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Terrorism and the Aviation Industry: Insights from the 1929 Warsaw Convention

Speedy Rice

Shana Fitzpatrick

TERRORISM AND THE AVIATION INDUSTRY: INSIGHTS FROM THE 1929 WARSAW CONVENTION

SPEEDY RICE*
SHANA FITZPATRICK**

I. INTRODUCTION

The terrorist acts of September 11, 2001, (September 11) crippled the domestic and international airline industry and its insurance carriers.[1] Were it not for government intervention in the United States and abroad, air carriers would have been forced to shut down due to the insurance and financial crisis.[2] The insurance industry cancelled policies, and then drastically revised its offerings, exclusions, policy limits, and charges.[3] Because of this and the stated intent of the terrorist organizations to destroy or cripple the economies of the West, the aviation industry now faces a risk level not seen since its earliest days.[4]

Since its conception, aviation has established itself as one of the most essential means of transportation and has expanded the global financial market. The first strides were made in communication and mail carriage, but as aviation progressed, people and shipments of goods could travel greater distances in relatively short periods of time. In the late 1920s and early 1930s, the industry grew at an exponential rate.[5] In a mere five years, passenger carriage increased over 6000%, from 8679 passengers in 1927 to 522,345 passengers in 1931.[6] Airplane manufacturing increased as commercial demand soared. In 1930, there were roughly 800 local "air-

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* Professor, Gonzaga University School of Law; B.A., Furman University, South Carolina, 1976; J.D., California Western School of Law, summa cum laude, 1986. Speedy Rice would like to thank Sasha of Podgorica, Montenegro, for his assistance in finding resources in his beautiful country.

** Research Assistant, Gonzaga University School of Law, J.D. expected 2003; B.A., University of Alaska, cum laude, 1999.

1. Andrew Ross Sorkin & Simon Romero, *A Day of Terror: The Insurers; Reinsurance Companies Wait to Sort Out Cost of Damages*, N.Y. TIMES, Sept. 12, 2001, at C6 [hereinafter *A Day of Terror*].

2. *Id.*; Keith L. Alexander & Frank Swoboda, *Deal Near on Federal Help for Airlines; $15 Billion in Grants, Loan Guarantees,* WASH. POST, Sept. 21, 2001, at A3.

3. Mark Pilling, *Industry Seeks Mutual Insurance Deal*, AIRLINE BUSINESS, Mar. 1, 2002, at 11.

4. U.S. Congress, White House Agree on $15 Billion Airline Aid Bill (Sept. 21, 2001), *available at* http://www.aviationnow.com.

5. George W. Ball, *Compulsory Airplane Insurance*, 4 J. AIR L. 52, 53 (1933).

6. *Id.*

taxi" services that utilized over 1000 airports around the country.[7] Individuals and cargo could travel long distances across numerous states and borders. There were as many as thirty-eight companies responsible for interstate air carriage of passengers, and approximately 8000 airplanes supported the aviation industry in the early part of the twentieth century.[8]

As the aviation industry grew, the concern over liability risks intensified. In 1927, twelve individuals per hundred thousand passengers died in airplane-related accidents, and five years later, the figure dropped slightly to five deaths per hundred thousand passengers.[9] The relatively high number of fatalities concerned industry experts. Accidents were not uncommon, and the rise in air traffic litigation reflected this trend.[10] In 1931, Colonial Western Airways received an unfavorable $89,000 judgment when one of its planes crashed and killed fourteen passengers.[11] In a similar suit, Northwest Airways was ordered to pay $60,000 when one if its planes crashed and injured five people.[12] Curtis-Wright Flying Service was also found liable for $25,000 in damages for the death of a single passenger in an airplane-related accident.[13] These examples demonstrate that juries were awarding substantial damages to injured passengers.

While the airline industry was showing signs of becoming financially independent, there were still concerns from industry leaders that liability risks would halt or substantially slow its growth.[14] A string of well-timed accidents, or a single catastrophic event with numerous causalities, was not unrealistic.[15] The resulting damage awards could quite possibly have bankrupted vulnerable airlines and negatively impacted the new aeronautical field. Furthermore, the standard of care in liability litigation was unclear, and varied by country and jurisdiction.[16] Shareholders, investors, insurance companies, and governments were apprehensive about financially backing the industry because of its unclear liability and regulatory

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7. Fredrick B. Rentschler, *Important of Uniform Aeronautic Regulatory Laws of the Aircraft Industry*, 2 AIR L. REV. 222, 223 (1931).

8. *Id.*

9. *Id.*; Ball, *supra* note 5, at 53.

10. *See* Ball, *supra* note 5, at 53 (discussing the death rate per airline passenger between 1927 and 1931).

11. *Id.* at 52 (citing Hagymasi v. Colonial W. Airways, 1931 U.S. Av. R. 7 (1931)).

12. *Id.* (citing Foot v. Northwest Airways, 1931 U.S. Av. R. 66 (1931)).

13. *Id.* at 53 (citing Williamson v. Curtis-Wright Flying Serv., 51 S.W.2d 1047, 1049 (Tex. Civ. App. 1932)).

14. G.L. Lloyd, *Legal and Other Problems Confronting Aviation Insurance Underwriters*, 1 J. AIR L. 543, 543 (1930).

15. Ball, *supra* note 5, at 53-54.

16. Fred D. Fagg, Jr., *A Survey of State Aeronautical Legislation*, 1 J. AIR L. 452, 452-53 (1930).

schemes.[17] These concerns echoed internationally.[18] Commercial leaders and aviation law experts theorized on possible liability schemes that would balance the needs of the infant industry with concerns for consumer safety and corporate responsibility.[19]

As a result of these concerns, liability limits were proposed and adopted in the Warsaw Convention of 1929.[20] The international agreement reflected the Warsaw Convention's two goals: (1) to create uniform and predictable regulations governing interstate air carriage that promote compensation, and (2) to limit the large-scale liability threatening the young industry.[21] Under this convention, air carriers were able to limit their liability unless they could prove all necessary and reasonable precautions had been taken.[22] However, injured plaintiffs could obtain unlimited recoveries if they could prove an accident was the result of an air carrier's willful misconduct.[23]

The economic growth of the twentieth century was inextricably intertwined with the development of aviation.[24] This began after World War I, when the rise in popularity of both private and commercial airline travel started.[25] In the seventy years since the Warsaw Convention was ratified, international liability laws and their limits have been severely modified with good justification.[26] Sentiments and the financial strength of the industry changed, and the liability limits imposed by the Warsaw Convention were seen as unfairly deferential to the airline industry.[27] Beginning in The Hague in 1955 and ending in Montreal in 1999, liability limits underwent significant changes, and were finally all but eliminated.[28]

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17. John R. Bullock, Jr., Note, *Aviation—Liability of Owners of Airplanes to Passengers*, 1 AIR L. REV. 407, 407-08 (1930).

18. Andreas F. Lowenfeld & Allan I. Mendelson, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967).

19. *Id.* at 499-501.

20. Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 22, 49 Stat. 3000, 3019 (1934) [hereinafter *Warsaw Convention*].

21. Domangue v. E. Airlines, Inc., 722 F.2d 256, 261 (5th Cir. 1984).

22. *Warsaw Convention, supra* note 20, art. 20.

23. *Id.* art. 25.

24. *See* Bullock, *supra* note 17, at 407 (stating that "aviation is destined to have a profound effect on the commercial life of the [United States]").

25. Andre Kaftal, *Liability and Insurance—The Relation of Air Carrier and Passenger*, 5 AIR L. REV. 157, 157 (1932).

26. Pablo Mendes DeLeon & Werner Eyskens, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66 J. AIR L. & COM. 1155, 1156-59 (2001).

27. *Id.*

28. Tamara A. Marshall, *The Warsaw Convention: A Cat with Nine Lives Walks the Plank One More Time*, 22 N. ILL. U. L. REV. 337, 339-41 (2002).

On September 11, the terrorist acts were domestic in nature and would not have been subject to liability limitations even under the 1929 Warsaw Convention.[29] However, the domestic and international effect on the airline industry was equivalent to the worst fears of the promoters of the Warsaw Convention—a series of high-profile air crashes that crippled the industry.[30] It quickly became clear that without government intervention and immediate assistance, including some type of a liability shield, most airlines would not have the foundation to navigate through the months following the attacks.[31] The federal government quickly passed aid packages that included air carrier liability limits.[32] Air carrier liability limits were not a new concept, but have been around since the fledgling stages of the aviation industry.

