082 (5th Cir. 1985).} the Court of Appeals for the Fifth Circuit held that one who simply is exposed to the results of an aircrash without sustaining any physical injury or property damage, and who was not in any personal danger, cannot recover damages for mental anguish under Louisiana law. This action arose out of the crash of a Pan American Boeing 727 in Kenner, Louisiana, on July 9, 1982. Plaintiff was a homeowner in the neighborhood where the aircraft crashed who observed the general devastation that was brought about as a result of the crash. The homeowner alleged that he suffered severe anxiety for several weeks following the accident, primarily related to the possible consequences that he and his family could have suffered as a result of the crash. The Fifth Circuit reversed a jury award of damages for past and future mental pain and suffering and the costs of psychiatric treatment related thereto, stating that an individual who is simply exposed to the results of the crash without sustaining any physical injury or property damage cannot recover for mental anguish under Louisiana law.\footnote{\textit{Id.} at 1083-84.}

C. \textit{Post-Traumatic Stress Disorder}

An area of mental injury which is becoming increasingly important to aviation interests is post-traumatic stress disorder (PTSD). PTSD occurs when a person is subjected to a shocking or horrifying event called a "stressor," which affects the person subsequently by causing symptoms of distress. These symptoms include reliving the
event, nightmares, loss of appetite, mood changes, feelings of despair, and even changes in personality. During World War I, this condition was described as "shell shock," and during World War II the condition was referred to as "battle fatigue." After the Vietnam conflict, numerous veterans suffered from this condition, and the American Psychiatric Association inserted PTSD in the third edition of its Diagnostic and Statistical Manual (DSM) for Mental Disorders.346

One consequence of the acknowledgement of PTSD as a legitimate psychological disorder is that plaintiffs in air disasters are now seeking damages as a result of this condition. It is not difficult to see how someone might suffer from PTSD after surviving an air crash. However, claims based on PTSD are also being made in cases where the event in question would not normally be particularly horrifying or shocking to the average person. A recent example is an aborted takeoff of a DC-10 at Bangkok International Airport where the passengers were safely evacuated by means of the escape slides. One or two passengers complained of bumps and bruises, but several passengers presented claims against the carrier alleging that they were suffering from severe personality disorders which were akin to PTSD.347

The problem with PTSD is a simple one. Many people suffer from a wide variety of emotional problems that resemble personality disorders. Frequently, the traumas of everyday life, including the break-up of relationships or the loss of a job, will push these people "over the brink" and cause them to start suffering severely from their underlying emotional difficulties. While traveling on board an aircraft, often at a high level of anxiety and fear, people with serious emotional problems could suffer severe emotional distress as a result of an event that might not be overwhelmingly shocking to an average person. Indeed,

347 All of such claims were settled without litigation.
the claims arising out of the aborted takeoff in Bangkok appear to involve several people who were suffering from severe anxiety and emotional distress prior to the subject flight. The problem is in distinguishing between emotional distress attributable to the person’s experience on board the aircraft and that which was pre-existing. According to the “egg shell skull” rule, courts should permit recovery of the full amount from the party responsible for the accident if it is difficult to distinguish between emotional distress which may be attributed to pre-flight events and that attributable to the flight itself.348

Recently, psychiatrists have begun to formulate tests which attempt to indicate the extent to which a person is suffering from PTSD.349 These tests are constantly being revised and refined, and one hopes they will prove to be useful in the future in defining the limits of a defendant’s responsibility in a PTSD situation.

D. Pre-Impact and Post-Impact Pain and Suffering

Courts in the United States are increasingly recognizing a right of recovery for pre-impact pain and suffering by a passenger prior to his death in an aircraft accident. In Haley v. Pan American World Airways, Inc.350 the Fifth Circuit recognized that such a right of recovery exists in the State of Louisiana, provided the claimant can prove such pre-death pain and suffering. While conceding that damages could not be awarded where the only evidence to support them was speculative or conjectural, the court stated that it was not necessary for a claimant to produce eyewitness testimony to support an award of damages for pre-impact


349 Dr. David Foy of the UCLA Medical Center has formulated two such tests, the Post-Traumatic Stress Disorder Checklist and the Plane Crash Trauma Event List.

