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AVIATION TORT LIABILITY: THE NEED FOR A COMPREHENSIVE FEDERAL AVIATION LIABILITY ACT

In 1903, the Wright brothers made their historic flight at Kitty Hawk.¹ Since that time, aviation has expanded tremendously. Today, a single commercial aircraft can seat over three hundred passengers² and the number of commercial planes is expected to double by 1994.³ The recent deregulation of airline competition⁴ may stimulate further growth as the number of aircraft flying over the same routes increases or new routes are added.

Although commercial airlines have an excellent safety record,⁵ collisions, negligent operation, and faulty equipment will occasionally cause aviation disasters.⁶ The ensuing injuries and deaths will give rise to complicated litigation⁷ and strain the judicial system with numerous claims.⁸ These claims may be filed

1. 19 ENCYCLOPEDIA BRITANICA 1032 (1979).

2. Comment, *The Case for a Federal Common Law of Aircraft Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U. L. REV. 231, 232 n.12 (1976) [hereinafter cited as *Judicial Solution*]. For instance, the most popular wide-body jet in the United States, the DC-10, is designed to accommodate up to 343 passengers. NEWSWEEK, June 11, 1979, at 38. See note 53 *infra* for a discussion of the potential impact of these wide-body aircraft on the judicial system.

3. AVIATION WEEK & SPACE TECHNOLOGY, September 1, 1980, at 66. In 1979, domestic airlines in the United States carried 300 million passengers, a seventy-five percent increase in just ten years. See U.S. NEWS & WORLD REPORT, March 10, 1980, at 58.

4. The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1708 (codified in scattered sections of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1979)), allows airlines to reduce fares and increase the number of flights flown without approval of the Civil Aeronautics Board (the economic regulatory agency of the federal government). In one year, airlines added flights to more than 100 cities. TIME, November 12, 1979, at 113. The Act's purpose is to make airlines more competitive, but takes a gradual approach to deregulation over a five year period.

5. Traveling by commercial airlines is one of the safest ways to travel. It is estimated to be more than 33 times safer than driving. U.S. NEWS & WORLD REPORT, October 9, 1978, at 45. In a ten year period between 1969 and 1979, commercial aviation fatalities ranged from a high of 467 in 1974 to a low of 153 in 1976. U.S. NEWS & WORLD REPORT, March 10, 1980, at 57.

6. See generally *Judicial Solution*, *supra* note 2.

7. Note, *The Applicability of Federal Common Law to Aviation Tort Litigation*, 63 GEO. L.J. 1083, 1084 (1975) [hereinafter cited as *Federal Common Law*].

8. For example, 118 wrongful death actions arose from one aviation disaster involving a DC-10 crash near Chicago. *In re Air Crash Disaster near Chicago, Illinois* on May 25, 1979, 644 F.2d 594 (7th Cir. 1981).

in different jurisdictions with resulting duplication of effort for the parties and the courts. The state judicial systems presently cannot relieve the burden of aviation disaster litigation; while the federal judicial system can reduce this burden through venue provisions⁹ and the Judicial Panel on Multidistrict Litigation,¹⁰ these devices do not cover all aspects of litigation.¹¹ Another major problem is that conflicting judgments may arise out of the same aviation disaster because each jurisdiction has its own choice of law and recovery rules.¹² Thus, the unpredictability that results from aviation disaster litigation complicates client counseling.¹³ There is at present no uniform state law to solve the conflicts. Although several federal causes of action¹⁴ provide uniformity in the law by superseding state law, there is no guarantee that all claims arising out of an aviation disaster will be decided by federal law. Potentially, federal common law could provide uniformity in litigation, but would have to be formulated on a case-by-case basis.¹⁵ Thus, the present judicial mechanisms are not equipped to handle aviation disasters.

This comment will explore the inadequacy of modern choice of law analysis and the strain on an overburdened judicial system in present day aviation disaster litigation. The viability of current proposed solutions will also be discussed. Finally, this comment will recommend a new federal law encompassing both procedural and substantive aspects of litigating aviation disasters.

EXISTING PROBLEMS IN AVIATION DISASTER CASES

Choice of Law Problems

The first problem in litigating aviation disaster cases concerns choice of law rules, that is, determination of which law will

9. 28 U.S.C. § 1404 (1976).

10. 28 U.S.C. § 1407 (1976).

11. 28 U.S.C. § 1407(a) (1976). The Judicial Panel on Multidistrict Litigation can consolidate for pretrial purposes but not for the actual trial.

12. For instance, Illinois allows certain persons other than a decedent's spouse or next of kin to institute a wrongful death action. Those persons, however, can recover only if they furnished medical care or hospitalization to the deceased or acted as administrator for the deceased's estate. ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd Supp. 1979). Missouri allows a plaintiff *ad litem* to bring action if there is no spouse or next of kin; there is no recovery limitation (*e.g.*, limiting recovery to actual medical costs). MO. ANN. STAT. § 537.080 (Vernon Supp. 1980).

13. Conklin, *Aviation—Doubt in the Courthouse: Is the Federal Law Supreme or Not?*, 20 TRIAL L. GUIDE 476, 480 (1976) [hereinafter cited as Conklin].

14. See notes 101-135 and accompanying text *infra*.

15. See notes 136-183 and accompanying text *infra*.

apply.¹⁶ In *Erie R.R. Co. v. Tompkins*,¹⁷ the United States Supreme Court held that the federal courts had to apply the substantive law of the state in which the court sat.¹⁸ Three years later, in *Klaxon Co. v. Stentor Electronic Manufacturing Co.*,¹⁹ the Court extended *Erie* by holding that federal district courts had to apply the state's choice of law rule as well.²⁰

For years, the *Klaxon* holding presented no problem in aviation disaster cases. Certainty in the litigation of aviation disaster cases was assured since all states applied the rule of *lex loci delicti*²¹ i.e. the law of the place of the wrong was applied for all aspects of tort law.²² All plaintiffs, no matter where they brought suit, would litigate under the same law. In the 1960s, however, the *lex loci delicti* rule came under attack as being too rigid²³ because in many tort cases, especially aviation disasters, the place of the wrong was often fortuitous.

The abandonment of *lex loci delicti* began with *Kilberg v. Northwest Airlines*.²⁴ In *Kilberg*, the plaintiff's decedent, a resident of New York, was killed in an airplane crash in Massachusetts. The action, however, was instituted in New York. Massachusetts imposed a damage limitation in a wrongful death action,²⁵ while New York allowed unlimited recovery.²⁶ The issue on appeal was whether Massachusetts' statutory limitation should apply. The court found that since the site of an airplane crash is largely a matter of chance, the court had an obligation to

16. BALLENTINE'S LAW DICTIONARY 246 (3d ed. 1969).

17. 304 U.S. 64 (1936).

18. *Id.* at 78. The *Erie* court reasoned that state substantive law should apply because there is no general common law among the states. The law of each state exists by the authority of that state without regard to the law of other states. *Id.* at 79. If choice of law were determined by citizenship, plaintiffs could avoid applying unfavorable state law by moving to another state and taking advantage of diversity jurisdiction. *Id.* at 76.

19. 313 U.S. 487 (1941).

20. *Id.* at 496. The Court stated that a different holding would result in inconsistency, disrupting the equal administration of justice by coordinate state and federal courts. A state is free to determine whether a given matter is to be governed by its own law or some other law. Applying a federal choice of law rule would disrupt this freedom.

21. 1 KREINDLER, AVIATION ACCIDENT LAW, § 2.02 (1980) [hereinafter cited as KREINDLER].

22. *Id.* The place of the wrong is defined as where the last event necessary to make the actor liable took place. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934). Thus, the law of the state where the injury occurred would be applied over the law of the place of death. *D'Aleman v. Pan Am World Airways*, 259 F.2d 493 (2d Cir. 1958).

