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Case Notes

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Case Notes

TORTS—PRODUCTS LIABILITY—Lesser Quality Component Parts Do Not Render an Engine Defective Merely Because More Technologically Advanced Parts Are Available, Nor Do Service Recommendations Create an Implied Warranty When an Express Warranty Is Present, but Breach of Contract and Negligence Actions Based On the Inferior Condition of the Engine Are Not Precluded. *Fisher v. Bell Helicopter Co.*, 403 F. Supp. 1165 (D.D.C. 1975).

Police Officer Fisher was injured on April 5, 1973, when the Juneau III, a helicopter owned by the District of Columbia (District) and operated by its Metropolitan Police Department, crashed because its engine failed when a bolt parted.[1] The helicopter had been manufactured and sold by Bell Helicopter Company (Bell); the engine was manufactured and sold to Bell by Avco-Lycoming Corporation (Avco); and the last major overhaul had been performed by Saguaro Aviation Corporation (Saguaro) prior to the crash.

The aircraft was originally obtained by the District under a lease-purchase agreement requiring Bell to maintain the craft in compliance with applicable Avco service bulletins[2] and FAA directives. In May of 1972, Saguaro overhauled the engine, replacing the rod assemblies with those sent to it by Avco, on Bell's instruction. The bolts used were not shot-peened.[3] After the overhaul by Saguaro, Avco issued service bulletins 303B and 303C, which were applicable to the Juneau III engine, recommending that rod assemblies with shot-peened bolts be installed in all engines

[1] Contrary to FAA directive 73-5-1, issued Feb. 1, 1973, the engine rods were not bolted with shot-peened bolts and the bearings were not chrome-backed.

[2] Avco issues service bulletins to alert customers and users of its engines to improvements and recommended operating procedures. These service bulletins are kept at maintenance facilities and are relied on by mechanics and operators.

[3] Of the twelve bolts, only two were shot-peened. In the late 1960's it was recognized that connecting rod bolts would wear due to stress and cause bolt fatigue and failure. The shot-peened bolt was developed to help prevent this. Such bolts, by reason of a dimpling effect, retain lubrication and lessen wear as the bolt gradually fatigues.

having 550 hours within the next fifty hours, at the owner's discretion.[4]

By November 4, 1972, when the District exercised its right to purchase under the lease-purchase agreement and became responsible for all maintenance work, the Juneau III had logged 552 hours.[5] When FAA directive 73-5-1, effective February 28, 1973, ordered the rod installation previously recommended in Avco Bulletins,[6] 772 hours had been logged on the Juneau III engine, and by crash time, the engine had logged 917 hours with rod bolts and bearings not in compliance with the FAA directive.[7] Investigations after the crash disclosed that the bolt which failed had had a preexisting fatigue fracture, and it was established that if the Juneau III engine had had shot-peened rod bolts, the helicopter would not have crashed when it did.[8]

At the time of purchase, the District was advised by Bell that the Juneau III engine complied with Service Bulletins 303B and 303C, when in fact this was not the case.[9] Relying on Bell's assurances that the Juneau III engine was in compliance, the District did nothing when the FAA directive was issued.[10]

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[4] The bulletin stated, among other things:

> REASON FOR CHANGE: The heavy reinforced connecting rod assemblies with phosphated bearing surface treatment (P/N LW-10776) to minimize galling has not shown improvement in extending connecting rod service as intended. The use of reinforced heavy type rod P/N 77450 which does not have the phosphate treatment in conjunction with bearing inserts with chrome backing is recommended. Also, the 77450 connecting rod assemblies are furnished with improved stretch type bolts of higher hardness with the addition of surface shot-peening to improve and minimize bolt fatigue.

[5] The engine was already operating within the fifty-hour grace period. The lease agreement required Bell to replace the assemblies before 600 hours.

[6] This directive required all engines which had logged 550 hours to have the new #77450 connecting rod assemblies within 50 hours.

[7] FAA directive 73-5-1.

[8] Avco's chief engineer indicated that shot-peening would extend bolt life, once fatigue set in, by up to 20 hours.

[9] The connecting rod bolts were not shot-peened and the bearings were not chrome backed. The engine, at the time of purchase, required new rod assemblies within 50 hours. This involves removal of the engine and extensive mechanical work.

[10] The District filed a negligence claim against Avco, but the action failed because the court found the District to be contributorily negligent for not determining whether the engine was in compliance with the mandatory FAA directive. The court also found, however, that the conduct of the District was a concurring rather than a superseding cause and that Avco was therefore not relieved of liability to Fisher.

Fisher sued Avco, Saguaro and Bell under negligence, warranty and strict liability theories.

Held: Lesser quality component parts do not render an engine defective merely because more technologically advanced parts are available, nor do service recommendations create an implied warranty when an express warranty is present, but breach of contract and negligence actions based on the inferior condition of the engine are not precluded. *Fisher v. Bell Helicopter Co.*, 403 F. Supp. 1165 (D.D.C. 1975).

The law of product liability[11] has developed rapidly in recent years, moving in less than a century from *caveat emptor*[12] through theories based on negligence[13] and breach of express or implied warranty[14] to strict liability in tort.[15] The products liability plaintiff has been able to charge manufacturers, sellers and suppliers with liability under each of these three modern theories.[16] An aircraft manufacturer has essentially the same legal duties and responsibilities for product safety as the manufacturer of any other product.[17] The impact and implications of *Fisher* can be explored

[11] Products liability is the name used to describe that area of law involving the liability of sellers or suppliers of products to third persons with whom they are not in privity of contract. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 641 (4th ed. 1971) [hereinafter PROSSER].

[12] The common law rule was that losses should be borne by the individual incurring them unless a valid reason existed for shifting them from one person to another. "Let the buyer beware." *Id.* at 641-42.

[13] *See generally* Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

[14] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[15] *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963).

[16] Liability can arise through negligence. *See* Bell Aerospace v. Anderson, 478 S.W.2d 191 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); Manos v. T.W.A., 324 F. Supp. 470 (N.D. Ill. 1971); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961). It can also arise from the breach of an express warranty. *See* Banko v. Continental Motors, 373 F.2d 314 (4th Cir. 1966); FRUMER & FREEDMAN, PRODUCTS LIABILITY, § 16.04(4) (1968). Liability can also arise on a breach of implied warranty. *See* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Holcomb v. Cessna, 439 F.2d 1150 (5th Cir. 1971). In most states and in the District of Columbia, liability can also arise under doctrine of strict liability in tort. *See* Cottom v. McGuire Funeral Service, Inc., 262 A.2d 807 (D.C. 1970).

[17] *See, e.g.*, Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955). *See generally* McCoy, *Manufacturer's Responsibility*, 34 J. AIR L. & COM. 489 (1968); 1 L. KRIENDLER, AVIATION ACCIDENT LAW § 7.02(6) (rev. ed. 1972).

most efficiently by considering each of these theories in turn.

Establishing the defective condition of the injury-inflicting product is the key to all product liability cases. A legally defective product has been loosely defined as one in such defective condition that it does not meet the reasonable expectations of the consumer.[18] The Uniform Commercial Code (U.C.C.) defines defective products as those not "fit for ordinary purposes for which such goods are used."[19] An alternative definition is found in the Restatement (Second) of Torts, section 402, which instead of setting a standard of compliance sets a standard of non-compliance, *i.e.*, that anyone who sells any product in a defective condition which is unreasonably dangerous to the user or consumer or to his property is subject to liability for injury caused by the defect.[20] Others attempt to define "defective" products by a flexible standard, balancing the utility of the product against the risk.[21] Although it is obvious that no precise definition of a "defective condition" has been agreed upon, it is equally obvious that "defective condition" has not been limited to improper design or manufacture.[22] The seller or supplier must provide the product with every element necessary to make it safe for use.[23] One such element may be warnings or instructions concerning the use or limitations of the product.[24] Where the product is defective because of the absence of such warnings, the supplier may be liable even without proof of negligence. Similarly, misinformation supplied or inadequate in-

[18] *See generally* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967). The author concludes, at 331, that a synthesis of present day trends would define a legally defective product as follows: 1) The product carries a significant physical risk to a definable class of consumer and the risk is ascertainable at least by the time of trial. 2) The risk is one that the typical member of the class does not anticipate and guard against. 3) The risk threatens established consumer expectations with respect to a contemplated minimum level of performance. 4) The seller has reason to know of the contemplated use and possibly, where injurious side effects are involved, has reasonable access to knowledge of the particular risk involved. 5) The seller knowingly participates in creating the contemplated use or in otherwise generating the relevant consumer expectations in the way attributed to him by the consumer.

[19] U.C.C. § 2-314(2) (1972).

[20] RESTATEMENT (SECOND) OF TORTS § 402 (1965).

[21] *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965).

[22] Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).

