Recent Cases and Developments in Aviation Law

James F. Stiven

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# RECENT CASES AND DEVELOPMENTS IN AVIATION LAW

**James F. Stiven**

## TABLE OF CONTENTS

I. **JURISDICTION** ................................... 2  
   A. In Personam Jurisdiction ............................. 2  
   B. Foreign Sovereign Immunities Act .................. 5  
   C. Forum Non Conveniens .............................. 7  

II. **PRODUCT LIABILITY** ............................. 9  
   A. Admiralty ........................................... 9  
   B. Government Contractor Defense .................... 10  
   C. Proof of Defect .................................... 15  
   D. Evidence ........................................... 21  
   E. NTSB Accident Investigation ....................... 27  
   F. Statute of Repose .................................. 28  

III. **FEDERAL TORT CLAIMS ACT** .................... 29  
   A. Feres Doctrine ..................................... 29  
   B. Air Traffic Control ................................ 31  
   C. Discretionary Function ............................. 35  
   D. Statute of Limitations ............................. 38  

IV. **CONTRIBUTION AND INDEMNITY** ............... 39  

V. **AIRPORTS** ....................................... 41  
   A. Premises Liability ................................... 41  
   B. Preemption ......................................... 42  
   C. Jurisdiction ........................................ 44  
   D. Equal Protection .................................... 45  
   E. Free Speech ........................................ 47

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. Landing and Terminal Rental Fees</td>
<td>49</td>
</tr>
<tr>
<td>G. Noise Abatement</td>
<td>51</td>
</tr>
<tr>
<td>H. Auto Concessions</td>
<td>53</td>
</tr>
<tr>
<td>VI. WARSAW CONVENTION</td>
<td>58</td>
</tr>
<tr>
<td>A. Jurisdiction</td>
<td>58</td>
</tr>
<tr>
<td>B. Injuries and Events Within the Scope of</td>
<td></td>
</tr>
<tr>
<td>the Warsaw Convention</td>
<td>63</td>
</tr>
<tr>
<td>C. Cargo and Passenger Baggage Claims</td>
<td>66</td>
</tr>
<tr>
<td>1. Claims Under the Warsaw Convention</td>
<td>66</td>
</tr>
<tr>
<td>2. Non-Warsaw Convention Baggage Claims</td>
<td>70</td>
</tr>
<tr>
<td>D. Statute of Limitations</td>
<td>74</td>
</tr>
<tr>
<td>E. Damages</td>
<td>76</td>
</tr>
<tr>
<td>F. Miscellaneous</td>
<td>80</td>
</tr>
<tr>
<td>VII. LIMITATIONS OF ACTIONS</td>
<td>83</td>
</tr>
<tr>
<td>A. Statute of Repose</td>
<td>83</td>
</tr>
<tr>
<td>B. Tolling</td>
<td>84</td>
</tr>
<tr>
<td>VIII. INSURANCE COVERAGE</td>
<td>85</td>
</tr>
<tr>
<td>A. Pilot Qualifications</td>
<td>85</td>
</tr>
<tr>
<td>B. Renter Pilots</td>
<td>92</td>
</tr>
<tr>
<td>C. Miscellaneous Coverage Cases</td>
<td>95</td>
</tr>
<tr>
<td>IX. FAA ENFORCEMENT/LOCAL REGULATIONS</td>
<td>101</td>
</tr>
<tr>
<td>ADMINISTRATIVE LAW</td>
<td></td>
</tr>
<tr>
<td>X. NEGLIGENCE</td>
<td>107</td>
</tr>
<tr>
<td>XI. ANTITRUST</td>
<td>115</td>
</tr>
<tr>
<td>XII. MISCELLANEOUS</td>
<td>118</td>
</tr>
</tbody>
</table>

### I. Jurisdiction

#### A. In Personam Jurisdiction

In *Dejong v. Bell Helicopter Textron*, the defendant manufactured and processed a tail rotor yoke assembly for helicopters. The defendant did not maintain a business office within the State of Missouri, nor did it have a registered agent or agent of any kind within the state.

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1. 20 Av. Cas. (CCH) ¶ 18,382 (W.D. Mo. 1987).
The defendant further alleged that it did not conduct business in the State of Missouri. The United States District Court for the Western District of Missouri explained that a federal diversity court, in deciding a motion to dismiss an action for lack of personal jurisdiction over a non-resident, is required to engage in a two-step analysis: first, whether the defendant committed one of the acts enumerated in the state's long-arm statute; and second, whether the exercise of personal jurisdiction over the defendant would violate the due process clause of the Fourteenth Amendment. The court noted, however, that in deciding a motion for dismissal the facts were to be viewed in the light most favorable to the plaintiffs, who were only required to show a prima facie case of jurisdiction.

In considering the first step of the analysis, the court noted that the plaintiff had claimed that the defendant was involved in the manufacture of the allegedly defective tail rotor yoke assembly, and that the crash had occurred in Missouri. Therefore, the plaintiffs had alleged a prima facie tort which resulted in an injury in the Missouri forum, and the Missouri long-arm statute was satisfied.

In determining whether the exercise of personal jurisdiction over the defendant in this case violated the Fourteenth Amendment, the court examined the criteria set forth by the United States Supreme Court in the International Shoe and World-Wide Volkswagen cases. The court examined the relationship among the defendants, the forum, and the litigation and held that the defendants' con-

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2 Id.
3 Id.
4 Id. at ¶ 18,383.
5 Id. The Missouri long-arm statute provided for jurisdiction over persons committing any tortious acts within the state of Missouri. Mo. Rev. Stat. § 506.500 (1)(3) (1971).
6 International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that due process requires a personal jurisdiction analysis based on the defendant’s “minimum contacts” with the state).
7 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (emphasizing fairness and the foreseeability of the defendant being subject to suit in the jurisdiction as factors in the “minimum contacts” test for personal jurisdiction).
tact with the forum state was purposeful. Consequently, they should have reasonably anticipated being hailed into court there. Therefore, the requirements for due process were satisfied, and the court had personal jurisdiction over the defendants.

In Insurance Company of North America v. Judge, the United States District Court for the District of Minnesota held that the owners of a Piper Cherokee Archer single engine aircraft, although residents of Illinois, had the requisite minimum contacts with Minnesota to be subject to personal jurisdiction in that forum. The defendants had entered into a sale and leaseback arrangement with an Illinois flying service that agreed to rent their plane to third parties. Although the flying service had total control over who the plane was rented to, the court held that the defendants were subject to the personal jurisdiction of a Minnesota court, where the accident occurred.

Under Minnesota law, the pilot of an aircraft is deemed to be an agent of the owner, and the owner is vicariously liable for injury or damage caused by the negligent operation of the aircraft. The court cited a five factor analysis of minimum contacts used in the Eighth Circuit: (1) the quantity of the defendant's contacts with the forum state; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. The court explained that while the mere foreseeability that a

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8 Djeng, 20 Av. Cas. at ¶ 18,383.
9 20 Av. Cas. (CCH) ¶ 18,594 (D. Minn. 1987).
10 Id. at ¶ 18,598.
11 Id. at ¶ 18,594.
12 Minn. Stat. § 360.0216 (1989). The Statute states:
   When an aircraft is operated within the airspace above this state or upon the ground surface or waters of this state by a person other than the owner, with the consent of the owner, express or implied, the operator shall in case of accident be deemed the agent of the owner of the aircraft in its operation.

Id.
13 Judge, 20 Av. Cas. at ¶ 18,597. The court stated that the first three factors were of primary significance. Id.
product would cause injury in another state was not a sufficient benchmark for personal jurisdiction under the due process clause, foreseeability was a relevant factor, particularly where a defendant either directly or indirectly served the market in the state by delivering its product into the state's stream of commerce. The court therefore focused its inquiry on whether the defendants could be deemed to be serving, directly or indirectly, the market of other states as a result of their leasing a plane which was rented out to third parties.

The court held that the defendants purposefully served the market for interstate travel by leasing an airplane to third parties on an ongoing basis without placing any geographical restrictions on its use. They received continuing financial benefit from the leasing and did not simultaneously relinquish their ownership of the airplane at the time they introduced it into the stream of commerce. Finally, the court distinguished this case from cases where automobile owners gave their casual permission for a third party to use their automobile out-of-state by noting that the defendants made a conscious business decision to lease their plane to third parties on a continuing basis.

B. Foreign Sovereign Immunities Act

In *Muwelled v. Lufthansa German Airlines*, the United States District Court for the Eastern District of New York held that an airline which refused to honor a ticket purchased in the United States for a passenger in a foreign country when it was presented to the airline's personnel in that foreign country was not entitled to immunity under the Foreign Sovereign Immunities Act.

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14 Id. at ¶ 18,597-98 (citing dicta from *World-Wide Volkswagen*, 444 U.S. at 295).
15 Id. at ¶ 18,598.
16 Id.
17 20 Av. Cas. (CCH) ¶ 18,472 (E.D.N.Y. 1987).
18 28 U.S.C. §§ 1602-1611 (1982). This Act generally provides foreign states with immunity from the jurisdiction of United States' courts. Id. § 1604. The Act defines a foreign state as the following:
The plaintiff was an American citizen who alleged that a friend purchased an airline ticket for him from a travel agency in New York so he could return home from Yemen. When he presented the ticket to the airline personnel in Addis Adaba, the airline personnel believed that the ticket was black-listed, confiscated it, and refused to either reimburse him or replace the ticket. The plaintiff brought an action in federal court in New York for false imprisonment, conversion and breach of contract.

The court began by noting that the airline had the burden of establishing that it was entitled to sovereign immunity by demonstrating that it did not fall within one of the statutory exceptions specified in the Foreign Sovereign Immunities Act. Section 1605(a)(2) of the Act specifies that a foreign state shall not be immune from the jurisdiction of either the United States courts or the courts of individual states when an action is based upon a commercial activity carried on in the United States by the foreign state. The court noted that the circuit courts have interpreted the provisions pertaining to "commercial activity" to mean that immunity will not be available when there is a

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(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "agency or instrumentality of a foreign state" means any entity — (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.

Id. § 1603.

19 Muwelled, 20 Av. Cas. at ¶ 18,473.
20 Id.
21 28 U.S.C. § 1605(a)(2) (1982). The Act provides that foreign states will not be immune from a United States' federal or state court in any case 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 United States[]

Id.
nexus between the defendant's commercial activity in the United States and the cause of action.  
In this case, the plaintiff alleged that the travel agency in New York was acting as the airline's agent. The court held that the plaintiff's claims arose solely because the ticket was allegedly sold in the United States, and the cause of action therefore bore a sufficient nexus to the airline's commercial activity in the United States. While the airline was denied protection under the sovereign immunity doctrine, the court acknowledged that if the plaintiff had never entered into a contract with the airline, the airline would be immune from suit and dismissal would be appropriate.

C. Forum Non Conveniens

In *Diaz v. Mexicana de Avion*, the United States District Court for the Western District of Texas dismissed a lawsuit arising out of an air crash in Mexico since the federal court was not the appropriate forum to entertain the dispute, even though it had jurisdiction to do so. The lawsuit arose out of the crash of Mexicana Airlines flight 940 on March 31, 1986, in the mountains west of Mexico City, Mexico. Boeing, a codefendant in the action, was successful in convincing the court that an adequate and available alternative forum for resolution of the dispute existed in Mexico, even though the plaintiffs claimed that trial there would be delayed for years and that it would be difficult to obtain jurisdiction over Boeing in Mexico. Boeing agreed that the court could condition its dismissal on Boeing's agreement to submit to the jurisdiction of the Mexican courts.

Applying Texas conflict of laws principles, the court

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22 *Muwelled*, 20 Av. Cas. at ¶ 18,473.
23 *Id.* at ¶ 18,474.
24 *Id.*
25 20 Av. Cas. (CCH) ¶ 17,983 (W.D. Tex. 1987).
26 *Id.*
27 *Id.*
found that the forum with the most significant relationship to both the event and the parties was Mexico. The crash occurred in Mexico, the domicile and residence of the original plaintiffs were in Mexico, and Mexicana had its principal place of business in Mexico. All the plaintiffs’ decedents purchased their tickets in Mexico City. The court noted that, as to the products liability claim in the case, the conduct causing the injury occurred in the United States where the plane was designed and manufactured. Any acts of negligence in the inspection of the plane by Mexicana occurred in Mexico, however, subsequent to any negligence in the inspection of the plane in the United States. The court held, therefore, that even if Mexican law was less favorable, it was not so clearly inadequate or unsatisfactory that it would constitute no remedy at all.29

Having determined that an adequate and available forum existed, the court then proceeded to balance the public and private interests involved. The court explained that, although the usual rule was that unless the balance of these factors was strongly in favor of the defendant the plaintiffs’ choice of forum would rarely be disturbed, the presumption applied with less force when the plaintiffs were foreign.30 Since access to the sources of proof were more readily available in Mexico where the investigation of the crash was being conducted by a Mexican government agency, most of the proof regarding liability existed in Mexico. In addition, the plaintiffs were Mexican residents and citizens, and proof of damages was located in Mexico as well. Explaining that there was no nexus to the Texas forum, other than the fact that Mexicana did business in Texas and the plaintiffs’ attorneys had their offices there, the court then dismissed the action.31 A writ of cer-

28 Id.
29 Id. The court stated that “the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry.” Id.
30 Id. at ¶ 17,984 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)).
31 Id. at ¶ 17,985.
torari was denied by the United States Supreme Court. 32

II. PRODUCT LIABILITY

A. Admiralty

In Friedman v. Mitsubishi Aircraft International, 33 the plaintiff instituted a wrongful death action in the United States District Court for the Southern District of New York under the Death On the High Seas Act (DOHSA), 34 arising from a plane crash on the high seas. The plaintiff brought a motion to reaffirm her right to proceed to trial on the basis of diversity jurisdiction and to affirm her right to trial by jury nearly a year after the court had granted the defendants’ motion to strike the plaintiff’s jury demand. 35 The plaintiff argued that the two-prong test set forth by the United States Supreme Court in Executive Jet Aviation v. City of Cleveland 36 must be met before the provisions of DOHSA can be applied so as to deprive a plaintiff of a jury trial.

The Executive Jet test requires that for admiralty jurisdiction to exist, the court must first find that the accident in question occurred on the high seas, and secondly that such action bears a significant connection to traditional maritime activity. 37 The court explained that this two-

Whenever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

Id. § 761.
35 Friedman, 678 F. Supp. at 1064.
37 Id. at 268. The Supreme Court concluded that The mere fact that the alleged wrong “occurs” or “is located” on or over navigable waters — whatever that means in an aviation context — is not of itself sufficient to turn an airplane negligence case into a
prong test only applies in the absence of a statute to the contrary, however, and the Supreme Court had explicitly stated that DOHSA was such a statute. Therefore, the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction pursuant to DOHSA. The court further held that DOHSA is the exclusive remedy where death results from a plane crash on the high seas, and that substantive state wrongful death remedies are preempted outside the territorial waters of a state. Consequently, the court denied the plaintiff’s motion, holding that she had no right to a jury trial.

B. Government Contractor Defense

The Supreme Court issued a landmark decision in Boyle v. United Technologies Corporation, on June 27, 1988. The decision was a 5-4 split with Justice Scalia writing the majority opinion. The issue was whether a contractor supplying military equipment to the federal government could be held liable under state tort law for injuries caused by defectively designed equipment. In Boyle, the plaintiffs’ decedent, a United States Marine helicopter copilot, was killed when the helicopter he was flying crashed into the ocean during a training exercise. The decedent survived the impact of the crash, but he was unable to es-

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"maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Id.; see also Friedman, 678 F. Supp. at 1065.

38 Friedman, 678 F. Supp. at 1065.

39 Id.

40 Id. at 1066.

41 108 S. Ct. 2510 [hereinafter Boyle I], cert. denied, 109 S. Ct. 559 (1988); see infra note 47 for Boyle I citation.

42 Id. at 2512. Justices Rehnquist, White, O’Connor, and Kennedy joined Justice Scalia’s majority opinion. Id. Justice Brennan filed a dissenting opinion in which Justices Marshall and Blackmun joined, while Justice Stevens filed a separate dissenting opinion. Id.

43 Id. at 2513.
cape from the helicopter and drowned. The decedent's father brought suit against the Sikorsky Division of United Technologies Corporation, the company which built the helicopter for the United States, alleging that Sikorsky's defective repair of the helicopter caused the crash. The plaintiff also alleged that Sikorsky had defectively designed the co-pilot's emergency escape system. Since the escape hatch opened outward instead of inward, the decedent was unable to escape from the submerged craft because of water pressure. The plaintiff further alleged that other equipment obstructed access to the escape hatch handle.

The jury returned a general verdict for $725,000 in favor of the plaintiff but the Fourth Circuit Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. The appellate court held that the plaintiff had failed to meet his burden of demonstrating that the repair work responsible for the alleged malfunction of the flight control system was performed by Sikorsky, rather than the Navy. The court also concluded, as a matter of federal law, that Sikorsky had satisfied the requirements of the "military contractor defense," and therefore could not be held liable for the allegedly defective design of the escape hatch.

The plaintiff sought review by the United States Supreme Court, challenging the Fourth Circuit's decision on three grounds. First, Boyle contended that no justification exists under federal law for shielding government contractors from liability for design defects in military equipment. In the alternative, he argued that even if the

\[\text{Id.}\]

\[\text{Id.}\] The plaintiff claimed that "Sikorsky had defectively repaired a device called the servo in the helicopter's automatic flight control system, which allegedly malfunctioned and caused the crash." \text{Id.}

\[\text{Id.}\] Boyle v. United Technologies Corp., 792 F.2d 413, 415-16 (4th Cir. 1986) [hereinafter Boyle I]; see supra note 41 for Boyle II citation.

\[\text{Id.}\] at 414-15. The Fourth Circuit had recognized the "military contractor defense" that same day in Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986).
military contractor defense should exist, the court of appeals inappropriately formulated the conditions for its application. Third, Boyle contended that the court of appeals erred in failing to remand the case for a jury determination of whether the elements of the defense were met.49

The Supreme Court disagreed with the plaintiff’s contention that specific legislation immunizing government contractors from liability for design defects was necessary for judicial recognition of such a defense.50 The Court noted that two areas of law involving uniquely federal interests were concerned. First, obligations to and rights of the United States under its contracts are governed exclusively by federal law. Second, civil liability of federal officials for actions taken in the course of their duties is a peculiarly federal concern warranting the displacement of state law.51

With respect to the first area, the Court found that the Boyle case did not involve a contractual obligation to the United States, but rather liability to third persons. While that liability may have been styled in tort, it essentially arose out of the performance of the contract. With respect to the second area, the Court acknowledged that the Boyle case involved the performance of an independent contractor’s obligation under a procurement contract, rather than a federal employee’s performance of his duties, but noted that both are intended to get the government’s work done.52 The Court explained that the United States has an interest in whether liability is imposed on government contractors since the imposition of such liability might cause the contractor either to decline to man-

49 Boyle II, 108 S. Ct. at 2513.
50 Id. The Court acknowledged that it has usually failed to recognize federal preemption of state law absent either clear statutory authority or a direct conflict between federal and state law. Id.
51 Id. at 2514.
52 Id. at 2515. The Court held that “it is plain that the Federal Government’s interest in the procurement of equipment is implicated by suits such as the present one — even though the dispute is one between private parties.” Id.
ufacture the design specified by the government or to raise its price.\textsuperscript{53}

The fact that the procurement of equipment by the United States was an area of uniquely federal interest merely established a necessary, but not sufficient, condition for the displacement of state law.\textsuperscript{54} Displacement requires either that a significant conflict exist between an identifiable federal policy and operative state law, or that the application of state law would frustrate specific objectives of federal law.\textsuperscript{55} In Boyle, the state-imposed duty of care asserted as the basis of the contractor’s liability was contrary to the duty imposed under the government contract.\textsuperscript{56} The Court nevertheless recognized that this situation does not always result in a significant conflict between the state law and the federal interest.\textsuperscript{57}

The Court refused to adopt the \textit{Feres} \textsuperscript{58} doctrine as the limiting principle to identify situations in which a significant conflict with federal policy or interest arises for two reasons. First, if the government contractor defense prohibited suit against the manufacturer whenever \textit{Feres} prevents suit against the government, strict application of the doctrine would be overly broad since even injuries to military personnel caused by standard government equipment would be covered.\textsuperscript{59} Second, since the \textit{Feres} doctrine

\textsuperscript{53} \textit{Id}.

\textsuperscript{54} \textit{Id}. The Court specifically refused to expand the theoretical scope of federal preemption by analyzing this situation “as the displacement of federal law reference to state law for the rule of decision.” \textit{Id} at 2515 n.3. The Court stated that this distinction between displacement of state law and displacement of federal law’s incorporation of state law does not make any practical difference in this case. \textit{Id}.

\textsuperscript{55} \textit{Id} at 2515.

\textsuperscript{56} \textit{Id} at 2516. The two conflicting duties were the state-imposed “duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary” and the government contract “duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications.” \textit{Id}.

\textsuperscript{57} \textit{Id}. The Court recognized that it was impossible to say that the government has a significant interest in having the escape hatches open outward. \textit{Id}.

\textsuperscript{58} \textit{Feres} v. United States, 340 U.S. 135 (1950). The \textit{Feres} doctrine states that the Federal Tort Claims Act does not cover injuries to armed service personnel incurred in the course of military service. \textit{Id}.

\textsuperscript{59} \textit{Boyle II}, 108 S. Ct. at 2517.
covers only service-related injuries, and not injuries to civilians caused by the military, the doctrine would be too narrow since it could not be invoked to prevent a civilian’s suit against a government contractor.60

Instead, the Court pointed to the exemption for “discretionary functions” under the Federal Tort Claims Act.61 The Court agreed with the Fourth and the Ninth Circuits that state law holding government contractors liable for design defects in military equipment presents a significant conflict with federal policy and must be displaced under certain circumstances.62 State law will be displaced only if the suit is within an area where the policy of the “discretionary function” would be frustrated, and the design feature in question was considered by a government officer and not merely by the contractor itself. A further requirement, that the supplier warn the United States about the dangers in the use of the equipment, is necessary because in its absence the displacement of state tort law might create some incentive for the manufacturer to withhold its knowledge of risks, since conveying that knowledge might disrupt the contract while withholding it

60 Id.

61 28 U.S.C. § 2680(a) (1982). In this Act, Congress made an exception to the general rule that the United States government could be liable for damages for negligent or wrongful conduct to the same extent as a private person. Excepted was “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” Id. The Boyle II court stated that the Armed Forces design selection for military equipment is certainly a discretionary function. Boyle II, 108 S. Ct. at 2517.

62 Id. at 2518. The Court stated:

Liability for design defects in military equipment cannot 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.

Id.; see also McKay v. Rockwell Int’l Corp., 704 F.2d 444, 451 (9th Cir. 1983) (setting out circumstances under which a supplier of military equipment is not liable for a design defect as a result of the government contractor defense), cert. denied, 464 U.S. 1043 (1984).
produces no liability.\textsuperscript{63}

C. Proof of Defect

In \textit{Kramer v. Piper Aircraft Corporation},\textsuperscript{64} the Florida Supreme Court held that a person injured while a passenger on an airplane did not have a cause of action under implied warranty against the airplane manufacturer separate and distinct from a strict liability action. The plaintiffs were injured when the Piper Cherokee plane in which they were passengers crashed on takeoff in Virginia.\textsuperscript{65} The plaintiffs named only the airplane manufacturer, Piper Aircraft, in their complaint, and asserted negligence, strict liability, breach of implied warranty of fitness, and breach of implied warranty of merchantability.

The Florida Supreme Court had previously adopted the doctrine of strict liability in tort.\textsuperscript{66} The court agreed with the manufacturer that "the adoption of the doctrine of strict liability in tort supplants and renders unnecessary a side-by-side remedy of non-contractual warranty for personal injury."\textsuperscript{67} The court clarified that the doctrine of strict liability did not result in the demise of the contract action of breach of implied warranty, where privity of contract is shown. It did, however, supplant all no-privity, breach of implied warranty cases for personal injury, because it was the state supreme court's intent to abolish that cause of action where the remedy of strict liability is appropriate.\textsuperscript{68}

In \textit{Held v. Mitsubishi Aircraft International Incorporated},\textsuperscript{69} the United States District Court for the District of Minnesota applied Texas state law in a diversity case due to a choice of law clause in the contract of sale for the aircraft. United Aircraft International (United) purchased a 1979

\textsuperscript{63} \textit{Boyle II}, 108 S. Ct. at 2518.
\textsuperscript{64} 520 So. 2d 37 (Fla. 1988).
\textsuperscript{65} Id. at 38.
\textsuperscript{66} \textit{See West v. Caterpillar Tractor Co.}, 336 So. 2d 80 (Fla. 1976).
\textsuperscript{67} \textit{Kramer}, 520 So. 2d at 89.
\textsuperscript{68} Id. The court stated that this decision is implicit in the \textit{West} decision. \textit{Id.}
\textsuperscript{69} 672 F. Supp. 369 (D. Minn. 1987).
Mitsubishi MU-2b-40 aircraft from Mitsubishi Aircraft International. While making its final approach into the Minnesota airport, the aircraft crashed, killing all five occupants aboard and completely destroying the plane. United brought an action against Mitsubishi to recover the value of the aircraft, the deductible on their insurance policy, the costs of removing the wreckage, and $130,000 paid as a settlement in one of the passenger claims. In addition, trustees for the four other victims asserted wrongful death claims, seeking more than $50,000 for each victim. The plaintiffs alleged that the defendants were negligent 1) in the design, construction and manufacture of the aircraft and its components, and 2) in the overhaul, service and repair of the plane. The plaintiffs also sought to recover on the theories of strict liability and breach of express and implied warranties of fitness and safety.

