Recent Developments in Aviation Case Law

Jonathan M. Hoffman
Lisa Brett Egan
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JONATHAN M. HOFFMAN*
LISA BRETT EGAN**

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* Partner, Martin, Bischoff, Templeton, Ericsson & Langslet, Portland, Oregon; A.B. History, Harvard University, magna cum laude, 1970; J.D., University of Oregon School of Law, 1975.

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** Law clerk with the firm of Martin, Bischoff, Templeton, Ericsson & Langslet; J.D., Northwestern School of Law, 1988.
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I. Jurisdiction

A. In Personam Jurisdiction

IN RE Air Crash Disaster at Gander, Newfoundland on December 12, 1985 involved the 1985 crash in Newfoundland of an Arrow Air DC-8 enroute from the Middle East to Fort Campbell, Kentucky. Plaintiffs alleged that Arrow Air Corporation operated the aircraft, and that Batch Air Corporation and World Air, Inc. serviced and maintained it. The district court held that states may exercise long-arm jurisdiction over parties acting within a federal enclave provided there is no conflict between the federal government's exercise of territorial sovereignty and the states' exercise of jurisdiction.

The court rejected defendants' contention that Kentucky's laws were inapplicable because Fort Campbell, at which decedents were stationed, was a federal enclave. Defendants argued jurisdiction had been ceded to the United States. The court cited Gulf Offshore Co. v. Mobil Oil Corp., for its ruling "that the location of the event giving rise to suit is an area of exclusive federal jurisdiction rather than another State, does not introduce any new

2 Id. at 1206.
3 Id.
4 Id.
5 Id. at 1208.
6 Id. at 1207. Fort Campbell is a military enclave located partly in Kentucky and partly in Tennessee. Id. Jurisdiction over Fort Campbell was ceded to the United States by Kentucky Statute 2376, now codified as KY. REV. STAT. ANN. § 3.010 (Michie/Bobbs-Merrill 1985).
limitation on the forum State’s subject matter jurisdiction."^8

The court also found sufficient minimum contacts between Arrow and Kentucky to confer personal jurisdiction. Arrow, although incorporated and having its principal place of business in other states, engaged in a contract with the forum to maintain its facilities at various state airports. Arrow also flew flights into the Fort Campbell military field under a Military Airlift Command and Military Traffic Management Command (MFO) contract which generated two million dollars for Arrow. The court asserted pendent jurisdiction over the other defendants, World and Batch. World was found to have operated commercial and military flights through the forum and to have benefited from financial arrangements with the other defendants. The court noted that while general jurisdiction might be constitutionally permissible under Helicopteros Nacionales de Colombia v. Hall, it may not be permissible under Kentucky’s “single act” long arm statute. The court did not reach this issue, however, because it held it had pendent jurisdiction over World. The court reached a similar conclusion concerning Batch. Therefore, it did not address plaintiffs’ plea to the court to “pierce the corporate veil” and attribute Arrow’s actions to Batch because both were owned by the same person and both shared the same executive vice

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^8 In re Air Crash Disaster, 660 F. Supp. at 1207-08.
^9 Id. at 1211.
^10 Id. Arrow is incorporated under Delaware laws. Id. Its principal place of business is within the state of Florida. Id. Arrow hangared aircraft at the Greater Cincinnati International Airport in Covington, Kentucky and used these aircraft for regularly scheduled cargo flights. Id. It also flew out of Louisville, Kentucky and Lexington, Kentucky. Id.
^11 Id.
^12 Id. at 1221.
^13 Id. at 1212.
^15 In re Air Crash Disaster, 660 F. Supp. at 1212.
^16 Id.
^17 Id. at 1213.
The court then found Arrow had purposefully availed itself of Kentucky's laws through its transportation business. The court rejected defendant's claim that the foreseeability of acting within the jurisdiction of a state is insufficient alone to grant jurisdiction in that state. The court explained that, while the defendant's claim was technically accurate, actual knowledge that one is acting in, or will cause a consequence within, a jurisdiction is an important factor in assessing the fairness of exercising personal jurisdiction over that person. The MFO contract listed Kentucky as a place of destination; in addition, Arrow's repeated flights into and maintenance of facilities in Kentucky made it foreseeable to Arrow that it might be subject to Kentucky's jurisdiction.

Finally, the court found relevant other factors outlined in Burger King Corp. v. Rudzewicz, such as Kentucky's interest in adjudicating the dispute, the plaintiffs' interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, the shared interest of the several states in furthering fundamental substantive social policies, and the burden placed upon the defendants in litigating this case in Kentucky. Kentucky was found to have an interest in actions of military personnel based in a federal enclave within Kentucky. This interest is evident due to its statutory facilitation of divorce proceedings for military personnel and recognition, by its courts, of benefits accruing to personnel stationed in the federal enclave.

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18 Id.
19 Id. In order to ensure that a state's exercise of jurisdiction is fair, due process requires that the defendant must have "purposely availed himself of the privilege of acting within the state." Hanson v. Denckla, 357 U.S. 235 (1958).
20 In re Air Crash Disaster, 660 F. Supp. at 1213-14.
21 Id.
22 Id.
24 In re Air Crash Disaster, 660 F. Supp. at 1214.
25 Id. at 1214-15.
Fort Campbell were or eventually became Kentucky citizens. The court also held it had jurisdiction over Arrow under Article 17 of the Warsaw Convention as authorized by 28 U.S.C. § 1331(a).

In Bearry v. Beech Aircraft Corp., a product liability case, the Fifth Circuit rejected the district court's "stream of commerce" analysis and found defendant's contacts with the forum state insufficient to confer personal jurisdiction. The court ruled that Beech's nationwide marketing campaign from 1980-1985, during which time nearly $250 million of Beech products flowed to seventeen independent Texas dealers from sales negotiated and completed in Kansas, was insufficient to constitute a "general presence" in Texas. Defendant was a foreign corporation with its principal place of business outside of Texas. The court found Texas law neither protected nor benefited Beech. It neither qualified to do business nor maintained an agent for service of process in Texas. Beech had no telephone listing in Texas, no warehouse, manufacturing facilities or bank account in Texas, and did not own any real estate or pay taxes in Texas. Indeed, Beech operated in a manner calculated to avoid the laws of the forum by requiring negotiation, performance, and completion of all contracts outside the state. The court also noted that Beech's distributors in Texas, who sold Beech's products for their own account, did not create

26 Id.
28 In re Air Crash Disaster, 660 F.Supp. at 1221.
29 818 F.2d 370 (5th Cir. 1987).
30 Id. at 372.
31 Id. at 372, 376.
32 Id. at 372. Beech is a Delaware corporation with its principal place of business in Kansas. Id.
33 Id. at 376.
34 Id. at 372.
35 Id.
36 Id. at 375-76.
minimum contacts sufficient to warrant general jurisdiction over Beech. The fact that the court would have specific jurisdiction over a contract dispute between Beech and a distributor in Texas did not control the inquiry into general jurisdiction over Beech.

Finally, the court noted that even if Beech's connections with Texas were continuous and systematic, the exercise of general jurisdiction would be unfair and unreasonable. The court relied on the recent Supreme Court decision, Asahi Metal Industry Co. v. Superior Court, which requires evaluation of the following factors in exercising personal jurisdiction:

1. the burden on the defendant;
2. the interests of the forum state;
3. the plaintiff's interest in obtaining relief; and
4. the interests of the several states.

The court also found that the plaintiffs, residents of Louisiana, did not have a distinct interest in a Texas forum, rather than another state, since they did not point to witnesses or other evidence located in Texas. Plaintiffs had filed related suits pending in Kansas and Mississippi.

Thompson v. Bellanca Aircraft Corp., a wrongful death action, held that personal jurisdiction could not be asserted over a corporation that had purchased the assets of the bankrupt Bellanca Aircraft Corporation (BAC). A Bellanca Super Turbo Viking crashed on October 28, 1983, in Littleton, Massachusetts, killing the two occupants. BAC manufactured the aircraft. On March 12, 1982, Viking Aviation, Inc. purchased the assets of BAC, consisting of one model line. Viking then changed its name to Bellanca, Inc.

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37 Id. at 576.
38 Id.
39 Id. at 377.
41 Id. at 1034.
42 Bearry, 818 F.2d at 377.
44 Id. at 17,623.
Defendants moved to dismiss for lack of personal jurisdiction. The contacts between Bellanca, Inc. and Massachusetts were as follows:

(1) Bellanca, Inc. sold $3,000 of spare parts;
(2) Bellanca, Inc. had made some telephone calls to Massachusetts customers;
(3) Bellanca, Inc. had sent two direct market mailings to Massachusetts residents. Plaintiffs argued that Bellanca, Inc. was a mere continuation of BAC. However, the court held that Bellanca, Inc. was not a mere continuation, although some of Bellanca Inc.'s employees were formerly employed by BAC and Viking Aviation purchased one model line of BAC.

The plaintiffs then argued, under a corporate successor theory, that Bellanca, Inc. made a product similar to BAC and therefore should be liable. The court stated that, for purposes of jurisdiction, predecessors and successors are not to be treated as one entity. Finally, the plaintiffs argued that Bellanca breached its duty to adequately warn all owners of Bellanca Model No. 17-31ATC aircraft. The court found that the warnings issued by BAC and Bellanca, Inc. were adequate.

Relying on Helicopteros Nacionales de Colombia v. Hall, the court stated that when the cause of action does not arise from the business contacts, as was true in this case, the contacts for personal jurisdiction must be more substantial. The court held that while the facts indicated some activity in Massachusetts, it was not enough to constitute a regular solicitation of business.

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45 Id. at 17,621.
46 Id. at 17,622.
47 Id. The court stated that "since almost every products liability case has a potential issue of failure to warn, grounding jurisdiction solely on allegations of such omission might remove any limitation upon a state's assertion of personal jurisdiction and again be beyond traditional notions of fair play and substantial justice." Bellanca Aircraft Corp., 3 Av. L. Rep. at 17,623 (citing Walsh v. National Seating Co., 411 F. Supp. 564 (D. Mass. 1976)).
49 Hall, 466 U.S. at 408.
B. Foreign Sovereign Immunities Act

Barnett v. Iberia Air Lines of Spain\textsuperscript{50} held that the Foreign Sovereign Immunities Act (FSIA)\textsuperscript{51} provides the exclusive basis of jurisdiction over an action against a foreign state and applied the "nexus" approach to reject subject matter jurisdiction over the defendant airline.\textsuperscript{52} The case arose from a missed connecting-flight in Spain and a subsequently ruined vacation. Plaintiffs claimed the FSIA\textsuperscript{53} was inapplicable because: (1) the action was based upon commercial activity carried on in the United States by the foreign state, or (2) acts were performed in the United States in connection with commercial activity of the foreign state elsewhere.\textsuperscript{54} Relying on an earlier Fifth Circuit case, Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation,\textsuperscript{55} the court applied the "nexus" approach, finding it superior to more liberal tests adopted by other circuits.\textsuperscript{56} The "nexus" approach requires a connection between the foreign defendant's commercial activity in the United States and the act giving rise to the plaintiff's claims.\textsuperscript{57}

TWA acted as Iberia's agent by selling the ticket in the

\textsuperscript{50} 660 F. Supp. 1148 (N.D. Ill. 1987).
\textsuperscript{52} Barnett, 660 F. Supp. at 1151.
\textsuperscript{53} 28 U.S.C. § 1605(a)(2) contains three exceptions to a foreign state's immunity. The FSIA provides:

(a) A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case . . . (2) in which 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 the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

\textsuperscript{54} Barnett, 660 F. Supp. at 1150.
\textsuperscript{55} 730 F.2d 195 (5th Cir.).
\textsuperscript{56} Barnett, 660 F. Supp. at 1150. The court used the "nexus" test to determine whether the foreign defendant carried on "commercial activity" in the United States under section 1605(a)(2) of the FSIA. \textit{Id.} at 1150-51. Other tests include a "literal" approach, a bifurcated "literal and nexus" approach, and a "doing business" approach. \textit{Id.}
\textsuperscript{57} \textit{Id.} at 1151.
United States. The court stated that this may have been sufficient to confer jurisdiction over Iberia under a "doing business" test, but not under the preferred nexus approach. Even if a contract with Iberia was formed in Chicago, where the ticket was issued, the acts which formed the basis of plaintiffs' claims all occurred in Spain and, therefore, FSIA did not confer jurisdiction over Iberia in the United States.

In Barkanic v. General Administration of Civil Aviation of the People's Republic of China, the Second Circuit found a sufficient nexus between a foreign national airline's commercial activities in the United States and the crash of its domestic flight in the foreign country to confer subject matter jurisdiction under the FSIA. Two United States businessmen died in a 1985 CAAC (the national airline of the People's Republic of China) crash of a domestic flight in China. The district court dismissed for lack of subject matter jurisdiction under the FSIA, finding the only connection between the foreign airline and the accident was the purchase of two unconfirmed tickets through an authorized United States agent for a domestic flight in China. According to customary practice, the tickets had to be confirmed in China, and the businessmen, once there, actually changed their flights.

The Second Circuit reversed and found the required nexus, since CACC's agreement required Pan Am to act as its agent for the domestic flight. Its acceptance in the United States of payment for the flight, even though the flight was not guaranteed and had to be confirmed in China, constituted a contract with decedents. In Gayda v. Union of Soviet Socialist Republics, the court

58 Id. at 1152.
60 822 F.2d at 13.
61 Id. at 12.
62 Id.
63 Id. at 13.
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denied a motion to dismiss on grounds of lack of jurisdiction because the defendants failed to meet their burden of establishing immunity under the FSIA. The action arose out of the Warsaw air crash disaster on March 14, 1980. The plaintiffs alleged that the defendants, the designers, manufacturers, and sellers of the aircraft, failed to properly warn of unsafe defects, failed to take precautions to correct and repair the defects, and failed to provide the necessary information for proper crew training and the safe maintenance and operation of the aircraft.

The defendants challenged the action on the ground they were immune from suit under the FSIA. The defendants alleged that:

1. the Ministry of the Aviation Industry's only connection to the aircraft was to issue an airworthiness certificate;
2. defendant USSR's only connection was overseeing the Ministry of the Aviation Industry;
3. defendant Aviaexport's only connection was to contract for the sale of the aircraft and arrange for aircraft servicing; and
4. defendant Aeroflot's only connection was that it made routine inspections of the radio and electrical equipment in 1974 and 1975.

The court held that these allegations were insufficient to sustain a motion to dismiss for lack of jurisdiction. The court noted that the complaint, which stated that the Ministry was responsible for regulating the entire airline industry, alleged sufficient facts to raise a triable issue over whether these defendants were acting as a principal for the defendants, Aviaexport and Aeroflot. Affidavits submitted by Aviaexport and Aeroflot also revealed sufficient involvement to preclude dismissal.

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65 Id. at 17,635.
66 Id. at 17,634.
67 Id. at 17,636.
68 Id. at 17,635.
69 Id. at 17,636-37.
In *Harris v. Polskie Linie Lotnicze*, many a case brought under the FSIA and the Warsaw Convention, the Ninth Circuit held the FSIA did not require application of a foreign country's choice-of-law rule to a lawsuit arising from a crash in that country. The court reviewed federal common law and the Restatement (Second) of Conflict of Laws and found that the foreign law would apply if the country had at least as significant an interest as the United States. Plaintiffs, California residents and parents of a victim of the 1980 Lot crash in Poland, appealed the trial court's decision to award "lost financial support" under Polish law in lieu of damages under California law which allows recovery for loss of care and companionship.

The court rejected plaintiff's first contention that the Warsaw Convention preempted the FSIA, ruling that both provided jurisdiction in this case. The court further found that both the Warsaw Convention and the FSIA lacked a provision for choice of law concerning damages. The choice-of-law rule delineated in *Klaxon Co. v. Stentor Electric Manufacturing Co.* was held inapplicable because the FSIA precludes diversity jurisdiction over foreign state defendants by federal courts.

The district court had avoided ruling on the choice-of-law issue by regarding the crash itself as the act or omission giving rise to liability under the FSIA in a Warsaw Convention case. The district court's analogy to a choice-of-law provision in the Federal Tort Claims Act was found unpersuasive because the FSIA lacked a choice-of-law provision. The court of appeals applied the law of the place where the negligence occurred, not where the negli-
gence had its operative effect. In this case, it was unclear where the negligence, the design defect, occurred. Finally, the court rejected, as speculative, plaintiff's contention that decedent's contributions to his mother would increase in proportion to his salary.\(^7\)

C. *Forum Non Conveniens*

In *Jennings v. Boeing Co.*,\(^8\) the plaintiff held dual British-Irish citizenship. Her husband died when a Boeing Chinook helicopter crashed into the North Sea. Plaintiff sued Boeing based on theories of gross negligence, strict liability, and breach of warranty. Boeing filed a motion to dismiss based on forum non conveniens.\(^9\) Plaintiff unsuccessfully argued that a dismissal on grounds of forum non conveniens and a resulting suit in the U.K. would effectively deny her the right to sue under favorable Pennsylvania law,\(^10\) and thereby violated the Treaty of Friendship\(^11\) between the United States and Ireland. The treaty requires equal treatment of Irish and U.S. citizens with respect to access to the courts of either nation.\(^12\) The court

\(^7\) Id. at 1005.


\(^9\) Id. at 799. “The principle of forum non conveniens permits the court to decline otherwise proper jurisdiction over an action where the convenience of the parties and witnesses, or the administrative constraints on the court, would be better served by allowing the action to proceed in a different available forum.” Id. at 800 (citing Dahl v. United Technologies Corp., 632 F.2d 1027, 1029 (3d Cir. 1980)).

\(^10\) Id. at 799. Pennsylvania is a more favorable forum due to the availability of strict liability theories, a more liberal measure of damages, and the potential for punitive damages. Id.

\(^11\) Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. IV(1), 1 U.S.T. 785, 790, T.I.A.S. No. 2792, at 274. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that (a) establish a right of recovery for injury or death, or that (b) establish a pecuniary compensation, or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

\(^12\) Id.
did not resolve whether Pennsylvania law would govern because the crash of the helicopter into the sea gave rise to jurisdiction under federal maritime law. Federal maritime law precludes recovery of damages for wrongful death pursuant to state law.

The court ruled that public and private interest factors dictated dismissal. The court found special significance in Boeing's agreement to concede liability for compensatory damages in an English or Scottish court. This concession would make the trial a simple damages case, unless the courts of the alternative forum recognize a punitive damages claim. The plaintiff merely filed suit in the United States to take advantage of favorable remedies. The court cited Piper Aircraft Co. v. Reyno for the proposition that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantive weight in the forum non conveniens inquiry." The

tion filed by an American citizen may be dismissed even though such a dismissal might result in a loss of a potential punitive damages award, so may such an action be dismissed when filed by an Irish citizen entitled to national treatment under the Treaty.

Id. 35 Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (crash of a helicopter used to ferry oil rig workers is within admiralty jurisdiction).


Id. (emphasis added). The Death on the High Seas Act was applicable because the accident occurred more than a marine league (defined as three miles) beyond the shore of any State of the United States. Jennings, 660 F. Supp. at 802.

Id. 37 Jennings, 660 F. Supp. at 809. "The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass,' or ' oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947).

Id. 38 Jennings, 660 F. Supp. at 805. "Both parties assume that under British law punitive damages may not be awarded. It is at least conceivable, however, that under choice of law rules, a British Court might apply the law of Pennsylvania or some other forum, especially with regard to any survival action." Id.


Id. (citing in Jennings, 660 F. Supp. at 807).
court therefore did not resolve the issue of whether the Treaty required application of the presumption in favor of Irish citizens as if they were United States citizens.

Myers v. Boeing Co.,91 arose from the deaths of Japanese travelers in the Japan Air Lines crash of August 12, 1985. The plaintiffs filed suit against Boeing in Washington. In response, Boeing filed a motion to dismiss on grounds of forum non conveniens. Boeing agreed not to contest liability and to try the issue of damages in Japan provided the cases were dismissed.92

The court concluded that Japanese courts were an adequate and available alternative forum for the damage issues. Boeing was amendable to process in Japan, and Japanese law provided an adequate remedy for the plaintiffs' injuries. The fact that Japanese law did not provide for exemplary damages was not a significant factor in the court's determination.93

The court further concluded that the balance of private and public interest factors weighed heavily in favor of Japan as the forum in which to determine damages. Plaintiffs' decedents lived and worked in Japan, virtually all of the witnesses, documents, and other evidence were located in Japan, and ease of access to sources of proof favored trial in Japan. In addition, the cost of obtaining attendance of Japanese witnesses in Washington would be substantial. Evidence located in Washington pertained solely to the issue of liability, not to damages.94

The court granted Boeing's forum non conveniens motion on the condition that:

93 Myers, Av. Ltr. Rep., Sept. 28, 1987, at 7,622-23. "[T]he possibility of an unfavorable change in law would not bar dismissal unless plaintiffs were left with no satisfactory remedy. This is not such a case, as Japanese law provides for recovery of substantial damages in event of wrongful death." Id. at 7,623.
94 Id. at 7,623. "[W]ere these actions to be tried in Washington, it is likely that at least some of the damages issues would be governed by Japanese law. The Japanese courts' expertise in applying their own law, while not a factor of paramount importance, favors dismissal." Id.
1. Boeing submit to jurisdiction and designate an agent for service of process in Japan;
2. Boeing waive any statute of limitations defense;
3. Boeing admit liability for compensatory damages; and
4. Boeing not oppose recognition in Japan of the liability judgment.95

In *Chhawchharia v. Boeing Co.*,96 another case arising out of the JAL crash, the survivors of an Indian plaintiff's estate filed suit against Boeing in New York. Before filing, the plaintiffs negotiated a settlement and signed a release concerning JAL's liability for the death.97 Subsequently, the plaintiffs refused to accept payment because they disputed whether Boeing was a named party to the release.98

The district court dismissed the suit on forum non conveniens grounds. The court held that India was an adequate alternative forum. India's strong interest was based on the Indian citizenship of the survivors, as well as the fact that the release was negotiated, drafted, and executed in India.99

The court was not persuaded by the plaintiff's argument that the prosecution would be hindered in India because of a backlog in the Indian court system.100 It cited *Union Carbide*101 and *Piper Aircraft*,102

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95 *Id.* at 7,624.
97 *Id.* at 1159. The release was later revised to include Boeing as a released party. *Id.*
98 *Id.* The plaintiffs claimed that they were falsely induced to release Boeing based on representations by defendant's agents that Boeing's liability was limited under the Warsaw Convention. *Id.*
99 *Id.* at 1161-62.
100 *Id.* at 1160. The plaintiff did not, however, deny that Indian law provides compensatory damages for wrongful death. *Id.*
101 *Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986) (Union Carbide moved to dismiss, on the grounds of forum non conveniens, the consolidation of several actions brought against the corporation for injuries and damages resulting from a leak at a chemical plant in Bhopal, India).
for the proposition that an alternative forum is inadequate only in rare circumstances where the forum is "so clearly . . . unsatisfactory that it is no remedy at all."\(^{103}\) If the suit remained in New York, defendants would have to try the case by deposition.\(^{104}\) In this case, then, "the presumption in favor of plaintiff's chosen forum [was] accorded 'less than maximum force' . . . because the assumption that the plaintiff's choice is convenient is 'much less reasonable' where the plaintiff is domiciled abroad".\(^{105}\) Accordingly, the plaintiff's complaint was dismissed with the stipulations that the defendant waive any statute of limitations defense and consent to personal jurisdiction in India.

In Kryvicky v. Scandinavian Airlines System,\(^{106}\) the plaintiff's husband died in a 1983 SAS crash in Spain. The plaintiff sued Boeing and SAS on theories of tort liability, and both defendants asked for a change of forum based on forum non conveniens.\(^{107}\) The Sixth Circuit found that the trial court did not abuse its discretion by dismissing the case on grounds of forum non conveniens.\(^{108}\) The district court correctly concluded Spain was an adequate alternative forum.\(^{109}\) The court also did not

\(^{103}\) Id. at 254.
\(^{104}\) Chhawchharia, 657 F. Supp. at 1161. "[S]ources of proof and access to witnesses regarding damages are factors weighing in favor of dismissal although not heavily. Since most of the probable deposition testimony in a trial on damages in the United States would relate to economic loss, a jury would not be severely hampered." Id.
\(^{105}\) Id. at 1159 (citations omitted) (quoting Piper Aircraft, 454 U.S. at 261).
\(^{106}\) 807 F.2d 514 (6th Cir. 1986).
\(^{107}\) Id. at 515. The plaintiff and her decedent lived in Spain at the time of the crash. After the accident, the plaintiff moved back to Michigan, where she resided before moving abroad. Id.
\(^{108}\) Id. at 516. The plaintiff argued that the district court should have withheld a determination of forum non conveniens until after resolving whether the court had personal jurisdiction over SAS. The appellate court noted this would be an "exercise of futility." A finding of lack of personal jurisdiction would also require dismissal on grounds of forum non conveniens. Id. at 516-17.
\(^{109}\) Id. at 516. "Dismissal was conditioned upon the defendants' submission to the jurisdiction of Spanish courts, their waiver of any statute of limitations defense,
abuse its discretion by failing to determine whether United States law applied, dismissing the case without a finding that the forum was "oppressive" or "vexatious" to defendants, failing to justify the financial burden imposed on plaintiff by litigating the claims in Spain, or failing to provide plaintiff additional time to rebut an affidavit interpreting Spanish law.

