Journal of Air Law and Commerce

Volume 34 | Issue 4 Article 6

1968

Current Legislation and Decisions

Anderson

Linda A. Whitley

William A. Stewart

Joseph W. Sheehan

CURRENT LEGISLATION AND DECISIONS

COMMENT

Federal Transfer: Problems of Multiple Litigation and the Inapplicability of Stare Decisis

I. INTRODUCTION

With a view toward ameliorating the harshness of the doctrine of *forum non conveniens*,[1] Congress, in 1948, provided for transfer of cases from one district to another on grounds similar to those underlying *forum non conveniens*.[2] The statute (Section 1404(a)) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[3]

In *Gulf Oil Corp. v. Gilbert*[4] the Supreme Court enumerated the criteria to be used in ruling on a motion for dismissal under *forum non conveniens* stating that in determining whether dismissal was to be granted, a court should consider the private interests of the litigant, relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of viewing the premises, relative advantages and obstacles to a fair trial, and all other practical problems that make the trial of a case easy, expeditious, and inexpensive.[5] *Gilbert* also emphasized that the weight of convenience must be "strongly in favor of the defendant"[6] or the motion for dismissal *must* be denied, thereby indicating that the defendant could not obtain dismissal by a mere balancing of the convenience in his favor.[7] A literal interpretation and strict application of the *Gilbert* rule to 1404(a) would point to the conclusion that the transfer provision is

---

[1] This doctrine states "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COL. L. REV. 1 (1929).

[2] F. JAMES, CIVIL PROCEDURE 668 (1965).

[3] Change of Venue, 28 U.S.C. § 1404(a) (1964).

[4] 330 U.S. 501 (1947); Annot., 170 A.L.R. 319.

[5] Mutual Life Ins. Co. v. Ginsburg, 125 F. Supp. 920 (W.D. Pa. 1954), *appeal dismissed*, 228 F.2d 881 (3d Cir.), *cert. denied*, 351 U.S. 979 (1956), *rehearing denied*, 352 U.S. 813 (1956); Lesser v. Chevalier, 138 F. Supp. 330 (S.D.N.Y. 1956); Latimer v. S/A Industries Reunidas F. Matarazzo, 91 F. Supp. 469 (S.D.N.Y. 1950); Richer v. Chicago, R.I. & P. R.R., 80 F. Supp. 971 (E.D. Mo. 1948); Cox v. Pennsylvania R.R., 72 F. Supp. 278 (S.D.N.Y. 1947); Di Lella v. Lehigh Val. R.R., 7 F.R.D. 192 (S.D.N.Y. 1947).

[6] Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950).

[7] Perry v. Atchison, T. & S.F. Ry., 82 F. Supp. 912 (N.D. Cal. 1948).

little more than a codification of the old *forum non conveniens* rule[8] and that the courts have very little discretion in granting transfer. Some courts have stated that in granting transfer a district judge is limited in his consideration to the convenience of the parties and witnesses and the interest of justice,[9] while others have endowed district judges with broad discretion in determining transfer.[10] Still other courts have taken the seemingly irreconcilable viewpoint that although a district judge has broad discretion in determining transfer, he is limited in his consideration to factors specifically mentioned in 1404(a) and may not properly be governed in his decision by any other factor or consideration.[11] However, in *Norwood v. Kirkpatrick*[12] the Supreme Court, using language in contrast to that in *Gilbert*, stated that the statute was *not* a codification of the *forum non conveniens* rule and that under 1404(a) courts have broad discretion in granting transfer.[13] The Court quoted *All States Freight v. Modarelli*[14] in which it was said:

> [T]he doctrine of "forum non conveniens" involves dismissal of a case because the forum chosen by the plaintiff is *so completely inappropriate* and inconvenient that it is better to stop the litigation in the place where it was brought and let it start all over again somewhere else; and such a doctrine is *quite different* from statutory provisions authorizing a district court to transfer an action to any other district where it might have been brought when such transfer is in the interest of justice and the convenience to the parties and witnesses [Emphasis added.].[15]

The Court noted that whether or not dismissal under the doctrine of *forum non conveniens* would have been appropriate, the *purpose of 1404(a)* was to grant a broad power of transfer for the convenience of the parties and witnesses in the interest of justice.[16] The Court further stated that a *lesser* showing of inconvenience is necessary under 1404(a) than would have been necessary under the doctrine of *forum non conveniens*, noting that 1404(a) deleted the harshest portion of the old rule when it did away with the requirement of dismissal of the action. "When the harshest part of the doctrine is excised by the statute, it can hardly be called mere codification."[17]

The *Norwood* decision, however, did not address itself to the question of whether 1404(a) supersedes dismissal under *forum non conveniens*.

---

[8] The Reviser's notes, as quoted in Norwood v. Kirkpatrick, 349 U.S. 29, 34 (1955), state that "[s]ubsection (a) was drafted in accordance with the doctrine of forum non conveniens . . . ."

[9] Sypert v. Bendix Aviation Corp., 172 F. Supp. 480 (N.D. Ill. 1958), *mandamus denied*, 266 F.2d 196 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959); Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404 (D. Mont. 1960).

[10] Phillip Carey Mfg. Co. v. Taylor, 286 F.2d 782 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); Healy v. New York, N.H. & H. R.R., 89 F. Supp. 614 (S.D.N.Y. 1949).

[11] Chicago, R.I. & P. R.R., v. Igoe, 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955); Dairy Industries Supply Ass'n v. La Buy, 207 F.2d 554 (7th Cir. 1953).

[12] 349 U.S. 29 (1955).

[13] 349 U.S. at 33.

[14] 196 F.2d 1010 (3d Cir. 1952).

[15] *Id.* at 1011.

[16] Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp., 177 F.2d 360 (4th Cir. 1949).

[17] *Ex parte* Collett, 337 U.S. 55, 61 (1949).

Although it would seem obvious that the transfer provision would be inapplicable under circumstances in which the alternate forum is not a federal district court and, therefore, would have no effect on *forum non conveniens*,[18] there is authority to the effect that where the statute has applicability, dismissal is no longer available as a remedy.[19] Frequently, the ends of justice will be better served by application of the milder remedy of transfer,[20] and it is difficult to see how 1404(a) could be construed to allow dismissal.[21] Nevertheless, in rare cases dismissal may continue to be the more appropriate remedy.[22]

The question of the extent to which a court's discretion under 1404(a) is reviewable is complicated by the fact that the grant or denial of a transfer motion is an interlocutory order and is not appealable;[23] once final judgment is reached, the issue of transfer is likely to become moot.[24] The real question, therefore, is whether mandamus is available as an immediate remedy to abuse of discretion.[25] The courts are in hopeless conflict on this point,[26] although the trend seems to be away from allowing interlocutory review, because the discretion of the trial court is virtually never disturbed, and such review causes undue delay in the proceedings.[27]

Prior to 1960, a majority of federal courts permitted transfer to a district where jurisdiction could not have been obtained over the defendant or where venue would not have been proper, providing the *defendant* sought transfer and consented to the jurisdiction and venue.[28] But, in 1960, the Supreme Court in *Hoffman v. Blaski*[29] expressly overruled this position in situations where venue would have been improper in the transferee forum and implicitly overruled it in situations where jurisdiction over the defendant could not be obtained.[30] In the face of a vigorous dissent,[31] the majority of the Court reasoned that any other conclusion would result in discrimination against plaintiffs.[32]

---

[18] *See*, Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1956).

[19] Collins v. American Automobile Insurance Co., 230 F.2d 416 (2d Cir. 1956).

[20] A companion section, 28 U.S.C. § 1406(a) (1964), allows the alternate remedy of dismissal where the original venue was improper.

[21] F. JAMES, CIVIL PROCEDURE 669 (1965).

[22] C. WRIGHT, THE LAW OF FEDERAL COURTS 141 (1963).

[23] *Id.* at 145-46.

[24] Chicago, R.I. & P. R.R. v. Hugh Breeding, Inc., 247 F.2d 217 (7th Cir.), *cert. denied*, 355 U.S. 880 (1957).

[25] F. JAMES, CIVIL PROCEDURE 669 (1965).

[26] *See*, 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.7 (Wright ed. 1960).

[27] *See*, All States Freight v. Modarelli, 196 F.2d 1010, 1011-12 (3d Cir. 1952).

[28] F. JAMES, CIVIL PROCEDURE 669 (1965). *See, e.g.*, Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951); *Ex parte* Blaski, 245 F.2d 737 (5th Cir. 1957).

[29] 363 U.S. 335 (1960).

[30] It has been suggested that the decision and its reasoning is applicable only to venue. *See*, 46 IOWA L. REV. 661 (1965). The general consensus, however, is to the contrary. *See*, 57 N.W.U. L. REV. 456 (1962).

[31] *See*, Sullivan v. Behimer, 363 U.S. 335 (1960), a companion case to *Hoffman*.

[32] For a criticism of the *Hoffman* result, *see*, F. JAMES, CIVIL PROCEDURE 670-71 (1965). "This, it is submitted, is unfortunate today when the greatest need is for rules which do tend to secure the optimum place of trial and to substitute rational guides to that end for the sterile and mechanical doctrines of the power myth."

II. THE LAW TO BE APPLIED

In *Erie Railroad Co. v. Tompkins*,[33] the Supreme Court held that:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.[34]

In *Erie* suit was brought in the federal district court of New York for an alleged tort in Pennsylvania. Holding that Pennsylvania law was applicable, the Court did not explain whether this law was applicable because the federal court must apply the choice of law rule of New York or because the federal court was applying its own choice of law rule.[35] Three years later in *Klaxon Company v. Stentor Electric Manufacturing Co., Inc.*,[36] the Court resolved this question, holding that in a diversity suit the conflict of laws rule to be applied is that of the state in which the district court sits. The reasoning of the *Klaxon* court, therefore, rested squarely on the major premise of *Erie*:

> [T]he desirability of federal uniformity and policy was outweighed by the consideration that federal courts should not afford an opportunity to escape the judgment which would prevail in a state court.[37]

The advent of 1404(a) gave rise to new problems of choice of law, *i.e.*, problems of the law that was to govern following transfer.[38] In tort cases, these problems traditionally have been resolved by strict application of the vested rights oriented rule adopted by the Restatement,[39] *lex loci delicti*.[40] Under *lex loci delicti*, the law of the place where a tort is committed governs both the existence of a cause of action and the extent of liability therefor.[41] The rule was based on the theory that a tort is considered to *vest* its victim with a locally created cause of action enforceable in any jurisdiction where suit is brought,[42] and found its development and application in neutral forums where the pertinent facts had occurred elsewhere.[43] Because of its advantages of simplicity, predictability, and discouragement of forum shopping, the application of *lex loci delicti* was approved by the Supreme Court in 1903.[44]

Recent aviation cases have greatly emphasized the shortcomings of *lex loci, e.g.*, constitutional problems of the arbitrariness of the indiscrimi-

---

[33] 304 U.S. 64 (1938), Annot., 114 A.L.R. 1487.

[34] 304 U.S. 64, 78 (1938).

[35] H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 24-25 (4th ed. 1964).

[36] 313 U.S. 487 (1941).

[37] *Id.* at 25. *Cf.*, Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

[38] *See*, Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

[39] RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

[40] *See*, Larsen, *Conflict of Laws*, 22 SW. L.J. 190 (1968).

[41] H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 165 (4th ed. 1964).

[42] Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903).

[43] *See*, Note, *Wrongful Death—Conflict of Laws—Significant Contacts vs. Lex Loci*, 34 J. AIR L. & COM. 309 (1968).

[44] Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903).

nate application of the law of the place of the tort[45] and the idea that the law of the forum most intimately involved with an action should govern.[46] The fortuitous nature of air crashes,[47] the fact that the planes involved in air crashes may spend but a few moments in a state's airspace,[48] and the fact that the speed of planes makes it such that the *locus* of the tort and the *locus* of the resulting injury, if at all determinable, may be in different states,[49] all point to the unsoundness of a mechanical application of *lex loci*. The landmark case illustrating dissatisfaction with the traditional conflicts rule is the New York Court of Appeals decision in *Kilberg v. Northeast Airlines, Inc.*[50] The *Kilberg* court, although allowing the cause of action to be based on the Massachusetts wrongful death statute under *lex loci delicti*, characterized the Massachusetts damage limitation as procedural, and, since strong New York public policy[51] prohibits limitations of recoverable damages in wrongful death actions, the court held that New York law as to damages would govern. In a companion case to *Kilberg*, *Pearson v. Northeast Airlines*,[52] the Second Circuit considered the question of whether New York could constitutionally split the cause of action or whether full faith and credit had to be given to the entire Massachusetts wrongful death statute. The court held that due process did not guarantee Northeast Airlines a vested right to the application of Massachusetts law in New York, and stated that "a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law."[53]

Two years after *Kilberg*, in *Babcock v. Jackson*,[54] New York completely severed *lex loci* from applicability in wrongful death actions and adopted a more flexible rule of significance contacts, *i.e.*, that the law to govern is the law of the state with the greatest interest in the issues before the court. The *Babcock* court found that, with the exception of the *locus* of the injury, all significant contacts were in New York. In *Kell v. Henderson*,[55] however, the New York court held the *Babcock* principle inapplicable to an action arising out of an automobile accident occurring in New York involving Canadian citizens. The court refused to allow defendants to amend their answer to plead the Ontario guest statute because the *Babcock* decision was not intended to change the established New York rule that a guest, whether a resident of New York or not, has a cause of action

---

[45] Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 3-77 (1963).

[46] RESTATEMENT OF CONFLICT OF LAWS (SECOND) § 379 (Tent. Draft No. 8, 1963).

[47] *See*, Long v. Pan American World Airways, Inc., 23 App. Div. 2d 386, 260 N.Y.S.2d 750 (1965), *rev'd*, 16 N.Y.2d 337, 213 N.E.2d 337, 213 N.E.2d 796, 226 N.Y.S.2d 513 (1965), where airliner disintegrated over the Delaware-Maryland border.

[48] Larsen, *Conflict of Laws*, 22 Sw. L.J. 190 (1968).

[49] Note, *Wrongful Death—Conflict of Laws—Significant Contacts vs. Lex Loci*, 34 J. AIR L. & COM. 309 (1968).

[50] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[51] N.Y. CONST. art. I, § 16, states that, in wrongful death actions, recovery "shall not be subject to any statutory limit."

[52] 309 F.2d 553 (2d Cir. 1962).

[53] *Id.* at 559.

[54] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

[55] 263 N.Y.S.2d 647 (1965), *aff'd*, 270 N.Y.S.2d 552 (1966).

for personal injuries against a host in an accident occurring in New York.[56]

The constitutionality of abandonment of *lex loci* was upheld in 1962 by the Supreme Court in *Richards v. United States*,[57] the Court holding that after a consideration of the competing interests, the forum state could constitutionally apply the law of *any* state having significant contact with the tort involved. The Court thereby recognized the inadequacies of its 1903 *Slater* decision.[58] Nevertheless, the traditional rule of *lex loci delicti* remains the established rule in the vast majority of the states and is not likely to be soon abandoned. The Texas Supreme Court, for example, recently refused to alter a strict application of *lex loci delicti* in an action in which all significant contacts, with the exception of the *locus* of the accident, were in Texas.[59]

III. Considerations in Federal Transfer Proceedings

A. *In General*

The present discussion of proper considerations in federal transfer proceedings can best be presented on a three-fold basis: (1) the "permissible" considerations founded both in case law and statutory requirement; (2) factors which weigh heavily upon any determination made by a court in a federal transfer proceeding but are not openly recognized as valid considerations; and (3) the importance to be attributed to a defendant's offer to pay the reasonable travel costs of plaintiffs, their witnesses, and counsel incurred as a result of the transfer.

Primary attention will be given to the underlying considerations not openly recognized and to the effect of the defendant's offer to pay the transfer expenses. The "permissible" considerations are simply the statutory convenience of the parties and witnesses and the interests of justice and those factors laid down in *Gulf Oil Corporation v. Gilbert*. These will be considered only in passing.

The effect of a defendant's offer to incur reasonable transfer expenses can be determined by analysis of a line of cases arising out of the crash of a military charter flight near Ardmore, Oklahoma, on 22 April 1966.[60] The airplane carried ninety-two soldiers and six employees of American Flyers Airline Corporation, defendant in the actions. The plaintiffs consisted of survivors, guardians of survivors, and administrators of the estates

[56] *But see*, Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 133 (1965) extending the *Babcock* principle to wrongful death cases.

[57] 369 U.S. 1 (1962). *Cf.*, Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967).

[58] Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903).

[59] Marmon v. Mustang Aviation, Inc., 10 Av. Cas. 17,896 (Tex. Sup. Ct. 1968).

[60] Dawkins v. American Flyers Airline Corporation, No. 66 C 2165 (N.D. Ill. 1966); Lora v. American Flyers Airline Corporation, No. 66 C 1308 (N.D. Ill. 1966); Scaramuzzo v. American Flyers Airline Corporation, 260 F. Supp. 746 (E.D.N.Y. 1966); Schmidt v. American Flyers Airline Corporation, 260 F. Supp. 813 (S.D.N.Y. 1966); Turner v. American Flyers Airline Corporation, No. 66 C 1309 (N.D. Ill. 1966); Bilgen v. American Flyers Airline Corporation, No. 67-256-AAH (C.D. Cal. 1967); Dolecki v. American Flyers Airline Corporation, No. 46858 (N.D. Cal. 1967); Farrell v. American Flyers Airline Corporation, 42 F.R.D. 341 (S.D.N.Y. 1967); Vasquez v. American Flyers Airline Corporation, No. 45639 (N.D. Cal. 1967); Wright v. American Flyers Airline Corporation and Helton v. American Flyers Airline Corporation, 263 F. Supp. 865 (D.S.C. 1967).

of the deceased soldier-passengers. In all of these cases American Flyers moved for transfer to the Eastern District of Oklahoma, predicting the motion on an offer to pay the reasonable travel costs of plaintiffs, their witnesses, and counsel. Only in *Farrell v. American Flyers* and the *Schmidt v. American Flyers* and *Scaramuzzo v. American Flyers* cases was transfer denied. In the other eight cases transfer was granted, contingent upon the defendant honoring its offer to pay expenses.[61]

B. *Underlying Considerations*

An analysis of transfer cases indicates that precedent takes a back seat in this area of the law because the peculiar facts of each case are determinative and the doctrine of *stare decisis* is of secondary importance.[62] One may justifiably surmise that concepts such as "the convenience of parties and witnesses" and "the interest of justice" are often used to "dress up" an opinion once a decision has been reached and that only then is applicable precedent cited to support the decision. Often, the determinative factors are not discussed or even mentioned in the opinion, and to further confuse the issue, such factors are sometimes disposed of as "not controlling" in arriving at the decision. In short, there are many criteria, other than convenience of the parties and witnesses and the interest of justice, that loom in the shadows behind the decisions in federal transfer proceedings.

1. *Convenience of Counsel*

Once a decision has been reached, the court will support it by citing one of two lines of cases, either the liberal *Norwood* viewpoint or the more strict *Gilbert* rule. For example, it is often stated as a general rule that convenience of counsel is to be given little or no weight in determining the priority of transfer under 1404(a),[63] and this proposition has been used both to support the grant of a 1404(a) motion[64] and to support a denial.[65] The convenience of counsel rule has been used in situations representing inconvenience to the counsel himself[66] and in situations representing inconvenience to the client in having to employ additional counsel in the transferee forum.[67] Although there is no case law recognizing the convenience of counsel as a factor demanding even momentary pause in a court's

[61] Dawkins v. American Flyers Airline Corporation, No. 66 C 2165 (N.D. Ill. 1966); Lora v. American Flyers Airline Corporation, No. 66 C 1308 (N.D. Ill. 1966); Turner v. American Flyers Airline Corporation, No. 66 C 1309 (N.D. Ill. 1966); Bilgen v. American Flyers Airline Corporation, No. 67-256-AAH (C.D. Cal. 1967); Dolecki v. American Flyers Airline Corporation, No. 46858 (N.D. Cal. 1967); Vasquez v. American Flyers Airline Corporation, No. 45639 (N.D. Cal. 1967); Wright v. American Flyers Airline Corporation and Helton v. American Flyers Airline Corporation, 263 F. Supp. 865 (D.S.C. 1967).