The court distinguished a situation where a plaintiff seeks to recover damages for a defective product which has caused damage only to itself from a situation where the defective product caused damage not only to itself but also to other persons or property. In the first case, the loss is deemed to be purely economic and recovery under strict liability is not permitted. In the second case, the entire resulting damage is recoverable under strict liability. Relying on a 1977 Texas case which cited section 402A of the Restatement (Second) of Torts, the court held that

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70 Id. at 372.
71 Id. at 373. United brought this suit on its own behalf and on behalf of its insurers. Id. at 372-73. The insurers paid $897,000 to United pursuant to an insurance policy covering the plane and paid $130,000 to one of the victims of the crash pursuant to its policy. Id. at 373 n.4.
72 Id. at 372-73.
73 Id. at 373.
74 Id. at 374.
75 Id. The court explained that this rule reinforces that the Uniform Commercial Code is the system for allocating losses which arise from commercial transactions. Id. Additionally "to the extent that the product itself has become part of the accident risk or the tort by causing collateral property damage, it is properly considered as part of the property damages, rather than an economic loss." Id.
76 General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977) (holding
the settlement payment of $130,000 to one victim's family did not convert an otherwise economic loss into a property loss recoverable under strict liability.

With respect to United's claims for recovery of economic loss, the court held that an economic loss caused by a defective product is recoverable under a tort theory of negligence, but not under a theory of strict liability, when third parties were injured as a result of the product's defect. After a comprehensive examination of Texas law, the court held that economic loss is recoverable in strict liability only when the party alleging the economic loss has also suffered personal injury or other property damage. Since United suffered only economic loss, the court dismissed its claims of strict liability in tort against both defendants. While noting that Texas law represents the minority position on the issue, however, the court held that economic loss not recoverable under strict liability was recoverable under the theories of breach of implied warranty and negligence in the state of Texas.

In Fullerton Aircraft v. Beech Aircraft, a diversity action based on alleged breaches of express and implied warranties, the Fourth Circuit Court of Appeals reversed the district court's grant of summary judgment to the manufacturer. The district court held that the plaintiff was collaterally estopped from bringing a second action due to an earlier action against a Beechcraft dealer and to lack of contractual privity between the aircraft's manufacturer and the plaintiff. The first action, against both the manufacturer and the dealer, had been brought in a district court in Virginia, seeking revocation of the acceptance of

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77 Held, 672 F. Supp. at 377.
78 Id. at 374 n.6, 377-78.
79 842 F.2d 717 (4th Cir. 1988).
80 Id. at 719. The district court granted summary judgment to both Beech Aircraft Corporation and a finance company, Beech Acceptance Corporation. Id. at 718.
the aircraft. The plaintiff alleged that abnormal vibrations rendered the aircraft in nonconformity with the contract and substantially impaired its value. The manufacturer was voluntarily dismissed from the first action because the revocation of acceptance remedy properly lay only against the dealer. Following a bench trial, the district court entered judgment against the plaintiff, holding that the plaintiff had failed to show nonconformity or substantial impairment. The trial judge apparently accepted the plaintiff's claims of abnormal vibrations, but found that the airplane was safe due to the repair efforts of both the manufacturer and the dealer. On appeal, the Fourth Circuit declined to affirm the district court's finding of conformity but did affirm on the grounds of failure to show substantial impairment.

After entry of the district court's judgment in the first action, the plaintiff commenced a second action against the manufacturer by filing a complaint alleging breach of express and implied warranties. In its answer, the manufacturer claimed that the action was barred by collateral estoppel. In addition, the manufacturer asserted that the plaintiff had failed to state a claim for breach of warranty upon which relief could be granted, due to a lack of contractual privity between the plaintiff and the manufacturer. The district court granted the manufacturer's motion for summary judgment on the grounds of collateral estoppel and want of privity of contract.

The district court found that plaintiff's breach of warranty claim was based on the same alleged defect of abnormal vibration in the aircraft that was central to the

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81 Id.
82 Id.
83 Id. at 719. The plaintiff asserted that the finance company was liable for all of his claims against Beech since it was Beech's wholly-owned subsidiary. Id.
84 Id. As grounds for its summary judgment motion, the defendants asserted that the plaintiff was collaterally estopped from relitigating the breach of warranty issue since it had already been decided against the plaintiff in the prior action against the dealer. Id. The defendants also asserted that the plaintiff's complaint failed to state a claim for breach of either express or implied warranties since there was a lack of contractual privity. Id.
plaintiff's claim for revocation against the dealer in the first action.\textsuperscript{85} The court of appeals reversed, holding that the effect of its decision in the first action was limited to a finding of no substantial impairment irrespective of conformity. Accordingly, that holding had no preclusive effect in the second action on the distinctly different issue of whether the alleged defect in the aircraft resulted in a breach of the express and implied warranties between the manufacturer and the buyer. The specific "defect" issue was not litigated in the first action, so the second action was not precluded on collateral estoppel grounds.\textsuperscript{86}

As to the district court's holding regarding lack of contractual privity, the Fourth Circuit held that lack of contractual privity did not bar the plaintiff's implied warranty claim against the manufacturer under Kansas law.\textsuperscript{87} The court noted that the manufacturer had extensive personal contacts with the plaintiff throughout the sale, both before and after it was consummated by the manufacturer's dealer. The court also held that contractual privity was not a prerequisite to an action for breach of express warranties under Kansas law.\textsuperscript{88}

In \textit{Sage v. Fairchild-Swearingen Corporation},\textsuperscript{89} the plaintiff was an employee of Commuter Airlines, Inc. in New York. The plaintiff was injured after she had finished unloading baggage from an aircraft. While attempting to lower herself from the aircraft cargo compartment, she caught a finger on a ladder hanger attached to the doorway of the compartment, injuring the finger so severely that it had to be amputated.\textsuperscript{90} She brought an action against the manu-

\textsuperscript{85} \textit{Id.} at 720. The district court concluded that although the plaintiff was seeking different remedies in the second action, the basic issue was identical to the one decided in the first action: "was there a vibration in the plane serious enough to render it defective." \textit{Id.}

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 722.

\textsuperscript{88} \textit{Id.} The court noted that "[t]o hold otherwise would be to permit a manufacturer to avoid express warranty representations made to a buyer simply by insuring that the actual contract of sale was with a dealer or other third party." \textit{Id.}

\textsuperscript{89} 70 N.Y.2d 579, 517 N.E.2d 1304, 523 N.Y.S.2d 418 (1987).

\textsuperscript{90} \textit{Id.} at 583, 517 N.E.2d at 1305, 523 N.Y.S.2d at 419.
facturer of the hanger alleging negligence and strict product liability based on design defect. At trial, the jury found that the hanger was not the original but a replacement part made and installed by the airline’s employees. The jury concluded, however, that it was substantially the same design and had substantially the same characteristics as the hanger originally installed by the manufacturer. The jury found that the hanger was defectively designed and that the design caused the plaintiff’s injuries. It awarded the plaintiff $185,000 in damages.\(^9\)

The appellate division reversed and dismissed the complaint because the hanger had not been manufactured by the defendant. The New York Court of Appeals then reversed the appellate division and ordered that the complaint be reinstated.\(^9\) The court of appeals found that the airline had replaced the original ladder hanger “by flattening the original part with a roller and then cutting a new part to duplicate the original design.”\(^9\) At trial, the manufacturer’s representatives acknowledged that they did not expect the airline to purchase a new part from the manufacturer if the hanger broke because the purchaser could easily fabricate a replacement.\(^9\) Noting that this was not a case in which a purchaser had removed or altered safety mechanisms or substituted parts of lesser quality, the court found that the airline’s employees had merely perpetuated the manufacturer’s bad design, and that the manufacturer’s own representatives foresaw that this might happen.\(^9\) Insulating the manufacturer from liability under those circumstances would allow it to escape

\(^9\) Id. In awarding damages, the jury apportioned fault 75% to the manufacturer and 25% to plaintiff’s employer, who had been impleaded by the manufacturer. Id.

\(^9\) Id. The court held that “because of the Appellate Division’s factual determination that the verdict was against the weight of the evidence, the matter should be remitted for a new trial.” Id.

\(^9\) Id. at 583-84, 517 N.E.2d at 1306, 523 N.Y.S.2d at 420. The replacement part made by the airline employees “was attached to the doorway of the cargo compartment in the same location and in the same manner as the original.” Id.

\(^9\) Id.

\(^9\) Id. at 587, 517 N.E.2d at 1308, 523 N.Y.S.2d at 422.
liability for designing flimsy parts, secure in the knowledge that once a part broke and the purchaser replaced it the manufacturer would no longer be liable.96

D. Evidence

In *Davis v. Stallones*,97 the plaintiffs brought a wrongful death action against the estate of the pilot of a Bell 206B Jet Ranger helicopter. The helicopter crashed in bad weather, killing all three men aboard.98 At the end of a jury trial, the plaintiffs were awarded $1.8 million in damages. On appeal, the estate claimed that the trial court had erred in twice refusing to declare a mistrial after the plaintiffs’ expert witness revealed to the jury the NTSB conclusions regarding the probable cause of the crash. Plaintiffs had offered expert testimony that the accident could have been caused by the negligence of the pilot.99

The appellate court observed that prior to trial, the court had granted a motion in limine excluding the entire NTSB report. When the report was referenced several times during trial testimony, however, the defendant failed to make a timely objection. In fact, the defendant themselves elicited some of the testimony which mentioned the NTSB report.100 The court of appeals upheld the trial court’s refusal to grant a mistrial, explaining that the proper predicate for complaint on appeal is a timely objection made when the evidence is offered by the opponent.101

The court of appeals also held that the trial court had properly refused to declare a mistrial based upon the

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96 *Id.* The court stated that “[p]lacing the economic burden on the manufacturer under these circumstances does no more than induce it to design quality equipment at the outset.” *Id.*
98 *Id.* at 236.
99 *Id.* The expert witness testified about the NTSB conclusions during cross-examination. *Id.*
100 *Id.* at 236-37.
101 *Id.* at 237. The court noted that a “timely objection is necessary when an improper question has been asked in violation of a motion in limine.” *Id.*
mention of insurance during the trial. On direct examination the defendant's expert repeatedly alluded to parts of the wreckage that were missing or unavailable for inspection. He theorized that these parts might have proved that the accident was caused by a mechanical failure, rather than by pilot error. The plaintiffs sought to establish in cross-examination that the wreckage had been in the continuous control of the insurance company which had insured the deceased pilot. The court of appeals held that, while evidence of insurance is not admissible to show negligence, it was admissible in this case since the defendant had put the issue of control in dispute. Therefore, the testimony about control was properly admitted. Once again, the court appeared to have little patience with the defendant’s failure to make timely objections.

In Nachtsheim v. Beech Aircraft Corporation, the plaintiffs brought a products liability action against the manufacturer of an aircraft following an accident in which the pilot and passengers were killed. The plaintiffs alleged that an elevator was defectively designed and may have frozen when the aircraft met with icing conditions. At trial, the jury returned a verdict in favor of the aircraft manufacturer. The plaintiffs appealed, alleging that the trial court had committed numerous abuses of discretion in

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102 Id. at 238.
103 Id. at 237. The trial court overruled a relevancy objection, reasoning that because the defendant had suggested to the jury that the plaintiffs “were responsible for the mystery of the allegedly missing pieces, the testimony was relevant to the issue of control of the wreckage.” Id.
104 Id. at 238.
105 Id.
106 847 F.2d 1261 (7th Cir. 1988).
107 Id. at 1265. As described in the court's opinion, “the elevator is a movable control surface which is attached to the fixed, horizontal portion of the tail called the stabilizer. . . . The position of the elevator controls the rise or fall of the nose of the plane in relation to the tail, otherwise known as the plane's pitch.” Id. The plaintiff's expert witness testified that the airplane had stalled, and the pilot was unable to recover from the stall “because ice had accumulated in the covegap due to the elevator's exposure to the airstream.” Id. Consequently, the pilot was unable to regain pitch control. Id.
The plaintiffs' first contention was that the district court erroneously excluded evidence of a subsequent accident which was substantially similar to the one in question. The Seventh Circuit Court of Appeals explained that evidence of other accidents in product liability cases is relevant to show "notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident." Before a court may admit such evidence, however, the proponent must show that the other accidents occurred under substantially similar circumstances, especially in cases where the evidence is proffered to show the existence of a dangerous condition or causation. Even when the proponent proves substantial identity of the circumstances, the trial judge still has discretion to find the evidence inadmissible after weighing "the dangers of unfairness, confusion, and undue expenditure of time in the trial of collateral issues against the factors favoring admissibility." Since the plaintiffs had not presented any evidence that the alleged dangerous condition was in any way involved in the subsequent similar accident, the court of appeals refused to disturb the district court's ruling.

The court of appeals also rejected the plaintiffs' contention that evidence concerning the subsequent similar accident should have been admitted because their expert witness relied upon this evidence in forming his opinion as to the cause of the crash in question. The court explained that admissibility of expert opinions under Federal Rule of Evidence 703 is still subject to Rule 403's...
general bar against the admission of unduly prejudicial evidence. Thus, the trial court has greater flexibility in deciding when to permit an expert witness to testify about otherwise inadmissible facts. Accordingly, the district court did not err in refusing to admit the testimony.

In addition, the court of appeals held that the district court did not err in redacting a sentence from an incident report which was filed following an accident subsequent to the one in question. The plaintiffs were permitted to read into evidence portions of the deposition taken of the pilot involved in the subsequent similar incident. The sentence redacted from the report stated that "[t]here was considerable ice packed in the gap between the elevator and the horizontal stabilizer by the horn." The district court redacted this statement because the pilot testified at his deposition that he was not the person who wrote the sentence, he did not know who wrote the sentence, and he only assumed it had been the instructor pilot.

The plaintiffs argued that the entire report was admissible under Federal Rule of Evidence 803(8) because it qualified under the public documents exception to the hearsay rule. The court of appeals noted that the theory behind this exception is that government reports are

113 Id. at 1270.
114 Id. at 1271. The subsequent similar incident involved a Forestry Service pilot who experienced an icing problem while flying the same model plane but was able to land safely after physically snapping the elevator back into position. Id.
115 Id. at 1272.
116 Id.
117 Id. Federal Rule of Evidence 803(8) provides an exception to the hearsay rule for the following:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8).
probably reliable, and the rule is silent about a requirement of personal knowledge. The introductory notes to Rule 803 state, however, that the Rule does not dispense with the requirement of first-hand knowledge. Since the pilot testified in his deposition that he did not have first-hand knowledge, the evidence was properly excluded.  

The plaintiffs also claimed that the district court erred in excluding a government bulletin issued by the United States Forestry Service almost two years following the accident. The bulletin advised Forestry Service pilots not to fly into known or forecast icing conditions with that model aircraft and offered some suggestions on frequent in-flight exercise of the elevator if the pilots encountered this condition. The pilot who testified about the filing of the incident report in the subsequent similar incident stated that he had read the bulletin and incorporated it into his flying habits. The plaintiffs asserted that he was able to identify the problem with his elevator and avoid disaster because of this warning. They argued that the bulletin was therefore relevant to the manufacturer’s duty to warn, to show the feasibility of warning pilots, and to demonstrate the positive effects such warnings can have.

The court of appeals conceded that the bulletin was relevant to an issue in the case, but noted that the district court permitted the pilot’s testimony that he knew to exercise the elevator frequently during the flight in icy conditions because he had received a warning. Under Federal Rule of Evidence 803(8), the trial court had the discretion to exclude an actual public document for lack

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118 Nachtstein, 847 F.2d at 1272-73.
119 Id. at 1273. The plaintiffs offered the bulletin on the issue of the manufacturer’s duty to warn. Id. The bulletin stated that “[i]f icing is encountered in flight, deactivate the auto pilot, make every effort to get out of the icing conditions, and exercise the elevators frequently to avoid jamming.” Id.
120 Id.
121 Id. at 1273-74.
122 Id. at 1274. Thus, the fact that the pilot “had been warned of the danger of flying in icing conditions was before the jury.” Id.
of trustworthiness. In this case, the plaintiffs were unable to provide any information about the author of the bulletin and the trial court questioned its trustworthiness. The court of appeals was unwilling to overturn this ruling.

Finally, the plaintiffs alleged that the manufacturer should not have been allowed to introduce into evidence a video tape demonstrating the manner in which ice accumulates and is removed by deicing equipment on the aircraft. The court of appeals held that the video tape in this case was presented to show the normal operation of the plane in icing conditions. The court noted that a disputed issue at trial was whether the plane could fly safely in icing conditions, and the video tape was not offered to reenact the accident. In addition, there was no suggestion that the experiment simulated actual events, so no reversible error occurred in the admission of the film.

In the case of *In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985*, Delta Airlines brought a motion to compel production of documents by the United States. Delta requested production of all notes, memoranda or other documents arising out of the investigation of the crash which were prepared by any employee or agent of the United States. The United States objected, stating that the NTSB is an independent agency over which it did

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123 Id.
124 Id. The court stated that it saw "no reversible error in the district court's ruling that it would not admit the bulletin because the court questioned its trustworthiness." Id.
125 Id. at 1277.
126 Id. at 1278.
128 Id. at 393. Specifically, Delta requested production of the following: "Any and all notes, diagrams, photographs, memoranda or other documents or writings relating to or arising out of the investigation of the crash prepared or compiled by any persons", including nine named members of the NTSB technical panel and "any other employee or agent of the United States of America." Id.
not have enforcement power.\textsuperscript{129} The NTSB, who was not a party to the lawsuit, filed an ex parte brief in support of its position that the materials should not be disclosed.

The district court held that it was clear the NTSB was entirely autonomous and not under the direction of any other executive agency. The NTSB had sole and exclusive control over the analysis reports and other materials requested and, consequently, the United States could not produce such reports. The only appropriate means to compel a non-party, such as the NTSB, to produce documents was to serve them a subpoena under Rule 45 of the Federal Rules of Civil Procedure.\textsuperscript{130}

The court further explained that a substantial question existed as to whether such reports were discoverable even if Delta had complied with these formalities. Delta was seeking to compel production of pre-decisional analytical documents, and production of these types of documents was governed by federal regulations.\textsuperscript{131} After conducting an in-camera inspection of the documents, the court found that these materials were privileged and exempt from public disclosure, since they contained preliminary opinions which were not necessarily the opinions adopted in the NTSB's final report.\textsuperscript{132} Delta's motion was therefore denied.

E. \textit{NTSB Accident Investigation}

In \textit{Miller v. Rich},\textsuperscript{133} a single engine North American T-28C aircraft crashed into an open field in California shortly after takeoff. The owner of the aircraft was not on board at the time. The defendant, in his official capacity with the NTSB, assumed custody of the wreckage and

\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Specifically, Delta claimed that production of these documents was governed by section 801.54 of Title 49 of the Code of Federal Regulations, 49 C.F.R. § 801.54 (1988). \textit{Air Crash at DFW}, 117 F.R.D. at 393.
\textsuperscript{132} \textit{Air Crash at DFW}, 117 F.R.D. at 394.
\textsuperscript{133} 845 F.2d 190 (9th Cir. 1988).
planned to disassemble and inspect the engine. The owner brought an action seeking declaratory and injunctive relief to enjoin the inspection and disassembly of the engine until his representative had been authorized to observe the inspection. The request for a preliminary injunction was denied and the owner appealed. The Ninth Circuit Court of Appeals reviewed prior case law and noted that it had previously held that the regulations governing NTSB investigations did not give individuals the right to participate in the investigation. The court held, however, that the NTSB’s discretion was not unbridled and since the agency had not given any rational justification for excluding the owner, its actions constituted an abuse of discretion. The court noted that the person seeking to be present had established an ownership interest in the aircraft and was not seeking to actively participate in the disassembly and inspection, but rather to merely observe. Since no rational justification for denying the request was advanced, the Ninth Circuit reversed the denial of the preliminary injunction and remanded the issue to the district court.

F. Statute of Repose

In Wallis v. Grumman Corporation, the Florida Supreme Court dismissed a product liability action brought by a person injured in the crash of an aircraft. The crash occurred more than 12 years after the delivery of the aircraft to its original purchaser. The court cited and reaffirmed its recent decision that an amendment which abolished the statute of repose in product liability actions in Florida could not be construed to operate retrospectively as to a

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134 Id. at 191.
135 Id.
136 Id. at 192. The court continued to adhere to those prior decisions but held that its “inquiry must focus on whether the NTSB has abused its discretion in making its determination denying Appellant the opportunity to observe the testing of the engine.” Id.
137 Id.
138 515 So. 2d 1276 (Fla. 1987).
cause of action that accrued before the effective date of the amendment.\textsuperscript{139}

The court also held that the plaintiff’s attempt to remove his tardy cause of action from the realm of product liability should fail. The plaintiff argued that his allegation of breach of duty by the manufacturer to warn of a known defect did not give rise to a product liability action under the applicable Florida statute.\textsuperscript{140} The Florida Supreme Court disagreed, holding that the allegation of the failure of a continuing duty to warn is clearly founded on the design and manufacture of the aircraft because the duty arises due to the manufacturer’s status as either an aircraft manufacturer or seller. Since there was no product liability claim as twelve years had passed since delivery of the aircraft by the manufacturer, there was also no duty to warn of a defect.\textsuperscript{141}

III. FEDERAL TORT CLAIMS ACT

A. \textit{Feres Doctrine}

In \textit{Walls v. United States},\textsuperscript{142} the Seventh Circuit Court of Appeals reviewed a district court decision in an action falling under the \textit{Feres} doctrine. In \textit{Feres v. United States},\textsuperscript{143} the Supreme Court held that the federal government is not liable under the Federal Tort Claims Act for injuries to servicemen which “arise out of or in the course of activity incident to service.”\textsuperscript{144} In \textit{Walls}, the plaintiff was an active duty member of the United States Army who suffered injuries in the crash of an Air Force Aero Club airplane. Air Force Aero Clubs are established and operate under the control of the Air Force as non-appropriated instrumentalities of the United States to promote morale among

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.} at 1277.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} 832 F.2d 93 (7th Cir. 1987).
  \item \textsuperscript{143} 340 U.S. 135 (1950).
  \item \textsuperscript{144} \textit{Id.} at 146. The Federal Tort Claims Act delineates the circumstances under which the government can be held liable for the negligent or wrongful conduct of its agents or employees. 28 U.S.C. §§ 2671-2680 (1982).
\end{itemize}
members of the military. Only active-duty military personnel are eligible for membership in these clubs.\footnote{Walls, 832 F.2d at 94 n.2.}

The plaintiff alleged that the Aero Club failed to provide adequate supervision of the pilot of the aircraft and that the pilot was negligent in flying the plane.\footnote{Id. at 94.} The Seventh Circuit stated that the application of the\textit{Feres} doctrine turned on the classification of plaintiff’s activities when the Aero Club plane crashed.\footnote{Id. at 95.} The court cited the Supreme Court’s most recent explanation of the\textit{Feres} doctrine, which identified three factors that underlie the doctrine:

(1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.\footnote{Id. (citing United States v. Johnson, 107 S. Ct. 2063 (1987)).}

The Seventh Circuit in the\textit{Walls} case agreed with the district court’s reliance on the third\textit{Feres} rationale, reasoning that if the courts allow servicemen to bring lawsuits for injuries incurred while engaged in Aero Club activities, there could be adverse effects on military discipline and decision making.\footnote{Id. (citing United States v. Johnson, 107 S. Ct. 2063 (1987)).} The court noted that the\textit{Feres} doctrine applies as long as the soldier is subject to military supervision at the time of the injury.\footnote{Id.} The court reasoned that, although he was traveling on an “out of bounds” pass, the plaintiff was considered to be on active duty and subject to military jurisdiction. Moreover, he could not have been a member of the Aero Club without being a member of the armed forces. This activity was di-
RECENT DEVELOPMENTS

rectly related to his serviceman status, and the district court properly dismissed his claim for lack of subject matter jurisdiction.151

B. Air Traffic Control

In Rodriguez v. United States,152 the United States appealed the finding of a federal district court that an air traffic controller's negligence was the sole cause of a mid-air collision between two private airplanes at a New Jersey airport. After one plane received permission from the control tower to join the airport traffic pattern, it collided in mid-air with a plane which was practicing landings and takeoffs.153 Despite a last minute warning by the controller, the aircraft being flown by the plaintiffs' decedents collided with a student pilot on the downwind leg of the traffic pattern, immediately before midfield. While the student pilot was able to land on one of the airport's runways, the decedents lost control of their aircraft and crashed.154 Both occupants of the aircraft were killed in the crash, and the survivors of the deceased pilot and instructor pilot brought suit, alleging that the collision was caused by the air traffic controller's negligence. The plaintiffs also named as defendants the student pilot, his flight school, and his flight service.155

The district court found that the negligence of the air traffic controller was the sole cause of the mid-air collision and awarded the plaintiffs $2,786,634. The Third Circuit Court of Appeals applied New Jersey law in determining the liability of the government under the Federal Tort Claims Act and affirmed the finding that the controller was negligent.156 The controller and a trainee were aware

151 Id. at 96.
152 823 F.2d 735 (3d Cir. 1987).
153 Id. at 737.
154 Id. at 739.
155 Id.
156 Id. at 741. The court held that the controller's warning was not sufficient and "represented a negligent performance ... of his duty to issue safety advisories." Id.
that the two aircraft were on a collision course sixteen seconds prior to the collision. The controller’s initial safety advisory was not in conformity with the air traffic control handbook, however, and was insufficient to convey to the decedents the need for immediate action.\textsuperscript{157} The court also found that the United States had introduced evidence that if the decedents had been adequately performing their duty under FAA regulations to scan for other aircraft they would have observed the student pilot and been obligated to take action to avoid the collision.\textsuperscript{158}

While the decedents may have been negligent, the court found that, even if the pilots had been negligent, this negligence was not a proximate cause of the collision.\textsuperscript{159} Under New Jersey law, the survivors of the pilots could recover from the United States only if the pilots’ negligence was comparatively less than the negligence of the air traffic controller.\textsuperscript{160} The court rejected the position that a pilot’s negligence in performing his duties would free the air traffic controller from liability.\textsuperscript{161} The court of appeals remanded the case to the district court, instructing the district court to first apportion comparative negligence between the deceased pilot and the deceased instructor pilot. The district court was then instructed to compare the negligence of the pilots to that of the air traffic controller. The plaintiffs could recover from the government if the negligence of the pilots was less than that of the air traffic controller.\textsuperscript{162}

In \textit{Berry v. United States},\textsuperscript{163} an air crash killed five persons

\textsuperscript{157} \textit{Id.} The court found that neither the content of the controller’s warning nor the controller’s tone of voice reflected a sense of urgency sufficient to convey the need for immediate action. \textit{Id.}

\textsuperscript{158} \textit{Id.} at 743-44. The court held that the district court was clearly erroneous in finding that the decedent pilots were not negligent in performing their duty to see and avoid other aircraft. \textit{Id.} at 744.

