Recent Developments in Aviation Case Law

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RECENT DEVELOPMENTS IN AVIATION CASE LAW

JONATHAN M. HOFFMAN*
PHILIP S. HARRIS**

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I. JURISDICTION

A. IN PERSONAM JURISDICTION

In FOWLER EVANGELISTIC ASS'N v. Cessna Aircraft Co.,¹ the Eleventh Circuit held that a listing in a specialized telephone directory did not create sufficient minimum

¹ 911 F.2d 1564 (11th Cir. 1990).
contacts to make the listed business subject to personal jurisdiction in a foreign forum. The suit arose when the plaintiff’s airplane crashed en route to Florida shortly after a Mississippi fixed base operator (FBO) had repaired it. The Florida district court dismissed the plaintiff’s suit for lack of personal jurisdiction.

The Eleventh Circuit affirmed the dismissal, noting that the FBO did not have offices, employees or agents in Florida and did not conduct any business in the state. Despite being listed in the 1986-87 Aviation Telephone Directory, whose distribution included Florida, the FBO had neither paid for the listing nor purchased more prominent advertising within the Directory. The court held that “[e]ven if the basic listings are considered ‘advertisements,’ they are not enough, without more, to provide contacts which comport with due process.” The court determined that the “something more” was not satisfied by the FBO’s knowledge that the plane was headed to Florida rather than to a location within Mississippi. Furthermore, it was not satisfied by any foreseeability that the FBO would service an airplane that would fly to Florida. Accordingly, the Eleventh Circuit held that the trial court’s dismissal for lack of jurisdiction was proper.

B. FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

The Second Circuit in Barkanic v. General Administration of Civil Aviation of the People’s Republic of China held that the FSIA implicitly required courts to apply choice-of-law rules of the forum state concerning all issues governed by state substantive law. In Barkanic, the estates of two American citizens brought a wrongful death action after their decedents were killed in the crash of a Chinese plane

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2 Id. at 1566.
3 Id. at 1565.
4 Id. at 1566.
5 Id.
6 923 F.2d 957 (2d Cir. 1991).
8 Barkanic, 923 F.2d at 959.
en route from Nanking to Beijing, China. New York choice-of-law rules were applied because it was the forum state which led to the application of Chinese law. Applying Chinese substantive law, the airline's liability for the wrongful death of a noncitizen was limited to $20,000.

In Antares Aircraft L.P. v. Federal Republic of Nigeria,\(^9\) the court held that the defendants were immune from suit in the United States because none of the statutory exceptions to the FSIA applied.\(^{11}\) A New York limited partnership brought an action to recover damages for conversion of an aircraft. The alleged conversion took place when the Nigerian Airports Authority (NAA) wrongfully imposed parking and landing fees upon the partnership's aircraft, blocking its removal until the fees were paid.

The NAA asserted it was an instrumentality of the Federal Republic of Nigeria and, therefore, entitled to avail itself of sovereign immunity under the FSIA. The district court agreed and rejected the plaintiffs' assertion that the acts complained of fell into the exceptions set forth in 28 U.S.C. § 1605(a). It was determined that because the forced transfer of funds was an indirect consequence of the alleged tortious activity in Nigeria, the "direct effects" test could not be used to invoke the commercial activities exception of the FSIA.\(^2\) Simply because the NAA operated an international airport did not mean it was engaged in commercial activity within the United States. Consequently, the expropriation exception was unavailable.\(^3\) Finally, the court noted that the noncommercial tort ex-

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9 \textit{Id.} at 960.


11 \textit{Id.} at *4.

12 28 U.S.C. § 1605(a)(2) provides that immunity will not be available in cases in which the activity is carried on "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1988).

ception was unavailable because the allegedly tortious conduct occurred outside the United States. Thus, the court granted defendants’ motion to dismiss.

In Schoenberg v. Exportadora de Sal, S.A., the Ninth Circuit stated “[a]lthough the general rule is ‘that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits,’ [where] jurisdiction . . . is based on FSIA, not diversity, . . . federal common law applies to the choice of law rule determination.” Schoenberg was a wrongful death suit brought against a Mexican corporation arising out of a fatal air crash that occurred in San Diego, California, as the plane approached an airport in Tijuana, Mexico. The court noted that federal common law presumes that the law of the place where the injury occurs applies, and because the presumption was not overcome, California law was applied.

In Trump Taj Mahal Assoc. v. Costruzioni Aeronautiche Giovanni Agusta S.p.A., the New Jersey district court held removal to federal district court was proper because Costruzioni Aeronautiche Giovanni Agusta S.p.A. (Agusta) was a “foreign state” under 28 U.S.C. § 1603. The plaintiffs, employers of three executives who died

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15 930 F.2d 777 (9th Cir. 1991).
16 Id. at 782 (citations omitted).
17 Id. at 783.
19 28 U.S.C. § 1603 provides in part:
   (a) A “foreign state” . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
   (b) An “agency of 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 a 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 the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
when an Agusta A109 helicopter crashed, sued Agusta in New Jersey state court for wrongful death damages. Agusta removed the case to federal court pursuant to 28 U.S.C. § 1604.20 Despite the plaintiff's assertion that § 1603(b)(2) did not contemplate that a private corporation could be owned by a foreign government, the court held it was irrelevant whether the entity was a public corporation or a private corporation, so long as the Italian government held a majority interest.21

Furthermore, the plaintiffs' assertion that Agusta was a citizen of the United States because it maintained a Delaware based wholly-owned subsidiary was rejected by the court. The Agusta court held that a foreign corporation does not become a United States citizen by the mere fact of its ownership of a United States subsidiary.22 A corporation is deemed to be a citizen of any state in which it has its principal place of business,23 and Agusta's principal place of business was Milan, Italy. Therefore, removal was proper, and the court held for defendants on the merits.24

C. FORUM NON CONVENIENS

In Lacey v. Cessna Aircraft Co.,25 the Third Circuit reversed the district court for the second time26 and held that the nature of the balancing of public and private interests articulated in Gulf Oil Corp. v. Gilbert27 is essentially

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20 28 U.S.C. § 1604 (1988). The statute provides in part that "a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in sections 1605 to 1607 of this chapter." Id.
22 Id.; see Trump Taj Mahal Assoc., 761 F. Supp. at 1151.
24 Trump Taj Mahal Assoc., 761 F. Supp. at 1151.
25 932 F.2d 170 (3d Cir. 1990).
qualitative. The court rejected a quantitative analysis which would allow removal if the majority of factors were satisfied. Lacey arose out of an aircraft crash in British Columbia, Canada, in which Lacey, an Australian citizen, was severely burned. Lacey brought suit in the Western District of Pennsylvania, the domicile of Hanlon & Wilson, the manufacturer of the allegedly defective exhaust system. The district court granted the defendants' motion to dismiss on forum non conveniens grounds and suggested British Columbia was an appropriate alternative forum. On appeal, a divided Third Circuit held that the district court had abused its discretion by quantitatively evaluating the Gulf Oil factors, rather than engaging in a qualitative analysis. The district court had failed to accord sufficient weight to the question of what difficulties Lacey might face in obtaining discovery from nonparties who were in possession of records relevant to the litigation. One such non-party was Wall Colmonoy, an Oklahoma based business, which had subsequently acquired Hanlon & Wilson. The court stated "we have neither substituted our judgment for that of the district court nor reduced the multi-factor Gulf Oil/Piper analysis to one factor [access to sources of proof]. We instead have read Piper as prescribing a qualitative not quantitative balancing." Thus, the court remanded with orders to reconsider whether British Columbia's discovery rules would afford the plaintiff access to essential sources of proof at trial with the understanding that much of the evidence necessary to the plaintiff's action might be outside of the defendant's control.

On remand, the district court determined that because the plaintiff could not specifically state what witnesses and

28 Lacey, 932 F.2d at 182.
29 Id.
31 Lacey, 932 F.2d at 182.
33 Lacey, 932 F.2d at 186.
34 Id.
documents were critical without discovery, it would be speculation for the court to make such a determination. The court stated "[i]n view of our singular lack of success so far in addressing the issues which the United States Court of Appeals for the Third Circuit deems vital on this question, we refuse to engage in such speculation." Consequently, the court denied defendants' motion to dismiss. The court held that the case should proceed until the close of discovery and that it would reexamine the forum non conveniens issue if the defendants wanted to represent it at that time.

In Martino v. VARIG, S.A., the court held that a party dismissed on grounds of forum non conveniens was still subject to the court's jurisdiction. The plaintiffs brought suit in the United States against Boeing, the manufacturer of an aircraft involved in a crash in Brazil. The court granted Boeing's motion to dismiss on the grounds of forum non conveniens. However, the court's order required Boeing to submit to service of process in Brazil, waive certain aspects of any statute of limitations, comply with federal court style discovery, and satisfy any judgment rendered against it by a Brazilian court. Furthermore, should Boeing fail to satisfy any of the conditions, the court stated it would reinstate jurisdiction upon request and reopen the action. The court did not explain its authority to direct Boeing to comply with these orders, nor did the court explain by what authority it could obtain jurisdiction since its analysis had already led it to the conclusion that suit in the United States was improper.

In Myers v. Boeing Co., the Supreme Court of Washington criticized and declined to follow the "lesser defer-

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36 Id.
37 Id.
39 Id. at *7.
40 Id.
41 Id.
ence” standard articulated by the United States Supreme Court plurality in Piper Aircraft Co. v. Reyno. The suit arose as a result of a crash in which a Boeing 747 owned by Japan Air Lines (JAL) crashed en route from Tokyo to Osaka, Japan, killing 520 people. The court noted that the ordinarily persuasive authority of Reyno was undermined by the fact that only a four-justice plurality concurred with the lesser in deference standard holding. Additionally, the court held Reyno “purports to be giving lesser deference to the foreign plaintiffs’ choice of forum when, in reality, it is giving lesser deference to foreign plaintiffs, based solely on their status as foreigners.” The court questioned why it is less reasonable to assume that a plaintiff, who is a Japanese citizen residing in Wenatchee, Washington, who brings a suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit. Finally, the court said it was unnecessary to adopt the Reyno rationale because the Gulf Oil factors, properly applied, were sufficient to ensure fair and equitable results. Thus, the court affirmed dismissal because the trial court had reached the proper conclusion despite improper reasoning.

D. Removal

In Mignogna v. Sair Aviation, Inc., the court held that: (1) an action against a Nonappropriated Fund Instrumentality (NAFI) activity was not subject to removal as an action against an “officer of the United States or [of] a federal agency,” and (2) absent certainty that state court jurisdiction would be barred, remand was required. In Mignogna, a single-engine Mooney aircraft piloted by

43 See Piper Aircraft, 454 U.S. at 232.
44 Myers, 794 P.2d at 1280.
45 Id. at 1281.
46 Id.
47 Id.
48 937 F.2d 37 (2d Cir. 1991).
49 Id. at 41.
50 Id. at 43.
Mignogna crashed at the Burlington, Vermont International Airport. Mignogna commenced an action in state court alleging that Hancock, a NAFI, had leased the aircraft to Mignogna and that Mignogna suffered injuries in the plane crash as a result of Hancock's negligence, recklessness and carelessness. The United States petitioned for removal pursuant to 28 U.S.C. § 1442(a)(1) on the ground that Hancock was an instrumentality of the federal government by virtue of 5 U.S.C. § 2105(c) and 10 U.S.C. § 9779(c). The district court accepted jurisdiction and subsequently dismissed the case on other grounds.

On appeal, the Second Circuit held that removal was improper. The court determined that "Hancock, an impersonal entity, was not an officer of the United States, and thus could validly effect removal under section 1442(a)(1) only if that section authorized removal by an "agency" of the United States." The court noted that in International Primate Protection League v. Administrators of Tulane Educational Fund, the United States Supreme Court had recently ruled that 28 U.S.C. § 1442(a)(1) did not provide the necessary authorization. In International Primate, the Supreme Court held, "when construed in the relevant context, the first clause of § 1442(a)(1) grants

A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
   (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

52 5 U.S.C. § 2105(c) (1988) describes which individuals are considered government employees when they are paid from nonappropriated funds and states that NAFI's are instrumentalities of the federal government.

54 937 F.2d at 41.
55 Id. at 40.
57 937 F.2d at 40.
removal power to only one grammatical subject, 'any officer,' which is then modified by a compound prepositional phrase: 'of the United States or of any agency thereof.' Consequently, jurisdiction was improper because 28 U.S.C. § 1442(a)(2) did not authorize an agency to remove an action.

However, the court noted that remand might be improper if it would be futile. This would exist, for example, if the state court could not exercise jurisdiction over Mignogna's claim against Hancock. In *International Pri-mate*, the Supreme Court recognized the possibility of a futility exception to the explicit remand rule of 28 U.S.C. § 1447(c), and determined that they were precluded from determining futility of a remand due to uncertainties of the case. The Second Circuit noted that the government's petition for removal asserted only that the NAFI's activities were considered instrumentalities of the federal government and did not assert that appropriated funds were at stake in the litigation. The court noted that Congress had clearly expressed its intention that no appropriated funds be used to support NAFI activities and that revenue from nonappropriated fund activities must be severed from general federal revenues. Therefore, NAFI funds had an identity apart from that of treasury funds. The court held NAFI might be subject to claims directly against them and their nonappropriated assets, as distinct from claims against the United States and the public fisc. Consequently, the court held a remand to state court would not be futile because it was uncertain whether Hancock possessed assets subject to state court jurisdiction.

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58 111 S. Ct. at 1705.
59 Id. at 1709.
60 937 F.2d at 41.
61 111 S. Ct. at 1709.
62 937 F.2d at 43.
63 Id. at 42 (citing United States v. Hopkins, 427 U.S. 123, 125 (1976)).
64 937 F.2d at 42.
65 Id. at 43.
In *Vail v. Pan Am Corp.*,\(^{66}\) the court held that the plaintiffs' claims were not preempted by the complete preemption doctrine\(^{67}\) and remanded the action to state court. The plaintiffs, whose decedents died when Flight 103 crashed near Lockerbie, Scotland, sued Pan Am in New Jersey state court, alleging fraud, consumer fraud, and breach of contract because Pan Am had represented that it was implementing a sophisticated security system which it did not in fact implement. Pan Am removed the action to federal court on the basis of federal question jurisdiction and plaintiffs sought remand.

The court noted that federal question jurisdiction can only be established if a federal cause of action was presented in a well-pleaded complaint.\(^{68}\) The plaintiffs had intentionally not met this requirement. Nonetheless, Pan Am asserted removal was proper because it intended to assert that the Federal Aviation Act (the Act)\(^{69}\) preempted the plaintiffs' state law claims. The court noted, however, that a case may not be removed to federal court on the basis of a federal defense to a state law claim.\(^{70}\) The court also rejected Pan Am's assertion that the "complete preemption" doctrine converted plaintiffs' state claim into one stating a federal claim for the purposes of the well-pleaded complaint rule.\(^{71}\) The court held that for the Act to create removal jurisdiction, the Act "must contain a civil enforcement provision and such provision must have been intended by Congress to create a basis for removal."\(^{72}\) Thus, removal jurisdiction was not proper because the Act contained no such provision.\(^{73}\)


\(^{67}\) Id. at 656; *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (employer's state claim under a no-strike clause was deemed to have arisen under the laws of the United States).

\(^{68}\) *Vail*, 752 F. Supp. at 655 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)).


\(^{70}\) *Vail*, 752 F. Supp. at 655 (quoting *Caterpillar*, 482 U.S. at 393).

\(^{71}\) Id. at 659.

\(^{72}\) Id.

\(^{73}\) Id.
E. Subject Matter Jurisdiction

In *Stewart v. American Airlines, Inc.*,\(^74\) the court held that state law claims of negligent maintenance were not completely preempted by federal law and remanded the action to state court for lack of subject matter jurisdiction.\(^75\) The plaintiff alleged that he was injured when the airplane he was travelling in suffered a deflated nose wheel and began shaking. He sued in Texas state court alleging the defendants were negligent in failing to properly maintain their aircraft, failing to correct unsafe conditions and contracting with and transporting passengers on a regional carrier which did not properly maintain its aircraft. The defendants removed the action to federal court relying on the "complete pre-emption" doctrine.\(^76\)

The defendants noted that the Federal Aviation Act specifically pre-empted all state law claims to the extent that such claims "relat[e] to rates, routes or services or any air carrier...."\(^77\) The defendants asserted that the plaintiff's claims were necessarily related to services and were therefore pre-empted. The court rejected the defendants' argument for two reasons. Initially, the cases supporting defendants' position "involved services provided by individual airline employees directly to passengers, such as ticketing, boarding, in-flight service, and the like," whereas in the present case, plaintiff's claims did not arise out of the allegedly negligent performance of such services.\(^78\) Secondly, assuming the defendants' assertion were valid, then most if not all state law claims would be pre-empted by the Act.\(^79\) However, the court noted several federal decisions in which such claims were not pre-empted.\(^80\) Moreover, the court noted that the

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\(^75\) Id. at 1199-1200.


\(^78\) 776 F. Supp. at 1197.

\(^79\) Id. at 1198.

\(^80\) Id.
Fifth Circuit had recently held jurisdiction was properly retained in an indistinguishable case. In *Seidman v. American Airlines, Inc.*,\(^81\) a plaintiff incurred injuries following an aircraft captain's orders to evacuate the airplane by using the emergency slides. The plaintiff brought a diversity action in federal district court alleging solely state law claims. The *Stewart* court noted that had the Act completely preempted the plaintiff's state law claims, the district court would have had no basis for retaining subject matter jurisdiction.\(^82\) In that case, the Fifth Circuit would have been obliged to dismiss the appeal on its own motion. Because the Fifth Circuit did not dismiss in *Seidman*, the *Stewart* court held that the Act did not preempt Stewart's claims.\(^83\) Therefore defendants' "complete preemption" position was without merit.\(^84\)

In *Lloyd's Syndicate 609 v. United States*,\(^85\) underwriters at Lloyd's brought a subrogation action against the United States in federal court seeking reimbursement of a one-time one million dollar payment to its insured, Helitaxi, Ltd. Helitaxi was the Colombian owner of a Grumman G-1 Aircraft which was declared a total loss as a result of extensive damage suffered during the United States bombardment of Panama's Paitilla Airport in 1989.