[23] *Id.*

[24] RESTATEMENT (SECOND) OF TORTS, § 402A, comment (h) (1965).

formation given concerning the dangers involved in the use of the product may render the product defective.[25]

Under the negligence theory, the manufacturer or supplier is required to exercise reasonable care to assure that the product sold will do no harm to the buyer or the ultimate user.[26] To recover in a products liability suit based on negligence, the plaintiff must first establish that injury was inflicted by the product. Second, he must show that the injury occurred because the product was defective or unreasonably unsafe. Third, he must prove that the defect existed when the product left the hands of the defendant. Without proof of each of these elements, the action must fail.[27]

With respect to the warranty theory, the U.C.C. provides that an express warranty is given when any affirmation of fact or promise is made by the seller and the buyer relies on those statements.[28] In

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[25] *See* Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968). *See also* PROSSER, § 99 (4th ed. 1971).

[26] MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). Judge Cardozo set forth the rationale as:

> We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and . . . things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.

[27] *See generally*, PROSSER, § 103 (4th ed. 1971).

[28] U.C.C. § 2-313(1) (1972) reads:

> a) Any affirmation of fact or promise made by the seller to the

the absence of an express warranty which explicitly excludes all other warranties, two additional warranties are implied by the U.C.C. A warranty of fitness for a particular purpose arises when a seller has reason to know of the buyer's particular purpose in buying the article,[29] and an implied warranty of merchantability arises to ensure that the product is fit for ordinary purposes for which the goods are used.[30] If any of these warranties is breached, an action on the contract will lie.

Strict liability in tort is defined in section 402A of the Restatement (Second) of Torts.[31] This doctrine was expressed in the

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> buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. b) Any description of the goods which is made part of the bargain creates an express warranty that the goods shall conform to the description. c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

[29] U.C.C. § 2-315, comment (1) (1972) reads:

> Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

[30] U.C.C. § 2-314(2) (1972) reads:

> Goods to be merchantable must be at least such as: a) pass without objection in the trade under the contract description; and b) in the case of fungible goods, are of fair average quality within the description; and c) are fit for the ordinary purposes for which such goods are used; and d) run, within the variations permitted by agreement, of even kind, quality and quantity within each unit and among all units involved; and e) are adequately contained, packaged, and labeled as the agreement may require; and f) conform to the promises or affirmations of fact made on the container or label if any.

[31] RESTATEMENT (SECOND) OF TORTS § 402A (1965), states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer. 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer, or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if: a) the seller is engaged in the business of selling such product, and b) it is expected to and does reach the consumer or user without substantial change in the condition in which it is sold.
>
> 2) The rule stated in subsection (1) applies although a) the seller has exercised all possible care in the preparation and sale of his

landmark case of *Greenman v. Yuba Power Products, Inc.*,[32] where a defectively designed and manufactured combination power tool propelled a piece of wood at the plaintiff, severely injuring him. Justice Traynor held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[33]

The elements of the strict liability action are: (1) the product is defective and unreasonably dangerous; (2) the defect existed when the product left the manufacturer; (3) the plaintiff was injured; and (4) the product was the cause in fact of the injury.[34] Similarly, a person who is in the business of selling specific products is held strictly liable when the product reaches the consumer without a substantial change from the condition in which it was sold and injury results from the defect.[35] The maker, however, is only required to produce a reasonably safe product, not necessarily the best product. The crucial issue is whether there is "a defective product unreasonably dangerous."[36] A flexible standard using a balancing approach appears to be the most equitable guide for both

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product, and b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[32] 59 Cal. 2d 57, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962). Chief Justice Traynor refused to apply the traditional warranty concept, stating:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . , and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

[33] The term "seller" is used generically to include all suppliers of products who, because they are engaged in the business of selling or supplying a product, may be said to have "undertaken and assumed a special responsibility" toward the consuming public and who are in position to spread the risk of defective products. RESTATEMENT (SECOND) OF TORTS, § 402A, comment (c). The actual form of the transactions of such suppliers, whether by sale, lease or bailment, should not alter their obligations. Occasional suppliers who are not in the business of selling or supplying such products are not "sellers" subject to strict liability.

[34] *See* note 31 *supra*.

[35] 1 L. KREINDLER, AVIATION ACCIDENT LAW, § 7.04(1) (1971).

[36] *See* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

the manufacturer and the injured party.[37] Relevant factors under this balancing approach are: (1) usefulness of the product; (2) available substitutes; (3) likelihood and seriousness of injury; (4) obviousness of the danger; (5) common knowledge of the danger; (6) avoidability of injury by care in use of product; and (7) ease of eliminating the danger.[38] Again, liability under this strict liability theory is based on the determination of the defectiveness or adequacy of the product.

A suit based on strict liability is preferable to a warranty action from the plaintiff's point of view because no contract is involved, so that disclaimers or privity requirements will not be held applicable by the court. Strict liability has been applied to remote purchasers, users, consumers, passengers and even bystanders, since it is now recognized by most courts that a manufacturer has a responsibility to the ultimate user based upon nothing more than the fact that he has so dealt with the goods that they are likely to come into the hands of another and do harm if they are defective.[39]

The *Fisher* court, in applying these theories, found Bell to be under a contractual duty to reveal the engine's true condition, thus justifying imposition of the liability set out in the lease-purchase agreement, which provided that Bell would be liable for all damages caused by a defective product.[40] It further concluded that the plaintiff's claim of strict liability was without merit, finding that the use of non-shot-peened bolts did not create a defective condition for strict liability purposes, reasoning that although shot-peening was a technological advancement, it did not automatically

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[37] *Id.*

[38] *Id.*

[39] *See* 1 L. KREINDLER, *supra* note 35.

[40] Paragraph L of the Lease-purchase agreement reads:

> Responsibility for Damages: The Contractor shall be liable for all damages to property of the District of Columbia caused by (i) the contractor's providing of defective rented property, (ii) the contractor's defective maintenance of rented property . . . , or (iii) the negligent operation of the rented property by the contractor or its employees and shall hold the District of Columbia harmless for all claims for damages caused to third persons or property of third persons arising out of (i) the contractor's providing of defective rented property, (ii) the contractor's defective maintenance of rented property . . . , or (iii) the negligent operation of the rented property by the contractor or its employees, and all other times except when operated by or at direction of District of Columbia employees.

render all non-shot-peened bolts defective. Since no evidence was presented indicating the bolts were improperly manufactured or were otherwise unsatisfactory in comparison with other non-shot-peened bolts, the claim was denied. A warranty claim for safe operation of the engine for one thousand hours was rejected, although service schedule recommendations stated that no overhaul need be performed until one thousand hours were logged, and the court further held that warranties of merchantability or fitness for a particular purpose were not implied. Finally, the court imposed liability upon Avco for negligently failing to differentiate between part numbers.

The court in *Fisher* encountered an excellent opportunity to define the parameters of product liability, but it unfortunately refused to consider important issues and reached several inconsistent conclusions. The determination that the product is defective is the focal point of any products liability analysis, since unless the product is defective, no liability will be imposed under any of the three theories. It is on this issue of the defective condition of the helicopter that the court displayed its inconsistency. The judge apparently determined that the necessary elements of a negligence action were established, since Avco was held to be negligent for failing to differentiate between part identification numbers,[41] and this negligence was found to be the proximate cause of the accident. Implicit in this conclusion are that the lack of shot-peening must have caused the injury-inflicting accident, that absent a warning that the non-shot-peened bolts were installed the aircraft was unreasonably unsafe, and that the non-shot-peened bolts were supplied by the defendant Avco, or else liability under the negligence theory should not have been imposed, since it is not negligent to market a product which functions properly. The failure to warn or adequately label the product should have been an obvious basis for imposition of strict liability. It was foreseeable that the failure to renumber the parts would cause damage when the lesser quality parts were installed in place of the higher quality parts, thereby creating a less than adequate, or defective, product; otherwise, without foreseeability that an unsafe product would be created by the

[41] Avco had used the number 77450 to designate various connecting rods since 1971. The rod assemblies sent to Saguaro for the overhaul were designated 77450, but did not have shot-peened bolts.

installation of a lesser quality part, no liability under the negligence theory should have been found. Strict liability should also be imposed for marketing the aircraft without adequate warning of the condition of the engine containing non-shot-peened bolts. Either the court determined the product was defective, which it denied, or no liability should have been imposed under any theory. If the court actually did find the helicopter to be defective, it was highly inconsistent in imposing liability for negligently creating a defective helicopter, while denying the defective condition in strict liability and warranty actions.

