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Recent Developments in Aviation Liability Law

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RECENT DEVELOPMENTS IN AVIATION LIABILITY LAW

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** This article would not have been possible without the tremendous effort of Jacqueline M. James, an attorney at Kreindler & Kreindler.

I. INTRODUCTION

WITHOUT A DOUBT, 1999 and 2000 will be remembered as years of remarkable developments in aviation liability law. Topping the list of major developments was the momentous drafting in May 1999 in Montreal, Canada of a new multilateral convention to govern the liability of airlines in international aviation accidents. The 1999 Montreal Convention establishes a unique system of airline liability, one that is radically different from the 1929 Warsaw Convention that it will hopefully replace. It is expected that the new convention may be ratified and enter into force in the United States and other nations within a few years.

Despite our more than sixty-year history with the 1929 Warsaw Convention, this treaty has continuously fascinated us with its difficult issues of treaty interpretation. Courts still grapple with such fundamental issues as the proper definition of willful misconduct and the circumstances under which damages for mental injuries are permitted. Only in 1999 did the Supreme Court finally resolve the issue of whether the Warsaw Conven-

tion cause of action for passenger injury or death is exclusive, an issue that had long divided the lower courts, some of which, ironically, were originally of the view that the Warsaw Convention did not even create a cause of action. We have come a long way in our understanding of this deceptively complex document.

Another key development in aviation law is the passage on April 5, 2000, of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR21"), a comprehensive reauthorization of the Federal Aviation Administration and Airport Improvement Program, which provides substantially more money for safety programs relating to airport facilities and personnel and aviation security and addresses various liability, competition, environmental, and passenger rights issues. Among its significant highlights is an amendment to the Death on the High Seas Act[1], which now permits recovery of damages for loss of a decedent's care, comfort, and companionship in aviation accidents on the high seas.

There was plenty of interesting case law in 1999 through 2000, including a decision defining the territorial scope of the Death on the High Seas Act; additional case law narrowly limiting the preemption of state law under the Airline Deregulation Act; a growing body of case law governing liability from the handling of in-flight medical emergencies; and a Third Circuit decision concerning the preemptive effect of FAA regulations. Issues of federal preemption continue to divide the federal circuits, mirroring debates in our Congress about the proper role of federal law in tort law.

Admittedly, not all recent case law is novel, momentous, and remarkable; but any annual survey of the law should be thorough at the risk of being over-inclusive. We hope this article offers the aviation practitioner that much-needed thorough review.

II. THE MONTREAL CONVENTION OF 1999

The International Civil Aviation Organization (ICAO)[2] convened an international conference in Montreal, Canada in May

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[1] 46 U.S.C. app. §§ 761-767 (1994).

[2] ICAO is a United Nations agency charged with developing international air transport standards and regulations for its 185 member states. It also administers the Convention for the Unification of Certain Rules for International Carriage by Air at Warsaw, Poland 1929, 49 stat 3000, T.S. No. 876, *reprinted in note following* 49

1999, with the ambitious goal of drafting and approving a new international Convention to replace the Warsaw Convention of 1929 and its several amending protocols and modifying intercarrier private agreements.

On May 28, 1999, representatives from over fifty countries, including the United States, approved a new "Convention for the Unification of Certain Rules for International Carriage by Air."[3] If formally ratified by the governments of at least thirty nations, the treaty will come into effect among the signatory nations and be known as the Montreal Convention of 1999. It is hoped that the treaty will come into force by the year 2001. Belize, Macedonia, and Japan have already ratified the new convention on August 24, 1999. President Clinton has signed the 1999 Montreal Convention and has submitted it to the Senate for ratification.

By the time this Convention convened in Montreal in May of 1999, the pillars of the Warsaw Convention, uniformity and liability limits, had already toppled.[4] Everyone involved in the drafting of the new Convention understood that liability limitations were no longer welcomed and could no longer be justified.

The Montreal Convention is an entirely new treaty and not another amendment to the 1929 Warsaw Convention. Article 55 specifically states that this Convention supercedes the Warsaw

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USCA § 40105 (1997), popularly known as the Warsaw Convention and related treaties.

[3] Convention for the Unification of Certain Rules for International Carriage by Air, *done* May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention]. There are six official language texts of the Montreal Convention: English, Arabic, Chinese, French, Russian, and Spanish. The Convention will enter into force on the sixtieth day following the date of deposit of thirty instruments of ratification and will enter into force as between those states that have deposited an instrument. *See id.* at Chapter VII cl. 6.

[4] As a result of subsequent protocols to the 1929 Warsaw Convention and special private intercarrier agreements modifying the treaty, different versions of the Warsaw Convention govern today, depending on the countries and the carriers involved and the date of the accident: 1) The unamended 1929 Warsaw Convention; 2) the Warsaw Convention amended by the 1955 Hague Protocol; 3) the Warsaw Convention modified by the 1966 Montreal Intercarrier Agreement, applicable in the United States for international travel involving a stop, departure, or destination in the United States; 4) the 1929 Warsaw Convention or the 1955 Hague Protocol, as modified further by the 1996 International Air Transport Association (IATA) Intercarrier Agreements on Passenger Liability; and 5) the Warsaw Convention amended by Montreal Protocol No. 4 and the 1955 Hague Protocol, with or without the further modifications of either the 1966 Montreal Agreement or the 1996 IATA agreements, depending on the particular carrier and the date of the accident. It is easy to see that the only hope for uniformity and predictability was to draft an entirely new treaty.

Convention and its protocols and special intercarrier agreements.[5] The new Montreal Convention gathers and incorporates changes that have occurred to the Warsaw Convention over the last seventy years and includes some entirely new provisions. These changes range from cargo regulation,[6] to modernization of documentation,[7] to an additional jurisdictional forum, to, most notably, the elimination of any damages limitations for injury and death cases and strict liability to a certain amount.

A. THE PASSENGER CAUSE OF ACTION UNDER ARTICLE 17

Article 17 of the Montreal Convention provides:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[8]

To a large degree this language mirrors the Warsaw Convention Article 17 language. There is still the presumption of liability upon proof of an "accident" and proof of the prerequisite bodily injury or death. An earlier draft of Article 17 of the Montreal Convention would have expressly included liability for "mental injury" and would have expressly excluded liability for "injury resulting solely from the state of health of the passenger."[9] This draft language was dropped from the final version. The question will still remain whether psychic injuries that *accompany*, but do not flow from, a bodily injury, are compensable. The question will also remain whether an injury like post-traumatic stress disorder, which has physical and mental components, is a bodily injury under Article 17. The new Convention

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[5] The scope of the treaty is the same as the 1929 Warsaw Convention. It will affect all international air travel between signatory nations or roundtrip travel to and from a signatory state with a stop in another country. *See* Montreal Convention, *supra* note 3, at art. 1.

[6] The Convention incorporates the provisions of the 1961 Guadalajara Convention, which was never in force, and the Montreal Protocol No. 4 which relates to cargo. *See id.* at arts. 4-15.

[7] The Convention also relaxes the prior, now outdated, requirements as to the contents of passenger documentation (passenger ticket and baggage check) and the cargo air waybill. *See id.* at arts. 3, 5.

[8] *See id.* at art. 17(1).

[9] Draft Convention for Unification of Certain Rules for International Carriage by Air, *done* May 3, 1999, DCW Doc. No. 4.

does not answer these questions.[10] The fact that there was a failed attempt to exclude liability for injuries resulting from the state of health of the passenger suggests that the treaty's drafters do consider that events involving the carrier's negligence in handling an in-flight medical emergency may constitute an accident within the scope of Article 17.

Article 17 of the Montreal Convention continues to require an "accident" as a condition to liability, and "accident" remains undefined. The case law that has developed to define "accident" as "an unexpected or unusual event or happening that is external to the passenger"[11] will, therefore, remain relevant. Indeed, with the removal of the Article 22 limitation of liability, it is now the carriers who will probably call for a narrow reading of "accident," while plaintiffs will urge for a broad reading.

The new Article 17, like its predecessor, does not address the damages law to be applied in passenger cases. Prior case law on this point, particularly *Zicherman v. Korean Air Lines Co.*,[12] will continue to govern. Thus, the forum court selects the applicable national damages law pursuant to its choice of law rules. The applicable choices of substantive law in United States courts are either state law or foreign law for air crashes that occur over land[13] or the Death on the High Seas Act, foreign law, or general maritime law possibly supplemented by state law, for air crashes over water.[14]

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[10] A statement was added to the working papers of the convention to the effect that "bodily injury" is still included in Article 17, but acknowledging that in some countries damages for mental injuries are allowed in certain circumstances and the convention is "'not intended to interfere with this development.'" *See* Sean Gates, *The Montreal Convention of 1999: A Report on the Conference and on What the Convention Means for Air Carriers and Their Insurers*, THE AVIATION QUARTERLY 186, 189-90 (1999). The author notes that this language can be interpreted to mean that individual states can interpret "bodily injury" to include pure mental injury. *See id.*; *see also* Ruwantissa Abeyratne, *Mental Injury Caused in Accidents During International Air Carriage—A Point of View*, THE AVIATION QUARTERLY 206, 207-10 (1999) (mental injury can be a damage recognized under the new convention and under the existing convention).

[11] Air France v. Saks, 470 U.S. 392, 405 (1985). Recently, the Supreme Court criticized the Second Circuit's narrow construction of "accident" and stated that the *Saks* definition should be flexibly applied. *See* El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 165 n.9 (1999).

[12] 516 U.S. 217, 231 (1996).

[13] *See, e.g.*, Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 12 (2d Cir. 1996).

[14] *See, e.g.*, *Zicherman*, 516 U.S. at 229-32 supra note 12; *cf.* Pub. Adm'r v. Angela Compania Naviera, 592 F.2d 58, 60-61 (2d Cir. 1979) (applying general maritime law to action involving death in foreign territorial waters).

Article 29, like Article 24 of the 1929 Warsaw Convention, restricts passenger claims under Article 17 to the terms and conditions of the new treaty. This cause of action is therefore exclusive and preempts any cause of action based on local law.[15]

B. Joint and Several Liability

Article 17 of the new Montreal Convention, like Article 17 of the Warsaw Convention,[16] creates joint and several liability on the part of the carrier. The passenger or the passenger's estate can look to the carrier for complete compensation, leaving to the carrier the burden to seek contribution or indemnity from third parties at fault.

C. Elimination of Damages Limitations and Adoption of a Two-Tiered Compensation Scheme

The Montreal Convention sets forth a unique two-tiered compensation scheme. Article 21 provides for strict liability up to 100,000 Special Drawing Rights (SDRs). For amounts in excess of that, the carrier can be exonerated if it proves its non-negligence or that the damage was solely due to third-party fault. Article 21 provides:

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 21(2)(a) replaces the "all necessary measures" defense set out in the Warsaw Convention's Article 20(1). Article 20(1) of the Warsaw Convention provides that "[t]he carrier shall not

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[15] The same is true with the Warsaw Convention. *See El Al Israel Airlines*, 525 U.S. at 176 *supra* note 11.

[16] *See* Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1304-05 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000) (carrier is jointly and severally liable to passengers or their estates under Article 17; state statutes on proportionate liability are inapplicable to a Warsaw Convention carrier).

be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."[17]

The question arises whether the "all necessary measures" defense is more difficult for the carrier to prove than the non-negligence defense under Article 21(2)(a) of the Montreal Convention. An analysis of the Warsaw Convention minutes and the case law interpreting the "all necessary measures" defense leads to the conclusion that Article 20(1) was meant to exonerate a carrier who took all those measures which could have been foreseen as reasonable and useful to avoid the damage, excepting those that were impossible to take. Because of the burden-shifting of Article 20(1), in practical effect, it means that the carrier must know all of the facts and circumstances leading to the accident, be able to identify the exact cause or all possible causes of the accident, and then with the advantage of hindsight identify and prove that it took all reasonable measures that could have been useful to avoid the accident.[18] The carrier's burden under the Warsaw Convention, then, is to prove that it was in no way negligent. Carrying this burden is a difficult thing to do in an air crash, especially when it presupposes that the carrier can piece together all the events leading to a crash and prove that not one mistake or omission by the carrier occurred that could have avoided the damage. Another way to look at it is that the carrier must prove that that the accident was *wholly* beyond its control.[19] While the Montreal Convention adopts language that appears more relaxed—"damage was not due to the

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[17] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 20(1), 49 Stat. 3000, 3019, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

[18] *See* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 58-62 (1977) (explaining that the origin of the Article 20(1) "all necessary measures" defense is the common-law shipping carrier's "due diligence" defense). The minutes to the 1929 Warsaw Convention state that under Article 20 the "carrier will be able to establish that he is in no way at fault and that he has taken all the useful measures to avoid the damage. . . ." SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW 252 (Robert C. Horner & Didier Legrez trans. 1975) (1929) ("all that can be asked for the carrier is to take reasonable measures to avoid the damages"). *See also* Mfrs. Hanover Trust Co. v. Alitalia Airlines, 429 F. Supp. 964 (S.D.N.Y.), *aff'd*, 573 F.2d 1292 (2d Cir. 1977), *cert. denied*, 435 U.S. 971 (1978); Rugani v. K. L. M. Royal Dutch Airlines, 4 Av. Cas. (CCH) 17,257 (N.Y.C. Ct. 1954); Am. Smelting & Ref. Co. v. Phil. Air Lines, Inc., 4 Av. Cas. (CCH) 17,413 (N.Y. Ct. 1954).

[19] This is the approach taken in France. *See* Preyvolo c. Air France (1973) 27 RFDA 345 (Trib. Com. Nice, 7 May 1973).

negligence or any other wrongful act or omission of the carrier"[20]—this "non-negligence" defense may be just as difficult as the "all necessary measures" defense, because the carrier must still prove that the accident was beyond its control and nothing it could have done would have avoided the accident.

D. Advance Payments and Automatic Review of Tier One Payment Amounts

Under Article 28 of the new Montreal Convention, carriers may be required by national law to make advance payments without delay to passengers or their representatives in death cases. Any such required payments will not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

The drafters of the 1999 Montreal Convention avoided the need for constant amendments and "special contracts" regarding the tier one payment amount by requiring in Article 24 that the Article 21 tier one monetary limits be reviewed every five years and adjusted for inflation.

E. Passenger's Contributory Fault

While the new Article 21 defense is unavailable in the first tier of liability for 100,000 SDR's, and the carrier is strictly liable for that amount, the carrier is not, however, absolutely liable, because it may raise the defense of the passenger's contributory fault. Article 20 of the 1999 Montreal Convention reads:

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. . . . This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.[21]

Article 20, nonetheless, should rarely be applicable, because passengers do not cause international air crashes. A possible factual scenario in which a carrier may try to invoke this provision is when a passenger's injury or death is caused by the passenger's failure to heed safety instructions, such as failure to

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[20] Montreal Convention, *supra* note 3, at art. 20.

[21] *Id.*

wear a seatbelt. One difference between the new Article 20 and its predecessor under the Warsaw Convention is that the predecessor expressly referred to forum law for a determination of the effect of a passenger's fault. The new treaty does not indicate what law should apply to determine the effect of contributory negligence. Presumably, the forum law, including the forum's choice of law rules, will be applied to resolve these issues.

F. Court Costs and Legal Expenses

Article 22(6) of the new convention also provides that, if allowed under forum law, the court may award plaintiff court costs and legal expenses, including attorney's fees, plus interest, in circumstances in which the plaintiff recovers an amount greater than the carrier's written settlement offer made within six months of the accident or prior to commencement of suit.

G. Punitive Damages

Article 29 of the new Montreal Convention explicitly states, "[P]unitive, exemplary or any other non-compensatory damages shall not be recoverable."[22] The Warsaw Convention does not address the availability of punitive damages, nor was the subject raised at the 1929 Warsaw conference. United States courts have grappled with the question of whether punitive damages are available under the Warsaw Convention, and three federal circuit courts of appeal have held that punitive damages are prohibited by Article 17, which creates a cause of action for only compensatory damages.[23] Other non-compensatory damages

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[22] *Id.* at art. 29.

[23] The Second, Eleventh, and District of Columbia Circuit Courts have interpreted Article 17 as permitting *only* compensatory damages. *See In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1270 (2d Cir. 1991), *cert. denied*, 502 U.S. 920 (1991); Floyd v. E. Airlines, Inc., 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991); *In re* Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1490 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). In *Zicherman*, 516 U.S. at 225, *supra* note 12, the Supreme Court held that the Convention does not specify what damages are allowed or prohibited and leaves that issue to forum court determination, pursuant to the forum's choice of law rules. *Zicherman* described Article 17, however, as creating an action for compensation. *See also Pescatore*, 97 F.3d at 14, supra note 13, (reaffirming the earlier pre-*Zicherman* holding in *Lockerbie* that Article 17 prohibits the recovery of punitive damages in all cases); *In re* Air Crash Disaster Near Roselawn, Indiana on October 31, 1994, 960 F. Supp. 150, 153 (N.D. Ill. 1997) (upholding pre-*Zicherman* cases and stating that Article 17 prohibits the recovery of punitive damages).

could include pre-judgment interest, when the law treats them as punitive in nature.

H. Addition of the Fifth Place of Treaty Jurisdiction

Article 28 of the Warsaw Convention provides for four possible places for suit: the country in which the carrier has incorporated, the country of the carrier's principal place of business, the country in which the ticket was purchased, or the country of the final destination. A perceived injustice to the treaty was that a passenger could not sue in his or her own domicile unless that domicile coincided with one of the four places in Article 28. This was true even if the carrier had a substantial business presence in the passenger's domicile. This problem has now been corrected.

Article 33(1) of the 1999 Montreal Convention allows an action to be brought in a fifth jurisdiction, the place where the passenger has or had his or her principal and permanent residence at the time of the accident, provided the carrier provides service to that location with its own aircraft or on another carrier's aircraft pursuant to a commercial arrangement, such as a code share agreement. The United States Department of Transportation (DOT) insisted upon the addition of the "fifth jurisdiction," the passenger's principal place of residence. Indeed, the absence of this provision from the 1996 IATA Intercarrier Agreements[24] caused delay in the approval of those agreements by the DOT.

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[24] In 1996, the International Air Transport Association (IATA), a trade organization of international air carriers, took the lead in drafting special intercarrier agreements that modified the Warsaw Convention by waiving the Article 22 limited liability provisions for passenger cases and provided for strict liability up to 100,000 Special Drawing Rights, unless a carrier specifies a lower amount. For liability for amounts in excess of that, the carrier reserved its right to assert the defense under Article 20 that the carrier had taken all necessary measures to avoid the accident. The agreements render Article 25, requiring proof of the carrier's "willful misconduct" as a condition to full liability, irrelevant. The IATA agreements collectively consist of one umbrella agreement and a choice of implementing measures, all of which contain the waiver of the Article 22 limits for passenger cases and strict liability up to a certain amount, before recourse can be had to the Article 20 "all necessary measures" defense. The IATA agreements otherwise vary, however, with respect to certain optional provisions. By 1998, all U.S. international carriers and most major foreign airlines had signed the IATA umbrella agreement and adopted some implementing agreement and/or incorporated the waiver of Article 22 in their tariffs. The United States DOT approved the IATA intercarrier agreements in January of 1997. *See* further discussion *infra* Part III.B.

I. Ticket Delivery

Under Article 3 of the Warsaw Convention, the delivery of a paper ticket to the passenger is absolutely required as a quid pro quo for the limited liability provision of Article 22. Failure to deliver a ticket bars the carrier from asserting Article 22. Under the Montreal Convention, Article 3 no longer provides a sanction for failure to deliver a ticket or otherwise preserve the flight information.

J. Recourse Against Third Parties at Fault

The Warsaw Convention never addressed the issue of the carrier's recourse over third parties at fault. The case law always presumed that domestic law applied on this issue. In the 1996 IATA Intercarrier Agreements, IATA inserted language reserving the carrier's right of recourse against third parties. The open question whether the carriers act as volunteers under the 1996 IATA agreements when they waived the limits of Article 22, without legal compulsion to do so, creates doubt, however, whether they retain any right to contribution or indemnity from third parties at fault for payments arguably made as volunteers. Moreover, rights of recourse exist as a matter of law or pursuant to a bilateral contract. One party cannot unilaterally create a right of recourse.

Under the Montreal Convention, there are no limits on compensation and a carrier is legally obligated to pay damages. The carrier is not a volunteer, and Article 37 preserves any right of recourse the carrier may have under law.

K. Statute of Limitations

The Warsaw Convention two-year statute of limitation under Article 29 is now found at Article 35 of the Montreal Convention.

L. Acts of Agents and Servants of the Carrier

The Warsaw Convention refers to the carrier's liability for the acts of its agents in Articles 20 and 25. It has always been presumed that this covers servants (or employees) of the carrier as well. The more complicated issue has been whether the carrier's servants, agents, and independent contractors, when independently sued, are entitled to assert the Warsaw Convention defenses, conditions to suit and damages limitations applicable to the carrier. Case law developed from the Second Circuit's

seminal case, *Reed v. Wiser*,[25] has held that the carrier's servants, agents, and independent contractors are entitled to assert the defenses, limitations, and conditions to suit of the Warsaw Convention, provided the servant, agent, or independent contractor performed a service in furtherance of the transportation contract or a service that the carrier is required to perform under the Convention.[26]

The Montreal Convention makes the carrier vicariously liable for the acts of "servants or agents."[27] While the new Montreal Convention, like the Warsaw Convention, applies only to "carriers" (which term is still not defined), it is presumed that *Reed v. Wiser* and its progeny will still be relevant.

III. LIABILITY OF AIR CARRIERS UNDER THE 1929 WARSAW CONVENTION

A. THE UNITED STATES ADOPTS THE 1975 MONTREAL PROTOCOL NO. 4

In 1996, the IATA trade organization of international carriers took the lead in drafting a series of intercarrier agreements in which the carriers voluntarily waived the damages limitations of Article 22 of the Warsaw Convention, thus rendering Article 25 of the treaty irrelevant. Under Article 25, the carrier could not avail itself of the Article 22 cap on damages if it had committed "willful misconduct."[28] By 1998, all U.S. and most foreign international carriers had signed and implemented the 1996 IATA Intercarrier Agreements. Under these agreements, by waiving Article 22, the carriers essentially became strictly liable under Article 17 for full compensatory damages, unless the carrier proved, pursuant to Article 20, that it had taken all necessary measures to avoid the accident, a nearly insurmountable burden. Under the IATA agreements, no passenger or plaintiff need prove the carrier's "willful misconduct" in order to obtain full compensation from the carrier, who, under Article 17, is jointly and severally liable.

With the passenger liability limits now out of the way, thanks to the IATA agreements, the United States took further steps to

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[25] 555 F.2d 1079 (2d Cir. 1979), *cert. denied*, 434 U.S. 922 (1977).

[26] A recent case applying the defenses of the Warsaw Convention to an independent contractor is Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V., 13 F. Supp. 2d 508, 515 (S.D.N.Y. 1998).

[27] Montreal Convention, *supra* note 3, at art. 17.

[28] Warsaw Convention, *supra* note 17, 49 Stat. at 3020, 137 L.N.T.S. at act 25.

reform and modernize the Warsaw Convention. To that end, the United States Senate ratified Montreal Protocol No. 4 in November 1998, and the protocol went into force in the United States on March 4, 1999. Montreal Protocol No. 4 has the effect of also binding the United States to the 1955 Hague Protocol amendments to the Warsaw Convention. So far, forty-seven states have ratified Montreal Protocol No. 4.[29]

The Montreal Protocol No. 4 primarily affects reform in cargo cases but also adopts the Hague Protocol's substitution of Warsaw Article 25(1) language. The new Article 25 delineates the conduct or omission of a carrier that will be sufficient to break the limited liability under Article 22(1) and no longer uses the term "willful misconduct."[30] Montreal Protocol No. 4 also adopts the Hague Protocol limit of liability of $16,600 for passenger injury or death. This limit, however, will have no effect in the United States because all U.S. airlines and a majority of foreign air lines have signed and implemented the 1996 IATA Intercarrier Agreements, which became effective in the United States in February 1998 for those carriers that were already signatories to the IATA agreements.[31] Any foreign airline that has not signed the IATA agreement must nonetheless still adhere to the 1966 Montreal Agreement, which raised the Article 22 limit to $75,000 for travel involving a stop, departure, or destination in the United States. Montreal Protocol No. 4 would never have been ratified by the U.S. Senate if its Article 22 had not been rendered moot by the IATA agreements, or at least the Montreal Agreement.[32] Montreal Protocol No. 4 should not affect any post-IATA agreement passenger injury or death case.

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[29] *See* Appendix A to this paper.

[30] *See infra* Part III.H.

[31] Montreal Protocol No. 4 was adopted during the 1975 ICAO meeting held in Montreal but was not ratified by the United States until after the 1996 IATA Intercarrier Agreements were in effect. Since 1975, the Senate has had the opportunity to ratify Montreal Protocol No. 4 but has refused to do so because of dissatisfaction with the passenger liability limits imposed by the companion Montreal Protocol No. 3. *See* S. Rep. No. 105-20, at 2-3, 6 (1998).

[32] The ratification of Montreal Protocol No. 4 was really an endorsement of its reform to cargo rules. The United States has consistently fought liability limitations and would not have agreed to reduce the limit to $16,600 at this late date. In fact, the Senate and the Administration were confident that the 1996 IATA Intercarrier Agreements had rendered the liability limit of Montreal Protocol No. 4 meaningless and that its ratification therefore would have no effect on passenger cases. *See id.* at 13.

B. The Effective Date of the 1996 IATA Intercarrier Agreements Waiving Article 22

The 1995 IATA intercarrier umbrella agreement calls for carriers to take action to waive Article 22 and implement other mandatory provisions of the umbrella agreement by signing an implementation agreement and filing new tariffs, or simply by filing new tariffs that incorporate, at a minimum, the mandatory terms of the umbrella accord.[33] The 1996 IATA intercarrier implementing agreement states that the agreement would become effective when the Director General of IATA declares the agreement in effect on November 1, 1996, or on such later date as all requisite government approvals have been obtained. The IATA organization sought the approval of the U.S. Department of Transportation (DOT). The DOT approved the IATA agreements in January 1997. The European Commission approved the agreements in February 1997. On receiving these approvals, the Director of IATA, on February 14, 1997, declared the agreements in effect for those carriers that had already signed and accepted the agreements.[34] An issue that has arisen is the proper effective date of the IATA agreements. Another issue is whether Article 22 was already waived, pending governmental approval of the IATA agreements.