Underwriters asserted jurisdiction under the Prize Act,\(^86\) the Federal Tort Claim Act (FTCA),\(^87\) the Suits in Admiralty Act,\(^88\) the Public Vessels Act,\(^89\) the Foreign Claims Act,\(^90\) and the All Writs Act.\(^91\) The court rejected

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\(^81\) 923 F.2d 1134 (5th Cir. 1991).
\(^82\) *Stewart*, 776 F. Supp. at 1200.
\(^83\) *Id.*
\(^84\) *Id.*
\(^86\) *Id.* at 1000. The Prize Act and the Prize Law permit suits in Federal Court to determine title or payment for items captured during times of belligerency which are intended for use by the United States or its agents. See U.S. Const. art. III, § 2; 28 U.S.C. §§ 1333, 1356 (1988).
\(^87\) 28 U.S.C §§ 1346(b), 2671-2680 (1988).
each basis of jurisdiction and dismissed the action.\textsuperscript{92}

The court first held the destruction of property during combat was not a taking, capture or seizure within the meaning of the Prize Act.\textsuperscript{93} The court stated:

To rule otherwise is to suggest that the United States would be liable for the wartime destruction of any property owned by any person, save for that either owned or being used by the armed forces of the other belligerent nation. This clearly is not and cannot be the law.\textsuperscript{94}

Underwriters also asserted that jurisdiction was supported because the United States had waived sovereign immunity. However, the court held that even if that assertion were true, jurisdiction was improper.\textsuperscript{95} The court noted that the FTCA did not apply because the claim did not arise within the United States.\textsuperscript{96} The Suits in Admiralty Act and the Public Vessels Act were inapplicable because land forces, not vessels, were responsible for the damage to the aircraft.\textsuperscript{97} And finally, as neither the Foreign Claims Act nor the All Writs Act contained a waiver of sovereign immunity provision, they did not supply grounds for exercising jurisdiction.\textsuperscript{98} Accordingly, the court granted the United States' motion to dismiss.\textsuperscript{99}

In \textit{RLI Insurance Co. v. United States Aviation Underwriters Inc.},\textsuperscript{100} following \textit{Carden v. Arkoma Associates},\textsuperscript{101} the court held that the citizenship of every member of an unincorporated entity must be considered for diversity purposes.\textsuperscript{102} RLI, a citizen of Illinois, sued United States Aviation Underwriters, Inc. (USAU), a citizen of New York, for injuries incurred in an aircraft crash. USAU was

\begin{thebibliography}{10}
\bibitem{92} \textit{Lloyd's}, 780 F. Supp. at 1000-01.
\bibitem{93} \textit{Id.} at 1000.
\bibitem{94} \textit{Id.}
\bibitem{95} \textit{Id.}
\bibitem{96} \textit{Id.}
\bibitem{98} \textit{Lloyd's}, 780 F. Supp. at 1000-01.
\bibitem{99} \textit{Id.} at 1001.
\bibitem{100} \textit{Id.}
\bibitem{101} 739 F. Supp. 1219 (N.D. Ill. 1990).
\bibitem{102} 494 U.S. 185 (1990).
\bibitem{103} \textit{RLI Ins. Co.}, 739 F. Supp. at 1221.
\end{thebibliography}
also the aviation manager for United States Aircraft Insurance Group (USAIG), a coalition of independent insurance companies who had insured the aircraft’s owner. Two USAIG members were Illinois citizens. The court held that an action brought against USAU necessarily included USAIG as the real party in interest. The court viewed USAU and USAIG as two partners, each of whom performed a particular task for the benefit of the partnership. Because the action involved a matter related to the business of the single entity comprised of USAU and USAIG, such as providing insurance for all aviation risks, it was appropriate to consider the citizenship of every member of USAIG. Because USAIG, a coalition of independent insurance companies, included members with the same citizenship as the plaintiff, diversity was destroyed and the case was dismissed for lack of subject matter jurisdiction.

In Rodrigue v. United States, the court held that claims settled under the Military Claims Act (MCA) were final with respect to administrative review only and not with respect to judicial review. The plaintiff alleged the United States Air Force owed his son, an airman, a duty to rescue him from drowning. The Department of the Air Force rejected the plaintiff’s claim for damages because the airman’s death was “incident to service.” The plaintiff exhausted his administrative remedies and filed suit in federal court seeking a declaratory judgment stating that the Air Force misinterpreted the “incident to service” exception. The United States filed a motion to dismiss for lack of subject matter jurisdiction.

The court reviewed the legislative history of the MCA to determine the meaning of “final and conclusive”. The court noted that in the section entitled “purpose of the Legislation” the United States Senate had stated: “The
proposed legislation would be consistent with the cited general policy of preventing other agencies of the Government from reviewing and reversing actions on claim settlements of agencies specifically authorized to settle and pay certain claims." Therefore, the language did not preclude judicial review. Consequently, the court held that it had subject matter jurisdiction of plaintiff’s claim.

F. ABSTENTION

In Neuchatel Swiss General Insurance Co. v. Lufthansa Airlines, the pendency of parallel proceedings in Geneva, Switzerland was an insufficient justification to apply the Colorado River abstention doctrine. The suit arose out of an ordinary commercial dispute over the loss of cargo involving the owner, the consignee, the cargo’s insurer, and the air carrier to whom the cargo was entrusted. The Ninth Circuit held that a federal court owes less deference to a foreign court than to a state court. That the parallel proceeding was pending in a foreign jurisdiction weighed in favor of retaining jurisdiction, not abstaining.

II. PRODUCTS LIABILITY

A. EAST RIVER STEAMSHIP DOCTRINE

Many cases follow the lead of the United States Supreme Court in East River and hold that an action in

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109 925 F.2d 1193 (9th Cir. 1991).
110 Id. at 1194; see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976) (absent "exceptional circumstances," federal courts have an obligation to exercise their jurisdiction concurrently with other courts).
111 Lufthansa, 925 F.2d at 1195.
112 Id.
113 East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986) (striking tort claims of oil-tanker operator which brought negligence and strict liability action against manufacturer of propulsion engine which malfunctioned causing commercial losses).
tort may not be maintained between commercial parties for economic losses arising from a defective product when there is no injury other than to the product itself.\textsuperscript{114}

The issue of what constitutes damage to "other property" has been addressed as well. In \textit{Lease Navajo, Inc. v. Cap Aviation, Inc.},\textsuperscript{115} for example, the court held that the failure of an engine component which caused the whole engine to explode constituted damage to other distinct property and did not preclude an action solely for economic damages.\textsuperscript{116} In \textit{Lease Navajo}, the plaintiffs brought a successful action against Cap Aviation Inc. (Cap) for damage sustained when two aircraft engines rebuilt by Cap exploded. Subsequently, Cap filed a third-party complaint against the engine manufacturer, Avco Lycoming, for contribution and indemnity. Cap asserted Lycoming breached its warranties of merchantability and fitness because the engine's technical manual directed Cap to rebuild the engine with outdated components. Cap sought recovery of the costs incurred in repairing the aircraft, replacing the engines and cores, and travelling to the location of the explosion to complete the repairs. Lycoming moved for summary judgment, asserting that Pennsylvania does not allow recovery by a commercial purchaser against a manufacturer of a product in a tort action where the only injury is to the product itself.

The court denied Lycoming's motion, distinguishing cases where a plaintiff purchased a multi-part integrated product and a single part failed.\textsuperscript{117} In integrated purchase


\textsuperscript{116} Id. at 460.

\textsuperscript{117} Id. at 459; see also Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110 (3d Cir.
cases, whether the destruction was either to the single part only, or to the entire unit, the courts have held the damage was to the product itself. However, in the present case the engines and the allegedly defective components were not purchased as an integrated unit. Rather, Cap purchased a component part which it then installed in a Lycoming engine. The court stated that "[n]owhere does it appear that Cap Aviation purchased the engines and the components as a whole. The failure of the component caused damage to other distinct property."

Reaching the contrary result in *Petroleum Helicopters, Inc. v. Avco Corp.*, the court held that an emergency flotation device was a "component part" of a helicopter, was not "other property," and therefore the owner could not maintain a strict products liability claim under maritime tort law. *Petroleum Helicopters* sought recovery for damages sustained by its helicopter when it capsized after the defendant's emergency flotation device failed. The float had been manufactured according to the helicopter manufacturer's specifications and assembled and sold as an integrated whole. The failed float was not original equipment on the crashed helicopter because the plaintiff routinely interchanged floats between similar helicopters. The district court held that *East River* applied to the case and granted summary judgment for defendants which was affirmed by the Fifth Circuit Court of Appeals. The court also held that the plaintiff's recovery was governed by the terms of its contract and agreed that the plaintiff should not be able to interchange the flotation devices and thereby create an additional non-warranty remedy.

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118 *Cap Aviation*, 760 F. Supp. at 459.
119 *Id.*
120 930 F.2d 389 (5th Cir. 1991).
121 *Id.* at 393.
122 *Id.* at 393.
123 *Id.* at 393.
Similarly, in *National Union Fire Insurance Co. of Pittsburgh, PA v. Pratt and Whitney Canada, Inc.*, the Supreme Court of Nevada held that an airplane engine and the airplane itself are a single integrated product for the purposes of a law suit in products liability. The action arose out of the total loss of a Piper Model PA-31T Cheyenne II which crashed when a compressor blade in one of two Pratt and Whitney Model PT6A-28 engines malfunctioned. The court recognized that the engine was a defective component part of the Piper and arguably destroyed other property, i.e., the entire airplane. The court agreed, however, with the United State's Supreme Court's reasoning in *East River* that "[s]ince all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability." 

The court was greatly persuaded by the availability of insurance to cover such risks. The court stated: "[c]ommercial products that may, for whatever reason, injure themselves are readily insured and suitable for inclusion within the economic loss doctrine. . . . When a product 'injures itself' protection derived from the interplay of manufacturer's warranties and insurance supplies a generally adequate basis for consumer redress." For similar reasons, the court held that tort damages were not available even though the product crashed calamitously and exposed persons to unreasonable risks of harm. Consequently, plaintiffs' subrogee could not recover from the manufacturer on a strict liability theory because the damage was an economic loss.

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125 Id. at 604.
127 815 P.2d at 604-05.
128 Id. at 605.
In *Aris Helicopters, Ltd. v. Allison Gas Turbine*, the Ninth Circuit held *East River* would control the resolution of a California tort action only if it were brought in admiralty. The plaintiff alleged it incurred economic damages because its helicopter crashed due to defendants' defective design and manufacture. The court held that proper authority in California is *Scandinavian Airlines System v. United Aircraft Corp.*, which adopted the rule enunciated in *Kaiser Steel Corp. v. Westinghouse Electronic Corp.* Although the district court applied the proper test, the Ninth Circuit held that the court erred by dismissing the complaint for failure to state a claim. The court also determined the *Kaiser Steel* factors were too complicated to be determined on a motion to dismiss.

**B. Government Contractor Defense**

In *Skyline Air Service, Inc. v. G. L. Capps Co.*, the Fifth Circuit held that the failure to provide the original government contract did not preclude partial summary judgment on the issue of the government contractor defense. In *Skyline*, a military surplus Bell Model UH-1B helicopter owned by Skyline Air Service, Inc. crashed during a log hauling operation. The crash killed the pilot and damaged the aircraft extensively. The National Transportation Safety Board concluded the crash was caused by engine failure. Americas Insurance Company

129 932 F.2d 825 (9th Cir. 1991).
130 *Id.* at 827.
131 Plaintiffs alleged the crash of the helicopter caused damage to the helicopter itself and a loss of income to Aris along with additional insurance expenses and the expenses of the lease for a substitute helicopter in the total amount of $509,677.33. *Id.* at 826.
132 601 F.2d 425 (9th Cir. 1979).
133 127 Cal. Rptr. 838, 845 (1976) (product liability does not apply between parties who (1) "deal in a commercial setting;" (2) are in "positions of relatively equal economic strength;" (3) "bargain the specifications of the product;" and (4) "negotiate concerning the risk of loss from defects" in the product).
134 *Allison Gas Turbine*, 932 F.2d at 827.
135 *Id.*
136 916 F.2d 977 (5th Cir. 1990).
137 *Id.* at 980.
filed a subrogation claim against Bell and others. Bell moved for summary judgment, raising the government contractor defense.

The court applied the three-part test set forth in Boyle v. United Technologies Corp. In Boyle, the United States Supreme Court held, liability for design defects in military equipment cannot be imposed, pursuant to state law, when: 1) the United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The Skyline court held Bell’s inability to produce the original government contract for the crashed helicopter did not prevent satisfaction of the first prong of the Boyle test. The court found Bell had presented sufficient evidence to establish that the United States approved reasonably precise specifications, especially in light of the plaintiff’s failure to challenge any of the information or produce contradictory evidence. Similarly, Bell was able to produce sufficient evidence to satisfy the second and third prongs. Therefore, summary judgment was appropriate.

In In re Air Crash Litigation Frederick, Maryland, the court held that the government contractor defense applies where the “discretionary function” exception to the FTCA would prevent liability on the part of the federal government in the area of military procurement. The case arose when an Air Force EC-135N aircraft crashed killing all aboard. The personal representatives of the military and civilian decedents brought a products liability
suit alleging that the aircraft was defectively designed. The court engaged in an extensive analysis and held that Boeing, the aircraft manufacturer, Lear, the manufacturer of the allegedly defective autopilot, and McDonnell Douglas Corporation, the aftermarket installer of the autopilot, were all entitled to immunity as a matter of law. The court held that approval of "reasonably precise specifications" was satisfied because the government had exercised its discretion with regard to the design of the particular piece of equipment, instead of simply ordering it from stock.\footnote{Id. at 1335.} Discretion was expressed through engineering analysis, through the exercise of judgment regarding technical and military factors, and through the evaluation of trade-offs between safety and mission effectiveness. The court noted that if the three Boyle elements were met, the requisite "significant conflict" was present and state law claims were preempted.\footnote{Id. at 1336.} Furthermore, the court rejected the plaintiffs' assertion that the defendants were negligent in failing to flight-test the aircraft, and therefore Boyle was inapplicable. The negligence claims were indistinguishable from the defective design allegations to which Boyle was applicable and were also barred.\footnote{Id. at 1364.}

C. PROOF OF DEFECT

In Cleveland v. Piper Aircraft Corp.,\footnote{890 F.2d 1540 (10th Cir. 1989).} the Tenth Circuit, applying New Mexico law, held that an initial tortfeasor, whose negligence may be deemed to have proximately caused all of the injuries, is or at least may be a concurrent tortfeasor with a crashworthiness tortfeasor as to the enhanced injuries.\footnote{Id. at 1549.} Cleveland arose from a bizarre set of facts. A Piper Super Cub Model PA-18-150 aircraft taking off from Mid-Valley Airport in Los Lunas, New Mexico,
crashed into a van deliberately parked on the runway by the airport owner. The owner had previously warned Cleveland, the pilot, that he was suspending airport operations because certain glider flights were not in compliance with Federal Aviation Administration regulations. The collision injured the pilot, who was sitting in the rear seat, which was equipped only with a lap belt, not a shoulder harness. He was thrown into a camera affixed to the front seat. The camera was installed to film a glider attached to the plane by a tow line. Cleveland sued Piper alleging that the aircraft was defectively designed because it had inadequate forward vision (the initial collision claim) and because it lacked a rear seat shoulder harness (the crashworthiness claim). The jury found Piper's negligence accounted for 41.7% of the initial collision damages and 91.6% of the crashworthiness damages. The court entered judgment in favor of the plaintiff in an amount derived by multiplying the total damages ($2,500,000) by the percentage of fault allocated to the initial collision. Because the plaintiff sustained only head injuries, the jury found 100% of plaintiff's injuries were attributable to the airplane's lack of a rear shoulder harness.

The plaintiff asserted that the initial and crashworthiness tortfeasors were successive tortfeasors because no injuries were attributable to the initial collision. The plaintiff further asserted that New Mexico's pure comparative fault law was inapplicable because it eliminated joint and several liability only as between concurrent tortfeasors. Consequently, the plaintiff contended that the district court erred in entering judgment on the first collision claim instead of on the crashworthiness claim because the negligence of the initial tortfeasors should not have been compared to the negligence of the crashworthiness tortfeasors.

The court acknowledged that the jury's finding that 100% of the damages were attributable to the crashworthiness injuries represented an implicit finding
that the plaintiff would not have received any injuries as a result of the initial collision. The court, however, declined to accept the plaintiff's reasoning that the verdict also represented an implicit finding that the negligence of the original tortfeasors was not a proximate cause of the crashworthiness injuries. Even though the relationship was that of successive tortfeasors, the court noted that under New Mexico law both the initial tortfeasors and the crashworthiness tortfeasors may be liable for the second collision or enhanced injuries. Nevertheless, because the verdict form did not permit the jury to compare the negligence of the initial tortfeasors with that of the crashworthiness tortfeasors, the court remanded for a new trial.

D. Non-Liability for Former Manufacturers

In *Goldsmith v. Olon Andrews, Inc.*, the Sixth Circuit, applying Ohio law, held that a manufacturer who had ceased manufacturing a product and who no longer sold the design for that product was not a seller for the purposes of establishing liability under Restatement (Second) of Torts § 402A. In 1984, Andrews and Goldsmith were injured when Andrews' Bell 47 helicopter crashed and caught fire. The plaintiffs' injuries were primarily due to the fire and Andrews died as a result of burn injuries. The plaintiffs brought suit alleging Bell was strictly liable because it had negligently designed the Bell 47's fuel system.

The court found the following facts: (1) the crashed helicopter had been assembled by Olympic Helicopters, a third party, from spare, new, and surplus parts acquired from various sources, including Bell; (2) Bell had ceased manufacturing the Bell 47 in 1974; however, it had continued to provide product support to operators of Model

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149 Id. at 1548.
150 Id. at 1550.
151 Id. at 1557.
152 941 F.2d 423 (6th Cir. 1991).
153 Id. at 427.
and (3) in 1976, Bell improved the crashworthiness of the fuel system for the Model 47 by providing retrofit kits for fiberglass-wrapped fuel tanks and breakaway fittings for the fuel lines. Bell notified existing owners, including Olympic, of the improvement. Olympic, however, had not included the improvements because FAA regulations did not require their inclusion on existing helicopters.

The court held that in order to satisfy the rationale for strict liability, Bell must be deemed a seller. The court noted Bell had never licensed, sanctioned, nor approved Olympic's use of Bell's design to manufacture the helicopter. Furthermore, Bell did not control production of the helicopter, could not assure conformity with its improved designs, and was in no position to treat the risks of producing the helicopter as costs of production or to obtain liability insurance. Consequently, the court affirmed the lower court's grant of a directed verdict in favor of Bell.

E. Evidence

1. Evidence of pilot's prior navigational error.

In Galowich v. Beech Aircraft Corp., the court held that the evidence of a pilot's prior conduct was relevant to prove what actually happened at the time of the accident. The plaintiff's decedent died when his Beech King Air B-90 crashed on approach to the Joliet Airport. The plaintiff alleged the crash occurred because the aircraft's left propeller went into reverse pitch, and the plaintiff further asserted that evidence of the pilot's conduct prior to the crash was irrelevant. The court noted, however, that the evidence showed that the pilot was spatially disoriented throughout the entire hour-long flight.

154 Id. at 426.
155 Id. at 427.
156 Id.
158 Id. at 51.
The court held that the evidence was unlike a momentary aberration which, if uncontradicted, would allow a finding that the conditions were the same until the moment of the crash. Instead, the court held that the evidence tended to show what probably happened and the evidence supported a reasonable inference that the conduct involved continued from the point of observation to the place of the accident.

2. Miscellaneous

In Western Helicopter Services, Inc. v. Rogerson Aircraft Corp., the court granted the plaintiffs' motion for relief from summary judgment on the basis of newly discovered evidence. In Western Helicopter, the plaintiffs' decedent was killed in a helicopter crash caused by the failure of the helicopter's main rotor blade fork. The district court rejected the plaintiffs' theory that because the defendant was the sole supplier of forks to the plaintiff during the period in which the accident fork was installed, the defendant's fork was the accident fork. Consequently, the court granted summary judgment in favor of the defendant because the plaintiffs had produced no evidence that the accident fork was manufactured by the defendant.

Two weeks prior to the entry of judgment, the plaintiffs' expert examined and tested certain forks. After entry of judgment, based on those tests, the plaintiffs' expert concluded that the defendant had manufactured the accident fork. The plaintiffs moved for reconsideration, which the court granted.