The court also refused to permit recovery under a breach of warranty theory. The plaintiff had asserted that there was an implied warranty for safe operation of the engine for one thousand hours, since the service schedule clearly stated that no overhaul need be performed until one thousand hours were logged and the aircraft crashed after only 917 hours. The court was unwilling to imply such a warranty without further evidence, even though it was not shown that the express warranty explicitly excluded an implied warranty. Regardless of the service schedule recommendations, the U.C.C. warranties of merchantability and fitness for a particular purpose should have been considered and implied, since exclusionary clauses were not produced in evidence.[42]

The court determined that the non-shot-peened bolts were not of lesser quality than other non-shot-peened bolts, and therefore the product was not defective. This ignores the fact that although the bolts themselves were not inferior, their presence within the engine of the Juneau III rendered the aircraft defective. The mere fact that a bolt of greater quality had been developed did not create a defective engine when the non-shot-peened bolts were installed, but the failure to warn that the bolts were not of supreme quality and were not likely to last as long did render the engine defective.[43] The engine was not safe for the extended usage for which Bell knew the aircraft was being purchased. In fact, the aircraft was already within the grace period at the time of pur-

[42] U.C.C. § 2-316 (1972). The existence of an express warranty will not destroy implied warranties unless it explicitly excludes such implied warranties.

[43] *See generally* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969); Harp v. Montgomery Ward & Co., 336 F.2d 255 (9th Cir. 1964); Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961).

chase, and, therefore, without a warning that the non-shot-peened bolts were installed, the engine was neither safe nor fit for the purpose for which it was purchased, thus breaching the implied warranty of fitness. The fact that the defect was not immediately damaging or immediately apparent should be of no consequence.[44] Neither should the lack of privity matter, since such warranties of fitness may run in favor of those not in privity of contract, such as pilots and stewardesses,[45] and it is well settled in the Washington, D.C. jurisdiction that privity of contract is not a requirement in implied warranty actions.[46] In spite of all this, however, the court did not find an implied warranty, apparently determining that the aircraft was not defective under the warranty theory, but was reasonably fit for the purpose for which it was sold.

The court further refused to find the Juneau III defective under the strict liability theory, reasoning that while shot-peening was a technological advancement, it did not automatically render all non-shot-peened bolts defective. Using a modern balancing standard, however, the court could have found the helicopter itself defective since the danger could have easily been eliminated, superior substitutes were available, the seriousness of potential injury was obvious, and the pilot could do virtually nothing to prevent damage after the product malfunction. The occurrence of a malfunction in absence of abnormal usage and reasonable secondary causes is evidence of a defective condition within the meaning of section 402A.[47] The court seemed to require that the component part which renders the engine defective must itself be defective before the strict liability is imposed, and therefore declined to apply strict liability in tort. Following such a requirement to its logical conclusion, any extremely dangerous product could be placed on

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[44] Agostino v. Rockwell Manufacturing Co., 236 Pa. Super. Ct. 434, 345 A.2d 735 (1975); Berkebile v. Brantly Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971); Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966).

[45] Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); Pickerd X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962).

[46] Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807 (D.C. 1970); Pickerd X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962).

[47] *See* Wojciechowski v. Long-Airdox Division of Marmon Group, Inc., 488 F.2d 1111 (3d Cir. 1973); D'Antona v. Hampton Grinding Wheel Co., Inc., 225 Pa. Super. 120, 310 A.2d 307 (1973); Burchill v. Kearney-National Corp., 468 F.2d 384 (3d Cir. 1972).

the market without risking strict liability in tort so long as the component parts are not themselves defective. This conclusion is repugnant to the spirit behind all products liability.

The modern day law of products liability has been derived to a great extent from the current social thinking that the financial burdens of personal catastrophes should be borne by those whom society perceives as better equipped to bear the loss. All manufacturers continue to face increasing exposure to legal liability for injuries related to their products. It is now recognized by most courts that a manufacturer has a responsibility to the ultimate consumer based upon nothing more than the fact that he has so dealt with the goods that they are likely to come into the hands of another and do harm if they are defective. The manufacturer is liable for the total product after all component parts have been installed. Even so, the maker is not required to produce the best possible product, or one as good as others make, or a better product than the one he has, so long as it is a reasonably safe product. The key determination must involve the presence or absence of a defect in the product. The court in *Fisher* adopted a very limited definition of "defective" by requiring the component part to be defective before liability is imposed under strict liability in tort or implied warranty; such a limited definition effectively defeats the purpose of strict liability in tort. Surely, the installation of a part not designed for such an engine would result in a defective engine, because it cannot function up to the reasonable expectations of the consumer. Therefore, the installation of a part of lesser quality, with assurances that the part is of greater quality, should also result in a defective engine, because it, too, cannot function up to the reasonable expectation of the purchaser. This should properly have been considered a defective engine, not capable of performing up to the standards of an ordinary consumer who believes he has purchased an engine capable of extended usage.

Even if strict liability were not imposed, some form of warranty should be found in the representations of the seller that the superior parts are installed in the engine. The seller knew that the buyer intended to make use of the aircraft as a police helicopter and use it for an extended period and that the craft would not be overhauled until long after the non-shot-peened bolts had become

unsafe. The public interest in human life and safety demands the maximum possible protection for those using such machines. The seller, by offering the helicopter for sale, represented that it was suitable and safe for use. He should not have been allowed to avoid liability by the mere proof that no individual component part was defective. The engine malfunctioned at a time when it would not have done so had the superior parts been installed.[48] This alone might not be a basis for liability, but coupled with the assertions that superior parts were installed, the machine becomes defective because it does not conform to reasonable consumer expectations for the superior engine. The engine was likely to develop a defect which would make the product unreasonably dangerous for those purposes for which it would foreseeably be used.

The court, while expressly rejecting the classification of the helicopter as "defective" for purposes of strict liability, apparently found the aircraft to be defective for purposes of negligence, and negligence liability was imposed on Avco for not renumbering the parts, and thereby causing a premature engine failure. If the engine was not defective in relation to the assurances given of its superior quality, liability for negligently creating a defective engine should not be imposed. Further, the court imposed contractual liability, making paragraph "L" of the lease agreement applicable.[49] That paragraph imposed responsibility for damages on the seller for providing a defective product. If the helicopter is defective under contract and negligence theories, it should not have become adequate under strict liability and warranty theories.

The court's decision regarding the defective nature of the helicopter must be considered to be too limited. For liability to be imposed, the product need not be manufactured or designed improperly, but rather it must create an unreasonable danger to the consumer. This helicopter, having been represented as equipped with an engine containing shot-peened bolts, created an unreasonable danger to the purchaser who depended upon the quality of those bolts. With such a defect existing, the strict liability in tort and implied warranties theory should not have been dismissed. "Defectiveness" must not be limited to improper manufacture or

[48] *See* note 8 *supra*.

[49] *See* note 40 *supra*.

design of the product, but must include any aspect of the product which would render the product unreasonably dangerous to the ultimate user.

Gary D. Elliston

ANTITRUST—PRIMARY JURISDICTION OF THE CAB—The District Court Had Jurisdiction to Issue a Preliminary Injunction Upon Foremost's Prima Facie Showing of Antitrust Violations. *Foremost International Tours, Inc. v. Qantas Airways Ltd.*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 425 U.S. 957 (1976).

Foremost International Tours, Inc. is engaged in the wholesale business of producing, packaging, selling, and operating inclusive tours to the South Pacific from various points in the United States and Canada. Until March 31, 1974, Qantas Airways Limited was a participating airline in one of Foremost's tours. Sometime shortly thereafter, Qantas entered the inclusive tour market in direct competition with Foremost. Foremost subsequently brought this antitrust suit in the District Court of Hawaii against Qantas, alleging violations of sections one and two of the Sherman Act[1] and complaining that the circumstances surrounding Qantas' entry into the inclusive tour business showed an intent to eliminate Foremost as a competitor.[2] Seeking monetary and injunctive relief, Foremost moved for a preliminary injunction while Qantas cross-moved for a summary judgment. The district court issued a preliminary injunction and, while retaining jurisdiction, stayed the proceedings

[1] Secton 1 of the Sherman Act, 15 U.S.C. § 1 (1970), generally makes illegal any contract, combination, or conspiracy, which is in restraint of trade or commerce. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1970), provides a penalty for such monopolization or restraint in the form of a fine and/or a prison term.

[2] More particularly, Foremost sought relief against Quantas' alleged below-cost pricing of inclusive tours and the alleged unfair appropriation of business through the practice of "tour switching." Finding that Foremost made a *prima facie* showing of antitrust violations, the district court made the following key finding of fact:

> In April, 1973, Foremost sold 310 (passenger) tours; in April, 1974, 102. In May, 1973, Foremost sold 851 tours; in May, 1974, 65. In June, 1973, Foremost sold 539 tours; as of June 20, 1974, 29.

Foremost Int'l Tours, Inc. v. Qantas Airways Ltd., 379 F. Supp. 88, 92 (D. Hawaii 1974).

until the Civil Aeronautics Board (CAB) could consider those matters which were in its primary jurisdiction.[3] Qantas appealed, arguing that it was inappropriate for the district court to issue the injunction.[4] *Held, affirmed:* The district court had jurisdiction to issue a preliminary injunction upon Foremost's prima facie showing of antitrust violations. *Foremost International Tours, Inc. v. Qantas Airlines Ltd.*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 425 U.S. 957 (1976).

