Recent Developments in Aviation Case Law

Donald R. Anderson

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RECENT DEVELOPMENTS IN AVIATION CASE LAW

BY DONALD R. ANDERSEN*

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* Partner, Mozley, Finlayson, Wedge & Andersen, Atlanta, Georgia. Education:
  Georgia Institute of Technology (B. Eng. Sci., with honors, 1973); University of Geor-
  gia (J.D., Cum Laude, 1976); Order of the Coif. Articles Editor, Georgia Law Review
  1975-76. Member, State Bar of Georgia; Admitted to practice before United States
  Patent and Trademark Office; Member, American Bar Association and Atlanta Bar
  Association; Lawyers Club of Atlanta; Defense Research Institute; Georgia Defense
  Lawyers Association; Lawyer-Pilots Bar Association; Atlanta Aviation Council; Past
  Secretary, Aviation Section of State Bar of Georgia; Secretary, Aero Club of Metropolitan
  Atlanta. Commercial pilot, multi-engine and instrument ratings.
I. INTRODUCTION

THE PAST YEAR resulted in a significant number of important aviation cases. The United States Supreme Court has considered eight aviation cases during the past year and at the time of this writing has rendered opinions in three of the cases. The Supreme Court cases which have been decided are Philko Aviation v. Shacket,1 Aloha Airlines v. Director of Taxation of Hawaii,2 and Lockheed Aircraft Corp. v. United States.3 The specific holdings in these cases and their possible effects will be discussed in this article. The aviation cases currently awaiting decision by the Supreme Court include Trans-World

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Airlines v. Franklin Mint Corp.; Helicópteros Nacionales De Colombia, S.A. v. Hall; S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States; United States v. United Scottish Insurance Co. and United States v. Weber Aircraft Corp. Each of these cases will also be discussed in the appropriate sections of this article.

II. FEDERAL PREEMPTION

In an area of particular importance to aircraft finance, the United States Supreme Court decided Philko Aviation v. Shacket. The Court held that the aircraft recordation and registration provisions of the Federal Aviation Act of 1958 (Federal Aviation Act) require that a sale or transfer of an interest in an aircraft must be in the form of a writing properly filed for recording in the Federal Aviation Administration (FAA) Aircraft Registry in order to be valid as to third persons without notice. In Philko Aviation, an aircraft dealer, Roger Smith Aircraft Sales, sold and delivered a new airplane to Mr. and Mrs. Shacket, gave them a photocopy of a

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4 690 F.2d 303 (2d Cir. 1982), cert. granted, 103 S. Ct. 3084 (1983). The case was argued in November, 1983. For the Supreme Court's disposition, see infra note 303.
5 638 S.W.2d 879 (Tex. 1982), cert. granted, 103 S. Ct. 1270 (1983). The case was argued in November, 1983. For the Supreme Court's disposition, see infra note 71.
6 692 F.2d 1205 (9th Cir. 1982), cert. granted, 103 S. Ct. 2084 (1983). For the Supreme Court's disposition, see infra note 178.
8 688 F.2d 638 (9th Cir. 1982), cert. granted, 103 S. Ct. 3534 (1983). For the Supreme Court's disposition, see infra note 264.
11 Section 503(c) of the Federal Aviation Act, 49 U.S.C. § 1403(c) (1976) provides: No conveyance or instrument the recording of which is provided for by [§ 1403(a)(1)] shall be valid in respect of such aircraft . . . against any person . . . by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.

Id.
bill of sale, and advised them that it would “take care of the paperwork,” including the filing of the bill of sale in the FAA Aircraft Registry. Unfortunately, Smith did not keep his word and never filed the Shacket’s bill of sale in the FAA Aircraft Registry. Later, Smith executed another bill of sale on the same plane to Philko Aviation, Inc. Philko checked the aircraft’s title against the FAA records and thought that it was acquiring good title.

After Smith’s fraudulent acts were discovered, the Shackets, having possession of the plane, filed a declaratory judgment action in federal district court to determine title to the plane. The district judge ruled in favor of the Shackets. On appeal, the Seventh Circuit affirmed, holding that the title to the aircraft had passed to the Shackets upon delivery of possession pursuant to the Uniform Commercial Code (UCC) in effect in Illinois.

The Supreme Court held, however, that if Philko was an innocent third party without notice of the prior sale to the Shackets, the prior unrecorded transfer was not valid as to Philko. The Court explained that the provisions of the Federal Aviation Act must be interpreted to provide that a transfer of an interest in the aircraft shall not be valid as to third persons without notice, unless a document evidencing the transfer has been recorded in the FAA Aircraft Registry. The Court further held that the Federal Aviation Act preempted the state law which would have mandated that title to the aircraft passed upon delivery by Roger Smith Aircraft to the Shackets.
In addition, the Supreme Court used *Philko Aviation* as a vehicle to express its view on the issue of federal preemption of state laws relating to priorities of interests in aircraft. The issue of whether the Federal Aviation Act preempts state law governing buyers in the ordinary course of business had created a split of authority between various state and federal courts. During the time that *Philko Aviation* was under consideration, a petition for certiorari from the Fifth Circuit was also pending in *Gary Aircraft Corp. v. General Dynamics Corp.*

In *Gary Aircraft*, the Fifth Circuit held that the Federal Aviation Act does not preempt the priority provisions of the U.C.C. as enacted in Texas. The appeals court, therefore, held that a security interest, for which a financing statement had been properly filed for recording in the FAA Aircraft Registry, did not have priority over the interest of a subsequent buyer in the ordinary course of business. The Supreme Court deferred any ruling on the petition for certiorari in *Gary Aircraft* until its decision in *Philko Aviation*.

Although the question of preemption of state laws dealing with priorities of interests was squarely presented in *Gary Aircraft*, the Court chose to address the issue in dicta in *Philko Aviation* and denied the petition for certiorari in *Gary Aircraft*.

"except to the extent that it might be read to suggest this court's endorsement of the view that one who makes a reasonably diligent effort to record will obtain the protections ordinarily reserved for recorded interests." *Id.*


23 681 F.2d 365 (5th Cir. 1982), cert denied, 103 S. Ct. 3110 (1983).

24 *Id.* at 372.

25 *Id.* at 377.

26 The precise question presented to the Court in *Philko Aviation* was: "whether the [Federal Aviation Act] prohibits all transfers of title to aircraft from having validity against innocent third parties unless the transfer has been evidenced by a written instrument, and the instrument has been recorded with the Federal Aviation Administration (FAA)." *Philko Aviation*, 103 S. Ct. at 2477.
The Court stated that it was "inclined to agree" with the Fifth Circuit in *Gary Aircraft* and added in passing that "state law determines priorities." The Supreme Court's actions are a clear signal that the Court does not view the preemption of state law under the Federal Aviation Act to include priorities of interests in aircraft once such interests have been properly perfected by a filing in the FAA Aircraft Registry.

Prior to *Philko Aviation*, a federal court in Montana had held that the Federal Aviation Act does not preempt the U.C.C. priority provision which allows a prior-recorded security interest priority over subsequent claims in *Western State Bank v. Grumman Credit Corp.* The *Western State* court expressed its view that the Federal Aviation Act expressly provides that validity of liens is governed by state U.C.C. provisions. The court rejected the argument of a junior lienholder that the senior lienholder's substitution of a new debtor, without refiling in the FAA Aircraft Registry, made the junior lien superior to that of the senior lienholder. Because the substitution of debtors was not misleading and the junior lienholder had notice that the aircraft was encumbered, the *Western State* court held that refiling was not required.

Following *Philko Aviation*, the Massachusetts Court of Appeals, in *South Shore Bank v. H & H Aircraft Sales, Inc.*, commented on the meaning to be ascribed "actual notice" (of a prior conveyance), which under the Federal Aviation Act would preclude an enforceable security interest.

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27 General Dynamics Corp. v. Gary Aircraft Corp., 103 S. Ct. 3110 (1983), denying cert. to 681 F.2d 365 (5th Cir. 1982).
28 *Philko Aviation*, 103 S. Ct. at 2480.
29 564 F. Supp. 9 (D. Mont. 1982), aff'd mem., 701 F.2d 187 (9th Cir. 1983).
30 564 F. Supp. at 13. The Federal Aviation Act, 49 U.S.C. § 1406 (1976), provides: "The validity of any instrument the recording of which is provided for by section 503 of this Act [49 U.S.C. § 1403] shall be governed by the laws of the State . . . . in which such instrument is delivered . . . ."
31 564 F. Supp. at 14-16.
32 *Id.*
34 *Id.* at 277-81.
Shore, the claim was first made on appeal that the second interest holder had “actual notice” of the prior purchase. The South Shore court held that the issue of “actual notice” may not be raised for the first time on appeal. The court proceeded, however, to discuss its interpretation of “actual notice” under the Federal Aviation Act. According to the South Shore court, a broad interpretation of “actual notice,” imposing on a lender the duty to check for possession of the aircraft and undertake an extensive investigation into the ownership of the aircraft, would undermine the reliability of the FAA recording system and nullify Philko Aviation’s requirement that even purchasers in possession of aircraft must properly file their interests in the FAA Aircraft Registry. Furthermore, as to lenders, the South Shore court stated its view that a check of the federal records is evidence of sufficient diligence in making a loan. The South Shore court added that although a lender bank might undertake an investigation and discover that an aircraft is not in the possession of the party securing financing, knowledge of nonpossession is not sufficient to constitute evidence of “actual notice” on the part of the lender. The clear impact of the Philko Aviation and South Shore decisions is that subsequent purchasers or financers of aircraft will be able to rely upon the records of the FAA Aircraft Registry to ascertain any prior interests in aircraft.

In 1983, the Supreme Court also addressed the issues of federal preemption in the area of state taxation of commercial air carriers. In Aloha Airlines v. Director of Taxation of Hawaii, the Supreme Court recognized that Section 7(a) of the Airport Development Acceleration Act of 1973 preempts di-

35 Id. at 279.
36 Id. at 280.
37 Id.
38 Id. (citing Marsden v. Southern Flight Serv., 227 F. Supp. 411, 416-17 (M.D.N.C. 1961)) ("possession alone . . . [i]s not sufficient to give third parties notice of the possessor's interest . . . . To hold otherwise would be to import constructive notice into the statute by the back door.").
40 Pub. L. 93-44, § 7(a), 87 Stat. 88, 90, codified at 49 U.S.C. § 1513 (1976). The court noted that the statute had been amended by the Airport and Airway Improve-
rect or indirect state taxation on persons traveling in air commerce, on the sale of air transportation, or on gross receipts derived therefrom. Accordingly, the Court held that a Hawaii tax equal to four percent of airlines' gross income was preempted, even though the tax was denominated a personal property tax on the property and value of an airline, because it indirectly taxed gross receipts from air transportation.

In another case involving a challenge to state taxation of air commerce, *Delta Airlines v. State of Florida*, a Florida trial court upheld the constitutionality of a Florida sales tax on fuel. The sales tax was challenged on the basis of the equal protection and commerce clauses of the United States Constitution. Delta Airlines contended that the state sales tax on fuel invidiously discriminated against airlines vis-a-vis other common carriers, and also discriminated against out-of-state carriers because a tax credit was provided for airlines having a home office in Florida. Furthermore, Delta contended that the sales tax was actually a "use" tax which attempted to regulate interstate commerce.

Addressing the equal protection challenge, the *Delta Airlines* court held that the distinction for purposes of fuel taxes between airlines and the common carriers was not unconstitutional. The court reasoned that under Florida law airlines enjoy some tax advantages over other carriers and therefore must tolerate some disadvantages as long as the disadvantages are not "hostile and oppressive." The court also held...
that the tax credit did not impose an unreasonable burden on foreign corporations. The court stated that the states could legitimately encourage in-state corporations. The court concluded, therefore, that the state could reasonably benefit Florida airlines as a class in order to further this objective.48

Turning to the challenge under the commerce clause, the court also held that the tax and its concomitant credit to in-state corporations did not burden interstate commerce. In reaching its conclusion, the court relied on the fact that the proceeds from the tax were to "provide funds for transportation purposes" including airports and aircraft services in the state of Florida.49 The court stated that the use of public airport facilities is a privilege and that the airlines should accordingly share the costs of the facilities. The court added that the benefit to the tax paying entity "does not have to be measured with mathematical accuracy."50

A third area of federal preemption addressed by the courts during the survey period was state jurisdiction over the occupational safety and health of airline employees. In United Airlines v. OSHA Board (California),51 the California Supreme Court held that the FAA is not vested with authority over the occupational safety and health of an air carrier's employees at a ground maintenance facility. In other words, the court concluded that FAA authority does not divest the California Division of Occupational Safety and Health of its jurisdiction over the facility. In California, the state OSHA statute specifically exempts from the state agency's jurisdiction those places of employment where state or federal agencies actively exercise their authority over the safety and health of the employees.52 Notwithstanding the exemption in the California OSHA statute, the United Airlines court held that the FAA, although empowered to regulate flight safety, is not statutorily directed to protect the health and safety of airline em-

48 Id. at 18,446-47.
49 Id. at 18,447.
50 Id.
52 CAL. LAB. CODE § 6303(a) (West 1983).
ployees. Therefore, the court left the regulation of the safety and health of airline maintenance workers to state regulation.

