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RECENT DEVELOPMENTS IN AVIATION CASES

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I. INTRODUCTION

HAVING REVIEWED several hundred decisions since the report of 1980, the principal impression as to any overall conclusion in the trend of jurisprudence is the rather phenomenal success that the defense seems to have obtained in the last year in aviation litigation. This has been a particularly good year for manufacturers, and component manufacturers, with several successful motions for summary judgment. Similarly, there has been continued success for defendants in the enforcement of contractual waivers between parties of relatively equal status. As this article will show, while there has been an occasional deviation, the Second Circuit has recently followed the Fifth and Ninth Circuits in important decisions in such contractual enforcements.

The year 1980 also proved to be ripe for cases involving implied causes of action arising out of aviation statutes. While

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the Seventh Circuit has expanded such remedies, some district courts have restricted them.

The past year also confirmed a continuation of judicial enforcement under the Warsaw Convention's technical requirements.

The following article illustrates that the major air disasters have resulted in interesting district and appellate court decisions, such as the Paris Air Crash of March 3, 1974, the JFK Air Crash of June 24, 1975 and the Chicago Air Crash of May 25, 1979.

There have been further cases involving allegations of negligence against the United States for publication of aeronautical charts, and there has been a split in reported decisions, with the Government winning some and losing others.

Aviation insurers generally have fared well in that reported decisions reflect a continuance of courts' enforcement of coverage limitations and exclusions in aviation insurance policies.

Some of the more interesting decisions in the past year have involved conflict of laws. Conflicts questions are very important to attorneys and litigants, in as much as underlying considerations usually are based principally upon strategy in shopping for favorable substantive law. Conflicts questions have largely arisen this past year in areas of great activity such as the offshore North Sea exploration and drilling operations.

The past year having been very litigious in aviation, the principal point in this introduction is simply to refer the reader to the following text.

II. LIABILITY OF AVIATION MANUFACTURERS

The only federal appellate court decision involving liability of manufacturers in the last year is, apparently, that of Bernard v. Cessna Aircraft Corp.,1 in which a directed verdict for the defense was upheld on the ground that there was insufficient evidence to support strict liability against Cessna, absent any evidence that the alleged deficiencies contributed to

1 614 F.2d 1075 (5th Cir. 1980).
RECENT AVIATION CASES

a midair collision.\(^2\) In *Gainous v. Cessna Aircraft Co.*,\(^3\) also involving Cessna, the owner and insurer of the airplane brought suit against Cessna on theories of negligent design, manufacture and strict liability. The manufacturer moved to dismiss, and the district court held that, while the owner of the airplane stated a cause of action in negligence under Georgia law for property damage, the insurer lacked standing under Georgia law to maintain a products liability action. Such a decision was based on the fact that the insurer was a corporation and under Sections 105-06 of the Georgia Code Ann. "strict liability is applicable only in actions by natural persons."\(^4\)

There were, however, several interesting decisions from district courts, and many of them involved the question of the liability of component suppliers. Whether a manufacturer of a component part, which was manufactured to specifications of a third party, and in which there was no manufacturing defect, can be held liable for a design defect stemming from the use to which the component part is put by the third party, was at issue in the United States District Court for the Eastern District of Pennsylvania decision in *Orion Insurance Co. v. United Technologies Corp.*\(^5\) Actions were brought both by the deceased pilot and the hull insurers for losses sustained in the crash of a Sikorsky helicopter while it was involved in unloading operations. Named as defendants were both the manufacturer of the helicopter (UTC), and Amtel, Inc., a manufacturer of the "stationary star" component in the main motor head assembly of the helicopter. The plaintiffs' allegations related to alleged defective design of the "stationary star," the failure of which was allegedly the cause of the crash. Amtel moved for summary judgment which was granted.

The court noted that Amtel's only involvement in this suit was that it machined to supplied specifications the rough-

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\(^2\) Id. at 1078.
\(^3\) 491 F. Supp. 1345 (N.D. Ga. 1980).
\(^4\) Id. at 1348 (quoting Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 227, 235 S.E.2d 664, 665 (1977)).
forged stars that were shipped to it by Sikorsky. Stating that the plaintiffs had no evidence of a manufacturing defect in Amtel's product, the court found the singular issue involved in Amtel's motion for summary judgment to be whether or not it could be held liable for design specifications provided by a third party. Injecting concepts of negligence into Restatement (Second) of Torts Section 402A liability principles, the court found that the issue boiled down to whether or not Amtel was negligent in relying upon the specifications submitted to it by Sikorsky — whether the specifications were "so obviously dangerous" that they should not reasonably have been followed.\(^6\) When this question must be answered in the negative, the court found that Section 402A liability cannot be imposed, simply because the manufacturer is not responsible for the defective condition.\(^7\) In short, the court found that it was reasonable for Amtel to rely upon Sikorsky's specifications. This conclusion holds true both in the cases involving allegations of defective design and failure to warn of the unavoidably unsafe condition of the manufactured product. With regard to the latter, the court would not impose a duty upon Amtel to undertake an independent investigation regarding the reason underlying Sikorsky's change in alloy composition specifications that was instituted shortly before the manufacture of the affected part. Therefore, "Amtel did not have the expertise required to know enough to give a warning."\(^8\) In Allied Aviation Fueling Co. of Minnesota v. Dover Corp.,\(^9\) the Supreme Court of Minnesota affirmed a directed verdict in favor of a component supplier of a valve which had been incorporated in a fueling system. The user brought suit

\(^6\) *Id.* at 176-77.

\(^7\) *Id.* The court cited Taylor v. Paul O. Abbe, Inc., 516 F.2d 145 (3d Cir. 1975) which held that a component manufacturer whose offer to install a safety guard on a mill saw was refused by the owner was not liable for the resulting injuries, and Verge v. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978) which held that Ford was not responsible for the lack of a safety back-up buzzer on a truck chassis, since the finished product was a garbage truck which reflected substantial work and modification by another party.

\(^8\) 502 F.2d at 178.

\(^9\) 287 N.W.2d 657 (Minn. 1980).
against the supplier and others for economic loss caused by failure of the valve. The Minnesota Supreme Court held that the supplier of the valve was not liable to the plaintiff, who was a skilled and knowledgeable user, when the failure of the component resulted from an application of force during use.\textsuperscript{10}

As previously reported, the question of contractual waivers, particularly between parties of generally equal stations, has been a lively judicial subject. For example, in an action for the value of a DC-8 destroyed in the November 28, 1972 air crash of a Japan Airlines DC-8 (JAL) in Moscow, the Second Circuit Court of Appeals found that under California law, the waiver of implied warranties, including strict tort liability, was effective between corporations bargaining and negotiating from positions of relatively equal strength.\textsuperscript{11} The waiver language was effective to negate liability arising from alleged negligence in failing to warn of a product defect.\textsuperscript{12} In so holding, the court noted that its decision was consonant with lines of jurisprudence emanating from the Ninth and Fifth Circuits.\textsuperscript{13} In doing so, the court rejected limitations asserted by JAL on the ability to limit a manufacturer's tort liability and found that where there is not intentional fraud involved, corporate parties of equal bargaining strength may bargain away liability, even that liability arising from negligent acts, involving knowledge imputed to the manufacturer.\textsuperscript{14} Thus the disclaimer of implied warranties was valid.

As an additional matter, the court rejected McDonnell Douglas' counter and cross-claims against JAL and its insur-

\textsuperscript{10} Id. at 659. The accident also occurred at least two years after the user had some knowledge that the design of the valve might be defective. Id.


\textsuperscript{12} Id. at 940.

\textsuperscript{13} Id. at 939-40. See Scandinavian Airlines System v. United Aircraft Corp., 601 F.2d 425, 429 (9th Cir. 1979); Delta Airlines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 245-46 (5th Cir. 1974), cert. denied, 421 U.S. 965 (1975); Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 797 (5th Cir. 1973); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1020-21 (9th Cir.), cert. denied, 400 U.S. 902 (1970).

ers, applying the California rule enunciated in *American Motorcycle Association v. Superior Court*\(^{15}\), which holds that a tortfeasor who settles a plaintiff’s claim in good faith is discharged from any claims of indemnity by a joint tortfeasor. The court found irrelevant the fact that the claims settled by JAL and its insurers were covered by the Warsaw Convention, whereas McDonnell Douglas’ liability was not. The *American Motorcycle* rule, it found, applies in the tortfeasor situation regardless of the applicability of the Warsaw Convention, and the invocation of the Warsaw Convention does not prevent settlement of such causes of action from being considered as arising in tort, rather than contract.\(^{18}\)

In another case upholding the waiver of liability in connection with a contract for modification of an aircraft, including both strict liability and failure to warn of inherent defects, factual issues in *Islamic Republic of Iran v. The Boeing Co.*\(^{17}\) were disposed of by summary judgment. Arising out of the crash of a Boeing 747 owned by the plaintiff, Iran, this action was brought for alleged design and manufacturing defects, as well as negligence and breach of contract in failure to properly train the crew and maintain the aircraft.\(^{18}\) The court granted the summary judgment motion of defendants on the basis of a waiver executed by the plaintiff and forming part of the contracts entered into with defendants.\(^{19}\) Indicating not only that there may be sound reasons for not applying the doctrine of strict tort liability to actions arising from transactions of two large corporate powers,\(^{20}\) the court found the boiler plate dis-

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\(^{16}\) Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 941-42 (2d Cir. 1980). The court noted that in Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979), it was held that the Warsaw Convention itself created a cause of action permitting recovery for travelers injured or killed in international flights, but that such language did not preclude finding Warsaw Convention liability founded in tort as well as contract. *Id.* at 917.

\(^{17}\) 15 Av. Cas. 18,189 (W.D. Wash. 1980).

\(^{18}\) *Id.*

\(^{19}\) *Id.* at 18,190.

claimer and release language binding. The court simply stated that the plaintiff was a "sophisticated and experienced sovereign state who must be held responsible for their voluntary agreements."  

It seems that this was a good year for manufacturers' summary judgments, particularly for Beechcraft, and particularly in the state of Louisiana. Beech obtained summary judgment in its favor in Sievers v. Beechcraft Manufacturing Co.\(^1\) on the basis that, in spite of extensive discovery, there was no evidence to establish causation between any alleged deficiency in the Beech Air King aircraft and its crash into Lake Pontchartrain, so as to entitle the plaintiff to recover on a theory of either negligence or strict liability.\(^2\) The court noted that _res ipsa loquitur_ was inapplicable.\(^3\) The Sievers opinion also cited the Fifth Circuit's decision of Bernard v. Cessna Aircraft Corp.,\(^4\) holding that in Louisiana strict liability cases, plaintiff must show first, that the product was in normal use and was unreasonably dangerous in that use and second, that the injuries were caused by the defect.\(^5\) The court held that the plaintiff had not introduced sufficient evidence to make a jury issue of whether the collision was caused by a defective product.\(^6\)  

Beech also had a motion for summary judgment affirmed by the Fifth Circuit in Kroon v. Beech Aircraft Corp.\(^7\) The pilot/owner alleged that Beech failed to design a fail-safe gust lock system so that the aircraft could not be moved with the lock engaged, and failed to warn of any possible danger.\(^8\) The Fifth Circuit affirmed the summary judgment finding that the pilot/owner's own negligence in failing to perform a preflight check to ensure that controls moved freely was the proximate

\(^{1}\) 15 Av. Cas. at 18,191.  
\(^{3}\) Id. at 201.  
\(^{4}\) Id. at 202.  
\(^{5}\) 614 F.2d 1075 (5th Cir. 1980).  
\(^{6}\) Id. at 1078.  
\(^{7}\) Id.  
\(^{8}\) 628 F.2d 891 (5th Cir. 1980).  
\(^{9}\) Id. at 893.
cause of the accident, rather than Beech's failure to design a fail-safe gust lock system.  