\textsuperscript{159} \textit{Id.} at 745.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} The court noted that both the pilot and the controller are responsible for the safety of the aircraft and passengers. Consequently, “there may be concurrent liability.” \textit{Id.} at 746.

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} 20 Av. Cas. (CCH) ¶ 18,436 (N.D. Ohio 1987).
when the pilot, who was conducting the flight under instrument flight rules (IFR), intentionally descended below the minimum descent altitude (MDA) approved for approach to the airport, even though he could not see the airport. \(^{164}\) Personal representatives of the decedent passengers sued the government for wrongful death under the Federal Tort Claims Act. \(^{165}\) When the air traffic control center informed the pilot during the descent that the airport was to his left, the pilot acknowledged the transmission but continued his approach, descending below the MDA and eventually crashing. \(^{166}\) Because the aircraft never left the protected airspace, the controller was not required to make a course deviation advisory. \(^{167}\)

The court found that the air traffic controller had complied with the regulations in the Air Traffic Control Manual and had handled the aircraft in a reasonable and prudent manner. \(^{168}\) Therefore, the court found that the pilot’s own negligence in failing to execute the approved missed approach procedure as required by the FAA was the sole proximate cause of the accident. \(^{169}\)

In *Apostol v. United States*, \(^{170}\) the First Circuit Court of Appeals affirmed a district court’s judgment for the United States. A pilot was injured when his small plane crashed shortly after it had taken off from San Juan International Airport in San Juan, Puerto Rico. \(^{171}\) The pilot

\(^{164}\) *Id.* at ¶ 18,438.


\(^{166}\) *Berry*, 20 Av. Cas. at ¶ 18,438. The pilot crashed “440 feet below the MDA permissible on the approved instrument approach procedure.” *Id.*

\(^{167}\) *Id.* While controllers are to issue safety advisories to an aircraft flying at an altitude too close to terrain, obstructions, or other aircraft for safe flight, “the aircraft never descended close enough to terrain to warrant a safety advisory” while it was still under radar coverage. *Id.*

\(^{168}\) *Id.* The court said that the “controllers could not have reasonably anticipated ... [the pilot’s] violation of Federal Aviation Regulations... [or] prevented such violations because the descent ... occurred below radar and radio coverage.” *Id.*

\(^{169}\) *Id.* at ¶ 18,441. A pilot cannot dip below the minimum descent altitude (MDA) unless he has the runway clearly in sight. 14 C.F.R. § 91.116(b) (1988).

\(^{170}\) 838 F.2d 595 (1st Cir. 1988).

\(^{171}\) *Id.* at 596.
sued the United States under the Federal Tort Claims Act,\textsuperscript{172} claiming that the air traffic controller did not allow sufficient separation time between the departure of a jet and the departure of plaintiffs' plane.\textsuperscript{173} After a bench trial, the district court found that the pilot's own negligence caused the crash by precipitating a stall.\textsuperscript{174} The court of appeals found that the district court had favored the testimony of the government's expert witness over the testimony of the plaintiff's expert.\textsuperscript{175} Pointing out that "findings based on witness credibility are lodged firmly in the province of the trial court" and are disturbed only by "a compelling showing of error," the court of appeals noted that the government's expert witness based his testimony on studies of wing tip vortices which he had personally supervised, while the plaintiff's expert used data collected during studies performed by other persons. In addition, the plaintiff's expert relied on studies of wing tip vortices of airplanes in flight and the plaintiffs' plane took off from the runway when the preceding commercial jet still had its wheels on the ground.\textsuperscript{176} Consequently, the trial court did not commit clear error in deciding to give more credit to the government's witness.

In \textit{Biles v. United States},\textsuperscript{177} the plaintiff was the widow of a passenger in an aircraft which crashed into a mountain ridge in poor weather. A weather briefing warned the pilots that low cloud ceilings and poor visibility made VFR flight risky. Even though the pilots and the aircraft were qualified and equipped for IFR flight, they elected to file a VFR flight plan.\textsuperscript{178} Before the aircraft crossed into air space controlled by another air traffic control center, the

\begin{itemize}
\item \textsuperscript{172} 28 U.S.C. §§ 2671-2680 (1982).
\item \textsuperscript{172} Apostol, 838 F.2d at 596-97. The plaintiff claimed the wake turbulence from "a previously departing commercial jet" caused the crash. \textit{Id.} at 596.
\item \textsuperscript{174} \textit{Id.} at 597.
\item \textsuperscript{175} \textit{Id.} at 598. The government's expert testified that wake turbulence from even the largest airplanes only lasts thirty seconds, and two minutes elapsed between the takeoff of the previous plane and plaintiff's plane. \textit{Id.}
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} 848 F.2d 661 (5th Cir. 1988).
\item \textsuperscript{178} \textit{Id.} at 662.
\end{itemize}
handling air traffic controller advised the pilots that radar service was about to be terminated and the frequency change was approved. Shortly after the controller terminated radar service, the aircraft collided with a mountain ridge approximately 2,000 feet above mean sea level.\footnote{A couple living about one-quarter of a mile northwest of the crash said that the area surrounding them was covered by fog, making visibility about fifty feet during the three hour period before the crash. \textit{Id.}} A passenger’s widow alleged that the air traffic controller was negligent because he failed to warn the pilots of the nearby mountains.\footnote{\textit{Id.}} The trial court concluded that the Air Traffic Control Manual did not impose such a duty to warn.\footnote{\textit{Id.}}

The court of appeals affirmed, finding that while the aircraft was apparently flying a straight course toward the mountain at an altitude below its crest in weather that caused marginal VFR flying conditions, other information was available to the controller which made her judgment reasonable.\footnote{Id. The court stressed that the pilot’s last communication with the controller indicated the aircraft was remaining on VFR status, and the controller was entitled to assume that this representation was accurate. Since Federal Aviation Regulations require the pilot operating in VFR conditions to have flight visibility of at least one mile,\footnote{14 C.F.R. § 91.105 (1988).} the air traffic controller could not be presumed to know that the pilot was not complying with the statute.\footnote{\textit{Biles}, 848 F.2d at 663.}} The court of appeals affirmed, finding that while the aircraft was apparently flying a straight course toward the mountain at an altitude below its crest in weather that caused marginal VFR flying conditions, other information was available to the controller which made her judgment reasonable.\footnote{Id. The court stressed that the pilot’s last communication with the controller indicated the aircraft was remaining on VFR status, and the controller was entitled to assume that this representation was accurate. Since Federal Aviation Regulations require the pilot operating in VFR conditions to have flight visibility of at least one mile,\footnote{14 C.F.R. § 91.105 (1988).} the air traffic controller could not be presumed to know that the pilot was not complying with the statute.\footnote{\textit{Biles}, 848 F.2d at 663.}}

C. \textit{Discretionary Function}

In \textit{McFarland v. United States},\footnote{20 Av. Cas. (CCH) § 18,460 (C.D. Cal. 1987).} the court denied dam-

\footnote{\textit{Id.}}
ages from the government to a pilot and his wife for injuries they suffered when their airplane crashed on landing at an airport located in a national park area. The plaintiffs brought suit under the Federal Tort Claims Act (FTCA), alleging that the United States negligently operated or maintained the airstrip. While trying to avoid a car on the runway, the plane overshot the departure end of the airstrip and flipped over.

The district court found that prior to takeoff, the pilot learned that the airstrip was in poor condition and that the only road in the area crossed a part of the airstrip. The court also found that during the course of the pilot’s pre-landing fly-by an alert pilot would have seen any ground vehicle coming from either direction on the road. In this case, however, neither plaintiff observed the vehicle until the airplane was already committed to landing.

Applying Arizona law and the FTCA, the district court held that decisions regarding design and safety aspects of airports and airstrips fall within the discretionary function exception to the FTCA. The court also noted that, even if the government had breached a duty, that breach was not the proximate cause of the injuries. The court noted that contributory negligence on the part of either plaintiff would defeat their ability to recover.

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186 Id. at ¶ 18,460-61. The pilot chose to attempt his landing on land “partially appropriated by ground vehicular traffic.” Id. at ¶ 18,461.
188 McFarland, 20 Av. Cas. at ¶ 18,461.
189 Id. On final approach, “a ground vehicle came into the plaintiffs’ view on the eastern side of the Airstrip and proceeded . . . [in] the direction in which Mr. McFarland was attempting to land his Airplane. Mr. McFarland turned the Airplane in order to fly over and around the vehicle.” Id.
190 Id. The airstrip, which was the only one at the airport, “(i) was unattended and unpaved, (ii) had no refueling or repair facilities, and (iii) did not have a windsock.” Id. In addition, the pilot knew “that the only road in the area . . . forks . . . and crosses the southeast corner of the Airstrip.” Id.
191 Id. The vehicle “had turned onto the airstrip and . . . was running directly into the Airplane’s landing path.” Id.
193 McFarland, 20 Av. Cas. at ¶ 18,463. The court was reluctant to conclude solely on the basis of the stipulated evidence that Ms. McFarland would be barred from recovery on grounds of contributory negligence. Id. at ¶ 18,464.
In *West v. FAA*, a widow and her three children appealed a district court’s decision that it lacked subject matter jurisdiction to determine whether the acts of certain FAA employees caused an airplane crash at Bishop Airport in California. An FAA procedures specialist designed and approved a special instrument approach and departure procedure for Bishop Airport, which required pilots to climb steeply while maintaining a two mile visual distance from the airport.

The district court found that a lack of sufficient ground lighting probably caused the night crash by misleading the pilot as to his distance from the airport. Although FAA employees knew about the visual phenomenon, they did not take any special steps to analyze its effects. In addition, the FAA did not check the visual climb aspect of the departure procedure by making a night flight. The Ninth Circuit disagreed with the plaintiff’s claim that the challenged actions of the FAA did not fall within the discretionary function exception to liability under the FTCA, and consequently it affirmed the district court’s ruling.

The Ninth Circuit focused on the Supreme Court’s decision in *United States v. Varig Airlines*, explaining that two factors were useful in determining when the acts of a government employee are protected from liability. First,
the nature of the conduct, rather than the actor’s status, is important in determining whether Congress intended to shield the government from tort liability. Second, the discretionary function exception includes “the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.” The exception would apply whenever judicial review would overlap an agency’s determination of policy issues.

The district court determined that the FAA employees’ negligence in not conducting tests at night proximately caused the accident. The Ninth Circuit, however, held that the FAA employees had exercised their discretion in determining that additional tests were not feasible or necessary. The circuit court ruled that determination of safety requirements involves a balancing of social, economic or political policies. Therefore, the court held that the case fell within the discretionary function exception and affirmed the district court’s dismissal for lack of subject matter jurisdiction. A writ of certiorari has been filed with the United States Supreme Court.

D. Statute of Limitations

In Weiss v. United States, the administrator of a pilot’s estate brought a wrongful death action against the United States, claiming that the negligence of air traffic controllers employed by the FAA caused the pilot’s death. The pilot and his plane, a two-seater Grumman aircraft, disappeared shortly after takeoff when the airport released flight control of the aircraft to the Terminal Radar Air

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202 West, 830 F.2d at 1047 (quoting Varig, 467 U.S. at 813-14).
203 Id. (citing Begay v. United States, 768 F.2d 1059, 1064 (9th Cir. 1985)).
204 Id. at 1046. The FAA employees were acting in the scope and course of their employment. Id.
205 Id. at 1048. The Ninth Circuit stated that the “costs of doing the type of tests the appellants suggested would greatly outweigh any added safety benefits.” Id.
206 Id. at 1047. The appellants had argued “that the district court considered safety alone and did not evaluate policy considerations.” Id.
207 20 Av. Cas. (CCH) ¶ 18,465 (E.D.N.Y. 1987).
Control Center. A proceeding was brought in a New York Surrogate Court on December 18, 1985, and the court ruled that the pilot had died intestate on the date he disappeared, which was July 12, 1982.

The plaintiff brought suit against the United States in the Eastern District of New York on July 30, 1986. The plaintiff asserted that the statute of limitations began running on December 18, 1985, the date the Surrogate Court rendered its decision, while the United States contended that the statute began running on the date that the plane presumably crashed. The district court held that it must examine state law to determine whether the plaintiff filed the wrongful death action within the proper time. Under New York state law, the date of the catastrophe, and not the date of the Surrogate Court's decree, is the date of death. The court therefore granted the government's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, as the two-year statute of limitations had expired.

IV. CONTRIBUTION AND INDEMNITY

In Auer v. Kawasaki Motors Corporation, the Fourth Circuit Court of Appeals reheard this case in conjunction with another personal injury case. Both cases presented the issue of whether state or federal law should determine the effect of a release of one joint tortfeasor.

208 Id. at ¶ 18,465-66. The court noted that neither the airplane nor the decedent were ever found. Id. at ¶ 18,466.
209 Id.
210 Id. There was a two year statute of limitations. Id.
211 Id.
212 Id. at ¶ 18,467.
213 Id. Under New York law, the court presumes death occurs at the end of an unexplained absence of five years, unless the absentee has met his death in a "perilous occurrence". Id. (citation omitted). In such a case, the court presumes death occurred on the date of the accident. Id.
214 Id. Since the plane disappeared on July 12, 1982, under New York law the latest the plaintiff could have brought the suit would have been July 12, 1984. Id.
216 Id. at 536. The court had jurisdiction over both based on diversity jurisdiction.
upon the state-created rights and liabilities of the other alleged joint tortfeasors. Applying state law, the Fourth Circuit held that the release of one joint tortfeasor effectively released the other joint tortfeasors, and the court affirmed the grant of summary judgment for the defendant in each case.

In Auer, one of the plaintiffs was a passenger on a Cessna 172H Skyhawk which crashed in the foothills of the Blue Ridge Mountains approximately 30 minutes after taking off from a Virginia airport. The plaintiff sued the manufacturer of the airplane and the airplane’s engine, the owner of the plane, and the plane’s senior pilot. The owner of the plane settled in return for a convenant not to sue. After an FAA report was filed stating that no defect in or malfunction of the engine had been found, the plaintiff settled with the manufacturer of the plane’s engine for $2,000. The court later granted summary judgment to the aircraft manufacturer because, under Virginia law, dismissal of the claim against the engine manufacturer with prejudice constituted a release and extinguished the plaintiff’s claim against the aircraft manufacturer.

In 1979, the Virginia General Assembly enacted a statute providing that a convenant not to sue, given in good faith to a joint tortfeasor, would discharge other joint tortfeasors only if there was a specific provision for it. The legislature amended the statute in 1980 to include a release given in good faith. The court determined, however, that it must apply Virginia law as it existed at the time of injury and not at the time of the release. At that time, each joint tortfeasor obtained a right of contribution.

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217 Id.
218 Id.
219 Id. at 537.
220 Id.
221 Id.
223 Id.
from the other joint tortfeasors. The Fourth Circuit therefore affirmed the district court's ruling that there had been an accord and satisfaction of the plaintiff's claim against the engine manufacturer, ultimately releasing the other joint tortfeasors. A dissenting judge argued that because the case involved a release reached during a federal proceeding, federal common law, not state law, governed the effect that a settlement with one joint tortfeasor had on other joint tortfeasors. A writ of certiorari has been filed with the United States Supreme Court.

V. AIRPORTS

A. Premises Liability

In Great American Airways v. Airport Authority, an airline sued for negligence and breach of contract because one of its planes struck a chunk of ice while attempting to take off from a runway. The Airport Authority had examined the runway at least once during the two hours prior to takeoff.

The Nevada Supreme Court conducted a plenary review of the contract between the parties and did not defer to the lower court's interpretation. Noting that the emphasis in contract construction is to determine the contracting parties' intent, the court found that the contract required the Airport Authority to maintain the facilities free of obstructions, and that this requirement was consistent with the Authority's contractual obligation to maintain its facilities in a manner suitable for the lessee's air transport uses. The Airport Authority drafted the con-

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224 Auer, 830 F.2d at 540.
225 Id.
226 Id. at 541.
228 Id. at 628-29. The crash damaged the "airplane's nose wheels, fuselage and engines." Id. at 629. The evidence showed that the "weather that morning was dry and the runway was clear of snow and slush." Id.
229 Id.
230 Id. This may be done where a trial court has interpreted a contract solely from its written terms. Id.
tract, and the court held that if they had intended for the airline to bear such losses, they could have made such specifications in the contract. The court therefore upheld the trial court’s dismissal of the negligence claim, but ordered a new trial on the claim of contract liability.

B. **Preemption**

In *Western Airlines v. Port Authority*, the Second Circuit Court of Appeals held that an airline was not entitled to enjoin a Port Authority that operated an airport from enforcing its “perimeter rule,” which prohibited airlines using the airport from running nonstop flights beyond the distance of 1500 miles. The airline argued that the perimeter rule was preempted by Section 1305(a)(1) of the Airline Deregulation Act, and that it violated substantive provisions of two other aviation statutes. The perimeter rule was instituted to reduce congestion by encouraging business persons to use La Guardia for relatively short trips and inducing vacationers to use Newark and Kennedy Airports for vacation flights.

The FAA limits flights to and from La Guardia by using “slots” which authorize the holder to make one landing or takeoff during a thirty-minute period. Western wanted these slots for three nonstop flights daily between La Guardia and Salt Lake City. In upholding the district

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231 Id. The Authority could have instead provided that it would keep the runways “reasonably’ free from obstructions.” Id.

232 Id. at 630. A new trial was required because the trial court’s dismissal precluded the Authority from presenting evidence which refuted the plaintiff’s claim that ice caused the damage to the plane. Id.

233 817 F.2d 222 (2d Cir. 1987).

234 Id. at 223. The district court had denied the airline’s suit for an injunction.

235 Id. at 224. Section 1305(a)(1) provided that no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority . . . to provide air transportation.

236 Id. at 224 n.1.

237 Id. at 223.
court's ruling, the Second Circuit held that although "the perimeter rule may be a regulation 'relating to . . . routes' within the meaning of section 1305(a)(1), . . . the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1)."\(^{238}\)

In *Stream Aviation, Incorporated v. Anders Production, Incorporated*,\(^{239}\) the plaintiff commenced an action against the defendant, alleging that it had provided air transportation services to the defendant for approximately one and a half years and had not been compensated. The plaintiff sought damages in the amount of $132,624.48. Harold Stream, son of the sole shareholder of plaintiff, had been married to the sole shareholder of the defendant, Lynn Anderson, and was bringing an action for reimbursement of transportation provided to Ms. Anderson and the Lynn Anderson Band during their marriage.\(^{240}\) The defendant contended that it was entitled to summary judgment because the plaintiff did not have authority from the FAA to act as a commercial operator.\(^{241}\) The defendant argued that because the plaintiff did not have an operating certificate, it could not seek enforcement of its alleged contract since it was in violation of federal regulations.

The trial court granted the defendant's motion for summary judgment. The court stated that when Congress en-

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\(^{238}\) Id. at 226-27. Section 1305(b)(1) provided in pertinent part that "'[n]othing in [Section 1305(a)] shall be construed to limit the authority of . . . the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights." Id. at 224 n.1.

\(^{239}\) 517 So. 2d 1157 (La. Ct. App. 1987).

\(^{240}\) Id. at 1158. Harold Stream had been granted full authority to act for plaintiff's sole shareholder in all of her business affairs pursuant to a power of attorney. Id.

\(^{241}\) Id. Anderson argued that Stream should have obtained a Part 135 Air Taxi/Commercial Operator's operating certificate before transporting the band for commercial purposes. Id. at 1158-59. The FAA regulations in question applied to air carriers carrying less than twenty passengers for compensation as a commercial operator, and prohibited operation under that section without an Air Taxi/Commercial Operator's operating certificate. 14 C.F.R. § 135.1(A)(3) (1988).
acted the Federal Aviation Act\textsuperscript{242} it expressly preempted the field of air transportation.\textsuperscript{243} The lower court concluded that FAA regulations have the effect of law and providing plaintiff with a remedy would violate the supremacy clause of the Constitution.\textsuperscript{244}

A Louisiana Court of Appeal reversed the decision and remanded the case, holding that the lower court had incorrectly interpreted the statute in question.\textsuperscript{245} The court ruled that Congress had not intended to preclude the courts from enforcing legally binding contracts because the "judicial enforcement of a contract for air transportation, subsequent to the faithful completion by the carrier, even when the carrier is not appropriately certified, is not the enactment or enforcement of a law or regulation relating to 'rates, routes, or services of an air carrier'."\textsuperscript{246}

C. Jurisdiction

In \textit{Cosmos Broadcasting Corporation v. Commonwealth},\textsuperscript{247} a Kentucky Court of Appeals held that the Kentucky Airport Zoning Commission lacked jurisdiction to deny a broadcasting company permission to construct a tower between airports located in two different counties. The tower was located approximately 20 miles from the nearest airport.\textsuperscript{248} The appellant television station argued that the Commission had exceeded its jurisdiction in attempting to regulate the proposed construction because the tower was not in the vicinity of an airport.\textsuperscript{249} The appellee's argument


\textsuperscript{244} \textit{Stream Aviation}, 517 So. 2d at 1159.

\textsuperscript{245} \textit{Id.} at 1160-61.

\textsuperscript{246} \textit{Id.} at 1160. The court remanded to resolve the issue of the validity of the alleged contract for transportation. \textit{Id.} at 1160.

\textsuperscript{247} 759 S.W.2d 824 (Ky. Ct. App. 1988).

\textsuperscript{248} \textit{Id.} at 826.

\textsuperscript{249} \textit{Id.} at 825. The trial court disagreed with this argument, holding that the legislature's intent was to grant broad regulatory authority to the zoning commission. \textit{Id.} at 826.
late court agreed, holding that under Kentucky statutes "navigable air space" was "limited to areas within and around publicly owned airports." The court was persuaded that the intent of the state legislature was to confine the Commission's power to the use of land only within and around airports. The court also noted that existing cases interpreting the statute all involved safety as it related to aircraft take-off and landings, which would obviously occur at the airport.

D. Equal Protection

In Herrick's Aero-Auto-Agua Repair Service v. State Department of Transportation and Public Facilities, the Alaska Supreme Court held that repair companies who were lessees at an Alaskan airport were denied equal protection under the Alaskan Constitution. The State Department of Transportation required on-base companies to obtain permits to conduct business on airport property or provide comprehensive public liability insurance, while itinerant mechanics were not subjected to the same regulations. The specific services provided by the plaintiffs were mechanical maintenance and air-frame repair. Their lease agreements required them to provide insurance against public liability and indemnify the airport for any damages caused. Mobile or itinerant mechanics provided services from their vehicles at their customers' storage facilities, but were also providing similar services at public areas in the airport and had not obtained the statutorily required permits.

In determining whether the lessees had been denied

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250 Id. The court found that the legislature had not intended to grant the commission jurisdiction over "every square inch of usable, navigable airspace within the state." Id.

251 Id.


253 Id. at 1112. Although the itinerant mechanics were legally required to obtain such permits, none of them had filed a permit request, and the Department of Transportation had failed to take any action against them. Id.

254 Id.
equal protection under the law, the trial court applied the rational basis test\textsuperscript{255} and concluded that the financial impact of enforcing the law against itinerant mechanics justified requiring only the lessees to obtain permits and provide insurance coverage.\textsuperscript{256} On appeal, the Alaska Supreme Court applied the rational basis test under the Alaska State Constitution. Under the state test, the court determines "whether the classification is 'reasonable, not arbitrary' and rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation.'" \textsuperscript{257} In applying this test, a court cannot assume facts which would justify otherwise questionable legislation.\textsuperscript{258} Thus, the burden on the state under the Alaska Constitution is greater than that required under the United States Constitution. The burden increases as the primacy of the individual interest involved increases. The court explained that "[e]ventually this burden reaches the functional equivalent of the federal compelling state interest test in those cases where fundamental rights and suspect categories are at issue."\textsuperscript{259}

The court noted that this legislation dealt with economic and commercial interests, which are generally subjected to a low level of judicial scrutiny. Consequently the Department of Transportation was only required to show that it had legitimate objectives.\textsuperscript{260} The Department of Transportation argued that their selective enforcement policy was justified due to the significant increase in resources necessary to enforce the regulation against itiner-

\textsuperscript{255} See generally United States v. Carolene Prod. Co., 304 U.S. 144, 152-54 (1938), for an articulation of the rational basis test.

\textsuperscript{256} Herrick's, 754 P.2d at 1114.

\textsuperscript{257} Id. (quoting Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)).

\textsuperscript{258} Id. The court noted that this differed substantially from the rational basis test under the United States Constitution which would permit a court to hypothesize facts necessary to sustain legislation. Id. at 1114 n.6; see also Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) (challenge of legislation on equal protection grounds will not prevail unless all considerations presented to the legislature and those which the court will assume establish that the issue is debatable).

\textsuperscript{259} Herrick's, 754 P.2d at 1114.

