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RECENT CASES AND DEVELOPMENTS IN AVIATION LAW: PART I

GEORGE S. PETKOFF*

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CURRENTLY, 106 product liability actions are pending in the Southern District of Texas that stem from employment-related exposure to asbestos at the Uvalde Rock Asphalt Company in Houston. One of those cases is Irving v. Owens Corning Fiber Glass Corp. The plaintiff, Irving, a former Uvalde employee, sued the supplier of raw as-

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2 864 F.2d at 383.
bestos under the theories of strict liability, negligence, and breach of warranty for respiratory injuries allegedly linked to asbestos exposure.\textsuperscript{3} The raw asbestos supplier, a Yugoslavian manufacturer, supplied approximately 5000 metric tons of asbestos to the plaintiff's employer annually from 1956 to 1970.\textsuperscript{4}

To establish jurisdiction in a diversity case, the plaintiff must satisfy both the forum state's long-arm statute and the fourteenth amendment's due process requirements.\textsuperscript{5} The U.S. Court of Appeals for the Fifth Circuit concluded that the plaintiff established a prima facie case for personal jurisdiction over the Yugoslavian defendant.\textsuperscript{6} In determining the exercise of personal jurisdiction over a nonresident defendant, the due process clause permits a district court to exercise \textit{in personam} jurisdiction when (1) the defendant has sufficient "minimum contacts" with the forum, and (2) the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."\textsuperscript{7} The minimum contacts must arise from actions of the nonresident defendant who "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."\textsuperscript{8} The Supreme Court has determined, in describing the degree of purposeful conduct necessary to satisfy the minimum contacts prong of the due process clause, that "the forum state does not exceed its power under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state."\textsuperscript{9} In \textit{World-Wide Volkswagen}, the court stressed that foreseeability for

\textsuperscript{3} Id. at 384.
\textsuperscript{4} Id.
\textsuperscript{5} Id. at 385 (citing De Melo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir. 1983)).
\textsuperscript{6} Id. at 387.
\textsuperscript{7} International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\textsuperscript{8} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).
\textsuperscript{9} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).
personal jurisdiction purposes turns on whether "the defendant's conduct and connection with the forum state are such that [it] should reasonably anticipate being haled into court there."\(^{10}\)

The *Irving* court noted that the Supreme Court's most recent statement on personal jurisdiction was found in *Asahi Metal Industries Co. v. Superior Court*,\(^{11}\) in which four justices favored a narrow interpretation of the stream of commerce doctrine. The court, however, chose not to rely on *Asahi*, concluding that the "splintered view of minimum contacts" expressed in *Asahi* provided no clear guidance on the issue. The court chose, instead, to use the stream of commerce standard described in *World-Wide Volkswagen*. This is the traditional approach of the Fifth Circuit.\(^{12}\)

In *Irving*, the defendant contended that its role in the distribution chain was too minor to vest the district court with personal jurisdiction under the stream of commerce doctrine.\(^{13}\) The appeals court disagreed, however, noting that the defendant held itself out as a seller in the contract, shared the cost of quality control testing by a Houston lab, accepted payments for the asbestos, and stored the product.\(^{14}\) These actions satisfied the minimum contacts prong of the due process test. The court noted that even a nonresident defendant's out-of-state activities can establish the necessary minimum contacts if those activities have "reasonably foreseeable consequences" within the forum state.\(^{15}\) The *Irving* court also found that the jurisdiction over the asbestos supplier would not violate the essential standards of fair play and substantial justice.\(^{16}\)

The defendant's argument stressed that under the Fifth Circuit's formulation it would carry a heavy burden as a

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\(^{10}\) *Id.* at 297.

\(^{11}\) 480 U.S. 102 (1987).

\(^{12}\) *Irving*, 864 F.2d at 386.

\(^{13}\) *Id.*

\(^{14}\) *Id.*

\(^{15}\) *Id.*

\(^{16}\) *Id.* at 387.
foreign company defending lawsuits in Texas.\textsuperscript{17} The defendant also noted the Supreme Court’s comment in \textit{Asahi} to give “significant weight” to the unique burdens placed on parties who face litigation in a foreign legal system.\textsuperscript{18} But the court, in citing \textit{Asahi}, concluded that when minimum contacts have been established, often the interests of the plaintiff and the forum will justify the serious burden placed upon the alien defendant. Therefore, the court concluded that the exercise of personal jurisdiction did not offend traditional notions of fair play and substantial justice.\textsuperscript{19}

In \textit{Insurance Co. of North America v. Judge},\textsuperscript{20} the district court originally 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.\textsuperscript{21} At that time, the court found that the defendants were subject to personal jurisdiction on the grounds that they purposely served the market for interstate travel by leasing the airplane in Illinois to an airplane rental agency, without imposing any restrictions on the airplane’s use.\textsuperscript{22} The court, however, decided to reconsider its previous decision\textsuperscript{23} in light of the United States Supreme Court decision in \textit{Asahi}, a case which had not been cited by either party in earlier jurisdictional motions.\textsuperscript{24}

On reconsideration, the Minnesota District Court concluded it could not assert jurisdiction over the defendant. Because of the Eighth Circuit’s narrow view of the stream-of-commerce theory, the court was unable to sustain jurisdiction over the defendants on the sole ground that by

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} 20 Av. Cas. (CCH) 18,594 (D.C. Minn. 1987).
\textsuperscript{21} See id. at 18,596-98.
\textsuperscript{22} Id. at 18,598.
\textsuperscript{23} 21 Av. Cas. (CCH) 17,776, 17,781 (D.C. Minn. 1988). The court noted that its reversal was “in light of \textit{Asahi}.” Id. at 17,779.
\textsuperscript{24} See id. at 17,780.
renting an airplane to third parties in Illinois, which subsequently caused injury in Minnesota, they had sufficient contact with Minnesota to be subject to jurisdiction there.\textsuperscript{25} Merely placing a product in the stream of commerce, even if it was foreseeable that the product would find its way into the forum state, was not sufficient without an act purposely directed at the forum state. Instead, what is required is additional conduct by the defendant manifesting "an intent or purpose to serve the market in the forum state," such as marketing or advertising activities directed at the forum.\textsuperscript{26} Because the defendants did not seek, either directly or indirectly, to serve the Minnesota market for airplane travel or rentals by advertising or other marketing techniques, they were not subject to the jurisdiction of the Minnesota courts.\textsuperscript{27}

The court further concluded that there was no agency relationship between the pilot and the owners where the pilot was not acting on the owner's behalf and was not under his control.\textsuperscript{28} Accordingly, the crash of the airplane in Minnesota could not be imputed to the owners as a contact with that forum under agency law principles. The court looked to automobile-related case law from other jurisdictions which supported the conclusion that statutes making the car owner vicariously liable for the negligence of drivers do not provide an independent basis for jurisdiction.\textsuperscript{29}

In \textit{Eason v. Linden Avionics},\textsuperscript{30} the district court found that the defendant, a manufacturer of an aircraft that departed from New Jersey and crashed in Rhode Island, had sufficient minimum contacts with the state of New Jersey to

\textsuperscript{25} Id.

\textsuperscript{26} Id. (citing \textit{Asahi}, 480 U.S. at 112).

\textsuperscript{27} Id.

\textsuperscript{28} Id. at 17,780-81.


render it amenable to personal jurisdiction in New Jersey.\textsuperscript{31} Although the defendant had intentionally structured its business activity to avoid being subject to the jurisdiction of states in which its products could be found, its contacts with New Jersey were sufficiently purposeful, continuous, and substantive to render it subject to the forum state's jurisdiction.\textsuperscript{32}

The defendant contended its contacts with New Jersey were insufficient to support either jurisdiction or venue in that district. The company conducted the bulk of its business outside the state, did not maintain manufacturing, sales, warehouse, or other facilities in New Jersey, owned no property in New Jersey, had no offices or employees in New Jersey, and had not authorized a New Jersey agent to accept service of process. The only contact with New Jersey arose from its use of the New Jersey market for the sale of its airplane.\textsuperscript{33}

The court found that the defendant placed an intermediary agent between its company and the ultimate consumer of its products which enabled it to enjoy the benefits of New Jersey's legal forum and protection. By sending company representatives to New Jersey, the defendant provided service to local customers and fully developed its business relationship with the state. By soliciting business in New Jersey, the defendant affirmatively and independently invoked the benefits of the laws of the forum state. It was, therefore, subject to the personal jurisdiction of New Jersey.\textsuperscript{34}

\textsuperscript{31} Id. at 324. The court relied on Asahi, saying that the placement of a product into the stream of commerce suffices to establish the requisite minimum contacts for personal jurisdiction where the defendant's conduct indicates an intent or purpose to serve the market in the forum state. An intent to serve the market might be evidenced by, for example, designing a product for the market, advertising, establishing channels for providing advice to customers, or marketing through a distributor. Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id. Beech characterized its advertising activities as "intermittent", arguing that these activities were concentrated in aviation and business magazines with national and international circulation. Id.

\textsuperscript{34} Id. "Beech expected that its products would be sold in New Jersey and it
In *Parry v. Ernst Home Center Corporation*, the plaintiff filed an action for personal injuries against defendants Ernst Home Center Corporation [hereinafter Ernst] and Pay N'Save. Plaintiff was injured by a maul which was manufactured by Hirota Tekko K.K., a Japanese manufacturer. Hirota sold the maul to Okada Hardware of Japan for export to the United States. Okada exported the maul to Mansour, a California corporation, who then sold it to Pacific Marine Schwabacher, its regional distributor. Schwabacher distributed and sold the mauls to retailers throughout the West Coast and Mountain area, including Ernst.

Plaintiff filed an action for personal injuries against defendants Ernst and Pay N'Save and amended its complaint, naming Mansour, Okada, and Hirota as defendants. Mansour, Ernst, and Pay N'Save filed third-party complaints against Okada and Hirota. Hirota and Okada each filed motions to dismiss all the claims against them on the grounds that the trial court lacked personal jurisdiction over them.

The trial court concluded that the Japanese defendants lacked sufficient minimum contacts with Utah to warrant the exercise of long-arm jurisdiction for the injury alleged by the plaintiff because they had not purposefully availed themselves of Utah's forum. The plaintiff and Mansour contended that the state of Utah had jurisdiction over the Japanese defendants under the stream of commerce theory.

The facts revealed that Hirota and Okada had been informed of potential sales in the southwestern United States, but they never came to Utah nor sent sales representatives to Utah to facilitate the marketing and purchase of their products.
ing of their product. The court concluded that an intentional and knowing distribution of a product in the western United States was not sufficient to satisfy the "minimum contacts" requirement. Neither Hirota nor Okada had any sales representatives or other agents, bank accounts, or personal property in Utah. Without the showing of "additional conduct," the court was unable to find that eventual sales of a product in Utah justified personal jurisdiction. Both companies' principal place of business was Japan, and they did not take advantage of the state's business climate or the protection of its laws. Therefore, they did not purposefully avail themselves of the privilege of conducting activities in Utah.

The mere possibility that a maul might be taken into Utah was insufficient to make Hirota and Okada subject to Utah's jurisdiction. The U.S. Supreme Court, in World-Wide Volkswagen, made it clear that a seller of chattels does not "appoint the chattel his agent for service of process." The Japanese defendants merely manufactured and distributed a product which ultimately caused injury in Utah. Thus, the injury alone could not satisfy the due process requirements for the exercise of personal jurisdiction. The appeals court affirmed the trial court's dismissal of the complaint.

B. Subject Matter Jurisdiction

1. General

In Blum v. Airport Terminal Services, Inc., a Missouri court of appeals upheld a lower court's dismissal of a complaint against Skycraft, the owner of a DC-3 cargo plane. Skycraft also employed both the pilot and copilot of the plane. Due to the misfueling of the aircraft, it

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39 Id. at 665.
40 Id. at 667.
41 World-Wide Volkswagen, 444 U.S. at 286.
42 Parry, 779 P.2d at 667.
43 Id. at 668.
44 Blum, 762 S.W.2d 67 (Mo. Ct. App. 1988).
crashed and the copilot, a Canadian citizen, was killed. His parents brought a wrongful death action against four defendants, including Skycraft. Defendant Skycraft filed a motion to dismiss on the ground that the court lacked subject matter jurisdiction because the workers' compensation law furnished the exclusive remedy against it. The trial court granted that motion.\footnote{Id. at 71.}

Subsequently, the plaintiffs filed an amended petition against the remaining defendants, omitting the owner of the aircraft as a defendant. Skycraft contended that the amended petition constituted a waiver or abandonment of the plaintiffs' right to appeal the court's action in dismissing Skycraft.\footnote{Id.} The general rule in Missouri is that an amended petition operates as an abandonment of the original petition. The plaintiffs asserted that the motion was improperly granted because the petition on its face did not establish that the copilot's death was covered by the Worker's Compensation Act (WCA).\footnote{Id.} They relied upon McLeod v. Marion Laboratories, Inc.,\footnote{Id. at 71.} which held that all jurisdictional facts bringing a plaintiff and a defendant under the WCA must appear in the petition where the issue is raised by motion to dismiss. The petition in Blum specifically stated that the deceased was Skycraft's employee. There was nothing before the court to evidence the inapplicability of the WCA.\footnote{Id. at 72.}

The Missouri Court of Appeals held that the complainants did not abandon their cause of action against the owner of the aircraft by filing the amended petition. Even though the deceased and Skycraft were residents of Ontario, Canada, and the employment contract had its situs in Canada, the trial court did not err in applying Missouri law rather than Ontario law.\footnote{Id. at 72.} Under a choice of law determination, the most significant contacts were in Onta-
rio. Under Ontario law, the plaintiffs elected by filing their suit against Skycraft in Missouri to claim compensation under the laws of Missouri. Therefore, Missouri law restricted them to worker's compensation remedies.51

In O'Carroll v. American Airlines, Inc.,52 a denied boarding case, the plaintiff held a valid flight ticket issued by Chaparral Airlines for passage between Portland, Maine, and Alexandria, Louisiana. The trip was comprised of three flight segments.53 After boarding for the final segment, the plaintiff became loud, boisterous, and intoxicated. During the ensuing events, the airline found an irregularity in the plaintiff's ticket. A flight attendant asked the plaintiff to deplane in order to check with the gate agent regarding the ticket mix-up. The plaintiff refused to deplane. The police removed him from the plane, charged him with disorderly conduct, and jailed him.54

The plaintiff brought an action against Chaparral Airlines, asserting various state law claims based on the plaintiff's alleged wrongful exclusion from the flight. Diversity of citizenship provided the basis for jurisdiction. After a trial, the jury returned a verdict awarding the plaintiff $260,273.23 in damages. The court denied the defendant's motion for judgment notwithstanding the verdict and motion to dismiss. The district court then entered judgment on the jury's verdict, and the defendant appealed.55

The defendant argued that the state law claims which formed the basis of the plaintiff's actions were preempted by federal law. The Fifth Circuit held that the federal trial court lacked subject matter jurisdiction over the plaintiff's complaint, since state claims are preempted by federal law. The appeals court found three instances where federal law pre-empts state law. First, Con-

51 Id.
52 863 F.2d 11 (5th Cir. 1989).
53 Id. at 12.
54 Id.
55 Id.
gress may expressly pre-empt state law. Second, congressional intent to pre-empt state law may be inferred from the pervasiveness of the federal regulatory scheme. Third, when state law conflicts with federal law and interferes with the achievement of congressional objectives, pre-emption occurs even though state law may not be displaced in its entirety. The existence of any of these circumstances is sufficient to establish preemption. Noting that the Federal Aviation Act (the Act) applies to the regulation of air travel, the court found that section 1305, entitled “Federal Preemption,” expressly preempted state law. The Act reads in pertinent part as follows: “No state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any carrier having authority under subchapter IV of this chapter to provide air transportation.” In view of this explicit manifestation of congressional intent, the court concluded that the plaintiffs’ claims were pre-empted by section 1305, and thus, the district court lacked subject matter jurisdiction over the action. The judgment of the district court was vacated.

In Sierra Club v. Skinner, the Sierra Club filed a complaint seeking judicial review of Federal Aviation Administration (FAA) designation of the Hart Military Operations Area as a military operations zone. The district court dismissed the complaint on the grounds that exclusive jurisdiction to review FAA actions was vested in the circuit court of appeals.

The Sierra Club contended that it was misled by the FAA handbook into believing that the designation of the

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58 Id.
59 Id.
60 O’Carroll, 863 F.2d at 13.
61 885 F.2d 591 (9th Cir. 1989).
62 Id. at 592; see 49 U.S.C. § 1486(a) (1982).
zone was not an order reviewable only under section 1486(a). The Sierra Club also argued that even had it known the designation was an order, it would have been difficult to file a petition for review within sixty days of the FAA decision, because the FAA did not notify these applicants, or any one else who commented on the proposal, that it had taken final action on the proposed zone. Finally, the Sierra Club argued that, in the interest of justice, the court should grant its application so it would have a forum in which to seek judicial review. The court concluded, however, that there had been no showing of a reasonable ground for failure to file the petition for judicial review in a court of appeals within sixty days of the entry of the FAA order, as required by federal statute. The court found that the FAA’s action in designating the military operations area constituted a final review of the agency’s order. The agency’s action was “final,” given the substantial administrative record and the formality and specificity of the decision document. The federal trial court properly dismissed the Sierra Club’s complaint for lack of jurisdiction, and application for leave to file a later petition for review was denied.