[62] United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), *aff'd in part, modified in part on other grounds*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964).

[63] Sypert v. Miner, 266 F.2d 196 (7th Cir. 1959), *cert. denied*, 361 U.S. 832 (1959); Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404 (D. Mont. 1960); Cressman v. United Air Lines, Inc., 158 F. Supp. 404 (S.D.N.Y. 1958); Molloy v. Bemis Bro. Bag Co., 130 F. Supp. 265 (S.D.N.Y. 1955); Henderson v. American Airlines, 91 F. Supp. 191 (S.D.N.Y. 1950).

[64] Thomas v. Silver Creek Coal Co., 264 F. Supp. 833 (E.D. Pa. 1967).

[65] Roller Bearing Co. v. Bearings, Inc., 260 F. Supp. 639 (E.D. Pa. 1966).

[66] Mims v. Proctor & Gamble Distrib. Co., 257 F. Supp. 648 (D.S.C. 1966).

[67] Patterson v. Louisville and N. R.R., 182 F. Supp. 95 (S.D. Ind. 1960).

determination in a federal transfer proceeding, a practical consideration of transfer cases points to the conclusion that the convenience of counsel is often given weight in both granting and denying transfer. Protracted litigation cases, such as *Farrell*, which involve substantial judgments represent examples of situations in which the convenience of counsel should merit utmost consideration. Although air crash cases usually do involve protracted litigation, there are only a handful of legal experts that represent plaintiffs in these cases. Thus, inconvenience to such counsel may impair a client's case and restrict his right to select counsel of his own choosing.[68] The well-settled convenience of counsel rule should be modified to accommodate the increasing number of protracted litigation and substantial damage cases typically represented by air crash actions. As these press to the forefront, a corresponding modification of the rule will become even more necessary.

2. *Time and Money*

The two foremost considerations for a plaintiff in bringing any action are (1) obtaining the maximum recoverable damages and (2) doing so with a minimum of delay. The defendant, on the other hand, typically desires to minimize his loss and to delay that loss as long as possible. For example, a plaintiff faced with the choice between bringing his action in New York or Oklahoma may well choose the New York forum where jury verdicts are substantially higher than in Oklahoma, even though the dockets of the New York courts are much more crowded and a speedier trial could be had in Oklahoma. The Oklahoma courts may, however, be much more appealing to the defendant.[69] The *Farrell* case involved this conflict of interests. It is submitted that one reason the plaintiff filed his claim in New York was the increased likelihood of a more advantageous result as reflected by that state's history of high damage awards in air crash cases. The defendant, on the other hand, sought transfer in order to avoid such an adverse result. Federal courts have consistently held, however, that the possibility that higher damages may be secured in one district rather than another, from either party's viewpoint, is entitled to no consideration in passing on a motion for change of venue.[70] Further, the relative liberality of juries in different jurisdictions in personal injury actions is not to be considered in determining whether a defendant's motion to transfer should be granted.[71]

On the other hand, federal courts have held that a prompt trial is relevant to the convenience of parties and witnesses and the interests of justice and accordingly should be given consideration in determining transfer under 1404(a).[72] Because the plaintiff originally chose the forum,

---

[68] This position was taken in the decision in the *Farrell* case as well as in the *Schmidt* and *Scaramuzzo* decisions.

[69] *See*, Martin, *The Defendant's View of Montreal*, 33 J. AIR L. & COM. 538 (1968).

[70] Hill v. Upper Mississippi Towing Corp., 141 F. Supp. 692 (D. Minn. 1956); Chicago, R.I. & P. R.R. v. Igoe, 220 F.2d 299 (7th Cir. 1955), *cert. denied*, 350 U.S. 822 (1955).

[71] Cox v. Pennsylvania R.R., 72 F. Supp. 278 (S.D.N.Y. 1947).

[72] Fannin v. Jones, 229 F.2d 368 (6th Cir. 1956), *cert. denied*, 351 U.S. 938 (1956).

his inconvenience is generally of no moment in the consideration of a 1404(a) motion by the defendant.[73] Following this reasoning to its logical conclusion, the result is reached that since a speedy trial is primarily a convenience to the plaintiff and not the defendant, the possibility of a quicker disposition of a case should not be given consideration on a defendant's motion to transfer. But such has not been the case. At least outwardly, the federal courts have closed their eyes to both the reason for bringing a claim in a particular forum and the reason for a defendant's desire to remove it. This apparent disparity between fact and practice raises the possibility that statutory relief is needed if the case is as the written opinions would have us believe.

3. *The Question of Power and Dockets*

Another factor given considerable (but unmentioned) consideration in federal transfer proceedings is the individualistic attitude of federal district courts.[74] Each federal district court is a separate entity having neither jurisdiction beyond a state line nor inherent authority to transfer a cause from one district to another.[75] Thus, in many cases, transfer of an action from one district to another becomes not so much a question of venue as a question of *power*.[76] The main concern is conditions in the proposed transferee district that may arise from a transfer of the action. Bitterness between federal jurisdictions is to be avoided. Transgression by the transferor into the sacred domain of the transferee calls for a high degree of judicial diplomacy lest the question of power represented by change of venue should effect righteous judicial indignation rather than the desired expeditious judicial economy. Presumably, a federal district court would prefer not to have a cause transferred into its district, simply because of the desire for an uncluttered docket. The foresaid judicial diplomacy necessitates inspection of the dockets of the proposed transferee courts. Absent extreme circumstances, it would seem that notable discrepancy in the dockets of the two courts should exist in order to safely avoid the embarrassment of transgression. Accordingly, there are federal transfer decisions on the issue of calendar conditions ranging within the full spectrum of circumstances. For example, decisions have ranged from the extreme position that *no court should* look to docket conditions in order to serve its own conscience,[77] through the view that such considerations are relevant,[78] to the other extreme that it is mandatory for a district court to take judicial notice of the congested condition of its calendar.[79] Interestingly enough, the cases holding that the docket factor is relevant have

[73] Heiser v. United Air Lines, Inc., 167 F. Supp. 237 (S.D.N.Y. 1958).

[74] *See*, Hoffman v. Blaski, 365 U.S. 355 (1960).

[75] Felchlin v. American Smelting and Refining Co., 136 F. Supp. 577 (S.D. Cal. 1955).

[76] United States v. 11 Cases, More or Less, Ido-Pheno-Chon, 94 F. Supp. 925 (D. Or. 1950).

[77] Fannin v. Jones, 229 F.2d 368 (6th Cir. 1956), *cert. denied*, 351 U.S. 938 (1956).

[78] Hostetler v. Baltimore & Ohio R.R., 164 F. Supp. 72 (W.D. Pa. 1958).

[79] Sypert v. Bendix Aviation Corp., 172 F. Supp. 480 (N.D. Ill. 1958), *mandamus denied*, 266 F.2d 196 (7th Cir. 1959), *cert. denied*, 361 U.S. 832 (1959).

described it as "not controlling,"[80] "not necessarily controlling,"[81] "a slight factor,"[82] and "not alone sufficient to justify transfer."[83] In one case eighteen months,[84] and in another fifteen months,[85] difference in calendars was deemed to "clearly" merit weight in determining transfer. The case with which a uniform rule relating to standards of docket discrepancies could be formulated indicates by the widely differing results that something more than court calendars was the basis of many transfer decisions.

It is quite possible that transferee indignation may result in a remand from the transferee court; this principle of remand is well entrenched in federal practice. When it appears that the transferor court did not have the authority to enter an order for transfer, the transferee court may inquire into the question, notwithstanding the principle that courts should not sit in review of the orders of other courts of equal and coordinate jurisdiction.[86] Sufficient grounds for remand have been lack of service of process,[87] lack of jurisdiction over the subject matter in the remanding court,[88] and lack of plaintiff's capacity to bring the action in the remanding court.[89]

4. *Pre-Trial Discovery*

One other factor in federal transfer proceedings which is of paramount importance in air crash cases should be briefly mentioned. Although not unique in air crash actions, pre-trial discovery problems are common to them. Protracted litigation is the obvious result of the majority of air crashes because, in contrast to automobile accident litigation and, to a lesser degree, railroad and commercial bus accident cases, air crash cases involve unique problems of discovery which are due not only to the air crash *per se*, but also to the more affluent clientele of airlines who correspondingly merit higher damage awards. Also unique are the widespread domiciles of the passengers and witnesses, if any, and the problems encountered in obtaining government records. These varied and perplexing problems in pre-trial discovery procedures have made it necessary to vest in the federal courts broad discretion to control, schedule and establish timetables for discovery in such cases.[90] In conjunction with this broad discretion, a five-step proposal has been made: (1) Early identification

[80] Petition of Texas Co., 116 F. Supp. 915 (S.D.N.Y. 1953), *aff'd*, 213 F.2d 479 (2d Cir. 1954), *cert. denied*, 348 U.S. 829 (1954), *petition denied*, 220 F.2d 744 (2d Cir. 1955); Clendenin v. United Fruit Co., 214 F. Supp. 137 (E.D. Pa. 1963); Willetts v. General Tel. Directory Co., 38 F.R.D. 406 (S.D.N.Y. 1965).

[81] Pharma-Craft Corp. v. F.W. Woolworth Co., 144 F. Supp. 298 (M.D. Ga. 1956), *mandamus denied*, 236 F.2d 911 (5th Cir. 1956).

[82] Henderson v. American Airlines, 91 F. Supp. 191 (S.D.N.Y. 1950).

[83] Pontes v. Calmar S.S. Corp., 256 F. Supp. 495 (E.D. Pa. 1966).

[84] A. Olinick and Sons v. Dempster Bros., Inc., 365 F.2d 439 (2d Cir. 1966).

[85] Schneider v. Sears, 265 F. Supp. 257 (S.D.N.Y. 1967).

[86] Wilson v. Kansas City Southern Ry., 101 F. Supp. 56 (W.D. Mo. 1951).

[87] *Id.*

[88] Fettig Canning Co. v. Steckler, 188 F.2d 715 (7th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

[89] Goranson v. Capital Airlines, Inc., 221 F. Supp. 820 (E.D. Va. 1963).

[90] *See Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); *Seminar On Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37 (1960).

of the "big" case, (2) its assignment to one judge for all purposes and his prompt assumption of control, (3) definition of the issues (which, it is increasingly recognized, should be accomplished through pre-trial conferences), (4) containing discovery within the boundaries set by the defined issues and the discovery rules, and (5) careful planning of the procedure to be followed at the trial and full utilization of tested trial techniques.[91] The pooling of discovery is particularly essential in air crash cases and, obviously, has special applicability in federal transfer proceedings. Where a number of plaintiffs in a particular action are jointly represented by counsel specializing in air crash litigation, or where a motion for transfer is predicated at least partially on the contention that a number of actions growing out of the same crash are pending in the transferee district, the pre-trial and discovery steps taken in the transferee district would be relevant and applicable to the case at hand.[92]

C. *The Defendant's Offer*

A perusal of the cases indicates that a determination of transfer is one of balancing the interests of the opposing parties. Often, the *Gilbert* rule that the balance must weigh heavily in favor of the defendant would no longer seem to be applicable. The courts would seem to have broad discretion in this area and in a close case an otherwise insignificant detail might tip the balance of interests in favor of transfer. Relying on *Norwood* and related cases and turning to the issue of how much weight the courts have attributed to the defendant American Flyer's offer to pay the reasonable expenses of the opposing parties, their witnesses, and counsel incurred as a result of the transfer, one may safely make at least one generalization. If the interests are closely balanced, then the defendant's offer will merely tip the balanced scales and thus be accorded little weight by the courts. But if absent such an offer by the defendant, the balance of interests is clearly in favor of the plaintiffs and a court nevertheless grants transfer contingent upon the defendant's payment of the opposing parties' transfer expenses, then such an offer would, without a doubt, be a significant factor in determining transfer.

1. *The Cases*

As noted, there are many factors involved in federal transfer proceedings which, although not expressly accorded a great deal of importance, nevertheless are often determinative of the decision granting or denying transfer. How then can the question of the relative importance of a defendant's offer to pay the expenses incurred by a plaintiff as a result of the transfer made pursuant to 1404(a) be resolved? The answer to this question requires a comparison of the three cases that have denied transfer in the face of the defendant's offer with the eight cases that have granted transfer contingent upon fulfilment of the offer. Fortunately, there is a

[91] *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 373 (1960).

[92] *See* Hoffman v. Blaski, 365 U.S. 355 (1960).

thread of reasoning that winds consistenly through each respective line of cases.

In deciding to deny transfer the court in *Farrell* merely reiterated the reasoning set forth in its *Scaramuzzo*[93] and *Schmidt* decisions.[94] In *Scaramuzzo*, which is typical of the cases that have denied transfer, the court proceeded on the basis (1) that the burden of proving the need for transfer is on the defendant,[95] (2) that the *Gilbert* criteria raised by the defendant in support of its motion must be weighed against the traditional right of the plaintiff to choose the forum,[96] and (3) that the balance of interests must be strongly in the defendant's favor.[97] The court felt that the grant of transfer would merely shift the inconvenience from the defendant to the plaintiff and that such a situation would not merit transfer.[98] First, all of the survivors, who were also fact witnesses on the issue of liability, resided outside the Eastern District of Oklahoma. Second, the medical witnesses and records, which would be determinative of the issue of damages, were in Texas and New York. Further, when the inconvenience to plaintiff's witnesses, who were largely New York residents, was taken into consideration the interests weighed heavily against transfer. The test in ascertaining the importance of witnesses, then, was one of quality and not quantity.[99] To defendant's argument that the transfer would effect a consolidation of the actions and hence result in substantial savings of time and money, the *Scaramuzzo* court replied that because different courts were likely to interpret the standards for granting transfer in varying ways, it was unlikely that all of the actions would be transferred to Oklahoma. It noted that even if the liability issues could be consolidated, the damage issue would require separate trials.[100] Finally, there was the possibility that an Oklahoma decision on the issues of liability would be determinative in New York[101] and that consequently the benefits of consolidation could be achieved without consolidating the causes.

Unlike the *Schmidt*, *Scaramuzzo*, and *Farrell* courts, which proceeded on the *Ryan* theory[102] that transfer is not to be allowed unless the balance of interests is strongly in favor of the movant, the South Carolina court in *Wright* and *Helton* noted that the plaintiff's choice of forum is *not an absolute right* but merely a factor to be considered by the court.[103] The *Wright* reasoning, which is typical of the cases granting transfer, was founded on the concept that the plaintiff's choice of forum will be deter-

[93] Scaramuzzo v. American Flyers, 260 F. Supp. 746 (E.D.N.Y. 1966).
[94] Schmidt v. American Flyers, 260 F. Supp. 813 (S.D.N.Y. 1966).
[95] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
[96] Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950).
[97] *Id.*
[98] Miracle Stretch Underwear Corp. v. Alba Hosiery Mills, 136 F. Supp. 508, 511 (D. Del. 1955).
[99] Mims v. Proctor & Gamble Distrib. Co., 257 F. Supp. 648, 655 (D.S.C. 1966).
[100] 136 F. Supp. 577 (S.D. Cal. 1955).
[101] Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 829 (1966).
[102] Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950).
[103] Oltman v. Currie, 231 F. Supp. 654, 655 (E.D.S.C. 1964).

minative *only* "when other factors are somewhat equally balanced."[104] The *Wright* line of cases stands for the proposition that once the preliminary requirement that the action originally could have been brought in the proposed transferee district has been established, a court has wide latitude in determining transfer.

The court laid down other guidelines: (1) The convenience of witnesses is to be determined by the quality of the witnesses and not by their number;[105] (2) Convenience of counsel is not to be considered;[106] (3) Often, the place where the cause of action arose is the most convenient forum.[107] These guidelines pointed to the conclusion that:

> [T]he interests of justice and the substantial conveniences—*especially considering the offer of the defendent to defray the expenses of the plaintiffs and their witnesses*—favor the transfer [Emphasis added.].[108]

Unlike the New York decisions which concluded that the key witnesses were the survivors, the *Wright* court was of the persuasion that since only four of the fifteen surviors were awake at the time of the crash and only one of the survivors was deemed important enough to be called as a witness at the CAB hearing, these witnesses were relatively unimportant. Also, no important witnesses were located in South Carolina. Thus, the important witnesses, both qualitatively and quantitatively, resided in or around Ardmore, Oklahoma. In applying the second guideline, the court said that South Carolina would follow *lex loci delicti*; thus Oklahoma was the place where the cause of action arose and Oklahoma law was applicable.[109] The court noted that New York has a new doctrine in the area of conflict-of-laws[110] that since the place of airplane accidents is fortuitous, it is the duty of the forum state to apply its own law as to the issues of *liability* in order to protect its own citizens.[111] South Carolina, however, has not adopted this rule. Thus, if transfer were granted, the law of Oklahoma would apply both to the issue of liability and to the issue of damages. The ends of justice would, therefore, be better served. Additionally, the court noted that a quicker trial was more likely in Oklahoma because the courts of that state were not as congested. Further, it was possible that substantially all of the cases could be consolidated in

---

[104] Forester v. Elk Towing Co., 242 F. Supp. 549, 550 (W.D. Pa. 1965); White v. Employers' Liability Assur. Corp., 86 F. Supp. 910 (E.D.S.C. 1949).

[105] Glickenhaus v. Lytton Financial Corp., 205 F. Supp. 102 (D. Del. 1962).

[106] Henderson v. American Airlines, 91 F. Supp. 191 (S.D.N.Y. 1950); Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404 (D. Mont. 1960); Parkhill Produce Co. v. Pecos Valley Southern Ry., 196 F. Supp. 404 (S.D. Tex. 1961).

[107] Van Dusen v. Barrack, 376 U.S. 612 (1964).

[108] Wright v. American Flyers Airline Corp., 263 F. Supp. 865, 868 (D.S.C. 1967).

[109] Hauton v. The Pullman Co., 183 S.C. 495, 191 S.E. 416 (1937); McDaniel v. McDaniel, 243 S.C. 286, 133 S.E.2d 809 (1963); Smith v. Southern Railway, 87 S.C. 136, 69 S.E. 18 (1910); Leppard v. Jordan's Truck Line, 110 F. Supp. 811 (D.S.C. 1953).

[110] It is possible that the court misconstrued the application of the new New York conflicts rule. *See* Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967). However, the correctness of the court's interpretation is of no moment to the present discussion. What is important is the manner in which various considerations were *actually* weighted in determining transfer. For this reason, this discussion will proceed on the basis of the South Carolina court's interpretation.

[111] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 179 (1961); Annot., 95 A.L.R. 2d 1.

Oklahoma. The court did not discount the possibility of consolidation merely because some courts would refuse to grant transfer.[112]

Although the *Wright* court could not ignore the fact that it would be more convenient for the plaintiffs if the trials were to take place in South Carolina and that the transfer would impose a financial burden upon them, the court reasoned that any burden was largely alleviated by the defendant's offer to defray expenses.

2. *Distinguishing Points*

The clearest distinguishing feature between the two lines of cases is to be found in the standards applied by the different courts in determining transfer. In *denying* transfer, the New York courts applied the *stricter rule* that the plaintiff's choice of forum is not to be lightly disturbed and that the balance of interests must be strongly in favor of the defendant before transfer will be granted. On the other hand, the cases that *granted* transfer applied the *more liberal Norwood rule*, which requires a lesser showing of inconvenience on the part of the defendant and gives the court broader discretion in determining transfer. In none of the cases in the latter group did the courts express the opinion that the balance of interests weighed strongly in favor of the defendant.

Another distinguishing feature is the difference in attitude toward the question of consolidation. The New York courts viewed the hope of consolidation of the cases in the Oklahoma forum as "illusory" and as "a fanciful hope of the defendant." However, the courts that granted transfer were moved by defendant's consolidation argument. There are at least three reasons for this difference of opinion.