The Civil Aeronautics Act of 1938[5] was passed during a time of general disillusionment over the value of free, unrestrained competition. In fact, one of the main aims of the Civil Aeronautics Act was to eliminate so-called "cut-throat competition" among the air carriers.[6] To do this, however, a rather pervasive scheme of regulation was contemplated and enacted.[7] To prevent monopolistic combinations, the Federal Aviation Act of 1958[8] (the Act) makes

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[3] As examples of the issues within the CAB's primary jurisdiction, the district court listed: "whether an airline such as Qantas may conduct an in-house tour operation, whether the acts of Qantas alleged in the complaint constitute unfair or deceptive practices or unfair methods of competition in air transportation, or the sale thereof, and whether the acts of Qantas alleged in the complaint have anticompetitive effects." Foremost Int'l Tours, Inc. v. Qantas Airways Ltd., 379 F. Supp. 88, 98 (D. Hawaii 1974). The Ninth Circuit listed another example: "whether by means of improper accounting methods relating to fixed cost allocation and translation of foreign exchange rates, Qantas was violating its tariff and illegally subsidizing its land tour operations with air fare revenues." 525 F.2d at 283.

[4] On appeal, Qantas raised the following issues: (1) whether it was appropriate for the district court to issue a preliminary injunction when: (a) the subject matter was arguably within the primary jurisdiction of the CAB; (b) the CAB arguably could have provided, under the suspension power of 49 U.S.C. § 1482(j)(2) (1970), the prophylactic relief sought by Foremost; and (c) the provisions of § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1970), grant a limited antitrust immunity to various acts approved by the CAB; and (2) regardless of the outcome of the first issue, whether the requirements for the issuance of the preliminary injunction were met in this case at all. Discussion in this article will be centered around issue (1)(a) and (1)(b).

[5] Ch. 601, 52 Stat. 973 (1938).

[6] Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 399 (1973) (dissenting opinion). For a discussion of the traditional arguments surrounding the passage of the Civil Aeronautics Act of 1939, *see* Comment, 42 J. AIR L. & COM. 187 (1976).

[7] H.R. REP. No. 2254, 75th Cong., 3rd Sess. 1 (1938); *see* Jones, *The Anomaly of the Civil Aeronautics Board in American Government*, 20 J. AIR L. & COM. 140, 141 (1953); *see also*, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 280 (1955).

[8] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 [hereinafter cited in text as "the Act"].

illegal certain mergers, consolidations, and other transactions without the consent of the CAB.[9] Section 412[10] of the Act requires every air carrier to file with the CAB a copy of every contract or agreement that "affects" air transportation. Once filed, the CAB, by order, either approves or disapproves such agreement or contract.[11] The importance of the CAB's power under section 412 is magnified because the CAB, by so ordering, can effectively relieve an air carrier from the operation of the antitrust laws.[12] This formidable power[13] was granted in order to enable the CAB to regulate

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[9] 49 U.S.C. § 1378 (1970).

[10] 49 U.S.C. § 1382(a) (1970) provides:

> Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

[11] 49 U.S.C. § 1382(b) (1970):

> The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

[12] 49 U.S.C. § 1384 (1970):

> Any person affected by any order made under Sections 1378, 1979 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in Section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

For discussion of express and implied exemption from the antitrust law, *see* Comment, 39 J. AIR L. & COM. 559 (1973).

[13] The power of the CAB to exempt air carriers from the operation of the antitrust laws has been termed "one of the most formidable powers possessed by

more effectively those matters congressionally delegated to it.[14] The CAB is further given the power to supervise and inquire into air carrier management[15] and to limit interlocking directorships when "public interest" demands it.[16] At issue in the Foremost case, along with the question of antitrust immunity, was another significant provision of the Act—Section 411.[17] This section generally prohibits unfair methods of competition and authorizes the Board to issue cease and desist orders where it finds foreign or domestic air carriers or ticket agents to have been engaged in "unfair or deceptive practices or unfair methods of competition."

The legislative history of this regulatory scheme indicates that the CAB was to have broad jurisdiction over air carriers.[18] Regulation of competition among carriers was a primary concern.[19] The

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any Government agency." Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 949 (1960).

[14] Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 400-03 (1973).

[15] 49 U.S.C. § 1385 (1970).

[16] 49 U.S.C. § 1379 (1970).

[17] 49 U.S.C. § 1381 (1970) provides:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

[18] H.R. REP. No. 2254, 75th Cong., 3d Sess., stated at 1:

> It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air transportation industry in the United States.

See also Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963).

[19] *See* 49 U.S.C. § 1302 (1970) which prescribes the general duties and aims of the Act. It provides in part:

> In the exercise and performance of its power and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity: . . .
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest

various sections previously cited evidence Congress' intent to give the CAB power to deal with at least some antitrust problems.[20] Yet, while the regulatory scheme appears pervasive, it does not totally preempt the operation of the antitrust laws.[21] The problem evolves into a determination of whether an antitrust dispute falls within the expertise of the administrative agency or whether it is a matter that initially is judicially cognizable. The doctrine of primary jurisdiction has traditionally operated to postpone adjudication by the courts of a controversy raising issues within the agency's competence until the agency resolves such issues.[22] While easily stated, this doctrine has not been applied with such ease in resolving various antitrust issues.[23]

> degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . . .

[20] Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963).

[21] Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 387 (1973). *See* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 305 (1963), where the Court pointed out that "while the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." It should be noted that the CAB is not empowered to award damages and therefore, is not in conflict with a claim for treble damages as provided by the antitrust laws. *See* S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 658, 661 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 78 F. Supp. 1, 8 (D. Hawaii 1948).

[22] *See generally* 3 DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 19 (1958); Jaffe, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 U. PA. L. REV. 577 (1954); Latta, *Primary Jurisdiction in the Regulated Industries and the Antitrust Laws*, 30 U. CINN. L. REV. 261 (1961); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954); Fox, *The Antitrust Laws and Regulated Industries: A Reappraisal of the Role of the Primary Jurisdiction Doctrine*, 2 MEM. ST. U.L. REV. 279 (1972); Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812 (1967).

[23] *See, e.g.*, Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); United States Nav. Co. v. Cunard S.S. Co., 39 F.2d 204 (S.D.N.Y. 1929), *aff'd*, 284 U.S. 474 (1932); Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (D.N.J. 1951), *cert. denied*, 346 U.S. 806 (1953); Far E. Conf. v. United States, 342 U.S. 570 (1952).

In the aviation context, conflict can arise if a court enjoins certain practices as being in violation of the antitrust laws, while the CAB concurrently determines that such practice is necessary to the development of air transportation.[24] To avoid such conflict, if the particular matter is clearly within the CAB's competence, the court will normally defer to the jurisdiction of the CAB rather than grant injunctive relief without such prior resort.[25] Historically, however, the courts have not been totally consistent in the application of this doctrine.

In the 1951 case of *S.S.W., Inc. v. Air Transport Association of America*,[26] plaintiff, a nonscheduled air carrier, sued an association of regularly certificated air carriers for treble damages and an injunction against an alleged combination in restraint of trade. The principal allegations centered around the association's attempts to eliminate competition through various pooling and non-competitive agreements.[27] Finding such allegations to be within the CAB's primary jurisdiction, the court referred that part of the action asking for an injunction to the CAB while remanding the portion seeking treble damages with a stay order until the CAB had acted.[28]

Later in the same year, in *Slick Airways v. American Airlines*,[29] another court reached a contrary result. In that case, plaintiff airlines also sought treble damages and injunctive relief based on allegations of a conspiracy to drive a competitor out of business by predatory rate policies. Defendants argued that the doctrine of primary jurisdiction dictated that the court should stay the pro-

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[24] *See* S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 658 (D.C. Cir. 1951), where the Court aptly phrased this problem at 663:

> Otherwise, we might have the spectacle of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined or may decide, subject to judicial review, that such practices serve the interest of the national air transportation policy.

[25] Laveson v. Trans World Airlines, 471 F.2d 76 (3d Cir. 1972); Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441 (2d Cir. 1967), *cert. denied*, 393 U.S. 846 (1968); S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 658 (D.C. Cir. 1951); Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9th Cir. 1949).

[26] 191 F.2d 658 (D.C. Cir. 1951).

[27] *Id.* at 662.

[28] *Id.* at 664.