2. Foreign Sovereign Immunities Act

In Burke v. Compagnie Nationale Air France, the defendant, Air France, was a corporation owned almost completely by the government of the Republic of France. The court found the defendant to be an instrumentality of France, pursuant to the Foreign Sovereign Immunities Act (FSIA), and thus subject to its provisions. Under FSIA there is no immunity from the jurisdiction of United States courts for actions based on commercial activity of:

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63 Sierra Club, 885 F.2d at 593.
64 Id.
65 Id. at 594.
67 Id. at 1019.
69 Burke, 699 F. Supp. at 1019.
foreign state. The court found that the operation of the airline was squarely within the commercial activity exception; therefore, jurisdiction over the defendant, a foreign state, was proper pursuant to section 1330(a).\(^{70}\)

The plaintiffs did not have to satisfy any requisite jurisdictional amount since the court based its jurisdiction on the Foreign Sovereign Immunities Act. The court allowed the plaintiffs to recover, under Puerto Rico’s Civil Code, for mental anguish and anxiety suffered when defendant’s aircraft developed engine trouble, even though the plaintiffs sustained no physical injuries.\(^{71}\)

In *America West Airlines, Inc. v. GPA Group, Ltd.*\(^{72}\), the Ninth Circuit held that the district court properly dismissed a suit in which an airline sought to recover damages allegedly arising from faulty engine maintenance work performed in Ireland by a foreign corporation. The district court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act.\(^{73}\) The lawsuit arose from damages sustained by America West Airlines when the engine of one of its aircraft stalled and caught fire shortly after takeoff. America West alleged that it suffered damages in excess of $500,000.00 due to the loss of the engine.\(^{74}\)

The aircraft purchase agreement between America West and GPA Leasing, a corporation organized and existing under the laws of Netherlands Antilles, provided that America West would purchase a Boeing 737-200 jet aircraft. Further, America West agreed to replace the fitted engines on the aircraft with two overhauled engines. The agreement provided that Arizona law would govern its interpretation. Prior to shipment, Airmotive Ireland, Ltd. serviced, inspected, repaired, and overhauled one of the engines.\(^{75}\)

\(^{70}\) *Id.* at 1019; *see* 28 U.S.C. § 1330(a) (1988).

\(^{71}\) *Burke*, 699 F. Supp. at 1020.

\(^{72}\) 877 F.2d 793 (9th Cir. 1989).

\(^{73}\) *Id.* at 802.

\(^{74}\) *Id.* at 795.

\(^{75}\) *Id.*
The district court concluded that it lacked subject matter jurisdiction over this action. With respect to the claims against Airmotive and Aerlinte (another defendant), the only basis for federal jurisdiction asserted by America West was the jurisdiction provision of the Foreign Sovereign Immunities Act. This provision creates original jurisdiction without regard to the amount in controversy for any nonjury civil action against a foreign state as defined in section 1603(a). This jurisdiction is for any claim for relief in *in personam* where the foreign state is not entitled to immunity under any applicable international agreement.

It was undisputed that Aerlinte and Airlingus were completely owned by the Republic of Ireland and fell within the definition of a "foreign state" under § 1603(a). The Foreign Sovereign Immunities Act provides that a foreign state and its instrumentalities are immune from suit, unless one of several specific exceptions applies.

America West asserted that one or more of the commercial activities exceptions outlined in section 1605(a)(2) divested the defendants of sovereign immunity. The fact that the Republic of Ireland carried on commercial activities in the United States was, in itself, insufficient to create jurisdiction under the first clause of § 1605(a)(2). The court recognized there must be a

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78 Id.; see also 28 U.S.C. § 1603(a).

(a) a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect on the United States.

*Id.*
nexus between the defendant's commercial activity in the United States and the plaintiff's grievances. The court found no nexus between America West's cause of action and any commercial activity carried on by the Republic of Ireland in the United States. The only commercial activity allegedly carried on in the United States by the Republic of Ireland was Aerlinte's operation of commercial passenger airline service between the United States and Ireland. America West's claim, however, did not relate to Aerlinte's commercial operation. The specific act that formed the basis of the suit was the engine maintenance of Airmotive, which took place solely in Ireland. Thus, the first clause of section 1605(a)(2) did not divest the three defendants of sovereign immunity.

America West also argued that the third clause of section 1605(a)(2), excepting "an act outside the territory of the United States in connection with a commercial activity elsewhere [which] causes a direct effect in the United States," divested Aerlinte and Airlingus of sovereign immunity. America West contended that the financial losses it incurred as a result of Airmotive's allegedly faulty maintenance constituted a "direct effect" for the purpose of section 1605(a)(2).

The court held that the foreign sovereign's activities must cause an effect in the United States which is substantial and foreseeable in order to abrogate sovereign immunity. Mere financial loss incurred by a native corporation does not, in itself, constitute "direct effect" for purposes of section 1605(a)(2). From Airmotive's standpoint, it was not foreseeable that its maintenance activities in Ireland would have an effect in the United States. When Airmotive performed the work, the engine was still owned by GPA Group, Ltd. In effect, their United States con-

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81 America West, 877 F.2d at 797.
82 Id.
83 Id. at 798; see also supra note 80.
84 Id. at 797.
85 Id. at 800.
contacts were purely fortuitous, in that they depended solely on the fact that the injured corporation happened to be in America. The appeals court upheld the district court's determination that it lacked subject matter jurisdiction under 28 U.S.C. 1330(a). Finally, the appeals court found the trial court had not abused its discretion in deciding the jurisdictional issue without allowing additional time for discovery and in refusing to allow America West to amend its complaint.

3. Federal Tort Claims Act

In Nicholson Air Service, Inc. v. United States, the owner of an airplane involved in a crash brought an action under the Federal Tort Claims Act (FTCA). The district court declared that it was not deprived of subject matter jurisdiction over the suit merely because the insurer of the aircraft, instead of the owner, had filed an administrative claim with the FAA. The plaintiff alleged that the United States was liable because of a navigational aid maintained by the Federal Aviation Administration. The district court held there was absolutely no substantive difference between what the insurer asserted in its administrative claim before the FAA and the claim asserted in this suit. The court held that the government's argument embodied an archaic conceptualization of subject matter jurisdiction, which was contrary to the spirit, purpose, and policy of the federal rules. Accordingly, the court denied the government's motion to dismiss, and the insured was substituted for the owner as plaintiff in this suit, pursuant to Federal Rule of Civil Procedure 17(a).

In Finley v. United States, a plane carrying petitioner's
husband and two of her children struck an electric trans-
mission line and crashed during its approach in San Di-
ego, California. Petitioner brought an action in state
court, claiming that San Diego Gas and Electric Company
had negligently positioned and inadequately illuminated
the transmission lines and that the City of San Diego's
negligent maintenance of the runway lights had rendered
them inoperative the night of the crash. When the peti-
tioner discovered that the FAA was, in fact, responsible
for the runway lights, she filed an action against the fed-
eral government in the United States District Court, bas-
ing jurisdiction on the FTCA. Plaintiff alleged the FAA
was negligent in the operation and maintenance of the
runway lights and in its performance of air traffic control
functions. A year later, plaintiff moved to amend her
federal complaint to include claims against the original
state court defendants, as to which no independent basis
for federal jurisdiction existed. The district court granted
petitioner's motion and asserted pendent jurisdiction
under United Mine Workers v. Gibbs. The court found it
clear that judicial economy and efficiency favored trying
the actions together and concluded that they arose “from
a common nucleus of operative facts.”

The district court certified an interlocutory appeal to
the Ninth Circuit Court of Appeals, but that court summa-
arily reversed on the basis of its earlier opinion in Ayala v.
United States, in which the court had categorically re-
jected pendent party jurisdiction under the FTCA. The
circuits were split on whether the FTCA permitted an as-
sertion of pendent jurisdiction over additional parties, so
the Supreme Court granted certiorari in Finley to resolve

94 Id. at 2005.
95 Id.
97 Finley, 109 S. Ct. at 2005.
99 Finley, 109 S. Ct. at 2005.
100 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978).
101 Id. at 1197.
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the dispute.\textsuperscript{102}

The Supreme Court did not allow the plaintiff to add state tort law claims against the city and utility company with regard to her action against the federal government under the Federal Tort Claims Act. The Court found that the language of the FTCA gives federal district courts exclusive jurisdiction of civil actions on claims against the United States for certain torts of federal employees acting within the scope of their employment.\textsuperscript{103} Appending the petitioner's claims against the city and utility company to the action against the federal government would require the district court to extend its authority to additional parties for whom an independent jurisdictional base was lacking. Federal courts have pendent-claim jurisdiction (jurisdiction over nonfederal claims between parties litigating other matters properly before the court) when the federal and nonfederal claims derive from a common nucleus of operative facts and are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding.\textsuperscript{104} With the addition of parties, however, as opposed to the addition of claims, it cannot be assumed that the forum's jurisdiction and power permitted by the Constitution have been congressionally authorized. The Federal Tort Claims Act confers jurisdiction over civil actions on claims against the United States; it does not provide for civil actions on claims \textit{that include requested relief against} the United States.\textsuperscript{105} The Court found that "against the United States" means against the United States and not one else.\textsuperscript{106} Regard for the rights of independent state governments requires that federal courts confine their own jurisdictions to the precise limits defined by the statute.\textsuperscript{107} The Court concluded that the Federal Tort Claims Act defines jurisdiction in a manner which does not list

\textsuperscript{102} \textit{Finley}, 109 S. Ct. at 2005.
\textsuperscript{103} \textit{Id.}; see \textit{28 U.S.C. § 1346(b)}.
\textsuperscript{104} \textit{Finley}, 109 S. Ct. at 2005 (quoting \textit{United Mine Workers}, 383 U.S. at 725.)
\textsuperscript{105} \textit{Id.} at 2008.
\textsuperscript{106} \textit{Id.} at 2008-09.
\textsuperscript{107} \textit{Id.} at 2009 (quoting \textit{Healy v. Ratta}, 292 U.S. 263, 279 (1934)).
defendants other than the United States. Although consolidated actions are efficient and convenient the Court favored separate actions in federal courts and state courts because the Federal Tort Claims Act permits the federal government to be sued only in federal court, and parties related to those claims cannot necessarily be sued there. The Court held that the added claims involved added parties over whom no independent basis of jurisdiction existed. While in a narrow class of cases a federal court may assert authority over such a claim “ancillary” to jurisdiction otherwise properly vested, the Court determined that this was not such a case.

The Court in Finley upheld the decision of Aldinger v. Howard and would not allow the United Mine Workers approach to be extended to the pendent-party field. Affirming the judgment of the court of appeals, the Supreme Court did not allow the plaintiff to amend her complaint to include claims against the original state court defendants. The Court noted that whatever it decided regarding the “scope of jurisdiction conferred by a particular statute” could be changed by Congress.

4. Warsaw Convention

In Hamadeh v. Middle East Airlines, a motion to dismiss an airline’s defense of lack of subject matter jurisdiction under Article 28 of the Warsaw Convention was denied. The court denied the plaintiff’s motion because it would have jurisdiction under the Convention only if the passenger’s “place of destination” was New York, as the passenger argued, and not Beirut, as the airline ar-

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108 Id. at 2010.
109 See id. at 2004.
111 383 U.S. at 715.
112 Finley, 109 S. Ct. at 2010.
113 Id.
114 Id.
115 21 Av. Cas. (CCH) 18,510 (S.D.N.Y. 1989).
116 Id.
gued. There was a genuine issue of material fact with respect to whether New York or Beirut was the passenger’s “place of destination.”

The Hamadeh court relied upon Gayda v. LOT Polish Airlines, which noted that for Article 28 purposes, the ultimate destination listed in the contract for carriage determines the place of destination. The court found no dispute as to whether the plaintiff was traveling to New York aboard the defendant’s flight; the defendant argued, however, that Beirut was the “ultimate destination” listed in the contract for carriage as evidenced by the travel agent’s coupon. Resolving all ambiguities and drawing all reasonable inferences against the plaintiff, the court held that the record contained insufficient evidence for the court to conclude that the coupon issued by the independent travel agency did not represent the actual contract for carriage under which the plaintiff traveled on the day he was killed.

C. Forum Non Conveniens

In Lacey v. Cessna Aircraft Co., a federal district court was held to have abused its discretion when it summarily dismissed, on grounds of forum non conveniens, a products liability suit seeking damages from the manufacture of the aircraft in which the complainant was a passenger at the time of the crash. Damages were also sought from the manufacturers of the allegedly defective parts. The

\[117\] Id. at 18,511. Article 28(1) of the Warsaw Convention provides that “an action for damage must be brought at the option of the plaintiff, either before the court of the domicile of carrier or his principal place of business, or where he has a place of business through which the contract was made, or before the court at the place of destination.” Id.

\[118\] 702 F.2d 424 (2d Cir. 1983).

\[119\] Id. at 425.

\[120\] Hamadeh, 21 Av. Cas. at 18,511.

\[121\] Id. Furthermore, the defendant had not had the opportunity to depose the plaintiff’s key witness. Id.

\[122\] 862 F.2d 38 (3d Cir. 1988).

\[123\] Id. at 49. The lawsuit arose out of an air crash that occurred in British Columbia. The plaintiff was an Australian citizen working in British Columbia with
plaintiff alleged that the air crash was "caused by engine failure, which, in turn, was caused by defects in the design and manufacture of the aircraft’s exhaust system and other defects." The suit was brought on theories of negligence, strict liability, and breach of warranty. The manufacturer of the aircraft, the manufacturer of the aircraft’s exhaust system, and the manufacturer of the aircraft’s engine filed separate motions to dismiss the complaint on *forum non conveniens* grounds.

In its motion to dismiss, the manufacturer of the aircraft argued that there were liability issues as to parties who were citizens of British Columbia, Canada, and not subject to the jurisdiction of the court. The aircraft manufacturer claimed that the pilot had negligently loaded the aircraft in excess of its permissible weight capacity, failed to ensure that the exhaust system was properly inspected, and failed to carry out appropriate emergency procedures. It also argued that the accident was caused in whole or in part by the aircraft’s owner, its maintenance contractor, and its owner. Since all of these parties would be subject to the jurisdiction of the courts of British Columbia, and the district court would be required to apply the law of British Columbia and/or Australia, plaintiffs argued that their motion to dismiss based on *forum non conveniens* should be granted.

The engine manufacturer argued that the suit should have been brought in British Columbia because that was where the accident occurred, where the wreckage and engine parts were presumed to be located, and where pertinent witnesses were believed to reside. The manufacturer also asserted that litigation arising out of

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124 Id. at 40.
125 *Id.* These motions attempted to persuade the court that "the litigation could not fairly proceed in the Western District of Pennsylvania." *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
the same accident was pending in British Columbia against several Canadian parties, and that those parties were indispensable to this litigation and not subject to the jurisdiction of the court.129

The Third Circuit relied on *Piper Aircraft Co. v. Reyno*,130 and *Van Cauwenberghe v. Biard*,131 in which the Supreme Court established the relevant jurisprudence of *forum non conveniens*.132 The district court must first decide whether an adequate alternative forum exists to hear the case.133 Furthermore, the court should also consider an American citizen’s choice of his home forum over a foreigner’s choice of an American forum. If there is an adequate alternative forum, the district court must consider and balance private and public factors that are relevant to the *forum non conveniens* determination.134 Although there are no rigid rules governing the court’s determination, the plaintiff’s choice of forum should only be disturbed if the balance of factors is strongly in favor of the defendant.135

The Third Circuit held that the district court’s decision “should be an exercise in structured discretion founded on a procedural framework guiding the district court’s decision-making process.”136 The district court’s decision deserves substantial deference when it has considered all public and private interest factors and its balancing of these factors is reasonable.137 The review by the court of appeals was limited to the question whether the district court abused its discretion—it was not a de novo review of

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129 Id. at 41.
132 Lacey, 862 F.2d at 42. The Supreme Court established that, in the exercise of discretion, a district court may dismiss a case “when an alternate forum has jurisdiction to hear the case, and when trial in the chosen forum would ‘establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.” Id.
133 Id. at 43.
134 Id.
135 Id.
136 Id.
137 Id.
the *forum non conveniens* issue.\textsuperscript{138}

The Third Circuit held that the district court abused its discretion when it summarily dismissed the suit on grounds of *forum non conveniens*.\textsuperscript{139} Dismissal of the action was held to be improper because the court failed to obtain adequate information from the manufacturers to facilitate the *forum non conveniens* issue. Furthermore the court failed to hold the manufacturers to their burden of persuasion, failed to adequately consider the contentions raised by the plaintiff, and failed to adequately consider and balance the relevant public and private interest factors affecting the *forum non conveniens* issue.\textsuperscript{140} The court further stated that the plaintiff's choice of forum should be given some weight when a foreign plaintiff is forced to choose between two inconvenient forums.\textsuperscript{141} The trial court's order granting the motion to dismiss was reversed, and the case was remanded to the district court for further proceedings.\textsuperscript{142}

In *Nieves v. American Airlines*,\textsuperscript{143} the court held the doctrine of *forum non conveniens* could not be properly applied as a basis for dismissing an action brought by an airline passenger who was a resident of New York and was allegedly injured when her shoe stuck in an escalator step at an airport in Puerto Rico. Plaintiff brought actions in both New York and Puerto Rico against American Airlines for the same injuries.\textsuperscript{144}

The court noted that "pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction . . . ."\textsuperscript{145} A suit may be brought in both a state and federal court. The fact that the plaintiff brought an action in both New York

\textsuperscript{138} Id.
\textsuperscript{139} Id. at 49.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 700 F. Supp. 769 (S.D.N.Y. 1988).
\textsuperscript{144} Id. at 770.
\textsuperscript{145} Id. at 771.
and Puerto Rico, in and of itself, was not grounds for dismissal. The court found that the doctrine of forum non conveniens was not applicable and denied the airline’s motion to dismiss on forum non conveniens grounds. The court held that the suit also could not be dismissed because the airline offered no authority for the appropriateness of dismissal on forum non conveniens grounds.\footnote{Id.}

D. Venue

In \textit{Eason v. Linden Avionics, Inc.},\footnote{706 F. Supp. 311 (D.N.J. 1989).} the court found that the District of New Jersey was the proper venue for the claim against defendant Beech Aircraft.\footnote{Id. at 330.} This wrongful death action was brought against the manufacturer of an aircraft that took off from New Jersey and crashed in Rhode Island. Defendant Beech Aircraft moved to dismiss the claim against it for lack of personal jurisdiction and improper venue. The court noted that venue restrictions imposed upon a plaintiff are statutory in origin.\footnote{Id. at 324.} Congress has limited a plaintiff’s choice of venue in order to protect defendants from the inconvenience and expense of defending actions in distant forums.\footnote{Id.} Venue requirements were created “primarily [as] a matter of convenience of litigants and witnesses.”\footnote{Id.}

Subject matter jurisdiction in \textit{Eason} was based upon diversity of citizenship.\footnote{Id. at 325.} Venue in a diversity action is governed by 28 U.S.C. § 1391, which states: “a civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.”\footnote{28 U.S.C. § 1391 (1988).} The court found venue to be proper in the District of New 

\footnote{Id.}
\footnote{Id. at 330.}
\footnote{Id. at 324.}
\footnote{Id.}
\footnote{Id. at 325.}
\footnote{28 U.S.C. § 1391 (1988).}
Jersey because all defendants resided in New Jersey and the cause of action arose in New Jersey.\textsuperscript{154}

\textit{Nieves v. American Airlines},\textsuperscript{155} involved an action brought by an airline passenger who was a resident of New York and was allegedly injured at an airport in Puerto Rico. The court transferred the action to Puerto Rico because "the center of gravity of the transaction in issue" was Puerto Rico, and the airline had made the requisite showing that a transfer was warranted.\textsuperscript{156} The court found that

\footnotesize{[t]he factors relevant to a determination of whether a transfer is warranted include the convenience to parties; the convenience of witnesses; the relative ease of access to sources of proof; the availability of process to compel attendance of witnesses; the cost of obtaining willing witnesses; the practical problems that make trial of a case easy, expeditious, and inexpensive; and the interest of justice. . . .}\textsuperscript{157}

Although the plaintiff's choice of forum is entitled to some weight, it is given reduced emphasis where, as here, the operative facts upon which the litigation is brought bear little material connection to the chosen forum. . . . In this action the underlying events all occurred in Puerto Rico. [Defendant] American Airlines had a leasehold at the International Airport and allegedly there was an indemnification agreement between American Airlines and the Port Authority of Puerto Rico. The issue at trial was found to be the precise situs of the accident and who had control over that area. Additionally, all of the identified witnesses that would be testifying about the accident resided in Puerto Rico.

