Recent Developments in Aviation Case Law

E. A. Simpson Jr.
The most startling development in aviation case-law during 1982 was the United States Court of Appeal for the Second Circuit's pronouncement in *Franklin Mint Corp. v. Trans World Airlines, Inc.*¹ that the Warsaw Convention's² limits on

---

¹ 690 F.2d 303 (2d Cir. 1982). The suit was brought by the Franklin Mint Corporation and others to recover damages for the loss or destruction of certain cargo the plaintiffs had entrusted to the defendant, Trans World Airlines, to transport from the United States to England. Because the plaintiffs had failed to specifically declare the value of the cargo, the airline sought to limit its liability under the Warsaw Convention. *See infra* note 2.


(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that
liability are prospectively unenforceable in United States courts.

The problem with enforcing the liability limits, according to the Second Circuit, is that the Convention uses gold as the unit of conversion to measure a plaintiff's recovery. According to the court, however, events subsequent to the Convention's drafting prompted those nations parties to the agreement to abandon gold as a currency base and, thus, to undermine the Convention's unit of conversion. For example, in 1978 the United States repealed the Par Value Modification Act and thus repealed the official price of gold in the United States. While other parties to the Warsaw Convention adopted alternative measures of conversion by signing a Protocol to the Convention, the United States has not yet acceded officially to the Protocol. Thus, the court in *Franklin Mint* observed that, at present, "there is no United States legislation specifying a unit to be used by United States courts...."

---

49 Stat. at 3019.

690 F.2d at 311-12. The court gave its holding prospective effect only, reasoning that the parties before it had "assumed" that the court had the power to select a new unit of conversion and, thus, its "resolution was not clearly foreshadowed." *Id.* (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)).

690 F.2d at 305. The court explained that the parties to the Convention selected gold as the unit of conversion because at the time of the Convention gold "served an official monetary function and its price was set by law." *Id.* Thus, the court observed that the Convention employed the gold measure because the parties believed it would ensure judgments of "uniform value" and would provide an easily calculable liability limit. *Id.*

After the United States had ratified the Convention, the depletion of its gold reserves prompted the Congress to repeal the official price of gold, and prompted the International Monetary Fund to substitute an alternative measure of account for the previous gold measure. *Id.* at 308.

Id. The court explained that the Warsaw conferees agreed upon a Protocol to the Convention that substituted for the gold unit of conversion the measure endorsed by the International Monetary Fund, the Special Drawing Right (SDR). It further noted that the Protocol was presented to the United States Senate in January 1977, but was not approved. *Id.*
to calculate a plaintiff's recovery under the Convention.\(^7\)

While the plaintiff offered various alternative measures\(^8\) that had each received support from other parties to the Convention, the court refused to select among the alternatives. It reasoned that none of the alternative measures of conversion had Congressional support and that the decision regarding the appropriate unit of conversion was not within the province of the courts.\(^9\) In addition, the Second Circuit expressed concern that the international community had not agreed upon an official unit of conversion to replace the gold measure under the Convention.\(^10\) The court thus stated that by requesting that the court select an alternative unit of conversion, the parties required the court to make a judgment regarding the United States' policy interests as a party to the Warsaw Convention.\(^11\) The Second Circuit concluded that the decision was a matter for Congress and was a political question, unfit for judicial resolution.\(^12\)

While *Franklin Mint* dealt specifically with the liability limit applicable to loss of or damage to cargo or baggage, the court's reasoning unquestionably would apply to actions

---

\(^7\) Id. at 309.

\(^8\) The parties suggested four alternative measures: (1) the last official price of gold in the United States, (2) the free market price of gold, (3) the SDR, the unit employed by the International Monetary Fund, and (4) the exchange value of the French franc. The court rejected each of the measures, stating:

\[\text{t}he\ \text{last}\ \text{official}\ \text{price}\ \text{of}\ \text{gold}\ \text{is}\ \text{a}\ \text{price}\ \text{which}\ \text{has}\ \text{been}\ \text{explicitly}\ \text{re-}\ \text{pealed}\ \text{by}\ \text{the}\ \text{Congress}.\ .\ .\ .\ \text{It}\ \text{thus}\ \text{lacks}\ \text{any}\ \text{status}\ \text{in}\ \text{law}\ \text{or}\ \text{rela-}\ \text{tionship}\ \text{to}\ \text{contemporary}\ \text{currency}\ \text{values}.\ \text{The}\ \text{free}\ \text{market}\ \text{price}\ \text{of}\ \text{gold}\ \text{is}\ \text{the}\ \text{highly}\ \text{volatile}\ \text{price}\ \text{of}\ \text{a}\ \text{commodity}\ \text{determined}\ \text{in}\ \text{part}\ \text{by}\ \text{forces}\ \text{of}\ \text{supply}\ \text{and}\ \text{demand}\ \text{unrelated}\ \text{to}\ \text{currency}\ \text{values}.\ \text{SDR's}\ \text{are}\ \text{a}\ \text{creature}\ \text{of}\ \text{the}\ \text{[International}\ \text{Monetary}\ \text{Fund]},\ \text{modified}\ \text{at}\ \text{will}\ \text{by}\ \text{that}\ \text{body}\ \text{and}\ \text{having}\ \text{no}\ \text{basis}\ \text{in}\ \text{the}\ \text{Convention}.\ \text{The}\ \text{French}\ \text{franc}\ \text{is}\ \text{simply}\ \text{one}\ \text{domestic}\ \text{currency},\ \text{subject}\ \text{to}\ \text{change}\ \text{by}\ \text{the}\ \text{unilateral}\ \text{act}\ \text{of}\ \text{a}\ \text{single}\ \text{government.}\]

Id. at 306.

\(^9\) Id.

\(^10\) Id. at 309.

\(^11\) Id. at 311.

\(^12\) Id. The court noted that the lack of an international standard of conversion possibly had resulted in the abrogation of the Convention. It found that the decision as to whether the treaty was abrogated, however, was in the province of the legislative and executive branches of the government and was not a matter for "judicial cognizance." *Id.* at 311 n.26 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1887)).
under the Convention for personal injury. The court's reasoning is equally applicable to actions for personal injuries because the Convention employs gold as the unit of conversion in both suits for personal injury and suits for property damage. In this author's opinion, the decision in Franklin Mint poses the potential problem that plaintiffs may successfully hold air carriers liable for damages without presenting proof of the carrier's fault but without the concomitant limitation on the carrier's liability that the Warsaw Convention guarantees.

Several cases during 1981-82 addressed the adequacy of an airline's notice to passengers of its intent to avail itself of the liability limitations contained in the Warsaw Convention, as modified by the Montreal Agreement (Warsaw/Montreal). For example, in Moner v. Port Authority of New York, a case of first impression, the plaintiff sought to avoid the limitation on the defendant-airline's liability because the ticket that the airline issued to her stated that the Warsaw Convention "may" be applicable. The plaintiff argued that under

---

13 Article 22, paragraph one of the Warsaw Convention provides:
(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Id.

14 See supra note 2.

1. For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
   
   (e) A statement that the transportation is subject to the rules relating to liability established by this Convention.

Id.

16 Av. Cas. (CCH) 18,081 (E.D.N.Y. 1981).

17 Id. at 18,082. The "notice" on the plaintiff's ticket stated that "if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." Id. at 18,081. The ticket further contained a provision referring the passenger to another notice provision that contained a more detailed explanation of the carrier's liability under Warsaw/Montreal.
Warsaw/Montreal, the ticket should have stated affirmatively that the Convention "is" applicable.\textsuperscript{18} The defendant-airline, on the other hand, defended on the ground that the wording of the notice on the ticket conformed almost precisely to the statement published by the Civil Aeronautics Board in a regulation enacted pursuant to the Convention, which also used the word "may."\textsuperscript{19} The court, rejecting the plaintiff's argument, stated that the airline's "use of the word 'may,' as opposed to 'is,' does not, as a matter of law, deprive air passengers of a reasonable opportunity to take further precautions to ascertain the applicability and extent of the limitations."\textsuperscript{20} The court further rejected the plaintiff's argument that the average layman should not be expected to determine whether Warsaw/Montreal would apply to a given flight.\textsuperscript{21} It reasoned that the "essential import" of the language of the notice on the ticket "should be comprehensible to the average layman" and at least should give him "'fair warning of the existence of limitations on the [air] carrier's liability.'"\textsuperscript{22}

Subsequently, the same court in \textit{O'Rourke v. Eastern Air Lines}\textsuperscript{23} upheld a notice provision despite the plaintiff's claim that the notice, while generally valid, was inadequate with respect to the particular person involved.\textsuperscript{24} The notice contained the statement required by the Civil Aeronautics Board Regulations and by the Montreal Agreement and was printed in English on the ticket.\textsuperscript{25} The plaintiffs, suing for wrongful death, claimed that the notice was inadequate, however, with

\textsuperscript{18} \textit{Id.} at 18,082.
\textsuperscript{19} \textit{Id.} 14 C.F.R. § 221.175 (1981) requires that airlines desiring to avail themselves of the limitations on liability contained in the Convention furnish to passengers a statement that "passengers embarking upon a journey involving an ultimate destination or stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey . . . ." \textit{Id.}
\textsuperscript{20} 16 Av. Cas. (CCH) at 18,083.
\textsuperscript{21} \textit{Id.} at 18,082.
\textsuperscript{22} \textit{Id.} at 18,083.
\textsuperscript{23} 16 Av. Cas. (CCH) 18,367 (E.D.N.Y. 1982).
\textsuperscript{24} \textit{Id.} at 18,370.
\textsuperscript{25} \textit{Id.} The court noted that both the Montreal Agreement and the Civil Aeronautics Board Regulations (CAB) are silent as to which language the notice should contain. \textit{Id.} See 14 C.F.R. § 221.175 (1981).
respect to the decedent because he spoke and understood only Greek.\textsuperscript{26} Noting that the flight in question originated in the United States, the court held the notice sufficient as a matter of law, reasoning that “if the notice is in the language of the place of contract, it must surely be sufficient.”\textsuperscript{27}

The court in \textit{In Re Air Crash Disaster at Warsaw, Poland}\textsuperscript{28} likewise addressed the sufficiency of the notice printed on an airline ticket. The plaintiffs, suing for wrongful death, claimed that the notice provision on the tickets issued by the Polish Airline, Polskie Linie Lotnicze, was deficient because the type size was too small.\textsuperscript{29} While the Montreal Agreement\textsuperscript{30} requires the notice to be printed in ten-point type, the defendant-airline had printed the notice in 8.5 type.\textsuperscript{31}

The court found that the defendant’s use of the smaller type-size was a breach of its duties under the Montreal Agreement,\textsuperscript{32} which the court observed “deals explicitly with the size of the type required for adequate notice.” Moreover, the court reasoned that the parties to the Montreal Agreement had intended to require strict compliance with the type-size requirement. The court therefore rejected the defendant’s argument that it had “substantially” performed its responsibilities under the agreement,\textsuperscript{33} stating that it “doubted whether the doctrine of substantial performance ha[d] any application at all to a contract such as [the Montreal Agreement].”\textsuperscript{34}

Finally, the court held that the defendant’s breach of the Montreal Agreement resulted in its forfeiture of its defenses under the Warsaw Convention, including forfeiture of the air-

\textsuperscript{26} Id. at 18,370.
\textsuperscript{27} Id. The court further reasoned that practical considerations dictated against requiring “every ticket counter at every airport in the world to keep tickets printed with notice in all of the world’s languages.” Id.
\textsuperscript{28} 535 F. Supp. 833 (E.D.N.Y. 1982).
\textsuperscript{29} Id. at 835.
\textsuperscript{30} See 14 C.F.R. § 221.175 (1981).
\textsuperscript{31} 535 F. Supp. at 835.
\textsuperscript{32} Id. at 836.
\textsuperscript{33} Id. at 837-38. The court distinguished the Montreal Agreement from the customary contract for carriage, to which the doctrine of substantial performance would apply, stating that application of the doctrine to the terms of the Agreement would “severely undercut” and possibly “frustrate” entirely the Agreement’s purposes. Id.
\textsuperscript{34} Id. at 838.
line's limited liability. The court reasoned that the "Montreal Agreement was clearly intended to operate within the framework and incorporate all the relevant provisions of the Convention." Accordingly, it held that the defendant airline's breach of the Agreement's provision respecting notice had the same effect as non-delivery of a conforming ticket under the Warsaw Convention. Therefore, since non-delivery of a ticket under Warsaw would have precluded the airline from relying on the defenses available under the Convention, the court refused to allow the defendant to assert the defenses that would have limited its liability.