[29] 107 F. Supp. 199 (D.N.J. 1951), *cert. denied*, 346 U.S. 806 (1953).

ceeding until the CAB had decided whether defendants' method of competition were unfair. The district court did not agree, notwithstanding the decision in *S.S.W.*, and refused to refer the matter to the CAB.[30] The court pointed out that the CAB had no power to award damages, and, therefore, the plaintiff would have had an inadequate remedy.[31]

Shortly thereafter, an independent ticket agency sought treble damages and injunctive relief against four scheduled air carriers and two trade associations in *Apgar Travel Agency, Inc. v. International Air Transport Association.*[32] The ticket agency alleged in substance that defendants had monopolized and restrained trade by commercially boycotting plaintiff because it had represented non-scheduled carriers. Following *S.S.W.*, the court stayed further proceedings until CAB action.[33] Although troubled by the lack of CAB authority to award damages,[34] the court noted there was a need for uniformity and consistency which requires preliminary resort to "agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."[35] As such, the court concluded that the controversy over non-scheduled air carriers was a difficult and specialized problem not within the "conventional experience" of judges.[36]

More recently, questions of primary jurisdiction have generally turned on the type of relief sought and not the issues to be determined. In *Allied Air Freight v. Pan American World Airways, Inc.*,[37] plaintiff sought treble damages only, alleging that defendants had entered into an agreement to force plaintiff out of business. In

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[30] *Id.* at 214.

[31] *Id.* at 211. The court noted that it was not deciding the question of whether the CAB had primary jurisdiction in a case where the plaintiff seeks only injunctive relief as opposed to a combination of injunctive relief and damages.

[32] 107 F. Supp. 706 (S.D.N.Y. 1952).

[33] *Id.* at 709. The court summarily refused to follow the rationale of *Slick*, instead finding that Congress intended to give the CAB "special status with relation to the antitrust laws." *Id.*

[34] *Id.* at 711.

[35] *Id.* at 711-12. This language quoted by the court was taken from Far East Conference v. United States, 342 U.S. 570, 574-75 (1952), where the Court deferred to the primary jurisdiction of the Federal Maritime Board to exmept operation of a conference rate structure from the antitrust laws.

[36] *Id.* at 712.

[37] 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968); *see* Note, 35 J. AIR L. & COM. 275 (1969).

holding for the plaintiff, the Second Circuit found no need to resort to the CAB, because plaintiff was suing for past antitrust violations and asking for a remedy—treble damages—which the CAB could not provide.[38] This decision was followed by the Second Circuit in *Breen Air Freight, Ltd. v. Air Cargo, Inc.*[39] In this case, plaintiff sought treble damages against several defendants for alleged violations of the antitrust laws due to their joint refusal to deal with plaintiffs as an air freight delivery service. Defendants argued that the primary jurisdiction of the CAB should be invoked and the action stayed. The court disagreed and held that the primary jurisdiction doctrine was not applicable, since the CAB did not have the power to immunize the agreement in question because section 412[40] was limited to "air carriers," and defendants were not within the definition of "air carriers."[41] Alternatively, the court held that even if the CAB could immunize the agreements under Section 412, invocation of the primary jurisdiction doctrine was not required because the issues involved were not technical, the CAB could not award treble damages, and there was no need to seek uniformity in this instance.[42]

While the courts in *Allied* and *Breen* refused to invoke the doctrine of primary jurisdiction on the grounds that the plaintiffs involved sought a remedy not awardable by the CAB, more recent decisions criticize this rationale.[43] In *Laveson v. Trans World Airlines,*[44] the Third Circuit invoked the primary jurisdiction doctrine where plaintiffs sought damages only, based upon an alleged con-

[38] 393 F.2d at 445. The Second Circuit distinguished *S.S.W.* and *Apgar* on the grounds that plaintiffs in those cases sought injunctive relief as well as treble damages and that their claims had been current rather than past ones. *Id.* at 446-47. The court further indicated that uniformity was not demanded in this instance and that the primary jurisdiction doctrine was flexible enough to allow the courts and the agencies to split the workload between them.

[39] 470 F.2d 767 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973); *see* Note, 39 J. AIR L. & COM. 453 (1973).

[40] 49 U.S.C. § 1382(a) (1970) [text set out in note 10 *supra*].

[41] 470 F.2d at 771.

[42] *Id.* at 774. *See also* Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Hawaii 1972); *contra* Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3d Cir. 1972); Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973).

[43] *See* Mark Aero, Inc. v. Trans World Airlines, Inc., 411 F. Supp. 610 (W.D. Mo. 1976); Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973); Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3d Cir. 1972).

[44] 471 F.2d 76 (3d Cir. 1972).

spiracy to fix the price coach passengers paid for the rental of headsets used with inflight movies.[45] The court went on to say that since the challenged actions were of "debatable legality" and were within the regulatory jurisdiction of the CAB, resort should be made to the CAB.[46]

Much of the confusion over the propriety of invoking the primary jurisdiction doctrine in a particular case can be traced to the Supreme Court decisions in *Pan American World Airways, Inc. v. United States*[47] and *Hughes Tool Co. v. Trans World Airlines, Inc.*[48] In *Pan American*, a suit for injunctive relief was instituted at the request of the CAB against Pan American and others.[49] Acting upon allegations that defendants had conspired to monopolize trade routes between certain points in the United States and South America, the district court held that Pan American had violated section 2 of the Sherman Act. The Supreme Court held that the Act had vested the CAB with exclusive authority to grant injunctive relief in certain instances.[50] The Court reasoned that "two regimes might col-

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[45] *Id.* at 83-84, where the court noted:

> The rationale for applying the primary jurisdiction doctrine does not depend upon the particular kind of relief plaintiffs request. Rather, it rests upon a judicial reluctance to hold practices within the scope of any agency's jurisdiction to be antitrust violation and then to act upon such holding by granting relief—damages or injunction—before prior resort to the agency.

[46] *Id. See also* cases cited in note 25 *supra*.

[47] 371 U.S. 296 (1963).

[48] 409 U.S. 363 (1973). In 1973, the Supreme Court decided four other cases involving antitrust issues in a regulated industry. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); Gulf States Utils. Co. v. FPC, 411 U.S. 747 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973). For a discussion of all of these cases, *see* Robinson, *Antitrust Developments: 1973*, 74 COLUM. L. REV. 163 (1974).

[49] The defendants named were Pan American World Airways, W. R. Grace & Co., and their jointly owned subsidiary Pan American-Grace Airways (Panagra). The complaint alleged that Pan American and Grace had conspired to monopolize air commerce between the East Coast of the United States and the West Coast of South America. Pan American argued it possessed immunity from the operation of the antitrust laws by virtue of CAB approval of its Through Flight Agreement with Panagra, 8 C.A.B. 50 (1947). Pan American also argued that the doctrine of primary jurisdiction required original resort at the agency level and that the district court was therefore without jurisdiction. United States v. Pan Am. World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961).

[50] 371 U.S. at 310. The court listed as instances questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers.

lide" if the courts were to "intrude independently with their construction of the antitrust laws."[51] The Court concluded that "Congress must have intended to give it [the CAB] authority that was ample to deal with the evil at hand."[52]

When *Pan American* was decided, previous speculation[53] that the antitrust laws might yield totally to the CAB's exclusive authority to deal with virtually any antitrust problem involving the air industry seemed to be more than mere conjecture.[54] The standards and principles propounded in *Pan American* were affirmed by the Court in the *Hughes Tool Co.* case. In this case, TWA sought treble damages, complaining about the method and manner in which Hughes Tool Co. (Toolco) had acquired and exercised control of TWA.[55] Holding that the CAB had immunized Toolco's acquisitions from the antitrust laws, the Court was careful to emphasize that every transaction or acquisition was approved by a CAB order based on a finding that such transactions were "just and reasonable and in the public interest."[56]

Foremost brought its complaint to the district court in the wake of the *Hughes* decision, alleging antitrust violations which were arguably within the primary jurisdiction of the CAB or, in addition, were immunized from the operation of the antitrust laws by previous CAB actions.[57] Qantas argued that the issues of "below

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[51] *Id.* at 310.

[52] *Id.* at 312.

[53] *See, e.g.*, Schwartz, *Legal Restrictions of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 469-70 (1954). *See also* Comment, 39 J. AIR LAW & COM. 559, 591-92 (1973).

[54] The dissenting opinion in *Pan American* indicated that the decision of the Court would create a "pro tanto repeal of the antitrust laws" since the law to be applied when dealing with section 411 would not be based on the standard of competition embodied in the antitrust laws, but rather would be decided in light of the nebulous "public interest" standard of section 102 of the Act. The dissent further urged the application of the primary jurisdiction doctrine so the courts would not lose all jurisdiction over an antitrust action. 371 U.S. at 319-21, 331-32. *See also* Schwartz, note 53 *supra*, and Comment, note 53 *supra*.

[55] 449 F.2d 51, 71 (2d Cir. 1971).

[56] 409 U.S. at 379.