350 746 F.2d 311 (5th Cir. 1984).
pain and suffering. Provided there was sufficient evidence for the trier of fact to reasonably infer that such pain and suffering occurred, such a finding would be competent.\footnote{51}{Id. at 316-17.}

In \textit{In re Aircrash Disaster Near Chicago, Illinois on May 25, 1979}\footnote{52}{18 Av. Cas. (CCH) 18,490 (N.D. Ill. 1984).} the Northern District of Illinois held that Illinois law, which allows recovery for pre-impact pain and suffering, applied to the claims of numerous plaintiffs even though not all the decedents were domiciled in the State of Illinois.

In \textit{Shatkin v. McDonnell Douglas Corp.}\footnote{53}{727 F.2d 202 (2d Cir. 1984).} the Second Circuit reversed a jury award for pre-impact pain and suffering, finding no evidence to indicate that the decedent was aware that anything was wrong immediately prior to the impact.

In \textit{Pregeant v. Pan American World Airways, Inc.}\footnote{54}{762 F.2d 1245 (5th Cir. 1985).} the Court of Appeals for the Fifth Circuit affirmed the judgment of a lower court which had returned a verdict in favor of the plaintiffs and awarded damages for pre-impact mental anguish and post-impact suffering. The court stated that the jury had not erred in awarding such damages to the surviving parents of an airplane crash victim.\footnote{55}{Id. at 1250.} The record contained sufficient evidence upon which a jury could base a finding of pre-impact mental suffering for 20 seconds before impact. The award of post-impact pain and suffering required proof that the decedent was conscious, however briefly, following the accident. Such proof could be inferred from the facts and circumstances surrounding the crash, and the court held that it was not improper for the jury to have done so in this case.\footnote{56}{Id. at 1249-50.}
VIII. Insurance

In *Puckett v. U.S. Fire Insurance Co.* the Texas Supreme Court held that a causal connection was required between the breach of a policy condition and a loss before the insurer would be permitted to rely on such breach of condition to avoid payment under the policy. The court stated that failure to require such causal connection between the breach and the loss would violate public policy.

In *Potter v. Ranger Insurance Co.* the Court of Appeals for the Ninth Circuit upheld a policy exclusion which provided that the policy did not apply "to any insured . . . who operates or permits the operation of the aircraft, while in flight, unless its airworthiness certificate is in full force and effect." The insured conceded that the airworthiness certificate of the aircraft was not in full force and effect at the time of the accident. The insured attempted to assert that the exclusion was ambiguous and, further, that it required knowledge on his part that the aircraft was being operated while the certificate of airworthiness was not in effect. The Ninth Circuit (emphasizing use of the word "unless," which directly preceded the language regarding the airworthiness certificate) found that the language clearly stated that the aircraft was not covered unless a valid and effective airworthiness certificate was in force at the time of the loss.

In *Threlkeld v. Ranger Insurance Co.* the California Court of Appeal rejected a similar attempt on the part of the insured to characterize as ambiguous an exclusion relating to losses occurring when the insured operated or permitted the operation of the aircraft without a valid airworthiness certificate. The aircraft's airworthiness certificate provided that it would remain in effect as long as

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557 678 S.W.2d 936 (Tex. 1984).
558 *Id.* at 938.
559 732 F.2d 742 (9th Cir. 1984).
560 *Id.* at 743.
561 *Id.* at 744.
563 *Id.* at 7-8, 202 Cal. Rptr. at 532-33.
the aircraft was maintained in accordance with FAA regulations. The insured contended that the exclusion was ambiguous since it could be construed to incorporate all FAA regulations into the policy, thus rendering the exclusion invalid under California Insurance Code section 11584. At the time of the accident section 11584 provided that "no policy of insurance issued or delivered in this state covering any loss, expense or liability arising out of the ownership, maintenance, or use of an aircraft shall exclude or deny coverage because the aircraft is operated in violation of federal or civil air regulations, or any state law or local ordinance. This section does not prohibit the use of specific exclusions or conditions in any such policy which relates to . . . establishing limitations on the use of the aircraft." The court found that section 11584 had been interpreted to prohibit exclusions or denials of coverage when an aircraft was being operated in violation of federal laws and regulations, but found that the exclusion involved in the action did nothing more than establish a limitation on the use of the aircraft. Such exclusion is expressly authorized by section 11584 of the California Insurance Code.