In `Diaz v. Mexicana de Avion,` the court dismissed an action on the basis of forum non conveniens. The lawsuit arose from the crash of Mexicana Airlines Flight 940, on March 31, 1986, in the mountains west of Mexico City. The evidence indicated that the crash was caused by the explosion of a tire shortly after take-off. Plaintiffs alleged negligence in Mexicana's failure to properly inspect, maintain, and operate the aircraft in Mexico City.

The court examined several factors to determine that Mexico was an adequate alternative forum. The domicile and residence of the original plaintiffs was in Mexico. Mexicana is incorporated and has its principal place of business in Mexico. The defendants purchased their tickets in Mexico City for the flight to Puerto Vallarta, Mexico. The court held that these factors indicated that Mexico had the most significant relationship to the crash and the parties. In addition, the court stated that Mexican

and their stipulation to pay any final judgment issued by Spanish courts and to its enforcement in the United States." `Id.`

`110 Id. at 517. "The balance of public and private interest factors may favor trial in a foreign jurisdiction even if it were determined that American law applied."` `Id. ` (citing `Piper Aircraft, 454 U.S. at 260`).

`111 Id. The expense, inconvenience, and potential unfairness to the defendants of a suit in the United States outweighed the plaintiff's burden of maintaining the suit in Spain. `Id.`

`112 Id. The plaintiff filed three motions in the district court, none of which addressed the inadequacy of a Spanish forum. The issue could not be presented for the first time on appeal. `Id.`

`113 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,981-83 (W.D. Tex. Jan. 23, 1987)."`
law should apply.\textsuperscript{114} The plaintiffs offered no evidence that a Mexican forum was unavailable.

The court then went on to balance the public and private interest factors. As for private interest factors, all of the evidence was in Mexico. In addition, the defendants agreed to make any of their witnesses available in the Mexican proceeding. Eyewitnesses were already located in Mexico. As for the public interest, the court noted the administrative difficulties flowing from court congestion.\textsuperscript{115} The court concluded that it is more appropriate for Mexican law be applied by a Mexican court. The only nexus the case had to Texas was the fact that Mexicana did business in Texas and the plaintiff’s attorneys had their offices in Texas. The court held dismissal based on forum non conveniens was appropriate.

\textit{Smedresman v. United Airlines, Inc.},\textsuperscript{116} involved a complaint, filed in New York arising out of an alleged accident aboard a United Airlines aircraft. The flight originated in Newark, New Jersey and landed in Chicago, Illinois. The injured plaintiff resided in New Jersey and received medical attention in New Jersey. The defendant’s principal place of business was in Illinois. The material non-party witnesses resided outside New York, and were not subject to the state court’s subpoena power.

The court noted that no transactions took place in New York. After considering the relevant factors, weighing the burdens on New York courts, the hardship to the defendant, and the availability of an alternative forum, the court concluded the action

\textsuperscript{114} Id. at 17,983. "[W]hile the laws of Texas and Mexico differ in several aspects, these differences do not render Mexican laws violative of public policy." Id. (citing Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979)).

\textsuperscript{115} Id. at 17,981-83, 17,985. "Boeing has suggested that the trial of this case would be lengthy. Such a burden ought not to be imposed upon this Court when this community has virtually no relation to this litigation." Id.

\textsuperscript{116} 3 Av. L. Rep. (CCH) (20 Av. Cas.) at 17,618 (N.Y. Civ. Ct. Dec, 12, 1986).
would be more appropriate in another forum.\textsuperscript{117}

In \textit{Trivelloni-Lorenzi v. Pan American World Airways, Inc. (In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982)}\textsuperscript{118} which involved two claims of Uruguayan passengers killed in the New Orleans air disaster, Pan Am appealed the district court’s denial of its motion to dismiss on forum non conveniens grounds. It contended that the cases should have been dismissed because Pan Am was willing to 1) submit to the jurisdiction of the Uruguayan courts; 2) concede liability; 3) waive any statute of limitations defense; 4) waive the Warsaw Convention limitations on damages; and 5) guarantee satisfaction of any judgment entered against it in Uruguay.\textsuperscript{119} Plaintiffs raised two noteworthy contentions in response. First, plaintiffs claimed that in a diversity case, the district court should look to state, rather than federal, forum non conveniens law. Since Louisiana law did not permit a forum non conveniens dismissal, Pan Am’s motion should have been summarily rejected.\textsuperscript{120} Second, plaintiffs claimed that cases properly brought in the United States pursuant to the Warsaw Convention should not be subject to forum non conveniens dismissal.\textsuperscript{121} Plaintiffs also claimed that Louisiana was a proper forum in any event.\textsuperscript{122}

The Fifth Circuit, \textit{en banc}, rejected plaintiffs’ two contentions but held that the case was properly brought in Louisiana.\textsuperscript{123} With respect to plaintiffs’ claim that the court should look to Louisiana’s state

\textsuperscript{117} Id. at 17,619. The court granted defendants motion to dismiss on grounds of forum non conveniens with the condition the defendant accept service in New Jersey or Illinois, and waive any statute of limitation defense. \textit{Id.}

\textsuperscript{118} 821 F.2d 1147 (5th Cir. 1987) (\textit{en banc}).

\textsuperscript{119} Id. at 1152.

\textsuperscript{120} See \textit{id.} at 1154.

\textsuperscript{121} Id. at 1160.

\textsuperscript{122} See \textit{id.} at 1162.

\textsuperscript{123} \textit{Id.}
law concerning the forum non conveniens doctrine, the Fifth Circuit held that the federal court's interest in self-regulation, administrative independence, and self-management were more important than the disruption of uniformity created by applying federal forum non conveniens law in diversity cases.\footnote{Id. at 1159.}

With respect to the argument that the Warsaw Convention precluded the application of the forum non conveniens doctrine, the court noted that the claim appeared to be one of first impression and rejected the argument.\footnote{Id. at 1160.} The court noted that the Warsaw Convention gives the injured party four possible places to institute suit: the domicile of the carrier; its principal place of business; the place of business where the contract was made; or the place of destination.\footnote{Id.; see Warsaw Convention, supra note 27, art. 28(1).} However, once the plaintiff selects a forum, the convention provides that the selection "is then subject to the procedural requirements and devices that are part of that forum's internal laws."\footnote{Trivelloni-Lorenzi, 821 F.2d at 1161.}

The court found that the district court's denial of Pan Am's motion was proper, because there was no other forum in which all defendants could be parties. Plaintiffs had sought to add the United States as a party defendant, and the United States had never consented to Uruguayan jurisdiction. Pan Am argued that the potential absence of the United States as a party was irrelevant, because Pan Am was willing to admit liability and to pay any judgment rendered against it. The court held that since the United States had not consented to Uruguayan jurisdiction and Pan Am had only agreed to pay a judgment rendered against itself, not the United...
States, the trial court's denial of the motion was not an abuse of discretion.\(^{128}\)

In *Hatzlachh Supply, Inc v. Tradewind Airways*,\(^{129}\) the plaintiff sued over misdelivery of cargo shipments by the defendant. The cargo was destined for Nigeria. Defendant, a British carrier, moved for a forum non conveniens dismissal, arguing that the case should be brought in Nigeria. The court denied Tradewind’s motion on the ground that Nigeria was not a viable alternate forum.\(^{130}\) Tradewind obtained the sworn declaration of a Nigerian solicitor that the plaintiff would have standing to sue in Nigeria; that Nigerian courts are competent to decide such a case and that the plaintiff would be treated fairly as a foreign litigant; that the plaintiff’s representatives would not have to appear in person in Nigeria; that trial witnesses were subject to compulsory process; and that the Nigerian courts were free from government interference.\(^{131}\)

The court found that Nigeria would not be an adequate alternate forum. The court concluded that Nigeria’s currency controls limited the maximum amount of currency that could be taken out of the country to twenty Naira (about twenty dollars) and that the plaintiff’s sixty-year-old president, and the sole witness, would incur health and other risks attendant to travel to Nigeria.\(^{132}\)

In addition to finding that Nigeria was not an adequate forum, the court also held that the balance of public and private interest factors favored keeping the case in New York. It noted that there were numerous and substantial contacts between the New York forum and the controversy. For exam-

\(^{128}\) *Id.* at 1168.


\(^{130}\) *Id.* at 115.

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

\(^{132}\) *Id.*
ple, the plaintiff was a New York corporation and the defendant did business in New York; the goods were delivered to the defendant in New York and transported from New York to Nigeria; and the sale of the goods was negotiated in New York.\footnote{133}

D. Removal

In Rockwell International Credit Corp. \textit{v.} United States Aircraft Insurance Group,\footnote{134} the Ninth Circuit \textit{sua sponte} questioned the existence of subject matter jurisdiction, found jurisdiction lacking, and then asked counsel for United States Aircraft Insurance Group (USAIG) to show cause why sanctions should not be imposed for failing to identify the real party in interest.

Rockwell sued USAIG in Maricopa County, Arizona, seeking recovery on an insurance policy. USAIG then removed the case to the United States District Court based on diversity. The removal petition stated that although USAIG was the named defendant, the controversy was between citizens of different states, namely the plaintiff and Aetna Casualty and Surety Co., the insurer on whose behalf USAIG had written the insurance.\footnote{135} These assertions apparently were never disputed. USAIG subsequently obtained summary judgment on the merits and Rockwell appealed. After oral argument, the Ninth Circuit panel raised the question of whether diversity jurisdiction existed \textit{sua sponte}.\footnote{136}

The appellate court reversed and found that federal jurisdiction did not exist because the real party defendant was not Aetna, but USAIG. Seeking removal, USAIG had the burden of establishing diversity in its petition. Neither the petition nor the record indicated that one of the USAIG group was not a Delaware corporation.\footnote{137}

\footnote{133} \textit{Id.} at 116.
\footnote{134} 823 F.2d 302 (9th Cir. 1987).
\footnote{135} \textit{Id.} at 303.
\footnote{136} \textit{Id.}
\footnote{137} \textit{Id.} at 304.
USAIG then sought to amend its removal petition, stating for the first time that United States Aviation Underwriters, Inc. (USAU) was the real party in interest. USAU was diverse from Rockwell. The court refused to allow the amendment, stating that: (1) the insurance policy itself established that USAU was not the real party in interest; and (2) the proposed amendment was not merely technical but attempted to create jurisdiction where none existed.\textsuperscript{138}

USAIG, in its motion to amend, stated that it should have advised the court of the defect in the proper party defendant. USAIG did not do so, and the court interpreted the action as a failure to disclose the true state of affairs to the district court. The panel remanded the case to state court and ordered counsel for USAIG to show cause why sanctions should not be imposed pursuant to Federal Rule of Civil Procedure \textsuperscript{139}

Subsequently, the Ninth Circuit imposed sanctions against the Arizona law firm which had filed the petition for removal.\textsuperscript{140} The court accepted that the law firm had relied upon information provided by a vice-president for general aviation claims at United States Aviation Underwriters who was also a lawyer admitted to practice in New York. The vice-president had told counsel that it was the practice of the USAIG to seek removal on the basis of the citizenship of one of its member companies. After the propriety of the original petition was brought into question, the vice-president suggested that USAU be substituted for USAIG and that such substitution had been done “in other cases.”\textsuperscript{141} Nevertheless, the court held that the filing of the petition to remove was objectively frivolous as a matter of law, notwithstanding the subjective good faith of the attorneys who filed it. The court

\textsuperscript{138} Id.

\textsuperscript{139} Id. at 305. Rule 11 provides that the signature of an attorney constitutes a certificate that, to the best of his knowledge, the paper he is filing with the court is well grounded in fact. Fed. R. Civ. P. 11.

\textsuperscript{140} In re Disciplinary Action Against Mooney, 841 F.2d 1003 (9th Cir. 1988).

\textsuperscript{141} Id. at 1004.
noted that the Fifth Circuit had dismissed a similar removal petition for lack of jurisdiction, where USAIG had attempted to remove to federal court by relying solely upon the citizenship of one of USAIG's members.\textsuperscript{142} Even if counsel was unaware of the decision, the vice-president of USAIG had to be aware of the case. The court added:

But the Vice-President's failure to let Mooney know of a case Mooney should have brought to this court's attention underlines a basic fact. Mooney should not have relied on the Vice-President for the law. We are told nothing of the Vice-President's legal attainments. He is not listed in Martindale-Hubbell's Directory of Lawyers. We do not know why Mooney thought him an expert in federal jurisdiction. In any event the responsibility was Mooney's. Counsel who are admitted to practice in a federal court take on themselves the obligation to know the relevant law.\textsuperscript{143}

The court upheld the imposition of sanctions against the law firm.

In \textit{Angela Cummings, Inc. v. Purolator Courier Corp.},\textsuperscript{144} the court held that removal was appropriate because Purolator's misdelivery of a package raised a federal question under federal common law but not under the Federal Aviation Act.\textsuperscript{145} Purolator provided bills of lading to the plaintiff which stated that it would not accept shipment of any articles having an actual or declared value in excess of \$25,000. The bills of lading also stated that articles of extraordinary value would be limited to a maximum declared value of \$500. On the bills of lading, the plaintiff declared the value of six items to be \$25,000 each but did not fill in the content description. The packages were never delivered. Plaintiff sued for breach of the bill of lading, failure to deliver goods, conversion, and punitive damages in New York state court.\textsuperscript{146} Defendants then re-

\textsuperscript{142} Aetna Casualty & Sur. Co. v. Hillman, 796 F.2d 770 (5th Cir. 1986).
\textsuperscript{143} Mooney, 841 F.2d at 1006.
\textsuperscript{144} 670 F. Supp. 92 (S.D.N.Y. 1987).
\textsuperscript{145} Id. at 94.
\textsuperscript{146} Id. at 93-95.
moved the action to federal court pursuant to 28 U.S.C. 1441(b).\textsuperscript{147}

Defendants argued that federal jurisdiction was appropriate because the Federal Aviation Act\textsuperscript{148} empowers the federal government to prohibit unfair or deceptive practices by air carriers. But the court rejected this argument because the section of the Act relied upon does not create a private right of action.\textsuperscript{149}

However, the court did agree that federal common law governed the loss of goods during interstate air transportation.\textsuperscript{150} Prior to the Airline Deregulation Act of 1978,\textsuperscript{151} federal common law governed air carrier liability and both the rights and liabilities of airlines and shippers were determined by the shipper’s valid tariffs.\textsuperscript{152} Passage of the Airline Deregulation Act did not eliminate federal common law regarding limitations of interstate air carrier liability.\textsuperscript{153} Defendant’s conduct was, therefore, governed

\textsuperscript{147} Section 1441(b) provides for removal jurisdiction without regard to diversity of citizenship, if the action is founded on a claim or right arising under the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1441(b) (1982).
\textsuperscript{150} Prior to the Airline Deregulation Act of 1978.
\textsuperscript{151} 49 U.S.C. app. § 1381(a) (Supp. II 1984).
\textsuperscript{152} Angela Cummings, Inc., 670 F. Supp. at 94.
by federal common law which confers jurisdiction upon
the federal courts. The court held that the bills of lading
were valid and that the $500 limitation governed the
defendant’s liability and the plaintiff’s right to
recovery.

E. Subject Matter Jurisdiction

In Zemp v. Boeing Vertol Co., the United States District
Court remanded to Pennsylvania state court thirty-two
cases that Boeing had removed, citing lack of subject mat-
ter jurisdiction. The cases arose from the November 6,
1986 crash of a Boeing Vertol helicopter into the North
Sea. Forty-five of the forty-seven passengers were killed,
as well as the crew. Plaintiffs asserted wrongful death
claims under state law.

Boeing removed the lawsuits to federal court on the ba-
sis of federal question jurisdiction. Boeing contended
that the estates’ wrongful death actions should be
recharacterized as arising under the federal Death on the
High Seas Act (DOHSA). Boeing argued that because
DOHSA preempted the state cause of action and pro-
vided a remedy, the plaintiff’s wrongful death claims must
arise under DOHSA.

The court stated that Boeing had submitted no persua-
sive authority or support for expanding the doctrine of "complete preemption" to cases involving DOHSA. The legislative history of DOHSA indicated no congressional intent to preempt state law claims within the scope of DOHSA so as to subject them to removal to federal court. The court further concluded that because the complete preemption doctrine did not apply, application of the well-pleaded complaint rule required remand, even though a defense of preemption may exist with regard to the state law wrongful death actions.

II. PRODUCTS LIABILITY

A. Admiralty

Comind, Companhia De Seguros v. Sikorsky Aircraft Division of United Technologies Corp., held that an insurance company was permitted to bring a subrogated products liability claim in admiralty for the loss of a helicopter. The same court's earlier decision was the first aviation application of East River Steamship Corp. v. Transamerica Delaval, Inc., which recognized products liability as part of maritime law. The Supreme Court held that liability in admiralty under negligence or products liability could only be imposed in cases where the defective product malfunctioned and inflicted personal injury on a user or third party.

In Comind, United Technologies claimed that the insurance company could not bring a products liability claim

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160 Id. The court stated: "Without some indication from Congress or the Court that the complete preemption doctrine should be expanded to encompass DOHSA, I decline to take such a course." Id.

161 116 F.R.D. 397 (D. Conn. 1987). Comind insured a helicopter owned by VOTEC, a Brazilian corporation. The helicopter crashed off the coast of Brazil on March 20, 1980, due to an alleged defect in its rotary mechanism. Comind's claim arose from the same accident which took the lives of those aboard the helicopter and, therefore, Comind was permitted to bring its tort claim in admiralty. Id. at 417.

162 106 S. Ct. 2295 (1986).

163 Id. at 2302. The Court held that when only the product is harmed, the reasons for imposing a tort duty are weak. The Court stated that contractual remedies are more appropriate. Id.
for purely economic loss. The court rejected this argument because the loss of the helicopter also involved the loss of several lives. The defendants argued that under *East River Steamship*, economic injury could never be recoverable in admiralty, even when the accident involved the death of several victims. The court rejected this interpretation. Near-misses or disappointed users may not properly give rise to a tort claim in admiralty, but "situations involving personal injury as a result of product defect lie at the very heart of negligence and strict products-liability concerns."  

United Technologies also argued that state law did not provide a permissible alternative remedy for the plaintiff. The court held that a plaintiff who invokes admiralty jurisdiction may also pursue state law remedies, provided that the state has a significant and pressing interest in the matter and would recognize the claim if the tort had occurred outside of admiralty law. The application of state law cannot disrupt a pre-existing rule in admiralty which requires uniformity, and the plaintiff must have an independent jurisdictional basis for its state law claim. Therefore, the plaintiff was entitled to pursue existing state law causes of action which did not conflict with federal admiralty law. The court found no disharmony between state law and federal maritime law.

B. Government Contractor Defense

For the past several years, the courts have sharply di-

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164 *Comind*, 116 F.R.D. at 423-24. The court stated that "[p]arties injured as a result of this latter type [strict products-liability] of products disaster are entitled to lay full claim to the salutory liability roles embodied in negligence and strict products liability concepts." *Id.* at 424.

165 *East River Steamship*, 106 S. Ct. at 2299 n.2 (citing Kossick v. United Fruit Co., 365 U.S. 731 (1961)). The *East River Steamship* court held that the state lacked a pressing and significant interest in the tort action. *Id.*

166 *Comind*, 116 F.R.D. at 417. The court stated that because (1) admiralty jurisdiction was not exclusive; (2) admiralty law did not preempt the state law claim; and (3) the court would otherwise have proper jurisdiction under 28 U.S.C. § 1332 to hear the state law claims, Comind was entitled to pursue its state law claims in addition to its admiralty claims. *Id.*
vided over the question of whether a government contractor who manufactures a product to government specifications may be sued for product liability by an injured serviceman. In *Boyle v. United Technologies Corp.*, the United States Supreme Court recognized the government contractor defense, holding that the federal government's interest in the procurement of equipment was paramount to the right of states to impose liability under tort law. The Court held that the state-imposed duty of care, which was the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary), was precisely contrary to the duty imposed by the government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). Accordingly, the Court held that liability for design defects in military equipment could not be imposed pursuant to state law when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. Notably, the Court held that such a defense would apply whether or not the claimant was a serviceman barred from suing the government directly under the *Feres* doctrine and specifically rejected the more liberal formulation of the government contractor defense adopted by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.* The government contractor defense was also considered in the following lower court cases, which were decided before *Boyle*. These cases should be read with caution in light of the Supreme Court's more recent ruling.

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In *Ramey v. Martin-Baker Aircraft Co.*, a district court held that the government contractor defense was not limited to bar only claims by servicemen. The court granted summary judgment for the government contractor in a case alleging a design defect in an E-18 ejection seat even though the injured party was a civilian aircraft mechanic. The court distinguished the duty of the manufacturer to warn of known defects. The case was remanded and the parties directed to brief whether a distinction existed in the allegations of defective design and the duty-to-warn. The court later found that the duty-to-warn claim was in effect a design-defect claim and was consequently barred by the government contractor defense.

In *Wilson v. Boeing Co.*, a district court reiterated the government contractor defense in dismissing the case involving oil contamination in the engine of a CH-46D helicopter. The oil problem ultimately caused a fatal emergency landing at sea. Plaintiffs had already settled with Boeing, the manufacturer of the plane. General Electric was the manufacturer of the engine, which the plaintiff claimed had a defectively-designed lubrication system and lacked a warning device. The court determined that the engine manufacturer complied with the specifications and did not have superior knowledge of the lubrication problem. The court rejected plaintiff’s argument that the contractor must show continuous discussion or negotiation regarding the item, stating: “This is not the formulation of the defense adopted by the Third Circuit in *Koutsoubos*. It is sufficient for the contractor to show . . . that the overall detailed specification was established or

171 *Id.* at 987. The government contractor defense states that if a product is manufactured according to government specifications, the manufacturer is entitled to share in the government’s privilege of immunity. *Id.*
approved by the government."\textsuperscript{173}

C. Proof of Defect

In \textit{Sage v. Fairchild-Swearingen Corp.},\textsuperscript{174} the New York Court of Appeals ruled that an employee of a commuter airline could recover from the original part manufacturer for injuries allegedly caused by a defective aft hangar, even though the owner of the aircraft had substituted a fabricated replacement for the original part. The aft hangar is a device used to hold one end of a portable ladder. At the time of injury, the plaintiff-employee had finished unloading baggage and was preparing to jump from the aircraft's baggage compartment. As she did so, the middle finger of her left hand caught on the aft hangar and, as a result, the plaintiff's finger was amputated.

After a jury trial, it was found that the aft hangar was a replacement part of substantially the same design as the original. The jury found the design to be defective and that the defect was the proximate cause of the plaintiff's injury. The plaintiff was awarded $185,000.

The Appellate Division reversed,\textsuperscript{175} finding that the trial court had misinterpreted \textit{Robinson v. Reed-Prentice Division},\textsuperscript{176} which held that a manufacturer can be liable if the original product is modified in an unsubstantial manner.

\textsuperscript{173} \textit{Id.} at 773 (construing \textit{Koutsoubos v. Boeing Vertol}, 755 F.2d 352 (3d Cir.), cert. denied, 474 U.S. 821 (1985)).

The \textit{Koutsoubos} court adopted a three-part test to establish the government contractor defense: (1) the contractor must prove that the government established specifications; (2) the product met those specifications; and (3) the government knew as much or more than the contractor about the hazards of the product. \textit{Koutsoubos}, 755 F.2d at 354.

The plaintiff argued that the first prong of the \textit{Koutsoubos} test required "the contractor to show that there were continuous back and forth discussions or negotiations regarding the inclusion or exclusion of the specific design deficiency alleged in this case." Wilson, 655 F. Supp. at 773.

\textsuperscript{174} 70 N.Y.2d, 517 N.E.2d 1304, 523 N.Y.S.2d 418 (1987).


\textsuperscript{176} 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717, 718 (1980) (holding that a manufacturer is not liable on a products liability or negligence cause of action where the owner substantially modifies the product).
Robinson did not address the issue of total replacement of the part. However, the New York Court of Appeals reversed, finding that plaintiff presented a "tenable claim" and noted that she established a prima facie case. Plaintiff's expert testified that the replacement part appeared to have the same dangerous design as the original part. Ordering a new trial, the court held that there was a "valid line of reasoning and permissible inferences which could lead rational men to the conclusion reached by the jury."

Norris v. Bell Helicopter Textron held that the plaintiffs failed to prove that excessive flapping of rabbit ears constituted a design defect. Even if a design defect existed, the plaintiffs failed to show this directly caused a Bell helicopter crash in 1980. The court stated that "lapse of time, inadequate 'accounting' for use between manufacture and accident, and alterations and repairs by persons other than the manufacturer will tend to negate the inference of a defect existing at the time of manufacture." The court noted, however, that mere alterations and repairs alone do not exculpate a manufacturer from liability.