The court found the transfer of the case to Puerto Rico appropriate because the "expense of producing even some of these witnesses in New York would greatly exceed the outlays necessary to litigate in the District of Pu-

\\textsuperscript{154} Eason, 706 F. Supp. at 325.
\textsuperscript{155} 700 F. Supp. 769 (S.D.N.Y. 1988).
\textsuperscript{156} \textit{Id.} at 772.
\textsuperscript{157} \textit{Id.}
RECENT DEVELOPMENTS

The court considered the fact that the airline's non-party witnesses were not subject to compulsory process in New York and all of those witnesses were amenable to compulsory process in Puerto Rico. The court further looked at those parties already involved in litigation in Puerto Rico, the convenience of the witnesses, and the lower cost for the parties to litigate the matter in Puerto Rico. The court found that since the plaintiff initiated her action in New York and subsequently filed a suit in Puerto Rico, allowing the lawsuit to remain in New York would be both wasteful and unnecessarily duplicative.\textsuperscript{159}

E. Choice of Law

In \textit{Thornton v. Cessna Aircraft Co.},\textsuperscript{160} the plaintiff brought a wrongful death action in a South Carolina state court against the manufacturer of an airplane for the death of her husband in a crash in Tennessee. She asserted three theories of recovery: negligence, strict liability, and breach of warranty.\textsuperscript{161} The defendant later removed the action to the U.S. District Court for the District of South Carolina, and shortly thereafter, the plaintiff filed a survival action, asserting the same three theories of recovery. The two actions were consolidated. The defendant then moved for judgment on the pleadings, asserting plaintiff's claims were barred under the applicable Tennessee statute of repose.\textsuperscript{162}

The court first considered the defendant's motion as it related to the plaintiff's negligence and strict liability claim. Where federal jurisdiction is based upon diversity, the court is governed by the conflict of law rules of the state in which it sits. South Carolina adheres to the traditional rule that, when an action is brought in one jurisdic-

\textsuperscript{158} Id. at 773.
\textsuperscript{159} Id. at 774.
\textsuperscript{161} Id. at 1229.
\textsuperscript{162} Id. (referring to TENN. CODE ANN. § 29-28-103 (1980)).
tion for a tort causing injury in another, the substantive rights of the parties are governed by the *lex loci delicti* (the law of the state in which the injury occurred) while matters of procedure are governed by the *lex fori*. Since the crash occurred in Tennessee, the court applied the substantive law of Tennessee and the procedural law of South Carolina. If the Tennessee statute of repose is a substantive rule of law, it would control plaintiff's tort causes of action and defeat those claims as a matter of law. A statute of limitation is generally procedural because it affects the remedy rather than the right. Tennessee's statute of repose requires that an action be brought within a fixed period from some date unrelated to the accrual of the action, such as the date of purchase or sale. This makes it a substantive statute, affecting the plaintiff's right. 6

The plaintiff asserted that even if the Tennessee statute of repose was controlling under the *lex loci delicti* rule, the court should decline to apply it because of an earlier state court ruling saying the statute of repose was procedural rather than substantive, that the application of Tennessee law would violate the plaintiff's due process rights under the United States Constitution, and that the statute was contrary to the public policy of South Carolina. The court reasoned that, while an interlocutory state court ruling prior to removal is subject to reconsideration by federal court, it is neither final nor conclusive. 6

The district court disagreed with the state judge's conclusion and found the weight of authority is that such a statute requiring that an action be brought within a fixed period following the purchase of goods is substantive rather than procedural because it affects the right rather than the remedy. 6 Furthermore, the court held the application of Tennessee law did not violate the plaintiff's right to due process under the U.S. Constitution on the

163 *Id.* 6

164 *Id.* (citing General Investment Co. v. Lake Shore and Mich. So. Ry., 260 U.S. 261 (1922)).

165 *Id.* at 1231.
grounds that there were insufficient contacts between the state of Tennessee and the decedent. The Supreme Court has expressly held that a state court may constitutionally apply the law of the place of injury in a wrongful death action arising from an airplane crash.\textsuperscript{166} The court held that the Tennessee statute of repose applied to the plaintiff's tort claims, and those claims were, therefore, time barred.\textsuperscript{167} The court granted the defendant's motion as it related to the plaintiff's negligence and strict liability claims.\textsuperscript{168}

Next, the court considered the defendant's motion concerning judgment on the plaintiff's warranty causes of action. It concluded that the motion should be denied because those causes of action were governed by South Carolina law.\textsuperscript{169} Because the plaintiff asserted his warranty claims under the Uniform Commercial Code, "the forum state shall apply its law if it has a reasonable relationship to the contract."\textsuperscript{170} The decedent resided in South Carolina and purchased and maintained the airplane in that state. Thus, there existed a "reasonable" and "appropriate" relationship to South Carolina. The court, in applying South Carolina law, denied defendant's motion for judgment on the pleading insofar as it related to plaintiff's cause of action for breach of warranty.\textsuperscript{171}

In Myers v. Hayes International Corp.,\textsuperscript{172} Tennessee's \textit{lex loci delictus} rule required the U.S. District Court to apply Kentucky law to a products liability action against the manufacturer of a military aircraft. Two injured crewmen and the widows of three persons killed in a plane crash in Kentucky sought recovery under theories of negligence, breach of warranty, strict liability in tort, and violation of

\begin{itemize}
  \item \textsuperscript{166} \textit{Id.} (citing Richards v. United States, 369 U.S. 1 (1962)).
  \item \textsuperscript{167} \textit{Id.} at 1234.
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} at 1235.
  \item \textsuperscript{170} \textit{Id.} at 1234 (citing S.C. Code Ann. § 36-1-105(1) (Law. Co-op. 1976)).
  \item \textsuperscript{171} \textit{Id.} at 1235.
  \item \textsuperscript{172} 701 F. Supp. 618 (M.D. Tenn. 1988).
\end{itemize}
the Tennessee Consumer Protection Act.\textsuperscript{173}

Lockheed Corporation, the defendant, was the original manufacturer of the aircraft. It moved for summary judgment on the grounds that the action was barred by the Tennessee statute of repose for products liability actions. Plaintiff argued that the statute of repose was substantive and, therefore, did not apply where the action was controlled by Kentucky substantive law.\textsuperscript{174}

The court was obligated to apply the law of the forum state, including the forum’s choice of law rules. The court recognized Tennessee’s steadfast adherence to the traditional rule of \textit{lex loci delictus} in determining which state’s substantive law applied to actions sounding in tort. The court found that, where the tortious act and the resulting injury occurred in different states, the traditional rule in Tennessee is that the substantive law of the state where the injury occurred controls.\textsuperscript{175}

The defendants argued that this case presented occasion for diverging from the longstanding rule of \textit{lex loci}. They claimed the language of \textit{Winters v. Maxey},\textsuperscript{176} and \textit{Great American Insurance Company v. Hartford Accidental & Indemnity Corp.},\textsuperscript{177} left open the possibility of adopting the “dominant contacts” rule in the light of future legal developments.\textsuperscript{178} The court was not persuaded by the defendants’ argument because they failed to demonstrate the development of principles to warrant adoption of the dominant contacts rule. Even if the court was convinced the dominant contacts analysis was superior, the court stated that it was not the proper mechanism to initiate the divergence from a clearly established conflict of laws

\textsuperscript{173} \textit{Id.} at 619; see Tenn. Code. Ann. § 29-28-103.
\textsuperscript{174} Myers, 701 F. Supp. at 620.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} 481 S.W.2d 755 (Tenn. 1972).
\textsuperscript{177} 519 S.W.2d 579 (Tenn. 1975).
\textsuperscript{178} Myers, 701 F. Supp. at 620-22. The court found that the state supreme court may repudiate \textit{lex loci} when the dominant contacts analysis produces clear principles of decision that would result in two courts, under the same set of facts, reaching the same conclusions. \textit{Id.}
rule.\footnote{179}

The district court recognized the U.S. Supreme Court’s ruling in \textit{Day & Zimmermann, Inc. v. Challoner},\footnote{180} that the conflict of law rules to be applied by the federal courts must conform to those prevailing in the forum state courts. That case recognized that a federal court is not free to engraft onto state rules exceptions or modifications which may commend themselves to the federal court, but not to the state courts in which the federal court sits. Therefore, the court’s proper inquiry is whether the circumstances of a case are so unique that the applicability of the traditional rule is questionable, or whether sufficiently uniform rules of decisions have emerged to satisfy departure from the \textit{lex loci delictus}.\footnote{181}

The court’s inquiry led it to conclude that, in the present case, \textit{lex loci delictus} was the applicable rule under Tennessee law. The accident, injuries, and death occurred in Kentucky. Therefore, the substantive law of Kentucky controlled the claim.\footnote{182}

The court further determined that the Tennessee statute of repose is part of Tennessee substantive law. Since Tennessee’s statute of repose is substantive, \textit{lex loci} compelled the court to apply Kentucky substantive law.\footnote{183} The court further found that the differences between Kentucky and Tennessee law did not warrant applying the public policy exception to \textit{lex loci}. The public policy exception could be applied only where the law of the jurisdiction where the tort occurred was contrary to good morals or natural justice, or where its enforcement would be prejudicial to the general interest of its citizens. Therefore, in applying \textit{lex loci delictus}, Kentucky substantive law controlled and precluded Tennessee’s statute of repose from barring the plaintiff’s action.\footnote{184}

\footnote{179} Myers, 701 F. Supp. at 622.\
\footnote{180} 423 U.S. 3 (1975).\
\footnote{181} Myers, 701 F. Supp. at 622.\
\footnote{182} Id.\
\footnote{183} Id.\
\footnote{184} Id. at 625.
In In re Air Crash Disaster at Stapleton International Airport, Denver, Colo., on Nov. 15, 1987, Texas law governed the punitive damages claims arising out of an air crash in which over eighty persons were either killed or injured. During a snowstorm at Stapleton International Airport, a Continental DC-9 crashed as it attempted to take off from Denver, Colorado en route to Boise, Idaho. Actions were brought against Continental Airlines for both personal injury and wrongful death.

The plaintiffs were residents of various states including Arizona, Colorado, Idaho, New Jersey, and Washington. They claimed the crash was the result of pilot inexperience, ineffectual pilot training, and the willful, wanton, and reckless disregard for passenger safety exhibited by Continental Airlines. Plaintiffs contended that Continental engaged in a pattern and practice of falsifying pilot records and other records in order to meet its demand for pilots and pass FAA inspections.

The defendants denied that negligence or wrongdoing caused the crash. They asserted that third parties over whom Continental had no control caused plaintiffs' damage. Specifically, defendants designated the City and County of Denver and the Federal Aviation Administration as culpable parties. The defendants contended that if the acts of any Continental employee caused the crash, those acts were limited to the decisions of the cockpit and ground crews at Stapleton.

The parties presented choice of law motions on the issue of punitive damages. The punitive damages laws of Texas, Idaho, and Colorado were in irreconcilable conflict. The district court began its analysis with a comparison of the punitive damages law of each jurisdiction to

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186 Id. at 1447.
187 Id.
188 Id.
189 Id. Idaho, (the residence of many of the victims), Colorado (the site of the crash), and Texas (the corporate residence of Continental) all had an interest in the litigation. Id.
determine whether a conflict existed requiring application of choice of law principles. The court found that the laws of Idaho and Texas provided for punitive damages in wrongful death actions, contract suits, and personal injury cases. Colorado law provided punitive awards only in personal injury cases while exemplary damages were prohibited in actions for wrongful death or breach of contract. The court found various other aspects of the states' punitive damages laws to be in irreconcilable conflict.190

The district court applied the Restatement (Second) of Conflict's two-step choice of law analysis. The first step involves the identification of the states having contacts with the parties in the crash. The second step comprises a determination of the relative significance of these contacts.191 The facts revealed Colorado and Texas provided the most prominent locality of the conduct to be considered in the litigation. The court was persuaded that the conduct for which Continental would be liable occurred primarily in Texas, since the corporate conduct potentially giving rise to an award of punitive damages occurred in Texas.192 In air crash cases, the residence of the plaintiff is generally of little significance in analyzing the issue of punitive damages. The interest of the domicile state is served by the application of the state's law to see that the plaintiffs are fully compensated for their injury and that they do not become dependent on the state. The court rejected an assertion that Idaho had the most significant interest in the parties or occurrence, since the interests of the complainants' domicile states were protected. The court also did not apply Colorado's punitive damages laws because they would have prejudicially frustrated the progress of the litigation.193 Since Texas was both the site of the conduct to which an award of punitive damages could

190 Id.
191 Id. at 1449; see also RESTATEMENT (SECOND) OF CONFLICTS § 145 (1982).
192 Stapleton, 720 F. Supp. at 1451.
193 Id. at 1454. Colorado law would have exposed the airlines to injustice resulting from consolidation procedures. Id.
attach and the principal place of business of the defendants, and since Texas had the most significant relationship to the parties and occurrence with regard to the issue of punitive damages, its relation to the litigation was most important. Accordingly, the court applied the law of Texas to the issue of punitive damages.\textsuperscript{194}

The court disregarded the language of the Restatement (Second) of Conflicts suggesting that the law of the state of injury should apply unless some other state has a more significant relationship to the litigation. In air crash cases, the Restatement's suggestion can be easily overcome because courts view the site of injury as fortuitous.

In \textit{Baloise Insurance Co. v. United Airlines, Inc.},\textsuperscript{195} the court applied federal common law, and not New York law, to determine the enforceability of provisions in air waybills that limited the liability of carriers for a lost shipment. The plaintiffs, Baloise Insurance Company and Global Lens Distribution Company, sued United Airlines (United) and Skytruck International Air Freight (Skytruck), to recover for nondelivery and loss of a shipment of optical products and equipment.\textsuperscript{196} The case was before the court on United's motion for summary judgment, and Skytruck and the plaintiff's Rule 56 cross-motion for summary judgment.\textsuperscript{197}

Skytruck picked up optical equipment from the supplier, consolidated the shipment to a single container, and delivered the goods to United. United acknowledged it had received the cargo at its warehouse at JFK Airport and could not explain what happened to the cargo after its arrival. Both United and Skytruck's waybills contained limitation of liability clauses.\textsuperscript{198}

The district court concluded that the limitation of liability clauses in the air waybills of United and Skytruck were

\textsuperscript{194} Id.


\textsuperscript{196} Id. at 197.

\textsuperscript{197} Id.; see also FED. R. CIV. P. 56.

\textsuperscript{198} Baloise, 723 F. Supp. at 198.
enforceable. Federal common law governs a carrier’s liability for the loss of goods during interstate shipment. Absent some affirmative proof of conversion, courts applying federal common law will enforce a contractual limitation of liability provision.\(^\text{199}\)

Under New York law, the court recognized that a plaintiff can establish a prima facie case of conversion by proving delivery to a bailee and the bailee’s failure to return the property upon demand. The defendant must then provide “evidence sufficient to prove that its failure to return the property is not the result of its conversion of that property to its own use.”\(^\text{200}\) Since federal common law governs a carrier’s liability for the loss of goods during interstate shipment, and the plaintiffs did not offer any evidence to suggest that either defendant converted the optical equipment to its own use, the court held that the liability limiting provisions of the defendants’ airbills were enforceable.

The court found no merit in the argument that New York law should apply because the goods had previously been stored in New York. New York rules of interstate commerce apply only to bailees in the business of storing goods and not to temporary bailments incident to interstate shipment.\(^\text{201}\) The court also found no genuine issue of material fact and granted both defendants’ motions for summary judgment.\(^\text{202}\)

In *Damin Aviation Corp. v. Sikorsky Aircraft*,\(^\text{203}\) Damin Aviation Corporation (Damin) brought a diversity action for its alleged loss of profits caused by the crash of a helicopter it leased and operated. Sikorsky Aircraft (Sikorsky) manufactured the helicopter’s airframe. Sikorsky was a Delaware corporation, with its principal place of business in Connecticut. Allison, a Delaware corporation with its

\(^{199}\) Id.