First, at the time the decisions were reached on the transfer motions, there were thirty-three cases pending that arose out of the Ardmore crash. Eighteen of these cases were pending in New York, and the remainder were scattered throughout numerous jurisdictions. Thus, the New York courts were probably of the opinion that consolidation would best be effected in New York, *viz.* if transfer were to be granted at all, it should be granted *to* and not from New York.

> [I]f the defendant, for its own convenience and benefit, must persist in its efforts to collect all the cases arising from this accident in one jurisdiction, then good sense and equity would dictate that an attempt be made to have all the Oklahoma cases transferred to New York. This makes even more sense when it is realized that the majority of the cases in Oklahoma involve claimants from other areas than Oklahoma.[113]

The courts granting transfer, however, did not have numerous crash cases pending in their jurisdictions and readily conceded that the chances of achieving consolidation were far more promising in Oklahoma than in their own jurisdiction.

Second, the different conflict-of-laws rules applied by the courts greatly

[112] Continental Grain Co. v. Barge FBL, 364 U.S. 19 (1964); Cressman v. United Air Lines, 158 F. Supp. 404 (S.D.N.Y. 1958).

[113] Affidavit of Frederick C. Stern to the U.S. District Court for the Southern District of New York, 67 Civ. 1630, sworn to 4 May 1967.

affected the consolidation argument of the defendant. Under the New York rule, even if transfer were allowed, New York and not Oklahoma law would apply to the issue of liability. It would not be in the interest of sound judicial administration for Oklahoma courts to be forced to interpret New York law when a simple denial of transfer would prevent this problem from arising.

> [I]n cases . . . where the defendant seeks transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms.[114]

Further, the New York cases in which New York law had to be applied could not be consolidated with the other cases in which Oklahoma law would be applied. The courts granting transfer, however, did not have a conflict-of-laws rule similar to that of New York, and cases transferred to Oklahoma by these courts would be wholly subject to Oklahoma law. Obviously, the consolidation argument of the defendant would carry much more weight with the courts outside of New York, and these courts recognized the possibility of consolidation as a strong argument for transfer.

Third, although the rule is well-settled that the convenience of counsel is not a factor that should be considered in the determination of a 1404(a) motion, as noted *supra*, this factor is one which in many instances should not be ignored by a court in a federal transfer proceeding. Interestingly enough, the convenience of counsel rule is conspicuously present in the opinions of the courts which granted transfer, while such a statement is conspicuously absent from the opinions of the New York courts. Foreign counsel arguing Oklahoma law before an Oklahoma court would obviously not suffer the inconvenience of his New York counterpart who would be forced to argue the law of a foreign jurisdiction.

Another distinguishing feature is the differing opinions as to which were the important or key witnesses. The New York courts applied a conflict-of-laws rule which operates on the theory that since the locale of an airplane is wholly fortuitous, it is the court's duty to protect New York citizens by applying New York law to the issue of damages. Consequently, the key witnesses were not the employees of the defendant but, rather, the survivors of the accident and the residents of New York who were plaintiff's damage witnesses.

> [I]f the determination of this motion were to rest on the balancing of the convenience of the fact witnesses on the liability issue alone, the scales would not favor transfer; add to the weight against transfer, the inconvenience to the plaintiff's witnesses on the issue of damages and the scales weigh heavily against transfer.[115]

As most of the survivors resided outside of Oklahoma, New York courts were as readily accessible as were the Oklahoma courts. The New York

[114] Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).
[115] Scaramuzzo v. American Flyers Airline Corporation, 260 F. Supp. 746, 749 (E.D.N.Y. 1966).

courts further observed that because defendant's "important" Oklahoma witnesses were largely its employees and under its control, they could be brought to New York at a minimum of inconvenience to the defendant. Hence, the courts dismissed the defendant's convenience argument as one based on a quantitative rather than a qualitative test. The courts which granted transfer, not operating under a conflicts rule similar to that of New York, found the defendant's convenience argument to be well-founded. These granting courts were strongly influenced by the fact that virtually no key witnesses resided in their respective jurisdictions and they reached the conclusion for reasons previously stated that the survivors were not the important witnesses in this instance.

Another distinguishing feature is the previously discussed problem of pretrial discovery in protracted litigation cases. Undoubtedly, the New York courts considered the availability of plaintiff's damage witnesses in New York to be significant. The courts granting transfer, on the other hand, were probably moved by the possibility of pooling discovery through consolidation in Oklahoma.

3. *Case Analysis*

The attitude of the court and not the correctness of the decision will determine the issue at hand. Whether or not all relevant factors were properly weighed is not of importance to a determination of the effect the defendant's offer to pay all reasonable and necessary transportation expenses of the plaintiffs, their counsel and their witnesses had on the decision of the courts. The relevant consideration is the manner in which the courts *believed* that the interests of the opposing parties were balanced notwithstanding the offer of the defendant. The analysis of the *Farrell, Schmidt,* and *Scaramuzzo* decisions indicates that in light of the reasoning used to support the decisions in these cases and the application of the stricted rule of *Ford Motor Company v. Ryan,*[116] the convenience of the parties and witnesses and the interest of justice were thought to be strongly in favor of the plaintiffs. Conversely, in the *Wright* line of cases, the application of the more liberal *Norwood* rule points to a close division in the interests of the opposing parties. Transfer in these cases was granted only upon an expressed condition.[117]

Consequently, the *Farrell, Schmidt,* and *Scaramuzzo* decisional theory would not allow an offer to pay expenses to "tip the scales" in a situation in which the balance of interests is strongly in favor of the opposing party. Not only is this consistent with New York precedent[118] but the recent New York conflicts rule appears to weigh so heavily against transfer of air crash cases from New York federal courts, that it would neces-

[116] Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950).

[117] It should be noted that there is adequate precedent for conditional transfers under 28 U.S.C. § 1404(a) (1964). Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955), *cert. denied* 350 U.S. 836 (1955); Hokanson v. Helene Curtis Indus., Inc., 177 F. Supp. 701 (S.D.N.Y. 1959); Nacona Leather Goods Co. v. A.G. Spalding & Bros., Inc., 159 F. Supp. 269 (D. Del. 1958); May v. The Steel Navigator, 152 F. Supp. 254 (S.D.N.Y. 1957); Crawford v. The Shirley Lykes, 148 F. Supp. 958 (S.D.N.Y. 1957).

[118] *See*, Hokanson v. Helene Curtis Indus., Inc., 177 F. Supp. 701 (S.D.N.Y. 1959).

sarily overshadow any attempt by a defendant airline to obtain a transfer contingent on its offer to pay expenses.

One additional point is pertinent. Although the proof on the issue of liability will be the same for all plaintiffs, each plaintiff has a separate and individual problem with respect to establishing the proof of damages sustained. This will require each plaintiff to produce his own witnesses to establish the damages sustained by that plaintiff. In most instances these witnesses would reside within the jurisdiction of the courts of the plaintiff's home state (New York, here) or within convenient distance. It would be manifestly unfair to require the plaintiff to transport these witnesses to Oklahoma. Although the defendant offered to pay the transfer expenses, this *offer may be an empty one* because many of the witnesses who may have to testify on the issue of damages may be unwilling or unable to travel to Oklahoma. Since they *cannot be compelled* to attend a trial in Oklahoma, the plaintiffs might be put to serious disadvantage because it may be impossible for them to establish the necessary proof to support their claim of damages. Although it is true that these witnesses' depositions may be taken in New York, the Oklahoma court would not have the benefit of hearing and observing them at an actual trial.

Decisions permitting transfer under 1404(a), conditioned upon the defendant's offer to pay expenses, notwithstanding the fact that the relevant interests are balanced strongly in favor of the plaintiff, are the exception and not the rule. Although there are cases reaching this result,[119] the better view would seem to be to the contrary.

In contrast, the *Wright* and *Helton* cases illustrate situations in which the interests of the opposing parties are closely balanced. If the interests of the opposing parties were perfectly balanced on a set of legal scales, with each party's interests offsetting the other's, then the addition to the defendant's side of the scales of a consideration such as the offer to pay transfer expenses would tip the scales in favor of transfer. But *Wright* and *Helton* indicate more than this; the offer may affect the scales to a degree disproportionate to the actual weight of the offer, because it *not only* adds its own weight to the defendant's side of the scales but also removes the "weight" of financial burden from the plaintiff's side of the scales.

The *Lora* and *Turner* cases indicate that transfer would have been granted even without defendant's offer. Therefore, they add very little to the discussion. Transfer in these cases, however, was granted on the expressed condition that the defendant honor its proposed offer. Airlines are thus put on notice that in cases where they make an offer to pay transfer expenses, transfer, if granted, will be contingent upon an honoring of the offer, regardless of how the interests of the parties are balanced.

4. *Concluding*

In summary, an offer to pay reasonable transportation and maintenance costs of the plaintiffs, their witnesses, and their counsel made by the

[119] Allied Petro-Products, Inc. v. Maryland Cas. Co., 201 F. Supp. 694 (E.D. Pa. 1961).

defendant pursuant to a 1404(a) transfer action will have its *most* pronounced effect in those cases where, in the absence of such an offer, transfer could not be permitted due to the financial burden placed on the plaintiff. Such an offer will have its *least* pronounced effect in transfer proceedings in which the balance of interests is strongly in favor of the plaintiff. In those courts favoring the more lenient spirit of *Norwood v. Kirkpatrick*, the "offer" will have considerable impact, but application of the *Norwood* rule necessitates a closer balancing of interests which correspondingly gives rise to situations more favorable to the effectiveness of the "offer." The more strict theory of *Ford Motor Company v. Ryan*, which requires plaintiff's choice of forum not to be lightly disturbed, negates the effectiveness of an offer to pay reasonable transfer expenses.

To complicate matters further, each federal transfer case is decided on its peculiar facts and many underlying factors not to be found in statutory enactments or written case laws are often determinative of the question of transfer. The difficulty in judging the significance accorded to such factors hinders a prediction as to the effect of an offer to pay expenses in a particular action. Nevertheless, it can be anticipated that the effect in many cases will be significant.

An airline's offer to pay transfer expenses clearly falls within the spirit of Section 403(b) of the *Federal Aviation Act of 1958*.[120] An airline must recognize that by the very nature of its carrying passengers from all parts of the world it may be forced to defend litigation proceedings in widely dispersed areas. This is not to say that an airline as a matter of law should be said to assume such a burden and its consequences, but merely to point out that prior recognition of a precarious situation would warrant protective measures. Any device which aids in the transfer and consolidation of such dispersed actions qualifies in importance as a protective measure. In this sense, the "offer" has sophistication.

IV. Collateral Estoppel: A Solution to the Problem

Obviously, a single trial in one district of cases involving a large number of claims turning on common issues of law and fact is more efficient administration of justice than multi-district litigation. Consolidation or centralization of actions through the mechanics of a 1404(a) transfer is one solution to the problem of multi-district litigation. The New York courts in the *Farrell*, *Schmidt*, and *Scaramuzzo* cases were, however, of the opinion that the prospects of achieving centralization were "so dim that the posited single trial is only a fanciful hope of the defendant."[121]

The decisions of the New York courts are reflective of the situations

[120] As a general rule, the Federal Aviation Act of 1958 § 403(b), 72 Stat. 758, 49 U.S.C. § 1373 (1964), prohibits rebates and the allowance of any passage for compensation below the set tariff rate. An exception is made, however, in Section 403(b), for any persons injured or killed in aircraft accidents and "witnesses and attorneys attending any legal investigation in which such air carrier is interested."

[121] Schmidt v. American Flyers Airline Corporation, 260 F. Supp. 813, 819 (S.D.N.Y. 1966).

in which the recently enacted *Multidistrict Litigation Act* (MLA)[122] should prove most useful. The act provides for the *temporary* transfer to a single district of civil actions pending in multiple districts and involving one or more common questions of fact in order to achieve centralization of *pretrial* proceedings. Transfer under the MLA is made by a judicial panel on multi-district litigation (provided for in the act) once a determination has been made that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[123] Once the pretrial proceedings are concluded, however, each action must be remanded to the district from which it was transferred.

The MLA provides only a partial solution to the problems of multidistrict litigation, because its applicability is limited to pretrial proceedings and has no effect upon common issues of liability. The doctrine of collateral estoppel may offer a more effective solution to problems of multidistict litigation especially where the possibilities of centralization are uncertain. Both the *Scaramuzzo* court[124] and the *Schmidt* court recognized the applicability of collateral estoppel.

> [T]here are other ways of avoiding a multiplicity of suits and duplication of discovery proceedings than relegating local citizens to the burdens of presenting their claims in remote jurisdictions. Collateral estoppel, for example, may be available if a final judgment is rendered against defendant in one action arising out of this crash, and protective orders under Rule 30(b) of the Federal Rules of Civil Procedure are open to defendant if its fears of duplicative discovery proceedings ripen into unreasonable annoyance or oppression. Moreover, experience teaches that, as a practical matter, attorneys in multiplaintiff cases work out a cooperative plan with defense counsel and the court to save time and expense inherent in duplicative discovery proceedings.[125]

The doctrine of collateral estoppel makes it possible for issues litigated in a previous final judgment to act conclusively upon identical issues in a subsequent action.[126] It has as its foundation the public policy consideration of putting an end to controversies and has historically required for its

---

[122] 82 Stat. 109, 28 U.S.C. § 1407, Pub. L. 90-296, 90th Cong., S-159, 29 April 1968.

[123] 28 U.S.C.A. § 1407(a) (1968):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

[124] Scaramuzzo v. American Flyers Airline Corp., 260 F. Supp. 746, 750-51 (E.D.N.Y. 1966). "It is possible that the benefits of consolidation will be achieved even if defendant's motion to transfer is denied. There is some authority in this Circuit which suggests that if the pending action in the Eastern District of Oklahoma results in verdict unfavorable to the defendant, it might be determinative of the liability issue here. *See,* Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966)."

[125] Schmidt v. American Flyers Airline Corporation, 260 F. Supp. 813, 816 (S.D.N.Y. 1966). *See also,* Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966); New York State Bar Association 1966 Antitrust Law Symposium, *Judicial Administration of Multiple-District Treble Damage Litigation,* at 55.

[126] Cromwell v. County of Sac, 94 U.S. 351 (1876).

application a mutuality of parties.[127] Mutuality means that the parties to the action must be the same or in privity with the parties to the previous final judgment. This has the same effect as to the previously litigated issues as the more familiar doctrine of res judicata has as to the previously litigated cause of action.

The requirement of mutuality was first abandoned in the 1942 landmark case of *Bernhard v. Bank of America.*[128] The Supreme Court of California concluded that there was no compelling reason for the defendant to be in privity in order to assert the doctrine of collateral estoppel as long as three tests of applicability were met: (1) "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" (2) "Was there a final judgment on the merits?" (3) "Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?"[129] [Emphasis added.].

The growing number of states[130] and federal courts[131] following the *Bernhard* decision reason that one fair day in court satisfies due process requirements,[132] that such a policy is helpful in alleviating the ever increasing problems of crowded dockets,[133] and that a more liberal policy regarding mutuality aids in preventing the anomalous results on conflicting determinations on identical issues.[134]

The most persuasive criticism of the *Bernhard* decision is that its application should be restricted to defensive pleadings.[135] Any other position, it is suggested, could lead to absurd results, *e.g.*, should a plaintiff be allowed to plead a single prior adjudication as conclusively establishing a defendant airline's negligence when in numerous previous actions in multi-district litigation the defendant has prevailed on the identical issues of liability?[136] Mutuality, then, should be required when collateral estoppel

---

[127] Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). 1B, J. MOORE, FEDERAL PRACTICE ¶ 0.412(1) (2d ed. 1965).

[128] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[129] Bernhard v. Bank of America, 19 Cal. 2d 807, 809, 122 P.2d 892, 894-5 (1942).

[130] United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom.*, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed*, 379 U.S. 951 (1964); Gorski v. Commercial Ins. Co., 206 F. Supp. 11 (E.D. Wis. 1962); Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); People v. Ohio Cas. Ins. Co., 232 F.2d 474 (10th Cir. 1956); United Banana Co., Inc. v. United Fruit Co., 172 F. Supp. 580 (D. Conn. 1959); Barbour v. Great Atl. & Pac. Tea Co., 143 F. Supp. 506 (E.D. Ill. 1956); Woodcock v. Udell, 97 A.2d 878 (Del. Super. Ct. 1953); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955); De Polo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956); Crosland-Cullen Co. v. Crosland, 249 N.C. 167, 105 S.E.2d 655 (1958); Harding v. Carr, 79 R.I. 32, 83 A.2d 79 (1951).

[131] Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964); Haddad v. Border Express, Inc., 300 F.2d 885 (1st Cir. 1962); Davis v. McKinnon & Mooney, 266 F.2d 870 (6th Cir. 1959); State of Colo. v. Ohio Cas. Ins. Co., 232 F.2d 474 (10th Cir. 1956); Gibson v. United States, 211 F.2d 425 (3d Cir. 1954); Hurley v. Southern Calif. Edison Co., 183 F.2d 125 (9th Cir. 1950).

[132] Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1961); *But see* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412(1) 1809 (2d ed. 1965); Coca-Cola Co. v. Pepsi-Cola Co., 172 A. 260, 263 (Super. Ct. Del. 1934).

[133] Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967).

[134] Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

[135] Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 28 (1957).

[136] *Id.*

is asserted against a party lacking the initiative in the prior adjudication.[137]

A number of jurisdictions[138] recognize the fact that due process problems arising from an abandonment of the mutuality requirement cannot be summarily discarded and that the reason underlying the more liberal policy toward mutuality is one of the party against whom the doctrine is asserted having, in fact, had a full and fair opportunity to litigate.[139] These courts consider all of the circumstances of each case in order to ascertain whether the parties have had their full and fair day in court.[140] A sympathetic jury, for example, without realizing the effect of its judgment on later *valid* claims against the defendant, might return a verdict against a wealthy corporate defendant based solely on the comparative wealth of the plaintiff and defendant and not on actual issues of liability.[141] An application of the doctrine to inherently unfair conditions would clearly constitute infringement upon due process requirements of fundamental fairness.[142]

> [N]o constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and actually did litigate it* [Emphasis by the Court.].[143]

A case in point in which fundamental fairness required that mutuality exist in order for collateral estoppel to be asserted is *Berner v. British Commonwealth Pac. Airlines, Ltd.*[144] In *Berner*, after prevailing in the initial trial, BCPA suffered a relatively small judgment on retrial. Reasoning that BCPA did not appeal from the retrial judgment for danger of suffering a substantial judgment on appeal, the court held the prior litigation was to be viewed as a settlement and not as an admission of liability. Since the prior adjudication was not intended as full and complete litigation as to the issues of liability, mutuality was required for the assertion of the doctrine of collateral estoppel.[145]

A recent case, *Maryland v. Capital Airlines, Inc.*,[146] supports the proposition that the need for transfer may be avoided by the use of collateral estoppel once the issues of liability have been determined by a federal district court. The court in *Maryland* followed *Bernhard* and required that the three questions laid down in that case be answered affirmatively before collateral estoppel could be asserted. In addition, the court stated a fourth requirement, this one relating to the issues of fairness: "Was the party against whom the plea is asserted given a fair opportunity to be heard on

---

[137] Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 302 (1961).

[138] Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

[139] Graves v. Associated Transp., Inc., 344 F.2d 894 (4th Cir. 1965).

[140] United States v. United Air Lines, 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom.*, United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed*, 379 U.S. 95 (1964).

[141] Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1928).

[142] Vestal, *The Constitution and Preclusion—Res Judicata*, 62 MICH. L. REV. 33 (1963).

[143] *Id.* at 725-26; *see also*, Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964).

[144] 346 F.2d 532 (2d Cir.), *cert. denied*, 382 U.S. 983 (1965).

[145] *Cf.* Eechnograph Printed Circuits, Ltd. v. United States, 372 F.2d 969 (Ct. Cl. 1967).