D. Exculpatory Clause

In Continental Airlines v. Goodyear Tire & Rubber Co., the Ninth Circuit held that an exculpatory clause in a contract for the sale of an airplane did not shield a parts manufacturer from liability where the parts were not included in the repair warranty. The purchase contract between Continental and McDonnell Douglas Corporation (MDC) included a limited warranty. MDC agreed to repair all

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177 Sage, 517 N.E.2d at 1308.
178 Id. "[P]hotographs presented to the jury permitted them to compare the parts and reach a similar conclusion." Id.
179 Id. (quoting Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499, 382 N.E.2d 1145, 410 N.Y.S.2d 282, (1978)).
181 Id. at 978.
182 819 F.2d 1519 (9th Cir. 1987).
183 Id. at 1521.
parts of the aircraft manufactured by MDC or by other manufacturers, as long as their parts were made to MDC's design specifications. An exculpatory clause in the contract with MDC excluded all remedies against MDC other than those provided by the "warranty and service life policy." In 1978, a DC-10 aborted its takeoff when two of the front tires failed. The subsequent crash and fire destroyed the plane and caused four fatalities. The court remanded the case to the district court to determine whether the warranty in fact reached the component parts involved. The court affirmed the district court's ruling that the exculpatory clause barred Continental's negligence and strict liability claims against MDC. However, the court remanded on the issue of whether the exculpatory clause barred any property damage recovery against the tire companies.

The lower court had relied on an earlier Ninth Circuit case which held that an exculpatory clause barred suit against parts manufacturers. The earlier case reasoned that an airline could recover from the parts manufacturer who would then simply seek indemnity from the manufacturer. But here the exculpatory clause differed. This warranty covered other manufacturers' parts only if those parts were made to MDC's specifications. Piper Acceptance Corp. v. Barton arose after the defendant, Barton, purchased an allegedly defective Piper Seneca III aircraft. The court held that he could not sue Piper Aircraft Corporation (Piper) on a strict liability theory because Piper was a remote manufacturer. Barton

184 Id. at 1526.
185 Id. at 1529.
186 Id. at 1528. The lower court relied on Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp., 677 F.2d 771 (9th Cir. 1982) (airline, by way of an exculpatory clause, waived its consequential damage remedies in return for manufacturer's promise to provide valuable servicing of component parts that allegedly caused the accident). Id.
187 Aeronaves de Mexico, 677 F.2d at 773. The Aeronaves de Mexico court feared the airline would receive a windfall of free repairs plus consequential damages. Id.
188 Continental Airlines, 819 F.2d at 1528.
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purchased the aircraft on October 9, 1981 from Piper Ac-
ceptance Corp (PAC). After six months of unsuccessful
attempts to repair the aircraft, Barton stopped making
payments. PAC repossessed and resold the aircraft. Also,
PAC sought to recover its loss and Barton cross-claimed
against Piper for his economic loss.

The court concluded that implied warranties do not run
to remote purchasers. Barton did not purchase the air-
craft directly from Piper and he alleged no personal in-
jury. Therefore, implied warranties did not run to his
benefit. Piper’s warranty included an exclusion for conse-
quential damages. Relying on Cayuga Harvester, Inc. v. Al-
lis-Chalmers Corp., the court concluded that the
consequential damage exclusion remained effective even
if Barton’s limited remedy failed of its essential
purpose.

E. Evidence

In Rainey v. Beech Aircraft Corp., the Eleventh Circuit,
en banc, divided evenly on the scope of admissibility of fac-
tual findings contained in a Navy Judge Advocate General
report. The effect of the stalemate was to let stand the
panel decision, which held that “evaluative conclusions
and opinions” such as those contained in the report
should not have been admitted by the trial court.

In Krause v. American Aerolights, Inc., the Oregon Court
of Appeals reversed a judgment in favor of the defend-

consequential damages exclusion valid unless unconscionable, despite a separate,
limited remedy of repair clause which failed in its essential purpose).

\[191\] N.Y. U.C.C. Law § 2-719(2) (McKinney 1964) provides that when a limita-
tion of remedy “fail[s] of its essential purpose,” the aggrieved party may seek any
other remedy under the U.C.C.

\[192\] 827 F.2d 1498 (11th Cir. 1987).

\[193\] 784 F.2d 1523 (11th Cir. 1986).

\[194\] Id. at 1528. The court relied on the Fifth Circuit’s interpretation in Smith v.
Ithaca Corp., 612 F.2d 215 (5th Cir. 1980), where a narrow reading of the “factual
finding” language in Federal Rule of Evidence 803(8) prevailed. Id. at 1527-28.

\[195\] 88 Or. App. 383, 745 P.2d 796 (1987), reh’g granted, 305 Or. 102, 750 P.2d
496 (1988).
ants, who manufactured and sold an ultralight. The court held that the trial court had erred in failing to admit evidence of post-accident remedial measures in a products liability case. The court reasoned that while post-accident measures are of marginal relevancy in a negligence case, they can be highly probative of whether a defect in the product existed at the time of the accident. Moreover, the court noted that since the manufacturer's "fault" is not at issue in a strict liability case, admission of such evidence would be less likely to prejudice the defendant than would the admission of such evidence in a negligence action. The Oregon Supreme Court accepted review and has heard oral argument. As of this writing, the decision is still under advisement.

III. Federal Tort Claims Act

A. Feres Doctrine

In United States v. Johnson, the United States Supreme Court reversed the Eleventh Circuit and ruled that the Feres doctrine barred a Federal Tort Claims Act (FTCA) wrongful death action arising from damages suffered incident to military service, even when the negligent act was committed by a civilian employee of the federal government. The Eleventh Circuit had held that a suit against a civilian air traffic controller was not barred by the Feres doctrine. The case arose from the death of a Coast Guard helicopter pilot. The pilot requested radar assistance from air traffic controllers, who vectored him

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196 Id. 745 P.2d at 800.
197 Id. at 798.
198 Id. at 798-99.
into the side of a mountain in IFR conditions.\textsuperscript{203} The Supreme Court reversed the Eleventh Circuit. It reasoned that the \textit{Feres} doctrine had been used consistently for forty years, and the Court had never suggested that the military status of the alleged tortfeasor was crucial to the application of the doctrine. Here, the crash arose directly from Johnson’s military service. The Court stated: “[T]he potential that this suit could implicate military discipline is substantial.”\textsuperscript{204} The decisions of military personnel would be subjected to scrutiny if the case proceeded to trial.

In \textit{Walls v. United States},\textsuperscript{205} an active duty service member of the United States Army was injured in the crash of an Air Force Aero Club airplane.\textsuperscript{206} Walls and the pilot were on their way to Sacramento, California to visit family members. The investigation concluded that the crash was caused by the pilot’s gross negligence. The Seventh Circuit upheld dismissal of the action under the \textit{Feres} doctrine, which bars claims against the government brought by servicemen injured incident to military service.

Relying on \textit{Woodside v. United States},\textsuperscript{207} the court held that an activity was incident to military service where it was provided directly by the military or where there was substantial involvement by the Armed Forces in the activity. The court concluded that if Walls could sue for injuries resulting from activities related to the Aero Club, serious adverse effects regarding military discipline and relationships could develop.

\begin{itemize}
\item \textsuperscript{203} \textit{Johnson}, 749 F.2d at 1531.
\item \textsuperscript{204} \textit{Johnson}, 107 S. Ct. at 2069.
\item \textsuperscript{205} 832 F.2d 93 (7th Cir. 1987).
\item \textsuperscript{206} See Air Force Regulation 215-1, vol. II (April 12, 1974) at 5. Air Force Aero Clubs are established and operated as non-appropriated instrumentalities of the United States under the control of the Air Force. \textit{Walls}, 832 F.2d at 94 n.2.
\item \textsuperscript{207} 606 F.2d 134 (6th Cir. 1979), \textit{cert. denied}, 455 U.S. 904 (1980) (wrongful death claim against government is barred where Air Force officer was killed while receiving flight instruction from an Air Force Aero Club, an activity “incident to service” under the \textit{Feres} doctrine).
\end{itemize}
B. Air Traffic Control

In Barbosa v. United States, the Eleventh Circuit affirmed a district court ruling that a pilot had the duty to obtain further weather information when prior information suggested a need to inquire. Plaintiff failed to ask for an updated weather briefing, even though his weather briefing was more than one hour old. The court held that supplying weather information was an "additional service" to be supplied by controllers to "the extent possible" and conditioned on the limitations of radar and higher priority duties. In addition, the Air Traffic Control Manual did not set forth mandatory duties on the part of Air Traffic Controllers to provide weather information. The court determined that the briefing indicated the presence of thunderstorms inland and reduced visibility along the coast and sufficiently notified the pilot of actual conditions. Moreover, the court upheld the district courts' finding that plaintiff operated the aircraft in violation of standard practices and assumed the risk of flying.

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208 811 F.2d 1444 (11th Cir. 1987). Barbosa (the pilot) and two passengers died in the crash of a Beechcraft twin-engine plane on July 19, 1981. Personal representatives of the three victims alleged the air traffic controllers and weather briefer were negligent and sued under the Federal Tort Claims Act. Id. at 1445.

209 Id. at 1446.

210 Id. Barbosa requested a weather briefing at 3:54 P.M. before the plane left Opa-Locka, Florida, at 4:00 P.M. After takeoff, Barbosa reported observing thunderstorms and asked for weather information for his destination in Jacksonville, Florida. He did not request any further weather information. The plane crashed at 5:11 P.M. Id. at 1445-46.

211 Id. at 1447. The court accepted the Air Traffic Control Manual’s provision instructing controllers to disseminate weather information as an “additional service.” AIR TRAFFIC CONTROLLERS MANUAL (ATCM) 7110.656, § 3, 50. The limits and conditions accepted by the court on this “service” are similarly found in the ATCM. Id. at 7110.6513, § 3, 45.

212 AIR TRAFFIC CONTROLLERS MANUAL § 50, a & b. Quoting from the manual, the court determined the controller would only have such a duty if the pilot requested weather information. Barbosa, 811 F.2d at 1447. Barbosa did not request it. Id.

213 Barbosa, 811 F.2d at 1447. Though plaintiffs alleged the original weather briefing was inaccurate, the court was not persuaded and stressed that the briefing was only a statement of current conditions. It did not purport to forecast future conditions. Id.
under adverse weather conditions.\textsuperscript{214}

In \textit{Haley v. United States},\textsuperscript{215} the Fourth Circuit affirmed the district court’s finding that the air traffic controller’s negligence was not the proximate cause of the crash.\textsuperscript{216} Plaintiffs argued that the air traffic controller could have substantially reduced the risk of a crash by directing the airplane toward an interstate highway rather than directing it over hilly terrain toward an unlit airport.\textsuperscript{217} However, there was evidence that, given the poor weather conditions, it would have been difficult to find the interstate highway from the air.\textsuperscript{218}

The defendant produced evidence to support the district court’s finding that carburetor icing and the pilot’s failure to use carburetor heat (the plane was found with the engine heater switch in the “off” position) caused the engine failure and proximately caused the accident.\textsuperscript{219} There was testimony to support the district court’s finding that the initial re-route of the airplane did not send it into substantially worse weather that it would have otherwise encountered.\textsuperscript{220} The court concluded that although the conflict in the evidence could have been resolved differently, the district court’s factual findings were not clearly

\textsuperscript{214} \textit{Id.} at 1445. The court concluded that once Barbosa was en route, and could observe weather conditions, “[h]is decision to continue his flight was his own decision based on accurate weather information.” \textit{Id.} at 1448.

\textsuperscript{215} 829 F.2d 1120 (4th Cir.) (mem.), aff’g 654 F. Supp. 481 (W.D.N.C. 1987). \textit{Haley} is a consolidation of three wrongful death actions filed by the representatives of the pilot and two passengers killed in the crash of a chartered plane on February 22, 1983, in North Carolina. \textit{Id.} 654 F. Supp. at 482.

\textsuperscript{216} \textit{Id.} 654 F. Supp. at 487. The court held that “a mere conjecture or surmise” that the controller’s negligence aggravated an inevitable crash was not sufficient proof for recovery. \textit{Id.}

\textsuperscript{217} \textit{Id.} at 486. While admitting the crash was inevitable, plaintiffs argued that a highway landing would have afforded a better chance of survival. \textit{Id.}

\textsuperscript{218} \textit{Id.} Indeed, the only evidence as to the highway’s condition appears to be that “but for a short stretch” it was not lighted. \textit{Id.}

\textsuperscript{219} \textit{Id.} at 487. The court was persuaded by the government’s experts that carburetor icing caused a “loss in manifold pressure, then the total loss of power, then the fatal crash.” \textit{Id.}

\textsuperscript{220} \textit{Id.} at 484 (finding that “the weather in the entire relevant flight area was substantially the same.”).
erroneous.\textsuperscript{221}

In \textit{McGory v. United States},\textsuperscript{222} a district court found no liability on behalf of the United States for air traffic control's (ATC) actions in providing radar vectors and information to a pilot.\textsuperscript{223} The proximate cause of the accident was an aircraft malfunction.\textsuperscript{224} Evidence suggested that the malfunction, in turn, may have been caused by loss of power from lack of fuel.\textsuperscript{225}

In \textit{Springer v. United States},\textsuperscript{226} the Fourth Circuit affirmed the admission of testimony of a plaintiff's weather expert concerning wind shear, without underlying factual foundation. The air traffic controllers were found to have given no notice of adverse wind conditions.\textsuperscript{227} This breach, by omission, proximately caused a crash.\textsuperscript{228}

In \textit{Norwest Capital Management \& Trust Co. v. United States},\textsuperscript{229} the Eighth Circuit reversed the trial court and held that the FAA Flight Service Station (FSS)\textsuperscript{230} specialists were negligent in providing a preflight weather briefing to the pilot of a Beech Baron that crashed, allegedly due to icing. The trial court found that plaintiffs had failed to prove the proximate cause of the crash, but the

\footnotesize{\textsuperscript{221} Id. at 488.\
\textsuperscript{222} 651 F. Supp. 1337 (N.D. Ohio 1987). \textit{McGory} is a consolidation of five wrongful death suits brought by representatives of the victims of a November, 1983 crash in Pennsylvania. \textit{Id.} at 1337.\
\textsuperscript{223} Id. at 1342. The court concluded that the controller had responded quickly and accurately to the pilot's request for help, and that "he provided all of the assistance proper under an emergency setting." \textit{Id.}\
\textsuperscript{224} Id.\
\textsuperscript{225} Id. The trial record showed that the plane had no fuel in its fuel lines or in its tanks after the crash. \textit{Id.}\
\textsuperscript{226} 819 F.2d 1139 (4th Cir. 1987) (mem.), aff'g 641 F. Supp. 913 (D.S.C. 1986). The representative of the deceased pilot, Jon Ricky Springer, brought this suit alleging a negligent failure to warn of wind shear as the cause of the crash. \textit{Id.} 641 F. Supp. at 914-5.\
\textsuperscript{227} Id. 641 F. Supp. at 925.\
\textsuperscript{228} Id. at 936.\
\textsuperscript{229} 828 F.2d 1330 (8th Cir. 1987). Estates of the pilot and passengers of a 1980 plane crash in South Dakota brought this suit under the Federal Tort Claims Act, claiming a failure to warn of dangerous weather conditions. \textit{Id.} at 1333.\
\textsuperscript{230} The court describes an FSS as "a Federal Aviation Administration air traffic facility that provides services to airmen such as weather briefings, receiving and processing flight plans, and communicating with airborne aircraft." \textit{Id.} at 1332.}
court of appeals found that this finding was clearly erroneous.\textsuperscript{231}

The pilot called the FSS at 5:40 A.M. for a weather briefing. The FSS specialist gave the pilot a briefing, but did not mention forecast icing, because the icing forecast was old and an updated area forecast was expected at 6:00 A.M. The pilot said he would call in again at 6:00 A.M. However, when the pilot called, the call was taken by another FSS specialist who was unaware of the prior call and did not give a full weather briefing. The Eighth Circuit, in effect, re-weighed the facts, found the government liable, and remanded for a determination of the comparative fault between the pilot and the government and for assessment of damages.\textsuperscript{232} The court also held that the trial court's determination that the pilot and passenger were engaged in a joint enterprise for purposes of contributory negligence was clearly erroneous.\textsuperscript{233} Although they were the president and assistant manager of the same company, going on a business flight, the passenger had no responsibility for operation of the aircraft and was not a pilot. Moreover, the pilot's negligence occurred on the ground before the flight took off.\textsuperscript{234} The decision evoked a strong dissent, on the basis that the court had transgressed the clearly erroneous rule by substituting its own findings for those of the trial court.\textsuperscript{235}

In\textit{ Moorhead v. Mitsubishi Aircraft International, Inc.},\textsuperscript{236} the Fifth Circuit held that (1) an FAA weather briefer was not negligent in failing to tell a pilot of moderate mixed icing

\textsuperscript{231} Id. at 1337. Indeed, the court of appeals determined that the district court's findings as to proximate cause were "both devoid of evidentiary support and mistaken." \textit{Id.}

\textsuperscript{232} Id. at 1345. The pivotal fact in the determination of the government's negligence was the failure of the FSS specialist to give an updated forecast, because "[c]omplete information means current information." \textit{Id.} at 1333.

\textsuperscript{233} Id. at 1345.

\textsuperscript{234} Id. at 1343.

\textsuperscript{235} Id. at 1347 (Gibson, J., concurring and dissenting).

\textsuperscript{236} 828 F.2d 278 (5th Cir. 1987). Claims of negligence and strict liability were brought against the United States and Mitsubishi after a fatal crash in Texas. \textit{Id.} at 281.
along the flight path;\footnote{Id. at 283.} \(2\) the defective manufacture of the Mitsubishi's airspeed indicator contributed to the crash;\footnote{Id. at 284.} \(3\) and \(3\) the IFR-rated pilot's decision to enter into clouds was not negligent.\footnote{Id. at 285.}

On September 2, 1981, a Mitsubishi MU-2B-25 airplane accumulated ice and crashed near McLeod, Texas. The crash killed all five occupants. Two hours before departing, the pilot received a weather briefing which included several reports of thundershowers and precipitation of unknown intensity along the expected flight path. The briefer did not tell the pilot about the forecast of moderate mixed icing, nor did the briefer report the freezing level. The aircraft departed and climbed to 21,000 feet. The aircraft began to accumulate ice, causing it to lose velocity. The pilot then requested permission to climb to 23,000 feet. The aircraft reached 21,400 feet and an airspeed of 125 knots, at which point the aircraft stalled, entered a spin, and struck the ground.

The district court found that the weather briefer was not negligent and that his conduct was not a proximate cause of the accident. The court also found that Mitsubishi was forty percent responsible for the defective airspeed indicator and that the pilot was sixty percent responsible. The Fifth Circuit affirmed, concluding that the evidence established that the weather briefer correctly gave the pilot information having a higher priority than the icing forecast.\footnote{Id. at 281.} The briefer also acted reasonably in discounting the importance of the icing forecast because the area forecast was seven hours old and not verified by any pilot reports. Any failure to warn of possible icing was not a proximate cause of the fatal crash, in light of the intervening negligence of Mitsubishi\footnote{Id. at 284.} and the pilot.\footnote{Id. at 285.}

Evidence established that moisture froze in the pitot
tube, trapping the pressure and causing the indicated air-speed to increase with altitude. As a result, the pilot's air-speed readings gave him no indication that the accumulating ice was slowing the aircraft. Evidence indicated that Mitsubishi's pilot system had previously malfunctioned in a similar fashion, and warnings had been issued to Mitsubishi pilots and owners to modify the system. However, the maintenance records established that the aircraft had an unmodified pitot system.

The appellate court reversed the district court's finding that the pilot was negligent in entering the cloud responsible for his demise.\(^\text{243}\) Witnesses testified that icing encounters of this magnitude were rarely hazardous and were routinely handled by descending below the freezing level. Further, it was not \textit{per se} unreasonable for the pilot knowingly to risk an encounter with moderate icing because the pilot was instrument-rated. The court affirmed the finding that the pilot was negligent for not descending immediately to escape the icing conditions.\(^\text{244}\) The court further concluded that the pilot was negligent for mismanaging the stall. Evidence revealed that the pilot was too short in stature to depress the rudder pedals as fully as is necessary to prevent or control a spin.\(^\text{245}\)

The district court had denied damages for the plaintiff's mental anguish and loss of inheritance. After this judgment, the Texas Supreme Court abolished the physical manifestation requirement in wrongful death cases.\(^\text{246}\) Accordingly, the case was remanded for consideration of the plaintiff's claim for mental anguish. It was found that the district court had included compensation for the plaintiff's loss of inheritance because the court's award in-

\[^{243}\text{Id. at 285.}\]
\[^{244}\text{Id. at 286.}\]
\[^{245}\text{Id. Testimony was given that the pilot had been advised to fly with his seat in its full-forward position to compensate for his lack of height. The pilot's seat, however, was found locked several inches back from that position. Id.}\]
\[^{246}\text{Moore v. Lillebro, 722 S.W.2d 683 (Tex. 1986).}\]
cluded both the portion of the salary that would have been spent to support the plaintiffs and any amount the decedents would have saved.\textsuperscript{247}

\textit{Rodriquez v. United States}\textsuperscript{248} affirmed the trial court’s finding of ATC negligence in a VFR\textsuperscript{249} mid-air collision case but remanded for additional findings on the pilot’s negligence. Rodriquez was administering a biennial flight review to Thomas in a Cessna 172 ("98V"). Diaz, a student pilot, was practicing touch-and-go landings in the traffic pattern ("21U"). The Cessna was instructed to fly an overhead approach to the airport. Finnerman, an FAA-certified traffic controller, and a trainee were monitoring the pattern. The Cessna entered the pattern. The controller trainee realized the dangerous course 98V was about to embark on and advised the controller. The controller said: "Start a right turn now sir." The Cessna did not execute an immediate right turn. The controller looked away momentarily. As his glance returned to the monitor he said: "On the downwind, watch the traffic coming in from overhead sir!" At this time there were three other aircraft on the downwind leg. The Cessna collided with 21U resulting in the death of 98V’s two occupants. The survivors of the deceased pilots brought suit against the United States under the FTCA. The district court concluded that the air traffic controller’s negligence was the sole cause of the collision.

The court affirmed the lower court’s conclusion that the air traffic controller was negligent because he failed to comply with the Air Traffic Control Handbook.\textsuperscript{250} Once the controller realized 98V was in an unsafe circumstance,
he was required to issue a traffic alert which instructed the pilot to comply with altitude and heading parameters. The controller failed to do this. He did not use any terms generally understood as compelling immediate action and he failed to give the reason for the immediate right turn. The warning issued ten seconds prior to the collision was insufficient to notify either 98V or 21U that the warning was directed toward them.

The district court had found no pilot negligence, stating that the government had the burden of ruling out the reasonable or likely possibility that various distractions, rather than the pilots' negligence, were the cause of 98V's failure to see and avoid 21U, and held that the government failed to meet this burden. The appellate court held that the pilots' breach of duty to see and avoid other aircraft was not excused simply because they were operating in compliance with the controller's instructions. The court also noted that the pilots of 98V failed to follow right-of-way rules, another indication that the pilots were not carrying out their duty to see and avoid other aircraft. The court concluded that there was no basis in the record to support the district court's finding that the pilots were distracted or could not have seen 21U had they looked. Therefore, the finding was clearly erroneous. The issue of comparative negligence was remanded to determine the percentage of fault of the 98V pilots and to apportion fault between them.

C. Naviaids

In Behling v. United States, plaintiffs contended the

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251 This duty is outlined in 14 C.F.R. § 91.67(a) (1988), which provides in part: "When weather conditions permit, regardless of whether an operation is conducted under [IFR] or [VFR], vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section." Id.

252 14 C.F.R. §§ 91.67(e), (f)(1988) provide that an overtaking aircraft shall "alter course to the right to pass well clear" of the overtaken aircraft, and that when two or more aircraft are approaching an airport for the purpose of landing, "the aircraft at the lower altitude has the right of way." Id.

FAA caused a Cheyenne to crash because of a non-functioning middle marker, which confused the pilot and caused him to impact rising terrain less than two miles from the end of the runway. The district court concluded that the marker functioned properly, and that if any defect existed, it was not the proximate cause of the accident. The proximate cause was the pilot’s failure to execute a missed approach at decision height.254

In addition, the court held the discretionary function exception precluded liability.255 The FAA has discretionary authority to prescribe maintenance procedures for a middle marker. The court noted that liability would not be precluded, however, for negligence arising out of technical errors, such as negligent replacement of a fuse.

D. Independent Contractors

In Letnes v. United States,256 the Ninth Circuit reversed the lower court’s finding that the decedent, a co-pilot employed by Waig Aircraft, which was under contract to the Forest Service, was an employee of the government for purposes of the Federal Tort Claims Act.257 On December 2, 1980, a mid-air collision occurred between Indio and Palm Springs, California. One aircraft landed safely at Palm Springs airport while the other aircraft crashed in the desert, killing the pilot and the co-pilot.

The government may be sued for failing to supervise a government contractor and its employees if the government has the authority to control the detailed physical performance of the contractor and supervises its day to day operations.258 The Ninth Circuit stated, however, that the mere ability to compel compliance with federal regulations did not transform a contractor’s personnel into fed-

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254 Id. at 18,147.
255 Id. at 18,142.
256 820 F.2d 1517 (9th Cir. 1987).
257 Id. at 1519. The court of appeals determined the pilot was not a federal employee because there was no substantial supervision over his day-to-day operations. Id.
258 Id. at 1518 (citing United States v. Orleans, 425 U.S. 807, 814-15 (1976)).
eral employees. The court held that the district court erred in finding that Waig's pilots were Forest Service employees. The contract, which included maximum operating periods between maintenance, weight and balance requirements, engine overhaul procedures, and detailed equipment provisions, was designed to secure minimum safety, not to control the detailed physical operation of the aircraft or the activities of a pilot. The court further stated that the government's ability to tell Waig's pilots where a fire was and where to drop the fire retardant was insufficient to indicate the supervision over the physical details of the pilot's daily operations necessary for employee status.