[57] The sale of inclusive tours in foreign air transportation is governed by the rules and regulations established by the International Air Transport Association (IATA). In 1966, IATA Resolution 810d was filed with the Board for approval. This Resolution defined the principles under which inclusive tours may be begun by IATA airline members. The American Society of Travel Agents (ASTA) filed an objection with the Board against the approval of IATA Resolution 810d on the grounds that the entry of the airlines into the inclusive tour market would

cost pricing" and "switching of tours" were matters eminently within the CAB's expertise under section 411 of the Act and as such required resort to the CAB before the court could act.[58] The district court agreed with Qantas' argument that the CAB had initial jurisdiction by holding that Foremost was a "ticket agent" within the meaning of the Act and by interpreting the phrase "air transportation or the sale thereof" as used in section 411 to encompass these allegedly unlawful activities.[59] Nevertheless, the court found that the "very real" danger that Foremost would suffer irreparable injury justified the limited injunctive relief sought by Foremost.[60]

The Ninth Circuit reached the same conclusion, but on a somewhat different rationale. It pointed out that the anticompetitive effects were not limited to the regulated (airline) industry, but had an adverse effect on a firm in an industry not regulated per se by the CAB.[61] The appeals court reasoned that since the CAB lacked authority to regulate all the parties involved, it could not make the accommodations and effect the compromises which are the "hallmark of agency regulation."[62] More importantly, the court emphasized that the CAB lacked the expertise and incentive to act on inter-industry problems.[63] Thus, while affirming the district court's

create substantial unfair competition for the independent travel agency industry. CAB Order No. E-24886, pp. 2-3, Docket 25513 (April 17, 1974). Note that it has been held that Board approval of an IATA Resolution or agreement confers antitrust immunity with respect to the subject matter thereof by virtue of Section 414 of the Act. National Air Carrier Ass'n v. CAB, 436 F.2d 185 (D.C. Cir. 1970).

[58] *See* note 24 *supra*.

[59] 379 F. Supp. at 95.

[60] *Id.* at 97. The district court pointed out that section 2 of the Sherman Act may be violated by an attempt to monopolize, even though the desired end of monopoly power is not attained. Plaintiffs need only prove a specific intent to monopolize and the dangerous possibility of success. *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953). Furthermore, the court noted that the requirement of a dangerous probability of success is met by the evidence that because Qantas is owned by the Australian Government and because it controls a large share of the South Pacific market, it can absorb certain costs and overhead in its air fare and therefore give the consumer a lower tour fare. 379 F. Supp. at 95 n.8. This showing, the court held, sufficiently warranted a preliminary injunction which the court can issue whenever there is a sufficient showing of irreparable injury. *See* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970). *See also* note 2 *supra*.

[61] 525 F.2d at 285.

[62] *Id.*

[63] *Id.* The court warned that "in cases such as this, the regulatory agency might

actions, the Ninth Circuit did not summarily adopt the lower court's views on the role of the CAB in antitrust matters.

The different reasoning used by the two courts in this case exemplifies the problems of consistent application of the doctrine of primary jurisdiction in the antitrust area. The district court had little difficulty in holding that the issues raised were within the CAB's jurisdiction to decide and regulate.[64] The Ninth Circuit, on the other hand, recognized that even though the CAB had a "substantial interest" in the litigation, it did not have exclusive jurisdiction, and therefore the court felt it must maintain its jurisdiction and utilize its power (including the issuance of preliminary injunctions), as it finds necessary.[65] The basic difference seems to be that the district court represents a position more deferential to the CAB than that of the appeals court. The Ninth Circuit explained that where the antitrust problem is not confined to the regulated industry, other factors and policy considerations may substantially alter the desirability of according such "substantial deference" to an agency which does not have a sufficiently broad perspective.[66] The court, however, failed to clarify these factors and policy considerations. Consequently, this decision fails to add any lucidity to the

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favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority."

[64] 379 F. Supp. at 95.

[65] 525 F.2d at 286.

[66] *Id.* at 285. But it can be argued that while analytically this is an inter-industry problem, previous CAB action substantiates Qantas' position that problems similar to those involved have been heretofore regulated and as such fall within the CAB's primary jurisdiction. *See* 14 C.F.R. § 378 (1974), entitled *Inclusive Tour Charters By Supplemental Air Carriers, Certain Foreign Air Carriers, and Tour Operators*; 14 C.F.R. § 378a (1974) entitled *One-Stop Inclusive Tour Charters. See* Trans World Air Lines, Inc., Flying Mercury, Inc.—Enforcement Proceedings—CAB Docket No. 24697, CAB Order No. 73-6-9 (June 4, 1973), where the CAB dealt with a practice which had developed wherein the land portion of an inclusive tour program was such that the tour participant rarely made use of it and it was therefore referred to in the industry as a "throw-away." After investigation, the CAB ordered TWA and Flying Mercury to cease and desist "from engaging in unfair and deceptive practices and unfair methods of competition within the meaning of Section 411 of the Act" by selling and operating inclusive tours in such a way as to permit the "throw-away" factors to persist. CAB Order No. 73-6-9, at 7. *See also* Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430 (9th Cir. 1962), where the court upheld the authority of the CAB to regulate the packaging and sale of tours by a hotel which included free air transportation as a part of the tour.

"murky area"[67] of primary jurisdiction in the context of antitrust immunity.

It is important, however, to note that both the district court and the Ninth Circuit were primarily concerned with providing Foremost an expedient remedy which the CAB had no power to grant.[68] By granting a preliminary injunction, the court recognized that, notwithstanding the doctrine of primary jurisdiction, the CAB does not have all of the tools necessary to deal with issues of unfair competition. The court has implicitly affirmed the observation made by the Supreme Court in *Pan American* that the regulatory scheme involved here was not "designed completely to displace the antitrust laws."[69] Criminal penalties and the recovery of damages for antitrust violations remain within the court's domain. While it could possibly be argued that the court in *Foremost* issued a mandate to the CAB or Congress to establish a more expeditious proceeding whereby a temporary cease and desist order could be issued by the CAB,[70] the more important aspect of this case is that the court may have signalled a judicial intrusion into the CAB's regulatory authority over air carriers and air transportation. Using the rationale of the Ninth Circuit, courts may use their powers when necessary to enjoin activities within the CAB's expertise whenever those activities have an adverse affect upon a firm in an "unregulated" industry. Whether Foremost is an "unregulated" industry is an arguable issue.[71] The court here, however, made that determination and awarded relief which the CAB in its proceedings could find to be erroneous if it determines Qantas' activity was sufficiently immunized from operation of the antitrust laws. If the CAB so decides, then the objectives of uniformity and avoidance of agency/court conflict will have been thwarted. This general conclusion, however, can only be substantiated by future decisions involving issues as unsettled as those involved in Foremost. Until Congress clarifies the CAB's role in the enforcement of the

[67] This was the term used by one author to describe the area of primary jurisdiction as it relates to the antitrust laws. Robinson, *Antitrust Developments: 1973*, 74 COLUM. L. REV. 165 (1974).

[68] 525 F.2d at 287 n.4; 379 F. Supp. at 96-97 n.7.

[69] 371 U.S. at 305.

[70] *See* 525 F.2d at 287 n.4.

[71] *See* note 66 *supra*.

antitrust laws or until the courts clearly define what constitutes "regulation" of an industry, inconsistency in the application of the primary jurisdiction doctrine will continue to permeate judicial decisions, leaving the law in this area unpredictable and sometimes confusing.

Guy H. Kerr

ENVIRONMENTAL IMPACT STATEMENTS—AIRPORT EXPANSION—Any Approval of an Airport Layout Plan, Which Has Not Previously Been Granted Approval, Constitutes Federal Action in the Meaning of the National Environmental Policy Act of 1969 and Requires Environmental Processing or Conditional Approval Pending Environmental Processing. *City of Boston v. Coleman*, 397 F. Supp. 698 (D. Mass. 1975).

In 1974 the Massachusetts Port Authority (Authority) prepared an Airport Layout Plan for proposed expansion to Logan Airport of existing runways[1] and construction of a new runway.[2] The Airport Layout Plan was submitted to the Federal Aviation Authority (FAA) in accordance with the Airport and Airway Development Act of 1970 (AADA).[3] Plaintiffs moved for a preliminary injunction against approval of the Airport Layout Plan pending compliance with the National Environmental Policy Act of 1969 (NEPA).[4] Plaintiffs alleged that an Environmental Impact Statement[5] was required on all proposed construction, since approval of the Airport Layout Plan was now federal activity as set out in new Federal Aviation Administration orders.[6] *Held, Granted*: Any approval of an airport layout plan, which has not previously

[1] Extensions to present runways 4 L-22 R and 9-27. City of Boston v. Brinegar, 6 ERC 1961 (D. Mass. 1974).

[2] General Aircraft/Short Take Off and Landing Runway 14-32. *Id.*

[3] Airport and Airway Development Act of 1970, 42 U.S.C. § 1701 *et seq.* (1970 & Supp. III 1973).

[4] National Environmental Policy Act of 1969 [NEPA], 42 U.S.C. § 4332(2)(c) (1970).

[5] *Id.* at § 102(2)(c).

[6] FAA Order 5050.2A. Adopted Feb. 24, 1975.

been granted approval, constitutes federal action within the meaning of the National Environmental Policy Act of 1969 and requires environmental processing or conditional approval pending environmental processing. *City of Boston v. Coleman*, 397 F. Supp. 698 (D. Mass. 1975).