[146] State of Maryland v. Capital Airlines, 267 F. Supp. 298 (D. Md. 1967). *Cf.*, 34 J. AIR L. & COM. 304 (1968).

the issue?"[147] Although the court stayed decision on a motion for summary judgment on the basis of collateral estoppel until completion of appellate disposition of cases in other district courts arising out of the same accident, the court held that such motion should be granted in light of judgments of other federal district courts determining that the negligence of federal employees was the cause of the collision giving rise to the actions. The court noted that:

> [T]here seems to be no compelling reasons for requiring that the party asserting the plea of collateral estoppel, *even affirmatively as in this case*, must have been a party or in privity with a party to the earlier litigation [Emphasis added.].[148]

Reflective of many of the same considerations discussed above, the court concluded:

> [I]n view of the crowded dockets of the courts today, ancient principles must give way to principles based on today's realities so long as these new principles do not deprive a litigant of his day in court.[149]

It would seem then that the simplicity of the wording of 1404(a) belies the complexity of its application. The decision in a federal transfer proceeding is based on numerous factors varying with the circumstances and supposition or generalization in this area of federal procedure is necessarily dangerous. The unpredictability of the application of the statute limits its utility as a vehicle for solving the problems presented by multi-district litigation. The recent search for a more effective remedy has encompassed both case law (collateral estoppel) and statutory enactment (the MLA). These remedies are new and their adequacy untested. They do, however, mirror the fact that the problems are recognized and the foundation for an adequate solution has been laid.

---

[147] *Id.* at 304.
[148] State of Maryland v. Capital Airlines, 267 F. Supp. 298, 303 (D. Md. 1967).
[149] *Id.* at 304.

NOTES

Warsaw Convention — Limited Liability — Voyage Charter

On 3 June 1962, a chartered Air France Boeing 707 jet liner crashed on takeoff at Orly Field, Paris, France, killing all 122 passengers aboard. The aircraft had been chartered by the Atlanta Art Association, acting as agent for its members making the round trip from Atlanta to Paris. Under the terms of the Charter Agreement, Air France, owner of the craft, assumed all responsibility and control over the actual preparation and conduct of the flight. It issued and delivered proper tickets to its passengers prior to departure. The only responsibility of the Atlanta Art Association under the agreement was to render payment of $36,000 to Air France. Forty-five actions for damages filed against Air France for the deaths of 62 passengers were consolidated. The district court heard the limited question of whether the Warsaw Convention applied to the type of charter flight involved in this case and concluded that it did. From this decision appeal was taken. *Held, affirmed*: "The Warsaw Convention applies to the international transportation of passengers under a contract of carriage on a *'voyage'* charter flight [Emphasis added.]."[1] *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied* 382 U.S. 905 (1968).

The Warsaw Convention was designed to regulate the legal relationship between a passenger who suffers injury to himself or his baggage during an international flight, and a carrier. The underlying purpose behind the drafting of the Convention was to avoid the complex legal issues which are inherent in any law suit involving various foreign jurisdictions. One authority has stated:

> The purposes of the Convention are to avoid difficulties of the application of a proper law. In some countries . . . the carrier is responsible for injury to passenger or damage to goods as an insurer. In other countries . . . the carrier is not responsible unless fault is shown. Also, the burden of proof differs in various countries. Some impose the burden on the plaintiff and some on the carrier. Furthermore, the *contractual* exemption of liability is permitted in some and not in others. When the various and conflicting laws are coupled with the fact that modern aircraft pass over in the span of an hour, one or more countries, the fortuitous circumstances of crashing in any one country, imposes a burden upon the passenger which may be so intolerable as to preclude any recovery. Furthermore, difficulties of application of foreign law, characterization of foreign law, problems of acquisition of jurisdiction, application of damages, all may make it so difficult that the passenger might find it impossible to recover at all. . . . Under the Convention the rights and liabilities do not depend upon a particular national law where the tort occurs

[1] Block v. Compagnie Nationale Air France, 386 F.2d 323, 326 (5th Cir. 1967).

or where the particular contract is made but are dependent upon a uniform system of rules.[2]

In response to these problems, the Convention holds the carrier presumptively liable for any injury to a passenger during an international flight.[3] In return for the presumption of liability the passenger is limited in his recovery to a maximum of approximately $8300.[4] The presumption of liability can be rebutted by proof that the carrier took all necessary steps to avoid injury.[5] Conversely, the carrier is denied the benefit of limited liability if the passenger can prove wilfull misconduct on the part of the carrier.[6] Further, the carrier must deliver a passenger ticket to the passenger in order to avail itself of the limited liability provisions in the Convention.[7]

The application of the Warsaw Convention to a particular case is dependent upon the existence of a contract of carriage between the carrier and the passengers[8] which establishes that the transportation contemplated by the parties is "international" as that term is defined by the Convention.[9] On its face, the Convention would seem to apply only to a two party relationship evidenced by the appropriate contractual instrument, the airline ticket. The problem of bringing three party charter flights within the rules of liability established by the Convention becomes, then, a serious one. Whether the scope of the Warsaw Convention excludes charter flights depends upon the answer to three questions: (1) Does the legislative history of the Warsaw Convention manifest an intent to exclude all charter flights from coverage by the Convention; (2) To which carrier, the owner of the craft or the actual operator, does the Convention impose the risk of liability; and (3) Does the particular charter contract executed by the parties qualify as a contract of carriage?

I. Legislative History

Article 1 of the Warsaw Convention states that the rules of liability established therein shall apply "to all international transportation . . . performed by aircraft for hire."[10] The expansive language of this article is limited by three specific exclusions made within the Convention. First, the Convention shall not apply "to carriage of mail and postal packages."[11]

[2] Mennell & Simeone, *U.S. Policy and the Warsaw Convention*, 2 WASHBURN L.J. 219, 223 (1962).

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Poland, 12 Oct. 1929). Articles 17-21 contain the rules governing the liability of the carrier. [Hereinafter cited Warsaw Convention.]

[4] Under the Warsaw Convention Liability Agreement, Civil Aeronautics Board Order No. E-23680, 13 May 1966, the liability limits of Warsaw were increased to $75,000, absolute liability, based on a private agreement between carrier and passenger. However, the present case arose before the Montreal Agreement was signed, and is therefore still subject to the original Warsaw limits.

[5] Warsaw Convention, art. 20, 49 Stat. 3019, T.S. No. 876.

[6] Warsaw Convention, art. 25, 49 Stat. 3019, T.S. No. 876.

[7] Warsaw Convention, art. 3(2), 49 Stat. 3015, T.S. No. 876.

[8] J. SUNDBERG, AIR CHARTER 198-99 (1961).

[9] Warsaw Convention, art. 1(2), 49 Stat. 3000, T.S. No. 876.

[10] Warsaw Convention, art. 1, 49 Stat. 3000, T.S. No. 876.

[11] Warsaw Convention, art. 2(2), 49 Stat. 3015, T.S. No. 876.

Second, the Convention shall not apply "to international transportation by air performed by way of experimental trial by air navigation."[12] Finally, the Convention shall not apply "to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business."[13] Of the three exceptions, only the last possibly includes air charter flights, and, by 1962, there was little controversy that air charter flights were no longer by definition an "extraordinary circumstance."[14] In addition, the Hague Protocol,[15] an amendment to the original text of the Warsaw Convention, "provides that as to cases properly fitting under Article 34, [the extraordinary circumstances exclusion] it is not the whole of the Convention that is excluded but only Articles 3 to 9 of the documentary chapter."[16] Therefore, even in the event charter flights were defined as extraordinary circumstances, they are still entitled to limited liability protection, if the other requirements of the Warsaw Convention are met.

The only attempt made by the Warsaw Convention delegates to determine whether air charter would be included was the Brazilian proposal for the definition of the word "carrier" which reads as follows:

> The carrier shall be considered the person who owns, charters, or manages an aircraft, uses it individually or jointly in the transportation of persons and goods, within the meaning of this Convention and in conformity with the national regulations.[17]

The Warsaw Conference rejected that proposed definition,[18] and from this rejection has come the diversity of opinion over air charter. Some scholars maintain that the question of charter flights was left undecided;[19] others asserted that the question of air charter was not considered at the Warsaw Conference since the "Convention was to be a codification of the law of aviation as aviation until then had developed."[20] It is essential to note, however, that while the Brazilian proposal would have defined a carrier's relationship to the aircraft, it would not have settled the issue of the relationship between the carrier and the passenger.[21]

The debate between the legal scholars on this question became more heated because of the difficulties in translating the original French text of the Convention into other languages. In 1961, the Guadalajara Conference convened in Mexico to settle the long controversy over charter flights by defining essential terms in the Warsaw Convention. The full title of the Guadalajara Convention[22] expressly noted that this Convention would be

[12] Warsaw Convention, art. 34, 49 Stat. 3020, T.S. No. 876.

[13] *Id.*

[14] J. SUNDBERG, *supra* note 8, at 262.

[15] Protocol Amending Carriage by Air, The Hague, 28 Sept. 1955. SENATE COMMITTEE ON FOREIGN RELATIONS, 86TH CONG., 1ST SESS. The United States has never ratified the Hague Protocol.

[16] J. SUNDBERG, *supra* note 8, at 263.

[17] 386 F.2d at 340, n.43. Mankiewicz, *Charter and Interchange of Aircraft and the Warsaw Convention: A Study of Problems Arising From the National Application of Conventions for the Unification of Private Law*, 10 INT'L & COMP. L.Q. 707 (1961) at n.3.

[18] Mankiewicz, *supra* note 17, at 707.

[19] K. GRONFORS, AIR CHARTER AND THE WARSAW CONVENTION 11 (1956).

[20] J. SUNDBERG, *supra* note 8, at 199-200.

[21] Mankiewicz, *supra* note 17.

[22] For the full text of the Guadalajara Convention see 28 J. AIR L. & COM. 52 (1962).

a supplement and not an amendment to the original Warsaw text.[23] The implication of the title is that the Guadalajara Convention merely defines the Warsaw Convention and does not in any way amend the contents of Warsaw. It can be argued, therefore, that the delegates at the Guadalajara Conference considered charter flights as within the original scope of the Warsaw Convention.[24]

II. THE WARSAW CARRIER

The typical air charter arrangement is a triangle: A will charter a plane from B for the purpose of providing transportation for C, in accordance with a contract between A and C. If C is an international passenger and is subsequently injured, the Warsaw Convention must be interpreted to determine which carrier, A or B, will bear the risk of liability under the rules of the Convention.

In Articles 1(3) and 30(1) the Warsaw Convention refers to carriage "performed by" the carrier—the obvious reference being to the *actual* carrier. However, the general framework of the Convention is apparently predicated upon the existence of a contractual relationship between the passenger and the carrier.[25] Where the actual carrier is not the party to a contract with the passenger, as in charter arrangements, the question arises whether the nature of the carrier liability necessarily contemplated by the Convention is contractual or tort.

As a point of departure, it must be noted that the Warsaw Convention's official text is in French.[26] The Convention was sponsored and promoted by Frenchmen. The influence of French law on the substantive provisions of the Convention was substantial. The instant court, recognizing the impact of French law on the Convention, interpreted the relevant provisions in terms of the dominant influence on its contents and applied French law.[27]

Prior to 1911, the French law of passenger carriage had been based on tort liability. Subsequently, the basis of liability shifted and had become contractual in nature by the time the Convention was drafted.[28] The obvious conclusion is that the nature of carrier liability embodied in the Warsaw Convention is contractual,[29] which is borne out by a reading of

[23] The full title for the Guadalajara Convention is, Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to the International Carriage by Air Performed by a Person Other than the Contracting Carrier. For a study of the scope of application of the Guadalajara Convention, and how it relates to the Warsaw Convention, see Koutalidis, *The New Guadalajara Convention*, 16 REVUE HELLENIQUE DE DROIT INTERNATIONAL 285 (1963).

[24] The jurisdiction of the Guadalajara Convention is apparently derived from the jurisdiction of the Warsaw Convention or its amended version, The Hague Protocol. For a discussion, see Koutalidis, *supra* note 23, at 287.

[25] J. SUNDBERG, *supra* note 8, at 244 *et. seq. See also* Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217 (1959).

[26] Warsaw Convention, art. 36, 49 Stat. 3020, T.S. No. 876.

[27] J. SUNDBERG, *supra* note 8, at 244 *et. seq.* Calkins, *supra* note 25, at 339. There is an important conflicts question as to whether Georgia or French law should govern in the instant case. The court applies French law without a discussion of the conflicts issue. Under the Auten v. Auten, 124 N.E.2d 99 (N.Y. Ct. App. 1950), test of substantial contacts, however, the court's decision to apply French law can be defended. One party to the contract was French, the crash occurred in France, and the carrier was French.

[28] Calkins, *supra* note 25, at 219; J. SUNDBERG, *supra* note 8, at 324 *et. seq.*

[29] Mankiewicz, *supra* note 17, at 709-10.

the Convention in its entirety.[30] The result of such a construction is that an actual carrier, under no privity of contract with a passenger, is left without the limited liability protection afforded the contractual carrier. Consequently, the passenger must file a tort claim against the actual carrier, and the carrier's liability is determined according to the local law found applicable by the forum. This reliance on diverse local laws of the international community would defeat the underlying purpose of the Convention which is to promote uniformity in international air carriage. A realization of the magnitude of the problem gradually led to a consensus that a new Convention was needed to settle the legal problems involved in charter flights. Committees of International Civil Aviation Organization (ICAO)[31] met from 1955 to 1957, to discuss the problems, and a convention was finally proposed and drafted at Guadalajara, Mexico, in 1961.[32] As noted above, the Guadalajara Convention is a supplement to the Warsaw Convention (defined as either the unamended Warsaw Convention or its amended version at the Hague).[33] The Guadalajara Convention consists mainly of definitions, and defines actual and contractual carriers, imposing joint and several liability for damages in certain instances.[34]

III. Contract of Carriage

Application of the Warsaw Convention is dependent upon the existence of a contract of carriage between the carrier and the international passenger. Under French law, a contract must contain four elements:[35] (1) consent of the party who binds himself, (2) his capacity to contract, (3) a special object forming the substance of the agreement, and (4) a legal cause for the obligation. A contract of carriage, as a particular type of contract, requires the additional element of an obligation to transport goods or passengers.[36] A charter contract, to come within the terms of the Convention, must be a contract of carriage.

The particular form and nature of a charter agreement will depend upon the charter arrangement made between the parties, of which there are two basic types: (1) voyage charter, involving the hire of a fully equipped aircraft, where the charterer acquires the "right to have his goods or passengers conveyed by a particular vessel, and subsidiary thereto, to have the use of the vessel and the services of the owner's master and crew;"[37] and (2) bare hull charter, "a demise or lease of the ship itself, to which the services of the master and the crew may or may not be super-

[30] Warsaw Convention, arts. 17-20, 49 Stat. 3018, T.S. No. 876; Mankiewicz, *supra* note 17, at 709-10.

[31] ICAO was formed in 1947 to replace the Committee of Aerial Legal Experts (CITEJA) which up to that time had been the conference responsible for the drafting of the Warsaw Convention.

[32] Koutalidis, *supra* note 23, at 285.

[33] See *supra* note 27.

[34] The actual carrier can be held responsible only for that part of the carriage which he performs, however. Guadalajara Convention, art. 2.

[35] These elements are the ones enumerated by the court in its opinion, 386 F.2d at 323, n.21.

[36] K. Gronfors, *supra* note 19, at 60.

[37] A. McNair, The Law of the Air 372 (3d rev. ed. 1964).

added, with the result that 'the charterer' here [becomes] the owner of the vessel."[38] Charter arrangements are seldom purely one form or the other of these types, and several hybrid categories of charter arrangements do exist.[39] The following discussion is offered upon the understanding that each charter contract must itself be measured against the Warsaw requirements.

While the contract of carriage contemplated by the Convention represents primarily a "sale and purchase of transportation of persons or goods,"[40] the voyage charter contract represents the "sale and purchase of moving space."[41] In contrast to both, the bare hull charter represents the hiring of an aircraft for use by the charterer, subject to certain conditions imposed in the contract.[42] Underlying both the contract of carriage and the voyage charter agreements is an obligation to carry passengers or goods, whereas the bare hull charter more closely resembles a lease. Under French law, "leases and contracts of carriage are contrasting and mutually exclusive terms. Accordingly, what is a lease cannot be a contract of carriage."[43]

With the contract of carriage as its starting point, the Convention enumerates several additional requirements which must be met before a contract will satisfy the Warsaw standards. The carrier is required to issue passenger tickets, luggage tickets, and air consignment notes.[44] The carrier may not avail itself of the limitation of liability contained in Warsaw unless it delivers the required ticket containing the following information: place and date of issue, name and address of carrier(s), a statement noting that the transportation is subject to the rules of the Convention, and the place of departure and destination including agreed stopping places.[45] The essential importance of the ticket is that with the proper recitation of points of departure and arrival and agreed stopping places, it serves to bring the particular transportation described thereon within the geographical qualifications of Warsaw applicability, as "international transportation." Although all of these requirements can be fulfilled under a voyage charter agreement, it would be impossible to meet them under a bare hull arrangement, where the charterer, during the period of the use of the aircraft, becomes the owner and operator of the craft himself. Further, in a bare hull charter agreement, no specific predetermined voyage must be agreed upon. The agreement upon and consent to the voyage is the essence of the obligation to transport passengers or baggage which underlies both voyage charter agreements and contracts of carriage.

IV. The Present Case

As noted above, the present case was a voyage charter flight, and the court limited itself to a consideration of this kind of charter arrangement.

[38] *Id.* at 372.
[39] C. Shawcross & K. Beaumont, Air Law § 509 (1945) lists four types of air charter.
[40] K. Gronfors, *supra* note 19, at 60.
[41] *Id.*
[42] *Id.*
[43] J. Sundberg, *supra* note 8, at 271 *eq. seq.*
[44] Warsaw Convention, arts. 3(1), 5(1), and 6(3-5), 49 Stat. 3015-16, T.S. No. 876.
[45] Warsaw Conventioin, art. 3(1), 49 Stat. 3015, T.S. No. 876.

Appellants maintained that all charter flights were denied protection of the liability provisions of the Warsaw Convention,[46] and that the requisite contractual relationship between the carrier and passengers did not exist. "Not only must there be a contract, but Article 1(2) requires 'the contract made by *the* parties.' 'Parties' is not defined. Who are the 'parties'? The *only* 'parties' mentioned are the carrier and the passenger. . . . A charter contract obviously is not 'the contract made by the parties' within the compass of the Warsaw Convention. . . ."[47] Appellee denied on the basis of the legislative history of the Convention[48] that all charter flights are *per se* excluded from the Warsaw Convention and contended that those charter flights evidenced by a contract of carriage are within the scope of the Convention. He further contended that the requirement of a *direct* contractual relationship between the parties was overruled in *Ross v. Pan American Airways*.[49] Finally, appellee asserted that the Charter Agreement was a proper contract of carriage, disclosing the intent of the parties that Warsaw would apply, since, on its face, each ticket proved the flight was engaged in "international transportation."[50]

In agreeing with appellee's contentions, the court followed recent federal patterns in American law on charter flights. Previously, two federal appellate courts had applied Warsaw to military charter flights. In *Mertens v. Flying Tiger Line, Inc.*,[51] a plane chartered to carry soldiers from California to Japan crashed in Japan. The Second Circuit Court of Appeals held that this flight did not come within the reservation[52] that flights operated by the United States Government would not come within the Warsaw Convention, and concluded that the craft was operated *for*, not *by*, the United States Government. The court stated, "The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit."[53] A second military charter flight case, *Warren v. Flying Tiger Line, Inc.*,[54] apparently assumed that the Warsaw Convention applies to charter flights because the court held the carrier was not entitled to limited liability since it did not deliver tickets to its passengers in advance.[55]

Noticeably absent from the court's opinion in the instant case was any mention of the Guadalajara Convention and the provisions contained therein. This Convention imposes joint and several liability on both the actual and contractual carriers and thus brings charter flights within the scope of Warsaw. It would seem that the legislative history of this Con-

[46] Brief for Appellants at 10, Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967).