E. Discretionary Function

In *Heller v. United States*, the plaintiff was a professional airline pilot who was diagnosed as having had a myocardial infarction in January, 1972. As a result, his treating physician provided a medical report to an Aviation Medical Examiner (AME), and the AME withdrew Heller's medical certificate because he had an "established medical history or clinical diagnosis of...myocardial infarction." After numerous attempts to become recertified or to obtain an exemption, the plaintiff finally received an exemption seven years later and sued the FAA, claiming that the denial of his medical certificate was caused by negligent investigation, data collection, data production, and diagnostic procedures. He claimed that the FAA failed to consult his 1968 electrocardiogram and that denial of his certification was based solely on the FAA's negligent application of the medical standard contained in the regulations. The district court dismissed his

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259 803 F.2d 1558 (11th Cir. 1986).
260 14 C.F.R. § 183.21(c) (1988). An Aviation Medical Examiner may, subject to reconsideration by the Federal Air Surgeon or his representatives, issue or deny medical certificates. *Id.*
claim as barred by the discretionary function exception and the Eleventh Circuit affirmed. The court noted that the FAA's medical standards could be divided into three categories: 1) standards that leave little or no discretion to the FAA; 2) standards that require the exercise of medical judgment but no balancing of competing policies; and 3) standards that require the FAA to balance a medical judgment with a calculation of whether the applicant's medical condition permits him to perform his duties safely. The court found that the standard at issue required a sufficient balancing of policy considerations concerning air safety to implicate the discretionary function exception.

In *West v. Federal Aviation Administration*, the Ninth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction, holding that the design of a departure procedure for Bishop Airport was an exercise of discretion under the Federal Aviation Act and, therefore, was subject to the discretionary function exception to the Federal Tort Claims Act (FTCA).

The action arose when a Sierra Pacific charter aircraft

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262 *Heller*, 803 F.2d at 1565.
263 830 F.2d 1044 (9th Cir. 1987).
264 Id. at 1049.

(a) The Administrator [Secretary of Transportation] is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: (b) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedures, as the Administrator [Secretary of Transportation] may find necessary to provide adequately for national security and safety in air commerce.

Id.

260 The provisions of this chapter and section 1346(b) of this title [28 U.S.C.] shall not apply for (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or perform or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.
struck a slope of the White Mountains as the pilot attempted to depart from the Bishop Airport. The district court found that the cause of the accident was a lack of sufficient ground lighting, resulting in a visual phenomenon whereby pilots flying on dark nights could be misled into believing they were closer to the airport than they actually were. The FAA employees were aware of the phenomenon but took no steps to determine whether it existed at Bishop Airport. The FAA did not make a night flight check of the departure procedure.

Relying on *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* the court concluded that the FAA’s determination of the extent to which it would supervise the safety of private individuals was an activity within the discretionary function exception. The court held that the FAA employees who were responsible for the design of the Bishop Airport departure procedure were given wide discretion and used their best judgment to determine which tests were appropriate to meet reasonable safety standards.

F. Miscellaneous

In *Mooney v. United States*, the court denied the government’s motion to dismiss a “negligent rescue” claim. On June 12, 1982, shortly after take-off, radar control of a Grumman aircraft was passed over to the FAA at the Terminal Radar Control Center at Westbury, New York. Shortly thereafter, the aircraft disappeared. Search procedures were initiated three days after the disappearance, but the airplane and the decedent were never found.

The plaintiff alleged that the passenger had survived

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267 467 U.S. 797 (1984) (holding actions against FAA for its alleged negligence in certifying aircraft for use in commercial aviation were barred by the discretionary function exception of the FTCA).
269 See generally 35 Am. Jur. 2D Federal Tort Claims Act § 84 (1967). If an agency of the government attempts a rescue, the government may be liable for the negligence of its agents in carrying out the attempt to the extent a private individual would be liable under the Good Samaritan doctrine under applicable state law. Id.
the crash and would have been rescued but for the negligence of the FAA. The plaintiff also alleged that the monitoring of the aircraft was conducted in a negligent manner. The government contended that the complaint did not state a claim for relief because the plaintiff could not prove that the decedent had in fact survived. However, the plaintiff produced expert opinions and data that indicated a possibility that a timely air/sea rescue could have saved the decedent's life. The court held that the complaint was not subject to dismissal because it was legally sufficient and entitled the plaintiff to proceed with discovery and offer evidence in support of his claim.

In Dyer v. United States, the Ninth Circuit held that the government was not liable for an airplane crash caused when a small airplane got caught in the wake turbulence of a large Coast Guard helicopter, landing in the traffic pattern ahead of the airplane, at an uncontrolled field. Plaintiff contended that the helicopter pilot was negligent per se in violating Federal Aviation Regulations, which require a helicopter landing at an uncontrolled field to “avoid the flow of fixed-wing aircraft.” The Ninth Circuit held that the Coast Guard pilot did not violate this regulation because he could not tell that the fixed-wing aircraft was in the pattern when the helicopter initiated its approach. The court further held that the sole responsibility for avoiding the crash was with the pilot of the airplane.

IV. CONTRIBUTION AND INDEMNITY

In Bell Helicopter v. United States, the Ninth Circuit held that what Lockheed Aircraft Corp. v. United States giveth,
state law taketh away. In *Bell*, a helicopter crashed due to fuel starvation near Port Hardy, British Columbia, while being operated by a pilot employed by the National Oceanographic and Atmospheric Administration. A passenger, also a government employee, suffered severe personal injuries. The passenger sued the manufacturer, the seller, and the lessor of the helicopter, claiming the helicopter was not crashworthy because of the design of the fixed float kit and because the shoulder harnesses had been removed before it was leased to the government. Bell, the manufacturer, and Sea Airmotive, the seller, thereupon sought to recover contribution or indemnity from the United States under the Federal Tort Claims Act (FTCA).275

Before 1983, such a claim would probably have been barred; all federal circuits but one had held that the federal government's tort immunity, from direct suits by injured employees under the Federal Employees Compensation Act (FECA)276, also prevented recovery by contribution or indemnity. Then, in *Lockheed*, the United States Supreme Court held that FECA did not bar claims for contribution or indemnity. However, in *Bell*, the Ninth Circuit held that even though the contribution claim was not barred under FECA, it was nevertheless barred under the immunity provisions of the state workers compensation act in Alaska.277 The court held that this result was

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275 28 U.S.C. §§ 1346(b), 2671-2680 (1982). The United States is generally liable for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 

*Id.* § 1346(b).


277 *Bell*, 833 F.2d at 1379. The Ninth Circuit held that the government enjoys the same immunity from claims of contribution and indemnity as does a private employer. *Id.; see also* ALASKA STAT. §§ 23.30.005-23.30.270 (1987). The liability of an employer is exclusive under the Alaskan Workers Compensation Act. *Id.* § 23.30.055.
compelled because liability under the FTCA was governed by the law of the state where the act or omission occurred. Since the pilot’s improper preflight planning occurred in Alaska, the immunity provisions of the Alaska Workers Compensation Act applied and the government was entitled to the immunity afforded a private employer under analogous circumstances, pursuant to state law. Alaska law applied even though the government did not participate in the state compensation system, the government’s employees did not live in Alaska, and the accident occurred outside Alaska. The court rejected the plaintiffs’ argument that the court should look to Alaska’s choice-of-law rules and that an Alaska court would decide an employer’s immunity by looking to the substantive provisions of the workers compensation system under which the injured worker was employed. The court, however, remanded the case on the common-law indemnity claim because, under Alaska law, claims for indemnity were not barred by the Alaska Workers Compensation Act.

In Gibbs v. Air Canada,278 the Eleventh Circuit held that the district court erred in its determination that the indemnity clause in a ramp service contract covered the willful misconduct of a contracting employee. Aircraft Services entered into a contract with Air Canada to provide various ramp services for Air Canada at the Miami International Airport. In the contract, Aircraft Services agreed to indemnify Air Canada for damages caused by the negligence or willful misconduct of its employees. On March 6, 1980, a truck driver employed by Aircraft Services misappropriated a cargo of precious metals. However, Air Canada’s ramp supervisor was responsible for the cargo’s security and was not present when the cargo was unloaded. The truck driver’s duty regarding the cargo was completed when the shipment was unloaded on the ramp.

The plain meaning of the indemnification provision re-

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278 810 F.2d 1529 (11th Cir. 1987).
quired that the injury or damage bear a causal relationship to the performance of Aircraft Services’ obligation under the contract. The court stated that the truck driver’s conduct did not occur during the performance of his services, because the truck driver had finished performance when he unloaded the cargo at Air Canada’s ramp. Thus, the theft of the container did not come within the scope of the indemnification clause.

Additionally, the district court established that Air Canada was guilty of gross negligence and willful misconduct, because it failed to ensure the safety and security of the cargo. Under Florida law, agreements to indemnify parties against their own wrongful acts are not favored and are only enforced if such an intent is clearly expressed. In the absence of such intent, any fault of the indemnitee that is the legal cause of its own loss negates the contractual indemnitor’s obligation.

Air Canada argued that the finding of gross negligence in the lower court did not defeat its right to indemnification. The court held that Air Canada was bound by the lower court’s finding of gross negligence because the indemnitee relied on the earlier judgment against him as the basis for his right to recover from the indemnitor. The court further held that the contract did not express a clear intent to indemnify Air Canada against its own negligence or willful misconduct, because the provision indicated an intent to limit liability only to those situations where the cause of damage was the negligence or misconduct of Aircraft Services.

In Passalacqua v. United Airlines, Inc.,279 the Pennsylvania Superior Court rejected United’s contention that an indemnification clause implied coverage for simple negligence. The indemnification provision excluded any claim for liability resulting from United’s own gross negligence or willful misconduct. The action arose when a United Airlines ground services crew negligently injured the

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plaintiff, a co-pilot for Altair Airlines, after failing to secure baggage restraining rods. Altair and United settled, each paying $22,500. United then sought indemnification from Altair under a provision in a ground service agreement between the two airlines.

United alleged that the agreement implied simple negligence coverage because it specifically excluded indemnification against United's own gross negligence. The court rejected this interpretation because, under Illinois law, an indemnity clause is not construed in favor of indemnifying a party against his own negligence unless the intent is explicit. The court affirmed the lower court's finding that an explicit intent to indemnify did not exist and that excluding indemnification against United's own gross negligence did not imply indemnification for simple negligence.

V. AIRPORTS

A. Premises Liability

In Forrester v. Port Authority of New York and New Jersey, the New York Supreme Court held that a passenger injured while entering a taxi cab could not recover from TWA or the Port Authority for lack of supervision and improper design of the taxi cab boarding area. The plaintiff had arrived on a TWA flight and was preparing to enter a taxi cab in front of the TWA terminal. He was walking behind the cab, to enter on the passenger side, when another cab, parked behind the first, lurched out and struck the plaintiff. Based on the language of the lease between TWA and the Port Authority, the plaintiff contended that TWA had a duty to control and supervise all roadway traffic around the boarding area. A second cause of action alleged that TWA was negligent for designing the taxi cab

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280 Id. at 18,052; see also Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 433, 70 N.E.2d 604, 607 (1946).
281 Passalacqua, 3 Av. L. Rep. at 18,053.
283 Id. In its lease, TWA expressly agreed to “control all traffic on the roadway
loading area in a manner which required the passenger to enter and exit into the traffic flow.284

The court held that the airline was under no duty to duplicate the supervisory services provided by the taxi company’s agent, and nothing in the contract made the airline an insurer of all passengers’ safety.285 As to the negligent design claim, the court held there was no causal connection between the design of the loading area and the alleged negligence of the second taxi cab driver.286 Relying on Margolin v. Freidman,287 the court stated that the premises merely furnished the location and the setting for the occurrence of the accident, rather than being the cause of the accident. Therefore, no liability for the airline resulted from the accident, either from the alleged lack of supervision or improper design.

In Williams v. Aer Lingus Irish Airlines,288 a minor was seriously injured on an escalator at an airport. The district court upheld the $1.25 million jury verdict against the two defendant airlines and the escalator manufacturer. The airlines, as co-lessees of the area in which the escalator was operated, were under a duty of care to maintain the escalator in a reasonably safe condition for use by patrons and the public.289

In Great American Airways, Inc. v. Airport Authority of Washoe County,290 the Nevada Supreme Court ordered a new trial on the issue of contract liability.291 On February

284 Id. The plaintiffs asserted that designing a wide taxi cab loading area tempted eager taxi drivers to drive negligently; therefore, the chance of an accident was “highly predictable.” Id. at 17,431-32.
285 Id. at 17,431.
286 Id.
287 43 N.Y.2d 982, 375 N.E.2d 734, 404 N.Y.S.2d 553 (1978) (holding that where there was no causal connection between the design or maintenance of the car wash and the accident, the companies that constructed or operated the car wash were not liable for injuries arising from the accident).
289 Id. at 429.
290 743 P.2d 628 (Nev. 1987).
291 Id. at 629.
27, 1983, a Great American jet struck a chunk of ice while attempting to depart Reno-Cannon International Airport. The airplane's nose wheels, fuselage, and engines suffered over $46,000 in damage.

Pursuant to an agreement between Great American and the airport authority, the airport authority agreed to: operate and maintain the Authority facilities in a safe, workable, clean, and sanitary condition, and in good repair and free from obstructions, including such clearing and removal of snow that is reasonably necessary to permit operations and as soon as it is practical for Authority to do. The trial court denied relief for Great American, construing this provision to require the Authority to remove obstructions from the runways to a degree "reasonably necessary to permit operations." The district court determined that the Authority had sufficiently removed obstructions from the runways. The Nevada Supreme Court stated that the phrase "that is reasonably necessary to permit operations" clearly modifies only the Authority's responsibility with respect to the clearing and removal of snow. The Authority did not specify in the contract that it would keep the runways "reasonably" free from obstructions. To the contrary, the Authority made an unqualified promise to maintain the facilities "free of obstructions." The court held that by modifying the Authority's express agreement to keep its facilities sufficiently free from ob-

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292 Id.
293 Id.
294 Id.
295 Id. The court attempted to construe the contract to ascertain the intent of the parties. Id. If such intention is clear from the contract itself, the court is bound to follow the language of the agreement. Id.; see also Watson v. Watson, 95 Nev. 495, 596 P.2d 507 (1979) (obligating the court to follow the language of the agreement); Barringer v. Gunderson, 81 Nev. 288, 302, 402 P.2d 470, 477 (1965) (concerning intent of the parties). Watson v. Watson, 95 Nev. 495, 596 P.2d 507 (1979) (obligating court to follow the language of the agreement).
296 Great American, 743 P.2d at 629. The airline's contract with the Airport Authority, which required the Authority to keep the runway free from obstructions and to perform snow removal reasonably necessary to permit operations, imposed an unqualified duty on the Authority to remove the ice chunk from an otherwise clear runway. Id.
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structions, the district court effectively revised the agreement, which it was not free to do.\textsuperscript{297}

B. Preemption

In \textit{Western Air Lines, Inc. v. Port Authority of New York and New Jersey},\textsuperscript{298} the Second Circuit upheld an airport's use of a local "perimeter rule", limiting use of the airport by operators of certain nonstop flights. In the district court, Western sought to enjoin the perimeter rule, citing the Federal Aviation Act,\textsuperscript{299} which limits local authority to regulate airlines' "rates, routes or services";\textsuperscript{300} requires an airport proprietor receiving federal funds to make its facilities available on a reasonable and nondiscriminatory basis;\textsuperscript{301} and prohibits such proprietors from granting exclusive access to any airline.\textsuperscript{302} The Second Circuit found that the plaintiff airline had no private right of action to enforce the federal aviation statutes involved,\textsuperscript{303} and that the Airline Deregulation Act and other federal statutes did not preempt the perimeter rule.\textsuperscript{304}

Western claimed an implied private right of action existed under both the Federal Aviation Act\textsuperscript{305} and the Federal Civil Rights Acts.\textsuperscript{306} Western also contended that 49 U.S.C. § 1305(a)(1) preempted the perimeter rule under the Supremacy Clause.\textsuperscript{307}

The district court held Western could assert its preemp-

\textsuperscript{297} \textit{Id.} The Court found that when the district court used "reasonably" to modify "free from obstructions," it was effectively revising the agreement rather than construing it. \textit{Id.}

\textsuperscript{298} 817 F.2d 222 (2d Cir. 1987).


\textsuperscript{300} \textit{Id.} § 1305.

\textsuperscript{301} \textit{Id.} § 2210(a).

\textsuperscript{302} \textit{Id.} § 1349(a).

\textsuperscript{303} \textit{Western Air Lines}, 817 F.2d at 225.

\textsuperscript{304} \textit{Id.} at 225-27.

\textsuperscript{305} See supra note 298.

\textsuperscript{306} 42 U.S.C. § 1983 (1982). Section 1983 provides civil liability for "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ". \textit{Id.}

\textsuperscript{307} \textit{Western Air Lines}, 817 F.2d at 223-24; U.S. CONST. art. VI, cl. 2.
tion claim based on the Supremacy Clause, but found on the merits that § 1305 did not preempt the Authority's perimeter rule. The district court, relying on Montauk-Caribbean Airways, Inc. v. Hope, also held that there were no implied private rights of action under the Federal Aviation Act to enforce sections 1349(a) and 1305(a), and that plaintiffs cannot use 42 U.S.C. § 1983 to enforce sections 1305(a) and 1349(a). The Second Circuit affirmed the district court's dismissal of Western's claim of a private right of action and stated it did not need to decide whether section 1983 applied with respect to section 2210(a), because the district court did not abuse its discretion in holding that Western did not press its section 1983 claims in court. In its reply brief, Western argued that the FAA, by granting "slots" at LaGuardia, preempted any regulation of those slots by the Authority. The court rejected Western's contention that section 1305 authorized the Authority to regulate those slots in accordance with its proprietary powers, the perimeter rule falling within those powers.

In Bryski v. City of Chicago, the Illinois Court of Appeals affirmed the dismissal of nuisance and trespass actions by property owners near an airport, holding that federal law preempted any state or local action. In addition, the plaintiffs' claims were based on the inflight operation of aircraft, regulated by the Federal Aviation Act. The court followed City of Burbank v. Lockheed Air Terminal, Inc. and ruled that the plaintiffs' claims "interfered"

508 Western Air Lines, 817 F.2d at 224-26.
509 784 F.2d 91 (2d Cir.), cert. denied, 107 S. Ct. 248 (1986) (airline denied an implied cause of action under Federal Aviation Act and a cause of action under 42 U.S.C. section 1983 in a suit against competitor airline and city authority which had refused to allow airline to serve at city airport on a year-around basis).
510 Western Air Lines, 817 F.2d at 225-26; Hope, 784 F.2d at 97-98.
511 Western Air Lines, 817 F.2d at 225-26.
512 Id. at 226.
513 Id. at 226-27.
515 411 U.S. 624 (1973). In City of Burbank, a city ordinance prohibited departures between 11 p.m. and 7 a.m. the following morning. The court found that
with the pervasive nature of federal regulation of air commerce and are therefore preempted by federal law.316 The court reversed on the inverse condemnation claims, however, and permitted plaintiffs to seek a remedy for damages to their property.317

In City and County of San Francisco v. Engen,318 the city airport commissioner refused to grant permission to Burlington Northern Air Freight, Inc. (Burlington) to fly Boeing 707s into the airport, based on San Francisco’s noise regulations. Burlington then filed a complaint with the FAA. Subsequently, the FAA staff issued a Notice of Proposed Order which proposed suspension of current grants to San Francisco and refusals to make future grants. The city petitioned for review. The court held that the matter was not reviewable because the FAA had not taken any final agency action.319 The proposal was merely a staff recommendation and did not impose an obligation, deny a right, or fix a legal relationship.320 The only grievance which the city could claim at the time was the Administrator’s apparent refusal to process the city’s grant applications for fiscal years after 1985.321 However, the refusal to process the grant applications was not reviewable.322

C. Free Speech

In Board of Airport Commissioners of Los Angeles v. Jews for the need for an exclusive and uniform system required federal preemption of state and local air commerce regulation. Id. at 638-39.

316 Bryski, 499 N.E.2d at 165.
317 Id. at 168.
318 819 F.2d 873 (9th Cir. 1987).
319 Id. at 874.
320 Id.; 49 U.S.C. app. § 1486(a) (1982) provides the court of appeals with exclusive jurisdiction to review FAA orders issued under the Federal Aviation Act, Chapter 20 of Title 49. The court found that a “mere staff recommendation” was not an “order” which was reviewable. Engen, 819 F.2d at 874.
321 Engen, 819 F.2d at 874-75.
322 Id. at 875. The Administrator has the power to refuse to grant applications under Chapter 31 of the Title 49. The court was unable to review the refusal because its jurisdiction was limited to the review of orders issued under Chapter 20 of Title 49. Id.; see supra note 319.
Jesus, the Supreme Court held that a resolution banning all First Amendment activities within the Central Terminal Area at Los Angeles International Airport (LAX) was unconstitutional under the overbreadth doctrine.

In July, 1983, the Board of Airport Commissioners adopted a resolution which prohibited all First Amendment activities within the central terminal area by any individual or entity. On July 6, 1984, a minister of the Gospel Jews for Jesus was stopped by a police officer while distributing religious literature. The minister was advised of the resolution and asked to leave the premises.

The district court and the Ninth Circuit held that the airport complex was a traditional public forum and that the resolution was unconstitutional on its face. The Supreme Court held that the resolution was overbroad because it prohibited even talking and reading, or the wearing of campaign buttons or symbolic clothing. The Court did not decide whether LAX was a public forum because it stated that even if LAX were a nonpublic forum, the ban was unjustified and not subject to a more limiting construction.

*International Caucus of Labor Committees v. City of Chicago* held that an association which challenged the constitutionality of airport regulations at O'Hare Airport prohibiting them from setting up tables, hanging signs from a table, and storing literature under a table, did not state a claim for which relief could be granted. The International Caucus of Labor Committees (ICLC) was an unincorporated association of persons dedicated to the

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324 *Id.* at 2573.
325 *Id.* at 2570.
326 *Id.* at 2570-2571. The court of appeals relied upon *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), and *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), in reaching its decision.
327 *Los Angeles*, 107 S. Ct. at 2572.
328 *Id.*
329 816 F.2d 337 (7th Cir. 1987).
330 *Id.* at 339.
dissemination of philosophical and political information to the public.\textsuperscript{331} ICLC did not allege that the regulations had been applied in a discriminatory fashion or that the regulations were overbroad or vague.\textsuperscript{332}

In order to survive constitutional attack, the regulations must be content-neutral, serve a significant governmental interest, and leave open ample alternative channels for communication of the information.\textsuperscript{333} The court concluded the regulations were clearly not content based.\textsuperscript{334} The regulations also served a significant interest in protecting the safety and convenience of persons using the public forum, and there were ample alternative channels for disseminating the information at Chicago O'Hare Airport.\textsuperscript{335} The court held that the regulations were reasonable, based on the nature of the airport traffic, and narrowly tailored to the city's interest in airport safety.\textsuperscript{336} Because ICLC alleged no more than the existence and nondiscriminatory enforcement of the regulations, the determination of their constitutionality was appropriate on a motion to dismiss.\textsuperscript{337}

In Jamison v. City of St. Louis,\textsuperscript{338} the court reversed the district court's finding that exclusion of the plaintiff for silently protesting his termination in an unsecured section of the airport was constitutional.\textsuperscript{339} The court affirmed.