Other manufacturers were also able to make use of summary judgment motions in recent cases. The Boeing Company received summary judgment and thus escaped liability arising from the crash on March 5, 1974 of an Air Force KC-135A aircraft.  

Defining the material fact as one which "may affect the outcome of the litigation," the court ruled that Boeing had successfully demonstrated, through affidavits and deposition testimony, an absence of a genuine issue of material fact as to each of several allegations made against it regarding manufacture and design of the aircraft.  

Finding that the plaintiff had then failed to meet his burden of showing "specific facts" establishing such an issue, the court dismissed Boeing from this litigation. However, co-defendant United Technologies, manufacturer of the aircraft's four engines, failed to extricate itself from the litigation. It failed to offer evidence that the stalling of an engine on take-off is normal or harmless.  

Bell Helicopter and a manufacturer of a component part of the helicopter were also granted summary judgment under theories of strict liability and breach of warranty in actions to recover for loss of helicopters which crashed in Idaho, Washington and Peru.  

In Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co., the district court applied Texas law as to Bell, and Illinois law as to the parts manufacturer. Illinois was the place of residence of this manufacturer. According to Texas law, there could be no recovery under the theory of strict liability against the manufacturer, and similarly, under Illinois law there could be no recovery against the parts manufacturer. Last, the court held that the language of the con-

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80 Id. at 894.  
82 Id. at 18,173-74.  
83 Id. at 18,178-79.  
86 Id. at 619-20.
tract between the parties, excluding express or implied warrant, was sufficient under Texas law. At this writing Borg-Warner was still in the case (its motion to dismiss plaintiff's breach of warranty being neither granted nor denied).

In Vasina v. Grumman Corp., the defendant manufacturer moved for a judgment n.o.v. from a verdict of over a million dollars awarded to the widow of a lieutenant in the United States Navy killed when the aircraft in which he was a bombardier-navigator crashed in a federal enclave in Oregon. In its denial of the motion, the court noted the manufacturer's defense that the crack in the wing was due to the Navy's failure to repair damage properly and that this failure was an "intervening" cause which "superseded" the act of the manufacturer. The court simply held that whether or not the Navy's acts constituted an intervening or superseding cause was a question of fact for the jury, and even if the jury found the Navy's failure to make proper repairs was a cause of the crash, the jury had sufficient evidence before it that the acts of both the Navy and Grumman were "substantial contributing factors."

Continuing its refusal to follow the "second accident" doctrine, the Supreme Court of Mississippi in Pattillo v. Cessna Aircraft Corp. absolved Cessna of liability occasioned by the death of a passenger in the crash of a Cessna, attributable to pilot error. In doing so the Mississippi court found that a manufacturer has no duty to design a seat or harness assembly so as to withstand a high speed crash. The court noted the growing majority allowing such actions and rejected the reasoning of cases such as Larsen v. General Motors Corp.

III. OWNER/OPERATOR LIABILITY

Although there were several cases involving the issue of

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87 Id. at 622.
89 Id. at 944.
90 Id.
91 379 So. 2d 1225 (Miss. 1980).
92 391 F.2d 495 (8th Cir. 1968).
owner/operator liability, in general these cases involved non-complex factual issues rather than legal issues, and consequently, are reviewed in other sections of this paper.

IV. DOMESTIC TRANSPORTATION—AIRLINE LIABILITY

The Second Circuit Court of Appeals, in a panel vote of 1-1-1, upheld the imposition of liability against Eastern Airlines, Inc. in connection with the crash of Eastern Flight 66 on June 24, 1975 at JFK International Airport. The concurring opinion, written by Judge Waterman, upheld the district court’s imposition of liability, rejecting several grounds of error asserted by Eastern. The action was brought against Eastern and the FAA’s air traffic controllers by representatives of several victims of the crash. In the liability portion of the bifurcated trial, the United States chose, on the day of the trial, to admit liability and thereby leave Eastern to defend the liability action alone. The jury found Eastern liable for its negligence in the crash and Eastern appealed, urging several grounds of prejudicial error.

The first substantial error asserted involved the trial judge’s refusal to allow Eastern to read into evidence several facts stipulated to by Eastern and the plaintiffs, though not the United States. These stipulations dealt with the knowledge and duties of the air traffic controllers to report to pilots the existence of severe weather conditions on runway twenty-two prior to Flight 66’s approach. In keeping with the concurring opinion’s characterization of the plaintiff’s predicament as walking a “tactical tight rope,” the majority ruled that the

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48 In re Air Crash Disaster at John F. Kennedy Int’l Airport on June 24, 1975, 635 F.2d 67 (2d Cir. 1980).
44 Id. at 81.
46 Id. at 70.
46 Id. at 82-83. The plaintiffs, Eastern and the United States, formulated a statement of facts prior to this trial. During trial, the United States contested those portions of the statement which claimed that the Kennedy weather service and the room controller had observed visually and on radar two severe weather cells on the final approach course for Runway 22 but had never warned Eastern Flight 66. Furthermore, the stipulations had specified that it was incumbent upon the United States to obtain specifics from preceding flights on Runway 22 and to change the runway use from Runway 22.
plaintiff could not be held to a stipulation made with an additional party not still present in the suit, and that "unintentional benefits" should not be bestowed upon the remaining defendant in such an action. The dissent, however, argued that when parties agree as to certain facts, their stipulation is binding and must be given effect by the court. The stipulations agreed upon by the plaintiffs and Eastern regarding certain failures of the United States in its air traffic control duties should have been admitted, according to the dissent, especially when the government conceded its liability. Since Eastern's defense in the litigation argued that the air crash was caused by the negligence of air traffic controllers alone, the dissent found that Eastern should have been able to rely on the stipulations vis-a-vis the plaintiffs, and that their rejection was highly prejudicial to Eastern's defense.

Eastern also attacked portions of the trial court's instructions to the jury, which stated that the air traffic controllers of Eastern Flight 66 "were expected to provide current weather information," but that the controllers' duty to warn did not relieve the pilots of their primary duty and responsibility for the flight. Eastern characterized this instruction as prejudicial error because the instructions failed to properly define the duty of the air traffic controllers to inform themselves of dangers on or near the runway, and to communicate this information to the pilots. In this assessment the dissent agreed, but the majority found that the instructions on the whole were proper.

Eastern objected to the jury charge concerning res ipsa loquitur, contending that when an airplane crash occurs and is

47 635 F.2d at 80.
48 Id. at 83.
49 Id. at 84.
50 Id. at 74.
51 Under the court's charge, the pilot had a primary duty and responsibility to be aware of danger that can be detected with the pilot's eyes or his instruments. If the pilot cannot see the trouble, or detect it on his instruments, he will not be held to have a primary duty to be aware of the danger if he is not warned of it by the controllers. Id.
52 Id. at 85.
53 Id. at 74.
caused by specific, identifiable factors, i.e., wind shear, *res ipsa* simply cannot apply. The dissent accepted Eastern's position wholeheartedly, but the majority disagreed, finding that the cause was not clear, that even if an error occurred, it was not prejudicial in light of the fact that the jury was also charged as to general negligence principles. The majority was not persuaded by the dissent's conclusion that the exclusive control prerequisite, implicit in a *res ipsa* application, had cut to the very heart of Eastern's defense.

The Federal Aviation Administration and the National Weather Service were exonerated from liability in connection with the crash of Pan American Flight 803 at the Pago Pago International Airport on January 20, 1974. Flight 803 crashed 3,865 feet short of the runway while making an instrument landing system (ILS) approach at 23:41 hours. The court found Pan American solely liable for the crash, which it attributed to various acts of negligence committed by the flight crew. The court found that the pilot had unreasonably failed to engage 50° flaps until two minutes after passing the glide slope intercept and had held his 150 knot approach speed. Further, the pilot failed to call out his sink rate after it exceeded 800 feet per minute and concomitantly descended at a rate of over 1,900 feet per minute. Finally, the court found that the pilot should have been aware of the aircraft's improper stabilization during its approach and that he should have attempted a missed approach prior to descending below decision height.

The denial of punitive damages in wrongful death actions in states allowing such damages in other personal injury actions was subject to an unsuccessful constitutional attack in the

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54 Id. at 77.
55 Id. The court concluded that "based on the jury charge read as a whole, [it] was of the opinion that any possible error . . . caused by the *res ipsa* change was remedied. . . ." Id.
56 Id.
57 *In re Air Crash Disaster at Pago Pago, American Samoa on January 30, 1974, 15 Av. Cas. 18,403 (C.D. Cal. 1980).*
58 Id. at 18,418.
59 Id. at 18,415.
60 Id. at 18,416.
Ninth Circuit. The court reversed the decision of the district court in *In re Paris Air Crash of March 3, 1974*.

Applying the "minimum scrutiny" standard of review, the court found that a rational relationship existed between the limitation of punitive damages in wrongful death actions and the state interests involved.

In enacting the wrongful death act, the court found that the state effected its purpose of providing compensation for economic loss and the deprivation of consortium suffered by certain classes of survivors. The court found that denying the recovery of punitive damages in such actions, was consistent with the compensatory nature of the wrongful death recovery scheme as set up by the California Legislature.

The court, therefore, concluded that the state legislature was within its discretion in avoiding excessive damages assessed against defendants under its wrongful death recovery scheme.

In a spin-off from litigation arising from the Chicago air disaster of May 25, 1979, the court in *DeYoung v. McDonnell Douglas Corp.*, rejected claims asserted under Illinois law by the heirs of a crash victim who were seeking recovery for mental anguish experienced by the decedent prior to the aircraft's impact with the ground. Noting the Illinois Supreme Court's policy reversal in 1974 when it first allowed a survival action in favor of a decedent's survivors for the conscious pain and suffering of the decedent, the court found itself constrained to limit such recoveries to pain and suffering "directly connected with a contemporaneous bodily injury."