II. AIR CARRIER LIABILITY IN THE EARLY AVIATION INDUSTRY

Air carrier liability prior to the Warsaw Convention and other similar conventions varied greatly in the United States and around the world.[33] There were no guidelines to assist courts in assigning liability.[34] In addition, the nature of the industry itself precluded a common law tort scheme directly on point.[35] There were comparable liability schemes in the maritime and railroad industries, but the aviation field was a completely new horizon.[36] The potential liability of air carriers was readily apparent, and governments were acutely aware of it.[37] Liability risks deterred investors and opened carriers to possible bankruptcy.[38] On the other hand, a recovery scheme was needed for injured international passengers.

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29. *See Warsaw Convention, supra* note 20, art. 1 (providing that the Convention applies to international transportation by aircrafts).

30. *See* Lowenfeld & Mendelson, *supra* note 18, at 499 (stating that the Warsaw Convention was created to "enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident").

31. *A Day of Terror, supra* note 1, at C6.

32. 49 U.S.C. § 40101 (2000 & Supp. 2002).

33. William K. Coblentz, *Limitation of Liability for Aircraft*, 330 INS. L. J. 649, 649-52 (1950).

34. *See id.* at 651 (stating that the status of liability for aircrafts was uncertain).

35. Henry Grady Gatlin, Jr., Note, *Tort Liability in Aircraft Accidents*, 4 VAND. L. REV. 857, 859-60 (1951).

36. Arnold W. Knauth, *Limitations on Aircraft Owner's Liability*, 3 AIR L. REV. 135, 135 (1932).

37. Kaftal, *supra* note 25, at 160.

38. *See id.* at 159 (noting that aviation's early financial instability, which was caused by unusually high liability risks, impaired the industry's ability to attract capital).

Limitations on liability were adopted to achieve these goals.[39] With liability limits, injured parties were ensured a recovery while the industry was insulated from outrageous damage awards.[40]

A. PROPOSED APPROACHES TO ASSIGN LIABILITY IN AVIATION ACCIDENTS

Without international guidelines or common law tort theory, state laws governing aviation accidents involved notions of strict liability and negligence.[41] The continued development of the aviation industry greatly affected the progression of liability laws. Early notions of strict liability were slowly replaced with negligence theories.[42] Simultaneously, the legislatures and the courts adopted creative systems of relief.[43] Compulsory insurance, liability limits, and res ipsa loquitur were the most viable proposals.[44] Eventually, liability limits gained international support and were adopted domestically.[45]

1. Strict Liability

Initial recovery schemes imposed strict liability upon air carriers for injury to cargo, passengers, individuals on the ground, and structures.[46] The early application of strict liability reflected aviation's "ultra-hazardous" nature.[47] Air carriers were strictly liable for injuries caused by aircrafts under their possession or control regardless of the care exercised to prevent injuries.[48] Injuries and property damage were not foreign to the evolving aviation industry because air transportation was seen as relatively dangerous and accidents were not that uncommon.[49] The frequency and gravi-

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39. N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 360-61, 384 (1873); Powell v. Union Pac. R.R. Co., 164 S.W. 628, 641 (Mo. 1914); Coleman v. Pa. R.R. Co., 89 A. 87, 90 (Pa. 1913); Davis v. Chi., Milwaukee & St. Paul Ry. Co., 67 N.W. 16, 20 (Wis. 1896).

40. LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 5 (1988).

41. Gatlin, *supra* note 35, at 863. Strict liability is "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." BLACK'S LAW DICTIONARY 926 (7th ed. 1999). It is also called absolute liability. *Id.*

42. *See generally* RESTATEMENT OF TORTS § 520 (1938); RESTATEMENT (SECOND) OF TORTS § 520A (1977).

43. *See* Ball, *supra* note 5, at 56-73 (discussing different approaches taken by courts and statutes to airline liability).

44. *Id.* at 66-72.

45. *See* 49 U.S.C. § 40105 (2000).

46. Gatlin, *supra* note 35, at 860-63.

47. RESTATEMENT OF TORTS § 520 (1938).

48. *Id.*

49. Gatlin, *supra* note 35, at 861.

ty of accidents was too great a liability risk for society to manage.[50] Instead, social policy, and eventually legal policy, dictated that the industry carry the burden for injuries caused by these accidents.[51] Strict liability also created incentives for the aviation industry to build safer and more economic modes of transportation.[52] Holding the carriers responsible stimulated research and development, which benefited both consumers and producers.[53]

However, a distinction was quickly made between ground damages and injuries sustained while taking off, landing, or in flight.[54] The ultra-hazardous nature of the aviation industry used to justify strict liability for injuries sustained from an airplane-related cause was highly debated after its characterization in the Restatement of Torts.[55] Courts shied away from the use of strict liability in cases of passenger injury.[56] Instead, strict liability was limited to suits alleging ground damage.[57]

Safety greatly improved with the introduction of the Douglas DC-3 and subsequent aircrafts.[58] Air carriage became more dependable and accidents were significantly reduced.[59] However, in respect to ground damage, the courts continued to place the risk of liability on the industry.[60] Therefore, the participants in the flight assumed some liability risk, but extraneous third parties on the ground were still shielded.[61] Those in possession and control were in the best position to mitigate the risk, and therefore, bore the

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50. *See supra* text accompanying notes 9-10.

51. RESTATEMENT OF TORTS § 520 cmt. c. Financially, individual carriers were in a better position to pool their assets and provide recovery than individual parties. *Id.*

52. *See* William M. Allen, *Limitations of Liability to Passengers by Air Carriers*, 2 J. AIR. L. 325, 327-33 (1931) (stating liability limits allow carriers to be irresponsible and decrease the desire to avoid accidents).

53. *Id.*

54. *See* J. Wolterbeek Muller, *The C.I.T.E.J.A. and Liability Toward Third Persons on the Surface*, 4 J. AIR L. 235, 235-36 (1933) (noting that at a meeting of the International Technology Committee of Aerial Legal Experts, injuries to passengers and injuries to third persons on the ground were discussed as mutually exclusive).

55. 41 A.L.I. PROC. 465-74 (1964); 42 A.L.I. PROC. 331-58 (1965).

56. Lincoln H. Cha, *The Air Carrier's Liability to Passengers in Anglo-American and French Law*, 7 AIR L. REV. 154, 160 (1936) (citing Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. R. 205 (1931)).

57. RESTATEMENT (SECOND) OF TORTS § 520A note (1977).

58. The DC-3's safety record was better than that of most airplanes, primarily because of its great structural strength and efficient single-engine performance. Smithsonian National Air and Space Museum, *Douglas DC-3*, *available at* http://www.nasm.si.edu/nasm/aero/aircraft/douglas_dc3.htm (last visited January 31, 2003).

59. *See* Edward C. Sweeny, *Is Special Aviation Liability Legislation Essential?*, 19 J. Air L. 166, 169 (1952) (espousing that one out of six planes operating in 1939 was involved in some type of aviation accident).

60. RESTATEMENT (SECOND) OF TORTS § 520A note.

61. *See id.*

significant burden.[62] While strict liability was still a practical solution for ground damage, negligence theories gained support for litigation involving passengers and cargo.[63]

2. Negligence

Individuals or entities act negligently if their conduct falls below the proscribed standard of care.[64] Therefore, a negligent party is liable for the injuries it causes to another.[65] To establish a prima facie case, the plaintiff must show that the defendant had a duty, the defendant breached the duty, and the breach was the proximate cause of the injuries sustained.[66] The plaintiff maintains the burden to establish the defendant's liability throughout the litigation.[67]

The defendant's duty depends on the variable standard of care adopted in tort cases.[68] The standard of care can be determined in a myriad of ways. The legislature can define a particular standard by which an actor's conduct is measured, or the courts can employ the reasonable person standard.[69] The standard is flexible and depends on the totality of the circumstances.[70] For instance, the weather, available equipment, technology, and known risks all affect whether an actor's conduct is reasonable in light of the surrounding circumstances.[71] In the past, weather and technology have played significant roles in determining the appropriate standard of care for an air carrier in a given situation.[72] In today's political climate, known risks may play the same role as an unforeseeable outside occurrence and may relieve a carrier of liability.[73] Therefore, when determining whether an air

62. *Id.* § 520A cmt. c.

63. Cha, *supra* note 56, at 160.

64. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

65. *See id.*

66. *Id.*

67. *Id.* § 433B.