\textsuperscript{260} Id.
ant mechanics. They also argued that it was hard to identify itinerant mechanics and to monitor their actions because the airport had so many entrances.\footnote{261} The court rejected the latter argument, stating that this was merely an admission that security at the airport was inadequate and that, as a result, the Department could not be expected to change its policies.\footnote{262} With regard to the significant financial impact of full enforcement, the court held that “cost savings alone are not sufficient government objectives under [an] equal protection analysis.”\footnote{263} Since itinerant mechanics may incur the same type of liability as lessees, the state’s potential exposure to liability was the same in either situation.\footnote{264} Because the Department of Transportation had failed to prove a rational basis for discrimination, the court held that there had been an equal protection violation. The plaintiffs were not entitled to damages, however, since there was no authorizing statute and injunctive relief was an available and appropriate remedy.\footnote{265}

E. Free Speech

In Jamison v. St. Louis,\footnote{266} the plaintiff had been an employee of Trans World Airlines for sixteen years but was fired in 1984. The plaintiff had been diagnosed as a manic-depressive and believed that his discharge was solely a result of his mental illness. He informed the director of the Lambert-St. Louis International Airport that he

\footnotesize{\begin{itemize}
\item \footnote{261} Id. at 1114-15.
\item \footnote{262} Id. at 1115.
\item \footnote{263} Id. at 1114. The court cited Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), in which the court had stated that:

Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.

Brown, 687 P.2d at 272.
\item \footnote{264} Herrick's, 754 P.2d at 1115.
\item \footnote{265} Id. at 1116.
\item \footnote{266} 828 F.2d 1280 (8th Cir. 1987).\end{itemize}}
wished to protest the airline's action by standing on an airport concourse with a sign reading "TWA discriminates against the handicapped." After the director indicated that he would deny the plaintiff's oral request, the plaintiff then submitted a similar written request emphasizing that he intended the protest to be entirely peaceful. The director denied the request in writing without stating his reasons for doing so.

At the time of the request, the Airport Authority operated under a rule establishing certain procedures for the exercise of constitutional freedoms at the airport. The rule provided that those wishing to exercise constitutional freedoms shall be protected if their activities are not commercial in nature and "do not result in interference with transportation functions at the Airport." The plaintiff claimed that his First Amendment rights were violated. The defendants claimed that although the rule was still in effect, it was "moribund" when plaintiff made his request, and the director did not apply the rule in making his decision to deny the request. Instead, the director believed he had general discretion to permit or deny any activities that he felt would not be in the best interests of the airport or its patrons. The director testified that he generally denied all requests for permission to protest or solicit, unless a court ordered that such permission be granted.

The Eighth Circuit Court of Appeals noted that the government can generally restrict access to its property only if it is a nonpublic forum, and then cited a lengthy list of decisions which held that an airport is a public forum. The court noted the Supreme Court's admonish-

\[267\] Id. at 1281.

\[268\] Id. The director's testimony indicated that he felt he had to protect the public from any potential ramifications of plaintiff's illness and that he did not desire to cause plaintiff any harm. Id. at 1282 n.3.

\[269\] Id. at 1282.

\[270\] Id. The rule 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.

\[271\] Id. at 1283.
ment that "speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." The court held the airport's procedure regarding the exercise of First Amendment rights constitutionally defective in two respects. First, the city had erred by giving the airport director blanket discretion in determining whether a person would be allowed to exercise his First Amendment rights. The Supreme Court has repeatedly rejected these methods "in recognition of the immeasurable injury inflicted on First Amendment freedoms by the potentially arbitrary and discriminatory exercise of an official's unfettered discretion." Second, the airport's practice was not narrowly drawn to achieve compelling interests because the director testified that he regularly refused all solicitation requests.

Consequently, the court held that the practice violated both the First and Fourteenth Amendments. The court further noted that the airport authorities have legitimate interests in security and operational efficiency, but the city failed to show how the exclusion of all mentally ill persons would further its valid efficiency interests. The court quoted the Supreme Court, stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

F. Landing and Terminal Rental Fees

In Rocky Mountain Airways Incorporated v. Pitkin County, the plaintiffs were two airlines who alleged that certain rates and charges imposed by the county were excessive,

272 Id. at 1284 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)).
273 Id.
274 Id. The court noted that it could not "discern [a] compelling government need that would warrant such a drastic exclusion of speakers from a public forum." Id.
275 Id. at 1285.
276 Id. (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)).
unreasonable, and discriminatory. The plaintiffs operated air carrier services between Stapleton International Airport in Denver and Aspen/Pitkin County Airport. Both of the airlines occupied space in the airport terminals and used the airfield facilities pursuant to agreements with Pitkin County.\textsuperscript{278} The county decided to enlarge and remodel the existing terminal, and some of the construction funds were to be generated by increasing the landing fees for regularly scheduled commercial airlines, based on maximum allowable gross landing weight. Additionally, the annual rental charges for terminal space would be increased by 153 percent.\textsuperscript{279} The airlines alleged that while they only accounted for 28.7 percent of annual operations at the airport, they would be paying 50.6 percent of all operating revenues for the airport in 1988. The county was not increasing costs for privately owned aircraft, although they allegedly accounted for 67.7 percent of annual operations.\textsuperscript{280}

The District Court held that the resolution violated the Anti-Head Tax Act.\textsuperscript{281} The court noted that gross weight was a figure which related to the number of passengers in the airplane and consequently the landing fee, which was based upon gross weight, arguably amounted to an indirect head-tax. Additionally, the terminal rental fee amounted to an indirect charge on persons traveling in air commerce because the airlines would pass the costs to consumers. Consequently, the court held that both fees were an indirect charge on the carrying of persons in air commerce.

\textsuperscript{278} \textit{Id.} at 313.
\textsuperscript{279} \textit{Id.} at 314. The rental fees were to increase from $233,417 to $564,488. The increase in landing fees was approximately fifty-two percent. \textit{Id.}
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} at 316. The Anti-Head Tax Act provides that No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, headcharge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . .

49 U.S.C. § 1513(a) (1982). Section 1513(b) provides some exceptions and allows airport owners or operators to levy reasonable rental charges and landing fees. \textit{Id.} § 1513(b).
commerce in violation of the Act.\textsuperscript{282} The county argued that the fees and rentals were merely “reasonable rental charges and landing fees” and were therefore protected under the exceptions to the Act.\textsuperscript{283} The court explained, however, that it was ruling on a motion to dismiss and therefore was bound to take the allegations in the complaint as true. The airlines had alleged that the fees and rentals imposed were unreasonable, and this sufficiently alleged a violation of the Act. The “reasonableness” of the charges were left to be determined by the trier of fact.\textsuperscript{284}

G. Noise Abatement

In \textit{Runway 27 Coalition, Incorporated v. Engen},\textsuperscript{285} the plaintiffs claimed that the FAA had instituted certain changes at Boston’s Logan Airport without considering the environmental impacts of the changes. Plaintiffs challenged the FAA’s introduction of a plan for arrivals and departures on two runways.\textsuperscript{286} The plaintiffs were seeking relief pursuant to provisions of the National Environmental Policy Act (NEPA)\textsuperscript{287} and the Federal Aviation Act of 1958.\textsuperscript{288} The court noted that the statute requiring an environmental impact statement\textsuperscript{289} clearly places a burden on the FAA to determine whether its actions “constitute major Federal actions significantly affecting the quality of the human environment.”\textsuperscript{290}

The court determined that during the time period in which the FAA’s actions were challenged, FAA regulations required the agency to evaluate environmental factors and determine whether an environmental impact

\textsuperscript{282} Rocky Mountain Airways, 674 F. Supp. at 315.
\textsuperscript{283} Id.
\textsuperscript{284} Id.
\textsuperscript{286} Id. at 96-97.
\textsuperscript{289} 42 U.S.C. § 4332 (1982).
\textsuperscript{290} Runway 27, 679 F. Supp. at 98.
statement (EIS) was required.\textsuperscript{291} The court concluded that the FAA's refusal to make such an assessment in this case was erroneous as a matter of law. In order to justify the lack of an environmental assessment, the record must show that changes to flight paths under 3,000 feet did not "routinely route air traffic over noise sensitive areas" or "tend to increase noise over noise sensitive areas."\textsuperscript{292} In this case, it was clear that the changes in the departure procedures affected flight paths over residential areas at a level less than 3,000 feet.\textsuperscript{293}

The court concluded that it was permitted to make a determination as to whether the FAA actions challenged constituted major federal actions and to order the agency to prepare an EIS.\textsuperscript{294} The court ruled, however, that the appropriate procedure would be to first order the preparation of an environmental assessment within 180 days, because the record was insufficient to justify ordering an EIS. The matter was remanded to the FAA for preparation of this report and for any further agency action as might be required by reason of the FAA's findings.\textsuperscript{295} The court retained jurisdiction over the case in order to ensure prompt judicial review.

In Neighbors Organized to Insure a Sound Environment v. En-\textsuperscript{296} gen, the plaintiffs brought an action against the FAA, alleging that the agency had violated the National Environmental Policy Act\textsuperscript{297} by failing to prepare an environmental impact statement (EIS) on a new terminal built at the Nashville Metropolitan Airport. The court began by reviewing the extensive history of studies performed on the airport, the development of two master plans, and the preparation of an environmental assessment on the new

\textsuperscript{291} Id. at 101.
\textsuperscript{292} Id. at 102.
\textsuperscript{293} Id. at 103.
\textsuperscript{294} Id. at 108.
\textsuperscript{295} Id. at 109.
\textsuperscript{296} 665 F. Supp. 537 (M.D. Tenn. 1987).
terminal. The court also noted that on the date the lawsuit was filed, contracts had been awarded for over $96 million, and $54 million had already been paid for completed work. The terminal was essentially complete and opening was targeted for four months from the date that the motions for summary judgment were filed.

The plaintiffs argued that the FAA had improperly rejected an alternative solution of building an entirely new airport. The court disagreed, however, concluding that it was not arbitrary and capricious to eliminate from further study the alternative of moving the airport to another site. In addition, a decision of the FAA to exclude from consideration the speculative impact of a new runway in an environmental assessment was not arbitrary where the new runway would not be necessary for at least ten years. The defendants' motions for summary judgment were granted.

H. Auto Concessions

In Alamo Rent-a-Car, Incorporated v. Sarasota-Manatee Airport Authority, the Airport Authority established a schedule of user or privilege fees in order to meet various expenses not covered by state and federal grants which applied to a wide range of activities conducted on the airport's facilities. After considering measures aimed at alleviating ground traffic congestion and obtaining revenue

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Id. at 543.

Id. at 544. Plaintiffs alleged that the FAA's rejection was based on deceptive treatment of one of the studies. Id.

Id. The court noted that it was neither "reasonable or prudent to radically change [comprehensive] planning when apparently no adverse environmental impacts were associated with pursuing it." Id.

Id. at 544-45.


Id. at 369. The activities subjected to the charge included "airplane landing fees, fees and lease payments for car rental companies located on airport property, parking fees, rent from restaurants and gift shops, and fees paid by taxis and limousines serving the airport." Id.
from operators of hotel and motel courtesy vehicles, the Authority adopted two resolutions. The first resolution assessed a flat fee for hotel and motel courtesy vehicles, while the second resolution assessed a fee against off-airport car rental companies of ten percent of all receipts derived from rentals to passengers picked up at the airport. The plaintiff, an off-airport auto rental service, brought an action in federal district court to enjoin the ten percent user fee, claiming that it violated the equal protection clause of the United States Constitution. The district court held that the fee denied plaintiff equal protection and issued an injunction against enforcement of the fee.

The Eleventh Circuit Court of Appeals reversed. It held that differences in the types of business conducted by these companies was a factor to be considered when analyzing an equal protection claim. In this case, however, the court held that even if there were no differences in the two types of companies involved, the Authority's scheme of user fees did not lack a rational basis and was therefore not arbitrary. The court found that the Authority had drawn rational distinctions based upon the relative benefits and the extent of use of each category of vehicles entering the airport. Therefore, the resolutions were rationally related to legitimate objectives of the Authority and were upheld. Certiorari was denied by the United States Supreme Court.

In *Airline Car Rental Incorporated v. Shreveport Airport Auth.*
thority,\textsuperscript{312} the Shreveport Airport Authority passed a resolution imposing charges on entities who did not have contracts with the Authority but used airport facilities in their business pursuits. The resolution required nonrentant rental car businesses to obtain a permit which required payment of seven percent of all gross business receipts obtained from renting vehicles to persons picked up at the airport.\textsuperscript{315} The plaintiff, a car rental service located near the airport, brought an action seeking declaratory and injunctive relief. The Authority filed a motion to dismiss under Rule 12(b)(6).\textsuperscript{314}

The Authority argued that dismissal was appropriate because the plaintiff was engaged in a business that was not within the scope of the Commerce Clause because it was only tangentially related to interstate commerce.\textsuperscript{315} The plaintiff, however, demonstrated that a substantial amount of its business was derived through a national reservation system.\textsuperscript{316} The court found that a great deal of the plaintiff’s operations were prearranged by interstate communications, and consequently the plaintiff had alleged facts which, if proven, would show that it engaged in interstate commerce. Therefore, the plaintiff had stated an interstate commerce claim upon which relief could be granted.\textsuperscript{317} The court also held that, even though the Authority alleged it was exempt from antitrust liability because it was an agent of the state, the plaintiff had stated a claim upon which relief could be granted under the Sherman Antitrust Act.\textsuperscript{318} The court held, how-

\textsuperscript{312} 667 F. Supp. 293 (W.D. La. 1986).
\textsuperscript{313} Id. at 294-95.
\textsuperscript{314} Id. at 295.
\textsuperscript{315} Id. at 296. The defendant relied upon United States v. Yellow Cab Co., 332 U.S. 218 (1947), “as authority for the proposition that ‘an individual or company can be engaged in a business tangentially related to interstate commerce and still not fall within the ambit of the commerce clause.’” Airline Car Rental, 667 F. Supp. at 296.
\textsuperscript{316} Id.
\textsuperscript{317} Id. at 296-97.
\textsuperscript{318} Id. at 297-98. The Authority alleged exemption from antitrust liability because it was an agent of the state with authority to enforce state policy regarding the airport. Id. at 297.
ever, that the plaintiff had failed to state a cause of action for violation of the Airport Development Acceleration Act of 1973, since that Act did not apply to a provider of ground transportation services.

On November 25, 1986, the court heard cross-motions for summary judgment in the same case. The court denied the plaintiff's motion for summary judgment and granted the defendant's summary judgment motion in part. The Authority had argued for summary judgment on the plaintiff's Commerce Clause claim under the market participant doctrine, arguing that a state or local government entering the market as a participant is not subject to the restraints imposed by the Commerce Clause. The court held that the Authority had not entered the market as a participant in the rental car industry, but rather acted as a market regulator. Because the Authority acted as a market regulator, the resolution was subject to scrutiny under the Commerce Clause. Therefore, summary judgment on the plaintiff's Commerce Clause claim was denied.

The court dismissed the plaintiff's antitrust claims, holding that the Authority was protected by a state action

321 Id. at 304.
322 Id. at 305. The Authority relied on the market participant doctrine as set forth by the Supreme Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). See also Reeves, Inc. v. Strake, 447 U.S. 429, 436-37 (1980) (The Court explained that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market.").
323 Airline Car Rental, 667 F. Supp. at 306. The court stated:

The Authority has not entered the market for rental car services. The Authority neither provides nor purchases these services. Rather, the Authority has simply created a suitable marketplace for the buying and selling of these services by private individuals. In the market for rental car services, the Authority's role, then, is essentially that of a market regulator.

Id.
324 Id.
exemption from the federal and state antitrust laws. Under the exemption, the Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. In this case, a state statute expressed a policy of permitting anticompetitive conduct, so the plaintiff’s state antitrust claims were also dismissed. The court found that the fee imposed by the resolution was properly fixed according to some fair and uniform standard, and that the resolution did not affirmatively discriminate against interstate transactions. Therefore, the resolution was reasonable and did not impermissibly burden interstate commerce.

The plaintiff also claimed that the Authority’s resolution violated the equal protection clause in that it created two classes which were treated differently: nontenant car rental businesses and all other off-airport businesses which used courtesy buses to pick up or deliver customers to and from the airport. The plaintiff failed to allege, however, that the resolution either impinged upon a fundamental right or discriminated against a suspect class. Therefore, the court applied the rational basis test set forth by the Supreme Court and found that the resolu-

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325 Id. at 307-08.
326 Id. at 306. The court held:

Municipalities, however, are not beyond the reach of federal antitrust laws by virtue of their status because they are not themselves sovereigns. “[B]efore a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.”

Id. (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985)).

327 Id. at 313-14. A fee is fair if “it was reasonable, and . . . the actual amount paid was directly proportional to the number of customers involved.” Id. at 313. The fee is uniform if “it was proportional to volume of business, and . . . a commonly accepted charge throughout the nation.” Id.

328 Id. at 308. The airline further alleged that the first class was treated differently from the second class because the resolution arbitrarily required the “[a]irline and other nontenant car rental businesses to pay a flat fee of seven percent of gross receipts for access to the airport terminals while other shuttle service operators pay only a lower fee flat or no fee at all.” Id.

329 Id.

330 Id. at 308-09. The court stated that in deciding “whether the challenged resolution passes the rationality test, this court must answer two questions: (1)
tion had a legitimate purpose, and that it was reasonable for the Authority to believe that the use of the resolution would promote that purpose. Since the resolution was an economic regulation, it did not violate either federal or state equal protection guarantees.

VI. WARSAW CONVENTION

A. Jurisdiction

In Kapar v. Kuwait Airways Corporation, plaintiff initiated an action seeking damages for injuries suffered at the hands of hijackers of a Kuwait Airways flight from Kuwait City to Karachi. The district court dismissed plaintiff's claims against both Kuwait Airways and Pan Am, issuer of plaintiff's ticket, ruling that it lacked subject matter jurisdiction over both carriers under Article 28(1) of the Warsaw Convention. It also dismissed Kapar's claim against Middle East Airlines Airliban, S.A.L., for lack of personal jurisdiction.

The court of appeals affirmed the dismissal based on Article 28(1) of the Warsaw Convention. The district court concluded that the United States could not serve as a proper forum under the first, second or fourth clauses of Article 28(1) because Kuwait Airways is based in Kuwait and the ultimate destination of the flight was Paki-

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Does the challenged legislation have a legitimate purpose? and (2) was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" Id. at 303 (quoting Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)).

831 Id.

832 845 F.2d 1100 (D.C. Cir. 1988).

833 Id. at 1102. The district court held that it lacked jurisdiction over Pan Am because it was fully entitled to Kuwait Airways' Warsaw Convention defenses since Pan Am was Kuwait's agent. Id.

834 Id. at 1101.

835 Id. at 1102. The court noted:

Article 28(1) provides that an action for damages arising out of international air travel "must be brought" in one of four countries: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) the country where the carrier has a place of business through which the contract of carriage was made; or (4) the place of destination.

Id.
stan. Regarding the third clause, the court rejected Kapar’s theory that jurisdiction was established by the fact that his ticket was electronically confirmed in New York and that as a federal employee he was obligated to buy his ticket from an American carrier. On that basis, the court granted Kuwait Airways’ motion to dismiss.

The court also rejected Kapar’s argument that Pan Am, as the issuing airline, was a “carrier” under the terms of the Convention. While the term “carrier” is not defined in the Convention, the court held that the Convention clearly establishes that its drafters were using the term “carrier” to refer only to those airlines that actually transport passengers or baggage. Accordingly, the court held that Pan Am was acting only as an agent for the carrying airline. The court concluded that by including Article 28(1), the Convention drafters intended to restrict the forums in which damage actions may be brought, and that the nexus of the United States with this case is too far removed to support jurisdiction.

In Stanford v. Kuwait Airways Corporation, the court held that in a Warsaw Convention action where an airline was dismissed as a party defendant for lack of subject matter jurisdiction, the airline could not be compelled to produce witnesses for deposition. Plaintiff sought to depose Kuwait Airways’ employees subsequent to Kuwait Airways’ dismissal as a party. The district court affirmed the magistrate’s order denying plaintiff’s motion to compel Kuwait Airways to produce these witnesses in New York on the grounds that the court had not previously directed their production, the court lacked subject matter jurisdic-

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336 Id.
337 Id. at 1103. The court stated that it could not “reasonably be concluded that the drafters intended an airline that merely issues a ticket to face potential liability as a ‘carrier.’” Id.
338 Id. at 1104. The court stated that “[b]ecause the nexus with the United States in this case can only be described as ‘slight . . . and remote,’ . . . subjecting Pan Am to suit in the District Court would be inconsistent with the underlying purpose of Article 28(1).” Id.
339 20 Av. Cas. (CCH) ¶ 18,388 (S.D.N.Y. 1987).
tion over Kuwait Airways rendering all earlier discovery orders invalid, and the subpoenas served on Kuwait Airways under Rule 45(d)(2) did not compel it to produce witnesses for deposition in New York.\textsuperscript{340}

In \textit{Alawode v. Nigeria Airways, Ltd.},\textsuperscript{341} the court granted defendant’s motion to dismiss plaintiff’s action for lack of subject matter jurisdiction pursuant to Article 28 of the Warsaw Convention.\textsuperscript{342} The court held that although the plaintiff’s trip consisted of several parts, the final destination was Lagos, Nigeria, and not New York City.\textsuperscript{343} Accordingly, New York was an improper forum under Article 28.

In \textit{Boyar v. Korean Airlines},\textsuperscript{344} the district court exercised jurisdiction under the Warsaw Convention in three separate actions arising from the downing of a KAL airliner by Soviet military aircraft in 1983. In each of the three actions, the issue was the time at which a contract for air carriage was formed. The court concluded that for purposes of determining jurisdiction under the Warsaw Convention, the place where the ticket is issued is usually, but not always, the place and time in which the contract arises.\textsuperscript{345} Applicability of the Convention is based on a contract of carriage arising between an air carrier and its passengers. The carrier must consent to transport the passenger internationally, and the passenger must consent to being transported.\textsuperscript{346} The court noted that the

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  \item \textit{Id.} at ¶ 18,398-90. The court noted that the witness would be subpoenaed to testify as a nonparty corporate witness, but must be examined at his residence or business. \textit{Id.} at ¶ 18,390.
  \item \textit{Id.} at 18,441 (N.Y. Civ. Ct. 1987).
  \item \textit{Id.} at ¶ 18,442.
  \item \textit{Id.}
  \item \textit{Id.} at 1481 (D.D.C. 1987).
  \item \textit{Id.} at 1485. The court concluded that in determining where the contract is formed, it must determine the “place of mutual consent.” \textit{Id.} This is a factual determination which courts will have to make in each individual case. \textit{Id.}
  \item \textit{Id.} The court cited Block v. Compagnie Nat’l Air France, 386 F.2d 323 (5th Cir. 1967), which examined the contractual relationship required to establish jurisdiction under the Warsaw Convention:
    
    \textit{It is based on a contract of carriage that arises from the relationship between a “carrier” and the passengers. This contractual relation-}
passenger's ticket "is not the contract but is instead evidence of the parties' contractual relationship."\(^\text{347}\)

The court granted the motion to dismiss for lack of treaty jurisdiction as to passenger Lee, concluding that the formation of his contract for carriage had occurred in Seoul. The court denied the motion to dismiss as to passenger Park, concluding that his contract had been formed when his sister-in-law booked their trip with a Michigan travel agent.\(^\text{348}\)

_Rhymes v. Arrow Air, Incorporated_\(^\text{349}\) was one of eighteen wrongful death actions arising out of the crash of an Arrow Air DC-8 in Gander, Newfoundland. The actions were consolidated for consideration in the Florida state courts. The complaints were filed under the Florida Wrongful Death Act and were based solely on the state cause of action and not on the Warsaw Convention.\(^\text{350}\) Defendants removed the cases to the United States District Court for the Southern District of Florida alleging that although plaintiffs failed to plead the Warsaw Convention, the wrongful death claims arose out of international air transportation and thus necessarily presented a wrongful death claim under the Warsaw Convention.\(^\text{351}\) On that basis, defendants contended that they had the right to remove the lawsuit to federal court even if the state court had concurrent jurisdiction.

The district court concluded that the cases should be remanded to the state court. The court rejected the defendants' argument that the cause of action created by the Warsaw Convention preempts the application of state wrongful death statutes for losses occurring during inter-

\[^{347}\] _Boyer_, 664 F. Supp. at 1485 (citing _Block_, 386 F.2d at 336).

\[^{348}\] _Id._ at 1486-87.


\[^{350}\] _Id._ at 738-39.

\[^{351}\] _Id._ at 738.
national flight.\textsuperscript{352} While courts in the past have held that the Warsaw Convention applies to limit recovery even when the cause of action is based on state law, the cause of action upon which recovery is based is not limited by the Convention. Both state law and the Convention may provide a cause of action. Any recovery obtained under either basis, however, is subject to the limitations of the Convention.\textsuperscript{353} Because plaintiffs chose to state their cause of action exclusively under the state wrongful death statute, the removal to federal court was improper.

In *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*,\textsuperscript{354} the Fifth Circuit Court of Appeals considered issues concerning the doctrine of forum non conveniens as it applies to cases governed by the Warsaw Convention. The issue arose when defendant Pan Am sought to have actions filed in New Orleans dismissed on the grounds that the suit should be tried in Uruguay, plaintiff's home country.\textsuperscript{355} As a preliminary issue, the court held that a federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case in favor of a foreign forum.\textsuperscript{356} The court then considered and rejected plaintiff's claim that Article 28(1) of the Warsaw Convention granted them the absolute right to choose the national forum in which their claims would be litigated. The court determined that adherence to the Warsaw Convention does not require the court to forfeit the valuable procedural tool of forum non conveniens.\textsuperscript{357}

\textsuperscript{352} Id. at 740-41. The court noted, however, that "[t]here is no question that when a state cause of action is in conflict with the provisions of the Convention the conflicting provision of the state action will be preempted by the applicable provisions of the Convention." Id. at 741.

\textsuperscript{353} Id. at 740.

\textsuperscript{354} 821 F.2d 1147 (5th Cir. 1987).

\textsuperscript{355} Id. at 1150.

\textsuperscript{356} Id. at 1154-59.

