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Aviation Litigation: Federal Preemption and the Creation of a Federal Remedy as a Means to Extinguish the Current Confusion in the Courts

I. INTRODUCTION

Air disasters, whether collisions mid-air or on the ground, are the subject of massive litigation.¹ When an air crash occurs, two responsibilities arise: determining the probable cause of the crash so that other pilots can be warned against duplicating the same action, and compensating the victims to the extent the law is able. One of the principle complexities in lawsuits that result from the crash of a public carrier exists due to the different state citizenships of the passengers involved and the conflicting state laws. Although there has been an effort to minimize the impact of state lines on the rights of interstate travelers,² one right that has escaped this effort is the right to receive damages in the event of death.³

The following scenerio is easily imaginable. A federal court sitting in State A, following the crash of a plane in State A which had departed from State B, could decide that some of the occupants were entitled to whatever damages State B would allow, others would be permitted whatever State A law would allow, and still others, who had boarded the flight in State C and only con-

1. For an illustrative list of litigation, *see* note 12 *infra*.

2. The following provision is found at 28 U.S.C. § 1407(a) (1976):

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

Id.

3. Federal Aviation Act of 1958, 49 U.S.C. 1506 (1976).

nected through State B, might be permitted to recover whatever State C would allow.

In some states, a human life is worth a few thousand dollars,⁴ while in others it can be worth millions,⁵ depending on the identity and domicile of the decedent. Naturally, every wrongful death litigant wishes to take advantage of the law most favorable to him or her. This leads to a great deal of forum shopping.⁶

Because of these conflicts between the various state laws, a mistake in seeking the proper jurisdiction could result in a loss to a client of hundreds of thousands of dollars, caused simply by trying a case in a jurisdiction subject to a limitation which could have been avoided if proper legal steps had been taken. The horrible irony is that one's recovery may be affected because one's husband, wife, father, or mother happened to be a domiciliary in one state and not another. There is little justice in this.

This comment will discuss the need for providing exclusive federal jurisdiction in the area of aviation litigation. The issue of whether an overriding federal interest in air commerce exists to preempt state tort law and to support the establishment of a federal tort cause of action accompanied by a federal remedy will also be addressed. In conclusion, a recommendation of how to implement the above concepts to eliminate the current injustices inherent in this area of litigation will be set forth in detail.

II. NEED FOR PROVIDING EXCLUSIVE FEDERAL JURISDICTION

Ordinarily, in the wake of a single air disaster, multiple suits will be brought in different jurisdictions due to diversity of citizenship between the carrier or manufacturer and the passengers, who are residents of several states.⁷ A defendant being sued by numerous plaintiffs in federal district courts will normally be able

4. 2 J. KENNELLY, *LITIGATION AND TRIAL OF AIR CRASH CASES*, ch. 6 (1st ed. 1968). Example of states limiting recovery for wrongful death includes: Colorado, \$35,000; Kansas, \$35,000.

5. In states which have not enacted recovery limitations, a plaintiff can literally be awarded whatever dollar figure the judge or jury deems proper under the particular circumstances. Two states with no restriction on recovery in death actions are Texas (*Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968)) and California (*Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974)).

6. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) states: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *See also Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (in diversity of citizenship cases involving questions of conflicts of laws, federal courts must follow rules prevailing in states in which they sit).

7. In pertinent part, 28 U.S.C. § 1332(a) (1976) provides:

(a) The district courts shall have original jurisdiction of all civil actions

to remove to the federal court any state court action arising out of the same crash, by use of the federal removal statute.⁸ For these reasons, aircraft litigation results in the use of federal "multidistrict litigation." Such cases are assigned and transferred by a Judicial Panel on Multidistrict Litigation.⁹ The Judicial Panel, established in section 1407(a)¹⁰ of the Federal Rules of Civil Procedure, attempts to discourage trying the same case a number of times, by allowing the lawsuits to be consolidated before a single court which has the power to "coordinat[e] or consolidat[e] pre-trial proceedings."¹¹ The advantages of a single forum include centrally controlled discovery procedures,¹² expedition of settle-

where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Id.

8. In pertinent part, 28 U.S.C. § 1441(a) (1976) provides:

- (a) Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.

9. Details of the Judicial Panel's procedures are set forth in Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?* 43 H. AIR L. & COM. 565 (1977).

10. See note 2 *supra*.

11. *Id.*

12. The following citations are to reported decisions of the Judicial Panel on Multidistrict Litigation consolidating state actions: *In re* Air Disaster at Denver, Colorado, on November 16, 1976, 486 F. Supp. 241 (J.P.M.D.L. 1980); *In re* Air Crash Near Van Cleve, Mississippi, on August 13, 1977, 486 F. Supp. 926 (J.P.M.D.L. 1980); *In re* Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979); *In re* Aircraft Accident at Barrow, Alaska, on October 13, 1978, 474 F. Supp. 996 (J.P.M.D.L. 1979); *In re* Air Crash Disaster at Stapleton International Airport in Denver, Colorado, on August 7, 1975, 447 F. Supp. 1071 (J.P.M.D.L. 1978); *In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 407 F. Supp. 244 (J.P.M.D.L. 1976); *In re* Air Crash Disaster at Charlotte, North Carolina, on September 11, 1974, 393 F. Supp. 1404 (J.P.M.D.L. 1975); *In re* Air Crash at Chattanooga, Tennessee, on November 27, 1973, 393 F. Supp. 1406 (J.P.M.D.L. 1975); *In re* Delta Airlines Crash at Boston, Massachusetts, on July 13, 1973, 373 F. Supp. 1406 (J.P.M.D.L. 1974); *In re* Delta Airlines Crash at Boston, Massachusetts, on July 13, 1973, 373 F. Supp. 1406 (J.P.M.D.L. 1974); Florida Everglades Crash of December 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. 1973), 368 F. Supp. 812 (J.P.M.D.L. 1973); Juneau, Alaska, Crash of September 4, 1971, 350 F. Supp. 1163 (J.P.M.D.L. 1972), 360 F. Supp. 1406 (J.P.M.D.L. 1973); Duarte, California, Crash of June 6, 1971, 346 F. Supp. 529 (J.P.M.D.L. 1972), 354 F. Supp. 278 (J.P.M.D.L. 1973);

ments,¹³ and elimination of duplicated efforts and expenditures by courts and litigants.¹⁴

The presence of the Judicial Panel and its exercised authority¹⁵ would tend to persuade one to believe that exclusive federal jurisdiction of airline crash actions has already been mandated. However, two impediments exist which prohibit, or at least hinder, consolidation. For example, if a crash involves parties with a common state of residence, the Judicial Panel will not remove the case to a federal court. Thus, the first impediment is the existence of purely state actions. The second is that the federal removal statute¹⁶ itself requires that all transferred cases be returned to the original federal district court after completion of trial-type procedures such as pretrial pleadings, law in motion and discovery.¹⁷ Further, the statute expressly bars a district court from taking jurisdiction of such cases for trial.

Courts have recognized the convenience and economy of transfers for many purposes and have attempted to circumvent the remand requirement of the Multidistrict Litigation Statute.¹⁸ If a uniform federal law is adopted, reason will exist to resolve cases from a single air crash in a common forum, thereby avoiding removal to a federal court to determine pre-trial procedural issues and returning the case to a state court for trial. The federal law

Las Vegas, Nevada, Crash of October 8, 1968, 336 F. Supp. 414 (J.P.M.D.L. 1972); Dayton, Ohio, Crash of March 9, 1967, 310 F. Supp. 798 (J.P.M.D.L. 1970); Hong Kong Crash of June 30, 1967, 298 F. Supp. 390 (J.P.M.D.L. 1969). See generally Martin, *Multidistrict Litigation—A Panacea or a Blight*, 18 TRIAL LAW GUIDE 409 (1974).

