AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

ADMISSIBILITY OF EXPERT TESTIMONY IN STATE COURTS

James W. Hunt
Los Angeles

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Los Angeles

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Fitzpatrick & Hunt,
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ADMISSIBILITY OF EXPERT TESTIMONY IN STATE COURTS

By:
James W. Hunt[1]

I. INTRODUCTION

Given the technical and engineering complexity involved in the litigation of aviation lawsuits, the admission and presentation of testimony by experts in many different disciplines is essential. This is true for both plaintiffs and defendants, and the "battle of the experts" is thus an important part of almost every aviation trial, particularly one involving product liability issues. The admission of a defendant's expert testimony is crucial to the defense, of course, but the exclusion or limitation of a plaintiff's expert testimony can also be a highly effective tool. It is no wonder, then, that litigants prosecuting or defending aviation lawsuits regularly bring—and vigorously press—challenges to exclude expert testimony under the jurisdiction's applicable evidentiary rules.[2] While standards governing the admissibility of expert testimony are well-settled in federal courts, state courts often apply different tests for determining the admissibility of expert testimony. State court litigants should, therefore, be aware of the evidentiary standard that will apply to their case.

This article will briefly review the applicable standards controlling the admission and exclusion of expert testimony in federal court, and will then survey the current rules in the various state courts. The guidelines discussed in this article chiefly pertain to the subject of the reliability of the methodology supporting the

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[1] Thanks to Los Angeles summer associate Jennifer Vagle, Pepperdine University School of Law, for her assistance in preparing this article.

[2] For recent challenges to expert testimony in aviation cases, *see Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1357 (S.D. Fla. 2009); *In re Air Crash at Lexington, Ky., Aug. 27, 2006*, 2009 WL 1764738 (E.D. Ky. 2009); *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 WL 1357234, 2009 WL 2912611, 2009 WL 3756980, 2009 WL 1272139, 2009 WL 1649773, 2009 WL 3190458 (D. Kan. 2009).

proffered evidence. In addition, the qualifications of the proposed expert in the pertinent field of expertise, and the relevancy of the offered evidence to the case need be established by the proponent of expert evidence. These areas also offer opportunities for attacking the opponent's case by excluding the evidence on grounds of lack of expert qualification of the witness or lack of relevance of the testimony to the facts of the case.

II. The Admissibility of Expert Testimony: From *Frye* to *Daubert*

In 1923, the U.S. District Court for the District of Columbia announced the *Frye* test, which required a proponent of scientific evidence to establish that the expert witness's theory and method were generally accepted within the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court explained:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014. Essentially, the *Frye* test involves a two-step analysis: (1) defining the relevant scientific community, and (2) evaluating the testimony and publications to determine the existence of a general consensus. At its core, the purpose of the *Frye* test is to ensure that "the scientific theory or discovery from

which an expert derives an opinion is reliable." *Hildwin v. State*, 951 So. 2d 784 (Fla. 2006).

Although criticized, the *Frye* test was adopted by many states and federal courts, remaining the dominant test until 1993, when the U.S. Supreme Court announced a new standard for determining the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Court reviewed the *Frye* test "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony" and held that Federal Rule of Evidence 702 ("FRE 702") superseded the *Frye* test. *Id.* at 585–87.

Establishing a "gate keeping" role for the trial judge, the *Daubert* Court identified several factors to be considered in determining the admissibility of scientific evidence. *Id.* at 592-94. The Court retained "general acceptance" within the relevant scientific community as one factor, but it was no longer the exclusive test for determining admissibility; additional factors to be considered include whether the method can and has been tested, whether it has been subjected to peer review and publication, and the known or potential error rate. *Id.* at 593-94. Emphasizing the new standard's flexibility, the Court explained that "[i]ts overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594–95.

Because the *Daubert* decision was based on the language of FRE 702, rather than constitutional grounds, states were not required to adopt its standard for the admissibility of expert testimony. Since *Daubert*, some states have continued to apply *Frye*, others have explicitly rejected *Frye* and adopted the more liberal *Daubert* standards or a similar test, and others still have adhered to their own unique tests.

III. A Comparison of State Approaches

Fourteen states[3] and the District of Columbia continue to apply *Frye* or a similar test. *See* Appendix A. State courts applying *Frye* have clarified their interpretations of the scope of the test. For instance, in *State v. Gregory*, the Washington Supreme Court explained that "[b]oth the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*." 147 P.3d 1201, 1238 (Wash. 2006). Florida has explicitly distinguished the methods to be evaluated under *Frye* from the conclusions reached using such methods: "when the expert's opinion is based upon generally accepted scientific principles and methodology, it is not necessary that the expert's deductions based thereon and opinion also be generally accepted as well." *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109-10 (Fla. 2002). California's version of the *Frye* test even permits "general acceptance" to be established as a matter of law: "Once a published appellate decision has affirmed admission of a scientific technique, the technique's general acceptance [is] established as a matter of law. Further hearings on general acceptance [are] unnecessary 'at least until new evidence is presented reflecting a change in the attitude of the scientific community.'" *People v. Doolin*, 198 P.3d 11, 53 (Cal. 2009) (quoting *People v. Kelly*, 549 P.2d 1240, 1245 (Cal. 1976)).

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[3] Because Michigan applies a hybrid test which combines the *Frye* and *Daubert* tests for purposes of determining the admissibility of testimony based on science, Michigan is included both in the list of states applying *Frye* and in the list of states applying *Daubert*. *See Clerc v. Chippewa County War Mem'l Hosp.*, 729 N.W.2d 221, 221 (Mich. 2007) (explaining that "the court 'shall' consider all of the [*Daubert*] factors listed in MCL 600.2955(1). If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field.").

Thirty-five states[4] have adopted *Daubert* or a similar test that treats the *Daubert* factors as "helpful" or "instructive." *See* Appendix B. States adopting *Daubert* often observe that their rules of evidence are "essentially identical" to the federal rules. *See, e.g.*, *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993). Other states acknowledge that the relevant state rule of evidence was "amended explicitly to incorporate *Daubert's* standards of reliability." *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 408 (Mich. 2004). Some states decline to expressly adopt *Daubert*, but set forth similar standards. *See, e.g.*, *State v. Council*, 515 S.E.2d 508 (S.C. 1999). Others simply acknowledge that *Daubert* is consistent with their existing interpretation of their rules of evidence. *See, e.g.*, *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *Nelson v. State*, 628 A.2d 69 (Del. 1993); *Hutchinson v. Amer. Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994). Even courts that decline to expressly adopt *Daubert* often recognize that the *Daubert* factors are useful to the trial courts. *See, e.g.*, *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265.

Two states, Virginia and Wisconsin, neither follow *Frye* nor *Daubert*, but have instead developed their own unique tests for determining the admissibility of expert testimony. *See* Appendix C. When presented with novel scientific evidence, Virginia vests broad discretion in the trial court to determine "whether the evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine credibility for itself." *Spencer v. Commonwealth*, 393 S.E.2d 609, 621 (Va. 1990). Wisconsin, on the other hand, applies a relevancy test which does not require any reliability determination: "Scientific evidence is admissible under the relevancy test regardless of the scientific principle that underlies the evidence." *State v. Swope*, 762 N.W.2d 725 (Wis. Ct. App. 2008).

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[4] *See*, *supra*, note 2.

IV. Conclusion

While federal courts continue to apply the *Daubert* standard, state courts vary widely in their tests for determining the admissibility of expert testimony regarding scientific, technical, or other specialized knowledge. Due to the importance of expert testimony to the successful litigation of aviation cases, state court litigants should remain aware of the jurisdictional standard for admission of expert testimony that will apply to their case. Although both *Frye* and *Daubert* remain alive and well in state courts, litigants may still benefit from the advice of Judge Wolff of the Supreme Court of Missouri:

> Forget *Frye*. Forget *Daubert*. Read the statute. Section 490.065 is written, conveniently, in English. It has 204 words. Those straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings. Section 490.065 allows expert opinion testimony where "scientific, technical, or other specialized knowledge will assist the trier of fact . . . ."

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003) (en banc) (Wolff, J., concurring in part and dissenting in part).

APPENDIX A

STATES CONTINUING TO APPLY THE *FRYE* TEST

State	Post-*Daubert* Case Retaining *Frye* or Similar Test
Alabama[5]	*Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000)
Arizona	*Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000)
California[6]	*People v. Leahy*, 882 P.2d 321 (Cal. 1994)
District of Columbia	*Bahura v. S.E.W. Investors*, 754 A.2d 928 (D.C. 2000)
Florida	*Flanagan v. State*, 625 So. 2d 827 (Fla. 1993)
Illinois	*People v. Basler*, 740 N.E.2d 1 (Ill. 2000)
Kansas	*Pullen v. West*, 92 P.3d 584 (Kan. 2004)
Maryland[7]	*Hutton v. State*, 663 A.2d 1289 (Md. 1995)
Michigan[8]	*Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004)
Minnesota	*Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000)
New Jersey[9]	*Hisenaj v. Kuehner*, 942 A.2d 769 (N.J. 2008)
New York	*People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994)
North Dakota	*Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994) (continuing to apply *Frye*); *but see State v. Hernandez*, 707 N.W.2d 449, 461 (N.D. 2005) (Crothers, J., concurring) (urging the adoption of *Daubert*)
Pennsylvania	*Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003)
Washington	*State v. Riker*, 869 P.2d 43 (Wash. 1994)

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5 Alabama's version of the *Frye* test, known as the "*Perry*/*Frye* test," was adopted in *Perry v. State*, 586 So. 2d 242 (Ala. 1991).

6 California's slightly modified version of the *Frye* test, known as the "*Kelly*/*Frye* test," was adopted in *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

7 Maryland's version of the *Frye* test, known as the "*Frye-Reed* test," was adopted in *Reed v. State*, 391 A.2d 364 (Md. 1978).

8 Michigan's version of the *Frye* test, known as the "*Davis-Frye* test," was adopted in *People v. Davis*, 72 N.W.2d 269 (Mich. 1955).