\textsuperscript{357} Id. at 1162. The court stated: If we were to adopt the plaintiffs' construction of Article 28(1) and ignore the language of 28(2), American courts could become the forums for litigation that has little or no relationship with this country. The plaintiffs' interpretation of Article 28(1) cuts against the Con-
RECENT DEVELOPMENTS

Noting that the standard of appellate review for a denial of a motion to dismiss based on forum non conveniens is narrow, the court of appeals ultimately affirmed the district court's denial of the motion. The appellate court held that the case was properly tried in the United States because no other forum could entertain the plaintiff's actions against all defendants. The presence of the United States as a party defendant precluded dismissal of the action for forum non conveniens.

In Martin v. Trinidad & Tobago (BIWA International) Airways Corporation, a federal district court determined that it lacked subject matter jurisdiction under Article 28(1) of the Warsaw Convention. The court held that under the Convention, the original point of departure of a roundtrip flight is the destination of the journey. Accordingly, even though the flight made an interim stop in Miami, Florida, the destination for the journey was Trinidad and Tobago. Thus, the plaintiff could not use Miami as one of the venues in which a civil action could be brought under Article 28(1). Consequently, the court granted defendants' motion to dismiss for lack of subject matter jurisdiction.

B. Injuries and Events Within the Scope of the Warsaw Convention

In Schneider v. Swiss Air Transport Company Ltd., the plaintiff, a five feet tall, 250 pound woman, occupied an

_id_ (footnote omitted).

558 Id. at 1168.
559 21 Av. Cas. (CCH) ¶ 17,497 (S.D. Fla. 1988).
560 Id. at ¶ 17,498.
561 Id. Under Article 28(a) of the Warsaw Convention, “[a]n action for damages must be brought...either before the court of domicile of the carrier or his principal place of business, or where he has a place of business through which the contract has been made, or before the court of the place of destination.” Id.
562 Id. at ¶ 17,499.
aisle seat on a trans-Atlantic flight from Israel to Boston. The person seated to her left required frequent access to the aisle, but the passengers in front of the plaintiff refused to move their fully reclined seats to the upright position. The plaintiff could not get up from her seat, she attempted to move herself over the arm rest to allow the person to her left access to the aisle. During this maneuver, the plaintiff injured her left knee. The question for the court was whether an "accident," as defined by the Warsaw Convention, caused the plaintiff’s injuries.

The Schneider court followed the Supreme Court’s holding in Air France v. Saks for the interpretation of the term "accident." In Saks, the Supreme Court held that under the Warsaw Convention, an “accident” must result from an event external to the passenger, such as the abnormal or unusual operation of the aircraft or equipment. The Schneider court determined that material factual issues remained as to whether the Swiss Air personnel’s denial of assistance and the other passengers’ refusal to raise their seats were external to the injured passenger. Accordingly, the court denied the defendant’s motion for summary judgment.

In Mazze v. Swiss Air Transport Company, Ltd., plaintiff was injured when she fainted in a lavatory during an overnight flight from New York to Zurich. The trial court de-

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364 Id. at 15-16. The plaintiff claimed that she “asked the children seated in front of her to return their seats to the upright position so that she could get up” and also “sought assistance from the children’s father.” Id.
365 Id. at 16.
366 Id. (citing Air France v. Saks, 470 U.S. 392 (1985)).
367 Saks, 470 U.S. at 405-06. The Supreme Court held:

[L]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. . . . When the injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.

Id.
368 Schneider, 686 F. Supp. at 17.
369 21 Av. Cas. (CCH) ¶ 17,320 (C.D.N.Y. 1988).
RECENT DEVELOPMENTS

terminated that an "accident," for purposes of the Warsaw Convention, occurs only if an unexpected or unusual event that is external to the passenger causes the injury.\textsuperscript{370} Because plaintiff failed to establish that an occurrence on the aircraft external to herself caused the fainting spell, the court held that defendant Swiss Air was not liable.\textsuperscript{371}

In \textit{Sweis v. Trans World Airlines, Incorporated},\textsuperscript{372} a terrorist attack on the airport injured the plaintiffs. The plaintiffs had checked their baggage, obtained their boarding passes, and were awaiting arrival of the airplane which was scheduled to fly them to New York.\textsuperscript{373} The court held that the terrorist attack was an "accident" within the terms of Article 17 of the Warsaw Convention.\textsuperscript{374} The court further determined, however, that the "accident" did not take place during the course of "embarking or disembarking" within the meaning of the Warsaw Convention. Thus, liability could not be found.\textsuperscript{375}

In reaching this conclusion, the court looked to the four criteria applied in \textit{Day v. Trans World Airlines, Incorporated}.\textsuperscript{376} In \textit{Day}, the Second Circuit Court of Appeals determined that the plaintiffs, who were injured by terrorists while standing in line at a boarding gate, were engaged in the operation of embarking.\textsuperscript{377} The \textit{Sweis} court determined that application of the \textit{Day} criteria made clear that the plaintiffs were not engaged in an operation of embark-

\begin{itemize}
\item \textsuperscript{370} \textit{Id.} at ¶ 17,321 (citing \textit{Saks}, 470 U.S. at 405-06).
\item \textsuperscript{371} \textit{Id.}
\item \textsuperscript{372} 681 F. Supp. 501 (N.D. Ill. 1988).
\item \textsuperscript{373} \textit{Id.}
\item \textsuperscript{374} \textit{Id.} at 503. The court noted that "while terrorist attacks might not seem at first thought to be 'accidents,' they have universally been held to be so and TWA does not contend otherwise." \textit{Id.} (citation omitted).
\item \textsuperscript{375} \textit{Id.} at 503-04. The court held that the Convention did not contemplate carrier liability to extend to a situation where passengers were waiting to check in their baggage and obtain boarding passes. \textit{Id.}
\item \textsuperscript{376} \textit{Id.} at 504 (citing \textit{Day v. Trans World Airlines, Inc.}, 528 F.2d 31 (2d Cir. 1975), \textit{cert. denied}, 429 U.S. 890 (1976)).
\item \textsuperscript{377} \textit{Day}, 528 F.2d at 33-34. The Second Circuit held that "whether one looks to passengers' actions (which was a condition to embarking), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that plaintiffs were 'in the course of embarking.'" \textit{Id.} (citation omitted).
\end{itemize}
Accordingly, the court granted TWA's motion for summary judgment on the issue of liability under the Warsaw Convention.

C. Cargo and Passenger Baggage Claims

1. Claims Under the Warsaw Convention

In Adesina v. Swissair, defendants appealed from a judgment in small claims court awarding plaintiff $1,281 and costs for the loss of baggage during an international flight. On appeal, the court held that the state lacked jurisdiction to entertain such a claim because the claim was covered by Article 28(1) of the Warsaw Convention and the United States did not fall within any of the four categories that would have given rise to jurisdiction.

In Abbaa v. Pan American World Airways, Incorporated, defendant Pan Am brought a motion to dismiss plaintiff’s complaint for lost baggage, arguing that the district court did not have subject matter jurisdiction to hear the dispute since jurisdiction was based on diversity and the amount in controversy was less than $10,000. Defendant based its claim on Warsaw Convention limitations on reimbursement for lost luggage, allegedly a total of $3,175.50 for five lost bags.

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378 Swies, 681 F. Supp. at 505. The court determined that "on all four factors identified in Day this case presents no really persuasive reason to apply Article 17 of the Warsaw Convention." Id.

379 The Sweises' activities were several steps further removed from actual boarding [than the Day plaintiffs]. [The] Sweises were not in TWA's control in the same sense as the [Day] plaintiffs... departure was not scheduled until two hours after the attack... [and] in Day the plaintiffs were a few feet from the boarding gate and 250 meters from the plane. Here [the] Sweises were about 620 feet... from the boarding gate, and their plane had not yet even landed in Rome. Id.

379 Id. at 506.


381 Id.


383 Id. at 992; see 18 U.S.C. § 1332 (1982) for requirements of diversity jurisdiction.

384 Abbaa, 673 F. Supp. at 992. The amount under the Warsaw Convention was limited to $634.90 per bag, based on a presumptive weight of seventy pounds per
Although the plaintiff argued that the limitation should not apply since the airline did not note the weight of the baggage, the court held that technical failure to comply with the Warsaw Convention does not preclude the airline from applying the limitations on liability, as long as the claimants were not prejudiced by the omission. As plaintiff was in the business of exporting merchandise and had previously exported goods through international carriers, the court held that plaintiff had not suffered prejudice from the omission. Accordingly, the court granted defendant's motion to dismiss without prejudice due to lack of jurisdiction.

In *Royal Insurance Company v. Aerolineas Argentinas*, plaintiff brought suit because of damage to cartons of shoes delivered by a ground handling crew of Trans World Airlines to the terminal where they were picked up by a trucking company hired by the consignee. An inspection and claim form noted that fifteen of the sixty cartons were "wet and intact subject to inspection." A legend below noted that the form was not a claim or legal notification of intent to file a claim.

The court held that under Rule 23(B) of the tariff filed by the defendant with the Civil Aeronautics Board, written notice of damage to cargo must be made within seven days of the date of receipt of the damaged goods. The bag, with Pan Am's reimbursement rate at $9.07 per pound. Plaintiff contended that the total value of bags and goods to be reimbursed was $10,539, plus the baggage charge of $450 and special damages, which brought total damages to $15,778. The court found that plaintiff could reasonably be held responsible for understanding the conditions under which merchandise is shipped, and that the plaintiff knew the weight of the luggage was in excess of the presumptive weight but declined to declare excess weight and to arrange for excess insurance. The court held that under Rule 23(B) of the tariff which defendant filed provides:

No action shall be maintained in case of damage to or partial loss of cargo unless a written notice, sufficiently describing the cargo concerned, the approximate date of the damage, and the details of the
court held that the notation on the inspection and claim form was not sufficient to apprise the defendant that the shoes inside were damaged and that a claim would be made. Accordingly, the requisite notice of claim was not timely presented, and defendant’s motion for summary judgment was granted.

In *Leather’s Best, Incorporated v. Aerolineas Argentinas*, the plaintiff brought an action to recover $9,250.78 for defendant’s failure to deliver one of three pallets of semi-finished leather shipped from Argentina to New York. The consignee’s trucker received the incomplete shipment on or about September 13, 1983. The trucker’s receipt identified one of the separately marked and numbered pallets as “missing.” Plaintiff consignee filed a notice of claim with defendant on approximately October 3, 1983, twenty days after receipt of the shipment.

In reversing the trial court’s grant of summary judgment for plaintiff, the appellate court held that under defendant’s tariff, the loss of one of three pallets of a shipment constitutes a partial loss of the total shipment and not the total loss of part of the shipment. The court found that the notation on the trucker’s receipt and the description of the shipment as consisting of three pallets was evidence that the plaintiff consignee had notice that one pallet was missing. The court noted that none of the documents described the portion of the cargo delivered as a partial shipment, which would have led plaintiffs to believe that delivery of the remaining pallet was imminent. Accordingly, the court held that the plaintiff’s ac-

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39f. *Id.* Moreover, TWA’s form required that the type and amount of any damage be specified. *Id.*


395f. *Id.* at 797, 520 N.Y.S.2d at 491.

394f. *Id.* In cases of damage or loss to part of the cargo, as opposed to total loss, the consignee is immediately aware of the carrier’s breach, and the seven day time period for filing notice of a claim should not be relaxed. *Id.*

395f. *Id.* at 797, 520 N.Y.S.2d at 492. Apparently, the court believed that if the
tion was barred by its failure to file a written notice of claim within seven days from the date of receipt of a portion of the cargo, as required by defendant’s tariff rules.\textsuperscript{396}

In \textit{Maro Leather Company v. Aerolineas Argentinas},\textsuperscript{397} the same court addressed the identical issue. The court again concluded that plaintiff’s action for failure to deliver two of nine pallets of unfinished leather goods shipped should be dismissed because of plaintiff’s failure to file a written notice of claim within seven days of receipt of a portion of the cargo.\textsuperscript{398}

In \textit{Royal Insurance v. Amerford Air Cargo},\textsuperscript{399} the issue before the court was whether an indirect air carrier can claim the limitations of liability provided under the Warsaw Convention. Defendant Amerford was an air freight forwarder who lost three cartons of goods which were to be shipped to Hong Kong for Royal Insurance’s insured, IBM. Total value of the lost goods was in excess of $95,000. When a claim was submitted for the full value of the goods, Amerford responded that its contractual liability was limited to $20 per kilo or a total of $1,310 under the terms of the Warsaw Convention.\textsuperscript{400} After paying the claim, IBM’s insurer, Royal Insurance Company, brought this action seeking to recover the value of the lost goods.

The court granted defendant’s motion for summary judgment on the grounds that the Warsaw Convention applied. The court noted that although the goods were

\textsuperscript{396} \textit{Id.} The court noted that the purpose behind such a short time limit for a partial loss claim was to allow the carrier to make a prompt investigation and endeavor to locate the item and identify the person or practice responsible. \textit{Id.}

\textsuperscript{397} 20 Av. Cas. (CCH) \textsuperscript{\textcopyright} 18,598 (N.Y. App. Term. 1987).

\textsuperscript{398} \textit{Id.} at \textsuperscript{\textcopyright} 18,599. The court reasoned in both cases that the loss of one of a number of pallets constituted a partial loss of a total shipment which, according to defendant’s tariff, triggered the seven day limit for filing notice of a claim. If the loss had been a total loss of part of the shipment, the plaintiff would have 120 days to file notice. \textit{Id.}

\textsuperscript{399} 654 F. Supp. 679 (S.D.N.Y. 1987).

\textsuperscript{400} \textit{Id.} at 680. IBM had not declared a higher value for the goods, nor paid for additional insurance.
being stored in a warehouse near JFK International, such storage was incidental to defendant’s business as an indirect air carrier. The court also noted that Amerford issued an airway bill to IBM when the lost goods were picked up. Thus, the Warsaw Convention applied rather than New York law concerning the liability of warehousemen for lost goods.

Finally, the court also rejected Royal’s argument that willful misconduct had occurred under the terms of Article 25 of the Convention. The court noted that Amerford’s affidavits showed that reasonable security measures were taken to safeguard the goods. Accordingly, the court declined to apply the presumption of conversion which applies to losses by warehousemen under New York law. For those reasons, the court denied Royal’s motion for summary judgment and granted that of Amerford.

2. Non-Warsaw Convention Baggage Claims

In Arkin v. New York Helicopter Corporation, plaintiffs sought remand of an action after it was removed by one of the defendants from the New York State Supreme Court. The plaintiff asserted five common law causes of action resulting from the loss of his luggage. The complaint neither invoked federal law nor referred to the Warsaw Convention.

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401 Id. at 682. Federal regulations defined an air freight forwarder to be an indirect air carrier. Id. In determining that Amerford was a carrier, the court looked at a variety of other factors, such as the way the party made its profit, the way the party’s obligation was expressed in the agreement, and the history of dealings between the parties. Id.

402 Id. at 684. The court emphasized that its holding was consistent with the fundamental purpose of the Warsaw Convention in limiting the liability of air carriers to fix costs and establish a uniform body of rules to govern international aviation. Id.

403 Id. Royal did nothing to suggest that any actions or omissions taken by Amerford had resulted in the loss of the goods. Id.

404 Id. at 680.

405 21 Av. Cas. (CCH) ¶ 17,403 (S.D.N.Y. 1988).

406 Id. Plaintiffs had traveled from New York to London, and their luggage never made it out of New York City. Id.
The court granted plaintiff’s motion to remand the action, noting that the Warsaw Convention created a separate cause of action independent of state law and is not the exclusive cause of action by which plaintiffs may seek relief.\textsuperscript{407} The court held that under the well-pleaded complaint rule, removal to federal court will not be permitted by the defendant unless the plaintiff’s complaint establishes that the case arises under federal law.\textsuperscript{408} Since plaintiff’s complaint was based on state common law, the removal was improper.

In Coughlin v. Trans World Airlines, Incorporated,\textsuperscript{409} plaintiff sued TWA for $78,000, an amount exceeding the baggage liability limitation printed on her ticket. She alleged that the liability limitation was voided because the ticket agent misinformed her that she could not carry the remains of her late husband on board but instead would have to check the package with her luggage.\textsuperscript{410} TWA moved for partial summary judgment on the issue of whether the liability limitation was valid notwithstanding the airline’s negligence. The district court granted the motion and awarded Ms. Coughlin $1,250, which was the maximum liability under TWA’s tariff.\textsuperscript{411}

The Ninth Circuit Court of Appeals reversed. The court held that a carrier may only limit its liability for loss or destruction of luggage if it allows passengers to protect the luggage by either carrying it on board or purchasing excess valuation insurance.\textsuperscript{412} TWA’s ticket agent would not allow Ms. Coughlin to carry her husband’s cremated remains on board, even though they were contained in a package well within the size restriction for carry-on lug-

\footnotesize{\textsuperscript{407} Id.  
\textsuperscript{408} Id.  
\textsuperscript{409} 847 F.2d 1432 (9th Cir. 1988).  
\textsuperscript{410} Id. at 1433.  
\textsuperscript{411} Id.  
\textsuperscript{412} Id. TWA’s published tariff expressly instructed passengers to carry their valuables personally. Id. The court stated that the cremated remains were unquestionably valuable, and nothing suggested that the carriage of human remains was prohibited. Id.}
gage.\(^{413}\) The court held that while a carrier’s negligence does not invalidate the tariff limitation,\(^{414}\) TWA breached the tariff rule requiring that passengers personally carry their valuables.\(^{415}\) The court concluded that the failure to allow Ms. Coughlin to carry the remains of her late husband on board was a material breach of the agreement which warranted its rescission, and consequently TWA could not enforce the tariff limitations.\(^{416}\)

In Ofikuru v. Nigerian Airlines Ltd.,\(^{417}\) plaintiff initiated a small claims action in April, 1986 to recover $1,500 for the loss of a piece of luggage and its contents which were on a Nigerian Airlines flight from Lagos, Nigeria to New York in October, 1983. Defendant Nigerian Airlines removed the action to federal court and filed a motion to dismiss pursuant to Rule 12(b) on the ground that plaintiff failed to commence the action within the appropriate period of limitation under the Warsaw Convention.\(^{418}\)

The court initially determined that Nigerian Airlines was an instrumentality of a foreign state as defined under the Foreign Sovereign Immunities Act,\(^{419}\) and thus removal was proper. The court subsequently determined that the case was barred by the two-year statute of limitations under Article 29 of the Convention.\(^{420}\) Accordingly, plaintiff’s case was dismissed.

In Nahm v. SCAC Transport Incorporated,\(^{421}\) plaintiff...
brought suit for recovery of goods lost during transit from Paris to Chicago. International freight forwarder SCAC admitted liability, but maintained that plaintiff had agreed to limit liability to a $10,000 level of insurance coverage. Defendant Flying Tigers argued that plaintiff had no cause of action against it because the transport of her goods did not constitute successive carriage under the terms of the Warsaw Convention, and because she did not contract directly with Flying Tigers. The trial court denied plaintiff’s motion for summary judgment and granted defendant’s motions, entering judgment against SCAC in the amount of $10,000.

The court of appeals reversed the trial court’s ruling that plaintiff was limited to the $10,000 recovery based on her election to insure the goods for that amount. The court noted that in order to limit a carrier’s liability to a specific amount, the shipper must make an absolute, deliberate and well-informed choice to do so. In this case, the court held that the election by this shipper did not constitute such a deliberate and well-informed choice because the shipper was not engaged in the import-export business and was not informed that her choice would be construed to limit liability. The court also rejected SCAC’s argument that recovery was limited to $10,000 under the “released value doctrine,” which applies only where the carrier and shipper agree upon the value of the goods.

The court affirmed the Flying Tigers’ motion for summary judgment based on its interpretation of the Warsaw Convention provisions regarding successive carriage. The court noted that successive carriage occurs where all of the parties intended and understood that the performance of the shipment by several carriers would constitute

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422 Id. at 971, 522 N.E.2d at 583.
423 Id.
424 Id. at 971, 522 N.E.2d at 584.
425 Id. The court found the released value doctrine inapplicable here.
a single operation. The court held that Flying Tigers did not understand or intend its transport of a consolidated shipment by SCAC to be a single operation for the benefit of plaintiff. Thus, under these circumstances, shipment of plaintiff’s goods by Flying Tigers was not a transport of successive carriers, and the trial court properly granted summary judgment.

D. Statute of Limitations

In Blaw-Knox Construction Equipment Company v. Royal Jordanian Airline, plaintiff’s air cargo was lost during shipment from Chicago to Saudi Arabia. The defendant shipper, BDG International (BDG), moved to dismiss the amended complaint pursuant to Rule 12(b)(6) due to plaintiff’s failure to file within the period of limitations. Plaintiff’s complaint alleged that, based upon its information and belief, the cargo was scheduled to arrive at its destination four to seven days after its scheduled departure on March 23, 1985. BDG sought dismissal, asserting that plaintiff’s cause of action accrued on the date of shipment. Consequently plaintiff’s filing of the complaint on March 24, 1987 was untimely under Article 29(1) of the Warsaw Convention, which requires that suits be brought within two years.

The court denied BDG’s motion to dismiss, holding that the cause of action did not accrue when the goods were supposed to be shipped. Rather, it accrued when the goods did not arrive in Saudi Arabia at the expected time, some four to seven days later. Accordingly, even though the complaint did not specify a particular arrival date, the estimated four to seven days were consistent with the contract agreed upon between the parties.

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426 Id.
427 21 Av. Cas. (CCH) ¶ 17,450 (N.D. Ill. 1988).
428 Id.
429 Id.
430 Id. at ¶ 17,450-51.
431 Id. at ¶ 17,451. The court stated that “the breach occurred when the goods
Moreover, the court noted that this interpretation was consistent with the Warsaw Convention provisions concerning limitations incorporated by reference into the contract. Thus, the period from March 27 to March 30, which occurred four to seven days after shipment, was equated to the date upon which the aircraft ought to have arrived pursuant to Article 29(1) of the Warsaw Convention.\footnote{Id.}

In \textit{Data General v. Air Express International Company},\footnote{676 F. Supp. 538 (S.D.N.Y. 1988).} plaintiffs brought an action pursuant to the Warsaw Convention against Air Express International for alleged damage to a cargo of computer parts. Thereafter, Air Express filed a third party action against Iberia Lineas Aereas de Espana (Iberia), claiming that it was responsible for any alleged damage.\footnote{Id. at 539. Air Express claimed that it delivered the computer parts in good condition to Iberia in New York on October 23, 1984. It further alleged that the parts were damaged while under Iberia’s control during shipment to Madrid, Spain on October 26, 1984. Air Express filed its third party complaint against Iberia on May 7, 1987, more than two years after the date of shipment. \textit{Id.} \footnote{Article 29 provides in part that “[t]he right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.” \textit{Id.} (citing 49 U.S.C. § 1502 (1982)).} The court determined that it was the intent of the drafters to make this two-year limitation an absolute bar which applied to all causes of action. Accordingly, the court held that filing an action within the two year time period was a prerequisite to maintaining an action under the Warsaw Convention, in-
cluding an action for indemnification or contribution
against a third party.435 Thus, Iberia's motion to dismiss
was granted.

E. Damages

In re Air Crash Disaster at Gander, Newfoundland on December
12, 1985436 was one of many actions stemming from an
air crash in Newfoundland which claimed the lives of
American servicemen returning from the Middle East to
Fort Campbell, Kentucky. Defendant brought a motion
for partial summary judgment on the issue of punitive
damages, claiming that such damages were unavailable
under the Warsaw Convention, and the court agreed.437

Both plaintiffs and defendants agreed that the Warsaw
Convention controlled this case. Article 17 of the Warsaw
Convention establishes the liability of international air
carriers for harm to passengers. The Convention pro-
vides that a carrier is liable only for damage sustained or
bodily injury suffered by a passenger when the accident
causing the injury takes place on board the aircraft or dur-
ing boarding or deboarding of the airplane.438 The court
interpreted the text of Article 17 as entirely compensatory
in tone, and noted that punitive damages are not damages
sustained but are private fines levied to punish a defend-
ant for his conduct and to deter others from engaging in
similar conduct in the future.439 Accordingly, punitive
damages are not measured solely by the bodily injury suf-
fered by a plaintiff. Instead, they are determined "accord-
ing to other factors such as the outrageousness of the

435 Id. at 540-41. The court noted that the drafters had considered and rejected
a provision which would have incorporated the tolling provisions of the forum
court. Id. at 540.
437 Id. at 930.
438 Id. at 931 (citing 49 U.S.C. § 1502 (1982)). Article 17 provides that "[t]he
carrier should be liable for damage sustained in the event of death or wounding of
a passenger or any other bodily injury suffered by a passenger, if the accident
which caused the damage so sustained took place on board the aircraft or in the
course of any of the operations of embarking or disembarking." Id.
439 Id.
injurious act, the defendant's culpability, the defendant's motive and intent, and the nature and extent of the harm to the plaintiff."

In holding that punitive damages cannot be recovered under the Warsaw Convention, the court rejected plaintiff's contention that punitive damages may be levied for wrongful acts that rise to the level of willful misconduct. Article 25 provides that a carrier may not avail itself of the liability limitation provisions of the Convention if the damage is caused by his willful misconduct or by conduct which is considered to be equivalent to willful misconduct. The court determined that this limitation, as well as that of Article 3(2), is most reasonably interpreted as exceptions to the limitations on the recovery of compensatory damages, not authority for the recovery of punitive damages. Finally, the court noted that other courts had held that the Warsaw Convention does not permit a claim for punitive damages. Consequently, the court granted defendant's partial motion for summary judgment.

_In re Korean Airlines Disaster of September 1, 1983_ arose from the downing of a KAL Airliner by a Soviet military aircraft. Plaintiffs moved for partial summary judgment on the issue of the per passenger damage limitation of the

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440 Id. at 931-32.
441 Id. at 932.
442 Id. (citing 49 U.S.C. § 1502 (1982)). Article 25 provides that:
   The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

443 Id. Article 3(2) provides that "if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Id. (citing 49 U.S.C. § 1502 (1982)).
444 Id.
445 Id. at 933.
Warsaw Convention, seeking a declaration that KAL was liable for compensatory damages without limitations and regardless of fault. The motion claimed that the type size used in the liability limitation notice printed on KAL passenger tickets was inadequate. The notice was printed in 8-point type while the Montreal Agreement specified 10-point type. The district court denied plaintiffs' motion, holding that KAL could avail itself of the $75,000 per passenger limitation. In so ruling, the district court considered and rejected contrary Second Circuit precedent. An interlocutory appeal from the district court's ruling was granted.