III. JURISDICTION

A. Federal Subject Matter Jurisdiction

The Ninth Circuit Court of Appeals dealt with the field of federal subject matter jurisdiction in In re Mexico City Aircrash of October 31, 1979, involving the crash of a Western Airlines DC-10. The Mexico City court held that the claims arising from the death of a Western Airlines' employee who was off-duty and returning to her home base when the plane crashed constituted an independent cause of action for wrongful death under the Warsaw Convention. Even though the employee was a resident of California and even though there was no diversity of citizenship between the plaintiff and defendant, the Ninth Circuit held that the independent cause of action under the Warsaw Convention provided a basis for federal jurisdiction of Warsaw Convention claims. Mexico City is significant not only because it recognizes that federal question jurisdiction exists for claims to which the Warsaw Convention applies, but also because it recognizes an implied cause of action for wrongful death under the treaties rather than under the provisions of state law.

In a case involving an airline passenger's claim for delay...
arising out of an unscheduled and emergency landing due to an explosion of the aircraft tires on takeoff, the federal court in *Arken v. Trans International Airlines*\(^5\) held that section 404 of the Federal Aviation Act\(^6\) does not apply to a tire manufacturer, create an implied cause of action against a tour operator, or provide a basis for applying pendent jurisdiction over non-federal claims against such parties. In this regard, the court held that section 404 of the Federal Aviation Act applies on its face only to air carriers and only requires proof of a confirmed reservation, compliance with the conditions of transportation, entitlement to a seat on the aircraft, and the refusal to honor the reservation.\(^6\) The court further explained that a section 404 claim was substantially different from the state law claims for negligence and breach of warranty against the tire manufacturer or claims for breach of contract and misrepresentation against the tour operator, and that state law claims therefore were not proper subjects for the exercise of pendent jurisdiction.\(^6\)

In contrast, in *Letnes v. United States*,\(^6\) the United States District Court for the District of Arizona held that federal jurisdiction over claims against the United States arising under the Federal Tort Claims Act (FTCA) provided a basis for ancillary party jurisdiction over negligence claims under state law.\(^6\) The plaintiffs alleged that the United States was liable under the FTCA for negligence in the supervision and control of aircraft fighting forest fires.\(^6\) Plaintiffs also alleged that several private parties were liable under state law for negligence in their operation of aircraft.\(^6\) In reaching its

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\(^\) 568 F. Supp. at 16. The court quoted from Aldinger v. Howard, 427 U.S. 1 (1976): “If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state law claim.” 427 U.S. at 18.

\(^\) 18 Av. Cas. (CCH) 17,327 (D. Ariz. 1982).

\(^\) *Id.* at 17,328-29.

\(^\) *Id.*

\(^\) *Id.*
conclusion, the court pointed out that not only did the other defendants meet the criteria for compulsive joinder, but that judicial resources would be conserved by retaining jurisdiction and that both claims arose out of a common nucleus of operative facts.67

B. Personal Jurisdiction

One of the cases currently pending in the United States Supreme Court is Helicopteros Nacionales De Columbia, S.A. v. Hall.68 This case is on appeal from the Supreme Court of Texas, which held that the exercise of personal jurisdiction over a non-resident Colombian corporation in a wrongful death action arising out of a helicopter accident in Peru did not violate due process.69 In Helicopteros, the Supreme Court is faced with two major issues. First, the Court must decide whether the Texas courts may constitutionally assert in personam jurisdiction over a non-resident Colombian corporation in a wrongful death action arising from an accident in Peru, where the Columbian corporation's sole contacts with Texas involved equipment purchases from a third-party Texas corporation and a single contract discussion with the decedents' employer in Texas and where the plaintiffs' causes of action did not arise out of these contacts.70 The second issue is whether the due process and equal protection clauses of the fourteenth amendment are violated by exercise of in personam jurisdiction over a nonresident alien corporation under circumstances in which a resident United States corporation could not constitutionally be subjected to jurisdiction.71

67 Id.
68 638 S.W.2d 870 (Tex. 1982), cert. granted, 103 S. Ct. 1270 (1983). The case was argued in November, 1983. See infra note 71.
69 638 S.W.2d at 879.
71 Id. The Supreme Court held that the nonresident corporation's contacts with Texas were insufficient to satisfy the requirements of due process, and that mere purchases by a nonresident corporation, even where occurring at regular intervals, are insufficient to warrant the exercise of in personam jurisdiction in a cause of action arising from such contacts. Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S. Ct. 1868 (1984). [Eds.].
As suggested by the questions to be determined by the Supreme Court, the application of in personam jurisdiction in aircraft accident cases is by no means a straightforward proposition. Furthermore, in recent years the application of various state long arm statutes has increasingly become an exercise in investigating and evaluating the unrelated contacts of non-resident corporate defendants in cases in which the cause of action did not arise within the forum state in order to determine whether such unrelated contacts provide a basis for the constitutional exercise of in personam jurisdiction by the courts of the forum state. Not infrequently, such decisions are based upon a subjective determination by the trial court as to whether, in view of the unrelated contacts of the non-resident corporate defendant, the exercise of in personam jurisdiction over the defendant would offend "traditional notions of fair play and substantial justice." The result of such subjective evaluations determines whether the exercise of long arm jurisdiction is constitutionally permissible. Finally, these "traditional notions of fair play and substantial justice," like "obscenity," tend to defy definition, and the best that can be said is that on a case by case basis perhaps the courts will instinctively recognize a case in which such "traditional notions" have been offended. Hopefully, Helicopteros will provide guidance as to the proper analysis of difficult cases involving questionable in personam jurisdiction and reveal whether contacts with a forum state, which are unrelated to the cause of action, may provide a basis for in personam jurisdiction over non-resident defendants.

Following the Texas Supreme Court's decision in Hall v. Helicopteros, a federal district court in Cobb v. McDonnell Douglas Corp., held that the manufacturer of an escape system for a military aircraft was subject to personal jurisdiction in

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73 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligently doing so. But I know it when I see it.

74 17 Av. Cas. (CCH) 18,184 (W.D. Tex. 1983).
Texas for wrongful death arising from an accident in Florida. In *Cobb*, the court found that the component manufacturer's conduct in connection with Texas was such that it could reasonably have anticipated being haled into court in Texas. In reaching its decision, the court noted that the manufacturer had a technical representative in Texas, that it manufactured escape systems for aircraft based in Texas, and that it sold other escape systems to Texas aircraft manufacturers.\(^\text{75}\)

In another case involving issues of in personam jurisdiction, the Illinois Court of Appeals held in *Maunder v. DeHavilland Aircraft of Canada, Ltd.*,\(^\text{76}\) that a Canadian aircraft manufacturer was subject to personal jurisdiction in Illinois for injuries arising out of an aircraft accident in Africa. The *Maunder* court evaluated the Illinois contacts of the Canadian aircraft manufacturer and concluded that the manufacturer "actively and systematically did business in the state through its wholly owned subsidiaries which sold and distributed parts for the manufacturer's aircraft."\(^\text{77}\) The court specifically held in *Maunder* that the exercise of jurisdiction based on contacts unrelated to the aircraft accident in Africa did not offend its understanding of the "traditional notions of fair play and substantial justice."\(^\text{78}\)

In *State ex rel. Hydraulic Servocontrols Corp. v. Dale*,\(^\text{79}\) the Oregon Supreme Court held that a component manufacturer which sold parts to be incorporated into aircraft to be distributed throughout the country could reasonably expect to be haled into court in every state, because it "delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in [every state]."\(^\text{80}\) The

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\(^{75}\) Id. at 18,185-86.


\(^{77}\) 445 N.E.2d at 1306. In *Maunder*, the court placed great reliance on the "control" exercised over the subsidiary by the parent, including the complete stock ownership by the parent and the combined financial statement of the parent and the subsidiary. The court concluded that the Illinois subsidiary was merely an "alter ego" of its corporate parent. *Id.*

\(^{78}\) Id. at 1307.

\(^{79}\) 294 Or. 381, 657 P.2d 211 (1982).

\(^{80}\) 657 P.2d at 215 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)).
Oregon court based its decision upon the *Gray v. American Radiator* line of authority, indicating that *Gray* was not limited by the later Supreme Court decision in *World-Wide Volkswagen Corp. v. Woodson*. This decision is consistent with other products liability cases limiting *World-Wide Volkswagen*, which have held that non-resident corporate defendants further up the chain of distribution of products introduced into the nationwide "stream of commerce" may be subject to jurisdiction, while distributors further down the chain of distribution which limit their distribution activities to specific states and territories generally are not subject to jurisdiction throughout the United States under a "stream of commerce" theory.

A case which demonstrates the disparate treatment of non-resident corporate defendants depending upon their products and services provided to aircraft is *Roberts v. Piper Aircraft Corp.* *Roberts* involved an aircraft accident in New Mexico. The plaintiff brought suit in a New Mexico court against a non-resident Oklahoma engine repair facility, a non-resident hydraulic pump maintenance facility, and a non-resident supplier of fuel for the aircraft. Even though all three of the non-resident corporate defendants could have expected that the aircraft they repaired or serviced might have an accident in any state, the *Roberts* court considered whether each defendant had contacts with New Mexico, derived revenue from New Mexico, availed itself of the protection of New Mexico laws, or did repair work for New Mexico residents, in order to determine whether any of the defendants might reasonably have expected to be haled into court in New Mexico. With regard to the Oklahoma engine repair facility, the court observed that it derived substantial revenue from New Mexico, availed itself of the protection of New Mexico

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81 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
83 See, e.g., Nelson v. Park Indus., 717 F.2d 1120, 1125-26 (7th Cir. 1983), and cases cited therein.
85 670 P.2d at 977-79.
laws and did repair work for New Mexico residents. The court therefore held that it was not unreasonable or unfair for it to defend litigation in New Mexico arising from a New Mexico accident. As to the non-resident fuel supplier, the court found that it did not have any contacts, ties, or relations with New Mexico and the fact that fuel sold by the supplier found its way into New Mexico did not support the exercise of personal jurisdiction. Finally, with regard to the maintenance facility that performed repair work on the hydraulic pumps, the court held that the plaintiffs had not carried their burden of proof to present evidence sufficiently connecting the non-resident corporate defendant to New Mexico to sustain the exercise of personal jurisdiction.

*Hydraulic Servocontrols* and *Roberts* contrast the treatment accorded component manufacturers and servicers of aircraft and suppliers of aircraft products. *Hydraulic Servocontrols* shows that courts are likely to find that a component manufacturer which sells components to be incorporated into aircraft to be sold and used throughout the United States can reasonably expect to be subjected to jurisdiction for claims arising from accidents within all states. On the other hand, *Roberts* indicated that repair facilities and suppliers of aviation products which limit their services and sales of products to specific geographic areas will probably not be subject to jurisdiction under a "stream of commerce" theory for accidents in foreign states. If, however, such repair facilities or suppliers specifically attempt to do business with persons in the forum state, derive revenue from the forum state and avail themselves of protection of the laws of the forum state, they may be subject to in personam jurisdiction. Even under these circumstances, however, the exercise of personal jurisdiction over the repair facilities or suppliers would be proper.

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66 *Id.* at 978-79. The Oklahoma repair facility had also advertised in two national aviation journals. *Id.* at 978.

67 *Id.* The supplier was a Las Vegas, Nevada fixed base operator which did not "solicit" business from New Mexico. *Id.*

68 *Id.* at 979.
only if it does not offend traditional notions of fair play and substantial justice.

In another case, *Schneider v. Sverdsten Logging Co.*, the Idaho Supreme Court held that both the former Pennsylvania corporate owner-operator of an aircraft and the maintenance facility which had maintained an aircraft in Pennsylvania had insufficient contacts with Idaho to support long-arm jurisdiction in Idaho for an accident occurring after the sale of the aircraft to an Idaho resident. The *Schneider* court stated that, although the maintenance facility advertised nationally, there was no specific showing that it had attempted to service the Idaho market by means of such advertising. The court therefore declined to exercise personal jurisdiction over the non-resident corporate defendants.

A comparison of the activities of the engine repair facilities in *Roberts* and *Schneider* demonstrates that the exercise of in personam jurisdiction is largely a question of degree because both facilities had advertised to a national market. A showing was made in *Roberts*, however, that the facility actually served the New Mexico market through its advertising, while no showing of service to the Idaho market was made in *Schneider*. The mere presence of national advertising apparently does not alone justify the exercise of personal jurisdiction in every state. Although these opinions do not state a rule that the exercise of in personam jurisdiction based solely on national advertising apparently would necessarily offend traditional notions of fair play and substantial justice, the courts seem to be in agreement that the exercise of jurisdiction in such circumstances would be unconstitutional.

C. Forum Non Conveniens

Since the decision of the United States Supreme Court in *Piper Aircraft Co. v. Reyno*, the federal courts have had numerous occasions to consider the application of forum non con-
veniens as grounds for the dismissal of actions. The First, Second and Ninth Circuits have affirmed forum non conveniens dismissals during the past year. In contrast, the Seventh Circuit, while recognizing the proper application of the doctrine of forum non conveniens, has held that a district court failed to consider several important factors with regard to a dismissal and remanded the case to the district court for further consideration.