9 New Jersey's admissibility test, which is similar to the *Frye* test, is discussed in *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

APPENDIX B

STATES APPLYING *DAUBERT* OR A SIMILAR TEST

State	Test	Explanatory Case Law
Alaska	*State v. Coon*, 974 P.2d 386 (Alaska 1999) (adopting *Daubert*)	*Samaniego v. City of Kodiak*, 80 P.3d 216 (Alaska 2003) (identifying factors for relevance and reliability)
Arkansas	*Farm Bureau Mut. Ins. Co. of Ark. V. Foote*, 14 S.W.3d 512 (Ark. 2000) (adopting *Daubert*)	*Graftenreed v. Seabaugh*, 268 S.W.3d 905 (Ark. 2007) (*Daubert* factors only applicable to novel evidence, theory, or methodology)
Colorado	*People v. Shreck*, 22 P.3d 68 (Colo. 2001)	*Shreck* (trial court may, but need not, consider *Daubert* reliability factors)
Connecticut	*State v. Porter*, 698 A.2d 739 (Conn. 1997) (adopting *Daubert*)	*Message Ctr. Mgmt., Inc. v. Shell Oil Prods. Co.*, 857 A.2d 936 (Conn. 2004) (identifying factors for reliability)
Delaware	*Nelson v. State*, 628 A.2d 69 (Del. 1993)	*M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999) (expanding the application of *Daubert* to technical and specialized knowledge); *New Haverford P'ship v. Stroot*, 2001 WL 493216 (Del. 2001) (trial court has flexibility in deciding whether *Daubert* reliability factors are appropriate)

State	Test	Explanatory Case Law
Georgia	*Mason v. Home Depot USA*, 658 S.E.2d 603 (Ga. 2008)	*Mason* (finding it "proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing a statute based on those rules")
Hawaii	*State v. Montalbo*, 828 P.2d 1274 (Haw. 1992)	*State v. Vliet*, 19 P.3d 42 (Haw. 2001) (expressly declining to adopt *Daubert*, but finding "construction of the federal counterparts of the HRE by the federal courts [to be] instructive")
Idaho	*State v. Merwin*, 962 P.2d 1026 (Idaho 1998)	*Weeks v. E. Idaho Health Servs.*, 153 P.3d 1180 (Idaho 2007) (explaining that Idaho has adopted some, but not all, *Daubert* standards)
Indiana	*Steward v. State*, 652 N.E.2d 490 (Ind. 1995)	*McGrew v. State*, 682 N.E.2d 1289 (Ind. 1997) (stating that "*Daubert* is "helpful, but not controlling")
Iowa	*Ganrud v. Smith*, 206 N.W.2d 311 (Iowa 1973)	*In re Detention of Holtz*, 653 N.W.2d (Iowa Ct. App. 2002) (identifying factors that trial courts may consider, at their discretion, in determining admissibility of expert testimony)

State	Test	Explanatory Case Law
Kentucky	*Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995) (adopting *Daubert*)	*Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35 (Ky. 2004) (identifying a non-exclusive list of factors for determining admissibility of expert testimony)
Louisiana	*State v. Foret*, 628 So. 2d 1116 (La. 1993) (adopting *Daubert*)	*State v. Williams*, 974 So. 2d 157 (La. Ct. App. 2008) (identifying relevant factors for determining admissibility of expert testimony)
Maine	*State v. Williams*, 388 A.2d 500 (Me. 1978)	*Searles v. Fleetwood Homes of Pa., Inc.*, 878 A.2d 509 (Me. 2005) (identifying reliability factors)
Massachusetts	*Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994)	*Commonwealth v. Patterson*, 840 N.E.2d 12 (Mass. 2005) (general acceptance in the relevant community is, on its own, sufficient to establish reliability regardless of other *Daubert* factors)
Michigan	*Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004)	*Edry v. Adelmani*, --- N.W.2d --- (Mich. 2010) (acknowledging that Mich. R. Evid. 702 incorporates the *Daubert* standards of reliability)
Mississippi	*Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2003)	*McLemore* (stating that the *Daubert* factors are "helpful, not definitive")

State	Test	Explanatory Case Law
Missouri	*State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (en banc)	*McDonagh* (indicating that *Daubert* provides useful guidance in interpreting and applying section 490.065, but where the approaches differ, the statute's standard must govern)
Montana	*State v. Moore*, 885 P.2d 457 (Mont. 1994) (adopting *Daubert*)	*Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 961 P.2d 75 (Mont. 1998) (*Daubert* standard should be limited to novel scientific evidence); *State v. Price*, 171 P.3d 293 (Mont. 2007) (identifying factors for determining admissibility of expert testimony)
Nebraska[10]	*Schafersman v. Agland Coop*, 631 N.W.2d (862 (Neb. 2001) (adopting *Daubert*)	*Carlson v. Okerstrom*, 675 N.W.2d 89 (Neb. 2004) (identifying factors for determining admissibility of expert testimony)
Nevada	*Krause Inc. v. Little*, 34 P.3d 556 (Nev. 2001)	*Higgs v. State*, 222 P.3d 648 (Nev. 2010) (expressly rejecting *Daubert* and the "rigid application of its factors," but finding it to be persuasive authority)
New Hampshire	*Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 813 A.2d 409 (N.H. 2002) (adopting *Daubert*)	*Baker Valley Lumber* (discussing reliability factors)

[10] In *Schafersman*, Nebraska adopted the *Daubert* standard for trials commencing on or after October 1, 2001. For trials commencing prior to that date, Nebraska continued to apply the *Frye* test.

State	Test	Explanatory Case Law
New Mexico	*State v. Alberico*, 861 P.2d 192 (N.M. 1993)	*Alberico* (identifying factors for determining admissibility of expert testimony)
North Carolina	*State v. Goode*, 461 S.E.2d 631 (N.C. 1995)	*Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674 (N.C. 2004) (identifying reliability factors, but expressly rejecting *Daubert*); *State v. Ward*, --- S.E.2d --- (N.C. 2010) (stating that the *Goode* test does not require *Daubert's* thorough scrutiny of an expert's scientific method)
Ohio	*Miller v. Bike Athletic Co.*, 687 N.E.2d 735 (Ohio 1998)	*Terry v. Caputo*, 875 N.E.2d 72 (Ohio 2007) (identifying reliability factors)
Oklahoma	*Christian v. Gray*, 65 P.3d 591 Okla. 2003) (adopting *Daubert*)	*Christian* (*Daubert* standard is applicable to all expert testimony—not just scientific testimony)
Oregon	*State v. O'Key*, 899 P.2d 663 (Or. 1995) (adopting *Daubert* in part)	*State v. Southard*, 218 P.3d 104 (Or. 2009) (identifying factors for determining admissibility of scientific evidence)
Rhode Island	*State v. Wheeler*, 496 A.2d 1382 (R.I. 1985)	*In re Mackenzie C.*, 877 A.2d 674 (R.I. 2005) (identifying reliability factors)

State	Test	Explanatory Case Law
South Carolina	*State v. Council*, 515 S.E.2d 508 (S.C. 1999)	*State v. White*, 676 S.E.2d 684 (S.C. 2009) (extending courts' gate keeping role to nonscientific evidence to be admitted under S.C. R. Evid. 702)
South Dakota	*State v. Hofer*, 512 N.W.2d 482 (S.D. 1994) (adopting *Daubert*)	*State v. Lemler*, 774 N.W.2d 272 (S.D. 2009) (identifying reliability factors)
Tennessee	*McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997)	*McDaniel* (indicating that Tenn. R. Evid. 702 encourages Tennessee "courts to take a more active role" in evaluating testimony; identifying reliability factors)
Texas	*E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (adopting *Daubert*)	*Robinson* (identifying reliability factors); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998) (applying Tex. R. Evid. 702 to all expert testimony—not just scientific or technical testimony)
Utah	*State v. Rimmasch*, 775 P.2d 388 (Utah 1989)	*State v. Crosby*, 927 P.2d 638 (Utah 1996) (although similar to *Daubert*, the more restrictive *Rimmasch* approach is the proper admissibility standard in Utah)

State	Test	Explanatory Case Law
Vermont	*State v. Brooks*, 643 A.2d 226 (Vt. 1993) (adopting *Daubert*)	*985 Assocs., Ltd. V. Daewoo Elecs. Amer., Inc.*,945 A.2d 381 (Vt. 2008) ("the trial court's inquiry into expert testimony should primarily focus on excluding 'junk science'—because of its potential to confuse or mislead the trier of fact—rather than serving as a preliminary inquiry into the merits of the case")
West Virginia	*Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1994) (adopting *Daubert*)	*Watson v. INCO Alloys Int'l, Inc.*, 545 S.E.2d 294 (W. Va. 2001) (finding that courts should only apply the *Wilt* gatekeeper analysis to scientific, rather than technical, testimony)
Wyoming	*Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999) (adopting *Daubert*)	*Chapman v. State*, 18 P.3d 1164 (Wyo. 2001) (explaining that if an expert's methodology is reliable, the court must then determine whether the testimony "fits" the facts of the case)

APPENDIX C

STATES FOLLOWING NEITHER *FRYE* NOR *DAUBERT*

State	Test	Rejection of *Frye* and *Daubert*
Virginia	*Spencer v. Commonwealth*, 393 S.E.2d 609 (Va. 1990)	*O'Dell v. Commonwealth*, 364 S.E.2d 491 (Va. 1988) (declining to adopt the *Frye* test); *John v. Im*, 559 S.E.2d 694 (Va. 2002) (leaving open for future consideration the question of whether Virginia should adopt the *Daubert* analysis)
Wisconsin	*State v. Walstad*, 351 N.W.2d 469 (Wis. 1984)	*Watson v. State*, 219 N.W.2d 398 (Wis. 1974) (rejecting the *Frye* test); *State v. Fischer*, 778 N.W.2d 629 (Wis. 2010) (declining to adopt a *Daubert*-like approach)

THE BATTLE OVER AIR FRANCE: DOES THE MONTREAL CONVENTION APPLY TO MANUFACTURER CLAIMS FOR CARRIER INDEMNITY?

By:
Alan H. Collier
Stephanie N. Brie[1]

In *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, currently pending as an Multidistrict Litigation ("MDL") action in the Northern District of California, the air carrier Air France was effectively immune to suit in the United States—until now.[2] All but two plaintiffs lacked jurisdiction over Air France under the controlling Montreal Convention, but Air France now finds itself defending an indemnity and contribution cross-complaint brought by certain manufacturing defendants.

Air France has responded with a motion to dismiss, arguing Montreal's jurisdictional requirements (the so-called five fora of jurisdiction) limits not only passenger claims directly against a carrier, but any actions against a carrier—including third party suits by manufacturer-defendants.