\(^{201}\) Id. at 199.

\(^{202}\) Id.

principal place of business in Michigan, manufactured the engine. Damin's principal place of business was in New Jersey, and it was a New Jersey corporation. The crash occurred in Fort Dix, New Jersey. The helicopter was a complete loss, the copilot died, and the pilot was seriously injured.\textsuperscript{204} Damin's claim for consequential damages was based on four theories of liability: negligence, breach of express warranties, breach of implied warranties, and strict liability in tort. After completing discovery, the defendants moved for summary judgment, arguing that (1) Damin could not recover in tort for consequential economic loss as a matter of law, and (2) Damin could not recover on the contract for such loss because of various warranty limitations.\textsuperscript{205}

Because jurisdiction was based on diversity, the court applied the choice of law rules of New York, the forum state. New York courts apply the "substantial interest" test to tort choice of law issues. In this test, controlling effect is given to the law of the jurisdiction which, because of its relationship to the occurrence or contact with the parties, has the greatest concern with specific issues raised in the litigation.\textsuperscript{206} Since the \textit{loci} of the tort was in New Jersey, as was the plaintiff's domicile, New Jersey had the most "substantial interest" in the issue of whether the plaintiff should have a remedy in tort. Under New Jersey law, the plaintiff was barred from recovering in negligence and strict liability for purely economic loss. The court limited \textit{Damin} to remedies under the U.C.C.\textsuperscript{207}

When deciding contract issues, New York courts apply the "paramount interest" test to determine the choice of law. Under this test, the law of the jurisdiction having the greatest interest in the litigation is applied. The court modified the paramount interest test because the agreement expressly provided Connecticut law would govern

\textsuperscript{204} Id. at 171-73.
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 174.
\textsuperscript{207} Id.
its construction. Connecticut was the principal place of business of Sikorsky. Therefore, there were sufficient contacts with the transaction to warrant honoring the parties’ contractual choice of Connecticut law.\(^{208}\)

The plaintiff unsuccessfully alleged that the defendant acted in bad faith by selling a product it knew to be defective. The court found that there had been full opportunity for discovery in the case and the plaintiff had not uncovered any evidence of prior knowledge by the defendant of the engine defect responsible for the crash.\(^{209}\) The plaintiff’s unsupported suspicion of bad faith did not create a genuine factual dispute and could not estop the defendant from invoking its contractual exclusion of consequential damages.

The plaintiff also made an unsuccessful claim for punitive damages. Since the defendants were entitled to summary judgment on all of the plaintiff’s substantive claims, the punitive damage claim could not stand alone.\(^{210}\)

II. Products Liability

A. Manufacturer’s Duty to Warn

In *John Deere Co. v. May*,\(^ {211}\) the decedent was killed when his bulldozer backed over him. The plaintiff’s theory of recovery was that the bulldozer backed over the decedent when it shifted itself from neutral into reverse. The evidence showed that John Deere Company (John Deere) knew as early as 1971 that its bulldozers would shift into gear from neutral if they were left with their engines running. Over the years, John Deere continued to receive reports of similar occurrences. Although the company notified dealers of this dangerous propensity in the 1970’s, it did not warn owners of the danger until 1983.\(^ {212}\)

In 1983, John Deere attempted to notify owners by mail

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\(^{208}\) *Id.*

\(^{209}\) *Id.* at 175.

\(^{210}\) *Id.* at 177-79.

\(^{211}\) 773 S.W.2d 369 (Tex. App.-Waco 1989, writ dism’d).

\(^{212}\) *Id.* at 371-72.
of the danger and inform them of a modification program. John Deere had no way of knowing whether the decedent had actually received the notification, since there was no evidence of a signed postal receipt. John Deere, however, knew the decedent had not responded to its original letter because his name continued to appear on monthly reports listing owners whose bulldozers had not been modified. The company made no further effort to contact him by phone or mail between May 1983 and his death in August 1984. Evidence revealed John Deere relied on its field representatives and dealers to notify owners regarding the modification program.213

The court stated that the manufacturer could not rely on an intermediary to warn those endangered by a product's use, unless it had reasonable assurance the warning would be communicated. Because the decedent had not responded to the original warning letter and the monthly reports, the court concluded that the jury reasonably could have found John Deere did not have reasonable assurance that its field representatives and dealers had warned the decedent of the danger. John Deere's failure to warn the decedent of the danger that the bulldozer might move while in neutral constituted conscious indifference, and the manufacturer and the distributor could have been found guilty of gross negligence.214

The court also admitted evidence of other incidents to show the defects of the bulldozer to the extent that the incidents and the accident involving the bulldozer occurred under reasonably similar, but not necessarily identical, circumstances. The court found that the circumstances surrounding the decedent's death and thirty-four other extraneous incidents were reasonably similar in that they all involved the same make of bulldozer.215

213 Id. at 378.
214 Id. at 379.
215 Id. at 372-73.
In Argubright v. Beech Aircraft Corp., the court decided when, under Texas law, a potential hazard in a product may be deemed so open and obvious as to obviate the duty of the manufacturer to warn prospective users. The suit arose from the crash of a Beech Aircraft known as the Musketeer Model B23. The pilot's seat unlocked during takeoff. The plaintiffs contended that an unlocked seat could go unnoticed until pushed by takeoff forces. Defendant Beech pointed to considerable evidence that the seat would slide during more gentle takeoff maneuvers, thereby alerting the pilot or causing the seat to lock automatically. Defendant Beech argued that the pilot unlocked his seat and attempted to reposition it during the actual takeoff.

The survivors of the crash filed a products liability action against Beech Aircraft, alleging both strict liability and negligence. The plaintiffs argued, first, that Beech defectively designed the pilot's seat in such a manner as to allow the seat to slide all the way back on its runner, rather than to automatically relock if left unlocked by the pilot prior to takeoff. The jury returned a verdict against the defective design of the seat mechanism, and thus ruled out the strict liability claim. The jury did, however, agree with the plaintiff's second allegation that Beech negligently failed either to warn the decedent of the risk of leaving the seat unlocked, or to instruct in the preflight check list that the seat be locked and left locked prior to and during the takeoff. The district court denied a post-trial motion for judgment notwithstanding the verdict filed by Beech.

On appeal, Beech argued that the district court erroneously denied the motion for judgment notwithstanding the verdict. Beech argued that it should not have been found negligent because the district court should have found, as a matter of law, that it owed no duty to warn the

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216 868 F.2d 764 (5th Cir. 1989).
217 Id. at 765.
218 Id. at 766.
plaintiffs of the risks of failing to properly lock the pilot's seat. Beech also argued that it satisfied any duty that may have existed by supplying the plane's owner with a revised manual containing warning information, pursuant to an FAA directive.\(^{219}\)

The court of appeals found that although the absence of adequate warnings or directions could render a product defective and unreasonably dangerous, even if the product had no manufacturing or design defects, there was no duty to warn where the defect was obvious and within the knowledge and expertise of those who could reasonably be expected to use the product. The court, applying Texas law, held the danger of an unlocked pilot's seat during takeoff was so open and obvious a hazard that it obviated any duty of the manufacturer of the aircraft to warn prospective users.\(^{220}\) Moreover, the manufacturer should be allowed to rely on a pilot's knowledge that constant positioning and smooth adjustment of the altitude control would be difficult, if not impossible, especially during the critical moments of a takeoff, if directed from a seat that was able to move freely in the same direction as the control. It was significant that the manufacturer had included the seat lock in a preflight check list sent to the owner of the aircraft. The practice of relying on the check list undermined the contention that some additional warning was necessary.\(^{221}\)

The court did not resolve the question of whether the plaintiff unlocked his seat during takeoff. The court found, as a matter of law, that Beech owed no duty to warn the plaintiff of the need to lock the seat prior to takeoff. The court of appeals also held the district court judge erred by allowing the jury to find to the contrary and by denying defendant Beech's motion for directed verdict and judgment n.o.v.\(^{222}\)

\(^{219}\) Id.

\(^{220}\) Id. at 767.

\(^{221}\) Id. at 766.

\(^{222}\) Id. at 767.
B. **Strict Liability**

In *Walton v. Avco Corp.*,\(^{223}\) a products liability suit was brought against the manufacturer of a helicopter and the manufacturer of a defective engine. The pilot and passengers lost their lives when the engine in the helicopter seized in mid-flight, causing the aircraft to crash. Subsequent investigation revealed that the accident occurred due to the failure of an oil pump which was a component of the engine manufactured by Avco. Complaints were filed against both Avco and Hughes Helicopter, Inc., the designer, manufacturer, and retailer of the helicopter. After extensive pretrial procedures, the cases were consolidated for trial and ultimately submitted to the jury on strict products liability theories alone. The jury found both Avco and Hughes strictly liable and awarded damages to the estates of both decedents. The court, on appeal, found no dispute as to the jury finding that the engine manufactured by Avco was a defective product under section 402A of the Restatement (Second) of Torts. It was also undisputed that when Avco became aware of the defective construction of the engine, it issued service instructions advising Hughes of the specific defect in the Avco engine and a detailed procedure to remedy this defect. Defendant Hughes received the service instructions from Avco. Unfortunately, Hughes never forwarded the service instruction or advised the owner of the helicopter or its authorized helicopter service of its contents. Over one year after Avco had issued the instruction, the engine was overhauled, but the defect in the helicopter was not remedied due to the fact that Hughes had not advised Executive Helicopters, an authorized Hughes Service Center, of the service instructions.\(^{224}\)

Following the verdict, Hughes sought a judgment n.o.v. on the strict liability issue of its failure to warn of the defective design of the Avco helicopter engine. Hughes ar-

\(^{223}\) 557 A.2d 372 (Pa. 1989).
\(^{224}\) *Id.* at 375-76.
gued that the issue of failure to warn is addressed only when a product is designed and manufactured without defect. The court disagreed with Hughes' construction of the strict products liability law and found that the trial court correctly concluded that Hughes, as the manufacturer of the helicopter, could be held strictly liable for the defective nature of the helicopter. Hughes had failed to warn the plaintiff of the defect in the design of the helicopter's engine which was discovered and publicized after the sale of the aircraft.225

The court reviewed the evidence and had no difficulty concluding that the jury could, without legal error, impose strict liability upon Hughes. The fact that Avco was also found to be strictly liable because it designed, manufactured, and sold a defectively designed helicopter engine did not preclude a finding that Hughes was strictly liable. Even though the manufacturer of the helicopter had been notified of the defect in the design of the engine, it had failed to issue warnings and service instructions to prior purchasers who were presumably still flying the helicopters. In addition, the court felt the helicopter manufacturer had failed to distribute to its authorized service centers a service instruction issued by the manufacturer of the engine. The court noted the helicopter was a unique and costly product which was manufactured, marketed, and sold to a specialized group of consumers.226

The court further remarked that many issues regarding a manufacturer's post-sale duty to warn were not implicated in this case and, thus, were not addressed by its decision. It left for future cases the task of formulating the boundaries of the product manufacturer's post-sale legal obligation. The court was convinced, however, that boundaries must be recognized. Strict products liability is justified when it encourages manufacturers and sellers to provide the public with safe products.227

225 Id. at 376.
226 Id. at 379.
227 Id. at 380.
C. Warranties

In *Woodworth v. Gates Learjet Corp.*, the plaintiff brought an action alleging a breach of an implied warranty of fitness for failure to install a bird-resistant windshield in an aircraft involved in a fatal accident caused by a collision with a bird. The Michigan court of appeals found that the trial court erred in granting a directed verdict in favor of the owner of the aircraft. The case arose out of an airplane accident in which a Model 23 Learjet collided with a common loon weighing between three and eleven pounds. Plaintiff's decedent, the copilot, was killed when the bird came through the windshield of the airplane. The airplane was manufactured by Gates Learjet Corporation, purchased by Freedom International, maintained by Jet Care Center and leased to the employer of the plaintiff's decedent.

The plaintiff alleged that Freedom International and Jet Care Center were negligent in failing to install a bird-resistant windshield on the airplane. Additionally, the plaintiff alleged that Freedom International breached its implied warranty of fitness. The Federal Aviation Administration certified the aircraft as airworthy in 1964 under regulations not requiring a bird-resistant windshield. In 1966, the FAA approved Learjet's Model 24, which did require a bird-resistant windshield. That same year Learjet made available a kit to convert the Model 23 aircraft to a Model 24 aircraft. Plaintiff introduced no evidence that the windshield on the airplane was defectively manufactured or that its failure was caused by improper maintenance. Instead, all the evidence indicated that the windshield, as designed, simply could not withstand the impact of the bird.

The Michigan court of appeals held that a Michigan statute which states that the owner or operator responsi-
ble for the maintenance or use of an aircraft would be liable for any injury occasioned by the negligent operation of the aircraft was not applicable to the case. The court found that the purpose of the statute was to impose liability on owners of aircraft who entrusted their planes to negligent pilots, rather than on owners who failed to install aircraft components not required under FAA Regulations.

The appeals court further held that the trial court erroneously ruled that the plaintiff’s decedent, as an employee of the lessee of the aircraft, could not recover from the lessor for breach of an implied warranty. The court’s reading of pertinent cases indicated that even if the plaintiff’s decedent was an employee of the corporation which leased the airplane, the plaintiff could still make a claim against the owner, as lessor, for breach of an implied warranty of fitness. The court further found that if the plaintiff proved the existence of an implied warranty and its breach, lack of privity would not bar recovery for breach of implied warranty.

The case of *Mergen v. Piper Aircraft Corp.* arose from the crash of a twin-engine Piper airplane and the deaths of the pilot and his two passengers. The decedents took off in a twin-engine Piper aircraft with visibility reduced to zero because of fog. They were without radio contact or radar guidance from the closed airport tower. Three minutes after takeoff the plane went down in a subdivision, killing all aboard. It was determined that the right engine had been shut off prior to impact, as evidenced by the feathering of the propellers, and that the left engine was operating at between 80% to 100% of its power. The right engine’s oil dip stick was bent and out of its socket, and the crankcase was crushed. Although the aircraft was designed to fly on one engine, the pilot had to maintain

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232 Id. at 480, 434 N.W.2d at 170.
233 Id. at 480, 434 N.W.2d at 171.
234 Id. at 480, 434 N.W.2d at 170-71.
the left engine at full throttle in order to maintain altitude and climbing speed after the right engine was shut down. The plaintiff brought a wrongful death action against the manufacturer of the aircraft, the manufacturer of the aircraft engine, and the seller of the aircraft. Plaintiff alleged that, but for the left engine's failure, the pilot could have safely feathered the right engine and landed the plane. Defendants argued that the pilot feathered the right engine for no reason and lost control of the aircraft when the plane rolled to the right due to the left engine torque.236

The plaintiffs contended that the aircraft had two serious problems when it left the manufacturer. They submitted evidence of extensive repair records and the testimony of expert witnesses indicating that the defendants breached their duty to deliver their plane free of defects. Since the defects in the aircraft were the same defects which caused the plane to crash, the court held the defendants liable. The court further held that the aircraft suffered from defects sufficient to annul the sale. The court found that the defects in the aircraft, which caused detonation, premature aging, and heat damage in both engines rendered its use so inconvenient that the purchaser would not have purchased it had the defects been known. The court rescinded the sale of the airplane and ordered its purchase price returned, in addition to payment of reasonable attorney's fees and interest from the day of the judicial demand until payment was made.237

D. Evidence

In Fasanaro v. Mooney Aircraft Corp.,238 defendant Mooney Aircraft Corporation (Mooney) filed a motion in limine for the exclusion of evidence of subsequent remedial measures. Plaintiff's husband was killed while piloting an M20K aircraft designed and manufactured by

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236 Id. at 1350-51.
237 Id. at 1354-55.
238 687 F. Supp. 482 (N.D. Cal. 1988).
Mooney. After the accident, Mooney took a number of remedial measures, including (1) changing the location of the alternate air door; (2) changing the air door from manual activation to automatic activation; (3) changing the Pilot's Operating Handbook regarding induction, icing, and engine restart procedures; (4) making recommendations to pilots regarding the maintenance and operation of the M20K; (5) pressuring the Magnetos; and (6) undertaking testing of the alternate air door, engine induction, and engine restart on the M20K.239

Mooney moved for exclusion of this evidence under Rule 407 of the Federal Rules of Evidence.240 Plaintiff raised several arguments in opposition to the motion under the doctrine of Erie Railroad Co. v. Tompkins.241 The plaintiff argued that the court should apply the California Evidence Code's equivalent of Rule 407, which would allow admission of this evidence.242 Second, plaintiff argued that the evidence was admissible on the issue of contributory negligence and for impeachment purposes. Finally, plaintiff argued that the post-accident tests were not within the scope of Rule 407.243

The court started its analysis with a discussion of Erie. The Supreme Court held, in Erie, that federal courts are constitutionally obligated to apply the substantive rules of decisions prescribed by state law.244 Examining subsequent cases articulating the distinction between "rules of substance" and "procedure," the district court held that Rule 407 could rationally be classified as procedural. Rule 407 was directly applicable since the plaintiff sought to introduce evidence of subsequent remedial measures.

239 Id. at 483.
240 FED. R. EVID. 407. Rule 407 provides, in part, "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measure is not admissible to prove negligence or culpable conduct in connection with the event." Id.
241 304 U.S. 64 (1938).
242 CAL. EVID. CODE § 1151 (West 1966).
243 Fasanaro, 687 F. Supp. at 483.
244 Erie, 304 U.S. at 65.
The rule prohibits such evidence. The court concluded that the federal rule was controlling, and that Congress had the power to enact the rule through the Rules Enabling Act.245

The court found no merit in the plaintiff's contention that Rule 407 does not require the exclusion of evidence of subsequent measures when offered to refute the manufacturer's defense of contributory negligence, or for impeachment purposes. The court held, however, that the evidence of testing undertaken by the defendant after the date of the decedent's accident was not within the scope of Rule 407. Rule 407 includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether there is a call for any remedial measures. Any tests conducted by the manufacturer were found to fall outside the scope of Rule 407, and evidence of such tests was, therefore, admissible. The court granted defendant's motion to exclude evidence of the subsequent remedial measures and denied the motion to exclude any post-event tests.246

In Causey v. Zinke,247 the Ninth Circuit found no reversible error in the admission of a Federal Aviation Administration report concerning Pan American World Airways (Pan Am) safety record and procedures, or in the admission of a report by Pan Am on its own safety record and problems completed just before the crash. The appeal court found the FAA report on Pan Am's safety record and procedures admissible pursuant to Federal Rule of Evidence 803(8)(C) which creates a hearsay exception for public documents. Further, defendant Pan Am failed to demonstrate that the report was untrustworthy or unduly prejudicial.248

Defendant argued that the district court erred in admitting the report pursuant to Federal Rule of Evidence...