[47] *Id.* at 108-09.

[48] Brief for Appellee at 23 *et. seq.*, Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967).

[49] 299 N.Y. 88, 85 N.E.2d 880 (1949).

[50] Brief for Appellee, *supra* note 48, at 37, n.44.

[51] 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

[52] When the United States ratified the Warsaw Convention, it did so with the reservation that all flights conducted by the United States Government would not be subject to the provisions of the Convention.

[53] 341 F.2d at 854.

[54] 352 F.2d 494 (9th Cir. 1965).

[55] Lacey, *Recent Developments in the Warsaw Convention*, 33 J. AIR L. & COM. 385 (1967).

vention *could* help explain the confusion that presently exists regarding the scope of the Warsaw Convention. For that reason no discussion of the legislative history of the Warsaw Convention can be complete without recognition of the purposes and accomplishments of the Guadalajara Convention, despite the fact that the United States has not ratified this Convention.

The court's opinion also devoted considerable attention to the contractual arguments of the appellants, concluding that voyage charters can be contracts of carriage. In its discussion, the court assumed that the French law on contracts determines the Warsaw concept of a contract of carriage and ignored a substantial conflicts of laws question as to whether French or Georgia law should determine the applicability of the Convention. While the court's reliance on French law might have been appropriate because the parties had substantial contracts with the French forum, the court has oversimplified the very complex issue of treaty interpretation.

Relying on French contract law, the court recognized that a contract of carriage must assume an obligation to transport passengers or goods, stating:

> The applicability of the Convention undeniably is premised upon a contract but on a contract of a particular kind. It is based on a contract of carriage that arises from the relationship between a "carrier" and the passengers. This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger in turn consent to the undertaking [Footnotes omitted.].[56]

The present decision is a proper one if the viability of the Warsaw Convention is to be maintained. The major objective of the Convention was to promote uniformity in the regulation of international air carriage. Such uniformity cannot be obtained unless all important aspects of air carriage are brought within liability rules established by the Convention. Although the present case is limited to only voyage charter flights, it will help to settle the controversy centering around charter flights, and will ultimately promote the objectives of the Warsaw Convention.

Linda A. Whitley

[56] 386 F.2d at 330.

Conflict of Law — Maritime Tort — Significant Contact Theory

Decedent, a Pennsylvania domiciliary, purchased a round-trip ticket to Boston from Northeast Airlines in Pennsylvania. On 3 October 1960, in the course of taking off from Boston Logan Airport, the Eastern Air Lines Lockheed Electra[1] crashed into navigable waters of Massachusetts, resulting in plaintiff's death. The administrator of his estate brought an action in assumpsit on the "law side" of the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on diversity of citizenship. Desiring recovery under Pennsylvania's Survival Statute[2] and Wrongful Death Statute,[3] the plaintiff alleged that the fatal injuries were the result of "negligence, breach of warranty, and breach of contract" on the part of Eastern.[4] The District Court held that the negligence of Eastern was the proximate cause of plaintiff's death and that Pennsylvania law, the law of the forum, controlled the question of recoverable damages. The defendant appealed the question of damages to the United States Court of Appeals for the Third Circuit.[5] *Held, affirmed*: An action for wrongful death of a Pennsylvania domiciliary occurring in the navigable waters of Massachusetts may be adjudicated under Pennsylvania's Wrongful Death Statute, on diversity jurisdiction, as an action for negligent breach of contract of carriage imposed upon the carrier by Pennsylvania law, without "abdication of federal authority over maritime torts." Moreover, the court in dictum stated that, when an action is adjudicated according to maritime law, a state's wrongful death statute may be applied to the maritime tort occurring in the territorial water of another state if the former state has the most significant contact with the parties and issues involved. *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1968).

I. Characterization of Suit

A. *Federal And State Law*

Historically, the crash of an airplane in the navigable waters of a state causing fatal injuries was cognizable as a maritime right of action sounding

[1] Eastern Air Lines is a Delaware corporation which does business in various states, including Pennsylvania.

[2] Pa. Stat. Ann. tit. 20, § 320.603 (1950) allows recovery equal to the descendent's probable earnings during the period of his life expectancy.

[3] Pa. Stat. Ann. tit. 12, § 1601 (1957) provides in part: "Whenever death shall be occasioned by unlawful violence or negligence, . . . the widow of the deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."

[4] Plaintiff dropped his breach of warranty theory before the case came to trial.

[5] The present opinion is the rehearing of the court *en-banc*. For the previous opinion in which the court reversed and remanded the issue of damages, see Scott v .Eastern Air Lines, Inc., 10 Av. Cas. 17,179 (3d Cir. 1968). (Not officially reported.)

in tort[6] which ordinarily would be adjudicated according to federal law.[7] As an alternative to the directive that all maritime actions are federal,[8] a state retains certain common law rights of action apart from federal maritime rights of action.[9] If the common law right of action is pursued in a federal court on diversity jurisdiction, the court would be bound by the rules laid down in *Erie R. Co. v. Tompkins*[10] and *Klaxon v. Stentor Elec. Mfg. Co., Inc.*[11] Accordingly, the court, sitting as another court of the state, would have to apply the substantive law of the state in which it sits. However, in determining whether a suit is properly characterized as a maritime action or as a state common law action, a federal court has no duty of deference to a state's view.[12] This reasoning originated in *Sampson v. Channell*[13] where a federal appellate court, entertaining a diversity case, was confronted with the question of whether state law or federal law governed the issue of the burden of proof in contributory negligence. In characterizing the issue as a substantive matter according to federal law, the court held that "classification by the state court for one purpose does not mean that the classification is valid for another purpose. Surely, the question whether a particular subject-matter falls within the power of the Supreme Court to prescribe rules of procedure . . . or is a matter of substantive law governed by the Tompkins case, cannot be foreclosed by the label given to the subject-matter by the state courts."[14] Nevertheless, a federal court may consider the state's characterization in arriving at its own characterization of the suit.

Pennsylvania law, the law of the forum in the present case, invokes the legal fiction of classifying a suit as a negligent breach of contract even though tort principles of negligence control the action.[15] Common law afforded a similar procedural stratagem of waiving the tort and suing in assumpsit. According to the court in *Quaker Worsted Mills Corp. v. Howard Trucking Corp.*,[16] Pennsylvania law imposes liability upon common car-

---

[6] If fatal injuries are sustained in navigable waters, tort claims for those injuries are maritime in nature, *see, e.g.*, Weinstein v. Eastern Air Lines, 316 F.2d 758, 766 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), whether the proceeding is instituted in admiralty or on the "law side" of the court. *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Massaro v. United States Lines Co., 307 F.2d 299 (3d Cir. 1962); J. B. Effenson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956). *See also* Note, 32 George Wash. L.J. 635 (1963) for a discussion of the test applied in determining whether a tort or contract is governed by maritime law.

[7] *See* notes 37-79, *infra*, and accompanying text.

[8] *See* note 38, *infra*.

[9] *See* "Saving Clause," 28 U.S.C. § 1333 (1964).

[10] 304 U.S. 67, 74-77 (1938). *See also*, Guaranty Trust Co. v. York, 326 U.S. 99, 108, *reh. denied*, 326 U.S. 806 (1945).

[11] 313 U.S. 487, 496-97 (1941). The principle question was whether, in diversity cases, federal courts must follow conflicts of law rules prevailing in the states in which they sit. The Supreme Court held "that the prohiibtion declared in *Erie* . . . against such independent determinations by the federal courts, extends to the field of conflict of laws." *See also*, 105 U. PA. L. REV. 797 n.36 (1957).

[12] Sampson v. Channell, 110 F.2d 754, 757-58 (1st Cir. 1940).

[13] *Id.*

[14] *Id.*

[15] As noted by Chief Justice Hastie, dissenting in the instant case, Pennsylvania law invoking this legal fiction is neither "persuasive" nor "authoritive" in permitting the court to classify the suit as a negligent breach of contract. 399 F.2d at 33.

[16] 131 Pa. Super. 1, 7, 198 A. 691, 694-95 (1938). *See also*, Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Robinson Elec. Co., Inc. v. Capitol Trucking Corp., 168 Pa. Super.

riers, and common carriers impliedly promise to exercise the highest degree of care. If the common carrier fails to exercise the degree of care "not bargained for by the respective parties [but] . . . imposed upon him by law," an action in assumpsit or trespass will lie for the breach.[17] Further, if failure to exercise this degree of care results in death, an action can be brought for the negligent breach of contract under Pennsylvania's Survival and Wrongful Death Statutes.[18] Where such an action involves a dispute over the choice of laws, Pennsylvania law, as espoused in *Griffith v. United Air Lines*,[19] demands application of the *significant contacts* theory instead of the *lex loci delicti* theory. Pennsylvania's choice of laws rule requires the court to analyze the interests of the states in determining which state's law applies to the legal issue in conflict.[20]

B. *Injection Of The Scott Decision*

By application of the rule of law in the *Sampson* case to the instant case, the federal court would not have beeen bound by Pennsylvania's characterization of the action. However, notwithstanding the maritime nature of the action,[21] the court reviewed both state and federal law, and characterized the action as Pennsylvania would have, that is, as a suit for negligent breach of contract of carriage.[22] Presumably, the deference to the state's view was due to some apprehension that federal maritime law would limit the amount of recoverable damages to the sum allowed under Massachusetts' Wrongful Death and Survival Statutes.[23]

Relying basically on *Weinstein v. Eastern Air Lines*,[24] a case that arose

430, 433, 79 A.2d 123, 125 (1951); Daugherty v. Main Transp. Co., 141 Me. 124, 129, 39 A.2d 758, 759 (1944).

[17] Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Nuside Metal Products, Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 152 A.2d 275, 279 (1959); Robinson Elec. Co., Inc. v. Capitol Trucking Corp., 168 Pa. Super. 430, 433, 79 A.2d 123, 125 (1951); Eckert v. Penn. R.R., 211 Pa. 267, 60 A. 781 (1905).

[18] Although Pennsylvania had precedent for an action in negligent breach of contract of carriage as applied to its Survival Statute [Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964)], it had no authority for such an action as applied to its Wrongful Death Statute. Nevertheless, the instant court held that "the negligent breach sufficient to satisfy the Survival Act is also sufficient to satisfy the Wrongful Death Act." 399 F.2d at 23. However, in *Di Belardin v. Lemmon Pharmacal Co.*, 416 Pa. 580, 585, 208 A.2d 283, 285-86 (1965), as followed in *Miller v. Preitz*, 422 Pa. 383, 386-87, 221 A.2d 320, 322 (1966), the Pennsylvania court, adjudicating an action for breach of warranty under the Wrongful Death Statute, held "that the right of action provided by the 'Wrongful Death' statute could be brought *only in trespass* and that, therefore, an action in assumpsit for breach of warranty was inappropriate" [Emphasis added.]. Since negligence was neither pleaded nor proved in *Di Belardino* and *Miller*, the instant court held that, recognizing them as authority in the present situation, would "amount to a repudiation of the progressive policies espoused in *Griffith* . . . ." 399 F.2d at 24.

[19] 416 Pa. 1, 203 A.2d 796 (1964). *See also*, Bauer, *Conflict of laws—Lex Loci Delicti—Significant Contact Theory*, 31 J. AIR L. & COM. 275 (1965).

[20] McSwain v. McSwain, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966); Griffith v. United Air Lines, 203 A.2d 796 (1964).

[21] Note, 6-7, *supra* and cases cited therein.

[22] Chief Justice Hastie in his dissent, reasoned that, "when, in the course of litigation in a federal court, it becomes necessary to determine whether the wrong in suit is a maritime tort or a breach of contract, the federal court must decide for itself what characterization is proper, without any duty of deference to any state view." 399 F.2d at 33.

[23] MASS. GEN. LAWS ch. 228, § 1(2) (1957), & ch. 229 (1949) *as amended* (Supp. 1962). Massachusetts' Survival Statute limits the amount of recovery to $20,000. However, Pennsylvania's Wrongful Death and Survival Statutes, PA. STAT. ANN. tit. 12, § 1601 (1957) & tit. 20, § 320.603 (1950), do not limit recovery.

[24] 316 F.2d 758 (1963).

out of the same crash, the present court reasoned that the action for negligent breach of contract of carriage was properly characterized since the action was not in conflict with maritime law.[25] In *Weinstein*, this same court, entertaining an action on admiralty jurisdiction, adjudicated claims involving a maritime tort, breach of contract, and breach of warranty. Not only did the court rule that the tort action was governed by maritime law, but it held:

> [A] contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance, nor are . . . [they] made maritime by virtue of the fact that the aircraft . . . flew briefly over navigable waters [of a state] . . . .[26]

In sum, the court in *Weinstein* drew a distinction between actions for the *simple* breach of contract that could be entertained on admiralty jurisdiction, and those that could not be brought on admiralty jurisdiction. Since the principles for simple breach of contract did not control the present case,[27] it is questionable that *Weinstein* governs the issue of whether or not an action for a *negligent* breach of contract is a proper characterization for a suit arising out of a crash in the navigable waters of a state. Moreover, Pennsylvania's law of invoking the legal fiction of waiving the tort and suing in assumpsit is neither persuasive nor authoritative in permitting a federal court to characterize this suit as a negligent breach of contract.[28] The legal fiction relies on enactment of laws imposing liability as a term in *every* contract, regardless of whether the parties to the contract intended to incorporate the liability into the contract.[29] Such imposition of liability appears to be an exertion of "force" and repugnant to contract law; any term in a contract procured through force is not enforceable.[30]

The majority avoided this line of reasoning by referring to Pennsylvania law. Justifying its characterization of the action as a negligent breach of

---

[25] *See* "Saving Clause," 28 U.S.C. § 1333 (1964); Justice v. Chambers, 312 U.S. 383, 389 (1941); Norton, Assignee v. Switzer, 93 U.S. 355, 356 (1876); Steamboat Co. v. Chase, 16 Wall 522, 533 (1872); Perry v. Stanfield, 278 Mass. 563, 180 N.E. 514, 515 (1932). For constitutional rejections of applying state law derogatory to maritime law, *see*, Chelentis v. Luckenback S.S. Co., 247 U.S. 372 (1918). The instant court held "that recognition of the diversity claim for breach of contract of nonnegligent carriage can in no sense be construed as an abdication of federal authority over maritime torts." 399 F.2d at 22.

[26] 316 F.2d at 766.

[27] The instant court relied on *Griffith*, 203 A.2d 796 (1964), in which the Pennsylvania Supreme Court held that "[t]he principles which will govern defendant's liability are principles of negligence, not of contract, since the action is for negligent breach, not simple breach, of contract." Moreover, the court held that [m]ere technicalities of pleading should not blind us to the true nature of the action." 203 A.2d at 800.

[28] Note 15, *supra*.

[29] *See*, S. WILLISTON, CONTRACTS, § 615 (3d ed. 1938). Williston suggests the standard that should be applied in determining whether a compulsory statute is adopted into the terms of a contract, since "it is a dangerous thing to read too many things into a contract that are not placed in the contract by the parties to it." Leiendecker v. Etna Indemnity Co., 52 Wash. 609, 611, 101 P. 219 (1909) (dictum); *contra, e.g.*, Lorando v. Gethro, 228 Mass. 181, 117 N.E. 185 (1917). These cases deal with statutes regulating contracts (in this case an insurance contract), and not with imposition of liability to avoid injury to another.

[30] Davidson v. Payne, 281 F. 544, 546 (C.C.D.K.), *aff'd*, 289 F. 69 (8th Cir. 1923). *See*, Note, 21 MICH. L. REV. 449 (1922), and cases cited therein for discussion of optional vs. compulsory statutes.

contract under Pennsylvania law, the court followed *Erie* and *Klaxon*. Making no distinction between goods and passengers,[31] the court concluded that the airline, like the common carrier of goods, impliedly promises to carry its passengers in a non-negligent manner, and is liable in assumpsit for breach of the degree of care imposed upon him by Pennsylvania law.[32] Since the state abandoned the *lex loci delicti* choice of laws theory in favor of the *significant contacts* theory,[33] the interests of both states were reviewed as to the issue involved—damages. The court held that Pennsylvania had "[d]emonstrated . . . a priority interest in the application of its choice of law,"[34] and that application of its law was not in conflict with the Constitution.[35] Although the plaintiff won his action under the "Savings Clause"[36] for negligent breach of contract of carriage, the court, in dictum, ruled on his maritime claim. In adjudicating the action, the court was faced with the issue of whether maritime law follows *significant contacts* conflict of law theory or the *lex loci delicti* theory.

II. MARITIME TORT: *Significant Contacts v. Lex Loci Delicti*

Maritime law afforded no right of action at common law for wrongful death occurring in a state's territorial waters.[37] To create a right of action, admiralty fashioned its own law[38] by adopting the wrongful death statutes of the states (and the rights of action created thereunder) to supplement maritime law.[39] Although a federal court entertaining a wrongful death action on admiralty jurisdiction adopts a state's death statute, it is not bound by the law of the state in which it sits.[40] Moreover, in *Pope & Talbot, Inc. v. Hawn*,[41] the Supreme Court held that it is immaterial whether admiralty or diversity jurisdiction is relied upon when the action involves

---

[31] "We cannot perceive . . . any compelling reasons for Pennsylvania to restrict an injured passenger to an action in trespass while, at the same time, a shipper may elect between trespass and assumpsit for damage to goods." 203 A.2d at 800.

[32] See cases cited at notes 16-17, *supra*.

[33] 203 A.2d 796 (1964).

[34] Pennsylvania's interests include: (1) the place of the wrong, (2) the domicile of the descendent, and (3) the place of administration of the estate. Massachusetts' interest was the place of the tort. *See*, Kuchinic v. McCory, 422 Pa. 620, 624, n.4, 222 A.2d 897, 899, n.4 (1966); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966).

[35] *See*, Richards v. United States, 369 U.S. 1, 15 (1961); International Shoe Co. v. Washington, 326 U.S. 310, 316-21 (1945), *as applied*, McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957). For state law in conflict with the Constitution, *see*, First Nat. Bk. of Chicago v. United Air Lines, Inc., 342 U.S. 396, 400 (1952), *reh. denied*, 343 U.S. 921 (1952); Hughes v. Fetter, 341 U.S. 609 (1951). *See also*, Van Dusen v. Barrack, 376 U.S. 612, 629 (1964), where the Supreme Court left open the question of constitutional limitations on the choice of law by state courts.

[36] "Saving Clause," 28 U.S.C. § 1333 (1964).

[37] Hess v. United States, 361 U.S. 314 (1960); Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Butler v. Boston and Savannah Steamship Co., 130 U.S. 527, 555 (1889); The Harrisburg, 119 U.S. 199 (1886).

[38] U.S. CONST. art. III, § 2, extends judicial power "[t]o cases of admiralty and maritime jurisdiction." U.S. CONST. art. I, § 8 confers upon Congress the power "to make laws . . . for carrying into execution the foregoing powers . . . ." If Congress has not set up statutory guidance (as in this instance), maritime law, as formed by the federal courts, is the law applicable to maritime matters. *See*, Kermarec v. Compagnie Generale, 358 U.S. 625 (1959); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1916).