Regarding the burden of proving delivery of a conforming ticket under Article 3 of the Warsaw Convention, the court in Manion v. Pan American World Airways held that the burden is on the air carrier. In Manion the plaintiff sought to recover damages for injuries sustained during a terrorist attack on the defendant's aircraft. The defendant-airline sought to limit its liability under the Warsaw Convention. The plaintiff claimed, however, that under Article 3(2) the defendant could not avail itself of the limited liability provision because the plaintiff had not received a ticket on departure from the Kennedy Airport where the flight originated.

The court reasoned that the airline should bear the burden of proving the ticket's delivery on departure because "assertion of the Convention's liability limitations is an affirmative defense" and "[t]he party asserting an affirmative defense generally bears the burden of proof" on the issue. Moreover, the court found that the airline is in the better position to show delivery because it had access to records and copies of tickets sold. On the other hand, it stated that the passenger's

---

56 434 N.E.2d at 1061, 449 N.Y.S.2d at 694.
57 Id. See Warsaw Convention, supra note 2, article 3(2), which provides that "if a carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability." Id.
58 434 N.E.2d at 1062, 449 N.Y.S.2d at 695.
burden might be "insurmountable." 4

The court in Manion further rejected the defendant's argument that while the plaintiff had not received a ticket containing the requisite notice at the initiation of the first leg of the journey, her receipt of the notice on commencement of the second leg was sufficient under the Convention. The court held that Article 3(2) requires the airline, if it desires to avail itself of the limited liability provision, to deliver a ticket containing the requisite notice prior to the initiation of the first leg of the journey. 4 The court supported its conclusion by reading literally the relevant provision of the Convention which states that the liability limitations are unavailable "if the carrier accepts a passenger without a passenger ticket having been delivered." 4 The court in Manion thus resolved a significant issue concerning the proper interpretation of the Warsaw Convention.

As to the time for filing action under Article 29 of the Warsaw Convention, 4 the court in Kahn v. Trans World Airlines, Inc. 4 held that the two-year time limitation in Article 29 is a condition precedent to bringing suit under the Convention and cannot be tolled. In Kahn the plaintiffs were a parent and two infant children who were injured when the defendant's aircraft was hijacked. While the hijacking had occurred more than two years prior to the date the plaintiffs filed suit, the plaintiffs argued that the infant children's claim should not be barred because their infancy tolled the time limitation. 4

434 N.E.2d at 1062-63, 449 N.Y.S.2d at 695-96.
434 N.E.2d at 1061-62, 449 N.Y.S.2d at 694-95.
"Id. (quoting Warsaw Convention, supra note 2, article 3(2)).

Article 29 of the Warsaw Convention provides:
1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date at arrival of the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. at 3000. Compare Article 29(2) of the Convention as it appears at 137 L.N.T.S. 11, which requires that the period be determined by the "law of the court seized of the case." Id.

The trial court granted the defendant-airline's motion for summary judgment.
Thus, the plaintiffs' argument equated the time limitation in Article 29 with a statute of limitations.

The court, however, rejected the plaintiffs' argument that the time limitation essentially was a statute of limitations. It instead endorsed the defendant's argument that the time limitation was a condition precedent to suit "which bars any action that has not been commenced within two years after accrual." The court noted that the general rule for deciding whether a statute contains a condition precedent or a statute of limitation requires the court to determine whether the statute creates a cause of action. As the court explained, the general rule is that "if the statute containing the time limitation creates the cause of action, then the limitation will generally be regarded as an ingredient of the cause of action and, thus, a condition precedent to suit."

After reviewing extensively the cases that previously had attempted to apply the general rule, however, the court in Kahn concluded that regardless of whether the Convention "creates" a cause of action, the time limitation is a condition precedent because that was the drafters' intent. Analyzing the Convention's history, the court concluded that the drafters intended to protect actions under the Convention from the uncertainty of the various "tolling provisions" in the member state's laws. Furthermore, the court decided that paragraph two of Article 29, which requires a court to calculate the limitation period under the law "of the court to which the case is submitted," merely allowed it to determine "whether the plaintiff had taken the necessary measures within the two year period to invoke [the] . . . court's jurisdiction over the action."

The court in Seguritan v. Northwest Airlines, Inc. subse-

---

with respect to the mother's claim, holding that her claim was barred by the two-year limitation period. She did not pursue the claim on appeal.

** 443 N.Y.S.2d 79, 81.
** Id. at 82.
** Id.
** Id. at 87.
quently applied the interpretation of Article 29(2) that it espoused in Kahn. In Seguritan the court held that the action under the Convention was not commenced within the two-year period, according to the law of the forum state, New York. While the plaintiff filed the action within the two-year period, the court held that it was not commenced within that period because under New York laws an action commences with the service of a summons. Because the plaintiff had served the summons more than two years after his cause of action accrued, the court held that the action was barred by the time limitation.

Finally, in 1982 the United States Court of Appeals for the Ninth Circuit upheld the Convention’s liability limitations against an argument that the limitations were unconstitutional. In In Re Aircrash In Bali, Indonesia, the plaintiffs advanced their argument against the constitutionality of the liability limitations. First, the plaintiffs argued that the limitation was so arbitrary and unreasonable as to deprive them of due process. Second, they claimed the limitations deprived them of equal protection of the laws. Finally, they argued that the liability limitations unconstitutionally burdened their right to travel.

With regard to the plaintiffs’ first two arguments, the court held that the liability limitation was merely an economic regulation and, accordingly, was constitutional under the Commerce Clause unless arbitrary or unreasonable. Without deciding whether the limitation was arbitrary or unreasonable, the court addressed the plaintiffs’ third argument, that the limitation interfered with the constitutional right to travel. Without ruling on any of the plaintiffs’ constitutional arguments, however, the court decided that an action under the Warsaw Convention might not be the plaintiffs’ exclusive remedy. Furthermore, it held that the existence of an alterna-

---

88 The court cited Kahn for the proposition that the time limitation is a condition precedent to suit which bars an action that is not brought within the two-year period. See Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 443 N.Y.S.2d 79 (N.Y. App. Div. 1981).

84 684 F.2d 1301 (9th Cir. 1982).
RECENT DEVELOPMENTS

RECENT DEVELOPMENTS

The court therefore reasoned that if compensation was available under the Tucker Act because the limitation on liability amounted to a taking of the plaintiffs' property without just compensation, it did not need to reach the constitutional issues under the Convention. While it refused to decide whether the application of the liability limitations to limit the plaintiffs' claims would amount to a "taking," the court held that the Court of Claims had jurisdiction to make the determination. Further, it held that the plaintiffs had a right to compensation if the Convention unreasonably impaired their claims. Thus, the Ninth Circuit carefully avoided deciding whether the Warsaw Convention's liability limitations are contrary to the guarantees in the United States Constitution.

II. INSURANCE

As usual, during the past year several courts construed aviation insurance policies to decide whether particular incidents or persons were within the policies' coverage provisions. For example, in Crawford v. Ranger Insurance Co., the United States Court of Appeals for the Ninth Circuit had to decide whether an aviation insurance policy covered damages resulting from the death of a pilot that rented the insured aircraft. The policy in question specifically provided that rental was a permissible use of the aircraft in the "Purpose of Use" provisions. The "Exclusions" section, however, excluded from coverage damages due to the injury or death of a pilot.

The court rejected the plaintiffs' argument that the two provisions were inconsistent, stating that the majority rule was that "there is no inconsistency between a declaration that

---

54 28 U.S.C. § 1491 (Supp. IV 1980) (giving the Court of Claims jurisdiction over suits against the United States that are founded on the Constitution).
55 The court raised the issue under the Tucker Act sua sponte, admittedly to avoid the necessity of deciding the Warsaw Convention's constitutionality.
57 653 F.2d 1248 (9th Cir. 1981).
rental to pilots is a permissible use and a pilot exclusionary clause." The Ninth Circuit reasoned that the declaration provision was merely a condition precedent to coverage under the policy. Thus, it concluded that if the aircraft were used in a manner that was contrary to the declaration, the coverage provisions would not apply and the insurer would not be liable.

Moreover, the court rejected the plaintiffs' argument that the policy was ambiguous. The plaintiffs argued it was ambiguous because the "Insuring Agreements" section obligated the insurer to compensate for the death of or injury to "any person," while the "Exclusion" clause excepted pilots from the coverage. Stating that "[m]ere complexity in an insurance policy does not make it ambiguous," the Ninth Circuit held that the policy in question contained no ambiguity. The court reasoned that the policy was not one that "would mislead a reasonably literate person who [took] the trouble to read it with respect to the coverage [provided in the policy]."

Similarly, in *Doyen v. Cessna Aircraft Co.*, the Louisiana Court of Appeals held that a pilot exclusionary clause was not inconsistent with a "Purpose of Use" clause that permitted rental to pilots. In *Doyen*, however, the policy expressly covered the "insured," which it defined to include persons operating the aircraft with the "named insured's" permission, while it excluded from coverage any person operating the aircraft pursuant to a rental agreement with the named insured. Thus, the question for the court in *Doyen* was whether the deceased pilot, who was fatally injured while operating the aircraft under a rental agreement, was an "insured" under the policy. The court held that the policy's unambiguous language dictated that the pilot was not covered.

---

**Id.** at 1251.

**Id.**

**Id.** at 1250.


**416 So. 2d 1337 (La. Ct. App. 1982).**

**Id.** at 1341. The court relied upon *Jahrman v. Valley Air Park, Inc.*, 333 So. 2d
In *Lloyds Underwriters v. Southeast Skyways Inc.*, the operator of an air taxi service sought to recover under an insurance policy that insured the entire fleet of aircraft that the operator based in his business. According to the policy's terms, however, most of his aircraft were insured only during the summer months, the insured’s “peak season.” The aircraft in question had crashed during October, and it was not expressly covered by the policy. The insured claimed, nevertheless, that the aircraft was a “substitute aircraft” under the policy, which extended coverage to aircraft that the insured acquired as “replacements” for expressly covered aircraft. The “Substitute Aircraft” clause in the policy provided that if an aircraft “owned by the named assured” were withdrawn because of “breakdown, repair, servicing, loss or destruction” the insurance coverage would extend to another similar, temporary aircraft “not so owned” while it served as a substitute.

The court, construing the policy, decided that “owned,” in this particular case, meant “leased” since the insured leased all of its aircraft from a third party. It reasoned that the “Substitute Aircraft” provision therefore would not apply if the insured owned the substitute aircraft “in the same capacity” that it “owned” the original aircraft. Thus, the court refused to hold that the “Substitute Aircraft” provision covered the aircraft in question. It stated that “the accident aircraft . . . was ‘owned’ by Skyways in the same way that it ‘owned’ the aircraft temporarily out of service. Both aircraft were leased to Skyways. . . .”

In *Safeco Insurance Co. v. Husker Aviation, Inc.*, the Supreme Court of Nebraska construed an airport fixed based op-
erator's (FBO) liability policy. The plaintiff in *Husker* sued the FBO, claiming that the FBO's negligence in operating a pilot training school was the proximate cause of the plaintiff's decedent's death. Because the accident aircraft was uninsured, the FBO sought to avail itself of the coverage under its fixed base operator's liability policy. The insurer denied that the accident was covered, however, relying upon a policy exclusion that excepted injury arising out of the maintenance, ownership, operation or use of any aircraft rented to the insured.

Using what the Nebraska court called an "ingenious" argument, the FBO and the decedent's representative sought to avoid the policy exclusion, claiming that the injury did not arise from the aircraft's operation. They argued instead that the injury arose from the FBO's negligence in training the decedent and in permitting him to operate the aircraft when he was unqualified as a pilot. The court reasoned that regardless of what was the "contributing cause" of the accident, the accident would not have occurred if the decedent had not been "operating" the aircraft. The court therefore concluded that the injury resulted from the specific activity that the policy excluded, and thus, the accident was not covered.