In Ahmed v. Boeing Co., the First Circuit affirmed the district court's forum non conveniens dismissal in a suit brought by the representatives of twenty-two Pakistani citizens who were killed in an accident involving a Pakistani airliner en route from Saudi Arabia to Pakistan. The Massachusetts district court accepted a carefully detailed recommendation from the magistrate to dismiss the suit for forum non conveniens reasons if the defendant, Boeing, would agree to appear as a defendant in either Saudi Arabia or Pakistan, to forego any statute of limitations defense other than those available if the case remained in Massachusetts, to make available any witness's evidence and to pay any judgment rendered against it. The First Circuit stated that Ahmed was "on all fours" with Piper Aircraft Co. v. Reyno, because the comparative availability of witnesses and evidence, the place of the accident, the nationality of the victims, and the comparative judicial familiarity with the likely applicable law all strongly favored a trial abroad.

The plaintiffs in Ahmed argued that the trial court failed to consider that Pakistani International Airlines had already paid approximately $30,000 respectively to eighteen of the twenty-two plaintiffs. This payment, known as the "diah", or "blood money," was given in settlement of the survivors'
claims. The plaintiffs argued that such settlements indicated that the case presented the "rare circumstances" in which the remedy offered by another forum is clearly unsatisfactory. The First Circuit concluded that a Massachusetts court would probably have to apply foreign law with regard to "diah" payments and, in any event, a possible limitation on damages to such "diah" payments resulted in at most a change in the substantive law which the Supreme Court held to not be determinative in Piper Aircraft. The court added that the "rare exception" referred to in Piper Aircraft is limited to cases in which the application of a foreign substantive law would be both different and basically unjust. The court held that the district court had not abused its discretion in finding that the 100,000 Ryal "diah" did not present such a rare exception with regard to the foreign plaintiffs.

In Overseas National Airways v. Cargolux Airlines Int'l, the Second Circuit held that the balance of factors weighed heavily in favor of a foreign forum in a case involving the destruction of the hull of an aircraft while the aircraft was undergoing modification at a hanger in a foreign country. The court pointed out that at least two foreign citizens were essential witnesses, the principal documents were located in the foreign country and were in a foreign language, and foreign contract law applied to the property damage claim. Accordingly, the court considered dismissal on the basis of forum non conveniens appropriate.

In Cheng v. Boeing Co., the Ninth Circuit affirmed a forum non conveniens dismissal of the claims of foreign nationals

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98 Id.
99 Id.
100 Id. at 225-26.
101 712 F.2d 11 (2d Cir. 1983).
102 Id. at 14. Justice Oakes, who dissented in Fitzgerald v. Texaco, 521 F.2d 448, 456 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976), concurred in the opinion of the court but noted that he was not retreating from the view that the entire forum non conveniens doctrine should be reexamined in light of the "transportation revolution that has occurred in the last thirty-six years." 712 F.2d at 14.
arising out of an aircraft accident in Taiwan.\textsuperscript{104} The Ninth Circuit approved of the district court's finding that Taiwan was a proper alternative forum.\textsuperscript{105} The Ninth Circuit also approved the district court's conclusion that both private and public interest factors favored a foreign forum for the claims of foreign nationals against a foreign air carrier, an American air carrier, and an American aircraft manufacturer where the accident occurred in a foreign country operated by the foreign carrier.\textsuperscript{106}

In Apolinar\'o v. Avco Corp.,\textsuperscript{107} a federal district court in Connecticut held that the claims of two Canadian citizens for damages sustained as a result of the crash of a helicopter in Ontario during a flight from Edmonton to Montreal should be dismissed based on forum non conveniens. The Apolinar\'o court found the fact that Canada provided an available alternative forum, that the plaintiffs were Canadian, that the owner and operator of the aircraft was a foreign national, and that the airframe manufacturer was a foreign national, all strongly favored a foreign forum for the claims against the Connecticut-based manufacturer of the helicopter engine.\textsuperscript{108}

In Wahlin v. Edo Corp.,\textsuperscript{109} a New York trial court found that the wrongful death actions brought in New York by representatives of foreign nationals killed in a Swedish aircraft accident against the manufacturer of the aircraft and its components had no nexus with New York. The court held that Sweden was a proper alternative forum and was the most appropriate forum because of the availability of witnesses and evidence relating to the accident and the maintenance of the aircraft, and because the owners, operators, and the maintenance facilities were subject to personal jurisdiction in the Swedish courts. Instead of dismissing the action, however, the New York court stayed the action pending ac-

\textsuperscript{104} Id. at 1409-11.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} 561 F. Supp. 608 (D. Conn. 1982).
\textsuperscript{108} Id. at 609-11.
\textsuperscript{109} 17 Av. Cas. (CCH) 17,562 (N.Y. Sup. Ct. 1982).
The Seventh Circuit reversed a forum non conveniens dismissal in *Macedo v. Boeing Co.* Macedo arose from an accident in Portugal. The Seventh Circuit held that while the plaintiffs had no connection with Illinois and under the Illinois choice of law rules Portuguese law would apply to many of the issues, the district court had failed to consider the need for discovery under the federal rules with respect to the aircraft manufacturer and the financial burden that would be imposed on American plaintiffs bringing the action in Portugal. Accordingly, the Seventh Circuit remanded the case to the district court for a consideration of these private interest factors, including consideration of a co-pending motion to transfer the actions from the Northern District of Illinois to the Western District of Washington.

The District of Columbia Circuit also held that a forum non conveniens dismissal was not proper. The court in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.* reversed such a dismissal because private interest factors showed that scientific evidence, documentary evidence, and the familiarity of the court and counsel with the accident favored the United States as a proper forum. In *Friends* the claims were brought by foreign nationals injured in an accident involving a Lockheed C-5 aircraft during the evacuation of Viet Nam. The court stated that where private interest factors are not in equipoise, then public interest factors need not be consulted.

Similarly, in *Rucht v. Boeing Co.*, a Pennsylvania federal court held, in the context of an aircraft accident in West Germany, that a forum non conveniens dismissal of the claims of
foreign nationals would not be proper where claims of American nationals would be litigated in the United States. The court stated that a dismissal would result in separating the cases and litigation between the United States and West Germany. The court concluded that such a separation of the cases would not advance the interests of ease of litigation or reduction of expenses.\footnote{Id at 17,154.}

Finally, in \textit{In re Aircraft Disaster Near Bombay, India on January 1, 1978}, a Washington federal district court held that because the statute of limitations for filing suits in India had expired, the defendants failed to meet their burden of showing that there was an alternative forum. In addition, the \textit{Bombay} court held that the Death on the High Seas Act (DOHSA)\footnote{46 U.S.C. §§ 761-67 (1976).} applied to death claims of foreign nationals against an American aircraft manufacturer. The court reasoned that the "high seas" are not necessarily limited to international waters and consequently applied DOHSA although the crash occurred within Indian territorial waters. The \textit{Bombay} court also held that Indian law would apply to the claims.\footnote{531 F. Supp. at 1188-91.}

In general, these forum non conveniens cases substantially limit the accessibility of American courts to foreign nationals asserting claims against both foreign and American defendants arising out of aircraft accidents in foreign countries. It also appears, however, that in order for a forum non conveniens dismissal to be proper, an appropriate alternative forum must exist. Under certain circumstances that requirement is not met if a foreign statute of limitations has expired, if the plaintiffs will be unable to obtain discovery from American defendants, or if necessary information is available only in the United States. Finally, forum non conveniens dismissals of the claims of American nationals arising out of foreign aircraft accidents generally have not been favored in the absence of a clear showing that other private
interest factors favor the alternative forum. Of course, as in Piper Aircraft Co. v. Reyno, obstacles to forum non conveniens dismissals, such as the inability to secure discovery against American defendants or the expiration of foreign statutes of limitations, may be avoided where defendants consent to cooperate in providing such discovery or waive the applicable foreign statutes of limitations.

D. Death on the High Seas Act and Suits in Admiralty Act

In Williams v. United States,122 the Ninth Circuit held that death claims against the United States for negligently failing to undertake timely measures to locate and report the loss of a transoceanic flight between California and Hawaii arose under admiralty law because the wrong occurred over navigable waters and the flight bore a significant relation to traditional maritime activity performed by water-borne vessels. The court further held that admiralty claims against the United States are not proper under the Federal Tort Claims Act123 because that Act is not applicable to admiralty claims. The court added that the exclusive basis for jurisdiction over admiralty claims against the United States is the Suits in Admiralty Act.124 Moreover, since the plaintiffs had sued the FAA, not the United States as required by the Suits in Admiralty Act,125 and since the United States was not served within the two year statute of limitations applicable to the Suits in Admiralty Act,126 the court barred the claims despite the fact that administrative claims against the FAA had been filed within the two year statute of limitations period.127 The

122 17 Av. Cas. (CCH) 18,533 (9th Cir. 1983).
125 46 U.S.C. § 781 (1976) states that:
A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States ...
127 17 Av. Cas. (CCH) at 18,535-36.
court further refused to allow the plaintiffs to add the United States as a defendant, under Federal Rule of Civil Procedure 15(c), because notice to the FAA would not be imputed to the United States Attorney or Attorney General.\textsuperscript{128}

In \textit{Alexander v. United Technologies Corp.},\textsuperscript{129} a Connecticut federal district court addressed whether the Death on the High Seas Act (DOHSA)\textsuperscript{130} confers exclusive jurisdiction upon the federal courts and therefore entitles a defendant to remove a case involving a death on the high seas from state court to federal court under federal question removal jurisdiction. In \textit{Alexander}, the representatives of an individual killed in a helicopter accident off the coast of Brazil brought suit in Connecticut state court for wrongful death under Connecticut law.\textsuperscript{131} The court held that DOHSA was intended to establish a concurrent rather than exclusive remedy for claims arising from deaths on the high seas. The \textit{Alexander} court added that exclusive admiralty jurisdiction was not compelled because the claims against the defendant helicopter manufacturer did not arise from traditional maritime activity, but rather arose from the design, manufacture, sale and distribution of the helicopter involved in the accident.\textsuperscript{132}

In \textit{Miller v. Eaton Corp.},\textsuperscript{133} a federal district court in Georgia held that the amended statute of limitations under DOHSA (extending the limitation period from two to three years)\textsuperscript{134} applied retroactively to a claim arising prior to the amendment. The amendment was enacted prior to the expiration of the former two year period of limitation on the plaintiff's

\textsuperscript{128} Id.
\textsuperscript{129} 548 F. Supp. 139 (D. Conn. 1982).
\textsuperscript{130} 46 U.S.C. §§ 761-67.
\textsuperscript{131} 548 F. Supp. at 140.
\textsuperscript{132} Id. at 143. The plaintiff in \textit{Alexander} based his claim entirely on state law and chose not to seek the remedy provided by the Death on the High Seas Act. The court noted that "[t]he plaintiff is the master of his claim and is entitled to choose the law he will rely upon." \textit{Id.}
\textsuperscript{133} 18 Av. Cas. (CCH) 17,337 (N.D. Ga. 1983).
claims. The court interpreted the amendment as being remedial because the prior two year limitation period did not extinguish rights under DOHSA but merely barred actions. In effect, the Miller court applied the general rule recognizing the "validity of statutes enlarging the period of limitation as to existing causes of action, that is, causes of action not barred by the original limitation."135

E. Federal Removal

In two cases during the survey period, a federal district court in New York reaffirmed the right of a defendant to remove a case arising under the Warsaw Convention136 to federal court on the basis of federal treaty jurisdiction. In Reiser v. Meloi World Travel Service,137 the court indicated that removal of a claim governed by the Warsaw Convention was proper, with the court apparently having had ancillary jurisdiction over other non-Warsaw claims arising from the same occurrence.138 In Feuer v. Pan American World Airways,139 the same court found that cases arising under the Warsaw Convention may be removed to federal court even though the state courts have concurrent jurisdiction and the plaintiff ordinarily has the right to select a forum.140

In another removal case, the same New York federal court in Lopez v. American Airlines141 found that removal based upon diversity jurisdiction was proper even though the defendant American Airlines was doing business in New York.142 The Lopez court applied the "nerve center" test for determining the principal place of business for an airline with far-flung activities, concluding that Texas was the "center of all signifi-

135 18 Av. Cas. (CCH) at 17,338.
137 18 Av. Cas. (CCH) 17,208 (S.D.N.Y. 1983).
138 See id. at 17,208-11.
139 17 Av. Cas. (CCH) 18,325 (S.D.N.Y. 1983).
140 Id.
141 17 Av. Cas. (CCH) 17,892 (S.D.N.Y. 1983).
142 Id. at 17,892.
cant corporate policy-making activity." Accordingly, the court allowed American Airlines to remove the case from a state court in New York to the federal district court for the Southern District of New York.

IV. CONFLICT OF LAWS

The cases decided during the survey period showed a continued trend toward the adoption of "governmental interest analysis" and the Restatement (Second) of Conflicts "substantial relationship test" in determining the law to be applied to issues arising from aircraft accident litigation.