[39] *See, e.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[40] Levinson v. Deupree, 345 U.S. 648, 650-52 (1953). *See also*, Goett v. Union Carbide Corp., 361 U.S. 340 (1960); The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[41] 346 U.S. 406 (1953).

a maritime tort.[42] Regardless of the nature of jurisdiction, a maritime action is "[s]ubject to the dominant control of the Federal Government."[43] In other words, the rights of an injured party should not be determined any differently on the "law side" of the court than they would be determined on the admiralty side.[44] Further, a state court when adjudicating an action for wrongful death occurring in state territorial waters, must apply federal maritime law, that is, the state's wrongful death statute and the rights of action created thereunder.[45]

This adoption of a state's right of action under its death statute without simultaneous adoption of the interpretative law thereunder, has aroused controversy as to the substantive law applicable by a federal court in maritime proceedings. In past decisions, courts took the position that application of a state's death statute was merely remedial,[46] and that state substantive law should not be applied in maritime cases.[47] Recently, federal courts have changed their position to that of enforcing the substantive law of the state under whose statute the action is brought,[48] unless the state's law is in conflict with a right created by maritime law.[49] In other words, the courts enforce the cause of action as a whole, limited by the conditions and terms of the statute.[50] In *The Tungus v. Skovgaard*,[51] the Supreme Court prescribed the degree to which it would enforce the law of a particular state. There, the decedent was killed on the deck of a docked ship in New Jersey territorial waters. His administrator brought a suit under the wrongful death statute of that state. In the alternative, the administrator argued that, if the New Jersey statute did not offer a remedy for wrongful death on a ship, maritime law could be applied so long as the state had enacted some type of wrongful death statute. The court, rejecting the alternative argument, gave full effect to the statute of the state.[52] In extending the doctrine, the Supreme Court in *Goett v. Union Carbide*

---

[42] 346 U.S. at 410-11.

[43] 346 U.S. at 410-11, especially n.4 and cases cited therein. See Judge Harlan's opinion in Siegelman v. Cunard White Star, 221 F.2d 189 (2d Cir. 1955). For an interesting contradiction, see, Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 321 (1955), where the Supreme Court held that, although marine insurance is a federal matter, "[w]e, like Congress, leave the regulation of marine insurance where it has been—with the States."

[44] *See*, Pope & Talbot, Inc. v. Hawn, 346 U.S. at 411; Massaro v. United States Lines Co., 307 F.2d 299 (3d Cir. 1962); J.B. Effenson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956).

[45] *See, e.g.*, Carlise Packing Co. v. Sandanges, 259 U.S. 255 (1922). In the instant case, Justice Seitz deduced that the majority opinion overruled cases such as *Carlise*.

[46] *See*, Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923), and the reasoning in *Pope & Talbot*, 346 U.S. at 409.

[47] Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); *cf.* Hess v. United States, 361 U.S. 314, 322-39 (1960) (dissenting opinion). *See also*, Sovel, *Determining the Applicable Law in Cases Arising in State Territorial Waters*, 37 TEMP. L.Q. 479 (1964).

[48] *See*, Hess v. United States, 361 U.S. 314 (1960); The Tungus v. Skovgaard, 358 U.S. 588 (1959); The H.S., Inc., 130 F.2d 341 (3d Cir. 1942).

[49] Kenney v. Trinidad Corp., 349 F.2d 832 (5th Cir.), *cert. denied*, 382 U.S. 1030 (1966). *Accord*, Hess v. United States, 361 U.S. 314, 320 (1960).

[50] *Infra*, note 51; Continental Casualty Co. v. The Benny Skou, 200 F.2d 246 (4th Cir.), *cert. denied*, 345 U.S. 992 (1953).

[51] 358 U.S. 588 (1959).

[52] *See*, Thomas v. United Airlines, 54 Misc.2d 540, 281 N.Y.S.2d 495 (Sup. Ct. N.Y. 1967), where the state court held that state choice of laws rules rather than federal choice of laws rules applied. The case was reversed because it extended too far the rule set forth in *The Tungus, Id.* Thomas v. United Airlines, 10 Av. Cas. 17,867 (Sup. Ct. N.Y.A.D. 1968) (not officially reported).

Corp.,[53] held that a state court, adjudicating a maritime action, could interpret the substantive law applicable to its death statute, or choose to include "general maritime principles."

Although the law to this point seemed fairly stable, discord ensued when the *Scott* decision stated, in dictum, that maritime law permitted the application of the *significant contacts* conflict of laws theory over the *lex loci delicti* theory. Prior to *Scott*, Third Circuit courts applied the wrongful death and survival statute of the state in whose territorial waters the tort occurred.[54] These courts appear to have adopted the *lex loci delicti* choice of laws rule; previous cases, however, dealt only with wrongful death actions commenced and adjudicated in the state where the maritime tort took place.[55] In these instances, the court applied the law of the state in which the person had *elected* to bring suit (*lex fori*). Theses courts were never faced with a choice between competing state statutes, thus revealing slim authority[56] for the rule that admiralty courts must apply the *lex loci delicti* theory in actions for wrongful death occurring in state territorial waters.[57]

The defendant in *Scott* contended that *The Tungus* was precedent for the rule that federal courts have created a maritime remedy equal to the statutory death remedy of the state within whose waters the injury occurred. The court stated that such an interpretation would be in conflict with the "clear congressional purpose" revealed by the legislative history of the Death on the High Seas Act.[58] When Section 7 of the Senate Bill[59] was presented to the House of Representatives, an amendment was proposed to delete the words, "as to causes of action accruing within the

---

[53] 361 U.S. 340 (1960).

[54] *See*, United Pilot's Ass'n v. Halecki, 358 U.S. 613 (1959); Hill v. Waterman S. S. Corp., 251 F.2d 655 (3d Cir.), *cert. denied*, 359 U.S. 297 (1959); Meehan v. Gulf Oil Corp., 312 F.2d 737 (3d Cir. 1963); Curtis v. A. Garcia Y. Cia, 241 F.2d 30 (3d Cir. 1957); The H.S., Inc., No. 72, 130 F.2d 341 (3d Cir. 1942); Klingseisen v. Costanzo Transp. Co., 101 F.2d 902 (3d Cir. 1939).

[55] *Id.*

[56] In The H.S., Inc., No. 72, 130 F.2d at 343, this same court held that "he who seeks to recover in admiralty under a State death statute for a maritime tort may do so only in accordance with the law of the State in which the tort occurred." Reference to Klingseisen v. Costanzo, 101 F.2d 902, relied upon by the court in H.S., Inc., No. 72, reveals that the holding of the case was that, when a plaintiff sues in admiralty under a state wrongful death statute, he is bound to the limitations of the statute. As the instant court held, the "analysis . . . by this court in The H.S., Inc., No. 72 is obviously *obiter dictum* . . . ."

[57] Moreover, as early as 1913 Sixth Circuit courts applied a *significant contacts* conflicts of laws theory in Thompson Towing & Wrecking Ass'n v. McGregor, 207 F. 209 (6th Cir. 1913). Proceedings in admiralty for deaths of crew members of a vessel named the *Stewart* were adjudicated under Michigan law. The court held that, although the explosion probably occurred in the Canadian waters of Lake Huron, the vessel "was through ownership and registration domiciled in Michigan and was, as respects the enforcement of such a right, part of the territory of Michigan . . . . [I]n determining the place of Workman's death, we must not overlook the question whether, in the circumstances of this case, the Stewart was constructively part of Michigan . . . ." *Id.* at 216-17. In Patton-Tully Transportation Co. v. Turner, 269 F. 334 (6th Cir. 1920), a case involving similar circumstances, the court held that when "[g]oing up or down the river, it [the vessel] would be crossing state lines constantly. It might be difficult, if not impossible, to know in what state the boat was when some accident on board happened. It would be unfortunate if the liability of the owner to a seaman for death, or the measure of damages, changed whenever a state line was crossed." *Id.* at 343.

[58] 41 Stat. 537, 46 U.S.C. § 761-67 (1964). This Act applies only where death occurs outside the territorial water of any state; *see*, 59 CONG. REC. 4482-87 (1920), for the legislative history.

[59] S. 2085, 66th Cong., 2d Sess. § 7 (1920).

territorial limits of any State."[60] Section 7 was presented as follows:

> That the provision of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State.[61]

The following proposal was made in support of the amendment:

> If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.[62]

The amendment was passed by the House,[63] and later passed by the Senate.[64] It appeared clear that Congress intended to leave with the states as much power as possible over causes of action for wrongful death regardless of where the cause of action arose.[65] Therefore, the court held that *The Tungus* was concerned with the degree to which maritime law will apply a state's wrongful death statute and enforce the law under it, and not as a guide for choosing between competing state statutes.

Finding no binding precedent in support of *lex loci delicti* and concluding that Congress did not intend to limit remedies under state law solely to deaths occurring in a state's territorial waters,[66] the court applied the *significant contacts* conflict of laws theory in a manner that it reasoned the Supreme Court would uphold.[67] The court relied on *Lauritzen v. Larsen*,[68] where the Supreme Court, after rejecting the *lex loci delicti* theory,[69] settled on the *significant contacts* theory as the choice of laws rule in admiralty cases.[70] In *Lauritzen*, a Danish seaman, while temporarily in the United States, joined the crew of a Danish ship and was subsequently injured in the Havana harbor. He brought suit under the Jones Act[71] in New York federal district court. On certiorari, the Supreme Court was presented with the question of whether Danish or American substantive law should be applied to the claim. In ruling that Danish law applied, the Court held:

---

[60] 59 CONG. REC. 4484 (1920).
[61] *Id.* at 4482.
[62] *Id.* at 4484.
[63] *Id.* at 4486.
[64] 41 Stat. 537, 46 U.S.C. § 767 (1964).
[65] 358 U.S. at 593. "The record of the debate in the House of Representatives . . . reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of federal law. 59 Cong. Rec. 4482-4486."
[66] In the instant case, the court held: "[W]e do not think that Congress contemplated, much less intended, precluding the application of one state's death act to a maritime tort occurring in the territorial waters of another state . . . ." 399 F.2d at 26.
[67] *See, e.g.*, Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943); D'oench, Duhme, & Co., Inc. v. Fed. Deposit Ins. Corp., 315 U.S. 447 (1942). If there is no Congressional ruling or judicial precedent on a federal question, a federal court can fashion its own rule.
[68] 345 U.S. 571 (1953).
[69] For support of the *lex loci delicti* theory, *see*, 92 A.L.R.2d 1,185, 1,185-90 and cases cited therein; RESTATEMENT OF CONFLICTS OF LAWS, § 391, Comment d, and § 412.
[70] For a complete analysis of the pros and cons of the *significant contact* theory, *see*, Note, *Conflicts of Laws—Wrongful Death—Significant Contacts vs. Lex Loci*, 34 J. AIR L. & COM. 114 (1968); Bauer, *Conflicts of Laws—Lex Loci Delicti—Significant Contact Theory*, 31 J. AIR L. & COM. 275 (1965).
[71] Jones Act, 41 Stat. 1007, 46 U.S.C. § 688 (1964).

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the *states* or governments whose competing laws are involved [Emphasis added.].[72]

The *significant contacts* theory set forth in *Lauritzen* was subsequently employed in *Romero v. International Terminal Operating Co.*,[73] where the court was confronted with claims under general maritime law as well as claims under the Jones Act. In *Romero*, a Spanish seaman was injured while his ship was docked in New York. Although the court noted that in *Lauritzen* the injury occurred in foreign waters and that in *Romero* the injury occurred in American waters,[74] it held that Spanish law applied because "[t]he broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally."[75]

The instant court applied a choice of law rule similar to the *significant contact* theory in force in Pennsylvania.[76] Chief Justice Hastie, in dissent, argued that the rule would create non-uniformity.[77] However, the majority stated that a court sitting in admiralty has an obligation to apply the law that is most appropriate and equitable notwithstanding a simple, rigid, and often inequitable rule. Maritime law has exhibited a capacity for growth and should not be exempt from applying a more equitable rule.[78] Not only have federal courts applied the *significant contacts* theory in certain situations,[79] but a growing number of states have abandoned the *lex loci delicti* theory in favor of the *significant contacts* theory.[80]

III. Conclusion

In ruling that a wrongful death action, arising from a plane crash occurring in a state's territorial waters, could be adjudicated on diversity

---

[72] 345 U.S. at 582.

[73] 358 U.S. 354 (1959); *see also*, Restatement (Second) of Conflict of Laws, § 145, Reporter's note at 20; F. Goodrich, Conflict of Laws (Fourth), § 92. The "significant contact" principles set forth in the *Romero* case were subsequently followed in McClure v. United States, 368 F.2d 197 (4th Cir. 1966) and Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966).

[74] 358 U.S. at 382.

[75] *Id.* at 382. *See also*, Noel v. United Aircraft Corp., 202 F. Supp. 556, 557-58 (D. Del. 1962); Noel v. Airponents, Inc., 169 F. Supp. 348, 351 (D.N.J. 1958) for cases that involve plane crashes on the high seas and follow the reasoning in the *Lauritzen* and *Romero* cases.

[76] *See* Douglas, J., opinion in Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943). When fashioning choice of law in federal courts, the court may follow state law.

[77] As to the desire for uniformity, *see*, Washington v. Dawson & Co., 264 U.S. 219 (1924); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Uniformity will not be accomplished until admiralty fashions its own wrongful death remedy without regard to any state statute, *see, cf.*, 358 U.S. 588 (1959) (dissenting opinion), *see also*, 77 Harv. L. Rev. 545, 546 (1963).

[78] *See*, Justice Freedman's dissenting opinion in Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A.B. Co., 372 F.2d 18, 21 (3d Cir.), *cert. denied*, 387 U.S. 930 (1967).

[79] *Supra*, notes 57, 68, 73 and cases cited therein.

[80] For states that have abandoned the *lex loci delicti* theory, *see, e.g.*, Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965) (construing Indiana law); Reich v. Purcell, 63 Cal. Rep. 31, 432 P.2d 727 (1967); Wartell v. Formusa, 34 Ill.2d 57, 213 N.E.2d 544 (1966); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Casey v. Manson Constr. & Engineering Co., 428 P.2d 898 (Ore. 1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Haumschild v. Continental Casualty Co., 7 Wisc.2d 130, 95 N.W.2d 814 (1959).

jurisdiction as an action for negligent breach of contract of carriage, the court side-stepped federal maritime law. If courts continue to characterize such actions by looking to state law notwithstanding the maritime nature of the action, state law could well supplant much of the non-statutory federal maritime law. Furthermore, this procedure will create greater non-uniformity and promote forum shopping. Of course, complete uniformity will not be accomplished until admiralty fashions its own wrongful death remedy without regard to any state statute.[81] Although the court adjudicated the wrongful death action on diversity jurisdiction and applied Pennsylvania's choice of laws rule, the results would have been the same had the court entertained the action on admiralty jurisdiction, since maritime law has applied the *significant contacts* theory in admiralty cases.[82] Even though the *lex loci delicti* theory is more uniform and predictable in theory than the *significant contacts* doctrine,[83] the court recognized that the rule is often unjust, and aptly stated that admiralty courts should be free to apply the most equitable rule.

William A. Stewart

[81] *See* note 77 *supra* and cases cited therein.

[82] *See* notes 57, 68 and 73, *supra* and cases cited therein.

[83] *See*, Stumberg, *The Place of the Wrong—Torts and the Conflict of Laws*, 34 WASH. L. REV. 388 (1959).

CAB — Jurisdiction — Foreign Tour Operators

The appellants, Pan American World Airways, Inc. and Trans World Airlines, Inc., filed suit in both the federal district and appellate courts against the Civil Aeronautics Board (CAB). The district court action was a demand for a declaratory judgment and issuance of an order of mandamus directing the members of the Board to exercise jurisdiction over unlicensed German tour operators organizing inclusive tours[1] to the United States.[2] It was claimed that the Board's refusal to so act was beyond its statutory power; this petition was denied. The court of appeals action was a combination of an appeal from the district court decision and a review of the Board's own decision.[3] The proceedings involved the approved application by the CAB of a German airline, Sudflug Suddeutsche Fluggesellschaft (Sudflug),[4] for inclusive tour charter agreements with Scharnow,[5] Touropa,[6] and other German tour operators; the approval permitted thirty flights from Germany to the United States with the right reserved by the Board to extend the flights beyond this number. Appellants argued that under the Federal Aviation Act of 1958, the CAB exceeded its statutory authority by refusing to exercise its jurisdiction over the foreign air transportation operations of German tour operators which were functioning as indirect foreign air carriers within the meaning of the Act. Relying on a previous decision of the court,[7] appellants further argued that the court had jurisdiction to review the questioned activities of the Board. Appellees counter argued that the federal courts lacked "original jurisdiction" because the particular issues raised were specifically excluded by statute,[8]

[1] As understood by travelers, an "inclusive tour" includes expenses for travel, food, lodging, and guided tours. As defined by the Board it is a "round trip tour which combines air transportation pursuant to an inclusive tour charter and land services." 14 C.F.R. § 378.2(b) (1966).

[2] It is well established that a district court action is appropriate to obtain an order of mandamus and compel a federal agency to exercise its statutory jurisdiction when it otherwise refuses to do so. Interstate Commerce Commission v. United States *ex rel.* Humbolt S.S. Co., 224 U.S. 474 (1911).

[3] An appeal (No. 21,149) from the district court's dismissal (for lack of jurisdiction and failure to state a claim upon which relief could be granted) of a complaint for declaratory judgment and mandamus challenging the Board's action was combined with the present cause of action (No. 20,860) for direct review of the Board's non-exercise of jurisdiction.

[4] Airlines are of two basic types; scheduled air transportation or trunkline carriers, and non-scheduled supplemental air carriers. Sudflug is of the latter classification, which, as the name implies, augmentates the scheduled transportation by charter service. Federal Aviation Act of 1958, § 101 (32), 72 Stat. 737, 49 U.S.C. § 1301 (32), (33) (1964).

[5] Full name: Scharnow-Reisen GmbH., Kommanditgeselschaft.

[6] Full name: TOUROPA—DER Deutsches Reiseburo GmbH.—Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft-Norddeutscher Lloyd—Amtliches Bayerisches Reiseburo GmbH.—Reiseburo Dr. Carl Degener KG.

[7] American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965).

[8] Federal court "original jurisdiction" is strictly limited to that given by statute. Direct review of the CAB is conferred on the United States Court of Appeals for the District of Columbia or any of the other United States courts of appeals by 72 Stat. 795, *as amended*, 74 Stat. 255, 75 Stat. 497, 49 U.S.C. § 1486(a) (1964), which provides:

> Any order, affirmative or negative, issued by the Board or Administrator under this Chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person dis-

and that the court of appeals decision referred to was not in point, for that decision spoke of an exception to a judge-made rule, whereas the present case dealt with a statutory rule.[9] *Held, affirmed*: The issue of jurisdiction to review was side-stepped; the court upheld the Board's position of refusing to exercise its jurisdiction over foreign tour operators. *Pan American World Airways, Inc. v. Civil Aeronautics Board*, 392 F.2d 483 (D. C. Cir. 1968).

Section 402 of the Federal Aviation Act[10] requires that a foreign air carrier possess a permit issued by the Board before engaging in foreign air transportation. As applied under this Act, a "foreign air carrier"[11] includes any person not a United States citizen who "whether directly or *indirectly or by lease* or any other arrangement," engages in foreign air transportation [Emphasis added.]. Such a permit shall be issued upon a determination that the particular carrier is fit, willing, and able to conform generally to the provisions of the Act, and that such transportation will be in the public interest.[12] After filing of an application for a permit, the Board shall give notice to the public that such an application is sought, and set the date for a public hearing so that any interested person may file a protest with the Board against the issuance of such permit.[13] In addition to the required CAB approval, any action taken by the Board under Section 402 is also subject to approval by the President.[14]

The Act also provides for review of any action taken by the Board or its failure to act when it is required.[15] The review is to be made by the Board itself or an Administrator, if it falls under his jurisdiction. Beyond this, any further review must be made by the United States Court of Appeals for the District of Columbia or the courts of appeals of the United States;[16] it must also be noted that an action may be brought in a United States district court to prohibit the Board from exceeding its jurisdiction.[17]

Appellants contention was that the tour operators by providing foreign air transportation, by means of chartered aircraft as a part of their inclusive tours, would be acting as "foreign air carriers" within the definition of the Federal Aviation Act.[18] As such the Board had an absolute duty to

---

> closing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

[9] *Id.*

[10] Federal Aviation Act of 1958, § 402(a), 72 Stat. 757, 49 U.S.C. § 1372(a) (1964).