An example of the positive results brought about by 28 U.S.C. § 1407 (1976) is the litigation resulting from the Duarte air disaster in which 49 persons were killed. Approximately 145 claims were represented in the case; all actions were transferred under the multidistrict litigation statute. Although discovery involved depositions exceeding a total of 6,500 pages, coordinated procedures resulted in settlement on the issue of liability less than two years after the accident. All claims were settled with total recovery of about \$10 million. Findings of Fact and Conclusions of Law at 1-2, 17, *Wilkerson v. Hughes Air Corp.*, MDL No. 106, Civil No. 72-459-PH (C.D. Cal. Oct. 22, 1974). The case is reported in Duarte, California, Crash of June 6, 1971, 346 F. Supp. 529 (J.P.M.D.L. 1972), *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972), and *In re Air Crash Near Duarte, California* on June 6, 1971, 357 F. Supp. 1013 (C.D. Cal. 1973).

13. *Id.* Specifically see *Gabel*, 350 F. Supp. 612; *Duarte*, 357 F. Supp. 1013.

14. *Id.*

15. See note 10 *supra* and accompanying text.

16. See notes 8 and 10 *supra*.

17. See generally Martin, *Multidistrict Litigation—A Panacea or a Blight*, 18 TRIAL LAW GUIDE 409 (1974). See also note 12 *supra*.

18. See note 9 *supra*. See also *In re Mid Air Crash Collision Near Fairland, Indiana*, 309 F. Supp. 621 (J.P.M.D.L. 1970). The court avoided the remand requirement by transferring and consolidating an air crash trial for all purposes and as a result a change of venue was declared. See also note 20 *infra*.

will apply to every case regardless of where it is filed.¹⁹

III. THE BURDENING ASPECT OF CONFLICTS OF LAW

Developing an exclusive federal jurisdiction would not end the confusion which is inherent in air crash litigation. When cases involving multi-state interests are transferred to a single federal district, each case brings with it its own state's substantive laws and conflict of laws choices because change of venue is merely a change in courtrooms.²⁰ The true confusion begins when the conflict of laws rules for the various states are analyzed.

A variety of approaches are used to determine the applicability of a state's choice of law rule²¹ when faced with a competing choice of law rule from another state that is involved in the same litigation. Traditionally, virtually all states adhered to the doctrine known as *lex loci delicti* when confronted with a conflict of laws issue involving a tort.²² The doctrine requires that the substantive law of the place of the wrong be applied to the case. The doctrine received grave criticism in that the place where a crash occurs depends on uncontrollable factors, such as the place where trouble first begins²³ or the angle of the descent of the aircraft.²⁴

19. See text accompanying notes 34-114 *infra*.

20. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). Defendants sought to transfer all actions to Massachusetts under 28 U.S.C. § 1404(a), hoping to take advantage of the limited liability of that state's wrongful death statute. The case was ultimately decided by the Supreme Court, Mr. Justice Goldberg concluding:

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

376 U.S. at 639. The Court was concerned only with those state laws of the transferor state which would significantly affect the outcome of the case. See also *Klaxton Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941). When jurisdiction of a court is based on diversity of citizenship, the choice of law rules of the state where the action was originally filed must be applied.

21. In the area of conflict of laws, the choice of law rule is the question presented in determining what law should govern. This determination can involve determining whether to apply the law of a sister state, when a federal court of the United States apply state law, or when a state court must apply federal law. S. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS CASES COMMENTS QUESTIONS 1-7* (2d ed. 1975).

22. *Alabama Great Southern R.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892) (negligence action by an employee injured in a state other than his place of domicile); *RESTATEMENT OF CONFLICTS OF LAWS* § 377 (1934).

23. Note, *Limitation of Liability in Death Actions is Procedural—Kilberg v. Northeast Airlines, Inc.*, 74 HARV. L. REV. 1652, 1654 (1961).

Lex loci delicti was slowly replaced by more flexible and rational approaches. One such approach is known as the "center of gravity" approach.²⁵ The courts, instead of treating the place of the wrong as determinative, lay emphasis upon the law of the state which has the most significant contacts with the matter in dispute. All of the relevant contacts are considered and the law of the state having the most dominant relation to the case is applied.²⁶

Another approach developed by the courts was the "government policy interest analysis"²⁷ approach. This approach requires a court to determine the relevant policies of each state, identify the interests each state has in having its law, as compared to that of another state, applied to the issues in dispute under the facts of the case, evaluate the competing interests of the states, and apply the most appropriate state law under the circumstances.²⁸

24. *Id.* Little regard was given to the public policies of the involved states or the interests of the states. *Kilberg v. Northeastern Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961). The limiting *lex loci delicti* is being widely displaced, at least to protect the citizens of the forum state against application of the varying laws of other states through or over which they move. *Id.*

25. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). The defendant husband, a British citizen, entered into a New York marital separation agreement with his wife, plaintiff, wherein she was to remain in England while he resided in New York. When the husband discontinued payments, the wife brought suit in a New York court. The court held that it could take into account the interests of the other jurisdiction and apply the law of the jurisdiction with the most significant contacts in the dispute. English law was found to be applicable as to the performance which the court found to be the essence of the marital agreement, since the performance was to be rendered by the wife in England. *See also* *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953) (involved an oral agreement not to revoke or alter wills); *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961) (conflict of laws problem over a child support payment).

26. *Id.*

27. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (New York Court of Appeals applied New York common law, although Ontario, the site of the accident, had a guest statute, because of the predominant concern of New York with an action involving injuries sustained by a New York guest as a result of the negligence of a New York host operating an auto garaged and licensed in New York). *See, e.g.*, *Storie v. Southfield Leasing, Inc.*, 90 Mich. App. 612, 282 N.W.2d 417 (1979) (foreign law will not be recognized if contrary to the public policy of the forum); *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W.2d 625 (1978) (*lex loci delicti* frustrates public policy of one state's exception to parental immunity); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (tort action arising from an out of state auto accident).

28. *Id.* While contacts are significant they must be weighed and not merely counted. Three factors which may be significant for this purpose are: (1) the domicile, nationality, residency, or place of business of the plaintiff and defendant, (2) the place of the wrong, and (3) the forum itself. *See generally* B. CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAW*, 690-742 (1st ed. 1963).

Closely related to the interest analysis approach is that followed in the California courts known as "comparative impairment." *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). The court determines which state's policy would be more severely affected if it were not applied. An example

A fifth approach²⁹ followed by numerous state courts is one known as "the most significant relationship" approach.³⁰ The most comprehensive technique under this approach is, first, to weigh the competing state interests by identifying the contacts with each state and assess their importance by evaluating their relationship to the state policy involved, and, second, to resolve the issue by applying the law of the state determined to have the most significant interest.³¹

of the application of this approach can be found in *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), wherein *Hurtado*, a California resident, was a defendant in a wrongful death action brought by a resident of Mexico. California had no limit to damages recoverable for wrongful death while Mexico limited recovery to a maximum of \$1,946.72. The trial court applied the law of California after determining California had the greater interest in the case. The Supreme Court of California affirmed after analyzing the issues and relevant interests. It concluded that the interest for limiting damages is to avoid financial burdens on the residents of Mexico. Here the defendants were Californians, therefore Mexico had no interest in applying its limitation. On the other hand, California did have an interest as to the defendants in order to deter their conduct.

29. For a discussion on various other approaches followed by a few various states see *Kuhn, Choice of Law in Products Liability*, 60 CALIF. L. REV. 1 (1972).

30. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971). Section 6 states: Choice-of-Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

Id.

See also *Wood Bros. Home Inc. v. Walker Adjustment Bureau*, 198 Colo. 444, 601 P.2d 1369 (1979) (once the state having the most significant relationship to particular issue is identified under RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, the law of that state is applied to resolve the particular issue); *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970) (Constitution does not require a court to apply doctrine of *lex loci delicti* rather than the "most significant contacts rule" in determining applicable law).