In General Electric Credit Corp. v. Southeastern Aviation Underwriters, Inc. breach of warranty coverage had been obtained in favor of a company financing the purchase of the insured aircraft. The breach of warranty endorsement provided, inter alia, that the insurance afforded by the policy "shall not be invalidated by any act or neglect of the Named Insured nor by any change in the title or ownership of the aircraft but conversion, embezzlement or secretion by or at the direction of the Named Insured is not covered hereunder; . . . Nothing herein contained shall vary, alter, waive or extend any of the terms, provisions, representations, conditions or agreements of the policy.

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565 156 Cal. App. 3d at 9, 202 Cal. Rptr. at 583.
The insured argued that the endorsement took precedence over the original wording of the policy and that it excluded from coverage only those conversions, embezzlements, or secretions which were "by or at the direction of the named insured." Accordingly, since the conversion of the insured aircraft in this case had been by a lessee of the aircraft without the insured's involvement, the plaintiff was entitled to recovery. The United States District Court for the Western District of Pennsylvania rejected this argument, holding that the provisions of the endorsement did not purport to extend any particular form of coverage to the lienholder, but simply excused the lienholder from the penalty of invalidation of existing policy coverages which might otherwise result from the act or neglect of the named insured. Thus, while the lienholder was relieved from certain consequences of the insured's conduct that would otherwise invalidate the policy, conversion, embezzlement and secretion by or at the direction of the named insured would invalidate the policy, even as to the lienholder. Accordingly, the court found that the lienholder was not entitled to recovery when the aircraft had been converted by a party to whom it had been leased by the insured, since the endorsement did not vary or extend any of the existing provisions of the policy.

In O'Connor v. Proprietors Insurance Co. the Colorado Supreme Court, affirming the decision of the Colorado Court of Appeals, held that when there is a provision in an insurance policy specifically excluding coverage in the event of an FAA violation, the insured is not entitled to recover unless it can be established that no causal relationship existed between the FAA violation and the acci-

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568 Id. at 17,828.
569 Id. at 17,828-29.
570 Id. at 17,830.
571 696 P.2d 282 (Colo. 1985).
dent giving rise to coverage. The policy in question provided no coverage for losses incurred if the aircraft was operated in violation of the terms of the Federal Aviation Airworthiness Certificate or Operational Record. Since the aircraft had not had its required annual inspection, the court found that the aircraft insurance policy did not cover damages sustained by the aircraft in the crash. The court held that the insured was not entitled to recover under the policy unless he could prove that no causal relation existed between the FAA violation and the accident and that the insured did not meet his burden of proof.

The conventional liability insurance policy provides not only an indemnity to the insured for liability incurred under the policy, but also provides a defense to the insured in respect of claims and lawsuits which may be instituted against him. An insurer thus has a duty to defend as well as a duty to indemnify if the liability is covered by the policy.

The traditional rule, which is still the majority rule, is that the insurer has a duty to defend every action in which the complaint shows a claim for damages covered by the policy. In some states, including California, the duty to defend has been expanded to hold that an insurer must defend a suit which potentially seeks damages within the coverage of the policy. Thus, an obligation is imposed on the insurer to investigate a claim to determine whether the facts surrounding it might give rise to a claim that, although not set forth in the complaint, would be covered by the policy.

To avoid the possibility of being sued in a bad faith action for wrongful failure to defend, insurers in the

372 Id. at 286.
373 Id.
United States frequently undertake to defend an insured under a reservation of rights. In such a situation the insurers provide a defense and simultaneously reserve their right to establish subsequently that the insured was not entitled to such defense, or that while the insured was entitled to a defense, he is not entitled to indemnity under the policy.