A California Court of Appeal had occasion during 1982 to construe similar language in a policy that expressly covered damages arising from the insured aircraft's ownership, maintenance or use. In *Transport Indemnity Co. v. Schrack* the insured sought indemnification for damages that resulted from a fire that occurred while the insured was refueling the aircraft. The insurer reimbursed the insured for the value of the aircraft but claimed that it was not liable under the policy for damages to third parties' property although the damages

---

90 317 N.W.2d at 748.
91 Id.
92 Id. The court further rejected the argument that the policy was ambiguous, stating that it would not "create an ambiguity simply to afford coverage where a clear reading of the policy would otherwise deny coverage." Id. at 749.
resulted from the fire. The insurer argued that the policy's express coverage provision was inapplicable because the fire, while it might have occurred "incident" to the aircraft's maintenance, did not "arise out of" the maintenance.

The court, noting that the policy did not "purport to regulate . . . the standard of causation," decided that the sole issue for it to resolve was the meaning of "arising out of." Observing that no court had as yet construed the phrase in an aviation insurance policy, the court analogized to cases that had construed automobile insurance policies containing the phrase. It relied upon cases holding that "arising out of" means "originating from," "flowing from," "growing out of" or "having connection with." Using this broad, general definition, the California court held that "[t]he fueling of an aircraft patently has a 'connection with' its 'use' or 'maintenance.'" It, thus, concluded that the policy covered the damages that resulted from the incident.

In Swish Manufacturing Southeast v. Manhattan Fire and Marine Insurance Co., the Eleventh Circuit Court of Appeals absolved an insurer from liability under a policy provision that excluded from coverage damages due to the aircraft's "conversion." The owner of the insured aircraft had loaned it to another corporation, pursuant to a lease agreement that prohibited the lessee from using the aircraft for unlawful purposes. Acting contrary to the lease, the lessee piloted the aircraft to the Bahamas for the purpose of smuggling marijuana into the United States. The aircraft was damaged when it was seized by government officials in the Bahamas, and the owner demanded indemnification from the

74 The policy obligated the insurer to indemnify the insured for all amounts the insured became liable to pay as damages because of property damage "caused by an occurrence and arising out of the ownership, maintenance, or use of the aircraft . . . ." 131 Cal. App. at 151, 182 Cal. Rptr. at 257 (emphasis supplied by the court).

75 Id.

76 Id. at 152, 182 Cal. Rptr. at 258.

77 Id. (quoting Red Ball Motor Freight v. Employers Mut. Liab. Co., 189 F.2d 374, 378 (5th Cir. 1951)).

78 131 Cal. App. at 152, 182 Cal. Rptr. at 258.

79 675 F.2d 1218 (11th Cir. 1982).

80 Id. at 1219.
The insurer defended on the ground that the lessee's unlawful use of the plane constituted "conversion" within the policy exclusion. The court agreed, reasoning that under the common law misuse or "use beyond that [to] which the owner consented" may constitute conversion. To support its holding, the court relied upon the Restatement (Second) of Torts section 228 which states that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." The court in Swish Manufacturing thus concluded that the policy exclusion applied and denied the plaintiff recovery under the policy.

With respect to policy exclusions generally, the Oregon Court of Appeals recently announced its intention to adhere to a strong precedent in other jurisdictions holding that an insurer need not prove a causal connection between a policy exclusion and an aircraft accident to avail itself of the exclusionary clause. In Ochs v. Avemco Insurance Co., the policy excluded coverage for property damage to an aircraft that did not have a current "airworthiness certificate." The plaintiff sought to recover under the policy for damage sustained while the plaintiff attempted to land the insured aircraft which had a broken tail wheel spring.

The plaintiff admitted that the aircraft did not possess the requisite airworthiness certificate, but alleged that the defendant could not avail itself of the policy exclusion because it had not proved that a causal connection existed between the accident and the exclusion. The court, acknowledging that

---

81 Id. The policy exclusion stated that the coverage did not extend to "loss or damage due to conversion, embezzlement or secretion by any person in possession of the aircraft under a bailment, lease, conditional sale, purchase agreement, mortgage or other encumbrance, nor for any loss or damage resulting therefrom" (emphasis supplied by the court). Id.
82 RESTATEMENT (SECOND) OF TORTS § 228 (1965).
84 636 P.2d at 422.
85 The plaintiff maintained that the inspection required to obtain a certificate of airworthiness would not have revealed the particular defect that caused the damage.
some precedent supported the plaintiff's position, found that the "better reasoned" authority was contrary. It accordingly held that an aircraft insurer may exclude from coverage damages to any aircraft that does not possess a valid and current certificate of airworthiness.

The Florida Court of Appeal took the contrary position, however, in Pickett v. Woods. In Pickett, the policy, likewise, contained an exclusion for aircraft that did not possess a current airworthiness certificate. In Pickett, however, the crash that resulted in the damage was caused by pilot error, as opposed to mechanical failure. Moreover, in Pickett, a Florida statute, which was directly on point, was dispositive. The statute provided that the insured's breach or violation of a condition contained in an insurance contract does not render the contract void unless the breach or violation "increased the hazard by any means within the control of the insured." Finding that the crash resulted from pilot error, and not from the lack of a certificate of airworthiness, the Florida court held that the insurer could not rely on the exclusion to deny coverage.

With regard to the ongoing disputes between primary and excess insurers, the California Court of Appeal in Olympic Insurance Co. v. Employers Surplus Lines Insurance Co. held that a secondary insurer does not become liable until the primary insurance coverage is exhausted despite the fact that the insured's liability exceeds the secondary policy's threshold amount. In Olympic, three insurance policies were disputed. Two of the policies provided primary coverage; one provided coverage to $20,000, and the other provided coverage to $1 million. The third policy provided secondary coverage from

because the inspection normally did not include tail wheel springs. 636 P.2d at 422-23.

** Id. at 423.


*9 Id.

*10 404 So. 2d at 1153.

$20,000 to $1 million. The insured settled the action that gave rise to the insurers' liability under the policies for $495,000.

The insured sought to recover under all three policies and requested a declaratory judgment that the insurers should prorate the liability among them. The excess insurer claimed, however, that it should not become liable under the secondary policy until the primary coverage was exhausted. The court agreed and held that a secondary insurer does not become liable under a policy until the underlying primary insurance is exhausted. It held that this principle applied as well when the secondary policy contemplated that the insured had less primary coverage than actually existed. Moreover, the court reasoned that the secondary insurer was not liable for the costs of defending the action under the policies because the primary insurers had the primary duty to defend.

Regarding a breach of warranty endorsement in an aviation insurance policy, the court in Underwriters at Lloyds v. United Bank Alaska held that the breach of warranty endorsement is a separate contract between the insurer and the lien holder, designed to protect the lienholder against acts of the insured. Thus, in United Bank, the court allowed the lien holder to recover from the insurer although the insured, through unilateral cancellation of his policy, had invalidated the coverage with respect to the accident aircraft. The court reasoned that the Breach of Warranty clause specifically protected the lienholder against the insured’s unilateral cancellation of the policy to the detriment of the lienholder without effective notice to the lienholder.

Various other decisions during 1981-82 addressed an avia-
tion insurer’s obligation to pay interest on judgments, the insurer’s liability to subsidiary corporations and the extent to which an insured’s misrepresentation will void a policy’s coverage. In Allegheny Airlines, Inc. v. Forth Corp.,99 for example, the Seventh Circuit Court of Appeals construed a clause in an aviation insurance contract that obligated the insurer to “pay . . . all interest accruing after the entry of judgment [against the insured] until the company has paid, tendered or deposited in court, such part of such judgment as does not exceed the limit of the company’s liability thereon . . . . ” 100 The court held that although the insurer’s liability under the policy was only $995,750, the policy provision obligated the insurer to pay interest on the entire judgment against the insured which was in the amount of $6,570,690. The Seventh Circuit reasoned that while a minority of jurisdictions have limited the phrase “all interest accruing after the entry of judgment” to include only interest on the amount of the insurer’s total liability under the policy,101 the majority view is contrary.102 The court thus followed the view prevailing in the majority of jurisdictions.

A second issue the court resolved in Allegheny Airlines concerned whether an “additional insured” is a “named insured” for purposes of a policy provision that excluded coverage for aircraft that belonged to the “named insured”.103 In Allegheny, the policy that was in dispute was an excess umbrella liability policy acquired by a parent corporation which named the subsidiary as an “additional insured.” Because the accident aircraft was owned by the subsidiary corporation, the question for the court to decide was whether the policy exclu-

99 663 F.2d 751 (7th Cir. 1981).
100 Id. at 755.
102 For the majority interpretation, the court cited, inter alia: Pawlik v. State Farm Mut. Auto. Ins. Co., 302 F.2d 255 (7th Cir. 1962); United States Auto. Ass’n v. Rossum, 241 F.2d 296 (5th Cir. 1957); America Auto. Ins. Co. v. Fulcher, 201 F.2d 751 (4th Cir. 1953).
103 663 F.2d at 759.
sion applied, which depended on whether the subsidiary was a “named insured.” The court held that the subsidiary was, indeed, a named insured, as evidenced by the parties’ intent as expressed in the policy. The court thus, denied that the subsidiary had a right to recover under the excess umbrella policy.

Finally, in Overturf v. Aero Insurance Co., the Fifth Circuit, applying Louisiana law, reaffirmed in 1982 that an insured who misrepresents his pilot status on an aviation insurance application makes a material misrepresentation which will void coverage. The insured in Overturf represented that he was a certified private pilot, while, in fact, he was merely a student pilot. After he was forced to crash land the insured aircraft, the insured sued to recover under the policy. The insurer defended on the ground that it would not have extended coverage if the plaintiff had disclosed his true pilot status on the insurance application. Further, it claimed that the misrepresentation was material and excused it from honoring the policy. The Fifth Circuit agreed and denied the recovery sought by the plaintiff.

III. PRODUCTS LIABILITY

In Halstead v. United States, the plaintiffs sued Jeppesen & Co., a manufacturer of aeronautical charts, and the United States. The complaint alleged in part that aeronautical charts sold by Jeppesen to the decedent’s employer and carried by the decedent while piloting a small private plane were defective. It further alleged that the defects caused the decedent to crash into a mountain ridge in West Virginia. Both

---

104 686 F.2d 350 (5th Cir. 1982).
105 Id. at 355.
106 Id.
108 Id. at 784-85. On August 31, 1975, a plane carrying Willard Vernon Wahlund, his father, and his son, Erik, crashed into a mountain ridge in West Virginia, killing all three. Plaintiffs, administrator and administratrix of Willard’s and Erik’s respective estates, filed separate complaints. The administrator of Willard’s estate, the pilot, alleged that the accident resulted from the negligence of federal air traffic controllers operating out of Dulles Airport in Virginia and from a defect in the navigational chart manufactured by Jeppesen. The administratrix of Erik’s estate
complaints sought to recover from Jeppesen under strict products liability doctrine. The court observed that whether strict liability would apply depended on whether the charts were classified as a service or as a product. Because Jeppesen mass produced and distributed its charts, the court determined that its activity was within the scope of The Restatement (Second) of Torts section 402A, because the manufacturer was selling a product rather than a service. Accordingly, the court held that the chart manufacturer was subject to the doctrine of strict liability in tort.

An interesting attempt to obtain the benefits of the doctrine of strict liability failed in Gobhai v. KLM. In Gobhai the plaintiff's son, as a passenger on a flight from Amsterdam to New York, received a pair of slippers from the "Royal" Dutch Airways, KLM, which the son testified were "part of a package" given to those passengers flying "first class." Nine months after the flight, the plaintiff slipped and fell while wearing the slippers and, subsequently, brought suit against the airline for his injuries.