31. This is the approach adopted by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). In tort cases:

- (1) The rights and liabilities of the parties with respect to an issue in tort are to be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.
- (2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

While the modern approaches to the various conflict of laws situations may be reasonable and efficient in a single case, they can flood courts with numerous conflicts in air crash litigation. For example, consider the recent litigation over claims for punitive damages in consolidated actions for wrongful death in connection with a fatal air crash in Illinois.³² There, the court had to determine the liability of the defendants in a consolidated action for wrongful deaths by applying the particular conflict of laws rule used by the states where each of the respective claims were originally filed. In the end, some plaintiffs were entitled to punitive damages from one defendant but not the other.³³

The conclusion to be drawn is that it is a fiction to believe that a judge can operate effectively when required to apply different conflict of laws rules to various claims arising from one single accident. The inevitable differences in the outcomes on identical issues are far from equitable when one considers that variations in liability and damages, though based on identical conduct, are due to differences in state conflict of laws principles and underlying tort law.

IV. PROPOSAL I: ESTABLISHMENT OF A FEDERAL TORT CAUSE OF ACTION ACCOMPANIED BY A FEDERAL REMEDY

To date, it remains clear that courts have not been able to deal equitably with the adverse consequences caused by conflicts of laws in air crash litigation. The issue has yet to be settled as to whether an overriding federal interest exists in air commerce sufficient to preempt state tort law and to impose federal common law in order to eliminate inconsistent results due to the application of conflicting state choice of law rules.

The most direct way to correct this incongruity in aviation law is by Congressional action. Presently, airlines are subject to

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- (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id.

32. *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980). The variety of state wrongful death statutes presented the greatest source of conflict in this air crash litigation. Actions were filed in Illinois, which applies "the most significant relationship" test, California, where the "comparative impairment" approach is followed, Michigan and New York, where the "government interest analysis" approach is applied, and in Puerto Rico and Hawaii, which the court held applied the "*lex loci delicti*" test.

33. *Id.* at 1054.

uniform federal regulation in almost every aspect of their operations.³⁴ The Federal Aviation Act of 1958³⁵ established exclusive federal control over the nation's navigable airways and at the same time gave authority to the Federal Aviation Administrator to develop aviation commerce and to establish the standards necessary to ensure aviation safety.³⁶ Additional evidence of federal interests preempting those of states can be found in various senate bills introduced to the 90th and 91st Congress which would have provided for exclusive federal jurisdiction over certain tort actions arising in the course of aviation commerce.³⁷ However, these bills were never passed.³⁸

Unfortunately, Congress has failed to readdress the conflict of

34. 72 Stat. 731 (codified at 49 U.S.C. § 1301 (1976)). Section 1508(a) provides specifically:

The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

Id.

35. 49 U.S.C. § 1301 (1976).

36. The objective of the Federal Aviation Act of 1958 is to foster the development of aviation commerce. 49 U.S.C. § 1346 (1976). For examples of primary federal authority in aviation, see *Air Line Pilots Assoc. Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960) (age limitations for airmen); *United States v. Drumm*, 55 F. Supp. 151 (D. Nev. 1944) (airworthiness and pilot certificates); *Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942) (airworthiness certificates for aircraft). See generally Comment, *State Versus Federal Regulation of Commercial Aeronautics*, 39 AIR L. & COM. 521 (1973).

37. The "Holtzoff Bill", introduced into the Senate in 1968, provided for exclusive federal jurisdiction over civil actions arising out of the operation of aircraft. S. 3305, 90th Cong., 2d Sess. § 1 (1968). As a result of opposition, the "Admiralty Bill" patterned after the Death on the High Seas Act, 46 U.S.C. §§ 761-62 (1976) was introduced, and provided for exclusive federal jurisdiction over any action for damages from injury or death for any breach of duty arising in the course of aviation activity. *Hearings on S. 3305 and S. 3306, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary 90th Cong., 2d Sess.* 31-32 (1968). In particular, the proposal by Senator Joseph Tydings urged that exclusive federal jurisdiction be granted only to those cases involving substantial numbers of people and suits in multiple jurisdictions. *Hearings on S. 961 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. (1969). Under the bill, "there exists a uniform body of federal law governing all civil relations arising out of air craft litigation." *Id.* However, the substantive rules of law were to be left to be shaped by judicial decisions.

38. The criticism by opponents to the proposed bill amounted to the objection that such an establishment of a federal uniform law would invade local definitions of tort law which had been traditionally based on community standards and state policies.

laws issue which is arguably entwined with the Federal Aviation Act of 1958. Rather than define a distinct remedial status for aviation wrongful death and personal injury cases, Congress appears to have deferred to the law of the interested state. In the case of *City of Burbank v. Lockheed Air Terminal, Inc.*,³⁹ the Supreme Court took some steps to resolve this issue. The majority held that the Federal Aviation Act of 1958 preempted the field of air safety.⁴⁰ It was confirmed that the Act was "intended to consolidate in one agency under the Executive Branch the control over aviation that had previously been diffused within that branch. The paramount substantive concerns of Congress were to regulate federally all aspects of air safety. . . ."⁴¹ It follows that if the federal policy of uniform control over aviation conflicts with competing state tort laws, the federal supremacy clause provides the choice of law answer.⁴² In addition, recent lower federal court decisions have successfully found alternatives which provide a federal remedy where none is expressly provided for by the statute.

In the landmark case of *Kohr v. Allegheny Airlines, Inc.*,⁴³ federal aviation common law achieved full recognition by the seventh circuit. The court held that federal common law which favors recovery preempted contrary Indiana law as to indemnity

39. 411 U.S. 624 (1973). The Supreme Court upheld the invalidation of a city noise ordinance which prohibited jet take-off from the Hollywood-Burbank Airport during certain prescribed hours.

40. *Id.* at 633. Also, the United States Supreme Court has upheld legislation which displaced the state tort remedies where the federal policy required national conformity under federal remedies. *See, e.g.,* New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917) (liabilities and obligations of interstate railroad companies is regulated inclusively and exclusively by the Federal Employers Liability Act). *See also* Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926) (the Boiler Inspection Act precludes state legislation).

41. 411 U.S. at 644 (Rehnquist, J., dissenting).

42. Federal preemption implies more than extensive administrative regulation. U.S. Const. art. VI cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. *See also* *Chicago*, 500 F. Supp. at 1054.

43. 504 F.2d 400 (7th Cir. 1974). The case arose out of a mid-air collision between a general aircraft and a commercial airliner near Fairland, Indiana. Eighty-three persons were killed. After more than 80 actions were filed in numerous federal district courts, the Multidistrict Litigation Panel transferred them to the Southern District of Indiana pursuant to the Multidistrict Litigation Statute. *In re* Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621 (J.P.M.D.L. 1970). A dispute arose as to whether Allegheny and the United States could maintain third party actions for contribution and indemnity on the assertion of contributory negligence on the part of the manufacturer of the Piper Cherokee aircraft. The district court dismissed on the grounds that Indiana law did not allow such recovery between tortfeasors upon which defendants appealed and ultimately prevailed.

and contribution for damages paid as a result of a collision between an interstate commercial airliner and a local private plane. The court based its decision on "the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways" and promoting uniformity of decisions.⁴⁴ The source of this predominant federal action is the Federal Aviation Act of 1958⁴⁵ which declares that the United States possesses "exclusive national sovereignty in the airspace of the United States"⁴⁶ in order, the court said, "to create one unified system of flight rules and to centralize in the . . . Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace."⁴⁷

In *Kohr*, the court did not limit the use of federal common law to governmental claims only. "The interest of the state wherein the fortuitous event of the collision occurred," the court concluded, "is slight as compared to the dominant federal interest."⁴⁸

The hypothesis that a federal right requires a federal remedy is not unique to the courts of the United States. The most important case recognizing a federal remedy is *Moragne v. States Marine Lines*.⁴⁹ The use of state laws failed to protect federal rights; therefore, the Supreme Court recognized the propriety of the federal, as opposed to state, tort remedies in a federally preempted field and was compelled to direct the lower federal courts to fashion federal tort remedies.⁵⁰ Although the case involved admiralty, the decision provides persuasive support for the establishment of federal air crash law because the policies and rationales behind both are analogous. They are both areas which are of predominant federal interest in relation to interstate transportation and the inevitable fatalities which occur therewith.⁵¹

44. 504 F.2d at 403 (7th Cir. 1974).

45. 49 U.S.C. § 1301 (1963).

46. 504 F.2d at 404 (citing 49 U.S.C. § 1508(a) (1976)).