A third party action broaching this particular issue has only been seen twice, in the Central District of California in 1999 and in the Eastern District of New York in 2004.[3] With the latter citing the former, both courts held that the jurisdictional limitations of the Warsaw Convention (updated by the Montreal Convention) were inapplicable and allowed the indemnity action against the carrier to proceed. However, only one of the decisions is officially

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1 Thanks to Los Angeles summer associate Vienna Munro, University of San Diego School of Law, for her assistance in preparing this article.

2 *In re Air Crash Over the Mid-Atl. on June 1, 2009*, MDL 2144, No. 10-CV-0977 CRB (N.D. Cal.).

3 *In re Air Crash at Agana, Guam, on Aug. 6, 1997*, MDL 1237, No. 98-MD-7211 (C.D. Cal. Jan. 25, 1999); *In re Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999*, 340 F.Supp.2d 240 (E.D.N.Y. 2004).

reported, the other decision was only decided at the trial court level, and ensuing case law reveals no subsequent third party indemnity claims attempted by manufacturers raising the same argument on any level. It has been generally assumed in the aviation bar that such claims would be barred by Montreal—similar to the bar on cross-claims against employers in workers' compensation cases. It is possible defending manufacturers did not attempt such cross-complaints in the past because of common insurance, out of reticence to sue their carrier-customers, or because it was not thought to be a legally viable claim under Montreal. Or perhaps it was thought strategically unwise; a successful indemnity action would mean losing the ability to highlight an absent co-defendant in a *forum non conveniens* motion, reducing its chance of being granted.

If the court denies Air France's motion, it will open the door to *en masse* circumvention of Montreal's protection of carriers within the United States when jurisdiction is otherwise unavailable to foreign plaintiffs. As the pertinent legal precedent is limited, the issue is effectively one of first impression, ripe for appellate review, and a strong candidate for a grant of *certiorari* by the Supreme Court in the next few years.

That is, if the issue is considered at all. Judge Charles Breyer (brother to U.S. Supreme Court Justice Steven Breyer and who has been assigned this massive litigation by the MDL Panel) has two major motions set on his docket for argument on September 24, 2010: Air France's Motion to Dismiss the third party claim against it, plus the defendants' Motion to Dismiss pursuant to the doctrine of *forum non conveniens*.

Presumably, unless Judge Breyer is intent on being heard on this issue, it will become mooted by a ruling in favor of the defense on *forum non conveniens*, thus placing this issue back into its legal quagmire.

I. The Treaty: History & Circumvention in Suits Against Manufacturers

Before Montreal, its predecessor treaty, the Warsaw Convention, governed the liability of carriers involved in the international transportation of passengers and cargo. Created in 1929, Warsaw sought to insulate the young air carrier industry from accident liability and to facilitate its growth. To achieve its purpose, Warsaw had a two-prong agenda: (1) to establish worldwide uniform laws for claims arising out of the international carriage of passengers, baggage and cargo; and (2) to limit the liability of the carrier for such claims. In short, Warsaw created a presumption of carrier liability in aircraft accidents but, *quid pro quo*, capped that liability absent proof of certain misconduct.

However, in the years following its ratification, a "hodgepodge of supplementary amendments and intercarrier agreements" redefined Warsaw liability.[4] Seventy years after Warsaw's signing, "the need to modernize and consolidate the Warsaw Convention and related instruments" was addressed in 1999 by its successor, the Montreal Convention.[5] For those States which have become signatories to Montreal, it has provided the exclusive causes of action and remedies against an air carrier for passenger injury or death during international air carriage.[6]

A key development in Montreal was its removal of Warsaw's cap on damages, essentially exposing carriers to unlimited damages liability. This was of special significance to manufacturers who have never been protected by Warsaw's capped liability, and were thus frequently sued by plaintiffs seeking to be "made whole" by exceeding the capped recovery against the carrier. With

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4 *Ehrlich v. American. Airlines*, 360 F.3d 366, 371 n.4 (2d Cir. 2004).

5 Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada, May 28, 1999 (Montreal Convention), Arts. 1(1), (2); *Smith v. American Airlines*, No. 09-02903, 2009 WL 3072449, *2 (N.D. Cal. Sept. 22, 2009).

6 *See Carey v. United Airlines*, 255 F.3d 1044, 1051 (9th Cir. 2001).

Montreal's removal of the cap, carriers became more attractive defendants, and manufacturers were less commonly alone in defending against potentially unlimited liability, especially within American courts where juries are famously generous with damages awards.

However, Montreal only extracted one thorn in the side of defending manufacturers. While it removed Warsaw's cap on a carrier's liability, Montreal continues to limit a foreign plaintiff's jurisdiction over a carrier in American courts. Under Montreal, a passenger-plaintiff can only bring suit against a defending carrier in the five fora identified in the treaty: (1) the carrier's place of domicile; (2) the carrier's principal place of business; (3) the place of business through which the contract of carriage was made; (4) the place of destination of the carriage; or (5) the principal and permanent residence of the passenger.[7] When the United States is not within the five fora permitting jurisdiction over carriers, it remains a common avenue for plaintiffs to avoid the Convention's jurisdictional limitations by bringing suit only against manufacturers over whom jurisdiction is available in the U.S.

II. The Battle Over Air France

In re Air Crash Over the Mid-Atlantic presents the novel issue of manufacturing defendants seeking indemnity from a carrier otherwise immune to suit in the United States. Given that all but two of the plaintiffs are barred from jurisdiction over Air France, the question becomes whether Montreal will apply to similarly bar the manufacturers' claim for third party indemnity and contribution.

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[7] Montreal Convention, Art. 33. The Warsaw Convention provides the same first four fora. Convention for the Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw, Poland, October 12, 1929 (Warsaw Convention), Art. 28(1).

III. LEGAL PRECEDENT

In re Air Crash at Agana, Guam (*Guam*), and *In re Air Crash near Nantucket Island, Massachusetts on October 31, 1999* (*Nantucket*) are the only federal U.S. cases to examine this issue.

A. *Guam*

Dealing with this issue as one of first impression, *Guam* (an unpublished decision) held that a carrier's liability to or from others based in tort or contracts is not governed by Warsaw. The *Guam* court interpreted the text of Warsaw to suggest it exclusively concerned itself with suits by passengers and shippers. In holding the identities of the parties central to the treaty's interpretation, the court concluded that the manufacturer's indemnity claim against the carrier was independent of the underlying passenger's claim, and therefore not governed by treaty.

Although *Guam* declined to apply the Convention to the indemnity claim, perhaps inconsistently it applied Warsaw's damages cap to any recovery against the carrier through indemnity. In making its determination, the court relied on a perceived misapplication of *Polec v. Northwest Airlines, Inc.* (*Polec*).[8] *Guam* read *Polec* to say that because a passenger's recovery could not exceed the liability limit of Warsaw, that limit also restricts the potential recovery of a manufacturer by indemnity.

However, in *Polec* the U.S. court had jurisdiction over the domestic carrier under Warsaw, and so the applicability of Warsaw's jurisdictional limits to a third-party claim against a carrier was not an issue. Also, the third-party action in *Polec* was for subrogation, which is an equitable remedy raised post-judgment or post-settlement, rather than indemnification which is more likely litigated early in the case and is usually based in contract. The defendant manufacturer in *Polec* was allowed to recover the full

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8 *Polec v. Northwest Airlines,* 86 F.3d 498 (6th Cir. 1996).

amount of its subrogation claim from the carrier, despite the liability limits of Warsaw, *only because a jury made a finding of "willful misconduct" on the part of the carrier*. The court in *Polec* noted that if the carrier had committed only ordinary negligence, the Warsaw cap would have applied to restrict the manufacturer's subrogation recovery.

Thus, the court in *Polec* generally applied the limitations of Warsaw to a third-party claim by a manufacturer against a carrier. Although the *Guam* court relied on *Polec* in applying the limitations of Warsaw to the liability exposure of a carrier in a third-party action, the court in *Guam* expressly declined to apply the limitations of Warsaw to jurisdiction over the carrier in a third-party action.

While some have questioned the reasoning of *Guam*, others have asserted that despite its status as an unpublished decision, it stands in support of the fact that the United States (who is the party to both the treaties) believes that contribution and indemnity claims are not barred by the Warsaw/Montreal Conventions. The United States was also a party in the *Guam* litigation and argued in opposition to KAL's motion to dismiss that "[n]othing in the Convention covers, or was intended to cover, claims between carriers and third parties such as the United States or manufacturers, whether the carriers are in the position of plaintiffs, defendants, or intervenors."[9]

B. *Nantucket*

The district court in the Eastern District of New York followed the *Guam* decision in *In re Air Crash near Nantucket Island, Mass*. In following *Guam*, the Court in *Nantucket* similarly considered the identity of the parties central to the interpretation

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[9] United States' Opposition to KAL's Motion to Dismiss Indemnity Claims Against Korean Air for Lack of Treaty Jurisdiction at 8, *In re: Air Crash at Agana, Guam on August 6, 1997*, MDL No. 1237 (C.D. Cal.).

of the treaty in holding that the Warsaw Convention did not govern a third-party contribution and indemnity action against the airline by a defendant manufacturer, reasoning that "[t]he express purpose of the Convention was to regulate litigation between passengers and carriers." The court held that the manufacturers' third-party claims for contribution and indemnity against *Nantucket* were not coextensive of the passenger's claims against the airline, but rather were based on their own separate and distinct legal and equitable relationships with the airline. In so holding, the Court cited to a U.S. Supreme Court case establishing that "indemnity liability 'springs from an independent contractual right' distinct from the underlying tort claim."[10] This reasoning explains the court's decision to not apply Warsaw to a third-party claim for *contractual* indemnity, but does not necessarily provide support for *equitable* indemnity outside the Convention. It remains to be seen whether other courts will follow the *Nantucket* case where the manufacturer's equitable claim for indemnity is not based is contract, but is arguably derivative of the underlying passenger's claim.

C. Subsequent Cases

At least one court within the district in which *Guam* was decided has already chosen not to discuss either *Guam* or *Nantucket* when presented with the opportunity to do so, impliedly because *Guam* remains an unpublished opinion.[11] In *Van Schijndel v. Boeing Co.* (*Van Schijndel*), the court made no mention of *Guam* and identified *Nantucket* as the only published decision addressing the issue before it: whether an American manufacturer could bring an indemnity claim against a foreign air carrier when the passenger-plaintiffs did not have United States jurisdiction over the carrier pursuant to the applicable Convention. However, the *Van*

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[10] *Nantucket*, 340 F.Supp.2d at 244, citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 130 (1956).

[11] *Van Schijndel v. Boeing Co.*, 434 F.Supp.2d 766, 780 (C.D. Cal. 2006).