In partially granting McDonnell Douglas Corporation's (MDC)
motion for summary judgment, the court rejected the pre-impact anxiety claim but found that the decedent's representatives could seek recovery for injuries suffered by the decedent after impact and before death ensued.\textsuperscript{67} The court rejected MDC's contention that, as a matter of law, the interval between impact and death was so small that no recovery could be had.\textsuperscript{68} However, the court noted that the jury must consider the duration of the pain and suffering in assessing the amount of damages to be awarded.\textsuperscript{69}

Litigation stemming from the 1977 crash of two Boeing 747's in the Canary Islands raised an interesting issue involving the extension of the California-recognized cause of action for damages arising from the mental anguish suffered by third-parties who view the death or injury of another person.\textsuperscript{70} In \textit{Burke v. Pan American Airways}, the court rejected the claim of the twin sister of a crash victim in her suit for damages arising out of her "extra sensory empathy" which allegedly occurred contemporaneously with the death of her sister several thousand miles from the plaintiff's California abode.\textsuperscript{71} Applying the seminal California decision of \textit{Dillon v. Legg},\textsuperscript{72} and post-\textit{Dillon} jurisprudence\textsuperscript{73} which construed the \textit{Dillon} "sensorily perceived"\textsuperscript{74} requirement as allowing only those actions arising out of visual or auditory perception of the injury, the court found recovery for extra sensory perception would extend liability to defendants for injury that was "remote and unexpected,"\textsuperscript{75} and against which the \textit{Dillon} decision stood as contrary precedent.\textsuperscript{76}

\textsuperscript{67} 507 F. Supp. at 23.
\textsuperscript{68} \textit{Id.} at 24.
\textsuperscript{69} \textit{Id.}
\textsuperscript{71} \textit{Id.} at 850-51.
\textsuperscript{72} 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The \textit{Dillon} court found that mental anguish suffered by a close relative who was not present at the scene of the accident and who did not directly perceive it through either auditory and/or visual perception did not constitute the type of harm that was "reasonably foreseeable."
\textsuperscript{74} 484 F. Supp. at 851.
\textsuperscript{75} \textit{Id.} at 852.
\textsuperscript{76} \textit{Id.} The \textit{Dillon} court set forth the following factors:

1. Whether the plaintiff was located near the scene of the accident as
The year 1980 was one ripe with judicial consideration of claims for implied private causes of action under various federal aviation statutes. For example, on remand from the United States Supreme Court to the Seventh Circuit for reconsideration of its original decision in light of *Touche Ross & Co. v. Redington*, the Seventh Circuit again found that a private remedy may be implied in favor of air charter travelers for losses incurred at the hands of insolvent tour operators under section 401(n)(2) of the Federal Aviation Act of 1958. Faced with a "paucity" of legislative history on this question, the majority still found themselves "compelled" to conclude that a private remedy should be implied from this section under the guidelines recently enunciated by the United States Supreme Court in *Touche Ross* and *Cannon v. University of Chicago*, as well as under the seminal decisions of *Cort v. Ash*, *J.J. Case Co. v. Borak* and *Sante Fe Industries v. Green*. The *Bratton* court found that the intent of section 401(n)(2) of the Act was designed "specifically to provide an enforceable remedy to individual air charter travelers against insolvent tour operators by providing compensation for their loss from a financially responsible third-party."

In a strenuous dissent, Justice Bauer argued that the statute itself evidences no intent on the part of the legislature to provide any private rights to an identifiable class, and that the statute does not even proscribe any conduct as unlawful.

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78 *Bratton v. Shiffrin*, 635 F.2d 1228 (7th Cir. 1980).
81 *422 U.S. 66* (1975).
84 *565 F.2d* at 1230.
85 *Id.* at 1233. (Bauer, J., dissenting.)
Instead, the dissent argued, the statute, by its terms, merely authorizes the CAB to require a supplemental air carrier to file a performance bond or an equivalent security arrangement and, according to guidance supplied by the most recent Supreme Court decisions, that no private cause of action should be implied from the statute's language, focus, and a "deafening legislative silence." The dissent further argued that, since Congress had provided express remedies for violation of other sections of the Act, it would have expressly provided for the action asserted by the plaintiff had it intended to create one.

Concerning the question of whether the Federal Aviation Act creates a private cause of action in favor of those excluded from using an air navigation facility which has received federal funds for improvements, (contrary to its prohibition against granting exclusive rights awarded for such use), the United States District Court for the Western District of New York in Guthrie v. Genesee County answered in the negative. The court did recognize, however, the plaintiffs' right to proceed under the Sherman Anti-Trust Act for an alleged restraint of trade. With regard to the implied private right of action asserted to flow from the Federal Aviation Act, the court, applying Cort v. Ash and its progeny, found no intent on the part of Congress to create a private right of action by passing the statute. Stating that the statutory provision was not enacted for the benefit of an "especial class" of which the plaintiffs are members, the court noted both the absence of any language implying such a cause of action under this section and the fact that Congress could have easily done so, in

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86 Id. at 1234.
88 635 F.2d at 1236.
89 See 49 U.S.C. § 1349(a), as amended by 49 U.S.C. §§ 1344-1351 (West Supp. III 1979), which provides in pertinent part: "There shall be no exclusive right for use of any landing area or air navigation facility upon which Federal funds have been expended."
91 Id. at 958.
92 422 U.S. 66 (1975).
93 494 F. Supp. at 959.
light of the private cause of action established in several other portions of the act. Further, considering the third underlying factor articulated in *Cort v. Ash*, the question of whether a private remedy is necessary to effectuate the purpose of the section, the *Guthrie* court found that "no strong remedial purpose" was reflected in the applicable section of the Federal Aviation Act and that no "compelling need" for the court to imply a remedy existed in the case.

Plaintiffs also asserted an anti-trust cause of action which the court did find could be maintained by corporate entities who were excluded from the use of the county facility by the airport operator, who had been awarded a virtually exclusive use contract by the county. In so ruling, the court rejected the "state action" exemption enunciated in *Parker v. Brown* and explained in *City of Lafayette v. Louisiana Power & Light Co.* The court found that the New York Legislature had not contemplated the type of action engaged in by the defendants, nor had it manifested a policy to displace competition in airport operation with regulation or monopoly public service. Therefore, the state-granted power given to the counties to facilitate regulation of municipal airports was found insufficient to support adoption of the granting of exclusive agreements as part and parcel of the state government's sovereign acts. The state, in short, had not "actively supervised" this type of behavior and therefore it was subject to the strictures of the Anti-Trust Act.

In another case which upheld an implied right of action under the Federal Aviation Act, the court in *Chumney v.*
Nixon,104 afforded an international flight passenger a private cause of action for damages resulting from an assault by a fellow passenger during a flight over the high seas. The plaintiff also brought claims against the travel agency which booked the tour and against the air carrier. In evaluating these claims, the court found that neither of the defendants was charged with the duty to provide police services aboard the flight.105 The court intimated, however, that a cause of action might exist for a breach of regulations regarding the boarding or service of alcoholic beverages to persons who are or appear to be intoxicated,106 if a causal connection between such violation and the injuries suffered could be established.107

In Kodish v. United Airlines, Inc.,108 the plaintiff alleged that his application for a United flight crew position was rejected because of age discrimination, admittedly utilized by United in its flight crew hiring practices.109 The plaintiff's suit was premised upon a private right of action arising under either (1) The Federal Aviation Act of 1958, 49 U.S.C. section 1302(a)(3) and section 1374(b); (2) The Civil Rights Act of 1866, 42 U.S.C. section 1901, or (3) Executive Order 11141, 29 Fed. Reg. 2477 (1964).110 The Tenth Circuit held that the plaintiff's complaint failed to state a claim for which relief could be granted under any of the three grounds cited.111 The court concluded that, under Cort v. Ash, no implied private cause of action existed under these statutes and that the executive order, which declared the policy against age discrimination in the hiring practices of federal contractors, failed to vest plaintiff with a cause of action.112

In Croce v. Bromley Corp.,113 two issues of interest were

104 615 F.2d 389 (6th Cir. 1980).
105 Id. at 395.
106 Id. at 395 n.2 (citing 14 C.F.R. § 121.575 (1979)).
107 615 F.2d at 395.
108 628 F.2d 1301 (10th Cir. 1980).
109 Id. at 1302. United Airlines required applicants to be between the ages of 21 and 29.
110 Id.
111 Id. at 1302-03.
112 Id. (citing Cort v. Ash, 422 U.S. 66 (1975)).
raised in the Fifth Circuit’s opinion. The court affirmed the imposition of joint and several liability on Mustang Aviation, Inc., a charter airline, and Bromley Corporation, a smaller charter service substituted by Mustang to transport singer Jim Croce and his entourage. The wife and son of the musical group’s road manager brought suit for wrongful death as a result of the subsequent airplane crash. The court held that the charter airline, which had contracted to transport the Croce group but had failed to disclose the substitution of the smaller charter service and its pilot, was estopped from denying that the smaller service was its agent and thus that Mustang was liable for its acts.

The court also dismissed the defendant’s argument that the contract of carriage was voided by an illegal purpose, inasmuch as the evidence showed the deceased to be carrying a small amount of marijuana on his person at the time of the crash. The court found that a common carrier is not entitled to avoid the high standard of care it owes its passengers “because of some unknown or undisclosed conduct of the passenger, merely incidental to the trip, that happen[s] to be in violation of some statute or regulation.” The decedent’s possession of a small amount of marijuana was ruled immaterial for the purpose of determining the degree of care that the common carrier owes its passengers.

The question of the legal significance of an airline or taxi service subcontracting or arranging for passengers to travel with another airline or air taxi service, as in Croce, was the principal issue in Roberts v. Gonzales. In Gonzales, Caribbean Executive Airline, Inc. had utilized the charter services of defendant, Conquest Airways, Inc. in transporting some of its passengers. The Conquest flight crashed into two homes shortly after takeoff, resulting in the death of three of its nine

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114 Id. at 1085.
115 Id. at 1088.
116 Id. at 1091 (quoting Williams v. Shreveport Yellow Cab Co., 183 So. 120 (La. Ct. App. 1938)).
117 Id. at 1091.
passengers as well as four occupants of one of the homes. The court found Caribbean liable to all plaintiffs based on its non-delegable duty as a common carrier, and even though Conquest was not an authorized agent, it was held to be a corporate personality with apparent authority to act on Caribbean's behalf under Section 8 of the Restatement (Second) of Agency.\(^\text{120}\)

Of interest to those air carriers who arrange vacation packages for their customers is the Illinois Appellate Court decision in *United Airlines, Inc. v. Lerner*\(^\text{121}\) which found that United Airlines had no duty to warn the plaintiffs, who had obtained a ski vacation package through United, of the likelihood of an avalanche which closed access roads to the ski lodge, thereby cutting in half the anticipated amount of skiing available to the vacationers.\(^\text{122}\) Although the court did find that the airline was acting on its customer's behalf as a travel agent and that it owed a "duty of loyalty," the court also found that the airline could not be charged with a duty of being "prescient."\(^\text{123}\)

United Airlines can also vouch for the determination of unhappy non-smoking passengers, even when they are seated in a first class non-smoking section. In *Ravreby v. United Airlines, Inc.*,\(^\text{124}\) a physician/attorney passenger sued United to recover for discomfort suffered as a result of smoking by the other passengers in the first class section. When he lost in the district court, he appealed to the Supreme Court of Iowa, which held that, while United owed the duty to provide a safe

\(^{120}\) Id. at 1312. Section 8 of the Restatement (Second) of Agency provides as follows: "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8 (1958).

\(^{121}\) 87 Ill. App. 3d 801, 401 N.E.2d 225 (1980).

\(^{122}\) Id. at 227.

\(^{123}\) Id. at 228.