246 Id. at 487.
247 871 F.2d 812 (9th Cir.), cert. denied, 110 S. Ct. 277 (1989).
248 Id. at 816.
801(d)(2)(D). This rule provides that statements which are not hearsay include admissions of a party opponent and defines such admissions as "a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." 249 Since all but one of the authors of the report were experienced Pan Am crew members, the court held that the report was admissible as an admission of Pan Am's employees concerning matters within the scope of their employment. 250

Pan Am further argued that the FAA report, in effect, was a subsequent remedial measure and was thus inadmissible under Federal Rule of Evidence 407. 251 The court expressed the purpose of Rule 407 as being to ensure that prospective defendants will not forego safety improvements because they fear that these improvements will be used against them as evidence of their liability. Neither of the reports were found to be subsequent remedial measures and, therefore, inadmissible under Federal Rule of Evidence 407. The appeals court looked to the defendant's participation in the subsequent measures at issue and found the admission of those measures into evidence would not "penalize" the defendant for efforts to remedy the safety problem. In this case, Pan Am's management had a legal obligation to cooperate with the FAA's investigation. Thus, the admission of the FAA report did not penalize Pan Am for its voluntary participation in safety measures and was not a subsequent remedial measure in response to the crash. 252

E. Statute of Repose

In Myers v. Hayes International Corporation, 253 the Tennessee ten-year statute of repose did not operate to bar a

249 FED. R. EVID. 801(d)(2)(D).
250 Causey, 871 F.2d at 816.
251 FED. R. EVID. 407; for the language of the rule, see supra note 240.
252 871 F.2d at 816-17.
products liability action arising out of a plane crash. The flight was to begin and end in Tennessee but crashed on the Kentucky side of the Ft. Campbell military installation. Each member of the five-man crew of the military aircraft was a resident of Tennessee. Plaintiffs sought recovery under theories of negligence, breach of warranty, strict liability, and violation of consumer protection legislation. Defendant Lockheed Corporation, the original manufacturer of the aircraft, moved for summary judgment on the grounds that the action was barred by the Tennessee statute of repose for products liability actions. The plaintiffs responded by arguing that the statute of repose is substantive and does not apply where the action is controlled by other substantive law.\(^2^{254}\) The United States District Court held that the substantive law of Kentucky applied because the accident, injuries, and deaths occurred in Kentucky.\(^2^{255}\)

On the question of whether the Tennessee statute of repose applied to this action, the district court found that the Tennessee statute of repose is part of Tennessee substantive law. Since \textit{lex loci} compelled the court to apply Kentucky substantive law, plaintiffs' cause of action was not barred by the ten-year statute of repose.\(^2^{256}\)

III. \textbf{FOREIGN SOVEREIGN IMMUNITIES ACT}

A. \textit{Applicability and Immunity}

In \textit{Solis v. Iberia Airlines},\(^2^{257}\) an action against the defendant, Iberia Airlines, could not be remanded to the state court from which it was removed since the airline was owned, operated, and funded by an agency of the government of Spain and was a "foreign state" under section 1603 of the Foreign Sovereign Immunities Act of 1976.

\(^{254}\) Id. at 620.

\(^{255}\) See id. at 622-25.

\(^{256}\) Id. at 625. For additional discussion of the choice of laws issue in this case see \textit{supra} notes 172-179 and accompanying text.

\(^{257}\) 21 Av. Cas. (CCH) 17,764 (S.D.N.Y. 1988).
The federal court had original jurisdiction pursuant to 28 U.S.C. 1330 because the action was against a foreign state. Furthermore, Iberia waived the defense of sovereign immunity by accepting a Civil Aeronautics Board permit to conduct flights in the United States. This waiver, however, was found to be irrelevant and had no bearing upon its right of removal. The court noted that forum selection by a foreign state, as contemplated by statute, is not defeated by lack of subject matter jurisdiction or statutory prohibition.

Plaintiff further argued that the removal petition was defective because an additional defendant did not join in the removal. The court found that where a foreign state removes an action to federal court, the entire action is removed, regardless of whether codefendants join in the removal petition. Therefore, the court denied the motion to remand the action to the state court.

In Matton v. British Airways Board, Inc., an airline was found not to be a foreign state within the meaning of the FSIA. The claim arose from an injury resulting from the defendant's negligence while the plaintiff was making a truck delivery onto a loading platform at JFK International Airport. At the time the plaintiff sustained his injuries, the British government owned the defendant corporation, known as British Airways Board, Inc. Approximately five months after the accident, British Airways PLC succeeded to the business of British Airways Board, Inc. Approximately three years later, the British government divested itself of its majority stock ownership of the defendant. Defendant became a private corporation no longer operated or owned by the government.

Plaintiffs, who sought damages for personal injuries and loss of services, commenced their action in the

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259 21 Av. Cas. (CCH) at 17,765.
260 Id.
261 Id.
262 21 Av. Cas. (CCH) 18,046 (S.D.N.Y. 1988).
263 Id. at 18,047.
Supreme Court of New York. Defendant removed the suit to the United States District Court pursuant to 28 U.S.C. § 1441(c) on the grounds that the defendant was a foreign state within the meaning of section 1603 of the FSIA.264

Sections 1441(d) and 1330(a) of the FSIA provide for a nonjury trial when a foreign state is a defendant in the litigation. The action was before the district court on defendant's motion to strike plaintiffs' demand for a jury trial. Plaintiffs cross-moved to remand to state court pursuant to 28 U.S.C. § 1447(c)(d) or, in the alternative, to direct a jury trial and permit plaintiffs to amend their complaint to include a jurisdictional allegation of diversity of citizenship. In addition, plaintiffs sought to amend their complaint to correctly identify defendant, British Airways Board, Inc., as British Airways PLC.265

The FSIA describes the manner in which an action can be maintained against a foreign state or its entities in the United States. Section 1603(a) of the FSIA defines a foreign state as including "an agency or instrumentality of a foreign state as defined in subsection (b)."266 Section 1330 of the FSIA gives federal district courts original jurisdiction in "any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity."267

The district court found that once a foreign state sells its interest in a defendant agency or instrumentality congressional concern with the sensitivity of actions involving

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265 Mattox, 21 Av. Cas. (CCH) at 18,047.
266 28 U.S.C. § 1603(a). Subsection (b) provides that:
(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 . . . and are created
under the laws of any third country.
foreign states is no longer implicated. The rationale behind the FSIA in favoring nonjury trials was uniformity in decision making, foreign states' lack of familiarity with jury trials, and a fear of overly generous damage awards where a "deep pocket" is involved. The reasons cited by the court had no application once the defendant in the action no longer met the statutory definition of an agency or instrumentality of a foreign state. The court found no basis for stretching the dictates of the FSIA beyond their intended purpose. Therefore, the provisions of the FSIA requiring a nonjury trial when a foreign state is a defendant did not apply.268

In addition to resisting the defendant's motion to strike their jury demand, the plaintiffs contended that the privatization of the defendant destroyed the basis for removal and that the action should, therefore, be remanded to state court. The court pointed out that section 1332(a)(2) of the FSIA vested the court with diversity jurisdiction since the action was between "citizens of a State and citizens or subjects of a foreign state."269 To remand the case to state court at the present stage of litigation would have resulted in a gross waste of both state and federal judicial resources. The court denied plaintiffs' motion to remand the action to state court. Plaintiffs, however, were allowed to amend their complaint to properly name British Airways PLC as the defendant in the action.270

B. Subject Matter Jurisdiction

In In re Compania Mexicana de Aviacion,271 the Ninth Circuit found the federal trial court lacked jurisdiction over an action arising out of a fatal air crash in Mexico, brought on behalf of sixty-nine Mexican decedents who traveled on tickets purchased in Mexico for travel within Mexico.

268 Matton, 21 Av. Cas. at 18,048.
270 Id. at 18,049.
271 859 F.2d 1354 (9th Cir. 1988).
The plaintiffs filed a notice of voluntary dismissal of the entire action without prejudice. Because Mexicana had answered the complaint, the clerk accepted, but did not file, the dismissal. Mexicana then moved to dismiss the complaint for lack of subject matter jurisdiction and *forum non conveniens*. At the same time, codefendant Boeing moved to correct the docket to reflect that the voluntary dismissal was effective as to all defendants except Mexicana. The district court granted Boeing's motion to correct the docket, dismissing the action against all defendants except Mexicana, and denied Mexicana's motion to dismiss. Mexicana moved for reconsideration of its motion to dismiss, but the court denied the motion. Mexicana then filed its petition for a writ of mandamus. The court of appeals found that the denial of the motion to dismiss for sovereign immunity was an appealable collateral order, and that mandamus was not available in the case. The court construed the petition as a notice of appeal because of the harsh result which would be obtained if the mandamus petition was simply denied.\(^\text{272}\)

The court of appeals agreed with the Seventh Circuit's decision in *Seguí v. Commercial Office of Spain*,\(^\text{273}\) where an order denying immunity under the FSIA was held appealable under the collateral order doctrine. The court held that an interlocutory appeal ensures that "a foreign state shall not be immune from the jurisdiction of the courts of the United States and of the states except as provided in the FSIA."\(^\text{274}\) Therefore, the denial of Mexicana's motion to dismiss was an immediately appealable order.

The FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states or their instrumentalities. A court lacks both statutory subject matter and personal jurisdiction over any claim against a foreign sovereign unless one of the Act's exceptions applies.

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\(^{272}\) *Id.* at 1357 (citing Clorox Co. v. U.S. Dist. Court, 779 F.2d 517 (9th Cir. 1985)).

\(^{273}\) 816 F.2d 344 (7th Cir. 1987).

Mexicana Airlines, being wholly owned by the Mexican government, was found to be a foreign state. Therefore, Mexicana was immune from suit in these cases unless it had waived immunity, the action was based on a commercial activity, or the action was based on a treaty conferring jurisdiction.

The plaintiffs argued that Mexicana waived its sovereign immunity by relying on a U.S. Department of Transportation Foreign Aircraft Permit issued to it, which included a waiver of any defense of sovereign immunity from any suit arising out of operations under the permit. The court stated that the plaintiffs were asking too much from this waiver, and a recent change of the waiver language made it clear that the intent behind the waiver was to give the United States courts jurisdiction over cases that have substantial contact with the United States. The decedents all purchased tickets in Mexico for travel between points of origin and destination within Mexico. The tickets, which were the governing contracts of carriage, demonstrated no contacts with the United States.

The same result was obtained under the Warsaw Convention, because the tickets concerned were not for international air transportation but for domestic Mexican flights. The Warsaw Convention establishes exclusive jurisdiction before the court of domicile of the carrier, its principal place of business, the place of business where the contract was made, or the place of destination. The place of destination is the final destination according to the contract of carriage. The court concluded that the fact the airplane was ultimately scheduled to arrive in Los Angeles did not provide a basis for jurisdiction.

Relying on section 1605 of the FSIA, the court stated that a foreign state is not immune from the jurisdiction of the courts of the United States for its commercial activities in the United States or its activities outside the United

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275 Id. at 1359.
276 Id.
States which cause a direct effect in the United States. Commercial activity carried on in the United States by a foreign state is defined as commercial activity having substantial contact with the United States. While Mexicana conducted commercial activities within the United States, that fact alone did not subject it to the action. FSIA requires a significant "nexus" between the cause of action and the "commercial activity" carried on in the United States. The only nexus plaintiffs alleged between the cause of action and the commercial activity conducted in the United States was the fact that the airplane had been serviced in Chicago prior to the accident and its ultimate destination was Los Angeles. The appeals court ruled that there was no jurisdiction based upon an act in the United States in connection with a commercial activity elsewhere, and that Mexicana had not performed any acts in the United States having any significant nexus with this action.\(^{278}\)

An additional exception to the FSIA involves commercial activity outside the United States which causes a direct effect within this country. The court held the FAA's orders relating to heavy jet aircraft in the United States fleet, issued as a result of the Mexicana crash, did not constitute a direct effect within the United States. Therefore, the court found the direct effect exception inapplicable. The direct effect of a negligent act abroad is limited to the death or injury resulting from the negligent act. It does not extend to other, indirect consequences.\(^{279}\)

In *In re Air Crash Disaster near Warsaw, Poland on May 9, 1987*,\(^{280}\) a federal trial court lacked subject matter jurisdiction under the FSIA over the Soviet manufacturer of an aircraft that was sold to a Polish airline and involved in a crash. The plaintiff brought an action against LOT Polish Airlines (LOT) and the Soviet Union alleging that two of

\(^{278}\) *Mexicana*, 859 F.2d at 1360.

\(^{279}\) *Id.*; see *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672 (9th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).

\(^{280}\) 716 F. Supp. 84 (E.D.N.Y. 1989)[hereinafter, *Warsaw Air Crash*].
the aircraft's engines failed, causing a fire that led to the crash. Plaintiff also alleged that LOT was negligent and committed willful misconduct in the operation, maintenance, and repair of the engines. Plaintiff's decedents purchased round trip tickets in the United States from LOT or its agents and were returning to New York. Plaintiff claimed that the Soviet defendant sold the aircraft to LOT, along with manuals and instructions for operating, servicing, and overhauling the engines; that the Soviet defendant was negligent in the design, manufacture, assembly, inspection, and servicing of the aircraft and its engines; and that it negligently gave inadequate warnings and instructions for safe operation, maintenance, repair, inspection, and overhaul to LOT and failed to warn LOT and plaintiff's decedents that the aircraft and its engines were defective.  

The district court concluded it lacked subject matter jurisdiction under the FSIA, since the foreign manufacturer was a "foreign state" immune from the jurisdiction of federal and state courts unless the case came within the "commercial activity" exception in the statute.

Plaintiff argued the defendant's action came within the first clause of section 1605(a)(2), as an action "based upon commercial activity carried on in the United States." The "activity" to which plaintiff pointed consisted of regular flights of the Soviet airline between Moscow and the United States, the fact the airline maintained an office in the United States, and the fact that it advertised in a newspaper. The court held that the Soviet airline's regular operation of its business in the United States was commercial activity carried on in the United States within the meaning of the first clause of section 1605(a)(2). The court, however, interpreted the clause restricting subject matter jurisdiction to "an action based upon" the commercial activity and found this action was not based upon the Soviet defendant's activity in the

281 Id. at 84-85.
United States. The airline’s business within the U.S. and the advertisement had no connection to the negligence that caused the crash. Since the alleged negligent acts outside the United States were not an integral part of the Soviet manufacturer’s business in the United States, there was no nexus between the cause of action asserted and the commercial activity in the United States.283

Finally, the court found no jurisdiction over the Soviet manufacturer based on the manufacturer’s alleged failure to warn the airline and passengers that the aircraft and its engines were defective. The court found the failure to warn not to be an “act” performed in the United States. Furthermore, the mere failure to warn did not furnish the minimum contacts needed to confer jurisdiction. The court held that the Soviet defendant was immune from its jurisdiction and dismissed the complaint as to the Soviet defendant.284

C. Exceptions to FSIA

In In re Compania Mexicana de Aviacion,285 an action was brought on behalf of sixty-nine Mexican decedents who traveled on tickets purchased in Mexico for travel within Mexico. Mexicana, the defendant airline, moved to dismiss the action for lack of jurisdiction because of foreign immunity and for forum non conveniens. The motion was denied by the district court, and Mexicana petitioned the court for a writ of mandamus.286

The court held that Mexicana Airlines, which is wholly owned by the Mexican Government, was a foreign state as defined by the FSIA, the exclusive source of subject matter jurisdiction over all suits involving foreign states and their instrumentalities.287 Under the FSIA, a foreign state

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283 Warsaw Air Crash, 716 F. Supp. at 86.
284 Id. at 87.
285 859 F.2d 1354 (9th Cir. 1988). For more discussion of this case, see supra notes 271-279.
286 Id. at 1357.
287 Id. at 1359; see 28 U.S.C. § 1603.
is not immune from the jurisdiction of United States courts where its commercial activity within the United States or outside the United States causes direct effects in the United States. 288 "Commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." 289 Although Mexicana was involved in commercial activities within the United States, that fact alone was insufficient to subject it to the jurisdiction of the court. 290

A significant nexus must also exist between the cause of action and the business practices conducted in the United States. The plaintiffs alleged only that the airplane had been in Chicago for servicing the day prior to the crash, and its ultimate destination was Los Angeles. 291

Another exception to the FSIA is commercial activity outside the United States that causes a direct effect within the country. 292 The plaintiffs argued that the FAA's orders regulating heavy jet aircraft in the United States fleet, which were issued because of the Mexicana crash, met that provision. The court, however, found that the FAA order did not constitute a direct effect for FSIA purposes. Only deaths or injuries resulting from the negligent act are included within the direct effect standard for acts abroad. Indirect consequences are excluded. 293

The court held that Mexicana was immune from suit under the act because it did not waive its sovereign immunity and no significant "nexus" was found between the cause of action and the "commercial activity" carried on in the United States. Neither an act in the United States in connection with a commercial activity elsewhere nor an act related to commercial activity outside the United States that caused a direct effect within the United States

290 Mexicana, 859 F.2d at 1360.
291 Id.
293 Mexicana, 859 F.2d at 1360.
was established.\textsuperscript{294}

In \textit{LeDonne v. Gulf Air, Inc.},\textsuperscript{295} the plaintiff sought to enforce an Illinois default judgment by arguing that, even if the FSIA was applicable, it conferred no immunity on Gulf Air because the underlying conduct of the default judgment fell within the FSIA "commercial activity" exception. Gulf Air argued for the applicability of the FSIA and, hence, the protection of immunity. Gulf Air further contended that even if the exception applied to deprive Gulf Air of FSIA immunity, plaintiff’s claim still failed because she did not comply with the FSIA’s service requirements.\textsuperscript{296} The court ruled that Gulf Air was not a foreign state, but rather it was an "agency or instrumentality of a foreign state."\textsuperscript{297}

The court next addressed the question of whether immunity was conferred by the FSIA based on the acts alleged in the Illinois action. If immunity did attach, then both the Illinois court and the federal court lacked subject matter jurisdiction under the FSIA. The court recognized that the core of the FSIA is the distinction delineated between commercial and government activity, and that commercial conduct is the principal exception to the grant of immunity.\textsuperscript{298} Congress did not define the distinction with a precise, bright line. Instead, very general terms were combined with an instruction to focus on the type of acts, not their purposes.\textsuperscript{299} The court noted that Congress had effectively delegated to the courts the task of drawing the exact distinction on an ad hoc basis.\textsuperscript{300}

In determining whether Gulf Air's alleged acts were commercial in nature, the court followed the "private party" test used in \textit{Texas Trading v. Federal Republic of Nige-}

\textsuperscript{294} \textit{Id.}
\textsuperscript{296} \textit{Id.} at 1402.
\textsuperscript{297} \textit{Id.} at 1405-06.
\textsuperscript{298} 28 U.S.C. § 1605(a)(2).
\textsuperscript{299} \textit{LeDonne}, 700 F. Supp. at 1407.
\textsuperscript{300} \textit{Id.}
ria as the key to proper application of the FSIA. In Texas Trading, the government of Nigeria refused to pay upon delivery of large quantities of cement ordered for a government project. Nigeria asserted sovereign immunity in the resulting lawsuits. In denying immunity, the Second Circuit held that "if the activity is one in which a private party could engage, [the sovereign] is not entitled to immunity."