The court noted that in order to grant relief, the mo-

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159 See Klavine v. Hair, 331 N.E.2d 355 (Ill. App. Ct. 1975) (evidence that plaintiff glanced into the glove compartment moments prior to the accident was inadmissible).
160 568 N.E.2d at 51.
162 Id. at 754.
163 Id. at 755.
vant must show that the evidence: (1) existed at the time of the summary judgment, (2) could not have been discovered through due diligence, and (3) was of such magnitude that production of it earlier would have been likely to change the disposition of the case. The court held the first factor was satisfied because the forks did in fact exist at the time the motion was filed. The court held the second factor was also satisfied despite the defendant’s assertion that the plaintiffs could have been more dogged in pursuing examination of the forks. The court held that the record reflected the plaintiffs’ diligent pursuit of that and other discovery. The court noted that a better course of action would have been to file immediately a motion for leave to file a supplemental memorandum in opposition to the motion for summary judgment. The third factor was satisfied because if the jury reasonably believed the testimony of plaintiffs’ expert, then it could reasonably find that defendant manufactured the accident fork.

In Gerhard v. Bell Helicopter Textron, the plaintiff alleged that the helicopter he was piloting crashed because of a defectively manufactured bell crank. The court granted defendant’s motion for summary judgment for a variety of reasons. First, the plaintiffs were unable to produce metallurgical testimony to support their claim, and the inability of their expert witness to conclude that the bell crank was unsound did not raise a genuine issue of material fact. Second, although the NTSB’s conclusion that the accident was probably caused by a defect was consistent with the plaintiff’s theory, NTSB’s conclusions regarding the probable cause of a crash were not admissible as evidence in a subsequent civil action arising out of the crash. Third, the affidavit of plaintiff’s mechanical engineering expert was conclusory and lacked specific

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165 Id. at 1545 (citations omitted).
166 Id. at 1546.
168 Id. at 555.
F. Pre-Trial Procedure

In Fine v. Facet Aerospace Products Co., the court held that a products liability plaintiff who raises a design defect claim is entitled to broader discovery than if the claim were solely one of negligent manufacture. In Fine, the plaintiff alleged that a defective fuel system caused the crash in which he was injured. Fine sought discovery of numerous aircraft fuel systems. The manufacturer produced documents specifically relating to metal fuel tanks or protruding vented fuel tanks like those installed in the crashed aircraft, but argued discovery of other types of systems was irrelevant. The court noted that under New York law a plaintiff bears the burden of proving feasible design alternatives that would have rendered the product safer. The requested discovery was relevant, therefore, to prove feasible alternatives. The court, however, still denied Fine’s discovery request because he had not specifically alleged the other fuel systems would be safer. Had Fine made a threshold showing of relevance, for example, through the affidavit of an expert in aviation engineering, presumably, discovery would have been allowed.

In In re Air Crash Disaster at Sioux City, the court granted the defendants’ motion for a protective order prohibiting the plaintiffs from taking depositions of its pilots in, or adjacent to, a flight simulator. The court noted that the flight recorder provided direct evidence of the events of the actual flight, and plaintiffs could question crew members about the flight. Conversely, the simulator required programming before it could simulate the

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170 Gerhard, 759 F. Supp. at 556.
172 Id. at 442.
173 Id. at 443.
174 Id. at 129.
175 131 F.R.D. 127 (N.D. Ill. 1990).
176 Id.
flight. The court held that although conducting the deposition while the crew members operated the flight simulator may have "theatrical value," it was burdensome and oppressive.\textsuperscript{177}

In \textit{Thomas Brooks Chartered v. Burnett},\textsuperscript{178} the Tenth Circuit held that the NTSB could invite manufacturers of a plane and its component parts to participate in an NTSB investigation without also allowing a representative of the individual who was killed in the crash to participate as an observer.\textsuperscript{179} The court noted that whether parties are named to participate in the investigation is left to the discretion of the investigator-in-charge.\textsuperscript{180} When they are picked, they are identified according to "who can provide suitable qualified technical personnel to actively assist in the field investigation."\textsuperscript{181} The court added: "An NTSB investigation is a forum for developing safety recommendations. It is not a show for an audience of silent note takers looking for someone to sue."\textsuperscript{182} Because the NTSB included in the record its reasons for denying participation,\textsuperscript{183} the court held that the decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.\textsuperscript{184}

\begin{itemize}
\item[\textsuperscript{177}] Id. at 128.
\item[\textsuperscript{178}] 920 F.2d 634 (10th Cir. 1990).
\item[\textsuperscript{179}] Id. at 636.
\item[\textsuperscript{180}] Id.
\item[\textsuperscript{181}] Id. at 637 (quoting 49 C.F.R. § 831.11(a) (1991)).
\item[\textsuperscript{182}] Id. at 646.
\item[\textsuperscript{183}] The trial court noted that having a representative of the aircraft owner present would impede the free flow of information between the NTSB and the manufacturer. Also, the court noted that if representation was allowed at the main investigation site, the investigation might be delayed because the same people might demand representation at remote test sites. Finally, the court noted that the NTSB factual reports were available to the aircraft owner, and that the investigators could be deposed. Id. at 640.
\item[\textsuperscript{184}] Id. at 647-48.
\end{itemize}
III. FEDERAL TORT CLAIMS ACT (FTCA)

A. DISCRETIONARY FUNCTION

In Tiffany v. United States, the Fourth Circuit held that a claim which challenged military defense procedures in intercepting an unidentified aircraft in restricted airspace was not justiciable because it would violate the separation of powers doctrine. The plaintiffs' decedents were killed in a mid-air collision between their Beech Baron airplane and a United States F-4C fighter jet. The decedent, flying without a flight plan, entered an Air Defense Identification Zone as an unidentified and potentially hostile aircraft. Military authorities dispatched two fighter jets to visually identify the unknown plane, and the collision occurred in poor weather conditions when one of the jets instituted a sharp left bank to avoid the Baron. Tiffany's widow brought suit under the Death on the High Seas Act (DOHSA) and Suits in Admiralty Act (SAA) alleging that the military pilot and ground control had been negligent in their conduct of the intercept.

The court noted that respect for separation-of-powers principles addressed through the discretionary function exception of the FTCA had been applied by analogy to suits brought under DOHSA and SAA. The court emphasized that the legislative and executive branches are vested with exclusive authority to make discretionary decisions regarding issues of actual military defense. The court held that it was not for the judiciary to challenge the legality, wisdom or propriety of military tactics. The court also held that the propriety of regulations which address intercept procedures were not for resolution by the courts, but rather were best left to other branches of government with greater expertise and more direct political

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186 Id. at 282.
189 Tiffany, 931 F.2d at 276 (citations omitted).
190 Id. at 279.
accountability. Consequently, the court reversed the lower court and remanded with directions to dismiss.

In Redmon By And Through Redmon v. United States, the Tenth Circuit held that the Federal Aviation Administration's decision to allow single-engine instrument flight rules (IFR) rated pilots to carry over their IFR rating to a multiengine rating without a practical flight test fell squarely within the discretionary function exception. Likewise, after a rule change requiring a separate practical test, the Administration's implementation of a grace period for pilots who had already commenced multiengine training fit within the exception. In Redmon, the pilot of a private plane was killed when his plane crashed during a thunderstorm. The plaintiffs alleged that the Administration negligently certified the pilot to fly multiengine aircraft in instrument flight conditions.

The court noted that 49 U.S.C. § 1421(a) empowered the Secretary of Transportation "to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen." Furthermore, the Secretary was authorized to impose "such terms, conditions, and limitations as to . . . periodic or special examinations . . . and other matters as the Secretary of Transportation may determine to be necessary to assure safety in air commerce." The court held that the language clearly implied discretion on the part of the Secretary to promulgate regulations and procedures. Consequently, the court remanded with instructions to enter summary judgment for the United States.

In Musick v. United States, the court held that the dis-

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191 Id.
192 Id. at 282.
193 934 F.2d 1151 (10th Cir. 1991).
194 Id. at 1156.
195 Id. at 1156-57.
196 Id.
198 934 F.2d at 1156.
199 Id. at 1157.
cretionary function exception to the FTCA\textsuperscript{201} did not preclude the United States from liability for the act of an Air Force pilot who flew his RF-4 aircraft within 300 feet of the ground causing a tree limb to fall and strike a timber cutter.\textsuperscript{202} Although prevailing military regulations limited pilots to an altitude no lower than 100 feet above ground level (AGL), a squadron policy in effect at the time of the accident limited pilots to an altitude of no lower than 300 feet AGL. The evidence showed that the limb in question could only have been separated from the tree if the RF-4 had been flying below 300 feet AGL.

The court distinguished \textit{Tiffany v. United States}\textsuperscript{203} on the ground that \textit{Tiffany} involved a "real world/real time military mission," whereas the present case involved a training mission.\textsuperscript{204} In \textit{Musick}, the court noted that the squadron policy established an "envelope" in which the pilot exercised judgment and discretion. Since the pilot reached the margins of the envelope, he lost this discretionary role.\textsuperscript{205} The court then held that the government was negligent \textit{per se} noting that the pilot was in control of a high performance aircraft and that unless he used due care, it was foreseeable that the plane would cause injury to persons on the ground.\textsuperscript{206} Therefore, the conduct causing the injury fell within the scope of a Virginia statute criminalizing the operation of an aircraft without due caution and in a manner endangering any person or property.\textsuperscript{207}

In \textit{Foster v. United States},\textsuperscript{208} the court held that the decision of the Federal Air Surgeon to grant a "special issuance" medical certificate clearly qualified for protection under the discretionary conduct exception to the

\textsuperscript{202} \textit{Musick}, 768 F. Supp. at 185.
\textsuperscript{204} \textit{Musick}, 768 F. Supp. at 185.
\textsuperscript{205} \textit{Id.} at 187.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.} (citing VA. CODE ANN. § 5.1-13 (Michie 1988)).
\textsuperscript{208} 923 F.2d 765 (9th Cir. 1991).
FTCA. Consequently, the plaintiff’s FTCA claim was barred.

B. AIR TRAFFIC CONTROL

In In re Air Crash at Dallas/Fort Worth Airport, the Fifth Circuit held that the plaintiffs had failed to cite evidence in support of their contention that two findings of the district judge were clearly erroneous. The plaintiffs brought suit for death and injuries sustained when Delta Flight 191 crashed after encountering an unusually strong wind shear while attempting to land. The plaintiffs first claimed that the trial judge erred in finding that the air traffic controllers were not negligent in failing to route Flight 191 to a different runway. The Fifth Circuit rejected this contention as a matter of law. The court noted that under federal law, the final decision whether to land rests with the captain of Flight 191, not the controllers.

The plaintiffs also claimed that the trial judge correctly found that the air traffic controllers were negligent in not relaying weather information to Flight 191, but erred in finding that their negligence did not proximately cause the crash. The Fifth Circuit rejected the plaintiffs’ request for de novo review of this issue. The court held that de novo review was inappropriate because a court’s ultimate determination of proximate cause is a finding of fact and is reviewable under the clearly erroneous standard. The court affirmed because under Texas law, the evidence supported the finding that the crew’s deliberate decision to land the airplane, when the airplane easily could have avoided windshear, was the sole proximate cause of the crash.

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209 Id. at 768.
211 Id. at 1088.
212 Id. at 1084. “The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.” F.A.R. 91.3(a).
213 Air Crash at Dallas/Fort Worth Airport, 919 F.2d at 1085.
214 Id. at 1088.
In Nakajima v. United States, the court held that an air traffic controller was negligent in failing to monitor and issue traffic advisories warning aircrafts operating in the area that a Cessna 152 was cleared for a fourth touch and go landing, despite the fact that the controller had issued traffic information to the aircraft during the previous touch and go landing. Nakajima was training in a Bell 47G helicopter and was holding in a normal pattern. The Cessna performed a simulated “dead-stick” emergency landing procedure and descended into the helicopter’s main rotor. The helicopter crashed to the ground, killing Nakajima; the Cessna landed without injury to its occupants.

The court held that the controller was negligent in both failing to advise the two aircraft of each other’s position and in failing to ensure that the respective pilots had each other in sight. The court also found the controller negligent in failing to remain vigilant during the 107 second period between the clearance for the fourth touch and go and the collision. The controller’s failure to properly scan and observe the airport traffic pattern proximately caused the controller’s failure to issue the safety alerts.

The United States asserted an affirmative defense of comparative negligence on the ground that Nakajima’s failure to “see and avoid” the Cessna was a contributing cause of the collision. The court determined Nakajima 30% at fault and the United States 70% at fault.

In Frutin v. Dryvit Systems, Inc., the court rejected the government’s attempt to avoid liability for ATC negligence because no similar type of liability existed under applicable state law. The plaintiff was injured when an allegedly negligent air traffic controller failed to issue a travel advisory to a departing plane that collided with his

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216 Id. at 1580-81.
217 Id. at 1579.
218 Id. at 1581.
220 Id. at 237.
aircraft. The court rejected the government’s assertion that it could not be held liable since Massachusetts law did not require a private person to issue a traffic advisory or an affirmative warning under similar circumstances. The court remarked that the United States Supreme Court had already rejected the argument that the FTCA imposes no liability for the performance of activities which private persons do not perform. Additionally, the court rejected the government’s assertion that the proper standard of liability was the good samaritan doctrine, instead holding “[n]egligence is the appropriate standard of liability imposed on private persons and the United States by Massachusetts law.”

C. MISCELLANEOUS

In Howell v United States, the Eleventh Circuit held that an FAA inspector’s failure to ground an airplane which the inspector knew contained contaminated fuel was not actionable under Georgia’s good samaritan doctrine because the plaintiffs had not relied on the FAA’s inspection. In Howell, the inspector cancelled a scheduled check ride after he observed that the plane’s fuel was contaminated. The inspector took no further action and the aircraft’s owners placed the aircraft back in service despite knowledge of the condition. The plane crashed two days later, killing seventeen people.

The passengers’ representatives brought suit under the FTCA alleging that the inspector should have taken further action, and the failure to do so breached a legal duty to the passengers. The court held that the closest state

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221 Id.
222 See Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955) ("There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.")
223 760 F. Supp. at 238.
224 932 F.2d 915 (11th Cir. 1991).
225 Id. at 918 (Georgia has adopted Restatement (Second) Torts § 324A).
226 Howell, 932 F.2d at 919.
law analogous to plaintiffs' cause of action was Georgia's
good samaritan doctrine which had been applied in Geor-
gia cases to evaluate the liability of private parties for neg-
ligent safety inspection. However, the court held that the
good samaritan doctrine was not satisfied because the
inspector's conduct did not cause a nonhazardous condi-
tion to become more hazardous, thereby increasing the
risk of harm. Furthermore, the FAA inspector did not
undertake to perform a duty owed by the airline to its pas-
sengers because "[t]he duties of the FAA supplement
rather than supplant the duties of the airline — duties
which the airline could not, and did not, delegate." The
court noted that the plaintiffs might have established
good samaritan liability by proving reliance on the inspec-
tion. However, the court held nothing, including public
knowledge that the FAA periodically inspects planes, es-
tablished that the passengers had actual knowledge of the
unplanned FAA "inspection" two days before their
flight. Therefore, they could not and did not rely on it.

IV. PREEMPTION

Courts have continued to address the circumstances de-
termining when the Federal Aviation Act (the Act)
preempts state law. In West v. Northwest Airlines, Inc., for
example, the court held that the Act preempted the plain-
tiff's state law claim for punitive damages. The plaintiff
brought a claim for compensatory and punitive damages
for breach of a covenant of good faith and fair dealing
arising from Northwest's refusal to allow the plaintiff to
board an overbooked flight. The court held that while the
plaintiff's claim for compensatory damages was not pre-

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228 Howell, 932 F.2d at 919.
229 Id.
230 Id.
231 923 F.2d 657 (9th Cir. 1990), cert. granted, 60 U.S.L.W. 3852 (U.S. June 22, 1992) (No. 91-505).
232 West, 923 F.2d at 659-60.
emptied by the Act, the claim for punitive damages was. The court also noted that federal airline overbooking regulations specifically contemplate customers choosing between either liquidated damages or state common law remedies. Therefore, "federal regulations contemplate overbooking as an acceptable practice so long as passengers receive compensation. Accordingly, any scheme that punishes the practice would be inconsistent with applicable federal law." In Holliday v. Bell Helicopters Textron, Inc., however, the court found Hawaii state law crashworthiness claims were neither impliedly preempted by the Act, nor conflicted with federal regulation. In Holliday, the plaintiffs brought a products liability action for injuries incurred when their helicopter lost power shortly after takeoff and plunged to the ground. The plaintiffs asserted that the pilot's seat and seat belt were designed defectively, enhancing their injuries and giving rise to a crashworthiness claim. The defendant first argued that the crashworthiness claim was impliedly preempted by the Act. The court rejected this argument, reasoning that the defendants were unable to show that Congress intended to occupy the specific field of products liability. Furthermore, the court noted that section 1506 of the Act was a savings clause which expressly precluded such congressional intent.

The defendant also asserted that federal regulations of aircraft design, maintenance, and operation were so comprehensive that they provided the exclusive standard for measuring design defects. The defendant argued that the

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233 Id. at 661.
234 14 C.F.R. § 250.9(b) (1990).
235 14 C.F.R. § 250.9(b) (1990).
236 14 C.F.R. § 250.9(b) (1990).
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240 14 C.F.R. § 250.9(b) (1990).
241 14 C.F.R. § 250.9(b) (1990).
plaintiffs' claim should be preempted because the defendant had met the minimum Federal Aviation Administration standards for aircraft seats and safety belts. The defendant analogized the case to those holdings that the National Traffic and Motor Vehicle Safety Act (MVSA) specifically preempted crashworthiness claims against car manufacturers for failure to provide an air bag as standard equipment. The court was unpersuaded, as it noted that the MVSA contained an explicit preemption clause, whereas the Federal Aviation Act did not. Furthermore, unlike the Federal Aviation Act, the MVSA empowered car manufacturers to choose among various options. The MVSA impliedly preempted state law claims because such claims would effectively prohibit the exercise of that federally granted option. Because the Federal Aviation Act did not provide such an option, the plaintiff's crashworthiness claim was not preempted.

The court also held that the crashworthiness claim was not preempted by conflict preemption because compliance with both state and federal law was possible. The court noted that although the federal law set forth minimum standards, "nothing in the [Federal Aviation Act] indicates that states may not require aircraft to be more safe or better designed." Furthermore, the court held that "aircraft manufacturers should not be insulated from liability for a defectively designed product by their compliance with certain minimum standards." Consequently, the defendants' claims were not preempted.

One court also held that state trucking regulations may be preempted by federal law. In Federal Express Corp. v.
California Public Utilities Commission,251 the Ninth Circuit held that the Airline Deregulation Act of 1978252 preempted state Public Utility Commission (PUC) regulations that affected Federal Express' trucking operations.253 Federal Express brought the action seeking to enjoin the California PUC from imposing regulations that governed the imposition, suspension and public inspection of tariffs of common carriers, and that governed the bills of lading, freight bills and other documents issued by the carriers.