The trial court, denying KLM's motion for summary judgment, found that an issue of fact existed as to whether KLM had sold the slippers to the plaintiff's son. On appeal, however, the appellate court determined that KLM did not design, manufacture or sell the allegedly defective footwear. Furthermore, the court found that the airline was not in the business of manufacturing or selling slippers, but rather, was in the business of providing air transportation. Finding that

made the same allegations and additionally alleged that the pilot was negligent. Id. at 785.
11 Id. at 789.
115 535 F. Supp. at 791.
116 Id.
118 445 N.Y.S.2d at 446.
119 Id.
120 Id. at 447. The court explained that the doctrine of strict products liability imposes liability without proof of fault upon manufacturers and vendors who are in the business of selling defective products that cause injuries. Id. at 446.
121 445 N.Y.S. at 447.
the distribution of slippers was incidental to the basic service provided by KLM, the court held that the incidental amenities were not subject to strict liability standards.\footnote{Id. The evidence revealed that the slippers were for KLM's first class passengers. Id.}

One notable case dealing with a component manufacturer's liability is \textit{Varig Airlines v. Walter Kidde & Co.}\footnote{690 F.2d 1235 (9th Cir. 1982).} Varig sued Boeing Aircraft and its component supplier, Weber Aircraft, a division of Walter Kidde & Co., for the loss of a 707 that crashed outside Paris in 1973.\footnote{Id. at 1236.} The accident occurred after dense smoke completely filled the aircraft, suffocating many passengers and obscuring the pilot's vision.\footnote{Id.} The French Commission which investigated the accident found that the probable cause was a fire that apparently broke out in the used towel receptacle in a lavatory.\footnote{Id. at 1236-37.} Defendant Weber Aircraft had manufactured the lavatory sink and cabinet unit, including the towel receptacle.\footnote{Id.}

Varig sought to recover from Weber on several theories, including (1) negligent design and manufacture of the sink and dispenser unit, (2) post-delivery negligence, and (3) strict liability in tort.\footnote{Id.} The Ninth Circuit found no substantial evidence in the record supporting post-delivery negligence.\footnote{Id. at 1239.} Furthermore, it refused to apply the doctrine of strict liability,\footnote{Id. at 1239-40.} relying on its precedent in \textit{Scandinavian Airline System v. United Aircraft Corp.},\footnote{601 F.2d 425 (9th Cir. 1979).} which held that the strict liability doctrine does not apply to negotiated transactions between large commercial enterprises.\footnote{Id. at 427-29.} In a prior appeal of Varig Airlines v. Walter Kidde & Co., 690 F.2d 1337 (9th Cir. 1980), the Ninth Circuit had applied the rule in \textit{Scandinavian Airline} between Varig and Boeing to hold that strict liability doctrine did not apply to their dealings with each other. See Varig Airlines v. Boeing Co., 691 F.2d 746 (9th Cir. 1981).
the airline, the aircraft manufacturer and the manufacturer of the component were all negotiating from positions of relatively equal economic strength and were able to allocate their risks by contract.\textsuperscript{131}

Regarding whether Weber had negligently designed or manufactured the component, the court absolved Weber of liability because it found that Weber manufactured the unit according to Boeing's design specifications. Moreover, it observed that the record contained no evidence that the fire occurred or spread because of some act or failure attributable to Weber.\textsuperscript{133} The court further concluded that the record contained no evidence that Weber had any authority over the component's design or that it was otherwise responsible for the disaster.\textsuperscript{135} The court noted, however, that Weber would be unable to defend on the ground that it lacked "design responsibility" if a defect in the component were so obvious that Weber knew or should have known that the component was dangerous.\textsuperscript{136}

One interesting issue that arises in products liability cases concerns the application of a state's statute of repose to bar a products liability action. In \textit{Catlette v. McDonnell Douglas Corp.},\textsuperscript{137} the court applied the Indiana ten-year statute of repose\textsuperscript{138} to bar a suit for damages arising out of a 1978 accident involving a DC-3, originally sold by the defendant in 1944.\textsuperscript{139} The court held that the statute applied to product actions based on negligence, strict liability and willful and wanton misconduct.\textsuperscript{138} It further held that the statute did not apply

\textsuperscript{131} 601 F.2d at 427-29.
\textsuperscript{132} 690 F.2d at 1239.
\textsuperscript{133} \textit{Id.} at 1238.
\textsuperscript{134} \textit{Id.} at 1238 n.6.
\textsuperscript{135} 16 Av. Cas. (CCH) 18,128 (S.D. Ind. 1981).
\textsuperscript{136} \textit{Ind. Code} § 33-1-1.5-5 (1976) provides in part that any product liability action must be commenced within ten years after the delivery of the product to the initial user.
\textsuperscript{137} 16 Av. Cas. (CCH) at 18,129. The plane was first purchased by the United States Army Air Corps, and delivery was accepted on February 5, 1944. \textit{See supra} note 137.
\textsuperscript{138} \textit{Id.} at 18,130-31. The court relied on \textit{Ind. Code} § 33-1-1.5-1 (1976), which states that it governs all products liability actions, including those in which the theory of liability is negligence or strict liability in tort.
to actions for breach of warranty in contract. It found, however, that privity was lacking between the plaintiffs and the manufacturer and, thus, denied recovery on the contract theory as well.139

IV. AIR CARRIERS

Worthy of special note in any discussion of air disaster litigation is Arnold v. Eastern Air Lines, Inc.140 Arnold was a consolidation of suits against Eastern and the United States that resulted from the crash of Eastern Air Lines Flight 212 near Charlotte, North Carolina in 1974. The district court consolidated for trial three personal injury and wrongful death suits against Eastern, Eastern's third-party claims for contribution against the United States, and the insurance carrier's claims against the United States for contribution.141

The trial court rendered judgments against Eastern for $3,027,500, $1,137,500 and $847,000.142 The court refused, however, to allow punitive damages against Eastern. Finally, the trial court refused to allow either Eastern or its insurance carrier to recover from the United States.143

On appeal, Eastern argued that it had been prejudiced by the consolidation because the jury learned of the existence and apparent scope of its insurance coverage. The insurance carrier complained, on the other hand, that it was prejudiced by evidence of Eastern's allegedly gross culpability and of the substantial injuries suffered by the crash victims.144 In assessing these complaints, the court noted that the risks of prejudice and possible confusion of the jury were obvious risks that the trial court was obliged to weigh. Had the trial court failed to carefully consider the risks and their alternative, the appellate court concluded, the trial court would have abused its discretion.145 The court found, however, that the record

139 Id. at 192.
140 Id. at 193.
showed that the court had carefully considered these risks.\textsuperscript{148}

Holding that the consolidation was proper, the court concluded that the specific risks of prejudice and possible confusion were outweighed by the opposing risks of "inconsistent adjudications of common factual and legal issues, the burden upon the parties, witnesses and available judicial resources posed by multiple suits, the length of time required to conclude multiple suits as against a single suit, and the relative expense to all concerned of the single-trial/multiple-trial alternatives."\textsuperscript{147} While acknowledging that these risks existed, the trial court had reasoned that it guarded against these risks by giving the appropriate instructions to the jury.\textsuperscript{148}

Both the district court and the circuit court summarily dealt with Eastern’s insurance/prejudice argument by noting that it would be “unrealistic to assume either that the jury did not know that insurance coverage existed or that, if it were known to exist, it would likely inflate any damage award made against a corporate defendant such as Eastern.”\textsuperscript{149} The court similarly dismissed another of Eastern’s arguments that certain of opposing counsel’s remarks and arguments to the jury were improper and tainted the jury verdicts, requiring that they be set aside.\textsuperscript{150} Nevertheless, the court stated that the ultimate issue on appeal was not the impropriety of counsel’s conduct, but rather, the propriety of the trial court’s response to it.\textsuperscript{151} The court further stated that review of trial court discretion in matters of counsel misconduct is especially deferential, because the trial court is in a much better posi-

\begin{footnotes}
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 194. To appreciate the importance of the court’s holding, that while improper, the remarks did not require reversal, the reader should note the allegedly objectionable comments and remarks, which are set out in the text of the opinion at pages 195-96. The court described the challenged comments and remarks by stating that: “[b]eyond its legal impropriety, it was in substantial part inelegant, tasteless, offensive, arguably violative of professional standards and, perhaps most deserving of condemnation, irresponsibly threatening to any verdicts that might in the end be obtained by offending counsel’s clients.” Id. at 195.
\textsuperscript{151} Id. at 195.
\end{footnotes}
tion to assess the impact of such conduct upon the jury. The court, therefore, concluded that the court’s admonitions to offending counsel and its cautionary instructions to the jury were sufficient under the circumstances.

Finally, the court addressed the size of two of the verdicts ($3 million and $1.1 million) and held that it could not set aside a verdict for “mere excessiveness.” The court stated that it had authority to reverse verdicts only if they were “untoward, inordinate, unreasonable or outrageous” in relation to the record. After reviewing the evidence of the injuries of the respective plaintiffs, the court concluded that the verdicts should not be set aside.

Regarding the liability of an air carrier for breach of a contract to transport, the court in Vick v. National Airlines, Inc. allowed a husband and wife to recover from National Airlines. The plaintiffs contracted with National to fly them non-stop from New Orleans to Miami, where they intended to depart to the Caribbean for a vacation. Because of bad weather, the incoming National flight was delayed and had to overfly a scheduled stop at Pensacola on its way to New Orleans. Accordingly, after the plaintiffs’ flight left New Orleans on a purportedly non-stop flight to Miami, National announced that it would stop in Pensacola to deplane the Pensacola passengers who were still on board. As a result of bad weather in Pensacola, the plaintiffs’ flight was further delayed causing the plaintiffs to miss their connections in Miami. As a result of this missed connection the plaintiffs contended that

---

183 Id. at 194-95.
184 Id. at 198-200.
185 Id. at 201.
186 Id. The court’s test for reviewing large awards is derived expressly from Grunenthal v. Long Island R. R., 393 U.S. 156 (1968).
188 Id. at 384.
189 Id.
190 Id.
their vacation was ruined.\textsuperscript{161} In sustaining an award for out-of-pocket expenses and $2,500 each for pain and suffering,\textsuperscript{162} the court held that the airline acted improperly by failing adequately to inform the plaintiffs of the changed flight schedule and by being callous to the problems caused by the delays and in deciding to make an unannounced stop enroute in bad weather.\textsuperscript{163}

On the issue of refusal of passage, an award of $500,000 against American Airlines was upheld in Adamson v. American Airlines, Inc.\textsuperscript{164} In Adamson the plaintiff arrived at the airport about 45 minutes before the flight in an ambulance and was transferred to a wheelchair, as she was paralyzed from the waist down. She was observed to be carrying a urine bag attached to the business end of a Foley catheter and was obviously very ill and in great pain. Claiming to have been caught by surprise, the airline declined to board the plaintiff for a three-hour flight to New York. As a result, the plaintiff claimed that she was injured because the treatment she was to receive at her destination was delayed.

In sustaining the jury verdict, the court held that there was sufficient evidence for a jury to have found that the airline's representatives were aware of the plaintiff's problem in advance. It further found that the jury could have concluded that the airline could have made arrangements for the plaintiff if she had been timely informed of the airline's requirements for transport.\textsuperscript{165} The court also found that because the

\textsuperscript{161} Id. Mrs. Vick's undisputed testimony was that flying in bad weather affects her emotionally. Thus, the rough landing in Pensacola, in addition to not receiving information about takeoff times and connecting flights caused her pain and suffering.

\textsuperscript{162} The actual language used by the trial court was "for their pain and suffering, mental anguish, inconvenience and inability to carry out their vacation plans . . . ." Id. at 384. The court also explained that in Louisiana, non-pecuniary damages are allowable in a breach of contract action when "the contract has as a principal object the gratification of some intellectual enjoyment". Id. at 385.

\textsuperscript{163} Id. at 386. The court specifically noted that National personnel failed to arrange alternate accommodations for the plaintiffs when they missed their connecting flight. Id.


\textsuperscript{165} 49 N.Y.S.2d at 488. In a memorandum opinion, J. Silverman dissented. He would have reversed the judgment on the ground that an airline has discretion to refuse to accept passengers under 49 U.S.C. § 1511 (1976). Silverman stated that a
airline's representatives were aware or should have been aware of the plaintiff's condition and the urgency of the flight, they had a duty to inquire sufficiently about the plaintiff's condition to determine whether airline requirements had been met.