Schijndel court gave no weight to *Nantucket*, noting the decision as not binding and that it was unclear how the Ninth Circuit would rule.

Five years after deciding *Nantucket*, the same judge sitting for the same court issued a seemingly contradictory holding in *Olaya v. American Airlines* (*Olaya*).[12] In *Olaya*, the plaintiff sued both American Airlines and the Deriso Funeral Home for allegedly mishandling his wife's remains during international shipment. The court held Montreal exclusively governed all claims against the carrier, including Deriso's cross-claim for indemnity and contribution. However, unlike *In re Air Crash Over the Mid-Atlantic*, in *Olaya* both the plaintiff and co-defendant had treaty jurisdiction over the carrier because both were party to the waybill for international shipping. Thus, the court's reasoning that the treaty applied to the cross-claim, because it arose from the same transaction as the plaintiff's claim, cannot be applied to cross-claims where treaty jurisdiction is not established—such as that against Air France.

In sum, *Guam* and *Nantucket* remain the only cases raising the precise issue of whether the treaty should apply to a manufacturer's indemnity claim against a carrier otherwise not subject to jurisdiction under Montreal. Based on the limited precedent on this important issue, appellate review is called for in order to clarify the limitations of Montreal in this area. When and if this issue is dealt with (whether in the context of the Air France 447 litigation or sometime in the future), any decision on the issue will, by necessity, turn to an interpretation of the treaty itself, including its text, drafting history, and underlying purpose.

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[12] *Olaya v. American Airlines*, No. 08-CV-4853, 2009 WL 3242116 (E.D.N.Y. Oct. 6, 2009) (not reported in F.Supp.2d (2000)).

IV. The Interpretation of Montreal: Carriers vs. Manufacturers

Resolution of this issue will largely hinge on whether Montreal applies to any action or only to passenger claims against a carrier, taking into account whether the third party action is a derivative of the passenger's suit and the underlying goals of the treaty.[13] The interpretation of Montreal must begin "with the text of the treaty and the context in which the written words are used."[14] If unclear, the text may be interpreted in light of its history and purpose, while giving effect to the expectations, negotiations, and practical construction employed by the parties.[15]

If the treaty applies only to passenger claims, as a manufacturer would argue, it would not apply to limit jurisdiction over a defending manufacturer's indemnification claim against a carrier. If the treaty applies to all claims arising out of the passenger's suit for damages, as a carrier would argue, it would limit jurisdiction over the manufacturer's indemnity claim.[16]

A. The Battleground Articles of the Treaty

Article 1: Scope of Application: "This Convention applies to *all* international *carriage of persons,* baggage or cargo performed by aircraft for reward."

Article 29: Basis of Claims: "In the *carriage of passengers*, baggage and cargo, *any action for damages, however founded*, whether under this Convention or in contract or in tort or

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[13] The treatment of the treaty in international courts may additionally influence Montreal's interpretation in the United States; treaty interpretations by the courts of sister signatories are "entitled to considerable weight." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 176 (1999).

[14] *Air France v. Saks*, 470 U.S. 392, 397 (1985).

[15] *Id.* at 399.

[16] As foundation to its argument, a carrier would first have to prove the passenger's lack of jurisdiction precludes it from directly suing the carrier.

otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the questions as to who are the *persons* who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

Article 33: Jurisdiction: "(1) *An action for damages* must be brought, *at the option of the plaintiff,* in the territory of one of the States Parties, either before the court of the domicile of the carrier or its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. (2) In respect of damages resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement."

Article 37: Right of Recourse Against Third Parties: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a *right of recourse against any other person*."[17]

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[17] Montreal Convention, Arts. 1, 29, 33, 37 (emphasis added).

B. The Carrier's Argument: Montreal Applies to All Claims

i. The Text: Broad to Include All Claims

In Article 1, the language "all" suggests all claims arising out of international air carriage, including third party claims, are included within the jurisdictional scope of the treaty.

Further, in Article 29, the language "any action for damages" is broadly worded and does not say any *passenger's* action for damages, leaving room for claims of third party indemnity or contribution. The language "however founded" also does not limit claims only to passengers or those bringing claims on their behalf. The subsequent self-application of the treaty to "persons" who have the right to bring suit should be meant to include non-passengers, since the drafters chose to deviate from the previously-used language of "passengers" in the same Article.

Additionally, the text of Article 29 is taken from Montreal Protocol No. 4, an amendment to the Warsaw Convention, which was drafted to expand and affirm the broad scope of Warsaw's equivalent Article 24.[18]

In Article 33, the language "an action for damages" is again used to encompass actions beyond only those of passengers or their representatives, in certain fora.

Finally, Article 37 only makes clear that the Convention does nothing to affect the "right" to bring third party claims. It does not question the applicability of the Convention once such claims are brought.

ii. The Drafting History: Limited Liability Intended

The minutes of the 1999 Montreal Conference reflect the drafters' intent for Article 29 to include broad bases of claims subject to limited liability under the treaty; the Chairman of the

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[18] *See Tseng*, 525 U.S. at 174.

Conference reflected the drafters' intent to limit liability in his comment, "Article [29] in effect put fences around how great an exposure the carrier would be liable to, by ensuring that whatever may be the nature of the action and however brought, it was subject to the conditions of the Convention."[19]

The Chairman later explained, "Once the Convention applied, its conditions and limits of liability were applicable."[20] In a case where the Montreal Convention applies and the plaintiff sues the manufacturer in a forum prohibiting suit against the carrier, the treaty must continue to apply in preventing the manufacturer's claim of indemnity against the carrier.

iii. The Underlying Claim: Derivative Jurisdiction

A third party claim necessarily arises from the same cause of action as the original, *i.e.,* the death or injury of a passenger during international air carriage: "a third party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim and is secondary or derivative hereto."[21] Therefore, a third party indemnity action should be governed by Montreal to the same extent as its underlying action.

iv. The Treaty's Goal: Uniform Carrier Liability

The "cardinal purpose" of Montreal is to "achiev[e] uniformity of rules governing claims arising from international air transportation."[22] It would fly in the face of uniformity to interpret Montreal to apply to passenger claims against a carrier, but not

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19 International Civil Aviation Organization, International Conference on Air Law, Montreal, Vol. I, Minutes, May 1999, Doc. 9775-DC/2 (Montreal Minutes), p. 189.

20 Montreal Minutes at 235.

21 *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 199-200 (9th Cir. 1988).

22 *Tseng*, 525 U.S. at 169.

third party indemnity claims against a carrier arising out of the same passenger-injury suit.

Further, under the Federal Rules of Civil Procedure, a third party defendant is entitled to all defenses available to it in the underlying plaintiff's action.[23] Applied to a case where the plaintiff has no jurisdiction over the carrier, the carrier should be able to assert the same defense of lack of jurisdiction as a third party defendant.

Finally, allowing a defending manufacturer the right to seek indemnification from a carrier in any jurisdiction would circumvent the entire purpose of the treaty by: (1) effectively bypassing its liability limits on carriers; and (2) creating inconsistent application of liability rules for claims by original plaintiffs versus claims by defendants as third party plaintiffs.

C. The Manufacturer's Argument: Montreal Applies Only to Passenger Claims

i. The Text: Limited to Passenger Claims

In Article 1, the language "carriage of persons" suggests the scope of jurisdiction is limited to only those claims arising out of contracts of air carriage. In contrast, a manufacturer's contract with a carrier is not for the carriage of persons, but for the particular product it produces, whether the aircraft itself or one of its components.

In Article 29, the language "any action for damages, however founded" is preceded by the context, "In the carriage of passengers, baggage and cargo." This does not include the context in which a manufacturer and carrier incur legal obligations and liability; a manufacturer does not provide or receive carriage of passengers, baggage or cargo from a carrier. Therefore, the basis of

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[23] Fed. R. Civ. Pro. 14(a).

a manufacturer's third party indemnity claim should not be limited or governed by Article 29.

Further, Article 29's language "however founded, whether under this Convention or in contract or in tort or otherwise" is meant to "accommodate all of the multifarious bases on which a claim might be founded in different countries, whether under code law or common law, whether under contract or tort, *etc.*, and to include all bases on which a claim seeking relief for an injury might be founded in any one country."[24] This particular language does not encompass claims against third parties by non-passengers.

The subsequent application of the treaty to "persons" is not meant to include *any* entity, but merely passengers and those suing on their behalf, in order to not prevent claims by a decedent's family or estate. That the drafting history does *not* use the word "entities" in defining applicable parties indicates a conscious exclusion of corporations from the scope of jurisdictional limits.

In Article 33, the language "at the option of the plaintiff" makes explicit that the causes of action and permissible jurisdictions outlined in the treaty contemplate its application only to passenger-plaintiffs, and not indemnity claims by defending manufacturers. Further, the five fora outlined in Article 33 affirm the application of the treaty to passenger claims alone; the fora are defined by either: (1) the passenger's itinerary, location of ticket purchase, residence; or (2) the carrier's place of business of domicile. None of the fora contemplate a jurisdiction defined by a third party claim involving a non-passenger party.

In addition, the fora are time-sensitive because they are determined based on whether the accident occurs in-flight. While a passenger's contractual relationship for air carriage is necessarily short in time, a manufacturer's contract with a carrier can be

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[24] *Husserl v. Swiss Air Transp. Co.*, 388 F.Supp. 1238, 1245 (S.D.N.Y. 1975).

formed decades before the accident triggering the suit, or even before the signing of the treaty.

Finally, Article 37 directly addresses the issue of third party claims; it guarantees the Convention will not "prejudice" third party liability. Applying the Convention to limit a manufacturer's ability to recover from a carrier as a third party when manufacturers are not contemplated or benefitted by the Convention would be exactly such a prejudice prohibited by the Article.

ii. The Drafting History: Only Passenger Claims Contemplated

At the convention, the drafters made no reference to third parties and stressed that "the new Convention should be based on the principle of balancing the interests of consumers and air carriers."[25] When the Chairman commented, "Article [29] in effect put fences around how great an exposure the carrier would be liable to," he meant not only do fences protect the carrier from unlimited liability, but they also define those whose recovery is limited—in this case the "persons" of the passengers and those suing on their behalf.[26] In his next sentence the Chairman further commented, "The more delicate issues as to the person who had the right to bring the action were not really governed as such by the Convention, but were left to national law, subject only to the provision that one remained within the limits set by the Convention and conditions subject to which the claims may be brought."[27] Thus the concern discussed by the drafters was whether to leave open the definition of who may sue on the passenger's behalf, not whether a third party action would be governed by the treaty.