The Ninth Circuit reversed the lower court and held that the PUC was impermissibly acting in an area of economic regulation.254 The court found that "[t]he trucking operations of Federal Express [were] integral to its operation as an air carrier."255 The court stated

Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier.256

V. PRACTICE AND PROCEDURE
A. CONTRIBUTION AND INDEMNITY

In Bell Helicopter Textron, Inc. v. United States,257 the court held that the exclusive remedy of Alaska's Worker's Com-

251 936 F.2d 1075 (9th Cir. 1991), cert.denied, 112 S. Ct. 2956 (1992).
252 49 U.S.C. app. §§ 1301-1557 (1988). The Act provides as follows: Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Id. § 1305(a)(1).
253 Federal Express Corp., 936 F.2d at 1078-79.
254 Id.
255 Id. at 1078.
256 Id. at 1079.
Pension Act (AWCA)\textsuperscript{258} precluded recognition of a third party's right to implied contractual or noncontractual indemnity against the employer of the injured employee.\textsuperscript{259} The suit arose when a helicopter piloted by an officer of the National Oceanographic and Atmospheric Administration (NOAA) crashed near Port Hardy, British Columbia. The crash occurred during the pilot's attempt to land after running out of fuel. A passenger who was a civilian employee of NOAA and the pilot were both seriously injured. The injured parties settled with the manufacturer and seller of the helicopter (Bell). Subsequently, Bell sued the government for indemnity or contribution pursuant to the FTCA.

The court noted that Alaska law requires three conditions to be met before a right of non-contractual indemnity can be established: (1) the indemnitee (Bell) must have discharged a legal obligation, such as a tort liability to a third party; (2) the indemnitor (the government) must be liable for the same obligation to the third party; and (3) the obligation ought to be discharged by the indemnitor rather than the indemnitee.\textsuperscript{260} The court held that the second prong was not satisfied because the exclusive remedy provision of AWCA precluded a finding that the government was liable in tort.\textsuperscript{261} Furthermore, the third prong was not satisfied because Alaska law would hold that Bell, rather than the government, ought to discharge Bell's obligation to the injured passenger.\textsuperscript{262} Therefore, the court granted the government's motion for summary judgment.\textsuperscript{263} The Ninth Circuit recently affirmed the

\textsuperscript{259} 755 F. Supp. at 273.
\textsuperscript{260} Id. at 274; see Industry Risk Insurers v. Creole Prod. Serv., Inc., 568 F. Supp. 1323, 1328 (D. Alaska 1983), aff'd, 746 F.2d 526 (9th Cir. 1984).
\textsuperscript{261} 755 F. Supp. at 274.
\textsuperscript{262} Id.
\textsuperscript{263} Id. at 275. The court would have held that the AWCA did not preclude an action by a third party for indemnity from the employer of an employee injured in part by the actions of the third party based upon an express contract to indemnify. However, no claim of express indemnity was raised. Id. at 273-74.
lower court’s decision.\textsuperscript{264}

\textbf{B. Issue Preclusion}

In \textit{In re Air Crash at Detroit Metropolitan Airport, Detroit, Michigan on August 16, 1987,}\textsuperscript{265} the court held that the plaintiffs in a mass tort litigation who had elected not to become parties to the underlying joint liability trial were permitted to apply the doctrine of offensive issue preclusion and obtain a finding of liability against the carrier.\textsuperscript{266} The litigation arose when a McDonnell Douglas Corporation (MDC) DC-9 aircraft, operated by Northwest Airlines, Inc., (Northwest) crashed on take-off when it did not attain a sufficient altitude to avoid hitting a light pole. One hundred and fifty-six people died in the accident, including passengers and bystanders on the ground below. The Judicial Panel on Multidistrict Litigation transferred all cases arising out of the crash to the Eastern District of Michigan for consolidated pretrial proceedings and ultimately the last of the participating plaintiffs accepted MDC’s offer of settlement. Subsequently, a jury found Northwest liable for the accident and required it to indemnify MDC for its losses. Shortly thereafter, the plaintiffs who had not participated in the prior proceeding brought suit and sought to apply the finding of liability to their respective cases. Northwest objected on the ground that the plaintiffs were barred from the use of collateral estoppel.

Northwest cited \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{267} for the proposition that since a federal court sitting in diversity applies state substantive law to the merits of the action, a federal diversity judgment is nothing more than a state-court judgment, the preclusive effect of which should be determined by state law.\textsuperscript{268} Northwest contended that

\textsuperscript{266} \textit{Id.} at 317.
\textsuperscript{267} 304 U.S. 64 (1938).
\textsuperscript{268} \textit{Air Crash at Detroit Metropolitan Airport,} 776 F. Supp. at 320.
Michigan requires mutuality and, because the plaintiffs were not parties to the earlier trial, mutuality was lacking. However, the court held that a mechanical application of the *Erie* doctrine was improper and that federal law should prevail.\(^{269}\)

As an initial matter, the court noted that the jury had also determined issues that were governed by federal law;\(^{270}\) therefore, the defendants' characterization that the matter involved solely state substantive issues was inaccurate.\(^{271}\) The court then held that the federal law of issue preclusion was applicable for three policy reasons. First, a federal court is duty bound to protect its own judgment regardless of the substantive issues involved.\(^{272}\) Second, preclusion concepts may relate to procedural interests of the court, rather than the substantive law. Third, fairness and efficiency should permit a court to determine the scope of its own judgments. In light of these reasons, the court applied the federal law of issue preclusion to the matter.

Northwest contended that even under federal law the United States Supreme Court had explicitly stated in *Park-Lane Hosiery Co. v. Shore*\(^{273}\) that offensive issue preclusion may not be applied in mass tort litigation. However, the court stated: "A close reading of *Park-Lane Hosiery* reveals that the Court (1) authorized the use of offensive collateral estoppel, and (2) only mentioned, but did not broadly accept, the arguments that have been advanced against the wholesale application of offensive collateral estoppel."\(^{274}\) The court agreed that the doctrine should not be applied in situations where the result would be unfair to the defendant. However, the court held that "[t]he contours of when of-
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fensive collateral estoppel would be unfair — even in mass tort litigation — should be developed on a case-by-case basis. Invoking the term ‘mass tort litigation’ is meaningless without contextual analysis.”

The court then held that application of the doctrine would not be unfair in the instant case. The court rejected Northwest’s contention that plaintiffs were “wait and see” plaintiffs who had benefitted from the efforts of MDC, but avoided exposure to the risks of an adverse verdict. The court noted that plaintiffs’ options in the prior case were: (1) settling, (2) severing, or (3) stipulating not to contest liability in exchange for a damages only trial. However, the plaintiffs’ options had not included the right to proceed to trial and judgment against Northwest.

The court also rejected Northwest’s contention that it would be denied procedural opportunities unavailable in the first action that would cause a different result in a second trial. Northwest asserted it could have conducted more discovery and called different witnesses. However, the court held that was true of every case and “like life, litigation must end at some point.” The court noted that the first trial had attained monolithic proportions and that Northwest’s claims of lack of discovery and inability to call witnesses were wholly unfounded.

C. MANDAMUS

In Transportes Aeros Nacionales, S.A. v. Downey, a Texas court of appeals refused to issue a writ of mandamus directing a judge to withdraw a choice-of-law order because the moving party failed to demonstrate the judge’s order was a clear abuse of discretion and there was no adequate remedy by way of appeal. The underlying action in-

\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at 319.}\]
\[\text{Id. at 325.}\]
\[817\text{ S.W.2d 393 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied])}.\]
\[\text{Id. at 395.}\]
involved a Continental Airlines airplane, leased to and operated by Transportes Aeros Nacionales, S.A. The airplane was en route to Miami, Florida, from San Jose, Costa Rica, and crashed while approaching an intermediate stop at Tegucigalpa, Honduras. The injured passengers and representatives of the deceased passengers brought actions under Texas law for negligence, gross negligence and strict products liability. The trial court held that Texas law would govern the issues of punitive damages, negligent inspection or maintenance, and products liability, and the law of Honduras would govern the issues of negligent operation of the aircraft.

Continental filed a writ of mandamus asserting that the trial judge abused his discretion in failing to presume that Honduras law would apply to all issues in the case. Continental argued that the "most significant relationship" test mandated application of Honduras law because both the accident and the conduct causing the accident occurred in Honduras. However, the court of appeals rejected Continental's argument because Continental failed to demonstrate the need for an extraordinary remedy. The court held that the trial judge's ruling was incidental and that an adequate remedy existed by way of appeal. Furthermore, the court held that Continental had also failed to demonstrate that the judge's order was a clear abuse of discretion.

D. Arbitration

In *Vintage Aircraft International, Inc. v. Specialty Restaurants Corp.*, the New York Supreme Court, Appellate Division, refused to hold a party in contempt for failing to comply with the exact terms of an arbitration agreement. As part of the dissolution of a business venture, Vintage Aircraft Int'l., Inc. (Vintage) was required to transfer a two seater Hawker Sea Fury to Specialty Restaurants Cor-

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281 *Id.*
282 *Id.*
poration's (Specialty). Vintage appealed the award; however, during the pendency of Vintage's appeal, the airplane was destroyed by fire. The order from the court below was affirmed and Specialty moved to punish Vintage for contempt for its failure to transfer the plane and for a money judgment for the value of the airplane. The trial court denied the motion, and Specialty appealed. The court noted that neither the arbitration award, nor the order and judgment confirming it, made provision for the monetary equivalent of the airplane in the event the airplane was not produced.284 The court held that in order to recover the monetary equivalent or the insurance proceeds, Specialty was required to file a motion to vacate or amend the order and judgment confirming the award.285

VI. AIRPORTS

A. PREMISES LIABILITY

In Gross v. American Airlines, Inc.,286 the court held a common carrier’s duty of care was not so broad as to protect a passenger injured as a result of attempting to assist a woman who had fallen backwards onto him while they were waiting in line at American’s check-in counter.287 The court held that the passenger had failed to link his injury to any conduct on the part of the carrier because he had not shown what caused the woman to fall.288 Furthermore, the court held that passengers waiting to check-in had a duty to look for obstacles, such as potentially misplaced bags, and to use reasonable care for their own safety.289 Consequently, the court found that the plaintiff failed to establish negligence and entered summary judg-

284 Id. at 297.
285 Id.
287 Id. at 91.
288 Id.
289 Id.
ment for the defendant.\textsuperscript{290}

In \textit{Jorgensen v. Massachusetts Port Authority},\textsuperscript{291} the court held that two airline pilots could not recover for damage to their reputations when their aircraft crashed due to the negligence of the Massachusetts Port Authority.\textsuperscript{292} \textit{Jorgensen} arose as a result of the pilots involvement in an accident when their aircraft skidded off the end of an icy Logan Airport runway and plunged partially into the Boston Harbor, killing two people. The accident was allegedly caused by the negligence of the Port Authority in failing to keep the runway free of ice. The court agreed that Massachusetts might recognize a claim for negligent damage to reputation.\textsuperscript{293} However, the court did not need to resolve that issue because the plaintiffs failed to present evidence of specific lost job opportunities. As a result of that omission, the court held that there was insufficient evidence to support the jury's award of damages for lost earning capacity stemming from injury to reputation.\textsuperscript{294} Similarly, there was insufficient evidence to support an award for emotional distress resulting from the alleged loss of earning capacity.\textsuperscript{295}

In \textit{Gaines v. Huntsville-Madison County Airport Authority},\textsuperscript{296} the Alabama Supreme Court struck down as unconstitutional a statutory provision which accorded larger airport authorities immunity from all actions in tort but smaller airport authorities immunity only from negligence.\textsuperscript{297} The plaintiff, who slipped and fell on a flight of stairs at the Huntsville-International Carl T. Jones Airport, sued the Airport Authority alleging both simple negligence and wanton negligence. The court dismissed the action be-

\textsuperscript{290} \textit{Id.}
\textsuperscript{291} 905 F.2d 515 (1st Cir. 1990).
\textsuperscript{292} \textit{Id.} at 521-22.
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.} at 526.
\textsuperscript{295} \textit{Id.}
\textsuperscript{296} 581 So. 2d 444 (Ala. 1991).
\textsuperscript{297} \textit{Id.} at 445.
cause it found the Authority was immune from suit.\textsuperscript{298} The plaintiff alleged the statutory immunity provision created unconstitutional classifications and asserted that had he been injured at a smaller airport, he could have recovered for willful negligence of an airport employee; whereas at a larger airport, he could not. Because no suspect classification was implicated, the court employed the lowest level of scrutiny to analyze the constitutionality of the provision.\textsuperscript{299} Even then, there was no rational basis for the distinction. Consequently, the court struck the portion of the act that provided immunity as to torts other than negligence, and reversed and remanded on the issue of wantonness.\textsuperscript{300}

B. Free Speech

In \textit{International Society for Krishna Consciousness, Inc. v. Lee},\textsuperscript{301} the United States Supreme Court held that an airport terminal was a non-public forum and an airport authority could promulgate reasonable regulations prohibiting the in-person solicitation of funds.\textsuperscript{302} The International Society for Krishna Consciousness, Inc. (ISKCON) brought an action seeking declaratory and injunctive relief setting aside various regulations promulgated by the Port Authority of New York and New Jersey (Port Authority). The regulations banned both the distribution of literature and in-person solicitation of funds. ISKCON asserted that the regulations violated the First Amendment because airport terminals were traditional public fora for expressive activity. The Court followed a "forum based" approach for assessing restrictions that the government sought to place on the use of its property.\textsuperscript{303} This approach divides government property into

\textsuperscript{298} Id.
\textsuperscript{299} Id. at 448.
\textsuperscript{300} Id. at 448-49.
\textsuperscript{301} 60 U.S.L.W. 4749 (U.S. June 26, 1992) (No. 91-155).
\textsuperscript{302} Id. at 4753.
three categories: government property that has traditionally been available for public expression, public property which is designated as a public forum, and all remaining public property. Government regulations restraining expressive activity conducted on the last category of property need only satisfy a reasonableness standard.\(^{304}\)

The Court held that airport terminals were neither a traditional, nor a designated public forum.\(^{305}\) Thus, terminals fell in the third category of property and were not public fora. The Court also held that Port Authority's ban on solicitation survived the "reasonableness" review because the solicitation might have a disruptive effect on airport business and the solicitor might cause duress by targeting vulnerable persons or by committing fraud by concealing his affiliation.\(^{306}\) The Court noted that the Port Authority could reasonably worry that the incremental effects of having one group and then another seek such access could prove quite disruptive even if the inconvenience caused by the petitioner might seem inconsequential.\(^{307}\)

In the related decision of Lee v. International Society of Krishna Consciousness, Inc.,\(^ {308}\) the Supreme Court held that the ban on distribution of literature by the Port Authority was invalid under the First Amendment.\(^ {309}\) Four of the five Justices who affirmed the judgment based their decision on the ground that an airport terminal was a public forum. The Justices held that the ban failed to satisfy the requirements of narrow tailoring to further a significant state interest and availability of ample alternative channels for communication.\(^ {310}\) Another Justice reached the conclusion on the ground that an airport terminal was not a public forum but the ban on distribution of literature

\(^{304}\) Lee, 60 U.S.L.W. at 4751.

\(^{305}\) Id.

\(^{306}\) Id. at 4752.

\(^{307}\) Id. at 4752-53.


\(^{309}\) Id.

\(^{310}\) Id.
failed to satisfy the reasonableness standard. The four dissenting Justices remarked that the distribution ban was as reasonable as the solicitation ban in a non-public forum and that it should be upheld.

C. NUISANCE

In *County of Westchester v. Town of Greenwich, Connecticut*, the court dismissed federal claims by a county of one state brought against another state, but refused to dismiss the county’s common-law claims. The plaintiff, Westchester County Airport (WCA), located in New York, desired to top trees located in adjacent Greenwich, Connecticut, which encumbered the clear zone of a runway. The fact that the trees were located in Connecticut led to the litigation because New York could not exercise its powers of eminent domain over property located in another state.

The court first held that the plaintiff was a citizen of New York for Eleventh Amendment purposes. Consequently, any relief based on Connecticut state law was barred for lack of subject matter jurisdiction. The court also rejected the plaintiff’s assertion that it was entitled to freedom of transit through the navigable airspace of the United States. The court held “nothing in the statute ... suggests that Congress meant to create a private right of action in favor of the owner of an airport.”

However, the court refused to dismiss the plaintiff’s

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311 Id. at 4761.
312 Id.
314 A clear zone is established by the FAA and requires a specified amount of unencumbered airspace for airplanes to take off and land. See 14 C.F.R. § 77.25 (1990). The FAA reduced the usable length of Runway 11/29 from approximately 4,450 feet to 3,100 feet because the neighboring trees reduced the clear zone.
315 *County of Westchester*, 745 F. Supp. at 955. The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.” U.S. Const. amend. XI.
317 *County of Westchester*, 745 F. Supp. at 955.
The court held that whether or not growing trees was a reasonable use of the property in the particular locality under the circumstances involved a "balancing of the competing interests of the parties and . . . must ultimately be resolved by the trier of fact." Furthermore, the court refused to dismiss the plaintiff's claim that it had acquired a prescriptive easement in the airspace above the defendant's property.

In Oakley v. Simmons, the Tennessee Court of Appeals reinstated a jury award of punitive damages, despite no award of compensatory damages, because the trial judge had awarded injunctive relief. In Oakley, the plaintiff maintained a private airstrip on his property. The defendant neighbor erected a forty foot pole directly in the path of Oakley's north/south runway. The defendant stated that the pole would be used as a light pole, but the pole was located 360 feet from the residence and 400 feet from the road. The defendant also indicated he intended to plant two fifty foot trees on either side of the pole. The plaintiff brought suit alleging the pole was a nuisance. At trial, a jury awarded the plaintiff $5000 punitive damages but no compensatory damages. The judge set aside the award but ordered the neighbor to remove the pole. Both parties appealed. The court of appeals held that the defendant's pole created a nuisance because it disturbed the free use of Oakley's property. The court also upheld the award of punitive damages. The court agreed that actual damages must be sustained in order to sustain an award of punitive damages. The court held, however, where the plaintiff has proved an entitlement to injunctive relief, an award of punitive damages may be upheld even

318 Id. at 959.
319 Id.
320 Id.
322 Id. at 672.
323 Id. at 671.
324 Id. at 671; see Emerson v. Garner, 732 S.W.2d 613 (Tenn. Ct. App. 1987).
without an award of compensatory damages.\textsuperscript{325}

D. NOISE ABATEMENT

In \textit{Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.},\textsuperscript{326} the United States Supreme Court held that an act of Congress authorizing the transfer of operating control of two major airports from the federal government to the Metropolitan Washington Airports Authority (MWAA) violated the constitutional doctrine of separation of powers.\textsuperscript{327} The transfer was fueled by a need to raise funds through tax-exempt instruments for capital improvements.\textsuperscript{328} The Transfer Act\textsuperscript{329} conditioned the transfer on the MWAA's creation of a unique Board of Review (Board). The Board was composed of nine congressional members and was vested with the power to veto decisions made by MWAA's board of directors. Essentially, the creation of the Board was intended to insure against the potential for decreases in traffic from National Airport to Dulles Airport likely to result from the transfer of control.\textsuperscript{330} The MWAA endeavored to overcome the separation-of-powers issue by requiring the Board members to serve in their individual capacities as representatives of users of the airports, rather than as agents of Congress.