The court in Cordero v. Cia Mexicana De Aviacion addressed a similar issue. In Cordero the court reinstated a jury verdict against an airline for refusing to reboard a passenger who, the airline claimed, had insulted the Captain and a Flight Attendant on a previous leg of the journey. The passenger claimed that it was a case of mistaken identity. Cordero is noteworthy because the Ninth Circuit ruled that, although an air carrier has been empowered by 49 U.S.C. § 1511(a) to refuse passage, the carrier is not immune from liability if its decision to deny passage is unreasonable or irrational. The court found that there was sufficient evidence to show that the airline failed to make even a "cursory inquiry" into the plaintiff's situation. It, therefore, held that there was sufficient evidence to conclude that the air carrier's exclusion of the plaintiff was unreasonable. The court borrowed from the Second Circuit a "reasonable man" test to determine the propriety of an airline's decision to refuse transportation to an individual. The test requires the fact-finder to look at the facts known by the airline's representatives and the circumstances surrounding the decision at the time the representatives made it, rather than the facts disclosed after

negligence standard is inappropriate to judge a decision made by airline representatives to refuse transportation to individuals when those representatives were acting "in good faith." Id. at 489.

166 681 F.2d 669 (9th Cir. 1982).

167 Id. at 670. Although the jury awarded the plaintiff damages for unjust discrimination in violation of the Federal Aviation Act of 1958 § 404(b), 49 U.S.C. §1374 (b) (1976 & Supp. IV 1980), the trial court judge granted judgment notwithstanding the verdict under 49 U.S.C. §1511(a) (1976), which allows airline representatives the discretion to refuse transportation to a person "when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." The trial court judge found that the airline's decision not to transport need not be reasonable. Id. at 670-71.

168 Id.

169 Id. at 672.

170 Id.

171 Id. at 671 (citing Williams v. Trans World Airlines, 509 F.2d 942 (2d Cir. 1975)).
the decision was made.\textsuperscript{172}

V. Federal Tort Claims Act

As occurs frequently in cases involving aviation accidents, the plaintiffs in \textit{Pierce v. United States}\textsuperscript{173} were unable to present proof of the actual or immediate cause of the crash. The plaintiffs sued the federal government claiming that the pilot, who perished in the accident, encountered an embedded thunderstorm of which he had not been warned by the flight service station (FSS). They further alleged that the thunderstorm overstressed his small aircraft and caused the crash. The government contended that the pilot, whose license required that he fly only under visual flight rules (VFR), became disoriented in conditions which required instrument flight rules (IFR). Moreover, the government argued that the pilot had been warned about the conditions and that he overreacted and overstressed his aircraft.

The district court concluded that the plaintiffs had not proved that the thunderstorm caused the airframe failure and the consequent crash and, thus, that the plaintiffs had failed to meet their burden of proof.\textsuperscript{174} Because the plaintiffs failed to prove actual causation, the district court found that it was unnecessary to make any findings regarding the federal government's negligence or proximate cause. In a subsequent memorandum that denied the plaintiffs' motion for rehearing, the district court stated that the plaintiff failed to prove that weather, as opposed to pilot error, caused the crash.\textsuperscript{175}

On appeal, the Fourth Circuit held that the plaintiffs' inability to demonstrate the immediate cause of the crash did not preclude the possibility that the government might have been liable.\textsuperscript{176} The court pointed out that the plaintiffs had always maintained that the FSS caused the pilot to operate the aircraft in a place where weather endangered it and that

\textsuperscript{172} 681 F.2d at 672.
\textsuperscript{173} 679 F.2d 617 (6th Cir. 1982).
\textsuperscript{174} Id. at 629.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 621.
while the pilot might have become disoriented after entering clouds, the government's negligence was at least a concurrent proximate cause of the crash. According to the court, because an aircraft accident may have more than one proximate cause, it was not necessary for the plaintiffs to prove that the government's negligence was the sole proximate cause of the accident.  

The court further stated that it recognized that it was difficult for a plaintiff to prove the actual or immediate cause of a crash, especially when there are no survivors. It therefore reasoned that the plaintiffs' inability to show which of two projected causes was the actual cause did not mean that he had failed to bear his burden of proof. The court further stated that the plaintiff could present a prima facie case by establishing that the government had breached a duty and that the breach was either the sole cause or a concurrent cause of the accident. Disregarding that the trial court properly could reach a decision on the evidence, the court noted that a decision that is founded on circumstantial evidence which is offered to support one of two opposing theories is not based on improper speculation, particularly when the court has heard expert testimony on the evidence. The court vacated the judgment and the case was remanded for further findings.

Proximate causation was again an issue in McCullough v. United States. McCullough was an action by the widow of an Eastern Air Lines check airman. The airman was fatally injured while he was conducting a line check on the flight en-

---

177 Id.
178 679 F.2d at 622.
179 Id. at 621. The court cited Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 237 (2d Cir.), cert. denied, 389 U.S. 931 (1967). In Ingham the United States was held liable concurrently with Eastern due to the failure of an air traffic controller to relay necessary weather information. The court also cited Himmler v. United States, 474 F. Supp. 914 (E.D. Pa. 1979), in which the failure of a controller to maintain continuous communication with a VFR pilot caught in IFR conditions was held a substantial contributing factor to the cause of the accident.
180 Id.
181 Id. at 623.
gineer of Eastern Flight 66, which crashed at Kennedy International Airport in 1975. In McCullough, the government defended against the plaintiff's motion for partial summary judgment by alleging that Eastern's negligence was the sole proximate cause of the accident, that the plaintiff had failed to establish the proximate cause of the accident, and that the decedent was contributorily negligent. Specifically, the defendant charged that the decedent had participated in conduct that disrupted the discipline of the cockpit.

The court, holding for the plaintiff, found that the air traffic controllers' negligence in failing to relay a wind shear report, to solicit pilot weather reports, or to report thunderstorm activity was the proximate cause of the crash. Regarding the government's various defenses, the court ruled that the record contained no evidence that the decedent engaged in conduct that was disruptive to cockpit discipline. Moreover, the court ruled that the decedent had no legal duty to prevent others from disrupting the cockpit because the duty to prevent disruptions, the court concluded, rested with the Captain. With regard to sole proximate causation, the court found that any acts by Eastern crewmen that contributed to the crash were entirely foreseeable and were consequences of the controllers' negligence. Thus, the court concluded that the negligence of Eastern's personnel was not a superceding or intervening cause of the accident.

Garbarino v. United States was a suit by the administrator of the estate of a passenger who died in the crash of a Cessna 177. The plaintiff claimed that the FAA had negligently failed to promulgate regulations requiring that certification procedures for aircraft include a test for "crashworthiness". The Sixth Circuit concluded that the action against the government was barred by the "discretionary function" except-

---

183 Id. at 695-96.
184 Id. at 698-700.
185 Id. at 698. The court pointed out that Mr. McCullough was not a required crew member and his role involved observation, as opposed to supervision. Id.
186 Id. at 700.
tion188 to the Federal Tort Claims Act. The court found that the section of the Federal Aviation Act that requires the Administrator of the FAA to promulgate safety regulations189 leaves the particulars of the regulations to the Administrator's discretion. The court stated that the statute required only that the Administrator set minimum safety standards. It further stated that deciding what those standards were and whether they should include crashworthiness criteria is the "type of policy decision that falls squarely within the discretionary function exception."190

The court also found that the plaintiff's claim that the FAA had negligently delegated inspection duties to the manufacturer of the aircraft was barred by the discretionary function exception.191 While holding that the delegation was not negligent, the court considered whether the FAA, having required others to perform the inspection, is responsible in damages for a negligent inspection that causes injury. The Sixth Circuit concluded that although a manufacturer, airline, or mechanic could be liable for negligent inspections, the government is not vicariously liable under the doctrine of respondeat superior for the inspections. The court premised its holding on the policy against extending the government's liability so as to make it a joint insurer of all activity subject to safety inspections.192

---

188 28 U.S.C. § 2680 (1976) provides that the following claims, inter alia, are exempt from coverage of the Federal Tort Claims Act:
   a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.


190 666 F.2d at 1065. See Miller v. United States, 522 F.2d 386 (6th Cir. 1975) (the exception bars claims that the United States is liable for failure of its officials to impose a more strict set of air safety standards) and Fielder v. United States, 423 F. Supp. 77 (C. D. Cal. 1976) (the exception bars claims for failure of the FAA to promulgate rules and regulations which promote the safety of hang gliders).

191 666 F.2d at 1065.

192 Id. at 1066.
In *Takacs v. Jump Shack, Inc.* the plaintiff brought suit, as the fiduciary of the estate of an individual who was killed when his parachute failed to open during a jump, against the FAA and Jump Shack. The FAA had issued Jump Shack a technical standard order (TSO) authorization that permitted Jump Shack to identify its parachutes by using the applicable TSO marking. The court found that the suit against the FAA for granting the TSO was barred by the discretionary function exception because the role of the FAA in granting TSO authorizations involves considerable latitude for policy judgment and discretion.

The court found that the action was also barred by the misrepresentation exception to the Federal Tort Claims Act. The court reasoned that even if the decedent had relied on the allegedly negligent TSO authorization his reliance was only upon the government's communication of facts. The court held that if the injury did not result from either the negligent conduct or the negligent performance of operational tasks it was barred by the misrepresentation exception.

*Federal Express Corp. v. State of Rhode Island* involved a suit against the United States and others for the loss of a Dassault Falcon 20-D jet aircraft. In this case, the Federal Express pilots had asked for and received night taxi clearance to the active runway, Runway 23L. Because of their unfamiliarity with the field, however, they taxied to the end of the parallel runway, 23R. Although 23R was closed, the runway lights were on because four aircraft which were temporarily parked on that runway were being serviced. When the pilots radioed that they were ready for departure, they received takeoff clearance and subsequently crashed into the other aircraft and service vehicles on the runway.

---

199 See supra note 139.
200 28 U.S.C. § 2680(h) (1976) excludes "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ." Id.
201 546 F. Supp. at 79.
202 644 F.2d 830 (1st Cir. 1981).
203 The plaintiff's allegation that the controller negligently failed to ascertain the
The court held that the controller that gave the takeoff clearance was not negligent for failing to observe the aircraft visually to verify its location on the field prior to issuing the clearance. Moreover, the court stated that the controller had a right to assume that, having given the aircraft clearance to taxi to the proper runway, the aircraft should have been on the proper runway. Furthermore, the court determined that the controller did not violate any FAA procedure, because he had determined the position of the aircraft on the field by using a "pilot report." In other words, the court reasoned that because the crew radioed that they were ready for departure and had requested taxi clearance to the proper runway only a few minutes previously, the crew had represented to the controller that the aircraft was on the proper runway.

In *Swoboda v. United States* the plaintiff alleged that the FAA proximately caused the death of her husband, Gerald Swoboda, by negligently failing to institute proper rescue procedures after the decedent’s plane crashed off the coast of Alaska. The decedent, while ferrying an aircraft from Midway Island to Adak, Alaska experienced radio difficulty. He was forced to communicate with the other two planes accompanying him by using a hand-held emergency locator transmitter (ELT). One of the companion planes notified FAA officials

Falcon’s position was based upon two provisions of the FAA Air Traffic Control Manual. Section 260 instructs controllers to “provide airport traffic control service based only upon observed or known traffic and airport conditions.” Section 386 directs controllers to “determine the position of an aircraft prior to issuing taxi information or takeoff clearance when its position is in doubt or unknown to you.” Id. at 835.

198 Id. at 836. The court stated that it refused to hold that:

"where the pilot has a map of the airport, where the controller has correctly ascertained the aircraft’s position prior to taxiing, where the controller provides the aircraft with correct taxiing instructions, where the pilot has announced he is proceeding to a specified runway, where the controller has no reason to believe anything has gone awry, and where the pilot subsequently announces that he is ‘ready’, it is not clearly erroneous for the district court, acting as factfinder, to hold... that the controller is not negligent."

Id. at 837.

300 662 F.2d 326 (5th Cir. 1981).