47. *Kohr*, 504 F.2d at 404 (7th Cir. 1974).

48. *Id.*

49. 398 U.S. 375 (1970) (concerns maritime law). The court overruled the 84 year-old rule derived from *Harrisburg v. Richards*, 119 U.S. 199 (1886) that only statutory remedies can be used in wrongful death maritime activities. The claim of a widow of a longshoreman injured in Florida's waters was removed to federal district court and dismissed for lack of a state remedy. On appeal the Supreme Court reversed holding that the federal interest was pervasive and therefore any remedy for wrongful death must be determined by federal common law, not by a state statute.

50. *Id.* at 410.

51. Another approach used by the federal courts using the Federal Aviation

The approaches and remedies fashioned by innovative courts, although significant, can only provide solutions to the particular facts involved in any given case. Decisions by courts demonstrate reluctance to create federal remedies and reveal the limitations of case law.⁵² Even the Federal Aviation Act of 1958 itself acknowledges concurrent state remedies;⁵³ thus, nothing short of an amendment to the act will make federal remedies exclusive. It is therefore apparent that the federal courts cannot provide the needed reform in aviation law and that the time has come for Congress to address this area of federal concern. In so doing, it must follow the precedents of *Moragne* and *Kohr* if a permanent solution is to be provided.⁵⁴

Act of 1958 as a guide, is the technique of creating "implied remedies." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Agents of the Federal Bureau of Narcotics made a warrantless entry into the petitioner's apartment, searched the apartment, and arrested the petitioner on narcotics charges. All of the acts were alleged to have been performed without probable cause. The Court concluded that the petitioner's complaint stated a cause of action under the fourth amendment and that he was entitled to recover money damages for any injuries he suffered as a result of the agents' violation of the amendment. Justice Harlan, concurring, said: [I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Id.* at 402. In other words, if an express federal right has been interfered with (right to safe air transportation) and damages have resulted from that interference (damages or death due to negligent pilot), it can be asserted that the deterring effect of providing a federal remedy on this situation would act to further Congress' underlying policy of air commerce safety and that thus such remedy should be available. *See Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972), where in considering the issue of whether a surviving widow could bring an action for wrongful death, the court held that a violation of a duty imposed by the Federal Aviation Act of 1958 created a cause of action in favor of the one who is injured or damaged by the death of a person resulting from such a violation. *See generally Note, Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

52. 500 F. Supp. at 1054.

53. 49 U.S.C. § 1506 (1976). "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.*

54. The United States Supreme Court has suggested such legislation in recognizing the limitations of using federal admiralty law to solve aviation litigations. Justice Stewart reasoned:

It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitious litigation in multi-party cases. . . . If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 273-74 (1972). *See also Chicago*, 500 F. Supp. at 1053.

V. PROPOSAL II: A DOMESTIC "WARSAW CONVENTION": FEDERAL LEGISLATION ESTABLISHING MAXIMUM RECOVERY FOR PERSONAL INJURY ARISING FROM AN AIR CRASH

A. *Legal Background of the Warsaw Convention*⁵⁵

Generally speaking, liability in international air transportation is governed by rules promulgated in an international treaty known as the Warsaw Convention, to which the United States, although not a sovereignty, adheres pursuant to presidential proclamation.⁵⁶ The rules promulgated are exclusive and take precedent over national law.⁵⁷ The Convention is concerned with only limited aspects of private law governing international carriage by air. More specifically, it does not deal with the legal capacities of the parties in a contract, or the form, validity, cancellation, voiding, violation, and non-execution of a contract. All of these questions must be dealt with by a court in accordance with the applicable national law.⁵⁸

The Warsaw Convention was created to promote uniform rules relating to the international transportation of persons, baggage, or goods performed by a commercial or hired air carrier.⁵⁹ The rele-

55. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw Convention, *opened for signature*, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 875, 137 L.N.T.S. 11 (adherence of the United States proclaimed Oct. 29, 1934); 49 U.S.C. § 1502 (1976).

56. *Id.*

57. The provisions of the Warsaw Convention supersede the traditional doctrine adhered to in United States and international conflict of laws cases, that the right and measure of recovery for injuries were governed by the *lex loci delicti* doctrine. See *Garcia v. Pan American Airways, Inc.*, 269 App. Div. 287, 55 N.Y.S.2d 317, *aff'd* 295 N.Y. 852, 67 N.E.2d 257, *remititur denied* 295 N.Y. 981, 68 N.E.2d 59, *cert. denied*, 329 U.S. 741 (1946). As to a departure from a strict application of the *lex loci delicti* doctrine in the United States, see notes 25, 28, 29 & 31 *supra* and accompanying text.

In addition, the Convention overrides and supplants any contrary local law as to the legality of limiting a carrier's liability. *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1954) (international transportation of a U.S.O. entertainer on an aircraft owned by a private corporation was *not* transportation performed by the United States government, thereby rendering the liability limitations of the Warsaw Convention inapplicable).

58. See generally *Information Control Group v. United Airlines Corp.*, 73 Cal. App. 3d 630, 140 Cal. Rptr. 877 (1977) (recognized availability of state remedies when not inconsistent with purpose of Federal Aviation Act); *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976) (action against airline for overbooking); *Archibald v. Pan American Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972) (action by passengers against airline for overbooking).

59. Landry, *Swift, Sure and Equitable Recovery—A Developing Concept in International Air Law*, 47 N.Y. St. B.J. 372, 373 (1975).

vant provisions of the Convention relating to liability limitation are as follows:

ARTICLE 17

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs (In 1934, approximately \$8,300). . . . Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability. . . .⁶⁰

Since their enactment, the Convention's limitation of liability provisions have been the center of considerable debate⁶¹ due to the various recovery policies adhered to by the countries who are parties to the Warsaw Convention. As a result, a conference was convened in Montreal, Canada, and an interim arrangement known as the Montreal Agreement was formulated.⁶²

It has been said that the Warsaw Convention treaty, like any other statute, must be construed reasonably and so as to accomplish its purpose.⁶³ These "purposes" have been interpreted by various federal district courts and federal courts of appeal to embrace the desire of the Convention's signatories to establish a uni-

The quest for uniformity was quite a success story. Today more than one hundred nations are parties to the Warsaw Convention. It is a private law treaty in the sense that it applies directly to individuals rather than to nations. And Warsaw has become the most widely adopted private law treaty in the history of mankind.

Id.

60. 49 U.S.C. § 1502 (1976). Also, the Convention prohibits contractual modifications for lower amounts, art. 23, 49 Stat. 3000, and the carrier may not avail himself of the limitation if plaintiff can show willful misconduct by the air carrier, art. 25, 49 Stat. 3000.

61. For detailed discussion of the history of the Convention, and amendments thereto, and debate surrounding the limitation provisions, see H. DRION, *THE LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* (1st ed. 1954); L. KREINDLER, *1 AVIATION ACCIDENT LAW* § 11.01-11.09 (rev. ed. 1981); Sand, *Air Carriers' Limitation of Liability & Air Passengers' Accident Compensation Under the Warsaw Convention*, 28 J. AIR L. & COMM. 260 (1961-62).

62. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Hague Protocol, September 28, 1955, 478 U.N.T.S. 371; Montreal Agreement, C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (May 19, 1966), approving Agreement C.A.B. 18,900. Under the Agreement, the majority of international air carriers scheduling flights involving the United States agreed to increase their liability limit to \$75,000 per passenger unless the plaintiff could show willful misconduct on the part of the defendant. Thus, an international carrier is absolutely liable, for up to \$75,000 per passenger, unless it can prove negligence on the part of the passenger, for damages sustained in the event of death or injury of a passenger, if the accident which caused the damage sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

63. See note 57 *supra*.

form body of world-wide liability rules to govern international aviation; for such rules to supersede, with respect to international flights; the scores of differing domestic laws; and for all claims for damages for personal injuries suffered by a passenger in an accident, whether physical or mental, to be resolved in one action under the Convention.⁶⁴

At this time it is relevant to discuss two very important aspects related to the liability limitations in Articles 17 and 22 of the Convention.⁶⁵ First, by the wording of Article 17, it is clear that the limitation on the amount of the recovery imposed by the Warsaw Convention can be invoked only by a carrier.⁶⁶ It does not apply to manufacturers of any equipment being used by a carrier. Therefore, if it appears that a recovery against the carrier might be limited by the operation of the Convention, plaintiff's counsel can and should consider the possibility of joining a noncarrier defendant to an action in order to effect full recovery.⁶⁷ Second, the

64. *Reed v. Wiser*, 555 F.2d 1079 (2nd Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (when a bomb on the airplane exploded personal representatives, heirs, and next of kin of nine airline passengers killed bring an action against the corporate officers of the air carrier); *Karfunkel v. Compagnie*, 427 F. Supp. 971 (S.D.N.Y. 1977) (in an argument wherein it was asserted the enactment of the limitations prescribed by the Convention was unconstitutional, the court determined that the limitations were applicable under the presidential proclamation which does not require legislative action to ensure adherence to the treaty); *Indemnity Ins. Co. v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944) (provision in transportation contract requiring written notice of claim within 30 days of disaster, death, or injury); *see also* U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416 (1920) (with respect to rights reserved to the states, the treaty-making power is not limited to what may be done by an unaided act of Congress).

65. *See* note 60 *supra* and accompanying text.

66. *Id.*

67. Federal Rule of Civil Procedure 19 states in pertinent part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person

limitation imposed by the Convention is not absolute as it allows unlimited recovery if the plaintiff is able to prove willful misconduct on the part of a defendant air carrier.⁶⁸

In conclusion, the Warsaw Convention governs air carriers' liability only against international air carriers and, thus, takes precedent over conflicting national law. The framework of the Warsaw Convention provides for jurisdiction, remedies, and limitations on liability regarding international air disasters. As a result, litigation and recovery are both efficient and final. A similar framework within the United States would accomplish the same ends on a national level.

B. Proposal for Federal Legislation

For the purposes of self-protection, every sovereign government possesses the right to control airspace above its territory. Accordingly, each state has the power to regulate the use of its airspace.⁶⁹ However, the Federal Aviation Act of 1958 prohibits, with some exceptions, state or local governments from enacting or enforcing any law, rule, regulation, standard, or other provision relating to rates, routes, or services of any carrier authorized under the Act to provide interstate transportation.⁷⁰ The Act itself, though, recognizes current remedies existing at common law and labels its own provisions as additions which are under no circumstances to abridge or alter those remedies.⁷¹

as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Federal Rule of Civil Procedure 20 states in pertinent part:

(a) Permissive Joinder. [A]ll persons (and any vessel, cargo, or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

68. See note 66 *supra* and accompanying text.

69. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930) (challenge to a minimum altitude requirement).

70. See note 34 *supra*.

71. See note 53 *supra*.

In light of the above, to establish complete uniformity by way of a complete body of aviation common law governing the rights and liabilities of injured parties, Congress should formulate national legislation to be applied in domestic airline accident litigation. The framework for the legislation can be found in the Warsaw Convention, specifically in Article 17 which establishes a cause of action, and in Article 22, which provides for the limitation of the carrier's liability.⁷² The federal cause of action established should favor any person who suffers injury or loss of property or the personal representative of any person who suffers death caused by a wrongful action occurring in air commerce.⁷³

Due to the unjust results in the recovery for injury or death,⁷⁴ a uniform federal liability limitation must be formulated. Otherwise, recoveries under the present Judicial Panel technique in aviation litigation will continue to result in some parties obtaining some recovery, but in states which limit recovery, the recovery can be severely limited due to the statutory recovery limitation.⁷⁵

In view of the existence of such recovery limitations in some states⁷⁶ and the fact that the majority of the states do not place any limitation on recovery,⁷⁷ it is important that any dollar figure determined to be the maximum recovery possible not be established arbitrarily. In order to arrive at a just sum, consideration of four federal interests in promoting aviation commerce must be contemplated. First is the proposition that air carriers be able to predict their business liability and insure against these risks. Second, the federal government has an economic interest in the success of the airline industry, and therefore, the recognition that catastrophic losses should not be borne by aviation alone is important. The fact that limitation of liability avoids litigation by facilitating quick settlements in a period when court calendars are

72. See note 60 *supra*.

73. Such an idea is in line with previous court decisions. See *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), overruling *Harrisburg v. Richard*, 119 U.S. 199 (1886).

74. 2 J. KENNELLY, *LITIGATION AND TRIAL OF AIR CRASE CASES*, ch. 6 (1st ed. 1968). See also note 4 *supra* and accompanying text.

75. Consolidation in a federal district court, absent federal preemption, would not alleviate the various recovery inequities because the court is obligated, after consolidation, to remand to the original court or when not remanded it must apply the conflict of laws rule of the state in which the suit was originally brought. 28 U.S.C. 1407(a) (1976). See notes 9 & 16 *supra* and accompanying text.

76. See note 4 *supra* and accompanying text.

77. See note 5 *supra* and accompanying text.

extremely backlogged is also of interest to the federal government. Finally, the need for unification of state laws with respect to the amount of damages to be paid must be contemplated.⁷⁸

Article 22 of the Warsaw Convention, and the discussion surrounding its adoption, is most helpful in establishing a maximum amount for recovery.⁷⁹ The first task undertaken by the Convention was to attempt to statistically demonstrate what effect a lower limit of liability would have on claims.⁸⁰ Information was obtained by the Civil Aeronautics Board,⁸¹ which clearly showed that any limit on the liability of air carriers would have an inherent inhibiting effect on a substantial portion of American accident victims.⁸² The average recovery between 1950 and 1964 for a fatality on a Warsaw case was \$6,486 as compared to \$38,499 on a non-Warsaw case, and during the most recent period (1958 through 1964), the average recovery for a fatality in a non-Warsaw case

78. Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests, and Teapots*, 37 J. AIR L. & COM. 3, 8 (1971). For example, because of differing state laws, potential liability cannot be determined accurately, requiring that insurance premiums be calculated assuming the most unfavorable circumstances, involving the highest cost for the greatest risk.

79. See note 60 *supra* and accompanying text.

80. The members of the working group were Messrs. John Warner and Peter Schwarzkopf (CAB), Robert P. Boyle and Charles Peters (FAA), and Leopold Gotzlinger, Andreas Lowenfeld and Allan Mendelsohn (Department of State). In addition, Mr. Robert Goodman from the staff on the CAB worked with the group in collecting and analyzing the economic data and in preparing the tables to be discussed *infra*.

81. 49 U.S.C. § 1377 (1976) (hereinafter cited as CAB). Pursuant to its authority under the Aviation Act of 1958, the CAB sent questionnaires to all American carriers requesting accident listings since January 1, 1958, for the period ending December 31, 1964.

82. 2 ICAO, SPECIAL ICAO MEETING ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND THE HAGUE PROTOCOL 123-26 (1966) (hereinafter cited as *Montreal Proceedings*). See note 83 *infra* and accompanying text.

had risen to over \$52,000.⁸³ It was also learned that the average

83. TABLE I

Passenger recoveries (including both judgments and settlements) in
Warsaw and non-Warsaw fatality cases:

Applicable Year	Number of Settlements	Total Settlements	Average per Passenger Fatality
Warsaw			
1950	25	\$ 201,529	\$ 8,061
1951	26	82,015	3,154
1952	43	276,634	6,433
1953	3	28,088	8,696
1954	—	—	—
1955	1	10,576	10,576
1956	2	11,656	5,828
1957	23	108,700	4,726
1958	1	4,812	4,812
1959	53	405,710	7,654
1960	10	74,700	7,470
1961	8	37,227	4,653
1962	2	12,000	6,000
1963	2	16,600	8,300
1964	14	\$ 114,000	8,142
TOTALS	213	\$1,382,247	\$6,489
Non-Warsaw			
1950	112	\$ 1,327,385	\$11,852
1951	105	1,506,764	14,350
1953	107	2,493,165	23,301
1954	—	—	—
1955	122	2,433,345	19,945
1956	85	2,467,980	29,035
1957	43	1,295,064	30,118
1958	112	6,451,351	57,601
1959	161	12,856,984	79,857
1960	184	8,901,610	48,378
1961	105	1,562,397	14,880
1962	117	7,421,849	63,434
1963	114	3,057,079	26,816
1964	23	1,763,000	76,652
TOTALS	1,452	\$55,900,883	\$38,499