23. Comment, *Air Crash Litigation: Disaster in the Courts*, 7 SW. U. L. REV. 661, 669 (1975) [hereinafter cited as *Disaster*].

24. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

25. MASS. ANN. LAWS ch. 229, § 2 (1960).

26. N.Y. EST. POWERS & TRUSTS (Consol.) ch. 13, § 130 (1950).

protect citizens of its jurisdiction against unfair treatment in a law suit arising from an aviation disaster.²⁷ Therefore, the court refused to enforce the provision limiting damages, but in all other aspects of the litigation, the suit was governed by the Massachusetts wrongful death statute.²⁸

Although the *Kilberg* court did not abandon the *lex loci delicti* rule for all purposes, the decision enabled other courts to do so.²⁹ In *Babcock v. Jackson*,³⁰ the plaintiff and the defendant, both New York residents, were traveling in Ontario, Canada.³¹ Ontario had a guest statute which barred recovery of damages.³² The court noted that jurisdictions other than the one where the accident occurred had an interest in the litigation.³³ Since Ontario had no real interest in the litigation between two New York residents, the court applied New York law.³⁴ The court abandoned the doctrine of *lex loci delicti* in favor of a more flexible approach called the center of gravity test.³⁵

The center of gravity test, also called the significant contacts test, gives controlling effect to the law of the jurisdiction which has the greatest concern or contacts with the specific issue involved.³⁶ Under the *lex loci delicti* doctrine, the court looked only to where the tort occurred. By contrast, in the significant contacts test, the occurrence of the tort in a particular state is only one of many factors to be considered in determining choice of law. Other important factors often considered are the parties' residence,³⁷ where the breach of duty occurred,³⁸ and where the relationship between the parties is centered.³⁹ Although the significant contacts test was intended to be more flexible than the *lex loci delicti* rule, the courts began mechanically counting

27. *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527-28, 211 N.Y.S.2d 133, 135 (1961).

28. *Id.* at 42, 172 N.E.2d at 528, 211 N.Y.S.2d at 138.

29. KREINDLER, *supra* note 21, at § 2.02. The author calls the *Kilberg* decision the most important conflicts case ever decided in the United States because the decision was the beginning of the end of *lex loci delicti*.

30. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

31. *Id.* at 476, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 745.

32. ONT. REV. STAT. ch. 172, § 105(2) (1960).

33. *Babcock v. Jackson*, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 745 (1963).

34. *Id.* at 481, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750.

35. *Id.* at 482, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

36. *Id.*

37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

38. *Id.*

39. *Id.*

contacts and the test became as rigid as the doctrine of *lex loci delicti*.⁴⁰

Dissatisfied with the significant contacts test, courts turned to the significant relationship test.⁴¹ Like significant contacts, this test looked to the various contacts a state had to the litigation. However, the significant relationship test added two elements: consideration of the purposes of the laws in issue and of each state's interest in fulfilling those purposes.⁴² Thus, other contacts being equal, the law of the state whose interests were affected most by the litigation was applied.

More recently, courts have used the interest analysis approach to solve conflict of laws problems. Interest analysis places more emphasis than the significant relationship test on which state has the greatest interest in the litigation.⁴³ Under interest analysis, the court applies the forum's law if the forum state has an interest in the issue involved, unless another state's interest predominates.⁴⁴ In deciding if a state has an interest in the litigation, the court looks to whether that state has a genuine concern with the outcome of a particular issue.⁴⁵ The state may be genuinely concerned if that state's policy will be significantly impaired if its law is not applied, or if that state has a particularly strong commitment to the law involved.⁴⁶

40. Douglas, *Air Disaster Litigation Without Diversity*, 45 J. AIR L. & COM. 411, 427 (1980) [hereinafter cited as Douglas].

41. This test, used by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS 145 (1971), is very similar to the significant contacts test; both use set principles to achieve certainty. The Restatement considers the following contacts: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, or nationality of the parties; and the location of the defendant's business. These contacts are weighed according to their relative importance with respect to the particular injury. The Restatement approach also considers the policies of the forum and other interested states. Nevertheless, the significant relationship test looks to the same contacts as the significant contacts test.

42. KREINDLER, *supra* note 21, at § 2.05.

43. *Id.* at § 2.07. Assume two residents of state A are involved in an accident in state B and one resident sues the other resident in state A. If state B has a high standard of liability and state A has a low standard of liability, the significant relationship test and interest analysis could give rise to different results.

Under the significant relationship test, state B's law might not be applied if the court determines that not only does state A have an interest in the litigation, but state A has more contacts than state B. Under interest analysis, state B's law would be applied because refusal to apply its law would impair the policy of B and result in unfairness to the plaintiff who might receive less than a plaintiff from another jurisdiction.

44. *Id.* at § 2.06.

45. *Id.*

46. *Id.* In the interest analysis approach, the court must determine if the interests of two or more states are involved. If so, then there is a genuine conflict which must be resolved by looking to which state has the

While the newer tests, from significant contacts through interest analysis, provide more flexibility in determining which state law will apply, it is done at the expense of great uncertainty.⁴⁷ There is no definite way to ascertain beforehand what law the court will apply. In addition, the cost of aviation liability insurance is increased because insurance carriers have to assume that the most unfavorable standards will apply.⁴⁸

The present conflict of laws tests encourage plaintiffs to forum shop.⁴⁹ Additionally, two plaintiffs, each suing in a different district or court, may receive different judgments based on the same set of facts.⁵⁰ The choice of law process also adds to the time and cost of litigation and tends to inhibit settlements.⁵¹ In a car crash, the flexibility provided by the modern conflicts of law approach may outweigh its difficulties. By contrast, in an aviation disaster where there are multiple plaintiffs and claims, the difficulties are compounded and the court may find resolution difficult if not impossible.⁵²

stronger governmental interest in seeing its law applied to the issue in conflict.

In recent times, the issue has been more narrowly defined. This process is known as *depeçge*. The idea is to search for the rule of law that can be most appropriately applied to govern that particular issue. The conflict, then, is between two rules of law rather than two state laws. *Id.*

While a state might have an interest in one issue of the case, it might not have an interest in another issue. Thus, interest analysis requires separate analysis of each issue. *Beech Aircraft Corp. v. Superior Court of Los Angeles County*, 61 Cal. App. 3d 501, 132 Cal. Rptr. 541 (1976).

47. Note, *Aircraft Crash Litigation*, 38 GEO. WASH. L. REV. 1052, 1054 (1970) [hereinafter cited as *Aircraft Crash Litigation*].

48. Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AMER. U. L. REV. 299, 304 (1969) [hereinafter cited as Tydings].

49. See generally *Aircraft Crash Litigation*, *supra* note 47.

50. A typical air crash involves numerous passengers who are residents of a number of different states. If these passengers sue in the district in which they live, conflicting judgments may result because each court could apply a different state's law. Tydings, *supra* note 48, at 306.

51. *Id.* at 304. Since parties are unsure of exactly how much they may recover or how much they may be liable for, they may not be willing to settle.

52. *Disaster*, *supra* note 23, at 671. A recent case, *In re Air Crash Disaster near Chicago, Illinois* on May 25, 1979, 644 F.2d 594 (7th Cir. 1981), illustrates the problem with the modern conflicts approach. A DC-10 on a flight from Chicago to Los Angeles crashed near Chicago. All persons on board as well as two persons on the ground were killed. From this disaster, 118 wrongful death actions were filed in four states and Puerto Rico.