\(^{124}\) 293 N.W.2d 260 (Iowa 1980). The CAB has expanded its rule making power over smoking to include a possible ban on all smoking, or in the alternative, to rescind the CAB smoking regulations and leave it up to each airline to establish a smoking policy. The Board has sought comments on whether the federal smoking rules should be eliminated or whether they should be transferred to another agency. Comments were due by March 25, 1981. 46 Fed. Reg. 11,827 (1981).
environment for travel, evidence of the airline's compliance with the CAB smoking regulations was sufficient to show that the airline had not breached its duty under either CAB regulations (which did not have primary jurisdiction over the claim) or under Iowa law.\textsuperscript{125}

In an action for damages brought by a "bumped" passenger, the court in \textit{Christensen v. Northwest Airlines, Inc.},\textsuperscript{126} construed literally the "denied boarding compensation" provision contained in 14 C.F.R. section 250.6(b)\textsuperscript{127} and found that a passenger who accepts alternate transportation after being bumped from a confirmed flight is barred from claiming liquidated damages.\textsuperscript{128} The court reasoned that the acceptance of alternative transportation is in lieu of denied boarding compensation\textsuperscript{129} so that the liquidated damages bar contained in 14 C.F.R. section 250.7\textsuperscript{130} is triggered.

In \textit{Landy v. FAA},\textsuperscript{131} the Second Circuit reversed the imposition of a $430,000 civil penalty which the lower court assessed after the jury found that the defendants had operated an aircraft for compensation or hire without following the more stringent requirements of Part 121 of the Federal Aviation Regulations (FAR).\textsuperscript{132} The FAA brought this action for imposition of civil penalties, alleging that the defendants had improperly skirted regulations in operating a charter service which utilized sham lease and sublease agreements. The court, in reversing, found substantial error in the trial court's

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{125} 293 N.W.2d 260 (Iowa 1980).
\item \textsuperscript{126} 633 F.2d 529 (9th Cir. 1980).
\item \textsuperscript{127} 14 C.F.R. \S\ 250.6(b) (1981) provides that a passenger is ineligible for denied boarding compensation if the carrier arranges transportation, accepted by the passenger, which is scheduled to arrive within two hours of the planned arrival time of the originally scheduled flight.
\item \textsuperscript{128} 633 F.2d at 530.
\item \textsuperscript{129} 455 F. Supp. 492, 494 (D.H. 1978), aff'd, 633 F.2d 529 (9th Cir. 1980).
\item \textsuperscript{130} 14 C.F.R. \S\ 250.7 (1974) (current version at 14 C.F.R. \S\ 250.4(b) (1981)), provides that acceptance of denied boarding compensation under section 250 constitutes "liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space."
\item \textsuperscript{131} 635 F.2d 143 (2d Cir. 1980).
\item \textsuperscript{132} 14 C.F.R. \S\S\ 121.1(a)(5), 121.3(f), 121.45(b), 121.75(a), 121.111, 121.123, 121.125, 121.163, 121.291(a), 121.369(a), (b)(1)-(9), (c) (1980).
\end{enumerate}
\end{footnotesize}
charges to the jury and in its special interrogatories.\textsuperscript{133} Relevant FARs were neither read nor explained to the jury but, instead, were paraphrased in special interrogatories that failed to pinpoint identity, time, place or flight. The instructions and interrogatories further failed to distinguish between the three defendants involved, thereby making all defendants liable for the violations committed by any of the defendants.\textsuperscript{134} The court found that in order to impose a severe civil penalty on a defendant, the requisite factual findings necessary to support each component part of such penalty cannot be made without reference to the applicable regulations, and that the jury must be specifically instructed as what those regulations are.\textsuperscript{135}

\section*{V. International Transportation — Warsaw System}

With some notable exceptions, 1980 saw a continuation of the judicial enforcement of the Warsaw Convention's technical requirements. In \textit{Whale v. British Airways},\textsuperscript{136} for example, a case involving a damage claim for loss of baggage during a flight which the plaintiff boarded using a ticket which he had altered to reflect his name, rather than that of the original purchaser, the court found that no liability could attach under either the Warsaw Convention or tariffs filed with the FAA by the defendant airline.\textsuperscript{137} Similarly, the Convention's two-year statute of limitations\textsuperscript{138} precluded the plaintiff's claim for damage flowing from an eight hour delay in providing international transportation from Rome to New York in the case of \textit{Rullman v. Pan American World Airways, Inc.}\textsuperscript{139} The action was filed over two and one-half years after the alleged incident.

In \textit{Greeley v. KLM Royal Dutch Airlines},\textsuperscript{140} an unsuccessful

\begin{footnotesize}
\textsuperscript{133} 635 F.2d at 145-46.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 147.
\textsuperscript{136} 15 Av. Cas. 18,122 (N.Y. Civ. Ct. 1980).
\textsuperscript{137} Id.
\textsuperscript{139} 15 Av. Cas. 18,522 (N.Y. Sup. Ct. 1980).
\textsuperscript{140} 85 F.R.D. 697 (S.D.N.Y. 1980).
\end{footnotesize}
attempt was made by a passenger, alleging loss of $1,650 of jewelry from his baggage, to bring a class action on behalf of all KLM passengers who had suffered baggage losses that were subsequently settled for $20 per kilogram,\textsuperscript{141} pursuant to KLM policy. The plaintiff also contended that the Warsaw limitation did not apply to his claim because of the failure on the part of the carrier to issue baggage checks that complied with Article 4(4)'s requirements.\textsuperscript{142} The plaintiff, when offered $20 by KLM in settlement of his claim, refused and instead brought suit on behalf of himself and the above-described class. Dismissing the class action claims, the court found that the plaintiff could not "fairly and adequately protect the interests of the class" as required under Federal Rule of Civil Procedure 23(a)(4), because his recovery would not require a

\textsuperscript{141} Id. at 698-99. Article 22(2) of the Convention limits the carrier’s liability for properly checked baggage to 250 francs per kilogram, unless a special declaration of value is made and additional charge paid. Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 U.N.T.S. 11 [hereinafter cited as Warsaw Convention of 1929].

\textsuperscript{142} 85 F.R.D. at 699. Article 4 provides:

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The name and address of the carrier or carriers;
(d) The number of the passenger ticket;
(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;
(f) The number and weight of the package;
(g) The amount of the value in accordance with article 22(2);
(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Warsaw Convention of 1929, supra note 141.
showing of fraudulent inducement to settle, an element crucial to all members of the purported class.\textsuperscript{148}

An example of a very harsh application of the Convention’s imposition of liability upon carriers under Article 18 is found in \textit{Kinney Shoe Corp. v. Alitalia Airlines.}\textsuperscript{144} There the court granted summary judgment in favor of the consignee of a shipment of shoes that was stolen from the surface transportation agent’s trucks when they were hijacked during the journey to the carrier’s terminal.\textsuperscript{145} The defendant airline unsuccessfully resisted the summary judgment by arguing that a substantial issue of fact existed with regard to whether or not “all reasonable measures to avoid the loss”\textsuperscript{146} were taken, or that it was “impossible to take such measures,”\textsuperscript{147} the two statutory grounds relieving the carrier of liability for damage or loss to cargo. Noting that the summary judgment is a “premier procedural device[] capable of terminating litigation quickly, efficiently and fairly,”\textsuperscript{148} the court found the plaintiff had made out a \textit{prima facie} case of liability by showing that the cargo was entrusted to an agent of the carrier and that, due to theft, it was never received by the consignee.\textsuperscript{149} The crucial issue was whether an “occurrence” had taken place during the transportation and, if so, whether the carrier had borne his burden of showing that he had taken “all reasonable measures to prevent the loss at issue.”\textsuperscript{150} Ostensibly basing its decision on the failure of the defendant to come forward with affidavits or other positive evidence, rather than relying on the conclusory allegations in its pleadings, the court rejected the carrier’s argument that the plaintiff faced a more substantial proximate causation problem where criminal intervention was the cause of the loss.\textsuperscript{151}

\textsuperscript{148} 85 F.R.D. at 700.
\textsuperscript{144} 15 Av. Cas. 18,509 (S.D.N.Y. 1980).
\textsuperscript{145} Id. at 18,510.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. (citing SEC \textit{v. Research Automation Corp.}, 585 F.2d 31, 32 (2d Cir. 1978)).
\textsuperscript{149} 15 Av. Cas. at 18,512.
\textsuperscript{150} Id. at 18,511.
\textsuperscript{151} Id. at 18,512.
Applying Article 20(1) of the Warsaw Convention the court in *McMurray v. Capitol International Airways*,\(^{153}\) found that a carrier is liable for damages to a passenger for delay or cancellation of a flight, despite conflicting provisions in the tariff filed with and approved by the Civil Aeronautics Board, which relieved the carrier of such liability.\(^{153}\) In *McMurray*, the plaintiff’s flight from Brussels to New York was cancelled because of engine trouble one day prior to its scheduled departure. The court rejected the defendant’s contention that all measures had been taken to avoid the damages, finding that the contingency of engine failure was certainly not to be considered “unforeseen” as part of an air carrier’s business.\(^{154}\) The court further found that the transportation the plaintiffs found on their own should and could have been obtained by the carrier as alternate transportation\(^{155}\) and that the carrier could not simply rely on the unavailability of any of its other aircraft.\(^{156}\)

The question of whether the failure of the carrier to properly issue a baggage check conforming to the convention’s requirements relieves the passenger of the necessity of filing a written complaint of loss within three days was answered in the affirmative in a case of apparent first impression, *Pirilla v. Eastern Airlines, Inc.*\(^{157}\) The plaintiff, alleging loss of baggage, failed to make a written complaint to the carrier regarding the damage to his luggage until nine days after it was discovered.\(^{158}\) Eastern raised the three day preemptive period as a defense. Evaluating Eastern’s invocation pursuant to Article 4(4) of the convention, which states that provisions of the act which “exclude or limit” carrier liability shall not apply where

\(^{153}\) 15 Av. Cas. 18,087 (N.Y. Civ. Ct. 1980).
\(^{154}\) Id. at 18,088.
\(^{155}\) Id.
\(^{156}\) Id.
\(^{157}\) Id.
\(^{158}\) Id. at 18,070. Article 26 provides in pertinent part: “In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three (3) days from the date of receipt in the case of baggage and seven (7) days from the date of receipt in the case of goods. . . .” Warsaw Convention of 1929, supra note 141.
the carrier fails to provide a baggage check with the required information, the court held that the three day notice period was a provision which "excluded or limited" the carrier's liability, and therefore was rendered inoperative by the failure to deliver to the passenger a baggage claim containing the requisite information.