In *In re Air Crash Disaster at Washington, D.C.: on January 13, 1982*, the federal district court for the District of Columbia held that for cases filed in other districts based on diversity jurisdiction and transferred to the District of Columbia, it must follow the conflict of laws rules of the states in which the actions were originally filed. The court then applied the various state conflicts rules to the issues relating to the defendants' liability for compensatory damages, apportionment of liability among defendants, and defendants' liability for punitive damages. The court held that as to all cases filed in jurisdictions following the "governmental interest analysis," the law of the District of Columbia would be applied to govern the question of the liability of the aircraft manufacturer for punitive damages, rather than the law of the State of Washington in which the aircraft was manufactured.

The court distinguished the case before it from the cases arising from the American Airlines DC-10 accident in Chicago. The court stated that the District of Columbia's in-

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143 Id.
144 Id.
147 See id. at 335. The court's earlier memorandum opinion and order had determined that the laws of the State of Washington, where the aircraft was manufactured, would govern the assessment of punitive damages against the Boeing Company. Id.
148 Id. at 352-59.
interest in liability for punitive damages vis-a-vis Washington (the state of manufacture) was greater than Illinois' interest vis-a-vis the other two interested states (California and Missouri) in the Chicago crash.\textsuperscript{150} The court also noted that the Boeing 737 aircraft had been designed for operation from airports such as Washington National Airport, and that the District of Columbia had a substantial interest in accidents involving aircraft designed to operate from its territory.\textsuperscript{151} The court added that the State of Washington had an interest in the design of the aircraft, but that such interest was not greater than the interest of the District of Columbia in the case.\textsuperscript{152}

In \textit{Proprietors Insurance Co. v. Valsecchi},\textsuperscript{153} a Florida appellate court applied the significant relationship analysis to claims arising from the deaths of Florida residents in an accident in North Carolina. The accident involved an aircraft rented in Florida, owned by Florida residents, and on a trip which was intended to begin in Florida and end in Florida. The \textit{Valsecchi} court rejected the application of the law of the place of the accident on the issue of wrongful death damages under the significant relationships test because the crash in North Carolina was purely fortuitous and the plaintiffs' decedents had no other contacts, such as employment or temporary residence, with North Carolina.\textsuperscript{154} The court also rejected the

\textsuperscript{150} Id. at 337.

\textsuperscript{151} Id. at 358. The court stated:

Boeing has a much more substantial relationship to the District of Columbia than a manufacturer generally has to the site of injury in a typical "fortuitous crash" case. It reasonably could have foreseen and no doubt desired, that its short-haul 737 aircraft would be used for flights out of Washington National Airport, one of the nation's busiest airports and a station limited by federal regulation to flights shorter than 1000 statute miles.

\textsuperscript{152} Id. at 359.

\textsuperscript{153} 18 Av. Cas. (CCH) 17,433 (Fla. Dist. Ct. App. 1983).

\textsuperscript{154} Id. at 17,435-36.
contention that the *lex loci delictus* rule should be applied in a case in which the law of the place where the accident occurred is more generous than the law of the state to be applied under the significant relationships test.155

In *Schulhof v. Northeast Cellulose, Inc.*,156 a Massachusetts federal court applied a Massachusetts conflicts rule very similar to the governmental interest analysis. The *Schulhof* court held that with regard to claims arising from a mid-air collision over Massachusetts, Massachusetts law would apply to tort liability issues and to the issues of compensatory and punitive damages. On the other hand, as to claims arising from breach of the contract of carriage which had been formed in New Hampshire, the court held that New Hampshire law would apply.157

Finally, in *Sargent Industries v. Delta Airlines*,158 the Georgia Supreme Court, in response to a certified question by the Eleventh Circuit, held that the Georgia *lex loci delictus* rule applied to indemnity claims against the employer of the claimant, even though the employment relationship was localized in another state, and even though the employee was drawing worker’s compensation in the other state.159 The court noted, however, that the accident and injury occurred in Georgia and that the plaintiff would have been eligible for worker's compensation in both states.160

V. FEDERAL TORT CLAIMS ACT

A. Applicability

In *Lockheed Aircraft Co. v. United States*,161 the United States Supreme Court held that the Federal Employees Compensation Act (FECA)162 does not bar a Federal Tort Claims Act

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155 Id. at 17,436-37.
157 Id. at 1208-10.
158 17 Av. Cas. (CCH) 18,592 (11th Cir. 1983).
159 Id. at 18,594.
160 Id.
(FTCA)” indeminity action by a manufacturer against the United States arising from the claims of a federal employee against the manufacturer, even though the federal employee would have been barred from suit against the United States. The Supreme Court carefully reviewed the FECA, and could find no evidence of congressional intent or any other basis for implying a limitation under the FECA on the indemnity rights of third parties against the United States. The Court distinguished Lockheed from the Feres and Stencel doctrines, which limit indemnity claims against the United States arising out of military accidents on the ground that the waiver of sovereign immunity set forth in the FTCA does not extend to military personnel. The Court resolved, however, that the waiver of sovereign immunity does extend to claims arising from accidents involving other government employees.

In Heflee v. United States, the Tenth Circuit reaffirmed the application of the Feres and Stencel doctrines to indemnity claims of a helicopter manufacturer against the federal government based on an implied contract of indemnity relating to the maintenance and inspection of aircraft. The Heflee court held that the contract claims were barred by the Feres and Stencel doctrines since the claims directly related to the conduct of the military. Furthermore, according to the court, military superiors were entitled to immunity from suit under the Feres and Stencel doctrines. Finally, the Heflee

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164 103 S. Ct. 1036-37.
165 Id. at 1037-38 n.8. See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); Feres v. United States, 340 U.S. 135 (1950). The Court in Feres held that the United States is not liable under the Federal Tort Claims Act for injuries to service-men suffered in activity incident to service. The Court in Stencel extended the immunity recognized in Feres to third-party indemnity actions against the United States. Justice Rehnquist and the Chief Justice, dissenting in Lockheed, opined that the majority was “mistaken when it state[d] that Stencel was decided ‘without regard to any exclusive liability provision.’” 103 S. Ct. at 1040 n.4.
166 Id. at 1036-37.
167 713 F.2d 1487 (10th Cir. 1983).
168 Id. at 1492-93.
169 Id. at 1490-92. The court noted that immunity applied regardless of whether the alleged act of negligence was discretionary or ministerial, and further rejected the plain-
court held, in evaluating the sovereign immunity statutes of Kansas, that the Kansas National Guard and the State of Kansas were also entitled to sovereign immunity from indemnity claims under the state statutes.170

In Sellfors v. United States171 the Eleventh Circuit held that the Airport and Airway Development Act of 1970172 does not create a privately enforceable statutory duty on the part of the federal government inuring to private citizens using federally funded airports. Sellfors involved the crash of a private plane which had ingested birds into its engines during take-off. The plaintiffs had alleged that air traffic controllers were negligent in failing to warn the pilot of the proximity of the birds.173 The court further held that the FTCA does not allow a claim against the federal government where state law would not permit such action based upon the omission or failure on the part of the FAA to enforce grant agreements with airport operators.174

B. Discretionary Functions

One of the most significant issues pending before the Supreme Court during the survey period is presented in two cases from the Ninth Circuit. In Varig Airlines v. United States175 and United Scottish Insurance Co. v. United States,176 the Ninth Circuit held that the certification and inspection of aircraft by the FAA does not fall within the discretionary function exception to the Federal Tort Claims Act. On appeal to

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tiff's argument that the Feres and Stencel doctrines did not apply when the injured party was not on "active duty." Id. at 1492.

170 Id. at 1493-94. The court would not retroactively apply the Tort Claims Act of the State of Kansas, KAN. STAT. ANN. §§ 75-6101 to 75-6118 (Supp. 1982), which was enacted after the accident.

171 697 F.2d 1361 (11th Cir. 1983).


173 697 F.2d at 1364.

174 Id. at 1367-68. The court noted that the laws of the State of Georgia did not recognize a "comparable private liability" under Miree v. United States, 242 Ga. 126, 249 S.E.2d 573 (1978), and that the plaintiff had not shown the acts necessary to create a duty under the good samaritan doctrine as set forth in RESTATEMENT (SECOND) OF TORTS § 323 (1965).

175 692 F.2d 1205 (9th Cir.), cert. granted, 103 S. Ct. 1084 (1983).

176 692 F.2d 1209 (9th Cir.), cert. granted, 103 S. Ct. 1084 (1983).
the Supreme Court, the issues presented in the two cases are whether the United States can be held liable under the Federal Tort Claims Act for the FAA's alleged failure to discover safety defects while carrying out its regulatory duty of certifying airworthiness of commercial aircraft and whether such FTCA actions are barred by the "discretionary function" or "misrepresentation" exceptions to the FTCA.\footnote{52 U.S.L.W. 3074-75 (U.S. Aug. 16, 1983). The Supreme Court held in these consolidated cases that the discretionary function exception to the FTCA precludes a tort action based upon the negligence of the FAA in certifying aircraft for use in commercial aviation. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 60 (1984) [Eds.].}

A similar question was presented to the Fourth Circuit in \textit{George v. United States}.\footnote{703 F.2d 90 (9th Cir. 1983).} In \textit{George}, the Fourth Circuit held that the FAA's failure to issue standards banning the use of a defective method of designing aircraft fuel systems does not subject the United States to liability under the FTCA. The Fourth Circuit reasoned that the discretionary function exception bars recovery based on faulty FAA approval of aircraft design features, or more specifically, bars recovery based on the FAA's issuance of type, production, and airworthiness certificates and failure to warn of dangers discovered in the course of the certification process.\footnote{Id. at 90-92.}

Similarly, in \textit{Hudson v. United States},\footnote{17 Av. Cas. (CCH) 17,718 (N.D. Tex. 1982).} a Texas federal district court held that the Federal Aviation Act does not give rise to a private cause of action against the United States for the FAA's negligence in certifying a mechanic and an authorized inspector. The court held that the mechanic and inspector were not employees of the Federal Aviation Administration and that the FAA did not control the details of their work.\footnote{Id. at 17,720-21.} Moreover, the court indicated that the Federal Aviation Act does not create a private cause of action.\footnote{Id. at 17,721.}

During the survey period, the District of Columbia Circuit interpreted the discretionary function exception to the FTCA in two cases involving the denial of medical certificates by the
FAA. In both **Harr v. United States**\(^{183}\) and **Beins v. United States**\(^{184}\) the District of Columbia Circuit held that the discretionary function exception of the FTCA does not preclude all claims against the FAA arising from the negligent failure of the FAA to administer and evaluate applications for medical certification under its regulations.\(^{185}\) Furthermore, in **Harr**, the court also held that failure to disclose information to a pilot applicant in a timely manner constitutes a basis for a FTCA claim for negligence and that such failure does not fall within the discretionary function exception of the FTCA.\(^{186}\)

Finally, in **Medley v. United States**,\(^{187}\) a California federal district court held that a decision of the FAA to chart an airway over a mountainous area was a discretionary function and therefore within the discretionary function exception of the FTCA.\(^{188}\) The court also held, however, that once the FAA decided to establish the route over a mountainous area, failure to warn of dangers associated with the route did not fall within the discretionary function exception of the FTCA.\(^{189}\)

### C. Other Cases

In **Brooks v. United States**,\(^{190}\) the Fifth Circuit affirmed a trial court decision holding that the FAA negligently failed to provide a pilot with Notices to Airmen (NOTAMS) relating to runway construction.\(^{191}\) The court also upheld a trial court finding that the pilot had been twenty-five percent negligent under the Texas comparative negligence statute in failing to obtain sufficient information regarding his flight and in failing to overfly an unfamiliar field before landing.\(^{192}\)

\(^{183}\) 705 F.2d 500 (D.C. Cir. 1983).

\(^{184}\) 695 F.2d 591 (D.C. Cir. 1982).

\(^{185}\) *Harr v. United States*, 705 F.2d at 505-06; Beins v. United States, 695 F.2d at 600-05.

\(^{186}\) *Harr v. United States*, 705 F.2d at 505-06.

\(^{187}\) 17 Av. Cas. (CCH) 17,738 (N.D. Cal. 1982).

\(^{188}\) *Id.* at 17,743.

\(^{189}\) *Id.* at 17,745.

\(^{190}\) 695 F.2d 984 (5th Cir. 1983).

\(^{191}\) *Id.* at 989-90.

\(^{192}\) *Id.* at 990.
In *Dyer v. United States*, a federal court in Michigan held that a pilot had been eighty percent negligent in failing to heed advice against VFR flight, failing to update weather information, failing to check the weather en route and at his destination, and failing to communicate flight conditions to air traffic controllers. The failure of the air traffic controllers to elicit information from the pilot, to properly record weather conditions, and to indicate their intentions to the pilot in handling his emergency constituted twenty percent negligence on the part of the FAA. The court also held that both pilots and air traffic controllers have concurrent duties and responsibilities for the safety of flight.