⁸³2 *Montreal Proceedings*, *supra* note 82, at 123-26. See also Lowenfeld & Mendelson, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 554 (1966-67).

recovery was by no means as astronomical as some had feared.⁸⁴

Another task undertaken was an attempt to arrive at a useful estimate of the economic cost to airlines if a higher limit of liability were imposed.⁸⁵ Although no table of liability insurance rates existed and insurance companies considered such rates to be the subject of confidential negotiations,⁸⁶ it was essential to get a meaningful and reliable estimate from the insurance industry itself. An agreement was finally reached among carriers which authorized their insurance companies to make available estimates their liability insurance costs.⁸⁷ With those figures and the insurance expenses listed by American airlines in their annual reports to the CAB, it was possible to project the insurance cost for given amounts of liability.⁸⁸ Upon completion of the statistical study, the United States felt confident that it had a valid economic case

84. TABLE II
Levels of Passenger Recovery In Non-Warsaw Fatality Cases
1958-1964

Amount of Payment	Number of Claims	Percent of Claims
0	53	6.5
\$1-\$8,292	194	23.9
8,293-16,583	159	19.5
16,584-33,000	115	14.1
33,001-50,000	54	6.6
50,001-75,000	47	5.8
75,001-100,000	45	5.6
100,001-200,000	110	13.5
200,001 and up	36	4.4
TOTALS	813	100.0

2 *Montreal Proceedings*, *supra* note 82, at 72-173.

85. See generally *Hearings on the Hague Protocol to the Warsaw Convention Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 30 (1965).

86. *Id.*

87. See note 98 *infra* and accompanying text.

88.

TABLE III
Liability Insurance Costs

Limit of Liability	Estimated Percentage Increase	Cost per Thousand Revenue Passenger Miles
\$ 8,300	—	\$0.64
16,600	5%	0.68
25,000	9%	0.71
50,000	25%	0.81
75,000	38%	0.91
100,000	48%	0.96
200,000	72%	1.12

2 *Montreal Proceedings*, *supra* note 82, at 72-173; see also Lowenfeld and Mendelson, *supra* note 83, at 556. Translating these figures into a specific air journey the difference between the Warsaw Convention limitation and the desired \$100,000 limit was about 96¢ for a 3,000 mile journey—say New York to London—a trip costing approximately \$225 one-way economy class.

for the \$100,000 limit. For individual victims, the difference would be very significant, but for the airlines, the impact would be slight. The third, and perhaps the most difficult problem was developing a position intertwining liability (possibly absolute) with a dollar recovery limitation acceptable to all the governments and agencies involved in the controversy. All recognized the twin goals of adequate passenger protection and continued national cooperation.⁸⁹

The traditional United States position had always been to oppose, on principle, any concept that eliminated fault as a basis for recovery in aviation accident litigation.⁹⁰ Fault as the basis for compensation to accident victims was viewed as a necessary protection for the growth of the airline industry.⁹¹ Argument and discussion continued over the philosophy of absolute liability and its earlier application in aviation law at a time when the industry was considered "ultrahazardous."⁹² However, as discussion continued, it became clear that commercial aviation could no longer be considered an ultrahazardous enterprise⁹³ and the concept of

89. The text of the 1952 Rome Convention appears in 19 J. AIR L. & COM. 447 (1952). For a summary of the work of CITEJA in developing the 1933 Convention and of the later work of the ICAO Legal Committee leading up to the 1952 Convention, see Brown, *The Rome Conventions of 1933 and 1952: Do They Point a Moral?*, 28 J. AIR L. & COM. 418 (1962). For the English text of the 1933 Convention, see I Foreign Rel. U.S. 968-77 (1950). The United States participated in the Rome meeting and signed but never ratified the resulting convention.

90. From the earliest postwar consideration of this convention the United States vigorously opposed the principle of absolute liability. See, e.g., ICAO Legal Committee, Minutes and Documents, 4th Sess. 14-15, 175, 224 (1949).

91. Rinck, *Damage Caused by Foreign Aircraft to Third Parties*, 28 J. AIR L. & COM. 405 (1962). The appendix to this article shows that out of 43 countries, only 7, including the United States, base liability for ground damage on either fault or presumed fault. The rule in the United States varies state by state, ranging from presumed to absolute liability by statute. See 2 F. HARPER & F. JAMES, TORTS 851-55 (1956); RESTATEMENT (SECOND) OF TORTS § 402A and note (Tent. Draft Nov. 10, 1964).

92. See Baldwin, *Liability for Accidents in Aerial Navigation*, 9 MICH. L. REV. 20 (1910). The attitude that the airplane was very dangerous to the public was based, partly at least, on *Guille v. Swan*, 19 Johns. R. 381 (N.Y. 1872).

As late as 1938, the American Law Institute thought aviation was an ultra-hazardous activity. RESTATEMENT OF TORTS § 520, comment b (1938), states that no matter how carefully constructed, maintained, and operated, the airplane may crash, cause injury to persons, structures, and chattels on the ground. The same idea was expressed in *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 851, 266 N.Y.S. 469, 472 (1933) (action for negligence and trespass against airplane pilot who crashed into tower).

93. Note, *Liability for Aircraft Damages to Ground Occupiers—A Study of Current Trends in Tort Law*, 31 IND. L.J. 63, 64-65 (1955). "Due to the technological

risk distribution between all parties was considered.⁹⁴

When the Montreal Conference⁹⁵ convened, the United States delegation remained dedicated to the convention system and, while proposing a limit, whether based on absolute liability or not, of no less than \$100,000 per passenger, expressed the hope that the Convention would be successful. The \$100,000 figure seemed to make sense, both in economic terms and in terms of adequate protection.⁹⁶

The American insurance estimates indicated that a limit of \$100,000 per passenger would make the insurance cost to the airlines slightly under one dollar per 1,000 passenger miles, as compared to thirty and forty-five cents per 1,000 passenger miles under the existing Warsaw limitation. The difference between a limit of liability at \$50,000 and one at \$100,000 would be seventeen cents and between \$75,000 and a \$100,000 limit, the difference would be six cents per 1,000 passenger miles.⁹⁷ Thus, whether the airlines absorbed the added insurance costs or passed them on to passengers through a possible increase in fares, the effect on aviation economics would be negligible.

In its quest to resolve the limitation dispute, the Convention viewed various plans and proposals. For the purposes of this discussion, the most significant were a British proposal where a passenger would choose between level A, say \$33,000 covered by the airlines existing insurance coverage, and level B, perhaps \$100,000

advancements made in the industry and to the commendable safety records compiled since World War II, aviation can no longer be said to be an ultra-hazardous activity." *Id.* at 64.

94. In short, this concept involves an analysis of who is in the best position to administer the risk, either by insurance or by loss distribution, so as to involve the least hardship. See, e.g., Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Keeton, *Conditional Fault in the Law of Torts*, 72 *HARV. L. REV.* 401 (1959).

95. Agreement C.A.B. 18,900 Civil Aeronautics Board Order Approving Agreement, May 13, 1966, 31 *Fed. Reg.* 7302 (1966). Most of the material relevant to this discussion of the Conference is found in 1 & 2 *Montreal Proceedings, supra* note 82.

96. See notes 82 & 88 *supra*. Some countries responded favorably to the United States proposal. The Swedish representative, for example, thought that a limit of \$100,000 per passenger was not unrealistic and pointed out that his country's experience with an increase in limits did not automatically carry with it a substantial rise in average recoveries. The Swiss delegate told the meeting that the question of limits was not just an economic one, but was a question of simple justice—whether it was just to hold the airlines responsible for death or injury to passengers, and if so to what extent. They were prepared to concede that the level proposed by the United States seemed excessive. If a person were really worth \$100,000, which was hard to imagine, he should take steps to insure himself. The rest asked why the poorer countries, the poorer airlines, and the poorer travelers should pay for the rich ones. 1 *Montreal Proceedings, supra* note 82, at 5-23.