The D.C. Circuit Court of Appeals adopted the decision of the district court, holding that the Warsaw Convention/Montreal Agreement's $75,000 per passenger damage limitation applied to all actions, including those transferred from district courts bound by the Second Circuit's contrary ruling. In so holding, the court rejected the rule that the law applicable in the transferor forum attends the transfer and applies to transferred federal claims. The court of appeals noted that, in theory, federal courts were members of a single system and apply a single of body of law. Thus, the plaintiff cannot expect

447 Id. at 1172. The per passenger damage limits were set at $75,000 by the Montreal Agreement. Id.

448 Id.

449 Id. The contrary decision cited was In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d 85 (2d Cir.) (holding that airline's use of 8.5-point type constituted a violation of the notice provision of the Montreal Agreement, thereby depriving the airline of the Agreement's defenses and liability limitations), cert. denied, 464 U.S. 845 (1983). For the opinion of the district court, see In re Korean Airlines Disaster of September 1, 1983, 664 F. Supp. 1463 (D.D.C. 1985) [hereinafter Korean Airlines I].

450 Korean Airlines II, 829 F.2d at 1173.

451 Van Dusen v. Barrack, 376 U.S. 612 (1964) (where an action is properly brought in the district court and defendants seek venue transfer, the change of venue is not accompanied by a change in governing state laws). In the Korean Airlines case, several actions were filed against KAL in several district courts and were subsequently consolidated and transferred to the District Court of Columbia pursuant to 28 U.S.C. § 1407. Korean Airlines II, 829 F.2d at 1173.

452 Id. at 1175. (citing H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963)). Thus, the difference between Korean Airlines and Van Dusen is that Korean Airlines involved a transferred federal claim and
a favorable interpretation of that law based solely on his ability to choose the original forum.\textsuperscript{458}

The court of appeals adopted the memorandum and order of the district court, rejecting plaintiff's argument that KAL's failure to print the Montreal advice concerning damage limitations in at least 10-point type constituted nondelivery of a ticket under Article 3(2) and that therefore KAL forfeited the limitation provisions of the Warsaw Convention.\textsuperscript{454} In reaching this conclusion, the court rejected plaintiff's argument that because KAL was a corporate citizen of a nonparty to the Warsaw Convention, it had no standing to avail itself of the Warsaw Convention defenses.\textsuperscript{455} The district court held that the Montreal Agreement, while it must be read in connection with the Warsaw Convention, does not provide for loss of damage limitation for failure to provide warning in 10-point type size.\textsuperscript{456} Moreover, while the domestic carriers agreed to the requirement in the Montreal Agreement, foreign air carriers are not contracting parties to that treaty.\textsuperscript{457} Acc-
Accordingly, they cannot be required to forfeit their damage limitations based on a failure to comply.

Finally, the court rejected plaintiff's contention that there is no treaty relationship between the United States and Korea. In reading its decision, the court noted that while the Republic of Korea adheres to the Hague Protocol rather than the Warsaw Convention, the Protocol consists of nothing more than a list of amendments to the original treaty. The court held that the Hague Protocol was intended to be and, in fact, is merely the Warsaw Convention with certain alterations. The court noted that it is the goal of the Warsaw Convention to establish uniformity in international civil aviation law and procedure, and a requirement of reciprocity would not further that goal.

F. Miscellaneous

In Sethi v. KLM Royal Dutch Airlines, plaintiff brought suit after KLM officials prevented him from boarding a KLM airliner for the second part of his trip from Georgia to New Delhi because his visa had expired. The court granted defendant's motion for summary judgment based on a tariff rule that provided for refusal of carriage to any passenger who could not present the required documents. The court denied attorneys' fees to the airline,
however, due to the fact that it had permitted the passenger to complete the Georgia-to-Amsterdam part of his trip before refusing to allow him to complete the remainder of his journey to New Delhi.\(^\text{463}\)

In *Lee v. China Airlines Ltd.*,\(^\text{464}\) plaintiffs were injured when the aircraft in which they were traveling made an unexpected and uncontrolled descent off the coast of California.\(^\text{465}\) Defendant moved to dismiss the action due to lack of jurisdiction under the Warsaw Convention. The Lees unsuccessfully argued that Article 28 of the Convention did not require dismissal and that, even if it did, the court should ignore the Convention’s mandate because the Convention is unconstitutional.\(^\text{466}\) The court concluded that the Warsaw Convention required dismissal because the United States was not one of the proper venues under the Convention. It was not the destination, carrier’s principal place of business, the place where the ticket was purchased, or the carrier’s domicile.\(^\text{467}\)

The court also rejected plaintiffs’ claims that the Warsaw Convention is unconstitutional as violative of substantive due process, procedural due process, and equal protection.\(^\text{468}\) In rejecting plaintiff’s substantive due process claims, the court noted that although the right to travel interstate is fundamental, the right to international

\[\text{Id.}\]

\(^{463}\) *Id.*


\(^{465}\) *Id.* at 980. The plane dropped approximately 31,000 feet. *Id.*

\(^{466}\) *Id.* The Lees argued that the Convention did not apply because Hong Kong, their departure point, was not a contracting party. The court held that the United Kingdom’s status as a contracting party extended to Hong Kong. *Id.*

\(^{467}\) *Id.* at 980-81. The Lees and China Airlines agreed that the airline’s principal place of business and its domicile was Taiwan, and that the ticket was purchased in Hong Kong. *Id.* at 981. They disagreed as to the flight’s destination. The Lees’ tickets enabled them to travel from Hong Kong to Taipei, on to San Francisco and then back to Hong Kong. *Id.* The court held that each ticket has only one destination, and “the Lees’ destination was Hong Kong because that was the ultimate stopping place of their travels . . . .” *Id.*

\(^{468}\) *Id.* at 982-85.
travel is not. Accordingly, the court had only to evaluate the Convention under the rational basis test. The court held that its goal of establishing uniformity in the law of international aviation clearly passed muster.

The plaintiffs also argued that the Warsaw Convention violated the equal protection clause of the Fifth Amendment because it makes distinctions among passengers on the same plane depending on their ticket and the destination specified thereon. Thus, some passengers would be able to bring an action in the United States for injuries suffered while other passengers would be precluded from bringing such an action. The court noted that treating similarly situated people differently is not always unconstitutional, and held that the distinctions must merely pass the rational basis test. The court then noted that it had already determined that the Convention passed the rational basis test.

Finally, the court rejected the plaintiffs’ claim that the jurisdictional limit violated due process by preventing American residents injured in or near the United States from bringing a tort action in the United States. Even assuming that the Lees had a property interest in their cause of action against the airline, the court determined that dismissal was appropriate. The court held that the

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469 Id. at 982-83 (quoting Califano v. Aznavorian, 439 U.S. 170 (1978)).
470 Id. at 983. The court held that the Convention had a de minimis impact on international travel because it neither prevented anyone from traveling abroad nor prevented an international traveler from obtaining additional insurance to compensate for the Convention’s liability limitations. Id. Thus, any limitations on international travel are incidental and not wholly irrational. Id.
471 Id.
472 Id. The Convention did not violate the equal protection clause because it did not impair any fundamental rights and did not create suspect classifications. Id. The classifications were rational because they ensured “that the Convention will only apply to journeys with a clear nexus to High Contracting Parties, and . . . that passengers will have had some notice and an opportunity to choose whether they are willing to subject themselves to the dictates of the Convention.” Id. at 984.
473 Id.
474 Id. The court cited Mathews v. Eldridge, 424 U.S. 319 (1976), which established three factors to consider in determining how much process is due:

First, the private interest that will be affected by the official action;
Lees failed to demonstrate that they would be unable to receive an adequate hearing of their claims in either Taiwan or Hong Kong, the two forums appropriate under Article 28. Accordingly, the court granted China Airlines' motion to dismiss.

VII. LIMITATIONS OF ACTIONS

A. Statute of Repose

In Harrison v. Northwest Orient Airlines, Incorporated, the plaintiff filed a complaint in the Federal District Court for the Southern District of New York for damages due to personal injuries allegedly suffered on a flight from California to Washington when she tripped over a luggage strap protruding into the aisle from underneath a seat. The court granted defendant’s motion for summary judgment dismissing the complaint on the ground that it was time-barred under the California statute of limitations for personal injury.

The court's subject matter jurisdiction was founded upon diversity of citizenship. The New York “borrowing statute” came into play because the plaintiff did not reside in New York. It provided that when the cause of action accrues outside of the state, the limitations period would be the lesser of the New York or California statute of limitations period.

The court determined that the accident second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Lee, 669 F. Supp. at 984. The court noted that the Lees had produced almost no evidence about the adequacy of proceedings in Hong Kong or Taiwan. Id. Additionally, the court noted that since both locations are parties to the Convention, a lot of the usual mystery regarding the law of the forum disappears since the Convention will play a dominant role in either country. Id.


Id. at 132. The California statute of limitations was one year, while the New York limitations period was three years. Id.

Id. The court noted that the statute provides:
occurred while the flight was in California air space, and that since the flight was from California to Washington, no other state had a more compelling interest in resolving the suit than California. Accordingly, the court determined that California’s one year statute of limitations applied, and the action was barred.

B. Tolling

In First Interstate Bank v. Piper Aircraft Corporation, plaintiffs brought a wrongful death action nearly six years after the fatal crash, alleging negligent design and construction, failure to warn, and intentional concealment of the airplane’s defective design and construction. Plaintiffs also asserted that because of the alleged concealment, the defective nature of the airplane was not known to them until publication of an article in the Wall Street Journal on December 15, 1983. Piper moved to dismiss, contending that plaintiffs’ cause of action accrued at the time of the crash and was therefore barred by the applicable statutes of limitation. Plaintiffs countered that the fraudulent concealment tolled the statute of limitations.

The court noted that Colorado had consistently recognized fraudulent concealment as a basis for tolling statutes of limitation. The court rejected defendant’s
argument that in products liability cases, knowledge of
death is tantamount to knowledge of the existence of the
basis of a potential claim. The court noted that negligent
conduct cannot be presumed from the happening of an
accident, and that some time is required for interested
persons to discover sufficient information about the cir-
cumstances of the accident to permit accurate assessment
of the actual cause of injury or death. Additionally, the
facts and circumstances surrounding different accidents
vary widely. Due to these factors, the question of whether
a plaintiff applied reasonable diligence in discovering that
a death was caused by a negligent act must generally be
determined as a question of fact. Accordingly, the
court held that the limitations period in Colorado’s
wrongful death statute could be tolled for fraudulent
concealment.

VIII. INSURANCE COVERAGE

A. Pilot Qualifications

*National Union Fire Insurance Company v. Zuver* involved
an action for declaratory relief in which the court was
asked to determine insurance coverage under an aviation
policy. The insured was a pilot with a visual flight rating
who crashed under weather conditions normally requiring
an instrument flight rating. The liability carrier ten-

prove in order to toll a statute of limitation are: (1) the 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 such a fact is being concealed; (3) igno-
rance of that fact on the part of the one from whom the fact is con-
cealed; (4) the intention that the concealment be acted upon; and (5)
action on the concealment resulting in damages.

2. 207, 750 P.2d at 1247.
5. Id. at 1201 (citing Richardson v. Pioneer Constr. Co., 164 Colo. 270, 434
P.2d 403 (1967)).
6. Id. (citing Kopeikin v. Merchants Mortgage & Trust Corp., 679 P.2d 599 (Colo.
1984)).
dered a defense to claims against his estate under a reservation of rights and subsequently filed an action for declaratory judgment. 487

At issue was the interpretation of two provisions of the policy. The first provision was an exclusionary clause which provided that the policy did not apply if the pilot was not properly certified for the operation involved. 488 The second provision was a pilot warranty which provided that insurance would be effective only when the aircraft was operated by a pilot who possessed qualifications for the flight involved. 489 The petitioners argued that the exclusionary clause created an ambiguity when read with the pilot warranty because the term “for the operation involved” was not defined. The insurer contended that the phrase “for the operation involved” was not ambiguous and required a different meaning than “for the flight involved” because “operation” and “flight” of an aircraft are not the same. 490

The court held that the construction of the two phrases was ambiguous and, therefore, must be given the construction most favorable to the insured. 491 Construed most favorably to the insured, “operation involved” refers

487 Id. at 207, 750 P.2d at 1248. The trial court found for the insurance company, and the court of appeals affirmed. Id.
488 Id. This clause provided:

This policy does not apply . . . [t]o any insured while the aircraft is in flight (a) if piloted by other than the pilot or pilots designated in the Declarations; (b) if piloted by a pilot not properly certified, qualified, and rated under the current applicable Federal Air Regulations for the operation involved, whether or not said pilot is designated in the Declarations.

489 Id. This warranty clause stated that “[i]nsurance will be effective only when the operation of the insured aircraft . . . is by a pilot . . . who possess [sic] a current and valid pilot certificate of the kind specified with appropriate ratings, . . . as required by the Federal Aviation Administration for the flight involved.” Id.

490 Id. Presumably, under National’s scheme, “operation” referred to the qualifications of the pilot in terms of his ability to fly in particular circumstances in compliance with federal regulations, while “flight” referred to the flight itself. Id. at 207, 750 P.2d at 1249.

491 Id. at 207, 750 P.2d at 1248-49. The court noted that it was bound to strictly construe exclusionary clauses against the insurer. Id. at 207, 750 P.2d at 1248. The court stated that when “any clause in the policy is ambiguous, a meaning and
to the flight as a whole, and since the insured took off under VFR conditions for which he was qualified, the insurance contract applied to the entire flight. The court held that such an interpretation permits insureds to know with certainty whether their insurance covers the operation of the aircraft for the flight involved without fear that unexpected weather conditions may void their policy.\footnote{492} Accordingly, the court determined that the weather conditions at the time and place of departure control.

In \textit{Fidelity and Casualty Company v. Burts Brothers Incorporated},\footnote{493} the insurer brought a declaratory relief action seeking a determination of its duty to defend and indemnify Burts Brothers and the estate of Edwin M. Burts in a wrongful death case arising out of a helicopter crash. The insurance policy at issue contained an exclusionary clause which voided coverage if the pilot in command did not meet certain qualifications as to ratings and flight time.\footnote{494} The pilot during the accident, Edwin M. Burts, clearly did not meet these requirements. In ruling on cross-motions for summary judgment, however, the trial court granted summary judgment in favor of the insureds, holding that the insurance policy viewed as a whole was ambiguous and should be construed to provide coverage.\footnote{495} The in-

\begin{footnotesize}
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\item Id. at 270, 750 P.2d at 1249-50.
\item 744 S.W.2d 219 (Tex. Ct. App. 1987).
\item Id. at 221. The clause read as follows:

PILOTS. The policy shall not apply while the aircraft is in flight unless the pilot in command holds a currently effective pilot certificate and rating(s) issued by the Federal Aviation Administration designating him a commercial (or better) pilot with rotorcraft category and further provided he has a written log indicating he has flown a minimum of 2000 total hours as pilot in command in helicopter including at least 1000 hours in turbine powered helicopter of which not less than 200 hours have been in Bell 206 model aircraft . . . .

\item Id. at 222. The supposed ambiguity arose out of a special endorsement in the policy for a Jerry McBeth. Id. at 221-22. The endorsement extended the policy's coverage to McBeth, even though he only had 100 hours of experience in Bell 206 aircraft. Id. Apparently, the trial court felt this left the requirements for others insured under the policy in question.
\end{itemize}
\end{footnotesize}
surer appealed.

The Texas Court of Appeals determined that the controversial clause was not ambiguous and expressly stated that the policy provided no coverage unless the pilot met the qualifications and ratings.\textsuperscript{496} A clause reducing the qualifications for one pilot under a separate endorsement did not affect the validity of the entire clause. In rejecting plaintiff's arguments that the clause did not apply to the named insureds, the court noted that such an interpretation would provide coverage for the named insureds whether they were qualified pilots or not, an interpretation unreasonable in light of the policy's language.\textsuperscript{497}

The court declined to grant summary judgment to the insurer, however, noting that it had failed to show a causal connection between the breach of the pilot's clause and the resulting crash.\textsuperscript{498} While the wrongful death action which triggered the coverage dispute determined that in-flight negligence was a proximate cause of the crash, the court concluded that the determination merely raised a factual issue as to whether such negligence was the result of Burts' failure to obtain proper licensing or possess the required flight hours.\textsuperscript{499} Moreover, the court held that factual issues existed concerning the possibility of fraud in the inception of the policy and in the representations of the insurance agents at the time the policy was issued. These remaining issues precluded summary disposition.\textsuperscript{500} Accordingly, the appellate court reversed and remanded the case for further proceedings.

\textit{Howell v. United States Fire Insurance Company}\textsuperscript{501} involved the crash shortly after takeoff of a Cessna 208 Caravan

\textsuperscript{496} Id. at 222.
\textsuperscript{497} Id.
\textsuperscript{498} Id. at 222-23.
\textsuperscript{499} Id.
\textsuperscript{500} Id. at 223-24. The insurer was in possession of affidavits sworn by the agents who issued the policy in question which stated that the decedent represented to the agents that he personally would never fly the craft. \textit{Id.} at 224.
Aircraft carrying sixteen parachutists. Plaintiff insurer had issued a policy which provided coverage for damage to the aircraft and liability resulting from its operation. It initiated this declaratory relief action for the determination of its duties under the policy. It sought a declaratory judgment that the crash was not covered under the policy and that it had no duty to defend any civil action arising from the crash. The insurer moved for partial summary judgment on the ground that the pilot did not meet the terms and conditions set forth in the “open pilot provision” of the policy.

The Georgia Court of Appeals upheld the trial court’s grant of summary judgment. The court rejected appellant’s arguments that provisions of federal aviation law required the insurer to provide coverage. In addition, the court rejected arguments that the insurer was bound by a clause appearing in a binder form issued to the insured prior to the actual policy, noting that a binder is a temporary contract which is replaced by the formal policy. Finally, the court held that the qualification provisions were clear and unambiguous and rejected appellant’s arguments that a manufacturer’s flight school

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502 Id. at 154, 363 S.E.2d at 561.
503 Id. at 154, 363 S.E.2d at 561-62.
504 Id. This provision read, in part, as follows:
Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft... pilots who must have a commercial or airline transport certificate with an instrument rating and a minimum of 2000 logged pilot hours of which 250 hours have been in turbine aircraft and are graduates of the ground and flight training school conducted by the manufacturer or an entity under contract to it for the [Cessna 208 Caravan] aircraft...

505 Id. at 154, 363 S.E.2d at 562 (the “issue of the extent to which coverage would be afforded must be determined on the basis of the policy as interpreted by applicable Georgia law”).
506 Id. The insureds attempted to argue that, since the words “binder No.” had been stricken and replaced with “assigned policy No.,” the binder had become a policy which could not be changed without the insured’s consent. Id. The court held, however, that this change was insufficient to alter the temporary nature of the binder. Id.
requirement could not be complied with due to lack of an appropriate training program because the manufacturer itself provided such training. Accordingly, the court affirmed the lower court's granting of summary judgment in favor of the insurer.

In *United States Fire Insurance Company v. Producciones Padosa Incorporated*, the court again interpreted an exclusionary clause. In 1982, United States Fire Insurance Company (USF) issued an insurance policy to defendant covering the latter's Beech A100 aircraft. The policy contained several exclusions, one of which made the coverage inapplicable to any loss which occurred while the aircraft was piloted by someone not named in the agreement. The declarations contained a clause which unambiguously articulated certificate, rating and experience minimums for pilots other than the two named pilots covered under the policy. The pilot in command at the time of the crash clearly did not have the requisite qualifications or experience and, although he was named as an insured for a period of time in a policy binder, he was not named as an insured under the policy in effect at the time of the crash. Accordingly, the court held that the certification

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507 Id. at 154, 363 S.E.2d at 563.
508 835 F.2d 950 (1st Cir. 1987).
509 Id. at 951. The exclusion provided that the insurance agreement did not apply "to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth [in]... the Declarations[.]
510 Id. The "pilot clause" specifically required that the pilot have (1) a current commercial or airline transport certificate, (2) multi-engine and instrument rating, and (3) a minimum of 3000 logged pilot hours of which at least 1000 hours must have been as a pilot in command of a multi-engine aircraft, with 500 of those hours in a turbine aircraft and at least 50 hours in the same make or model aircraft as the insured craft, namely the 1972 Beech A100. Id.
511 Id. at 952. Following the crash, USF discovered that the pilot had less than 400 hours of turbine aircraft flying time and that little of that time had been as a pilot in command. Id. Thus, the pilot failed to meet the minimum requirements for coverage under the policy. Id. at 951.
512 Id. at 955-56. USF sent a telex to Professional Underwriter's Insurance Company that the pilot had been accepted for coverage. The court held that even if Professional Underwriter's Insurance could be viewed as an agent of USF, thus binding the company to its acceptance of the pilot, this oral binder was negated under the Puerto Rican Insurance Code, which provided that an oral binder was
and experience minimums applied to him.\(^{513}\)

The court determined that the exclusionary language was a condition precedent to coverage, and a breach of these conditions automatically voided USF's obligations to the insured under the policy.\(^{514}\) The court further held that the insured's misstatements regarding the accident pilot's qualifications, even though made in good faith, amounted to a breach of the contract.\(^{515}\) Finally, the court rejected the insured's claim that the policy should be enforced because of its good faith belief that the conditions were met. As the court noted, the insured was in a better position than the insurer to ascertain the truth about the pilot's credentials but neglected to do so.\(^{516}\) Accordingly, the court ruled that USF was entitled to summary disposition as a matter of law and affirmed the lower court's grant of summary judgment.

In *Insurance Company v. Mather*,\(^{517}\) plaintiff had issued an aviation insurance policy which contained certain conditions and exclusions. One of the conditions provided that coverage would be disallowed if a pilot without the proper qualifications operated the aircraft.\(^{518}\) The insurer sought a declaration that it had no duty to defend or indemnify the estate of the named insured in subsequent wrongful

\(^{513}\) Id. at 958.

\(^{514}\) Id. at 955. The court observed that although the phrase "condition precedent" did not actually appear in the policy, the format, structure, and language of the exclusionary clause combined to unmistakably constitute the functional equivalent of a direct statement that the stipulations in the pilot clause must be met before recovery under the policy would be possible. *Id.*

\(^{515}\) Id.

\(^{516}\) Id. at 957-58. The court noted that an "insured's good faith belief that it has complied with a policy exclusion like that here in issue, without more, does not serve to override the exclusionary language and to work a retention of coverage contrary to the policy terms and conditions." *Id.*


\(^{518}\) Id. at ¶ 17,183. In September, 1982, the insured aircraft crashed, killing the pilot named in the insurance policy and three passengers. *Id.*
death actions filed by passengers.\textsuperscript{519} The court held that even if the decedent pilot had obtained his medical certification by fraud, that did not render him improperly certificated under the terms of the policy, and consequently coverage applied.\textsuperscript{520} In its ruling, the court noted that under the Federal Aviation Act, only the FAA could revoke the decedent’s medical certificate, and only the court of appeals and the Supreme Court could review that revocation.\textsuperscript{521} Having determined that the court had no jurisdiction to inquire into the validity of the certificate, the court held that the proffered evidence concerning the decedent’s fraudulent certificate was irrelevant.\textsuperscript{522} Finally, the court noted that the insurance company could easily have included language voiding coverage in the event the certificate had been obtained fraudulently. Since the decedent had a current medical certificate in his possession when the flight was commenced, he was in strict compliance with the terms of the policy.\textsuperscript{523}

B. Renter Pilots

In \textit{Transport Indemnity Company v. Sky-Kraft, Incorporated},\textsuperscript{524} the insurer sought a determination that an aircraft hull and liability policy and an airport/fixed base operator’s policy did not provide coverage for claims arising out of the fatal crash of one of Sky-Kraft’s aircraft. At issue was whether the VFR-qualified renter pilot’s takeoff in

\begin{itemize}
\item \textsuperscript{519} \textit{Id.} The insurance company argued that at the time of the accident, the insured possessed a medical certificate obtained by fraud and thus was not “properly certified”, as required for coverage. \textit{Id.}
\item \textsuperscript{520} \textit{Id.} at ¶ 17,186-87. The court reasoned that “properly certificated” was not an ambiguous term, and the court should not read into its meaning that the certificate cannot be obtained by fraud or misrepresentation. \textit{Id.} at ¶ 17,186.
\item \textsuperscript{521} \textit{Id.} at ¶ 17,185.
\item \textsuperscript{522} \textit{Id.} at ¶ 17,185-86. The insurance company had argued that at the time of his medical examination, the insured did not disclose the fact that he had been placed on medication for angina pectoris. \textit{Id.} at ¶ 17,185.
\item \textsuperscript{523} \textit{Id.} at ¶ 17,187. The court stated that the “policy requires only that the pilot be ‘properly certificated.’ [The insured] was ‘properly certificated’ in that he held a medical certificate which had not been suspended or revoked by the FAA.” \textit{Id.}
\item \textsuperscript{524} 48 Wash. App. 471, 740 P.2d 319 (1987).
\end{itemize}
marginal VFR conditions and subsequent flight into IFR conditions violated the pilot clause, which required that a pilot be "properly rated for the flight" before the policy applied. The insurer argued that subsequent flight into IFR conditions violated the clause, while the decedent pilot's estate urged that the decedent was properly rated for the flight because he had filed a VFR flight plan and because at the beginning of the flight his weather briefing and the weather at the field permitted VFR flight.