Failure of the carrier to properly deliver a ticket to the plaintiff notifying him of the Warsaw liability limitations was also involved in Manion v. Pan American World Airways, Inc. In Manion, a sixteen year old girl, part of a tour group organized for relatives of certain Aramco officers and employees in Saudi Arabia, was severely injured by a terrorist bomb blast in the Rome International Airport while she awaited a connecting flight to Beirut, Lebanon. In dealing with the invocation by the carrier of the $75,000 limitation of liability provided by the Warsaw Convention, as modified by the Montreal Agreement, the court dealt with the issue of burden of proof as applied to delivery or non-delivery of a satisfactory ticket. With completely contradictory evidence present in the record, the court found that a ticket holder who seeks to avoid the application of the Warsaw limitation of liability does not have the burden of proving non-delivery of the ticket. Instead, the court placed such a burden on the defendant carrier who sought to invoke the $75,000 limitation of liability. In doing so, the court relied upon the "well settled" jurisprudence that a party pleading an affirmative defense has the burden of proving it. Accordingly, the court held that the carrier asserting limitation of liability has the duty of proving the applicability of the convention's limitation of liability, including the physical delivery of a properly worded ticket. Therefore, since no evidence was adduced at trial establishing

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15 See note 142 supra.
165 Id. at 493.
166 Id. at 495.
that either the plaintiff or her tour escort had received a properly constituted ticket prior to the time she boarded the flight in New York, the carrier was held not to be entitled to the limitation of liability and was found liable for all damages sustained by the plaintiff.167

VI. FEDERAL TORT CLAIMS ACT — U.S. GOVERNMENT LIABILITY

Litigation involving liability of the United States for faulty aeronautical charts has continued since the publication of last year's report on case law developments. The plaintiffs prevailed against the United States in wrongful death actions under the Federal Tort Claims Act for acts and omissions of the FAA and FCC in Reminga v. United States,168 a Sixth Circuit opinion. The three decedents in Reminga were returning from a hunting trip in Wisconsin when their plane crashed about 17 miles from the airport. Although the weather was marginal, conditions were above minimum standards for takeoff.169 The pilot was flying VFR in and out of the clouds, rain and snow just before the crash, which occurred when the plane hit a guy wire some 405 feet above the ground. Although the 1,720 foot tower to which the wire was attached was painted and illuminated in accordance with 47 C.F.R. Part 17, there were no lights or other markings on the guy wires.170 The Sixth Circuit affirmed the district court's decision that the Government was negligent in publishing the Green Bay Sectional Map with the location of the TV tower shown inaccurately on the chart.171 Citing 49 U.S.C. section 1348(b) which authorizes but does not require the publication of such charts,172 the court held that when the FAA arranges for the publication of aeronautical navigation charts and engenders reliance on them, it is required to use due care to see

167 Id.
168 631 F.2d 449 (6th Cir. 1980).
169 Id. at 451.
170 Id.
171 Id. at 452.
that they accurately depict what they purport to show, and that the failure to show the accurate location of the tower rendered the United States liable.\textsuperscript{173}

At the Fourteenth Annual Air Law Symposium, the case law development report cited \textit{Baird v. United States},\textsuperscript{174} a Kansas state court decision dealing with a publisher's liability for aeronautical charts. In \textit{Baird}, the district court granted the Government's motion to dismiss, holding that the development and formulation of specifications for aeronautical charts was within the "discretionary function" exception to the Federal Tort Claims Act.\textsuperscript{175} The \textit{Baird} case was distinguished, however, in \textit{Allnutt v. United States},\textsuperscript{176} which involved a pilot, killed when his aircraft struck a power transmission line while flying at an altitude of 100 feet at approximately 100 miles per hour over the Osage River. The plaintiffs contended that the United States, acting through the Commerce Department and its subagency, the National Oceanic and Atmospheric Administration, Aeronautical Chart Division (ACD),\textsuperscript{177} was negligent in failing to depict a power transmission line on a particular chart. The pilot relied to his detriment on the inaccurate chart, which chart stated on its face that it was published in accordance with the Inter-Agency Air Cartographic Committee (IACC) specifications.\textsuperscript{178} The \textit{Allnutt} court noted that in \textit{Baird},\textsuperscript{179} the plaintiff's complaint was that the Government, through the IACC, failed to develop sufficiently comprehensive policies for inclusion of

\textsuperscript{173} 631 F.2d at 452. The district court had also premised liability on two other grounds which the Sixth Circuit rejected. First, the court held that the FAA was not negligent in issuing a "no hazard determination" when the construction of the TV tower was proposed. Second, neither the FAA nor the FCC was negligent for failing to require additional lighting or marking. The FAA was performing a discretionary function in making the "no hazard determination," and the FAA's failure to mark the guy wires could not be the basis of an action against the United States for damages. \textit{Id.} at 458 (citing 49 U.S.C. § 1348(a) (1976); and 28 U.S.C. § 2680(a) (1976)).

\textsuperscript{174} 15 Av. Cas. 17,476 (D. Kan. 1979).

\textsuperscript{176} Id. at 17,480.

\textsuperscript{177} 498 F. Supp. 832 (W.D. Mo. 1980).

\textsuperscript{178} Id. at 835.

\textsuperscript{179} Id. at 837.

\textsuperscript{179} 15 Av. Cas. 17,476 (D. Kan. 1979).
visual flight information. In *Allnutt*, the court distinguished *Baird*, noting that the plaintiffs were not challenging the sufficiency of the IACC specifications, but rather that the personnel within the ACD failed to properly adhere to the established IACC specifications in the preparation of the chart. The *Allnutt* court held:

As such, this court finds that the discretionary function exception does not apply to the mechanical *preparation* of aeronautical charts when such preparation fails to conform to specific IACC standards or specifications. At such a basic level there is no discretionary behavior in following the established IACC rules for inclusion of power lines on sectional aeronautical charts.

As to negligence, however, the *Allnutt* court held that the United States was not liable when the power transmission line was below 200 feet, and had no landmark value; therefore, the transmission line was not required by the IACC rules to be included on the chart.

The United States was found liable due to air traffic controller negligence in *Universal Aviation Underwriters v. United States*. In that case a mid-air collision occurred in clear weather within the Denver Terminal control area at a time when visibility extended up to forty miles. The district court found that the air traffic controllers failed to utilize in-

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180 *Id.* at 17,477.
181 498 F. Supp. at 838.
183 *Id.* at 841. *Arguendo*, the court held that the pilot’s conduct in flying his airplane at an altitude of 100 feet and a speed over 100 miles per hour over a winding river constituted contributory negligence. *Id.* at 843. See also *Foss v. United States*, 623 F.2d 104 (9th Cir. 1980) (where the Ninth Circuit affirmed judgment in favor of the plaintiff in a wrongful death action under the Federal Tort Claims Act, 28 U.S.C. § 2671 (1976) (FTCA), holding that the FAA was negligent in publishing a traffic pattern calling for an 800 foot downwind approach to the airport at Fullerton, California, where there was an 819 foot radio tower less than two miles away); *Knight v. United States*, 498 F. Supp. 316 (E.D. Mich. 1980) (where a federal district court in Michigan found no negligence on the part of the United States under the FTCA for failing to portray a radio tower on an aeronautical chart when the chart was published prior to a time when information concerning the construction of the tower was available).
formation available from a Britescope to supplement visual observation out of the window of the control tower. As the court itself noted, there were no issues of law decided in Universal Aviation Underwriters which were either complex or difficult, but attorneys who are concerned with air traffic control should read this case for an outline of factual circumstances viewed in the context of the requirements of the FAA Air Traffic Procedures Manual.

VII. AIRPORT AND AIRLINE OPERATIONS AND Regulations

In petitions for review of orders of the Civil Aeronautics Board (CAB), the Tenth Circuit in Frontier Airlines, Inc. v. CAB, held that CAB statutory power to order involuntary continuance of service to cities by Frontier until a suitable replacement carrier could be found also included the power to order Frontier to provide temporary backup service for the replacement carrier in order to ensure the replacement carrier to be capable of providing essential services to the affected cities on a continuing basis.

In Sima Products Corp. v. McLucas, the plaintiff corporation and its president brought an action in the United States, Northern District of Illinois, challenging an amendment to a regulation promulgated by the FAA concerning the use of X-ray devices for inspection of carry-on baggage at airport security points. The plaintiffs argued that the required signs were too misleading and that the rule allowing airports to permit signs to be posted was arbitrary, capricious and unreasonable. The Seventh Circuit held that the courts of ap-

186 Id. at 647. A Britescope is a television reproduction of the radarscope located in the radar room.
187 Id. at 650. See Gill v. United States, 429 F.2d 1072 (5th Cir. 1970); Hartz v. United States, 387 F.2d 870 (5th Cir. 1968).
188 621 F.2d 369 (10th Cir. 1980).
189 Id. at 372 (citing 49 U.S.C. § 1389(a)(6) (Supp. II 1978)).
190 Id. at 309 (7th Cir.), cert. denied, 446 U.S. 908 (1980).
193 Id. at 312.
peals have exclusive jurisdiction to review a rule promulgated by the FAA, pursuant to notice-and-comment rulemaking. The court further held that the district court's decision to dismiss because of a lack of subject matter jurisdiction was correct; the sixty day limit for filing a petition for review of an agency in a court of appeals had long passed for the plaintiffs.

The District of Columbia Court of Appeals has ruled that, under the Federal Aviation Act of 1958, a rule of the FAA promulgated after informal notice-and-comment is an "order" within the exclusive review jurisdiction of the courts of appeals. In another District of Columbia appellate case, National Small Shipments Traffic Conference, Inc. v. CAB, the petitioners challenged provisions of CAB regulations governing domestic air cargo transportation. The challenged rule exempted domestic air cargo carriers from: (1) the duty to file tariffs showing the carrier's rates, rules and practices for cargo transportation; (2) the duty to provide air transportation service upon reasonable request; and (3) the statutory provisions relating to the filing of inter-carrier agreements affecting domestic air transportation.

In National Small Shipments Chief Judge J. Skelly Wright reviewed the history of the Federal Aviation Act and the background of Congress' fundamental changes in the approach to the air transportation industry. In a lengthy opinion, the court held that the CAB had ample authority to issue the regulations which were challenged, and that its decision was not ar-

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193 Id. at 314-15.
196 618 F.2d 819 (D.C. Cir. 1980).
197 Id. at 821.
201 618 F.2d at 822-26.
bitrary or capricious.202

Delta Airlines in Delta Airlines, Inc. v. United States203 brought an action in the district court for the Northern District of Georgia to enjoin the FAA and the Federal Air Surgeon from certain practices, and the Airline Pilots Association, International, was permitted to intervene. Delta filed a motion for summary judgment, which was granted by the court, enjoining the FAA, the Administrator and the Federal Air Surgeon from issuing pilots' medical certificates to pilots possessing any of the Federal Aviation Act's absolutely disqualifying medical conditions, without a proper finding that an exemption was in the public's interest.204 The Federal Air Surgeon was also enjoined from placing on airmen any limitations that described the flight functions that such airmen might perform.205

In Branning v. United States,206 the plaintiff, who owned island property adjacent to a marine air training facility, sued the United States for the taking of his property without just compensation. Several days each month, heavy training operations took place which involved Flying F-4 aircraft at altitudes from 600 to 1,000 feet in a race track pattern over the plaintiff's property.207 The plaintiff, through discovery, obtained and brought before the court an Air Installation Compatibility Use Zone Study (AICUZ) that had been performed for the Marine Corps, which denoted the plaintiff's property as rendered "clearly unacceptable for residential use or development."208 Relying on the AICUZ as the primary evidentiary basis for its decision, the court found that the plaintiff's use of his property had been substantially impaired and that com-

202 Id. at 827-28, 831-32.
203 490 F. Supp. 907 (N.D. Ga. 1980). See also County of Kern v. CAB, 633 F.2d 856 (9th Cir. 1980) (CAB's interpretation of "essential air transportation" was reasonable and in compliance with underlying policies of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978)).
204 490 F. Supp. at 917.
205 Id. at 918-19.
206 15 Av. Cas. 18,123 (Ct. Cl. 1980).
207 Id. at 18,124.
208 Id.
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pensation would, therefore, be due from the United States.\textsuperscript{209} In so holding, the court rejected the United States' defense that the airspace utilized in its training operations was declared to be navigable airspace and subject to the regulation of the United States.\textsuperscript{210}