Recently in *In re Air Crash at Agana, Guam on August 6, 1997*,[35] a California district court ruled that for carriers that had already signed the IATA Intercarrier Agreements, the effective date of the waiver of Article 22 is February 14, 1997, the date that the IATA Director declared the agreements in effect upon having received DOT approval. In this case, which involved a crash of a Korean Airlines plane, the court ruled that the approval of the Korean government was not also required for the IATA Article

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[33] The IATA intercarrier agreements consist of several documents referred to herein collectively as the 1995 IATA Intercarrier Agreement. There is the 1995 IATA Intercarrier Agreement on Passenger Liability ("IIA") signed in Kuala Lumpur on October 21, 1995; the Agreement on Measures to Implement the IIA ("MIA") opened for signature in May of 1996; and the separate implementing agreement drafted by the Air Transport Association (ATA), a trade association of American carriers, which has been called the Agreement on Passenger Liability ("IPA"). The Department of Transportation ("DOT") has approved all three agreements. Carriers who have signed the IIA, but not the MIA or the IPA, can create their own implementation plan by filing their conditions of carriage with the DOT.

[34] As of June 30, 1999, 122 carriers signed the IIA and 90 carriers signed the MIA. See Appendix B to this paper.

[35] MDL 1237, CV 97/7023 HLH; CV97-8657 et al. (C.D. Cal. 1998).

22 waiver to become effective. The court noted that there was no indication that any foreign carrier signatory to the IATA agreements took the position that its own country's tariff authority had to approve the IATA agreements before the agreements became effective.

In *Berlin v. Delta Air Lines, Inc.*,[36] the court examined whether the effective date of a carrier's waiver of Article 22 could be the date the carrier signed an implementing agreement to the IATA intercarrier accord, and therefore could be earlier than the date of the DOT approval and announcement by the IATA Director on February 14, 1999. Plaintiff sought discovery to show that Delta's waiver of Article 22 occurred prior to September 26, 1996, the date of plaintiff's injury, and occurred almost four months before IATA's announced effective date of the agreements. The Delta tariff in effect on that date, however, included the Montreal Agreement $75,000 limitation and a statement that no employee of the carrier could waive a contract provision. The court also took note of a press release stating that ATA and IATA were filing documents with the DOT for approval of the attached waiver. The plaintiff argued that Delta had nonetheless already waived Article 22, despite the lack of DOT approval. The court permitted plaintiff leave to renew its application for discovery. In the renewed application plaintiff would have to show that, as a matter of law, Delta was legally permitted to waive the Article 22 liability limitation without prior government approval and was permitted to waive a tariff provision in effect in September 1996 in light of the "filed rate doctrine or its analogues under present statutory and case law."[37]

It is noteworthy that Article 22 of the Warsaw Convention permits a carrier to agree to higher liability amounts. Presumably, the plaintiff's argument was that, assuming Delta had signed the IATA agreements by September 26, 1996, Delta's waiver of Article 22 occurred immediately upon signing the agreement, even though the carrier had not yet obtained the required DOT government approval to withdraw from the Montreal Agreement. If such is the case, the carrier would have waived Article 22 completely but still would be bound by the Montreal Agreement, which completely waives the Article 20 "all necessary measures" defense for all amounts of liability. The distinction to be made maybe that while the carrier does not require U.S. governmental

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[36] No. 98 CIV. 6263, 1999 WL 269678 (S.D.N.Y. 1999).

[37] *Id.* at *1.

approval to waive the limited liability provisions of Article 22, it does require governmental approval to withdraw from the Montreal Agreement and file new tariffs that readopt the Article 20 defense.[38] A different result occurred in *Prince v. KLM-Royal Dutch Airlines*,[39] there the district court ruled that although the carrier KLM had signed the IATA intercarrier agreement, and the DOT had approved the agreements, prior to the accident, the Article 22 waiver did not govern the case because KLM had not filed new tariffs incorporating the terms of the IATA intercarrier agreements.[40]

C. Defining an International Flight

Courts are frequently asked to determine what constitutes "international transportation" under Article 1 of the Warsaw Convention. Article 1 makes the Convention applicable to international transportation and defines it as transportation in which the departure and final destination occur in two states that are signatories to the Convention or in which the departure and final destination occur in a signatory state and there is an intermediary stop in another state.

Courts have long concluded that a domestic leg of an international flight is a part of the international transportation. Thus, an accident occurring during a domestic flight that is part of the international itinerary is governed by the Convention. In one recent case, *Haldimann v. Delta Airlines, Inc.*,[41] a plaintiff was injured when an aircraft engine caught fire on the domestic portion of an international flight. The plaintiff had separate tickets in separate booklets for the domestic and international portions of her trip. On the domestic portion of the trip, the plaintiff had remained in the United States for more than one month. Plaintiff had arranged the entire trip through a Swiss travel agency, and her tickets for all legs of the trip were issued and paid for on the same date and carried the same record number.

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[38] It appears that the DOT agrees that the filing of new tariffs is not required to effectuate a waiver of Article 22. When the DOT issued its conditional approval of the IATA agreements on November 6, 1996, it stated that the agreements were self-executing and that tariff filings were unnecessary to implement the waiver of liability limitations. *See* Order Approving Agreements 96-11-6, 1996 WL 656334 (Dep't of Trans. Nov. 12, 1996). The primary effect of filing the tariffs is to withdraw from the Montreal Agreement.

[39] 107 F. Supp. 2d 1365 (N.D. Ga. 2000).

[40] Id. at 1371-74.

[41] 168 F.3d 1324 (D.C. Cir. 1999).

The court held that the contract of transportation, considered as a whole, was for international transportation.[42] The Warsaw Convention applied.

D. Determining Treaty Relationship Between Adherents

Difficult questions arise when different versions of the Warsaw Convention apply in the two countries that form the international transportation and one of those countries has ratified only the Hague Protocol, an amended version of the Convention, while the other has ratified only the original, unamended Warsaw Convention. The question that arises is whether the two countries are in a treaty relationship with each other. The Second Circuit, in *Chubb & Son, Inc. v. Asiana Airlines*,[43] has ruled that the two countries are not in a treaty relationship. In *Chubb & Son*, the United States had ratified the Warsaw Convention but not the 1955 Hague Protocol. The other state involved in this flight, the Republic of Korea, had ratified only the 1955 Hague Protocol. Plaintiff Chubb brought an action against Asiana for loss of part of a shipment of computer chips shipped from Seoul to San Francisco. Chubb argued that under the 1929 Warsaw Convention, the limitation of liability provision could not apply because the air waybill did not contain the "agreed stopping places." Article 3 of the unamended treaty voids the limited liability provision if the air waybill fails to contain certain requirements, among them the "agreed stopping places." The airline responded by noting that the Hague Protocol amendments to the Warsaw Convention, adopted by the Republic of Korea, eliminate the requirement to state the "agreed stopping places" on the air waybill. The defendant argued that plaintiff was relying on a treaty provision which no longer constituted a part of the treaty agreement or relationship between the two nations.

The district court had held that South Korea's adherence to only the Hague Protocol had the effect of binding Korea to only those portions of the 1929 Warsaw Convention that had not been amended by the Hague Protocol and, of course, to the

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[42] *Id.* at 1326.

[43] 214 F.3d 301, 309 (2d Cir. 2000). The underlying events to this litigation occurred before the Montreal Protocol No. 4 came into effect in the United States in March 1999. The Montreal Protocol No. 4 has the effect of binding the United States to the Hague Protocol as well.

1955 amendments in the Hague Protocol.[44] The court then concluded that the treaty relations which existed between the two countries consisted only of those portions of the Convention that were common to both countries, namely only those portions unamended by the Hague Protocol. Thus, because the provision in Article 8(c) of the original treaty regarding the air waybill had been amended, Article 8(c) of the Warsaw Convention was therefore not a part of the treaty relations between the two nations. In other words, the only portions of the Warsaw Convention that were enforceable were those which had not been amended by the Hague Protocol. The airline's failure to include the "agreed stopping places" on the air waybill, therefore, did not prevent it from taking advantage of the Article 22 limitation of liability. In contrast, the district court held, the limitation of liability provision of the Convention was only reworded in the Protocol and the same liability limitation was retained. Consequently, this provision still constituted a part of the agreement between Korea and the United States, entitling the Carrier to take advantage of its protection.

Plaintiff Chubb pointed out that the court's holding had the result of creating a fictional "third hybrid treaty" that neither the United States nor Korea had ratified. The plaintiff's position was supported by the Vienna Convention on the Law of Treaties,[45] which at Article 40(5)(b) provides that a state which becomes a party to an amended treaty shall nonetheless be considered "a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement." The Vienna Convention could be interpreted as making the two states parties to the entire unamended treaty, not merely the portions of the unamended treaty not affected by a later protocol. The Second Circuit reversed the district court, holding that there was no treaty relationship at all between the United States and Republic of Korea since the Republic of Korea had never adhered to the original treaty, the only treaty the United States had ratified.[46] The Second Circuit rejected on several grounds the district court's application of a hybrid treaty, one containing only those portions of the Warsaw Convention unamended by the Hague Protocol. It held that a hybrid treaty cannot apply

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[44] *See* Chubb & Son, Inc. v. Asiana Airlines, 96 Civ. 5082 (LAP), 1988 U.S. Dist. LEXIS 14767, at *17-*18 (S.D.N.Y. Sept. 22, 1998).

[45] U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875, 888 (1969).

[46] *See Chubb & Son*, 214 F.3d at 312.

because no such treaty has been ratified by any country. Secondly, applying a hybrid treaty encroaches upon the treaty-making powers of the political branches. In the United States, only the President has the power, with the consent of the Senate, to make a treaty binding on the United States. The courts can only interpret, not make, treaties.

The Second Circuit also rejected the plaintiff's argument that under Article 40(5)(b) of the Vienna Convention, in ratifying the Hague Protocol, the Republic of Korea had also agreed to be bound by the Warsaw Convention for carriage between itself and a signatory of only the original Warsaw Convention. This view is accepted by legal commentators on the Warsaw Convention.[47] Applying the treaty interpretation rules of the Vienna Convention, which the Second Circuit found to be authoritative customary law among nations, the court found Article 40(5)(b) ambiguous as to what it means to "'become[ ] a party to the treaty.'"[48] The Second Circuit adopted the view that Article 40(5)(b) applies only to a state that adheres to the original treaty after it has been amended by fewer than all signatories, but does not apply to a state that adheres to an amended treaty only. The court further noted that Article XXIII(2) of the Hague Protocol provides that "[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol." Thus, the court concluded that adherence to the Hague Protocol does not implicitly mean adherence to the Warsaw Convention. As a consequence, South Korea and the United States are signatories to different Conventions and are not in treaty relationship with each other; therefore, no version of the Warsaw Convention governed the plaintiff's loss of cargo. Moreover, the case was remanded to the district court to determine whether any other ground existed for federal jurisdiction.

The *Chubb* decision may be an important one for the Supreme Court to resolve, especially given the Second Circuit's acknowledgment that there is ambiguity in Article 40(5)(b) of the Vienna Convention as to whether those states that become parties to an amended treaty are in any treaty relationship with those states that are signatories to only the unamended treaty. The Second Circuit's result—finding no treaty relationship at all be-

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[47] *See* RENJ H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 2 (1981).

[48] *See Chubb & Son*, 214 F.3d at 310.

tween the United States and South Korea—may not be what the framers of the Hague Protocol had in mind when they opened up the Hague Protocol for signature in 1955, allowing states which were not signatories to the 1929 Warsaw Convention to join the Warsaw system by adhering to the amended Hague Protocol version. It is likely that because of the uniformity on numerous issues that the Warsaw system prescribes and its system of limited liability, the signatory states assumed that there would always be some treaty relationship between adherents to different versions, with the version applicable between the states always being whichever version of the two preceded the other.

In *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*,[49] the Ninth Circuit was asked to determine whether adherence to the Warsaw Convention by China also binds Taiwan. In *Mingtai*, a package shipped from Taiwan to San Jose, California was lost en route by defendant United Parcel Service ("UPS"). Plaintiff alleged that the package contained over $83,000.00 worth of computer chips and sued under the Warsaw Convention for the lost cargo. UPS argued that the Warsaw Convention did not apply to Taiwan and therefore its liability was limited to the $100.00 released value provided by the air waybill.

The Ninth Circuit concluded that the Warsaw Convention applies only to shipments between signatory states, and Taiwan was not a signatory to the Convention. The difficult question the court had to resolve was what effect to give to the fact that the United States established relations with China in 1979 and derecognized Taiwan, and the fact that when China signed the Warsaw Convention, it declared that the Convention "'shall of course apply to the entire Chinese territory including Taiwan.'"[50]

The court found that these issues involved political questions. It therefore deferred to the Executive Branch's position on the effect that the derecognition of Taiwan had on international agreements between this country and Taiwan.[51]

The court reviewed a State Department publication "Treaties in Force" and found that the State Department listed both China and Taiwan separately as to treaties in force between each of those countries and the United States. The court noted that

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[49] 177 F.3d 1142 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 374 (1999).

[50] *Id.* at 1144 (quoting CHRISTOPHER N. SHAWCROSS AND KENNETH M. BEAUMONT, AIR LAW A17 (Peter Martin et al. eds., 4th ed. 1977) (1997 Supplement)).

[51] *Id.* at 1146.

even after the United States had severed diplomatic relations with Taiwan in 1979, the Executive Branch directed that all existing international agreements between the United States and Taiwan continue to remain in force.[52] Finally, the court relied heavily on the Executive Branch's position, stated in its amicus brief and at oral argument, that China's status with the United States did not affect Taiwan's own separate position with respect to the Warsaw Convention. The court ruled that China's adherence to the Convention did not bind Taiwan, and because Taiwan was not a Warsaw Convention signatory, the treaty did not apply to the lost cargo. The damages were properly limited as set out in the air waybill.[53]

E. The Article 17 Cause of Action for Passenger Injury and Death

1. Supreme Court Decides Exclusivity Issue

In 1999, the United States Supreme Court in *El Al Israel Airlines, Ltd. v. Tseng*[54] resolved a conflict among the courts on the issue of whether the Warsaw Convention creates an exclusive cause of action for events within its scope that preempts state law causes of action. The Supreme Court held that the scope of the Article 17 exclusive cause of action was for injuries or deaths sustained during an international flight or in the course of embarking or disembarking from such flight. If any of the conditions to Article 17 liability are not met, and Article 17 therefore provides no recovery, the plaintiff cannot resort to local law for a remedy.[55] For example, if an injury takes place in the course of a flight but does not qualify as an Article 17 "accident,"[56] that injured passenger cannot seek compensation under a state law cause of action. Similarly, if the event causing the injury is an accident within the meaning of Article 17, but the plaintiff cannot prove the requisite Article 17 "bodily injury," the plaintiff cannot recover under the treaty and may not seek damages under an alternative state law theory of liability.

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[52] *Id.* at 1145.

[53] *Id.* at 1146.

[54] 525 U.S. 155 (1999).

[55] *Id.* at 160.

[56] The term "accident" is not defined in the treaty. The Supreme Court has broadly defined it as "an unexpected or unusual event or happening that is external to the passenger." Air France v. Saks, 470 U.S. 392, 405 (1985). *Tseng* emphasized the need to apply this definition of "accident" flexibly. *Tseng*, 525 U.S. at 166 n.9.

The *Tseng* case arose out of an intrusive search of a passenger conducted by the carrier's employees before the passenger was allowed to board a flight from New York City's Kennedy Airport to Tel Aviv. As a result of the search, the passenger allegedly suffered psychic and psychosomatic injuries. Because she failed to allege any "bodily injury," she could not recover under Article 17 of the Convention, which requires proof of a bodily injury or death. The Court of Appeals for the Second Circuit, however, ruled that the incident was not an "accident" within the meaning of Article 17 and therefore fell outside of the Convention, even though the plaintiff was clearly in the course of embarking.[57] The appeals court allowed plaintiff to pursue a state law claim. The Supreme Court reversed. Looking to the language and drafting history of the Convention, the Court concluded that for injuries sustained within the scope of Article 17—during flight or during embarkation or disembarkation—the Convention provided the exclusive cause of action. Any failure to meet the conditions of liability imposed by Article 17—lack of proof of an accident or failure to allege bodily injury or death—barred plaintiff's recovery.[58]

The Court noted that allowing state law claims when plaintiff could not prove an Article 17 "accident" or a "bodily injury" would thwart a cardinal purpose of the Convention: to achieve uniformity of liability rules governing claims arising from international air transportation. The court added that a ruling would also compromise a complementary purpose of the Convention—to accommodate or balance the interests of passengers and the interest of the carriers. Allowing a passenger to pursue a state law claim for incidents within the scope of Article 17 would upset this careful balance. The Supreme Court noted, however, that the Convention's preemptive effect on local law extends no further than the substantive scope of Article 17. Therefore, a passenger injured before embarking or after disembarking, when the terms of Article 17 do not operate, could still maintain a state law claim. The Court also observed that the Second Circuit had narrowly defined "accident," ruling that the intrusive search of a passenger did not meet the *Air France v. Saks* test of an unexpected or unusual event external to the passenger. Because certiorari was not sought on that issue, the Su-

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[57] *See* Tseng v. El Al Israel Airlines Ltd., 122 F.3d 99, 104 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999)

[58] *See Tseng*, 525 U.S. at 161.

preme Court did not rule on this holding, although it was clearly critical of the Second Circuit's analysis of "accident."[59] The Supreme Court reminded the lower courts that "accident" must be defined flexibly.[60] This is all the more critical now that the Article 17 cause of action is deemed to be an exclusive cause of action.

The impact of *Tseng* was discussed in *Donkor v. British Airways Corp.*[61] Plaintiff Donkor was a citizen of Ghana traveling on a passport from Ghana. She had purchased a ticket from Kennedy Airport in New York City to Charles DeGaulle Airport in Paris. The ticket required a stop in the United Kingdom in order to meet a connecting flight to France. The plaintiff alleged that she was told by British Airways that she would not need a transit visa in order to make the connecting flight.

A fellow passenger became ill during plaintiff's flight, and the pilot made an unscheduled landing in Gander, Newfoundland, before continuing the now very delayed flight to the United Kingdom. Plaintiff missed her connecting flight. Upon arrival in the U.K., plaintiff was detained by British Immigration and later deported. Plaintiff filed suit in state court, characterizing her claim as one "based in negligence, breach of contract, personal injury, wrongful detention, assault and loss of personal belongings."[62] British Airways removed the action to federal court, alleging that it was governed by the Warsaw Convention and further moved for summary judgment, arguing preemption of the state law claims under the Airline Deregulation Act of 1978.[63]

The *Donkor* court recognized that the Supreme Court in *Tseng*[64] had held that if a claim is covered by Article 17, the Convention provides the exclusive remedy. The court concluded, however, that defendant British Airways had not proven that the claim was within the scope of Article 17.[65] The court noted that in the Second Circuit the factual determination of whether or not a plaintiff's injury occurs during embarkation or disembarkation is determined under the three-part test set out in *Day v. Trans World Airlines.*[66] Defendant submitted no evidence that

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[59] *See Tseng*, 525 U.S. at 166 & n.9.

[60] *Id.* at n.9.

[61] 62 F. Supp. 2d 963 (E.D.N.Y. 1999).

[62] *Id.* at 965.

[63] The Airline Deregulation Act is discussed *infra* at Part VI.

[64] El Al Israel Airlines, Ltd. v. Tseng, 526 U.S. 155 (1999).

[65] *See Donkor*, 62 F. Supp. 2d at 969.

[66] 528 F.2d 31, 33 (2d Cir. 1975).

plaintiff was still under the physical custody and control of the airline, as required under *Day*. Defendant, therefore, failed to meet its burden to support removal on the basis of an exclusive cause of action governed by the Warsaw Convention. The court concluded that removal was improper and remanded the case to the New York state court.[67]

In *Alleyn v. Port Authority*,[68] the court applied the three-prong test set forth in *Day*[69] to determine if a passenger injured while on an escalator in the terminal was still disembarking when the accident occurred, so as to create a cause of action under the Convention. The plaintiff had just deplaned and had not yet reached the common terminal area. The plaintiff was still under the control and direction of Delta employees. Given these facts, the court held that Delta was liable under Article 17, because the plaintiff was still disembarking.

In *Moses v. Air Afrique*,[70] plaintiff alleged that he was accosted by three Air Afrique ground crew when he attempted to retrieve his luggage in the baggage claim area. The court held that there was no Article 17 cause of action because "[a]t this point in his travels, [plaintiff] cannot be said to have been under the control or direction of Air Afrique."[71]

One very troublesome case to arise from *Tseng* is *Brandt v. American Airlines*,[72] in which the district court held that *Tseng* also preempts a cause of action arising from federal anti-discrimination statutes, in this case the Air Carrier Access Act ("ACAA").[73] In other words, according to *Brandt*, carriers involved in international transportation are exempt from compliance with federal anti-discrimination laws. This result is highly questionable. The federal anti-discrimination laws are federal statutes, equal in stature under the Supremacy Clause to federal treaty obligations. They are also of great public importance, based as they are on fundamental notions of justice and constitutional rights. Indeed, foreign carriers and domestic carriers

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[67] *See Donkor*, 62 F. Supp. 2d at 974.

[68] 58 F. Supp. 2d 15 (E.D.N.Y. 1999).

[69] The *Day* court adopted a three-prong test to determine whether a specific accident occurred during the course of embarking or disembarking. The *Day* test examines where the plaintiff was when the accident occurred, what the plaintiff was doing, and under whose direction the plaintiff was acting. *See Day*, 528 F20 at 33. .

[70] No. 99-CV-541 (JG), 2000 WL 306853 (E.D.N.Y. 2000).

[71] *Id.* at *7.

[72] No. C 98-2089 SI, 2000 WL 288393, at *4 (N.D. Cal. 2000).

[73] 49 U.S.C. § 41705 *et seq.* (1994).

are how both expressly prohibited from subjecting a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry,[74] now that the Air Carrier Access Act was expressly extended to apply to foreign carriers. It could not have been the intent of the Supreme Court in *Tseng* to exempt all carriers involved in international air transportation from liability under these statutes. Undoubtedly, this important issue will be the subject of appellate review.

2. Accident Under Article 17

In the case of an assault by one passenger injuring another passenger, an issue to be resolved is whether the assault which caused the passenger's injury is an "accident" giving rise to liability under Article 17 of the Warsaw Convention. In *Air France v. Saks*,[75] the Supreme Court provided a flexible definition of the term "accident" and concluded: "[L]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." In *El Al Israel Airlines, Ltd. v. Tseng*,[76] the Supreme Court held that any injury sustained during flight or the operations of embarkation or disembarkation is exclusively governed by the Convention. Given the exclusive nature of the Convention's cause of action, the *Tseng* court reminded lower courts that the definition of "accident" in *Air France v. Saks* must be applied flexibly.

In determining whether an assault-type injury has been caused by an Article 17 "accident," some lower federal courts have focused on whether the cause of the injury is "a characteristic risk of air travel" or whether it bears a "relation to the operation of the aircraft." Using this qualification to the *Air France v. Saks* definition of "accident," some courts find that absent some air carrier complicity in the event leading to the assault/injury, an assault of a passenger by another passenger is not an "accident" and, therefore, the air carrier is not liable under Article 17. However, where the acts or omissions by airline personnel have facilitated or furthered the injuries of a passenger, these

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[74] *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Pub. L. No. 106-181, § 706, 114 Stat. 61, 157-58 (2000).

[75] 470 U.S. 392, 405 (1985).

[76] 525 U.S. 155, 161 (1999).

courts have found liability under Article 17. These two approaches are exemplified in two recent cases.

The Court of Appeals for the First Circuit in *Langadinos v. American Airlines, Inc.*[77] addressed the issue of whether a tort committed by a fellow passenger qualifies as an "accident" within the meaning of Article 17 of the Warsaw Convention. The Court stated that not every tort committed by a fellow passenger is a Warsaw Convention "accident" and that where airline personnel play no causal role in the commission of the tort, there is no "accident."[78]

The case arose out of a flight on American Airlines from Boston to Paris. Plaintiff Gregory Langadinos alleged he was assaulted by another passenger who had been served an excessive amount of alcohol. Plaintiff brought an action against American based upon state law and the Warsaw Convention, claiming that prior to the assault, American served additional alcohol to the offending passenger despite knowing that he was intoxicated and that his behavior was "erratic" and "aggressive." American moved to dismiss the action, arguing that the state law claim was preempted by the Warsaw Convention and that a tort committed by a fellow passenger is not an "accident" within the meaning of Article 17 of the Warsaw Convention. The trial court agreed and dismissed the action. Plaintiff appealed only the dismissal of the claim based upon the Warsaw Convention.

The court of appeals recognized that the Supreme Court's definition of "accident" in *Air France v. Saks* was broad enough to permit recovery for torts committed by fellow passengers. However, the court of appeals stated the standard for liability under Article 17 as follows:

> Of course, not every tort committed by a fellow passenger is a Warsaw Convention accident. Where the airline personnel play no causal role in the commission of the tort, courts have found no Warsaw accident. On the flip side, courts have found Warsaw accidents where airline personnel play a causal role in a passenger-on-passenger tort.[79]

The court of appeals found that the plaintiff's claim survived this standard. The court explained:

> He has alleged that (1) [the offending passenger] appeared intoxicated, aggressive and erratic, (2) American was aware of this

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[77] 199 F.3d 68 (1st Cir. 2000).

[78] *Id.* at 71.

[79] *Id.* at 70-71, (internal citations omitted).

behavior and (3) despite this awareness, American continued to serve him alcohol. Serving alcohol to an intoxicated passenger may, in some instances, create a foreseeable risk that the passenger will cause injury to others.[80]

The court stated, however, that Langadinos could not prevail simply by proving that American served the offending passenger excessive alcohol. He would also have to establish that he suffered a compensable injury and that American's service of alcohol to the assailant was a proximate cause of his injury. Nevertheless, the appeals court reversed the decision of the trial court because it was unable to determine, on the basis of the facts presented, whether American should bear causal responsibility for the alleged assault, noting that "[i]n this case, discovery will be required before such an assessment can be made."[81] Accordingly, the court of appeals found that Langadinos had stated a valid claim under the Warsaw Convention and reversed the decision of the trial court dismissing the case. .