\textsuperscript{331} \textit{Id.}
\textsuperscript{332} \textit{Id.}
It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired . . . . We have often approved restrictions of that kind provided that they are justified without reference to content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of information.
\textit{Id.}
\textsuperscript{334} \textit{Labor Committees}, 816 F.2d at 339.
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.} at 340.
\textsuperscript{337} \textit{Id.}
\textsuperscript{338} 828 F.2d 1280 (8th Cir. 1987).
\textsuperscript{339} \textit{Id.} at 1281.
the finding that the defendant’s process to determine who may protest at the airport was unconstitutional.\textsuperscript{340}

Plaintiff was employed by Trans World Airlines (TWA) for sixteen years until his termination on April 16, 1984.\textsuperscript{341} Believing that his discharge was discriminatorily based on his mental illness, plaintiff requested to stand in an unsecured area of the Lambert-St. Louis International Airport with a sign reading: “TWA discriminates against the handicapped.”\textsuperscript{342} Plaintiff’s request was denied because the director of the airport felt the public could be placed in jeopardy.\textsuperscript{343}

The court stated that an airport terminal is similar to a busy city street.\textsuperscript{344} Both are lined with shops, restaurants, newstands, and other businesses, with members of the general public coming and going at will. No security checkpoint must be crossed to reach the area where the plaintiff wished to protest, nor must a fee be paid to enter the area.\textsuperscript{345} Relying on these facts and the city’s Solicitation Rule 1.05,\textsuperscript{346} the court concluded that the concourses of Lambert Airport were a public forum.\textsuperscript{347}

The defendant’s procedure for determining who may exercise First Amendment rights at the airport was, therefore, unconstitutional in two respects.\textsuperscript{348} Relying on Staub

\textsuperscript{340} Id. at 1285.
\textsuperscript{341} Id. at 1281.
\textsuperscript{342} Id.
\textsuperscript{343} Id. The director testified that he had general discretion to disallow any activities that in his opinion would not be in the best interests of the airport or persons using it. The director’s unvarying practice was to deny all requests for permission to protest or solicit except those accompanied by a court order. Id. at 1282.
\textsuperscript{344} Id. at 1283.
\textsuperscript{345} Id.
\textsuperscript{346} Id. at 1282. Rule 1.05 stated that persons or organizations desiring to exercise constitutional freedoms “shall be protected in such activities, provided that the same do not constitute commercial activities and do not result in interference with transportation functions of the Airport.” Id. The second section of the rule stated that the rule and its accompanying regulations were intended “[t]o insures that persons seeking to exercise constitutional freedoms of expression can communicate effectively with users of the Airport.” Id.
\textsuperscript{347} Id. at 1285. The court also concluded that the plaintiff was entitled to attorney’s fees. Id.
\textsuperscript{348} Id. at 1283.
v. City of Baxley,\textsuperscript{349} the court concluded that giving the director complete discretion to rule on applications to exercise First Amendment rights "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official" and therefore, "an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."\textsuperscript{350} Moreover, the city's practice was not narrowly tailored to serve compelling interests, because the director routinely refused all requests to protest except those accompanied by a court order.\textsuperscript{351}

The government may regulate the time, place, and manner of expression in public forums as long as its regulations are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.\textsuperscript{352} The district court held that defendant's refusal to allow plaintiff to protest because of his mental illness satisfied these criteria.\textsuperscript{353}

The Eighth Circuit disagreed, concluding that the city had failed to demonstrate how excluding all persons suffering from mental illness will further the city's interests in security and operational efficiency.\textsuperscript{354} Relying on \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{355} which stated "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"\textsuperscript{356} the court opined that a broad assertion that some manic-depressive persons may be prone to violence cannot justify depriving all mentally ill persons of their First Amendment rights.\textsuperscript{357} Nor did the evidence

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\textsuperscript{349} 355 U.S. 313 (1958).
\textsuperscript{350} Jamison, 828 F.2d at 1284 (citing Straub, 355 U.S. at 322).
\textsuperscript{351} Id.
\textsuperscript{353} Jamison v. City of St. Louis, 671 F. Supp. 641, 646 (E.D. Mo. 1986).
\textsuperscript{354} Jamison, 828 F.2d at 1285.
\textsuperscript{355} 393 U.S. 503 (1969).
\textsuperscript{356} Tinker, 393 U.S. at 508.
\textsuperscript{357} Jamison, 828 F.2d at 1285.
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demonstrate that plaintiff would, in fact, pose a danger to the public.\textsuperscript{358}

D. Nuisance

\textit{Redington Ranch Associates v. Redman}\textsuperscript{359} held that a homeowner association's protective covenant prohibited the defendant from landing his helicopter on his three-acre homesite located near the Rincon Mountains.\textsuperscript{360} The covenant prohibited the lots from being used in a way that would cause any noise which would disturb the peace, quiet, comfort, or serenity of the occupants of the surrounding property. However, under the Pima County Zoning Code, the defendant's helicopter was permitted if it was a customarily incidental and subordinate use of the property.\textsuperscript{361}

The court stated that if it were to hold that the defendant's helicopter was a customarily incidental use, the zoning code would be construed to allow all residences and businesses to use helicopters.\textsuperscript{362} The effect, in terms of noise, invasion of privacy, and potential safety hazards would be enormous. Therefore, the court concluded that the defendant's use of his helicopter was not permissible.\textsuperscript{363}

\textit{Board of County Commissioners of Johnson County v. Atter}\textsuperscript{364} held that the Board of County Commissioners satisfied its burden of establishing that public necessity required the condemnation of two parcels of land in order to extend a runway.\textsuperscript{365} The court concluded that a showing that the project improved public safety was sufficient to satisfy these requirements.\textsuperscript{366}

\textsuperscript{358} Id.
\textsuperscript{360} Id. at 808.
\textsuperscript{361} Id. at 809.
\textsuperscript{362} Id.
\textsuperscript{363} Id.
\textsuperscript{364} 734 P.2d 549 (Wyo. 1987).
\textsuperscript{365} Id. at 552-53.
\textsuperscript{366} Id. at 553. "Public necessity" within the meaning of the eminent domain statute meant a reasonable necessity. The court held this was established by a
In *State v. Doyle*, plaintiffs property owners brought an action for inverse condemnation against the State of Alaska as a result of construction and operation of a new runway at Anchorage International Airport. Plaintiff’s property actually increased in value after the runway was built. However, the trial court found that the property would have appreciated even more, but for the runway construction. The Alaska Superior Court held that the plaintiffs had a legally cognizable claim for inverse condemnation because of the reduced rate of appreciation of the property.

In *Stephens v. United States*, plaintiffs sued for inverse condemnation as a result of low overflights of jet aircraft in the landing pattern at Hill Air Force Base, Utah. The court found that in 1982, the year of the alleged taking, there were 73,384 takeoffs, overflights, or landings, over 35,000 of which were by F-16s. The base conducted 20,835 “sorties” flown by F-16s stationed at the base, 85% of which overflew plaintiff’s property, resulting in an average of seventy-three overflights per day. The vast majority of overflights were between 1,000 and 2,500 feet above the ground. The court established the general rule that when overflights occur in navigable airspace, a presumption of non-taking exists which can be overcome by proof of destruction or substantial impairment to the property. As the height of overflights increases, however, the government’s interest in maintaining air sovereignty increases, while the landowner’s interest showing that the airport would result in increased safety for pilots and passengers.

*Id.*

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368 *Id.* at 734.
369 *Id.* at 738. Testimony at trial showed an annual appreciation rate of approximately 13.7%, while average appreciation rates for similar properties unaffected by airport noise was about 16%. *Id.*
370 *Id.* at 737-38.
371 11 Cl. Ct. 352 (1986). The decision may also be found at 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,584 (Cl. Ct. Dec. 17, 1986).
372 *Stephens*, 11 Cl. Ct. at 355-56.
373 *Id.* at 362.
diminishes, so that the damage showing required increases in a continuum toward showing absolute destruction of all uses of the property. These flights, virtually all of which occurred in navigable airspace, were not so severe as to amount to a practical destruction or substantial impairment of the property, which at that time was used primarily for raising cattle.

E. Noise Abatement

In Illinois v. FAA, the state challenged a final rule promulgated by the FAA. The state maintained that the FAA violated applicable statutory requirements by failing to provide a detailed explanation for its decision not to require all certificated airport operators to submit aircraft noise abatement plans to the agency.

In 1976, the Environmental Protection Agency (EPA) proposed that all certificated airport operators submit noise abatement plans to the FAA for approval. In 1981, the FAA finally promulgated an interim rule. In comments to the interim rule, the EPA took the position that the FAA was statutorily required to embrace the mandatory nature of the EPA's proposal. The FAA's final rule stated that the mandatory nature of the EPA's proposal "would be burdensome and unnecessary." The court stated that the EPA's argument "badly misses the mark." The FAA did promulgate an elaborate set of regulations. Further, the FAA set forth a variety of reasons for adopting a voluntary program. These reasons included concern over imposing an "unnecessary

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374 Id.
375 Id. at 369.
376 832 F.2d 168 (D.C. Cir. 1987).
377 Id. at 169.
378 Id.
380 Illinois, 832 F.2d at 170. "It is clear beyond cavil that the FAA has promulgated an elaborate set or regulations . . . [which stand] in sharp rebuke to Illinois' strained assertion that no regulations were prescribed at all." Id.
cost burden on those airports with no present or anticipated noise problem," and concern that the airport certification program would not be "the proper vehicle for implementation of an airport noise abatement planning program." The court denied the state's petition for review.

F. Auto Concessions

In *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, the Eleventh Circuit rejected Alamo's claim that the airport authority denied them equal protection by treating off-airport auto rental companies differently than those operating on the field. Even if the fee schedule placed off-airport rental companies at a competitive disadvantage, the rules did not violate equal protection, because they were rationally related to the legitimate governmental objective of maximizing revenue from airport operations.
VI. Warsaw Convention and Air Carrier Liability

A. Warsaw Jurisdiction

In Kapar v. Kuwait Airways Corp., the court dismissed a lawsuit against Kuwait Airways, citing lack of Warsaw Convention jurisdiction. The action was brought against Kuwait Airways and three other defendants for negligence and willful misconduct in connection with the airplane hijacking in which four Americans were held hostage in Tehran, Iran. The plaintiff was one of four Americans taken hostage by terrorists for six days in December, 1984. Two of the hostages were killed and the other two were tortured and beaten. Article 28(1) of the Warsaw Convention establishes the forum in which actions for damages may be brought:

(a) the domicile of the carrier;
(b) the carrier's principal place of business;
(c) the place of business through which the contract of carriage has been made; or
(d) the place of destination.

Plaintiff relied on subsections (c) and (d) above. His status as a federal employee required him to purchase his ticket through an American carrier by means of a government travel voucher; he purchased his ticket from Pan American and on Pan American ticket stock. However, the court held that this did not establish jurisdiction under the Warsaw Convention. The entire contract of carriage was performed by Kuwait Airways and Pan American owed no duty to the plaintiff. The court stated that

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*663 F. Supp. 1065 (D.D.C. 1987).*

*Warsaw Convention, supra note 27, art. 28(1).*

*Kapar, 663 F. Supp. at 1068.* The other defendants were Pan American World Airways, which, plaintiff claimed, owed him a duty because it sold him his ticket; the International Air Transport Association, which plaintiff claimed had a duty to warn him that the security procedures used by Kuwait Airways and Middle East Airlines Airliban were inadequate; and Middle East Airlines Airliban, which, plaintiff claimed, negligently transported the hijackers from Beirut, Lebanon to Dubai U.A.E., where the hijacking took place. *Id.*

*Id. at 1067.*

*Id.*
the sequence of events through which the ticket was issued did not transform the United States into the place through which the contract of carriage was made.\textsuperscript{393}

Kuwait Airways was domiciled in Kuwait; the airline's principal place of business was Kuwait; and the carrier's place of business through which the contract was made was Yemen; and the place of destination was Karachi, Pakistan.\textsuperscript{394} Thus, there were no grounds for plaintiff's argument that the United States was his place of destination, even though, as a U.S. citizen, he would eventually return there.\textsuperscript{395} All four defendants' motions to dismiss were granted.

B. Injuries and Events Within Scope of Convention

In \textit{Lemly v. Trans World Airlines, Inc.},\textsuperscript{396} the Second Circuit affirmed dismissal of a Warsaw Convention claim of negligence and strict liability from an accident on the domestic leg of plaintiff's journey from Maryland to Saudi Arabia. The court found that the journey was broken up into two flights on different airlines, and tickets were purchased separately. The flights were also a day apart. TWA and the plaintiff did not contemplate international travel for both legs of the journey, because TWA could not be held to know plaintiff's international travel plans once she arrived in New York.\textsuperscript{397}

In \textit{Johnson v. American Airlines, Inc.},\textsuperscript{398} the deceased's remains were delivered to American Airlines in a sealed casket. The names of the shipper and consignee appeared on the waybill, but not the names of the plaintiffs. Plaintiffs

\textsuperscript{393}  Id. Plaintiff purchased his ticket in Yemen, and the court found that the fact that his purchase was through an American carrier did not satisfy the "place of business" test in Article 28(1)(c) of the Warsaw Convention. \textit{Id.}

\textsuperscript{394}  Id.

\textsuperscript{395}  Id.; see \textit{Smith v. Canadian Pacific Airways, 452 F.2d 798 (2d Cir. 1971)} (plaintiff, injured on Canadian Pacific aircraft on flight from Vancouver, Canada to Tokyo, Japan, had to bring suit in Japan to satisfy the "place of destination" jurisdiction test).\textsuperscript{396}

\textsuperscript{396}  807 F.2d 26 (2d Cir. 1986).

\textsuperscript{397}  \textit{Id.} at 28.

\textsuperscript{398}  834 F.2d 721 (9th Cir. 1987).
did not declare an excess value for the casket. When the casket arrived in Ireland, the seal had been broken, the remains were damaged, and items of personal property were missing. The Ninth Circuit affirmed the district court holding that the plaintiffs lacked standing under the Warsaw Convention because they were not parties to the shipping contract\textsuperscript{399} and holding that remains were "goods" under the Convention\textsuperscript{400} and, therefore, the Convention was the exclusive remedy.

\textit{Kenner Products-General Mills, Inc. v. The Flying Tiger Line, Inc.},\textsuperscript{401} arose when a steel mold, shipped from Taipei to Cincinnati, was temporarily lost. Kenner was the consignee of one waybill under which Morrison Express accepted the goods for transportation to Cincinnati, but there was a second waybill by which Morrison arranged with Flying Tiger to transport the goods to Chicago. The steel mold was lost for about three months, whereupon it turned up in Flying Tiger's facility in Cincinnati. Flying Tiger attempted to return the mold to Kenner, but Kenner sued for damages.

The court had initially dismissed all of Kenner's claims except the claim under the Warsaw Convention.\textsuperscript{402} Defendants moved to reconsider the court's refusal to dismiss the Warsaw claim, and the court, on reconsideration, dismissed the Warsaw claim as well. Initially, the court had held that under Article 30(3) of the Convention, the plaintiff was free to sue the alleged last carrier or any of the intermediate carriers.\textsuperscript{403} However, on reconsidera-

\textsuperscript{399} \textit{Id.} at 724-25. The plaintiffs had arranged for a California funeral home to ship the decedent's body to a funeral home in Ireland. \textit{Id.} at 722. The funeral homes were thus the consignor and consignee to the air waybill and were the only parties with standing to sue the airlines involved. \textit{Id.} at 725.

\textsuperscript{400} \textit{Id.} at 723-24. The remains were listed as "goods" on the waybill. \textit{Id.} at 723. The waybill warned that any recovery for injury to the goods was limited by the Warsaw Convention, unless the shipper opted to pay a higher shipping fee to receive additional coverage. \textit{Id.}

\textsuperscript{401} 3 \textit{Av. L. Rep. (CCH) (20 Av. Cas.)} 18,282 (N.D. Ill. Oct. 6, 1987).

\textsuperscript{402} \textit{Id.} at 18,283.

\textsuperscript{403} \textit{Id.} at 18,284. "Thus, [plaintiff] can take action against ... the alleged last carrier, and the intermediate carriers, one or more of whom may be responsible for the loss or delay at issue here." \textit{Id.} at 18,283-84.
tion, the court acknowledged that this provision of Article 30(3) only applied if the transportation by successive carriers "has been regarded by the parties as a single operation." Here, there were separate waybills between different parties for different shipments to different destinations, with different freight charges assessed. Since Kenner was not the consignee on the second waybill, it could not sue the carriers who transported the goods under that waybill.

C. Cargo and Passenger Baggage

1. Non-Warsaw Cases

Travellers should beware of the consequences of failure to insure man's best friend. In *Deiro v. American Airlines*, seven racing dogs died and two others were injured from heat exhaustion during a layover. The Ninth Circuit held that American's baggage liability limitation on the passenger ticket of $750 per dog was valid under a "reasonable communicativeness test." The court found the contract of carriage included the baggage liability provision, and the airline met the requirements under the released valuation doctrine, providing plaintiff reasonable notice and a full and fair opportunity to declare a higher value for his baggage. The airline's contractual limitation of liability for gross negligence was also held valid.

The reasonable communicativeness test, adopted by several circuits, evaluates whether the physical characteristics of the ticket are reasonably conspicuous and clear and whether the circumstances surrounding the passenger's purchase of the ticket, including his familiarity and time to study the ticket, render it reasonable to bind the passenger to the ticket's contractual limitations. The court found the plaintiff was an experienced commercial

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404 *Id.* at 18,282, 18,284; Warsaw Convention, *supra* note 27, art. 30(3).
405 *Kenner*, 3 Av. L. REP. at 18,284.
406 816 F.2d 1360 (9th Cir. 1987).
407 *Id.* at 1365.
408 *Id.* at 1364.
air traveler and aware of print on the back of the ticket, having received the ticket nine days prior to his flight. The plaintiff thus had ample opportunity to familiarize himself with the baggage provisions, particularly in light of the baggage’s value.

2. Warsaw Cases

In Republic National Bank of New York v. Eastern Airlines, Inc., the Second Circuit held that absence of information about the weight and identification number on baggage tickets did not vitiate an airline’s limited liability under the Warsaw Convention. The case arose out of the loss of baggage containing $2 million in currency on an international flight from New York to Lima. The court found relevant that Republic’s courier personally supervised handling of the currency bags and that Eastern had no opportunity to assure that the baggage was properly identified because the baggage was loaded from an armored truck. Republic was found to be on notice that it could declare a higher value.

In Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, an action for damages to fifteen drums of chemicals, prejudgment interest was added to an award for property damage under the Warsaw Convention. The court followed Domanque v. Eastern Airlines Inc. and stated that Article 28 of the Warsaw Convention could be interpreted to allow prejudgment interest. The purpose of the Convention, which was to fix, at a definite level, the cost to airlines for damages, was not thwarted by awarding interest. If prejudgment interest was disallowed, the money paid would actually be the present value of a future payment, a discounted amount, and less than the limitation imposed by the Convention. The court granted interest from the date of the loss.

410 815 F.2d 232 (2d Cir. 1987).
412 722 F.2d 256 (5th Cir. 1984).
In *Import Birds, Inc. v. Empresa Ecuatoriana De Aviacion*, the court held that plaintiff’s attempt to escape a contractual limitation of liability was for the birds. Plaintiff’s parrots died enroute from Peru to Miami. The district court found the airline’s liability was limited to $20 per kilogram, as provided by the airway bill. Import Birds did not declare a higher value for the birds and was, therefore, subject to the contractual limitation.

In *Montazami v. Kuwait Airways Corp.*, an action by a passenger seeking to recover $3,000 in damages for the theft or destruction of his luggage and its contents, the court denied the airline’s motion for partial summary judgment, limiting liability to $400 pursuant to Article 22 of the Warsaw Convention. The plaintiff arrived in New York from London on KAC flight KU100 on July 22, 1986. The plaintiff’s luggage was missing when he arrived in New York. Within fifteen days, the luggage was returned, but the plaintiff claimed that the suitcase had been ripped open and several valuables were either lost or destroyed.

The defendant argued that the losses should be limited to $20 per kilogram, under Article 22 of the Warsaw Convention. However, such a limitation is only valid, under Article 22, in the absence of willful misconduct. The plaintiff claimed that coins, a silver tea set, and gifts were taken from his returned baggage, that candy and cigarettes were opened and crushed, and that his suitcase had been ripped open. These assertions suggested a possible intentional act, making summary judgment inappropriate.

What happens when the total weight of a shipment is one hundred and thirteen pounds and the carrier loses or damages one item weighing only five pounds? Is the shipper entitled to recover the liability limit ($9.07 per pound)

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413 Warsaw Convention, *supra* note 27.
415 Warsaw Convention, *supra* note 27, art. 22.
416 Montazami, 3 Av. L. Rep. at 17,943.
on the total weight of the total shipment or only on the five-pound item? In *Hartford Fire Insurance Co. v. Trans World Airlines, Inc.* the court held that the Warsaw Convention's limits apply only to the weight of the lost or damaged goods.

D. *Tour Operators*

In *Arkin v. Trans International Airlines, Inc.* the Second Circuit held that passengers seeking damages from a charter airline, for physical and emotional injuries they allegedly suffered as a result of a delayed international flight, could not recover because the airline breached no duty of care. The Arkins had purchased a tour package from a tour operator who in turn chartered an aircraft from Trans International for a New York - Lisbon tour. The aircraft was scheduled to depart from Kennedy International Airport in New York (JFK) at 11:59 p.m. on May 2, 1979. The departure was delayed due to a hydraulic system failure. The Arkins were originally told that the flight would depart at 4:00 or 4:30 a.m. The tour operator would not provide dinner or motel accommodations. The Arkins returned at 2:30 a.m., as requested, only to be advised there would be further delays. The flight eventually departed at approximately 1:00 p.m. on May 3, 1979.

The Arkins claimed they did not receive appropriate flight information. However, the court stated that the Arkins were provided with truthful flight information, although not by Trans International directly. Mrs. Arkin was having physical discomfort but did not seek medical attention. Therefore, her claim for a failure to provide medical services failed. With regard to the claim that a rest place was not provided, the court stated that the Arkins spent at least four hours in a motel restaurant and room and the remainder of the time in the Concorde area of the Air France lounge, a large area with many seats.

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418 815 F.2d 12 (2d Cir. 1987).
The international terminal at JFK was operated by the Port Authority of New York and New Jersey, and any complaints about the airport’s lack of amenities can only be made to the Port Authority. Moreover, since the passengers were aware that when they purchased less expensive charter transportation they would not have “Concorde-type amenities” in connection with their late night flight, they had no complaint against the charter airline, and any complaint they may have had could only be brought against their tour operator.\(^{419}\)

*Neilan v. Value Vacations, Inc.*\(^{420}\) held that a class action brought against a tour operator for failure to provide reimbursements for cancelled flights adequately stated a cause of action. The tour operator had entered into a depository agreement with a bank to provide escrow accounts for the consumer’s funds. When the consumers sought reimbursement, it was discovered that approximately $1.33 million was missing from the escrow account. It was later discovered that Arrow Air, the air carrier, had consistently requested more money for flights than was appropriate. Arrow Air’s bank, on request, transferred funds from the escrow account to Arrow’s operating account but never cross checked to be sure the amounts coincided with the original payment amount.

The court held that direct mailing of notices followed by publication of the proposed settlement was sufficient. The plaintiffs alleged that Arrow Air’s bank violated a federal regulation requiring separate accounts to be maintained, and that the bank had breached its fiduciary duty created by the same regulation. The court stated the purpose of the regulation was to segregate and protect consumer’s funds, and concluded that Arrow’s bank had failed to observe the required procedures and granted summary judgment to the plaintiffs. The court approved the class settlement, stating that it was within an accepta-

\(^{419}\) Id. at 14.

ble range of reasonableness and the risks of proving liability were outweighed by the benefits of settlement.

E. Discrimination

In *Williams v. Hughes Helicopters, Inc.*, the Ninth Circuit held that formerly-employed pilots were not entitled to partial summary judgment when they challenged a company policy requiring experimental and production test pilots to stop flying when they reached certain ages. On October 1, 1982, Hughes Helicopters put into effect a policy which required experimental pilots to stop flying at age 55 and production pilots to stop flying at age 60. A complaint was filed alleging age discrimination, and Hughes raised the bona fide occupational qualification defense (BFOQ). The plaintiffs alleged that Hughes could not properly rely on the FAA's age-60 rule and other expert testimony developed at trial to validate its stop-flying policy.

Plaintiffs contended the FAA's age-60 rule was irrelevant. The court disagreed. Relying on *Western Air Lines, Inc. v. Criswell*, it held the rule was relevant in support of a BFOQ defense, if there was sufficient congruity between the occupation of commercial airline pilots, upon which the age-60 rule is based, and helicopter test pilots. The court found sufficient congruity between the two and also found that the weight of the evidence supported a safety rationale. The court held the age-60 rule relevant.

F. Miscellaneous

In *Patterson v. United Airlines, Inc.*, judgment was entered in favor of United Airlines in a negligence action brought by a passenger who fell from the mobile stairway while deplaning. As the plaintiff was deplaning, she fell from the last step when the passenger agent allegedly

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421 806 F.2d 1387 (9th Cir. 1986).
423 3 Av. L. Rep. (CCH) (20 Av. Cas.) 18,073 (D. Or. May 12, 1987).
"lunged" at her. The court found that the plaintiff was 61 years old, had a weak and unstable left knee, and was susceptible to stumbling. The passenger agent went up the stairs to render assistance to the passenger because she seemed to have stumbled. The passenger agent's actions were a minor factor in causing the plaintiff to fall, if his actions were a cause at all. The court held that the plaintiff had not established that the negligence of United Airlines or its agent approached the 51% fault necessary to entitle plaintiff to damages.

In *Harby v. Saadeh*, the Ninth Circuit held Kuwait Airways was not liable for damages arising out of a passenger's delay in Yemen, for 10 days, because the airline could not provide him timely return reservations. The plaintiff had purchased a round-trip, open-return ticket between San Francisco and Yemen. The court found that an open-return ticket guarantees no departure time but merely the right to the next available open seat. In addition, the court found the travel agent was not an agent of Kuwait Airways. Plaintiff failed to show he was entitled to the difference between the round-trip airfare and the portion of the ticket used by plaintiff, as provided for in the Federal Aviation Act.

In *re Korean Air Lines Disaster*, the D.C. Circuit held that KAL was entitled to avail itself of the $75,000 per passenger limitation contained on its tickets even though the tickets used 8-point type, rather than the 10-point type required under the Convention. Plaintiffs contended that the court was bound to follow contrary Second Circuit precedent because the cases had been transferred to the District of Columbia and the transferee court was bound to follow the precedent of the circuit to which it was transferred.