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25 Montreal Minutes at 236.

26 *Id.* at 189.

27 *Id.* at 189-90.

When the Chairman later explained, "Once the Convention applied, its conditions and limits of liability were applicable," he was again responding to issues involving passengers, not third party indemnity claims.[28] Indeed, the Chairman was replying to a concern that the Convention might be construed to cover instances of non-fulfillment of a contract of carriage, denied boarding, or refunds.[29] No mention was made of manufacturers or any party other than in the capacity of a passenger. Thus to apply Montreal to indemnity claims of manufacturers would be an expansion of the treaty beyond its intended scope.

iii. The Underlying Claim: No Derivative Jurisdiction

While an indemnity action is always factually derivative, conditioned on the precedent of the plaintiff's suit, it does not follow that the indemnity is legally derivative. Though a plaintiff's cause of action against a manufacturer may be a tort for injury or death, the manufacturer's indemnity claim against a carrier is often based in contract; thus the indemnification is for a different underlying cause of action not subject to any of the same limitations as the original claim.

Indemnity liability instead "springs from an independent contractual right" distinct from the underlying tort claim.[30] "A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to [the] plaintiff."[31]

iv. The Treaty's Goal: Inapplicable to Manufacturers

The goals of Montreal do not apply to parties other than passengers and carriers. While attempting to protect the fledgling

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28 *Id.* at 235.

29 *Id.*

30 *Ryan Stevedoring Co.,* 350 U.S. at 130; *Triguero v. Consoidated Rail Corp.*, 932 F.2d 95, 99 (2nd Cir. 1991).

31 Restatement (Third) of Torts: Apportionment of Liability § 22(b) (2000).

aviation industry at the turn of the century, Warsaw, and later Montreal, struck a balance of costs and benefits to the passenger and the carrier. This bargain neither contemplated nor held any legal or financial benefit for manufacturers, and thus the treaty should not be applied to the legal relationship between manufacturers and carriers.

Further, a manufacturer is not party to the contract between a passenger and a carrier invoking the application of Montreal, formed by the purchase of the passenger's ticket. Application of the treaty to a manufacturer's indemnity claim against a carrier denigrates the bargain struck in contractual negotiations between the carrier and manufacturer, denies expectations, and undermines the ability to rely on contractual commitments.

Finally, the international decision to immunize an industry from a certain class of plaintiffs does not entirely immunize it from litigation. It would be unjust to force potential sole liability on a manufacturer by application of a treaty to which the manufacturer was not a contemplated or contracting party.

V. Conclusion

Montreal began a shift away from protecting carriers in the 21st century, first with a lower standard of negligence and, second, with the addition of the fifth forum. It could follow that courts will continue the shift by refusing to apply Montreal to indemnity claims against carriers, making them liable to manufacturers who were likely not contemplated by the treaty's authors.

On the other hand, courts could instead recognize that *not* applying the Convention essentially defeats its underlying purpose; allowing a third party indemnity claim would create indirect jurisdiction over a carrier otherwise unavailable to plaintiffs under the treaty. Accordingly, courts of this persuasion would apply the Convention to prohibit the indemnity claim,

conjuring a second tier of carrier protection not contained in the text of the treaty or in the contractual negotiations between the carrier and a manufacturer.

Either outcome may have advantages and disadvantages for defending manufacturers. If Montreal applies to a third-party action for indemnification, the manufacturer will have to deal with the disadvantage of seeking contribution from the carrier in a foreign jurisdiction, and having its recovery limited by Montreal's liability caps. However, in this scenario the manufacturer will benefit from a stronger argument in favor of *forum non conveniens* based on the lack of U.S. jurisdiction over a necessary defendant. If the treaty does not apply, the manufacturer would have a greater chance of jointly sharing damages with the carrier, but would have a weaker *forum non conveniens* argument since jurisdiction over the foreign carrier would exist in the U.S. Until the issue is resolved, carriers will continue to be indirectly protected from indemnity claims by the doctrine of *forum non conveniens* as manufacturers are forced to think twice about seeking indemnification before being heard on a *forum non conveniens* motion.

This is an issue of importance in the aviation community that must be considered, analyzed and dealt with by the federal appellate courts, if not the U.S. Supreme Court. Whether the end result was correct or not, being left with the unpublished *Guam* decision and the limited holding of *Nantucket* leaves aviation legal practitioners and their clients in a state of unnecessary flux.

While it is possible that Judge Breyer will never get to decide this issue as it may become mooted by *forum non conveniens*, the importance of the issue, as well as the divergence of opinions, have been raised to the forefront in this high profile air disaster.

CONGRESS REVISITS DEATH ON THE HIGH SEAS ACT: GUIDING LIGHT? OR GUIDING LIABILITY?

By:
Alexander P. Fuchs
Nelson Camacho

I. Turbulent Seas for the Aviation Industry:

Recently proposed legislative changes to the Death on High Seas Act (DOHSA) will create additional risk and liability exposure to Aviation insurers, placing them in uncharted waters with submerged dangers.

United States Congressional Bills reacting to the April, 2010 Deepwater Horizon drilling rig explosion in the Gulf of Mexico have currently passed in the House of Representatives and are being further considered in the Senate. In essence, these Bills seek to increase the recoverable damages available to family members and dependants for deaths resulting from accidents in international waters. These Bills are also proposing shoreline distance threshold adjustments, which can increase the jurisdictional reach of State Courts. As a result, these proposed changes present new exposures and unprecedented applications of DOHSA to Aviation accidents.

The foregoing would require a conceptual traverse table to chart the possible application and effect of these proposed Bills on the Aviation and Insurance industry's legal liabilities. However, until an actual Bill is passed amending DOHSA, true liability exposure will remain a very murky and unpredictable issue for the Aviation industry and its insurers. This article endeavors to chart DOHSA's potential changes and effects as DOHSA is rigged with these proposed Amendments.

II. Death on the High Seas Act

The Death on the High Seas Act[1] ("DOHSA") is Admiralty law enacted by the United States Congress in 1920 as a source of relief for spouses, children or dependants of seamen killed at sea, or "international waters", due to negligence or wrongful conduct. DOHSA would be triggered for maritime deaths occurring beyond "one nautical league", or three miles, from the coast of the United States. DOHSA actions would be brought by a representative of the decedent's estate via an Admiralty claim within the U.S. Federal Court system. Conversely, maritime deaths occurring *within* three nautical miles of the U.S. shore, or within a U.S. State's territorial waters, are not governed by DOHSA and are instead subject to that particular State's law and courts.

For a successful recovery of damages under DOHSA, the resultant seaman's death must be due to a "wrongful act, neglect, or default" on the part of the allegedly responsible party, such as the vessel owner or crewmember. DOHSA provides recovery of *pecuniary* losses to survivors for the decedent's lost lifetime earnings and funeral costs against the ship's owner or operator. At the time of its initial passage, the Act was considered progressive by granting a quantum of support to families, that would otherwise be without recourse, after the death of their principal care giver.

With the advent of commercial and general aviation across the seas, DOHSA began to be applied to aviation accidents occurring off the shores of the United States. For 80 years, deaths occurring on the high seas as a result of aviation accidents and ship accidents were treated identically under the Act. Falling 20,000 feet out of the sky would effectively be the same as falling 50 feet overboard under DOHSA.

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[1] 46 U.S.C. app. §§ 761-768

III. DOHSA 2000 AMENDMENT—THE WAKE OF TWA 800

In July of 1996, TWA Flight 800 exploded and crashed shortly after takeoff, killing all 230 passengers on board. TWA 800 was a commercial flight originating from New York's JFK Int'l Airport, when twelve minutes later, its wreckage was drifting approximately 9 miles off the coast of New York in the waters near East Moriches, Long Island. As a result of the strict three nautical mile threshold of DOHSA, families of Flight 800 passengers were limited only to recovery for pecuniary losses from the airline. No other damages were recoverable under the Act.

Public protest ensued, and the impetus of much of the debate and call for change was the presence of small children and elderly on TWA 800. Lost wages are difficult, if not impossible, to calculate for children who have never worked and for the retired elderly. Additionally, pecuniary losses were deemed to be a pitiful measure of loss for the companionship and comfort of deceased family members. In essence, the survivors were clamoring for the inclusion of recoverable *non-pecuniary* damages within DOHSA.

In 2000, responding to the chorus of disapproval from TWA 800 survivors, DOHSA was amended and ratified by the U.S. Congress with specific focus on *commercial* aviation accidents. Consequently, the amendment of Section 30307 of the Act extended the distance threshold of DOHSA's applicability—for *commercial* aviation accidents—from the original three nautical miles to *twelve* nautical miles off U.S. shores. For any accident occurring within 12 nautical miles of the U.S. shoreline, State law would apply. Moreover, for the first time in U.S. history, deaths occurring as a result of a commercial aviation accident beyond 12 nautical miles would include recovery of *non-pecuniary losses*, in addition to pecuniary losses. "Non-pecuniary" losses were now, as established by DOHSA, recoverable for loss of comfort, care and companionship of the decedent. However, the Act did place a prohibition on the recovery of punitive damages, thereby curtailing plaintiff recovery for special damages of this type.

IV. DOHSA 2000—PRESENT

The Section 30307 amendment served as a concession to the public outcry lamenting the limited remedies provided by DOHSA. The amendment was, however, only a partial change for the narrow class of plaintiffs who died as a result of commercial aviation accidents. The amendment made no allowances of enhanced recovery for families of decedents who perished on ships or in *general aviation* accidents, who are still held exclusively limited to recovery for pecuniary losses. As DOHSA does not define "general" or "commercial" aviation, a void has been left for the Courts to fill.

The vast majority of case law considering DOHSA since 2000 has concerned the interpretation of what "*commercial aviation*" means under the 30307 amendment. In *Brown v. Eurocopter*[2] a Federal district court ruled that a helicopter, acting as an "on demand" air taxi to oil platforms, was engaged in "commercial aviation" as intended under the statute. To support its rationale, the *Brown* Court took the approach of simply considering the Black's Law Dictionary definition of "commercial" (*any type of business or activity which is carried on for a profit*) and "Aviation" (*the operation of a heavier-than-air aircraft*) as a basis for their conclusion that the air taxi was engaged in "commercial aviation". Also persuasive to the *Brown* Court's decision was the pilot's obligation to obtain a *commercial* pilot's license to operate the flight. Such an obligation, the *Brown* Court reasoned, galvanized the "commercial" aspect of the air taxi operation to the oil platforms.