The National Environmental Protection Act is supposed to embody a cohesive national policy to bring about a productive coexistence between man and the environment to enhance the attractiveness of those measures which halt the destruction of this balance.[7] Furthermore, Congress foresaw the principal objective of NEPA as a practical outline for implementing environmental protection policy at the federal agency level.[8]

To prevent irreparable injury to the environment, the best time to evaluate a project's impact is before the actual work on the project has begun.[9] In formulating this Act, Congress, and especially Senator Henry Jackson, the sponsor, was adamant about making it an effective and viable tool.[10] Therefore, the bill was drafted to impose a duty on federal agencies to comply "to the fullest extent possible"[11] so that it would be more than a nicely-phrased statement of desire.[12] It would appear that Congress intended that an

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[7] NEPA, 42 U.S.C. § 4321 (1970) provides: "The purpose of this chapter is: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote effects which prevent or eliminate damage to the environment."

[8] ENVIR. REP. (BNA)—Federal Laws, 71:0301, para. 1 (1970). "[The principal objective is] to build into the agency decision-making process an appropriate and careful consideration of the environmental aspects of proposed action, and to assist agencies in implementing not only the letter, but the spirit of the act."

[9] While the use of a facility can cause environmental damage (*e.g.* noise pollution in an airport), many times the construction itself, or preparations for construction, may cause the damage (*e.g.*, filling part of a bay for airport extension).

[10] S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969). "A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But if goals and principles are to be effective, they must be capable of being applied in action."

[11] CONF. REP. TO S. 1075, 91st Cong., 1st Sess. 39,701, 39,702-03.

[12] *Hearings on S. 1975, S. 237, and S. 1752 Before the Senate Interior and Insular Affairs Comm.*, 91st Cong., 1st Sess. 116 (1969):

> It seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effects of these proposals on the state of the environment. . . . It would not be enough, it seems to me, when we speak of

EIS be filed in contemplation of future action.

There was, however, a major problem with the drafting of NEPA: the failure to define "Major Federal Action."[13] This caused confusion as to when the Act's provisions should be triggered. One court very liberally construed the provisions of NEPA to impose strict standards of compliance.[14] Under the Administrative Procedure Act[15] a possible avenue was open to force compliance by judicial action, preventing otherwise delinquent federal agencies from ignoring the spirit of NEPA. Nevertheless, the legislation afforded the federal agencies themselves the opportunity to become the leaders in composing the practical structure of national environmental policy.[16]

The goal is the earliest possible evaluations of environmental consequences. There is great advantage to placing the practical implementation of NEPA within the federal agencies: each agency is usually the first federal entity to have contact with a project affecting the environment. Several courts have accepted this idea.[17] An Environmental Impact Statement (EIS) becomes especially important considering the importance of evaluating location in airport construction.[18] Legal scholars have noted that the unfor-

> policy, to think that a mere statement of desirable outcomes would be sufficient to give us the foundation that we need for a vigorous program of what I would call national defense against environmental degradation. We need something that is firm, clear, and operational.

[13] Silva v. Romney, 342 F. Supp. 783, 784 (D. Mass. 1972).

[14] Calvert Cliffs' Co-ordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

[15] Administrative Procedure Act, 5 U.S.C. § 553 (1971). Under § 706, a reviewing court can determine not only all relevant questions of law, but can as well set aside agency action committed without observance of procedures required by law.

[16] Exec. Order No. 11,514, 3 C.F.R. § 308 (1970). President Nixon said of the NEPA, "The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals."

[17] Irreparable damage, in the context of an action to enforce NEPA, consists of the failure by responsible authorities to fully evaluate the environmental impact before engaging in a project which constitutes major federal action. City of Boston v. Brinegar, 6 ERC 1961, 1965 (D. Mass. 1974); Dick Jones v. District of Columbia Redevelopment Land Agency, 6 ERC 1534 (D.C. Ct. App. 1974).

[18] *See* Harper, *The Airport Location Problem: The Case of Minneapolis-St. Paul*, 38 ICC PRAC. J. 550 (1971).

tunate reality is that environmental concerns are given little weight in airport planning.[19] Seeing this, the same court had previously observed:

> Clearly, insistence on the traditional concept of the necessity of actual physical harm or damage to trigger preliminary equitable relief would bar virtually all such relief in actions seeking to enforce compliance with NEPA. The allegedly harmful action may eventually be taken notwithstanding full compliance with NEPA, which requires only consideration of environmental factors.[20]

Similarly, legal commentary has addressed the problems resultant from an EIS not being required at the planning stage,[21] and one critic strongly urged judicial activism to bring about this result.[22] Notably, each of these commentators dealt with an earlier proceeding in the Logan Airport expansion. An after-the-fact EIS was only managing to predict harm which was by then irreversible. Quite often it is the disruption of the act of construction itself, or land clearing or filling, or the erection of a permanent or semipermanent structure which causes the harm, and not the existence of the final project.

The controversy surrounding the expansion of Logan Airport (Airport) provides a good study of the evolution of the FAA's approach to NEPA. Under the Airport Development Aid Program,[23] approval of the Airport Layout Plan is a prerequisite to any federal grant of financial aid. The AADA falls within the jurisdiction of the Department of Transportation (DOT) and is administered by the FAA. The first significant federal involvement in the present expansion of the Airport occurred in December 1969 when the Authority submitted an Airport Layout Plan to the FAA.[24] The FAA gave its general approval in early 1970,[25] and the

[19] *See* Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 URB. LAW. 1 (1972); Comment, *Jetport: Planning and Politics in the Big Cypress Swamp*, 25 U. MIAMI L. REV. 713 (1971).

[20] City of Boston v. Brinegar, 6 ERC 1961, 1965 (D. Mass. 1974). The court went on to state: "It may well be that the point of approval of a layout plan would be an appropriate time to require an EIS, even though some of the projects included might never be completed, or completed only in the distant future."

[21] *Id.*; *see* Note, 41 J. AIR L. & COM. 550 (1975).

[22] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972), *discussed in* Note, 39 J. AIR L. & COM. 121 (1973).

[23] 14 C.F.R. § 152.5(a) (1977).

[24] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972), *discussed in* Note, 39 J. AIR L. & COM. 121 (1973).

[25] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

Authority commenced construction on the outer taxiway that December.[26] In February 1971 the Authority forwarded a request for aid to FAA and included a "negative declaration"[27] that no significant adverse environmental impact was foreseen.[28] The Boston Redevelopment Authority disagreed and expressed its view to the FAA, which in turn explained that this issue had to be resolved before any funds would be forthcoming.[29] Nonetheless, the Authority forwarded its application for aid, which the Department of Transportation returned in July 1971 "until an environmental impact statement is prepared."[30]

Up to this point in this airport expansion the Authority had requested a federal grant,[31] the federal agency had made a tentative allocation of funds,[32] and the Authority had submitted a formal application for approval.[33] The court in *City of Boston v. Volpe* found, however, that the project had not become "major federal action."[34] Only preparatory subjects had fallen within federal purview, and the Authority was proceeding without federal funds and might even have been able to complete the project without those funds. No injunction pending the filing of an EIS would be granted.[35] The action had not as yet come within the ambit of sufficient federal action, as defined at that time, to warrant any court action.

As the Authority became more ambitious in its plans for expansion, more litigation arose seeking to enjoin federal approval of the Authority's new application for funds without an EIS.[36] By this

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[26] *Id.*

[27] There are times when a declaration showing that *no* change to the environment will result from a project is sufficient and avoids the costly and lengthy preparation of an EIS.

[28] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

[29] *Id.*

[30] *Id.*

[31] 14 C.F.R. § 151.21(a) (1977).

[32] 14 C.F.R. § 151.21(b) (1977).

[33] 14 C.F.R. § 151.21(c) (1977).

[34] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972). The court spoke only of "federal action" at that point in time. Later, however, the lines of battle were drawn around the concept of "major federal action." Bearing in mind the time differential, the two terms are actually synonymous and are cited interchangeably.

[35] *Id.*

[36] City of Boston v. Brinegar, 6 ERC 1961 (D. Mass. 1974).

time, the runways project approved in the 1969 Airport Layout Plan had been altered somewhat, but throughout the interim the Authority and the FAA had maintained contact with each other.[37] The Authority submitted another request for aid, asking $2,360,-000, fifty percent of the estimated cost, and introduced its own environmental impact report.[38] This report dealt mainly with the effect of noise, which is a major consideration in airport planning.[39] The importance of noise, however, should not permit the exclusion of other environmental considerations within a report. The physical impact of the construction could also result in serious environmental upheaval. The Authority had executed covenants with the FAA agreeing to make no alterations of the airport without an FAA-approved airport layout plan unless the changes would not adversely affect the safety, utility, or efficiency of the Airport, in which case they were permissible. None of the changes, actual or proposed, were anticipated to so affect the Airport.[40]

The Authority had entered into a contract for airport construction for $7,764,701.[41] Although the Authority continued actively pursuing federal funding, and despite active negotiations between local, state, and federal officials,[42] the District Court for Massachusetts in *City of Boston v. Brinegar* found that the Authority could have continued with the project even absent federal funds.[43] Again the injunction was denied, as the court found that certain provisions[44] specifically excluded the approval of Airport Layout Plans from the list of federal actions requiring an EIS.[45] The court did state that although much evidence had been introduced on substantial environmental impact, it would make no finding in respect

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[37] *Id.* at 1962.