In order to meet federal regulations pertaining to the funding of airport improvements, a runway clear zone was established by imposing height restrictions on several parcels adjacent to the airport owned by the plaintiffs in the case \textit{S. J. & J. Service Station, Inc. v. State}.\textsuperscript{211} All of the parcels were zoned for light industry, a category which excluded residential use. In an action brought by the plaintiff landowners seeking damages for the appropriation of air space due to the establishment of the clear zone, the court denied the claims, finding that there had been no showing of a diminution of market value considering the industrial uses of the properties.\textsuperscript{212}

\textbf{VIII. Aviation Insurance}

Following the trend noted in the 1980 case law review, the courts are showing a growing willingness to enforce coverage limitations and exclusions contained in aviation insurance policies. For example, in \textit{Ranger Insurance Co. v. Air-Speed Co.},\textsuperscript{213} the court applied and interpreted the standard policy provision allowing for coverage of a substitute aircraft while the named aircraft is temporarily out of service. In that case the insured utilized a second aircraft in its commuter service operations and this non-named aircraft crashed while engaged in such use. The policy-named aircraft was not flying at the time of the crash. The court, noting the prior operation by the

\textsuperscript{209} \textit{Id.} at 18,132. The court, noting that its latest decision, \textit{Lacey v. United States}, 595 F.2d 614 (Ct. Cl. 1979), could not be construed as a denial that a "taking" could occur where the activities complained of consisted of flying at altitudes above 500 feet. The court found that the noise aspect of such flights, by itself, might form a sufficient basis for the finding of a taking and the awarding of damages caused thereby. \textit{Id.} at 18,131-32.

\textsuperscript{210} \textit{Id.} at 18,129.

\textsuperscript{211} 15 Av. Cas. 18,039 (N.Y. App. Div. 1980).

\textsuperscript{212} \textit{Id.} at 18,040.

\textsuperscript{213} 401 N.E.2d 872 (Mass. 1980).
insured of two aircraft and considering the insured’s policy to use only one aircraft when business was light, found that the airplane involved in the crash was not an aircraft “temporarily used as a substitute,” within the meaning of the policy.\footnote{Id. at 875.} For the same reasons, the destroyed aircraft was also found not to be an “equipped replacement” for the named aircraft.\footnote{Id.}

The “temporary use of substitute aircraft” policy provision was also an issue in \textit{Roberts v. Gonzales},\footnote{Id.} albeit with opposite results. In \textit{Roberts}, the principal carrier, under an informal arrangement, transferred passengers to a substitute air taxi service, and after that aircraft crashed, the coverage question arose.\footnote{495 F. Supp. 1310 (D.V.I. 1980).} In interpreting this provision, the court had no difficulty with most of the policy prerequisites to coverage. The first requirement of the clause, that the named aircraft be “withdrawn from normal use” at the time of the occurrence giving rise to the claim, was perfunctorily answered in the affirmative.\footnote{Id. at 1313. Clause IV of Lloyd’s of London’s insurance policy No. 20594 provided:}

\begin{quote}
\textit{Temporary Use of Substitute Aircraft}

While an aircraft owned by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such aircraft applies also with respect to another aircraft of similar type, horsepower, and seating capacity, not so owned while temporarily used as the substitute for such aircraft. This Insuring Agreement does not cover as an insured the owner of the substitute aircraft nor any agent or employee of such owner.
\end{quote}

\footnote{Id. at 1318.}
within which Caribbean could return its aircraft to service and retain coverage would be a minimum of 24 hours."

The most "strenuous analysis" of the six policy prerequisites was applied to the question of whether the substitute aircraft was "temporarily used as the substitute." After reviewing the facts and citing cases involving the same question as to automobiles, the court held that the substituted aircraft was "temporarily used as a substitute" for the principal flight and noted that its "somewhat expansive interpretation of the term 'used'" is consistent with the general view of courts analyzing the term in insurance contracts, and therefore, Lloyds' policy extended coverage to the substituted flight.

In construing whether or not an "all risks" hull policy covered expenses incurred in bringing the covered aircraft's engines to zero time in order to satisfy air worthiness certification requirements, the court in Busch v. Ranger Insurance Co., found in the affirmative. In this case, the subject aircraft had struck both of its propellers on the runway during a hard landing. In order to bring the engines up to air worthiness condition, disassembly and inspection were required. The court found that such expenses were covered and must be paid under the "all risks" insurance coverage provision. The insured, it found, was entitled to have his aircraft restored to an airworthy condition in order to make whole the damage sustained in the covered occurrence.

Relying on the "operated by any pilot other than as specified in the declaration" exclusion, the district court in Master Feeders II, Inc. v. United States Fire Insurance Co., rendered summary judgment in favor of the insurer of a Cessna 182 and against its owner, Master Feeders. The aircraft struck power lines during its approach while the "unqualified" pilot

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220 Id. at 1319.
221 Id.
222 Id. at 1321.
223 Id.
225 Id. at 307.
226 Id.
227 15 Av. Cas. 18,420 (D. Kan. 1980).
was in command of the aircraft. A "qualified" pilot was present in the right-hand co-pilot's seat and upon noting the power lines looming ahead, he seized the right-hand controls and pulled back on the yoke, as did the non-qualified pilot. Unfortunately, the aircraft was unable to clear the obstruction and crashed. The court found that the exclusion of coverage while the aircraft was operated by a non-qualified pilot operated to negate liability on behalf of the insurer for injuries suffered by the passenger occupying the co-pilot's seat. Finding that the unqualified pilot was operating the airplane at the time of the crash, the court noted that even had this not been the case, when a non-qualified pilot places the aircraft in such a position as to increase the insurer's risk of loss, the mere gaining of control by a qualified pilot does not restate the coverage, as long as the increased risk of loss created by the non-qualified pilot continues to exist.

The efficacy of the standard insurance clause requiring each insured pilot to maintain a current medical certificate was upheld by the court in Smith v. Coker Aviation Insurance. In rendering its summary judgment, the court found in favor of the insurer and against claims made under the policy for damages arising out of the crash of the insured aircraft while it was operated by the plaintiff, a pilot whose medical certificate had expired over five months previous to the accident. The plaintiff, however, renewed his certificate two weeks after the accident occurred, and argued that the exclusion was therefore inapplicable. The court based its decision on the plain language of the policy, refusing to read the exclusion so as to give any retroactive effect to the regaining of a current medical certificate.

Consistent with other reported cases which literally apply policy requirements and exclusions, the Texas Supreme Court

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328 Id. at 18,424-25.
329 Id. at 18,425.
330 15 Av. Cas. 18,217 (W.D. Okla. 1980).
331 Id. at 18,218-19.
332 Id. at 18,218.
333 Id. at 18,219.
in Stewart v. Vanguard Insurance Co. affirmed the Court of Civil Appeals’ take nothing judgment in a personal injury action brought by the pilot of the insured aircraft who had not complied with the ten hour type experience requirement contained in the pilot description clause of the policy. Plaintiff Stewart, upon making a final approach at a local airstrip, came in too high, bounced violently several times upon contact with the runway and then froze at the controls. A passenger, also a pilot, took control of the aircraft and attempted a belated missed approach, but could not gain enough altitude and struck a pine tree at the end of the runway. In construing the term “logged” as used in the policy’s ten hour type currency requirement, the court found that the policy required a pilot to have operated a Cessna 180 airplane “as the pilot in command” for ten hours preceding the occurrence. Accepting the jury’s finding that the passenger was the pilot in command of the aircraft at the time of the crash, the court found that this pilot had “logged” only six hours in the aircraft prior to the time he left on the subject flight. The plaintiff’s testimony that the passenger had acted as an instructor in flying the Cessna during the fateful trip, and had thereby met the ten hour requirement, was not sufficient evidence to show compliance with the insurance policy. The court, therefore, affirmed the Court of Civil Appeals finding for the insurer.

In Middlesex Mutual Insurance Co. v. Bright, the court upheld the insurer’s defense against claims made by its insured for recovery of damages to power lines occasioned by the crash of the subject aircraft shortly after a nighttime takeoff. Investigation showed that the aircraft was loaded with over 541 kilos of marijuana at the time of the crash. Finding non-coverage, the court affirmed the decision of the Superior Court which dismissed the claims of the power company for

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224 603 S.W.2d 761 (Tex. 1980).
225 Id. at 763.
226 Id. at 762.
227 Id. at 763.
228 Id.
the damages to its transmission lines. In doing so, the court overruled the company's argument that such a policy exclusion was unenforceable under the provision of the California Insurance Code which prohibits exclusion of coverage for operation of the insured vehicle "in violation of federal or civil air regulations, or any state law or local ordinance."

Rejecting the plaintiff's contention that the "illegal purpose" exclusion was prohibited by this California statute, the court found that a clear distinction exists between the "operated for an illegal purpose" exclusion and the restricting language of the California Insurance Code. The latter, it found, referred to exclusions based upon violation of federal air operational regulations. This exclusion, the court reasoned, is separate and apart from exclusions establishing a limitation of the use of an aircraft for illegal purposes. The court also rejected the plaintiff's argument that the insurer must show a causal connection between the unlawful use and the air crash. Noting that some ambiguity existed in the jurisprudence, the court followed the lead of the Idaho district court in Roberts v. Underwriters at Lloyds of London and refused to place such a burden on the insurer denying coverage.

Demonstrative of the maxim that the injured party has no greater right against the wrongdoer's insurer than the insured would have, the trial division of the New York Supreme Court in Steinbach v. Aetna Casualty & Surety Co., found that the plaintiff, who had obtained a judgment against the insured of the defendant, Aetna Casualty, was not entitled to recover against the insurance company. The court found that the insured's failure to notify the company of the accident giving rise to the litigation served to vitiate coverage by the

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240 Id. at 293, 165 Cal. Rptr. at 50.
241 CAL. INS. CODE § 11584 (West 1980).
242 106 Cal. App. 3d at 288, 165 Cal Rptr. at 48.
243 Id.
244 Id. at 289, 165 Cal. Rptr. at 49.
247 15 Av. Cas. 18,096 (Sup. Ct. N.Y. 1980).
IX. JURISDICTIONAL AND PROCEDURAL MATTERS

A. Jurisdiction

Jayne v. Royal Jordanian Airlines Corp., is an example of the extremely broad construction of long arm jurisdiction statutes vis-a-vis foreign defendants. Here the court held that it had jurisdiction to adjudicate claims made by representatives of American citizens killed in the 1977 crash of an Arab Wings aircraft in Amman, Jordan. Two actions, one filed in Illinois and the other in New York, were consolidated for pre-trial proceedings by the Judicial Panel on Multi-District Litigation. The owner and the operator of the Lear jet aircraft, Arab Wings, had no offices or employees located in the United States. The court conceded that such tenuous contacts as borrowing money from New York banks or securing the services from a New York public relations firm were not sufficient to submit the corporation to the jurisdiction of the New York court. However, the court zeroed in on the close relationship between Arab Wings and Royal Jordanian Airlines, which on occasion had acted as a booking agent for the charter carrier. Royal Jordanian's single agent in New York, in the year preceding the disaster, booked approximately $16,000 of business for Arab Wings and earned a 5% commission totalling $800.