After lengthy discussion, the appellate court adopted the analysis of the Texas Supreme Court in *Glover v. National Insurance Underwriters*. The *Glover* court articulated a two-step analysis for characterizing a flight as IFR or VFR. First, the court held that the flight should be viewed as a whole, rather than in segments. Second, the flight was characterized as a whole according to weather conditions existing at the inception of the flight. The appellate court found that the *Glover* analysis allowed a court to determine the character of the flight without resort to speculation or conjecture as to the existing conditions. Moreover, the court noted that use of a "segmented flight" analysis ignored the reality of unreliable weather forecasting and sudden weather changes.

In reaching its decision, the court rejected the insurer's argument that the court should characterize the flight as

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525 *Id.* at 476, 740 P.2d at 322-23.
526 545 S.W.2d 755 (Tex. 1979). The *Glover* pilot requested a weather briefing at 7:55 a.m. for a flight from Midland to Eagle Pass, Texas. He planned to depart within three to four hours from the time of the briefing. He was informed that the weather in both cities was poor. When the weather cleared in Midland the pilot took off for Eagle Pass without requesting another weather briefing. The weather in Eagle Pass had not improved. *Id.* at 758.
527 *Id.* at 762. The Texas Supreme Court stated that the "weather conditions existing at the beginning of the flight should . . . be looked to in determining whether the flight is a VFR or an IFR flight." *Id.*
528 *Transport Indem.*, 48 Wash. App. at 479, 740 P.2d at 324. The court noted that "'segmented flight' analysis . . . would require the court to examine every brief segment of a flight to determine whether a pilot was properly rated for that portion of the flight." *Id.* at 478-79, 740 P.2d at 324. The court further reasoned that very little physical evidence would be available to the court in making a segmented flight analysis. *Id.* at 479, 740 P.2d at 324.
IFR or VFR depending on the pilot's knowledge of weather conditions existing along the flight path or at his destination.\textsuperscript{529} The court rejected the analysis of the Texas Supreme Court in \textit{United States Fire Insurance Company v. Marr's Short Stop},\textsuperscript{530} in which the court held that the pilot's knowledge of weather conditions was a determining factor in characterizing a flight. The court ultimately determined that the record before it failed to establish whether IFR or VFR conditions prevailed at the time of the decedent's departure. Accordingly, the court noted the existence of a genuine issue of fact which precluded granting summary judgment.\textsuperscript{531}

The court was also required to determine the existence of coverage under the fixed base operations policy issued by the insurer.\textsuperscript{532} With regard to that policy, the court affirmed the lower court's ruling that coverage did not exist because the crash did not occur "in or about" the premises since the tragedy happened some three and one-half miles east of the field.\textsuperscript{533} The court rejected plaintiff's alternative arguments that Sky-Kraft negligently entrusted the keys of the aircraft to the decedent or that Sky-Kraft was performing any duties in connection with its business at the time of the crash.\textsuperscript{534}

\textsuperscript{529} \textit{Id.} at 481-82, 740 P.2d at 325.

\textsuperscript{530} 680 S.W.2d 3 (Tex. 1984). The \textit{Transport} court noted that adoption of the "pilot's knowledge" test would require the court to apply the precepts of negligence law to a case involving the issue of contract construction. \textit{Transport Indem.}, 48 Wash. App. at 482, 740 P.2d at 326.

\textsuperscript{531} \textit{Id.} at 483-84, 740 P.2d at 326.

\textsuperscript{532} \textit{See id.} at 485, 740 P.2d at 327. The insurer agreed under the terms of the fixed base operations policy to pay for bodily injury caused by an accident "in or about the premises" or "elsewhere in the course of any work or of the performance of any duties carried out by the Insured." \textit{Id.} (quoting the insurance policy terms).

\textsuperscript{533} \textit{Id.} at 487, 740 P.2d at 328. The court interpreted "in or about" as "limiting the scope of coverage to areas within the immediate vicinity of the premises." \textit{Id.}

\textsuperscript{534} \textit{Id.} at 487-88, 740 P.2d at 328. The court held that after the decedent obtained the aircraft keys, "Sky-Kraft ceased performing any work in connection with its business." \textit{Id.} at 488, 740 P.2d at 328. Sky-Kraft was in the business of flight instruction. Decedent had received instruction from Sky-Kraft culminating in a private pilot certificate. The flight at issue in this case occurred approximately one month after decedent received his certificate. Decedent had rented an
The court also held that no coverage was afforded under the completed operations and products liability section of the fixed base operations policy where the decedent’s estate claimed only that he died as a result of negligent operation of Sky-Kraft’s flight school. Accordingly, the court affirmed the lower court’s grant of summary judgment, holding that coverage did not exist under the fixed base operations policy.

C. Miscellaneous Coverage Cases

In State v. Underwriters at Lloyds of London, the dispute concerned liability for repairs to a Boeing 747 aircraft owned by Japan Airlines (JAL) which was damaged when it slid off an icy taxiway at the Anchorage International Airport. The cost to repair the aircraft was nearly $20,000,000. JAL and its property insurers sued the state of Alaska, owner of the airport, claiming that the accident resulted from the faulty design and maintenance of the taxiway. At trial, the state was found eighty percent responsible for the accident and settled with JAL and its insurers prior to entry of final judgment. At the time of the accident, the state was an additional named insured on a policy issued to JAL by the underwriters of Lloyds of London. In the instant case, the state sought a declaration that the underwriters provided liability insurance for the state covering the accident under the premises liability policy which named the state as an additional insured.

The Alaska Supreme Court reversed the trial court’s ruling denying the existence of coverage. The court held

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535 Id. at 498, 740 P.2d at 329. The court stated that the policy “was not intended to provide coverage for Sky-Kraft’s negligent operation of its flight school, but rather was designed to provide coverage for injuries or damages caused by defects in goods or products.” Id.

536 Id. at 498, 740 P.2d at 329. The court stated that the policy “was not intended to provide coverage for Sky-Kraft’s negligent operation of its flight school, but rather was designed to provide coverage for injuries or damages caused by defects in goods or products.” Id.

537 Id. at 473-74, 740 P.2d at 321.

538 Id. at 498, 740 P.2d at 329. The court stated that the policy “was not intended to provide coverage for Sky-Kraft’s negligent operation of its flight school, but rather was designed to provide coverage for injuries or damages caused by defects in goods or products.” Id.


540 Id. at 397.

541 Id.

542 Id. The State also brought a judgment for a portion of the defense and settlement costs. Id.
that the premises operations coverage extended to the events on the taxiway under the clause which provided coverage for "all airport and airline operations necessary or incidental" to JAL's ownership, maintenance, and use of the premises. The court declined to interpret an aircraft exclusion which denied coverage for damage to aircraft owned by, hired by, or loaned to the insured, finding that JAL's use of the airliner did not avoid coverage of the state. Finally, the court rejected the underwriters' argument that the policy did not cover the accident because it was beyond the reasonable expectations of the parties to the contract. Accordingly, the court determined that the loss was covered under the policy.

In Hutzel v. United States Aviation Underwriters, the issue was whether the policy excluding coverage for persons engaged in commercial aviation applied to the decedent independent contractor piloting the aircraft at the time of the accident. While the defendant insurance company submitted that the decedent was excluded because he had previously flown for a commercial airline, was paid for his services as a pilot and flight instructor, and was receiving compensation for piloting the aircraft at the time of the crash, the plaintiff argued that the clause was ambiguous. The court agreed with the plaintiff.

The court noted that ambiguities, especially in the exclusionary clause of a policy, must be construed against the insurer. It found that "commercial aviation" could...
reasonably refer to a person who was receiving compensation for piloting the aircraft. An equally reasonable interpretation, however, is that the exclusion applies to a person operating the aircraft when the airplane's owner is deriving compensation from its use. Moreover, the policy left unclear whether the person had to be so engaged at the time of the occurrence or might have been so engaged at some earlier time. Accordingly, the court held that the decedent pilot was covered.546

The aviation policy issued by the insurer in United States Fire Insurance Company v. Cowley & Associates547 covered "personal and pleasure use and use in direct connection with the insured's business, excluding any operation for which a charge is made."548 The insurer sought to avoid liability for claims arising from the crash of the private aircraft by alleging that the flight on which the accident occurred was part of a charter operation run by an independent contractor pilot who flew the plane for owner Cowley. The trial court found that the accident was covered and granted summary judgment to the insured.549 The court of appeals affirmed.

While the insurer offered evidence that payments were solicited and received by the decedent pilot after previous trips, and that this procedure was followed after an earlier flight with some of the same passengers who were killed in the accident, the court found that there was no direct evidence that any payment arrangement was used on the flight in question.550 Moreover, owner Cowley testified showing that its interpretation is the only one which reasonably can be placed on the exclusionary clause." Id.

546 Id. at 45, 522 N.Y.S.2d at 304. The court stated that "commercial aviation" could also refer to "regularly scheduled airplane service complete with tickets, schedules and attendants." Id. at 45, 522 N.Y.S.2d at 303. Since several interpretations of "commercial aviation" were reasonable, the court held that the insurer had failed to meet its burden in interpreting the exclusionary clause. Id. at 45, 522 N.Y.S.2d at 304.

548 Id. at 478, 359 S.E.2d at 161.
549 Id.
550 Id. at 478, 359 S.E.2d at 162. The court stated:

Since all of the passengers died in the crash, none was available to
that he did not make any charges regarding the operation of the plane on the fatal flight, and that use of the plane as a charter was strictly prohibited. As to the fatal flight, Cowley said that the decedent was acting on his own behalf in showing some of the passengers the plane’s capabilities and in investigating the possibility of work at a Lexington, Kentucky building site. As the insurer could show only a possibility that the flight was made for profit, the court of appeals affirmed the trial court decision in favor of coverage.

In Amatuizio v. United States Fire Insurance Company, the question was whether “air racing” was included in the policy endorsement covering “aerobatic flight, air shows or aerobatic competition.” The insured aircraft was destroyed in an accident during a closed-course pylon race at the Reno, Nevada National Championship Air Races. The insurer denied coverage, alleging that the closed-course pylon race did not fall within the definition of “aerobatic flight, air shows and aerobatic competition” for which coverage was provided. The trial court agreed, but the court of appeals reversed.

The policy did not define the terms “aerobatic flight, air show or aerobatic competition.” Common usage also did not settle the issue since the acceleration and maneuvering involved in pylon racing falls within the common definitions of aerobatics. Federal Aviation Regulations

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409 N.W.2d 278 (Minn. Ct. App. 1987).

Id. at 279. “In a closed-course pylon race, the aircraft fly six to ten laps around an oval course at heights from 35 to 400 feet above the ground. The Reno course was one mile in the straight-away and one-half mile at the ends, defined by 35-foot high pylons.” Id.

Id. at 280. The court articulated the test for determining whether ambiguity exists in an insurance policy as “what a reasonable person applying for this type of
define aerobatic flight as "an intentional maneuver involving an abrupt change in an aircraft's altitude, an abnormal altitude, or abnormal acceleration, not necessary for normal flight." The court found that the abrupt maneuvering, sharp turns, and rapid acceleration of pylon racing are well within the FAR description of acrobatic flight. The court concluded that the language of the policy was ambiguous and therefore should be construed in favor of coverage.

In Certain Underwriters at Lloyds of London v. Evans, the coverage issue turned on the interpretation of "passenger." The plaintiff alleged that coverage was excluded by policy provisions which excepted coverage for certain passengers. In holding that the exclusion was effective, the court rejected the defendant's argument that a "passenger" under Oklahoma law is one that pays for the ride while a "guest" rides for free. The court held that this interpretation, utilized in the context of automobile guest statutes, was inapplicable in the instant case. Instead, the court found that the term "passenger" should be given its

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557 Id. The regulation prohibits acrobatic flight "(a) Over any congested area of a city, town, or settlement; (b) Over an open air assembly of persons; (c) Within a control zone or Federal Airway; (d) Below an altitude of 1,500 feet above the surface; or (e) When flight visibility is less than three miles." Id. These provisions may be waived. See 14 C.F.R. § 91.63 (1988) (authorizing the Federal Aviation Administrator to issue a certificate of waiver).

558 Amatuzio, 409 N.W.2d at 281. The court noted that FAR 91.71's definition of "acrobatic" flight did not resolve the ambiguity in the policy language referring to "acrobatic flight." Id. The court held: "The terms 'acrobatic flights, airshows and acrobatic competition' are susceptible to the inclusion of the activity of 'air racing.' When language of an insurance policy is ambiguous or susceptible of two meanings, it must be given the meaning which is favorable to the finding of insurance coverage." Id.

559 20 Av. Cas. (CCH) ¶ 18,592 (N.D. Okla. 1987).

560 Id. at ¶ 18,593. The second page of the policy, attached as Exhibit A to the complaint, excluded from coverage "any passenger in or intending passenger of any aircraft or vehicle which is used directly in event covered herein." Id.

561 Id. at ¶ 18,593-94.
ordinary meaning, which is a person who travels in a mode of conveyance without participating in its operation, and that the decedent was a passenger and thereby was excepted from coverage.\(^{562}\)

In *Forum Insurance Company v. Seitz Aviation, Incorporated*,\(^{563}\) an insurer sought a determination that an exclusion in an aviation insurance policy relieved it of liability for the death and injury of passengers resulting from an aircraft accident. The insurance company urged that an exclusion in the policy voided liability where the decedents and injured parties were employees or directors of various entities named as additional insureds.\(^{564}\) The trial court, however, did not reach the merits of whether the exclusion applied, determining instead that all exclusions in the base policy were voided by an endorsement to the policy which provided coverage for air taxi operations.\(^{565}\) On that basis, the court granted judgment in favor of the defendants and the insurance company appealed.

On appeal, the Kansas Supreme Court addressed the issue of whether all the basic policy exclusions had themselves been excluded by the provisions of the endorsement concerning air taxi operations, the clause relied upon by the lower court.\(^{566}\) The court concluded that the endorsement applied only to liability arising from air transport operations, interpreting that term to mean the carrying of persons or property for compensation as a

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\(^{562}\) *Id.* at \(\S\) 18,594. The ordinary meaning relied upon by the court was that a passenger is "a person who travels in a train, airplane, ship, bus, or other conveyance, without participating in its operation." *Id.* (citing the AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE).


\(^{564}\) *Id.* at 334, 737 P.2d at 30. The relevant exclusion applies to "any claim or suit by one insured, its agents, servants or employees against any other insured, its agents, servants or employees." *Id.*

\(^{565}\) *Id.*

\(^{566}\) *Id.* at 334, 737 P.2d at 31. The endorsement provided that "the [exclusions] of the policy to which this endorsement is attached are deleted and are replaced by the following exclusions . . .." *Id.* Specifically, the endorsement excluded from coverage "any loss arising from operations other than carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in interstate, overseas, or foreign air transportation." *Id.*
common carrier in interstate air transportation. Absent those circumstances, the court held that the underlying policy and its exclusions applied.\textsuperscript{567} The court ultimately remanded the case for rehearing because insufficient facts were developed to determine whether or not the flight was an interstate flight or whether the carriage was for compensation.\textsuperscript{568}

\textbf{IX. FAA ENFORCEMENT/LOCAL REGULATIONS/ADMINISTRATIVE LAW}

In \textit{Borden v. FAA Administrator},\textsuperscript{569} the National Transportation Safety Board (NTSB) suspended Borden’s certificate for a period of twenty days for violating Federal Aviation Regulations requiring that an aircraft not be operated contrary to air traffic control (ATC) instructions in an area where ATC is exercised.\textsuperscript{570} The alleged violation occurred when Borden taxied across a runway without clearance.\textsuperscript{571} The court of appeals noted that although there was apparently some confusion created by the exchange between the pilot and the ground controller concerning which taxiway to use, a request for clarification was the appropriate response for the pilot.\textsuperscript{572} Accordingly, the court affirmed the order of the NTSB upholding the suspension.

In \textit{Komjathy v. National Transportation Safety Board},\textsuperscript{573} the plaintiff appealed the suspension of his airman certificate for 180 days for alleged violations of the Federal Aviation Regulations on the grounds that the FAA had no statutory authority to suspend airman certificates, and that the regulation permitting such suspension was unconstitutionally

\textsuperscript{567} \textit{Id.} at 334, 737 P.2d at 34-35.
\textsuperscript{568} \textit{Id.} at 334, 737 P.2d at 35.
\textsuperscript{569} 849 F.2d 319 (8th Cir. 1988).
\textsuperscript{570} \textit{Id.} at 319.
\textsuperscript{571} \textit{Id.} at 320.
\textsuperscript{572} \textit{Id.} at 322. The court stated that “even in the face of confusing or inadequate instructions from the control tower, the pilot must, if he can, assure the public safety by requesting clarification before he proceeds.” \textit{Id.}
vague. The court rejected this argument, noting that the Federal Aviation Act gave the administrator of the FAA broad discretion to suspend airman certificates upon a determination that safety and the public interest required suspension. The regulation implementing that Act reiterated the statutory language, precluding any argument that notice and comment procedures were required prior to suspension.

Plaintiff also claimed that the implementation regulation was unconstitutionally vague. The court rejected this argument, noting that the vagueness of which plaintiff complained is simply the broad discretion granted by Congress to the FAA Administrator. The court also noted that plaintiff did not challenge the regulations which actually proscribed the conduct for which plaintiff’s certificate was suspended. The plaintiff instead alleged only that he was not duly warned of the penalty the Administrator might choose to impose. Accordingly, the petition for review was denied.

In Westmoreland v. National Transportation Safety Board, the plaintiff, an FAA Aviation Safety Instructor, alleged that the NTSB did not properly consider her claim that the FAA’s suspension of her license was in retaliation for plaintiff’s filing a civil rights complaint against her supervisor. The court of appeals ultimately determined that the appeal was moot since Westmoreland had regained her suspended commercial pilot certificate.
While Westmoreland argued that a live controversy remained because she might be disqualified from potential future employment based upon her previous suspension, the court of appeals dismissed this possibility as speculative. The court further held that the appeal was not saved by any exception to the mootness doctrine. Accordingly, the court held that the case was moot because the order of suspension lapsed as soon as Westmoreland successfully passed her re-examination.

In National Center for Air Travel Safety, Ltd. v. Dole, plaintiff, a non-profit corporation that sought to promote safety in air carrier travel and general aviation, filed complaints alleging that the Air Deregulation Act of 1978 increased competition and reduced air fares, and this required air carriers to price fares in a way that created conflict between air safety and profitability. Plaintiff sought an order compelling defendants to promulgate regulations that would authorize the defendants to review air fares and issue cease and desist orders to prohibit inordinately low air fares and maintenance and flight officer economies that endanger the public. The complaint also alleged that the FAA delegated a number of testing and inspection functions to private parties who had inherent conflicts of interest and were otherwise incapable of performing their functions properly. The complaint also protested the inadequacy of air traffic controllers and the

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581 Id. ("The possibility of this harm is too speculative to create a cognizable interest in the outcome of this litigation for Westmoreland.").

582 Id. In particular, the court referred to the "capable of repetition, yet evading review" exception. Id. The court held that this exception is limited to cases in which the following factors are found: "(1) The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Id. (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)). The court held that Westmoreland did not satisfy either criteria. Id.

583 20 Av. Cas. (CCH) ¶ 18,475 (S.D.N.Y. 1987).

584 Id. at ¶ 18,476.

585 Id.
lack of proper regulations limiting takeoffs and landings at airports. 586

Defendants moved for dismissal under Rule 12(b)(6), alleging that plaintiffs failed to exhaust their administrative remedies, and the trial court agreed. The court noted that the FAA has established procedures by which parties can petition the agency for action concerning the promulgation of rules. Since plaintiffs wholly failed to exhaust or even make use of the available administrative remedies, the court held that the action must be dismissed. 587

In Alphin v. National Transportation Safety Board, 588 the FAA suspended the plaintiff for forty-five days due to improper sign-offs on engine overhauls. 589 The NTSB reversed, finding that the substandard conditions in the engines could not be directly attributed to Alphin's actions. 590 Alphin subsequently applied for attorneys' fees and costs in the amount of $135,525 under the Equal Access to Justice Act (EAJA). 591 After both the Administrative Law Judge and the NTSB denied his application, Alphin appealed to the District of Columbia Circuit Court of Appeals. 592 The court of appeals found that the NTSB incorrectly evaluated whether the FAA was substantially

586 Id.
587 Id.
588 839 F.2d 817 (D.C. Cir. 1988).
590 Id. at 819.
591 Id. at 820.
592 Alphin, 839 F.2d at 820-21.

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

justified in suspending Alphin. The NTSB’s initial determination indicated that, based on its inspectors findings, the FAA was substantially justified. The NTSB, however, failed to review the record as a whole in making its determination. Although the FAA may have had evidence sufficient to initiate and continue proceedings against Alphin, that was not the standard required by the EAJA. The NTSB erred in failing to consider whether the FAA was substantially justified in basing its order in part on allegations that the NTSB itself ultimately determined to be without merit. Moreover, the NTSB should have examined the application to determine whether a partial award was appropriate with respect to each allegation in light of the FAA’s knowledge at various stages of the proceedings. The court of appeals remanded the case to the NTSB for a more extensive evaluation of the FAA’s position at each step of the proceedings to determine whether a partial award was appropriate and the amount of any such award.

In Rawlins v. National Transportation Safety Board, the plaintiff’s aircraft crashed while carrying approximately 750 pounds of marijuana. The plaintiff was convicted of multiple drug offenses, each carrying penalties of imprisonment in excess of one year. The FAA subsequently

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593 Id. at 821.
595 Alphin, 839 F.2d at 821. The court stated that the EAJA expressly requires an examination into “the lesser administrative record, as a whole” and that “any lesser examination would defeat the purposes of the EAJA.” Id.
596 Id. at 822. The court condemned the “shotgun approach” used by the NTSB, which included disposing of several alleged deficiencies in a footnote and failing to discuss the allegations. Id.
597 Id. The court applied the standards set in Cinciarelli v. Reagan, 729 F.2d 801, 804-05 (D.C. Cir. 1984) (allowing for partial awards of attorneys fees when some but not all of the government’s defenses are substantially justified), and Martin v. Lauer, 740 F.2d 36, 44 (D.C. Cir. 1984) (mandating that each step of a proceeding must be separately evaluated).
598 Alphin, 839 F.2d at 823.
599 837 F.2d 1327 (5th Cir. 1988).
600 Id. at 1328. Rawlins was convicted of “conspiracy to violate narcotic laws (in violation of 21 U.S.C. § 846); possession of marijuana (in violation of 21 U.S.C.
revoked his commercial pilot's license and ordered that he could not apply for a new certificate for five years.\textsuperscript{601} The plaintiff appealed, contending that the NTSB erred in holding that the Administrator was precluded from considering sanctions less severe than revocation under section 609(c) of the Federal Aviation Act.\textsuperscript{602} The court of appeals disagreed, relying on the plain language of the statute and the legislative history of section 609(c), which confirmed that Congress intended the Administrator to revoke an airman certificate for drug trafficking violations.\textsuperscript{603}

The court noted further that under section 609(c)(3) of the Federal Aviation Act, the NTSB may only affirm or reverse the Administrator's order of revocation.\textsuperscript{604} Therefore, the NTSB had no discretion to consider mitigating circumstances in determining whether to revoke a certificate.\textsuperscript{605} The court rejected Rawlins' argument that the language of section 609(c)(3), which affords an airman

\textsuperscript{601} Id.

\textsuperscript{602} Section 609(c) of the Federal Aviation Act is codified at 49 U.S.C. app. § 1429(c) (Supp. III 1985). The statute mandates that "[t]he Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance . . . ." Federal Aviation Act § 609(c), 49 U.S.C. app. § 1429(c) (Supp. III 1985).

\textsuperscript{603} Rawlins, 837 F.2d at 1329. The court stated that "[t]he legislative history only confirms that § 609(c) [r]equires the Administrator to revoke an airman certificate" if a pilot is convicted of violating drug trafficking laws. \textit{Id.} (citing H.R. \textit{CONG. REPS. \& ADMIN. NEWS} 3916, 3921).

\textsuperscript{604} Section 609(c)(3) of the Federal Aviation Act is codified at 49 U.S.C. app. § 1429(c)(3) (Supp. III 1985). The statute provides that "[a]ny person whose certificate is revoked by the Administrator under this subsection may appeal the Administrator's order to the National Transportation Safety Board and the Board shall, after notice and a hearing on the record, affirm the Administrator's order." Federal Aviation Act § 609(c)(3), 49 U.S.C. app. § 1429(c)(3) (Supp. III 1985).

\textsuperscript{605} The court contrasted the mandatory language of section 609(c)(3), \textit{supra} note 604, of the Federal Aviation Act with that of section 609(a) "which permits the NTSB to amend, modify or reverse the Administrator's order amending, suspending, modifying or revoking an airman certificate if safety in air commerce or air transportation and the public interest requires . . . ." Rawlins, 837 F.2d at 1329.
the opportunity to "be heard as to why such a certificate should not be revoked," permits mitigation by the NTSB. The court held that this language affords an airman the opportunity to be heard concerning the validity of the facts underlying the FAA's order of revocation, but not regarding the degree of sanction.\textsuperscript{606} Accordingly, the court affirmed the NTSB's decision.