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424 816 F.2d 436 (9th Cir. 1987).
427 Robles v. LOT Polish Airlines (*In re Air Crash Disaster at Warsaw, Poland*), 705 F.2d 85 (2d Cir.), cert. denied, 464 U.S. 845 (1983) (airline's use of 8.5 point rather than 10 point type to inform passengers of liability limitations made the airlines' limitation of liability void).
by the law of the transferor court. The D.C. Circuit, however, held that the rule relied upon by the plaintiffs only required the transferee court to follow state law in diversity actions, not conflicting interpretations of federal law. In the latter case, each circuit is free to adopt its own interpretation. The court noted, however, that such matters are "in need of definitive resolution for our national court system." Accordingly, the Supreme Court granted certiorari to resolve the issue.

In Tsangalakis v. Olympic Airways, the court denied the defendant's motion for summary judgment, because at issue was the place of destination, which the court determined was a question of fact. Pursuant to Article 28(1) of the Warsaw Convention, the plaintiff could bring his action in the forum of his destination. However, the plaintiff's destination could not be readily determined because, although the ticket provided for passage from Athens to New York on June 17, 1985, the return to Athens was "open." No date for the return was booked.

VII. LIMITATION OF ACTIONS

A. Statutes of Repose

Kirchner v. Aviall, Inc., held that Florida's 12-year statute of repose barred plaintiff's wrongful death action. In 1955, General Dynamics Corporation sold to the United States Navy, the original purchaser, a certain airplane which crashed on April 30, 1983, killing Kirchner's hus-

428 Van Dusen v. Barrack, 376 U.S. 612 (1964). "[W]here the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." Id. at 639.
429 In re Korean Airline Disaster, 829 F.2d at 1175-76. "The federal courts . . . owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court . . . ." Id. at 1176.
430 Id.
431 In re Korean Airline Disaster, 108 S. Ct. at 1288.
Less than two years later, Kirchner sued General Dynamics for wrongful death based on a products liability theory.

Relying on Phlieger v. Nissan Motor Co., Ltd., the court stated that the survivor's right of action under the wrongful death statute must be determined by the facts existing at the time of the death. Wrongful death actions may be maintained only if the fatal event would have entitled the person injured to maintain an action and recover damages if death had not ensued. The twelve year statute of repose on products liability actions had run long before the death of Kirchner's husband. Therefore, the decedent would not have been entitled to maintain an action. The judgment was affirmed.

In Spellissy v. United Technologies Corp., the court affirmed the trial court's denial of a j.n.o.v. and reversed the dismissal of General Dynamics, Inc., the manufacturer of the C-131F transport. The court of appeals held that the statutory period for wrongful death actions, not the period of time in Florida's statute of repose, applied to the personal representatives of thirteen Navy crewmen who died in the C-131F crash. The panel certified to the Florida Supreme Court the question of whether the statute of repose should apply to the sole survivor.

The action arose from the April 30, 1983 crash of a Navy C-131F transport plane which attempted an emergency landing at the Jacksonville Naval Air Station, following an in-flight fire in the left engine. Fourteen persons were killed, and the only survivor was severely in-

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434 Id. at 1273.
435 Id.
436 487 So. 2d 1096 (Fla. Dist. Ct. App. 1986), aff'd, 508 So. 2d 713 (Fla. 1987) (twelve-year products liability statute of repose inapplicable to wrongful death action brought on behalf of truck driver killed due to allegedly defective roof design).
437 Fla. Stat. § 95.031(2) (1985). Amendment of this statute has effectively repealed the twelve-year statute of repose as it applies to products liability actions. Phlieger, 508 So. 2d at 715 n.2.
438 823 F.2d 438 (11th Cir. 1987).
439 Id. at 445-46.
jured. Lawsuits were filed against Aviall, Inc., the overhailer of the R2800 engine, and against General Dynamics, Inc., the designer and manufacturer of the airframe. The plaintiffs alleged that the engine failure and resulting fire were caused by Aviall’s use of an unauthorized, or used, No. 8 piston pin during the overhaul process. Plaintiffs also claimed that General Dynamics was negligent in the design of the aircraft’s fire control system.

Florida’s statute of repose required a product liability action be brought within twelve years after the date of delivery of the completed product to its original purchaser. The statute was subsequently repealed by the Florida legislature. In addition, the Florida Supreme Court interpreted the statute, following the district court’s decision, and held that the statute of repose does not apply to an action brought by a personal representative.\(^{440}\) Therefore, the appellate court in Spellissy held that the statute of repose did not apply in the actions brought by the personal representatives for wrongful death.

In Erickson Air-Crane Co. v. United Technologies Corp.,\(^ {441}\) the Oregon Supreme Court reversed the court of appeals, and held the products liability statute of repose did not insulate a manufacturer from negligence liability for furnishing incorrect life-limit information on an engine component after a product was sold.\(^ {442}\) The suit arose out of 1981 crash of a helicopter which was purchased in 1971. Plaintiff alleged that in 1977 the engine manufacturer gave him a sheet incorrectly listing the life-limit of an engine compressor disc as 6,000 hours, when in fact it was 4,000.\(^ {443}\) The engine failed after approximately 4,300 hours. The trial court found liability.

The court of appeals reversed the trial court on the ground that the products liability statute applied to any

\(^{440}\) See supra notes 435 and 436 and accompanying text.

\(^{441}\) 303 Or. 281, 735 P.2d 614, modified, 303 Or. 452, 736 P.2d 1029 (1987).

\(^{442}\) Erickson Air-Crane, 735 P.2d at 618.

\(^{443}\) Id. at 615.
claim of failure to properly warn or instruct concerning the use of the product.\textsuperscript{444} That court also held the claim was barred because the action was brought more than ten years after the helicopter was first sold.

The Oregon Supreme Court examined the legislative history of the products liability statute and concluded the legislature intended to establish a uniform cutoff date concerning product defect claims arising at, or before, the time the product was first purchased for use or consumption.\textsuperscript{445} The court held that where there was a post-sale failure to warn or properly instruct, another state statute of repose was activated, which allowed ten years from the date of the act or omission.

In \textit{S.S. Aircraft Company v. Piper Aircraft Corp.},\textsuperscript{446} the Michigan Court of Appeals held that an aircraft purchaser's products liability claim against the defendant was barred by the three-year statute of limitations concerning products liability. The case arose from a 1981 crash of a Cheyenne during an instrument approach. The complaint was filed more than three years after the crash. The court also dismissed, as untimely, defendant's amendment to its original timely cross complaint to allege products liability.

B. Tolling

In \textit{Bancorp Leasing and Financial Corporation v. Agusta Aviation Corporation},\textsuperscript{447} the Ninth Circuit held that breach of warranty claims against a foreign helicopter manufacturer were barred by Oregon's two-year products liability statute of limitations.\textsuperscript{448} The complaint was filed within two years of the injury, but the summons was not served within sixty days from the date the complaint was filed. Service of the summons did not therefore, relate back to

\textsuperscript{444} 79 Or. App. 659, 720 P.2d 389 (1986).
\textsuperscript{445} \textit{Erickson Air-Crane}, 735 P.2d at 617.
\textsuperscript{447} 813 F.2d 272 (9th Cir. 1987).
\textsuperscript{448} \textit{Id.} at 277.
the time of filing the complaint under Oregon law.\textsuperscript{449} The court rejected plaintiff's argument that the statute was tolled because the defendants did not transact business in the state and were not amenable to service. Plaintiffs did not claim they were unable to locate and serve the defendants. Because the defendants were amenable to service by mail, the tolling statute for persons who could not be "found within the state" was inapplicable.\textsuperscript{450}

The court also rejected the plaintiff's contention that the breach of warranty claim should be governed by the UCC four-year statute of limitations\textsuperscript{451} rather than the two-year statute of repose.\textsuperscript{452} Plaintiff claimed that the four-year UCC statute applied because the claim was for property damage, rather than personal injury. The Ninth Circuit disagreed.\textsuperscript{453}

In \textit{Tennimon v. Bell Helicopter Textron, Inc.},\textsuperscript{454} the appellate court held that the district court correctly granted summary judgment in favor of the defendant.\textsuperscript{455} Texas' limitations period commences upon discovery of the injury described in the complaint, not upon discovery of all the elements of the applicable cause of action.\textsuperscript{456} Plaintiff's husband was killed in a 1973 crash in Kentucky. Plaintiff argued, before the district court, that the Texas statute of limitations should be tolled because defendant was aware of the phenomenon of "mast bumping" since 1967, and did not inform the pilot.\textsuperscript{457} The district court rejected the plaintiff's argument that this constituted concealment of the plaintiff's cause of action and the plaintiff did not take this issue on appeal. Also significant was the plaintiff's

\begin{itemize}
  \item \textsuperscript{449} Id. at 274 n.2.
  \item \textsuperscript{450} Id. at 275.
  \item \textsuperscript{451} OR. REV. STAT. § 72.7250(1) (1988).
  \item \textsuperscript{452} OR. REV. STAT. § 30.905(2) (1988).
  \item \textsuperscript{453} \textit{Bancorp Leasing}, 813 F.2d at 277. "Under [Oregon] law, a claim remains a products liability claim even though the only property damage for which the claim is made is damages to the product itself." \textit{Id.} (citations omitted).
  \item \textsuperscript{454} 823 F.2d 68 (5th Cir. 1987).
  \item \textsuperscript{455} Id. at 69.
  \item \textsuperscript{456} Id. at 72.
  \item \textsuperscript{457} Id. at 73 n.5.
\end{itemize}
failure to ascertain who manufactured the helicopter. Nor did the plaintiff sufficiently raise an issue of fact concerning Bell's actual knowledge of any wrong. Bell's affidavit claimed no concealment of the mast-bumping taking place.

In *First Interstate Bank v. Piper Aircraft Corp.*, the Colorado Supreme Court held that the statute of limitations could be tolled by an aircraft manufacturer's fraudulent concealment of the facts underlying the wrongful act. The elements necessary to toll the statute were:

1) concealment of a material existing fact that in equity and good conscience should be disclosed; 2) knowledge on the part of the party against whom the claim is asserted that the fact is being concealed; 3) ignorance of that fact by the one from whom the fact was concealed; 4) the intention that the concealment be acted upon; and 5) action on the concealment resulting in damages.

The court held that the question of fraudulent concealment was for the jury.

VIII. Hague Convention

*Societe Nationale Industrielle Aerospatiale v. United States District Court*, arose from a 1982 crash in Alaska of a helicopter manufactured by a French government-owned corporation. The plaintiff alleged a design defect and requested discovery under Fed. R. Civ. P. 34. The French corporation objected on the grounds that the Hague Convention should be followed, and that French law precluded French citizens from disclosing economic, commercial, or related documents, except those subject to international treaties or agreements.

The Supreme Court held, 5-4, that the Hague Conven-
tion was not an exclusive discovery device against foreign defendants; nor were courts uniformly required to resort to the Hague Convention before permitting discovery under the Federal Rules. Rather, the Court held that principles of international comity require a court to determine such issues on a case-by-case basis. The Court turned to the following factors contained in the Restatement of Foreign Relations Law:

[1] the importance to the investigation or litigation of the documents or other information requested;
[2] the degree of specificity of the request;
[3] whether the information originated in the United States;
[4] the availability of alternative means of securing the information; and
[5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

The Court remanded the case to the Eighth Circuit, which had held that the Convention does not apply when a district court has jurisdiction over a foreign litigant, even though the information sought may be physically located within the territory of a foreign signatory to the Convention. The Court stated, "such a rule would deny the foreign litigant a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures. . . ."

Foreign-based manufacturers had argued in these types of cases that the Hague Convention preempted the Federal Rules of Civil Procedure or, alternatively, that the

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466 Id.; Societe Nationale, 107 S. Ct. at 2555-56.
467 Societe Nationale, 107 S. Ct. at 2557.
Convention should be a first resort before using the Federal Rules. These contentions were rejected by various circuits.

IX. **DAMAGES**

A. **Punitive Damages**

In *Andor v. United Air Lines, Inc.*, the Oregon Supreme Court reversed the court of appeals, holding that punitive damages were not warranted against United Airlines. A jury had awarded $161,275 in compensatory damages and $750,000 in punitive damages to a minor who survived United's DC-8 crash in Portland, Oregon in 1978, in which both her parents died. The crash occurred when the plane ran out of fuel. It circled Portland because the crew mistakenly believed that the landing gear had failed. Plaintiff maintained that United took an unreasonable risk to reduce costs by failing to replace a corroded eyebolt in the landing gear system, and that the pilot and crew's conduct in running out of fuel after the abnormal extension of the landing gear constituted willful or wanton misconduct.

The trial judge granted a j.n.o.v. as to punitive damages and the court of appeals reversed *en banc*. The court of appeals held that whether a defendant's conduct qualified for punitive damages was a jury question and that judges should not attempt to substitute their judgment for that of the jury by making subjective, normative evaluations of the "aggravatedness" of the defendant's conduct.

The Oregon Supreme Court, however, ruled that neither of plaintiff's claims supported a claim for punitive

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468 *Id.* at 2551-52 n.20.
469 303 Or. 505, 739 P.2d 18 (1987).
470 *Id.* at 507, 739 P.2d at 19.
471 *Id.* at 311, 719 P.2d at 499.
472 Id. at 311, 719 P.2d at 496 (citing 2-D's Logging v. Weyerhaeuser, 53 Or. App. 677, 632 P.2d 1319 (1981)).
The court was required to determine "whether the defendant's relationship to the victim impose[d] obligations greater than would [exist] toward a stranger," which in turn bore upon "the mental element required to impose liability and also on the offensiveness of the conduct." The Oregon Supreme Court pointed out that a court may also have to determine whether the alleged acts, "if proved, qualify as extraordinary conduct which a reasonable jury could find beyond the farthest reaches of socially tolerable behavior." Finally, the supreme court noted that a court must determine whether the defendant in fact engaged in conduct beyond the farthest reaches of socially tolerable behavior.

The court concluded that in certain instances, not existing here, negligent actions, involving persons performing different functions in an organization, may establish that the organization as a whole was indifferent to known or highly predictable risks. This indifference evinces the degree of social irresponsibility that justifies punitive damages.

B. Non-Pecuniary Damages

In Fagerquist v. Western Sun Aviation, Inc., the California Court of Appeal upheld a non-economic damages award for a seriously retarded child even though the award substantially exceeded the amount of economic loss. A 42V Piper aircraft crashed enroute from Guaymas to Tucson killing the child's father. The court held the lower court's award of $1.5 million in non-economic damages to the seriously retarded child not excessive. Defendants' argument that the retarded child would miss the love and affection of parents less than a normal child would provoked chastisement by the court.

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474 Andor, 303 Or. at 515-16, 739 P.2d at 24-25.
475 Id. at 513, 739 P.2d at 23 (citing Hall v. May Dept. Stores, 292 Or. 131, 637 P.2d 126 (1981)).
476 Id. at 516, 739 P.2d at 25.
In *Darras v. Trans World Airlines, Inc.*, a district court found that the wife of a passenger aboard a hijacked plane was not entitled to recover for emotional distress suffered from viewing seventeen days of media coverage, because she was not in the zone of physical danger.

C. Personal Consumption/Income Taxes

In *Woodling v. Garrett Corp.*, the Second Circuit affirmed the liability of the defendants for the Lockheed Jetstar crash near Westchester County, New York in 1981. Six executives of Texasgulf, Inc., the pilot, and the co-pilot were killed. Defendants were not immune from liability merely because they were covered by worker's compensation. In addition, the court affirmed the district court's refusal to apply that state's law to avoid the worker's compensation immunity defense. The court ruled that the plaintiff was also entitled to rescission of a release she signed in favor of the parent company.

However, the court vacated the damages award of $1.1 million. The court found that the district court erred on the following points: (1) allowing the jury to deduct income taxes from one plaintiff's future lost earnings; (2) calculating the prejudgment interest to which one plaintiff was entitled; and (3) failing to require the same plaintiff to pay Texasgulf interest on $250,000 for the period during which she had use of the money prior to her rescission of the release agreement.

D. Wrongful Death

*Schuler v. United States* arose when a Cessna 401 crashed in the vicinity of the Muskegon County Airport

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479 813 F.2d 543 (2d Cir. 1987).

480 *Id.* at 549.

481 *Id.* at 551.

482 *Id.* at 557.

killing the pilot and a paying passenger. On the issue of damages, the court held that evidence concerning future tax liability would be considered in calculating the amount of economic damages awarded to the passenger but, with regard to the pilot, future tax liability would not be considered, because the economic injury he suffered was modest.

The passenger, Schuler, was the president of a Michigan company. To determine the amount of economic loss to Schuler’s estate, the court considered the earnings of a co-owner, stating that it was proper to consider evidence of salary and profits earned by similarly situated persons, because such testimony has a tendency to prove what the decedent would have earned had he remained in a particular line of business. Income tax returns and the financial condition of the Schuler estate were also factored into the court’s conclusion that the estate suffered a loss of $1,650,000. Future income awarded for profits and investments was limited to ten years, because consideration beyond this period would entail speculation. Schuler’s widow was awarded $750,000 for non-economic damages and the two surviving children were awarded $200,000 each. The pilot’s estate was awarded a total of $85,000. Punitive damages were denied because they are not recoverable against the government.

E. Pecuniary Damages

In Morgan Guaranty Trust Co. of New York v. Texasgulf Aviation, Inc., the defendants moved for judgment notwithstanding the verdict or, in the alternative, a new trial on the issue of damages. Defendants argued that the verdict should be set aside because of the plaintiff’s counsel’s improper summation. Alternatively, the defendants argued that the judgment was excessive.

Plaintiff argued in summation that the decedent’s income should be used as a guideline to determine the pe-
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The defendants objected and submitted a curative instruction, claiming that there was no relationship between the decedent's income and the pecuniary loss of parental care. The court rejected the instruction because it was not accurate to say there was no relationship between the decedent's earning power and the pecuniary value of his parental services. The court then correctly charged the jury as to what elements should be considered with respect to the pecuniary damages for the loss of parental guidance. The court rejected the motion for a new trial based upon improper summation.

The court did hold the verdict to be excessive. Decedent had eight children, but only one was a minor at the time of the crash. One of the adult children was living at home, but the remaining children had established their independence and their careers. After reviewing cases decided by New York courts and federal courts, the court reduced the award to $250,000.

F. Recovery of Costs and Attorney Fees

In Tiedel v. Beech Aircraft Corp., plaintiff filed a motion to vacate a judgment granting the defendant costs and attorney fees pursuant to 28 U.S.C. § 1920. The court concluded that decedent was a rich and influential man who had power to do more for his children than someone of more humble status. For example, the decedent had already helped several of his children with their career opportunities. Two of his children had been employed by Texasgulf, and he had helped another gain employment with Morgan Guaranty some years before his death.

485 Id. at 83. The court concluded that decedent was a rich and influential man who had power to do more for his children than someone of more humble status. For example, the decedent had already helped several of his children with their career opportunities. Two of his children had been employed by Texasgulf, and he had helped another gain employment with Morgan Guaranty some years before his death. Id.


487 Id. at 60. 28 U.S.C. section 1920 reads as follows:
A judge or clerk or any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. A
P. 54(d), and Michigan Local Court Rules 42(j) and 42(k).

Plaintiff argued that Local Rules 42(j) and 42(k), in imposing the prevailing party's actual costs on the losing party, was inconsistent with both the Federal Rules of Civil Procedure and 28 U.S.C. § 1920, because neither the statute nor the Rules contain any provision for including, as "costs", the prevailing parties actual expert witness fees or attorney's fees.

The court applied Michigan law regarding the imposition of attorney's fees. Under Michigan law, attorney's fees may not be recovered as an element of costs unless authorized by statute or court rule. Under Michigan's mandatory mediation rule, attorney's fees may be awarded as costs, if a party fails to recover a verdict greater than that awarded by the mediation panel. Thus, the court found the imposition of attorney's fees as costs a valid exercise of its rule-making authority.

Plaintiff also objected to imposition of enhanced expert witness fees as taxable costs pursuant to the mediation rule. The court relied on Crawford-Fitting Co. v. J.T. Gibbons, Inc., where the Supreme Court held that absent explicit statutory or contractual authority, a federal court

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bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.


Tiedel, 118 F.R.D. at 60. The circuits had previously split on whether Fed. R. Civ. P. 54(d) and 28 U.S.C. section 1920 permitted taxation of expert witness fees in excess of the $30 limit mandated by 28 U.S.C. section 1821. Id.

Id. at 58. Sections 42(j)(3) and (k) provide:

(j)(3) If the mediation panel's evaluation is unanimous and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) per cent greater than the evaluation in order to avoid the payment of actual costs to the defendant. (k) Actual costs. Actual costs include those costs and fees taxable in any civil action and attorneys' fees for each day of trial as may be determined by the court.

Id.

may not tax expert witness fees against a losing party in excess of the thirty dollars per day statutory fee mandated by 28 U.S.C. § 1821. The award was reduced to the extent that costs awarded included payment of expert witness fees in excess of thirty dollars per day of trial.

X. INSURANCE COVERAGE

A. Pilot Qualifications

In United States Fire Insurance Co. v. Zurzolo, the Third Circuit affirmed a declaratory judgment in favor of the insurer, finding no coverage for a pilot who failed to satisfy the pilot warranty requirements of the policy. The crash occurred while the policy was still under binder. The insured argued that the binder was ambiguous on its face, and, therefore, must be construed in favor of coverage. Relying on Vlastos v. Sumitomo Marine & Fire Insurance Co., the court noted that, in determining whether there was any ambiguity, the court need not confine its attention to the four corners of the contract but may consider extrinsic evidence. The district court, therefore, correctly considered evidence of the pilot's understanding of the binder's terms. Specifically, the district court found that the coverage requirements were explained to the pilot and that the pilot requested a reduction in the solo flight prerequisites for coverage. From these facts, the district court reasoned that the pilot was aware that he would not be covered for solo flight until he met the binder's requirements. The district court concluded that the contract was not ambiguous, in light of the extrinsic evidence. The Third Circuit found that the district court's findings and conclusions were not clearly erroneous.

Transport Indemnity Co. v. Sky-Kraft, Inc., found no coverage for a renter pilot's estate under fixed-base operator

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491 Tiedel, 118 F.R.D. at 60.
492 Id.
493 835 F.2d 284 (3d Cir. 1987).
494 707 F.2d 775 (3d Cir. 1983).
(FBO) policy and that there were issues of fact precluding summary judgment as to a "hull and liability" policy.

On August 13, 1981, Schaefer rented an aircraft from Sky-Kraft for a flight to Klamath Falls, Oregon. Schaefer held a private pilot's license limited to VFR operations. At 5:50 a.m., Schaefer obtained a weather report from the Portland Flight Service Station which indicated that the weather at Portland International Airport was "marginal VFR." Schaefer departed from Pearson Airpark, four miles from Portland International, at 6:11 a.m. By this time Portland International was reporting IFR weather conditions. Schaefer crashed approximately four minutes after takeoff, in a wooded area 3.5 miles from Pearson Airpark.

Schaefer's estate filed a wrongful death action against Sky-Kraft, alleging negligent entrustment and instruction by Sky-Kraft in the operation of its flight school business. Sky-Kraft was covered by two insurance policies at the time of the accident: a hull and liability policy and a FBO policy. The insurer claimed there was no coverage under the hull and liability policy because: (1) Schaefer was not properly rated for instrument flight; and (2) Schaefer's claims of "negligent entrustment" and "negligent flight instruction" did not arise out of the use of the aircraft.

The insurer disputed coverage under the FBO policy because: (1) Schaefer's death was not caused by an accident which arose in or about the premises or elsewhere in the course of the performance of the insured's duties; and (2) Schaefer's death was not caused by an accident which arose out of the possession, use, consumption, or handling of any goods supplied or distributed by the insured.

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496 Id. 740 P.2d at 321.
497 Id.
498 Id. at 322.
499 Id. at 327.
500 Id. at 327-28.
In order to determine whether Schaefer was properly rated for the flight, the court had to determine whether the fatal flight should be characterized as a VFR or an IFR flight. Relying on National Insurance Underwriters v. King Craft Custom Products, Inc., and Glover v. National Insurance Underwriters, the court stated that the flight was to be characterized as a whole according to the weather conditions existing at the point of departure.

The record failed to establish if the weather was indisputably IFR or VFR at Pearson Airpark at the time of departure. The court concluded that a genuine issue of material fact remained to be determined, and held that summary judgment in favor of Schaefer's estate was improper. Relying on Farmers Insurance Group v. Johnson, the court concluded that the claim based on negligent entrustment and instruction was indivisibly related to the use of the aircraft. Therefore, if Schaefer was properly rated for the flight, the liability portion of the policy would be applicable.