Subsequently, MWAA's Board of Directors adopted a master plan to build a new terminal and increase capacity at National. Suit was brought by a group of citizens, the

\textsuperscript{325} Oakley, 799 S.W.2d at 672.
\textsuperscript{326} 111 S. Ct. 2298 (1991).
\textsuperscript{327} 111 S. Ct. at 2312.
\textsuperscript{328} The Secretary of Transportation concluded that, given the need to limit federal expenditures, necessary capital improvements could not be financed for either airport unless control of the airports was transferred to a regional authority with power to raise money by selling tax-exempt bonds. \textit{Id.} at 2302; see S. Rep. No. 99-193, p.2 (1985).
\textsuperscript{330} It was feared that flights to National would be rerouted to Dulles. Since National was favored by government employees, a decrease in flight availability would have been inconvenient.
Citizens for the Abatement of Aircraft Noise, Inc. (CAAN) who resided under the flight paths at National. CAAN sought a declaration that the Board's veto power was unconstitutional and asked the court to enjoin any actions taken by MWAA which were subject to a potential veto. The effect of CAAN's proposed declaration would cripple the MWAA and prevent the implementation of the Transfer Act.

The Court rejected MWAA's contention that the creation of the Board did not present a constitutional issue. The Court held:

We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny.331

The court expressed concern that "Congress could, if this Board of Review were valid, use similar expedients to enable its Members or agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy."332 Therefore, the Court held the Transfer Act was unconstitutional.333

E. Auto Rental Concessions

In Epps Aircraft Inc. v. Montgomery Airport Authority,334 the Alabama Supreme Court held that an airport authority resolution violated the Alabama Constitution because it impaired the obligation of contracts.335 In Epps, Exxon was authorized under the terms of its primary lease to act as a Fixed Base Operator (FBO) and to provide "[s]uch

331 Metropolitan Washington Airports Authority, 111 S. Ct. at 2308.
332 Id. at 2312.
333 Id.
334 570 So. 2d 625 (Ala. 1990).
335 Id. at 629.
other services . . . and rental of such other items as from
time to time may be handled by FBO's generally."

Epps Aircraft Inc. (Epps) entered into a lease with Exxon
to operate a Thrifty Car Rental business. Exxon's lease
with the airport required Exxon to pay fees of no more
than four percent of gross income. As a sublessee, Epps'
fee schedule was the same as Exxon's. In contrast, Air-
port Authority regulations required that automobile
rental businesses who obtained their concessions directly
from the airport were charged ten percent of gross sales.
Subsequently, the airport approved a resolution which
compelled "non-tenant rental car businesses" (a term
which by definition included Epps' business) to directly
pay the airport ten percent of gross income.

Epps brought suit challenging the constitutionality of
the resolution. The court held automobile rental services
fell within the lease category of "[s]uch other services . . .
and rental of such other items as from time to time may be
handled by Fixed Base Operators generally." To hold
otherwise would be to allow the Airport to avoid its con-
tractual obligations under the primary lease, in violation
of article I, section 22, of the Alabama Constitution. Con-
sequently, the resolution was inapplicable to Epps.

F. LIMOUSINE SERVICES

In Pontarelli Limousine, Inc. v. City of Chicago, the Sev-
enth Circuit held that a state court judgment which had
been vacated was not entitled to have a preclusive effect in
any future litigation. Furthermore, the court held that a
city regulation which prohibited city livery services from
using dispatcher booths at O'Hare Airport, but allowed
suburban services to use them, did not violate equal
protection.

The dispute originated twenty years earlier when the
City of Chicago established a livery dispatch system in order to reduce traffic congestion caused by parked cabs which blocked traffic as the drivers hawked for "walk up" fares. The dispatch booths were used only for suburban livery services since the principal demand for "walk up" passengers was for service to the suburbs rather than the city. Subsequently, two city-licensed livery services became affiliated with suburban livery services, leading to a lawsuit in Illinois state court against the City of Chicago by three city-licensed livery services. The livery services won, but in exchange for additional consideration, agreed with the City and the state court to vacate the judgment.

Pontarelli was a duplicative suit brought by ten city-licensed livery companies. In Pontarelli, a jury awarded plaintiffs $400,000 in damages but the district judge entered judgment for defendants notwithstanding the verdict. On appeal, the Seventh Circuit held that the district court did not err in refusing to give preclusive effect to the state court litigation. The court held that Illinois law deprived a vacated judgment of any future effect. Additionally, the court held that there was no denial of equal protection. The court noted that the regulation could only be struck down if it was irrational because no suspect classification was implicated. The court determined that the regulation was rationally related to alleviating the city's perceived traffic congestion problem at the airport. Consequently, the district court did not err in overturning the jury verdict.

A similar result was reached in American V.I.P. Limousines Inc. v. Dade County Board of County Commissioners. A group of limousine operators brought an action challenging various regulations governing service to Miami International Airport. The district court held that the

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341 929 F.2d at 340.
343 929 F.2d at 341.
344 Id. at 343.
classifications neither violated the equal protection rights of the limousine services nor did the regulations violate the commerce clause.\textsuperscript{346} The court did, however, hold a pickup fee of ten dollars charged to limousine services was discriminatory in view of the fact that taxicabs were only required to pay one dollar.\textsuperscript{347}

**VII. WARSAW CONVENTION AND AIR CARRIER LIABILITY**

**A. Warsaw Jurisdiction**

In *Alvarez v. Aerovias Nacionales de Colombia, S.A.*,\textsuperscript{348} the court held that the Warsaw Convention\textsuperscript{349} did not create an exclusive cause of action and therefore did not authorize an action brought solely under state law to be removed to federal court.\textsuperscript{350} In *Alvarez*, the plaintiff's decedents died in the crash of Avianca Flight 52 while approaching Kennedy Airport, New York, en route from Medellin, Colombia. The plaintiff filed her complaint in Florida state court. The defendants asserted that the Warsaw Convention created an exclusive federal cause of action, however, and thus removal to federal court was proper. The court rejected the defendant's assertion and held that the Convention does not create an exclusive cause of action. The court did agree, however, that the Convention creates an exclusive remedy which limits the liability that can be imposed on carriers for claims brought under state law.\textsuperscript{351} Consequently, because the plaintiffs grounded the action solely in Florida wrongful death law and did not invoke any federal law or statute as a basis for her claim, the court remanded the action for further proceedings in the

\textsuperscript{346} U.S. Const. art. 1, § 8, cl. 3.

\textsuperscript{347} Dade County Board, 757 F. Supp. at 1999.


\textsuperscript{350} 756 F. Supp. at 555.

\textsuperscript{351} Id.
state court.\textsuperscript{352}

In \textit{In re Air Crash Disaster Near Warsaw, Poland},\textsuperscript{353} the court held that for purposes of determining whether Warsaw jurisdiction was proper "the ultimate destination of the passenger is the place where the passenger intended to end up and would have ended up but for the accident".\textsuperscript{354} Litigation arose from an airline crash in which the plaintiff's decedents were killed. The defendant LOT, the Polish national airline, asserted that because the ultimate destination on the plaintiff's decedent's round trip ticket was Warsaw, the district court lacked subject matter jurisdiction under Article 28(1) of the Warsaw Convention. The plaintiffs asserted their decedents had intended to remain in the United States and redeem the unused portion of their tickets. The plaintiffs further maintained that their decedents had only purchased round trip tickets because they believed that Polish law requiring the purchase of round trip tickets applied to them, despite having United States permanent residency status.

The court noted other decisions in which the "ultimate destination" has been determined either by looking at the destination listed on the contract,\textsuperscript{355} or the place where the mutual intentions of the parties determine the ultimate destination was if other than that listed on the contract.\textsuperscript{356} The court rejected both alternatives. The court held that "[t]he intention of the passenger alone, and not the mutual intention of the parties as expressed in the contract or otherwise, determines the passenger's 'ultimate destination'. . . . [T]here should be a presumption

\textsuperscript{352} Id. at 556.
\textsuperscript{354} Id. at 32.
\textsuperscript{355} See Gayda v. LOT Polish Airlines, 702 F.2d 424, 425 (2d Cir. 1983) ("it is the 'ultimate' destination listed in the contract that controls").
\textsuperscript{356} See \textit{In re Air Crash Disaster at Malaga, Spain}, 577 F. Supp. 1013 (E.D.N.Y. 1984) (Gayda does not preclude either the passenger or the carrier from showing that certain terms in the purported contract arose from a mutual mistake).
that the ticket indicates that destination.” Consequently, LOT’s motion was denied with the provision that it could renew the motion after taking discovery concerning the decedents’ intentions.

B. Injuries Within Scope of Convention

In Eastern Airlines, Inc. v. Floyd, the United States Supreme Court interpreted Article 17 of the Warsaw Convention to exclude recovery for purely mental injuries. In Floyd, an international flight originating in Miami experienced rapid loss of altitude resulting from the failure of all three of the aircraft’s engines. After descending without power for a brief period the crew managed to restart one engine and the plane returned safely to Miami. A group of passengers, whose complaints were consolidated for trial, brought an action against Eastern claiming damages solely for mental distress arising out of the incident. Reversing the decision of the court of appeals and affirming the district court, the Supreme Court held that the term “bodily injury” excludes recovery for purely mental injuries. The court held: 1) the contemporary plain meaning of “lésion corporelle” excludes non-physical injuries; 2) neither French legislative history nor decisional law indicates that, at the time the Warsaw Convention was drafted, the term “lésion corporelle” included non-physical injuries; 3) the minutes of the drafters’ committee meetings provided no evidence that the drafters contemplated the existence of a psychic injury unaccompanied by a physical injury; 4) protocols appearing to expand the meaning of “lésion corporelle” were not supported by discussions that would incorporate solely non-physical injuries; and 5) to follow the single sister signatory that expanded the term to include solely

357 Air Crash Disaster near Warsaw, Poland, 760 F. Supp. at 32.
358 111 S. Ct. 1489 (1991) (prior decision at 872 F.2d 1462 (11th Cir. 1989), on remand to 937 F.2d 1555 (11th Cir. 1991).
359 Floyd, 111 S. Ct. at 1497.
360 Id. at 1498.
psychic injuries could subject international air carriers to strict liability for purely mental distress.\textsuperscript{361}

In contrast, the New York court in \textit{In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986},\textsuperscript{362} found damages for pain and extreme psychic suffering were awardable under the Warsaw Convention.\textsuperscript{363} A known terrorist had boarded Flight 840 in Cairo and had placed a bomb under her own seat. After setting the bomb trigger and deplaning in Rome, she proceeded to a self-congratulatory television appearance in Lebanon. As Flight 840 approached Athens Airport, the bomb exploded, killing four passengers and injuring others. Alberto Ospina, seated above the bomb, was blown out of the plane; his broken body was later found with serious wounds in the lower torso. A jury found TWA's failure to maintain adequate security measures constituted willful conduct and awarded Mr. Ospina's widow $2,754,951.60 in damages. TWA asserted that the Convention did not cover survival damages and argued that the court had erred in permitting an included award of $85,000 for Mr. Ospina's pain and suffering for being blown out of the plane and falling to the ground.

The court held that federal common law, not state law, resolved the issue of the Convention's coverage of damages in a survival action.\textsuperscript{364} To fashion a uniform modern federal common law rule for Warsaw Convention recoveries, the court looked to the policies underlying survival actions, to state law decisions addressing the issue, and to analogous federal statutes. The court noted survival actions are designed to ensure that a tortfeasor will not fare better in court by killing than by injuring, due to the termination of subsequent damages for pain and suffering.

\textsuperscript{361} \textit{Id.} at 1493-94.


\textsuperscript{363} \textit{Id.}

The court was particularly persuaded that damages were appropriate because of a person's iniolate right against impairment of his or her freedom. The court also noted that the majority of states have either survival statutes or provide for survival recovery under wrongful death statutes. Furthermore, the court noted that several federal statutes provide for survival recovery, including damages for pain and suffering. Consequently, the court held that the damages included survival recovery for the purpose of the Convention. Therefore, the court affirmed the award.

In Padilla v. Olympic Airways, the court held that an airline was not liable under the terms of the Convention for a passenger's injuries where the passenger had deliberately consumed between seven and nine beers prior to collapsing in the airplane lavatory. The court maintained that the plaintiff had not proven that he was injured as the result of an "accident" within the meaning of Article 17. The plaintiff had failed to prove that the continued service of alcohol to him during the flight was an unusual or unexpected event because there was no evidence that the airline was aware of his alleged intoxication.

C. Cargo and Passenger Baggage

In Victoria Sales Corp. v. Emery Air Freight, Inc., the Second Circuit held that article 18, section 3, of the Warsaw Convention did not apply to the loss of cargo which had been successfully transported to an air freight forwarder's warehouse located outside the boundaries of the airport,

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365 778 F. Supp. at 631.
366 Id.
367 Id. at 632-36.
368 Id.
370 Id. at 838.
371 Id. at 837 (citing Air France v. Saks, 470 U.S. 392, 405-06 (1985) (liability arises under Warsaw Convention only if injury is caused by an unexpected or unusual event or happening that is external to passenger)).
372 917 F.2d 705 (2d Cir. 1990).
and then lost once in its possession.\textsuperscript{373} Emery contended that a practical interpretation of "transportation by air" would extend coverage to include the storage of cargo at a place outside the airport, until the time when the goods were picked up by the consignee pursuant to the carriage contract. Emery also suggested that its warehouse should be deemed to be functionally part of the airport. The trial court agreed with Emery and assessed damages according to the limitations of the Convention.

On appeal, the Second Circuit rejected Emery's position. The court held "as the plain language of Article 18 directs, 'transportation by air' would include a loss occurring while the cargo was in the air or on the ground but within the confines of the airport's boundaries".\textsuperscript{374} Consequently, the case was reversed and remanded for a new trial.

In \textit{Onyeanusi v. Pan American World Airways, Inc.},\textsuperscript{375} the Third Circuit held that human remains shipped via an international air carrier qualified as "goods" subject to the Warsaw Convention.\textsuperscript{376} The plaintiff had made arrangements with Pan American World Airways, Inc. (Pan Am) to ship his mother's remains from New York to Port Harcourt, Nigeria. The remains were delayed and when finally arrived were damaged and decomposed. The plaintiff gave written notice of the claim two months after receipt of the remains; however, Pan Am rejected the claim as untimely.

Under the Warsaw Convention, damage of goods must

\textsuperscript{373} Article 18, § 3 provides in pertinent part:

The period of the transportation by air shall not extend to any transportation by land, by sea or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

\textsuperscript{374} \textit{Victoria Sales Corp.}, 917 F.2d at 707.

\textsuperscript{375} 952 F.2d 788 (3d Cir. 1992).

\textsuperscript{376} Id.
be reported within seven days of receipt, and delayed delivery of baggage and goods must be reported in writing within fourteen days of receipt. Failure to comply with the timing requirements precludes an action against the carrier, save actions for fraud. The plaintiff asserted that human remains were neither baggage nor goods and therefore the Convention's timing rules were inapplicable. The court disagreed. The court noted "goods" was a translation of the French word "marchandises" which had been interpreted as "anything able to be the object of a commercial transaction." The court observed that there was in fact a market for human tissue and organs and other parts of the human body; thus human remains fit within the definition of "goods." The court also held that a policy of limiting the potential liability of air carriers would be frustrated by excluding "goods" whose commercial values were difficult to determine. Such a construction "would exempt a significant number of claims from the Convention, thus exposing air carriers to inestimable liability." The court further rejected the plaintiff's assertion that Pan Am's willful misconduct avoided the notice requirements of the Convention. The court held such misconduct would only excuse the Convention's limitations on monetary liability, not the requirements of notice. Because the plaintiff had failed to give timely notice of the damage to his mother's corpse as a prerequisite for maintaining an action, Pan Am's motion for summary judgment was properly granted.

577 Warsaw Convention, supra note 349, art. 26(s)(3).
578 Id. art. 26(4).
579 Onyeanusi, 952 F.2d at 791 (citation omitted).
580 Id. at 792.
581 Id. at 793.
582 Id.
583 Id. at 794.
D. Discrimination

In *Shinault v. American Airlines, Inc.*, the court held that emotional distress damages were available to a private plaintiff who sued under the Air Carrier Access Act of 1986 (ACAA). Under the particular circumstances of the case neither injunctive relief, nor recovery of punitive damages, were appropriate. The case arose when Shinault, a thirty-year-old quadriplegic, was denied permission to deplane first, along with other passengers who were in danger of missing their connecting flights. Shinault was forced to deplane last. Shinault's connecting flight was also delayed. Once Shinault arrived at the connecting gate, he was denied boarding even though the airplane had not yet left the gate and the jetway was still open. As a result, Shinault waited five hours before catching the next direct flight. Shinault sued American under the ACAA alleging American discriminated against him by not allowing him to board his connecting flight because he was handicapped. Shinault sought injunctive relief, compensatory damages, emotional distress damages, and punitive damages. The district court granted American's motion for summary judgment.

The Fifth Circuit reversed the district court. As an initial matter, the court rejected American's motion to affirm on the alternative ground that Shinault had presented no evidence of discrimination. The court held that a jury could conclude that, but for Shinault's handicap and the additional time required to get him aboard the airplane, American would have allowed him to board the flight.

The court also rejected American's assertion that private remedies under the ACAA should be the same as private remedies under section 504 of the Rehabilitation Act

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384 936 F.2d 796 (5th Cir. 1991).
386 *Shinault*, 936 F.2d at 805.
387 *Id.* at 800.
of 1973. Instead, the court held that the ACA allowed a private plaintiff to recover all necessary and appropriate remedies to place him in as near as the same position as possible that he would have occupied if the wrong had not been committed. Therefore, the court held that the ACA allowed recovery of compensatory damages and emotional distress damages. However, the court held that the doctrine of primary jurisdiction precluded a finding that the ACA provided injunctive relief to Shinault. The court determined Shinault’s interest was insufficient to exceed that of the Department of Transportation because it was unlikely that Shinault would encounter the same set of circumstances again. The court also declined to determine whether punitive damages were available under the ACA because Shinault had not alleged the type of wanton and malicious conduct necessary to recover punitive damages.

E. MISCELLANEOUS

In O’Toole v. Trans World Airlines, Inc., an airline agent told a plaintiff to run as fast as she could to catch a connecting flight. Subsequently, the plaintiff claimed breathing-related injuries resulting from having to run the length of twenty-three gates. The court granted defendant’s motion for summary judgment and held that “[a]bsent any indication that the passenger is ailing, the community standard clearly does not view running as a

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588 Id. at 803-04; see Pub. L. 93-112, 87 Stat. 335 (codified as amended 29 U.S.C.A. § 794(a) (Supp. 1991) (the Act permits injunctive relief and declaratory relief, as well as monetary awards in the form of back pay).
589 Shinault, 936 F.2d at 804.
590 Id.
591 When legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One way to accomplish this is to have an agency pass in the first instance on those issues that are within its competence. Id. (quoting Mississippi Power & Light Co. v. United Gas Pipe Line, 532 F.2d 412, 417 (5th Cir. 1976), cert denied, 429 U.S. 1094 (1977)).
risk to healthful breathing.\textsuperscript{394}

In \textit{In re Air Crash at Detroit Metropolitan Airport, Detroit, Michigan on August 16, 1987},\textsuperscript{395} the court held that an interstate carrier can relieve itself from liability on its travel passes for ordinary negligence.\textsuperscript{396} Any conduct which is beyond ordinary negligence cannot be contractually released from liability, however, regardless of whether it is characterized as gross negligence, wanton or willful misconduct or willful and wanton negligence.\textsuperscript{397}

\section*{VIII. LIMITATION OF ACTIONS}

\subsection*{A. Statutes of Repose}

In \textit{Carr v. Beech Aircraft Corp.},\textsuperscript{398} the court determined that Arizona's statute of repose was constitutional and thus precluded the plaintiffs' product liability action.\textsuperscript{399} \textit{Carr} arose out of death and injuries incurred on October 2, 1988, when a 1969 Beech aircraft burst into flames after landing short of the runway at Scottsdale, Arizona. The plaintiffs filed product liability actions against Beech, the aircraft manufacturer. Beech moved for summary judgment claiming that Arizona's 12-year statute of repose\textsuperscript{400} for product liability actions had expired. The plaintiffs contended that the statute was unconstitutional and unenforceable. The court held that the plaintiffs' claims were foreclosed because they had specifically been rejected by the Arizona Supreme Court.\textsuperscript{401} The court also held that the statute of repose did not violate the equal protection clause of the Fourteenth Amendment, because it was rationally related to the state legislature's purpose.