301 All aircraft are required by 49 U.S.C. § 1421 (1976) to be equipped with an ELT. After an accident, the ELT emits a continuous audio tone which allows the
at Anchorage Center that a military aircraft had heard an ELT signal from Swoboda's aircraft but told the officials that the signals were Swoboda's way of telling them that he was okay.

Although FAA officials violated the express language of an FAA regulation\(^2\) by failing to notify the rescue coordination center of Swoboda's ELT signal, the Fourth Circuit held that under the circumstances the violation was excusable.\(^3\) The court reasoned that because the FAA officials knew that Swoboda's radio was not working and because one of the companion planes had made two position reports on Swoboda, it was reasonable for FAA officials to rely upon the companion plane's message that Swoboda's ELT transmission did not signify distress, but was instead a means of communicating.\(^4\)

The court also rejected the plaintiff's contention that FAA officials were negligent both in failing to notify the Search and Rescue Coordinator when Swoboda's plane was overdue at Adak and in supplying the rescue control coordinator with incorrect location information when the search finally began. The court found that the failure to promptly notify the Search and Rescue Coordinator was not negligent because the FAA officials had no concrete reason to believe that Swoboda was in distress and because a pilot of one of the companion planes had told the officials that Swoboda had probably gone to an alternate destination.\(^5\) The court further held that the inaccuracies in the location information were not the result of a lack of due care on the part of the FAA because Anchorage Center had received the incorrect position report from one of the companion planes and merely had relayed it to the rescue coordination center.\(^6\)

---

\(^2\) An order issued by the Federal Aviation Administration (FAA) states in part that "[w]hen an ELT signal is received or reported, it shall be assumed that an emergency exists. FAA facilities shall immediately notify the appropriate rescue coordination center . . . ." FAA, ORDER No. 6050.29 (Nov. 19, 1973).

\(^3\) 662 F.2d at 329.

\(^4\) Id. at 329-30.

\(^5\) Id. at 330.

\(^6\) Id.
Another decision absolving the government from liability was *Hahn v. United States*. In *Hahn*, the plaintiff brought suit in his capacity as the representative of the estate of a passenger who died in a private plane that struck an electrical cable on a power transmission line. The plaintiff alleged that the government negligently failed to accurately and adequately depict the transmission line and its altitude on the aeronautical charts and that the government negligently failed to place warning lights on the transmission towers. The court found that the transmission line was accurately reflected on the pertinent aeronautical charts. It further found that because the line was substantially under the level at which it would have been considered an obstruction to air traffic under FAA standards, the government was not negligent in failing to indicate the height of the towers on the aeronautical charts. The court concluded that the government had no duty to light the power line because there was no indication that the government had reason to believe the transmission line posed any particular hazard to air traffic in the vicinity. Further, it concluded that the evidence indicated that a pilot taking off from the airport had adequate time to execute a standard flight pattern before reaching the transmission line which was five miles away.

In *Cooper v. Perkiomen Airways, Ltd.*, the court dismissed a suit in which the plaintiff named the FAA as a defendant but failed to file the appropriate administrative claim. The court reiterated the first law of federal tort claims:

Conditions imposed by the FTCA as a prerequisite to suit include the requirement that would-be plaintiffs file, within the specified time limit, and with the appropriate federal agency, an administrative claim stating the amount of money to which the aggrieved party believes they are entitled. Failure to do so raises a jurisdictional defect; it cannot be waived and bars the

---

211 Id. at 136-37.
suit. 213

On the other hand, the court in Forest v. United States 214 excused the plaintiff's administrative error and refused to dismiss her wrongful death action against the government. In Forest, the legal representative of the persons that possessed the administrative claim 215 failed to comply with administrative requirements that required the representative to make a timely presentation of evidence of his authority to make the claim. Ruling in favor of the plaintiff, the court found that extenuating circumstances 216 existed that excused literal compliance with the requirements and that there was no showing that the government was prejudiced.

VI. JURISDICTION

On a certified question from a diversity action in the United States District Court for the District of Montana, the Supreme Court of Montana, in Reed v. American Airlines, Inc., 217 held that the federal district court had in personam jurisdiction over American Airlines (American) for damages resulting from the loss of camera equipment. The plaintiff, a Montana citizen, had traveled to New York City from Missoula, Montana on Northwest Airlines and intended to transfer flights and continue to Nepal on British Airways. The plaintiff alleged that during the transfer process, American

---

213 Id. at 1086-87.
215 28 C.F.R. § 14.3(e) (1982) states:
   [a] claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or the legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

Id.
216 539 F. Supp. at 174-75. The court stated that “[t]he fact that the administrative claim requirement is jurisdictional in nature, should not preclude consideration by this court of equitable factors.” Id. at 174. The court considered it important that the rights of minors were involved and that prior to trial, the FAA required evidence from the attorney of his authority to act on behalf of one claimant but did not request evidence of his authority to act on behalf of the other claimants. Id. at 174-75.
217 640 P.2d 912 (Mont. 1982).
came into possession of his camera equipment and was responsible for its loss.

American had no property or personnel located in Montana, paid no taxes there, and, except for an infrequent charter flight, did not fly into or out of Montana. On the other hand, American solicited business in Montana by listings in nineteen Montana phone directories, by television ads broadcast in Montana, and by furnishing material to travel agents in Montana. Additionally, American personnel occasionally go to Montana to instruct Montana travel agents. American provided toll free calls to Montana residents to schedule flights on American. The business generated from these calls was almost one million dollars per year.\textsuperscript{218}

The defendants did not contend that "due process" would be offended by the assertion of jurisdiction.\textsuperscript{219} Instead, they argued that Montana's Rule of Civil Procedure 4B(1) did not permit the court to assert jurisdiction over the parties. Rule 4B(1) states: "All persons found within the state of Montana are subject to the jurisdiction of the courts of this state."\textsuperscript{220} The court stated that "[b]efore the activities of a foreign corporation can create a physical presence within Montana, those activities must be substantial, continuous, and systematic as opposed to isolated, casual or incidental."\textsuperscript{221} It held, that American's activities satisfied\textsuperscript{222} the test and, thus, that American was "found in Montana" within the meaning of the rule.\textsuperscript{223}

In \textit{Missouri ex rel Newport v. Wiesman},\textsuperscript{224} the Supreme Court of Missouri found that Beech Aircraft Corporation (Beech), a Delaware Corporation with its principal place of business in Kansas, was subject to personal jurisdiction in

\textsuperscript{218} \textit{Id.} at 912-14.

\textsuperscript{219} \textit{Id.} at 915.


\textsuperscript{221} 640 P.2d at 914.

\textsuperscript{222} The court cited Ladd v. KLM Royal Dutch Airlines, 456 F. Supp. 422 (S.D.N.Y. 1978) and Gullet v. Qantas Airways, Ltd., 417 F. Supp. 490 (M.D. Tenn. 1975), both of which had facts very similar to the ones before the court.

\textsuperscript{223} 640 P.2d at 915.

\textsuperscript{224} 627 S.W.2d 874 (Mo. 1982).
Missouri. The action arose out of a crash in Georgia and was grounded on strict liability for the manufacture of a defective aircraft. The court found that the long arm statute under which personal service was effected on the defendants extended the personal jurisdiction of Missouri courts over non-residents to the limits of "due process." The court further determined that Beech had "transact[ed] . . . business within [the] state" within the meaning of the statute because it had established two franchised dealers in Missouri for the purpose of sale and service of aircraft.

With respect to federal due process, the court held that Beech's business in Missouri alone constituted the "minimum contacts" necessary to permit Missouri courts to assert personal jurisdiction. The court pointed out that Beech had many business contacts with Missouri and had delivered its products into the stream of commerce with the expectation that Missouri consumers would purchase them. The court further found that the plaintiff was a Missouri resident.

The Texas Supreme court reached a similar conclusion in Hall v. Helicol. Hall arose out of a helicopter crash in Peru in which the plaintiff's husband was killed. The helicopter was owned and operated by Helicol, a corporation that had contracted in Texas with the decedent's employer to supply helicopter services. Helicol did not maintain an office in Texas, was not authorized to do business in Texas, and did not recruit employees in Texas. On the other hand, Helicol purchased substantially all of its helicopter fleet in Texas and had employees in Texas.

With respect to the Texas long-arm statute, the Texas Supreme Court reaffirmed a prior case holding that the Texas long arm statute reaches as far as due process permits.

---

226 627 S.W.2d at 876.
227 Id. at 877.
228 Id. at 879. The court's position was not changed by the fact that the aircraft at issue was not one of the four models sold by Beech in Missouri. Id.
229 Id.
230 638 S.W.2d 870 (Tex. 1982), cert. granted, 103 S. Ct. 1270 (1983).
The court further found that Helicol's contacts constituted "doing business" within the meaning of the long arm statute and were sufficient minimum contacts to satisfy due process. The court stated that it was not necessary that the cause of action arise out of the contacts with the forum when the defendant's contacts with the forum state are numerous. Other important factors that influenced the court's finding that jurisdiction was proper were Texas' interest in protecting the employees of its residents and the plaintiff's interest in a convenient forum.

VII. CHOICE OF LAW

Bennett v. Enstrom Helicopter Corp., was a wrongful death action which was brought in a Michigan federal court by the estate of a New Zealand citizen who was killed in a helicopter crash in New Zealand. The district court granted summary judgment for the defendant helicopter manufacturer, following the Michigan lex loci delicti rule, and the court of appeals affirmed. Consequently, the substantive law of New Zealand governed the case. The application of New Zealand law resulted in a judgment for the defendant, because New Zealand law did not permit persons covered by New Zealand's comprehensive no-fault compensation act to maintain common law personal injury or death actions. The appellate court refused to bend the Michigan lex loci delicti rule stating that even if a "dominant contacts" conflict of laws rule were applied, it was doubtful that a Michigan court

---

339 638 S.W.2d at 872.
340 Id. at 873.
341 Id. The court found that Texas had some interest in the litigation in spite of the fact that the plaintiff was not a Texas resident.
342 679 F.2d 630 (6th Cir. 1982).
343 Id. at 631.
344 Id. Lex loci delicti provides that the forum court should apply the substantive law of the place of the wrong. Id. See, e.g., Sweeney v. Sweeney, 402 Mich. 234, 262 N.W.2d 625 (1978).
345 679 F.2d at 632.
would apply Michigan substantive law, because there were no such “dominant contacts.”

California has dropped the law of the place of the wrong rule and follows the more flexible governmental interest analysis to determine which law to apply. Consequently, in *Browne v. McDonnell Douglas Corp.*, a case arising out of the mid-air collision of two aircraft in Yugoslavia, the court applied California law on issues of strict liability and wrongful death damages, and applied Yugoslavia law on the issue of proportionate liability. In reaching this dichotomy, the court pointed out that in Yugoslavia a defendant is required to pay only that portion of damages for which he is held responsible; whereas, California law would have imposed the entire liability on the defendant McDonnell Douglas, rather than apportioning a share of the liability against Yugoslavian tortfeasors. The court reasoned that applying Yugoslavia’s law, would impair Yugoslavia’s interest in deterring the tortious conduct of its residents within its borders. The court, therefore, concluded that because California had no interest in applying its recovery rule to impose disproportionate liability upon its resident defendant when all tortfeasors were not subject to its jurisdiction, and because Yugoslavia’s interest in

---

*679 F.2d at 632. The lower court had found that “[t]he mere fact that defendant's helicopter was manufactured in Michigan is an insufficient reason to invoke this state's public policy.” Id. The Court of Appeals reasoned that “[n]either the decedent nor his family resided in Michigan. The downed helicopter was not owned by a Michigan resident or corporation. Although the bailment of the helicopter to Mr. Bennett was, as the district court noted, in a commercial environment, there was no sale and no employment contract [between defendant Enstrom and the decedent].” Id.

*See supra note 239.

*See Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967).

*The governmental interest analysis approach to conflict of laws is that the forum should apply the substantive law of the state which has the most important interest in the application of its policy. See generally B. Currie, Selected Essays on the Conflict of Laws (1963).


*Id. at 519.

*Id. at 518-19.