The implication of *Brown*, and other similar cases, is that "commercial" aviation—along with its attendant risks and exposures—under the DOHSA 2000 amendment, may be broader then the commercial passenger flights that prompted the amendment. Subsequent cases have alternatively considered the

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

U.S. Congress' meaning of "commercial" aviation to be limited to scheduled FAA Part 121 passenger flights like TWA 800. With Congressional silence on the issue, disparate Court interpretations of "commercial" aviation under DOHSA remain today.

V. Reaction to Deepwater Horizon Tragedy

On April 20, 2010, an explosion occurred on the Deepwater Horizon Drilling Platform operated by BP in the Gulf of Mexico. Eleven crew members were killed by the explosion, and an oil spill of cataclysmic proportions was triggered. The platform was located over three nautical miles from the shore of Louisiana. As a result of its distance from the shore, the deaths of the crew members would fall under the Act as originally specified. The families and dependants of the crew would be entitled to recover only the lost earnings of the deceased crew members and funeral expenses.

In the case of some crew members, who were without spouses or children and whose bodies could not be recovered, only a nominal recovery could be obtained. Public criticism gushed out in opposition of the perceived "harsh" and limited recoveries allowed under DOHSA—very similar to the public outrage expressed after the TWA 800 crash. Bills to amend DOHSA have since been introduced in the U.S. Congress via the House of Representatives and the Senate respectively.

On July 1, 2010 the House Bill (H.R. 5503) was passed by the Members. The Senate counterpart-bill (S. 3663) will be considered when the U.S. Senate reconvenes in September of 2010. Both the House and Senate bills represent a radical departure from the recoveries permitted by DOHSA as originally enacted, and present new issues for both commercial and general aviation.

VI. HOUSE BILL: H.R. 5503

H.R. 5503 was the first Congressional response to the inequities harped on by critics in the wake of the Deepwater

Horizon explosion. It currently establishes several changes to the Act with regard to both: deaths occurring on sea-going vessels *and* aircraft over international waters.

The first major change established by the resolution is the allowance of recovery of non-pecuniary losses for a decedent's family. Non-pecuniary losses are defined in the statute as the recovery for the loss of the decedent's ''comfort, care and companionship.'' Additionally, the family would be entitled to recover a fair compensation of the decedant's conscious pain and suffering experienced prior to death. Both the non-pecuniary losses and pain and suffering damages are in addition to the pecuniary losses traditionally recoverable under the Act.

The resolution also allows for a greater class of family members—including siblings and parents—to bring suit, while simultaneously dispensing with the added procedural step of having suit brought through an estate representative. Significantly, the resolution completely strikes the TWA 800 year 2000 amendment from DOHSA (section 30307) addressing recovery for ''commercial'' aviation accidents. Though not expressly specified in the Act, the removal of this section will most likely cause ''commercial'' and ''general'' aviation accidents to be treated *identically* because of its silence on a distinction.

H.R. 5503 details that the twelve nautical mile threshold established by the 2000 amendments will no longer be applicable. Instead, DOHSA will apply for deaths occurring on the ''high seas'' *three* nautical miles off the shore of the United States for both ''general'' and ''commercial'' aviation accidents. The other seismic change in this Bill is that with the removal of the year 2000 amendment, the language precluding punitive damages is no longer in the Act, creating uncertain treatment of special damages under DOHSA.

Repercussion of H.R. 5503

To give an example of what these changes can mean for both commercial and general aviation accidents, it is best to examine a hypothetical. A general aviation craft is being flown to Florida for delivery to its purchaser. Due to mechanical failure during the flight, the aircraft crashes *four* nautical miles off the coast of Florida. Under DOHSA—as it currently exists—the pilot's spouse or estate representative's only avenue for recovery would be suit under DOHSA. This suit would have to be brought in Federal court, and recovery would be limited to the pilot's lost lifetime earnings and funeral costs. Had the crash occurred within *three* nautical miles of the Florida shore, then the family of the pilot would be entitled to bring a wrongful death claim in State court while applying Florida liability and damages recovery schemes. A wrongful death claim could potentially, depending on the state's law, entitle the family to lost earnings, funeral expenses, pain & suffering damages, and punitive damages.

Under DOHSA as amended by H.R. 5503, the pilot's representative or spouse would be able to recover the lost earnings and funeral expenses granted originally under DOHSA, *in addition to* damages for the pilot's pre-death conscious pain and suffering and loss of comfort, care, and companionship. There is also the potential, though not expressly granted by the amendment, that punitive damages may be pursued. The amendment would have no effect on the ability of the pilot's family to bring a State law claim if the death occurs within three nautical miles of the shore.

Under DOHSA, as amended by H.R. 5503, the seemingly arbitrary 12 nautical mile threshold for commercial aviation would be irrelevant to the situation. As long as the crash occurred more than three nautical miles off of the shore, DOHSA would automatically apply. A conceivably positive aspect of the amendment is that, for commercial crashes, the previous 12 nautical mile threshold is reduced to three nautical miles, limiting the area in which state law would apply.

VII. Senate Bill: S. 3663

The Senate bill currently drafted, but not yet voted upon, offers potentially different changes to DOHSA with somewhat different repercussions. Several Congressional Bills have been introduced into the Senate before, and after, the passing of H.R. 5503. Currently, S. 3663 the Clean Energy Jobs and Oil Company Accountability Act of 2010 is the latest and most supported bill in the Senate to amend DOHSA. The Bill, as the title denotes, is a holistic response to the Deepwater Horizon explosion and subsequent months-long spill of oil into the Gulf of Mexico. Section 504 of the Bill, appropriately titled "Amendments to the Death on the High Seas Act", is the relevant portion of the Bill.

Section 504 proposes several changes to DOHSA. First, similar to the changes in H.R. 5503, S. 3663 proposes to provide recovery for non-pecuniary losses (loss of decedent's comfort, care, and companionship) and compensation for the decedent's conscious pain and suffering prior to death. These recoveries are in addition to the pecuniary (lost earnings and funeral expenses) losses, which have always been recoverable under DOHSA. Secondly the Act specifically addresses DOHSA's application to "general" and "commercial aviation". S. 3663 amends section 30307 of DOHSA (the 2000 amendment) by adding "*and general aviation*" after each appearance of "commercial aviation" in the section, thus eliminating any distinction between the two terms. Third the Act prohibits legal action under section 30307 of DOHSA except as an action in Admiralty in a Federal court.

The practical result of the Senate amendment is that "commercial" aviation and "general" aviation would be treated *identically* under DOHSA. Further, both types of aviation accidents would be subject to the 12 nautical mile threshold created by section 30307 of DOHSA. As a result of the corresponding changes to the Act, family members and dependants of anyone who dies in an aviation accident more than 12 nautical miles off the shore of

the United States could receive pecuniary losses, non-pecuniary losses, and damages for the decedent's pain and suffering.

Notably, the portion of section 30307 which prohibits recovery of punitive damages has been left unchanged; therefore, punitive damages could not be recovered in an action under DOHSA. Any aviation accident occurring *within* 12 nautical miles of the US shore would be subject to State law in a State court, where punitive damages are typically recoverable.

VIII. Bottom Line

It appears inevitable that the Death on High Seas Act will be amended in some form within the upcoming months. It remains unclear how these changes will be embodied and what impact they will have on the aviation, legal, and insurance industry until actual passage by both House and Senate with Presidential approval.

H.R. 5503 has already been passed by the House of Representatives and presents several issues regarding "general" and "commercial" aviation accidents. This amended Act would impose the smallest distance threshold for application of DOHSA (3 nautical miles) for both "commercial" and "general aviation", potentially limiting the number of cases likely to reach State court. For numerous factors, State court provides a greater recovery potential for plaintiffs, part of which is due to the inclusion of punitive damages. Adding greater uncertainty of the application of the Act, H.R. 5503 does not explicitly prohibit the recovery of punitive damages under DOHSA for aviation accidents, regardless of distance threshold. If signed into law, it can be expected that future plaintiffs will surely argue for punitive damages since the Act will cease to preclude special damages.

Senate Bill 3663 also contains varied aspects, whose ultimate impact is difficult to determine. At least on an interpretative level, the uniform treatment of "commercial" and "general" aviation may alleviate any confusion Courts may have had over the last 10 years when considering DOHSA and aviation

activities. However, as a consequence of this democratization of aviation activities, the Senate-proposed Act extends DOHSAs threshold of 12 nautical miles to *all* aircraft—including formerly excluded "general" aviation; thereby expanding the area where costly State law wrongful death claims can be brought. Comfort may be taken in the fact that currently, S. 3663 maintains the prohibition on punitive damages for aviation accidents under DOHSA.

IX. FUTURE?

Determinations of potential impact are intensely fact-based and difficult to predict, especially in an area where caselaw and statutory interpretation have a decades-old reign over an infrequently modified Act. The Deepwater Horizon event in the Gulf of Mexico has put liability predictions for aviation liability under a new DOHSA into a tailspin.

What is abundantly clear is that the House Bill and Senate-proposed Bill contain differences in each that, despite tension between the two, undoubtedly extends the liability-penumbra for aviation operators, manufacturers and insurers under DOHSA. The new general schemes of the U.S. Congress amendments to DOHSA can be distinguished as follows:

- HOUSE Bill H.R. 5503—
    1. Adds *non-pecuniary* (*i.e.*, "pain & suffering") damages to the existing recoverable pecuniary damages;
    2. Reduces "high seas" range from 12 nautical miles to 3 nautical miles;
    3. Silent on punitive damages; and
    4. "Aviation" is an undefined term without "commercial" or "general" classifications.

- SENATE-proposed Bill S. 3663—
    1. Adds *non-pecuniary* (*i.e.*, "pain & suffering") damages to the existing recoverable pecuniary damages;
    2. Maintains "high seas" range at 12 nautical miles;
    3. Preserves ban on punitive damages; and
    4. "Commercial aviation" joined by the word "and" to "general aviation".

One will note that both Bills are unified by points "1" and "4", thereby automatically increasing liability exposure under both Bills. The addition of *non-pecuniary* damages, with the nullification of distinction between "commercial" and "general" aviation" extends the liability and recoverable-damages shadow originally cast by DOHSA.

Point "3" on punitive damages will be the crucial element that can greatly amplify plaintiff recovery and establish how extensively the black cloud of damages will span. All parties will be keenly interested in what direction point "3" will take as it navigates the legislative currents of Washington D.C.