[38] *Id.*

[39] *See*, Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?*, 38 J. AIR L. & COM. 473 (1972); *cf.* Goldstein, *Airport Noise and the Selection of Airport Sites*, 43 PA. B. ASS'N Q. 229 (1972).

[40] City of Boston v. Brinegar, 6 ERC 1961 (D. Mass. 1974).

[41] *Id.* at 1963.

[42] The three officials were Edward King, Executive Director of the Authority, Alan Altshuler, Secretary of the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts and Ferres Howland, Director, New England Region, FAA.

[43] City of Boston v. Brinegar, 6 ERC 1961, 1965 (D. Mass. 1974).

[44] FAA Orders 1050.1A, 5050.2.

[45] City of Boston v. Brinegar, 6 ERC 1961, 1964 (D. Mass. 1974).

to it.[46]

Such was the situation when again the case reached the court, in a new round of litigation, as *City of Boston v. Coleman.*[47] In fact, by now the Ninth Circuit was citing the two prior *City of Boston* cases as showing that FAA approval of an airport layout plan did not require an EIS.[48] Nevertheless, the court broke from these earlier decisions and ordered the injunction, at least partially.[49]

This reversal was permitted by a change in FAA Orders.[50] FAA Order 5050.2A superseded FAA Order 5050.2. Paragraph 32 of the superseding Order[51] states that approval of Airport Layout Plans is an "action" for purposes of NEPA. Those FAA actions preceding the Order were unaffected. Accordingly, the 1970 Airport Layout Plan was ruled properly approved since it had met all the FAA requirements at the time it had been filed. The 1974

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[46] *Id.* The court maintained that:

> This is the purpose for which an EIS is designed and is not for the court to decide at this stage. Suffice it to say that I find that the impact of airplane noise is a highly sophisticated and complex matter, involving many variables and requiring an objective study of not only theoretical measurements based on sound patterns and exponential increases, but also on actual measurements and inquiry into the conscious and subconscious effect on real people in the actual neighborhoods. . . . I find, however, that no such objective evaluation has yet been made.

[47] 397 F. Supp. 698 (D. Mass. 1975).

[48] Friends of the Earth v. Coleman, 518 F.2d 323 (9th Cir. 1975).

[49] Cognizant of its shift, the court stated: "The focus of the *City of Boston* cases was on enjoining construction of projects not yet federally funded, and it is my impression that the present issue was not reached in those cases." City of Boston v. Coleman, 397 F. Supp. 698, 700 (D. Mass. 1975).

[50] The order was promulgated under the authority of § 4 Department of Transportation Order 5610.1B, 39 Fed. Reg. 35,235, 35,237 (1974). On September 30, 1974, the DOT delegated environmental impact statement approval authority for airport projects to the FAA Administrator or his designee. Order 5050.2A laid out the guidelines the FAA was to follow in the area and was distributed to Washington Airports Service, Office of the Chief Counsel, Office of Environmental Quality, and the Office of Aviation System Plans to branch level; to Regional Planning Staffs to the branch level, Regional Airports Divisions and Regional Counsel; and to all Airports District Offices. *Instructions for Processing Airport Development Actions Affecting the Environment*, FAA Order 5050.2A. Adopted Feb. 24, 1975.

[51] Paragraph 32(a) orders that either an EIS must be completed under Paragraph 20 or a negative impact statement under Paragraph 22. Paragraph 32(b) provides for approval of an Airport Layout Plan conditional upon completion of Paragraph 32(a) requirements. Paragraph 32(c) allows annotation of an environmental approval for any portion of the layout plan earlier approved.

Airport Layout Plan could only be given conditional approval, however, since it was subject to the new, more stringent regulations.[52]

Another problem remained. The defendants appealed, claiming the district court had erred in admitting the superseding Order because the Order was not an FAA regulation, but rather an "advanced copy" of what was possibly intended to be published at some future date as a Notice of Proposed Rule Making.[53] The Authority claimed that the Order had not as yet complied with the Administrative Procedure Act[54] and was therefore invalid. This point was never reached, since the case became moot before reaching appeal.[55] In the court's memorandum and order, it was determined that since the FAA had returned the 1974 Airport Layout Plan to the Authority and the Authority no longer sought approval, no controversy existed between the parties.[56] In the *City of Boston v. Brinegar* case, however, under similar circumstances the court had held the Authority chargeable with knowledge of FAA Orders.[57] In other words, the defendants saw little or no chance for success on appeal, and by discontinuing the project, the Authority was acquiescing in the decision. Although the case has not been affirmed on appeal, that is essentially a result of the defendant's challenge being abandoned. For that reason, and as the first judicial interpretation of the new FAA Order, the decision's importance remains. This case certainly signals an end to the judicial treatment of the FAA's NEPA duties established in the two earlier *City of Boston* cases.

Although the FAA was somewhat slow in adopting the proper regulations within the spirit of NEPA[58] and trailed the Department

[52] City of Boston v. Coleman, 397 F. Supp. 698, 701 (D. Mass. 1975).

[53] Brief for Appellant at 31 *et seq.*, City of Boston v. Coleman, 397 F. Supp. 698 (D. Mass. 1975).

[54] Administrative Procedure Act, 5 U.S.C. § 553 (1971).

[55] City of Boston v. Coleman, 527 F.2d 643 (1st Cir. 1975).

[56] City of Boston v. Coleman, No. 75-1418, 75-1419, unpublished Memorandum and Order (1st Cir. 1975).

[57] "To the extent material, the Authority is charged with knowledge of these Orders, even though they were not published in the Federal Register. They were referred to in prior litigation between these parties in this court . . . ." City of Boston v. Brinegar, 6 ERC 1961, 1964 (D. Mass. 1974).

[58] The heads of federal agencies were directed to establish formal procedures for identifying those agency actions requiring an EIS in Guidelines of the Council on Environmental Quality, 36 Fed. Reg. 1398, 7724 (1971).

of Housing and Urban Development by over four years,[59] now that it has adopted these regulations, it is bound to follow them.[60] Although an injunction is not available against the non-federal parties,[61] and although the only lever available may be unavailability of FAA approval of the Airport Layout Plan,[62] the power of withholding these funds could be quite substantial. While the state would have been permitted to proceed with construction wholly independent of the federal government,[63] as a practical matter the costs involved in airport construction are probably beyond the means of a state. Conversely, where they are within the means of the state the possibility of serious environmental damage is, of necessity, considerably lessened. In defending its decision in *City of Boston v. Volpe*, the court gave an eloquent account of the vital role that federal funds can take in the state's or other non-federal entity's financial planning.[64] The court was fairly adamant in its belief that a lack of federal funds in the Logan project would force the Authority to abandon it altogether. This is indeed what happened. The present decision is even more potent in light of that argument and result, since the EIS now must be filed at the planning stage, as was intended all along. Additionally, with only minor exceptions, federal aid cannot be awarded for costs incurred prior to the execution of the grant agreement.[65] It is doubtful that any major construction or expansion could be carried on today or in the foreseeable future without the federal aid that is available only through prompt compliance with the FAA regulations.

The *City of Boston v. Coleman* decision signals FAA acceptance of the original purpose of NEPA, at least as the court has interpreted the new Order. The promulgation of the new regulation forces airport planners to come to grips immediately with the environmental consequences of construction or expansion. The impact of the FAA is so sudden and practically inevitable that it might be criticized as overly coercive and an undue federal inva-

[59] "Major HUD Actions Significantly Affecting the Environment" appeared in Appendix A of the HUD guidelines issued January 22, 1971.

[60] Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972).

[61] City of Boston v. Coleman, 397 F. Supp. 698 (D. Mass. 1975).

[62] *Id.*

[63] New Windsor v. Ronan, 329 F. Supp. 1286 (S.D.N.Y. 1971).

[64] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

[65] 49 U.S.C. § 1720(a)(2) (1970).

sion of state or local affairs. Consideration of the time and expense of an EIS strengthens this attack. What cannot be overlooked, however, is the enormous effect airports have on the environment. Realistically, few airport development projects are viable without federal help, and the only way in which the environment can be safeguarded as provided for in NEPA is to have the proper measures taken at the earliest possible moment. No longer must environmentalists stand on the sidelines as possibly irrevocable environmental damage is caused before "major federal action" triggers NEPA requirements. With this decision, the FAA finally becomes an active environmental watchdog as Congress, in passing NEPA, had envisaged it to be.

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