In *Buck v. United States Aviation Underwriters, Inc.* the Court of Appeals for the Sixth Circuit reaffirmed the rule that the construction favoring coverage must be adopted when an insurance policy contains an ambiguous provision. In *Buck* the term "any employee" was liberally construed to mean even a "temporary" employee, as opposed to a "regular" employee, operating an aircraft at the time of an accident. In that case a helicopter pilot involved in an accident was exempt from an otherwise applicable insurance policy exclusion. The court held that although the plaintiff was not a "regular" employee the term "any" employee was ambiguous. Thus, the plaintiff was an additional insured under the policy and was entitled to have the insured defend him in a tort action.

In a recent California case, *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.* the California Court of Appeal held that when insurers provide their own counsel to defend an insured under a reservation of rights, in circumstances where a conflict of interest exists between the insurers and the insured, the insured is entitled to counsel of his own choosing at the expense of the insurers. The potential conflict of interest between insurer and insured in the defense of liability cases, where coverage is in issue, has attracted considerable attention in the United States. Indeed, the *Cumis* decision has attracted a great deal of attention in view of its potential

576 763 F.2d 224 (6th Cir. 1985).
577 Id. at 227.
578 Id.
580 Id. at 375, 208 Cal Rptr. at 506.
implications. The judgment of the California Court of Appeal seems to imply that whenever coverage is in question, the insurers should appoint two counsel, one to protect the interests of the insurers and one to protect the interests of the insured. However, numerous questions in relation to such an arrangement remain unanswered. For example, what would the respective responsibilities of each set of counsel be vis-a-vis the conduct of the litigation? Would the insured be entitled to select any law firm to represent his interests, regardless of expense? Would the insured be bound to select a law firm which charged a reasonable fee? What would be reasonable in the context of any particular case?

One anticipated result of the Cumis decision may be that insurers will be more reluctant to contest coverage or to reserve their rights to do so, in view of the legal costs which could be incurred. The resolution of other questions surrounding this issue remains to be seen.

IX. MISCELLANEOUS CASES

In District of Columbia v. Air Florida, Inc. the Court of Appeals for the District of Columbia addressed the question of whether an airline is responsible for the costs of rescue and clean up provided by municipal police and emergency services at the site of an aircraft disaster. The accident in question was the 1982 crash of an Air Florida jet into the Fourteenth Street bridge in Washington, D.C. The court held that recovery of such costs is governed by local law. Since the local municipal law did not address the issue, the general common law rule was applied. The common law rule provides that the costs of public services for protection from fire or for other safety purposes is borne by the general public as a whole and is not assessed against the tortfeasor whose negligence creates the need for the emergency services. Thus, an airline is

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[582] Id. at 1079.
[583] Id. at 1080.
not liable for police and other emergency services provided at the site of an aircraft disaster unless the local municipal law specifically addresses the issue and requires reimbursement from the airline.\textsuperscript{384}

In \textit{United States v. One Rockwell International Commander 690C/840} \textsuperscript{385} the Court of Appeals for the Eighth Circuit ruled that aircraft which are used to transport illegal drugs are exempt from governmental forfeiture under the Aircraft Confiscation Act if the flight on which the illegal drugs are transported is conducted as a common carrier flight.\textsuperscript{386} The rationale for the decision was that the carrier should not be penalized by the forfeiture of its aircraft absent privity or consent on the part of the carrier to carry the illegal drugs. As long as the carrier held itself out as a common carrier to the public and was willing to carry all passengers for hire indiscriminately, and no employee or agent of the carrier was privy to or consented to the transportation of illegal drugs, the carrier was exempt from governmental forfeiture.\textsuperscript{387}