68. *Id.* § 285.

69. *Id.* Defendants are said to act reasonably if their conduct conforms to that of a person acting reasonably under the same or similar circumstances. *Id.* § 283.

70. *Id.* § 283 cmt. c.

71. *See id.* (stating that whether one's conduct is negligent depends on "the circumstances under which he must act").

72. *See* Gatlin, *supra* note 35, at 863-64 (noting the flexibility of a negligence standard and that a determination as to reasonableness must be in the context of the same or similar circumstances).

73. *See* RESTATEMENT (SECOND) OF TORTS §§ 289-290 (1965) (noting an air carrier has a duty to prevent injury to passengers and third parties from risks the carrier knows or should have known about, but a highly organized terrorist attacks may be undetectable and unpreventable, limiting a plaintiff's ability to establish a prima facie showing).

carrier's conduct was reasonable, one has to evaluate the known risks and the carrier's subsequent reaction to them.

The application of common law negligence to the aviation industry was not without its flaws.[74] The plaintiff had to overcome substantial evidentiary obstacles to establish a prima facie case.[75] Due to the catastrophic nature of aviation accidents, the burden of proof was difficult to overcome.[76] The large-scale destruction involved in an airplane crash obliterates any direct or circumstantial evidence of the carrier's culpability.[77] What physical evidence remains would be arduous and expensive for the plaintiff to investigate and catalog.[78] The plaintiff would have to rely on the individual carrier's investigation and subsequent governmental findings.[79] Beyond the large-scale destruction of evidence and the expense of gathering what remained, the plaintiff would also be disadvantaged by the carrier's control of the accident scene.[80] All these issues were magnified in international air crashes. Together these considerations became considerable stumbling blocks, and required some type of remediation. This type of remediation came in the form of res ipsa loquitur.[81]

3. *Res Ipsa Loquitur*

The principle of res ipsa loquitur originated as an evidentiary rule and evolved into another means by which to assign liability.[82] Applying res ipsa loquitur allows the judge or jury to infer negligence merely by the occurrence of an event.[83] In aviation accident litigation, res ipsa loquitur effectively shifts the plaintiff's burden to the defendant.[84] As a result, the plaintiff does not have to establish a prima facie case of negligence.[85]

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74. *See* Coblentz, *supra* note 33, at 651-52 (stating negligence theories were difficult for plaintiffs to prove due to the condition of the wreckage, lack of witnesses, destruction of physical evidence, inability to recreate the scene, and the carrier's control of the accident scene).

75. Gatlin, *supra* note 35, at 868-69.

76. *Id.* at 867.

77. Coblentz, *supra* note 33, at 650.

78. *Id.*

79. *Id.*

80. *Id.*

81. Res ipsa loquitur "provid[es] that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish the prima facie case." BLACK'S LAW DICTIONARY 1311 (7th ed. 1999).

82. Cha, *supra* note 56, at 175-83.

83. RESTATEMENT (SECOND) OF TORTS § 328D (1965).

84. *Id.* cmt. a.

85. Cha, *supra* note 56, at 174-75. When applying res ipsa loquitur, the defendant must overcome a rebuttable presumption of negligence created by the fact that the accident occurred. *Id.*

Instead, the air carrier must overcome the presumption of negligence with compelling evidence that it acted reasonably.[86] This rule is only applied in a particular set of circumstances that support certain inferences.[87] The accident must not ordinarily occur without negligent conduct on the part of the actor, and the actor must have exclusive control of the instrumentality that caused the injury.[88] The plaintiff must be unable to establish negligence, and the defendant must be in a superior position to discern the cause of the injury.[89]

Res ipsa loquitur caused significant changes in the aviation industry. Early on, aviation's "ultra-hazardous" nature justified assigning carriers strict liability.[90] However, developments in technology and design reduced the inherent dangers of air transport.[91] The newfound safety and dependability standards in the aviation industry warranted inferences regarding a defendant's negligent conduct.[92] A particular set of facts surrounding an air disaster may lead to the inference that the accident would not have happened but for the defendant's negligence. For example, in *Haasman v. Pacific Alaska Air Express*,[93] a plane flying in good conditions disappeared.[94] Without the wreckage, the plaintiffs were never able to gather physical evidence and ascertain whether the defendant's role in the accident was reasonable or negligent.[95] These types of evidentiary problems were remedied by shifting the plaintiff's responsibility to establish the prima facie case to the defendant.

Evidentiary remedies eventually gave way to unique procedural remedies in aviation accident cases.[96] Liability risks greatly affected the laws governing the assignment of liability and the standard of care expected in the aviation industry.[97] A unique form of the principle res ipsa loquitur

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86. *Id.* at 177.

87. *Id.* at 174-75. Res ipsa loquitur only applies in situations that warrant the inference of negligence or situations which presumably would not have occurred but for negligent conduct. *Id.*

88. RESTATEMENT (SECOND) OF TORTS § 328D.

89. *Id.* cmt. c.

90. RESTATEMENT OF TORTS § 520 cmt. b (1938).

91. *See* Howard Osterhout, *The Doctrine of Res Ipsa Loquitur as Applied to Aviation*, 2 AIR L. REV. 9, 10 (1931) (noting that the safety and stability of the aviation industry increased greatly after World War I, and did not warrant the application of strict liability, which allowed for the use of negligence principles such as res ipsa loquitur).

92. *See id.* at 23-24 (noting that most aviation accidents were caused by pilot error, which allowed for a presumption of pilot negligence).

93. 100 F. Supp. 1 (D. Alaska 1951).

94. *Haasman*, 100 F. Supp. at 2.

95. *Id.*

96. RESTATEMENT (SECOND) OF TORTS § 328D cmt. h (1965).

97. *See generally* Ball, *supra* note 5 (stating the heavy influence of liability risks was intertwined with the changing face of liability); *see also* Cha, *supra* note 56, at 175.

evolved and created a "special responsibility" that carriers owed to passengers.[98] A distinctive procedural presumption against the carrier was created, and unless the carrier could establish that it acted reasonably, liability was assigned.[99] The carrier's burden could only be overcome by showing that the injury was caused by a circumstance beyond its control or knowledge.[100] This shift in the burden of proof allowed for a recovery where it was otherwise difficult to prove. A presumption of liability ensured a recovery similar to the application of strict liability in aviation's most dangerous days.[101] While the risk to the public was minimized, the industry's stability was still in the hands of the courts.[102] As a result, frequent and large damage awards slowed industry growth and development.[103]

Liability limits clearly insulated the aviation industry against unusually large settlements.[104] However, unreasonably low limits were too deferential to the airline industry.[105] Courts began to pattern liability after res ipsa loquitur principles, but balanced the divergent interests with liability limits.[106] Passengers would be ensured a recovery unless air carriers could overcome the heavy burden of establishing that they were not negligent, and an atmosphere conducive to aviation growth and development was possible by limiting recovery.[107] Without oppressive damage awards, assets could be used to further technology and not to mitigate liability risks.

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98. RESTATEMENT (SECOND) OF TORTS § 328D.

99. *See* Osterhout, *supra* note 91, at 15 (stating the defendant may point to the plaintiff's or another third party's negligent conduct and its own reasonable conduct to defeat the presumption of negligence).

100. Haasman v. Pac. Alaska Air Express, 100 F. Supp. 1, 3 (D. Alaska 1951).

101. *See supra* Part II.A.1.

102. Ball, *supra* note 5, at 52-53 (quoting Hagymasi v. Colonial W. Airways, 1931 U.S. Av. R. 73 (1931); Foot v. Northwest Airways, 1931 U.S. Av. R. 66 (1931); Williamson v. Curtis-Wright Flying Serv., 1932 U.S. Av. R. 133 (1932)).

103. *Id.* at 52.

104. *See Warsaw Convention, supra* note 20, art. 22 (stating that pursuant to the original draft convention, injured passengers could only receive 125,000 francs).

105. *See* Daniel Karlin, *Warsaw, Hague, The 88th Congress and Limited Damages in International Air Crashes*, 12 DEPAUL L. REV. 59, 64-65 (1962) (stating the financial instability of the aviation industry was exaggerated to the detriment of the passengers and the benefit of the carriers).