In *Doak v. United States*, an Arizona federal court held that the failure of a pilot to maintain a proper lookout for other aircraft constituted contributory negligence. The court denied recovery because under Arizona law contributory negligence bars any recovery, even if the government is also negligent in providing air traffic control services.

In *Wallace v. United States*, a federal district court in Georgia held that a pilot's failure to carry sufficient fuel on board and to timely notify air traffic controllers of a fuel emergency was the proximate cause of the resulting accident. Furthermore, the *Wallace* court found that there was no liability for the alleged negligence on the part of the air traffic controllers in South Carolina for failing to relay information to subsequent controllers in Florida who were handling the aircraft at the time of its crash. The court reasoned that the crash was in no way caused by the fact that the subsequent controllers were unaware that the aircraft had experienced some navigation, communication and instrument difficulties and that the pilot had previously been notified of a minor course.

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194 Id. at 1276-77, 1280.
195 Id. at 1277-80.
196 Id. at 1275-76.
197 17 Av. Cas. (CCH) 17,985 (D. Ariz. 1982).
198 Id. at 17,987-88.
199 17 Av. Cas. (CCH) 18,066 (S.D. Ga. 1982).
deviation which he corrected. Finally, the Wallace court considered the pilot's request, "we need vectors to the nearest airport," following two missed approaches at his destination insufficient to put controllers on notice of a potential fuel emergency.

In Hersch v. United States, the Sixth Circuit affirmed a trial court's findings that the conduct of air traffic controllers was not a proximate cause of an unexplained accident in which the plaintiff alleged that wing tip vortices from a converging aircraft had been the cause of the accident. The Hersch court held that the trial court's findings that the aircraft did not converge were not clearly erroneous. The appellate court further held that the trial judge was entitled to plot courses himself based on his personal military and sailing experience in order to support his finding.

In Keister v. United States, a Florida federal court held that in an accident under instrument meteorological conditions (IMC) in which the FAA provided all required weather information, issued proper instructions under the air traffic control manual, and fulfilled all responsibilities required by law, the inability of the pilot to control the aircraft under IMC was the sole proximate cause of the accident. The court explained that pilots on instrument flight plans have the responsibility to control spatial disorientation and that the pilot ultimately has the responsibility for the safe conduct of the flight.

VI. STRICT PRODUCTS LIABILITY AND NEGLIGENCE CASES

A. Strict Products Liability

In McKay v. Rockwell Int'l Corp., the Ninth Circuit held

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201 Id. at 18,072.
202 Id. at 18,073-74.
203 719 F.2d 873 (6th Cir. 1983).
204 Id. at 878.
205 18 Av. Cas. (CCH) 17,101 (S.D. Fla. 1983).
206 Id. at 17,104.
207 704 F.2d 444 (9th Cir. 1983), cert. denied, 104 S. Ct. 711 (1984).
that a manufacturer of a military aircraft could not be held strictly liable in tort for the death of a military pilot allegedly caused by a defective ejector seat. The court held that strict liability does not apply to the manufacturer of military equipment when the manufacturer proves that the equipment was manufactured to government specifications, that the manufacturer had warned the government of patent defects in the specifications, and that the United States is immune under the *Feres-Strickland* doctrine.\(^\text{207}\) The court based its decision to preclude strict liability in such cases on the ground that the socio-economic justification for strict liability does not apply with regard to the sale and use of military equipment.\(^\text{208}\)

In *James v. Bell Helicopter Co.*,\(^\text{209}\) the Fifth Circuit faced the issue of whether a claim against a helicopter manufacturer for damage to a helicopter for pure economic loss allegedly caused by a defective component part stated a strict liability claim under Texas law. The court held that claims against the manufacturer of the component part which caused the damage to the helicopter were claims for damage to property other than the component itself and therefore stated a strict products liability claim under Texas law.\(^\text{210}\) The court also held, however, that the alleged strict liability claims against the helicopter manufacturer were claims for pure economic loss and were not recoverable under Texas law.\(^\text{211}\)

In *Piper Aircraft Corp. v. Coulter*,\(^\text{212}\) a Florida appellate court held that strict liability will support a claim for punitive damages under Florida law. In addition, the court held that evidence that the manufacturer knew of the danger of accidental door openings and failed to warn passengers or failed to modify the airplane was sufficient to support a punitive

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\(^{207}\) *Id.* at 451.

\(^{208}\) *Id.* at 451-53.

\(^{209}\) 715 F.2d 166 (5th Cir. 1983), [*aff*] 491 F. Supp. 611 (N.D. Tex. 1979).

\(^{210}\) *Id.* at 170-71.

\(^{211}\) *Id.* at 170-72. *See* Robinson v. Parker-Hannifin Corp., 4 Ohio Misc. 2d 6, 447 N.E.2d 781 (C.P. 1982) (holding that contributory negligence is not a defense to a products liability case).

\(^{212}\) 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983).
damages award.\(^{213}\)

In *Elsworth v. Beech Aircraft Corp.*,\(^{214}\) a California appellate court held that a trial court erred in allowing the plaintiff to make a collateral attack on the FAA certification of an aircraft in order to attempt to prove a design defect based upon a failure to comply with FAA regulations relating to the certification of aircraft.\(^{215}\) The *Elsworth* court also held that the trial court erred in instructing the jury that if the plaintiff proved that the aircraft design did not meet the requirements of the FAA for type certification, then such failure might constitute negligence *per se*.\(^{216}\) On the other hand, the fact that the FAA had issued a type certificate and that the aircraft had been manufactured in accordance with the type certificate did not preclude plaintiff from attempting to prove a design defect or provide a complete defense to the manufacturer. In this case, however, the plaintiff failed to prove the existence of such a design defect or that the manufacturer had failed to warn of the operating precautions required of a pilot in charge of his airplane.\(^{217}\)

In *McGee v. Cessna Aircraft Co.*,\(^{218}\) a California appellate court expounded upon the peculiar burden of proof arising under California products liability law. In *McGee*, the court held that a jury verdict in favor of the defendant should be reversed on the ground that the trial court did not properly instruct the jury on the burden of proving proximate causation. The court explained that California products liability law shifts the burden of proof on the issues of defect *vel non* and proximate cause to the defendant once the plaintiff proves a *prima facie* case that she was within the class protected by a regulation, that the defendant violated the regulation, and that the injury resulted from an occurrence the regulation was designed to prevent.\(^{219}\) In addition, the Cali-
fornia court held that evidence of pilot error would generally not be admissible in crashworthiness cases, but because the plaintiffs also sought to recover on alleged airworthiness design defects (so that the cause of the crash was in issue), evidence of pilot error was admissible. Finally, the California court noted that while a product must be crashworthy, it need not necessarily be crashproof.

In Gobhai v. KLM Royal Dutch Airlines, the New York Supreme Court held that an air carrier which distributed slippers to its first-class passengers was not liable under New York strict products liability law for a fall allegedly caused by those slippers. The passenger’s mother allegedly slipped and fell on a non-carpeted area of an apartment while wearing the slippers. The court stated that the air carrier did not manufacture or design the slippers, that there had been no "sale" of the slippers, and that the distribution of such slippers by the airline was merely incidental to the basic service of air transportation.

B. Res Ipsa Loquitur

In Ashland v. Ling Temco Vought, Inc., the Ninth Circuit held that, in order for the doctrine of res ipsa loquitur to apply in multiple defendant cases, there must be a basis either for vicarious liability among the multiple defendants or a basis for finding that a breach of each defendant’s independent duty was more probably than not a contributing cause of the crash. In Ashland, defendant LTV had performed extensive modifications on a C-135 aircraft which was involved in a mysterious crash over the South Pacific Ocean while being operated by the United States Air Force. The court held that the doctrine of res ipsa loquitur could be applied not only to the United States, but also to LTV if the plaintiff carried her burden of proof of showing that “LTV was more probably

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220 Id. at 545-46.
221 Id. at 549 (citing Larsen v. General Motors Corp., 391 F.2d 485 (8th Cir. 1968)).
223 445 N.Y.S.2d at 446-47.
224 711 F.2d 1431 (9th Cir. 1983).
than not a contributing cause of the crash.\textsuperscript{225} The court was unable to determine based on the record, however, whether the evidence would support such a finding, and the case was remanded to the trial court for a trial limited to those issues.\textsuperscript{226}

In \textit{Tompkins v. Northwestern Union Trust Co.},\textsuperscript{227} the Montana Supreme Court addressed a similar issue and held that the doctrine of \textit{res ipsa loquitur} may be applied to a claim arising from the alleged negligence of a pilot, even though the defendant also produced evidence of equipment failure. The \textit{Tompkins} court held that it was not necessary for the plaintiff to prove that the pilot of the aircraft had exclusive control of all aspects of maintenance, inspection, and operation of the aircraft in order for the doctrine of \textit{res ipsa loquitur} to be applied to claims arising from the pilot's alleged negligence.\textsuperscript{228} Instead, the court held that the plaintiff was entitled to a jury charge on the doctrine of \textit{res ipsa loquitur} even though there had been evidence of equipment failure. The court indicated that under the facts of the case the jury could have found that the pilot's negligence could have combined with such equipment failure to proximately cause the accident.\textsuperscript{229}

Finally, in \textit{Winans v. Rockwell Int'l Corp.},\textsuperscript{230} the Fifth Circuit held that the doctrine of \textit{res ipsa loquitur} may not be applied in claims against a defendant repair facility where all possible tortfeasors are not joined and where the evidence does not negate the possibility of fault on behalf of the plaintiff. The Fifth Circuit noted that the repair facility did not exercise control over the aircraft at the time of the accident and that there was no showing that others with control were free from fault.\textsuperscript{231} Yet, when an aircraft had been within the exclusive control of one defendant, the Alaska Supreme Court held that the doctrine of \textit{res ipsa loquitur} applied, stating that air

\begin{itemize}
  \item \textsuperscript{225} \textit{Id.} at 1440.
  \item \textsuperscript{226} \textit{Id.} at 1441.
  \item \textsuperscript{227} 645 P.2d 402 (Mont. 1982).
  \item \textsuperscript{228} \textit{Id.} at 406.
  \item \textsuperscript{229} \textit{Id.}
  \item \textsuperscript{230} 705 F.2d 1449 (5th Cir. 1983).
  \item \textsuperscript{231} \textit{Id.} at 1454-55.
\end{itemize}
carrier accidents generally do not occur without negligence.\textsuperscript{232}

C. Persons Liable

Two cases considered the issue of airport operator liability during the survey period. In \textit{Alitalia-Linee Aeree Italiane v. United States},\textsuperscript{233} the district court in Massachusetts held that the failure of the airport operator to exercise reasonable care in clearing runways, inspecting the airport, and failing to provide adequate information to the aircraft crew regarding the height of snowbanks constituted negligence which proximately caused damage to an aircraft.\textsuperscript{234} In \textit{Osibov v. State of Washington},\textsuperscript{235} however, a Washington appellate court held that the failure of an airport operator to advise the FAA of construction on an airport (in contravention of FAA regulations) did not constitute negligence \textit{per se} since the purpose of the regulations was to allow the FAA to review construction and not necessarily to provide notice to pilots.\textsuperscript{236}

Also, in \textit{Puritan Insurance Co. v. Butler Aviation-Palm Beach},\textsuperscript{237} the Eleventh Circuit held that a fixed base operator had control over aircraft at its facility and became a bailee where it maintained a fence around the aircraft, controlled access to the area, and registered and parked all aircraft in its possession. The court did not consider the fact that the aircraft owner retained the key to the aircraft dispositive of the bailment issue. The court noted, however, that no ignition key was necessary to start the aircraft in question.\textsuperscript{238}

D. Contribution and Indemnity

In \textit{Herndon v. Seven Bar Flying Service},\textsuperscript{239} the Tenth Circuit decided that, even though New Mexico had adopted compar-

\textsuperscript{233} \textit{17 Av. Cas. (CCH) 18,160} (D. Mass. 1982).
\textsuperscript{234} \textit{Id. at 18,161-65.}
\textsuperscript{235} \textit{17 Av. Cas. (CCH) 18,110} (Wash. App. 1982).
\textsuperscript{236} \textit{Id. at 18,111-12.}
\textsuperscript{237} \textit{18 Av. Cas. (CCH) 17,201} (11th Cir. 1983).
\textsuperscript{238} \textit{Id. at 17,201-02.}
\textsuperscript{239} 716 F.2d 1322 (10th Cir. 1983).
ative fault, traditional indemnity principles continue to apply between joint tortfeasors. The court held that under such indemnity principles, a mechanic who fails to discover a defect is entitled to indemnification from a manufacturer of the defective component. The court rejected an argument that the comparative fault rules under New Mexico law supplanted the former indemnity rule based upon active and passive negligence, even though the proportionate share of liability to the plaintiff had been determined at the trial court.  

E. Evidence

Two cases during the past year dealt with testimony concerning National Transportation Safety Board (NTSB) investigations. In Swett v. Schenk, a California trial court held that an NTSB investigator cannot claim a privilege for statements which were made to the NTSB investigator by an employee of a party to litigation, and that the NTSB investigator may testify as to all but the opinions of the Board in regard to the ultimate cause of the accident. In McGee v. Cessna Aircraft Co., a California appellate court held that an FAA employee who is a party to an NTSB investigation may testify to the facts surrounding the investigation and as to standard calculations, but not as to opinions and conclusions based upon the investigation.