As legislation and politics meet, waters will be muddied, and the foregoing amendments will evolve into hybrids of one another, or more distinct Bills. Notwithstanding such uncertainty, aviation operators, manufacturers, and insurers will have inclement conditions to deal with in regard to increased liability and exposure under both House and Senate proposals and their amendments to DOHSA.

CHOICE OF LAW & CHOICE OF FORUM IN FOREIGN AIR DISASTER LITIGATION

By:
Alan H. Collier
Nicholas A. Weiss[1]

I. INTRODUCTION

Often resembling a philosophical riddle, questions of choice of law and forum continue to generate confusion and uncertainty in foreign air disaster litigation. Due to the largely interdependent relationship between choice of law and choice of forum, these issues cannot be considered separately, but instead must be evaluated as part of one coherent litigation strategy.

There is no better example of the interplay between choice of law and choice of forum than in the recent Bashkirian Airlines Flight 2937-DHL Airways Flight 611 Mid-Air Collision litigation ("Bashkirian"). The Bashkirian litigation arose from a mid-air collision between a Bashkirian Airlines Tupolev TU-154M and a DHL 757-200 that occurred over German air space in 2002. Despite minimal connections to the United States, Plaintiffs nevertheless filed lawsuits against U.S. defendants in the United States.

Following *forum non conveniens* ("FNC") dismissal in the United States, the Bashkirian plaintiffs refiled in Spain, and ironically, the foreign court applied U.S. law to determine issues of liability and damages. Pursuant to its choice of law analysis under the Hague Convention, the Spanish court applied Arizona law to one defendant and New Jersey law to the other based on their respective principal places of business. Although the awards were significantly less than what a U.S. jury was likely to award if liability were established, the mere possibility that a foreign court would

[1] Thanks to Los Angeles summer associate Jennifer Vagle, Pepperdine University School of Law, for her assistance in preparing this article.

apply U.S. damages law is cause for concern for U.S. aviation product manufacturers and warrants careful scrutiny of the perceived value of the FNC dismissal on a case-by-case basis. In light of Bashkirian, a manufacturing defendant's decision to seek FNC dismissal must involve a comprehensive case-by-case analysis of whether FNC dismissal is the best litigation strategy—with a particular emphasis on choice of law concerns.

II. The Doctrine of *Forum Non Conveniens*

In aviation cases, it is no secret that plaintiffs' (and their counsels) preferred choice of forum is the United States due to the comparatively high standards of compensation, absence of the "loser pays" rule, availability of jury trials, advantageous contingency fee arrangements, and the liberal rules of discovery. While some litigants rely upon these procedural incentives offered by U.S. courts, most plaintiffs are simply motivated by the availability of strict liability and the prospect of a substantially higher and more generous recovery under U.S. damages law. Faced with litigation brought by foreign plaintiffs for damages sustained in foreign aviation accidents, U.S. product manufacturers routinely seek relief through the doctrine of *forum non conveniens*, through which federal courts may dismiss a case if it could be more conveniently litigated in another forum. The motivating force behind manufacturing defendants' strategy to seek FNC dismissal is based on the widely recognized assumption that foreign jurisdictions will apply more favorable damages law than U.S. Courts. An analysis of various FNC considerations, coupled with the potential application of U.S. damages law in foreign jurisdictions, reveals that this assumption may not always be accurate, and decisions regarding whether to seek FNC dismissal merit a closer look—in conjunction with a thoughtful choice of law analysis.

As established in *Gulf Oil v. Gilbert*, "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a

general venue statute."[2] Under the doctrine, a court is permitted to exercise discretion in deciding whether the circumstances warrant dismissal in favor of a more convenient forum. In evaluating a defendant's FNC motion, the court conducts a threshold inquiry to determine the degree of deference to be accorded to the plaintiffs' choice of forum. The court then proceeds with a two-part test—first determining whether the proposed alternative forum is both available and adequate, and then balancing the private and public interests implicated by the litigation.

It is well recognized among aviation attorneys that FNC issues are often the most critical to the outcome of the litigation. As observed by Justice Doggett of the Texas Supreme Court, "a *forum non conveniens* dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery."[3] After dismissal is granted, plaintiffs maintain the option of seeking relief in the alternative forum, yet cases dismissed on FNC grounds rarely reach trial abroad.[4] Due to foreign forums' limited discovery procedures, lack of contingency fee arrangements, and likely application of restrictive damages and tort law, plaintiffs often settle for a small sum or forego their claims altogether following FNC dismissal. Although this is common, a defendant must nonetheless be fully informed of the potential consequences of FNC dismissal and prepared to effectively litigate in the foreign forum if forced to do so.

III. Choice of Law Considerations

As demonstrated in the Bashkirian litigation, a comprehensive understanding regarding the law to be applied in

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2 *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

3 *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 682 (Tex. 1990) (Doggett, J., concurring).

4 *See* Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. Chi. L. Rev. 1369, 1388 (1991).

the alternative forum is vital to a defendant's decision to seek FNC dismissal. Choice of law rules, which are unique to each prospective venue, determine what law will govern the litigation. A defendant considering FNC dismissal should, therefore, separately consider (1) the choice of law rules applied in the plaintiffs' chosen forum, and (2) the choice of law rules applied in the proposed alternative forum. After identifying and applying each forum's choice of law rules, the defendant can then effectively compare the rights and remedies available if the case were tried in the plaintiffs' chosen forum with those available if the case were tried in the proposed alternative forum. Because liability standards and available damages may vary widely based on the law applied, this should be a primary consideration in a defendant's analysis of the desirability of FNC dismissal.

Choice of law determinations are not always straightforward and may even require a detailed analysis simply to determine which choice of law rules apply. Consider, for example, the two competing sets of choice of law rules affecting European jurisdictions—the 1973 Hague Convention on the Law Applicable to Products Liability ("Hague") and Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations ("Rome II").

The Hague Convention

Hague determines the law applicable to products liability cases brought within the jurisdiction of a signatory state.[5] Hague's Article 11 compels signatory states to apply Hague's choice of law provisions "even if the applicable law is not that of a Contracting State." As a result, in foreign air disaster cases, U.S. law may be applied in products liability cases litigated in Hague states—despite the United States' non-signatory status.

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[5] Eleven countries have ratified Hague: Croatia, Finland, France, Luxemburg, Montenegro, the Netherlands, Norway, Serbia, Slovenia, Spain, and the former Yugoslav Republic of Macedonia.

Hague's choice of law provisions are set forth in Articles 4 through 6. Article 4 provides for the application of the law of the place of injury if that state is also the (a) habitual residence of the person directly damaged, (b) defendant's principal place of business, or (c) place where the product was acquired by the person directly damaged. If the Article 4 requirements are not satisfied, Article 5 then provides for the application of the law of the habitual residence of the person directly damaged if that state is also (a) the defendant's principal place of business, or (b) the place where the product was acquired by the person directly damaged. If neither Article 4 nor Article 5 is applicable, Article 6 permits plaintiffs to choose between the law of the defendant's principal place of business and the law of the place of injury.

Rome II

Effective for proceedings commenced after January 11, 2009,[6] Rome II binds all European Union ("EU") Member States, with the exception of Denmark, in situations in which non-contractual obligations in civil and commercial matters involve a conflict of laws. Under the general rule of Article 4, the law applicable to such litigation is the law of the country in which the damage occurs. If, however, both the defendant and the person sustaining damage principally reside in the same country when the damage occurs, that country's laws will apply.

There are a number of exceptions to this general rule. Article 5 designates, in successive order, three countries whose laws may govern a products liability case, provided that the country coincides with the place of marketing and the defendant cannot prove that the marketing was unforeseeable: (a) the habitual residence of the person sustaining damage; (b) the place where the

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[6] Rome II arguably has a limited retroactive effect. Article 31 provides that Rome II applies "to events giving rise to damage which occur after [Rome II's] entry into force." According to the general rules on the application in time, the date of Rome II's entry into force is the twentieth day following its publication in the *Official Journal of the European Union*—August 19, 2007.

product was acquired; and (c) the place of injury. If all three designated fail both the marketing and foreseeability tests, then the applicable law is that of the defendant's principal residence.

Although Rome II preempts Member States' national choice of law rules, under Article 28, it is unlikely to preempt Hague or other preexisting conventions governing non-contractual obligations where such conventions do not apply exclusively to Rome II signatories.[7]

Hypothetical Examples

Consider the choice of law implications of FNC dismissal to a European jurisdiction in the following hypothetical examples:

> *Example A*:
>
> In 2010, Defendant, a manufacturer with its principal place of business in California, was sued in the U.S. by Norwegian, American, and Spanish Plaintiffs for injuries sustained in connection with the 2008 crash of an aircraft in Norway. Defendant is deciding whether to seek FNC dismissal and is evaluating the choice of law implications of Norway as an alternative forum.

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[7] Rome II signatories include all EU Member States except Denmark. Because Croatia, Montenegro, Norway, Serbia, and the former Yugoslav Republic of Macedonia are signatories to Hague, but are not EU Member States bound by Rome II, Hague does not currently apply exclusively to Rome II signatories. Therefore, Hague is not preempted by Rome II. This produces the illogical result that signatories to both Hague and Rome II (Finland, France, Luxembourg, the Netherlands, Slovenia, and Spain) may continue applying Hague's choice of law rules (until Croatia, Montenegro, Norway, Serbia, and the former Yugoslav Republic of Macedonia all become signatories to Rome II), while other Rome II signatories must apply Rome II's choice of law rules. (Interestingly, Montenegro and Serbia have applied for EU membership, and Croatia and the former Yugoslav Republic of Macedonia are official candidates for EU membership; as such, they may become future signatories to Rome II—and only Norway would prevent Rome II's preemption of Hague.)

Here, the alternative forum (Norway) is a signatory to Hague, but not to Rome II. Consequently, a Norwegian court would apply Hague's choice of law rules. Pursuant to Article 4, Norwegian law would apply to the Norwegian Plaintiffs because the place of injury (Norway) is also the habitual residence of the persons directly damaged. Article 4 would not, however, apply to the American and Spanish Plaintiffs because the place of injury is neither their habitual residence nor Defendant's principal place of business, and the third possibility for applying Article 4—that the place of injury is also the place where the product was acquired by the person directly damaged—is inapplicable to this scenario.