106. *See* N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 376-77 (1873); Powell v. Union Pac. R.R. Co., 164 S.W. 628, 640-43 (Mo. 1914); Coleman v. Pa. R.R. Co., 89 A. 87, 90-92 (Pa. 1913); Davis v. Chi., Milwaukee & St. Paul Ry. Co., 67 N.W. 16, 20 (Wis. 1896) (recognizing that public policy would not allow air carriers to escape liability completely, the courts tried to provide the customers with an avenue for recovery and protect the industry from high liability risks).

107. *Lockwood*, 84 U.S. (17 Wall.) at 376-77; *Powell*, 164 S.W. at 640-43; *Coleman*, 89 A. at 90-92; *Davis*, 67 N.W. at 20.

Based on equity and public policy, the courts upheld reasonable liability limits when coupled with principles of res ipsa loquitur.[108]

4. Compulsory Insurance

Compulsory insurance was also earmarked as a solution to the economic frailty of the airline industry.[109] After a party was assigned liability, compulsory insurance, or a similar remedial scheme, enabled the liable party to pay.[110] One author stated compulsory insurance allowed the airline industry to substitute insurance for liability.[111] There were several approaches to compulsory insurance and who should be liable for aviation accidents.[112] There were concerns that third party landowners were not sufficiently participating in the air carriage to warrant responsibility.[113] If passengers were responsible for their own coverage, notions of public policy came into question.[114] To an extent, compulsory insurance allowed the industry to contract away its liability.[115] This contracting away of duties appeared unreasonable, and therefore, unenforceable.[116] Lastly, if the industry bore the entire burden without some type of liability limitation, insurance premiums threatened to cripple it.[117] There was some agreement that if a comprehensive insurance plan was realized, numerous parties would have to participate.[118] In the end, passengers and common carriers most likely bore the financial burden to provide mandatory insurance coverage.

Compulsory insurance had several shortcomings. First, some thought insuring carriers would promote carelessness.[119] If carriers knew insurance providers were available to pick up the check, they could promote an unsafe

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108. *Lockwood*, 84 U.S. (17 Wall.) at 376-77; *Powell*, 164 S.W. at 640-43; *Coleman*, 89 A. at 90-92; *Davis*, 67 N.W. at 20.

109. *See* Ball, *supra* note 5, at 66-67 (noting that if strict liability was imposed on air carriers, compulsory insurance must be available to help pay the costs of remediation).

110. *Id.*

111. *Id.* at 67.

112. *See id.* at 68-72 (noting one approach was a flat fee for all passengers and another required passengers to purchase their insurance with the cost included in the ticket fare).

113. *Id.* at 74.

114. *See id.* (noting there were concerns compulsory insurance purchased by the passengers would promote air carrier recklessness, thus insurance companies would choose not to be involved in a costly premium game because insurance rates would merely rise, creating new problems).

115. *Id.*

116. Anderson v. Erie R.R. Co., 119 N.E. 557, 558 (N.Y. 1918). The court rejected the carrier's attempt to have each passenger contract for liability individually. *Id.*

117. Ball, *supra* note 5, at 74.

118. *See id.* at 69-70 (discussing the possibility that parties may contract for liability limitations, including carriers, third parties, and passengers).

119. *Id.* at 74.

and irresponsible attitude.[120] Further, compulsory insurance was not a viable solution absent liability limits.[121] Without limits, carriers would face the same large-scale liability, and insurance companies would demand substantial premiums.[122] While the industry would be insulated to some degree, the premiums could be equally burdensome.[123] Eventually, premiums would reach unmanageable levels and buckle either the providers or the insureds. Most importantly, insurance would have had to be compulsory across the board through either uniform state laws or federal statutes.[124]

Many of these concerns proved timeless.[125] Unusually high liability risks create financial burdens on dangerous industries.[126] Aviation accidents will always be catastrophic because of the number of casualties involved. Mandating insurance for any industry with high liability risks requires a well-organized regulatory scheme.

B. THE USE OF LIABILITY LIMITS TO MITIGATE RISKS

After much debate, liability limits were settled on internationally to resolve liability issues.[127] Liability limits proved to be the most reliable means to ensure a fair and equitable recovery without bankrupting the air carriers.[128] Limitations on liability supported notions of fairness and justice. Air carriers were afforded some guarantees in pending aviation accidents, but were not given free reign.[129] The carriers benefited from the

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120. *Id.*

121. *See id.* (noting insurance premiums would merely escalate if excessive damage awards were allowed).

122. *Id.*

123. *See id.*

124. Taking into account an aircraft's ability to cross multiple state lines, a uniform system governing compulsory insurance would need to be established. Coblentz, *supra* note 33, at 652-53.

125. *See generally* Osterhout, *supra* note 91. While aviation was still evolving, the high number of damages suits threatened its existence, and courts were repeatedly faced with the dilemma of balancing recovery for individuals with the stability of aviation. *Id.* at 14-17. It was important to resolve the concerns and apply a uniform recovery theory. *Id.* at 28.

126. *See* Lloyd, *supra* note 14, at 553 (concluding that without aviation accident insurance, the newly spawned aviation industry would collapse under high liability risks).

127. Coblentz, *supra* note 33, at 650-53.

128. Ball, *supra* note 5, at 74.

129. *See* N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 376-77 (1873); Powell v. Union Pac. R.R. Co., 164 S.W. 628, 640-43 (Mo. 1914); Coleman v. Pa. R.R. Co., 89 A. 87, 90-92 (Pa. 1913); Davis v. Chi., Milwaukee & St. Paul Ry. Co., 67 N.W. 16, 20 (Wis. 1896) (noting public policy would not allow air carriers to escape liability completely, but would provide the customers with an avenue for recovery and protect the industry from high liability risks).

limitations, and society benefited from the interesting procedural flip.[130] Overall, the burden of proof placed upon the carriers justifiably mitigated the need for large damage awards.[131] Social policy supported liability limits in favor of a more equitable remedy.[132]

From its beginning, the aviation industry has played an integral part in expanding global industrialization. The effect of air transportation on modern societies is immeasurable. Goods can now be traded over long distances, people can meet in the far corners of the world, and businesses can transcend borders. Aviation's positive effects on commerce and culture were worth protecting in its early, fragile stages of development. Air carriage is one of the foundations of today's economy and financial viability. Other influential transportation industries were afforded similar protections.[133]

At their inception, liability limits protected the industry without being too deferential to carriers.[134] Legislators believed limits afforded adequate protection while ensuring an equitable recovery.[135] A plaintiff's disadvantage in a simple negligence case against major airlines was mitigated with the use of liability limits.[136] Limits enabled many parties to come to the table and provide an equitable solution to proof problems unique to aviation accident cases.[137] Liability limits created value and incentives for air carriers.[138] Intra-industry agreements reflected the willingness to bear the shifted burden of proof so long as liability limits

130. *See* RESTATEMENT (SECOND) OF TORTS § 328D (1965) (noting ordinarily the plaintiff must offer proof of negligence, but in cases where res ipsa loquitur applied, the defendant must overcome the presumptive burden of negligence).

131. *See* Cha, *supra* note 56, at 175-83 (noting that with the implementation of res ipsa loquitur, plaintiffs were able to recover without a costly showing of negligence, and in return, their damage awards were reduced).

132. *See* Ball, *supra* note 5, at 56 (stating that because of the public's interest in the continued viability of the aviation industry, strict liability should not be enforced even though aviation may have been seen as a hazardous endeavor).

133. *See* Lloyd, *supra* note 14, at 543-47 (tracing the historical developments of maritime transport industries, as well as automobiles, and comparing the liability risks to the new aviation industry).

134. *See* Bullock, *supra* note 17, at 414-15 (stressing the aviation industry's inability to grow without liability limitations, and therefore, it was not unfair deferentialism, but necessity, that dictated the implementation of limits).

135. Commerce Dept., Aeronautical Division Bulletin No. 18 (Sept. 1, 1929).

136. *See Warsaw Convention*, *supra* note 20, at arts. 20, 22 (creating a presumption of air carrier liability, but limiting the amount of damages available).

137. *See* Gatlin, *supra* note 35, at 867-71 (stating that applying negligence to aviation cases made it difficult for the plaintiffs to make the prima facie showing in order to bring a cause of action, and therefore, limited their influence and ability to negotiate with large corporations).