Under this test, the immunity question turns on whether the conduct in question could be legally engaged in by either a private party or the government, or whether only a government could pursue the activity. In addition to the private party test, the activities under scrutiny should be analyzed to determine if they are "customarily carried on for profit." If so, the activities are commercial in nature regardless of the identity of the parties engaging in them.

The court, in applying the private party test, held that Gulf Air's activities alleged in the Illinois action were private and commercial in nature so that immunity was not appropriate under the FSIA for those acts. Plaintiff's Illinois action alleged that Gulf Air made maliciously false statements to TWA, the FBI, and other authorities to the effect that the plaintiff had no authority to use the name of Gulf Air or any of its employees for the purpose of obtaining complimentary air travel tickets. This activity was characterized as conduct in which a private person or airline engaged in pursuit of commercial, for-profit airline activities. The court found that authorizing or refusing to authorize the issuance of complimentary air travel tickets, and reports to authorities and to other airlines concerning unauthorized attempts to obtain complimentary air travel tickets, were indisputably part of the business of private, commercial airlines. In summary, the court found Gulf Air's alleged activities were private and commercial in na-

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302 Id. at 309.
303 LeDonne, 700 F. Supp. at 1408.
In *In re Air Crash Disaster near Warsaw, Poland on May 9, 1987*, the district court concluded that it lacked subject matter jurisdiction under the FSIA over a Soviet manufacturer of an aircraft that was sold to LOT Polish Airlines (LOT). The aircraft was involved in a crash and a suit was brought on behalf of the estates of two passengers who died in the crash. Plaintiff’s decedents purchased round-trip tickets in the United States from LOT or its agents and were returning to New York. The plaintiff alleged that two of the aircraft’s engines failed, which caused a fire that led to the crash. Additionally, plaintiff argued that LOT was negligent and committed willful misconduct in the operation, maintenance, and repair of the engines. The Soviet defendant, according to the plaintiff, sold an aircraft to LOT which was negligently designed, manufactured, assembled, inspected, and serviced. Warnings and instructions to LOT for the safe operation, maintenance, repair, inspection, and overhaul were allegedly negligent. Furthermore, the plaintiff contended that the defendants failed to warn LOT and the plaintiff’s decedents that the aircraft and its engines were defective and unairworthy.

The court, without deciding whether the Soviet defendant and its instrumentalities constituted a foreign state as defined under the FSIA, considered the application of the immunity exceptions. Plaintiff argued that the defendants were not immune because the action was based upon both a commercial activity carried on in the United States and an activity performed in the United States in relation to the foreign state’s commercial activity elsewhere. The activities in the United States which plaintiff referred to were regular flights of the Soviet airline to and from Moscow and the United States, the airline’s maintenance of an office in the United States, and an advertisement in the United States.

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304 *Id.* at 1409-10.
305 716 F. Supp. 84 (E.D.N.Y. 1989). For a similar discussion of this case, see supra notes 280-284.
306 *Id.* at 84-85.
Wall Street Journal by the airline reciting that it supplied aircraft, engines, and other equipment for such aircraft.\textsuperscript{307}

The court found that the airline's regular operations in the United States qualified as commercial activities carried on in the United States within the meaning of the FSIA. The court, however, recognized that Congress did not exercise its full constitutional power to grant subject matter jurisdiction. FSIA restricts subject matter jurisdiction to actions based upon commercial activity and found that this action was not based upon the Soviet defendant's activity within the United States. The airline's business in the United States and the placing of the advertisement were not connected to the defendant's alleged negligence in causing the crash. The decedents did not have dealings or contacts with the airline's business or with the advertisement. The activities outside the United States were not an integral part of the airline's United States business or of the advertisement. No nexus existed between the cause of action and the commercial activities conducted in the United States.\textsuperscript{308}

Plaintiff further asserted that the action was based upon an act performed in the United States in connection with the foreign state's commercial activity elsewhere. The act performed here by the Soviet defendant, as contended by the plaintiff, was the failure to warn LOT and the decedents that the aircraft and its engines were defective and unairworthy. The court held that the failure to warn was insufficient to establish subject matter jurisdiction under the FSIA over a foreign manufacturer of an aircraft. Further, the mere failure to warn by defendant did not confer jurisdiction because the necessary minimum contacts were absent. Therefore, the court decided that the Soviet defendant was immune from the jurisdiction of all United States courts and did not come within the commercial activity exception of the statute.\textsuperscript{309}

\textsuperscript{307} Id. at 86.
\textsuperscript{308} Id.
\textsuperscript{309} Id. at 87.
In *America West Airlines, Inc. v. GPA Group, Ltd.*, a federal court properly dismissed a suit in which America West Airlines (America West) sought to recover damages that had allegedly occurred as a result of faulty engine maintenance work performed in Ireland by a foreign corporation. The appellate court upheld the district court's ruling that it lacked subject matter jurisdiction. The foreign defendant undisputedly fell within the FSIA definition of a foreign state. Subject matter jurisdiction in the dispute depended upon whether the defendants were entitled to sovereign immunity.

In this case, no dispute existed that a second defendant, Airmotive, was engaged in commercial activity through its engine overhaul work. The court found the fact that the Republic of Ireland carried on commercial activities in the United States was insufficient to create jurisdiction under the applicable FSIA clause.

The court concluded that there was not a nexus between America West’s cause of action and any of the commercial activities carried on by Ireland in the United States. America West alleged only that the defendant operated a commercial airline that carried passengers between the United States and Ireland. America West’s claim did not in any way relate to the airline’s commercial operations. The specific acts that formed the basis of the suit were the engine maintenance activities of Airmotive, which took place solely in Ireland. Thus, the first clause of the FSIA commercial exceptions did not divest these defendants of sovereign immunity.

America West further argued that the FSIA immunity exception relating to commercial activities carried on abroad causing a direct effect in the United States divested the defendants of sovereign immunity. The financial losses America West incurred as a result of Airmotive’s allegedly faulty maintenance were argued as a direct

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310 877 F.2d 793 (9th Cir. 1989).
311 Id. at 796-97.
312 Id. at 797.
effect for purposes of FSIA. The appellate court, in agreement with most courts that have analyzed the direct effect clause, held that the foreign sovereign's activities must cause an effect in the United States that is substantial and foreseeable in order to abrogate sovereign immunity. Mere financial loss incurred by a United States corporation is insufficient to constitute a direct effect for FSIA purposes.³¹³

Applying the substantial and foreseeable effect test, the court found no direct effect and, thus, no subject matter jurisdiction. From Airmotive's standpoint, its maintenance activities in Ireland would not foreseeably have an effect in the United States. According to the evidence, when Airmotive performed work on the aircraft engine, which was still owned by GPA, it was not aware that the engine would be used in the United States. America West failed to adequately rebut this evidence. The court found that the United States contacts were fortuitous and depended solely on the fact that the injured corporation happened to be American. The effect in the United States from Airmotive's allegedly improper repair work was not direct enough to deprive Airmotive of sovereign immunity. The court concluded that no subject matter jurisdiction was established.³¹⁴

D. Statute of Limitations

In Burke v. Compagnie Nationale Air France,³¹⁵ the plaintiffs filed suit in the United States District Court of Puerto Rico against Air France for mental anguish and anxiety allegedly suffered when their aircraft developed engine trouble and began to shake. Upon expiration of the six-month period for service of process, the judge ordered the plaintiffs to show cause why the action should not be dismissed for lack of service on the defendant. The plaintiffs filed for voluntary dismissal without prejudice, rather

³¹³ Id. at 799.
³¹⁴ Id. at 800.
Defendant’s motion to dismiss for expiration of the statute of limitations and failure to state a claim was before the court. A one-year statute of limitations applies to tort actions in Puerto Rico. Defendant contended that the action was time-barred because the incident giving rise to the suit occurred on February 21, 1986, and the suit was not filed until December 17, 1987.

In most states, the court stated, the defendant’s position would be correct. The statute of limitations would be tolled for no greater period than the time that the voluntarily dismissed suit was pending, and the statute would have run on October 26, 1987. The civil law in Puerto Rico, however, mandated a different result. The district court looked to the First Circuit holding in *Silva-Wiscovich v. Weber Dental Mfg. Co.*, which held that when a case under Puerto Rico law is voluntarily dismissed without prejudice in federal court before service, the statute of limitations is tolled in the common law sense and begins to run anew as of the dismissal date.

The defendant attempted to distinguish *Silva-Wiscovich* because, in the present case, the six-month period in which to serve the defendant had expired and an order to show cause had been issued prior to the voluntary dismissal. The court rejected this distinction and applied the reasoning of *Silva-Wiscovich* to this case. Therefore, the suit was not time-barred by Puerto Rico’s one-year statute of limitations for tort actions.

Also, since defendant Air France was a corporation almost wholly owned by the government of France, it fell within the provisions of the FSIA. No immunity from the jurisdiction of the United States courts existed because the operation of an airline meets the commercial activity

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316 Id. at 1016. See also P.R. R. Civ. P. 4.3(b); Fed. R. Civ. P. 41(a)(1).
318 835 F.2d 409 (1st Cir. 1987).
319 Id. at 410.
320 Burke, 699 F. Supp. at 1018.
exception under the FSIA.\textsuperscript{321}

E. Jury Trial

In \textit{Matton v. British Airways Board, Inc.},\textsuperscript{322} the plaintiff was injured as a result of the defendant's alleged negligence while the plaintiff was making a truck delivery at the defendant's loading dock. At the time the plaintiff sustained his injuries, the British government owned the defendant. The British government divested itself of its majority stock ownership of the defendant three years later. The defendant had become a private corporation that was no longer owned or operated by the government.\textsuperscript{323}

The plaintiffs commenced their action in state court. The defendant then removed it to the U.S. District Court for the Southern District of New York on the grounds that the defendant was a foreign state within the meaning of the FSIA.\textsuperscript{324} The FSIA provides for a nonjury trial when a foreign state is a defendant in any litigation.\textsuperscript{325} The plaintiffs served their demand for a jury trial shortly after learning that the British government had divested its interest in the defendant.

The defendant argued that, because federal subject matter jurisdiction properly was obtained \textit{ab initio}, jurisdiction would generally not be lost due to post-commencement events. The basis for jurisdiction remained pursuant to the FSIA, disregarding the privatization of British Airways, and the FSIA's nonjury requirement remained in effect. The plaintiffs conceded that as long as the defendant was owned by the British government, a jury demand would have been improper.\textsuperscript{326} The plaintiffs contended that the post-removal privatization of the defendant had fundamentally changed the manner in which

\textsuperscript{321} Id. at 1019.
\textsuperscript{322} 21 Av. Cas. (CCH) 18,046 (S.D.N.Y. 1988). For further discussion of this case, see supra notes 262-270 and accompanying text.
\textsuperscript{323} Id. at 18,047.
\textsuperscript{324} Id.
\textsuperscript{325} 28 U.S.C. § 1441(d), § 1330(a).
\textsuperscript{326} Matton, 21 Av. Cas. at 18,047; see Fed. R. Civ. P. 38(b).
the mandates of the FSIA must be read.

The district court agreed with the plaintiffs' assertion, holding that once a foreign state no longer has any interest in a defendant agency or instrumentality, congressional concern with the sensitivity of actions involving foreign states is no longer involved. The legislative history of the FSIA indicates that nonjury trials were favored because of uniformity in decision-making, the foreign state's lack of familiarity with jury trials, and a fear of overly generous damage awards when a deep pocket is involved. Those reasons were not applicable once the defendant in the action no longer met the FSIA definition of a foreign state's agency or instrumentality. The court found no basis for expanding the FSIA dictates beyond their intended purposes. The defendant's contention that the FSIA continued to provide the court with subject matter jurisdiction was ruled irrelevant to the issue of whether the FSIA foreclosed a jury trial in the instant case. Therefore, the court denied the defendant's motion to strike the plaintiff's jury demand.

In Burke, passengers of an aircraft who were seeking to recover damages for mental anguish and anxiety allegedly suffered when Air France's aircraft developed engine trouble were not entitled to a jury trial because jurisdiction was asserted over the airline under FSIA provisions. Defendant Air France was a corporation almost fully owned by the French government and was therefore an agency or instrumentality of France under the FSIA. The court found that Air France had immunity from the jurisdiction of United States courts.

United States courts have jurisdiction over a foreign state as to any claim for relief with respect to which it is not entitled to immunity, but the Burke court found that

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327 Matton, 21 Av. Cas. at 18,047.
328 Id. at 18,048.
329 699 F. Supp. at 1019. For further discussion of this case, see supra notes 315-321 and accompanying text.
330 Id.
jurisdiction was allowed only over nonjury actions. The court stated that Congress was not required to allow jury trials because at common law no civil actions were allowed against foreign states, and thus the seventh amendment is inapplicable. Therefore, the plaintiffs were not entitled to a jury trial, and the defendant’s motion to strike the jury demand was granted.392

F. Damages

In Burke, the defendant contended that the plaintiffs did not state a claim upon which relief could be granted because their mental distress was “nonserious.” The district court recognized that traditionally, under common law, recovery has only been allowed for emotional or mental distress if the plaintiff had also experienced physical injury—the “impact” rule. The impact rule has been broadened in many jurisdictions to allow recovery by a plaintiff, not physically injured, who was in the “zone of danger” at the time when another person was physically injured. The court recognized that some jurisdictions, such as California, went so far as to allow recovery for serious mental distress when the plaintiff is in physical, temporal, and relational proximity to a person physically harmed—the “bystander proximity doctrine.” The rule requires that the plaintiff must be near the accident, must observe it, and must be closely related to the victim.393 In the civil law system in Puerto Rico, however, no distinction is drawn between types of damages. Pursuant to Puerto Rican law, mental suffering is generally as compensable as physical harm.394

The court stated that, although some common law principles have been introduced judicially into Puerto Rican tort law, the Puerto Rico Supreme Court has specifically held that common law limits on liability for mental and emotional damages fundamentally conflict with Puerto Ri-

392 Burke, 699 F. Supp. at 1019.
394 P.R. LAWS ANN. tit. 31, § 5141 (1968).
can judicial tradition and principles and would not be adopted.335 The court relied on the First Circuit’s decision in Room v. Caribe Hilton Hotel336 which allowed a plaintiff to recover damages for mental suffering, without any accompanying physical injury. Tort liability under Puerto Rican law requires proof of only three elements: (1) negligent or culpable conduct; (2) harm; and (3) a legally sufficient causal connection between the conduct and the harm.337

After examining all of the relevant cases, the district court held that the plaintiffs had sufficiently alleged the three elements of a claim for damages under Article 1802 of the Puerto Rican Civil Code, which does not limit recovery for mental anguish.338 The court found the plaintiff had stated a claim upon which relief could be granted, and denied the defendant’s motion to dismiss.339

IV. WARSAW CONVENTION

A. Injuries and Events Within the Scope of the Jurisdiction of the Warsaw Convention

Shinn v. El Al Israel Airlines,340 arose under the Warsaw Convention, Article 17, which subjects a carrier to liability for damage sustained in the event of a death, wounding, or any other bodily injury suffered by a passenger, if the occurrence takes place on board an aircraft or in the course of embarking or disembarking.341 Therefore, if the plaintiff was not engaged in embarking, the air carrier is not liable for injuries under the Convention. Evidence revealed the plaintiffs had arrived at the airport some two hours before the flight. The airplane which they were to board had not yet arrived, and they were in a public access

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335 Burke, 699 F. Supp. at 1019.
336 659 F.2d 5 (1st Cir. 1981).
337 Burke, 699 F. Supp. at 1019.
338 Id.
339 Id.
340 21 Av. Cas. (CCH) 18,331 (D. Colo. 1989).
341 Id. at 18,332.
area at the time of the attack. The court held that the plaintiff was not engaging in embarking and, therefore, granted defendant’s motion to dismiss.\textsuperscript{342}

In \textit{Gilbert v. Pan Am World Airways, Inc.},\textsuperscript{343} a jury awarded the plaintiff $25,000 for emotional distress and mental anguish she experienced prior to being struck by a runaway bar cart not secured during takeoff. Defendant Pan Am contended that a cause of action for emotional injury, unaccompanied by fear of impending death, was not available under the Warsaw Convention. The district court rejected the defendant’s contentions and held that a legitimate fear of impending death was not an absolute condition for recovery of damages for pre-impact emotional distress.\textsuperscript{344}

In the alternative, the defendant challenged the award of damages as excessive. The court found that although the award was generous, it was not excessive in light of evidence that the passenger observed that the cart was not secured and understood that she was not only in danger, but in serious danger, given the weight of the cart and the velocity with which it could be expected to bear down upon her. Because the plaintiff was a former flight attendant, she was uniquely qualified to appreciate the peril. Under the circumstances, the jury was entitled to accept the passenger’s testimony that she feared for her life or feared that she would receive maiming injuries.\textsuperscript{345} With respect to the jury’s award to the plaintiff’s husband for expenses, including medical expenses, the court reached a different conclusion, finding the award excessive. The court found an insufficient evidentiary basis with which to justify the award beyond the documented medical and non-medical expenses resulting from his wife’s injuries.\textsuperscript{346}

In \textit{In re Hijacking of Pan Am World Airways, Inc., Aircraft

\textsuperscript{342} \textit{Id.} at 18,334.
\textsuperscript{343} 21 Av. Cas. (CCH) 18,482. (S.D.N.Y. 1989).
\textsuperscript{344} \textit{Id.} at 18,483.
\textsuperscript{345} \textit{Id.} at 18,483-84.
\textsuperscript{346} \textit{Id.} at 18,484.
Sept. 5, 1986, plaintiff alleged that defendant Pan Am engaged in willful misconduct associated with the hijacking of its aircraft by fraudulently inducing plaintiffs to fly on Pan Am with promises of heightened security. Plaintiffs further asserted that Pan Am willfully failed to provide them with adequate security. Pan Am moved for a partial summary judgment, contending that it had not engaged in willful misconduct as that term is defined in the Warsaw Convention.