\textsuperscript{394} Id. at *2.
\textsuperscript{396} Id. at 324.
\textsuperscript{397} Id. at 326.
\textsuperscript{399} Id. at 1332.
of controlling a perceived tort liability crisis. Additionally, the court held that the statute did not deprive the plaintiffs of a fundamental property right by precluding a strict liability in tort action before the claim even accrued. The court held that "[d]ue process is not implicated by such statutes because there is no tort cause of action, and therefore no vested property right upon which to base a Fourteenth Amendment due process challenge, until an injury actually occurs."  

B. TOLLING

In Palmer v. Borg-Warner Corp., the court held that the period of limitations for a products liability suit, as a matter of law, commences upon notification of an airline crash. In Palmer, the plaintiff brought a wrongful death action arising from an airplane crash. Two years and nine days after the plaintiff became aware of the crash, the plaintiff filed a products liability suit alleging that a defective carburetor had caused the crash. The defendant moved to dismiss the case because the two-year period of limitations had expired. The court interpreting its holding in Mine Safety Appliances v. Stiles, held that "[u]pon notification of an airplane crash, a reasonable person has, as a matter of law, enough information to be alerted that she 'should begin an inquiry' concerning a potential cause of action against the pilot, the carrier or the manufacturer." The court rejected arguments that the plaintiff did not know of and could not have known of the defective carburetor until a later date. The court held "[i]f inquiry, diligently pursued, would have revealed sufficient information to justify filing within the two-year limitations period, we see no basis for equitably tolling the statutory

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402 Carr, 758 F. Supp. at 1334.
403 Id. at 1334-35.
404 Id. at 1334 (citations omitted).
406 Id. at 634.
408 Palmer, 818 P.2d at 634.
time limitation."\textsuperscript{409}

A strongly worded dissent noted that under the majority formulation, "in order to act reasonably a claimant must begin an immediate investigation of all possible causes of an accident, no matter how far-fetched, comparatively unlikely, or well-concealed they may be."\textsuperscript{410} The dissent argued that formulation had been implicitly rejected in \textit{Hanebuth v. Bell Helicopter Int'l}.\textsuperscript{411}

\section*{IX. DAMAGES}

\subsection*{A. PUNITIVE DAMAGES}

In \textit{In re Air Disaster at Lockerbie, Scotland on December 21, 1988},\textsuperscript{412} the Second Circuit, applying federal common law, held that punitive damages were not recoverable in actions governed by the Warsaw Convention.\textsuperscript{413} The court reviewed the Convention's purposes, structure, and history and explored the role of punitive damages in American law generally. In light of its analysis, the court held that "the Convention preempts state causes of action because differences in the various state law — some of which view punitive damages as penal in nature, some compensatory, and some both — would introduce such great confusion into the subject as to destroy any hope of uniformity in applying the Convention."\textsuperscript{414}

The court next held that because air carrier liability is a uniquely international problem requiring uniform interpretation, the Convention must be interpreted according to federal common law.\textsuperscript{415} The court adopted the federal common law of torts and determined that federal common law did not contemplate a compensatory element in

\begin{itemize}
\item \textsuperscript{409} Id.
\item \textsuperscript{410} Id. at 638 (Compton, J., dissenting).
\item \textsuperscript{411} 694 P.2d 143, 146 (Alaska 1984).
\item \textsuperscript{413} Id. at 1269-70.
\item \textsuperscript{414} Id. at 1270.
\item \textsuperscript{415} Id. at 1278.
\end{itemize}
a punitive damages claim.\textsuperscript{416} It remained, therefore, to determine whether the Convention permitted punishment of a defendant and deterrence of certain kinds of conduct by allowing punitive damages. The court held no intent existed because: (1) Article 17 referred to "actual harm caused by an accident rather than generalized legal damages;"\textsuperscript{417} (2) it was highly unlikely that Article 24(2)\textsuperscript{418} was intended by its drafters to preserve a common law right to punitive damages; and (3) the "unlimited liability for willful misconduct" provision of Article 25 was meant only to refer to unlimited liability for compensatory damages.\textsuperscript{419}

Furthermore, the court held that allowing recovery of punitive damages would undermine the policy considerations underlying the Convention.\textsuperscript{420} First, the goal of establishing a uniform carrier liability regime would be defeated because no other country had awarded punitive damages under the Convention. Second, the goal of making airlines insurable would be defeated because if an airline could not find an insurer willing to sell insurance for punitive damages, it might choose to terminate international flights rather than risk bankruptcy with every flight. Third, the availability of punitive damages would defeat the goal of compensating plaintiffs quickly with a minimum of litigation because every plaintiff would claim willful misconduct.

Similarly, in \textit{In re Korean Air Lines Disaster of Sept. 1},

\begin{footnotesize}
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    \item \textsuperscript{416} \textit{Id.} at 1280.
    \item \textsuperscript{417} \textit{Id.} at 1281.
    \item \textsuperscript{418} Article 24 provides:
        \begin{enumerate}
            \item In the cases covered by articles 18 and 19 [baggage claims] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
            \item In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.
        \end{enumerate}

Warsaw Convention, \textit{supra} note 349, art. 24.
    \item \textsuperscript{419} Warsaw Convention, \textit{supra} note 349, art. 17.
    \item \textsuperscript{420} \textit{Air Disaster at Lockerbie, Scotland}, 928 F.2d at 1280.
\end{itemize}
\end{footnotesize}
the District of Columbia Circuit interpreted Article 17 of the Warsaw Convention to exclude recovery for punitive damages. The litigation arose out of a crash when a Boeing 747 airliner was shot down over the Sea of Japan by one of the Soviet Union’s SU-15 interceptor aircraft, killing all 269 persons on board. A jury awarded the plaintiffs both actual and punitive damages. On appeal, the court vacated the $50 million punitive damages award. The court held that the language “liable for damage sustained” strongly implies that the carrier’s responsibility is compensatory and extends only to the reparation of loss from the death or injury of passengers. Additionally, the requirement that the damage sustained resulted from an accident aboard the aircraft reinforced the conclusion that recovery was available only for actual loss since an accident cannot cause punitive damages.

In Hospital Authority of Gwinnett County v. Jones, on remand from the United States Supreme Court, the Supreme Court of Georgia reconsidered and reinstated its previous judgment that an award of nominal damages of $5,001 and punitive damages of $1.3 million was not unconstitutionally excessive. O’Kelley, the plaintiff’s decedent, was severely burned in an automobile accident and taken by ambulance to a nearby hospital. Shortly thereafter, in accordance with hospital policy, O’Kelley was airlifted by helicopter to a hospital with a burn unit. Enroute, the helicopter crashed. O’Kelley was slightly in-

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422 Id. at 1484-85.
423 Id. at 1491.
424 Id. at 1485 (quoting Warsaw Convention, supra note 349, art. 17).
425 Id.
426 Id. at 1486.
428 Id. at 502.
jured in the crash but died several days later as a result of his original burn injuries.

In its first consideration of the case, the Georgia Supreme Court approved the jury award. The court found that there need be no relationship between the injury and the amount of punitive damages under Georgia law, the sole exception to this being damages awarded for wounded feelings. The court observed that the Hospital Authority's policy of bypassing continued care at a nearby non-participating hospital and diverting patients to the Hospital Authority's own hospitals "supports a jury’s finding of wanton disregard for the rights, and a conscious indifference to the best interest, of its injured patients."

The United States Supreme Court granted the Hospital Authority's writ of certiorari, then vacated the judgment and remanded the case for reconsideration in light of Pacific Mutual Life Ins. Co. v. Haslip. On remand, the Georgia Supreme Court noted that

[w]hile the Supreme Court in Haslip analyzed the punitive damages award by comparing it to the actual award, nothing in the opinion mandates such a comparison. In fact, the Court approved the Alabama review standards which include 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'

The court held the award was not excessive because the actual harm to O'Kelley was slight, but the potential harm to patients in other circumstances supported the punitive

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429 Hospital Auth. of Gwinnett County v. Jones, 386 S.E.2d 120 (Ga. 1989), cert. granted and judgment vacated, 111 S. Ct. 1298 (1991) [hereinafter Hospital I]. The court held the award of nominal damages was supported because O'Kelley would not have received the additional slight injuries but for the unwarranted transportation. Id. at 123.

430 Id.

431 Id. at 122.


433 Hospital II, 409 S.E.2d at 503.
damages award. The court stated:

Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided.

B. BURDEN OF PROOF

In Faria v. M/V Louise, the Ninth Circuit held the indemnitee bears the burden of apportioning damages in an indemnity case where the underlying settlements covered multiple accidents, only some of which involved claims against the indemnitor. The underlying action involved claims by two employees against their employer, Louise V, for injuries arising out of two accidents involving McDonnell-Douglas helicopters and two accidents having no connection with McDonnell Douglas Helicopter Company (MDHC). The employer paid the employees lump sums of $60,000 and $112,500 respectively in good faith settlement of their claims. The settlement agreement did not apportion the amounts among the accidents nor was apportionment discussed at the settlement hearing. Subsequently, the employer sued MDHC for indemnity and demanded reimbursement of the entire settlement to the first employee and $87,500 out of the second settlement. The district court found for the employer and awarded reimbursement as requested, plus costs and fees and denied MDHC's motion to dismiss.

On appeal, the Ninth Circuit reversed. The court rejected the employer's contention that once it had submit-
ted the settlement figures and proven the amounts were paid, it was incumbent upon the indemnitor to introduce evidence that the representation of damages was inaccurate or inappropriate. The court noted that a good faith settlement might create a rebuttable presumption as to the facts upon which the settlement was based. However, a good faith settlement did not create a presumption that damages had been apportioned among claims where no such apportionment was made in connection with the settlement. Because the employer had failed to point to any evidence before the district judge to support an apportionment of damages, the Ninth Circuit reversed and entered judgment for MDHC.

C. PECUNIARY DAMAGES

In Das v. Royal Jordanian Airlines, the court held that a travel agent was liable for consequential damages which resulted when it issued confirmed tickets to a passenger who was in fact on a wait list. Bengal, the travel agency, confirmed Das for a flight to Calcutta, India; however, the flight was subsequently cancelled by Royal Jordanian. When Royal Jordanian reinstated the flight, Bengal obtained a new reservation for Das as a wait-listed passenger. When Das complained about his status, Bengal issued tickets showing confirmed space. The details on the tickets were handwritten, not computer-generated. When Das arrived at the airport, Royal Jordanian refused to honor the tickets. Bengal asserted that holders of confirmed tickets on the original flight should be entitled to the same status on the reinstated flight. The court rejected that contention because the obligation did not exist in the aviation industry. The court held that Bengal

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440 Faria, 945 F.2d at 1144.
441 Id. at 1145.
443 Id. at 171.
444 Id. at 170.
was Das' agent and as such owed a duty of due care to Das. Consequently, Das was entitled to recover the cost of the tickets, the costs incurred due to being delayed an additional day, and $1,000 for the emotional distress Bengal inflicted on Das by its actions.

In *Delta Airlines, Inc. v. Ageloff*, the Florida Supreme Court held the term "net accumulations" under the Florida Wrongful Death Act excluded investment income, but included the investment return on future savings. Ageloff, who had died in an airline crash, was unmarried and had no dependents. Ageloff's experts testified that Ageloff would have continued to reinvest 25% of his gross earnings into his family's toy business. They testified that the present value of the loss of prospective net accumulations to Ageloff's estate was between two and three million dollars. Delta contended that the investment yield on future savings constituted "income from investments continuing beyond death" and was therefore excluded from the definition of "net accumulations". The court held "net accumulations" included the investment income on the future savings and affirmed.

D. Costs and Fees

In *Galowich v. Beech Aircraft Corp.*, the court held a deposition which was used at trial to impeach or refresh the recollection of a witness was not "necessary" for the purpose of awarding costs to the losing litigant. The court remarked that "[i]f a witness admits making a contradictory statement during a deposition, we fail to see why it is necessary to use the deposition at trial. Likewise,
we do not believe that any attempt to refresh recollection, no matter how minor the issue, is a necessary use."\textsuperscript{455}

X. INSURANCE COVERAGE

A. PILOT QUALIFICATIONS

In \textit{United States Aviation Underwriters, Inc. v. Cash Air, Inc.},\textsuperscript{454} USAU sought a declaration that coverage was not available for injuries or damages caused by a crash of its insureds' Piper Seneca. It was uncontested that the pilot, Covich, did not have the experience as a pilot that was required in the pilot experience warranty of the policies. Following the majority view, the Supreme Judicial Court of Massachusetts held "the USAU policy requirements concerning pilot experience were intended to be conditions precedent to the existence of coverage."\textsuperscript{455} Similarly, the court held that, even when the loss was not caused by a breach of that policy condition, an insurer is entitled to rely on a policy provision that unambiguously makes coverage dependent on the pilot of the aircraft meeting particular experience standards.\textsuperscript{456}

Consequently, the court held "the explicit condition precedent of pilot experience serves a worthwhile purpose, and it is irrelevant whether the breach caused the loss for which a claim is made under the policy."\textsuperscript{457}

B. CONTRACT LANGUAGE

1. Ambiguous Terms

In \textit{National Union Fire Insurance Co. of Pittsburgh, Pa. v. Hudson Energy Co.},\textsuperscript{458} the Supreme Court of Texas construed an insurance policy not to exclude coverage for simultaneous piloting of an aircraft by a qualified and an

\textsuperscript{455} \textit{Id.}
\textsuperscript{454} 568 N.E.2d 1150 (Mass. 1991).
\textsuperscript{455} \textit{Id.} at 1152.
\textsuperscript{456} \textit{Id.}
\textsuperscript{457} \textit{Id.}
\textsuperscript{458} 811 S.W.2d 552 (Tex. 1991).
unqualified pilot. Hudson, the insured, purchased a Cessna P-210 with dual controls. During a lesson with his instructor, the air traffic controller instructed Hudson to land on a runway that required him to make a steep descent. As the airplane was landing, it began to bounce and the instructor assisted Hudson by operating the second set of instruments. Inexplicably, the Cessna veered off the runway into the sod and flipped over when its nose gear sheared off.

Hudson filed a claim under his insurance policy to recover for damage to the plane. The insurance policy required that when in flight, the aircraft was to be piloted either by Hudson, provided he was a "private pilot," or by any "private or commercial pilot." The jury found that although Hudson was not qualified because he was only a student pilot, the instructor was qualified. National Union asserted that denial of coverage was proper because the policy excluded coverage when an unqualified pilot was at the controls, even if a qualified pilot was simultaneously piloting the aircraft. Conversely, Hudson asserted that the policy merely required that a qualified pilot be at the controls, and that it did not matter if an unqualified pilot was also at the controls.

The court held that the policy was ambiguous because it did not expressly address the situation in which the aircraft was piloted by a qualified pilot and by a pilot other than a qualified pilot. Under Texas law, an ambiguous insurance policy is construed according to any reasonable interpretation of the contract terms advanced by the in-

459 Id. at 554-55.
460 Id. at 554. Hudson's "private pilot" status required that he was properly certified by the FAA, having had a minimum of 213 logged flying hours and having received 15 hours of dual instruction from a properly certified pilot prior to solo. Id.
461 Id. To qualify for this status, the pilot was to be instrument rated with a minimum of 750 logged flying hours, including 150 hours in retractable gear aircraft and 15 hours in the make and model of the aircraft to be insured. Id.
462 Id. at 555.
Hudson's construction was reasonable because National Union knew that the aircraft had dual controls. Therefore, it was incumbent on the insurer to expressly exclude simultaneous piloting from the scope of coverage. Alternatively, the court held that coverage was available because the instructor was acting as the "pilot" since he was effectively in control of the Cessna throughout its flight.

In *Avemco Insurance Co. v. McCrone*, the court held that the term "child" was ambiguous and could not be applied to limit the insurer's liability to the insured's adult son who was killed in an airplane accident. The insured's policy limited liability to an insured person's parent or child to 12% of the limit for each person, (i.e. $100,000) but not more than $12,500. The court maintained that the term "child" could reasonably be construed to mean "minor child" or simply refer to the relationship to the insured. Consequently, the court construed the ambiguous provision in favor of the insured and awarded the full $100,000.

In *Jordan v. National Accident Insurance Underwriters Inc.*, the court refused to decide whether the insured decedent's status should be determined at the moment of impact or at some point before the death or injury occurred. Instead, the court held that the policy was ambiguous and construed it in favor of the insured. In *Jordan*, the insured's policy expressly limited coverage to injuries incurred while riding as a passenger (and not as a pilot or member of the crew). Jordan had been taking a refresher course in IFR flying from Page, an experienced

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464 Hudson Energy Co., 811 S.W.2d at 555.
465 Id.
467 Id. at 1077.
468 Id. at 1076-77.
469 922 F.2d 732 (11th Cir. 1991).
470 Id. at 735.
471 Id.
instructor. The plane lost power upon final approach and Page took the controls. Page attempted to land the plane but it struck power lines and Jordan was killed in the ensuing crash. The court held that the policy was ambiguous because it did not define the terms “pilot,” “passenger” or “member of the crew.” The court noted that while some courts have adopted the “moment of impact” test in construing those terms, others have rejected it. The court remarked that “[u]nder Alabama law, if an insurance contract provision is subject to more than one interpretation, it should be construed in favor of coverage, and against the insurer."

The court also noted that under Alabama law the general rule is that the insured bears the burden of proving coverage. When the insurer denies coverage under an exclusionary clause, however, the insurer bears the burden of proving that the exclusion applies. When the insurer contended that the insured was not expressly covered, it was attempting to place the claim within the provision of the policy excluding all injuries arising from aviation accidents regardless of whether the insured was riding as a passenger or otherwise, unless coverage was expressly provided. Because the insurer denied coverage under an exclusionary clause, the court held that the insurer bore the burden of proving that the exclusion applied.