In \textit{Brown v. Byard} \textsuperscript{388} the District Court for the Southern District of Ohio held that the Federal Aviation Act does not create an implied private cause of action for the representatives of a person killed in an air crash. The court found no indication in the legislative history of the Act that Congress intended to create a private cause of action in favor of the representatives of an air crash victim. Thus, a cause of action by the representatives of a deceased person must be based on local law.\textsuperscript{389}

In \textit{Friel v. Cessna Aircraft Co.} \textsuperscript{390} the Court of Appeals for the Ninth Circuit determined that the recently enacted three year statute of limitations of the Death on the High Seas Act ("DOHSA") applied to an action, even though a

\textsuperscript{384} Id.
\textsuperscript{385} 754 F.2d 284 (8th Cir. 1985).
\textsuperscript{386} Id. at 287.
\textsuperscript{387} Id.
\textsuperscript{388} 600 F. Supp. 396 (S.D. Ohio 1984).
\textsuperscript{389} Id. at 399.
\textsuperscript{390} 751 F.2d 1037 (9th Cir. 1985).
two year statute of limitations was in effect at the time of the accident. The action sought damages for the death of an individual who was forced to abandon his airplane while flying from Santa Barbara, California to Hawaii. The defendants moved for summary judgment, contending that the action was barred by the two year statute of limitations. The district court disagreed, holding that the three year limitation period applied, and denied the motion for summary judgment. The appellate court affirmed the district court's ruling, stating that the three year statute of limitations applied to the action even though the accident occurred when the two year statute of limitations was in effect. The court stated further that the intent of Congress in making the change from a two year to a three year statute of limitations was to eliminate uncertainty and to provide a uniform limitation for all maritime torts.

In *Tallentire v. Offshore Logistics, Inc.* the Court of Appeals for the Fifth Circuit held that, based on its interpretation of section 7 of DOHSA, litigants may pursue claims for recovery under state wrongful death actions even in light of the existence of DOHSA. The action arose out of the death of two offshore workers who were killed in a helicopter crash approximately 30 miles off the Louisiana coast. The plaintiff sought to recover damages for pecuniary as well as nonpecuniary loss under Louisiana law. DOHSA does not allow recovery of damages for nonpecuniary injuries. The court held that Louisiana had the authority to apply its Death Act to its own citizens in actions arising on the high seas adjacent to the Louisiana coast.

In *Baker v. Burbank - Glendale - Pasadena Airport Authority* homeowners living adjacent to an airport filed suit

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391 Id. at 1039.
392 Id. at 1039-40.
393 754 F.2d 1274 (5th Cir. 1985).
394 Id. at 1277.
395 Id. at 1286.
against the airport for inverse condemnation and nuisance arising from operation of the airport. The trial court sustained a demurrer to both causes of action and dismissed the inverse condemnation action because the defendant was prohibited by statute from exercising the power of eminent domain. The court dismissed the nuisance action because it was barred by the statute of limitations covering permanent nuisances.397

The California Supreme Court held that inverse condemnation is not based on the power of an entity to exercise eminent domain, but rather on a showing that the damage resulted from an exercise of governmental power. The court, therefore, reinstated the plaintiffs' cause of action for inverse condemnation, even though defendant was unable to exercise the power of eminent domain.398

In a holding which may have a far reaching effect on airport operations in California, the California Supreme Court held that "[a]irport operations are the quintessential continuing nuisance,"399 and plaintiffs may elect to treat airport noise and vibrations as either a continuing or a permanent nuisance. This ruling opens the door for repeated lawsuits against airports by the same plaintiffs, because the statute of limitations for a continuing nuisance begins to run each time the nuisance occurs.400 In the case of a permanent nuisance plaintiffs are ordinarily required to bring one action for all past, present and future damages within three years after the permanent nuisance is created.401

397 Id. at 863, 705 P.2d at 868, 218 Cal. Rptr. at 295.
398 Id. at 867, 705 P.2d at 869, 218 Cal. Rptr. at 296.
399 Id. at 873, 705 P.2d at 873, 218 Cal. Rptr. at 300.
400 Id. at 869, 705 P.2d at 870, 218 Cal. Rptr. at 297.
401 Id.
Casenotes and Statute Notes