138. *See id.* at 873-74 (noting a presumption of negligence, or the Convention's contractual presumption of negligence, created incentives that brought the carriers to the table in good faith).

were imposed.[139] The courts upheld the limits if they were reasonable.[140] Many in the early twentieth century regarded limits as the most viable solution to the intricacies of aviation accident litigation.[141]

However, there was not a consensus regarding the utility of liability limits. Some believed the limits were unfairly deferential to the aviation industry and, as a result, did not achieve goals fundamental to the judicial system.[142] These critics thought that allowing an industry to contract away costly damages created a dangerous precedent.[143] They claimed liability limits employed the judicial system to protect the private industry,[144] allowed the air carriers to act irresponsibly,[145] and favored the aviation industry over the general public.[146] Further, these critics thought the aviation industry was strong enough to absorb costs just like any other viable industry.[147] They felt legislated liability limits created predictable recoveries that would destroy the preventative aspects in awarding damages because large judgments promoted industry responsibility and dependability.[148]

Critics of liability limits continually noted the air of impropriety and the potential for abuse as main concerns.[149] Unfortunately, there was not a viable alternative. Compulsory insurance was dismissed as ultimately impracticable.[150] The international community favored liability limits after years of intense debate,[151] and discussions about adopting them began very early in aviation history.[152] The International Convention of Air Navigation

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139. *See* GOLDHIRSCH, *supra* note 40, at 5 (stating the aviation industry looked favorably on the presumption of liability coupled with liability limitations).

140. N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 373 (1873); Allen, *supra* note 52, at 328.

141. Bullock, *supra* note 17, at 414-15; John C. Cooper, Jr., *Rules of Aircraft Liability in the Proposed Federal Merchant Airship Act*, 2 AIR L. REV. 327, 347 (1931); Arnold W. Knauth, *Limitation of Aircraft Owners' Liability*, 3 AIR. L. REV. 135, 140-41 (1932).

142. Allen, *supra* note 52, at 327-28.

143. *See* Karlin, *supra* note 105, at 59 (noting that limitations would make the passenger responsible for the carrier's negligence).

144. *Id.*

145. Allen, *supra* note 52, at 328-29.

146. *Id.*

147. *See* Karlin, *supra* note 105, at 65 (quoting H. Drion for the proposition that the United States aviation industry was second to none and did not need limited liability in order to survive).

148. *See* Allen, *supra* note 52, at 329 (discussing the possibility that carriers would act irresponsibly if absolved of liability and determining that large judgments created an incentive to act with care and caution).

149. *Id.;* Karlin, *supra* note 105, at 59.

150. *See supra* Part II.A.4. To date, insurance is not mandated, but economic realities drive carriers to provide for adequate resources in the event of a catastrophic accident.

151. Muller, *supra* note 54, at 236.

152. *See id.* at 235 (noting that the International Convention of Air Navigation, CINA, met in October of 1919 to discuss air carrier liability and briefly discussed compulsory insurance).

(CINA) was held in October of 1919 and marked the beginning of the decade-long debate concerning liability limits, which peaked with the Warsaw Convention of 1929.[153] Subsequent amendments followed, but they merely modified the Warsaw limitation amounts.[154]

III. THE WARSAW CONVENTION OF 1929

The Warsaw Convention of 1929 (Convention) applied to common carriers engaged in the international transport of passengers and goods between signatory states.[155] The Convention created a statutory scheme by which plaintiffs were almost ensured a recovery.[156] Under the Convention, air carriers were held to a procedural presumption similar to strict liability, but were afforded favorable recovery guidelines.[157] To obtain a limited recovery, injured plaintiffs did not bear the heavy burden of establishing negligence.[158] Instead, plaintiffs only had to show willful misconduct if they sought damages that exceeded the limitation guidelines.[159]

The Convention outlined rules governing passenger and luggage ticket information, the rights of all contracting parties, and, most notably, notice of imposed liability limits.[160] The Convention also created the presumption of negligence on behalf of the international common carrier.[161] Article 20 stated, "The carrier is not liable if it proves it took all the necessary measures to avoid the damage or that it was impossible for him to take such measures as to avoid the damage."[162] The Convention heightened the common law tort, negligence standard.[163] Air carriers were not merely required to act with ordinary care, but were required to act with the most

153. *Id.* at 235-36.

154. Protocol To Amend The Convention for the Unification of Certain Rules Relating to International Carriage By Air, *signed at* Warsaw (1929), *as amended by* The Protocol Done at the Hague (1955) (on file with author) [hereinafter *The Hague*].

155. *See Warsaw Convention*, *supra* note 20, art. 1.

156. *See id.* art. 20 (providing that carriers are presumed responsible unless they can prove they took all the necessary steps reasonably available to avoid an accident).

157. *See id.* art. 22 (stating that the liability limit was limited to 125,000 francs per injured passenger and 250 francs for each kilogram of goods or luggage).

158. *See id.* art. 17 (presuming carrier liability unless the carrier could demonstrate it took all necessary steps to protect against injury).

159. *See* Ian D. Midgley, Note, *You'll Love the Way We Fly--But if You Don't, Too Bad!: Does* Zicherman v. Korean Air Lines *Offer Hope of Subjecting Reckless International Airlines to Punitive Damages?*, 48 CASE W. RES. 73, 75 (1997) (citing *Warsaw Convention*, *supra* note 20, art. 25).

160. *See generally Warsaw Convention*, *supra* note 20.

161. *Id.* art. 17.

162. *Id.* art. 20.

163. *See id.* (stating the carriers, acting as defendants, have the burden to overcome a presumption of negligence).

reasonable care.[164] The carriers could only escape liability if they proved that they acted in the most reasonable manner exercising all necessary precautions to ensure no injuries.[165] With the ratification of the Warsaw Convention, steps were finally taken to unify international rules on air carriage.[166] Many saw the Convention as a triumph for the aviation industry and essential to its success.[167] However, the debate on liability limits intensified.[168]

IV. LIABILITY LIMITS TODAY

The assignment of aviation accident liability to passengers and third parties on the ground has changed significantly through the years. Originally, aviation's ultra-hazardous nature created strict liability for air carriers.[169] As aircraft and engineering progressed, casualties and equipment damage decreased. The need to hold the airlines strictly liable subsided, and something more than mere negligence emerged.[170] Air carriers were charged to take all the precautions necessary to ensure a safe flight with no injuries.[171] Variations of res ipsa loquitur solved difficult evidentiary and procedural difficulties.[172] The development, and subsequent withdrawal, of liability limits was the most important change.[173] Originally created to protect the fledgling industry, liability limits were eventually terminated domestically with voluntary private agreements, but they remain internationally.[174]

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164. *See id.* (noting the carriers must establish that they took all the steps necessary and not merely the reasonable steps available).

165. *Id.*

166. *See generally id.* (stating the Convention was formally termed the "Convention for the Unification of Certain Rules Relating to International Carriage by Air").

167. *See generally* Alexander N. Sack, *International Uniformity of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345 (1933); Kaftal, *supra* note 25 (discussing the evolution of the aviation industry and noting the positive impact of the liability limitations established).

168. *See generally* Allen, *supra* note 52; Karlin, *supra* note 105 (pointing out the negative impacts of the Warsaw Convention, such as carrier irresponsibility, escape of liability, and legislation too deferential to the aviation industry).

169. RESTATEMENT OF TORTS § 520 (1938).

170. RESTATEMENT (SECOND) OF TORTS § 328D cmt. h (1965).

171. *See Warsaw Convention*, *supra* note 20, art. 20.

172. RESTATEMENT (SECOND) OF TORTS § 328D cmt. h.

173. *See Warsaw Convention*, *supra* note 20, art. 22; International Air Law Conference: Legal & Corporate Secretary, Montreal Convention 1999, *available at* http://www.iata.org/legal/dep_subpage.asp?department.html.

174. Muller, *supra* note 54, at 236.

The Warsaw Convention of 1929 was the first international agreement outlining a remedial scheme that limited air carrier liability.[175] Early on, the United States had reservations about the low limits.[176] The Convention was not adopted by the United States until 1934.[177] There was never clear support for liability limits, and the debate continued at The Hague in 1955.[178] Still dissatisfied with the low liability limits, the United States did not ratify the Hague Protocol.[179] Liability limitations were addressed in four subsequent meetings, dubbed the "Montreal Protocols."[180] In 1999, the International Air Transportation Association (IATA) and International Civil Aviation Organization negotiated a private inter-carrier agreement that finally survived United States scrutiny.[181] The air carriers stipulated to a two-fold recovery scheme. Air carriers were strictly liable for damages up to 100,000 Special Drawing Rights (SDRs)[182] or approximately $135,000.[183] However, the individual plaintiffs could recover for the amount of damages without limitation if they claimed the air carrier acted negligently.[184] Therefore, the air carriers retained the burden to establish they did not act negligently, just as stipulated in the Warsaw Convention of 1929, but the need to show malicious intent was removed. As a result, the need for a good insurance underwriter intensified without practical liability limits.[185]

Prior to September 11, domestic and international air carriers generally insured the hull, passengers, third parties, and structures on the ground.[186] International carriers routinely extended their coverage to include war risk

175. *Id.; Warsaw Convention, supra* note 20, arts. 20-22. The first international aviation convention was held on October 13, 1919, and led to the Warsaw Convention in 1929, which was the first convention to adopt an international liability scheme. Muller, *supra* note 54, at 235-36.