The plaintiffs' bar would argue that the First Circuit misconstrued the Article 17 "accident" requirement as interpreted in *Air France v. Saks.* All that *Saks* requires is proof of an unexpected, unusual event external to the passenger, which this assault surely was. Under Article 17, this is sufficient to engage the Article 17 presumption of carrier liability. Under Article 20 of the Convention, the burden then shifts to the carrier to show that it took all necessary measures to avoid the accident or that such measures were impossible to take. Whereas Article 20 clearly shifts the burden to the carrier to show its complete lack of any causal role, *Langadinos* incorrectly places the burden on the plaintiff to show some causal role on the part of the carrier. The decision by the First Circuit in *Langadinos* addresses essentially the same question that was before the Court of Appeals for the Second Circuit in *Wallace v. Korean Air,*[82] namely, whether a sexual assault of a passenger by another passenger during the course of international transportation by air is an "accident" within the meaning of Article 17 of the Warsaw Convention. Unlike *Langadinos,* in *Wallace* it was undisputed that no acts or omissions of Korean Airlines caused or contributed to the assault or injury.

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[80] *Id.* at 71.

[81] *Id.*

[82] 214 F.3d 293 (2d Cir. 2000).

Wallace involved an action against Korean Air Lines by a passenger arising out of a sexual assault by a fellow passenger. The trial court dismissed the action, finding that the sexual assault did not constitute an Article 17 "accident." The lower court stated that the definition of "accident" should focus on whether the cause of injury is "a risk characteristic of air travel," or whether it bears a "relation to the carrier's operation of the aircraft" as "injuries unrelated to the foreseeable risks of air travel and unrelated to the operation of aircraft fall outside the scope of Article 17."[83] In applying this test, the court found "that sexual molestation such as that alleged by plaintiff is not a risk characteristic of air travel or related to the operation of an airplane."[84] Thus, the court held that Korean Air Lines should not be held responsible for such actions because it was "not in a special position to develop defensive measures or insure against such incidents."[85]

Plaintiff appealed the dismissal of the case to the Second Circuit, arguing that sexual molestation or assault by another passenger is an "unexpected or unusual event or happening that is external to the passenger" and as such falls within the *Saks* definition of "accident." Plaintiff further argued that because the flight was governed by the 1966 Montreal Agreement, under which the carrier waived the Article 20 defense that it had taken all necessary measures to prevent the harm or the measures were impossible to take, the carrier should have been held strictly liable for $75,000.[86] Plaintiff pointed out that the concern of the district court, that accepting the *Saks* definition without any qualifications would make carriers strictly liable for assaults that were unforeseeable and unpreventable, was misplaced. Korean Airlines was strictly liable in *Wallace* only because the carrier voluntarily waived its Article 20 necessary measures defense. Had Article 20 not been waived, the carrier would have been able to defend against the presumption of carrier liability for an Article 17 "accident" by establishing either that all reasonable measures had been taken to avoid one pas-

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[83] Wallace v. Korean Air, No. 98 Civ. 1039, 1999 WL 187213, at *4 (S.D.N.Y. 1999).

[84] *Id.*

[85] *Id.*

[86] In pre-IATA Intercarrier Agreement cases, to recover amounts exceeding $75,000, the plaintiff would have to establish the carrier's "willful misconduct" under Warsaw Convention Article 25. *See* Warsaw Convention, *supra* note 17, 49 Stat. at 3020, at art 25.

senger from assaulting another or that the measures were impossible to take.

The Second Circuit in *Wallace* reversed the district court, but its opinion avoided answering whether *Saks* only requires proof of an unexpected, unusual event external to the passenger or also requires proof of a risk characteristic to aviation. The Court ducked the issue by holding that sexual assaults are a risk characteristic of air travel, which says little for the morality and civility of our society.[87] Judge Pooler's concurrence, however, addresses the issue directly. She concluded that *Saks* does not require proof of a risk characteristic to air travel.[88]

Whether an in-flight medical emergency constitutes an Article 17 accident is also debated. Industry standards require an airline to make an unscheduled landing in the case of an in-flight medical emergency requiring immediate hospital care, and failure to do so may result in liability. Nonetheless, in *McDowell v. Continental Airlines, Inc.*,[89] the court reluctantly concluded that the crew's failure to make an unscheduled landing was not an "accident" under Article 17 and was therefore not actionable under the Convention. Furthermore, because the medical emergency occurred in-flight, the court also held that under *El Al Israel Airlines, Ltd. v. Tseng*[90] any state law claim was preempted.[91] In *McDowell*, a passenger suffered a heart attack and a nurse and cardiovascular surgeon who were on board attempted to treat the passenger. The surgeon found that the aircraft's medical kit was inadequate to treat the patient and advised the flight attendant that it was very important to get the patient on the ground and to a hospital as soon as possible. The pilot did not make the unscheduled stop and continued on to the scheduled destination, Nassau.

In concluding that there was no Article 17 "accident," *McDowell* relied on the Eleventh Circuit case *Krys v. Lufthansa German Airlines*.[92] *Krys* found that a failure to make an unscheduled landing for a medical emergency is not an Article 17 "accident," because the plaintiff's injury was caused by the plaintiff's own internal reaction to the usual, normal, and expected operation

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87 *See Wallace*, 214 F.3d at 299-300.

88 *Id.* at 300-01 (Pooler, J., concurring).

89 54 F. Supp. 2d 1313, 1320 (S.D. Fla. 1999).

90 525 U.S. 155 (1999).

91 *McDowell*, 54 F. Supp. 2d at 1321.

92 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

of the aircraft.[93] *McDowell* was bound by the Eleventh Circuit's ruling in *Krys*. The *Krys* opinion can nonetheless be criticized for its failure to consider that the unexpected, unusual event external to the passenger, which satisfies the definition of accident under *Air France v. Saks*,[94] is the flight crew's breach of its duty to land the plane to get the sick passenger to a hospital. Under generally accepted tort principles, a carrier having custody of passengers does have a special duty to render assistance because the passenger is deprived of normal opportunities to seek help.[95]

McDowell noted that *Krys* had softened the impact of its interpretation of "accident" by ruling that the plaintiff was able to recover under state law. The *McDowell* court acknowledged that *Tseng* overrules *Krys* on this issue.[96] *McDowell* was open in its criticism of the *Krys* decision and *Krys*'s construction of "accident:"

> An airline crew who attempts to aid a passenger and does something that would fall under the current definition of "accident" opens the airline up to liability. However, if the crew completely ignores the passenger and continues the flight as if nothing had happened, the airline is completely immune from any liability.[97]

The court went on to criticize this result as a "dissolution of an airline's duty of care to its passengers" and suggested that this could not have been the Senate's intention in ratifying the Warsaw Convention.[98] Feeling bound by precedent, the court reluctantly granted the carrier's summary judgment motion.

McDowell did not consider that in *Tseng* the Supreme Court criticized the appellate court in that case for its narrow construction of "accident" and emphasized that the definition of "accident" in *Saks* should be applied flexibly. *Tseng*, therefore, creates an opening for reexamination of prior cases that applied a narrow construction of accident, perhaps in order to allow state law to provide a remedy.

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[93] *See id.* at 1521.

[94] 470 U.S. 392, 405 (1985).

[95] *See* Restatement (Second) of Torts §§ 314, 314A (1964). Section 314A states that "a common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid if it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others."

[96] *McDowell, supra* note 87, 54 F. Supp. 2d at 1320.

[97] *Id.*

[98] *Id.*

In *Rajcooar v. Air India Ltd.*,[99] the district court held that failure to render adequate medical care to a passenger suffering a heart attack during boarding was not an Article 17 "accident" because it was not an unexpected or unusual event external to the passenger. Plaintiffs would argue that the court failed to see that the heart attack is not the accident; rather, the accident—the unexpected, unusual event external to the passenger—is the failure of the carrier to respond adequately to the distress of a passenger under its control.

An issue discussed in *Grimes v. Northwest Airlines, Inc.*[100] was whether an altercation between a passenger and a Northwest employee resulting in the passenger's arrest constituted an "accident" under Article 17. The court, applying the *Saks* definition of "accident," held that an Article 17 "accident" had not occurred because the passenger's own behavior caused the arrest, including his refusal to leave the airplane without a police escort.[101]

The two issues of what constitutes an Article 17 "accident" and the exclusivity of the Warsaw Convention cause of action under *Tseng* were addressed in *Asher v. United Airlines.*[102] In *Asher*, a husband who was traveling with his wife and a business associate bought two business class tickets for travel from Washington Dulles Airport to Milan, Italy. Because his wife suffered from advanced rheumatoid arthritis, the husband gave his wife his business class seat. The husband's business associate was upgraded to first class and the wife invited her husband, who had been sitting in her coach seat, to join her in the now-vacated business class seat next to her. The husband and wife sat in business class for most of the flight.

About two hours from landing, a flight attendant noticed a discrepancy in the seating chart and awoke the wife, demanding in an allegedly aggressive manner that she return to coach. Upon arrival in Milan, Italy, a United Airlines representative stopped the plaintiffs, collected their tickets and passports and instructed them they could not leave the airport until they paid $2,000, the difference in the price of a coach and business class fare. The United Airlines representative threatened to call the

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[99] 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000).

[100] No. CIV. A. 98-CV-4794, 1999 WL 562244 (E.D. Pa. 1999).

[101] *Id.* at *3.

[102] 70 F. Supp. 2d 614 (D. Md. 1999).

police if plaintiffs did not pay. The plaintiffs paid the $2,000 fare increase and later filed suit.

The parties agreed that the Warsaw Convention applied. The first issue was whether or not there was an Article 17 "accident." The court noted the plaintiff had failed even to allege that the events complained of constituted an accident as defined in *Saks.*[103] Moreover, the plaintiff conceded that all her injuries were nonphysical. Because the events occurred in-flight, however, *Tseng* precluded any recovery under state law.[104]

Plaintiffs alternatively argued that United Airlines committed willful misconduct under Article 25(1) and that this willful misconduct created an independent ground for recovery outside the Convention. The court rejected this interpretation, because Article 25 "merely lifts the monetary limitation liabilities of Article 22" and does not create a separate cause of action.[105]

By contrast, in *Carey v. United Airlines, Inc.*,[106] the District Court of Oregon concluded that *Tseng* required a flexible application of the definition of "accident." The court held that an Article 17 "accident" did occur when the flight attendant had a heated argument with the plaintiff, threatened to have him arrested, prevented him from changing seats with his children, interfered with his ability to attend to his children's ear aches, and humiliated him, causing him to sustain emotional distress.[107] However, because the plaintiff alleged no physical injury, his claim for damages were dismissed under authority of *Eastern Airlines, Inc. v. Floyd*,[108] which requires proof of physical injury. Regardless of whether the flight attendant's conduct amounted to willful misconduct, the failure to allege physical injury was a bar to the suit.[109]

In *Toteja v. British Airways*,[110] the plaintiffs claimed that they sustained swelling in their legs due to the inadequate amount of leg room in the economy class seating. The court dismissed plaintiffs' claims, holding that there was no Article 17 accident.

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[103] *Id.* at 617.

[104] *Id.*

[105] *Id.* at 619-20.

[106] 77 F. Supp. 2d 1165 (D. Or. 1999).

[107] *Id.* at 1170-71.

[108] 499 U.S. 530 (1991). *See infra* Part III.E.3.

[109] *See id.* at 1175-76.

[110] Civil No. JFM-99-815, 1999 U.S. Dist. LEXIS 17374 (D. Md. 1999).

3. Article 17 Requirement of Death or Bodily Injury

Litigants have long debated whether or not a plaintiff may recover under the Warsaw Convention for purely emotional injuries. In 1991, the Supreme Court held in *Eastern Airlines, Inc. v. Floyd*[111] that the Article 17 language "bodily injury" required proof of some physical injury and excluded recovery in a case where the passenger sustained a purely psychic injury. The Court held that there could be no recovery without a physical injury or physical manifestation of injury, but left open the question of whether there could be recovery for psychic injuries that accompany a physical injury.[112] The *Floyd* decision provoked a series of difficult questions. What is a physical manifestation of injury? Does it include psychosomatic injuries, that is, somatic symptoms caused by a psychological stressor? Does Article 17 allow recovery for a psychological injury that accompanies a physical injury but results from the terror experienced during the accident and does not flow from the physical injury? Or, does Article 17 allow recovery for only that mental suffering that results directly from the prerequisite physical injury? *Floyd* did not resolve these questions, and the lower courts continue to be in conflict.

In *Grimes v. Northwest Airlines, Inc.*[113] a wife alleged that she sustained emotional injuries after her husband was injured during an altercation over seating with a member of the flight crew and was later arrested. The district court held that the plaintiff could not recover for her injuries, because an Article 17 "accident" had not occurred, and because the Warsaw Convention does not permit recovery for "purely mental or emotional injuries."[114] In *Grimes* the plaintiff did not allege any physical injuries. Had the court found an Article 17 "accident" causing bodily injury to the husband-passenger, the question the court would have faced was whether the wife could recover for her emotional distress, given the proof of an Article 17 injury to a passenger.

Article 17 does not limit who may recover damages in the event of injury or death to a passenger. Article 24 leaves that

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[111] 499 U.S. 530, 552 (1991).

[112] *Id.* at 552. In Langadinos v. Am. Airlines, Inc., 199 F.3d 68 (1st Cir. 2000), the court expressed no view whether the plaintiff in that case—who was assaulted by an intoxicated passenger who forcefully grabbed his testicles—could also recover for his emotional distress. The court left the question to another day.

[113] No. CIV. A. 98-CV-4794, 1999 WL 562244 (E.D. Pa. 1999).

[114] *Id.* at *2.

question to forum law determination.[115] In *Diaz Lugo v. American Airlines,*[116] the court held that a husband was entitled to recover damages for his emotional injuries and loss of consortium resulting from injuries his wife sustained when coffee was spilled on her lap. The husband and wife were traveling together.

In *Alvarez v. American Airlines, Inc.*,[117] the plaintiff sued the carrier for injuries suffered during an emergency evacuation of an international flight, claiming both physical and psychological injuries. Defendant moved for summary judgment dismissing all psychologically-based injuries. The court acknowledged that the plaintiff suffered physical injuries to a knee during the evacuation and ruled that plaintiff was entitled under Article 17 to seek recovery for these injuries.[118] Additionally, the plaintiff was diagnosed as suffering from post-traumatic stress disorder ("PTSD"). The court acknowledged that PTSD included physical aspects (elevated heart rate, profuse sweating, and anxiety attacks, for example) but ruled that under *Floyd* a direct causal relationship must exist between the physical injury—in this case the injured knee—and the PTSD, including the physical aspects of plaintiff's PTSD.[119] Because *the plaintiff's* PTSD resulted from his reaction to the terror of the accident, and not from his knee injury, the court held that plaintiff could not recover damages for PTSD, even though PTSD includes physical injuries.[120] Partial summary judgment was awarded.

The court rejected plaintiff's argument that Article 17 only requires a physical injury or death as a condition to liability, and that once that condition is met, Article 17 allows recovery for all damage sustained in the accident, whether physical or psychological, if allowed under the applicable domestic law. Under plaintiff's view, the nexus required is between the psychological injury and the accident, not between the physical injury and the psychological injury.

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[115] *See* Zicherman v. Korean Air Lines, Co., 516 U.S. 217, 228 (1996) (stating that Article 24 and Article 17 are pass-throughs to local law on the questions of who may sue and for which damages).

[116] 686 F. Supp. 373, 376 (D. P.R. 1988).

[117] No. 98 Civ. 1027 (MBM), 1999 WL 691922 (S.D.N.Y. 1999), *reargument denied,* No. 98 Civ. 1027 (MBM), 2000 WL 145746 (S.D.N.Y. 2000).

[118] *Id.* at *4-*5.

[119] *Id.* at *5.

[120] *See* Alvarez v. Am. Airlines, Inc., No. 98 Civ. 1027 (MBM), 2000 WL 145746, at *3 (S.D.N.Y. 2000).

By contrast, in *Weaver v. Delta Airlines, Inc.*,[121] the court ruled that the plaintiff's evidence, that PTSD is an injury to the brain that affects the nervous system, was sufficient to create a triable issue of fact that PTSD is a physical injury. The defendant's motion for summary judgment dismissal under *Floyd* was therefore denied. The court acknowledged that the plaintiff's PTSD injury allegedly resulting from an emergency landing manifested itself in ways "that are similar to the 'injuries' previously found not compensable" by other courts applying *Floyd*[122] but concluded that the precise question was a medical one, not a legal one. The court also acknowledged that its holding may result in "more valid actions under the Warsaw Convention . . . attributable only to the increased sophistication of medical science."[123]

In *Carey v. United Airlines, Inc.*,[124] the District Court of Oregon, after concluding that a flight attendant's humiliating treatment of the plaintiff was an accident under Article 17, dismissed plaintiff's claim for emotional distress on the ground that plaintiff admittedly sustained no physical injury. Relying on *Terrafranca v. Virgin Atlantic Airways*[125] and *Alvarez*, the court based its dismissal on the grounds that physical manifestations of injury, such as nausea, cramps, sleeplessness and nervousness, are insufficient to satisfy *Floyd*.[126]

F. Recovery of Damages and Apportionment of Liability Under Article 17

In 1996, the Supreme Court in *Zicherman v. Korean Air Lines Co.*[127] held that Article 17 of the Warsaw Convention, making the carrier liable for "damage sustained" in the event of an accident, did not dictate what damages are recoverable. Instead, held the Court held, Article 17, in combination with Article 24, was a mere "pass-through" to domestic damages law selected under the forum's choice of law rules. In *Cortes v. American Air-*

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[121] 56 F. Supp. 2d 1190 (D. Mont. 1999).

[122] *Id.* at 1192; *see, e.g.*, Terrafranca v. Virgin Atlantic Airways Ltd., 151 F.3d 108 (3d Cir. 1998) (holding that plaintiff's post-traumatic symptoms of insomnia, weight loss, and anorexia were not physical injury but rather only physical manifestation of injury, which must be caused by an Article 17 physical injury to be compensable under *Floyd*).

[123] *Weaver, 56 F. Supp. 2d at 1192.*

[124] 77 F. Supp. 2d 1165 (D. Or. 1999).

[125] 151 F.3d 108 (3d Cir. 1998).

[126] No. 98 Civ. 1027 (MBM), 1999 WL 691922 (S.D.N.Y. 1999).

[127] 516 U.S. 217 (1996).

lines, Inc.[128] a Warsaw Convention case arising out of the December 20, 1995 crash of an American Airlines flight near Cali, Colombia, the Eleventh Circuit applied the conflict of law rules of Florida, the jurisdiction in which the district court sat. The Eleventh Circuit ruled that under Florida's adoption of the Restatement (Second) Conflict of Laws test, the district court did not err in applying Florida damages law to a case involving a Colombian decedent and Colombian beneficiaries.[129] The decision is noteworthy first of all because it applies state choice of law rules, rather than federal choice of law rules.[130] It is further noteworthy because the appellate court did not apply Colombian law, even though the accident occurred in Colombia and the decedent was a Colombian domiciliary. The court found that Colombian law was difficult to interpret and apply. The court concluded that, on the other hand, Florida damages law could apply based on the facts that the flight departed from Florida, Florida is the American Airlines hub for Latin America, the pilots were domiciliaries of Florida, and interstate interests would not be impaired by that choice.[131]

Additionally, the Eleventh Circuit in *Cortes* considered whether the "pass-through" to state law on the issue of damages mandated by the Court in *Zicherman* also required the court to apply Florida's apportionment of liability laws. The Florida apportionment statute provides that defendants are jointly and severally liable for pecuniary losses, but liable for nonpecuniary losses only in accordance with their proportionate share of liability. The court ruled that the apportionment statute was inconsistent with Article 17 of the treaty, which makes the carrier jointly and severally liable for "damage sustained."[132] State law that is inconsistent with treaty provisions is preempted by the treaty. Thus, the court refused to apply the apportionment statute. The court held, however, that the carrier could pursue a contribution cause of action against other potential tortfeasors independent of the Warsaw Convention even if the carrier were

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[128] 177 F.3d 1272 (11th Cir. 1999).

[129] *Id.* at 1303.

[130] Other courts have also applied state choice of law rules. *See, e.g.*, Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1 (2d Cir. 1996). But some courts have held that a federal choice of law rule should apply to Warsaw Convention cases, in recognition of the fact that it is a right of action created by a federal treaty. *See, e.g.*, Bickel v. Korean Air Lines Co., 83 F.3d 127 (6th Cir. 1996), *vac. on other grounds*, 96 F.3d 151 (6th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997).

[131] *See Cortes*, 177 F.3d at 1302-03, 1306.

[132] *Id.* at 1304-05.

to be found liable for willful misconduct under Article 25. Willful misconduct, held the court, did not bar a contribution action.

By contrast, in *In Re Air Crash at Little Rock, Arkansas, on June 1, 1999*,[133] the district court of Arkansas held that a Warsaw Convention carrier that has become a signatory to the IATA intercarrier agreements,[134] which makes the carrier liable for full compensatory damages without regard to the convention's willful misconduct requirement under Article 25, is liable to the passenger in contract, not tort, and is therefore not a joint tortfeasor under Arkansas law.[135] According to the court, because the carrier was liable solely on the basis of the IATA contractual agreement, it could not seek contribution from third parties since contribution is limited to joint tortfeasors.[136]

G. Article 20 All Necessary Measures Defense

Article 20 allows the carrier to exonerate itself from liability if it can prove that it took all necessary measures to avoid the damage, excepting those that were impossible to take. In *Obuzor v. Sabena Belgian World Airlines*,[137] the question was whether the carrier was liable for passengers' delay damages when the carrier's failure to make a connecting flight in Brussels caused the passengers' five-day delay in reaching their final destination of Lagos. Following established case law,[138] the court interpreted "all necessary measures" to mean "all reasonable measures" and held that it would not have been reasonable to delay the departure of the Brussels to Lagos flight, since this would have caused delay to other passengers who had already reached Brussels on time. Plaintiffs were unable to suggest any alternative that would not, in turn, have caused damage to other passengers.

H. Article 25 Unlimited Compensatory Liability for Carrier's Willful Misconduct

In the wake of the 1996 IATA Intercarrier Agreements waiving Article 22 and the hopeful ratification of the 1999 Montreal Convention, the need to prove the carrier's willful misconduct

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[133] 109 F. Supp. 2d 1022 (E.D. Ark. 2000).

[134] *See* discussion *supra* at Part III. B.

[135] *Little Rock*, 109 F. Supp.2d at 1025.

[136] *Id.*

[137] No. 98 CIV 0224 (JSM), 1999 WL 223162 (S.D.N.Y. 1999).

[138] *See* Manufacturers Hanover Trust Co. v. Alitalia Airlines, 429 F. Supp. 964 (S.D.N.Y. 1977).

to receive full compensation under applicable damages law is on the eve of extinction. Article 25 is still currently relevant, however, because the 1996 IATA Intercarrier Agreements have not been interpreted as retroactive. Article 25 is still relevant to passenger cases involving accidents occurring prior to the effective date of the carrier's adoption of the 1996 IATA Intercarrier Agreements. Also, not all carriers have signed the IATA agreements or otherwise acted to waive Article 22. Finally, Article 25 is still relevant in cargo cases.

One litigation in which the accident pre-dates the IATA agreements involves the American Airlines crash in Cali, Colombia on December 20, 1995. The District Court for the Southern District of Florida ruled that plaintiffs had met their burden of proving as a matter of law that the flight crew of Flight 965 had committed willful misconduct in knowingly descending into dangerous mountainous terrain from an off-course position.[139] The district court applied the Eleventh Circuit's definition of willful misconduct in accordance with domestic law concepts as set forth in *Butler v. Aeromexico.*[140] *Butler* had defined willful misconduct as either "the intentional performance of an act with knowledge" that harm would probably result or an act committed in reckless disregard of the probable consequences or a deliberate violation of a duty.[141] The plaintiffs had moved for summary judgment relying on the definition of willful misconduct as acting in reckless disregard of the consequences, which plaintiffs argued could be proved according to an objective, reasonable person standard by showing that the pilots knew or should have known that they were acting in a manner that would probably lead to injury. Defendant American Airlines, however, argued that the reckless disregard test for willful misconduct required proof of subjective or actual knowledge by the pilots that their acts would probably lead to harm. The district court ruled that while reckless disregard appears to be an objective standard, the plaintiffs had nonetheless met their burden of proving both subjective and objective reckless disregard.[142] The defendant appealed to the Eleventh Circuit, arguing that reck-

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[139] *See In re* Air Crash Near Cali, Colombia, 985 F. Supp. 1106 (S.D. Fla. 1997), *rev'd in relevant part, aff'd in part, sub nom.* Cortes v. Am. Airlines, 177 F.3d 1272 (11th Cir. 1999), *cert. denied,* 120 S. Ct. 980 (2000).

[140] 714 F.2d 429 (11th Cir. 1985).

[141] *Id.* at 430 (quoting Koninklijke Luchtvaart Maatschappij N.V. v. Tuller, 292 F.2d 775, 778-79 (D.C. Cir. 1961)).

[142] *See In re* Air Crash Near Cali, Colombia, 985 F. Supp. at 1129, 1138.

less disregard, as a test for willful misconduct under Article 25, required proof of the pilots' subjective knowledge of the probable risk of harm.