*Id. at 519.
deterring wrongful conduct within its borders would be impaired if its law were not applied, there was a compelling reason to displace forum law on that issue.\footnote{Id.} The court continued by stating that even if the result were to limit damages recoverable by plaintiffs, it "would be justified because California had no interest in impairing the ability of California corporations to compete in other jurisdictions by imposing upon them obligations to foreign residents which exceed those imposed by the foreign jurisdictions."\footnote{Id.}

In Cox v. McDonnell Douglas Corp.,\footnote{Id.} the survivors of a United States Air Force captain who was killed in a 1970 Idaho air crash brought a wrongful death action in a Texas federal court.\footnote{Id. at 566 (5th Cir. 1982).} The district court applied the law of Missouri, which was the state where the defendant had its principal place of business and where the accident aircraft had been designed and built.\footnote{Id. at 567.} Missouri's statute of limitation barred the plaintiffs' action.\footnote{Id.} The Fifth Circuit Court of Appeals reversed, holding that Idaho law (the law of the place of the injury) applied and that the action of the decedent's minor children was not barred by the Idaho statute of limitations.\footnote{Id. at 573.} The court remanded to the district court the issue of whether the widow's claim was barred. It instructed the lower court to determine whether the "discovery rule" and "fradulent concealment" doctrine, applied \textit{vel non} because the widow claimed that the Air Force had misled her regarding the nature of her husband's fatal accident.\footnote{Id.}

The court in Baltimore Football Club, Inc. v. Lockheed Corp.\footnote{525 F. Supp. 1206 (N.D. Ga. 1981).} held that the law of Georgia, the place where the plaintiff's allegedly defective airplane was manufactured, was more appropriate for determining tort liability for negligence
than the law of Wisconsin, the place where the alleged defects were discovered. The court reasoned that the discovery of the defects in Wisconsin was fortuitous and that the place of the alleged misconduct (the negligent manufacture of the airplane) had a greater interest in applying its laws. Accordingly, the plaintiff was denied recovery because under Georgia law a corporate plaintiff cannot recover upon a strict liability theory. Moreover, a plaintiff may not recover economic losses under a negligence theory.261

VIII. FORUM NON CONVENIENS

In Piper Aircraft Co. v. Reyno,262 the Supreme Court of the United States addressed the issue of forum non conveniens. Reyno was a wrongful death action brought by an American representative of foreign residents263 against Piper264 and Hartzell265 as a result of a crash that occurred in Scotland.266 Both defendants moved to dismiss the action on the basis of forum non conveniens and the district court granted the motions, reasoning that Scotland was the more appropriate forum. In reaching this decision, the court first balanced the private interest factors affecting the convenience of the parties...

---

260 Id. at 1208.
261 Id. at 1208-09.
262 Id. at 1209-10.
263 102 S. Ct. 252 (1982).
264 Id. at 257. The decedents, the pilot and five passengers, were all Scottish citizens and residents, as were their heirs and next of kin. Id.
265 Piper Aircraft company manufactured the aircraft in Pennsylvania. Id.
266 Id. at 258.
267 Id. at 257.

The real parties in interest are citizens of Scotland as were all the decedents. Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident - all essential to the defense - are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

ties and the public interest factors affecting the convenience to the forum. It refused to accord any weight to plaintiff's argument that dismissal would result in the application of the less favorable law of Scotland. The Third Circuit reversed the district court, holding that its forum non conveniens analysis was incorrect and that dismissal is never appropriate when the law of the alternative forum is less favorable to the plaintiff.

On certiorari, the Supreme Court reversed the Circuit Court, holding that a dismissal for forum non conveniens should not be denied upon the mere showing that the substantive law that would be applied in the alternative forum is less favorable than the law of the chosen forum. It further held that the possibility that the substantive law would change ordinarily should not be given conclusive, or even substantial weight in the forum non conveniens inquiry. The Court also held that the district court's private and public interest analysis was reasonable. The Court concluded that the public interest favored trial in Scotland, since the accident occurred there, all the decedents were Scottish and, except for the manufacturers, all potential plaintiffs and defendants were either Scottish or English.

The private and public interest factors were again weighed in Lampitt v. Beech Aircraft Corp., which was an action that arose from the crash of a Beech Super King Air 200 in

---

368 The district court noted that an alternate forum existed in Scotland, that Piper and Hartzell had agreed to submit to Scottish jurisdiction, and that the plaintiff's choice of forum was not entitled to "substantial deference" when plaintiffs were foreign citizens who sought "[t]o benefit from the more liberal tort provided for the protection of citizens and residents of the United States." 102 S. Ct. at 252 (1981).

370 Reyno v. Piper Aircraft Co., 630 F.2d 149 (3rd Cir. 1980).

371 102 S. Ct. at 261. The Court stated that it had expressly rejected the Third Circuit's position in Canada Malting Co. v. Paterson Steamship Co., 285 U.S. 413 (1932). Id. Furthermore, the Court noted that "[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the flexibility that makes it so valuable." Id. at 262.

372 Id. at 266-68.

373 Id.

374 17 Av. Cas. (CCH) 17,358 (N.D. Ill. 1982).
France on a flight from England. Plaintiffs, heirs of the deceased pilot, brought this wrongful death action against Beech on theories of negligence, breach of warranty and strict liability. The decedent, a British citizen, was the pilot for a British aviation company. The court found that the private interest factors, especially the presence of the witnesses and evidence in Great Britain, weighed in favor of dismissal. It also found that the public interest factors favored dismissal because Illinois had no interest in the outcome of the litigation, and its connection with the defendant Beech was tenuous, at best.

In *In Re Disaster At Riyadh Airport Saudi Arabia*, multidistrict litigation against Saudi Arabian Airlines, Trans World Airlines, Inc. and Lockheed Corporation grew out of the tragedy at Riyadh in Saudi Arabia during the summer of 1980. The defendants’ motions based on *forum non conveniens* were conditionally granted. At the time the motion was argued, all cases of United States residents had been settled, and the remaining plaintiffs were foreign. The court determined that the alternative forums that were available were adequate, and that the private and public interest factors clearly favored the use of a foreign forum.

---

276 Id. The aircraft was manufactured by Beech Aircraft Corp., a Delaware corporation, whose principal place of business was in Kansas. It was operated by Eagle Aircraft Services, a British company. Id.
277 Id.
278 Id. at 17,360.
279 Id.
280 Id. The court also noted that under Illinois choice of law principles, English law would be applied in any event. Id.
281 Id. at 1141 (D. D.C. 1982).
282 Id. at 1144.
283 Id. at 1146. The court found that the likelihood of lesser damage awards and the unavailability of a contingent fee relationship in an alternative forum do not make those forums inadequate. An alternative forum is inadequate only where the available remedy is "clearly unsatisfactory." Id. at 1145-46 (quoting Piper Aircraft Co. v. Reyno, 102 S. Ct. 252, 265 n.22 (1982)).
284 Id. at 1146-51. The court found the private interest factors to outweigh only slightly the presumption against disturbing plaintiff’s initial forum choice. Id. at 1151.
285 Id. at 1151-54. The court found the public interest factors (contacts between the forum and the litigation, interest of the forum in the litigation, and familiarity with governing law) clearly favored the use of a foreign forum. Id.
est factors favored the use of a foreign forum, especially since all plaintiffs were foreign. The court dismissed the suit on the condition that the defendants agree to appear and defend damage suits in foreign forums, to waive limitations on compensatory damages imposed by the Warsaw Convention, guarantee jointly and severally payment of judgments, and to not raise the statute of limitations defense.

IX. OPERATION OF AIRPORTS

Aircraft noise, nuisance and inverse condemnation cases still abound, but only a few are worthy of mention. In Northeast Phoenix Homeowners' Ass'n v. Scottsdale Municipal Airport, a group of citizens sought an injunction to restrain the extension of a runway, to impose a reasonable curfew on flight operations, and to prohibit right hand turns on takeoff. They further sought to require all aircraft to use the full runway and the available threshold in their operations, which would cause aircraft to over-fly the plaintiffs' property only when necessary and at the highest altitude possible.

The plaintiffs in Northeast Phoenix Homeowners' Ass'n sought injunctive relief for trespass, nuisance and alleged violations of federal regulations and state statutes. As to the state statutes, the court, applying a preemption analysis held that it could not "formulate injunctive relief based on state statutes regulating flight operations because the federal regulatory scheme precludes additional regulations of flight."

The Arizona Court of Appeals applied the "proprietors' exception" to federal preemption of aviation regulations which the United States Supreme Court recognized in Burbank v.

---

386 Id. at 1154.
387 Id. at 1144.
388 Id. at 1155.
389 130 Ariz. 487, 636 P.2d 1269 (1981). Multiple party litigation arose out of a conflict between residents in Northeast Phoenix whose homes were located under the flight path of airplanes using the Scottsdale Municipal Airport and the City of Scottsdale as the owner and operator of the airport. 636 P.2d at 1270.
390 Id. at 1271-72.
391 Id. at 1278. The plaintiffs specifically alleged violations of federal regulations pertaining to flight operations, 14 C.F.R. § 911 (1982). 636 P.2d at 1278.
392 636 P.2d at 1279.
Lockheed Air Terminal, Inc. The court, denying injunctive relief, stated that that exception does not allow courts exercising injunctive powers to force proprietors to act with regard to airport operations. In other words, the Arizona court maintained that the Burbank preemption rule applied not only to state and local legislation, but also to judicial rules and regulations governing airport and airline operations.

Regarding the violations of federal aviation regulations, the Arizona court held that the plaintiffs lacked standing to seek direct judicial enforcement of these regulations. The court construed the Federal Aviation Act to preclude “direct injunctive enforcement of any other FAA regulation by a private party in interest.” The court noted, however, that the plaintiffs had an administrative remedy and could file a complaint with the DOT, which must investigate and is empowered to issue orders compelling compliance.

In Drybread v. City of Saint Louis, the plaintiffs sought damages and injunctive relief to abate an “existing nuisance” at the St. Louis Airport. Drybread, like Northeast Phoenix...
Homeowners' Ass'n, was an action by a group of homeowners whose property was directly beneath flight paths designated for jet aircraft. In looking at the conduct complained of and the relief requested, the court reasoned that because the city could not reasonably abate the nuisance by closing the airport,\textsuperscript{300} the plaintiffs' action, in reality, was an action for a permanent nuisance and, therefore, should have been a condemnation proceeding.\textsuperscript{301}

In Joseph v. Helms\textsuperscript{302} a group of homeowners brought an inverse condemnation suit against the United States Government alleging that the operation of the Washington National Airport resulted in a taking of their property. The claims were dismissed because the plaintiffs were unable to refute documented government affidavits that stated that there had been no significant change in published flight paths, in the number of flights into and out of the airport, or in the type of aircraft operated by air carriers at Washington National since the plaintiffs acquired their property.\textsuperscript{303} Because of these uncontroverted affidavits, the court did not consider whether a taking had occurred. It reasoned that even if a taking had occurred, the plaintiffs would not qualify for compensation because any arguable navigation easement in the airspace above their land existed before they acquired the property. The court further stated that if the flights were so low and so frequent as to amount to a taking under the rule of United

\textsuperscript{300} Id. at 521. The court stated that closing or relocating the airport would not be "reasonably practicable." The court stated "'[t]he [plaintiff's] relief, if any, for the permanent nuisance lies in their inverse condemnation claim," citing United States v. Causby, 328 U.S. 256 (1946). 634 S.W.2d at 521.

\textsuperscript{301} 634 S.W.2d at 520-21.

\textsuperscript{302} 16 Av. Cas. (CCH) 18,287 (D.D.C. 1981).

\textsuperscript{303} Id. at 18,288. The court therein stated:

In the face of this uncontroverted submission, we cannot gainsay the district court's ruling that appellants failed to show a genuine issue for trial. See Fed. R. Civ. Puc. 56(c). It did not suffice for appellant to complain of existing condition or to assert generally that "'[a]ircraft operations typically build up slowly over years and decades." It was incumbent upon them to set forth specific facts counteracting the Government's documented statements of "no significant change" from the period prior to appellants' ownership.