Many plaintiffs requested punitive damages and the issue was appealed. The Seventh Circuit based its decision on the modern conflict of laws approach. Seven states had an interest in the litigation and, from these seven states, the court had to determine which state had the most significant relationship to the accident and apply that state's law on punitive damages. Ultimately, the court applied the conflicts rule of each state where actions had been filed. After finding several of the states' interests

Overburdening the Judicial System

Besides presenting choice of law problems, aviation disaster cases frequently give rise to a multitude of suits based on identical claims arising out of the same event. For example, one collision could result in as many as seven hundred claims.⁵³ Each passenger would be suing for injuries caused by the same occurrence, yet each passenger might litigate the same facts in a different court. This causes wasteful litigation, inefficiency, and injustice due to the duplication of discovery, attorney's fees, and other litigation costs and procedures. In addition, since laws vary widely from state to state,⁵⁴ two plaintiffs whose cases arise out of the same aviation disaster may end up with inconsistent and conflicting results.⁵⁵ Finally, there may be situations where a plaintiff must bring his claims in two different courts.⁵⁶

The above mentioned problems could have a negative effect on the judicial system.⁵⁷ The system currently is not equipped to handle aviation disasters because state courts and federal courts in diversity actions have to deal with choice of law

balanced, the court applied the law of the forum (Illinois). Through a long and difficult process, the court used modern conflict of laws analysis and arrived at the result which *lex loci delicti* would have achieved.

53. *Judicial Solution*, *supra* note 2, at 232. Wide-body planes can now carry over 350 passengers. Two planes colliding in midair could give rise to 700 claims. To date, the worst aviation disaster occurred when two jumbo jets collided on a runway in the Canary Islands on March 27, 1977. 581 persons died. *TIME*, June 4, 1979, at 12. The worst United States disaster has been the DC-10 crash near Chicago referred to in note 52 *supra*. In that crash, 271 persons died. *TIME*, June 4, 1979, at 12.

54. Differences in state laws may be extremely important in aviation disaster cases on such issues as negligence, amount of recovery, *res ipsa loquitur*, breach of warranty, due care, and defenses. See generally Kinzy, *Current Aviation Decisions in Conflict of Laws*, 41 *J. AIR. L. & COM.* 311 (1975) (discussion of how choice of law is handled for specific issues).

55. *Disaster*, *supra* note 23, at 672-74. This has been a recurring problem since the early fifties. For example, four cases arose out of a single air crash at Mt. Carmel, Pennsylvania. One suit filed in Pennsylvania, *Schuyler v. United Air Lines, Inc.*, 94 F. Supp. 472 (M.D. Pa. 1950) resulted in a judgment for the defendant. Two months later, however, the plaintiff in a New York case, *De Vito v. United Air Lines, Inc.*, 98 F. Supp. 88 (E.D. N.Y. 1951) received \$160,000 (reduced from a \$300,000 verdict). Two other suits from the same crash also litigated in New York, *Kendall v. United Air Lines, Inc.*, and *Sebo v. United Air Lines, Inc.*, 200 F.2d 269 (2d Cir. 1952) (consolidated on appeal), resulted in verdicts of \$150,000 and \$100,000 respectively.

56. Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 *CHI. B. REC.* 248, 255 (1975). The author suggests two ways this could happen. First, if diversity is lacking between a plaintiff and one of the defendants, the plaintiff may have to present his claims against that defendant in the state court and against another defendant in the federal court. Second, litigation could end up in the courts of different states.

57. See generally *Judicial Solution*, *supra* note 2. In 1979, domestic airlines carried 300 million passengers. *U.S. NEWS & WORLD REPORT*, March 10, 1980, at 57.

problems; even application of some federal statutes will involve choice of laws problems.⁵⁸ Therefore, a federal action may not provide any more uniformity than state law. State courts cannot reduce the effects of multiple plaintiffs, and although federal courts, by transferring all cases to one forum, can reduce the workload of aviation disaster cases, they can do so only to a limited extent.⁵⁹ However, since some federal actions are of limited use,⁶⁰ many parties may not be able to avail themselves of the federal courts. Unless a solution is found, the present problems will only be compounded because, as the aviation industry grows, the number of disasters will increase, resulting in more litigation.⁶¹

EXISTING SOLUTIONS TO THE PROBLEMS OF AVIATION DISASTER CASES

Uniform State Laws

One possible solution to the problems of aviation disaster litigation is a uniform state law.⁶² The first question concerning such a law is whether it would be constitutional. Since torts are

58. See, e.g., the Federal Tort Claims Act, 28 U.S.C. § 1346 (1976). In *Richards v. United States*, 369 U.S. 1 (1961), the Supreme Court held that section 1346 of the Federal Tort Claims Act requires application of the whole state law where the tort occurred. This included that state's choice of law rule. Thus, a district court, in an action involving the act, would have to go through the same process as a state court would in determining which law would apply.

59. See notes 88-95 and accompanying text *infra* for discussion of the Judicial Panel on Multidistrict Litigation. The Panel can only transfer and consolidate for pretrial purposes; the actual trial for each claim must be litigated separately. 28 U.S.C. § 1407(a) (1976).

60. See notes 101-124 and accompanying text *infra* on admiralty jurisdiction. Unless the accident occurs over water, admiralty jurisdiction cannot even be considered in an aviation disaster case.

61. See Tydings, *supra* note 48, at 315: "As engineers are improving airport facilities and revising aircraft safety procedures in the anticipation of the greater demands soon to be placed by increased air travel and larger aircraft, laws and legislators have an obligation to keep pace."

62. Examples of uniform state laws include the Uniform Commercial Code and the Uniform Probate Act. These laws are usually drafted by the National Commissioners on Uniform State Laws. There are three officially appointed commissioners from each jurisdiction (all fifty states, the District of Columbia, Puerto Rico, and most United States territories) plus a few life members. Leflar, *Maurice H. Merrill and Uniform State Laws*, 25 OKLA. L. REV. 501 (1972). When the commissioners decide to create a new act, a committee is appointed to draft statutes for the next annual meeting. Successive drafts are presented at each meeting until the act is officially offered to the states for enactment. *Id.* The commissioners meet annually at the same place as the American Bar Association and record their activities in their own handbook. Note, *Uniformity in the Law—The National Conference of Commissioners on Uniform State Laws*, 19 MONT. L. REV. 149, 153 (1958). Each jurisdiction is entitled to one vote to approve a proposed act. *Id.*

considered primarily a matter of state concern,⁶³ a uniform state law would protect state interests in tort litigation because its enactment would be based on the state's police power. At the same time, a uniform state law would not place an undue burden on interstate commerce. Airlines are already subject to state laws concerning liability;⁶⁴ thus a uniform state law would not usurp or interfere with the federal government's control over aviation.⁶⁵

A uniform state law would help solve aviation disaster litigation problems because the law would be the same no matter where the claim was brought. Parties could litigate their claims without the uncertainty that now exists in aviation disaster cases. In fact, the idea has been tried before. The National Commissioners on Uniform State Laws approved the Uniform Aviation Liability Act in 1938.⁶⁶ The Act was based on strict liability for both personal injury and property damage occurring within a state that passed the Act.⁶⁷

There are, however, two insurmountable problems with a uniform state law. First, there is no way to consolidate multiple claims filed in different states. Each state would have its own discovery and trial, so there would still be duplication of litigation even if the standards of liability were the same. More importantly, for such an act to work, it must be approved by all or at least a significant number of states.⁶⁸ Otherwise, the choice of law problems would remain.⁶⁹ Since there is no guarantee of

63. *Disaster*, *supra* note 23, at 663. Tort duties traditionally have been tied to community public policies.

64. Since colonial times, tort claims involving public carriers have been uniformly entrusted to the state courts. Morris, *Constitutional and Procedural Problems Presented by Proposals in Congress on Tort Liability in Air Transportation*, 14 *INS. COUNSEL J.* 22, 23 (1947).