The Eleventh Circuit appeal had been argued but was still pending when the Senate in November 1998 ratified Montreal Protocol No. 4 ("MP4"), which amends Article 25 by replacing the willful misconduct standard with the language "intentionally or recklessly with knowledge that damage would probably result."[143] The Eleventh Circuit concluded that Article 25 of MP4 was a clarification amendment to the original treaty and required proof of the crew's subjective knowledge of probability of harm.[144] The court held that MP4 clarified that this subjective test was always intended by the treaty's original drafters. As applied to the facts of American Airlines' crash into mountainous terrain in Cali, Colombia, the court held that Article 25 of the treaty could only be satisfied if the circumstances permit an inference that in knowingly descending, the flight crew must also have known that the aircraft was significantly off course. Although it was clear that the pilots actually knew they were somewhat off-course, and should have known that they were wildly off-course, the court nonetheless ruled that the evidence did not support the conclusion "that the *only* reasonable inference was that the pilots knew that they were significantly off course."[145] While noting that such a conclusion would certainly be supported by the evidence, the court ruled that it was error for the district court to have reached that conclusion as a matter of law.[146]

According to the plaintiffs, the history of the Warsaw Convention negotiations demonstrates that the drafters did not intend that plaintiffs had to prove willful misconduct according to a subjective test for knowledge of probability of harm. Moreover, the weight of precedent in foreign courts is that Article 25 of the treaty can be satisfied by proof of very gross negligence or objective recklessness. Plaintiffs also pointed out that the Second Cir-

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[143] Montreal Protocol No. 4 To Amend The Convention For The Unification of Certain Rules Relating to International Carriage by Air Signal at Warsaw on October 12, 1929. As amended by the Protocol done at the Hague on September 28, 1955, Signed at Montreal on September 25, 1975, T. Doc. No. 95 2 (B).

[144] Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1291 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000).

[145] *Id.* at 1293.

[146] *Id.* The Eleventh Circuit also held that a carrier's willful misconduct under Article 25 does not bar a claim for contribution by the carrier against other tortfeasors. *Id.*

cuit has applied an objective test for recklessness,[147] the standard normally applied in tort law and consistent with the interpretation of Article 25 by the Executive Branch.[148]

To some courts, the issue of how to interpret Article 25 turns on a choice of law analysis, especially on the issue of the carrier's vicarious liability under Article 25(2) for the wrongful acts of its servants. Prior to *Zicherman v. Korean Air Lines Co.*,[149] courts in the United States did not look beyond the Warsaw Convention itself and national law in interpreting Article 25. After *Zicherman*, the Second Circuit ruled that the forum court should apply its choice of law rules and select the applicable domestic law to answer the Article 25(2) question of the vicarious liability of the carrier for the illegal acts of employees.[150]

The Ninth Circuit addressed this issue in *Insurance Co. of North America v. Federal Express Corp.*[151] The court was asked to determine whether Federal Express could be liable under Article 25 for the employee theft of a large shipment of computer chips shipped by Federal Express from Canada to California. The court examined what law to apply to determine both the Article 25(2) question of vicarious liability and the Article 25(1) question of the carrier's willful misconduct "in accordance with the law of the court to which the case is submitted."[152]

To determine which jurisdiction's law applies to these questions, the court relied on the rule in diversity cases that a federal court must apply the substantive law of the forum in which it sits, including the forum's choice of law rules. The court believed that the *Zicherman* decision mandated that state choice of law rules apply, even though the litigation involved a federal treaty. The court noted that *Zicherman* "admonished lower courts to refrain from developing federal common law 'under cover' of advancing the goal of uniformity in Warsaw Convention cases."[153]

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147 *See, e.g.*, Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1164 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1978).

148 *See* S. Rpt. No. 105-20, at 52-53 (1998).

149 516 U.S. 217 (1996).

150 *See, e.g.*, Brink's Ltd. v. South African Airways, 93 F.3d 1022 (2d Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997).

151 189 F.3d 914 (9th Cir. 1999).

152 *Id.* at 919.

153 *Id.* at 920. It is submitted that the *Zicherman* case, however, involved the question of damages, which is not governed by the treaty at all. The drafting minutes demonstrate that the drafters intentionally failed to cover this issue, leaving the matter of damages wholly to national law. By contrast, Article 25 is a key

The court then applied California's governmental interest test to determine if California state law or Canadian law should apply. The court noted that no true conflict existed between Canadian and California law. Because of California's strong interests in having its laws applied, the court applied California tort law to hold that Federal Express was not liable for its employee's theft, which served only the employee's personal interests.

Similarly, in *Asher v. United Airlines*,[154] the District Court of Maryland held that Maryland state law should apply to determine what constitutes willful misconduct under Article 25(1). The court applied Maryland law, even though Maryland applies *lex loci delicti* and the conduct occurred over the Atlantic Ocean and in Europe, not in Maryland. Applying Maryland law, the court held that the airline did not commit willful misconduct when its employees insisted that the plaintiffs, a husband and wife traveling together, pay for business class passage and threatened plaintiffs with arrest and confiscating their passports after the wife moved to business class and enjoyed the amenities without purchasing a business-class ticket. Under Maryland law willful misconduct requires proof that the defendant's acts were "performed with the actor's actual knowledge or with what the law deems the equivalent to actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury."[155] The court likened it to gross negligence.[156] The court held that there was no willful misconduct, because it was the plaintiff's own improper actions in taking an unpaid-for business class seat which resulted in any injury she suffered.[157]

In *Hermano v. United Airlines*,[158] the court held that plaintiff failed to present a genuine issue of material fact regarding the airline's willful misconduct. The plaintiff alleged that the car-

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provision of the treaty and does expressly govern the issue of the carrier's liability for full damages in cases of willful misconduct. The drafters could not have intended the lack of uniformity as to Article 25 that the Ninth Circuit's decision permits.

[154] 70 F. Supp. 2d 614 (D. Md. 1999).

[155] *Id.* at 619 (quoting Wells v. Polland, 708 A.2d 34, 44 (Md. Ct. Spec. App. 1998)).

[156] *Id.* at 619.

[157] *Id.* It is submitted that the court overlooked the fact that while the airline may have been entitled to ask for the payment of the difference in price between coach and business class, that right did not immunize the airline from liability for the manner in which it sought the payment.

[158] No. C 99-0105 SI, 1999 U.S. Dist. LEXIS 19808 (N.D. Cal. 1999).

rier intentionally misrepresented that the plaintiff had a gun in his baggage, causing him to miss his flight. In contrast, the court concluded that the carrier's employees' belief that the plaintiff did have a gun in his baggage was sincere; therefore, there was therefore no showing of willful misconduct.[159]

I. ARTICLE 28(1)

1. Third-Party Claims for Indemnification or Contribution

Few cases have considered whether the Warsaw Convention's jurisdictional provisions of Article 28, which determine where a suit under the treaty may be brought, apply to a third-party action against an airline for indemnification or contribution when the underlying action arises out of an international aviation accident involving death of a passenger. In a case arising out of the 1997 crash in Guam of an international Korean Air Lines (KAL) flight,[160] a federal court in the Central District of California ruled that the venue and jurisdiction provisions of Article 28 did not apply to a third-party action by the United States government and Serco (the air traffic controller contractor) against the carrier for indemnity or contribution. The court held that the third-party suit against the carrier could be maintained in the United States, even though some of the plaintiffs suing the United States and Serco could not themselves acquire treaty jurisdiction over KAL in the United States.[161] Some of the passengers who were injured or killed were domiciliaries of South Korea who were unable to obtain treaty jurisdiction against KAL in the United States because they had purchased their tickets in South Korea, and their final destination was South Korea. Thus, they could sue KAL in Korea only. Nevertheless, these Korean plaintiffs properly sued the United States government and Serco in the United States. These defendants in turn filed claims for indemnity or contribution against KAL in all cases in which they had been sued, including those which were initiated by the Korean domiciliaries. KAL moved for a dismissal of the third-party

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159 *Id.* at *15.

160 *In re* Air Crash at Agana, Guam on August 6, 1997, Case No. 98 ML 7211, MDL No. 1237 (C.D. Cal. 1999).

161 *Id.* Article 28 provides that an action for damages under the treaty must be brought, at the option of the plaintiff, in the place of the carrier's incorporation or principal place of business, where the ticket was purchased, or in the place of the final destination. The final destination in round-trip transportation is the place of departure. *See, e.g.*, Okaneme v. British Airways, 26 Av. Cas. (CCH), 16,495, 16,496 (D. Mass. 1999).

claims pertaining to the Korean domiciliaries, arguing that these suits were precluded by Article 28.

In considering KAL's motion, the court first looked to the language of the Convention and concluded that the provisions of the Convention were only meant to apply to suits by passengers and shippers, since these plaintiffs were parties to the contract of transportation.[162] The court also observed that indemnity or contribution claims are distinct from the personal injury or death claims out of which they arise. The court concluded that the third-party claims were not governed by Article 28 of the Convention and, because personal jurisdiction existed over KAL, the United States and Serco could sue the carrier in the United States. Nevertheless, the court ruled that KAL's liability on the indemnity claim could not exceed the damages amount permitted by the Convention. In this litigation, however, the court had previously ruled that the carrier's liability was governed by the 1996 IATA Intercarrier Agreements. Consequently, KAL was strictly liable up to 100,000 SDRs, and if it could not prove that it took all necessary measures to avoid the accident, its liability under the indemnity claims would be unlimited.

In *Carroll v. United Airlines, Inc.*,[163] a New Jersey appellate court upheld the trial court's denial of a motion by an independent contractor third-party defendant to dismiss the airline's third-party suit against it based on lack of subject-matter jurisdiction. The court remanded the case to the trial court, however, for a determination of whether personal jurisdiction over the third-party defendant was proper in the United States.[164] The plaintiff in *Carroll* was a paraplegic. He was on a United Airlines flight from Newark, New Jersey to Japan. He was injured while disembarking in Japan. United Airlines had a contract in Japan with third-party defendant JSS, a Japanese corporation, for provision of wheelchair services in Japan for United's passengers. JSS has no contacts with New Jersey or the United States.

Plaintiff brought an action against United in New Jersey state court under the Warsaw Convention for the injuries sustained. United in turn brought a third-party action against JSS, seeking indemnification pursuant to the contract between JSS and

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[162] *See In re* Air Crash at Agana, Guam on August 6, 1997, Case No. 98 ML 7211, MDL No. 1237 (C.D. Cal. 1999).

[163] 739 A.2d 442 (N.J. Super. Ct. App. Div. 1999).

[164] *Id.* at 449-50.

United. JSS moved to dismiss United's third-party action, arguing that the court lacked subject-matter jurisdiction because a forum selection clause required United to sue JSS in Japan. The court rejected that argument, finding that the forum selection clause was part of a separate and distinct contract.

The court instead held that Article 28 was the proper "forum clause" for an action by United against JSS. The court appeared to apply Article 28 to the carrier's third-party action for contractual indemnification against JSS under two theories. The first theory was that Article 28(2) leaves questions of procedure to be determined by forum law. The court noted that under New Jersey's venue rules, if proper venue lies over the main underlying claim, proper venue also exists for a third-party claim. The second theory was that Article 28(1) applied directly to the carrier's action for contractual indemnification against an independent contractor. The court relied on a line of case law holding that under the theory that the contractor is a part of the carrier's enterprise, a suit by the passenger against that contractor is governed by the treaty when a carrier's contractor performs services in furtherance of the contract of transportation.,.[165]

It is submitted that the logic of this line of cases does not extend to application of the Convention to a carrier's contract suit against its contractor. Such lawsuits are not governed by the treaty at all. The Warsaw Convention creates causes of action against the carrier for accidents involving injury or death to the passenger (Article 17), for delay damages (Article 18), and for damages due to loss of or damage to baggage or cargo (Article 19). It is these causes of action that are governed exclusively by the Convention under Article 24. The Convention creates no cause of action in favor of the carrier against its contractors.

2. *Article 28 and Forum Non Conveniens Dismissal*

In *In re Air Crash off Long Island, New York, on July 17, 1996*,[166] Judge Sweet of the Southern District of New York ruled that the Warsaw Convention does not prohibit dismissal based on *forum non conveniens*. The plaintiffs advanced several bases for their argument that Article 28 is inconsistent with *forum non conveniens*

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[165] The court cited cases such as Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977); Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V., 13 F. Supp. 2d 508 (S.D.N.Y. 1998); Baker v. Lansdell Prot. Agency, Inc., 590 F. Supp. 165 (S.D.N.Y. 1984).

[166] 65 F. Supp. 2d 207 (S.D.N.Y. 1999).

dismissal: 1) it gives the plaintiff the "option" of where to sue; 2) the four venues selected were selected for their prima facie convenience to the carrier; 3) the Convention's drafters were primarily civil law legal experts from countries that did not, and still do not, recognize *forum non conveniens* dismissal; and 4) Great Britain had drafted a proposed amendment to add language to Article 28 that would have permitted courts the discretion to dismiss based on an inconvenient forum, but withdrew the proposal.[167] Judge Sweet ruled that the treaty did not deprive a court of the discretion to dismiss based on the inconvenience of plaintiff's chosen forum. The court ruled, however, that the defendants Boeing and TWA did not meet their burden to show that the private and public interest factors weighed heavily in favor of dismissal.[168]

3. Jurisdiction Based on Where the Carrier Has a Place of Business Through Which Contact Was Made

Article 28 establishes jurisdiction in those signatory states where the carrier is domiciled or has its principal place of business, where the final destination is located, or at the carrier's place of business through which the contract was made. In *Singh v. Tarom Romanian Air Transport*,[169] the plaintiff contracted for transportation aboard defendant air carrier at a New York travel agency authorized "to sell and issue tickets" on Tarom Airlines. While plaintiff ordered and purchased the tickets through the New York travel agency, the tickets were issued in Delhi, India. The court held that the place of issuance of tickets is the place at which the contract is made, unless plaintiff establishes that a principal-agent relationship existed between the agency at which the tickets were paid and the issuing agency or carrier. The Court found that an affidavit saying only that the New York agency was "authorized to sell and issue airline tickets in New York" was insufficient. It is necessary for a plaintiff to establish that the travel agency is authorized by the specific carrier in question to sell and issue tickets.

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[167] One English court that has addressed this issue has held that Article 28 of the Warsaw Convention is indeed incompatible with a court's dismissal based on *forum non conveniens*. *See* Milor v. British Airways, 3 W.L.R. 642 (1996).

[168] *See In re* Air Crash off Long Island, 65 F. Supp. at 218; *see also infra* Part XIII.A.

[169] 88 F. Supp. 2d 62 (E.D.N.Y. 2000).

J. Article 29 Limitations Period Is Not Subject to Tolling

In the United States, the language of Article 29 has been construed as a condition precedent to suit and not subject to any tolling under local rules of procedure. In *Glavey v. Aer Lingus,*[170] the plaintiff alleged that her wallet was stolen from her checked baggage during her trip on Aer Lingus. The court ruled that plaintiff's claim for theft of goods was governed by the Warsaw Convention. Because plaintiff did not assert her claim until three years after the event, the action was time-barred under Article 29. The court held that the two-year time period for suit was not subject to tolling.[171]

Similarly, in *Husmann v. Trans World Airlines, Inc.,*[172] the court ruled that the two-year time period in Article 29 could not be tolled, as it was a strict condition precedent to suit. Even the bankruptcy of the airline did not toll the limitations period, Missouri law notwithstanding.

In *Kadir v. Singapore Airlines, Inc.,*[173] the plaintiff filed a lawsuit beyond the two-year period and argued that because the carrier failed to provide plaintiff with a copy of the air waybill, the carrier could not assert the Article 29 limitations period defense. The plaintiff based this argument upon Article 9 of the treaty, which precludes the carrier from relying on the treaty provisions which exclude or limit its liability when the carrier fails to provide a copy of the air waybill. The court disagreed, concluding that Article 29 is not an exclusion or limitation on liability within the meaning of Article 9.[174] The action was dismissed.

K. Liability for Delay Under Article 19

The question of when a carrier is liable for delay was raised in the recent case of *Peralta v. Continental Airlines, Inc.*[175] In *Peralta,* a businessman was prohibited from boarding his scheduled flight because his ticket appeared to have been altered and there was no record that he checked in for the flight. He was escorted off the plane while a security officer investigated. Satisfied that the plaintiff belonged on the flight, the security officer

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[170] 1999 WL 493350 (S.D.N.Y. 1999).
[171] *See id.* at *4.
[172] 169 F.3d 1151, 1153-54 (8th Cir. 1999).
[173] 1999 WL 261932 (N.D. Ill. 1999).
[174] *Id.* at *4.
[175] 1999 WL 193393 (N.D. Cal. 1999).

attempted to stop the plane's departure. The attempt was unsuccessful, and the carrier instead arranged for plaintiff to travel to his destination on the next available flight. Plaintiff alleged that the delay caused his business negotiations to fail. The court held that plaintiff's common-law claims for breach of contract and breach of implied covenant of good faith and fair dealing were preempted by the Warsaw Convention under *El Al Israel Airlines v. Tseng*.[176] Plaintiff's only available cause of action, therefore, was for delay damages under Article 19. The court further found, however, that the carrier had met its Article 20 burden to demonstrate that it had taken all necessary steps to accommodate plaintiff and avoid damage.[177] Based on this showing, the plaintiff could not recover for delay under Article 19.

In *Minhas v. Biman Bangladesh Airlines*,[178] the plaintiff was "bumped" from a flight as she was attempting to return from India to New York. Defendant informed plaintiff that it was unable to book her on a flight to New York for the next four months. After forty-five days, plaintiff finally returned home on another airline. Plaintiff's state law claim for negligence was held to be preempted by the Warsaw Convention, and she was limited to the $400 compensation available for delay under Article 19. Additionally, the parties disputed whether the return flight ticket was timely and correctly reconfirmed, leaving a factual dispute to be resolved by the jury regarding plaintiff's entitlement to even these minimal damages.

L. Liability Under Article 18 for Luggage and Cargo Loss or Damage

Article 4 of the unamended Warsaw Convention requires delivery to the passenger of a baggage check with specified information. If an airline fails to deliver such a baggage check, the carrier forfeits liability limits. A number of recent cases raise this forfeiture issue. In *Spanner v. United Airlines*,[179] the Ninth Circuit held that the Article 22 limitation of liability provision of the Warsaw Convention did not apply to plaintiff's claim for lost baggage, because the baggage check failed to contain the number and weight of the bags. The court held that this result was

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[176] 525 U.S. 155 (1999). *See supra* Part III.E.1.
[177] *See Peralta*, 1999 WL 193393 at *2.
[178] 1999 WL 447445 (S.D.N.Y. June 30, 1999).
[179] 177 F.3d 1173 (9th Cir. 1999).

mandated by the plain language of the unamended Warsaw Convention, despite the fact that the passenger was not prejudiced by the failure.

The District of Columbia Circuit agrees. In *Cruz v. American Airlines, Inc.*,[180] the plaintiffs' suitcases did not arrive in Santo Domingo. American Airlines's baggage checks did not state the weight of the suitcases. American Airlines argued that Article 4(4) of the unamended Warsaw Convention operated to forfeit the liability limits of Article 22 only when the baggage checks failed to contain any of the three particulars specified at Article 4(3)(d), (f), and (h). The D.C. Circuit disagreed, holding that even though the requirements of Article 4(3)(d), (f), and (h) were outdated and served no purpose, Supreme Court case law required strict adherence to plain treaty language.[181] It disagreed with the Second Circuit, which has condoned ignoring the plain language of Article 4(4).[182] The court also held that Montreal Protocol No. 4, which became law in the United States in March 1999 and eliminated the baggage weight requirement, was clearly a treaty amendment that could not apply retroactively. Finally, the court concluded that Article 18, like Article 17, was an exclusive cause of action that preempts state law claims.[183] The court applied the analysis of the Supreme Court *Tseng* decision, discussed *supra* at Part III.E.I., to Article 18.

Weinerth v. El Al Israel Airlines[184] involved plaintiffs who flew from Miami to New York on American Airlines, where they connected with defendant's flight for Israel. Their luggage, which had been checked in Miami, did not appear in New York. Plaintiffs alleged that an El Al employee in New York assured them that the baggage had tag numbers and would be sent to Tel Aviv. The luggage did not appear in Tel Aviv and was never located. Defendant argued that it never had custody or control over the baggage. These allegations raised triable issues of fact on the question of control and precluded summary judgment in favor of the airline.[185]

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[180] 193 F.3d 526 (D.C. Cir. 1999).

[181] The court cited Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1989).

[182] *See* Republic Nat'l Bank of New York v. Eastern Airlines, 815 F.2d 232 (2d Cir. 1987).

[183] *Id.* at 235.

[184] 1999 WL 390612 (E.D.N.Y. 1999).

[185] *Id.* at *4.

In a cargo case, *Tai Ping Insurance Co. Ltd. v. Expediters International,*[186] errors in the air waybill led to forfeiture of liability limits. In this action by a shipper for the loss of a shipment of crystal platters, the carrier was not entitled to the protection of the limited liability provisions of the Warsaw Convention because the air waybill failed to include the regularly scheduled stopping points in the flight and indicated the wrong departure date.

A carrier is required under Article 8(c) to list "agreed stopping places," provided the carrier an alter the stopping places when necessary. In the Second Circuit, case law allows the carrier to indicate the "agreed stopping places" by incorporating by reference its timetables.[187] Article 8(c) was at issue in a number of recent cases. In *Insurance Co. of North America v. Federal Express Corp.*,[188] a California corporation purchased $638,500 worth of computer chips from a Canadian company. The shipment disappeared from a Federal Express storage area in Memphis. The plaintiff argued that Federal Express could not avail itself of the liability limitations set out in the Warsaw Convention for cargo because it had failed to comply with Article 8(c) when it omitted Memphis as an "agreed stopping place." The court rejected the plaintiff's argument because the air waybill made it clear that there were *no* "agreed upon" stopping places, and Federal Express explicitly reserved the right to route the shipment as it saw fit.[189] Therefore, Federal Express was protected by the liability limitation.

In *Intercargo Insurance Co. v. China Airlines, Ltd.*,[190] the Second Circuit held that the waybill failed to communicate the "agreed stopping places" even though the face of the waybill referred to the timetable schedule for Flight C1317 and the timetable revealed that the flight had a Los Angeles departure and a stop in Taipei before the destination of Hong Kong. The air waybill, however, failed to indicate that at Taipei the cargo would be transferred to Flight C1607 and then carried to Hong Kong. The timetable did not list this flight number. Accordingly, Article 8(c) was not satisfied and the limited liability provisions did not apply.

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186 34 F. Supp. 2d 169, 174-76 (S.D.N.Y. 1998).

187 *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2d Cir. 1996).

188 189 F.3d 914 (9th Cir. 1999).

189 *Id.* at 918-19.

190 208 F.2d 64 (2d Cir. 2000).

In *Sotheby's v. Federal Express Corp.*,[191] the court held that the carrier's rerouting of art works from Newark to Memphis, on the ground that Newark had a staff shortage, was not an agreed upon stopping place and was not a rerouting based on necessity within the meaning of Article 8(c) because the carrier should have anticipated the staff shortage.

The scope of the Warsaw Convention as applied to cargo cases is set out in Article 18. Article 18 precludes liability for damage caused by transportation by land. However, when transportation by land takes place for the purpose of loading, delivery, or transshipment in the performance of a contract for transportation by air, any damage is presumed, *subject to contrary proof*, to have resulted during the air transportation. In *Read-Rite Corp. v. Burlington Air Express, Ltd.*,[192] the court held that when there was contrary proof to show that the goods were in fact destroyed during the ground transportation outside of London's Heathrow Airport, the Warsaw Convention does not apply.

In *Mitsui Marine & Fire Insurance Co., Ltd.*,[193] the plaintiff attempted to get around the liability limit set out in Article 22 for cargo shipments by alleging that the damage to the computer equipment shipped from Boston to Tokyo occurred during the land transportation to Kennedy Airport in New York City and not during the air transportation. The court noted that at Kennedy Airport the shipment was accepted and a receipt was signed attesting that the shipment was in "Good Order and Condition." The court rejected plaintiff's argument and applied the limitation of liability set out in the Warsaw Convention.

M. Removability of Warsaw Convention Case

In *Husmann v. Trans World Airlines, Inc.*,[194] the court denied plaintiff's motion to remand the case to state court. The plaintiff was injured when he tripped over luggage while boarding a TWA flight from London, England to St. Louis, Missouri. The plaintiff filed his complaint based on state law and argued that the Warsaw Convention did not apply. The Eighth Circuit rejected this argument and held that the case was removable because the cause of action arose under the Warsaw Convention,

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[191] 97 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2000).

[192] 186 F.3d 1190 (9th Cir. 1999).

[193] 55 F. Supp. 2d 308 (S.D.N.Y. 1999).

[194] 169 F.3d 1151 (8th Cir. 1999).

which preempted state law claims.[195] The court also ruled that because the Article 29 two-year statute of limitation had expired, the case should be dismissed.[196] In *Donkor v. British Airways Corp.*,[197] however, the court held that British Airways failed to support the case's removal to federal court when it failed to submit factual proof that plaintiff was still in the process of disembarking when she allegedly sustained her injuries.

N. Application of Warsaw Convention to Carrier's Agents or Independent Contractors

In *Alleyn v. Port Authority of New York and New Jersey*,[198] the Warsaw Convention did not apply to plaintiff Alleyn's claims against an elevator service company. The court noted that although the service company was acting as a Delta agent, the agent was performing work that Delta was not required by law to perform. The court concluded that the case law extending the application of the Warsaw Convention to the carrier's agents or contractors did so only when the agent or contractor was performing a service in furtherance of the contract of carriage or performing a service that the airline was otherwise required by law to perform.[199] The agent's services in *Alleyn* did not fall within this narrow category.

IV. LAW APPLICABLE TO AIRCRAFT DISASTERS OCCURRING IN WATER OR ON OFFSHORE PLATFORMS

A. Territorial Scope of DOHSA's Application

By court interpretation, the Death on the High Seas Act[200] ("DOHSA") is the applicable United States law to aviation disasters occurring on the high seas.[201] When DOHSA was enacted in 1920, the high seas were defined in maritime collision cases as those non-sovereign waters belonging to no nation, which began beyond a marine league or three miles from a sovereign's shores. By the 1980s, the international community recognized each nation's right to a broader sovereign territorial sea of

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[195] *Id.* at 1153.
[196] *Id.* at 1154.
[197] 62 F. Supp. 2d 963 (E.D.N.Y. 1999).
[198] 58 F. Supp. 2d 15 (E.D.N.Y. 1999).
[199] *Id.* at 24.
[200] 46 U.S.C. § 761 (1920).
[201] *See, e.g.*, Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217 (1996).

twelve miles, beyond which lay the high seas. This understanding was formalized in many nations by treaty and in the United States by a 1988 Presidential Proclamation. In 1988, President Reagan issued the Territorial Sea Proclamation and, in accordance with international law, claimed a twelve-mile sovereign territorial sea for the United States.