X. NEGLIGENCE

In \textit{Biles v. United States},\textsuperscript{607} the plaintiff's decedent was killed when the aircraft in which he was a passenger collided with a ridge line on Lookout Mountain, Georgia, after flying marginal VFR conditions at approximately 2,000 feet mean sea level. The airplane crashed a few moments after the air traffic controller terminated radar service.\textsuperscript{608} Biles alleged that the air traffic controller was negligent because she breached a duty to warn the pilot of the plane's proximity to the mountainous terrain.\textsuperscript{609} The trial court concluded that under the circumstances: (1) no duty arose out of paragraph 33 of the Air Traffic Control Manual;\textsuperscript{610} (2) even if a duty did arise, the controller was not negligent; and (3) even if she was in some manner negligent, her negligence was not a proximate cause of the crash.\textsuperscript{611}

The Fifth Circuit Court of Appeals affirmed, holding that the circumstances did not impose a duty on the air

\begin{itemize}
\item \textsuperscript{605} \textit{Id.}
\item \textsuperscript{607} 848 F.2d 661 (5th Cir. 1988).
\item \textsuperscript{608} \textit{Id.} at 662.
\item \textsuperscript{609} \textit{Id.}
\item \textsuperscript{610} \textit{Id.} The court held that:
\begin{quote}
[T]he circumstances did not give rise to a duty of the air traffic controller to issue a warning or advisory concerning the proximity of [the plaintiff's airplane] to the terrain. Paragraph 33 of the Air Traffic Control Manual, FAA order 7110.65C, establishes the guidelines for issuance of such advisories as follows:

\begin{quote}
Issue a safety advisory to an aircraft if you are aware that the aircraft is at an altitude which, \textit{in your judgment}, places it in an unsafe proximity to terrain, obstruction, or other aircraft.
\end{quote}
\textit{Id.} (emphasis added).
\item \textsuperscript{611} \textit{Id.}
\end{itemize}
traffic controller to issue a warning or advisory concerning the aircraft's proximity to high terrain. Although the weather at the control site was marginal and the pilot informed the controller that he might not be able to fly above 1,500 feet and remain VFR, the crash site was some twenty miles from the airport, and the controller could not be expected to assume that conditions were uniform all the way to Lookout Mountain. Moreover, the flight crew's last communication with the controller indicated that the aircraft was still flying VFR. Radio communications between the controller and the aircraft indicated that there were no problems. Absent some awareness that minimum VFR conditions had ceased to exist or that the aircraft was in trouble, the court held that the controller had no duty to warn.

In *Schwamb v. Delta Air Lines*, a briefcase fell from an overhead compartment and struck the plaintiff's head, after the compartment was opened by another passenger. The jury awarded $420,000 in general damages and $560,000 in lost earnings, and his spouse received $35,000 for loss of consortium. The court of appeals affirmed the trial court's judgment but reduced the award.

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612 *Id.* at 663. The controller's radar indicated that the pilot had been varying between 1,500 and 1,900 feet, contradicting the pilot's statement that he could not fly above 1,500 feet. The court held that the plane's crew was in the best position to be informed about conditions at the area of the crash. *Id.*

613 *Id.* at 663 n.4. "The controller had a right to assume that in the absence of evidence to the contrary, conditions were such that the aircraft could operate under visual flight rules." *Id.* at 663 (quoting Redhead v. United States, 686 F.2d 178, 183 (3rd Cir. 1982), cert. denied, 459 U.S. 1203 (1983)). The court held that the controller could assume that the pilot could see the terrain himself. *Id.*

614 *Id.*


616 *Id.* at 456. Schwamb drove himself home, but later complained of dizziness, pain and numbness in his arm and leg. *Id.*

617 *Id.* at 466. The jury awarded damages as follows:
of general damages to $290,000.618

The court examined Delta's liability, first noting that a passenger injured on a common carrier need only establish a *prima facie* case of negligence, and the burden then shifts to the defendant to overcome the plaintiff's showing.619 Schwamb carried his burden, and Delta failed to prove that it did everything possible under the circumstances to prevent the accident, as required of a common carrier.620 The court relied in part upon the testimony of an expert witness that Delta could have taken steps to minimize the risk to passengers, including: (1) a preloading announcement concerning how to load baggage; (2) preboarding inspection of carry-on baggage; (3) a printed warning on the plastic safety card concerning overloading of bins; and (4) a prelanding announcement to passengers concerning the removal of baggage from overhead bins.621

In *Erickson Air-Crane Company v. United Technologies Corporation*,622 plaintiff sought damages for the loss of a helicop-

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To Mr. Schwamb:
- Past physical pain and suffering $50,000
- Future physical pain and suffering 100,000
- Past mental anguish 20,000
- Future mental anguish 20,000
- Disability 200,000
- Past medical expenses 20,000
- Future medical expenses 10,000
- Past loss of earnings 200,000
- Future loss of earnings 360,000
- Loss of profits from proposed project 0

To Mrs. Schwamb:
- Past lost or impaired consortium, services and society $15,000
- Future lost or impaired consortium, services and society 20,000

Id.  
618 Id. at 467. The court found that the award of general damages was clearly excessive because it failed to take into consideration the fact that Schwamb's injury was of indefinite duration and that there was no indication that he had suffered permanent brain injury. Id.
619 Id. at 461.
620 Id. at 463.
621 Id.
ter manufactured by defendant.\textsuperscript{623} At trial, United Technologies presented evidence that Erickson failed to comply with FAA regulations requiring it to maintain records of life-limited parts\textsuperscript{624} and to make certain that the aircraft conformed to type certificate data sheets.\textsuperscript{625} Using this evidence, United Technologies attempted to establish that Erickson was contributorily negligent as a matter of law.\textsuperscript{626} The court refused to instruct the jury on contributory negligence per se based on these violations.\textsuperscript{627} The court of appeals affirmed, holding that the proper test for determining whether Erickson was contributorily negligent per se was whether, as the injured

\textsuperscript{623} Id. at 577, 743 P.2d at 749.
\textsuperscript{624} Id. Section 91.173(a)(2)(ii) of Title 14 of the Code of Federal Regulations states that:

(a) Except for work performed in accordance with § 91.171, each registered owner or operator shall keep the following records for the periods specified in paragraph (b) of this section: . . . (2) Records containing the following information: . . . (ii) The current status of life-limited parts of each airframe, engine, propeller, rotor, and appliance.

\textsuperscript{625} 14 C.F.R. § 91.173(a)(2)(ii)(1988).

\textsuperscript{626} Erickson, 87 Or. App. at 577, 743 P.2d at 749. Section 91.171(b) of Title 14 of the Code of Federal Regulations states that:

(b) The [altimeter system and altitude reporting equipment] tests required by paragraph (a) of this section must be conducted by —

(1) The manufacturer of the airplane or helicopter on which the tests and inspections are to be performed;

(2) A certificated repair station properly equipped to perform those functions and holding —

(i) An instrument rating, Class I;

(ii) A limited instrument rating appropriate to the make and model of appliance to be tested;

(iii) A limited rating appropriate to the test to be performed;

(iv) An airframe rating appropriate to the airplane or helicopter to be tested; or

(v) A limited rating for a manufacturer issued for the appliance in accordance with § 145.101(b)(4) of this chapter; or

(3) A certificated mechanic with an airframe rating (static pressure system tests and inspections only).

\textsuperscript{627} 14 C.F.R. § 91.171(b) (1988).

\textsuperscript{627} Erickson, 87 Or. App. at 577, 743 P.2d at 749.

\textsuperscript{627} Id. at 577, 743 P.2d at 749 n.4. United Technologies assigned error to the instruction the trial court gave on negligence per se. The court of appeals, however, held that the error was harmless because it held that negligence per se did not apply to the facts of the case. Id.
party, he was within the class protected by the statute. The court rejected United Technologies' assertion that the maintenance regulations were intended to protect against economic loss, holding that they are for the protection and safety of pilots, passengers and persons on the ground. Accordingly, the court declined to hold that Erickson's violation of the maintenance regulation gave rise to a finding of negligence per se.

In Crosby v. Cox Aircraft Company, the Washington Supreme Court held that owners and operators of aircraft should not be strictly liable for ground damage caused by aircraft operation. Rather, general principles of negligence controlled. The action arose when an aircraft on a test flight ran out of fuel and landed on the roof of Crosby's garage, causing $3,199.89 in damage. Crosby sued both the pilot and owner of the airplane to recover for his property damage. The trial court granted partial summary judgment for Crosby, holding that both the pilot and owner, Cox Aircraft, were strictly liable for all damage to Crosby's property.

On appeal, the Boeing Company and the Washington State Trial Lawyers Association both filed amicus curiae briefs regarding the appropriate standard of liability. Boeing argued for a simple negligence standard, while the Trial Lawyers Association contended that strict liability

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628 Id. at 577, 743 P.2d at 749.
629 Id.
631 Id. at 581, 746 P.2d at 1199 (Crosby was a 5-4 decision); see infra note 644 for additional information regarding voting of the judges.
632 Crosby, 109 Wash. 2d at 581, 746 P.2d at 1199.
633 Id. at 581, 746 P.2d at 1198.
634 Id. Crosby's complaint raised the following alternative allegations: (1) negligent operation of the plane by the pilot; (2) negligent maintenance of the plane by Cox Aircraft; (3) vicarious liability attributed to Cox Aircraft for all of the pilot's negligence under the doctrine of respondeat superior; and (4) strict liability of both Cox Aircraft and the pilot for all damage caused by the crash. Id. at 581, 746 P.2d at 1198-99.
635 Id. at 581, 746 P.2d at 1199. The trial court did not address Crosby's negligence claims and a third-party complaint against Parker Hannifin Corporation, which equipped the plane with its fuel system. Id.
should apply. The defendants argued for a third standard, which was a "rebuttable presumption" of negligence on the part of the aircraft's operator and owner. The court held that general principles of negligence applied. The court rejected the argument of Crosby and the Trial Lawyers Association urging adoption of Restatement (Second) of Torts section 520A, which establishes strict liability for ground damage caused by aircraft. Section 520A is a "special application" of sections 519 and 520, which governs liability for "abnormally dangerous" activity.

Rejecting the strict liability standard, the court noted

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520A. Ground Damage From Aircraft

If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft, (a) the operator of the aircraft is subject to liability for the harm, even though he has exercised the utmost care to prevent it, and (b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation.

**RESTATEMENT (SECOND) OF TORTS § 520A (1977)** [hereinafter **RESTATEMENT**].

**Crosby**, 109 Wash. 2d at 581, 746 P.2d 1199. Comment a to section 520A of the Restatement states that "[t]his Section is a special application of the rule stated in § 519, together with that stated in § 520." **RESTATEMENT** § 520A comment a. Section 519 of the Restatement states:

**§ 519. General Principle**

1. One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

2. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

**Id. § 519.** Section 520 of the Restatement states:

**§ 520. Abnormally Dangerous Activities**

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
that the modern trend followed by a majority of states was to impose liability based on a negligence standard. Only six states impose strict liability for ground damage caused by aircraft, and those states impose it only upon the aircraft’s owner. Moreover, the court noted that a number of courts have expressly disavowed the notion that aviation is an “ultrahazardous activity.” The court further noted that even passengers injured in aircraft accidents must prove negligence in order to recover damages, and that the doctrine of res ipsa loquitur is still available to prove negligence.

The court also rejected the plaintiff’s alternative argument that a rule of strict liability should apply to ground damages caused by test flights of aircraft. The court declined to impose such a rule, holding that the plaintiff failed to show that test flights are so inherently dangerous that a “high degree of risk of harm” cannot be eliminated by the exercise of reasonable care. Instead, in light of the extensive regulations regarding design development and testing of new aircraft pursuant to FAA standards, the court concluded that test flights are not abnormally dangerous. Consequently, the court reversed the lower court’s grant of partial summary judgment and remanded the case for trial.

In a dissent joined by the chief justice and two other members of the court, Justice Brachtenbach argued in favor of adopting a strict liability standard for property

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(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

640 Crosby, 109 Wash. 2d at 581, 746 P.2d at 1200. The states imposing strict liability include Delaware, Hawaii, Minnesota, New Jersey and Vermont. Id.


642 Crosby, 109 Wash. 2d at 581, 746 P.2d at 1202.

643 Id.

damage caused by aircraft. The dissent argued that the majority misinterpreted section 520, which was intended to stand on its own apart from the section 520 requirements establishing an abnormally dangerous activity.\(^{645}\)

Moreover, the dissent argued that even absent a determination that aviation is an abnormally dangerous activity, strict liability should be imposed for policy reasons.\(^{646}\) The dissent suggested that the nature of the benefit and the creation of risk was one-sided when the interests of aircraft owners and operators are examined vis-a-vis property owners.\(^{647}\) Another factor supposedly favoring strict liability was the difficult and expensive burden of proof placed on a plaintiff to prove negligence in an aviation accident case.\(^{648}\) The dissent suggested that the expense of litigation effectively amounted to a denial of the plaintiff’s right to damages, particularly in a case where the damages are relatively small.\(^{649}\) A final policy reason advanced for the imposition of strict liability was the ability of aircraft owners and operators to spread the financial risk through insurance.\(^{650}\) The dissent also urged that the policy considerations of comment c to section 402a of the Restatement (Second) of Torts\(^{651}\) mandated the impos-

\(^{645}\) Id. at 581, 746 P.2d at 1205. The dissent points out that the authors of section 520A expressly intended for it to stand on its own. \( Id.\)

\(^{646}\) Id. at 581, 746 P.2d at 1203.

\(^{647}\) Id. at 581, 746 P.2d at 1203-04. The dissent states that:

Thus where each user of a highway receives the direct benefit of such use but whose presence and conduct increases the risk of harm to the other, the law of negligence applies. But the one-sidedness in the receipt of benefits and creation of risks should lead to strict liability . . . . This analysis is logical and satisfies the demands of justice. Its application here leads to strict liability.

\( Id.\) at 581, 746 P.2d at 1204.

\(^{648}\) \( Id.\)

\(^{649}\) \( Id.\) The plaintiff was seeking only $3,199.89 in damages. Another factor the dissent considered was the fact that the plaintiff was in the midst of a third-party fight over the cause of the crash, which included an expected battle of experts over the design and manufacture of a critical part of the fuel system. \( Id.\)

\(^{650}\) \( Id.\) at 581, 746 P.2d at 1205.

\(^{651}\) Comment c to section 402A of the Restatement states:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility to-
tion of strict liability.\textsuperscript{652} Thus, based on either policy reasons or the literal language of Restatement (Second) of Torts section 520A, the dissent would impose strict liability.\textsuperscript{658}

XI. ANTITRUST

In \textit{McElderry v. Cathay Pacific Airways, Ltd.},\textsuperscript{654} plaintiff claimed that a $10.64 baggage charge assessed because her baggage weighed seven kilograms over the twenty-kilogram free baggage allowance was improper. McElderry alleged that this assessment was in violation of sections 403 and 404(b) of the Federal Aviation Act,\textsuperscript{655} sections 1 and 2 of the Sherman Act,\textsuperscript{656} and section 1 of the Robinson-Patman Anti-Discrimination Act.\textsuperscript{657} Cathay Pacific moved to dismiss under rules 12(b)(1) and (12(b)(6)).\textsuperscript{658}

The court dismissed McElderry's claims. The court determined that no private right of action exists under sections 403 and 404(b) of the Federal Aviation Act.\textsuperscript{659}

\textsuperscript{652} \textit{Crosby}, 109 Wash. 2d at 581, 746 P.2d at 1205, 1208.

\textsuperscript{653} \textit{Id.}; \textit{see supra} note 638 for the text of section 520A of the Restatement.

\textsuperscript{654} 678 F. Supp. 1071 (S.D.N.Y. 1988).

\textsuperscript{655} 49 U.S.C. §§ 1373, 1374(b) (1982).

\textsuperscript{656} 15 U.S.C. §§ 1, 2 (1982).


\textsuperscript{658} \textit{McElderry}, 678 F. Supp. at 1073.

\textsuperscript{659} \textit{Id.} at 1073-74. The court used the four factor analysis set forth in \textit{Cort} v. \textit{Ash}, 422 U.S. 66, 78 (1975), in determining that a private right of action does not exist under sections 403 and 404(b) of the Federal Aviation Act. \textit{McElderry}, 678 F. Supp. at 1074. The four factors enunciated in \textit{Cort} are as follows: First, is the plaintiff "one of the class for whose \textit{especial} benefit the statute was enacted," — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of leg-
Moreover, the court held that even if McElderry had the right to assert her claims under the FAA, they were without merit.660 The subject flight took place between Hong Kong and Taipei. While Cathay Pacific was required to maintain a piece-based luggage charge system for flights originating from or terminating in the United States, it could use a weight-based luggage charge system for those flights completely outside the United States under the dictates of Rule 16, the Cathay Pacific tariff.661 The court noted that the Warsaw Convention terminology regarding destination does not apply in interpreting Rule 16.662

The court also dismissed McElderry's claims of violations of sections 1 and 2 of the Sherman Act663 and section 4 of the Clayton Act664 for failure to meet the requirements of the Foreign Trade Antitrust Improvement Act665 and for reasons of comity.666 McElderry failed to

islative intent, explicit or implicit, either to create such a remedy or to to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Court, 422 U.S. at 78 (citation omitted); see also Wolf v. Trans World Airlines, Inc., 544 F.2d 134, 137 (3d Cir. 1976) (no private right of action under section 403(b) of the FAA for passengers given airline package tour accommodations impractically far from airport), cert. denied, 430 U.S. 915 (1977); Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 338 (3d Cir. 1975) (no private right of action under section 404(b) of the FAA available to airline passengers provided with inferior lodgings in airline package tour).

660 McElderry, 678 F. Supp. at 1075.
661 Id. Rule 16 is the tariff filed by Cathay Pacific with the CAB, which regulates, among other things, luggage charges. Id.
662 Id. at 1076. The district court held that McElderry could not rely on the Warsaw Convention's definition of the phrase "place of destination" since the interpretation of the Convention was not in issue and because Rule 16 used phrasing different from that of the Convention. Id.
666 McElderry, 678 F. Supp. at 1077. McElderry claimed that Cathay Pacific violated section 1 of the Sherman Act in that it conspired with other air carriers in restraint of trade to adopt an illegal baggage charge system for use against passengers on flights originating or terminating in the United States. Id. McElderry further argued that Cathay Pacific violated section 2 of the Sherman Act in that it attempted to monopolize a portion of aerial commerce by using a baggage charge
allege a direct anticompetitive effect on United States commerce, as required by the Foreign Trade Antitrust Improvement Act to state a viable cause of action under the Sherman Act. The complaint alleged at most injury only to individual passengers due to overcharging. In order to state a viable Sherman Act claim, a plaintiff must demonstrate injury to American commerce in general, and not mere monetary damage to individuals. Moreover, the court noted that it was far from clear that Cathay Pacific's weight-based system gave it a competitive advantage over airlines using a piece-based system.

Finally, the court held that even if McElderry's claim had met the requirements of the Foreign Trade Antitrust Improvement Act, which limits the application of the Sherman Act to foreign entities, it should still decline to exercise jurisdiction under principles of international comity. Cathay Pacific argued successfully that its manner of handling baggage on a weight-based system for flights not originating or ending in the United States was required by the United Kingdom's regulatory system. Accordingly, the act of state doctrine applied and the court should avoid judicial inquiry into the actions of foreign government officials.

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667 Id.
668 Id. at 1078; see Fine v. Barry & Enright Prod., 731 F.2d 1394, 1399 (9th Cir.)(a plaintiff suing under the Sherman Act must "show injury to a market or to competition in general, not merely injury to individuals."), cert. denied, 469 U.S. 881 (1984).
669 Id.
670 Id. at 1078-79. McElderry alleged that the Cathay Pacific weight-based baggage charge system was anti-competitive because it increased Cathay Pacific's revenues in comparison to United States airlines using a piece-based system. Id. The court, however, noted that since passengers might be charged less for baggage under the piece-based system, this could cause airline passengers to choose United States carriers over Cathay Pacific. Id.
671 Id. at 1078-79. The court noted that the United Kingdom had repeatedly rejected attempts to impose piece-based baggage charge systems on foreign airlines engaged in exclusively foreign travel and that accepting jurisdiction of this case would "clearly exacerbate the stated differences between the two countries." Id. at 1079.
672 Id. at 1078-80. The United Kingdom filed a diplomatic note with the State
In *Tri-State Executive Air, Incorporated v. Tri-State Airport Authority*, plaintiff claimed that the defendant violated federal and state antitrust laws and the Federal Aviation Act of 1958 due to its policy of reserving the exclusive right to sell aviation fuel at the Tri-State Airport. While the defendant authority contended that it was immune from the antitrust laws because of its grant of power from the West Virginia Legislature, the court found that no immunity applied. The court noted the presumption against implied exclusions from coverage under the antitrust laws. This presumption, combined with the legislature's failure to clearly and affirmatively express a state policy authorizing the challenged action, led the court to deny the defendant's motion for summary judgment.

**XII. MISCELLANEOUS**

In *Mathews v. Northwest Airlines, Incorporated*, the plaintiff paid $960 for tickets from Syracuse, New York to West Palm, Florida. The tickets were purchased at a reduced rate and had a nonrefundable cancellation clause. When plaintiff subsequently was unable to use the tickets, Department stating that Hong Kong or Taiwan should have jurisdiction, but not the United States. *Id.* at 1078-79. Also, affidavits filed by Cathay Pacific conclusively showed that the United States and United Kingdom disagree over the proper baggage system, and thus the act of state doctrine necessitated dismissal of the claim. *Id.* at 1079-80.

*Id.* at ¶ 17,188-89. The airport authority claimed that the state legislature intended to provide it with "the broadest possible powers." *Id.* at ¶ 17,189.

*Id.* (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)). In *Lafayette*, the Supreme Court stated that the Sherman Act was intended to apply to "every person engaged in business whose activities might restrain or monopolize commercial intercourse," and that "even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Lafayette*, 435 U.S. at 398.

*Id.* Tri-State Executive Air, 20 Av. Cas. at ¶ 17,189. The district court specifically stated that defendant's "fuel policy cannot be exempt from antitrust scrutiny unless it constitutes the action of the state itself in its sovereign capacity, or unless it constitutes action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy." *Id.*

*Id.* 21 Av. Cas. (CCH) ¶ 17,300 (N.Y. Sup. Ct. 1988).
Northwest maintained that no refund was due. 678

The court disagreed. The court found that plaintiff had given defendant ample time to fill the seats, noting that there was no indication that the flight left with less than a full complement of passengers. 679 Moreover, the court noted that there was no mutuality of obligation since the airline reserved the right to cancel plaintiff's reservations but did not offer her any opportunity to alter the reservations or pay an additional premium for a ticket containing less restrictions. 680 The court found that defendant had been unjustly enriched at plaintiff's expense and awarded plaintiff damages in the amount of $960.

In Lopez v. Eastern Airlines, Incorporated, 681 plaintiff Lopez was bumped from a flight on which he held a confirmed reservation. He was scheduled to leave Newark, New Jersey for Miami at 7:59 p.m. He subsequently was offered a seat on a later Eastern Airlines flight, which he accepted. He declined Eastern's offer to return the price of his ticket. 682 He later brought suit seeking actual damages for his alleged "humiliation, annoyance and distress." 683

The court found that his complaint stated a cause of action for breach of contract. The court held that overbooking and bumping constitutes a simple common law breach of contract for which Lopez was entitled to actual compensatory damages. 684 The court noted that inconven-

678 Id. at ¶ 17,301. Plaintiff was unable to use the tickets because she had booked a flight for the week preceding the one during which she was planning to vacation.
679 Id.
680 Id.
682 Id. at 182.
683 Id. Lopez had originally planned to arrive at his Key Largo condominium around midnight and attend a wedding the following day. Although the overbooking of the flight caused him to arrive in Key Largo between three and four o'clock in the afternoon instead of midnight of the previous evening, Lopez was still able to attend the wedding as planned. Id.
684 Id. at 183. The court cited Goranson v. Trans World Airlines, 121 Misc. 2d 68, 467 N.Y.S.2d 774 (N.Y. City Ct. 1983). Lopez, 677 F. Supp. at 183. In Goranson, the court held that a plaintiff involuntarily denied boarding on a TWA flight
ience, delay and uncertainty are worth something, even in the absence of out-of-pocket costs, and awarded plaintiff $450.685.685

In Brun-Jacobo v. Pan American World Airways, Incorporated,686 the jury awarded $20,000 for pre-impact mental anguish suffered by parents killed in an air crash and $65,000 to each of their children for loss of love, affection and companionship. The trial court granted plaintiff's motion for a new trial, holding that the awards for loss of love, affection and companionship were unreasonably low because of bias or prejudice against the plaintiffs, who were foreigners.687

The Fifth Circuit Court of Appeals overruled the trial court. It noted that the district court did not refer to any independent or specific evidence of bias or prejudice toward plaintiffs.688 In finding the awards inadequate, the trial court simply compared those awards with awards in other cases arising from the same plane crash and concluded that because the amounts were substantially lower, they must have been the result of prejudice or bias.689 The court of appeals rejected this method of assessing the adequacy of damages. The court stated that the question was whether the original award was clearly within the universe of possible awards supported by the evidence. If not, then the trial court did not abuse its discretion in ordering a new trial.690

The appellate court rejected as improper the trial court's use of only those awards in cases arising from the

from New York to London could sue on a common law breach of contract claim regardless of TWA's tariff or any Civil Aeronautics Board regulation limiting the amount of compensation available to wrongfully "bumped" passengers. Goranson, 121 Misc. 2d at 68, 467 N.Y.S.2d at 781.

685 Lopez, 677 F. Supp. at 183.
686 847 F.2d 242 (5th Cir. 1988).
687 Id. at 243.
688 Id. at 244.
689 Id. The damages awarded at the second trial were greater: $25,000 for pre-impact mental anguish and $110,000 each to the children for loss of love, affection, and companionship. Id.
690 Id. at 246.
same crash when it determined the adequacy of damages. The court held that the particular cause of the deaths was irrelevant and that the district court should have instead focused on awards for similar injuries.\textsuperscript{691} A more representative sample would have been wrongful death awards granted to children to compensate them for the loss of their parents, regardless of the cause of deaths.\textsuperscript{692} The court determined that the awards contained within the original verdict were clearly within the realm of possible awards supported by the evidence and therefore were proper.\textsuperscript{693} On that basis, the court remanded the case to the district court with instructions to enter judgment on the original verdict.\textsuperscript{694}

\textsuperscript{691} \textit{Id.}
\textsuperscript{692} \textit{Id.} The court expressly stated that the "relevant similarity is that pertaining to the injury suffered by the children on account of the parents' death, not the cause of death." \textit{Id.}
\textsuperscript{693} \textit{Id.} at 246-47. The court commented that although the awards were lower than those received in other airplane crash cases, they were "nonetheless well within the permissible range of such awards in Louisiana." \textit{Id.} at 246.
\textsuperscript{694} \textit{Id.} at 247.