65. Comment, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation*, 18 *VAND. L. REV.* 1632 (1965).

66. The commissioners' draft was not the first attempt to propose a uniform law. In 1911 the committee refused to recommend a proposal before the American Bar Association Committee on Jurisprudence and Law Reform. In 1922, the commissioners adopted the Uniform State Law for Aeronautics which was later abandoned in favor of a series of uniform acts dealing with aviation. The most controversial of the acts presented was the Uniform Aviation Liability Act. Comment, *Uniform State Aviation Liability Legislation*, 1948 *WIS. L. REV.* 356.

67. Tydings, *supra* note 48, at 308. Another controversial aspect of the act was the provision calling for compulsory insurance. Comment, *Uniform State Aviation Liability Legislation*, 1948 *WIS. L. REV.* 356, 370. The Act was withdrawn in 1953. In 1956 the National Commission recommended that a new code be drafted, but so far nothing has happened. Tydings, *supra* note 48, at 308.

68. Comment, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation*, 18 *VAND. L. REV.* 1632 (1965).

69. *Id.*

passage in every jurisdiction, a uniform state law is an inadequate solution to the problems of litigating aviation disasters.

Federal Legislation

Federal legislation, instead of a uniform state law, could solve many aviation disaster litigation problems. Actually, federal legislation is more desirable than state legislation because most aviation disaster cases end up in the federal courts under diversity of citizenship.⁷⁰ In addition, the federal system is conducive to reducing the burden of multiple claims through such mechanisms as the venue provisions.⁷¹ This reduces the burden on the courts in that all actions are in one court with a single discovery process rather than a separate one for each claim. Also, removing all cases to the same district is some guarantee of consistency in results among plaintiffs. Finally, the Federal Aviation Act of 1958⁷² and regulations promulgated thereunder indicate that aviation should rest entirely within federal jurisdiction because of the inclusive nature of the Act.⁷³

In some areas, the federal judicial system can reduce aviation disaster litigation problems. While these areas include admiralty law and the federal common law, the most significant inroads have been made in reducing the burden on the judicial system caused by multidistrict litigation.

70. Diversity of citizenship is one of the bases of original jurisdiction in federal court and occurs when there is an actual and substantial controversy between citizens of different states. *BALLENTINE'S LAW DICTIONARY* 363 (3d ed. 1969).

71. See notes 74-86 and accompanying text *infra*.

72. 49 U.S.C. §§ 1301-1542 (1976).

73. *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974). "The basis for imposing a federal law . . . is . . . the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways." *Id.* at 403. The Federal Aviation Act of 1958 declares that the United States exercises complete and exclusive national sovereignty of its airspace. 49 U.S.C. § 1508(a) (1976). Furthermore, the Act shows that Congress intended that the federal government take responsibility for regulating air traffic. As the United States Supreme Court noted in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring):

Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. * * * Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

It seems then, that if all aspects of aviation except litigation are controlled by the federal government, and the federal government's interest in promoting safety is so strong, control of the litigation of aviation disasters by the federal government would promote the interest in safety and be consistent with the present legislative acts. See *Judicial Solution, supra* note 2, at 249.

Federal Statutes Governing Multidistrict Litigation

One method of easing the burden of multidistrict litigation is a change of venue under 28 U.S.C. § 1404.⁷⁴ Section 1404 allows transfer from one district court to another for all purposes in a civil action for the convenience of the parties and witnesses and in the interest of justice.⁷⁵ This section was essentially a codification of *forum non conveniens*,⁷⁶ but without that doctrine's harsh result of dismissal.⁷⁷ For this reason, a lesser standard of inconvenience is needed to invoke section 1404 than traditionally was needed for *forum non conveniens*.⁷⁸ Once the transfer is made, however, the transferee court is bound to apply the law of the state where the transferor court sits.⁷⁹

Additionally, there is a requirement that the action be transferred to a district where it might have been brought.⁸⁰ This has been held to mean that the transferee court must be in a district where the plaintiff had an absolute right to litigate at the time the action was filed.⁸¹ Federal, not state rules control, however, in deciding where an action might have been brought.⁸² To hold otherwise would restrict the applicability of the section and therefore frustrate its purpose. Thus, section 1404 allows litigation of all aviation disaster claims in one place, avoiding wasteful duplication of discovery and litigation.⁸³

Despite the advantages section 1404 presents in aviation disasters, there are two major problems with its use. First, under the present requirements of section 1404, the action must be transferred to a district where the accident occurred or where all the plaintiffs or all the defendants reside.⁸⁴ In an aviation disas-

74. 28 U.S.C. § 1404 (1976).

75. *Id.*

76. The *forum non conveniens* doctrine states that, where justice suggests that the controversy may be more suitably tried elsewhere, jurisdiction should be declined and the parties relegated to seek relief in the other forum. *BALLENTINE'S LAW DICTIONARY* 493 (3d ed. 1969).

77. 1 *SPEISER, AVIATION TORT LAW* 235 (1979).

78. *Id.*

79. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

80. 28 U.S.C. § 1404 (1976).

81. *Hoffman v. Blaski*, 363 U.S. 335 (1960).

82. *Farrell v. Wyatt*, 408 F.2d 662, 665 (2d Cir. 1969) ("Where a case 'might have been brought' refers to federal laws of venue, service and jurisdiction. . ."). *See also Van Dusen v. Barrack*, 376 U.S. 612 (1964) (Supreme Court's discussion of same principle).

83. All districts where claims are filed could transfer the claims to a single district.

84. Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 *Sw. L. REV.* 215, 217 (1970). The venue provisions apply in diversity cases; the plaintiff may bring his action only where all the plaintiffs reside, where all the defendants reside, or where the claim arose. 28 U.S.C. § 1391(a) (1976).

ter, it is unlikely that all the plaintiffs or all the defendants reside in the same district; the only other choice, then, will be where the accident occurred,⁸⁵ which may not always be the most convenient forum for any of the parties. Additionally, where there is a choice of venue, the transferor courts may disagree on which is the most convenient court.⁸⁶

The other major problem concerns choice of law. Under section 1404, the transferee court must apply the law of the state where the transferor court sits.⁸⁷ If several state laws are involved, the jury could become confused in trying to reach a verdict. Furthermore, one could reach an inconsistent result in the same courtroom among virtually identical plaintiffs. When there are multiple claims arising out of one aviation disaster, fairness dictates that similar claims arising out of one act be decided the same way. This is particularly true if there is no basic difference between plaintiffs who are allowed to recover and plaintiffs who are barred from recovery.

Another device used to reduce the burden on the federal judicial system is the Judicial Panel on Multidistrict Litigation.⁸⁸ The Panel has the power under 28 U.S.C. § 1407(a) to transfer all cases involving one or more common questions of fact to any district for pretrial proceedings. The Panel must look to whether the transfer will promote the convenience of the parties and witnesses and whether the transfer will promote the just and efficient conduct of the actions.⁸⁹ Proceedings for transfer may be made on the motion of any party to the suit or on the Panel's own motion. The Panel may also sever and remand any claim, cross-claim or third party claim to the district from which it came.⁹⁰ At the conclusion of the pretrial proceedings, each action is remanded to its original district unless the action has been terminated.⁹¹ Thus far, the Panel has limited itself to ordering transfers or remands.⁹² One advantage to using the

85. Comment, *Federal Courts—Proposed Aircraft Litigation Legislation*, 35 SW. L. REV. 215, 217 (1970).

86. *Id.*

87. This includes a state's choice of law rule.

88. Hereinafter cited as the Panel.

89. 28 U.S.C. § 1407(a) (1976).

90. 28 U.S.C. § 1407(c) (1976).

91. 28 U.S.C. § 1407(a) (1976).