The applicability of the international definition of high seas to DOHSA became a major issue in two air disasters that have occurred in sovereign territorial seas. TWA Flight 800 crashed eight miles off Long Island on July 17, 1996, within the territorial seas of the United States as defined by international and federal law. Swissair Flight 111 crashed into Canadian territorial seas approximately seven miles off Peggy's Cove, Nova Scotia on September 2, 1998. The Canadian government has passed federal legislation, in conformity with international law, recognizing that its territorial sea extends to twelve miles from shore. In both of these cases defendants have argued for the application of DOHSA, which limited damages awards to pecuniary losses only until the 2000 amendment to DOHSA.[202] The 1920 DOHSA did not permit any recovery for loss of society, grief, decedent's pre-death pain and suffering, or punitive damages and could not be supplemented by state or general maritime law.[203] Thus, the territorial scope of DOHSA's application became a central issue in these litigations.

The defendants in both crashes argued that DOHSA applies to all ocean waters beyond a marine league from the U.S. shores, whether or not these waters are in fact the international high seas. Prior to the 2000 DOHSA Amendment, which expressly made DOHSA inapplicable to commercial aviation accidents occurring within 12 miles of the U.S. shores, Judge Sweet of the Southern District of New York had held that DOHSA applies only if death occurs both beyond a marine league from

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[202] *See* AIR21, Pub. L. No. 106-181, 114 Stat. 61 (2000).

[203] In the 2000 amendment to DOHSA, under AIR21, the statute was retroactively amended to permit recovery of damages for the nonpecuniary loss of decedent's care, comfort, and companionship. This change applies only to commercial aviation accidents that occur more than twelve miles from U.S. shores. The statute now expressly provides that DOHSA does not apply to aviation commercial accidents within twelve miles of the U.S. shores. The amendment expressly prohibits punitive damages, and there is still no recovery for the decedent's pre-death conscious pain and suffering. *See infra* Part XIII for a more detailed discussion of AIR21 and the DOHSA Amendment.

shore *and* on the sovereignless high seas.[204] The district court examined the legislative history of DOHSA and held that "high seas," for purposes of the territorial scope of DOHSA, means international, non-sovereign waters, and that the statute therefore does not apply in any United States territorial waters.[205] The district court acknowledged that when DOHSA was enacted the United States territorial sea extended only three miles, or one marine league, from the shores of United States territories. The court further found, however, that the 1988 Territorial Seas Proclamation "established the dividing line between United States sovereign and international waters at twelve nautical miles, thereby relocating the 'high seas.'"[206] The relocated high seas, in turn, meant that DOHSA did not apply to deaths occurring within the twelve-mile United States territorial sea. Consequently, the court held that DOHSA did not apply to the deaths of the passengers of TWA Flight 800, which crashed into waters that were no longer the high seas.

Just prior to the effective date of the 2000 DOHSA amendment, which retroactively and expressly made DOHSA inapplicable to aviation accidents within the twelve-mile territorial sea, the Court of Appeals for the Second Circuit affirmed Judge Sweet's TWA ruling that the 1920 DOHSA did not apply to the TWA Flight 800 litigation.[207]

The Second Circuit, in a split two to one decision, concluded that the term "high seas" in Section 1 of DOHSA meant international, nonterritorial, nonsovereign waters, and therefore did not apply to accidents occurring within the U.S. twelve-mile territorial sea. Since the TWA Flight 800 crash occurred within the twelve-mile U.S. territorial sea, DOHSA did not apply. The court based its construction of "high seas" on a number of grounds:

1. The international definition was adopted by the Supreme Court in maritime high seas collision cases and these were the cases that shaped the drafting of DOHSA;

2. This definition of high seas has prevailed over time;

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[204] *In re* Air Crash Off Long Island, New York, on July 17, 1996, 1998 WL 292333 (S.D.N.Y. 1998), *aff'd*, 209 F.3d 200 (2d Cir. 2000).

[205] *See id.* at *7-*8.

[206] *Id.* at *8.

[207] *See In re* Air Crash off Long Island, New York on July 17, 1996, 209 F.3d 200 (2d Cir. 2000).

3. The legislative history of DOHSA demonstrates that this was the meaning that Congress adopted, and the low-water mark definition was not accepted by Congress;

4. This definition of high seas is consistent with the use of the term "high seas" in Section 4 of DOHSA and consistent with the purpose of the statute as a whole.

After publication of the Second Circuit decision, the DOHSA 2000 amendment was enacted on April 5, 2000,[208] making DOHSA inapplicable to commercial aviation accidents "occurring on the high seas 12 nautical miles or closer to the shore of [the United States]." The defendants in TWA Flight 800, Boeing and TWA, have sought rehearing or *en banc* review, arguing that the amendment's language clarifies that "high seas" for purposes of DOHSA always meant all waters of the ocean coast to coast, including the territorial seas.[209] Defendants argued that the 1920 DOHSA excluded application of the act only to that portion of the high seas which is within a marine league (three nautical miles) from U.S. shores. Thus, TWA Flight 800, which occurred about eight miles from the U.S. shore, occurred on the high seas. The plaintiffs opposed the petition, arguing that (1) DOHSA 2000 is retroactive to TWA Flight 800 and expressly excludes application of DOHSA within the twelve-mile territorial sea; and (2) the new language in DOHSA 2000—"on the high seas 12 nautical miles or close to the shore of [the United States]"—was extraneous and inadvertently added and did not clarify or redefine "high seas" for purposes of DOHSA. The petition for rehearing has been denied.[210]

The issue in Swissair/Delta Flight 111 involving the crash of Flight 111 near Peggy's Cove, Nova Scotia on September 2, 1998, is whether the DOHSA term "high seas" includes foreign territorial waters. Defendants' briefs argue that "high seas" mean all ocean waters beyond the low-water mark, or coast to coast waters. Defendants say that this meaning is underscored by the DOHSA 2000 amendment, and DOHSA therefore gov-

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[208] *See* AIR21, § 404, 114 Stat. at 131.

[209] The defendants' petition raised a question about the amendment's retroactivity clause but did not address the issue.

[210] In an unpublished decision by the Second Circuit involving the 1983 shoot-down of KAL Flight 007 over the Sea of Japan, the court held that plaintiff had waived the argument that the shoot-down occurred in Soviet waters and not over the international high seas, because plaintiff had admitted in his pre-trial order that Flight 007 "was shot down over the high seas." Ephraimson-Abt v. Korean Air Lines, 1999 WL 980959 (2d Cir. 2000). A petition for *en banc* review was denied in this case as well.

erns crashes in foreign territorial waters. A long line of cases has applied DOHSA to aviation crashes in foreign territorial waters.[211] Plaintiffs' briefs argue that the legislative history to the 1920 DOHSA and the statute as a whole confirm that Congress adopted the international meaning of "high seas" as waters outside the territory of any nation. Plaintiffs pointed to statements in the legislative history to the effect that the DOHSA drafters left out foreign territorial waters. Plaintiffs argued that the line of cases applying DOHSA to foreign waters looked only at the statute's ambiguous text and did not examine the DOHSA 1920 drafting history.

Plaintiffs further argued that DOHSA 2000 never intended to redefine or clarify the meaning of "high seas" and did not overrule the original meaning of "high seas" as international non-sovereign waters. Plaintiffs examined the legislative history to DOHSA 2000 and noted that no House or Senate draft bill ever adopted any new language affecting or modifying the central term "high seas." The final language was inserted by the conference committee, which drafted new language to substitute for the House and Senate bills. The conference committee report explains the amendment's intent to conform to the 1988 Presidential Proclamation on the 12-mile Territorial Sea and expand the DOHSA remedy for aviation accidents occurring more than twelve miles from land.[212]

According to the plaintiffs, the final change in language, inserted at conference, was inadvertent and apparently was added in haste to reconcile the differences between the House bill and the Senate bill, neither of which ever intended to clarify or redefine the meaning of high seas. The issue is pending before the MDL court, Chief Judge Giles of the Eastern District of Pennsylvania.

B. DOHSA's Application Based on Location of the Misconduct

The application of DOHSA also depends on a determination of the location of the wrong which causes death; under 46 U.S.C. 5761, it is the "wrongful act, neglect or default" that must "occur on the high seas", not the death. This issue came up in two decisions authored by Judge Kent of the Southern District

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[211] The parties' briefs are available upon request. Please contact Blanca I. Rodriguez at Kreindler & Kreindler.

[212] *See* H.R. Rep. No. 106-513, at 185 (2000).

of Texas, both involving a helicopter crash on November 28, 1996, into a fixed oil platform in the Gulf of Mexico. The two decisions are *Williamson v. Petroleum Helicopters, Inc.*,[213] and *Brown v. Eurocopter, S.A.*[214] The plaintiffs in those cases argued that because the wrong, the tort, occurred when the helicopter crashed into an offshore platform, which is treated as land under the Outer Continental Shelf Lands Act (OCSLA), OCSLA, not DOHSA, should apply to the helicopter crash. The court disagreed, concluding that DOHSA applied.

OCSLA[215] provides a federal remedy for accidents occurring on offshore platforms. The offshore platforms are treated as federal enclave land. Accidents on the platforms are governed by federal law which adopts the state law of the adjacent state, provided it is not inconsistent with federal law. It is not an admiralty remedy.[216] In *Williamson*,[217] the helicopter passengers who worked on the fixed oil platform were killed when their helicopter, which began experiencing mechanical difficulties while flying over the high seas, crashed into the fixed oil platform in the Gulf of Mexico while attempting to land and thereafter sank into the ocean. The court ruled that when, under the factual circumstances, a remedy for wrongful death exists under both OCSLA and admiralty law, admiralty law takes precedence and governs to the exclusion of OCSLA.[218] The court therefore examined whether this accident involved a maritime tort, which would create maritime jurisdiction. It applied the Supreme Court's multi-prong test for determining maritime jurisdiction as most recently discussed in *Grubart v. Great Lakes Dredge & Dock Co.*[219] The fact that the aircraft began experiencing mechanical problems over the Gulf of Mexico and ultimately sank in the Gulf waters was held sufficient to satisfy the maritime locality requirement for maritime jurisdiction, which requires a tort in navigable waters. In addition, the transfer of personnel to and from offshore drilling platforms was akin to the use of boats to perform such tasks; therefore, the requirement of traditional maritime activity for maritime jurisdiction was also met. Finally,

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213 32 F. Supp. 2d 456 (S.D. Tex. 1999).

214 38 F. Supp. 2d 515 (S.D. Tex. 1999).

215 43 U.S.C. § 1331 (1994).

216 *See* Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352 (1969).

217 32 F. Supp. 2d 456 (S.D. Tex. 1999).

218 The court relied on Fifth Circuit law. *See, e.g.*, Smith v. Penrod Drilling Corp., 960 F.2d 456 (5th Cir. 1992).

219 513 U.S. 527, 534 (1995).

the crash of a helicopter into navigable waters has the potential to disrupt maritime commerce. Thus, the requirement of a connection to maritime activity was also met. Because maritime jurisdiction existed, the court applied the relevant admiralty statute, in this case DOHSA.[220]

In the second case involving this crash, *Brown v. Eurocopter, S.A.*,[221] the court reaffirmed that DOHSA applied. In this decision, the court directly ruled on whether or not the accident fell within the language of DOHSA, which requires "death of a person . . . caused by wrongful act, neglect, or default occurring on the high seas. . . ."[222] Here, the plaintiff argued that the death occurred as a result of a wrong which occurred on land when the helicopter crashed into the offshore platform. The court admitted that application of DOHSA is not "immediately discernible" in cases where death occurs on land.[223] The court concluded, however, that the locus of the death was not determinative; rather, the determinative factor is where the misconduct is "consummated" and reaches its moment of "crisis."[224] The court said, "[T]he great weight of courts considering the question of where the wrongful act 'occurred' have concluded that the wrong must be 'consummated' upon the high seas for DOHSA to apply."[225]

Relying on *Lacey v. L.W. Wiggins Airways, Inc.*,[226] the court concluded that when DOHSA speaks of wrongful act occurring on the high seas "it contemplates the substance of the occurrence which resulted in death and gave rise to a right to recover."[227] In a product defect case, said the court, it is not the misconduct or omissions that occurred on land that are pertinent to determine the scope of DOHSA's application, but rather where those failures took "full effect." If the product defects were "consummated" on the high seas, DOHSA applies, even if the death from

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[220] Note that other courts have applied DOHSA to deaths occurring on the high seas without regard to whether the traditional multi-prong test for maritime jurisdiction exists or not. *See, e.g.*, Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217 (1996). Under this analysis, DOHSA applies simply when the facts of the case fall within the language and terms of art of the statute. *See also* Motts v. M/V Green Wave, 210 F.3d 565 (5th Cir. 2000), discussed *infra*.

[221] 38 F. Supp. 2d 515, 518 (S.D. Tex. 1999).

[222] 46 U.S.C. §761 (1994).

[223] *Supra* note 215, 38 F. Supp. 2d at 517.

[224] *Id.*

[225] *Id.*

[226] 95 F. Supp. 916 (D. Mass. 1951).

[227] 38 F. Supp. 2d at 517(quoting Lacey, 95 F. Supp. at 918).

the misconduct over the high seas occurred on land.[228] The court held that the moment of "consummation" may be separate from the moment of death. According to *Brown*, DOHSA was triggered because the alleged wrong, the product malfunction, was "consummated" and reached its point of crisis upon the high seas. The high seas was the place where the aircraft's mechanical problems fully manifested themselves. The court did not define the terms "consummation," "crisis," or "full effect." It also did not consider that, under generally recognized tort principles, a personal injury tort does not reach full effect until injury to the person occurs. In this case the personal injury occurred on the platform, when the helicopter crashed and the decedents sustained their fatal injuries. A product can malfunction without causing personal injury, therefore focusing on when and where the aircraft itself initially manifested mechanical problems is not equivalent to the inquiry of the location of the fatal injury of the person killed.

A recent Fifth Circuit DOHSA decision in a nonaviation case may require re-examination of Judge Kent's decisions in *Brown* and *Williamson*. The case, *Motts v. M/V Green Wave*,[229] involved a seaman who sustained an injury while his vessel was on the high seas and later died in a hospital as a result of delay of the shipmaster in seeking treatment for the seaman. The Fifth Circuit in *Motts* held that DOHSA expands and by itself creates admiralty jurisdiction in the federal courts without regard to the admiralty multi-prong test for jurisdiction. The *Motts* court also held that the "'moment of consummation'" approach to determining the place of fatal injury for purposes of DOHSA's preemptive scope should not be used. Rather, said the court, "the district court's attention should have been drawn to [decedent's] location when he was injured. . . ."[230] If the place where the decedent was injured was the high seas, then DOHSA applies and preempts state law, even if the decedent later died on land. Thus, in *Brown* the district court should have focused on the fact that decedents were not injured until the helicopter

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[228] The court noted that in Moyer v. Rederi, 645 F. Supp. 620 (S.D. Fla. 1986), the court applied DOHSA in a case in which the decedent died on land after sustaining a heart attack while snorkeling.

[229] 210 F.3d 565 (5th Cir. 2000).

[230] *Id.* at 571-72 & n.6.

crashed onto the platform, which under OCSLA is treated as land, not the high seas.[231]

V. NON-WARSAW CONVENTION LIABILITY OF AIRLINES AND AIRCRAFT OWNERS OR OPERATORS

A. AIRLINE'S LIABILITY FOR ACTS OF COMMUTER AIRLINE

In *Grajales-Romero v. American Airlines*,[232] the First Circuit ruled that American Airlines, which is owned by AMR Corporation, can be held liable under the theory of apparent agency for the negligence of the AMR's commuter or regional airline, American Eagle. The plaintiff was injured by a collapsing check-in counter at an airport in St. Kitts. Plaintiff was checking in to board an American Eagle flight from St. Kitts to Puerto Rico. The plaintiff sued American Airlines and American Eagle, but the district court dismissed the claims against American Eagle for lack of personal jurisdiction. The First Circuit upheld the lower court's finding that agency by authority existed between American Airlines and American Eagle, making American Airlines, as principal, vicariously liable for the negligence of American Eagle. The court relied on a number of facts, among them that plaintiff's ticket was issued by American Airlines and identified the carrier as "AA"; that the telephone information line for American Eagle flights was the American Airlines information line; that the check-in counters at San Juan and St. Kitts bore American Airlines and American Eagle logos; that the in-flight magazines were the American Airlines magazines; and that American Airlines lists St. Kitts as one of its destinations. Plaintiff relied on such facts to assume that he had chosen to fly on American Airlines. The court found the existence of a principal-agent relationship.

B. AIRLINE'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS

In *Marino v. City of New York*,[233] the plaintiff alleged that her injuries were caused by the negligence of curbside check-in per-

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[231] In a later decision, Brown v. Eurocopter SA, Civ. Action No. G-98-529 *SBK (S.D. Tex. 2000), the court held that the "air taxi" service involved in this crash was "commercial aviation" within the meaning of the 2000 DOHSA amendment, so as to entitle it to receive compensation for loss of decedent's care, comfort and companionship.

[232] 194 F.3d 288, 293-94 (1st Cir. 1999).

[233] 686 N.Y.S.2d 77 (N.Y. App. Div. 1999).

sonnel. The airline was not held liable for her injuries because the check-in personnel were deemed to be independent contractors not working under the control of the airline.

C. Airline's Liability for Removal of a Passenger

The circumstances under which an airline may be liable for requesting a passenger to leave a plane or having a passenger removed by the police or other authorities has been the subject of a number of recent cases. In *Schaeffer v. Cavallero*,[234] the court ruled that there was an issue of fact regarding whether the airline properly had the plaintiff passenger removed from the plane for safety reasons or improperly had plaintiff removed in retaliation for the passenger's prior verbal arguments. The court acknowledged that the Federal Aviation Act provides that an airline may refuse to transport a passenger or property that the carrier decides is or might be a danger to safety.[235] Therefore, if the airline acted out of concern for safety, it would not be liable. However, given the plaintiff's prior verbal abuse directed at a crew member, the court concluded that the airline's decision may not have been based solely on safety concerns. A refusal to transport cannot give rise to a claim for damages under federal or state law unless the carrier's decision was arbitrary and capricious.[236] The court did, however, dismiss plaintiff's claims of battery and false imprisonment. The court reasoned that it was the passenger's decision to refuse to leave the aircraft, which resulted in the police escorting him off the plane.

Another case, *Hugger v. Northwest Airlines, Inc.*,[237] held that the airline did not commit racial discrimination under Title II of the Civil Rights Act when it asked the police to escort plaintiff off the plane. In *Hugger*, an African American passenger was removed from the plane after having a verbal dispute with a white passenger. During the argument, the plaintiff tossed the other passenger's luggage and verbally threatened him. The pilot asked the plaintiff to leave the plane, citing safety concerns. The court ruled that the plaintiff was unable to prove that the pilot's stated safety reason for the airline's action was a pretext for racial discrimination. The court also ruled that plaintiff's

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234 54 F. Supp. 2d 350, 351 (S.D.N.Y. 1999).
235 49 U.S.C. § 44902 (1994).
236 *See Schaeffer*, 54 F. Supp. 2d at 351.
237 1999 WL 59841 (N.D. Ill. 1999).

state law tort claims were preempted under the Airline Deregulation Act (ADA),[238] because the decision to remove a passenger relates to services, thus precluding state law claims.[239]

D. Airline's Failure To Respond Adequately to In-Flight Medical Emergencies

In recent years, the number of in-flight medical emergencies has increased dramatically, from about three cases a day between 1986 and 1988 to approximately 30 cases per day in 1996.[240] With more people flying every day, this unfortunate statistic can only go up. Yet the airlines, particularly domestic carriers, have been slow to respond by providing expanded medical device equipment and pharmaceuticals on board their aircraft. Furthermore, the FAA has not expanded the list of contents required to be carried in emergency medical kits since the list was first published in 1986.[241] Before that date, airlines were only required to carry rudimentary first aid kits. Under current standards, emergency medical kits must contain at least the following items: a sphygmomanometer, a stethoscope, three breathing tubes, syringes and needles, 50% dextrose injections for hypoglycemia, epinephrine for asthma, diphenhydramine for allergic reactions, and nitroglycerin tablets for cardiac chest pain.[242] The medical equipment on this list is inadequate to allow airline personnel to cope with many serious medical emergencies. Since in-flight medical emergencies often involve heart attacks, the absence of defibrillators from this list has been particularly important. Recently, in response to increasing public pressure and a growing number of lawsuits, several domestic carriers have installed or announced their plans to install defibrillators in their aircraft.[243]

A number of lawsuits have charged airlines with negligence for failure to provide adequate medical aid to a stricken passen-

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[238] The ADA is discussed *infra* at Part VI.

[239] *See also* Sanders v. Southwest Airlines Co., 86 F. Supp. 2d 739 (E.D. Mich. 2000) (holding that the airline was not negligent and did not intentionally inflict emotional distress or violate anti-discrimination laws when it had the police meet a passenger who had been rude and disruptive on the flight as she exited the plane).

[240] *See* John Manibusan, "In Flight Medical Emergencies: Can Airlines Cope?" Supplement to TRIAL, July 1998.

[241] 14 C.F.R. § 121 app. A (1996).

[242] *See* 14 C.F.R § 121.309 (1997).

[243] *See* Somes v. United Airlines, Inc., 33 F. Supp. 2d 78 (D. Mass. 1999).

ger.[244] In *Tandon v. United Airlines, Inc.*,[245] applying New York law, the court permitted the plaintiff to amend the complaint to include a claim against the airline for failure to maintain a medical kit with the equipment necessary for the proper treatment of a heart attack. Applying New York law, the court in *Walker v. Eastern Airlines, Inc.*[246] allowed the jury to decide the adequacy of the in-flight medical aid available to a passenger who died aboard defendant's flight. Plaintiff alleged that defendant breached its duty not to board a passenger potentially not physically fit to fly and its duty to render aid to ill passengers in flight. Because the court concluded that issues involving duty of care and causation should be decided by the jury, defendant's motion for summary judgment was denied.

The Ninth Circuit, in *Landet v. Air France*,[247] ruled that the Airline Deregulation Act (ADA), which preempts state law claims that relate to "rates, routes or services of any carrier,"[248] did not preempt plaintiff's claim that the airline caused the death of her mother by failing to see that she received prompt medical care for an embolism after her airplane landed in France.

In *Somes v. United Airlines, Inc.*,[249] the widow of an airline passenger sued the airline for the wrongful death of her husband, who suffered a cardiac arrest and died while traveling aboard defendant's aircraft. The plaintiff alleged that the defendant was liable because it failed to equip its aircraft with certain medical equipment, including an automatic external defibrillator, which allegedly would have saved her husband's life. The airline argued that plaintiff's state law claim was preempted by the ADA because it sought to impose a duty on the airline that related to the airline's "services." The court rejected this argument, holding that the provision of emergency medical equipment is not an airline "service" as Congress understood that term. The court also rejected the defendant's argument that the plaintiff's claim was preempted because FAA regulations did not require the inclusion of a defibrillator in the aircraft's emergency medical kit. The court noted that the federal regulations merely set forth minimum requirements and did not

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[244] *See, e.g., id.*

[245] No. 94 Civ. 7002 (DC), 1997 WL 158365 (S.D.N.Y. 1997).

[246] 23 Av. Cas. (CCH) 17,904 (S.D.N.Y. 1991).

[247] 182 F.3d 926 (9th Cir. 1999) (unpublished table decision).

[248] *See* discussion of ADA *infra* at Part VI.

[249] 33 F. Supp. 2d 78 (D. Mass. 1999).

prevent the airline from carrying supplemental devices to protect its passengers or preempt state law duties requiring more from the airlines.

E. Airline's Duty to Travel Agents

In *Kabo v. UAL, Inc.*,[250] decided under Pennsylvania law, the plaintiff, a travel agent, suffered a heart attack while assisting in check-in procedures and baggage handling for a tour group. The court held that the defendant airline did not breach any duty to plaintiff by allowing him to handle baggage, despite the fact that his help violated the airline's FAA approved security program and the airline's own internal rules. The court ruled that the airline did not have a duty to warn plaintiff of the dangers of lifting luggage, since these dangers were obvious as a matter of law.

F. Airline's Liability to Employee-Passengers and to Employees of Independent Contractors

The exclusivity provisions in state worker's compensation laws ordinarily bar flight attendant actions against their employers, even when the airline's employee is deadheading aboard a flight and has been issued a ticket by the airline. The issuance of a ticket to an airline employee is not, by itself, determinative of whether the employee is traveling purely as a passenger or as an employee. In *In re Air Crash Off Long Island, New York, on July 17, 1996*,[251] the court ruled that because the flight attendants were on board the flight to Paris to resume their duties as flight attendants and were required by their employment to travel on TWA, they were traveling as employees, not passengers. Their suits against the airline were dismissed.

According to *Waite v. American Airlines, Inc.*[252] an airline will not be held liable for injuries sustained by the employee of an independent contractor unless one of the following conditions is met: 1) the airline assumed a specific duty under the contract with the independent contractor that the airline breached; 2) the airline breached a common-law or statutory duty to maintain safe premises; or 3) the airline had a statutory or common-law duty to control or perform the work. In *Waite*, a baggage handler employed by an American Airlines independent contractor

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[250] 762 F. Supp. 1190 (E.D. Pa. 1991).
[251] 30 F. Supp. 2d 631 (S.D.N.Y. 1998).
[252] 73 F. Supp. 2d 349 (S.D.N.Y. 1999).

was injured when he tried to adjust a piece of luggage on a moving conveyor belt. The court held that the plaintiff could not recover damages against the airline for the following reasons: 1) the airline never assumed a specific duty to train the plaintiff in the proper method of handling baggage; 2) the airline did not create or tolerate a known dangerous condition on its premises; and 3) the airline did not have a statutory or common-law duty to control the work.

G. Effect of Release from Liability

Scrivener v. Sky's the Limit, Inc.[253] involved a skydiving student who had signed a release from liability prior to taking skydiving lessons. Injured while taking a lesson, the plaintiff brought an action against the school to recover damages for his injuries. The court granted summary judgment to the defendant because the language of the release and the indemnification signed by the plaintiff prior to his lessons expressed in unequivocal and clear terms the parties' intent to relieve the defendant and its instructors from negligence liability. Plaintiff was not entitled to the protection of a New York statute which deems void any release signed in connection with a recreational center because the activity here was instructional, not recreational.