97. See note 88 *supra*.

with a small premium payable for the latter choice.⁹⁸ The most promising suggestion, worked out by Sweden, Germany, New Zealand, and Jamaica, called for a split level plan, with the higher limitation set at \$74,700 and the lower level set at \$58,100.⁹⁹ In addition, the four countries, led by Sweden, made the first proposal that the issue of fault be eliminated for claims under the Warsaw Convention, so that, in effect, passengers would receive a guarantee of some recovery, though not necessarily up to the limit, in all cases.¹⁰⁰

For the United States, the four-power proposal had substantial appeal. It would have enabled the delegation to tell Washington that in return for its reducing the \$100,000 limit, it had obtained a benefit to claimants in terms of speed and certainty of judgments and thus probably lower litigation costs. Also, even with the presumption of liability, the carrier placed the burden of pronouncing some theory suggesting fault on the part of the carrier on the plaintiff, enabling him to possibly recover more than the maximum recovery.¹⁰¹ The final outcome of the Montreal Convention resulted in absolute carrier liability up to \$75,000 on all flights in

98. 1 *Montreal Proceedings*, *supra* note 82, at 49. The United States' attitude was one of careful examination of the possibility of a \$100,000 recovery. The airlines said the scheme was totally impractical in terms of keeping records, and in any event they were reluctant to have to talk to each passenger about the possibility of his death just at the time of the ticket sale or boarding the aircraft. In the end, the British proposal was abandoned by practically all. Another scheme, known generally as the A-B-C plan, called for a split level liability; however, each country would have to select the liability level it would adhere to at the time of adhering to the treaty and if any conflict arose the higher limitation would apply. 1 *Montreal Proceedings*, *supra* note 82, at 195 (introduced by Argentina, Brazil, and Columbia). This plan may have been approved but the maximum level the sponsors could agree to was only \$50,000 per passenger. 1 *Montreal Proceedings*, *supra* note 82, at 195.

99. 1 *Montreal Proceedings*, *supra* note 82, at 49. A number of other plans were also discussed, calling, for example, for bilateral negotiations of liability limits. 2 *Montreal Proceedings*, *supra* note 82, at 200 (introduced by Denmark). Another proposal was for two parallel conventions, one among high and one among low level countries. 2 *Montreal Proceedings*, *supra* note 82, at 208 (introduced by Ireland).

100. 2 *Montreal Proceedings*, *supra* note 82, at 90-91. The Swedish delegate thought that absolute liability would provide a gain for plaintiffs that might well induce the United States to accept a lower limit than the one it had proposed. Elimination of the issue of fault would avoid the need to delay settlement negotiations until accident investigation had been completed, and would greatly speed up and probably reduce the cost of litigation.

101. See 1 L. KREINDLER, AVIATION ACCIDENT LAW, §§ 10.01-10.02 (rev. ed. 1981).

and out of the United States.¹⁰² The legislative history of the Warsaw Convention and two of the plans discussed by the members of the Montreal Conference¹⁰³ serve as guidelines for this proposal. The British plan, which involved a split-level of liability and required that a premium be paid for the higher liability,¹⁰⁴ is helpful due to its split-level characteristic.¹⁰⁵

The other split-level plan which proposed a higher \$74,000 limitation and eliminated the issue of fault,¹⁰⁶ is the ideal guideline for a uniform federal proposal. A high and low limit was set. Recovery for the lower limit required no showing of fault, while any higher recovery over the set maximum level required proof by the plaintiff of some fault on the part of the carrier.¹⁰⁷ The proposal of this comment is to establish a split-level of liability limitation on the air carrier predicated upon the following. The legislatively determined minimum level of liability would be available to all plaintiffs without regard to the issue of fault on the part of the carrier. This would, as in the Warsaw Convention, guarantee some recovery to a plaintiff in all cases. A maximum level should also be imposed to enable a plaintiff to receive more than the minimum level, but in no case more than the maximum level,¹⁰⁸ if he can predicate his claim upon some theory of fault or negligence by the air carrier.

A second section to this proposal would state that the rights and limitations discussed and proposed be expressly limited to actions involving the air carrier only. In so doing, actions in tort and strict liability in tort would be preserved for the plaintiff to pursue against the manufacturers and suppliers¹⁰⁹ whose actions or lack of action contributed to the damage sustained by the plaintiff.

Also, a carrier would be able to limit, but not totally frustrate, a

102. Agreement C.A.B. 18,900 Civil Aeronautics Board Order Approving Agreement, May 13, 1966, 31 Fed. Reg. 7302 (1966).

103. See notes 98 & 99 *supra* and accompanying text.

104. 1 *Montreal Proceedings*, *supra* note 82, at 49. See also note 98 *supra* and accompanying text.

105. However, any requirement of a payment in excess of the airplane ticket price, of a premium for higher liability, may not withstand constitutional attack under a charge of violation of equal protection under the fifth amendment of the United States Constitution. U.S. CONST. amend. V states that "[N]o person shall be . . . deprived of life, liberty, property, without due process of law. . . ." But consider possible defense to such action under theory of federal preemption under the commerce clause in the U.S. CONST. art. I, § 8, cl. 3.

106. 2 *Montreal Proceedings*, *supra*, at 224. See also notes 99 & 100 *supra* and accompanying text.

107. 2 *Montreal Proceedings*, *supra* note 82, at 224.

108. Some exceptions will be provided for and will be discussed. See notes 112 & 113 *infra* and accompanying text.

109. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

plaintiff's recovery if the carrier could prove that the plaintiff or the deceased was in some way responsible, by his or her own negligence, for the injury or subsequent death suffered. The concept here is that of comparative negligence.¹¹⁰ In application, this would amount to the following: once a carrier established contributory fault for the injury, such contribution would not be a complete bar to recovery, but would allow any determined recovery to be reduced in proportion to the degree of negligence attributable to the plaintiff.¹¹¹

Lastly, the carrier would be able to avoid all liability if it is able to prove that it took all measures to avoid the damage which occurred or that it was impossible to take such action.¹¹² The heavy burden of proof here, to be borne by the defendant air carrier, is to prove the matter by a preponderance of the evidence.

In conclusion, and in contrast to the textual reading of Article 20(1) of the Warsaw Convention,¹¹³ there should be no provision allowing for private contractual agreements to increase the liability limitations between a party and the air carrier. The rationale is that this proposal promotes uniformity and predictability. If parties are able to contract for differing liability clauses, carriers would be significantly burdened with the duty to provide notice of such availability. In the long run, this would frustrate the federal policy of predictability because a carrier would not be able to accurately contemplate the bargaining power of its passengers. The concept of uniformity would also be impaired since courts would have to undertake the exercise of determining the applicable choice of law rules with respect to the area of contracts.¹¹⁴ The confusion now existing in determining the applicable law would merely be shifted to the area of contractual agreements.

If one were to apply the first and third components of the proposal of this comment to the scenerio put forth in the introductory section of this paper involving a State A crash being tried in a federal court in State A, involving plaintiffs from State A, State

110. C. HEFT AND C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL*, § 1.10-1.70 (rev. ed. 1978).

111. *RESTATEMENT (SECOND) OF TORTS* § 467 (1965).

112. 49 U.S.C. § 1502 (1976). Article 20(1) provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

113. *Id.*

114. *RESTATEMENT OF CONFLICT OF LAWS* § 332 (1934). *See also* *RESTATEMENT OF CONFLICT OF LAWS* § 311, comment d (1934).

B, and State C, the issue of recovery would be determined as follows. First, all cases involving the crash would be consolidated into one court for both the pretrial and trial procedures. Each plaintiff would be entitled to the legislatively determined minimum level of recovery for liability despite the possibility that the state from which the plaintiff hails has a smaller, larger, or perhaps no recovery limitation. Equally important, the plaintiff would be relieved of proving fault on the part of the defendant in order to receive a recovery. This practice could be contrary to state law.