The parties disputed the extent to which the defendant deliberately refrained from providing adequate security at the Karachi International Airport. Defendant contended that the amount of security provided was within the sole discretion of the Pakistani government. Plaintiffs claimed, on the other hand, that Pan Am could have hired additional armed security guards and that the defendant, as well as other airlines, had done so in the past. Each side presented affidavits to support their contentions. The court found that, as a matter of law, it could not hold that the defendant's failure to provide adequate security rose to the level of reckless disregard sufficient to constitute willful misconduct (defined under the Warsaw Convention to be either intentional performance of an act with knowledge it would result in injury or performance of an act in such a manner as to imply recklessness). A rational jury could have concluded that, prior to the hijacking, the airline engaged in a campaign to advertise its security program and induce concerned passengers to travel despite fears of terrorist activities.

In Schroeder v. Lufthansa German Airlines, the court held that an airline which received a telephone call stating that a passenger's luggage contained a bomb, was not responsible or liable under the Warsaw Convention for any ac-

348 Id.
349 Id.
350 Id. at 1484.
351 Id.
352 875 F.2d 613 (7th Cir. 1989).
tions taken by the Royal Canadian Mounted Police in detaining, searching, and questioning the passenger for more than five hours. After receiving the call, the Chicago Air Traffic Control Center notified Lufthansa in Frankfurt, the FBI, the Royal Canadian Mounted Police, and the Air Traffic Control Center in Canada. The Canadian Air Traffic Control Center radioed the flight and informed the pilot that a bomb was in the plaintiff’s luggage or on her person. The pilot received permission to make an emergency landing in Canada.

After the plane landed, all passengers deplaned, and the Royal Canadian Mounted Police took plaintiff into custody. After searching her handbag, they transported her in a military car to the terminal building. At the terminal building she was questioned about the bomb threat, and a female officer conducted a personal search of plaintiff. At no time did plaintiff object to being searched or questioned, nor did she state that she wanted to leave. After the investigation concluded, all passengers, including plaintiff, reboarded the plane and completed the flight to Frankfurt.

The plaintiff sued the airline under the Warsaw Convention for slander, battery, false arrest, false imprisonment, intentional infliction of emotional stress, and failure to warn. She alleged that the $75,000 liability cap contained in the Warsaw Convention did not apply because defendant’s actions amounted to willful misconduct. The lower court, applying Illinois law, had dismissed her failure to warn claim for not stating a claim upon which relief could be granted, and granted defendant’s summary judg-

353 Id. at 615.
354 Id. at 615-16. During flight, the pilot had an attendant bring the plaintiff forward so he could speak with her. The attendant took the plaintiff by the arm and led her to the cockpit. The pilot informed the plaintiff about the telephone call and asked whether or not she knew anything about it. She replied that she knew nothing about it. The pilot requested that plaintiff remain in the cockpit to prevent alarm to other passengers, and the flight engineer fastened a seat belt for her. Id.
355 Id.
ment motion as to the rest of her tort claims. The trial court held that, under the circumstances, defendant's actions were justified.\textsuperscript{556}

On appeal to the Seventh Circuit, plaintiff argued that under the Warsaw Convention and Illinois law, defendant was liable for the injuries she allegedly sustained due to the Royal Canadian Mounted Police's detention and personal search. The court based its decision on Article 17 of the Warsaw Convention which states that an airline is liable for injuries if they take place aboard the aircraft or in the course of embarking or disembarking.\textsuperscript{357} The court concluded that the defendant could not be held liable under the Warsaw Convention for the actions of the Royal Canadian Mounted Police unless detention of the plaintiff occurred on the plane or in the course of embarking or disembarking.\textsuperscript{558}

In deciding whether the detention and search of the plaintiff occurred in the course of embarking or disembarking, the court looked to tests used in other circuits. The First, Second, and Third Circuits view three factors as primarily relevant to the determination of liability under Article 17: "location of the accident; the activity which the injured person was engaged in; and the control by the airline over the injured person."\textsuperscript{359} The Ninth Circuit uses a slightly different test requiring an assessment of the total circumstances surrounding the passenger's injuries. The location of the passenger was only one of several factors to be considered.\textsuperscript{360}

The Seventh Circuit held that in looking at the total circumstances surrounding the plaintiff's detainment and search, placing particular emphasis on location, activity and control, any injury sustained by the plaintiff due to

\textsuperscript{556} Id. at 616.
\textsuperscript{557} Id.
\textsuperscript{558} Id. at 617.
\textsuperscript{559} Id. (quoting Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977)).
\textsuperscript{560} Schroeder, 875 F.2d at 617; see also Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir. 1977), cert. denied, 431 U.S. 974 (1979).
the actions of the Royal Canadian Mounted Police was not sustained while embarking or disembarking from the plane. The court concluded that the Royal Canadian Mounted Police conducted their detention and search of plaintiff at the terminal building, away from the aircraft. Secondly, the Royal Canadian Mounted Police questioned the plaintiff about a bomb threat, which was not related to passengers embarking or disembarking from an airplane. Finally, defendant had no control whatsoever over the plaintiff or the Royal Canadian Mounted Police while the police detained and searched her.\(^1\)

The court further stated that the legislative history of the Warsaw Convention clearly established that a proposal which would have made an airline liable for all injuries sustained by passengers entering the airport of departure until leaving the airport of arrival was rejected.\(^2\) Therefore, since injury plaintiff allegedly suffered due to her detention and search was not sustained on the plane or during embarking or disembarking, defendant could not be held liable for those injuries under Article 17 of the Warsaw Convention.\(^3\) The court of appeals affirmed the district court's granting of defendant's motion for summary judgment.\(^4\)

**B. Jurisdiction**

In *Steber v. British Caledonian Airways, Ltd.*,\(^5\) plaintiffs filed a complaint in the Mobile County Circuit Court (Alabama) against British Caledonian Airways, Ltd., Delta Air Lines, and Eastern Airlines, seeking damages for the loss of their baggage while flying on these airlines. Delta and Eastern were granted summary judgments. British Caledonian was dismissed as a party for lack of jurisdiction.

\(^1\) *Schroeder*, 875 F.2d at 617-18.

\(^2\) *Id.; see also* Martinez Hernandez v. Air France, 545 F.2d 279, 282 (1st Cir. 1976).

\(^3\) *Schroeder*, 875 F.2d at 618.

\(^4\) *Id.* at 624.

and plaintiffs appealed that dismissal.366

Article 28(a) of the Warsaw Convention restricts where a claim may be brought: the domicile of the carrier, its principal place of business, where the contract was made, or the place of destination.367 Plaintiffs purchased round-trip tickets on Delta from Mobile, Alabama to London, England. In Mobile, the plaintiffs were placed on Eastern Airlines for a flight to Atlanta, Georgia. Upon arrival in Atlanta, the plaintiffs, with assistance of Delta employees, were transferred to British Caledonian for the trip from Atlanta to London. The plaintiffs’ baggage did not accompany them on this flight to London. The facts showed that neither the domicile nor principal place of business of British Caledonian is in Alabama. Furthermore, the facts failed to show that the contract of carriage was made between the plaintiffs and British Caledonian in Mobile County. Therefore, British Caledonian would not properly be under the jurisdiction of the Alabama court.368

The court applied the rationale of In re Alleged Food Poisoning Incident, March 1984,369 in determining whether, under the Warsaw Convention, an undivided transportation may have more than one destination if more than one carrier, or successive carriers, are parties to the contract of transportation. The court stated that the destination of a journey for convention purposes is determined by the intent of the parties.370 If the parties regarded the transportation as a single, undivided operation, the beginning of that operation is the origin and the end of the opera-

366 Id. at 986.
367 Warsaw Convention, opened for signature Oct. 12, 1929, art. 28(a), 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 reprinted in 49 U.S.C. app. § 1502 (1982). The article provides: “An action for damages may be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court of the domicile of the carrier, or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.” Id.
368 Steber, 549 So.2d at 987.
369 770 F.2d 3 (2d Cir. 1985).
370 Steber, 549 So. 2d at 988.
tation is the destination. Additionally, the court decided that this interpretation was supported by Article 1(2) of the Convention, which uses the term destination in the singular for an undivided transportation.\textsuperscript{371}

In relying on \textit{In re Alleged Food Poisoning Incident}, the court found plaintiffs' ultimate destination was Mobile, Alabama. The court regarded Eastern and British Caledonian as successive carriers in the plaintiffs' round-trip journey. Therefore, the court held that the parties contemplated a single, undivided transportation by successive carriers on the plaintiffs' round-trip journey and that the plaintiffs' destination was, in the meaning of the Warsaw Convention, always at the place where the journey originated. Accordingly, the court reversed the judgment dismissing British Caledonian as a party defendant and remanded the cause for further proceedings.\textsuperscript{372}

C. Cargo and Passenger Baggage Claims

In \textit{Arkin v. New York Helicopter Corporation},\textsuperscript{373} the court found that, under the Warsaw Convention, the air carrier was not entitled to limit its liability for bags to $20.00 per kilogram. The carrier had not complied with the specific provisions of Article 4 of the Warsaw Convention. Article 4 requires that the number and weight of the passenger's checked baggage be noted on the passenger's ticket and baggage checks.\textsuperscript{374}

The plaintiffs checked two pieces of baggage with New York Helicopter Corporation before traveling to JFK International Airport where they boarded British Airways to London. Upon their arrival in London, plaintiffs' baggage was not available. It appeared that upon arrival at JFK, the bags were unloaded from the helicopter but not delivered to British Airways until the next morning. The bags were left at the British Airways baggage room which was

\textsuperscript{371} Id.; see also 770 F.2d at 5-6.
\textsuperscript{372} Steber, 549 So.2d at 989.
\textsuperscript{374} Id. at 17,164; see also Warsaw Convention, supra note 367, art. 4.
closed at the time. The luggage was never found. There was no dispute that the number and weight of the plaintiffs' checked baggage were not noted on the ticket, nor on the baggage check delivered to the plaintiffs.\textsuperscript{375}

The New York Supreme Court, Appellate Division, held that New York Helicopter Corporation was not entitled to limit its liability to $9.07 per pound ($20.00 per kilogram) because the carrier failed to comply with the specific provisions of Article 4 of the Convention requiring certain information be made known to the passenger. The defendant argued that the absence of such information was insubstantial; it did not prejudice the passenger and did not warrant the drastic remedy of voiding its limit of liability under the Convention. The defendant further argued that the better rule was that found in cases construing Article 4 as a technical and formal requirement which has no current practical applicability today.\textsuperscript{376}

The court concluded that the stricter interpretation of the Warsaw Convention was the better construction, quoting Gill v. Lufthansa German Airlines\textsuperscript{377} in support:

\begin{quote}
The language should be given its plain meaning and effect. Article 4 is straightforward. Nor [sic] is it over demanding. Only three elements on the claim check are absolutely required to preserve liability limitations: notice, ticket number, and number and weight of the bags. . . . Loss of the check and absence of the other required data do not vitiate the limitations. In view of the fact that the Warsaw Convention limits the carrier's liability and shifts a greater part of the responsibility and risk to the passenger, it is not unreasonable or overly technical to require the carrier to comply with the minimum requirements plainly set out by the Convention.\textsuperscript{378}
\end{quote}

The court found that the text of Article 4 should be given its plain meaning.\textsuperscript{379}

\textsuperscript{375} Arkin, 3 Av. L. Rep. at 17,164.
\textsuperscript{376} Id.
\textsuperscript{378} Gill, 620 F. Supp. at 1456, quoted in Arkin, 3 Av. L. Rep. at 17,165.
\textsuperscript{379} Arkin, 3 Av. L. Rep. at 17,165.
In Schmoldt Importing Co. v. Pan American World Airways, Inc., the fact that an air carrier retained a cargo of hats shipped from China for twenty-six days did not terminate the international character of the shipment and render the Warsaw Convention inapplicable to a claim for damages against the carrier. Specifically, Schmoldt Importing (Schmoldt) hired Pan Am to ship its goods from China to Oklahoma. Pan Am retained the goods for twenty-six days before turning the goods over to the connecting carrier, Continental Airlines. Continental Airlines received the goods in damaged condition from Pan Am and stamped “received damaged” on the air waybill. Upon receipt of the goods, a Schmoldt representative signed the air waybill, noting, “one box opened prior to inspection.” Schmoldt subsequently wrote a more detailed complaint and mailed it to Pan Am. The plaintiff alleged the goods were unfit for resale and sought damages against Pan Am due to the one month delay in delivery.

The court concluded that Schmoldt made a timely written complaint to Pan Am for damages to the goods in compliance with notice provisions of the Warsaw Convention, but did not make a timely complaint with respect to the delayed delivery of the goods. The Convention requires that persons entitled to delivery must complain to the carrier within seven days if the goods were damaged or within fourteen days if the goods were delayed. Article 26(2) and (3), viewed in conjunction, set forth two requirements for maintaining an action against the carrier: the person entitled to delivery must make a timely written complaint and the carrier must thereby be notified of either delay or damage during transportation, or both.

The court found that Schmoldt’s notation on the air waybill constituted a complaint because it indicated some meddling with the merchandise. The facts revealed the

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Id. at 412.

Id. at 413.

Id. at 413-16.
complaint was made on the day of receipt and well within the seven-day period allowed by Article 26(2). Continental’s notation that the goods were, in fact, physically damaged notified Pan Am of the damage. Therefore, the Article did not bar Schmoldt’s cause of action for physical damage to the goods. Since the notations made by Schmoldt alluded only to the physical damage to the goods and not to the delayed delivery, however, that part of Schmoldt’s claim which included damages for delay was barred by Article 26 because of its fourteen-day notification requirement. The trial court’s summary judgment was reversed insofar as it affected Schmoldt’s right to recover for damaged goods. It was affirmed as a partial summary adjudication denying Schmoldt’s recovery for delay in the delivery of the goods.

In Vekris v. Peoples Express Airlines, Inc. an international airline was not entitled to limited liability under the Warsaw Convention because it neglected to follow the strict provisions of Article 4 of the Convention concerning the proper preparation of baggage checks. Prior to boarding, plaintiff checked two pieces of personal property, a canvas suitcase and a cardboard tube, and was issued a baggage claim stub for each piece. Plaintiff alleged that Peoples Express did not weigh the baggage, write plaintiff’s ticket number on either claim check, or write the number of bags on either claim check. When the cardboard tube was lost, plaintiff sought damages for the loss of the original art work contained in the tube. Defendant countered that its liability was limited by the Warsaw Convention to $9.07 per pound.

The court held that in order to enjoy the protection of Article 22(2) of the Warsaw Convention, a carrier must take specific steps with respect to baggage checks. Article 4(3) requires a baggage check issued to a passenger to contain, inter alia, the number of the passenger’s ticket,
the number and weight of the packages the passenger is checking, and a statement that the flight is subject to the liability rules established by the Warsaw Convention. Article 4 further provides that "if the baggage check does not contain the particulars listed above, the carrier should not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability." The court concluded that in cases involving noncommercial airline passengers, Article 4 must be interpreted literally: travelers must be notified of the exact weight of the baggage so they will know the limit of the airline's liability. Since the effect of the Warsaw Convention is to keep liability of the airlines artificially low, it is not unreasonable to require that carriers comply with the strict requirements of Article 4 before availing themselves of its liability limits.

The court rejected the defendant's argument that, since the plaintiff's paintings were intended for sale, they were not baggage for which the defendant was responsible. The court held that the defendant, having accepted payment for transit and having treated the paintings as baggage, could not now claim they were not baggage. Therefore, the court found that the paintings were within the term "baggage" as defined by the tariff and the defendant's own conduct.