In Gonzalez v. Mission American Insurance Co., the court held that an endorsement limiting recovery for “bodily in-

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472 Id.
475 Jordan, 922 F.2d at 735 (quoting Colbert County Hosp. Bd. v. Bellefonte Ins. Co., 725 F.2d 651, 654 (11th Cir. 1984)).
476 Id. (citing Colonial Life and Accident Ins. Co. v. Collins, 194 So. 2d 532, 535 (Ala. 1967)).
477 Id. (citing Burton v. State Farm Fire and Casualty Co., 533 F.2d 177, 178 (5th Cir. 1976), citing Fleming v. Alabama Farm Bureau Mut. Casualty Ins. Co., 310 So. 2d 200, 202 (Ala. 1975)).
478 Id. at 736.
479 795 S.W.2d 734 (Tex. 1990).
jury” to $100,000 per passenger did not also limit recovery for death to $100,000. The court held that “death” and “bodily injury” were not identical terms for coverage purposes. Consequently, the plaintiffs were entitled to recover up to $1,000,000, the aggregate amount of coverage under the policy.

2. Unambiguous Terms

In *Monarch Insurance Co. v. Heatherly*, the Supreme Court of New York, Trial Division, held that an insured's Agriplan Aerial Applicator's Insurance Policy did not provide third party coverage for injuries resulting from the accidental spraying of herbicides and fungicides. The policy offered seven types of liability coverage, including Chemical Liability. However, the insured purchased only Bodily Injury and Property Damage coverage, both of which expressly excluded Chemical Liability. When the insured was subsequently sued by a neighbor for both negligently spraying and for failing to warn of the spraying, the insurer refused to defend and sought a declaration of its rights. The court held that the unambiguous language of the policy excluded coverage for accidental spraying, and furthermore, the failure to warn arose out of the use of chemicals and was similarly excluded.

In *Marine Midland Leasing Corp. v. Chautauqua Airlines, Inc.*, the court declared that under the clear and unambiguous language of the parties' lease, the lessor was entitled to receive and retain the insurance proceeds from the loss of its aircraft, to the extent that such proceeds exceeded the fair market value or casualty value of the air-

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480 Id. at 736.
481 Id. at 736-37.
483 Id. at 746.
484 Id. "No coverage applies to bodily injury which is caused by or arises out of the use of chemicals . . . [or] resulting directly or indirectly from chemicals, fertilizers or seeds." Id.
craft, whichever was greater.\textsuperscript{486} Chautauqua Airlines, Inc., the lessee, had procured insurance in an amount clearly greater than either of those values; however, Marine Midland, the lessor, refused to sign the proof of loss unless it also received any excess proceeds. The proof of loss for damage was $2.5 million and the casualty value was $1,445,903.63. The court held that the lessee would be entitled to any excess; however, the court remitted the matter because the record lacked proof concerning the fair market value of the aircraft.\textsuperscript{487}

C. CAB Endorsement

In \textit{United States Fire Insurance Co. v. Southeast Airmotive Corp.},\textsuperscript{488} North Carolina Court of Appeals held an insurer’s claim for reimbursement was not a claim which existed at the time the complaint was served in the previous declaratory judgment action.\textsuperscript{489} Consequently, the claim was not barred by issue preclusion. The suit arose as a result of the crash of a Southeast Airmotive Corp. (Southeast) aircraft en route to Douglas International Airport in Charlotte, North Carolina. Southeast tendered its defense to U.S. Fire who refused the tender. Southeast obtained a judgment declaring that U.S. Fire was required to provide coverage. U.S. Fire subsequently defended and incurred expenses in the amount of $80,499.48.

U.S. Fire thereafter sued Southeast for reimbursement of its litigation costs. Southeast filed a motion to dismiss, alleging that the subject of U.S. Fire’s complaint was previously joined as an issue in the prior action, and that the subject of the complaint was in the nature of a compulsory counterclaim which should have been brought in the prior action and was therefore barred. The trial court granted Southeast’s motion and U.S. Fire appealed.

The court of appeals noted that the underlying policy

\textsuperscript{486} \textit{Id.} at 574.
\textsuperscript{487} \textit{Id.} at 574-75.
\textsuperscript{489} \textit{Id.} at 468.
contained a CAB endorsement⁴⁹⁰ and that Southeast’s liability had resulted from an ambiguity in that endorsement.⁴⁹¹ The court held that a claim for reimbursement could arise only if coverage resulted from the presence of the CAB endorsement.⁴⁹² Therefore, a claim for reimbursement could not be a coverage related claim which existed at the time of serving the complaint in the previous action. As such, it could not be in the nature of a compulsory counterclaim.⁴⁹³ The court held that the issue of reimbursement was neither raised nor disposed of in the prior action because it was distinct from the issue of coverage.⁴⁹⁴ Consequently, the court determined that the claim could not be barred by issue preclusion, reversing the trial court’s order.

D. Policy Renewal

In Avemco Insurance Co. v. Medicalodges, Inc.,⁴⁹⁵ the court held that the insured did not accept the insurer’s offer to renew a noncommercial aircraft policy within a reasonable time.⁴⁹⁶ In November, 1987, the insured received an invitation to renew since the policy was to expire on December 1, 1987. On December 11, 1987, the aircraft was damaged when the engine was started. On December 19, 1987, the insured elected to renew the policy, but backdated its check to December 1, 1987. The insurer denied liability because it asserted the policy had expired on December 1, 1987, and was not in force on the 11th.

⁴⁹⁰ See 14 C.F.R. § 298.41 (1991) (requiring a CAB standard endorsement as part of a policy of insurance). The endorsement provided: “The named insured will promptly reimburse the insurer for payments made by the insurer which the insurer would not have been obligated to make except for the provisions of this endorsement.” Southeast Airmotive Corp., 402 S.E.2d at 467.
⁴⁹¹ Southeast Airmotive Corp., 402 S.E.2d at 467.
⁴⁹² Id.
⁴⁹³ See Faggart v. Biggers, 197 S.E.2d 75, 78 (N.C. App. 1973) (a counterclaim is compulsory when it is in existence at the time of the serving of the pleading, when it arises out of the same transaction or occurrence, and when it does not require the presence of third parties over whom the Court cannot acquire jurisdiction).
⁴⁹⁴ Southeast Airmotive Corp., 402 S.E.2d at 468.
⁴⁹⁶ Id. at 398.
The court noted that the policy did not include a clause stating the period for which the policy extended its offer to renew.\textsuperscript{497} The court resolved the ambiguity by imposing an implied term of tendering the premium for renewal "within a reasonable time."\textsuperscript{498} The court held, however, that the insured did not accept the insurer's offer within a reasonable time.\textsuperscript{499} The insured accepted the offer only as a result of the aircraft accident. The court stated "[a]lthough a delay of this length under different circumstances might be acceptance within a reasonable time, the court has no difficulty in concluding that defendant's acceptance after the accident simply came too late."\textsuperscript{500}

E. MISCELLANEOUS

In \textit{Dickman Aviation Services v. United States Fire Insurance Co.},\textsuperscript{501} Dickman was sued for breaching a contract to provide a factory-like new Cessna 210 airplane to McKoane. Dickman damaged the aircraft's engine during the overhaul which resulted in an additional charge of $10,561.50. McKoane sued Dickman, who tendered the defense to U.S. Fire, which declined to defend the action because the loss did not result from "an occurrence." Some time later, McKoane served Dickman an amended complaint alleging Dickman's negligence caused the damage. Dickman failed to inform U.S. Fire of the amended complaint. Instead, the parties appeared before the court and judgment was entered for McKoane. Subsequently, Dickman sued U.S. Fire to recover the money it paid in satisfaction of the judgment.

The court held that a liability insurer was not bound by the judgment against the insured on the negligence count of the amended complaint.\textsuperscript{502} The court noted the origi-\textsuperscript{497} Id.
\textsuperscript{498} Id. (relying on Shepard v. United States Fidelity and Guar. Co., 504 P.2d 228, 230 (Kan. 1972)).
\textsuperscript{499} Id. at 398.
\textsuperscript{500} Id. at 399.
\textsuperscript{501} 809 S.W.2d 149 (Mo. 1991).
\textsuperscript{502} Id. at 153.
nal complaint contained other theories of liability which were outside the policy's coverage.\textsuperscript{503} Thus, denial of tender was proper. The insurer was not liable because the insured had breached the terms of the policy by failing to notify the insurer of the amended complaint and immediately appearing before the court. Consequently, the court granted the insurer's motion for summary judgment.

XI. FAA ENFORCEMENT/LOCAL REGULATION

A. Due Process

In \textit{Atorie Air, Inc. v. Federal Aviation Administration},\textsuperscript{504} the court determined that an air cargo company had waived procedural due process rights by relinquishing its right to judicial review as provided for in 49 U.S.C. § 1486.\textsuperscript{505} Due to prior numerous violations of FAA safety regulations, and a current air crash, the FAA's associate regional counsel asked Atorie to voluntarily surrender the certificates necessary to its operation.\textsuperscript{506} Atorie surrendered the certificates after the FAA agreed to return the certificates as soon as Atorie complied with the regulations. The FAA failed to timely return the certificates because it purportedly found continued unaddressed violations. When the FAA finally recertified Atorie and returned its certificates, Atorie had allegedly lost all of its cargo contracts.

Atorie sued the FAA for loss of its business. The court determined that Atorie had negotiated with the FAA con-

\textsuperscript{503} \textit{Id.} at 152.

\textsuperscript{504} 942 F.2d 954 (5th Cir. 1991).

\textsuperscript{505} \textit{Id.} at 960-61. Section 1486 provides in pertinent part:

(a) Any order . . . issued by the [Federal Aeronautics] Board . . . shall be subject to review by the courts of appeals for the United States . . . upon petition.

(d) . . . [U]pon good cause shown and after reasonable notice to the Board . . . interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.


cerning its compliance with agency regulations, voluntarily relinquished its certificates to avoid an emergency suspension order, knowingly refrained from seeking court review when the FAA failed to return the certificates as promised, and, instead, attempted to restructure its business.\(^{507}\) Consequently, Atorie had waived its procedural due process rights.

On appeal, the Fifth Circuit agreed that procedural due process was available to Atorie because the FAA action complained of could have been subject to appellate review.\(^{508}\) The court rejected Atorie’s assertion that because the certificates were voluntarily surrendered, there was never a final agency action issued. The court noted that Atorie voluntarily surrendered its certificates and no emergency order revoking certification had been issued by the FAA. Therefore, Atorie had a duty to demand their return. In the absence of a demand, the “FAA was never obliged to justify its continued holding of the certificates.”\(^{509}\) The court noted that had Atorie made such a demand, “judicial review of that demand and the FAA’s refusal would have been available under section 1486(a)”\(^{510}\)

The Fifth Circuit also agreed with the district court that Atorie had waived its procedural due process rights. The court noted that for a waiver to take place “the record must reflect a basis for the conclusion of actual knowledge of the existence of the right, . . . full understanding of its meaning and clear comprehension of the consequences of waiver”.\(^{511}\) The court stated that basis was satisfied because Atorie had retained counsel who was a former lawyer with the FAA and was familiar with the applicable statutes and regulations and who had determined that it was better to cooperate with the FAA than rock the boat.

\(^{507}\) Atorie Air, 942 F.2d at 957.
\(^{508}\) Id.
\(^{509}\) Id. at 960.
\(^{510}\) Id.
\(^{511}\) Id. at 961 (quoting Burno v. City of Denna, 714 F.2d 484, 492-93 (5th Cir. 1983)).
by demanding the return of the certificates. Consequently, the court held that when Atorie decided not to avail itself of its appellate rights, waiver occurred.

B. Appeal

In *McCarthney v. Busey,* a divided Sixth Circuit held that a petitioner’s notice of appeal from the issuance of an emergency revocation order did not start the running of the sixty-day period in which the National Transportation and Safety Board (NTSB) had to render a decision. The Federal Aviation Administration (FAA) issued emergency revocation orders charging McCarthney and six others (petitioners) with intentionally or fraudulently falsifying entries in official records in violation of 14 C.F.R. § 61.59(a)(2). The orders were served by certified mail on Friday, October 26, 1990, and petitioners appealed immediately. Later that day, the FAA faxed the NTSB copies of its motion to consolidate the seven appeals, enclosing with each an emergency revocation order and advising that “[t]he Administrator had determined that an emergency exists” as to each. The NTSB stamped the motion to consolidate received on Monday, October 30, 1990, and rendered its decision fifty-nine days later on December 28, 1990.

Petitioners argued that the sixty-day period began on October 26, 1990, the day they filed their notice of appeal. Therefore, the NTSB’s action was not timely since

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512 *Id.* at 961.
513 *Id.* at 961-62.
514 947 F.2d 1302 (6th Cir. 1991), modified, 954 F.2d 1147 (6th Cir. 1992).
515 The statute provides:

[T]he Secretary of Transportation advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation.

516 *Busey,* 947 F.2d at 1302.
the matter was disposed of on the sixty-third day. The court rejected this argument, holding that the petitioners' appeal did not satisfy the statutory and regulatory requirements. The court noted that the sixty-day period did not run until written notification was received from the Administrator which expressed the "emergency nature of the orders." That notice must be sent by the Secretary of Transportation or the Administrator. Notices of appeal from petitioners were not "advice from the Secretary" and, therefore, did not begin the running of the sixty-day period. Conversely, the notices sent by the FAA did satisfy the statutory requirements. Because these latter notices were stamped received on October 30, 1990, the NTSB decision was timely.

C. FORFEITURE

In In re Forfeiture of One 1980 Cessna T 207-A, the Florida District Court of Appeal held forfeiture of an aircraft was proper because the owners had knowingly violated a registration requirement, despite their claim that they were in the process of having the aircraft inspected and repaired in order to obtain registration at the time of seizure. The owners, Inverest International, Inc. (Inverest) and Roberto Striedinger, purchased a 1980 Cessna T-207 which displayed French registration numbers from a previous owner. One month after purchase, the FAA notified the owners of the need to register the aircraft. Twelve months later, the owners arranged to have the aircraft repaired and registered through a fixed base operator. The next month, pursuant to state law,

517 Busey, 954 F.2d at 1152.
518 See id.; 49 U.S.C. app. § 1429(a) (1988); 49 C.F.R. § 821.55(b) (1992) ("The procedure set forth herein shall apply as of the date when the Administrator's written advice of the emergency character of his order has been received by the Office of Administrative Law Judges or by the Board.")
519 Busey, 954 F.2d at 1152.
521 Id. at 554.
Broward County Sheriff’s Deputies seized the aircraft when they discovered that the French registration had expired and the aircraft had not been registered with the FAA.\footnote{Sections 329.10 and 329.11 provide that an aircraft with improper registration may be seized and forfeited under the Florida Contraband Forfeiture Act. FLA. STAT. ANN. §§ 932.701-704 (West 1991).}

Striedinger and Inverest appealed the forfeiture on the ground that they did not “knowingly” violate the Florida forfeiture statute. They asserted they were in the process of having the aircraft inspected and repaired in order to obtain registration and furthermore, that they were not instructed to secure registration by the FBO. The court disagreed and instead approved the trial court’s suggestion that failure to register the aircraft implied some clandestine use. The court held that, “[t]he record supports the trial court’s conclusion that appellants knew that the plane required FAA registration and notwithstanding this, they knowingly failed to register the plane.”\footnote{Cessna T 207-A, 587 So. 2d at 554.} Accordingly, the court affirmed the trial court’s judgment.

A forceful dissent argued that the majority’s formulation impermissibly shifted the burden of proving knowledge to the party opposing forfeiture. The dissent argued that the burden was on the party seeking forfeiture to allege and prove the owners’ intentional act to conceal the owners’ identity.\footnote{Id. at 556.} The dissent also included an “Epilogue To Dissent,” that commented on subsequent public knowledge that Striedinger had become a player in the Noreiga trial because of reported drug smuggling activities. The dissent stated:

This newly reported information had no effect whatsoever on the work of any judge on the panel as none of that information was in the trial record of the present case being reviewed on appeal. Accordingly, should the reader consider the dissent to be naive, as is the reader’s privilege, the reader does so without an understanding of appellate review of trial records, notwithstanding the foregoing
D. IMPROVEMENT GRANTS

In City and County of San Francisco v. Federal Aviation Administration,527 the Ninth Circuit held that the FAA properly denied San Francisco airport improvement grants under the Airport and Airway Improvements Trust Fund.528 According to the court, the use of noise control regulations by San Francisco to bar aircraft on a basis other than noise,529 or without a factual basis, was inconsistent with a fair and efficient national air transport system.530 Furthermore, because the FAA violated the 180-day limit on its consideration of certain grants,531 including refiled grants, the court directed the FAA to approve grants for certain years.

E. MISCELLANEOUS

In Janka v. Department of Transportation, National Transportation Safety Board,532 the Ninth Circuit upheld a finding of intentional falsification of a logbook entry.533 In the consolidated cases, defendant Janka was charged with violating Federal Aviation Regulation (FAR) 91.9 for operating an aircraft in a careless or reckless manner, FAR 91.65(a) for creating a collision hazard, and FAR 61.59(a) for maki-
ing an intentionally false logbook entry. Janka asserted that he had not violated FAR 61.59(a) because he lacked any intent to deceive. The court held that an "intent to deceive" is only required where the violation charged is fraudulent falsification of a logbook; whereas the elements of intentional falsification of a logbook were falsity, knowledge, and materiality. Janka also asserted that the logbook entry was not material. The court adopted the Sixth Circuit's definition of materiality and held that a logbook entry is material if the statement was capable of influencing the Federal Aviation Administration. Consequently, the court affirmed the Board's decision.

XII. STRICT LIABILITY

A. DANGEROUS INSTRUMENTALITIES

In Bailey v. Pennsylvania Electric Co., a Pennsylvania intermediate appellate court held that high voltage lines were a dangerous instrumentality and therefore a power company owed a high duty of care towards pilots and not merely an ordinary duty of care. Bailey and Muth, pilots for an air reconnaissance company hired by Pennsylvania Electric Company (Penelec), were engaged in a routine patrol of a Penelec 46Kv electrical transmission line. Their helicopter collided with an intersecting unmarked 115Kv line and plunged to the ground killing Muth and severely injuring Bailey. A jury found Penelec 65% at fault and Penelec moved for a judgment n.o.v., which the court denied.

Penelec appealed on the ground that it had no notice of the dangerous condition. The court, however, following

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535 Janka, 925 F.2d at 1150.
536 The entry indicated that Janka gave one hour of instruction in August, when in fact the instruction took place in May.
537 See Cassis v. Helms, 737 F.2d 545 (6th Cir. 1984).
538 Janka, 925 F.2d at 1150.
540 Id. at 43.
Yoffee v. Pennsylvania Power & Light Co.,\textsuperscript{541} held that where there is a likelihood that an aircraft will fly by a transmission line, harm is foreseeable.\textsuperscript{542} The court also noted that "the fact that Bailey and Muth were retained to perform flight inspections for Penelec is sufficient proof that the power company was aware that aviation activities would be taking place over its lines."\textsuperscript{543}

The court further held that high voltage transmission lines were dangerous instrumentalities which carry a high probability of death or serious injury if they are not properly marked with spherical line markers.\textsuperscript{544} The court held Penelec was properly held to a high, not an ordinary, duty of care because it was responsible for hundreds of high voltage lines over which pilots fly their aircraft.\textsuperscript{545} In the present case there was ample evidence for the jury to conclude that Bailey and Muth were not alerted properly to the presence of the intersecting transmission line. Because the jury could surmise that the insufficient warning was the proximate cause of the helicopter crash, judgment n.o.v. was properly denied.