Regarding the FBO policy, the court found there was no coverage. The court viewed "in or about the premises" to mean in the immediate vicinity of the FBO premises. The aircraft crashed 3.5 miles from Pearson Airpark and, thus, was not in the immediate vicinity. The court further concluded that after Schaefer obtained the keys to the aircraft, Sky-Kraft ceased performing any ongoing work or duties. Accordingly, Schaefer's death did not occur in the course of the performance of Sky-Kraft's duties. Coverage was also denied under the FBO policy because

502 545 S.W.2d 755 (Tex. 1977). The court stated that the term "flight" refers to the entire time the aircraft is in flight. The court refused to adopt a "segmented approach" whereby the flight status changes as the pilot enters differing weather conditions. Id. at 762.
503 43 Wash. App. 39, 715 P.2d 144 (1986). In Johnson, the court held that a claim of negligent entrustment of a boat was indivisibly related to an insurance clause that precluded coverage for injuries arising from use of watercraft. Id. at 146-47. The court stated that the favored trend is to view the claim of negligent entrustment as derived from, rather than exclusive of, use of an "instrumentality." Id. at 146.
the policy was intended to provide coverage for injuries or damages caused by defects in goods or products, not negligent operation of the flight school.

In *URSA Air Ltd. v. Federal Insurance Co.*, plaintiff's aircraft was destroyed when flown by a pilot who was not authorized to operate the aircraft. Plaintiff delivered the aircraft to a broker for the purpose of selling the aircraft, but the broker permitted the aircraft to be flown by someone who was not an approved pilot under the pilot warranty. Defendant denied coverage, and the plaintiff sued for a declaratory judgment. Plaintiff claimed, in effect, that it should not bear the loss when the aircraft was flown without its permission. The insurer argued successfully that the policy excluded coverage for any "loss due to conversion by any person in lawful possession of the aircraft or by any person whose possession of the aircraft would be lawful but for such conversion." The court held that under the exclusion, "the defendant does not assume the risk of the insured's carelessness in delivering the aircraft to and allowing its use by someone who might convert it." 

In *National Union Fire Insurance Co. v. Zuver*, the Washington Court of Appeals held there was no coverage for a non-instrument rated pilot who flew in instrument conditions for at least one mile prior to the crash. However, the Washington Supreme Court reversed.

The insured argued that an ambiguity existed between the exclusionary language and the pilot warranty. The

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Id. 736 P.2d at 676. The policy exclusionary language stated:

This policy does not apply: To any insured while the aircraft is in flight (b) if piloted by a pilot not properly certified, qualified, and rated under the applicable federal air regulations for the operation involved, whether or not said pilot is designated in the declarations; The pilot warranty stated: 1. Insurance will be effective only when
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court of appeals disagreed, concluding that the intent of the words "operation involved," which is not defined in the policy, meant something other than "flight" or "in flight." Nevertheless, the Washington Supreme Court overruled the lower court's decision. The supreme court held that the terms "operation involved" were ambiguous and that insurance law requires construing an ambiguous contract term in favor of the insured. The court held that the terms refer to the flight as a whole, from its inception, rather than as a segmented moment-to-moment series of incidents. Thus, the insured's coverage was held effective.

In National Union Fire Insurance Co. v. Meyer, National denied coverage because the policy endorsement stated that the insurance would be effective only when the airplane was operated by a pilot holding a current medical certificate. The airplane crashed while flown by a pilot with an expired medical certificate. The pilot's physical condition was not a cause of the crash. The trial court concluded that National waived its contention that a current medical certificate was required to cause effective coverage because in responding to a request for admission, it admitted that the policy was in full force and effect the operation of the insured aircraft in motion is by a pilot designated below who possess [sic] a current and valid pilot certificate of the kind specified with appropriate ratings, and a current medical certificate; all as required by the Federal Aviation Administration for the flight involved and who meets the additional qualifications set forth below.

Id. at 677-78.

Zuver, 750 P.2d at 1249.


Id. The endorsement stated:

Insurance will be effective only when the operation of the insured aircraft in motion is by a pilot designated below who possess[es] a current valid pilot certificate of the kind specified with appropriate ratings, and a current medical certificate; all as required by the Federal Aviation Administration for the flight involved and who meets the additional qualifications set forth below.

Id.
the day of the accident.\textsuperscript{513}

The California Court of Appeal reversed, holding that National had not waived the coverage issue.\textsuperscript{514} It further held that the pilot warranty clearly excluded coverage where the pilot did not meet the medical certificate requirement, and that there need not be a causal connection between the policy violation and the loss.\textsuperscript{515}

B. Renters Pilots

In \textit{Rusk Aviation, Inc. v. Northcott},\textsuperscript{516} a student pilot crashed during a solo flight, damaging the plane and two parked aircraft. The aircraft was operated under a rental agreement or a training program, for which renumeration was received. Rusk Aviation and Employers Casualty sued for damages to parked aircraft, claiming the owners of the aircraft negligently entrusted the Piper aircraft to the pilot.

The court held that the insurance company could properly refuse to defend the student pilot because he was not an "insured" under the omnibus clause.\textsuperscript{517} The provision was held not to include persons operating under any rental agreement or training program which provided renumeration to the named insured. The court based this holding on a provision in the policy which expressly excluded such persons.\textsuperscript{518}

C. Air Taxi Endorsement

\textit{Forum Insurance Co. v. Seitz Aviation, Inc.},\textsuperscript{519} arose out of an airplane crash in which several occupants of the aircraft

\textsuperscript{513} \textit{Id.}
\textsuperscript{514} \textit{Id.}
\textsuperscript{515} \textit{Id.} at 636.
\textsuperscript{516} 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,817 (Ill. App. Dec. 31, 1986).
\textsuperscript{517} \textit{Id.} at 17,818-19. The plaintiffs agreed that the definition of "insured" set out in the policy included student pilots. The definition included "the named insured and any person or organization legally responsible for its use, provided the actual use is with the permission of the [n]amed [i]nsured." \textit{Id.} at 17,818.
\textsuperscript{518} \textit{Id.}
were insureds under an aviation insurance policy. The policy specifically excluded liability coverage for any claim by one insured against any other insured. However, the policy also contained an air taxi endorsement deleting all exclusions and replacing them with a more limited set of exclusions which omitted the exclusion in question. The Kansas Supreme Court held that the exclusion applied unless the decedents were killed in an air taxi operation. The court remanded the case to determine whether the fatal flight was that of an air taxi flight.

D. Miscellaneous Coverage Cases

In *American Eagle Insurance Co. v. Lemons*, the Texas Court of Civil Appeals held an insurer liable under terms of the "newly acquired aircraft" clause of a policy when a passenger was killed on the same day the pilot purchased a new airplane.  

*Employers Casualty Co. v. Dietz*, held that "[a]n aviation liability and hull insurance policy covering an aircraft involved in a mid-air collision did not provide coverage as to any claims either directly or indirectly from the estate of an individual killed in an aircraft or from any other party seeking contribution or indemnification for payments of obligations to the estate." During the coverage period, a Cessna 150 and a Mooney M-20C collided in mid-air, killing Baker and Dietz in the insured Mooney aircraft and Gibbons and Goldsmith in the Cessna 150.

"The policy provided in the definition of the term 'in-
sured' that the insurance with respect to any person or organization other than the named insured did not apply to: ‘(a) bodily injury or death of any person who is the named insured ...’". There was no merit found in the contention that the language which had the effect of a denial of coverage was in the wrong place in the policy and should have been in the exclusion section of the policy. “It was significant that the policy was approved as required by statute and there was no ambiguity created by either the language of the policy or by its placement in the policy. Finally, a contention that public policy demanded that the insurance policy be enforced could not be accepted.”

In *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, the Tenth Circuit held that the manufacturer was not immune from a subrogation suit by its insurer under an insurance policy intended to benefit both purchaser and manufacturer. The manufacturer was not the “insured” party under the policy, since the purchaser’s policy, by endorsement, reserved a right of subrogation. Recognition of the manufacturer as an insured would have precluded suit by the insurer.

In *St. Paul Insurance Co. of Illinois v. Venezuelan International Airways, Inc.*, the court held that the “contract of carriage” between Viasa and St. Paul consisted of both the airway bill and all validly filed tariff. The action arose from the alleged pilferage or shortage of spare tractor parts sent from Caracas, Venezuela to Miami, Florida.

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527 *Id.* at 17,819.
528 *Id.*
529 *Id.*
530 805 F.2d 907 (10th Cir. 1986). Rocky Mountain purchased the helicopter involved in an accident from Bell, the manufacturer. *Id.* at 909. The sales contract, as well as a prior lease agreement, provided that Rocky Mountain, the purchaser, would insure the helicopter “for the benefit of the Purchaser and Seller as their interests may appear ...” *Id.* Following an accident involving the helicopter, both Rocky Mountain and Southeastern, the company carrying the insurance policy, sued Bell, claiming the accident was caused by a manufacturing defect. *Id.* at 909-10.
531 *Id.* at 914.
532 807 F.2d 1543 (11th Cir. 1987).
The shortages were discovered on June 3rd and June 10th of 1983, but written notice was not sent to Viasa until July 21, 1983. The court determined that the notice provision in Viasa’s tariff controlled. Consequently, St. Paul had failed to give timely notice of its loss and its claim against Viasa was barred.

_In re Bethel Ventures, Inc._\(^5\) concerned the construction of the breach of warranty (BOW) endorsement in the insurance policy purchased by Bethel. Plaintiff insured a fleet of aircraft, some of which were financed by Cessna Finance. The underlying policy provided for a 10% deductible on losses; the breach of warranty endorsement provided for a 3% deductible. The insurer argued that the loss occurred without a denial of coverage by the insurer; in effect, Cessna Finance was simply a loss payee under the main policy and, therefore, was subject to the larger deductible on the main policy. Cessna Finance argued that the BOW was a separate contract of insurance under which it was tantamount to a “first-party insured.”\(^6\) The court agreed, holding that Cessna Finance’s protection was afforded under the BOW and was, therefore, subject to the smaller deductible.

**XI. FAA Enforcement/Local Regulation**

_In Searight v. NTSB_,\(^5\) the Tenth Circuit reviewed an administrative law judge’s (ALJ) determination that Searight was careless and reckless in the operation of his aircraft in violation of Federal Aviation Regulation § 91.9. The FAA claimed that Searight took off, landed, and then took off again from the No. 2 airport in Salt Lake City, Utah, at a time when the airport was closed for snow removal. The

\(^{5\text{a}}} 3\text{ Av. L. Rep. (CCH) (20 Av. Cas.) 18,296 (D. Alaska June 7, 1987).  
^{5\text{b}}} _\text{Id.} Cessna Finance argued that the BOW was a separate contract which offered protection to the lienholder from negligent acts of the insured. _\text{Id.}  
^{5\text{c}}} 812 F.2d 637 (10th Cir. 1987). The case arose from the NTSB’s suspension of the pilot’s commercial pilot certificate. _\text{Id.} at 638.  
^{5\text{d}}} _\text{Id.} at 638. Section 91.9 provides that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.” 14 C.F.R. § 91.9 (1988).
FAA also claimed that Searight flew in close proximity to a snow blower and its operator.

In response, Searight contended that "someone" had informed him that the airport was open. He testified that he landed after the initial takeoff because he thought something was wrong with his engine. Searight further stated that he never saw the snow blower or its operator. The ALJ responded by saying that Searight's testimony that he did not see the snow blower was "inherently incredible."\(^{537}\)

Searight claimed that the ALJ was personally biased because the ALJ overruled an objection based on hearsay, stating that "he was going to be 'up front' and apprise all at that point that he was disinclined to give much weight to that type of testimony."\(^{538}\) The court held that Searight's claim of prejudice was unsupported by the record and affirmed the NTSB's suspension order.

*New York v. Muhly*\(^ {539}\) held that provisions of the New York City Administrative Code,\(^ {540}\) which prohibited advertising by aircraft using tow banners, were not violated when a helicopter equipped with an illuminating sign overflew the city advertising a fast food chain. On July 5, 1986, a fast food chain used the defendant's company to conduct promotional flights. The helicopter was equipped with an illuminating sign installed below the fuselage and above the landing skids. The sign became a permanent part of the aircraft when installed thus requiring the defendants to obtain authorization from the FAA. The defendant obtained the necessary authorization but,

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\(^{537}\) *Searight*, 812 F.2d at 639. The findings of the ALJ can be summarized as follows: (1) Searight knew, or should have known, that the airport was closed at the time of takeoff, landing, and subsequent takeoff; (2) Searight took off on a runway where a snowblower was being operated; (3) testimony that Searight never saw the snowblower being operated was "inherently incredible"; and (4) Searight's conduct was reckless and endangered his passengers as well as the snowblower. *Id.*

\(^{538}\) *Id.* at 639-40.


\(^{540}\) N.Y. City Admin. Code § 435-16.0(d) (Consol. 1986).
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nonetheless, the helicopter was intercepted and forced to land, and the pilot was arrested.

The Administrative Code prohibited any person to advertise in the form of towing banners from aircraft. The defendant argued that the electric sign was "affixed" to the helicopter and did not constitute a "tow banner" within the meaning of the statute. The court stated that due process required a criminal statute to be stated in terms which were reasonably definite so that a person of ordinary intelligence would know what the law prohibits. The court found that a person of ordinary intelligence would not necessarily conclude that the defendant's electric sign constituted a "tow banner" within the meaning of the New York statute. Therefore, the defendant's motion to dismiss was granted.

In Roach v. NTSB, the NTSB suspended Roach's commercial pilot's certificate in a proceeding in which Roach was called as an adverse witness. Roach claimed that this violated his Fifth Amendment rights. The Tenth Circuit held that a certificate revocation proceeding before the NTSB was not a criminal or quasi-criminal proceeding. Therefore, the airman was not entitled to invoke his Fifth Amendment privilege against self-incrimination.

In Twomey v. NTSB, the First Circuit upheld the FAA's revocation of plaintiff's certificate. Plaintiff had backdated his application for renewal of his medical certificate. Twomey argued that backdating his application


541 Muhly, 3 Av. L. Rep. at 17,791.
542 Id.
543 804 F.2d 1147 (10th Cir. 1986) Roach, in the process of conducting a sales demonstration flight, made three passes over the runway at approximately 500 feet, including a roll-over. Id. at 1149. This conduct violated section 91.79(c) of the Federal Aviation Regulations, which prohibits operation of an aircraft at less than 500 feet from the surface or within 500 feet of structures on the surface. 14 C.F.R. § 91.79 (1988).
544 821 F.2d 63 (1st Cir. 1987). An FAA inspector discovered, on May 6, 1984, that Twomey's medical certificate had expired on April 30, 1984. Twoney proceeded to falsify a medical certificate, backdating one acquired on May 7, 1984, to appear as if it was issued on April 30, 1984. The administrator of the FAA learned of the falsification and subsequently revoked Twomey's medical, pilot, flight engineer and ground instructor certificates. Id. at 65-66.
was not falsification of a material fact.\textsuperscript{545} Relying on \textit{Cassis v. Helms},\textsuperscript{546} the court concluded the falsification was material because the falsification need only have a "natural tendency to influence, or be capable of influencing, a decision of the agency in making a required determination."\textsuperscript{547}

Twomey then argued that the FAA never established that he was flying as pilot-in-command.\textsuperscript{548} If Twomey had served in some lesser capacity, his existing medical certificate would have been valid. However, Twomey’s command status was confirmed because, on the date of the FAA inspection, he was scheduled to fly as the captain and pilot-in-command of Delta Flight 164 from Memphis to Atlanta.

Twomey finally contended that the revocation was arbitrary, capricious, and an abuse of discretion.\textsuperscript{549} Relying on \textit{Nevada Airlines, Inc. v. Bond},\textsuperscript{550} this court held that to challenge an FAA emergency determination, it must be shown "that the determination was a 'clear error of judgment' lacking any rational basis in fact."\textsuperscript{551} The court

\begin{footnotes}
\footnote{545}{14 C.F.R. § 67.20 (1988) refers to falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records. Subsection (a)(1) provides that "[n]o person may make or cause to be made . . . any fraudulent or intentionally false statement on any application for a medical certificate under this part . . .." \textit{Id.} Although it does not expressly require that a falsification be of "material fact," nevertheless it is undisputed that materiality is required. \textit{Twomey}, 821 F.2d at 66.}
\footnote{546}{737 F.2d 545, 547 (6th Cir. 1984). In this case a commercial pilot license was revoked on the ground that Cassis had intentionally made false, material statements in a pilot logbook. \textit{Id.} at 546. The court found the entries were material because they were capable of "influencing the ultimate decision" as to how many hours of flight experience the applicant actually had. \textit{Id.}}
\footnote{547}{\textit{Twomey}, 821 F.2d at 66.}
\footnote{548}{\textit{Id.} at 67. The FAA found that Twomey had violated section 61.3 of the Federal Aviation Regulations by acting as a required crewmember without an appropriate current medical certificate. \textit{Id.} Section 61.3(c) requires that a person acting as pilot in command or as a required flight crewmember must have in his personal possession an appropriate current medical certificate. 14 C.F.R. § 61.3(c) (1988).}
\footnote{549}{\textit{Twomey}, 821 F.2d at 68.}
\footnote{550}{622 F.2d 1017, 1021 (9th Cir. 1980).}
\footnote{551}{\textit{Twomey}, 821 F.2d at 68 (quoting Nevada Airlines, Inc. v. Bond, 622 F.2d 1017, 1021 (9th Cir. 1980)).}
\end{footnotes}
concluded that no clear error in judgment occurred, due to basis in the record which concluded
that such a material false statement indicates . . . the lack of the necessary degree of care, judgment, and responsibility that the holder of any type of airman certificate could have or should have to be certified accordingly as a pilot by the Federal Aviation Administration.\footnote{552}

In Peabody Coal Co. v. Missouri Tax Commission,\footnote{553} plaintiff operated two aircraft, primarily for transportation of its employees and property around the country. The aircraft were hangared in the St. Louis area and were there about 75\% of the time. Missouri tried to tax the aircraft at their full appraised value even though the aircraft had acquired a taxable situs in Indiana. One aircraft made 19.1\% of its landings in Indiana, and the other made 31.8\% of its landings there. Plaintiff claimed that to tax the aircraft at full value in Missouri was a denial of due process and a restraint upon interstate commerce.\footnote{554}

The court noted that the case appeared to be one of first impression, inasmuch as Peabody was not a regularly scheduled common carrier and the parties cited no cases involving the ad valorem taxation of aircraft not operated by a common carrier. However, the court found that Peabody's showing that the aircraft were flown often to Indiana was insufficient to require apportionment, and that apportionment would not be constitutionally required absent a showing of a "continuous presence" in another state sufficient to "supplant" the home state.\footnote{555}

\footnote{552} Id.
\footnote{553} 3 Av. L. Rep. (CCH) (20 Av. Cas.) 18,211 (Mo. June 16, 1987).
\footnote{554} Id. at 18,212. Plaintiff argued that to allow Missouri to tax the aircraft at their full value would burden interstate commerce under the Commerce Clause of the United States Constitution (art I, § 8, cl.3) and the Due Process Clause of the Fourteenth Amendment. Id.
\footnote{555} Id. at 18,213. The court wrote: "It has never been considered that apportionment is required simply because an item of personal property is not always in the same place." Id. The court indicated that the plaintiff has not met its burden of showing a continuous presence in Indiana. Id. Plaintiff used the two aircraft to travel to Indiana without any regularity and only in accordance with business requirements. Id. Compare Central R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962)
In *Sierra Club v. Lehman*, the Ninth Circuit held that the Secretary of the Navy did not exceed his authority by designating, without specific approval from the FAA, a supersonic operations area in air space over, and including, a previously designated military operations area, where the military operations area had received specific approval. The action arose from the Navy’s establishment of a Supersonic Operations Area (SOA) which would extend upward from a Military Operations Area (MOA) already approved by the FAA, into space designated as Air Traffic Control Assigned Airspace (ATCAA). The Sierra Club challenged the Secretary of the Navy’s authority to establish a SOA without the approval of the FAA.

The district court granted the government’s motion for summary judgment, on the basis that the SOA was within existing special use airspace and that the FAA did not regulate supersonic flight by military aircraft above 10,000 feet. The FAA referred to supersonic flight in its guidelines for special use airspace restrictions. When the military anticipated supersonic flight, the FAA required an environmental assessment to accompany the request for FAA approval. The Navy prepared such an

(holding that State of New Jersey could levy an apportioned ad valorem tax on interstate railroad carrier which operated under a habitual employment contract over the lines of the New Jersey railroads) and *Braniff Airways, Inc. v. Nebraska State B. of Equalization and Assessment*, 347 U.S. 590 (1954) (holding that Nebraska courts may levy an apportioned ad valorem tax on interstate air carrier which operates daily scheduling to and from points in Nebraska).

556 825 F.2d 1366 (9th Cir. 1987). The Sierra Club and the Nevada Outdoor Recreation Association brought this suit in an attempt to stop the Navy’s flying supersonic training flights over Nevada. *Id.* at 1368.

557 *Id.* at 1367. The FAA-approved MOA extended from 100 feet above ground level to 18,000 feet above mean sea level. The new SOA was to extend from 11,000 to 58,000 feet above mean sea level. The airspace from 18,000 to 60,000 feet above mean sea level is designated as ATCAA, and all flights there are FAA controlled. *Id.* The Secretary of the Navy did not seek specific FAA approval for the SOA designation. *Id.* at 1368.

558 *Id.*

559 *Id.* at 1369. The court refers to Part 7 of the FAA Handbook, which requires FAA approval for assignment, review, or modification of special use airspace. *Id.*

560 *Id.* The assessment is necessary to comply with the National Environmental
assessment in 1979 for the designation of one of the MOA's involved, and the FAA reviewed and approved the request. The extension of an SOA into airspace above MOAs did not constitute modification of existing special use airspace because it was within the boundaries of the existing MOAs and ATCAA already approved by the FAA. In the limited facts of this case, the SOA did not modify existing airspace designations.

After the Ninth Circuit's decision in Graham v. Teledyne-Continental Motors, plaintiff petitioned the Supreme Court to review and finally resolve the issue of whether the NTSB could conduct destructive testing.

In January, 1986, the Ninth Circuit enjoined destructive testing, pending a hearing on the merits. On December 17, 1986, the Ninth Circuit allowed a teardown, but Teledyne had already torn down the engines on December 15, in cooperation with the NTSB. The Ninth Circuit refused to hold the NTSB and Teledyne in contempt, holding that a contempt motion was moot. The Ninth Circuit instructed the district court to enter judgment in favor of Teledyne and NTSB, and declared that the injunction was no longer in effect. The Supreme Court denied plaintiff's application for recall and stay of mandate and injunction pending a petition for writ of certiorari.

In Miller v. Rich, the Ninth Circuit held that the NTSB's refusal to allow an aircraft owner to observe the


Lehman, 825 F.2d at 1370. Though admitting that supersonic flights would increase dramatically in the SOA, the court held the increased use was not a modification because the FAA had anticipated some supersonic use. Id.

805 F.2d 1386 (9th Cir. 1986), cert. denied, 108 S. Ct. 67 (1987). James Graham was the pilot of an aircraft that crashed in California in December, 1985, killing five persons and injuring others. His estate sought to have its representative "participate in, or at least observe" the teardown of the craft's engine. Id. at 1387.

teardown of his engine without providing any reason for its refusal constituted an abuse of discretion.

In Badhwar v. United States Department of the Air Force, the court upheld the privilege, first established in Machin v. Zuckert, for confidential statements made to military air crash safety investigators. The court further held that the comments and evaluations solicited from government contractors by government accident investigators were also privileged and were not disclosable under the Freedom of Information Act (FOIA). Finally, the court remanded to the district court for a determination of whether disclosure of portions of autopsies of the decedents might constitute a "clearly unwarranted invasion of personal privacy" and, therefore, be exempt from disclosure under the FOIA.64

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564 829 F.2d 182 (D.C. Cir. 1987). Badhwar is a consolidation of three cases in which journalists sought access to reports concerning military aircraft accidents from the Army, Navy, and Air Force. Id. at 183.

565 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963) (determining that, "when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program . . . the reports should be considered privileged.").

566 The Machin privilege distinguishes between disclosable and non-disclosable parts of a mishap report by whether the material sought was "obtained in large part through promises of confidentiality" or otherwise reflects official "deliberations or recommendations as to policies that should be pursued." Id.

567 Badhwar, 829 F.2d at 185. The court held that any revelations (including factual ones) that "would tend to compromise the promise of confidentiality" would undermine the Machin privilege. Id. The FOIA, exception 5, incorporates the Machin privilege protecting confidential statements made to military air crash safety investigators. Id. at 184; see also United States v. Weber Aircraft Corp., 465 U.S. 792 (1984).


568 Badhwar, 829 F.2d at 185-86. FOIA exception 6 reads as follows:

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . .

5 U.S.C. § 552(b) (1982). The court wrote: "Some autopsy reports, presumably, would not be of a kind that would shock the sensibilities of surviving kin. Others clearly would. Because the district court did not address an exemption 6 claim,
XIII. Negligence

Beck By Chain v. Thompson\textsuperscript{569} affirmed a lower court's ruling that a pilot was not negligent for failing to have an authorized emergency locator transmitter (ELT) on board, failing to file a flight plan, failing to request flight following, failing to activate his transponder, deviating from his planned flight course, failing to provide de-icing equipment, and failing to request updated weather information.\textsuperscript{570}

The action arose when a Piper Lance, conducting a cross-country flight between Jackson, Mississippi, and Van Nuys, California, crashed into Mt. Graham in Arizona. The failure to have an operable ELT on board delayed the rescue efforts, leading to the death of the plaintiff's mother. The plaintiff's mother survived the immediate crash but died of hypothermia.\textsuperscript{571} The district court found that the defendant was not negligent, because he had not violated a Federal Aviation Regulation and did not breach his duty to act as a reasonably prudent pilot under the circumstances.\textsuperscript{572}

The Fifth Circuit reviewed the district court's finding of no negligence under the clearly erroneous standard and affirmed. The appellate court agreed that the defendant failed to remove an unauthorized ELT in violation of a 1979 Airworthiness Directive (AD).\textsuperscript{573} However, this alone did not constitute negligence \textit{per se}, because the AD also authorized continued operation of aircraft without

\textsuperscript{569} 818 F.2d 1204 (5th Cir. 1987). \textit{Beck} was a wrongful death claim filed by the daughter of the sole passenger in pilot Thompson's attempted cross-country flight. \textit{Id.} at 1206.