[11] Federal Aviation Act of 1958, § 101(19), 72 Stat. 737, 49 U.S.C. § 1301(19) (1964).

[12] Federal Aviation Act of 1958, § 402(b), 72 Stat. 757, 49 U.S.C. § 1372(b) (1964).

[13] Federal Aviation Act of 1958, § 402(d), 72 Stat. 757, 49 U.S.C. § 1372(d) (1964).

[14] Federal Aviation Act of 1958, § 801, 72 Stat. 782, 49 U.S.C. § 1461 (1964).

[15] Federal Aviation Act of 1958, § 1002(a), 72 Stat. 788, 49 U.S.C. § 1482(a) (1964).

[16] Federal Aviation Act of 1958, § 1006(a), 72 Stat. 795, *as amended*, 74 Stat. 255, 75 Stat. 497, 49 U.S.C. § 1486(a) (1964).

[17] Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958).

[18] Under the Act, a person need only be associated indirectly or by lease to be considered a foreign air carrier; Scharnow, Touropa and the other German tour operators are considered foreign air carriers, because by arranging for such tours, they have become by lease or indirect means at least, as stated in Section 101(19) of the Federal Aviation Act, required to obtain a permit as a "foreign air carrier."

> "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation. 72 Stat. 737, 49 U.S.C. § 1301(19) (1964).

exercise the jurisdiction given it under the Act.

Section 402 requires in no uncertain terms that no "foreign air carrier" shall be permitted to engage in such air transportation activities, unless it possesses a permit issued by the Board to such effect.[19] Here, since no permit was issued the tour operators, the Board had violated the statute as it had itself interpreted the statute in the *International Airfreight Forwarder Investigation*.[20] There is no specific case law regarding the CAB and its authority to decline jurisdiction under Section 402 of the Federal Aviation Act; however, appellants cited several cases dealing with similar matters in other agencies of the federal government.[21] In these particular decisions, there was a disregard of statutory procedure and requirements, and in both cases the courts issued writs of mandamus to remedy the agencies' failure to perform their statutory duty.

The Board, however, did not assert that the operators were unqualified as "foreign air carriers;" its argument *inter alia* was that it was not burdened by an absolute duty to act under these circumstances, and even if there were such a duty, the appellants had not followed the necessary statutory review methods set up, and the court of appeals lacked jurisdiction to determine questions concerning CAB jurisdiction of "foreign air carriers,"[22] as did the district court. The Board justified the exercise of this discretion based on the fact that the actual air transportation by Sudflug, which had obtained a "foreign air carriers" permit from the CAB, was at all times subject to regulation on an economic basis as well as to the future imposition of conditions and possible revocation of its permit for failure to contract tours which were in the "public interest." The activities which most affected the tour operators took place outside the boundaries of this country and any exercise of power by the Board would be an attempt to extend its jurisdiction into a foreign country. The Federal Aviation Act was not enacted for the purpose of regulating business or citizens of foreign countries; to enforce such a theory would strain any effective reciprocity and prejudice the ability of United States tour operators to obtain the needed permission from foreign countries for their own services.

---

[19] Federal Aviation Act of 1958, § 402(a), 72 Stat. 757, 49 U.S.C. § 1372(a) (1964).

> No foreign air carrier shall engage in foreign air transporattion unless there is in force a permit issued by the Board authorizing such carrier so to engage.

[20] CAB Order No. E-9179, 1955 (J.A. 115-117).

> [The Board] does not possess the power to exempt or similarly relieve foreign air carriers from any of the economic provisions of the Act as is the case with United States air carriers . . . [and that it] may only authorize the conduct of such operations by foreign citizens through the issuance of a permit, after hearing and Presidential approval, as is provided in sections 402 and 801 of the Act.

This was explicitly understood by Board member Gillilland in his dissenting opinion from the Board's present action.

> The tour operators will be foreign air carriers engaged in foreign air transportation without the permit required by section 402(c) of the Act. Neither tour operator possesses such a permit and the Board does not propose to issue one. Instead it declines to exercise jurisdiction. There is no statutory basis for such disclaimer.

[21] Folkways Broadcasting Co. v. FCC, No. 19,971 (D.C. Cir. 1967). Interstate Commerce Commission v. United States *ex rel.* Humbolt S.S. Co., 224 U.S. 474 (1911).

[22] "The court of appeals is not such a court of original jurisdiction unless specifically authorized by statutory grant of power." A.F. of L. v. Labor Board, 308 U.S. 401, 404 (1940).

Section 1006[23] is the only statutory basis for judicial review of the Board's actions; it seems to fly directly in the face of any contention that any court has the power to review CAB activities as related to "foreign air carriers."[24] This point was summed up in *British Overseas Airways Corporation v. Civil Aeronautics Board*,[25] where the court stated:

> Section 1006(a) of the Federal Aviation Act . . . does not authorize review by this court, *now or later*, of the proposed regulation in suit, since it is "[an] order in respect of *** foreign air carrier[s] subject to the approval of the President" under Section 801 . . . . This is not to say that there may not be a judicial remedy against administrative, or even Presidential, action beyond the scope of lawful authority, as defined by the Aviation Act. The petitions will accordingly be dismissed, without prejudice to independent proceedings in the District Court challenging the validity of the proposed regulation if and when promulgated [Emphasis added.].[26]

This decision would also seem to support appellant's contention that the Act required the Board to act with regard to "foreign air carriers," and the Board was subject to an action in the district court for exceeding its jurisdiction. However, this court found that the latter quoted portion of *British Overseas Airways Corporation*, which stated that the Board's actions might be reviewable in the district court, was questionable in light of a Supreme Court decision, in which it was stated that unless the Constitution was to the contrary, review of administrative action would turn on whether or not Congress had chosen to give review.[27] Thus, since the Congress has given review to the courts of appeals of the United States and the Court of Appeals for the District of Columbia, with the single exception noted as to "foreign air carriers,"[28] it would seem that the old common law adage of *Expressio Unis Est Exclusio Alterius* was being applied and that the district courts should be without jurisdiction to try such an action because district court review was contrary to the review scheme established by Congress.[29]

Despite this, there was authority based on a recent decision of the present court[30] to the effect that under Section 1006(a) appellate courts

---

[23] Federal Aviation Act of 1958 § 1006(a), 72 Stat. 795, *as amended*, 74 Stat. 255, 75 Stat. 497, 49 U.S.C. § 1486(a) (1964).

[24] *Id.* This section provides:

> Any order, affirmative or negative, issued by the Board or Administrator under this Chapter, *except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this Title*, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing or reasonable grounds for failure to file the petition theretofore [Emphasis added.].

[25] 304 F.2d 952 (D.C. Cir. 1962).

[26] *Id.* at 952-53.

[27] Estep v. United States, 327 U.S. 114, 120 (1946).

[28] Federal Aviation Act of 1958 § 1006(a), 72 Stat. 795, *as amended* 74 Stat. 255, 75 Stat. 497, 49 U.S.C. § 1486(a) (1964).

[29] The question of the right to judicial review is a problem with major ramifications which go beyond the scope of this note. For a complete analysis of the subject see L. L. Jaffe, Judicial Control of Administrative Action (1965).

[30] American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965).

had jurisdiction to review the Board's actions where such were in excess of its statutory authority.

> The deference *Waterman* accords to Presidential discretion in matters of national defense and foreign policy as they bear on overseas air carriers has no relevancy where, as here alleged, the President purports to approve a recommendation which the Board was powerless to make; if indeed the Board has no power, then as a legal reality there was nothing before the President.[31]

Against this argument, the Board distinguished the present fact situation from those dealt with in the cited decision. The tour operators involved here are "foreign" air carriers involved in foreign air transportation and those dealt with in *American Airlines* were "citizen" or United States carriers involved in foreign air transportation. However, such a distinction seemed to be rebutted by the *American Airlines* decision, where the court stated:

> In *Chicago and Southern Airlines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), the Supreme Court held that orders granting or denying applications of citizen carriers to engage in overseas and foreign air transportation are exempt from Court of Appeals review under Section 1006 of the Civil Aeronautics Act to *the same extent as are orders affecting foreign [air] carriers, since both types of orders are subject to Presidential approval* [Emphasis added.].[32]

The opinion of this court stated that a thorough search of the statute did not support the Board's position of discretion as to when the CAB was to exercise its jurisdiction, but because of the diplomatic policy reasoning given by the Board, the court had to support the logic of this position.

It is obvious that the jurisdictional problem involved in this area as to which court, if any, had jurisdiction over questions of this nature is clearly one which has not as yet been settled. This particular court did not follow the standard procedure of the judiciary, to first determine its power to decide a particular matter; it instead made the issue moot by affirming the case without regard to such issue.[33]

The validity of the court's position is questionable. It appeared that the court, by not deciding the jurisdictional question, had taken this

---

[31] *Id.* at 353. The court also stated at 352:

> The question immediately before us is whether the *Waterman* principle [*Chicago and Southern Airlines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), in which the Supreme Court held that, by virtue of Section 1006(a) of the Federal Aviation Act, the Courts have no power to review on the merits an order of the Civil Aeronautics Board involving foreign air transportation which had been approved by the President] governs a situation in which a petitioner claims that awards made by the Board, with Presidential approval, exceed the Board's *power* under the act. Stated in another way, does *Waterman* govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act? We think not, for in the latter situation there is nothing legally to submit to the President. Clearly *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensable predicate without which there is nothing Presidential action can approve.

[32] *Id.* at 351-52.

[33] It is a well established principle that courts may avoid jurisdictional issues in appropriate circumstances by a decision on the merits. Brooks v. Dewar, 313 U.S. 354, 359-60 (1941); *Ex parte* Bakelite Corp., 279 U.S. 438, 448 (1929); Carrington v. Civil Aeronautics Board, 337 F.2d 913 (4th Cir. 1964).

opportunity to give its support to the Board's position. If the court had directly held that it did have jurisdiction,[34] perhaps the circuit would have been less willing to condone this agency's actions which appeared to be beyond its administrative authority as set out by statute. The reasoning behind the courts action is difficult to follow; the same results could have been reached by simply dismissing the cause for lack of jurisdiction. It is noteworthy that current legislation is before Congress which is directly related to this problem area; its passage could considerably clarify the answers to the issues raised in this proceeding.[35]

Joseph W. Sheehan

[34] It would seem that by deciding the issue without regard to the jurisdictional question the court has presumed its power to decide the matter.

[35] S. 3566, 90th Cong., 2d Sess. (1968).

Government Liability — Type Certification — Admiralty Jurisdiction

On 4 October 1960, an Electra turbo-prop aircraft[1] encountered a flock of birds on take-off from Boston's Logan Airport. An ingestion of birds caused engine failure, and the plane crashed into the waters of Boston Harbor. Plaintiffs[2] sued the airline, the aircraft and engine manufacturers, and the United States. In the action against the United States the plaintiffs alleged, *inter alia*, that the government was negligent in its type certification of the Electra plane when it knew the aircraft was capable of ingesting birds on take-off with a resulting loss of power. *Held*: The proximate cause of the accident was the negligence of the federal government in certification of the plane. The United States was liable under the Suits in Admiralty Act.[3] *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967).

Government liability arising out of crashes of civilian aircraft is relatively new to aviation law, and is far from being a well-developed field. A major hurdle in any suit against the federal government is obtaining the requisite consent to sue the sovereign.[4] Once consent is established there still remains the complex problem of determining the standards to be used in finding liability. Most actions against the government have been under the Federal Tort Claims Act[5] (hereinafter FTCA) with the air traffic control (hereinafter ATC) cases being most numerous. A strong line of cases indicate that the federal government will be held liable under the FTCA for the negligence of control tower operators. The leading case in this area was the 1955 case of *Eastern Air Lines v. Union Trust Co.*[6] in which it was decided that the functions of control tower operators in informing two planes of each other's activity and in issuing clearance to land were operational in nature and, therefore, did not fall under the "discretionary" exception[7] of the FTCA. Since that decision, the number of

[1] A Lockheed Electra L-188, turbo-prop aircraft.

[2] A vast amount of other litigation has arisen from this one accident in which fifty-nine passengers and three crewmen were killed with ten persons surviving. For litigation other than that to be discussed in this note, *see*: Van Dusen v. Barrack, 376 U.S. 612 (1963); Scott v. Eastern Air Lines, Inc., 10 Av. Cas. 17,979 (3d Cir. 1968); Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir. 1963).

[3] The action was originally brought under the Federal Tort Claims Act, 28 U.S.C. § 1346, but judgment was rendered under the Suits in Admiralty Act, 41 Stat. 425, 46 U.S.C. § 742 (1964). The significance of this is discussed later in this note.

[4] For a good overall survey of governmental liability for torts, *see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE Chapt. 25 (1958).

[5] Federal Tort Claims Act, 28 U.S.C. § 1346.

[6] Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd mem. sub nom.*, United States v. Union Trust Co., 350 U.S. 907 (1956).

[7] 28 U.S.C. § 2680(a) provides:

> The provisions of this chapter and § 1346(b) for this title shall not apply to—
> (a) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

actions against the government has increased greatly. In some cases it has been determined that there was either no negligence on the part of the government or that the negligence was not the proximate cause of the accident.[8] However, there has been a significant number of cases in which negligence has been found.[9] In *Cattaro v. Northwest Air Lines, Inc.*,[10] the court found the government had undertaken a duty to keep aircraft apart "whether it had to or not and in so doing became chargable with the negligence of its employees. . . ."[11] This was the equivalent of finding the government liable under a "good samaritan" doctrine.[12] This approach was taken in *Ingham v. Eastern Air Lines*[13] where the government was found liable for the negligent reporting of weather conditions. It was pointed out that the public relied heavily on the knowledge that the government was constantly overseeing the carrier's operations in order to promote safety. The court reasoned:

> It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently.[14]

In *Furumizo v. United States*[15] the government was also held liable for negligent acts of ATC personnel when a small plane was caught in the wake turbulence of a larger one after receiving clearance coupled with a cautionary warning from the control tower operator. The significant aspect of *Furumizo* was that the government employees had followed the prescribed procedure for the situation, but, as the district court noted:

> There was simply *a slavish purported following of the "book", with no attempt to exercise judgment*, which under the circumstances, it was the duty and within the power of the controller to exercise, and which would and could have avoided the accident [Emphasis added.].[16]

In a similar fact situation, a district court reached a contrary conclusion in *Hartz v. United States*;[17] that court held that following of the *Air*

---

[8] *See, e.g.*, Franklin v. United States, 342 F.2d 581 (7th Cir.), *cert. denied*, 382 U.S. 844 (1965), no duty to warn small aircraft of helicopter on field where wake turbulence problems unknown at time; United States v. Schultetus, 277 F.2d 322 (5th Cir. 1956); De Vere v. True-Flite, Inc., 268 F. Supp. 226 (E.D.N.C. 1967); McClenny v. United Air Lines, Inc., 178 F. Supp. 862 (W.D. Mo. 1959); Smerdon v. United States, 135 F. Supp. 929 (D. Mass. 1955); Georger v. United States, 2 Av. Cas. 14,859 (D. Va. 1949).

[9] *See, e.g.*, in addition to cases to be cited below: Maryland v. United States, 257 F. Supp. 768 (D.D.C. 1966); Hochrein v. United States, 238 F. Supp. 317 (E.D. Pa. 1965); Annot. 86 A.L.R.2d 384 (1962).

[10] Cattaro v. Northwest Air Lines, Inc., 236 F. Supp. 889 (E.D. Va. 1964).

[11] *Id.* at 895.

[12] A good statement of this doctrine as it applies to the federal government is found in Fair v. United States, 234 F.2d 288, 294 (5th Cir. 1956) where it is stated: "if the government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care; that obligation of due care extends to the public and the individuals who compose it . . . ."; *Accord* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[13] Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied*, 88 U.S. 295 (1967). For analysis of this case as decided by the district court *see* 33 J. AIR L. & COM. 185 (1967).

[14] *Id.* at 236.

[15] Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd* 381 F.2d 965 (9th Cir. 1967).

[16] *Id.*

[17] Hartz v. United States, 249 F. Supp. 119 (N.D. Ga. 1965), *rev'd*, 387 F.2d 870 (5th Cir. 1968).

Traffic Control Procedures Manual by ATC personnel was a sufficient exercise of care and no duty beyond that existed. This decision was reversed,[18] however, by the Court of Appeals, which held that a warning given to the pilot was not in compliance with the *Manual* and was not sufficient to caution the pilot.

A general survey of cases reveals that there has been an increasing number of suits filed against the government and an apparent trend toward findings of liability. Much of the concern of the courts to date has been whether or not the particular situation before them fell within the exceptions to liability under FTCA.[19]

Rapp presents a provocative departure from the FTCA cases. What was said in *Rapp* concerning consent to be sued and choice of forum is to be found in the court's "Conclusions of Law" where it stated:

> 1) This Court has jurisdiction of the case against the government under the Suits in Admiralty Act. 46 U.S.C.A. 741-752. *Weinstein v. Eastern Air Lines, Inc.*, 3 Cir., 316 F. 2d 758 (1963).[20]

This conclusion is interesting from two standpoints: First, the cited case of *Weinstein v. Eastern Air Lines, Inc.*[21] dealt only with Eastern's negligence and explicitly stated that it was not concerned with any question of government liability; and second, the Suits in Admiralty Act cited has not previously been used to find government liability in aviation law.

Weinstein arose out of the same 1960 bird ingestion crash as *Rapp*. It held that a tort action *against the carrier* for wrongful death arising from the accident was cognizable in admiralty via a state wrongful death statute, even though the negligent acts occurred on land.[22] Thus, what the *Rapp* court evidently meant when it cited *Weinstein* was that the action against the government was cognizable in admiralty as a maritime tort.

Jurisdiction, however, must be based on more than a mere maritime tort. The consent of the government to be sued must first be established.[23] Actions arising from aviation accidents have been brought in admiralty against the United States under the Death on the High Seas Act,[24] but have always been coupled with the foundation of the FTCA.[25] The Suits in Admiralty Act approach to obtaining consent to sue the federal government is without precedent in aviation law. The applicable provision of the Suits in Admiralty Act is Section 742:

> In cases where if such vessel were privately owned or operated, or if such

---

[18] *Id.*

[19] 28 U.S.C. § 2680 (1964).

[20] Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673, 680 (E.D. Pa. 1967). The court did include Section 742 of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. §§ 741-52 (1964) in its appendix to the decision. It should also be noted that the suit was originally brought under the FTCA.

[21] Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[22] For a more complete discussion of admiralty jurisdiction *see* Moore and Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. & COM. 3 (1967).

[23] For a discussion *see*: 1 A. KNAUTH, BENEDICT ON ADMIRALTY § 187 (6th ed. 1940).

[24] 41 Stat. 537-38, 46 U.S.C. §§ 761-68 (1964).

[25] *See, e.g.*, Blumenthal v. United States, 306 F.2d 16 (3d Cir. 1962); Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal. 1956).

> cargo were privately owned or possessed, *or if a private person or property were involved*, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title [Emphasis added to denote 1960 amendment.].[26]

Prior to the 1960 amendment it is clear that no action under the Suits in Admiralty Act could be brought against the government unless the complaint arose from operation of maritime vessels or dealt with maritime cargo.[27] The official title of Chapter 20 in the United States Code is "Suits in Admiralty By or Against Vessels or Cargoes of the United States."[28] The 1960 amendment, however, apparently opened a new door by adding the phrase "or if a private person or property were involved."[29] A few non-aviation cases support this conclusion,[30] but there is also some authority that the Act is still somewhat limited in scope.[31] The House and Senate reports[32] on the amendment indicate no real interest on the part of Congress to expand the Act beyond its former bounds. The stated purpose of the amendment was to prevent misfilings between admiralty and civil courts.[33] Thus, a literal reading of Section 742, as amended, indicates that the court had jurisdiction and that consent to sue the federal sovereign was contained therein, but the legislative history and a recent application of the Act[34] do not clearly support this approach.