176. Warsaw Convention of 1929, art. 22. Originally, liability limits were stipulated at 125,000 francs, or $8300. *Id.*; *The Hague, supra* note 154; J.C. Batra, *Modernization of the Warsaw System – Montreal 1999*, 65 J. AIR L. & COM. 429, 429 (2000).

177. Marshall, *supra* note 28, at 338.

178. Batra, *supra* note 176, at 431.

179. *The Hague, supra* note 154.

180. Batra, *supra* note 176, at 432.

181. *Id.* at 442.

182. Special Drawing Rights were incorporated as "a unit of exchange for the [franc]." *Id.* at 432.

183. *Id.* at 441.

184. *Id.* at 442.

185. *See* Ball, *supra* note 5, at 66 (stating that "insurance is the answer to the . . . problem created by absolute liability").

186. Ruwantissa Abeyratne, *Crisis Management Toward Restoring Confidence in Air Transport—Legal and Commercial Issues*, 67 J. AIR L. & COM. 595, 610 (2002).

protection.[187] Although, in hindsight, the coverage was grossly inadequate, and domestic carriers did not necessarily carry such supplemental plans.[188]

V. TERRORISM AND THE FINANCIAL IMPLICATIONS FOR THE AVIATION INDUSTRY

A. SEPTEMBER 11 AND THE RECENT CRISIS

The strength of the aviation industry is integral to a healthy overall economy.[189] The industry supports numerous sub-industries, such as restaurants, lodges, merchants, and tourism opportunities.[190] Air travel is an immeasurable asset to today's businessperson. Aviation in general has incredible positive effects on the nation's economy and culture. The events of September 11 will have long-lasting effects on the aviation industry and should catalyze a renewed support for liability limitations. The destruction and loss of life as a result of September 11 was immense, and the overall damage exceeded $5 billion.[191] The carriers directly involved in the events surrounding September 11 were seriously impacted, as were peripheral airlines.[192]

Over 3000 individuals lost their lives during the September 11 terrorist attacks.[193] In total, two structures were decimated, and four airliners, American Airlines (American) flights 11 and 77 and United flights 93 and 175, crashed with passengers on board. These numbers do not factor in the countless individuals injured from falling debris and similar hazards. There was also a disastrous effect on the economic health of the country. Immediately following the attacks, all air transports were grounded and airports were closed for four days.[194] The closures were incredibly costly. Not only did the grounding cost air carriers billions, it created a significant ripple effect. The Joint Economic Committee estimated that there was a

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187. *See id.* at 599-610 (stating that insurers cancelled war risk insurance after September 11).

188. Paul Mann, *Congress Worried About Terrorism Insurance Void*, AVIATION WEEK & SPACE TECH., June 3, 2002, at 39, *available at* http://www.avaitionnow.com.

189. H.R. 2891, To Preserve The Continued Viability of The United States Air Transportation System, 107th Cong. 45, 22 (2001) (statement by Ms. Brown of Florida).

190. *Id.*

191. *Hearing on S. 1450 before the United States Senate Committee on Commerce, Science, and Transportation*, 107th Cong. (2001) (testimony of Leo F. Mullin, CEO Delta Air Lines), *available at* http://www.house.gov/transportation/fullchearings/09-19-01/mullin.html [hereinafter Mullin].

192. *Id.*

193. Mary Beth Casper, *Quilt Pieces Together Images of Lives Lost*, Newsday, July 11, 2002, at B2.

194. Mullin, *supra* note 191.

$40 billion to $70 billion economic loss directly attributable to the terrorist activity that took place on September 11.[195] Insurance underwriters paid out billions in claims.[196] Most air carriers were devastated by the low passenger carriage rates directly following September 11. The slow passenger return exacerbated the financial woes of an already depressed industry.[197]

Estimates of laid off workers toppled the hundred thousand mark.[198] Even worse, many workers were terminated without the usual severance packages routinely offered at other times.[199] In an attempt to curb costs and avoid bankruptcy, many carriers minimized the number of payouts from pension funds and severance packages.[200] Some estimates calculated that pension funds were as much as $12 billion in the red for the seven major carriers.[201] Needless to say, many carriers teetered on the edge of viability in the days and months following September 11. Eventually, U.S. Airways and United Airlines (United) filed for bankruptcy because of their performance after September 11.[202] The aviation industry relapsed to its precarious position in the early twentieth century.[203] Once again, uncertainty plagues the future of one of America's most vital industries. The utility of liability limits was once essential to the sustainability of the aviation industry, and in light of today's political climate, may need to be revisited.

B. GOVERNMENTAL REMEDIAL MEASURES

Eleven days after the September 11 attacks, the United States government passed legislation to bolster the viability of the aviation

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195. Mann, *supra* note 188, at 39.

196. Kimberly Johnson, *Airports: Airports Regain Wartime Insurance, At A Higher Price*, AVIATION WEEK'S AIRPORT, Oct. 3, 2001, *available at* http://www.aviationnow.com. American International Group estimated a total payout of $20 billion. *Id.*

197. Jim Ott, *Signs of April Revenue Decline Darken Airline Outlook*, May 6, 2002, AVIATION WEEK & SPACE TECH., *available at* http://aviationnow.com.

198. James R. Asker, *Unions See A 'Slap' To Laid-off Workers*, AVIATION WEEK & SPACE TECH., Oct. 1, 2001, at 40, *available at* http://www.aviationnow.com.

199. *Id.*

200. James Ott, *Pension Plans Suffer From Terrorist Fallout*, AVIATION WEEK & SPACE TECH., June 10, 2002, *available at* http://www.aviationnow.com

201. *Id.*

202. *U.S. Airways Declares Bankruptcy*, L.A. TIMES, Aug. 13, 2002, at A1, *available at* http://www.airsafetyonline.com; Keith L. Alexander & Sara Kehaulani Goo, *Expect a Bad Year, Airlines Tell Senate*, WASH. POST, Jan. 10, 2003, at E1.

203. *See* Kaftal, *supra* note 25, at 157 (noting that in its infancy, the aviation industry was seriously compromised by potentially bankrupting liability created by high death rates, which is similar to today's liability risks created by highly organized terrorist attacks with the potential to kill thousands of people in one incident).

industry.[204] The legislation provided aid on three major fronts. First, it offered relief in the form of federal grants and loan guarantees to qualified carriers.[205] Second, the federal government assumed some liability for damages incurred by third parties on the ground.[206] Finally, the legislation addressed the precarious state of aviation war risk insurance immediately following the attacks.[207] Congress and the White House quickly agreed on the legislation, and termed it the Air Transportation Safety and System Stabilization Act (Act).[208] Many felt the aviation industry could not recover without such federal aid.[209]

The Act provided relief for the aviation industry in the form of $5 billion in grant allowances and another $10 billion in loan guarantees.[210] The federal grants were intended to reimburse carriers for losses directly attributable to the terrorist attacks on September 11.[211] Airport closures and interruptions in flight schedules created significant hardships on all the operating carriers.[212] The federal aid was intended to stabilize the air transportation industry for losses incurred between September 11, 2001, and December 31, 2001.[213]

Loan guarantees, or Federal Credit Instruments, were also approved to bolster the viability of the air transport industry.[214] The Act created an Air Transport Stabilization Board (Board) with the power to approve loan guarantees and extend federal credit.[215] In essence, the guarantees obligate the federal government to pay a pre-arranged percentage of the debt if an approved carrier is unable to fulfill its primary obligation.[216] The Board

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204. Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (Supp. 2002).

205. *See id.* sec. 101 (providing aviation disaster relief).

206. *See id.* sec. 401 (providing a September 11th victims compensation fund).

207. 49 U.S.C. §§ 44302-44303 (Supp. 2002).