In Freeman v. Beech Aircraft Corp., the Ohio Court of Appeals held that only those portions of an NTSB report, including calculations, which are based on firsthand knowledge of the investigator are admissible under Ohio law. The court refused to admit those portions of the report not based on the observations of the investigator. The court noted that Ohio did not adopt Federal Rule of Evidence 803(8)(c) re-

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240 Id. at 1331-32.
241 18 Av. Cas. (CCH) 17,106 (Cal. Sup. Ct. 1983).
242 Id. at 17,106-08.
244 188 Cal. Rptr. at 551-52.
245 18 Av. Cas. (CCH) 17,275 (Ohio Ct. App. 1983).
246 Id. at 17,288.
247 OHIO EVID. R. 803(8) (Page 1981) deleted a portion of its federal counterpart
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Regarding the admissibility of portions of a report which are not within the first-hand knowledge of a government investigator.248

As to the admissibility of post-accident events, the Tenth Circuit in *Hemdon v. Seven Bar Flying Service*,249 held that post-accident service bulletins are admissible under Federal Rule of Evidence 407 in strict liability actions. The court stated that Rule 407's exclusion of subsequent remedial measures for the purpose of showing culpability was not applicable to strict liability actions because culpability is not at issue and the remedial measures are of value in proving the existence of a defect.250 In addition, the *Hemdon* court added that airworthiness directives are admissible because they are required by law, and the policy of encouraging post-accident remedial measures does not apply when the post-accident remedial measures are required by law.251

Contrarily, in *Freeman v. Beech Aircraft Corp.*,252 an Ohio appellate court held that a post-accident report regarding revised recommended safe single engine inoperative speeds for various aircraft is inadmissible in a strict liability case to prove that pre-accident warnings and data were incorrect or inadequate.253 And in *James v. Bell Helicopter Co.*,254 the Fifth Circuit refused to overrule the exclusion under Rule 407 of post-accident tests in the absence of a sufficient offer of proof as to the purpose for tendering the remedial measures into evidence.255

In *Kastner v. Beech Aircraft Corp.*,256 a Missouri appellate

which would have permitted the admission of public records containing "factual findings resulting from an investigation made pursuant to authority granted by law." *Id.* at 17,286.

*248 See id. at 17,286-88. See also Piper Aircraft Corp. v. Evans, 424 So. 2d 586 (Ala. 1982) (holding that FAA reports introduced to prove notice to the manufacturer of potential muffler hazards were not inadmissible as hearsay).

*249* 716 F.2d at 1326-29.

*250 Id.

*251 Id. at 1331.

*252* 18 Av. Cas. (CCH) 17,275 (Ohio Ct. App. 1983).

*253 Id. at 17,289-90.

*254* 715 F.2d 166, 174-75 (5th Cir. 1983).

*255 Id.

*256* 650 S.W.2d 312 (Mo. 1983).
court held that reports and recommendations of the NTSB are admissible where they do not include "probable cause" findings. The court also held that recommendations concerning other accidents are relevant to the issue of notice and are admissible to rehabilitate a witness who on cross-examination was asked whether anyone shared his opinions as to the existence of defects.\textsuperscript{257} The NTSB report was introduced to show that the NTSB concurred in the witness' opinions. Finally, the court concluded that such NTSB reports were not inadmissible as hearsay because they fell under an exception to the hearsay rule for official reports prepared pursuant to statutory authority.\textsuperscript{258}

In \textit{Radke v. Cessna Aircraft Co.},\textsuperscript{259} the Eighth Circuit held that a trial court did not abuse its discretion in allowing the defendant to present evidence of other litigation arising from the same accident and involving a particular witness in order to show bias or interest of the witness. In addition, the \textit{Radke} court upheld the admissibility of a felony drug conviction after balancing the probative value of the evidence against the possible prejudice where the witness was the only person to provide any testimony whatsoever of a defect in the aircraft which may have caused the accident.\textsuperscript{260}

Finally, in \textit{United States v. Weber Aircraft Corp.},\textsuperscript{261} the United States Supreme Court granted certiorari in a case involving whether statements made in confidence by witnesses in an Air Force air crash safety investigation are protected from disclosure under exemption five of the Freedom of Information Act (FIA).\textsuperscript{262} The Ninth Circuit Court of Appeals held that such confidential witness statements are not exempt from disclosure under exemption five of the FIA. The Ninth Circuit sug-

\textsuperscript{257} \textit{Id}. at 318.

\textsuperscript{258} \textit{Id}. at 319. \textit{See} \textit{Walker v. Fairchild Indus.,} 554 F. Supp. 650, 651-53 (D. Nev. 1982) (holding that certain military accident reports may be admissible under \textit{FED. R. EVID.} 803(8)(c), including evaluative opinions and conclusions, based on the timing of the report and the skill of the investigator and other indicia of trustworthiness).

\textsuperscript{260} 707 F.2d 999, 1001-02 (8th Cir. 1983).

\textsuperscript{261} \textit{Id}.

\textsuperscript{262} 688 F.2d 638 (9th Cir. 1982), \textit{cert. granted}, 103 S. Ct. 1499 (1983).

\textsuperscript{262} 51 U.S.L.W. 3811 (U.S. May 10, 1983).
gested that to interpret the FIA as exempting confidential witness statements prepared as a part of an Air Force collateral investigation would involve judicial amendment and create the evil which Congress sought to avoid in passing the FIA. 263

F. *Burden of Proof*

In two cases during the survey period, federal appellate courts affirmed directed verdicts in favor of manufacturers on the ground that the plaintiff failed to carry the burden of proof in establishing that a design defect proximately caused the accident involved in the cases. In *Hersch v. United States*, 264 the Sixth Circuit affirmed a trial court holding that the evidence was insufficient to show that the alleged design defects proximately caused the accident. The *Hersch* court held that a directed verdict in favor of the defendant manufacturer was proper because the plaintiff was unable to tilt the scales on the issue of causation from a mere "possibility" to a "probability." The court added that a jury should not be permitted to engage in speculation and conjecture on the issue of causation. 265

In *Browne v. McDonnell Douglas*, 266 the Ninth Circuit held that in order to avoid a directed verdict, a plaintiff must present substantial evidence that would rationally support the conclusion that a design defect proximately caused the accident. Moreover, the *Browne* court rejected the plaintiff's argument that broader inferences are justified in air crash cases than in other cases. 267 The court stated that "it is not the law that in aircraft crash cases everyone sued must pay." 268

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263 688 F.2d at 644. The Supreme Court reversed the Ninth Circuit, holding that confidential statements made to military air crash safety investigators are "Inter-Agency Memoranda" not routinely available to a private party in pre-trial discovery and as such are protected from disclosure by exemption five of the FIA. United States v. Weber Aircraft Corp., 104 S. Ct. 1488 (1984). [Eds.]

264 18 Av. Cas. (CCH) 17,291 (6th Cir. 1983).

265 Id. at 17,295.

266 17 Av. Cas. (CCH) 17,908 (9th Cir. 1982).

267 Id. at 17,909.

268 Id. (citing Leversen v. Boeing Co., 510 F.2d 937, 938 (9th Cir. 1975)).
VII. Air Carrier Liability

A. Warsaw Convention

1. Jurisdiction and Venue

The Second Circuit held in *Gayda v. LOT Polish Airlines*\(^\text{269}\) that the venue provisions of the Warsaw Convention (Convention)\(^\text{270}\) are jurisdictional, and that a federal court lacks subject matter jurisdiction where the plaintiff files a claim governed by the Convention in a place other than the venue specified.\(^\text{271}\) The *Gayda* court grounded its decisions in the Convention's very precise venue provisions which require that the claim be filed in one of the following locations:

1. The domicile of the defendant;
2. The principal place of business of the defendant;
3. The place of formation of the contract of carriage; or
4. The ultimate destination under the contract of carriage.\(^\text{272}\)

In *Hurley v. KLM Royal Dutch Airlines*,\(^\text{273}\) a California federal court held that the place of destination under a round trip ticket from Jeddah, Saudi Arabia was California in a case in which Santa Barbara, California was the destination on only one leg of the trip. The court adopted a "common sense" interpretation of destination (as employed in the venue provisions of the Convention), holding that at least two places of destination exist in a round trip ticket. The court then added that the determination of whether a particular stop constitutes a destination is to be determined by taking into account such factors as the passenger's intent, the nature of the stop and the length of the stop.\(^\text{274}\)

In *PT Airfast Services, Indonesia v. Superior Court of Siskiyou County*,\(^\text{275}\) a California appellate court held that where there

\(^{269}\) 702 F.2d 424 (2d Cir. 1983).

\(^{270}\) See supra note 136.

\(^{271}\) 704 F.2d at 425.

\(^{272}\) Id. (quoting Convention, supra note 136, at art. 28).

\(^{273}\) 18 Av. Cas. (CCH) 17,151 (C.D. Cal. 1983).

\(^{274}\) Id. at 17,152.

\(^{275}\) 17 Av. Cas. (CCH) 18,087 (Cal. App. 1983).
was not a single contract for individual travel by successive carriers, a "destination" existed for each segment of the journey. The court rejected an argument which, in substance, would have determined "destination" by the passenger's unilateral expectations as to his ultimate destination.276

Finally, in Hill v. United Airlines,277 a federal district court in Kansas held that article 28(1) of the Convention establishes jurisdiction within a particular country and does not address issues of jurisdiction and venue of a particular court within the United States. The court stated, therefore, that once jurisdiction and venue are established in the United States under article 28(1) the issues of jurisdiction and venue in a particular American court are controlled by domestic law.278 In addition the Hill court held that the Convention did not limit liability for the common law tort of intentional misrepresentation and further held that a claim for punitive damages fell within the willful misconduct exception.279

2. Applicability

The applicability of the Convention was addressed in several cases during the survey period. In two cases, the applicability of the Convention to embarking and disembarking accidents was discussed. In fact, the two cases involved falls on the same or similar sets of escalators in New York. In Curran v. Aer Lingus,280 a New York federal district court held that the air carrier was not liable for injuries under the Warsaw Convention when a passenger on an international flight fell on an escalator while going to the customs area of the airport. The court found that the passenger was not "disembarking" under either the location of the accident test or the control by the carrier test. The court chose not to hold either test determinative of "disembarking" however, because the outcome was the same under both.281

276 Id. at 18,090.
277 17 Av. Cas. (CCH) 18,100 (S.D.N.Y. 1982).
278 Id. at 18,104.
279 Id. at 18,105.
280 17 Av. Cas. (CCH) 17,560 (S.D.N.Y. 1982).
281 Id. at 17,561-62.
In Rolnick v. El Al Israel Airlines, another federal court in New York held that a passenger on an escalator who had checked his baggage and obtained a boarding pass, but had not yet entered the passport control area or an area controlled by the air carrier, could not recover under the Convention for his injuries sustained. The court applied the "fluid" analysis under Day v. Trans World Airlines in determining that the passenger's activities did not constitute embarkation on the international flight.

In a case concerning property damage claims, a federal district court in New York in Railroad Salvage of Connecticut v. Japan Freight Consolidators (USA) held that once the goods are delivered by the airlines to a motor carrier, the air travel associated with the goods has been terminated and the limitations on liability set forth in the Convention do not apply. Similarly, in Lerakoli, Inc. v. Pan American World Airways, the same federal court held that the Convention, by its terms, does not apply to international mail shipments. The court stated, however, that the liability of Pan Am, a sub-bailee, would not exceed the liability of the United States Postal Service, the bailee, unless Pan Am intentionally converted the lost parcels.

Finally, in Oliver v. Scandinavian Airline System, a Maryland federal court held that a claim for negligence arising from an intoxicated passenger falling on another passenger was an "accident" within the meaning of the Convention. Hence, the court held that the claims against the defendant air carrier were barred by the two year statute of limitations of Article 29 of the Convention.

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283 551 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). The Rolnick court described the test as "tripartite", focusing on "activity (what the plaintiffs were doing), control (at whose direction), and location." 551 F. Supp. at 263.
284 Id.
286 17 Av. Cas. (CCH) 18,107 (E.D.N.Y. 1983).
287 Id. at 18,108.
288 17 Av. Cas. (CCH) 18,283 (D. Md. 1983).
289 Id. at 18,284.
290 Id. at 18,284-85.
3. **Notice of Liability Limitations**

In *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980,* the Second Circuit held that an airline which fails to comply with the type-size requirements for the notice of limitations on liability could not avail itself of the liability limits of the Convention or invoke the defense to liability provided under the Convention. Notably, the failure of the airline to comply with the type requirements consisted entirely of using type size which was 15/270ths of an inch too small.

In *Mahmoud v. Alitalia Airlines,* a New York federal district court rejected a plaintiff's contention that she should have been provided with the treaty limitation information in her native language (Arabic). The court rejected the plaintiff's contention because of the practical difficulties which would arise if tickets were required to be printed in languages which all passengers could understand. Instead, the *Mahmoud* court stated that "it seems more reasonable and consistent with the treaty's policies to require passengers to ask for translations, if necessary."