92. Martin, *Multidistrict Litigation—A Panacea or a Blight*, 18 TRIAL L. GUIDE 409, 414 (1975). In one case, *In re Crash Disaster at Florida Everglades*, December 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. 1973), the plaintiffs sought to compel the defendants to pay for reasonable travel expenses in connection with attending the pretrial proceedings. The Panel refused to rule on the request because the granting of such a request was outside the scope of power conferred under § 1407. See also *In re Air Crash Disaster at Greater Cincinnati Airport*, 354 F. Supp. 275 (J.P.M.D.L. 1973) (Panel re-

Panel is that it prevents waste of judicial resources by consolidating all discovery proceedings into one court. Another advantage is that there are no venue provisions, so the transferee court need not necessarily be the court of the district where the accident occurred.⁹³ Finally, one judicial entity decides to which district the cases will be transferred, whereas under section 1404, transferor courts will often disagree on which district is the most convenient.

There are, however, disadvantages to use of the Panel. Most obvious is that the actual trials must be litigated in separate districts because the Panel can consolidate only for pretrial proceedings. Once the pretrial proceedings are over, each claim must be remanded to its original district for a separate trial. Numerous trials result in duplication of effort and time in litigating the facts. Therefore, the Panel provides only a partial solution. The Panel is further hampered by its inability to order the transfer of related state actions, thus leaving a party to litigate some of his claims in the state courts and the rest in the federal courts.⁹⁴ Finally, the transferee court must still apply the law of the transferor forum and therefore must still work through the conflict of laws problem.⁹⁵

There has been some effort to combine sections 1404 and 1407 in order to overcome the disadvantages of each.⁹⁶ The theory is that once transfer has been made pursuant to section 1407, the transferee court transfers all cases to its courtroom under section 1404 for trial on such issues as liability.⁹⁷ This is advantageous because judicial economy is achieved by having all aspects of the litigation combined in one proceeding. More importantly, the transferee judge has supervised the litigation for a long time and may be the best qualified to conduct the trial

fused to order plaintiffs to pay their lead counsel before remand, or strike two defendants from the claims after the transferee court granted them summary judgment). This has lead Martin to conclude that, once transfer is made, the transferee judge has exclusive jurisdiction.

93. See, e.g., *In re Air Crash Disaster near Silver Plume, Colorado* on October 2, 1970, 352 F. Supp. 968 (J.P.M.D.L. 1972). The aviation disaster in Colorado involved the Wichita State University football team. Because most of the parties lived in Kansas, the Panel transferred the action there. The Panel also has transferred claims to the district where the most extensive discovery has occurred. *In re Air Crash Disaster near Pellston, Michigan* on May 9, 1970, 357 F. Supp. 1286 (J.P.M.D.L. 1973).

94. *Disaster, supra* note 23, at 667.

95. See generally 1 SPEISER, AVIATION TORT LAW 269 (1979).

96. For a critical commentary on this procedure, see Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159 (1972).

97. A transferee court transferred all cases to itself for all purposes under § 1404 in *In re Air Crash near Duarte, California* on June 6, 1971, 357 F. Supp. 1013 (C.D. Cal. 1973).

because of his familiarity with the facts.⁹⁸

This technique has been criticized primarily because it has not been expressly authorized by Congress.⁹⁹ Another criticism is that combining sections 1404 and 1407 does not reduce the case load because the number of claims remains the same whether or not these two sections are used. Therefore, it is argued, there is no need to use both sections 1404 and 1407.¹⁰⁰ Such criticism, however, fails to consider that each plaintiff has a right to have his claim adjudicated regardless of the number of claims; but use of sections 1404 and 1407 can eliminate some of the duplication of effort that now exists by allowing each claim to be litigated separately.

Admiralty Law

In some cases, there are federal grounds on which plaintiffs may sue for recovery, thus removing the problems connected with choice of law¹⁰¹ or venue provisions. Basically, there are two methods of obtaining federal question jurisdiction in domestic aviation disaster cases.¹⁰² First, the plaintiff may file suit on the basis of admiralty jurisdiction when there is an aviation

98. See *Disaster*, *supra* note 23, at 668.

99. Neither 28 U.S.C. § 1404 nor 28 U.S.C. § 1407 makes reference to the other or any general reference to use of other sections.

100. Farrell, *Multidistrict Litigation in Aviation Disaster Cases*, 38 J. AIR L. & COM. 159, 167 (1972). Farrell asserts that aviation cases do not have the complexity to warrant transfer of all claims to the transferee judge simply because he is more familiar with the case. Therefore, the claims should go back to their original district and the right to jury trial should control. *Id.*

101. Since federal law controls, uniformity of results follows.

102. The two areas of federal substantive law in aviation disaster cases arise out of domestic law. There is, however, one action arising out of a treaty: the Warsaw Convention, 49 Stat. 3000, T.S. No. 816 (Dec. 12, 1929) ratified by the United States in 1934. Originally, the convention was formulated to protect the then infant airline industry. It provided for strict liability but recovery was limited to \$8,300. Two later agreements, the Hague Protocol, S. Exec. Doc. No. H, 86th Cong., 1st Sess. (1954) and the Montreal Agreement, 49 U.S.C. § 1052 (1976), raised the limitation to \$16,000 and \$75,000 respectively. This becomes confusing in litigation because different limitations can apply depending on which treaty is applicable. The Convention, by its definition of international activity, may include air travel normally considered domestic because Article 1(2) focuses on points of departure and destination. Therefore, two passengers on the same flight may be subject to two entirely different bodies of law.

Another interesting aspect of the Convention is that the limitations only apply to airlines and not to manufacturers. Thus, a manufacturer may end up paying most of a plaintiff's claim. However, because the Convention only applies to a small percentage of all aviation disasters litigated in this country, extended discussion of the Convention is beyond the scope of this paper. For further discussion of the Warsaw Convention and its impact on aviation litigation, see Loggans, *Personal Injury Damages in International Aviation Litigation: the Plaintiff's Perspective*, 13 J. MAR. L. REV. 541, 543 (1980).

disaster on or over the high seas.¹⁰³ Second, the plaintiff may file suit against the United States as a defendant under the Federal Tort Claims Act.¹⁰⁴

If an aviation disaster occurs on or near navigable water, an action may be litigated under admiralty law. One available action is the Death on the High Seas Act,¹⁰⁵ which provides a wrongful death action for torts committed on the high seas one marine league¹⁰⁶ or more from shore. Congress probably did not envision the Act's use in aviation disasters when it was enacted in 1920.¹⁰⁷ Nevertheless, the statute has been used in appropriate aviation disaster cases and it provides jurisdiction in federal admiralty courts.¹⁰⁸

Another admiralty cause of action arose out of *Moragne v. States Marine Lines, Inc.*¹⁰⁹ In *Moragne*, a death occurred on navigable waters within Florida's territorial limits.¹¹⁰ Florida's wrongful death statute, however, did not recognize the admiralty doctrine of unseaworthiness upon which the plaintiff's claim was based.¹¹¹ The Court held that Congress had a strong policy favoring recovery for wrongful death caused by breach of a duty imposed by federal maritime law.¹¹² Furthermore, passage of the Death on the High Seas Act did not preclude a remedy for a wrongful death which occurred in a state's territorial waters.¹¹³ Therefore, the court allowed recovery for wrongful death in admiralty law even though the death occurred outside the provisions of the Death on the High Seas Act.¹¹⁴ The hold-

103. See notes 101-135 and accompanying text *infra*.

104. 28 U.S.C. § 1346 (1976). See notes 125-135 and accompanying text *infra*.

105. 46 U.S.C. §§ 761-67 (1976).

106. A marine league is a unit of distance equal to three miles. THE AMERICAN HERITAGE DICTIONARY 744 (1st ed. 1969).

107. Prominski, *Wrongful Death in Aviation: State, Federal and Warsaw*, 15 U. MIAMI L. REV. 59, 67 (1960).

108. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1970).

109. 398 U.S. 375 (1970).