208. *See* S. 1450, 107th Cong. (2001) (representing a federal aid package introduced by Mr. Daschle for himself and Mr. Lott); H.R. 2926, 107th Cong. (2001) (representing a federal aid package introduced by House Representative Young from Alaska); President George W. Bush, Jr., Address to The Nation (Nov. 2001), *reprinted in* 2001 U.S.C.C.A.N. D35. The President highlighted the need to "come together to promote stability and keep our airlines flying with direct assistance during this emergency." President George W. Bush, Jr., Address to The Nation (Nov. 2001).

209. *E.g.*, Bush, *supra* note 208.

210. 49 U.S.C. § 40101 sec. 101(a)(1)-(2).

211. *See id.* sec. 101(a)(2) (stating the intent to compensate air carriers for up to $5 billion of losses incurred as a result of the terrorist attacks on September 11).

212. Mullin, *supra* note 191.

213. 49 U.S.C. § 40101 sec. 101.

214. *See id.* sec. 102(b) (authorizing the Air Transportation Stabilization Board to enter into loan agreements with qualified and approved applicants).

215. *Id.* sec. 102.

216. *Id.*

established three minimum requirements for carriers to secure a government-backed loan:

> (1) the borrower is an air carrier for which credit is not reasonably available at the time of transaction; (2) the intended obligation by the borrower is prudently incurred; and (3) such an agreement is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.[217]

While the Board promulgated flexible guidelines, not all carriers that applied were approved, and only America West has been approved to date.[218]

America West was one of the five carriers to request a loan guarantee in the past several months.[219] Reportedly, it lost more than $100 million in the third quarter directly following the four-day airport closures.[220] But, loan guarantees significantly changed its financial outlook, and demonstrated their necessity to ensure a strong financial future for the airlines.[221] In the week following its federal credit instrument approval, America West's stock rose sixty percent.[222]

U.S. Airways and United Airlines also hoped to cash in on the loan guarantees and revitalize their portfolios.[223] U.S. Airways requested a $900 million guarantee on a $1 billion loan, which has been conditionally approved.[224] United requested a $1.8 billion guarantee on a $2 billion loan.[225] The latter application was denied because there was not a "reasonable assurance" the loan would be paid back.[226] This did not bode well for United, which was forced to declare bankruptcy.[227] Any federal loan guarantee that hinges approval on repayment capability could be devastating for a carrier facing unlimited liability. While United's future is

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217. 14 C.F.R. § 1300.10 (2002).

218. David Bond, *United, US Airways Put Loan Guarantees to Test*, AVIATION WEEK & SPACE TECH., July 1, 2002, at 39, *available at* http://www.aviationnow.com.

219. *Id.* The carriers include America West, United Airlines, US Airways, Vanguard Airlines, and Frontier Flying Service. *Id.*

220. Jim Ott, *Expenses Flat, America West Still Dealt A $100 Million Operating Loss*, AVIATION WEEK & SPACE TECH., Oct. 31, 2001, *available at* http://www.aviationnow.com.

221. Steve Lott, *America West Stock Soars Thanks to Loan Guarantees*, AVIATION DAILY, Jan. 3, 2002, *available at* http://www.aviationnow.com.

222. *Id.*

223. *See* Bond, *supra* note 218, at 39 (noting both companies submitted applications to the Air Transportation Stabilization Board).

224. Michelle Maynard, *US Airways to Cut Costs $1.8 Billion a Year*, N.Y. TIMES, Dec. 22, 2002, at 39.

225. Bond, *supra* note 218, at 39.

226. *Id.*

227. *See* sources cited *supra* note 202.

uncertain, it was, at the very least, given reprieve from exorbitant liability to third parties.[228] In a climate with no federal aid, inadequate war risk insurance, and high liability risks, securing loans could be close to impossible.

The liability incurred by United Airlines contributed to its bankruptcy filing, and American Airlines faces mounting debts of bankrupting proportions.[229] There were also fears for airlines not directly tied to the events of September 11.[230] Congress approved aid packages that benefited more than just American Airlines and United Airlines.[231] However, United and American's exposure to large-scale liability agitated an already perilous situation. While the air carrier market crumbled, the carriers directly involved with the hijackings faced additional liability pressures. Surely, the burden would have been too much to bear without government assistance.[232]

The implications for the global economy are clear. Terrorists demonstrated that they could successfully disrupt the United States, or any other nation's, economy by using airplanes in a string of well-planned attacks with high casualties. Aviation's significant effect on world commerce warrants protection against such acts. Immediately following September 11, the federal government assisted United Airlines and American Airlines in compensating victims of the attacks.[233] The September 11th Victims Compensation Fund of 2001 (Fund) allowed injured third parties compensation through a revolving federal fund,[234] and protected the air carriers dangerously exposed to potentially fatal liability.[235] The Fund provided compensation for economic and non-economic losses of individuals present at the World Trade Center, the

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228. 49 U.S.C. 44302(b)(2) (Supp. 2002), *amended by* Pub. L. No. 107-296, 116 Stat. 2135 (2002) (providing that carriers which were victims of the terrorist attacks on September 11 were not liable to third parties on the ground).

229. *See* Johnson, *supra* note 196.

230. H.R. 2891, *To Preserve the Continued Viability of the United States Air Transportation System, and on the Financial Condition of the Airline Industry in the Aftermath of the Events Which Occurred on Tuesday, September 11, 2001, Hearing on H.R. 2891 before the House Comm. On Transportation and Infrastructure,* 107th Cong. (2001) (testimony of Scott C. Gibson, Senior Vice President and Managing Officer, SH&E, Inc.); Mullin, *supra* note 191 (testimony of Leo F. Mullin, Chairman and CEO, Delta Airlines) (testifying about the wide array of repercussions affecting the entire domestic aviation industry).

231. 49 U.S.C. §§ 40101, 44302-44303 (Supp. 2002).

232. Mullin, *supra* note 191. In addition to airport shutdowns and general industry woes, carriers directly involved in the events of September 11, 2001, faced large-scale liability to third persons on the ground. *Id.*

233. 49 U.S.C. § 40101.

234. 49 U.S.C. § 44307 (2000).

235. 49 U.S.C. § 40101. sec. 401.

Pentagon, the Shanksville, Pennsylvania crash site, and passengers or crew aboard any of the four hijacked airplanes.[236] The Special Master in charge of deciding compensatory amounts was directed not to take negligence into account.[237]

The federal government also set explicit liability limits for air carriers.[238] Liability was limited up to the amount of the insurance coverage held by the carrier at the time of the terrorist attacks.[239] While the record is scant, and the legislation was passed hurriedly, one can infer that the limits were established to insulate the carriers from potentially bankrupting liability risks. Permanent liability limitations on a global level would achieve the same goals. The global air transportation industry is particularly vulnerable to liability risks, especially in today's political climate where airplanes are being used as deadly weapons. Liability limitations could save whole nations from economic collapse.

Immediately following September 11, three major insurance carriers repealed their war risk coverage.[240] Most insurance underwriter contracts included clauses allowing underwriters to rescind coverage with seven days notice, or within a comparable period.[241] When coverage was finally renewed, it was reinstated with significantly inflated premiums.[242] Estimates of increases in unpredictable war risk insurance premiums ranged from 300% to 2500%.[243] Congressional findings echoed industry concerns that insurance coverage was critical to economic growth, urban development, the construction and maintenance of public and private housing, and the promotion of United States exports and foreign trade in an increasingly interconnected world.[244] Further, any lack of insurance could

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236. *Id.* sec. 405.

237. *Id.* sec. 405(b)(2).

238. 49 U.S.C. § 44302(b)(2), *amended by* Pub. L. No. 107-296, 116 Stat. 2135 (2002).

239. 49 U.S.C. § 44302.

240. Kerry Lynch, *U.S. Companies Scramble for War Risk Protection*, BUSINESS & COMMERCIAL AVIATION, Sept. 27, 2001, *available at* http://www.aviationnow.com.

241. *Id.*

242. *Id.*

243. *See To Preserve the Continued Viability of the United States Air Transportation System, and on the Financial Condition of the Airline Industry in the Aftermath of the Events Which Occurred on Tuesday, September 11, 2001, Hearing on H.R. 2891 Before the House Comm. on Transportation and Infrastructure*, 107th Cong. (2001) [hereinafter *Hearings*] (noting airline insurance premiums were expected to rise from five cents per passenger to $1.25 per passenger); *see also* Mann, *supra* note 188, at 39 (stating prior to September 11, 2001, $6 million provided $1.5 billion in coverage, compared to after September 11, where premiums of $7.5 million provided $70 million in coverage); Jim Ott, *Regionals Get Price Break From FAA War Risk Formula,* June 18, 2002, *available at http://www.aviationnow.com* (noting that from September 11, 2001, until June 18, 2002, insurance premiums rose 300%).