The differences between FTCA and admiralty jurisdiction are few, but significant. In admiralty there may be no prohibition against punitive damages, depending on local law, whereas under the FTCA[35] there is such a prohibition. Certain defenses, as seen in the ATC cases, are available to the government under the FTCA, the most common being the "discretionary function" exception of Section 2680(a). Such exceptions to liability do not exist under the Suits in Admiralty Act. Finally it should be noted that where an admiralty remedy is available under the Suits in Admiralty Act, the FTCA is not available.[36] The result of using the admiralty procedure can be an assessment of liability easier to arrive at

---

[26] 41 Stat. 425, 46 U.S.C. § 742 (1964).

[27] *See, e.g.*, Angfortygsaktiebolaget Tirfing v. United States, 70 Ct. Cl. 251 (1930).

[28] 41 Stat. 425, 46 U.S.C. §§ 741-52 (1964).

[29] It must be noted that there is a close similarity in the words used in the Suits in Admiralty Act, § 742 and the words in the FTCA, § 2674.

[30] *See, e.g.*, Beeler v. United States, 338 F.2d 687 (3d Cir. 1964), *considered on remand*: 256 F. Supp. 771, 776 (W.D. Pa.1966): "It is clear that prior to the 1960 amendment to the Suits in Admiralty Act, no proceeding such as this could have been maintained in admiralty against the United States." Chelette v. United States, 228 F. Supp. 653 (E.D. Tex. 1964).

[31] In Amell v. United States, 384 U.S. 158 (1966), a claim was brought by government employees against the United States for wages, and it was held that the Suits in Admiralty Act was not applicable.

[32] S. REP. No. 1894, 86th Cong., 2d Sess. (1960); H. REP. No. 523, 86th Cong., 1st Sess. (1959), both to accompany H.R. 5396.

[33] "Its purpose is to prevent the repetition of misfilings in the future. It restates in brief and simple language the now existing exclusive jurisdiction conferred on the district courts, both on their admiralty and law sides, over cases against the United States which could be sued on in admiralty if private vessels, persons, or property were involved." H. REP. No. 1894, 86th Cong., 2d Sess. (1960).

[34] Amell v. United States, 384 U.S. 158 (1966).

[35] Federal Tort Claims Act, 28 U.S.C. § 2674 (1964).

[36] 28 U.S.C. § 2680(d) states that any claim for which a remedy is provided under 41 Stat. 425, 46 U.S.C. §§ 741-52 (1964), cannot be brought under the FTCA.

and with different monetary awards than under the FTCA.

Beyond the consent-to-be-sued issue lies the more complex question of the nature of the "duty" owed in various situations by the federal government, and in particular, what constitutes actionable negligence in certification of aircraft.

In 1958, the Lockheed 188 Electra in *Rapp* was issued a "type" certificate[37] which was necessary before the airplane could be used in air commerce. At the time of the particular Electra's certification the CAB was "empowered" and had the "duty":

> (a) To promote safety of flight in air commerce by prescribing and revising from time to time—
>
> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft engines, and propellers as may be required in the interest of safety;[38]

The Administrator of Civil Aeronautics was authorized to issue type certificates if he found:

> That such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation and meets the minimum standards, rules, and regulations prescribed by the Board . . . .[39]

On the basis of the above statutory provisions, the court found the government liable for issuing a type certificate for the 188 Electra when it knew that the aircraft's engines were capable of bird ingestion which would result in a loss of power.[40]

Government liability arising from the approval and certification of aircraft is unprecedented in aviation law. Prior to *Rapp*, *Gibbs v. United States*[41] was the only reported case in which a plaintiff sought to recover from the United States for the negligent certification of an airplane. In *Gibbs*, the plaintiff brought an action against both the pilot and the United States under the FTCA. The court found that the government was negligent in approving, certifying, and licensing the plane, but that such negligence was not the proximate cause of the accident and concluded that the United States was not liable.[42] But *Gibbs* does not indicate whether the

[37] Such a certificate is issued for a general type of aircraft. Also, each particular aircraft is certified and receives an airworthiness certificate. An aircraft must conform to a type certificate to obtain an airworthiness certificate. 52 Stat. 1009, 1012, 49 U.S.C. §§ 553, 560 (1938), *now* Federal Aviation Act of 1958, §§ 603, 610; 72 Stat. 776, 780, 49 U.S.C. §§ 1423, 1430 (1964). In the words of one noted authority: "It [certification] is the *sine qua non*, without which a manufacturer may not sell and an operator may not use an airplane," Kreindler, *Admiralty and Effect of Government Approval and Certification of Aircraft*, 3 B. C. IND. & COM. L. REV. 367, 370 (1961-62). The court in *Rapp*, did not really distinguish between the two types of certification, but did speak in terms of type certification.

[38] 52 Stat. 1007, 49 U.S.C. § 551 (1938), *now* Federal Aviation Act of 1958, § 601, 72 Stat. 775, 49 U.S.C. § 1421 (1964).

[39] 52 Stat. 1009, 49 U.S.C. § 553 (1938), *now* Federal Aviation Act of 1958, § 610, 72 Stat. 780, 49 U.S.C. § 1423.

[40] 264 F. Supp. at 680. Prior to the certification of the plane, certain tests were conducted by the government. In these tests four-pound chickens were injected into the engines. It was found that the ingestion of such birds in the engine could cause a loss of power as well as internally damage the engine, but nothing was done about the loss of power effect. *Id.* at 678.

[41] Gibbs v. United States, 251 F. Supp. 391 (E.D. Tenn. 1965).

[42] *Id.* The pilot's negligence was found to be the cause and he was held liable.

government could have been liable even if it were negligent.

The position has been taken that if there is negligent inspection and approval of aircraft proximately causing an accident, the United States could be held liable.[43] In a 1961 article, Lee S. Kreindler stated:

> If the responsibility of the government is predominant, then, presumably, in litigation arising from these accidents, the government might be held just as liable, or more liable, than the manufacturers.[44]

In discussing liability, the *Rapp* court spoke in terms of "duty":

> The C.A.B. . . . had the *duty* to promote safety of flight in commerce. . . . The Board had to exercise and perform its powers and *duties* in such a manner as would tend to reduce or eliminate the possibility of accidents in air transportation. 49 U.S.C. §551 [Emphasis added.].[45]

On this basis the court found that the conduct of the CAB[46] could be judged and liability assessed, but it made no real comment on *how* such liability arose from the *statutory provision* which enumerated the duties and powers of the CAB. Charging a governmental agency with a function is not equivalent to rendering the government liable for defective performance of that function, but establishing a basis for "duty" in governmental negligence cases is often difficult and the courts have used varying approaches.

In non-aviation cases, there is authority that an assumption of responsibility by the federal government can give rise to a duty to exercise due care in fulfilling that function. This seems to hold true whether or not the activity in question could be assumed by private interests. In *Indian Towing Co. v. United States*,[47] the government tried to argue that the maintenance of a lighthouse service was "uniquely governmental" and therefore that an action under FTCA could not be maintained when the Coast Guard was negligent in performing that function. The basis of this argument was that Section 2674 of the FTCA used the words "shall be liable in the same manner and to the same extent as a private individual under like circumstances." Mr. Justice Frankfurter rejected the "uniquely governmental" approach urged by the government and found liability under FTCA stating:

> [O]nce it [Coast Guard] exercised its discretion to operate a light . . . and *engendered reliance* on the guidance afforded by the light, it was obligated to use due care to make certain the light was kept in good working order . . . [Emphasis added.].[48]

The *Indian Towing* decision presents a parallel to the situation involved in *Rapp*. First, both activities—lighthouse maintenance and aircraft certifi-

---

[43] L. KREINDLER, AVIATION ACCIDENT LAW, § 5.09 (Supp. 1966).

[44] *Supra* note 37. It should be noted that this article deals mainly with liability of aircraft manufacturers and carriers.

[45] 264 F. Supp. at 680.

[46] At the time of the Electra's certification in *Rapp* the CAB did the certification. After 1958, this became a function of the FAA.

[47] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[48] *Id.* at 69. A strong dissent agreed with the government.

cation—were clearly governmental functions. Second, the statutory provisions in both cases allowed recovery from the government where recovery would be had from a private individual under the same facts.[49] Indeed the *Indian Towing* decision seems to support liability for negligent certification of aircraft by finding of a "duty" arising from an assumed responsibility.

The fact that a statutory provision indicates that a government agency is to inspect and approve a particular item or project does not mean that failure to do so will render the federal government liable for any injuries that may follow. A good illustration of this is seen in the case of *Mahler v. United States*[50] where it was held that the inspection provisions of a statute dealing with federally-aided highways were not intended to create a duty running to the plaintiff who was injured when his automobile struck a boulder on a highway constructed with federal aid.

There has been virtually no litigation at the federal level dealing with liabilities arising from duties imposed by statutory law. Attempts to draw parallels between aircraft certification and other areas where government inspection and approval[51] are involved become most difficult because of the almost complete lack of case law on the subject. In the few federal cases which have been reported, the plaintiffs have not fared too well.[52] Furthermore, little is available concerning liabilities of state governments. New York has produced the greatest number of cases, probably because of its broad statutory waiver of sovereign immunity.[53] In New York, failure properly to inspect or adequately to warn after an inspection can give rise to liability;[54] however, there must be a statute prescribing a duty before any liability can be found.[55]

The most cogent reason for supporting a finding of liability for negligence by the government agency in certifying aircraft is that the public relies heavily on aircraft being safe, and on the fact that the government does inspect and control civil aviation to promote such safety. This type of argument is at the heart of the *Ingham, Cattaro* and *Furumizo* ATC cases and the *Indian Towing* decision. This is not finding liability for breach

---

[49] *Supra* note 29.

[50] Mahler v. United States, 306 F.2d 713 (3d Cir. 1962), *cert. denied*, 371 U.S. 923 (1963).

[51] Discussion here of responsibility of inspectors and certifiers other than government employees has been omitted here because little is said in these cases that is not covered elsewhere in this note. For background, *see* Bollin v. Elevator Construction & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949); Evans v. Otis Elevator Co., 168 A.2d 573 (S.C. Pa. 1961); Annot. 6 A.L.R.2d 284 (1949).

[52] United States v. Neustadt, 366 U.S. 696 (1960); Mahler v. United States, 306 F.2d 713 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962); Anglo-American & Overseas Corp. v. United States, 144 F. Supp. 635 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 236 (2d Cir. 1957).

[53] Laws of New York, 1939, Ch. 860-§8 of the Court of Claims Act:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of the law as applied to actions in the supreme court against individuals or corporations . . . .

For general discussion of the New York system of claims against the state *see* McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHNS 1 (1965); Herzog, *Liability of the State of New York for 'Purely Governmental Functions,'* 10 SYRACUSE L. REV. 30 (1958).

[54] Metildi v. State of New York, 177 Misc. 179, 30 N.Y.S.2d 171 (Ct. Cl. N.Y. 1941).

[55] *Id.*; Heiston v. State of New York, 189 N.Y.S.2d 225 (Ct. Cl. N.Y. 1959).

of a statutory duty, but rather because there was an undertaking, an assumption of responsibility, which when pursued must be without negligence. The government's function in licensing and certifying aircraft fits well into such a category and in this area the responsibility is magnified by public reliance.

If other instances arise where the government is held liable for certification activities, Congress could enact legislation limiting or exempting the United States from liability in this field. This would indeed clarify a field where the finding of liability is questionable and perhaps unreasonably expensive to the United States government.

Rapp presents a departure from prior aviation cases concerning government liability and could influence litigation in other areas where certification or inspection is involved. Further use of the Suits in Admiralty Act could encourage future claims against the government and perhaps even a Congressional reaction. It can also be conjectured that other courts may be hesitant to extend government liability as far as did this decision. In the meantime, the case stands as indicative of a recent trend toward government liability for negligence in its regulation of aviation.

Newell D. Krogmann

RECENT DECISIONS

Wrongful Death — Res Judicata — Multiplicity of Litigation

An action was brought in New York based upon wrongful death arising from the crash of an American Airlines airliner at Covington, Kentucky, on 8 November 1965. Numerous proceedings against American arose from this disaster; one especially pertinent to this action was *Creasy v. American Airlines, Inc.*,[1] a Texas federal district court decision which held for the plaintiff, applying the Kentucky wrongful death statute as well as Kentucky's substantive law. A motion was made in the present proceedings that summary judgment be granted in favor of the plaintiff on the issue of liability. Plaintiff's contention was that by the prior *Creasy* decision all triable issues of fact concerning the defendant's alleged negligence had been adjudicated, and that by reason of *res judicata* this prior determination of the issues should be accepted as a matter of law. *Held, motion denied*: There is no authority to support plaintiff's contention that a prior decision, concerning the same defendant, should be favorably applied collaterally in a different forum, to a non-party, so as to render *res judicata* the issue of liability decided in a foreign forum. *Hart v. American Airlines, Inc.*, 10 Av. Cas. 17,894 (N. Y. Sup. Ct. 1968).

To avoid a multiplicity of litigation, plaintiff contended that the judgment on the liability issue given by the court in *Creasy* should have been applied in this case, since the liability question was the same as that presented in this litigation. Defendant had ample opportunity to present his arguments on this issue, with the aid of the same counsel in both cases.

Plaintiff's theory was not accepted; in federal diversity of citizenship proceedings the question of estoppel is determined by the law of the state where the federal district court is located.[2] Under Texas law, where *Creasy* was decided, there is mutuality of estoppel; it is applicable only to those parties who are directly or by privity related to the suit. The mere fact that the plaintiff shares a common misfortune arising from the same circumstances as those in *Creasy* would not be enough to establish mutuality under Texas law.[3] Nor were there such contacts with the state of New York as to give rise to a conflict between the law of Texas and that of New York; the deceased as well as his surviving dependents were non-domiciliaries of the state of New York. The full faith and credit provision of the United States Constitution requires that the Texas judgment be

[1] This case is currently on appeal, and thus far is unreported.

[2] New York v. Halvey, 330 U.S. 610 (1947); Morris v. Jones, 329 U.S. 545 (1947); Kloeb v. Armour & Co., 311 U.S. 199 (1940); Boulter v. Comm. Standard Ins. Co., 175 F.2d 763 (9th Cir. 1949).

[3] Kirby Lumber Corp. v. So. Lumber Co., 196 S.W.2d 387 (Tex. Sup. Ct. 1946); Groberry v. Dallas, 250 S.W.2d 387 (Tex. Civ. App. 1952).

accepted, and any attempt to modify this judgment by importing another state's collateral estoppel law can not be accepted and will not render *res judicata* the issue of liability.

On the facts of the present action, the court refused to accept plaintiff's theory that *Babcock v. Jackson*[4] and *De Witt v. Hall*[5] are a basis upon which collateral estoppel from another jurisdiction can be supported. The claimed avoidance of multiple litigation on a particular issue is not by itself enough to overrule the present New York authority,[6] nor does it appear to be the final solution to a very complex problem.[7]

J.W.S.

Railway Labor Act — System Board of Adjustment — Review of Decision

Two flight attendants employed by Eastern Air Lines were discharged because of alleged mishandling of the liquor service (under-reporting the number of drinks sold and over-reporting the number of complimentary drinks served) on a particular flight. The employees in question filed grievances with the hearing officer under the procedure established by the collective bargaining agreement then in force between their union and Eastern. The hearing officer upheld the discharge and an appeal was had to the applicable System Board of Adjustment, which also upheld the discharge. Suit was then filed in federal district court. Plaintiffs sought review of the System Board decision, reinstatement, back pay, and punitive damages. The district court dismissed the action. On appeal, plaintiffs claimed, *inter alia*, that they were denied constitutional and "industrial" due process because (1) the hearing officer should not have conducted his own investigation of the case, and (2) the System Board should not have held a *de novo* hearing, but should have limited itself to a review of the record made before the hearing officer. *Held, dismissal affirmed*: A decision of a System Board of Adjustment is final and binding on the courts and is not subject to review on the merits in the absence of a finding of a denial of due process. Further, the remedy for mistreatment before a hearing officer is in the hands of the System Board, and not in the courts, even if the mistreatment constituted a denial of due process. *Rosen v. Eastern Air Lines, Inc.*, 400 F.2d 462 (5th Cir. 1968).

In setting forth the general rule of non-reviewability of System Board awards, the Fifth Circuit quoted from a recent Supreme Court decision, which stated:

> This Court time and again has emphasized and re-emphasized that Congress intended minor grievances . . . to be decided finally by the . . . Adjustment

[4] 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).
[5] 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).
[6] *Id.*
[7] Long v. Pan American World Airways, 16 N.Y.2d 337, 266 N.Y.S.2d 513, 213 N.E.2d 796 (1965).

> Board. . . . Consequently, the merits . . . as decided by the Adjustment Board must be accepted by the District Court.[1]

However, the court recognized the authority of a district court to review a System Board's award where some act of the Board has resulted in a denial of fundamental or "industrial" due process. The test as to whether the authority exists is whether the denial of due process constituted sufficient grounds to allow a collateral attack on the jurisdiction of the System Board. Here, the court found no such denial of due process which would warrant review.

As to plaintiffs' claim of unfair treatment before the hearing officer, the court held that federal courts are also without authority to review a denial of due process which occurs prior to the action of the System Boards. The remedy for such mistreatment is in the hands of the System Board, and not in the federal courts.

D.L.B.

Federal Aviation Act — Security Interest Priorities — Mechanics Liens

An aircraft, leased from one Smith, was taken by the lessee to Eastern Airmotive Corp. (hereinafter Eastern) for repairs. Fourteen months later, Eastern gave notice to Smith of its intention to sell the aircraft at a public sale to satisfy its claims for repairs and storage. The basis for this action was a claimed possessory aircraft mechanics lien which had arisen under New Jersey statutory law. This lien, however, was not recorded by Eastern. The bank which had financed the aircraft for Smith held a federally recorded security interest in the aircraft and intervened, challenging the priority of Eastern's possessory mechanics lien. *Held*: A federally recorded security interest in an aircraft has priority over an unrecorded aircraft mechanics lien, which under state law would take priority over a perfected security interest. *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (1968).

Under New Jersey law, an aircraft mechanics lien is a possessory lien which has express priority over a perfected security interest.[1] The federal regulatory scheme, on the other hand, provides for central recording of all interests in aircraft.[2] Eastern tried to avoid the impact of the federal recording requirements by arguing that its interest in the aircraft did not constitute a "conveyance" or "other instrument executed for security

---

[1] Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257, 259 (1965).

[1] New Jersey Stat. Annot., art. 2A:44-2, provides in part: "The lien shall be superior to all other liens, except liens for taxes, and the operator of such aircraft shall be deemed the agent of any owner, mortgagee, conditional vendor or other lienor thereof for the creation of such superior lien." *See also*, New Jersey Stat. Annot., art. 12A:9-310.

[2] Federal Aviation Act of 1958, § 502, 72 Stat. 772, *as amended*, 73 Stat. 180, 78 Stat. 236, 49 U.S.C. § 1403 (1964).

purposes" as provided for in the *Federal Aviation Act*, which provides in part:

> The Administrator shall establish and maintain a system for the recording of each of the following:
> (1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States,
> (2) Any . . . other instrument executed for security purposes. . . .[3]

The court, however, rejected this approach and found that Eastern's interest fell within the federal law and, since the interest had not been recorded as it could have been, the perfected security interest would prevail.

As the court pointed out, all reported federal and state cases that have considered the question have held that the federal system gives validly recorded security interests priority over unrecorded mechanics liens, even where under the state law a different result would obtain. The directive of *Smith* and other cases dealing with similar security interest questions involving aircraft[4] is clear—federal recordation is an absolute requisite.

N.D.K.

[3] *Id.*

[4] *See, e.g.*, In re Veteran's Air Express Co., Inc., 76 F. Supp. 684 (D.N.J. 1948); American Aviation, Inc. v. Aviation Insurance Managers, Inc., 244 Ark. 829, 427 S.W.2d 544 (1968); Continental Radio Co. v. Continental Bank and Trust Co., 369 S.W.2d 359 (Tex. Civ. App. 1963).