\textbf{B. Preemption}

In \textit{Green v. Industrial Helicopters, Inc.},\textsuperscript{546} the Supreme Court of Louisiana reversed the en banc opinion of the court of appeals\textsuperscript{547} and held that under the facts of that instant case, state law was not preempted by, but supplemented general maritime law since the state law did not "impermissibly conflict with the substantive general maritime law."\textsuperscript{548} Consequently, a passenger who was injured in a helicopter crash while being ferried from shore onto

\begin{itemize}
\item \textsuperscript{541} 123 A.2d 636 (Pa. 1956) (a wrongful death action involving the pilot of a single engine aircraft who was killed when his aircraft collided with a transmission line strung across the Susquehanna River by defendant at a height of 185 feet).
\item \textsuperscript{542} Bailey, 598 A.2d at 46.
\item \textsuperscript{543} Id.
\item \textsuperscript{544} Id. at 46, 51.
\item \textsuperscript{545} Id. at 47.
\item \textsuperscript{546} Green, 593 So. 2d at 636.
\item \textsuperscript{547} 593 So. 2d 634 (1992).
\item \textsuperscript{548} 576 So. 2d 1183 (La. Ct. App. 1991).
\end{itemize}
an offshore production platform was entitled to recovery under Louisiana’s strict liability statute without proof of the helicopter owner’s negligence.

The Supreme Court of Louisiana agreed that admiralty jurisdiction was invoked because the activity at issue was traditionally performed by waterborne vessels and involved an accident on the high seas. However, the court held that when bringing claims under a “saving to suitors” clause, it was not necessary to find an exact counterpart to the strict liability provision of the general maritime law. Instead,

[the proper inquiry is whether in this setting strict liability under Louisiana law thwarts the purpose of any specific congressional pronouncement, or “work[s] material prejudice to the characteristic features of maritime law or interfere[s] with the proper harmony or uniformity of that law in its international and interstate relations.]

The requirement of “no specific Congressional pronouncement” was satisfied because the court found no clearly applicable federal statute “governing the liability of a helicopter owner to an offshore worker passenger for injuries sustained by the passenger from a crash landing on the high seas caused by a defective condition of the helicopter.” The requirement that there be “no mate-

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549 LA. CIV. CODE ANN. art. 2317 (West 1991).
550 Under general maritime law, a vessel owner’s exposure to non-seamen passengers is predicated on the theory of negligence. Green, 593 So. 2d at 640; see MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES, § 3:4 at 63 (4th ed. 1990).
551 28 U.S.C.A. § 1333 (“saving to suitors” clause which permits claimants to pursue common-law remedies in state court).
552 Green, 593 So. 2d at 638. The court of appeals had held that where the remedy sought under state law altered or conflicted with the maritime law which established the substantive rights of the parties, maritime law should control. Such a conflict existed in the present case because general maritime law required proof of negligence by a passenger who sues a common carrier, whereas Louisiana’s strict liability statute law had no such requirement. Because plaintiff had not proven negligence, the court of appeals dismissed plaintiff’s claims. Green, 576 So. 2d at 1184.
553 Green, 593 So. 2d at 638.
554 Id.
rial prejudice” was satisfied because

given the lack of maritime rule clearly applicable to a helicopter crash on the high seas and the recognition of liability in the absence of fault in the general maritime law, [the court held that] strict custodial liability embodied in Louisiana Civil Code article 2317 cannot be said to ‘materially prejudice’ characteristic features of the general maritime law.555

Lastly, the requirement that there be no interference with uniformity of law was satisfied because the tangential relationship of offshore drilling to traditional maritime activities combined with strong state interest brought the case within the “maritime but local” doctrine.556 Consequently, the trial court did not err in applying state law.

XIII. NEGLIGENCE

In Rodriguez Pardo v. Delta Airlines, Inc.,557 a federal district court held that the plaintiffs had failed to demonstrate any genuine issue as to any material fact upon which a finding of liability against Delta Airlines, Inc. (Delta)558 could rest and granted Delta’s motion for summary judgment. The plaintiffs were paying passengers on Delta flight 179 from San Juan to Miami. After landing in Miami and while taxiing towards the gate, a camera case stored by an unidentified passenger in an overhead compartment fell out and hit one of the plaintiffs on the back of her neck when the passenger retrieved his belongings.

The plaintiffs alleged that Delta was negligent in failing to ensure that the compartment was not overloaded. However, the court noted that the plaintiffs failed to come forward with any evidence upon which a finding of improper loading could be based.559 The plaintiffs further

555 Id. at 642.
556 Id. at 643. The doctrine allows the application of state law “[i]f it [can] be said that the work activities of the injured employee have no direct concern with navigation or commerce.” Id. (citations omitted).
558 Id. at 29.
559 Id. at 28.
alleged that Delta was negligent in allowing the unidentified passenger to stand while the "fasten seat belt" sign was illuminated. However, the court noted that the plaintiff had not produced evidence showing that the crew failed to order the passenger to sit down, or that there was time for a flight attendant to instruct him to remain seated.\footnote{Id.} Finally, the court noted that plaintiffs had not produced any evidence that any Delta employee was involved in Mrs. Rodriguez Pardo's injury.\footnote{Id. at 29.} Consequently, the court granted Delta's motion for summary judgment.

In \textit{Marshall v. Western Air Lines, Inc.},\footnote{813 P.2d 1269, 1269 (Wash. Ct. App.), \textit{review denied}, 822 P.2d 287 (Wash. 1991).} the Court of Appeals of Washington held that the doctrine of \textit{res ipsa loquitur} would not relieve a plaintiff of the burden of proving that the defendant's negligence caused the sudden changes in cabin air pressure which allegedly harmed the plaintiff.\footnote{Id. at 1274.} The court further maintained that an airline had no duty to warn of hazards associated with a passenger's particular condition.\footnote{Id. at 1275.} In \textit{Marshall}, the plaintiff alleged Western Air Lines, Inc. (Western) had negligently caused a sudden change in cabin air pressure while she was a passenger aboard defendant's aircraft. The plaintiff alleged the pressure change ruptured the membrane of her middle ear\footnote{Id. at 1271.} which consequently restricted her lifestyle in that she was no longer able to travel anywhere involving a change of altitude. The trial court rejected the plaintiff's theory and granted Western's motion for summary judgment.

On appeal, the Court of Appeals of Washington affirmed. The court noted that in order for \textit{res ipsa loquitur} to apply, the accident producing the injury must be of a

\footnote{\textit{Id.}}

\footnote{\textit{Id.}}

\footnote{\textit{Id. at 29.}}

\footnote{\textit{Id. at 1274.}}

\footnote{\textit{Id. at 1275.}}

\footnote{\textit{Id. at 1271.} Plaintiff's medical condition was diagnosed as a perilymph fistula. \textit{Id.}}
kind that ordinarily does not happen in the absence of someone's negligence.\textsuperscript{566} The court held that although a sudden, abnormal change in cabin air pressure was such an event, the plaintiff failed to show that the change in air pressure actually occurred.\textsuperscript{567} Therefore, the plaintiff was not relieved of the burden of proving her case in chief.

Additionally, the plaintiff alleged that Western failed to warn its passengers of the risks associated with sudden changes of air pressure in air travel and of the preventive measures passengers can take to relieve pressure in the ear. The court held, however, that Western had not breached any duty to Marshall because an airline had no duty to warn of risks relating to a passenger's particular condition.\textsuperscript{568} The court noted that the only type of warning that might have helped Marshall was a notice before the flight that a very small percentage of individuals, for a variety of reasons, may suffer permanent ear damage due to normal pressure changes.\textsuperscript{569} Even if such a warning was given, there was no evidence that Marshall's injuries would have been prevented because Marshall was not aware of any inner ear problems. Therefore, Marshall's claim on the theory of duty to warn would fail on the causation element.

In \textit{Martin Marietta Corp. v. INTELSAT},\textsuperscript{570} the court held that a provider of private launch services had no duty in tort for losses arising out of a failed satellite launch.\textsuperscript{571} Furthermore, the court held that a contractual waiver to claims based on gross negligence was consistent with congressional intent requiring parties to assume the risk of their own loss.\textsuperscript{572} In August, 1987, INTELSAT con-

\textsuperscript{566} \textit{Id.} at 1273 (quoting Adams v. Western Host, Inc., 779 P.2d 281, 285 (Wash. App. 1989)).
\textsuperscript{567} \textit{Id.}.
\textsuperscript{568} \textit{Id.} at 1275; see Sprayregen v. American Airlines, Inc., 570 F. Supp. 16 (S.D.N.Y. 1983) (no duty to warn a passenger of the hazards of flying with a head cold).
\textsuperscript{569} \textit{Id.}.
\textsuperscript{571} \textit{Id.} at 1333.
\textsuperscript{572} \textit{Id.} at 1330.
tracted with Martin Marietta for the launch of two INTELSAT satellites on Titan III launch rockets. The first launch was unsuccessful because the satellite failed to separate from the rocket at the correct time and could not be boosted into the proper orbit. INTELSAT sustained substantial losses due to the failure of the mission to position the satellite correctly. Martin Marietta brought an action seeking a declaratory judgment absolving it of any liability for the incident. INTELSAT counterclaimed, asserting a breach of contract, and alleging negligence, gross negligence and negligent misrepresentation.

The court rejected Martin Marietta's assertion that the Commercial Space Launch Act (CSLA) created liability waivers for contracts in which the parties failed to expressly agree upon any waivers. The court agreed that the CSLA required that the licensee include cross-waivers in its contract. However, as a consequence of the failure to include cross-waivers, the Department of Transportation could revoke the license. Nothing in the CSLA imputed cross-waivers into the contract. In fact, the court noted that Martin Marietta's license required it to certify to the Office of Commercial Space Transportation that it would indemnify and be responsible for liability if it failed to enter or include the cross-waivers.

Although the CSLA did not absolve Martin Marietta of liability, the court held that INTELSAT's tort claims were

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573 Id. at 1329. INTELSAT paid Martin Marietta approximately $112 million for the launch prices alone, and experts estimated that the cost of rescuing the satellite may be as high as $90 million. Additionally, the satellite does not function at its present orbit and is useless. Id.

574 49 U.S.C. app. §§ 2601-2623 (1988). The statute was enacted to reverse the virtual shut-down of the private commercial space launch industry brought about because commercial launchers incurred huge liability risks and were unable to procure insurance at any price. It requires all licensed private launch providers to enter into reciprocal waivers of claims, under which all parties agree to assume their own risks of loss.

575 INTELSAT, 763 F. Supp. at 1330.

576 Id.

577 Id.

578 Id.
invalid in light of the specific contractual obligations.\footnote{\textit{Id.} at 1333-34.} The court noted that "[e]qually sophisticated parties who have the opportunity to allocate risks to third party insurance or among one another should be held to only those duties specified by the agreed upon contractual terms and not to general tort duties imposed by state law."\footnote{\textit{Id.} at 1332.} Applying Maryland law, the court dismissed INTELSAT's claim for negligent misrepresentation because no relationship of special trust existed between the parties.\footnote{\textit{Id.} at 1333; see Flow Indust. v. Fields Const. Co., 683 F. Supp. 527 (D. Md. 1988) (a claim for negligent misrepresentation is improper when the only relationship between the parties is contractual, both parties are equally sophisticated, and the contract does not create an express duty of due care in making representations).} INTELSAT was not unsophisticated and the contract did not impose any duty of due care.

The court also rejected INTELSAT's assertion that public policy invalidated contractual waivers of gross negligence. The court noted that Congress intended the waivers required by the CSLA to bar recovery in all instances, including gross negligence.\footnote{\textit{INTELSAT}, 763 F. Supp. at 1333.} The court found that "[t]hose who seek to explore, and to exploit, outer space must do so charged with acceptance of the unknown, and perhaps unknowable, perils to be faced in that vast and potentially hostile environment."\footnote{\textit{Id.} at 1334.}

In \textit{Broussard v. Paul Fournet Air Service, Inc.}, the court held that the owner of a private aircraft, which flipped and was destroyed in a sudden windstorm, failed to prove that an FBO was negligent in not tying down the plane.\footnote{574 So. 2d 541 (La. Ct. App. 1991).} The court noted that the owner had been notified that the FBO would not maintain the tie-down ropes. Furthermore, the court held that the accident was caused by an overpowering force and the FBO was not liable for any
XIV. DEBTOR-CREDITOR

A. BANKRUPTCY

In In re Pan Am Corp., plaintiffs, whose decedents died when Flight 103 crashed over Lockerbie, Scotland, brought suit against Pan Am in Florida state court. Pan Am, debtors in a Chapter 11 bankruptcy proceeding, sought to transfer the action to the Southern District of New York under 28 U.S.C. § 157(b)(5). The court recognized that Pan Am's strategy was then to move for the panel on multidistrict litigation to transfer the action to the Eastern District of New York where similar cases were pending. The court noted that, because Florida had not yet held that the Warsaw Convention provided the exclusive remedy for injuries sustained during international air transportation, punitive damages might be recoverable. However, New York courts had held that the Warsaw Convention preempted state law causes of action and so precluded recovery of punitive damages.

The court found the reasoning of In re White Motor Credit to be persuasive. There, the Sixth Circuit had questioned the equity of forcing a debtor to face tort litigation in a foreign forum. The White Motor Credit court held that "the fact that section 157(b)(4) of title 28

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586 Id. at 543.

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy is pending.

Id.
592 761 F.2d 270 (6th Cir. 1985).
removes tort cases from mandatory abstention under section 1334(c)(2) but does not remove discretionary abstention under 1334(c)(1), convinces us that the district court has the authority to leave tort cases in the courts in which they are pending for liquidation there."\textsuperscript{593} The Pan Am court found that this reasoning was equally compelling when applied to a tort plaintiff in an action against a debtor. The court held that discretionary abstention under 28 U.S.C. § 1334(c)(1) created the authority to leave tort cases in the courts in which they are pending.\textsuperscript{594} Therefore, notwithstanding the language of 28 U.S.C. § 157, the court deemed abstention was proper and denied Pan Am's motion to transfer.\textsuperscript{595}

B. MISCELLANEOUS

In \textit{The Connecticut National Bank v. Trans World Airlines, Inc.},\textsuperscript{596} the court granted Connecticut National Bank's (CNB) motion for summary judgment, determining that Trans World Airlines, Inc. (TWA) was not excused from performing its contractual obligations.\textsuperscript{597} The lawsuit arose out of a 1986 Equipment Trust Agreement (the Agreement) between CNB and TWA which provided that CNB would purchase ten aircraft and approximately ninety-six jet engines from TWA, then lease them back to TWA until February 1, 1996. In connection with the Agreement, CNB received notes with an aggregate principal amount of $312 million. TWA met its obligations until January 31, 1991 at which time it failed to make payments of approximately $57 million. As provided by the Agreement, CNB demanded the return of the aircraft and engines as well as immediate payment of the outstanding balance on the notes. TWA did not make any payments and did not return CNB's property.

\textsuperscript{593} Id. at 273.
\textsuperscript{594} Pan Am Corp., 128 B.R. at 64.
\textsuperscript{595} Id. at 65.
\textsuperscript{597} Id. at 81.
CNB moved for summary judgment seeking specific performance in accordance with the Agreement’s default remedies. TWA opposed the summary judgment, asserting that it had not been afforded an adequate opportunity to conduct discovery. The court noted, however, that TWA did not suggest what additional evidence it needed to obtain. Consequently, the court rejected TWA’s naked assertion that the matter was too important to entertain a summary judgment.

TWA next asserted that it would be inequitable to require it to return the property in light of the tremendous ramifications such an order might have on both TWA and the public. The court refused to accept this argument, noting that New York law permits a secured creditor to sue on a debt or foreclose on the collateral. The court stated that “CNB is more than a secured creditor, it actually owns the property. It would defy logic for [CNB’s] rights to be more limited than those of a secured creditor, especially when the Agreement specifically affords CNB this remedy.” The court also rejected TWA’s suggestion that CNB would be adequately protected if it secured a money judgment, commenting that “[i]f TWA had the money, it presumably would not have defaulted in the first place.”

Finally, the court rejected TWA’s argument that it should be excused from satisfying the contract because the Persian Gulf War resulted in decreased air travel and increased oil prices, curtailing its cash flow. The court noted TWA could have negotiated for a force majeure clause in the contract to protect itself in the event of

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598 Id. at 79. The court held there was no merit to the claim that CNB was a “naked trustee” and that further discovery would change that conclusion. Id.
599 Id.
602 Id.
603 The clause would have protected “the parties in the event that a part of the contract [could] not be performed due to causes which [were] outside the control
such circumstances. Moreover, the court held that the impossibility defense was precluded because "all of the alleged factors impacting upon TWA's profits were clearly foreseeable and simply represent the risk of doing business in an international forum."604

XV. FREQUENT FLYER PROGRAMS

In TWA, Inc. v. American Coupon Exchange, Inc.,605 the Ninth Circuit addressed the legal issues surrounding the enforceability of TWA's tariffs restricting the transfer of frequent flyer awards.606 American Coupon Exchange, Inc.(ACE), a frequent flyer brokerage house, appealed from a district court order enjoining its operations.607 ACE asserted that the transfer restrictions constituted an unreasonable restraint on the alienation of property. The court noted that "the novelty and complexity of the factual setting in which this case arises makes summary judgment on the reasonableness issue inappropriate on anything less than an exhaustive investigation of the economic realities of the matter."608 Thus, because the district court resorted to speculation in important areas of inquiry, summary judgment was inappropriate.

The district court determined that the policy against restraints on alienation of property applied to TWA's tariff because the coupons embodied property rights. The Ninth Circuit, however, held the coupons were "contract rights" rather than "property rights."609 The court relied

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605 913 F.2d 676 (9th Cir. 1990).
606 Id. at 678-79. The restriction limited transfer of coupons to persons other than a family member, legal dependent, or specified relative; and voided certificates transferred to any other party. Id.
608 American Coupon Exchange, 913 F.2d at 684.
609 Id. at 685.
on analogous cases involving restrictions on transfers of railroad\textsuperscript{610} and theater tickets\textsuperscript{611} in which the courts held that such issues involved contract rights. Furthermore, the court noted that "since a frequent flyer award coupon is not even a ticket; it is merely the right to receive a ticket upon redemption of the coupon . . . . this further militates against classifying these awards as 'property rights'."\textsuperscript{612}

In Greenberg v. United Airlines\textsuperscript{613}, the trial court dismissed the plaintiffs' claim for negligent misrepresentation arising out of the Mileage Plus program. The plaintiffs alleged that by changing the terms of its Mileage Plus frequent flyers program in 1988, United negligently misrepresented the terms of the 1981 Mileage Plus program in which the plaintiffs were already enrolled. The appellate court held that because the plaintiffs were unable to allege any injuries suffered, the case was properly dismissed.

\textsuperscript{610} See Illinois Cent. R.R. Co. v. Caffrey, 128 F. Supp. 770 (C.C.E.D. Mo. 1904) ("The complaining parties have the right to sell round-trip and commutation tickets over their respective roads at reduced rates, on condition that they shall only be good in the hands of the original purchasers and shall not be transferred. Contracts of this sort between a carrier and its passengers are lawful." Id. at 772 (emphasis added)).

\textsuperscript{611} Collister v. Hayman, 76 N.E. 20 (N.Y. 1905) (Provision on back of Knickerbocker Theater ticket stating "if sold on the sidewalk, this ticket will be refused at the door." Id. at 20).

\textsuperscript{612} American Coupon Exchange, 913 F.2d at 688.