244. H.R. 3210, 107th Cong. (2001).

seriously undermine the aviation industry's ability to sustain itself in the future. Without immediate governmental action, the aviation industry faced a difficult period of uncertainty that would have surely scared away investors and slowed industry growth.

Fortunately, the Air Transportation Safety and System Stabilization Act addressed this concern. Under the Act, the federal government statutorily agreed to reimburse carriers for insurance premium increases directly following September 11, 2001, for coverage already paid through October 1, 2001.[245] In addition to insulating the industry from reactionary rate increases, Congress alleviated insurance underwriters of liability in excess of $100 million to third parties injured on September 11.[246] Together, these measures were designed to stabilize unpredictably high premiums.[247] After the hijackings and the subsequent attacks on the World Trade Center and the Pentagon, domestic and international carriers sought war risk coverage.[248] War risk coverage is essential to the growth and development of air carriers who wish to ensure their future viability.[249] Without this coverage, air carriers are not insulated from potentially bankrupting damage awards. However, insurance underwriters will never be able to provide affordable coverage without reasonable liability limitations.[250] Because insurance is a critical factor in the overall equation to help resolve the current air crisis,[251] liability limits must be considered.

VI. LIABILITY LIMITS REVISITED

Airlines, as opposed to passengers or third parties, are in the best position to shoulder the risks. Carriers and those engaged in flight are rightfully the parties to assume their respective portion of liability. However, such a liability scheme places the airlines in a precarious position. While they are in the best position to shoulder the burden, no one party can possibly bear the enormous liability risks associated with air

245. 49 U.S.C. § 44302(b)(1) (Supp. 2002).

246. *Id.* § 44303.

247. *See Hearings, supra* note 243 (recognizing extreme insurance premium inflation when considering a stabilization package); *see also* 49 U.S.C. § 44302 (providing carriers reimbursement for insurance cost increases with respect to a premium for coverage ending before October 1, 2002).

248. *See Hearings, supra* note 243.

249. *See* H.R. 3210, 107th Cong. (2001) (listing the Congressional findings and purpose).

250. *See generally Hearings, supra* note 243 (noting there were concerns the aviation industry would be bankrupted by liability, and insurance providers quickly revoked war risk insurance; a presumption can be made that the withdrawal of coverage was due in part to the hefty claims).

251. *See id.* (noting insurance providers are not willing to extend coverage without some type of financial guarantees).

travel in light of recent terrorist events. Once again, airlines are in a vulnerable position that mirrors their troubles more than three-quarters of a century ago.[252] In the early days, technical and equipment shortfalls posed a grave risk to the public.[253] Today, the risk is created by well-planned and intentional catastrophic air disasters. Regardless of the cause, the aviation industry may not be able to shoulder the large liability risks economically.[254]

Recently, enacted federal legislation demonstrated air carrier's vulnerability to high liability risks and the need to once again protect this invaluable industry.[255] The Air Transportation Safety and System Stabilization Act merely re-created liability protections afforded by early international agreements such as the Warsaw Convention.[256] Most notably, the recent legislation achieved the two goals of early liability agreements. First, the governmental regulation ensured that injured parties would be compensated, and second, it protected an industry vulnerable to high liability risks.[257]

The passengers and crew aboard the hijacked airliners, as well as injured third parties on the ground, are able to recover by merely demonstrating their losses in respect to September 11.[258] If a party was compensated through the Victims Compensation Fund, negligence was irrelevant.[259] Just as in early aviation accident cases, the traditional negligence standards of proof heavily burdened the injured parties' ability to establish a prima facie case.[260] The crashes on September 11 completely obliterated the World Trade Center's twin towers and four airlines, and severely damaged the Pentagon. The crash sites in New York City; Shanksville, Pennsylvania; and Washington, D.C., were quickly barricaded. Government and industry investigators retained sole control over the sites. Surely, the injured parties' limited access to the sites created a significant obstacle to recovering evidence. However, if the passengers, crew, and

252. *See supra* note 14 and accompanying text.

253. RESTATEMENT OF TORTS § 520 (1938).

254. *See generally Hearings, supra* note 243 (noting there were concerns the aviation industry would be bankrupted by the liability and airplane groundings directly resulting from the attacks on the World Trade Center and the Pentagon).

255. 49 U.S.C. §§ 40101, 44302-44303 (Supp. 2002).

256. *See Warsaw Convention, supra* note 20, art. 22 (providing that liability was limited to 125,000 francs for passenger injury).

257. GOLDHIRSCH, *supra* note 40, at 5.

258. 49 U.S.C. § 40101.

259. *Id.* sec. 405(c)(3)(B).

260. *See* Coblentz, *supra* note 33, at 652 (stating evidentiary obstacles such as lack of physical evidence and carrier control of the wreckage present significant hardship on the plaintiff trying to establish a prima facie case of negligence).

injured third parties had been unable to recover due to evidentiary problems, an injustice would have occurred. To alleviate this dilemma, the Victims Compensation Fund expressly omitted a negligence standard and ensured a recovery for injured parties.

The Air Transportation Safety and System Stabilization Act also created protections to ensure the longevity and vitality of the aviation industry.[261] Recognizing the incredible positive influence the aviation industry has on the United States economy and global commerce, Congress quickly adopted short-term protection programs. The legislation addressed air carrier liability on two fronts. First, the Victims Compensation Fund directly limited the amount of recovery to the carriers' maximum allowance under their war risk coverage on September 11.[262] Participants in the Fund could not be compensated for losses over the policy limits.[263] Therefore, the carriers directly involved in the hijackings were given a reprieve from unpredictably high damage awards that threatened to destroy their ability to compete in the marketplace. Second, the federal government agreed to compensate third parties who chose not to seek compensation through the Fund.[264] The federal government assumed responsibility for recoveries over and above $100 million.[265] Therefore, regardless of whether injured third parties chose to exercise their rights under the Fund or through legal action, the government effectively insulated the aviation industry from crippling liability awards.

VII. CONCLUSION

Without the necessary government funding and protections in place, Capitol Hill was frantic immediately following September 11. Temporary regulations allowed the aviation industry to escape liability risks too great for any one industry to bear. However, the terrorist threats are not short-term, and more permanent solutions are needed. Air carriers around the globe are in financial disarray from the events that occurred on September 11. The financial crisis in the air transport industry has sent shock waves throughout the entire economy. Over one hundred thousand United States

261. *See* 49 U.S.C. §§ 44101, 44302-44303 (providing loan guarantees, reimbursement for insurance increases, and recovery for third parties on the ground, which helped absorb the bankrupting financial crisis and insulate the aviation industry to ensure its survival).

262. 49 U.S.C. § 40101 sec. 408(a)(1).

263. *Id.*

264. 49 U.S.C. § 40303.

265. 49 U.S.C. § 44303 sec. 201(b).

workers in the aviation industry were laid off.[266] More layoffs are sure to come unless there is an upward trend in the near future. The future of America's aviation industry is plagued with uncertainty. Future financial stability is essential to ensure the aviation industry endures.

Liability limitations offer a predictable recovery scheme that will not deter potential investors. In addition, liability limitations will bring down the price of war risk insurance. Liability limitations may be the solution to ensure the aviation industry's future, while sharing the international risk associated with terrorism. Without limitations, the liability risks are great and will require government patchwork solutions in any future crisis. Additionally, a new Warsaw-type convention will send a clear message to terrorists that legitimate governments will not let terrorist acts destroy an essential element of the world's economies. Without some form of standardized liability limitation that protects the airlines and society, aviation's vulnerable financial outlook, coupled with high liability risks, will surely destroy one of the world's great industries. International liability limits allow injured parties redress without bankrupting vital commercial institutions. Liability limitations lost their need and rationale in a stable and prosperous world, but in an age of terrorist acts, liability limitations are as important as they were more than three-quarters of a century ago. Without liability limits, efficient operations of air transportation may be too costly to survive.

266. *See generally Hearings, supra* note 243 (projecting nearly one hundred thousand workers would be laid off as a direct result of the terrorist attacks on September 11, 2001).

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