Another important point is the concept which allows the defendant to utilize the principles of comparative negligence to reduce any recovery by the plaintiff. Assume State A follows contributory negligence principles which act to defeat any recovery by the plaintiff if he or she is in any manner a contributor to the damages, and that the plaintiff from State A so contributed to the damages sustained. Absent this proposal, the plaintiff would be barred from any recovery against the carrier while State B and State C plaintiffs would recover. However, if this proposal were implemented the plaintiff would be able to recover, but only in proportion to the degree of his contribution to the damages sustained.

VI. RECOMMENDATION FOR IMPLEMENTATION: PROVIDING FOR EXCLUSIVE JURISDICTION AND LEGISLATING A FEDERAL RECOVERY STATUTE

Limitation of the Multidistrict Panel's power under section 1407¹¹⁵ of transfer actions for only pretrial proceedings should be reconsidered. Despite the frequency of consolidated dispositions of common issues in transferee courts, the limitation has created many practical problems which have prevented realization of the full benefits available from consolidated handling of multidistrict litigation. The drafters of section 1407 considered its limitation to pretrial advisable because of the impracticality of trying a massive group of cases in one court, the frequent need for local discovery to supplement coordinated discovery, and respect for plaintiffs' choice of forum.¹¹⁶ However, the importance of these considerations were overestimated because, first, trial of complex common issues in one court is frequently practical and efficient. As the experience of the Judicial Panel shows, even when the liti-

115. See note 5 *supra* and accompanying text.

116. See *Hearings on S. 3815 Before the Subcomm. on Improvements on the Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 17 (1966) (testimony of Judge William H. Becker).

gation is too complicated to be tried all at once, significant efficiencies may nonetheless be achieved by dividing the cases into closely related groups and trying each group in a separate district. Second, because cases have tended to be settled either in pretrial or upon resolution of common issues of liability or patent validity, local discovery regarding noncommon issues has rarely been necessary. Moreover, when local discovery is required on issues such as damages, it can just as easily be undertaken after the resolution of common issues as at the end of pretrial.¹¹⁷ Section 1407 should be revised to establish an exclusive federal procedure allowing the Judicial Panel to transfer a multidistrict litigation to one court for consolidated pretrial and trial.

Allowing the Judicial Panel to consolidate for all purposes would enable parties who want a group of similar cases to be tried in the same court to go directly to the Judicial Panel without first having to use section 1407¹¹⁸ and other time consuming and unpredictable devices.¹¹⁹ It would also reduce the attorney and judicial resources that must be expended to achieve consolidated dispositions in transferee courts. Finally, it would place the power to decide all questions of consolidation in the body most qualified to weigh and uniformly apply the policies involved in the efficient administration of the federal courts.

To accompany exclusive federal procedure, Congress should, with the guidance of the federal common law established in the area of recovery for parties in air crashes, legislate a federal recovery statute focusing on the desirability of creating a more com-

117. *Id.*

118. *See* note 5 *supra*.

119. The change of venue provision of the statute reads:

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

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone, and "district" includes the territorial jurisdiction of that court.

28 U.S.C. § 1404 (1976).

plete body of aviation law governing the rights and liabilities of injured parties.¹²⁰ The recognized legislative attempts to enact comprehensive aviation legislation providing for exclusive federal jurisdiction over civil damage actions have been unsuccessful due to congressional unwillingness to preempt states' predominant interests in protecting its citizens who have been injured in aviation commerce.¹²¹

Nevertheless, despite this opposition, the federal interests in air commerce provide a strong policy basis for federal preemption in this area. First, the exercise of common law power when an overriding national interest is presented has been partially obviated by the apparent desire of courts to justify the exercise of this power by incorporating statutory or constitutional sources in order to "find" the applicable law¹²² rather than to allow the power to stand alone in the federal government. This is not only because the rights and duties are largely local in nature, but also because a state might be required to bear the financial burden of a citizen who is inadequately compensated for a personal injury. Second, since an aircraft's "airworthiness"¹²³ and the qualifications for pilots and air traffic controllers¹²⁴ are subject to federal control as a part of the government's responsibility for air safety, the duties and any breach thereof are federal also. However, mere recognition of the federal interest under the issue of federal preemption would ignore the important issue of whether the federal interest is dominant over state interests in applying its law for recovery in wrongful death actions. Under the same analysis, the mere existence of a state interest should not override the need to implement federal policies.

In deciding which interest is to be determined as superior in

120. The action must be of a legislative nature due to the broad language of *Erie* which chills significantly a federal court's exercise of its power to formulate common law, particularly in a diversity case. See note 2 *supra*.

121. 28 U.S.C. § 1407(a) (1976) (establishing judicial panel on multi-district litigation and remand requirement); Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1976); S. 3305, 90th Cong., 2d Sess. § 1 (1968) ("Holtzoff Bill"); S. 3306, 90th Cong., 2d Sess. § 1 (1968) ("Admiralty Bill"). See notes 5 & 37 *supra* and accompanying text.

122. For two examples of this approach, see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (action for fraud in the inducement of consulting agreement); *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447 (1942) (federal question regarding a promissory note).

123. Federal Aviation Act of 1958, *as amended*, 49 U.S.C. § 1423(c) (1976). For a comparison with maritime law, see *Moragne*, note 73 *supra*, where a unanimous court held that an action for a death resulting from a vessel's "unseaworthiness" is maintainable under general maritime law. See *Barbe v. Drummond*, 507 F.2d 794, 798-801 (1st Cir. 1974) (citing *Moragne*, court found a survival action or pain and suffering).

124. Federal Aviation Act of 1958, *as amended*, 49 U.S.C. § 1422 (1976).

the field of air commerce, it must be recognized that a state's interest, to whatever degree, is applicable only when its laws are being applied with respect to one of its citizens, and, as happens quite often in complex aviation litigation, the conflict of laws analysis undertaken to determine the state law to be applied can easily result in the application of laws of a state other than that in which the citizen is domiciled. In comparison, the overriding federal interest in promoting aviation commerce necessarily involves the proposition that air carriers should be able to predict business liability.¹²⁵ It appears that a liability limitation such as the one proposed by this comment would enable the air carriers to attract capital investors by dispelling fears that a carrier could be financially destroyed by a single catastrophic accident.¹²⁶ The natural result would be an economically healthier domestic air transportation system. Thus, any state interest is slight compared with the dominant federal interest in the application of a uniform federal rule of recovery.

Because the state policies in aviation law area are contrary to federal interests, the state law cannot be brought within the goals of the federal law. Under a strict supremacy clause analysis, rooted in the existing federal preemption in the field of aviation commerce, a legislatively implemented liability limitation would prevail over the current judicial exercise of subjecting an air carrier to the differing laws of the many states because federal law is held to be superior to state law.¹²⁷

VII. CONCLUSION

This article has sought to reveal the inadequacies and inequi-

125. It should not be forgotten that the proposal in this comment suggests that the parties not be permitted to privately contract a higher limitation on liability like the provision in Article 22(1) of the Warsaw Convention. This would be known to both parties, which would allow the carrier to predict with great certainty what its business liability would be.

See Comment, *Action Against International Air Carriers: The Inapplicability of California's Wrongful Death Law*, 12 PAC. L.J. 147 (1980), criticizing the court's interpretation of Article 22(1) in *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1126 (C.D. Cal. 1978).

126. See, e.g., *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 410 (1978); L. KREINDLER, *AVIATION ACCIDENT LAW* § 11.01 (rev. ed. 1981); A. LOWENFELD, *AVIATION LAW* ch. VI, §§ 26, 27 (reprinted 1977).

127. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) (power over external affairs not shared by states, but rather, is vested exclusively in national government).

ties involved in the current procedures surrounding aviation litigation and to impress upon the reader the need for providing exclusive federal jurisdiction and federal procedures in this area. The implementation and adoption of such would result in a reduction in time and resources expended by attorneys and judges, and greater uniformity in gaining access to federal courts. Furthermore, to correct the inequities inherent in aviation recovery, a federal recovery statute needs to be adopted. The statute should include a liability limitation applicable in domestic aviation litigation which would create uniformity and predictability in aviation recovery.

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