Applying the New York jurisdictional test applicable to agents, the court found that Royal Jordanian Airlines was a de facto agent of Arab Wings and that it did “all the business which the other corporation could do were it here by its own officials.” The court found that under New York law, the focus must be on the question of whether the in-state services

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248 Id. at 18,098.
250 Id. at 856.
251 Id. at 858.
252 Id. at 855.
company has the authority to make final reservations in the name of the out-of-state defendant.\textsuperscript{254} The court distinguished cases involving the design of products,\textsuperscript{255} noting that defendant Arab Wings had only sold a service, much of which was provided by its agent.\textsuperscript{256} Regarding the Illinois action, the court found that jurisdiction was assertable consonant with \textit{International Shoe} "minimum contacts."\textsuperscript{257} Due process requirements were met since Royal Jordanian Airlines was present in Illinois and actually conducted business there. Because the court found that Arab Wings was a "department" of the parent, Royal Jordanian Airlines, jurisdiction attached and minimum contacts thereby existed in Illinois sufficient to sustain the imposition of \textit{in personam} jurisdiction over the carrier.\textsuperscript{258}

In \textit{Montgomery v. American Airlines, Inc.},\textsuperscript{259} the court dismissed the plaintiff's class action for failure to state a claim upon which relief could be granted. The action purported to represent all sky caps who were not afforded the reduced fare or cost-free interstate transportation by American Airlines, Inc., that was afforded its employees, directors and certain affiliates' employees, pursuant to a filed tariff.\textsuperscript{260} While noting that section 403(b)(1) of the Federal Aviation Act,\textsuperscript{261} permits free or reduced fair rates only for overseas or foreign air transportation, the court nevertheless dismissed the plaintiff's action in favor of a prior adjudication by the Civil Aeronautics Board. The court found that the CAB has "primary jurisdiction" over claims which assert that a filed tariff is either unreasonable in amount or unduly discriminatory in effect.\textsuperscript{262} The court further ruled, however, that when a claim is made that a carrier has violated its own filed tariff or established

\textsuperscript{254} 502 F. Supp. at 858.
\textsuperscript{255} See, \textit{e.g.}, Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).
\textsuperscript{256} 502 F. Supp. at 859-60.
\textsuperscript{258} 502 F. Supp. at 861.
\textsuperscript{259} 637 F.2d 607 (9th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 1368 (1981).
\textsuperscript{260} \textit{Id}.
\textsuperscript{262} 637 F.2d at 608.
transportation custom, then such claim falls within the jurisdiction of the federal courts and may be adjudicated there. In doing so, the court followed the lead of the Second Circuit in *Danna v. Air France.*

Air carriers should take note and be warned by the Eighth Circuit's decision in *International Trade Arrangers, Inc. v. Western Airlines, Inc.* There, the plaintiff, a Minnesota organizer of travel group charters, brought a suit against Western Airlines for alleged anti-trust violations. The court found that Western had engaged in a campaign to prevent travel group charters from becoming a competitive threat to its regularly scheduled air service. The campaign included false, misleading and deceptive advertising directed at consumers and travel agents. The court affirmed the district court's restraint of trade trebled damages award of $361,000, along with substantial costs, and modified attorney's fees in the sum of $118,000 for lead counsel and $43,000 for local counsel. The court also reviewed the contingency fee agreement between the plaintiff and lead counsel, and concluded that the outer bounds of reasonableness required that such fee be limited to 45% of the trebled damage award.

Eagerness often results in prematurity, as the Pilots Rights Association discovered in *Pilots Rights Ass'n, Inc. v. FAA,* a case in which the Association brought an action against the FAA to enjoin a study reexamining the continued medical and scientific rationality of the "Age 60 Rule." The FAA's motion to dismiss was granted by Judge Gesell on the grounds both that the Association did not have standing to challenge the FAA's award of a contract to conduct the study, and that under Article III, Section 1 of the Constitution the claim was

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263 Id. at 610.  
264 463 F.2d 407 (2d Cir. 1972).  
266 Id. at 1266.  
267 Id. at 1278.  
268 Id.  
270 Id. at 177.
not ripe for judicial resolution.\(^{271}\)

The Greater Tampa Chamber of Commerce in its suit against the Secretary of Transportation\(^{272}\) challenged the validity of the "Bermuda II" agreement between the United States and the United Kingdom, which regulates air travel between the two nations.\(^{273}\) The District of Columbia Court of Appeals held that the Chamber of Commerce did not have standing to maintain the action since it failed to show that the court could redress the injury which it averred to have suffered.\(^{274}\) The court noted that even if the Chamber prevailed, the independent obstacles of possible Senate approval of Bermuda II and the United Kingdom's control over its own air space would remain and, while these might not be "absolute" obstacles, the complaint contained nothing which would lead the court to expect that they would be overcome.\(^{275}\)

B. Choice of Law

The Chicago air disaster of May 25, 1979, is providing several noteworthy decisions. For example, the Seventh Circuit has issued an interesting choice-of-law decision in *In re Air Crash Disaster, Near Chicago, Illinois, on May 25, 1979.*\(^{276}\) Choice of law considerations were successfully invoked by the defendants to avoid the imposition of punitive damages. The court observed that the primary alternative forums could be: (1) the place of a disaster; (2) the place of the manufacture of the aircraft; (3) the place of the primary business of the airline; or (4) the primary place of business of the manufacturer.\(^{277}\) Only the latter forum allowed punitive damages, and the court found, based on the Restatement (Second) Conflict of Laws' determinants, that the law of the place of injury, Illi-

\(^{271}\) *Id.*

\(^{272}\) Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258 (D.C. Cir. 1980).

\(^{273}\) *Id.*

\(^{274}\) *Id.* at 265.

\(^{275}\) *Id.* at 263.

\(^{276}\) 644 F.2d 594 (7th Cir. 1981).

\(^{277}\) *Id.* at 604.
nois, would be applicable.278

One hundred and eighteen wrongful death actions arising out of the crash of American DC-10 Flight 191 were consolidated by transfer by the Judicial Panel on Multi-District Litigation to the Northern District of Illinois.279 Lawsuits against American Airlines and McDonnell Douglas Corporation had been filed in Illinois, California, New York, Michigan, Hawaii and Puerto Rico by residents of eleven states, Puerto Rico and three foreign countries. It was the decision of the district court that, under Illinois' "most significant relationship" test, the law of the principal place of business of each of the defendants should prevail with regard to the issue of punitive damages.280 Therefore, that court found that American Airlines, with its principal place of business in New York, escaped punitive damages281 while McDonnell Douglas, with its principal place of business in Missouri, was subject to such claims.282 Reversing the lower court's denial of McDonnell Douglas' motion to strike punitive damages claims, the Seventh Circuit also held that MDC was not subject to punitive damages.283

The court reviewed the substantive law of each of the seven interested states, noting that Illinois, California, New York and Hawaii reject punitive damage awards in wrongful death actions, while Oklahoma, Texas and Missouri (through a concept of "aggravating circumstances") allow them.284 After considering the individual state choice of law rules,285 the court determined which of the states having some relationship to the parties of the crash had the "most significant interest in the application of its own substantive law to the merits of the punitive damage issue."286 The court rejected an approach

278 Id. at 611.
279 Id. at 604 n.1.
280 Id. at 605.
281 Id.
282 Id.
283 Id. at 616.
284 Id. at 605-07.
285 See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), where the Supreme Court held that in diversity cases, federal courts must decide conflict of laws questions by following the conflict of laws rules of the states in which they sit.
286 644 F.2d at 610.
which would have considered the various states’ interests “in general,” but instead, narrowed the issue to state’s interest in the application of punitive damages. Therefore, the depecage splitting of choice of law, issue by issue, was utilized by the court to make its analysis more “precise.”

Ironically, after methodically plodding through the Restatement (Second) of Conflicts’ “most significant relationship” test adopted by Illinois, the court found that the situs of the accident controlled and that Illinois law should apply to those actions filed in Illinois. The court arrived at this result by finding that of the three interested states (Illinois, Missouri and California) Missouri’s and California’s interests in, respectively, allowing and disallowing punitive damages, were evenly balanced. Therefore, there was no showing that another state had “a more significant relationship” than that of the place of injury, as specified in the Restatement (Second) presumption contained in Section 175. Deeming such analysis a “principled means” which “creates certainty,” the court put air carriers on notice that, where a true conflict exists between states having equal interests regarding the issue of punitive damages, the place of injury will control. With regard to American Airlines, the court likewise found that

287 Id. at 611.
289 644 F.2d at 611.
290 Sections 175 and 178 of the Restatement (Second) of Conflict of Laws provides as follows:

§ 175. Right of Action for Death
In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

§ 178. Damages
The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death.

Restatement (Second) of Conflict of Laws §§ 175, 178 (1971).
291 644 F.2d at 616.
292 Id.
293 Restatement (Second) of Conflict of Laws § 175 (1971). See note 290 supra.
294 644 F.2d at 616.
under Illinois law, the place of alleged negligent conduct (Oklahoma), and the state of the principal place of business (New York), had equally strong interests which could not, therefore, displace the law of the situs of the accident as the one to be applied.295

Regarding the suits filed in California, the court applied the California “comparative impairment” conflicts scheme296 and found that the California interest in denying punitive damages was equivalent in strength to Missouri’s interest in imposing them.297 Therefore, the court reasoned that Illinois law should be applied because, as the situs of the accident, its twofold interest underlying denial of punitive damages would be the most impaired if Illinois law were not applied.298 This analysis was found true both for McDonnell Douglas, which would not be liable for punitive damages under either California or Illinois law, and for American Airlines, since its New York principal place of business refused to impose punitive damages. New York’s interest in protecting New York corporations from excessive financial liability overshadowed Oklahoma’s interest in punishing tortfeasors through punitive damages.299 For the same reasons that Illinois law regarding punitive damages was held to apply to McDonnell Douglas, New York law was held to apply to American Airlines.300

With regard to actions filed in New York, the same interest-analysis outlined by the court under Illinois law was utilized, resulting in the application of Illinois law to these claim.301

295 Id. at 621.
296 Id.
297 Id. at 625. The court noted that Illinois was “severely affected” by the crash, and it had a strong interest in protecting “airplace-related industries” from excessive liability, as well as deterring negligence in Illinois. Id. at 625-26.
298 The two-pronged test of the California rule examines these factors: (1) the current status of the statute and the intensity of the interest with which it is held, and (2) the comparative pertinence as “fit” between the purpose of the legislature and the statute in the situation at hand. The controlling law is that of the state whose interest would be the more impaired if its law were not applied. Bernhard v. Harrah’s Club, 16 Cal. App. 3d 313, 546 F.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976).
299 644 F.2d at 624-26.
300 Id. at 626-28.
301 Id. at 628-29.
For much the same reason, and in consideration of the *lex loci delicti* rule which is still influential in Michigan, the same result was reached for the claims filed in Michigan. As a final matter, the court found that denying punitive damages in wrongful death actions, while allowing them in other personal injury actions, did not offend the plaintiffs' due process or equal protection rights.