H. Liability of Aircraft Owner

In the recent case of *White v. Inbound Aviation*,[254] an aircraft owner leased an aircraft to a partnership, which then rented the aircraft to pilots. The aircraft was rented to an inexperienced pilot who crashed while attempting to take off from a high-altitude airport surrounded by mountains. The owner of the airplane was also an employee and manager of the partnership and in charge of day-to-day operations. The court held that the owner could be found vicariously liable under a state statute because he personally benefited from each rental of his airplane and he personally released the airplane to the pilot, and the jury could have inferred that he was not acting solely as an employee of the partnership when he entrusted the plane to the pilot. The owner's vicarious liability for the pilot's negligence was limited by statute to $15,000.

The owner was also held directly liable to the aircraft's passengers on the theory of negligent entrustment. The defendant

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[253] 68 F. Supp. 2d 277 (S.D.N.Y. 1999).

[254] 82 Cal. Rptr. 2d 71 (Cal. Ct. App. 1999).

knew that the pilot had flown only five times since receiving his license two years earlier. Rejecting the argument that the pilot was "competent" as a matter of law because he possessed a pilot's license, the court ruled that there was sufficient evidence to support the conclusion that the lessor knowingly leased the aircraft to an individual who lacked the ability to use it safely for a trip that involved a take-off and landing at a dangerous airport.

In *Lawson v. Management Activities, Inc.*,[255] spectators to an airplane crash who were not physically injured could not recover for emotional injuries they sustained as a result of viewing the crash, even if, for a brief moment, they experienced reasonable fear for their own safety. The owners and operators of the airplane had no duty of care to these spectators. The court stated several reasons for declining to extend the duty of care under these circumstances: 1) no moral blame attached to the defendant's conduct; 2) the extension of liability in such cases would not help to prevent future harm; 3) the burden on aircraft owners and operators could be great; and 4) the actuarial unpredictability of emotional distress damages could add significantly to the cost of insuring air transportation.

VI. PREEMPTION OF STATE LAW CLAIMS AGAINST AIRLINES UNDER THE AIRLINE DEREGULATION ACT

In 1978, Congress enacted the Airline Deregulation Act ("ADA") to maximize reliance "on competitive market forces to determine the quality, variety and price of air services."[256] Prior to the passage of the ADA, the airline industry was heavily regulated. To ensure that state regulation would not replace the old federal regulation, the ADA provides that "no state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier."[257] Since the 1992 Supreme Court opinion in *Morales v. Trans World Airlines, Inc.*,[258] defendants have argued that the ADA preempts state law tort claims in a variety of different settings. The current prevailing view in the

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[255] 81 Cal. Rptr. 2d 745, 758-68 (Cal. App. 1999).

[256] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

[257] Airline Deregulation Act § 105, 92 Stat. at 1708, codified at 49 U.S.C. § 41713(b)(1) formerly 49 U.S.C. App. § 1305(a)(1).

[258] 504 U.S. 374 (1992).

federal courts is that the ADA does not preempt run-of-the-mill state tort law claims.

A. The ADA Does Not Preempt Run-Of-The-Mill State Law Tort Claims

The Ninth Circuit Court of Appeals, sitting *en banc*, held in 1998 that in enacting the ADA "Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry."[259] The court concluded that Congress had no intent to preempt run-of-the-mill personal injury claims:

> Congress used the word "service" in the phrase "rates, routes, or services" in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo or mail. . . . To interpret "service" more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. . . . Nowhere in the legislative history, or in what remains of the federal airline regulatory statutes, does Congress intimate that "service," in the context of deregulation, includes the dispensing of food and drinks, flight attendant assistance, or the like.[260]

The Ninth Circuit's *Charas* decision also concluded that Congress's intent not to displace state tort law is demonstrated in the fact that federal law still requires commercial airlines to maintain insurance to cover bodily injury and death claims.[261] Also, the FAA's savings clause[262] expressly preserves state tort law remedies already existing at common law.

The Ninth Circuit in *Newman v. American Airlines, Inc.*,[263] relying on its *Charas* decision, overturned a prior ruling and held that the plaintiff's state law claims for her personal injuries were not preempted by the ADA.

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[259] Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (en banc) (expressly overruling Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995); Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997)), *cert. denied*, 522 U.S. 915 (1997).

[260] *Charas*, 160 F.3d at 1261,1266.

[261] 49 U.S.C. § 41112(a) (1994).

[262] 49 U.S.C. § 40120 (1994).

[263] 176 F.3d 1128 (9th Cir. 1999).

In *Lewis v. Continental Airlines, Inc.*,[264] a plaintiff who missed his connecting flight from Houston to Atlanta, allegedly because of the negligence of the airline, entered into an argument with an airline employee during which the employee called a security officer who turned the plaintiff over to the Houston Police Department. Plaintiff was interrogated and searched, incarcerated for twelve to fourteen hours, deprived of his epilepsy medication, and charged with aggravated assault against an airline employee and making terrorist threats. Plaintiff brought an action against the airline, charging it with negligence, malicious prosecution, false arrest, intentional infliction of emotional distress, assault, and violation of his right to be free from unwarranted seizure of his person under the Constitution. The court held that the plaintiff's state law claims were not preempted by the ADA, because the activities in question did not constitute airline services; they did not arise from ticketing, boarding, or baggage services.[265] The effect of the lawsuit on the airline's services was at best incidental. Furthermore, plaintiff contended that defendant's actions were outrageous, and such claims have been found to fall outside the scope of ADA preemption.

In *Glavey v. Aer Lingus*,[266] a plaintiff alleged that her wallet was stolen from her checked baggage during her trip on Aer Lingus. She reported the loss to defendant's employees, who were allegedly outraged that plaintiff, herself the employee of an airline, should "'have the audacity to make such a Report.'"[267] Ten days later, when she attempted to board her flight for home, employees of the airline would not allow her to board the flight unless she wrote an apology to the airline. When plaintiff refused, she was not permitted to board. The next day she returned home on another airline. The court ruled that plaintiff's claim for theft of goods was governed by the Warsaw Convention and was time-barred. Plaintiff's claim for negligent exclusion was not preempted however, by the ADA because her particular situation did not fall under traditional boarding procedures so as to constitute a "service" under the ADA.[268]

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[264] 40 F. Supp. 2d 406 (S.D. Tex. 1999).

[265] *Id.* at 414.

[266] No. 98 Civ. 7003 (LAP), 1999 WL 493350 (S.D.N.Y. 1999).

[267] *Id.* at *1.

[268] The *Glavey* case does not discuss why plaintiff's claim for exclusion from boarding did not fall within the scope of Article 17 as a boarding event.

In *Duncan v. Northwest Airlines, Inc.*,[269] the Ninth Circuit held that the ADA did not preempt a class action suit for personal injuries to flight attendants from defendant carrier's policy of permitting smoking on certain flights. Applying the *Charas* test, which interprets the word "services" in the ADA in its "public utility sense" of "provision of air transportation to and from various markets at various times,"[270] the *Duncan* court held that allowing smoking on certain flights does not constitute a service because it does not relate to the frequency of scheduling of transportation or the selection of markets to or from which transportation is offered. Instead, smoking deals with "amenities" offered by the carrier, which are not within the scope of the ADA's preemption.

B. ADA Does Not Preempt Claim for Inadequate Medical Assistance

In *Landet v. Air France*,[271] the court held that the ADA did not preempt plaintiff's claim alleging that the airline caused the death of her mother by failing to see that she received adequate medical care for an embolism after her airplane landed in France.

Another case, *Somes v. United Airlines, Inc.*,[272] dealt with an airline's failure to provide adequate emergency medical equipment aboard its aircraft. In *Somes,* the widow of an airline passenger sued the airline for the wrongful death of her husband, who suffered a cardiac arrest and died while traveling aboard defendant's aircraft. The plaintiff alleged that the airline negligently failed to equip its aircraft with certain medical equipment, including an automatic external defibrillator. The *Somes* court ruled that the provision of emergency medical equipment is not inherent in the nature of an airline's operations and is typically not a "bargained-for or anticipated"[273] service. Therefore it did not fall within the ADA's meaning of "service" as defined in the case law of the Ninth Circuit, to which the court referred for guidance.

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269 208 F.3d 1112 (9th Cir. 2000).

270 *Id.* at 1115.

271 182 F.3d 926 (9th Cir. 1999) (unpublished table decision).

272 33 F. Supp. 2d 78 (D. Mass. 1999).

273 *Id.* at 83 (quoting Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995)).

In the unpublished decision *Gulley v. American Airlines*,[274] the plaintiff-passenger was injured while descending the stairway of a nineteen-seat commuter airplane. Plaintiff alleged that she informed the airline that she was disabled and she needed assistance in disembarking, yet the airline's employees provided no help. The court held that the plaintiff's claim was not preempted by the ADA.

C. ADA AND DISCRIMINATION CLAIMS

The plaintiffs in *Woodson v. US Airways, Inc.*[275] filed suit asserting federal discrimination claims and violation of the anti-discrimination provision of the Federal Aviation Act ("FAA").[276] They also asserted numerous state claims. US Airways filed a motion to dismiss the FAA and state law claims.

The plaintiffs were an African-American couple who boarded a US Airways plane going to San Juan, Puerto Rico. They purchased their tickets electronically and received pre-assigned seatings for the flight. An employee of US Airways told the plaintiffs to board the plane. Once plaintiffs boarded, they noticed that the plane was full and that two passengers, who were white, were standing in the aisle without seats. The plaintiffs had been in their assigned seats for about fifteen or twenty minutes when a second US Airways employee approached them and told them that there was a "weight and balance" problem and that because the Woodsons were the last two people to board the plane, they would have to leave. The Woodsons explained that they had to meet their cruise ship in San Juan that evening. The employee assured them that there were other flights that would get them there in time.

As soon as the plaintiffs left the plane, the two white passengers who were previously standing in the aisle took plaintiffs' seats. After leaving the plane, the plaintiffs also learned that there were no flights that would allow them to meet their cruise ship. The same employee that had told the Woodsons to board the plane was rude, telling the plaintiffs that because they had violated the "ten-minute rule" their tickets had been canceled. Eventually, the plaintiffs met their cruise ship at its second port of call, St. Thomas.

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[274] 176 F.3d 483 (9th Cir. 1999) (unpublished table decision).

[275] 67 F. Supp. 2d 554 (1999).

[276] 49 U.S.C. § 41310 (1996).

The court acknowledged that the ADA prohibits states from regulating "price, route, or service" associated with commercial air travel. In reviewing the case law, the court found inconsistency in the application of ADA preemption to discrimination claims. The court noted that the Second Circuit had previously held that preemption issues must be decided on a case-by-case basis.[277] The court denied defendants' motion to dismiss the state law claims because the case was still premature, no factual record existed, and the court did not find a *prima facie* impact on services. The court also noted that the case would continue, in any event, under the federal claims. The court did dismiss the FAA anti-discrimination claim because the travel at issue was not foreign air travel.

In *Huggar v. Northwest Airlines, Inc.*,[278] the court held that the ADA preempted plaintiff's state law claim for improper removal from the plane because the airline's decision to remove the plaintiff related to boarding services, even if the claim would not have a significant economic impact on that service, *Huggar* appears to be inconsistent with the Ninth Circuit's definition of "services" for purposes of ADA's preemptive scope, since negligence in treatment of a passenger boarding does not relate to the selection of transportation markets or the economics of airline services.

D. ADA Does Not Preempt Routine Contract Claims

Recent cases applying the Supreme Court decision in *American Airlines, Inc. v. Wolens*[279] have held that routine breach of contract claims are not preempted when the claims do not require anything more than interpreting the contractual terms to which the airline itself stipulated. In *Breitling U.S.A., Inc. v. Federal Express Corp.*,[280] the court held that a breach of contract claim that relies on the equitable doctrine of waiver is preempted under the ADA because such a claim relies on application of state law equitable principles.

In *In re Air Transportation Excise Tax Litigation*,[281] the District Court of Minnesota held that plaintiff could bring a breach of contract claim that solely involved duties self-imposed by the

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277 *See* Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77 (2d Cir. 1997).
278 No. 98 C 594, 1999 WL 59841 (N.D. Ill. 1999).
279 513 U.S. 219 (1995).
280 45 F. Supp. 2d 179 (D. Conn. 1999).
281 37 F. Supp. 2d 1133 (D. Minn. 1999).

parties to the contract. Such breach of contract claims are based on duties voluntarily assumed, not legally imposed by operation of state law. The court also held that plaintiff's claims for unjust enrichment against Federal Express were not preempted because such claims would not adversely impact the economics of the airline industry. The court stated that "Congress surely did not pass the ADA to give airlines carte blanche to convert property or unjustly enrich themselves willy-nilly, immunized from state law consequences."[282]

The court in *Greer v. Federal Express*[283] held that because the contract claims were not preempted, removal to federal court was in error. Therefore, the court affirmed its earlier decision remanding the case to state court. In *Greer*, plaintiffs took a sealed contractor's bid to a local delivery company and requested delivery by a certain time. This company in turn hired Federal Express to deliver the package. The package arrived late, the bid was not considered, and the plaintiffs filed suit alleging that but for the failure of delivery, their low bid would have won. Defendants removed to federal court, arguing that the ADA preempts the state law claims. The court held that the ADA does not preempt routine breach of contract claims.

The defendant also argued that removal was appropriate because federal common law will be applied to govern the limitation of liability provisions in its contract. The court rejected this argument, holding that a defense based on federal law is an insufficient basis for federal question jurisdiction.

In *Parra v. Tower Air, Inc.*,[284] the court found that the bumping of passengers related to boarding services and that the plaintiffs' claim affected services *directly* within the meaning of the ADA. Therefore, the plaintiffs' breach of contract and breach of covenant of good faith and fair dealing claims were preempted by the ADA.

VII. IMPLIED FEDERAL PREEMPTION BY PERVASIVE REGULATION

There is currently a conflict among the Circuit Courts whether the Federal Aviation Act (FAA) and the regulations promulgated thereunder (FARs) preempt state law on the theory of "field preemption." The FAA has no express preemption

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[282] *Id.* at 1140.

[283] 1999 WL 803591 (W.D. Ky. 1999).

[284] N.Y.L.J. July 22, 1999, pg. 30, col. 1 (N.Y. Sup. Ct. 1999).

clause other than Section 105 (a)(1) of the 1978 ADA, discussed *supra* at Part VI, which preempts state regulation of "rates, routes and services," but not garden variety state tort claims.

Under the federal preemption doctrine, federal statutes preempt state law only under certain conditions: 1) the federal law expressly declares state law to be preempted (express preemption); 2) the federal law has no express preemption clause, but state law "actually conflicts" with federal law or "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress" (conflict preemption); or "Congress evidences an intent to occupy a given field," thus preempting "any state law falling within that field (field preemption)."[285] The touchstone of the federal preemption analysis is whether it was Congress's intent to displace state law.[286] In *Wardair Canada, Inc. v. Florida Department of Revenue,* the Supreme Court held that for field preemption to exist "we have required that there be evidence of a congressional intent to pre-empt the *specific field* covered by the state law."[287] In *Wardair,* the court rejected the argument that by enacting the Federal Aviation Act, Congress left no room for local control over foreign air travel. The court upheld the validity of a state tax on aviation fuel.

In *Cleveland v. Piper Aircraft Corp.*,[288] the Tenth Circuit ruled that federal law neither expressly nor impliedly preempted common-law claims for the negligent design of an aircraft, even though the design fully complied with FAA guidelines and the aircraft received a certificate of airworthiness. Similarly, in *Public Health Trust of Dade County v. Lake Aircraft, Inc.*,[289] the Eleventh Circuit held that a state law negligent design claim could progress despite the fact that, at the time of the crash, the aircraft had a valid airworthiness certificate and was in compliance with federal design regulations. Courts have observed that when Congress ordered the FAA to develop aviation safety regulations, it used the term "minimum standards" to describe these regulations. These courts determined that a common-law duty

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285 Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-56 (1984). In *Silkwood,* the Supreme Court held that despite the federal government's exclusive authority over the safety and proper method of disposal of nuclear materials, state tort law was not preempted and punitive damages could be awarded for personal injury resulting from plutonium contamination.

286 *See* Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986).

287 *Id.* (emphasis added).

288 985 F.2d 1438 (10th Cir. 1992), *cert. denied,* 510 U.S. 908 (1993).

289 992 F.2d 291 (11th Cir. 1993).

of safety may be owed beyond the minimum standards of the FAA regulations.[290]

The Tenth and Eleventh Circuits concluded that there was no implied preemption on various additional grounds:

1. There is a strong presumption against implied preemption, absent clear proof of Congressional intent or an express preemption clause;

2. Any Congressional intent to preempt state law is rebutted by the FAA Act's express saving of state remedies existing at common law and establishment of only "minimum standards;"

3. The express preemption clause in the 1978 ADA implies that no other preemption of state law exists; and

4. There is also no "conflict preemption," because it is not impossible to meet both state common law standards of safety design and the federal regulations.[291]

Going against what it acknowledged was the prevailing case law, however, the Court of Appeals for the Third Circuit has ruled that in enacting the FAA law and authorizing relevant regulations to be promulgated, Congress intended generally to preempt state and territorial regulation of aviation safety. In *Abdullah v. American Airlines, Inc.*,[292] applying the theory of "field preemption," the court concluded that the standards of care in aviation accident cases must be based solely on federal statutes and regulations because federal regulation of this area is pervasive and leaves no room for inconsistent state standards of care.

The Third Circuit held that 14 C.F.R. Section 91.13(a), which provides that "[n]o persons may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another," establishes a "complete and thorough" standard of safety in operation of aircraft, and this standard preempts supplementation or variation by state law standards of care.[293] The court looked to the legislative history of the FAA and the statements

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[290] *See, e.g., In re* Air Disaster at Lockerbie, Scotland, 37 F.3d 804, 815 (2d Cir. 1994), *cert. denied,* 513 U.S. 1126 (1995); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1445 (10th Cir. 1992); *cert. denied,* 510 U.S. 908 (1993); Sunbird Air Services, Inc. v. Beech Aircraft Corp., 789 F. Supp. 360, 362-63 (D. Kan. 1992); Holliday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396, 1401 (D. Haw. 1990); *see also In re* Air Crash Disaster at JFK Int'l Airport, 635 F.2d 67, 74-75 (2d Cir. 1980); Trinidad v. American Airlines, 932 F. Supp. 521 (S.D.N.Y. 1996); *In re* Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185, 1187 (D. Colo. 1988).

[291] *See Cleveland,* 985 F.2d at 1441-45; *Public Health Trust,* 992 F.2d at 294-95.

[292] 181 F.3d 363 (3d Cir. 1999).

[293] *Id.* at 365.

there emphasizing the need to have one agency issue safety regulations. The court relied also on cases that had concluded that the FAA regulations in such discrete areas as pilot regulations or airspace management preempted state law.[294]

Because the standard of care in 14 C.F.R. Section 91.13(a) is a general one, the *Abdullah* court held that when a jury is considering whether or not a pilot acted "carelessly or recklessly," expert testimony may help the jury to understand whether the pilot's actions "constituted careless or reckless operation."[295]

Although the Third Circuit found federal preemption of the standards of aviation safety, it went on to conclude that traditional state law remedies will continue to apply to redress violation of those standards. Thus, if an airline violates the standard of care set forth in federal statutes and regulations, state law will determine the availability and amount of damages.[296]

In *Somes v. United Airlines, Inc.*,[297] the court rejected the argument that the plaintiff's claim for failure to provide adequate emergency medical equipment aboard its aircraft was preempted under the federal doctrine of field preemption on the ground that FAA regulations did not require the inclusion of a defibrillator in the aircraft's emergency medical kit. The court noted that the federal regulations merely set forth minimum requirements, which did not prevent the airline from carrying supplemental devices to protect its passengers or preempt state law from requiring more from the airlines.[298] The court also rejected the airline's argument that the plaintiff's claim was impliedly preempted under a conflict theory. The court ruled that the defendant's argument on this issue was premature, because no conflict could exist between state and federal requirements unless and until the FAA declined to approve the fulfillment of the state requirement. There was nothing in the record to sug-

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294 Plaintiffs would argue, however, that these cases are reflective of either actual "conflict preemption," or discrete areas of specific "field preemption," in which Congress did indicate its intent to "pre-empt the *specific field* covered by the state law," such as airspace management. Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6 (1986).

295 *Abdullah*, 181 F.3d at 371-72.

296 For a case applying *Abdullah*, *see* Margolies-Mezvinsky v. U.S. Air Corp., 2000 WL 122355 (E.D. Pa. Jan. 2000); *see also* Retzler v. Pratt and Whitney Co., 723 N.E.2d 345 (Ill. App. Ct. 1999) (interpreting as preempting state standards of aviation safety, but not state remedies; accordingly, plaintiffs could assert a claim for relief under state law).

297 33 F. Supp. 2d 78 (D. Mass. 1999).

298 *Id.* at 85-87.

gest that the FAA had denied or would deny approval for an enhanced emergency medical kit. Indeed, the court observed that this argument was disingenuous, because several airlines, including the defendant, had actually installed or announced plans to install defibrillators in their aircraft.

The *Somes* court additionally relied on the facts that federal law still required commercial airlines to obtain insurance for injury and death claims, consistent with the nonpreemption of state tort claims; the FAA law contains a savings clause preserving state tort law remedies; and the ADA preemption clause neither refers to claims relating to safety of passengers nor creates an alternative remedy for tort damages.[299]

In *In re Commercial Airfield*,[300] the Supreme Court of Vermont phrased the "field preemption" question differently from the Third Circuit in *Abdullah*: "Appellant frames the question as whether federal law has fully occupied the field of aircraft operation. The appropriate and narrower question is whether the federal government has fully occupied the field of land use as it relates to aircraft operation."[301] Framing the question in this fashion appears to be more in tune with the Supreme Court decision in *Wardair Canada, Inc.*,[302] which held that "field preemption" requires proof that Congress intended "to pre-empt the specific field covered by the state law" and which validated a state tax on aviation fuel.[303] The Vermont Supreme Court concluded in *Commercial Airfield* that "although the federal government has preempted certain aspects of aircraft and airport operation, it has not preempted land use issues such as zoning and environmental review."[304] Thus, in that case, the court held that the airport owner was required to comply with local permit requirements regarding land use, even for certain airport improvements and associated flight activities.

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[299] *See also* Avemco Ins. Co. v. Elliott Aviation Flight Serv., Inc., 27 Av. Cas. [CCH] 17,569 (C.D. Ill. 2000), which held that the FAR's, in particular 14 CFR § 91.13, which prohibits operation of an aircraft in a careless or reckless manner, could be considered to determine whether the pilot breached the standard of care he owed to his student pilot and was "[i]n addition to the . . . [state law] duty to act as a reasonably prudent pilot."

[300] 752 A.2d 13 (Vt. 2000).

[301] *Id.* at 14.

[302] Wardair Canada, Inc. v. Florida Dep't of Reserve, 477 U.S. 1 (1986).

[303] *Id.* at 6.

[304] *Commercial Airfield*, 752 A.2d at 15.

VIII. LIABILITY OF MANUFACTURERS

A. THE 1994 GENERAL AVIATION REVITALIZATION ACT

The 1994 General Aviation Revitalization Act (GARA)[305] is a statute of repose that, with limited exceptions, bars actions against aircraft manufacturers and aircraft component part manufacturers for passenger product defect claims that arise more than eighteen years after the manufacture of a plane or any component involved in an accident.

In *Campbell v. Parker-Hannifin Corp.*,[306] an action for wrongful death arising out of an airplane crash in Australia, GARA barred plaintiff's suit against Cessna, because the aircraft had been manufactured more than eighteen years before the crash. The fact that the gyroscopic artificial horizon and vacuum pumps were replaced less than eighteen years before the crash did not revive the cause of action against Cessna because Cessna submitted proof that it had nothing to do with the manufacture of the replacement components. Plaintiff's argument that Cessna should be liable on a failure to warn theory rather than as the manufacturer of the replacement components was not viable, held the court, because GARA could not be circumvented by merely relabeling the claim.[307]

In *Burroughs v. Precision Airmotive Corp.*,[308] a California state appellate court held that GARA also covers a successor manufacturer which assumes the obligations and duties of the actual manufacturer.

B. ADMISSIBILITY OF EVIDENCE ISSUES

In *Lawhon v. Ayres Corp.*,[309] evidence of prior accidents was admissible where the plaintiff established that the prior events arose out of substantially similar circumstances. The evidence was introduced in the context of proof that the accidents in question all involved defendant's aircraft and the prior accidents were followed by warnings and recommendations regarding corrective measures.

The court held, however, that the service bulletin issued by the manufacturer after the subject crash should have been excluded because it was evidence of a subsequent remedial mea-

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305 49 U.S.C. § 40101 (1996).
306 82 Cal. Rptr. 2d 202 (Cal. Ct. App. 1999).
307 *Id.* at 1545-46.
308 93 Cal. Rptr. 2d 124 (Cal. Ct. App. 2000).
309 992 S.W.2d 162 (Ark. Ct. App. 1999).

sure. The bulletin required inspection of the wing spar to detect cracks in the lower spar of the wing assemblies. The plaintiff alleged that the crash was caused by wing structure failure or by pilot error. The evidence served only to show the culpability of the manufacturer and was not offered for any other purpose. The court also held that it was reversible error for the trial court to admit testimony that the decedent-pilot had a reputation for being reckless. The rules of evidence preclude the admission of evidence of a trait or character to conclude that a person acted in conformity with that trait on the occasion in question.[310]

In *Smith v. Beech Aircraft Corp.*,[311] the Ninth Circuit held that the district court did not abuse its discretion in admitting other accident evidence at trial. After the parties vigorously briefed and argued the issue of "substantial similarity" of the prior accidents, the district court found that it could not determine the exact nature of the accident in this case and decided to permit the jury to decide whether this accident occurred in the same manner as the prior accidents. Special interrogatories indicated that the jury found that the other accidents had occurred in the same way.