110. *Id.* at 376.

111. FLA. STAT. § 768.01 (1965). This case was certified to the Florida Supreme Court specifically to determine whether the Florida wrongful death statute allowed recovery for the admiralty concept of unseaworthiness. After reviewing the history of the act, the Florida court decided that it did not. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 377 (1970).

112. *Id.* at 393.

113. *Id.* In other words, Congress did not legislate that a federal tort remedy would not apply for mishaps in a state's territorial waters merely because Congress chose not to include those waters within the Death on the High Seas Act.

114. *Id.*

ing in *Moragne* has been extended to aviation disaster cases.¹¹⁵ Thus, *Moragne* provides an alternative jurisdictional basis in admiralty for an appropriate aviation disaster case.

An action based on the *Moragne* decision, however, must meet the test laid out in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*.¹¹⁶ In *Executive Jet*, a jet crashed in Lake Erie shortly after takeoff¹¹⁷ on a flight from Cleveland to Portland, Maine.¹¹⁸ The United States Supreme Court held that a claim arising out of an aviation disaster in navigable waters would not lie under the *Moragne* rationale unless the aircraft's activity bore a significant relationship to a traditional maritime activity.¹¹⁹ Furthermore, absent specific legislation, there is no federal admiralty jurisdiction over aviation disaster claims arising from a flight between two points within the United States.¹²⁰ Thus, *Executive Jet* has placed severe limitations on *Moragne*.¹²¹

There are advantages to using admiralty jurisdiction. Since admiralty is part of the federal system, sections 1404 and 1407 may be used to reduce duplication of litigation. In addition, the same law is applied in all cases. Even if an admiralty action is initiated in a state court,¹²² it must apply the law as if the action had been brought in the admiralty courts.¹²³ The major drawback to admiralty jurisdiction is that its application is severely

115. *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970). This case arose out of the midair collision of two aircraft engaged in spotting schools of fish. The collision occurred near enough to the Louisiana shore that the action could not be based on the Death on the High Seas Act.

116. 409 U.S. 249 (1970).

117. *Id.* The accident occurred when the plane struck a flock of seagulls and lost power shortly after takeoff.

118. From Portland, the plane was to continue to White Plains, New York; therefore, the entire flight was to take place within the United States.

119. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 268 (1970). An example of a traditional maritime activity occurred in *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970), where two planes crashed while engaged in spotting schools of fish. This was a function traditionally performed by waterborne vessels. The *Executive Jet* decision reflected the Court's desire that invocation of admiralty jurisdiction be based on historical and logical justification rather than a fortuitous event. Note, *Aviation Tort Claims—Relationship to Traditional Maritime Activity Required for Admiralty Jurisdiction*, 47 TUL. L. REV. 1143, 1147 (1973).

120. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 274 (1970).

121. The Death on the High Seas Act appears to be unaffected by the *Executive Jet* decision. Annot., 30 A.L.R. Fed. 759, 765 (1976).

122. Under 28 U.S.C. § 1331(1) (1976), state courts have concurrent jurisdiction with federal admiralty courts for enforcement of rights conferred by maritime law if adequate relief may be given in an action at law.

123. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

limited because few aviation disasters occur over water,¹²⁴ of those that do, the number of claims that can be litigated under admiralty is even smaller because of the *Executive Jet* decision.

The Federal Tort Claims Act

The other major substantive federal action in domestic aviation disaster litigation is the Federal Tort Claims Act.¹²⁵ The Act provides an action against the federal government for loss of property, personal injury or death caused by an employee of the federal government while acting within the scope of his employment.¹²⁶ The injury must occur under circumstances such that if the federal government were a private person, it would be liable to the plaintiff under the law where the act or omission occurred.¹²⁷ There is a two year statute of limitations and all actions are tried by the court without a jury.¹²⁸

The Federal Tort Claims Act frequently provides a cause of action in aviation disasters because of the large number of aircraft owned by the government and its control over aviation through various agencies.¹²⁹ Furthermore, pendent jurisdiction¹³⁰ may be obtained for claims against other defendants so that no plaintiff has to litigate one claim in state court and another in federal court.¹³¹ Thus, the Federal Tort Claims Act has one advantage over admiralty jurisdiction: the Act is used frequently because of the large number of claims filed against the United States. As a result, parties in these cases can utilize sections 1404 and 1407 to reduce duplication in litigation.

124. Most aviation and hence most aviation disasters in the United States occur within the continental borders. International aviation disasters may occur over water, but are ruled by the Warsaw Convention. See note 102 *supra*.

125. 28 U.S.C. § 1346 (1976).

126. *Id.*

127. *Id.* This causes the government to be subject to the same negligence law as private industry. If an employer forces his employees to work to the point of fatigue, he is liable to those injured. Therefore, if the government does the same thing to its air traffic controllers, it is only fitting that the federal government also be liable. See generally Kennelly, *Claims and Suits for Aviation Accidents under the Federal Tort Claims Act*, 16 TRIAL L. GUIDE 1 (1972).

128. 28 U.S.C. § 2401(b) (1976).

129. KREINDLER, *supra* note 21, at § 5.01(1).

130. Under pendent jurisdiction, federal courts can determine state law claims if the state claim forms a ground of relief parallel to that of the federal claim. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

131. Douglas, *supra* note 40, at 439. The author argues that in aviation disaster cases, where the United States is a defendant under federal common law, state claims may be attached through pendent jurisdiction. The aircrash itself is the common nucleus of operative facts and consolidation under § 1404 would meet the requirement of judicial economy.

The Federal Tort Claims Act, however, has several problems in aviation disaster litigation, the major one being choice of law. At first glance, the Act appears to have its own choice of law rule; it applies the law of the state where the negligent act or omission took place.¹³² This provision of the Act is deceptive because the United States Supreme Court has held that the Federal Tort Claims Act requires application of the whole state law, including its choice of law rule.¹³³ Since the federal courts must apply choice of law rules as in diversity cases, the Act has the same problems caused by modern choice of law analysis.¹³⁴ Finally, the Act is limited to claims against the government and does not apply where the government is not a defendant in an aviation disaster.¹³⁵ Thus, the Act is not a complete solution since it will not apply in every aviation disaster.

Federal Common Law

A possible solution to the problems in aviation disaster lies in the federal common law,¹³⁶ which develops by case law rather than by statute. The application of federal common law may be warranted in an aviation disaster because aviation is an interstate activity.¹³⁷ The interstate nature of aviation has been recognized by Congress and, through legislation such as the Federal Aviation Act of 1958,¹³⁸ Congress has imposed duties on those who engage in aviation.¹³⁹ These duties have created in

132. 28 U.S.C. § 1346 (1976).

133. *Richards v. United States*, 369 U.S. 1 (1962).

134. Another problem concerns the Act's administrative claim period. The head of each federal agency is authorized to settle tort claims up to \$25,000. Any claim above that amount may be settled but only with the written approval of the Attorney General. In order to accomplish this, one cannot sue unless the claim is first presented to the agency. Should the claim be denied or the agency fail to respond within six months, the claimant may then file suit. 28 U.S.C. § 2675 (1976). This requirement subjects the plaintiff to the perils of bureaucracy. Kennelly, *Claims and Suits for Aviation Accidents under the Federal Tort Claims Act*, 16 TRIAL L. GUIDE 1, 4 (1972). This tends to increase rather than decrease litigation since the various agency heads tend not to be willing to settle substantial claims against the government. *Id.*

135. 28 U.S.C. § 1346 (1976).

136. Although *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), held that there is no federal common law, the truth is, there has always been a federal common law. *Minerluder v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), decided on the same day as *Erie*, applied a federal rule in regard to apportionment of water in an interstate stream. See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), notes 109-115 and accompanying text *supra*, which recognized a cause of action under general common law.