\textit{Id.}
RECENT DEVELOPMENTS

States v. Causby,\textsuperscript{304} a reasonably diligent inspection and inquiry would have revealed the pervasive interference. Thus, the court ruled that the plaintiffs could not avail themselves of the rule that the purchaser of land burdened by an easement takes it free and clear of such burden because the plaintiffs had either actual or constructive notice of the easement.\textsuperscript{305}

DiPerri v. Federal Aviation Administration\textsuperscript{306} was a private action intended to force the FAA to resolve airport noise problems at a local airport. The plaintiffs in DiPerri alleged that both the Massachusetts Port Authority and the FAA collaborated to create an unreasonable nuisance condition by operating the Logan Airport. The complaint sought relief not only from the severe noise pollution but also from an alleged safety hazard. The complaint alleged that aircraft flew over a large oil tank farm at a height of only three hundred feet.\textsuperscript{307} The court held that neither 49 U.S.C. § 1348, which gives the Administrator authority over flight patterns, nor 49 U.S.C. § 1431, which gives him authority over aircraft noise, supported the plaintiffs' action for relief.\textsuperscript{308}

X. DAMAGES, JUDGMENTS AND COSTS

In Bottazzi v. Petroleum Helicopters, Inc.,\textsuperscript{309} the plaintiff suffered a severe, long-term psychological reaction as a result of the combined effect of two helicopter accidents. Plaintiff brought separate actions against separate defendants, but Petroleum Helicopters, Inc. was a common defendant in each suit. The cases were consolidated for trial, and the plaintiff's mental infirmities supplied the necessary "common question

\textsuperscript{304} 328 U.S. 258 (1946). In Causby, the respondents owned a dwelling and a chicken farm near a municipal airport. The issue involved was whether respondents' property was taken, within the meaning of the Fifth Amendment, by frequent and regular flights at low altitudes. In order to constitute a taking, the Supreme Court in Causby, stated that the flights over the property must render it uninhabitable to its owners. Id. at 261.

\textsuperscript{305} Id. at 261.

\textsuperscript{306} 16 Av. Cas. (CCH) at 18,288.

\textsuperscript{307} 664 F.2d 49 (5th Cir. 1981).

\textsuperscript{308} Id. at 261.

\textsuperscript{309} 671 F.2d 54 (1st Cir. 1982).
of law or fact” that Federal Rule of Civil Procedure 42(a) requires for consolidation.\textsuperscript{310} At the trial, experts testified that “it was impossible to assign to either [accident] a proportionate degree of causation [of the plaintiff’s injury].”\textsuperscript{311} In approving an equal division of damages between the defendants, the court held that “[r]eason suggests that where . . . separate wrongful acts by different tortfeasors produce a unitary injury and where the degree of contribution of each act to that injury cannot be ascertained, an equal division of damages resulting from it is appropriate”.\textsuperscript{312} The court stated that “any other rule would deny the injured party [a] recovery . . . because he was unable to prove how much each one caused.”\textsuperscript{313} The court stated that the equal apportionment rule was a rule of necessity and described it as “a lesser evil than exonerating one or more culpable parties because the discrete degrees by which they contributed to the injury are either unproved or unprovable.”\textsuperscript{314}

In suits arising out of the American Airlines DC-10 accident at Chicago’s O’Hare Airport in 1979, the defendants in \textit{In Re Air Crash Disaster Near Chicago, Illinois}\textsuperscript{315} sought to introduce evidence of what portion of the decedents’ past earnings were subject to taxation and of the percentage of future earnings that would have been subject to taxes.\textsuperscript{316} The defendants also requested a jury instruction that any jury award would be exempt from taxation and that the “jury should not be concerned about or consider the effect of taxes on the award.”\textsuperscript{317} These issues were the subject of motions \textit{in limine} by both plaintiff and defendant.\textsuperscript{318} The court finding against the defendants stated that federal law, if free from the diversity jurisdiction obligations imposed by \textit{Erie},\textsuperscript{319} would admit the

\textsuperscript{310} \textit{Id.} at 50-51.
\textsuperscript{311} \textit{Id.} at 51.
\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.}
\textsuperscript{316} \textit{Id.} at 227.
\textsuperscript{317} \textit{Id.}
\textsuperscript{318} \textit{Id.} at 228.
\textsuperscript{319} \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938).
taxation evidence and allow the requested instructions. It stated, however, that because Illinois law was contrary, it must apply, reasoning that it would be unfair for the character or result of the litigation to differ materially because the suit was in federal, rather than, state court.\(^{320}\)

On the issue of the liability for damage awards among joint tortfeasors, the plaintiff in *Piper Aircraft Corp. v. Dumon*\(^{321}\) paid more than its *pro rata* share of a personal injury judgment for which plaintiff and defendants were jointly and severally liable. The plaintiff sought to recover the additional sum that it had paid. The defendants contended that their negligence that gave rise to the original suit was only passive, whereas the plaintiff's was active. They, therefore, argued that they should not have to contribute to the judgment. Ruling in favor of the plaintiff, the court held that the time for a joint tortfeasor to contest the extent of his liability *vis-a-vis* another tortfeasor is at the trial of the original action. The court stated that after a joint judgment is entered against a party, he no longer can litigate the extent of his liability to other defendants.\(^{322}\)

The Ninth Circuit refused to allow the recovery of prejudgment interest in *Berns v. Pan American World Airways, Inc.*\(^{323}\), which was a wrongful death action. In *Berns*, the court entered judgment in favor of surviving children of airplane crash victims. The plaintiffs had requested an instruction authorizing the jurors to award interest on the children's recovery from the date of their parents' death.\(^{324}\) The court held that "their damages were not subject to precise calculation" and, therefore, that prejudgment interest was not recoverable.\(^{325}\) Further, the court noted that the children "were not deprived of the use of a readily ascertainable sum of money during the period from the date of their . . . [parents'] death."

\(^{320}\) 526 F. Supp. 231 (quoting Hanna v. Plummer, 380 U.S. 460, 467 (1965)).


\(^{322}\) 314 N.W.2d at 711.

\(^{323}\) 667 F.2d 826 (9th Cir. 1982).

\(^{324}\) Id. at 829.

\(^{325}\) Id.
to the date of judgment.\footnote{188}

On the other hand, recovery of prejudgment interest was allowed in \textit{Safeco Insurance Co. v. City of Watertown},\footnote{189} which was a subrogation action for the total loss of an aircraft. The interest award, however, did not commence until the date the complaint was filed, which was the first date at which it appeared that the damages had become certain.\footnote{190} Notably, in this case, the court excepted from prejudgment interest those times during which the action was ready for trial but trial had been delayed upon the plaintiff's motion for a continuance.\footnote{191}

Another case involving prejudgment interest is \textit{Havis v. Petroleum Helicopters, Inc.}\footnote{192} In \textit{Havis}, the plaintiff had a maritime cause of action for the crash of his helicopter at sea, but he alleged both maritime and diversity jurisdiction in his complaint and, further, demanded a jury trial.\footnote{193} He did not request prejudgment interest at the trial, and the jury returned a general verdict in his favor.\footnote{194} On plaintiff's later motion, the district court awarded prejudgment interest.\footnote{195} Reversing the award, the Fifth Circuit stated that when a maritime case is tried solely to a jury under the exercise of diversity jurisdiction, the grant or denial of prejudgment interest must be submitted to the jury.\footnote{196}

Concerning the issue of costs and expenses in multi-district litigation cases, the D. C. Circuit Court of Appeals in \textit{In Re Air Crash Disaster Near Saigon, South Vietnam}\footnote{197} held that it was reasonable and within the ambit of the district court's discretion to allocate litigation costs on a per capita basis without regard to the size of any particular plaintiff's settle-
ment. The court held, however, that costs could not be assessed against a plaintiff's counsel, as the court below had done, because costs are sanctioned against counsel personally only in specific cases of bad faith action by the attorney. In this case no instances of bad faith were present.

XI. MISCELLANEOUS

A. Federal Aviation Act

Private causes of action were addressed by a New York District Court in Halama v. New Horizons Helicopter Corp., in which the plaintiffs sought to enjoin a private corporation from spraying pesticides from a helicopter and alleged violations of the Federal Aviation Act of 1958 and the regulations promulgated thereunder. The court held that the Act gives no private right of action to sue for its violations.

Diefenthal v. Civil Aeronautics Board was an action by two passengers who were denied the privilege of smoking on an Eastern Airlines flight. The Fifth Circuit Court of Appeals held that there was no implied right of action against an air carrier to require it to comply with its own rules on smoking and that denying a passenger the right to smoke did not constitute discrimination within the meaning of 49 U.S.C. § 1374(b). The plaintiffs' breach of contract and tort claims against Eastern were dismissed on Eastern's motion for lack of the requisite diversity jurisdiction amount, even though the plaintiffs were claiming $50,000 in damages. On this issue, the court found that the plaintiffs had failed to show some basis for the amount of damages they claimed and stated that this aspect of the suit was precisely the kind of petty controversy that Congress intended the jurisdictional amount to ex-

---

836 Id. at 566.
837 Id. at 567-68.
838 17 Av. Cas. (CCH) 17,339 (E.D.N.Y. 1982).
839 681 F.2d 1039 (5th Cir. 1982).
840 Id. at 1043-46.
841 Id. at 1051-53.
clude from federal jurisdiction.\footnote{Id. at 1053.}

B. Tariffs

It is well established that valid tariffs filed with the Civil Aeronautics Board govern the rights and liabilities between airlines and their domestic passengers.\footnote{See North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 233 (2d Cir. 1978) where the court held, "[I]t is clear that a carrier's valid federal tariffs which are applicable to shipment at issue govern not only the nature and extent of liability, but also the nature and extent of the shipper's right of recovery."Id. 533 F. Supp. 426 (S.D.N.Y. 1982).} For example in Chambers & Assoc. v. Trans World Airlines\footnote{Id. at 429.} the court held that the tariff limiting the liability of an airline to $750.00 for loss of baggage continues in effect after the passenger's trip has ended and the airline has delivered, delayed or misplaced baggage to a private delivery service. The court held that the tariff applied although the passenger's baggage subsequently had been stolen. Having found the tariff in effect, the court also dismissed for lack of the requisite jurisdictional amount in a diversity action.\footnote{687 F.2d 181 (D.C. Cir. 1981).}

C. Deregulation

In Air Line Pilots Ass'n Int'l v. Civil Aeronautics Board\footnote{Id. at 1053.} the court held that the Airline Deregulation Act of 1978 did not impose upon the CAB a requirement that the CAB consider whether each applicant for operating authority will be as safe as the industry-wide average. Additionally, the court held that the Act does not require independent technical assessments of safety by the CAB, nor does it establish a more stringent safety standard for new carrier applicants during the transition period before the CAB is abolished in 1984. The court therein noted that air carrier economic regulation remains within the province of the CAB, while safety regulation of civil aeronautics is entrusted to the FAA.
D. *Res Ipsa Loquitur*

In *Sievers v. Beechcraft Manufacturing Co.*, the United States District Court for the Eastern District of Louisiana, applying Louisiana law, refused to apply the “res ipsa loquitur” doctrine in a products liability action. The court held that the doctrine did not apply when it could not be shown that the aircraft was in the exclusive control of the manufacturer or that the cause of the accident was more properly within the knowledge of the manufacturer, and when pilot error was a plausible alternative explanation. On the other hand, the Fourth Circuit in *Travelers Insurance Co. v. Riggs*, applying Virginia law, refused to apply the doctrine in a negligence action against a pilot, stating that “it is a matter of common knowledge that an aircraft may fall or crash in the absence of negligence or fault on the part of the pilot.”

E. *Trivia*

The court in *Saintshannanday v. Trans World Airlines, Inc.* held that an air carrier had no duty to place a guard in a lost baggage inquiry room to prevent the unlikely event that a passenger who was irate over losing his baggage would vent his anger by assaulting another passenger who had also lost his luggage. The court reasoned that while, in retrospect, one could argue that TWA should have foreseen the unfortunate event, its occurrence was not objectively reasonable to expect.

---

448 Id. at 202-04.
449 671 F.2d 810 (4th Cir. 1982).
450 Id. at 815 (citing *Surface v. Johnson*, 215 Va. 777, 214 S.E.2d 152 (1975)).
451 16 Av. Cas. (CCH) 18,232 (N.D. Ill. 1982).