In Shapiro v. United Airlines, plaintiff sued United Airlines for delay in delivery of his checked luggage, alleging breach of contract and negligence, and seeking compensatory and punitive damages. United claimed that its liability to the plaintiff was limited as set forth in the "Condition of Contract" and that plaintiff had already received $100 from United, or $60 more than plaintiff's documented expenses. The court granted United's mo-

387 Id. at 767 (citing 49 U.S.C. app. § 1502, art. 4(3)(d)).
388 Vekris, 707 F. Supp. at 676.
389 Id. at 678-79.
It is well established that federal common law governs the validity of an air carrier's limitation of liability. Under the "released valuation doctrine," a carrier may validly limit its liability to an agreed value of the goods, provided the following conditions are met: the carrier gives its passengers a fair opportunity to choose between higher and lower liability by paying a greater or lesser fee; the passenger is aware of the opportunity to pay a higher price for greater coverage; and the passenger, with full knowledge, chooses to pay for lesser coverage.

United provided the plaintiff with an opportunity to declare a higher value for his baggage, and the plaintiff received reasonable notice of that opportunity. Plaintiff's ticket contained the words "Passenger Ticket and Baggage Check Subject To Conditions of Contract on Passenger's Coupon." The ticket also included the notice of baggage liability limitations which alerted a ticket holder that "liability for . . . delay . . . is limited unless a higher value is declared in advance, and additional charges are paid." Furthermore, Paragraph 12 of the "Conditions of Contract" noted that United had tariff rules regarding limitations of baggage liability and that the rules were available for inspection at a United ticket counter or from United's consumer affairs department. The court concluded this information provided plaintiff with reasonable notice that United's liability for damages caused by the delay would be limited unless a passenger took affirmative action to pay for higher coverage, or the airline gave no opportunity to pay a higher amount for greater coverage. Under this test, United's limitation of liability was found valid.

The court found no merit in the plaintiff's allegation.

\[391\] Id. at 17,396.
\[392\] See Deiro v. American Airlines, Inc. 816 F.2d 1360 (9th Cir. 1987).
\[393\] Shapiro, 3 Av. L. Rep. at 17,397; see also Deiro, 816 F.2d at 1365.
\[394\] Shapiro, 3 Av. L. Rep. at 17,397.
\[395\] Id.
\[396\] Id.
that United’s actions amounted to gross negligence and that a valid limitation of liability could not insulate it from liability for that negligence. The court concluded that where interstate carriage is concerned, only an appropriation of property by the carrier for its own use will nullify a proper limitation of liability. The facts revealed that United did not convert plaintiff’s baggage to its own use, but, instead, returned the baggage within thirteen hours. Therefore, the plaintiff could not recover an amount greater than the tariff limit, regardless of the degree of United’s negligence. Also, United’s tariff entitled plaintiff to all reasonable documented expenses incurred as a direct result of delay in the delivery. The evidence revealed that the only reasonable, documented expense plaintiff incurred was $40 for replacement of medication. Since United had already paid plaintiff $100 before the action began, United owed plaintiff nothing and was entitled to summary judgment.

In *Campbell v. Air Jamaica*, a federal trial court erred in dismissing a passenger’s claim involving a cancelled international flight, flight delays, and lost luggage. The Second Circuit held that the court lacked subject matter jurisdiction under the Warsaw Convention. Under the Warsaw Convention, an action for damages must be brought, at the option of the plaintiff, where the carrier is domiciled, where the carrier’s principal place of business is located, where the carrier has a place of business through which the contract had been made, or where the final place of destination is located.

The Second Circuit found that the trial court improperly concluded the carrier did not have “a place of business through which the contract had been made” in the United States. Although it was clear from the passen-

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397 *Id.*
398 *Id.*
399 863 F.2d 1 (2d Cir. 1988).
400 *Id.* at 1-2.
401 *Id.* at 2.
ger's ticket that the place through which the ticket was purchased was Jamaica, a closer factual inquiry was required because the passenger had submitted to the trial court an affidavit alleging that the ticket was purchased in New York city on his behalf. Arguments on appeal demonstrated that the passenger should be allowed to conduct discovery on that point. The case was remanded to the trial court to determine whether the airline had a place of business in the United States through which the contract was made, thereby giving the United States international or treaty jurisdiction.\(^{402}\)

In \textit{Duff v. Trans World Airlines, Inc.},\(^ {403}\) the plaintiff traveled to New York and many different foreign countries during a seven week period. The plaintiff returned from Madrid to New York and was scheduled to take a Trans World Airlines (TWA) flight to Chicago. That flight was delayed approximately four hours. The plaintiff filed a complaint against TWA, alleging that the airline failed to leave New York at the scheduled departure time, negligently damaged his luggage, and lost or damaged items in his luggage.\(^ {404}\) TWA filed a motion for summary judgment.

The trial court granted partial summary judgment to TWA on plaintiff's claim regarding baggage and lost items. The court further granted summary judgment in favor of TWA on plaintiff's remaining claims alleging damages due to the flight delay. TWA contended that summary judgment was appropriate, based upon (1) the Warsaw Convention, (2) the contractual terms of the TWA airline ticket issued to the plaintiff, and (3) plaintiff's lack of any damage occasioned by his delayed departure.\(^ {405}\)

The Illinois Appellate Court affirmed the trial court's decision and held that the trial court did not err in relying

\(^{402}\) \textit{Id.}


\(^{404}\) \textit{Id.} at 266, 527 N.E.2d at 499.

\(^{405}\) \textit{Id.; see also} 49 U.S.C. app. § 1502.
upon provisions of the Warsaw Convention in granting summary judgment in favor of the airline. Further, the court held that the airline tickets for those flights contained an adequate Warsaw Convention notice. The court found it was clear that the passenger contracted for international travel when he purchased tickets and that his return flight from New York to Chicago was part of his overall international travel and did not constitute a truly domestic flight.\textsuperscript{406} The appeals court affirmed the trial court's decision denying the airline's motion for the assessment of sanctions against the passenger because the case was not one in which sanctions were appropriate.\textsuperscript{407}

D. Damages

In \textit{Gilbert v. Pan American World Airways, Inc.},\textsuperscript{408} the district court found that the Warsaw Convention did not specifically bar a derivative claim by the husband of a passenger who was injured aboard an international flight. The husband, who was not physically injured, sought to recover damages for medical expenses and for the loss of the society and comfort of his wife. The action was before the court on defendant's motion \textit{in limine}, which sought exclusion from trial of all evidence offered by the plaintiff in connection with the husband's cause of action. Defendant argued that the Warsaw Convention barred any recovery by the spouse of an injured passenger.\textsuperscript{409}

The District Court for the Southern District of New York held that the Warsaw Convention does not specifically preclude the recovery by spouses of damages for loss of consortium or medical expenses. Subsection 2 of Article 24 presupposes that there would be Warsaw Convention plaintiffs, other than passengers, suing for damages suffered. Therefore, the court reasoned, the Convention did not specifically bar recovery on the derivative claim by

\textsuperscript{406} 173 Ill. App. 3d at 266, 527 N.E.2d at 500-01.
\textsuperscript{407} \textit{Id.}
\textsuperscript{408} 21 Av. Cas. (CCH) 18,482 (S.D.N.Y. 1989).
\textsuperscript{409} \textit{Id.} at 18,483.
the spouse. The court, however, found no merit in the defendant's contention that even if the Convention did not explicitly bar derivative suits, the Convention should be applied to the accident and preclude recovery not specifically provided for by the treaty.

In *Floyd v. Eastern Airlines, Inc.*, an Eastern flight began to lose altitude after its three jet engines failed. After one engine was restarted, the flight subsequently landed safely, but Eastern was sued by twenty-five passengers on the flight. Twenty-three of the passengers brought suit claiming damages solely for mental distress arising out of the incident. The claims were based on intentional infliction of emotional distress under Florida law and under the Warsaw Convention. The district court held that the plaintiffs failed to state a claim upon which relief could be granted under either Florida or federal law.

On appeal, the Eleventh Circuit looked to the face of the complaint and accepted its allegations as true. The court addressed the state law claim for intentional infliction of emotional distress, the cause of action under the Warsaw Convention for emotional injury, the claim for punitive damages pursuant to Article 25 of the Warsaw Convention, preemption of plaintiff's state law claim for punitive damages, guidance on remand with respect to willful misconduct under the Warsaw Convention, and denial of leave to amend the complaint.

The plaintiffs first alleged that Eastern's maintenance personnel responsible for the flight had failed to install the required oil seals or "big O-rings" necessary to prevent oil leaks. Second, they alleged that Eastern's records revealed that the aircraft had experienced a dozen prior engine failures stemming from the absence of O-rings. Finally, they alleged that Eastern knowingly failed to insti-

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410 Id. at 18,484.
411 Id.
412 872 F.2d 1462 (11th Cir. 1989).
413 Id. at 1466.
414 Id.
415 Id.
tute appropriate procedures to correct the problem. Based on these allegations, the plaintiffs sought damages for intentional infliction of emotional distress under Florida law, but the court held that the issue could not be resolved until the Florida Supreme Court made a decision regarding a similar incident.\footnote{416}

The court recognized that the Warsaw Convention creates a cause of action including the right to recover for purely emotional injuries. The court’s conclusion did not mean that the courts would allow recovery for every claim for mental injury up to $75,000. The damages actually sustained must be proved.\footnote{417}

The plaintiffs also argued that Eastern's actions entitled them to punitive damages. This argument was based both on the Warsaw Convention itself and on their state law cause of action for intentional infliction of emotional distress. The court held that the Warsaw Convention did not create an independent cause of action for willful misconduct which authorized recovery for punitive damages. The intent of the Convention to provide compensatory damages suggested that it would be inconsistent to allow punitive damages, which serve a purpose very different from compensating victims. The Convention also preempts a claim by airline passengers seeking punitive damages under state law for intentional infliction of emotional distress.\footnote{418} The appeals court found no case governed by the Convention in which a court awarded punitive damages, and the court declined to depart from this uniformity. On remand, the trial court was to determine the question of whether the facts showed willful misconduct, thus removing the liability limitations on compensatory damages in the Convention.\footnote{419}

\footnote{416} Id.
\footnote{417} Id. at 1467-76.
\footnote{418} Id.
\footnote{419} Id.
E. Notice

The case of Chan v. Korean Airlines, Ltd.\textsuperscript{420} presented the question whether international air carriers lose the benefit of a limitation on damages for passenger injury or death provided by the Warsaw Convention if they fail to provide notice of that limitation in the ten-point type size required by the Montreal Agreement. On September 1, 1983, over the Sea of Japan, a military aircraft of the Soviet Union destroyed a Korean Airlines jet en route from New York to Seoul, South Korea. All aboard were killed, and the families of the victims filed wrongful death actions against Korean Airlines in several federal district courts. These suits were transferred for pretrial proceedings to the District Court for the District of Columbia. All parties agreed that their rights were governed by the Warsaw Convention.\textsuperscript{421}

The controversy centered around the per-passenger damages limitation for personal injury or death. The Convention fixed the limit at approximately $8,300, but the Montreal Agreement raised the amount to $75,000.\textsuperscript{422} In addition to providing higher damage limitations, the Montreal Agreement required carriers to give passengers written notice of the Convention's damage limitations in print no smaller than ten-point type. The notice of the Convention's liability rules printed on Korean Airlines' passenger tickets for the flight in question appeared in only eight-point type.\textsuperscript{423} The plaintiffs sought a declaration that this discrepancy deprived Korean Airlines of the benefit of the damages limitation.\textsuperscript{424} The district court denied the motion, finding that neither the Warsaw Convention nor the Montreal Agreement prescribes that the sanction for failure to provide the required form of notice

\textsuperscript{420} 109 S. Ct. 1676 (1989).
\textsuperscript{421} Id. at 1678.
\textsuperscript{422} Id. The Montreal Agreement is an agreement among carriers executed in 1966 and joined by Korean Airlines in 1969. Id.
\textsuperscript{423} Id.
\textsuperscript{424} Id.
results in the elimination of the damage limitation.425

The U.S. Supreme Court granted certiorari to resolve the conflict among the circuits.426 Plaintiffs conceded that the Montreal Agreement imposed no sanctions for failure to comply with its ten-point type requirement. They argued, however, that such a requirement was created by a combined reading of the Montreal Agreement and the Warsaw Convention. Plaintiffs first argued that Article 3 of the Warsaw Convention removed the protection of limited liability if the carrier fails to provide adequate notice of the Convention's liability limitation in its passengers' tickets. In addition, plaintiffs asserted that the Montreal Agreement's ten-point type requirement supplied the standard of adequate notice under Article 3.427

The Supreme Court held that the Warsaw Convention did not eliminate the limitation of damages for passenger injury or death as sanctions for failure to provide adequate notice of that limitation.428 It found nothing in Article 3, nor anywhere else in the Convention, which imposed a sanction for failure to provide an adequate statement. The only sanction in Article 3 appears in the

425 Id.
426 In addition to the Second Circuit, the Fifth Circuit was in disagreement with the District of Columbia Circuit.
427 Id. at 1679.
428 Id. at 1679-80. The court stated some important aspects of the Warsaw Convention:

[A] passenger ticket . . . shall contain the following particulars: (a) [t]he place and date of issue; (b) [t]he place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character; (d) the name and address of the carrier or carriers; (e) a statement that the transportation is subject to the rules relating to liability established by the Convention . . . [t]he absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of [the] convention. Nevertheless, 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 [the] Convention which exclude or limit his liability.

Id. (quoting the Warsaw Convention).
second clause of Article 3(2). This provision subjects a carrier to unlimited liability if it accepts a passenger whose passenger ticket has not been delivered.\textsuperscript{429} Several courts, however, have equated non-delivery of a ticket with the delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitations. The entire second sentence of Article 3(2) is rendered implausible by the first sentence, which specifies that the irregularity of the passenger ticket "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this Convention." The Supreme Court stated "it is clear from this that (1) an 'irregularity' does not prevent a document from being a 'passenger ticket'; and (2) that an 'irregularity' in the passenger ticket does not eliminate the contractual damages limitation provided for by the Convention."\textsuperscript{430} Therefore, a delivered document does not fail to qualify as a passenger ticket and does not cause forfeiture of the damages limitation merely because it contains a defective notice.\textsuperscript{431}

The proposition that delivering a defective ticket is equivalent to failure to deliver a ticket produces an absurd result. A carrier should not be entitled to avail itself of the provisions of the Convention which exclude or limit its liability when a ticket defect fails to give the passenger proper notice of those provisions. There is no textual basis for limiting the "defective ticket is no ticket" principle to that particular defect. Thus, the limitation of liability would also be eliminated if the carrier failed to comply, for example, with the requirement of Article 3(1)(d) that the ticket contain the address of the carrier.\textsuperscript{432}

Further, the Supreme Court found that the use of 8-point type instead of 10-point for the liability limitation notice was not so great a shortcoming as to prevent a doc-

\textsuperscript{429} Id. at 1680; see supra note 428.
\textsuperscript{430} Id.
\textsuperscript{431} Id.
\textsuperscript{432} Id.
ument from being considered a ticket. In addition, non-delivery of the ticket cannot be equated with the delivery of a ticket in a form that fails to provide the notice required under the Convention. The delivered document does not fail to qualify as a passenger ticket and does not cause forfeiture of the damage limitation merely because it contains a defective notice.\textsuperscript{433}

F. Federal Preemption

In \textit{Floyd v. Eastern Airlines},\textsuperscript{434} the Eleventh Circuit found that, where both state law and the Warsaw Convention allow recovery for alleged injuries, the Convention pre-empts those aspects of the state law claims which are inconsistent with it.\textsuperscript{435} Accordingly, since the Convention provides the exclusive avenue for recovery for passengers involved in any “accident” within the meaning of the Convention, all state law claims are barred. The court, however, declined to speculate further on whether the Convention entirely pre-empts state law causes of action once its provisions are triggered by an “accident” within the meaning of the Convention. The engine failure in question was an “accident” within the meaning of the Convention, and the court determined that the Convention provided recovery for mental injuries unaccompanied by physical impact.\textsuperscript{436} Where the Convention applies, it preempts any inconsistent state law provisions.\textsuperscript{437} The defendant, Eastern, was entitled to invoke the $75,000.00 per passenger liability limitation and the other provisions of the Convention. Therefore, to the extent that the cause of action for intentional infliction of emotional distress recognized under state law conflicted with the cause of action under the Convention, Florida

\textsuperscript{433} Id.

\textsuperscript{434} 872 F.2d 1462 (11th Cir. 1989). For further discussion of this case, see supra notes 412-419.

\textsuperscript{435} Id.

\textsuperscript{436} Id. at 1481-82.

\textsuperscript{437} See Butler v. Aeromexico, 774 F.2d 429, 430 (11th Cir. 1985).
law was preempted.\textsuperscript{438}

G. Miscellaneous

In *Rodriguez v. Taca International Airlines*,\textsuperscript{439} plaintiffs were passengers on a Taca International (Taca) flight when they were allegedly injured while landing in a rain-storm. Plaintiffs' claims were governed by the Warsaw Convention, as supplemented by the Montreal Agreement (hereinafter Warsaw-Montreal). Since the plaintiffs were engaged in international travel, Warsaw-Montreal was applicable.

Warsaw-Montreal imposes liability on a carrier without fault for injuries to passengers such as the plaintiffs, who are engaged in international travel. Warsaw-Montreal also imposes a limitation on the amount of damages ($75,000 per passenger) for which the carrier may be liable. The damage limitations, however, can be voided upon proof of willful misconduct by the carrier.\textsuperscript{440}

If the damage issue were tried first and the damages found by a jury were less than $75,000 per claimant, then any willful misconduct issue would be moot. All of the expense and efforts devoted to trying to discover and prove or disprove alleged willful misconduct would be obviated. The court held that there was no reason for the court and the parties to be burdened with extensive and costly liability discovery where the complainants could recover their damages without proof of fault. The district court considered the nature of the incident and the damages involved and bifurcated the issue of liability from damages, since it was clearly the most expeditious, economical, and convenient means of proceeding in the action.\textsuperscript{441}

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\textsuperscript{438} *Floyd*, 872 F.2d at 1481-82.

\textsuperscript{439} 21 Av. Cas. (CCH) 17,807 (E.D. La. 1988).

\textsuperscript{440} *Id.* at 17,807.

\textsuperscript{441} *Id.*