137. Comment, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation*, 18 VAND. L. REV. 1632 (1965).

138. 49 U.S.C. §§ 1301-1542 (1976).

139. *Disaster*, *supra* note 23, at 678.

passengers a federal right to air safety.¹⁴⁰ Congress, however, failed to provide a federal remedy to protect this right, deferring instead to the state courts.¹⁴¹

Air carriers should conform their behavior to the duties imposed on them. Air carriers, however, can do this only if they know what behavior is expected. While the Federal Aviation Act and the regulations formulated thereunder give air carriers some idea of expected behavior, the various state laws create uncertainty. Because of the large number of plaintiffs from different districts and states involved in most aviation litigation, there is confusion over which law to apply and conflicting results have occurred. Thus, the mass of conflicting laws has failed to protect the federal right to air safety and some kind of uniformity is necessary.

When there is a need for national uniformity, state and local interests must yield.¹⁴² This need has led some to argue for the application of federal common law to preempt state law and provide uniformity.¹⁴³ By use of precedent, the federal courts over time can provide a uniform body of law under which aviation disasters can be litigated. As federal actions are developed by case law, the courts will be able to assume jurisdiction and use sections 1404 and 1407 to reduce the strain of multidistrict litigation. Therefore, federal common law has great potential as a solution to the problems of litigating aviation disasters.

140. *Id.*

141. *Id.* The Federal Aviation Act provides: "Nothing 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." 49 U.S.C. § 1506 (1976).

142. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The court stated:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Id. at 230.

143. See *Federal Common Law*, *supra* note 7, and *Judicial Solution*, *supra* note 2, for commentary arguing in favor of the use of federal common law in aviation disaster litigation. See also Annot., 31 A.L.R. Fed. 270 (1977) for case law recognizing actions based on violation of the Federal Aviation Act of 1958. But see Prewitt, *Federal Common Law of Aviation and the Erie Doctrine*, 40 J. AIR L. & COM. 652 (1974) (arguing that federal common law cannot be applied in aviation disasters until the Supreme Court reviews the *Erie* doctrine). See also Note, *The Decline of the Implied Cause of Action Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41 (1977) (discussion of the reluctance of courts to use federal common law); and *Disaster*, *supra* note 23 (critical commentary on using federal common law).

There is authority for extending federal common law to aviation disaster cases. In *Gabel v. Hughes Air Corp.*,¹⁴⁴ the court held that the Federal Aviation Act of 1958¹⁴⁵ and the regulations promulgated thereunder imposed a duty on the defendant airline to perform with the highest degree of care.¹⁴⁶ Furthermore, breach of this duty created a cause of action in favor of the one injured or damaged by the death of a person in an aviation disaster.¹⁴⁷ The court came to this conclusion by looking to the various provisions of the Federal Aviation Act of 1958 which emphasizes safety;¹⁴⁸ the reference to safety undoubtedly meant the safety of passengers. Although the *Gabel* court created a federal cause of action, it also applied the state rule on damages.¹⁴⁹ Thus, in and of itself, *Gabel* does not provide a sufficient basis for solving aviation disaster litigation problems since it applied state law.¹⁵⁰

A later case, *Kohr v. Allegheny Airlines*,¹⁵¹ may have solved the problem in *Gabel* by holding that the federal rule of contribution and indemnity is applicable to actions arising out of mid-air collisions.¹⁵² The power of the *Kohr* court to fashion a rule of decision stems from *Clearfield Trust Co. v. United States*.¹⁵³ In *Clearfield*, the United States Supreme Court held that federal courts could apply a federal common law rule over an appropriate state law where there is a "paramount federal interest." A paramount federal interest can arise either from the need to prevent state law from impeding the function of the federal system¹⁵⁴ or from the need for uniformity.¹⁵⁵ *Kohr* appears to have relied on both tests since it found federal preemption in avia-

144. 350 F. Supp. 612 (C.D. Cal. 1972).

145. 49 U.S.C. §§ 1301-1542 (1976).

146. *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612, 614 (C.D. Cal. 1972).

147. *Id.* at 615.

148. *Id.* at 615-17.

149. *Id.* at 623.

150. *Gabel* supplied a federal cause of action but failed to apply federal law. In so doing, *Gabel* leaves a problem for subsequent cases. In these cases, the courts must decide which state law to apply. Under modern choice of law analysis, this may be difficult to determine in litigation involving multiple plaintiffs. See notes 16-52 and accompanying text *supra*. Similarly, because state laws vary, there will probably be inconsistent results. Since uniformity of law is one of the reasons for initially applying a federal cause of action, *Gabel* fails to provide a complete solution to the problems involved in aviation disaster cases. *Judicial Solution, supra* note 2, at 242.

151. 504 F.2d 400 (7th Cir. 1974).

152. *Id.* at 403.

153. 318 U.S. 363 (1943).

154. *Id.* at 366.

155. *Id.* at 367.

tion¹⁵⁶ and the need for a single rule of contribution and indemnity.¹⁵⁷ *Kohr* is important because the court recognized that a federal court has the competence to fashion or select a rule instead of relying on existing state law¹⁵⁸ as required by *Erie Railroad Co. v. Tompkins*.¹⁵⁹ *Kohr*, however, provides authority for applying federal law over state law in aviation disasters only in the federal courts. While applying federal law does provide uniformity, *Kohr* does not help a plaintiff who cannot gain entry to the federal courts.¹⁶⁰

Because *Gabel* found a cause of action based on federal common law and *Kohr* applied a federal rule of decision, the two cases could form a possible basis for all aviation disaster cases to be tried under federal common law. *Gabel* insures access to a federal forum by recognizing an implied cause of action in favor of those injured in an aviation disaster,¹⁶¹ thus, a plaintiff can sue under federal question jurisdiction.¹⁶² The *Kohr* decision provides the next step by allowing courts to decide the applicable rules of law in cases arising under that implied action.¹⁶³ Read together, the two cases provide federal courts with jurisdiction through an implied cause of action and thereafter allow all aspects of the litigation to be governed by federal common law.¹⁶⁴

156. *Kohr v. Allegheny Airlines*, 504 F.2d 400, 403 (7th Cir. 1974) (federal preemption in aviation meant that state law could not impinge on federal government control over aviation).

157. *Id.* The conflicting rules of contribution and indemnity were replaced by a single rule, thereby creating uniformity.

158. *Judicial Solution*, *supra* note 2, at 243.

159. 304 U.S. 64 (1938).

160. *Judicial Solution*, *supra* note 2, at 243.

161. *Id.* In so doing, the *Gabel* court was following the lead of previous cases by implying a civil remedy for violation of a federal regulatory statute. The theory is that when the enforcement provisions of a statute are inadequate to fulfill the strong social policy embodied in the statute, the courts should fill in the gaps by allowing private enforcement through an implied cause of action. Comment, *Implied Causes of Action: A New Analytical Framework*, 14 J. MAR. L. REV. 141, 166 (1980) [hereinafter cited as *Analytical Framework*]. Stated another way: "Where a federal right is created by a statute, a federal remedy must be fashioned . . . to protect that right." *Id.* at 152. Failure of the court to do this in effect would condone the conduct considered wrongful. *Id.* at 143.

162. A federal question is defined as a genuine controversy which arises under the Constitution of the United States or a United States law or treaty and is amenable to judicial solution. *BALLENTINE'S LAW DICTIONARY* 462 (3d ed. 1969). By using an implied cause of action as a remedy to protect a federal right, the courts are allowing access to the federal courts under federal question jurisdiction. Therefore, lack of diversity will not bar plaintiffs from litigating in federal courts.

163. *Judicial Solution*, *supra* note 2, at 242.