\textsuperscript{570} \textit{Id.} at 1206.

\textsuperscript{571} \textit{Id.} at 1207. An ELT would have been activated immediately when the plane crashed, emitting a signal that could have aided rescuers in finding the crash site. \textit{Id.} at 1206. The wreckage was not found for six months. \textit{Id.} at 1207.

\textsuperscript{572} \textit{Id.} at 1209, 1212.

\textsuperscript{573} \textit{Id.} at 1209. Because ELTs with lithium sulphur dioxide batteries were suspected of not meeting federal safety standards, FAA Airworthiness Directives issued in 1979 required that such ELTs be removed from the aircraft. \textit{Id.}
The defendant was in violation of 14 C.F.R. § 91.52, which required placarding an aircraft not equipped with an authorized ELT. However, the appellate court was persuaded that the error was harmless because the placard was required to be placed in the view of the pilot and not the passenger. The court rejected plaintiff's common-law negligence claims under the clearly erroneous rule, thereby evoking a strong dissent.

In *Monger v. Cessna Aircraft Co.*, the Eighth Circuit addressed the issue of presumption of due care. It upheld the district court's ruling that the existence of some evidence precluded a jury instruction that the pilot was presumed to have undertaken a preflight check for water in the fuel. Here, that circumstantial evidence showed that the decedent pilot did not have a ladder with which to conduct a proper inspection of the aircraft's fuel supply or to check for water in the fuel. The court also held that, in a diversity case, state law applied concerning the presumption of due care, and that the trial judge had broad discretion to instruct the jury concerning the presumption of due care.

In addition, the court found the trial court properly admitted defendant's expert's testimony, even though he worked closely with NTSB. The expert's conclusions

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574 Id. Two of the 1979 Airworthiness Directives authorized operation of an aircraft without an operable ELT for a period until March 28, 1980. Id. The accident occurred on December 20, 1979. Id.

575 Id. at 1209-10. The placarding requirement states: "No person may operate the aircraft unless the aircraft records contain an entry which includes the date of initial removal, the make, model, serial number, and reason for removal of the transmitter, and a placard is located in view of the pilot to show 'ELT is not installed.'" 14 C.F.R. § 91.52 (f)(10)(i) (1987).

576 812 F.2d 402 (8th Cir. 1987). *Monger* involves a 1982 crash in Missouri in which the pilot and his wife were killed. The cause of the crash was in dispute: the deceased children claimed it was caused by undetectable water in the fuel system; Cessna claimed the pilot had run out of fuel. Id. at 404.

577 Id. at 405.

578 Id. The Court of Appeals noted that lack of a ladder was "direct and circumstantial evidence" of the pilot's negligence in operating the plane and was sufficient "contrary proof" to rebut any presumption of due care. Id.
were not barred by statute because the expert was not an NTSB employee.579 The court also upheld the district court’s refusal to admit into evidence a letter from the chief of the FAA’s Flight Standards Division criticizing Cessna for past failure to identify safety problems in its plane because it related to prior misconduct and would overly confuse the jury.580

In Ocasek v. Krass,581 the court held that the plaintiff failed to meet the requirements necessary to avail herself of the dual capacity doctrine,582 an exception to the exclusive remedy provision of the Worker’s Compensation Act.583 The action arose on January 16, 1980, when an aircraft crashed at Lake County Airport killing the pilot and his wife, who was also the pilot’s employee.

The dual capacity doctrine provides that an employer, normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if the employer occupies a second capacity that confers obligations independent of those imposed on him as employer. The plaintiff failed to demonstrate that the pilot had a legal persona separate from his role as employer and failed to establish that his obligations were unrelated to his capacity as employer.

In Schellinger v. Marschall, Preston & Associates, Inc.,584 a wrongful death and survivorship action, the Montana

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579 Id. at 408. The statute is section 304(c) of the Independent Safety Board Act of 1974. 49 U.S.C. § 1903(c) (1982).
580 Monger, 812 F.2d at 406.
582 Id. at 1260.
583 Id. at 1259. Under workers’ compensation jurisprudence, the statutory remedies normally serve as the employee’s exclusive remedy if he encounters injury on the job. Id. The dual capacity doctrine is an exception to this general rule. Id.; see ILL. ANN. STAT. ch. 48, para. 138.5 (Smith-Hurd 1986). Section 5(a) of the Act states in pertinent part:

No common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employer while employed in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is governed by the provisions of this Act.

Id.
584 733 P.2d 346 (Mont. 1987).
Supreme Court affirmed the trial court's grant of summary judgment in favor of a ground survey crew. In early May, 1981, Schellinger was picking up two members of a geological survey crew on a steep hillside, when the helicopter's rotors hit the hillside and caused the crash.

The plaintiffs attempted to raise the following issues of material fact: (1) whether the survey crew's contact with the helicopter prior to the crash caused the helicopter crash; (2) whether the survey crew's lack of training and experience contributed to the crash; (3) whether one of the survey crew members actually opened the door of the helicopter; and (4) whether the testimony of one of the survey crew members was credible. The court held that nothing in the record supported any of these contentions. Therefore, the plaintiffs failed to set forth specific facts showing that there was a genuine issue for trial.

In *Erickson Air-Crane Co. v. United Technologies Corp.*, the plaintiff's helicopter crashed when an engine compressor disk failed. The disk had been operated in excess of its FAA-approved time between overhaul (TBO), but the manufacturer had furnished a document which erroneously listed the life-limit as substantially longer. The defendant claimed that the plaintiff was contributorily negligent *per se* for failing to comply with the FARs that require the operator to maintain a record of the "current status of life-limited parts" and to ensure that the aircraft at all times conforms to the type certificate data. However, the court held that the aircraft operator could not be negligent *per se*, because the operator was not among the class of persons intended to be protected by the maintenance regulations and that economic injury arising from the loss of the helicopter was not the type of injury sought to be protected by the regulations.

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585 *Id.* at 347.
586 *Id.* The only eye witnesses to the accident were the defendants, from whom the plaintiff did not get any depositions or sworn statements. The record was absent of any summary judgment proof from the plaintiffs. *Id.* at 347-48.
588 *Id.* at 749; see 14 C.F.R. §§ 91.173(a)(2)(ii), 91.171(b) (1988).
In *Canada v. Blain's Helicopters, Inc.*, the Ninth Circuit reversed the granting of summary judgment in favor of Blain's Helicopter Sales and Service (BHS&S). On May 1, 1981, a helicopter owned by BHS&S crashed near Williston, North Dakota. The pilot of the aircraft, Canada, and all seven passengers were killed. Canada was an employee of BHS&S. The cause of the crash was engine failure attributed to improper fuel mixing. The district court granted BHS&S's motion for summary judgment because Canada had failed to verify the fuel invoices, which could show that BHS&S was responsible for improper fueling of the aircraft, and the court could not consider them in ruling on the summary judgment. Canada had also failed to produce evidence to prove that BHS&S was liable as lessor of the aircraft for failure to warn of a known danger.

Relying on Restatement § 407 and § 388 and related comments, the court concluded that BHS&S, as lessor, owed a duty to Canada as a foreseeable user of the helicopter, because the duty is owed to the entire class of persons whom the supplier expects to use the product.

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589 831 F.2d 920 (9th Cir. 1987).
590 *Id.* at 923. Restatement (Second) of Torts § 407 (1965) provides:
[a] lessor who leases a chattel for the use of others, knowing or having reason to know that it is or is likely to be dangerous for the purpose for which it is to be used, is subject to liability as a supplier of the chattel.

*Id.*
591 *Canada*, 831 F.2d at 923. Restatement (Second) of Torts § 388 (1965) provides:
One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

*Id.*
592 *Canada*, 831 F.2d at 923; see Restatement (Second) of Torts § 388 comments a, b. and c (1965).
BHS&S owed Canada a duty to warn him of any known danger which pertained to the operation of the helicopter and to advise him of all information about the character and condition of the helicopter which would be necessary for Canada to learn of the danger of using this helicopter. The court concluded that the evidence was sufficient to show that BHS&S breached its duty to Canada. 593

Doug Miller, another company pilot, testified that the president of the company represented that there was a letter on file from a major oil company which stated that the mixture of fuel met all the required specifications. If Miller’s testimony was believed, it would tend to show that the president affirmatively misled the pilots into believing the fuel was safe. The court concluded that BHS&S had raised a question of fact concerning the reasonableness of the president’s efforts to warn the pilots, and, therefore, summary judgment was not appropriate. The court also held that a court may not consider unauthenticated documents in opposition to a motion for summary judgment.

In Butcher v. Cessna Aircraft Co., 594 a Cessna 182 crashed at Gulf Park Airport in Ocean Springs, Mississippi. All of the passengers were killed. Plaintiffs alleged that the crash was caused by the negligence of the pilot and the owner and operator of the aircraft. The parties settled for $75,000 each. Subsequent to the settlement, another action was filed against Cessna Aircraft Company. This second action alleged that the crash occurred because the pilot’s seat slipped back on its tracks, rendering the pilot unable to maintain full control of the aircraft. The court stated that the plaintiffs were attempting to allege inconsistent facts which would necessarily deny the facts earlier plead and on which a settlement was obtained. It was the court’s opinion that either the accident occurred because

593 Canada, 831 F.2d at 924. The court refused to decide whether Montana law would recognize a duty of lessors to warn lessees of dangers discovered after delivery. Id.
of the pilot's and/or the operator's negligence or because the seat slipped back. The court also stated that although one may pursue joint tortfeasors separately, one may not pursue one party on one set of facts and, after obtaining a recovery based on those facts, assert a claim for the same damage against one who was not a party to the first action. The court held that because adequate discovery was had in the prior litigation, the decision to proceed without Cessna was irrevocable.

Memphis Aviation, Inc. v. Kershaw held that the seller of a used aircraft who negligently misrepresented airworthiness directive (AD) compliance to the buyer could not be sued for negligent misrepresentation. The buyer, who showed experience in aviation and expertise in ADs, and who had access to the logbooks, did not justifiably rely upon the representation. This was true even though the evidence showed that it was not customary for the buyer in such transactions to make an independent examination of AD compliance.

In Yocum v. Piper Aircraft Corp., the court held that the prior owner of an aircraft, who was not in the business of selling aircraft, owed no duty to warn subsequent purchasers of any defect in the aircraft.

XIV. Antitrust

In Association of Retail Travel Agents, Ltd. v. Air Transport Association of America, the court denied ATA's motion for summary judgment under the "rule of reason.

ATA is a joint venture consisting of 134 air carriers.

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595 Id. at 576. The court noted that "[t]o allege in the present actions negligence and/or strict liability in tort against Cessna is to deny the negligence earlier alleged and settled upon." Id.

596 3 Av. L. REP. (CCH) (20 Av. Cas.) 18,266 (Tenn. Jun. 19, 1987).

597 738 S.W.2d 145 (Mo. Ct. App. 1987).

598 3 Av. L. REP. (CCH) (20 Av. Cas.) 17,728 (D.D.C. Feb. 19, 1987).

599 The rule of reason provides that, under antitrust law, a court must engage in a complex inquiry to decide if a particular restraint, once found to exist, is unreasonable. The test is usually whether the restraint suppresses or destroys competition. See Association of Retail Travel Agents, Ltd. v. Air Transport Ass'n of America, 623 F. Supp. 893, 898 (D.D.C. 1985).
ATA's members control nearly 100% of the market for air transportation and carrier-purchased travel agent services. ATA required all accredited agents to report and remit payments on a uniform schedule. Agents who failed to do so were subject to termination. The effect of these requirements was to restrict competition in respect to the time during which carriers and agents have the use of ticket proceeds. The court held, following *Catalano, Inc. v. Target Sales, Inc.*,\(^6\) that a restriction on credit terms was an unlawful restriction on price competition.

ATA further required each agent to post a bond or letter of credit. Failure to do so was grounds for termination of the agent-carrier relationship. The court ruled that this practice had no pro-competitive effects which, on balance, justified the restraint on competition. An additional requirement imposed by ATA required an agent who purchased another travel agency accredited by ATA to assume the obligations of its predecessor. The court held that this practice was not materially different from that struck down in *United States v. First National Pictures, Inc.*\(^6\)

ATA argued that these restrictions permitted important efficiencies, but ATA offered no showing that increasing the number of participants in the market had the effect of increasing competition in the market. The court stated that the purpose of the antitrust laws was not to protect efficiencies but to protect competition.

The First Circuit in *Interface Group, Inc. v. Massachusetts Port Authority*\(^6\) held that a practice of the Massachusetts Port Authority to require non-tenant airlines to have their planes serviced exclusively by the airport's fixed base operator did not constitute an unreasonable exclusive dealing arrangement. The Interface Group, in planning its charter service operation, agreed with TWA to use TWA's

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\(^6\) 446 U.S. 643 (1980) (holding that "an agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is 'plainly anticompetitive.' ").

\(^6\) 282 U.S. 44 (1930) (holding arrangement between motion picture distributors in conflict with the Sherman Act).

\(^6\) 816 F.2d 9 (1st Cir. 1987).
ground services available at a terminal at Logan Airport. The Port Authority refused to allow Interface Group to operate out of the terminal because it required all non-tenant charter carriers to operate out of a different terminal. Interface Group contended this was in violation of the federal antitrust laws.\footnote{Interface alleged that the Port's refusal was a violation of section 1 of the Sherman Act. \textit{Id.} at 10. Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal . . ." 15 U.S.C. § 1 (1982).}

Interface Group had to show that the anticompetitive consequences of the terminal requirement outweighed the Port Authority's legitimate business purposes. However, the complaint was insufficient because Interface Group did not claim that the policy made it easier for the Port Authority to abuse its market power.\footnote{Interface Group, 816 F.2d at 11.} The court stated that the Port was a public, rather than a private, entity. The Port did not directly profit from its ownership of Logan Airport. Under \textit{Parker v. Brown},\footnote{317 U.S. 341 (1943). \textit{Parker} held that antitrust laws are not applicable to state actions. \textit{Id.} at 350-52.} the Port Authority was, therefore, immune from antitrust liability because antitrust laws did not reach restraints of trade imposed by the state.\footnote{Interface Group, 816 F.2d at 12-13.} The court held that the complaint was properly dismissed.

Interface also alleged that the Port violated the Federal Aviation Act, 49 U.S.C. §§ 1349(a), 1513, and 2210.\footnote{\textit{Id.} at 10. Section 1349(a) involves the use of federal funds in airports and air navigation facilities and provides, in part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended." 49 U.S.C. § 1349(a) (1982). Section 1513 involves the prohibition of state taxation of air commerce. 49 U.S.C. § 1513 (1982). Section 2210 involves airport development projects, a condition precedent of which is non-discriminatory rates, fees, rentals, and other changes as well as rules, regulations, and conditions applicable to all carriers. 49 U.S.C. § 2210(a)(1)(A) (1982).} The court held that sections 1349(a) and 2210 did not create a private right of action.\footnote{Interface Group, 816 F.2d at 14-15.} The court concluded
that Congress did, however, intend to create a private right of action in 49 U.S.C. § 1513.609

XV. DEBTOR-CREDITOR

A. Bankruptcy

In In re Jet Florida System, Inc.,610 the court held that certain payments made to the Airlines Clearing House (ACH) did not constitute preferential payments recoverable from ACH under statutory bankruptcy provisions.611 ACH is an organization that facilitates the interline settlement of accounts between air carriers. In May and June of 1984, Jet Florida was an associate member of ACH. The funds paid to settle the accounts of Jet Florida, then known as Air Florida, did not inure to the benefit of ACH. If a carrier did not meet its obligation, ACH's only recourse was to suspend the carrier.

The court held that ACH was not an initial transferee under section 550 of the Bankruptcy Code.612 ACH was a mutual agent, a "mere conduit", employed by the carriers to effectuate settlement and was not liable for payments made by a debtor carrier to satisfy its obligations to other carriers.613

In Re Arrow Air, Inc.,614 a bankruptcy proceeding, involved a claim by a representative of a class of consumers who had purchased a European vacation tour package from a tour operator. The court held that the representative was not entitled to an order certifying the class claim, permitting the filing of a previously filed proof of claim,

609 Id. at 15-16.
611 Id. at 84. The trustee alleges that the payments were preferences under section 547 of the Bankruptcy Code. 11 U.S.C. § 547 (1982).
612 In re Jet Fla. Sys., 69 Bankr. at 84. Section 550 covers the liability of a transferee of a fraudulent transfer or preferential transfer. 11 U.S.C. § 550 (1982). Section 550(a) provides that the trustee may recover the value of property transferred from "the initial transferee of such transfer or the entity for whose benefit such transfer was made . . . ." Id. § 550(a).
613 In re Jet Fla. Sys., 69 Bankr. at 85.
and determining the non-dischargeability and priority of the claim. Overwhelming case authority established that class proofs of claim were not permissible in bankruptcy proceedings.

B. FAA Recordation

Aircraft Trading and Services, Inc. v. Braniff, Inc., held that the seller of an aircraft engine, who failed to record the chattel mortgage securing the payment of the purchase price, did not lose its security interest upon the subsequent sale of the engine. However, three years later, when the seller finally did perfect its interest with the FAA, the seller's security interest became subject to state priority rules, and thus, subordinate to those of two intervening buyers.

Aircraft Trading and Services, Inc. (ATASCO) sold a jet aircraft engine subject to a chattel mortgage that secured the purchase price payment to Northeastern Airlines. ATASCO failed to record the chattel mortgage with the FAA, as required for perfection of its security interest. Meanwhile, the engine was sold to Braniff, which in turn sold it to another buyer, Condren. Condren then leased the engine, with an option to purchase, to International Air Leases, Inc. (IAL). In March of 1985, ATASCO finally recorded the chattel mortgage with the FAA. In July, 1985, IAL, with notice of the chattel mortgage, exercised its option to buy the engine. ATASCO brought suit for conversion, replevin, and forfeiture against all of the parties involved in the transaction.

Relying on Philko Aviation, Inc. v. Shacket, the Second Circuit stated that state law determines priority, but all interests must be federally recorded before they can obtain the priority to which they are entitled. Although Braniff and Condren had filed with the FAA prior to ATASCO's filing, ATASCO did finally perfect its interest. Therefore,

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615 3 Av. L. Rep. at 18,063.
state law determined the priority of the interests.\textsuperscript{618}

In this case, New York's Uniform Commercial Code, Article 9 applied. Section 9-307(1) provided:

\begin{quote}
A buyer in ordinary course of business \ldots takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.\textsuperscript{619}
\end{quote}

The engine was found to be capital equipment rather than inventory. Braniff was not a buyer in ordinary course of business when it purchased capital goods. Therefore, the court held that the sale to Braniff was not in the ordinary course of business and section 9-307(1) did not extinguish ATASCO's security interest. Condren and IAL did not attempt to establish that they were buyers in the ordinary course of business.

To determine the priority between ATASCO, Braniff, and Condren, the court relied on section 9-301(1), which stated that an unperfected security interest is subordinate to the rights of a buyer not in the ordinary course of business, if the collateral is received without knowledge of the security interest and before the security interest is perfected. Both Condren and Braniff bought without knowledge of ATASCO's security interest and before it was perfected. Therefore, the court held, as buyers not in the ordinary course of business, their respective rights to the engine were superior to ATASCO's.

Finally, the court addressed the priority between ATASCO and IAL, who had competing perfected interests in the engine. Section 9-312(5)(a) governs conflicts between competing perfected interests.\textsuperscript{620} Relying on this section, the court held that the first to file with the FAA ranked first in priority. ATASCO filed in March, 1985 and IAL filed in August, 1985. Therefore, ATASCO had priority over IAL.

\textsuperscript{618} Aircraft Trading, 819 F.2d at 1232.
\textsuperscript{620} Id. § 9-312(5)(a) (McKinney Supp. 1987); Aircraft Trading, 819 F.2d at 1236.
Shacket v. Roger Smith Aircraft Sales, Inc., a case on remand from the United States Supreme Court, resolved a priority dispute between subsequent purchasers of an aircraft. The first purchaser failed to record its interest with the FAA, but attempted to do so by leaving the bill of sale with the aircraft dealer to have it recorded and making several phone calls to check on the progress of the recording. The second purchaser was deemed to have acquired the aircraft with actual notice of the first purchase. It paid “grossly inadequate” consideration for the purchase of the aircraft, because it knew of problems concerning ownership of the aircraft at the time it sought to record its own interest. Therefore, the first purchaser was entitled to priority, despite failing to record the security interest.

In Compass Insurance Co. v. Moore, an aircraft priority dispute between a judgment creditor and an antecedent purchaser, the appellate court reversed the district court and accorded priority to the antecedent purchaser. In December, 1981, Compass obtained a judgment in the amount of $111,088. On June 8, 1982, the FAA recorded Compass’ interest on the FAA register. In November 1979, the aircraft was sold to Mid-South Aircraft Sales, which in turn sold the aircraft to H.P. Moore in May, 1981. These sales were not recorded with the FAA until June 30, 1983. The district court entered summary judgment in favor of Compass because Compass perfected its lien prior to Moore’s perfection of its purchase of the aircraft.

The Eighth Circuit reversed the district court’s holding, because the judgment lien obtained by Compass could not attach to property which was no longer owned by, or in the possession of, the judgment debtor and was no

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621 651 F. Supp. 675 (N.D. Ill. 1986), aff’d, 841 F.2d 166 (7th Cir. 1988).
622 Shacket, 462 U.S. at 406.
624 806 F.2d 796 (8th Cir. 1986).
longer in the jurisdiction of the Florida state court. The court justified its decision by stating that this result did not frustrate the purpose of the Federal Aviation Act, because a judgment creditor is not the kind of innocent party who engages in transactions in reliance on the FAA registry.

XVI. MISREPRESENTATION

In Crigler v. Cessna Aircraft Co., the plaintiff purchased a 1977 Cessna 172 Skyhawk with a 0-320-H2AD engine in 1979. On February 8, 1980, the FAA issued an airworthiness directive (AD) which set forth immediate and recurring maintenance procedures in response to problems with bent pushrods and spalling hydraulic valve tappets in the 0-320-H2AD engine. In August 1980, the plaintiff traded in his 1977 Skyhawk for a new 1980 Skyhawk. The dealer who sold the plaintiff the new Skyhawk offered only $18,000 for the 1977 Skyhawk trade-in because it had "a bad engine." Nevertheless, the plaintiff went ahead with the trade-in after the dealer informed the plaintiff that the 1980 model had "a completely different engine." The service manager informed the plaintiff that the engine problem had been solved. More than five years and 480 flight hours later, the 1980 Skyhawk's engine failed and had to be replaced.

The plaintiff brought suit, alleging Cessna Aircraft Company and Avco-Lycoming conspired to defraud him. The district court granted summary judgment to the defendants concluding that the AD put the plaintiff on legal notice of the engine problem. Therefore, the plaintiff

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626 Compass Ins. Co. v. Moore, 806 F.2d at 799.
627 Id.
628 830 F.2d 169 (11th Cir. 1987).
630 Crigler, 830 F.2d at 170 n.4. The plaintiff testified that he never asked why the engine was "bad." Id.
631 Id.
could not prove that he justifiably relied on any misrepresentation.

The court of appeals affirmed. Airworthiness directives\textsuperscript{632} are published in the Federal Register. Publication acts as legal notice to owners and operators.\textsuperscript{633} The court concluded that the AD was sufficient to put the plaintiff on notice that such engines were susceptible to stalling.\textsuperscript{634}

**XVII. Choice of Law**

In *Emmart v. Piper Aircraft Corp.*,\textsuperscript{635} the court held that Indiana law applied to the case of a plane crash occurring in Indiana in which three Indiana residents, employed by a Piper distributor, were killed. Plaintiffs sued in Florida and sought to gain the benefit of Florida’s more liberal punitive damages law, on the ground that Piper’s principal place of business was in Florida.

Relying on the Restatement of Conflicts §§ 145 and 146,\textsuperscript{636} the court determined that Indiana had more significant relationships to the issues presented. The crash in Indiana was not a fortuitous event, because the decedents were all residents of Indiana, the aircraft was hangered in Indiana for use by the Piper distributor, and the aircraft was carrying employees of the distributor at the time of the crash. The only contact with Florida was that the defendant had its principal place of business there.

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\textsuperscript{632} See supra note 628.


\textsuperscript{634} Crigler, 830 F.2d at 172.

\textsuperscript{635} 659 F. Supp. 843 (S.D. Fla. 1987).

\textsuperscript{636} Restatement (Second) of Conflict of Laws §§ 145-46 (1971).