4. **Notice of Claims**

In *Amazon Coffee Co. v. Trans World Airlines,* a New York state court held that neither actual knowledge of a loss, nor inspection of damaged property by airline investigators waived the notice of damage requirements under the Convention. The court observed that the Convention clearly requires notice in writing within seven days from the date of receipt of goods before an action would lie. In addition, the court held that the willful misconduct exception contained in the Convention relates only to monetary limits and does not waive or change the time limits for filing claims.

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292 *Id.*
293 17 Av. Cas. (CCH) 17,598 (S.D.N.Y. 1982).
294 *Id.* at 17,599.
295 *Id.*
296 18 Av. Cas. (CCH) 17,264 (N.Y. Sup. Ct. 1983).
297 *Id.* (quoting Convention, supra note 136, at art. 26).
298 *Id.* at 17,265.
In Dresser Industries v. KLM Royal Dutch Airlines, a Texas federal district court barred, in a motion for summary judgment, a property damage claim under both the seven day notice provision of the Convention and also under the 120-day notice provision of the air carrier's tariff filed with the CAB. Moreover, the court rejected any argument based upon lack of CAB authority over tariffs concerning foreign air transportation since the plaintiff had failed to present evidence sufficient to create an issue of fact on that point.

5. Limitation on Liability

By far the most significant development relating to the Convention during the survey period has been the consideration by the United States Supreme Court of Franklin Mint Corp. v. Trans World Airlines. In its grant of certiorari, the Supreme Court agreed to consider whether the Warsaw Convention's limitation on liability for loss of air cargo is enforceable notwithstanding Congress' abandonment of the unit of gold conversion specified by the Convention and whether the determination of a proper conversion factor for gold franc provisions is justifiable, and if so, what that factor is.

Notwithstanding the grant of certiorari in Franklin Mint, several courts during the survey period have addressed the issue of the appropriate limitation on liability under the Warsaw Convention since the United States has abandoned an official price of gold. Most significantly, in In re crash at Kimpo International Airport, Korea, on November 18, 1980, the United States District Court for the Central District of California followed the Second Circuit holding in the Franklin Mint case. The Kimpo court held that since the United States no longer

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299 17 Av. Cas. (CCH) 18,293 (S.D. Tex. 1983).
300 Id. at 18,294.
301 690 F.2d 303 (2d Cir. 1982), cert. granted, 103 S. Ct. 3084 (1983).
302 103 S. Ct. 3084 (1983). The Supreme Court held that the repeal of the Par Value Modification Act in 1978 did not affect the enforceability of the Convention. The Court also concluded that the last official price of gold is the appropriate factor for converting the liability limits of the Convention into United States dollars. Trans World Airlines v. Franklin Mint Corp., 104 S. Ct. 1776 (1984). [Eds.]
has an official price of gold, the liability limitations of the Convention are not enforceable with regard to the claims arising under the Convention.\footnote{Id. at 74-75.}

On the other hand, an Illinois federal court twice held that the last official price of gold in the United States sets the limitation on liability. The court reasoned that this standard most nearly effectuates the purpose of the Convention. In Deere & Co. v. Ag Deutsche Lufthansa, A.G.,\footnote{18 Av. Cas. (CCH) 17,178, 17,179 (N.D. Ill. 1982).} and in Maschinenfabrik Kern, A.G. v. Northwest Airlines,\footnote{562 F. Supp. 232, 239-40 (N.D. Ill. 1983).} the Illinois court held the limitation on liability under the Convention to be enforceable and the measure of the liability limitation to be established by reference to the last official price of gold in the United States.

6. Miscellaneous

In a particularly interesting case, a New York federal court held, in Hexter v. Air France,\footnote{17 Av. Cas. (CCH) 18,054 (S.D.N.Y. 1982).} that the carrying of a passenger’s overnight bag by a flight attendant on board an aircraft may constitute acceptance of baggage by the air carrier such that issuance of a baggage check is necessary to preserve the air carrier’s right to limit liability. The court held that when an air carrier removes baggage from a “passenger’s charge,” the carrier thereby accepts the baggage within the meaning of Article 4(4) of the Convention, and must issue a baggage check to preserve its right to limit liability.\footnote{Id. at 18,056.}

Finally, two Circuit Courts of Appeal reached diametrically opposed conclusions with regard to the recoverability of pre-judgment and post-judgment interest in addition to the liability limits established under the Convention as amended by the Montreal Agreement. In O’Rourke v. Eastern Airlines,\footnote{18 Av. Cas. (CCH) 17,763 (2d Cir. 1984). The aircraft accident occurred on June 24, 1975, when Eastern Airlines Flight 66, en route from New Orleans to New York City, crashed on its approach to John F. Kennedy International Airport, Queens, New York. Id. at 17,764.}
the Second Circuit did not allow the plaintiff to recover pre-judgment interest in addition to a maximum $75,000 recovery under the Convention. The court held that the $75,000 limitation on liability was inclusive of legal fees and costs and that no additional interest could be awarded. Conversely, in *Domangue v. Eastern Airlines,* the Fifth Circuit held that pre-judgment interest may be awarded over the $75,000 limitation in order to ensure the speedy disposition of claims and a more adequate recovery. The Fifth Circuit also held in *Domangue* that post-judgment interest may be awarded in order to encourage speedy compensation for damages.

B. Other Air Carrier Cases

The liability of air carriers under a negligence theory was addressed in *Sporn v. Metro International Airways.* In *Sporn,* a New York trial court ruled, in response to a motion for summary judgment, that an action for breach of contract does not lie for the failure of an airline to keep its schedule where the passenger tickets indicated that the timetable was not guaranteed. Nevertheless, the court indicated that when an airline undertakes to publish a schedule, it may be liable if it negligently fails to keep the schedule by delaying takeoff. In *Sporn* the takeoff was delayed for three hours to permit the filming of the aircraft for a movie production.

In addition, two cases during the survey period held that an air carrier may be subject to liability as a bailee for lost baggage. In *Tremaroli v. Delta Airlines,* a New York trial court held that baggage delivered to an airline for security check creates a bailment and the failure to return the baggage constitutes prima facie evidence of conversion or negli-
gence. Similarly, in *Loewenstein v. Delta Airlines*, the Ohio Court of Appeals held that a plaintiff established a prima facie case under a bailment theory when certain camera equipment was allegedly removed from a camera case checked as luggage.

In cases not involving conversion under a bailment theory, the tariff limitations on liability have generally been applied. In *Shlulman v. Eastern Smelting & Refining Corp.*, a Massachusetts trial court held that an air carrier is not liable for lost shipment of precious metal scraps where the shipper lists the cargo as scrap metal waste, and not as precious metal, and the tariff does not allow the carrier to accept precious metals for shipment. The court held that the tariff is binding on the shipper notwithstanding his lack of knowledge or consent to it.

In the area of overbooking, the results of two cases indicate that there is no liability for overbooking in the absence of fraud, malice, or oppression in the overbooking, that the mere practice of overbooking does not constitute fraud or a deceptive trade practice, and that airlines are under no duty to disclose the overbooking. In *Biswa v. British Airways*, a California federal court granted summary judgment in favor of an air carrier where the carrier had no intent not to provide the services when the ticket was sold. Similarly, in *Mendelson v. TWA*, a New York trial court held that there was no fraud, deceptive trade practice, or warranty claim arising from overbooking practices. The court stated, however, that an air carrier which fails to follow its own procedures in alleviating the effects of overbooking may be liable for discrimination under the provisions of section 404(b) of the Federal Aviation Act.

In another case involving the right of carriers to refuse boarding, a federal court in New York held in *Mahler v. Ameri-

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317 18 Av. Cas. (CCH) 17,343 (Ohio Ct. App. 1982).
318 17 Av. Cas. (CCH) 18,026 (Mass. Dist. Ct. 1982).
319 Id. at 18,028.
320 18 Av. Cas. (CCH) 17,104 (N.D. Cal. 1983).
322 466 N.Y.S.2d at 171 (citing 49 U.S.C. § 1374b (1982)).
can Airlines that an "attempted" bumping claim stated a cause of action, even though the passenger was not actually bumped from the flight. The court held that the purpose of section 404(b) of the Federal Aviation Act is to prohibit discrimination in air carriage, regardless of whether such discrimination ultimately results in a refusal of transportation.

On the other hand, the determination by an air carrier of whether to carry a sick or invalid person rests within the discretion of the carrier according to the New York Court of Appeals in Adamson v. American Airlines. The standard to be applied in reviewing such discretion is whether the action of the carrier, under the facts and circumstances known at the time of making the decision to deny transportation, was arbitrary, capricious or irrational, constituting an abuse of the discretion vested by law in the carrier.

Finally, the discretion of air carriers in denying transportation was broadly applied in the case of Zervignon v. Piedmont Aviation. In Zervignon, the court rejected the plaintiffs' allegations that their involuntary removal from an aircraft violated the nondiscriminatory provisions of section 404(b) of the Federal Aviation Act. The captain of the aircraft ordered removal of a group of passengers after one of the group had assaulted a stewardess, and other members of the group made other passengers apprehensive about the possibility of hijacking. The court held that the captain of the aircraft was justified, under section 1111 of the Act, in removing such passengers from the aircraft based upon a reasonable concern for the safety of the aircraft and its passengers.

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323 17 Av. Cas. (CCH) 18,203 (E.D.N.Y. 1981).
324 Id. at 18,204.
326 457 N.Y.S.2d at 775.
328 Id.
329 Id.
A. Liability Insurance

In *National Union Fire Insurance Co. v. Rick*, the Arizona Supreme Court held that an aircraft insurance policy may properly exclude coverage to renter pilots, even though the purpose-of-use clause in the policy provides coverage to the named insured for aircraft rental operations. The court also held that a motor vehicle statute requiring liability coverage to be provided to renters does not apply to aircraft. Furthermore, the *Rick* court stated that there is no inconsistency in providing coverage to the owner-operator of an aircraft for rental operations, and at the same time excluding liability coverage to the renter pilot.

In *Travelers Insurance Co. v. North Seattle Christian & Missionary Alliance*, the Washington Court of Appeals considered whether a liability insurance policy, which was issued to a church and included within its coverage stockholders of the insured, covered a church member piloting the church's plane when it crashed. The court reasoned that the member, who was not an employee of the church, was performing no duties analogous to those of a stockholder by piloting the plane. The court therefore held that the pilot/member was not insured as a stockholder.

The types of claims which may be covered under a particular policy listing an additional insured was considered in *Piper Aircraft Corp. v. Insurance Co. of North America*. In this case, a Pennsylvania trial court held that an aircraft manufacturer that is a lessor of an aircraft and listed as an additional insured under the lessee's liability policy is entitled to full coverage. The court added that the coverage includes the conduct of a defense in a wrongful death action, even though the recovery sought against the manufacturer is in its capacity as the designer and manufacturer of the aircraft and not

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331 654 P.2d at 61-63.
332 17 Av. Cas. (CCH) 18,268 (Wash. Ct. App. 1982).
333 Id. at 18,271.
334 17 Av. Cas. (CCH) 18,051 (Pa. Commw. Ct. 1982)
solely as the owner and the lessor of the aircraft.\textsuperscript{335} The \textit{Piper} court reasoned that the endorsement adding Piper Aircraft as an insured, "but only as respects their interest as owner/lessor" of the particular aircraft was intended to exclude the manufacturer's interest in aircraft other than the particular aircraft identified in the policy.\textsuperscript{336} In this regard, the court held that the word "interest" may be interpreted to address interest in the particular aircraft, and not the capacity in which the additional insured aircraft manufacturer is claimed to be liable for damages arising from accidents involving the particular aircraft.\textsuperscript{337}

In \textit{Fort Myers Airways v. American States Insurance Co.},\textsuperscript{338} the Florida Court of Appeals refused to extend coverage under a flying student's policy to the employer of the insured's flight instructor, although it had previously held that the flight instructor was covered by the policy. In holding that the flight instructor was covered, the court previously concluded that the instructor was an "agent or employee" of the insured student and therefore specifically covered by the policy. The court was not persuaded, however, that the instructor's employer was under a sufficient degree of control and direction to be an agent of the student.\textsuperscript{339}

B. \textit{General Exclusions}

Co-employee and crew member exclusions were the subject of a number of cases during the survey period. In \textit{Figueroa v. United States},\textsuperscript{340} the court did not exclude from coverage under the co-employee exclusionary clause the claim against an employee pilot arising from the deaths of two co-employees. The court held that both the pilot's employer and the pilot could be "insureds" under the omnibus insurance clause and therefore independently provided with coverage under

\textsuperscript{335} \textit{Id.} at 18,052-53.
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id.}
\textsuperscript{338} 17 Av. Cas. (CCH) 18,297 (Fla. Dist. Ct. App. 1982).
\textsuperscript{339} \textit{Id.}
\textsuperscript{340} 17 Av. Cas. (CCH) 17,785 (D.P.R. 1983).
the policy. The court pointed out that the named insured under the policy was not the employer of the pilot and his co-employees and that the pilot was using the plane with permission of the named insured.