Article 5 will apply to the American Plaintiffs if their habitual residence is also Defendant's principal place of business—that is, California—in which case, California law will govern their claims. If the American Plaintiffs do not reside in California, the choice of law applied to their claims (like that applied to the Spanish Plaintiffs' claims) will be determined under Article 6. Pursuant to Article 6, any non-California resident American Plaintiffs and the Spanish Plaintiffs will be permitted to choose between the law of Defendant's principal place of business (California) and the law of the place of injury (Norway). For the reasons previously cited, these Plaintiffs will undoubtedly choose the law of California.

Example B:

> The facts are the same as in Example A, except that the crash occurred in Spain, an EU Member State, and Defendant is deciding whether to seek FNC dismissal and is evaluating the choice of law implications of Spain as an alternative forum.

Here, the alternative forum (Spain) is a signatory to both Hague and Rome II. Because Rome II does not preempt Hague, the Spanish court will apply Hague's choice of law rules. Consistent with the analysis in Example A, Spanish law will apply to the

Spanish Plaintiffs (under Article 4), California law will apply to any American Plaintiffs that habitually reside in California (under Article 5), and any non-California resident American Plaintiffs and the Norwegian Plaintiffs will be permitted to choose between California law and Spanish law (under Article 6).

If Rome II preempted Hague, the Spanish court would instead apply Rome II's choice of law rules, producing a very different result.

Bashkirian Litigation: Analyzing Choice of Law

As demonstrated in the examples above, choice of law analysis is one of the most rigorous and perplexing tasks that attorneys are faced with in modern air disaster litigation. Never has the choice of law task been more unpredictable than in the recent Bashkirian Airlines Flight 2937-DHL Airways Flight 611 Mid-Air Collision litigation. The Bashkirian litigation arose from a mid-air collision between a Bashkirian Airlines Tupolev TU-154M and a DHL 757-200 that occurred over German air space in 2002. Despite minimal connections to the United States, Plaintiffs' nevertheless chose to file the vast majority of the ensuing lawsuits against U.S. based manufacturers of the Traffic Alert and Collision Avoidance Systems ("TCAS") in the United States. Defendants' successfully moved the court to dismiss the case on FNC grounds.

Following FNC dismissal, the Spanish court, applying the Hague Convention's choice of law provisions, concluded that as neither Article 4 nor Article 5 of the Convention applied, Article 6 permitted the plaintiff to proceed under the law of the defendant's principal place of business—New Jersey and Arizona, respectively. Ironically, if the case had remained in the United States, the laws of Russia, Spain or Germany would likely be controlling in accordance with traditional U.S. choice of law analysis. Although the damages ultimately awarded were considerably less than a

comparable U.S. verdict[8], this does not alter the fact that this decision demonstrates that a defendant's successful FNC dismissal does not guarantee the application of foreign law in the alternative foreign forum.[9] In some cases, FNC dismissal may even trigger specific statutes that permit the court to apply U.S. law in the foreign jurisdiction.[10] Conversely, U.S. courts may apply foreign law if the litigation remains in the U.S.[11] Thus, choice of law analysis must be undertaken at the earliest stage of the litigation in case where a defendant is considering FNC dismissal.

Due to the highly complex nature of choice of law issues, it is often best to consult foreign counsel familiar with the alternative forum to obtain opinions regarding its choice of law rules, what law is likely to be applied, and what damages are available and likely to be awarded. After identifying the law likely to be applied by each forum, the defendant should then consider other factors relevant to the desirability of FNC dismissal.

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8 For example, a Los Angeles jury awarded $43.6 million to the survivors of three foreign decedents who perished in the 1997 crash of SilkAir Flight 185 in Indonesia. *Sun v. Parker Hannifin Corp.*, No. BC 202587, 2004 WL 1732063 (Cal. Super. Ct. July 6, 2004).

9 *See supra* (discussing the 2002 aircraft collision over Germany and the hypothetical examples).

10 Walter W. Heiser, Forum Non Conveniens *and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 610 (2008) (noting that Nicaragua and the Commonwealth of Dominica "have adopted statutes that, at a minimum, authorize their courts to apply tort liability and damages law similar to that of the country in which an action was previously commenced by one of their residents, but subsequently dismissed on forum non conveniens.").

11 *See, e.g.*, *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1191 (D. Kan. 2008) (denying FNC dismissal even though Canadian law applied).

IV. Additional *Forum Non conveniens* Considerations

As previously suggested, defendants should not simply assume that international forums are preferable to U.S. courts. They should instead consider various factors in deciding whether to seek FNC dismissal. For instance, if criminal proceedings are pending in the alternative forum, a defendant might be exposed to criminal liability by submitting to jurisdiction in that forum. In such a case, a defendant should consult foreign counsel familiar with the alternative forum to determine whether there is an elevated risk of criminal prosecution if the defendant submits to jurisdiction in the foreign forum.

Although a substantial benefit to FNC dismissal is the likelihood that the plaintiffs will subsequently settle for a small sum or forego their claims altogether, this potential benefit should be weighed against the costs that will be incurred in the event that a plaintiff(s) refiles in the alternative forum. A defendant may incur significant expenses in bringing witnesses and evidence to the foreign forum, as is often required as a condition to dismissal. Additionally, due to unfamiliarity with the foreign law, the defendant will need to retain foreign counsel, resulting in additional costs—and perhaps even a loss of control over the litigation due to the defendant's reliance on foreign counsel. Although these costs will generally be justified when considered in relation to the risk of a substantial U.S. damages award, they should be considered nonetheless—particularly by a peripheral defendant with a very strong case on the merits.

Depending on the circumstances of the case, foreign pretrial and trial procedures may be either beneficial or detrimental to a defendant. For instance, if the defendant has a strong case on the merits, it may prefer to litigate in the U.S. court, where procedures exist to obtain summary judgment and summary adjudication. Because such dispositive motions are often unavailable in foreign forums, the defendant may prefer to keep the litigation in the U.S. and seek dismissal on the merits. In

contrast, a defendant with a weak liability case may go so far as to stipulate to liability as a condition to FNC and only litigate the damages issues in the alternative forum[12]—provided, of course, that the defendant is confident that the foreign forum will apply preferable damages law.

In further evaluating the effectiveness of expedited foreign pretrial and trial procedures, defendants should consider any potential disadvantages to plaintiffs. Because foreign procedures generally provide only limited time for gathering evidence and proving a liability case, and they often do not allow for liberal pretrial discovery, plaintiffs may have difficulty establishing a case against all defendants. Consequently, plaintiffs may decide to focus on primary defendants, and they may ultimately decide to settle or forego their claims against peripheral defendants.

Defendants should also consider whether the case will be decided by a judge or a jury. In most foreign forums, civil cases are decided by judges. This may significantly impact an award of damages. Consider, for example, the Bashkirian litigation in Spain. Although the Spanish court applied U.S. damages law, the court awarded only approximately $348,000 per decedent—considerably less than a typical U.S. verdict[13]—presumably due to the judge's strict application of damages law. Juries, on the other hand, are more often swayed by emotion. Because there is no cap or formula for computing non-economic damages, the unlimited discretion of a sympathetic jury may result in substantial awards even if foreign damages law is applied. If other factors suggest that a defendant should litigate in the U.S., the defendant should seriously consider the possibility that a U.S. jury might award a large judgment despite the application of foreign damages law.

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[12] This was done in *In re Air Crash over the Taiwan Strait*, litigation arising out of the 2002 crash of China Air Flight CI611.

[13] *See* fn 7.

Defendants should also be aware of the political climate in the alternative forum. In some countries, judges may—like juries—be swayed by emotion, and this may result in unfavorable verdicts and damages awards where the forum provides its judges with wide discretion. For example, in *Ferreira v. Northrop Grumman Corp.*, a Brazilian judge published an opinion stating:

> It would appear that for some, it is better to applaud war, because destroyed lives do not matter very much. For them, what is important is to produce weapons, bombs, communications systems for barren places, combat aircraft, etc. **To display consumption and profit.** There is not, with a live heart, the spirit of things, but it is what man sees in society, as we have been taught only in the last fifty (50) years: Hiroshima, Vietnam, Iraq and the Gulf, Palestine, Bosnia, Kosovo and other manufacturers that say so.[14]

In light of such an opinion, defendants should thoroughly research the political climate in the alternative forum prior to seeking FNC dismissal.

Finally, defendants should consider whether the U.S. court lacks jurisdiction over other necessary parties. For instance, if there is a possibility that the airline's employees contributed to the crash, it is important that the airline be a party to the litigation. Under the Montreal Convention, however, foreign plaintiffs may

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[14] *Ferreira v. Northrop Grumman Corp.*, Case No. 1,509/98 (São Paulo, Brazil, July 30, 2000) (Opinion of Judge Rômolo Russo Júnior, District Court) (emphasis in original).

be unable to establish U.S. jurisdiction over foreign carriers[15]—leaving the remaining defendants to point to the liability of an "empty chair." Under such circumstances, a defendant may be disadvantaged if the litigation remains in the U.S.

Before proceeding with a motion to dismiss on FNC grounds, defendants should weigh the various factors affecting the desirability of FNC dismissal. Depending on the circumstances of each individual case, these factors may weigh in favor of or against FNC dismissal.

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[15] The Montreal Convention provides that plaintiffs can only file suit against a carrier for passenger injury or death during international air carriage in one of five specified fora: (1) the carrier's place of domicile; (2) the carrier's principal place of business; (3) the place of business through which the contract of carriage was made; (4) the place of destination of the carriage; and (5) the principal and permanent residence of the passenger. Under the Convention, foreign plaintiffs are thus unable to establish U.S. jurisdiction over foreign carriers unless the ticket was purchased in the U.S. or the flight's destination was in the U.S. Montreal Convention, art. 33 (1999).

V. Conclusion

Choice of law rules, which vary by jurisdiction, determine what law will govern the litigation. Because liability standards and available damages may vary widely based on the law applied, defendants considering FNC dismissal should thoroughly evaluate what law is likely to be applied under the alternative forum's choice of law rules. Because of the highly interdependent relationship between choice of law and choice of forum, this should be a primary consideration in a defendant's analysis of the desirability of FNC dismissal.

Defendants can use FNC as a powerful tool against foreign plaintiffs suing for damages sustained in foreign aviation accidents. Despite the potential benefits of a successful FNC motion, however, defendants should consider all of the relevant factors affecting the desirability of FNC dismissal. Foreign air disaster defendants should conduct a case-by-case analysis of the advantages and disadvantages of the foreign forum to ultimately decide whether, on balance, the foreign forum is preferable to the U.S. forum for defending the litigation.