In *Masera v. Trans World Airlines, Inc.*, an action arising out of the September 8, 1974 crash of TWA Flight 841 into the Ionian Sea, the Southern District of New York court felt constrained to apply Italian law under the New York "center of gravity" or "grouping of contacts" choice of law doctrine. The case was brought by the survivors of two Italian stewardesses who were based in Rome, and employed there by TWA. The court found that Italy "has the greatest concern with the specific issue raised in this litigation." The contacts noted by the court included the fact that the plaintiffs were Italian citizens living in Italy, the air crash occurred in waters off Italy, and a TWA occupational life insurance policy covering the decedents was purchased and issued in Rome and paid in Italian lire. The only New York contacts were found to be that TWA's principal office was located in New York and that

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803 Id. at 629-30. The same conclusion was reached for the claims filed in Puerto Rico, which not only applies the *lex loci delicti* doctrine but also does not recognize punitive damages in tort actions. Id. at 630. With respect to the claims filed in Hawaii, the court held that Hawaii apparently does not allow punitive damages so that under the "two modern choice-of-law theories, as well as the old rule of *lex loci delicti," punitive damages could not be awarded against either McDonnell Douglas or American Airlines. Id. at 630.

804 Id.

805 Id. at 610. The court found that such a classification is rationally related to a legitimate state purpose, finding support in *In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980), that the legitimate state interest in avoiding excessive liability to defendants was valid and was determined by the state interest in punishing or deterring misconduct. Id.

806 492 F. Supp. 950 (S.D.N.Y. 1980) See also *Hawley v. Beech Aircraft Corp.*, 625 F.2d 991 (10th Cir. 1980), where the court held that the action brought in Kansas must be dismissed, because under Kansas' borrowing statute, by application of the statute of limitations of the *locus delicti* (California), that state's limitation period for wrongful death of one year required affirmation of the lower court's dismissal.

807 Id. Supp. at 953.
the ultimate destination of Flight 841 was New York. Weighing the contacts, the court found that application of Italian law was mandated, and since Italian law made the insurance proceeds an exclusive remedy, the court dismissed the plaintiff's complaint.

In *Reyno v. Piper Aircraft Co.*, the plaintiffs filed a wrongful death action in a California state court against, among others, Piper, the Pennsylvania plane manufacturer, and Hartzell Propeller, Inc., an Ohio propeller manufacturer, for damages arising out of the crash of a Piper plane in Scotland. The case was removed to federal court and then transferred to the United States District Court for the Middle District of Pennsylvania. The Third Circuit, as to the choice of law issues, noted that the action against Piper was transferred from California to Pennsylvania under section 1404(a) of the United States Code, and held that the law of the transferring forum (California choice of law rules) would, therefore, be applied to Piper under the Supreme Court case of *Van Dusen v. Barrack.* As to Hartzell, the propeller manufacturer, the situation was more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking. That court did not dismiss the case against Hartzell, but quashed process and transferred it to Pennsylvania along with Piper. The court held that any asserted conflict between American strict liability and Scottish negligence law was a false one. Scotland's interest in the encouragement of industry by protecting manufacturers and making it relatively more difficult for consumers to recover, was perceived to be in conflict with Pennsylvania's adherence to strict liability which acted to shift some of the burdens of injury from consumers

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308 *Id.*
309 *Id.*
311 *Id.* at 164. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
313 630 F.2d at 167.
to producers. The court noted that the application of Pennsylvania strict liability standards to its resident manufacturer would serve that state's interest in the regulation of manufacturing, and that Scotland's interest in encouraging industry within its borders would not be impaired by applying a stricter standard of care to a foreign corporation. The court, therefore, concluded that as between Pennsylvania and Scottish law, a California court would apply Pennsylvania's strict liability analysis.

The court also applied Pennsylvania law as to Hartzell, holding the primary approach of the Pennsylvania Supreme Court in choice of law to be governmental interest analysis. The Third Circuit "predicted" that, under California law, the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland. The court held that the district court erred in its conclusion that Scottish law would govern a substantial part of the case or that this consideration should be a determinative factor in dismissing the case under forum non conveniens. There will probably be a further report on the development of this case in next year's report.

The decision in Icelandic Airlines, Inc. v. Canadair, Ltd., will be mentioned only briefly since, ultimately, the court applied the law of Quebec in a suit brought by an aircraft buyer against the aircraft's manufacturer and the New York manufacturer of an allegedly defective hydraulic selector valve. The aircraft manufacturer, Canadair, had previously been dismissed by the court. The valve manufacturer, whom plaintiff sought to hold liable on theories of negligence, strict liability and breach of warranty, moved for summary judgment. The reasoning of the court vacillated on the choice of law question

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314 Id.
315 Id. at 168.
316 Id.
317 Id. at 170.
318 Id. at 170-71.
319 Id. at 171.
from New York to Quebec. The defendant placed an apparently uncontested affidavit in evidence which indicated that Quebec did not recognize an action based upon strict products liability. The manufacturer’s motion for summary judgment was then granted. Though it is apparently dictum, there is interesting language in that portion of the court’s decision under New York law, which the court ultimately did not apply. The defendant had argued, with respectable authority, that since both it and the plaintiff were large corporations dealing in the aviation field, plaintiff was not in the position of an average consumer so as to rely upon strict liability. The court volunteered its observation, however, that under New York law no distinction had yet been made by the New York Court of Appeals between ordinary consumers and commercial specialists.

In In re Holiday Airlines Corp., a bankruptcy action, the Ninth Circuit affirmed the district court and held that Pacific Propeller, Inc., the Washington aircraft repair company which argued for the validity of a lien against the aircraft, could assert Washington law pertaining to aircraft liens. Under choice of law rules, Washington was determined to be the state where such a lien attached, and under the Federal Aviation Act, Washington lien law was found to be the proper law by which to test the validity of the lien.

The Florida Supreme Court recently retreated from the

321 428 N.Y.S.2d at 399.
322 Id.
323 Id.
324 620 F.2d 731 (9th Cir. 1980).
325 49 U.S.C. § 1406 (1976). The court also held that the lien was enforceable in the bankruptcy proceedings since it was filed with the FAA at a place designated under the Federal rules as appropriate, citing section 1406 as authority. 620 F.2d at 735.
326 620 F.2d at 735-36 (applying WASH. REV. CODE ANN. § 60.08.010 (West. 1961)). But see Bitzer-Craft Motors, Inc. v. Pioneer Bank & Trust Co., 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980) (where, in a secured transaction case, the court held that while the underlying validity of the aircraft title instruments filed with the FAA is to be resolved under state law, the mere fact of filing such instrument pursuant to FAA provisions is not the single determinative factor in resolving a priority dispute which otherwise arises under applicable divisions of the UCC). See also Martin v. Heady, 103 Cal. App. 3d 580, 163 Cal. Rptr. 117 (1980) (the lien sales provisions of California’s Aircraft Lien Law violated the procedural due process provisions of the California Constitution).
strict *lex loci delicti* rule in the conflicts area and adopted the most significant relationship test as set forth in the Restatement (Second) of Conflict of Laws. In *Bishop v. Florida Specialty Paint Co.*, the court noted that, particularly in the case of an aircraft accident in which the extraordinary mobility of aircraft was a consideration, the significant relationship test was the most appropriate way to proceed in deciding which law to apply.

C. *Foreign Sovereign Immunities Act*

28 U.S.C. § 1441(d) provides in part:

(d) Any civil action brought in a State court against a foreign state as defined in Section 1603(a) of this title may be removed by the foreign state to the District Court of the United States for the district and division embracing the place where such action is pending. Upon removal, the action shall be tried by the court without a jury.

Thus, where an action subject to the act is removed to federal court pursuant to section 1441(d), the statute precludes trial by jury. Where the action is originally filed under diversity jurisdiction, however, the thorny question has arisen concerning whether section 1441(d) precludes jury determination of the case under the independent diversity ground of jurisdiction.

The Southern District of New York in *Herman v. El Al Israel Airlines, Ltd.* dealt with a claim for personal injuries falling under the commercial activity exclusion to immunity. The case was originally filed in state court but was removed by the defendant to the federal court pursuant to 1441(d),

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527 15 Av. Cas. 18,490 (Fla. 1980). The following twenty-five states, as well as the District of Columbia, have now rejected the *lex loci delicti* rule in favor of modern approaches involving evaluation of multiple factors or contacts: Alaska, Arkansas, California, Colorado, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin. Id. at 18,492 n.2.

528 Id. at 18,491.


where the plaintiffs then asserted their right to trial by jury under diversity jurisdiction. The court, openly acknowledging the recent jurisprudence allowing trial by jury in similar circumstances when the action was originally filed in federal court, found section 1441(d) to be an unequivocal denial of trial by jury in an action against a "foreign state," as defined in the act, when the case is removed to the federal court from a state forum. The court also rejected the plaintiff's constitutional attack on the strictures of 28 U.S.C. section 1441(d) under the Seventh Amendment, finding that at the time of the Seventh Amendment's adoption in 1791, the doctrine of Sovereign Immunity existed and barred suit against sovereign governments. Therefore, the court reasoned, the action could not be a "suit at law" under the Seventh Amendment, for which trial by jury is preserved.

The case of *Sugarman v. Aeromexico, Inc.* illustrates the "commercial activities" exception to the Foreign Sovereign Immunities Act. In *Sugarman*, the plaintiff brought suit in November of 1978 in Federal District Court in New Jersey against Aeromexico, a corporation wholly owned by the Mexican government. The complaint alleged injury due to an unexplained fifteen hour delay in providing transportation from Aculpulco to the United States. Choosing to construe the exception to immunity contained in 28 U.S.C. section 1605(a)(2) expansively, the court reversed a summary judgment in favor of the airline, finding that a sufficient nexus existed between the plaintiff's grievance and the defendant's "commercial activity carried out in the United States." The court based its

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333 Id.
334 Id.
335 626 F.2d 270 (3d Cir. 1980).
337 Id. at 273. 28 U.S.C. § 1605(a)(2) (Supp. 1981) provides in pertinent part:
(a) A foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the states of any case:
decision on the fact that the plaintiff's delayed return trip was bound for New York City and was a part of a package that was purchased at a travel agency in New Jersey.\textsuperscript{338}

Despite Aeromexico's urging, the court refused to construe the first clause of section 1605(a)(2) so as to predicate exclusion from immunity on the grounds that the alleged misconduct occurred in the United States.\textsuperscript{339} The court found, instead, that Congress did not intend to limit liability for acts carried out or having direct effects in the United States, and accordingly, the exclusion provisions of liability limitation were ruled applicable to acts performed outside the country.\textsuperscript{340} Where the acts complained of grew out of "a regular course of commercial conduct" that is "carried on in the United States,"\textsuperscript{341} the court found that the section 1605(a)(2) exclusion applies.\textsuperscript{342}

\begin{footnotesize}
(2) In which an action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
\textsuperscript{338} 626 F.2d at 273.
\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id. at 274-75. The court found that the Act included within its provisions the principle that the immunity of a foreign state is restricted to suits involving a foreign state's public acts, as opposed to its private acts. In transferring the determination of sovereign immunity from the executive branch to the judicial branch, Congress thereby avoided foreign policy implications inherent in executive immunity determinations.
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