In *Ranger Insurance Co. v. Ram Flying Club*, a Colorado appellate court held that an aircraft insurance policy excluding coverage for bodily injury to any person who is a pilot or crew member excludes coverage for injuries sustained by a student pilot. The student pilot performed the pre-flight inspection, started and taxied the aircraft, took off, and performed maneuvers. The instructor, however, was operating the aircraft at the time of the crash. The *Ranger* court noted that both of the pilots were crew members because they were "associated together for purposes of operating an aircraft between different points or during a certain time interval."

A similar case was presented in *Beckwith v. American Home Assurance Co.* In *Beckwith*, a North Carolina federal court held that whether or not a person is a crew member depends on the status of the person throughout the flight, and not at the "moment of impact." Even though the status of a person arguably could change over the course of a flight if only one crew member was required for the operation of the aircraft, the court held that a person may not act as a crew member throughout the flight and then change his status by relinquishing control of the aircraft when a crisis develops.

An exclusion for "property under the control of the insured" was considered in *Godwin Sprayers, Inc. v. Utica Mutual Insurance Co.* The North Carolina appellate court considered whether a United States Department of Agriculture aircraft in the possession of an insured was "property under the control of the insured" and therefore excluded from cover-

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341 Id. at 17,787.
342 Id. at 17,785-87.
344 Id. at 66-67.
345 18 Av. Cas.(CCH) 17,302 (W.D.N.C. 1983).
346 Id. at 17,304.
347 Id.
348 17 Av. Cas. (CCH) 18,093 (N.C. Ct. App. 1982).
The court held that there was an issue of fact as to whether the aircraft is "property under the control of the insured" when the insured maintains and has access to the aircraft at its own airport, but only operates it on specific flights under the direction of Department of Agriculture employees.  

The Arizona Court of Appeals considered the exclusion for flights for which a "charge" is made in *Flagstaff Mortuary, Inc. v. Gamble.* The court held that in a case in which it is undisputed that payment is a condition for use of an aircraft, a "charge" for use of the aircraft exists when a payment is made in excess of direct operating expenses.  

Finally, in a particularly interesting case, *Gelder v. Puritan Insurance Co.,* the New Mexico Court of Appeals considered whether coverage was excluded under a clause excepting from coverage any damage resulting from conversion, where an aircraft, in breach of the lease agreement, crashed while being used for transportation of controlled substances. The appellate court agreed with the trial court that conversion occurred when the plane crashed. The court then held that the exclusion for conversion applied even though the aircraft had unloaded its illegal drugs, was in the process of taking off, and arguably was being returned to its lawful purposes at the time of the accident.

C. Compliance with Federal Aviation Regulations, Pilot Qualifications and Airworthiness Certificate Exclusions

This area produced a diversity of opinions during the survey period. For example, in *Ideal Mutual Insurance Co. v. Lucas,* an unpublished decision, a Georgia federal district court held that a pilot failed to meet the pilot warranty re-

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349 *Id.* at 18,094.
350 *Id.*
352 *Id.* at 151-52.
354 *Id.* at 17,371, (citing Swish Mfg. Southeast v. Manhattan Fire & Marine Ins., 675 F.2d 1218 (11th Cir. 1982)).
requirements of 100 hours, because he only had 96.8 hours. The court, therefore, denied coverage under the policy. Notably, the insurer also based its denial of coverage on the grounds that the pilot lacked the required pilot certificates and ratings for the flight and that the aircraft was being used for a non-covered use. The court, however, chose to base summary judgment for the insurer on the pilot’s failure to meet the pilot flight-time requirements.  

In Bellefonte Underwriters Insurance Co. v. Alfa Aviation, the North Carolina Court of Appeals held that the failure of a renter pilot to have a valid and effective medical certificate as required under a pilot endorsement clause constitutes a proper basis for denial of coverage, regardless of whether a causal connection existed between the failure to meet the requirement and the accident from which the claim of coverage arose. In addition, the court denied coverage to the owner of the leased aircraft, Alfa Aviation, under a separate airport liability policy because the policy expressly excluded coverage for “any aircraft owned by, hired by, loaned to or operated for the account of the insured.”

In Bonanza of Cleveland v. Fairfax Underwriters Services, an Ohio appellate court considered the pilot endorsement of a flying club’s policy which limited coverage to operation of the aircraft either by certain named individuals or by members of the flying club “having an ownership interest in the flying club, or owning stock in the corporation (if the flying club is incorporated).” The pilot operating the aircraft at the time of the accident did not meet this requirement. The insurer consequently denied coverage for a property damage claim arising out of the operation of the aircraft by the pilot. The court reviewed the requirement for “an ownership interest” and concluded that the requirement was a proper basis for denial of coverage because “[o]wners may have a greater

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356 Id. at 3.  
358 Id. at 17,449.  
360 Id. at 17,445.
interest in protecting their property than nonowners.” The court also rejected the insured’s argument that the omnibus insurance clause conflicted with the pilot endorsement and created an ambiguity as to who could use the aircraft and still be covered. The court noted that the omnibus insurance clause merely identified the persons entitled to coverage if coverage otherwise was provided under the terms and conditions of the policy, including the conditions and requirements of the pilot endorsement.

In *Ideal Mutual Insurance Co. v. Limerick Aviation Co.*, a Pennsylvania federal court held that an insurer has no duty to provide a defense where a pilot does not meet the pilot requirements of total flight time, multi-engine flight time or time in make and model, and the aircraft is not being used for the “pleasure or business” of the named insured, but for the “air charter” business of another. The *Ideal* court also based its decision on the ground that the pilot made false statements regarding past accidents, past damage history and past cancellations on his application for insurance.

In a somewhat similar case, *Master Feeders II, Inc. v. United States Fire Insurance Co.*, the Tenth Circuit reasoned that where an unqualified pilot flies an aircraft for its entire flight, the fact that a qualified pilot takes the controls just prior to an accident, does not render the exclusionary clause inapplicable. Accordingly, the court held that coverage was not provided under the policy.

In *Federal Insurance Co. v. Bahari Aviation*, a New York federal court held as a valid exclusion the requirement that the co-pilot of a business jet be a graduate of an approved manufacturer school to be a valid exclusion, even though the co-pilot has arguably received “equivalent” training. The court

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361 Id.
362 Id. at 17,446-47.
363 17 Av. Cas. (CCH) 18,205 (10th Cir. 1983).
364 Id. at 18,206-07.
365 Id. at 440-41.
also held that there is no waiver or estoppel based upon previous approval by the insurer of specifically named pilots who have not completed the manufacturer's approved school, but have received the equivalent training.\textsuperscript{369}

In contrast, one recent case held that failure to meet the pilot and aircraft airworthiness certification requirements of a policy does not result in an exclusion of coverage. In \textit{Florida Power & Light Co. v. Foremost Insurance Co.},\textsuperscript{370} the Florida Court of Appeals held that under a recent state statute,\textsuperscript{371} violation of a pilot warranty does not constitute grounds for denial of coverage unless the violation increases the hazard of loss or injury.\textsuperscript{372} In \textit{Security Mutual Casualty Co. v. O'Brian},\textsuperscript{373} however, the New Mexico Supreme Court reversed an appellate court decision which held that absent a causal connection between the accident and the grounds for the policy exclusion, the insurer could not deny coverage.\textsuperscript{374} The New Mexico court noted that the policy exclusions provide much incentive for aircraft owners to comply with FAA regulations.\textsuperscript{375} Hence the court held that the coverage may be denied even though there is no causal connection between the exclusion clause and the accident.\textsuperscript{376}

The frequently addressed question of whether a VFR pilot has the requisite qualifications for a flight in instrument meteorological conditions when the flight departs in VFR conditions was considered in \textit{Marr's Short Stop of Texas v. United
In Marr's, a Texas appellate court held that whether a flight is VFR or IFR depends on the weather conditions at the commencement of the flight. Thus, the appellate court regarded as "immaterial" the finding that the pilot knew he would be flying into IFR weather conditions where the conditions were VFR at the beginning of the flight.

The effect of CAB and FAA regulations requiring compulsory liability coverage was considered in Miques v. Universal Airways. In Miques the insurer took the position that failure of the insured air taxi operator to comply with certain CAB economic regulations and FAA safety regulations (regarding the operation of the aircraft) excluded coverage. The Miques court held that compulsory liability insurance provisions under the CAB and FAA regulations are intended for the protection of the public, and coverage of liability claims arising from injury to the public may not be denied for failure of the insured to comply with economic or safety regulations. Furthermore, the court added that only where the loss in question involved the insured's property, and not liability for injury to the public, would liability under the policy be excluded.

D. Lienholders' Endorsements

Three cases involving coverage for lienholders were decided during the survey period. In Aero International v. United States Fire Insurance Co., the Fifth Circuit held that lienholders' endorsements do not create a new contract but add a party to the original insurance contract, and that the coverage is limited to the same risks insured under the origi-
nal insurance contract. Similarly, in *Lakewood Bank and Trust v. Security Insurance Co.*, a Texas federal court held that the coverage provided to a lienholder under the lienholder's endorsement does not expand the coverage to risks which are not covered under the basic coverage.

In *Northeastern Flyers v. Olson Brothers*, the Eighth Circuit held that, for purposes of insurance coverage, title to an aircraft passes under the U.C.C. at the time of delivery of the aircraft, regardless of whether the bill of sale or application for registration has been delivered or filed in the FAA Aircraft Registry. This case is similar to cases arising under policies of motor vehicle insurance where the requirements of motor vehicle certificate-of-title statutes generally need not be met in order to find that there has been a valid sale for purposes of determining whether coverage is provided under the seller's or buyer's insurance policy.

**E. Miscellaneous**

In *Tadday v. National Aviation Underwriters*, the Wyoming Supreme Court held that, under the doctrines of waiver and estoppel, an insurer's settlement of a hull claim under a policy did not bar the right of the insurer to contest coverage for a liability claim arising from the same accident. The court stated that waiver and estoppel are applicable only where there is an alleged forfeiture by the insured, followed by a waiver by the insurer. Forfeiture was not an issue in *Tadday*.

In *Figueroa v. United States*, a federal district court in Puerto Rico addressed the question of apportionment between insurance policies. One of the policies considered in *Figueroa* contained an excess insurance clause while the other contained a pro rata clause. The court determined that the pol-

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383 17 Av. Cas. (CCH) 17,611 (N.D. Tex. 1981), aff'd, 690 F.2d 903 (5th Cir. 1982).
384 679 F.2d 1264 (8th Cir. 1982).
385 See generally 6 B. APPLEMAN, INSURANCE LAW AND PRACTICE § 4313 at 335-36 (1979).
386 660 P.2d 1148 (Wyo. 1983).
387 Id. at 1150-51.
388 17 Av. Cas. (CCH) 17,785 (D.P.R. 1983).
icy with the pro rata clause was the primary policy but added that the pro rata clause did not apply without other “valid and collectible” insurance. The court continued, stating that the secondary policy, because of its excess insurance clause, was not “valid and collectible” until the primary policy was exhausted. The court, in effect, disregarded the pro rata clause of the primary policy ordering compensation from this policy alone until the policy limits were met.

IX. DAMAGES

A. Elements of Damages

In the area of damages, the question of whether pre-impact pain and suffering are compensable in wrongful death actions arising from aviation accidents was addressed. In Hurst Aviation v. Junell, a Texas court of appeals held that evidence of only two seconds between a mid-air collision and impact with the ground was sufficient to support an award of $20,000 for pre-impact mental anguish. The court reiterated that the consciousness of approaching death is a proper element to be considered in evaluating mental anguish under Texas law.

B. Calculation of Damages

A case which demonstrates both the delay and also the ultimate adaptability of our legal system to the purposes of proper compensation for victims of air crash accidents, and provides a fitting conclusion to this survey of recent developments in aviation case law is Friends for All Children v. Lockheed Aircraft Corp. In Friends the court approved the creation of a “central trust” from the proceeds of the settlement of the cases for the purpose of providing funds for the continued medical expenses predicted for the children who survived the C-5A accident in Viet Nam during the evacuation of that
country. The court noted that this settlement on behalf of all of the survivors was reached in 1979 after trials of ten cases resulted in disparate verdicts from zero to $1,000,000 in individual cases for children who, according to experts, had approximately the same risk of crash-related symptoms. The court further noted that no insurance alternatives to the "central trust" were available in the current market, but that the trustee would be instructed to periodically review the possibility of insurance alternatives.

In approving the trust, the court carefully considered, but chose not to follow, the views of some parents and their attorneys in favor of a lump sum payment. These persons expressed concerns ranging from costs of administration of the trust to the objections of one counsel based on an "expensive, unwarranted invasion of [his client's] property and privacy rights." Instead, the court followed the views of parents who, although concerned about the expense of administration, agreed to the trust "for the protection of those children, if any, whose needs come to exceed the resources of their families," and others who were "satisfied that the Parent Advisory committee and the Guardian Ad Litem have acted in the best interest of all and that the Central Trust concept is the answer to future contingencies."

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394 Id. at 17,387.
395 Id. at 17,386-87.
396 Id. at 17,386.
397 Id.
398 Id.