In an unpublished decision, an appellate court in Ohio ruled that the trial court did not abuse its discretion in allowing defendant Hartzell Propeller to add expert witnesses after discovery cut-off dates.[312] The plaintiff rejected the court's offer of a continuance in order to depose the expert witnesses. On appeal, the court held that plaintiff could have cured any prejudice by accepting the continuance. In this case, defendant Hartzell was found not liable for a product defect in a case involving separation of propeller blades from the propeller assembly. The defendant's experts had testified that the blade separation was caused by prior blade damage.

C. Government Contractor Defense

In *Arnhold v. McDonnell Douglas Corp.*,[313] a Missouri appellate court stretched the limits of the government contractor defense, which immunizes, in certain instances, a government contractor who provides a product to the government according to specific

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[310] *Id.* at 164.

[311] 178 F.3d 1300 (9th Cir. 1999).

[312] *See* Stokes v. Hartzell Propeller, Inc., 1999 WL 1034461 (Ohio Ct. App. 1999).

[313] 992 S.W.2d 346 (Mo. Ct. App. 1999).

government-selected specifications. The court applied the defense to the actions of a government contractor who was test flying aircraft for the government at supersonic speeds. In this case, a landowner alleged that the sonic booms from military aircraft flown by the defendant caused severe damage to his building. The plaintiff did not claim that the aircraft had been defectively designed and argued that the court should not "extend" the government contractor defense to the contractor's conduct and performance during the contractor's contractual relationship with the government. The court rejected the plaintiff's argument.

The government contractor defense was adopted by the Supreme Court in 1988 in the case *Boyle v. United Technologies Corp.*[314] The *Boyle* decision reasoned that if the government cannot be sued under the Federal Tort Claims Act for its discretionary decisions in selecting military products because these choices involve protected social, economic, political and military decision-making, then its contractors should also be immunized when they build the product in accordance with government-approved, reasonably precise specifications, provided that the government had full knowledge of any potential risks or dangers. The court concluded that if the contractors are not immunized, the cost of liability would ultimately be borne by the government as a matter of contract pricing.

In *Arnhold,* the question involved extending the defense to the conduct of the contractor in conducting supersonic flights for the government. The court found that the defendant's performance of military test flights at supersonic speeds, per the government's requirements, still involved a uniquely federal interest. The government's requirements and procedures for aircraft testing involved the performance of a governmental discretionary function that was immune from liability under FTCA.[315] Thus, the threshold issue for the application of the government contractor defense had been met. After concluding that portions of *Boyle's* three-prong test were inappropriate to a case dealing with negligent performance, the court applied a modified version of the *Boyle* test and ruled that the defendant had met its evidentiary burden by showing that 1) the govern-

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[314] 487 U.S. 500 (1988).

[315] In Ward v. United States, 471 F.2d 667 (3d Cir. 1972), the court held that the government's decision regarding the necessity of supersonic flights was a discretionary act, but the court did not rule out the possible liability for negligence in operating the flight contrary to the government's procedures.

ment approved reasonably precise documented procedures for the contractor's supersonic test flights; 2) the test flights were flown by the defendant's pilots in strict conformance with those procedures; and 3) the government had full knowledge of the potential adverse consequences of the supersonic flights.

In *Bragg v. United States*,[316] the court held that the Navy was not liable for the death of a worker who was crushed by a swinging hangar door at a Naval Air Station. The designer of the hanger door also moved for summary judgment, claiming it was protected from liability by the government contractor defense. The design company argued that the Navy had approved the design of the door and the switch that operated it. In applying the *Boyle* test, the court concluded that while the government conducted a "substantive review of the overall design for the hangar," the evidence did not indicate whether the government reviewed and approved the design feature in question.[317] The *Bragg* court held that under *Boyle*, the government contractor defense only protects government contractors from liability for design defects when the government has "approved reasonably precise specifications" for the design feature at issue.[318] Therefore, given the lack of evidence to show that the government reviewed and approved the design feature in question, summary judgment was denied.

Similarly, in *Shurr v. Siegler*,[319] the court held that defendants Hydro-Aire and Crane-Hydro-Aire, Inc. were not entitled to summary judgment on the government contractor defense because the Air Force did not approve reasonably precise specifications for all the design features in question.

The Fifth Circuit Court of Appeals in the recent case *Kerstetter v. Pacific Scientific Co.*[320] also confirmed that to satisfy prong one of the *Boyle* test, the government must have actually evaluated the design feature alleged to be defective. The specifications approved by the government need not address the specific design "defect" alleged to exist, but they must address the "design feature" in question.[321]

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316 55 F. Supp. 2d 575 (S.D. Miss. 1999).

317 *Id.* at 591.

318 *Id.*

319 1999 WL 1029528 (E.D. Wis. 1999).

320 210 F.3d 431 (5th Cir. 2000).

321 In *Kerstetter*, the court affirmed the ruling below that the contractor was immune from liability for alleged design defects in the alleged aircraft's pilot restraint system.

IX. LIABILITY OF THE UNITED STATES

A. LIABILITY FOR INCORRECT INTERPRETATION OF FAA REGULATION

The United States government may be sued only to the extent it has waived its sovereign immunity. The Federal Tort Claims Act ("FTCA")[322] provides for a broad waiver of immunity that is subject to specified statutory exceptions and a judicially created exception known as the *Feres* doctrine, which bars suit by military service members injured while on active duty. The FTCA does not create causes of action against the U.S. government. Rather, it permits suit according to the law of the place where the misconduct occurred, including its choice of law rules, but limits the scope of liability of the government to actual negligence and to instances when a private individual would be liable under like circumstances. Thus, if the government agency is performing a peculiarly governmental task not performed by private individuals, courts will not permit suit.

In *Central Airlines, Inc. v. United States*,[323] the plaintiff-carrier filed a negligence suit against the Federal Aviation Administration (FAA) under the FTCA for economic loss due to negligence in interpreting federal regulations. The FAA had informed the plaintiff, a commercial air freight carrier, that its planes did not comply with federal regulations governing flights in icing conditions. The carrier protested the FAA's interpretation of the relevant regulations. Faced with threats and fines, however, the carrier subsequently complied with the FAA's demands by installing the requested equipment. The FAA later admitted that it had incorrectly interpreted the regulations. The carrier subsequently filed the negligence suit against the FAA. The law of Missouri, the place of the wrong, did not recognize a negligence cause of action analogous to the carrier's claim for misinterpretation of regulations. Therefore, the carrier's claim was dismissed.

B. EXCEPTION TO GOVERNMENT LIABILITY FOR DISCRETIONARY FUNCTIONS

The FTCA discretionary function exception to the waiver of immunity[324] was at issue in *Carter v. Bell Helicopter Textron, Inc.*[325]

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322 28 U.S.C. § 2674 (1940).
323 169 F.3d 1174 (8th Cir. 1999).
324 28 U.S.C. § 2680(a) (1940).
325 52 F. Supp. 2d 1108 (D. Az. 1999).

In this case, the discretionary function exception barred suit against the United States based on the Forest Service's conduct during the investigation into a helicopter crash. The plaintiff and defendant Bell Helicopter, after settling the case between them, sought to hold the government liable for spoliation of evidence. After the helicopter crash, the Forest Service investigated, took pictures, and removed the wreckage. After the wreckage was removed, the swivel hook, which was crucial to the determination of fault between Bell Helicopter and the manufacturer of the alleged defective part, was lost. Various statutes, policies, and regulations authorize the Forest Service to organize, conduct, and control aviation accident investigations. The plaintiff and manufacturers argued that the Forest Service was mandated by regulation to release the wreckage at the appropriate time and that therefore the government could be held liable for spoliation of evidence because the obligation to release the wreckage was not performance of a discretionary function. The court rejected this argument, holding that in conducting the crash investigation, the Forest Service did have to make choices and decisions that effect social, economic, and political policy.[326] The court noted that none of the Federal Regulations and nothing in the Forest Service's "Aviation Accident Investigation Report Manual" dictated the manner in which the investigator must conduct the accident investigation. Thus, the court concluded that the scope and manner of the investigation of the crash was discretionary.

The court went on to note that even when the conduct of an investigator indicates "poor judgment and a general disregard for sound investigative procedure,"[327] the discretionary function may still apply. The court found that the primary purpose of the accident investigation was to prevent similar accidents and to obtain and preserve factual evidence. Therefore, an investigation must take into consideration broad social and economic policies, and these were the type of decisions Congress intended to shield from tort liability.[328] The court's decision does not appear to take into account that while there may be discretion in performance of the investigation, the specific duty to release the wreckage does not involve discretion of a social, economic, or political type and should not be immunized.

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[326] *Id.* at 1112.

[327] *Id.* at 1116.

[328] *See id.* at 1117.

X. LIABILITY OF FOREIGN NATIONS: THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. LIABILITY FOR A FOREIGN STATE'S TERRORIST ACTS

Many foreign air carriers and foreign manufacturers of aircrafts are owned by foreign states. When suit is brought against a foreign state-owned entity, the Foreign Sovereign Immunities Act (FSIA)[329] applies. The FSIA determines under which circumstances a foreign state can be sued in the United States. The scope of liability is determined by the extent of the exception to foreign state sovereign immunity. In 1996, the FSIA was amended to provide another exception to immunity. The new exception to immunity is for a foreign state's terrorist acts directed at United States citizens. This amendment has been applied against Cuba in a lawsuit arising out of the international shoot-down of two United States civilian airplanes that were flying over international waters. Cuba was designated as a foreign state sponsor of terrorism, and the court found that the shooting constituted extra-judicial killings for which no immunity exists.[330]

Plaintiffs in the Cuban shoot-down case successfully concluded their case and obtained a judgment against the Republic of Cuba. However, Cuba's Ministry of Foreign Relations expressed its intention to reject the court's mandate, and it refused to compensate the victims. Thus, the victims were required to seek other means to satisfy their judgment. Once victims of terrorism have obtained a judgment against a foreign government by virtue of the anti-terrorism provision of the FSIA, the statute further strips the foreign government of immunity and allows the victims to attach any property belonging to the foreign government located in the United States.[331] Following the action of the Cuban Ministry in this case, Congress again amended the FSIA to require the Secretaries of the Treasury and State to assist any judgment creditor under this section in "identifying, locating, and executing against the property of the foreign state or any agency or instrumentality of such state."[332] The statute further provides, however, that the President may waive the requirements of this section in the interest of national

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329 28 U.S.C. § 1602 (1994).

330 Alejandre v. Republic of Cuba, 42 F. Supp. 2d 1317 (S.D. Fla. 1997), *vacated on other grounds and remanded*, 183 F.3d 1277 (11th Cir. 1999).

331 28 U.S.C. § 1610 (1994 & Supp. 2000).

332 *Id.*

security.[333] On the same day that the President signed this amendment into law, he invoked the waiver provision in the Cuban shoot-down case. Following the President's action, the Cuban government argued that the President's waiver prevented the plaintiffs from attaching blocked assets to satisfy the judgment. In the most recent district court decision involving this litigation, the court rejected Cuba's argument, holding that this provision only gave the President the authority to waive the requirement that the Secretaries of Treasury and State assist the judgment creditor in locating and executing against property and did not affect the right of the judgment creditor to attach assets.[334]

B. Liability for Commercial Activity

A foreign state is not immune under the FSIA when the action "is based upon a commercial activity carried on in the United States by a foreign state."[335] In *Moses v. Air Afrique*,[336] this exception to immunity was held not to apply to a personal injury action arising from an Air Afrique flight that departed from New York, bound for Senegal, with a destination of Nigeria, in which the plaintiff claimed that the carrier's employees accosted him in the airport baggage claim area in Senegal. Despite the fact that the alleged wrongful conduct of the employees occurred in connection with the New York flight's arrival in Senegal, and despite the fact that a carrier's duty of care to its passengers extends to the baggage claim area and throughout the entire flight relationship, the *Moses* court held that plaintiff's cause of action was not "based upon" the flight's commercial activity in the United States. The court held that the phrase "based upon" requires that elements of the plaintiff's right to relief must require proof of the defendant's commercial activity in the United States.[337] While this is indeed true, other courts have held that this "based upon" requirement is met when the "proof comes in the form of some duty owned to the plaintiff as a result of defendant's commercial activity in the United States."[338] Under this standard, the result in *Moses* should have been different. In

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[333] *Id.*

[334] *Alejandre*, 42 F. Supp. 2d at 1330-31.

[335] 28 U.S.C. § 1605(a)(2) (1994).

[336] No. 99-CV-541, 2000 WL 306853 (E.D.N.Y. Mar. 21, 2000).

[337] *Id.* at *3 (citing *Nelson v. Saudi Arabia*, 507 U.S. 349, 357 (1993)).

[338] Nazarian v. Compagnie Nationale Air France, 989 F. Supp. 504, 508 (S.D.N.Y. 1998).

Owolabi v. Air France,[339] the court held that Air France was not immune from liability for breach of contract in a transport of cargo case where the contract was entered into in New York, although the damage was sustained in Nigeria. However, plaintiff's claim for intentional infliction of emotional distress, extending from conduct which occurred in France, was said not to be "based upon" commercial activity in the United States, because proof of that claim did not require any proof that Air France sold plaintiff the transportation in New York.

C. No Jury Trial Under The FSIA

Actions against foreign states pursuant to the FSIA are tried to the federal court without a jury whether the suit is instituted in federal court or removed by the foreign state to that forum. Thus, in *Laor v. Air France*,[340] involving an action against an airline that was an instrumentality of the French government, there was no right to a jury trial.

XI. LIABILITY OF MAINTENANCE COMPANIES

An unpublished decision from a Texas appellate state court upheld a finding of liability for compensatory and punitive damages against a maintenance company doing work for the United States Air Force.[341] The case involved the crash of a military Learjet C-21A near Mobile, Alabama en route from Andrews Air Force Base to Randolph Air Force Base. All eight service members on board were killed. A severe fuel storage imbalance in the wings caused the left wing to hold 1,800 pounds more fuel than the right wing, forcing the plane to go into a spin and crash. When the pilots landed at Andrews, they reported electrical and fuel system problems. The government's contract with the maintenance outfit Serv-Air required that the mechanic fill out a particular form and, in this instance, place a red "x" to denote the seriousness of the reported condition. The red "x" would have meant that the plane could not be released as airworthy until the repairs were made and the "x" removed. The mechanic did not fill out the form and had not finished troubleshooting the plane when the pilot asked to defer further maintenance until the plane reached home base at Randolph.

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339 No. 99 Civ. 0017, 2000 U.S. Dist. LEXIS 3208 (S.D.N.Y. Mar. 15, 2000).

340 51 F. Supp. 2d 505 (S.D.N.Y. 1999).

341 *See* Serv-Air, Inc. v. Profitt, 18 S.W.3d 652 (Tex. App. § San Antonio 1999, pet. abated) (unpublished table decision).

Had the red "x" been recorded, the pilot would not have been allowed this option. The mechanic released the plane, and it crashed before reaching Randolph.

The jury found no negligence against the pilots and no liability against the manufacturer. It found the government contractor negligent for its failure to train the pilots on a procedure that could have possibly prevented the crash. This defendant settled with the plaintiffs after trial. The maintenance outfit Serv-Air appealed the finding of liability for compensatory and punitive damages. The appellate court upheld the jury's verdict, concluding that from a subjective perspective the mechanic was consciously indifferent to the safety of the pilots when he released the aircraft after completely ignoring documentation procedures, knowing that the aircraft had a problem that he had not fixed, and knowing that he had not told this to anyone. The court also found sufficient evidence to uphold punitive damages against Serv-Air's management. There was evidence of system-wide failures in training and supervision, including nondocumentation of unresolved maintenance problems.

XII. JURISDICTIONAL AND PROCEDURAL QUESTIONS

A. FORUM NON CONVENIENS

Defendants' motion for dismissal of French plaintiff cases based on *forum non conveniens* in *In re Air Crash Off Long Island, New York, on July 17, 1996*,[342] was denied in the Southern District of New York. The case involves the disaster of TWA Flight 800 on July 17, 1996, which crashed into the U.S. territorial seas off Long Island, New York, shortly after its departure from Kennedy Airport in New York City for a flight to Paris and Rome. More than half the passengers were American, and the remaining passengers were primarily European. The largest number of foreign passengers on Flight 800 were from France. The motion by defendants TWA and Boeing sought dismissal of the actions brought on behalf of the French domiciliaries killed in the crash. If successful on that motion, the defendants then intended to seek dismissal of all foreign plaintiffs' claims.

The court noted that at "first blush" one would wonder why the defendants would file such a motion, given that the accident occurred over United States territorial waters, all defendants are

[342] 65 F. Supp. 2d 207 (S.D.N.Y. 1999).

United States corporations, and "most—if not all—of the evidence pertaining to liability is located in the United States."[343]

Defendants TWA and Boeing supported the motion with a conditional promise that if the court dismissed the French actions and the actions were subsequently filed in France, these defendants would agree not to contest liability in the French courts. The court acknowledged that with this conditional promise France could provide an adequate alternative forum. The court nonetheless found that the private interest factors did not strongly support dismissal of the French actions and were in equipoise. For example, the plaintiffs had invested time and money on discovery, independent investigations, experts, consultants, and pretrial proceedings in the United States. The court also noted that in France contingency fee arrangements are not permitted, and plaintiffs may face difficulties retaining replacement counsel in France.

As to the public interest factors, the court concluded that they weighed strongly against dismissal. The court began its discussion of the public interest factors by noting that the defendants had failed to cite a single case arising from a catastrophic event that happened in United States territory that was dismissed on *forum non conveniens* grounds. The court concluded that the public interest factors favored suit in the United States because the United States had expended great resources and had a strong interest in such a large disaster occurring in its territory and because the court found it desirable to avoid piecemeal litigation. The court did not believe it would be fair to burden courts throughout Europe when it would still have to resolve the remaining American plaintiff cases.

In *In re Air Crash Disaster Near Palembang, Indonesia*,[344] the district court denied defendant Boeing's motion for dismissal based on *forum non conveniens* in a case in which the air disaster took place in Indonesia. Other considerations were that the crash involved a Silk Air flight, a foreign carrier; Silk Air was not amenable to suit in the United States; and the foreign investigation was considering whether the cause of the crash was pilot homicide or suicide. The court denied the motion to dismiss plaintiffs' cases because plaintiffs' claims against Boeing were based on design defect in the Boeing 737 rudder control and the evidence of that alleged defect was all in the United States.

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[343] *Id.*

[344] MDL No. 1276, slip op. (W.D. Wash. 2000).

The court also emphasized the public interest in the State of Washington concerning any potential design defect to an aircraft popularly flown in the U.S. and the presumption in favor of retaining the action in a plaintiff's chosen forum.

A foreign plaintiff defeated a *forum non conveniens* motion in *Woods v. Nova Companies Belize, Ltd.*.[345] In *Woods*, a resident of Belize was injured in an aircraft accident in Costa Rica. The passenger was on an aircraft owned by a Belizean corporation, and there was no significant question of liability. In evaluating the private interests of the litigation, the court concluded that Florida was an appropriate forum since the majority of the plaintiff's medical treatment occurred in the United States, with a substantial amount of treatment taking place in Florida, and the majority of the damages testimony and evidence would involve witnesses located in Florida.

In contrast, in *Campbell v. Parker-Hannifin Corp.*,[346] an action for the wrongful death of Australian citizens arising out of an airplane crash in Australia, the appellate court upheld the decision granting defendant's motion for *forum non conveniens* on the ground that all plaintiffs were from Australia and virtually all of the evidence relating to damages was located in Australia. The court acknowledged that all of the evidence relating to the design and manufacture of the airplane was in the United States but held that California's interest in the case was not sufficient to justify the commitment of judicial time and resources that the case would require.

B. Subject Matter Jurisdiction

In *Gschwind v. Cessna Aircraft Co.*,[347] the plaintiff, a citizen of Belgium, filed a wrongful death action in Ohio state court against defendants for the death of her husband, a French national residing in Belgium at the time of his death. Death occurred while the decedent piloted a Cessna aircraft near Cannes, France. The defendants included Cessna, a Kansas corporation, Pratt & Whitney, a Canadian Corporation, and Hartzell Propeller, Inc., an Ohio corporation. Cessna removed the case to district court, asserting diversity. The plaintiff's claim was dismissed based on *forum non conveniens,* and the Tenth Circuit affirmed. Subsequently, plaintiff filed a motion for rehear-

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345 739 So. 2d 617 (Fla. Dist. Ct. App. 1999).
346 82 Cal. Rptr. 2d 202 (Cal. Ct. App. 1999).
347 189 F.R.D. 643 (D. Kan. 1999).

ing and for the first time argued that the District Court did not have diversity jurisdiction over the case. The Tenth Circuit denied the motion without opinion and plaintiff filed a petition in the Supreme Court, which was denied.[348]

The plaintiff then filed a motion to vacate the district court's previous order pursuant to Federal Rule of Civil Procedure 60(b)(4), arguing that because the district court never had diversity jurisdiction it was without power to dismiss the action. The district court held, however, that once the Supreme Court denied plaintiff a writ of certiorari the issue of subject-matter jurisdiction became *res judicata* and could not be collaterally attacked.

At the outset the court acknowledged that if the court did not have subject-matter jurisdiction over the case, then its dismissal based on *forum non conveniens* was an erroneous exercise of jurisdiction. However, the court held that an erroneous judgment does not render the order a nullity and does not justify plaintiffs' collateral attack. The court held that a court has the power to determine its own jurisdiction and an error in that determination will not render the judgment void. Thus, a judgment based upon an erroneous finding of diversity is not void and is immune from collateral attack. Similarly, the Second Circuit held that a defendant in a multi-district litigation case who failed to argue lack of diversity jurisdiction until after a jury verdict in plaintiff's favor forfeited the defense of lack of subject matter jurisdiction.[349]

In a diversity case, *Luckett v. Delta Airlines, Inc.*,[350] a plaintiff brought an action in state court alleging that her heart failure was caused by the fact that defendant lost the luggage which contained her prescription medicine. Defendant had the case removed to federal court, where the court dismissed the action because the prescriptive period had run. The plaintiff argued that the federal court did not have subject matter jurisdiction because the amount in controversy did not exceed $75,000. The Fifth Circuit held that the trial court did not err in finding that the plaintiff's claim exceeded $75,000 because plaintiff alleged in her complaint damages for loss of property, travel expenses, an emergency ambulance trip, a six-day stay in the

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348 Gschwind v. Cessna Aircraft Co., 526 U.S. 1112 (1999).

349 *See* Hamilton v. Atlas Turner, Inc., 197 F.3d 58 (2d Cir. 1999).

350 171 F.3d 295 (5th Cir. 1999).

hospital, pain and suffering, humiliation, and temporary inability to do housework.

In *Montanez v. Solstar Corp.*,[351] the court denied plaintiffs' motion for remand on the ground of lack of complete diversity, because the plaintiffs had fraudulently joined a travel agency in an attempt to defeat diversity. The court held that in a case involving personal injury from an altercation with a flight attendant, there was no basis for a claim against the travel agent who sold the tickets. Accordingly, the court concluded that the plaintiff fraudulently joined the travel agent to defeat the diversity between the plaintiffs and the defendant airline. Plaintiffs' motion for remand was therefore denied.

C. In Personam Jurisdiction

In the 1987 case *Bearry v. Beech Aircraft Corp.*,[352] the Fifth Circuit ruled that there was no basis for personal jurisdiction over defendant Beech in Texas simply because Beech's products flowed into Texas. In a more recent case, however, a Texas appellate court ruled that, in the years following the Fifth Circuit's ruling in *Bearry*, Beech Aircraft's contacts with the state had evolved to the point that the exercise of long-arm jurisdiction was no longer precluded.[353] The court noted that Beech is a wholly-owned subsidiary of Raytheon Company and that changes had recently been made to the corporate structure at Raytheon. The activities of other Raytheon subsidiaries, and Beech's close relationship to them, were sufficient to allow the court to conclude that Beech does business in Texas through the activities of these subsidiaries. In addition, the court observed that Raytheon has a web site that includes a Beech home page, which the court characterized as "somewhat interactive." Although the web site alone would not have been sufficient to establish jurisdiction in Texas, the court found that it was a factor to be considered along with the other contacts. Finally, the court noted that the aircraft in the current case had been modified in Texas, including the installation of engines and a Beech-made part. This also distinguished the case from *Bearry*, where the lawsuit did not in any way relate to Beech's contacts in

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[351] 46 F. Supp. 2d 101 (D.P.R. 1999).

[352] 818 F.2d 370 (5th Cir. 1987).

[353] *See* Jones v. Beech Aircraft Corp., 995 S.W.2d 767 (Tex. App. § San Antonio 1999, pet. dism'd w.o.j.).

Texas. Taken together, these factors were sufficient to subject Beech to general jurisdiction in Texas.

In *Woods v. Nova Companies Belize Ltd.*,[354] a resident of Belize was injured in an aircraft accident in Costa Rica while a passenger on an aircraft owned by the defendant, a Belizean corporation. The court had to determine whether Florida could exercise general jurisdiction over the defendant. Specific jurisdiction principles did not apply because the tort did not occur in Florida. Furthermore, the defendant did not own property in Florida, was not registered to do business in Florida, did not advertise in Florida, and did not maintain a mailing address, telephone listing, or bank account in Florida. The court nonetheless ruled that jurisdiction was proper because the defendant engaged in continuous and systematic business activities with Florida and derived great pecuniary benefit from its transactions there. The defendant, a shrimp farmer and distributor, sold approximately eighteen percent of its product to Florida importers, moved nearly all of its product through the state, purchased equipment and supplies from Florida suppliers, utilized storage facilities in the state, and established essential business relationships in the state.

The First Circuit, in an unpublished decision,[355] agreed with the District Court of Massachusetts that there was no *in personam* jurisdiction in Massachusetts over ICALM, the insurance claims adjuster for American Eagle. ICALM is a New York Corporation with its principal place of business in North Carolina. It was conducting an investigation into plaintiff's claim for injury as she deplaned an American Eagle flight at Boston's Logan Airport. Plaintiff sued ICALM in Massachusetts alleging deceptive insurance practices in that plaintiff was lulled into believing that ICALM was extending the Warsaw Convention statute of limitation while it was conducting its pre-suit investigation into the incident. After requesting and receiving from the plaintiff additional information and authorizations for release of medical and employment records as part of its investigation, ICALM subsequently denied the claim on the ground that it was time-barred under the Warsaw Convention. The First Circuit ruled that no personal jurisdiction existed under Massachusetts's long-arm statute based merely on ICALM's acts of adjusting claims

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354 739 So. 2d 617 (Fla. Dist. Ct. App. 1999).

355 *See* Louis v. Flagship Airlines, 181 F.3d 79 (1st Cir. 1999) (unpublished table decision), *available in* 1999 WL 525947 (1st Cir. 1999).

brought by Massachusetts residents against ICALM's clients located elsewhere. ICALM had no office in Massachusetts and was not registered to do business there. Its work of adjusting claims was done from its North Carolina offices.

D. Bifurcation of Trials

Rule 42(b) of the Federal Rules of Civil Procedure permits the court to order separate trials on any specific claim or issue to further convenience and economy or to avoid prejudice.

In *Houseman v. United States Aviation Underwriters*,[356] a passenger who was injured in the crash of a small plane alleged that he had been prejudiced by the trial court's order to bifurcate his claims against the pilot and the aircraft manufacturer. The order was granted because the plaintiff attempted to add a new theory of products liability against the manufacturer shortly before the trial was set to begin. The court concluded that the manufacturer would have been unable to fully prepare for the new claim in the time remaining before trial, and the pilot should not have to wait until the manufacturer was prepared. In the first trial, the jury found that the pilot's negligence was not a cause of the crash. The plaintiff dismissed his claim against the manufacturer and appealed the bifurcation order.

The appellate court noted that under Rule 42(b) bifurcation may be granted to avoid prejudice to a party or to promote judicial economy. The court found that the plaintiff's attempt to amend his complaint for the second time just prior to trial, along with the resulting prejudice and inconvenience that this would have caused to the other defendant, created a sufficient basis for the trial court's decision to bifurcate. However, the court observed that even if a sufficient basis exists, a court may not grant such a motion if bifurcation will unfairly prejudice the non-moving party or if the order will violate the Seventh Amendment, which bars two separate juries from passing on the same essential questions.[357]

The plaintiff argued that any time a court decides to order separate trials as to separate defendants that decision allows each defendant to blame the absent defendant and deprives plaintiff of the opportunity to raise the theory of alternative liability, by which the plaintiff can shift to the defendants the burden of proving causation. Alternative liability, when applicable,

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[356] 171 F.3d 1117 (7th Cir. 1999).

[357] *Id.* at 1121.

requires the joinder of all potential culpable parties. The court rejected plaintiff's argument because it found that the alternative liability theory did not apply in this case. Alternative liability applies in cases in which only one of two or more defendants could have caused the injury, plaintiff cannot prove which defendant caused the harm, and the defendants have a better ability than plaintiff to prove causation. In this case, it would have been entirely possible for a jury to find that the conduct of the pilot and the manufacturer jointly resulted in the plaintiff's injuries. Furthermore, the court noted that there were other possible responsible parties who were not joined in the case. Therefore, burden shifting would not have been appropriate. Finally, the court noted that burden shifting is only appropriate if the plaintiff is not in a position to prove causation, which was not the case here. Consequently, the court concluded that the plaintiff did not suffer prejudice as a result of bifurcation.[358]

Plaintiff also argued that the bifurcation order violated the Seventh Amendment because it created a situation in which two juries would decide the causation issue. The court rejected this argument, noting that the claims against each defendant were based on different legal theories and involved distinct causation inquiries. The fact that the two juries would each examine much of the same evidence was not sufficient to raise a constitutional concern. The court concluded that the trial court's bifurcation order, while possibly not the best decision under the circumstances, did not represent an abuse of discretion.

In the unpublished decision *Smith v. Beech Aircraft Corp.*,[359] the Ninth Circuit ruled that the district court did not abuse its discretion by refusing to bifurcate the trial to ask the jury to first reach a preliminary determination on the issue of the substantial similarity of prior accidents.

XIII. WENDELL H. FORD AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY (AIR21)

A. HIGHLIGHTS OF AIR21

On April 5, 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") became law.[360] AIR21 is a five-year comprehensive reauthorization of the Fed-

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358 *Id.* at 1122-24.

359 178 F.3d 1300 (9th Cir. 1999) (unpublished table decision).

360 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), Pub. L. No. 106-181, 114 Stat. 61 (2000).

eral Aviation Administration and the Airport Improvement Program and addresses many of the perceived problems in the aviation system. AIR21 provides substantially more money for safety programs relating to airport facilities and personnel and aviation security. AIR21 also addresses various liability, competition, environmental and passenger rights issues.

Among the highlights of AIR21 are the following:

- It makes it an unfair practice to fail to notify a purchaser of an electronically transmitted ticket of any expiration date that the e-ticket has. (Section 221);
- It increases the penalty to $2,500 per violation for violations of the various consumer protection provisions of the Federal Aviation Act. (Section 222);
- AIR21 requires that each U.S. carrier member of the Air Transport Association (ATA), all of whom have entered into ATA voluntary customer service commitments, provide a copy of its individual customer service plan to the DOT, which in turn transmits a copy to Congress. The DOT will monitor implementation of the plans and prepare a report to Congress by June 15, 2000, evaluating carriers' commitments to the Plan. A final DOT report is due to Congress by December 31, 2000 on the effectiveness of the individual carrier plans and commitments and recommendations to improve accountability, enforcement, and customer protection. (Section 224);
- The DOT is required to initiate rule-making to increase domestic baggage liability limit. The domestic baggage liability limit was increased in December 1999 to $2,500 per passenger. (Section 225);
- AIR21 revises air carrier plans for domestic and foreign air carriers that provide assistance to the families of passengers involved in aircraft accidents to require them to include the following minimum assurances: (1) upon request of the family of a passenger, the air carrier will inform the family whether the passenger's name appears on the preliminary passenger manifest for the flight involved in the accident; (2) the air carrier will provide adequate training to air carrier employees and agents to meet the needs of survivors and family members following an accident; and (3) in the event that the air carrier volunteers assistance to U.S. citizens within the United States, in the case of an aircraft accident outside the United States involving major loss of life, the air carrier will consult with the NTSB and the Depart-

ment of State on the provision of such assistance. (Sections 402, 403);

- AIR21 amends DOHSA. (Section 404)[361];
- AIR21 prohibits unsolicited communications by attorneys to individuals regarding potential personal injury or wrongful death claims arising from domestic air carrier accidents and foreign air carrier accidents in the United States for the first forty-five days following the accident. It also prohibits local level attempts to prevent non-profit organizations with experience in disasters from rendering counseling services within thirty days after an accident. (Section 481);
- AIR21 increases the civil penalty to up to $25,000 for acts by unruly passengers that pose an imminent threat to the safety of the aircraft or individuals on the aircraft. (Section 511);
- AIR21 provides protection in cases involving aeronautical charts and related products and services. Section 603 provides that the FAA may arrange for the publication of necessary aeronautical maps and charts using U.S. facilities and agencies as far as practicable. The Government is also required to indemnify any person that publishes an aeronautic map or chart from any part of a claim arising out of the depiction of a defective or deficient flight procedure or airway, provided the flight procedure or airway was prescribed by the FAA Administrator, was depicted accurately on the map or chart, and was not obviously defective or deficient. (Section 603);
- AIR21 prohibits a domestic or foreign air carrier from subjecting a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry. (Section 706);
- AIR21 extends to foreign air carriers the requirements of the Air Carrier Access Act, providing rights and protection to physically disabled passengers. (Section 707);
- AIR21 prohibits smoking on scheduled flights in the United States, subject to certain exceptions relating to foreign air carriers. (Section 708); and
- AIR21 provides for the implementation of Article 83 of the Convention on International Civil Aviation relating to aircraft registration. (Section 714).

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[361] *See infra* Part XIII.B.

B. AIR21's Amendment to the Death on the High Seas Act

The AIR21 amendments to DOHSA will have significant and immediate impact on the liability of air carriers. Ever since the Supreme Court decision in *Zicherman v. Korean Air Lines Co.*,[362] applying the admiralty statute DOHSA to aviation accidents on the high seas, there has been an effort to amend DOHSA by either rendering it inapplicable altogether to aviation accidents (the House version of proposed amendments) or expanding the types of recoverable damages (the Senate version of the proposed amendments). In 2000 the two houses resolved their differences in conference committee and came up with a substitute version which incorporated some of what each house had proposed. The enacted law amends DOHSA by making DOHSA inapplicable to commercial aviation accidents within the U.S. twelve-mile territorial sea and providing that federal, state and "other" law applies in that twelve -mile sea, the same as it already applies within the three-mile belt of territorial sea.[363] Secondly, the enacted law expands the types of recoverable damages in those commercial aviation accidents occurring beyond twelve nautical miles from U.S. territory.

AIR21 amends DOHSA as follows:

1. Within Twelve Miles: DOHSA does not apply to a "commercial aviation accident" occurring "on the high seas 12 nautical miles or closer to the shore" of the United States. Rather, "the rules applicable under Federal, State, and other appropriate law shall apply."

2. Beyond 12 Miles: DOHSA applies to a commercial aviation accident "occurring on the high seas beyond 12 nautical miles from the shore" of the United States, but

a. additional compensation for nonpecuniary damages (defined as compensation for loss of decedent's care, comfort, and companionship) is recoverable, and

b. punitive damages are expressly made not recoverable.

3. Effective Date: The amendments made shall apply to any death occurring after July 16, 1996. This is the day before TWA Flight 800 crashed off the shore of Long Island.

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362 516 U.S. 217 (1996).

363 *See* H.R. Rep. No. 106-513, at 185 (2000).

The amendments to DOHSA are made expressly retroactive. While DOHSA 2000 expressly addresses some key issues, it raises many questions.

Issues will certainly arise with respect to the fact that the amendment not only expressly renders DOHSA inapplicable to accidents within US territorial waters (i.e., twelve nautical miles from shore), but also provides that within the twelve-mile territorial sea the applicable law can be "the rules applicable under Federal, State, and other appropriate law. . . ." By using the word "and," the amendment raises the question whether it permits plaintiffs to argue that they are entitled to aggregate the various provisions of state law, federal common law and "other appropriate law" to assemble the most favorable package of rights (*that is*, types of damages and class of beneficiaries). This amalgam approach, however, creates a law that does not exist in any jurisdiction and would seem to conflict with the separation of powers doctrine and due process of law. A more reasonable interpretation is that the amendment gives the parties a choice of options among state, federal or foreign law, to be selected based on choice of law principles or the better rule of law. In non-DOHSA, non-seafarer death cases, courts hold that while *Yamaha Motor Corp., U.S.A. v. Calhoun*[364] allows state law to apply in territorial waters in lieu of general maritime law, the *Calhoun* decision does not, however, restrict plaintiff to state law. Therefore, plaintiffs have been successful in arguing that whichever law, state law or general maritime law, provides a more generous recovery, that is the law on damages that should apply.[365]

Where DOHSA 2000 does apply, the only nonpecuniary damages authorized are for loss of decedent's care, comfort, and companionship. Unlike earlier Senate bills, no cap on this compensation is provided. Such damages are recoverable by the class of beneficiaries for whom DOHSA creates a remedy: decedent's spouse, child, or parent, or a "dependent relative." Case law holds that a "dependent relative" is one who is financially dependent on the decedent at the time of decedent's death. A future promise of support is not sufficient, nor is emotional dependency sufficient.[366] Therefore, while parents need not prove

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[364] 516 U.S. 199 (1996).

[365] *See* Kelly v. Bass Enters. Prod. Co., 17 F. Supp. 2d 591 (E.D. La. 1998); Brateli v. United States, 1996 A.M.C. 1980 (D. Ala. 1996).

[366] *See* Ephraimson-Abt v. Korean Air Lines Co., 199 F.3d 1322 (2d Cir. 1999) (unpublished table decision); *see also* Oldham v. Korean Air Lines Co., 127 F.3d 43 (D.C. Cir. 1997).

economic dependency in order to recover for loss of their child's care, comfort and companionship—because the DOHSA schedule of beneficiaries says "parents," not "dependent parents"—a sibling, however, would be required to prove financial dependency. Significantly, nonpecuniary damages for predeath pain and suffering are still not allowed. Therefore, the Supreme Court's decision in *Dooley v. Korean Air Lines Co.*[367] remains valid with respect to a death beyond twelve miles. The amendment also expressly denies punitive damages under DOHSA.

With respect to retroactivity, the general rule is that, unless stated otherwise, legislation is not given retroactive effect. Of course, here, the amendment specifically provides for retroactive application. The legislative history placed specific reliance on *Plaut v. Spendthrift Farm, Inc.*,[368] in which the Supreme Court acknowledged Congress's power to enact retroactive civil laws.[369] The following chart compares the old (DOHSA 1920) and the new (DOHSA 2000):

	DOHSA 1920	DOHSA 2000—Commercial Aviation Accident
Applicability	Applies to a death caused by wrongful act "occurring on the high seas beyond a marine league from the shore of any State" (approx. 3 nautical miles). 46 U.S.C. app. § 761.	***Within 12 Miles:*** DOHSA does not apply to a "commercial aviation accident" (which is not defined), occurring "on the high seas 12 nautical miles or closer to the shore" of the United States. *See* discussion *infra* at B.2 on the questions raised by this new language. ***Beyond 12 Miles:*** DOHSA still applies to a "commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore" of any State.
Who Can Sue	Action must be brought by the authorized personal representative. 46 U.S.C. app. § 761.	***Beyond 12 Miles:*** Same as in DOHSA 1920
Who Can Recover—The Beneficiaries	Action by the "personal representative" for the "exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. app. § 761. The term "commercial aviation accident" is not defined, but there is no dispute that it covers commercial flights such as TWA flight 800.	***Beyond 12 Miles:*** Same as in DOHSA 1920

[367] 524 U.S. 116 (1998).
[368] 514 U.S. 211 (1995).
[369] *See* H.R. Rep. No. 106-32, at 2 (1999).

	DOHSA 1920	DOHSA 2000—Commercial Aviation Accident
Compensatory Damages	Only pecuniary loss damages are allowed, such as: • Loss of support • Loss of services • Loss of parental nurture. Recovery of loss of nurture into adult years is limited to specific evidence of the pecuniary value of nurture extending beyond the child's minority. *See Solomon v. Warren*, 540 F.2d 777, 788 (5th Cir. 1976). *But cf. Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 588 n.23 (1973) (court disapproved of lower federal court cases disallowing loss of society and services to adult children). • Loss of inheritance • Funeral/Burial expenses (46 U.S.C. app. § 762) ***Compensatory damages not allowed:*** • Loss of society or loss of care, comfort and companionship • Grief damages • Pre-death pain and suffering damages *Dooley v. Korean Air Lines Co. Ltd.*, 524 U.S. 116 (1998) *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996)	***Beyond 12 Miles:*** In addition to all pecuniary damages allowed under DOHSA 1920, DOHSA 2000 allows additional compensation in commercial aviation cases for nonpecuniary damages (defined as damages for loss of decedent's care, comfort, and companionship). ***Beyond 12 Miles—Compensatory damages not allowed:*** • Grief damages • Pre-death pain and suffering damages
Punitive Damages	Not allowed by case law.	***Beyond 12 Miles:*** Not allowed by statute.

XIV. MISCELLANEOUS ISSUES

A. IMMUNITY FOR COMMUNICATIONS MADE DURING NTSB INVESTIGATIONS

It has been held that an NTSB accident investigation is a quasi-judicial proceeding, and as such, any communications made by the manufacturer during an investigation are absolutely immune from being the subject of any law suit. In *Shanks v. Allied Signal, Inc.*,[370] an aircraft mechanic brought an action under Texas law against an aircraft manufacturer, alleging that the manufacturer conspired to manipulate the NTSB investigation and contributed to the NTSB's allegedly false accident report, which concluded that the probable cause of the crash was improper maintenance of the aircraft. The Fifth Circuit Court of Appeals predicted that the Texas high court would rule that communications made in the course of NTSB investigations are quasi-judicial and absolutely immune from suit.

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370 169 F.3d 988 (5th Cir. 1999).

B. PUNITIVE DAMAGES

The Supreme Court has ruled that the Seventh Amendment requires that the plaintiff be given the option of a new trial in lieu of a remittitur.[371] There is now a conflict in the circuits concerning whether the Seventh Amendment right is implicated when punitive damages are found to be constitutionally excessive.

The Second and Tenth Circuits have ruled that when punitive damages are adjudged to be constitutionally excessive, the plaintiff has the choice of accepting the remittitur or a new trial.[372] These courts reason that, by doing so, they "avoid any conflict with the Seventh Amendment."[373]

To the contrary, the Court of Appeals for the Eleventh Circuit in *Johansen v. Combustion Eng'g, Inc.*[374] ruled that a court may order a "constitutional reduction" of a punitive damages award without offering the plaintiff the opportunity for a new trial. The *Johansen* court reasoned that a constitutionally reduced verdict is not really a remittitur at all; rather, it is a "mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause."[375] The court observed that the cautious approach taken by the Second and Tenth Circuits is not prohibited by the Constitution, but that, in its opinion, such an approach is not required.

The *Johansen* court concluded that the punitive damages award of $15 million was "grossly disproportionate" to both the actual damages and the administrative penalty. The ratio of punitive damages to actual damages was 320:1. The ratio of punitive damages to the administrative penalty was 1500:1. The court further noted that the degree of reprehensibility of the defendant's conduct was not very severe.[376] The final award, as determined by the district court and affirmed by the Court of Appeals, represented a ratio of 100:1 with respect to the compensatory award and 400:1 with respect to the administrative

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[371] *See* Hetzel v. Prince William County, Va., 523 U.S. 208 (1998).

[372] *See* Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996); Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 643 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997).

[373] *Continental*, 101 F.3d at 643.

[374] 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999).

[375] *Id.* at 1331.

[376] *Id.* at 1337-39.

sanction. Both courts agreed that such an award was the maximum that would be constitutionally acceptable in this case.[377]

C. Insurance Questions

In *Ranger Insurance Co. v. Kovach*,[378] the court held that a pilot certified to fly aircraft under only visual flight rules (VFR) was unambiguously excluded from coverage under the insurance policy's pilot qualification clause when he flew a plane under a filed and activated instrument flight rules (IFR) flight plan. The court, following the majority view, ruled that under Connecticut law it was not necessary to establish any causal relationship between the crash and the pilot's lack of IFR certification. Moreover, the insurance policy was void *ab initio* because the pilot had misrepresented on his application that he had never had a certificate revoked, and this misrepresentation was knowing and material.

In an unpublished Seventh Circuit decision, the court held that an insurance contract provision that provided that the insurer would have no duty to defend the insured if it deposited the applicable limit of liability with a court of competent jurisdiction was unambiguous and enforceable.[379]

D. Evidentiary Issues

The doctrine of *res ipsa loquitur* was used recently to render American Airlines liable for a collapsing check-in counter that resulted in injury to a passenger attempting to check in. In *Grajales-Romero v. American Airlines, Inc.*,[380] the First Circuit, applying the law of Puerto Rico, held that *res ipsa loquitur* applied to the sudden collapse of a ticket counter because ticket counters do not ordinarily collapse absent negligence, and the counter was within the exclusive control of the defendant. Also, the court held that the plaintiff could not be held responsible for the accident merely because the counter collapsed after the plaintiffs' companion reached onto the counter top and grabbed a built-in ashtray in order to gain leverage to lift luggage. The court held that the companion's action was normal usage of the counter by a passenger.

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377 *Id.*

378 63 F. Supp. 2d 174 (D. Conn. 1999).

379 *See* Reliance Nat'l Ins. Co. v. Imber, 182 F.3d 922 (7th Cir. 1999) (unpublished table decision).

380 194 F.3d 288 (1st Cir. 1999).

E. NUISANCE

In *Seale v. Pearson*,[381] a homeowner living near Moundville Airport in Alabama alleged that the planes taking off from the airport and flying low over his home were a nuisance. The airport operated planes for skydiving, and the jury found that planes taking off from the airport routinely were flown fifty to 150 feet over the plaintiff's homes. The owner of the planes admitted to flying some low flights over the home but argued that the homeowner had not proven he flew all the relevant low flights. The jury heard evidence from fact witnesses and uncontested expert testimony that there was no legitimate reason to fly below 500 feet. The homeowner had asked defendant numerous times, both verbally and in writing, to stop the low flights, explaining that his wife was suffering from a brain tumor and the flights were very disturbing. For a short time the low flights stopped but resumed after about two weeks. When further complaints were unavailing, the homeowner filed suit. The jury awarded plaintiff $23,000 in compensatory damages and $29,000 in punitive damages. The court found that the jury could properly base its compensatory award on the plaintiff's own testimony regarding his estimated value of rental property during the time of nuisance. Moreover, the court concluded that the punitive damages award was not excessive. The plaintiff had met his burden by producing evidence that the low flights were "wanton, malicious, or attended by circumstances of aggravation."[382]

In *Benton v. Savannah Airport Commission*,[383] the plaintiff owned unimproved real estate near Savannah International Airport operated by the Savannah Airport Commission. Plaintiff sued the commission, claiming that the air traffic and noise in the immediate vicinity of their property had increased significantly, leaving them with property that could not be used productively. The plaintiffs sued under Georgia law for inverse condemnation and nuisance and under 42 U.S.C. § 1983 for unlawful taking. The court affirmed the lower court's ruling that the state claims were time-barred. The court held that the airport should be considered a permanent nuisance because the extension of a runway and increase in traffic had been steady since 1992. Moreover, the traffic at the airport had actually decreased in the last four years. Therefore, any injury to plaintiff's

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[381] 736 So. 2d 1108 (Ala. Civ. App. 1999).

[382] *Seale*, 736 So.2d at 1113.

[383] 525 S.E.2d 383 (Ga. Ct. App. 1999).

property had accrued over four years before suit was filed. Thus, plaintiff's state law claims were time-barred. The trial court erred, however, in dismissing the § 1983 claim.

F. False Claims Act

In *United States v. Boeing Co.*,[384] the United States filed suit against Boeing for, among other things, a violation of the False Claims Act[385] in manufacturing and selling defective gears to the government on Boeing's CH-47(D) Chinook Army helicopters. The Government's complaint also alleged that the Speco Corporation manufactured defective gears in Ohio, and Boeing installed the gears in the helicopters and provided them to the U.S. Army. The complaint was originally filed under seal but was unsealed in May 1997.

The Government alleged that one of the Speco-made gears failed in 1991, leading to the total loss of a CH-47(D) helicopter and all its contents at an estimated loss of $10 million, and that in 1993 a Speco-made gear failed in another helicopter, resulting in approximately $1 million dollars in damages.

In its summary judgment motion, the Government sought to strike Boeing's affirmative defense based on the High Value Items Clause ("HVIC"), set forth in C.F.R. § 46800 and incorporated into the contract between the government and Boeing. Boeing argued that in the HVIC clause the government agreed to hold Boeing harmless for loss or damages to high value government property, including any defects or deficiencies that may have been present in the helicopters Boeing sold to the Government.

The Government argued that the HVIC clause should not apply when there is proof of "willful misconduct" or "lack of good faith" by Boeing's managerial personnel. The court agreed with the Government and granted its motion for summary judgment dismissing Boeing's affirmative defense based on the HVIC clause.

G. Passenger List Is Discoverable to Create Class for Class Action Suit

A plaintiff filed suit against Tower Air claiming personal injury, mental anguish, and loss of consortium in *Wallman v. Tower*

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384 73 F. Supp. 2d 897 (S.D. Oh. 1999).

385 31 U.S.C. § 3729 (1983 & Supp. 2000).

Air, Inc.[386] The plaintiff boarded a Tower Air flight scheduled to fly from New York to San Francisco. The plane was delayed at Kennedy Airport in New York City while the crew attempted to repair the engine on the Boeing 747. Eventually all of the passengers were moved to another aircraft which took off four hours late. After flying for about fifteen minutes, the passengers observed a bright red light, and the plane lurched violently to the left. At that point, flight attendants began shouting hysterically and the passengers were informed over the intercom "to remove jewelry and glasses and prepare for an emergency landing." The plane landed without incident. Tower Air personnel called the New York Police Department to handle the near-riot by the passengers. The next day, plaintiff was placed on a TWA flight to San Francisco.

The district court bifurcated the action, ordering the parties to focus first on discovery related to possible certification of a plaintiff class. Plaintiff requested a copy of the passenger list for the flight, and the defendant objected. Pursuant to the Aviation Security Improvement Act of 1990, the Department of Transportation requires that certified air carriers and large foreign air carriers collect the full names of United States citizens traveling on segments to and from the United States, along with passport numbers and information on a contact person. In the event of an aviation disaster, this information is used to contact the designated contact person. The passenger list and contact information may not be released except to the family of a passenger, the State Department, or the National Transportation Safety Board. The court held that despite the confidentiality provisions of the statute, there was adequate justification within the rules of civil procedure for producing the list. Plaintiff wanted the passenger list so that he could contact fellow passengers as potential witnesses and/or plaintiffs and possibly to establish a class action. The court held that the airline was obliged to allow the production of the passenger list under the Federal Rules of Civil Procedure but would allow it produced subject to a protective order.

H. Expert Testimony

In *Weisgram v. Marley Co.*,[387] the Supreme Court held that Rule 50 of the Federal Rules of Civil Procedure permits an appellate court to direct the entry of judgment as a matter of law in favor

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[386] 189 F.R.D. 566 (N.D. Cal. 1999).

[387] 120 S. Ct. 1011 (2000).

of an appellant when the court determines on appeal that expert evidence was erroneously admitted at trial and when that evidence there was not a legally sufficient evidentiary basis for a reasonable jury to find for the opposing party. In *Weisgram*, the evidence erroneously admitted was expert testimony regarding a defect in a heater, which allegedly caused decedent's death by carbon monoxide poisoning. The appellate court concluded that the expert testimony failed to meet the *Daubert*[388] standard for admission of expert opinions and should have been excluded. Without this testimony, the verdict in favor of the plaintiff could not stand. The Supreme Court held that in such a case the appellate court is not limited to reversal and remand for a new trial and may enter judgment as a matter of law in favor of the appellant. The Supreme Court rejected any argument of unfairness, pointing out that it is implausible to suggest, after *Daubert*, that parties will present anything less than their best expert evidence in the expectation of a second chance at trial should their first try fail.

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[388] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).


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