164. *Id.*

There is doubt, however, whether federal common law will be utilized by the federal courts in the future.¹⁶⁵ In the past, decisions such as *Gabel* have justified implied remedies where there is a need for national uniformity or it is necessary to grant relief for the invasion of a federal right.¹⁶⁶ This right must arise from a federal rather than a state statutory prohibition.¹⁶⁷ However, the United States Supreme Court, in *Cort v. Ash*¹⁶⁸ established four criteria for finding a common law cause of action:

First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' Second, is there any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one. . . . Third, is it consistent with the underlying scheme to imply such a remedy for the plaintiff. . . . [F]inally, is the cause of action one traditionally relegated to state law, in an area basically the concern of states, so that it would be inappropriate to infer a cause of action based solely on federal law.¹⁶⁹

Obviously, the Supreme Court has restricted use of the implied cause of action doctrine.¹⁷⁰ *Cort* was the first decision to require that an implied cause of action meet the requirements of *all* the previously formulated tests.¹⁷¹ Whether federal causes of action, including recognition of an implied cause of action under the Federal Aviation Act of 1958, will be recognized in the future is in doubt.

Application of the four *Cort* tests to the Federal Aviation Act of 1958¹⁷² casts doubt on its usefulness in aviation disaster litigation. For instance, the second test requires that there be a legislative intent to create a remedy for the plaintiff. Although Congress has not explicitly denied a cause of action for torts based on the Act, silence by Congress has lately been construed

165. See Conklin, *supra* note 13, at 480.

166. *Federal Common Law*, *supra* note 7, at 1088.

167. *Id.*

168. 422 U.S. 66 (1975).

169. *Id.* at 78 (emphasis in the original).

170. See generally *Analytical Framework*, *supra* note 161.

171. See Note, *The Decline of the Implied Private Cause of Action Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41, 53 (1978). Actually, *Cort* only continued the trend of two earlier cases, *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) and *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) which applied two of the first three *Cort* tests. The fourth test was used for the first time in *Cort*.

172. Of all the statutes concerning aviation, an implied cause of action for aviation disasters is most likely to be found in the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1976). This Act set up the Federal Aviation Administration which is charged with promoting air safety through issuing and enforcing regulations. 49 U.S.C. § 1421 (1976). See *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972) (finding an implied cause of action based on the Federal Aviation Act). See also notes 144-150 *supra*.

as denying the existence of an implied cause of action.¹⁷³ An even stronger argument is that the Savings Clause¹⁷⁴ of the Act, which allows the continued existence of common law or statutory remedies, is evidence that state law should apply.¹⁷⁵

Previously, courts would apply whichever one of the *Cort* tests that fit the facts.¹⁷⁶ The Supreme Court, however, in *Cort* used all four tests to determine whether an implied cause of action existed. Therefore, in the future, courts must apply all the *Cort* tests to decide if an implied cause of action will be allowed. Furthermore, cases following *Cort* have either made the *Cort*

173. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974). Applied the rule of construction that inclusion of one thing implies exclusion of another. The court held that for a statute to include remedies other than those enumerated, there must be clear evidence of legislative intent. *Id.* at 458.

174. 49 U.S.C. § 1506 (1976) provides that "[n]othing 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."

175. Douglas, *supra* note 40, at 447. As to the other three *Cort* tests, only the first is likely to be satisfied in determining whether an implied cause of action should be allowed. This test requires the plaintiff to belong to the class for whose special benefit the legislation was enacted. There is little doubt that passengers in aviation activity are members of the class for whose benefit the Federal Aviation Act of 1958 was enacted. The predominant emphasis on safety in the Act indicates an intention to establish rights for passengers. This is conceded even by those who criticize use of the federal common law to create a cause of action. *Id.* at 447.

Application of the remaining two tests to the Act raises doubt whether they would be satisfied. The third *Cort* test asks if recognizing an implied cause of action is consistent with the underlying scheme of the Act. Since the Act emphasizes safety, implying a cause of action for failure to follow the standards set by the Act is consistent with the Act's purpose and promotes its goals. *See also Judicial Solution, supra* note 2, at 248-49. *See generally* Douglas, *supra* note 40 (implying a cause of action under the Federal Aviation Act of 1958 would promote the statute's economic purposes).

Yet, it has been argued that Congress's purpose in the Act was air safety regulation and that purpose is adequately protected by the federal aviation program. Nor does state tort law interfere with the functioning of the federal aviation program. *Federal Common Law, supra* note 7, at 1099. Moreover, there must be a specific intent to occupy a given subject matter. *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405 (1975).

The final test asks if the cause of action is one traditionally relegated to state law in an area basically the concern of states so that it would be inappropriate to infer a federal cause of action. Although Congress has enacted wrongful death statutes (*see, e.g.,* the Death on the High Seas Act, notes 101-124 and accompanying text *supra*), wrongful death actions are traditionally a matter of state concern and the federal courts have shown an extreme reluctance to enter into areas of traditional state concern. *See, e.g., Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975) (plaintiffs had an adequate state remedy for wrongful death).

176. *See Note, The Decline of the Implied Private Cause of Action Continued: The Third Circuit Construes the Federal Aviation Act*, 31 *RUTGERS L. REV.* 41, 47 (1978).

tests more restrictive¹⁷⁷ or denied altogether the judiciary's competence in finding an implied cause of action.¹⁷⁸

The elimination of implied actions has serious consequences for the use of federal common law in aviation disaster cases. In order to apply the federal common law, a federal cause of action must be found. Only then can the court fashion federal rules to insure uniformity in the litigation of aviation disasters.¹⁷⁹ While the *Gabel*¹⁸⁰ case did find a federal cause of action implicit in the Federal Aviation Act of 1958, that decision predated *Cort*. The federal courts will apply the *Cort* tests to decide whether or not *Gabel* should be followed.¹⁸¹ Since it is likely that one of the *Cort* tests will not be fulfilled, use of federal common law would not be an adequate solution to the problems of aviation disaster litigation.¹⁸²

In addition to the *Cort* tests, other problems exist in applying federal common law to aviation disaster cases. For example, issues such as determining the proper beneficiaries may still have to be tried under state law.¹⁸³ Another and more serious problem is that, by forming a new area of federal common law, uncertainty will be the norm.¹⁸⁴ Until an issue reaches the courts, it is unknown what rules will be formulated and applied.

177. See, e.g., *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (denied an implied cause of action by holding that the primary beneficiaries of the statute must be determined from the face of the statute in order to fulfill the first *Cort* test).

178. In one case, *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the Court stated that it was not the federal courts' duty to fill in legislative voids in a statutory scheme. *Id.* at 579. For a further discussion of elimination by the Supreme Court of implied causes of action, see *Analytical Framework*, *supra* note 161.

179. While it is true that *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), applied a federal rule of contribution in a state action, the federal courts' reluctance to impinge upon traditional matters of state law makes it difficult for them to follow *Kohr* absent a federal action.

180. *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612, 614 (C.D. Cal. 1972).

181. See *Rauch v. United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976) where the court refused to recognize an implied cause of action based on violations of the Federal Aviation Act of 1958 for a breach of implied warranties of merchantability and fitness for a particular purpose, and for strict liability in tort. The court held that the first and fourth *Cort* tests were not met. *Id.* at 460. See also *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977) in which the Court refused to extend the federal common law to a suit involving a breach of contract with the Federal Aviation Administration. The Court held that the federal government's interest in safety was not a sufficient reason to displace state law when there was no showing that the state law was inadequate to protect the federal interests involved. *Id.* at 31.

182. See notes 16-60 and accompanying text *supra*.

183. *Judicial Solution*, *supra* note 2, at 257 (certain issues such as who are proper beneficiaries are tied to state rather than federal law).

184. *Federal Common Law*, *supra* note 7, at 1104.

Conflicts may develop between districts or circuits and the disputes will have to be resolved by the Supreme Court,¹⁸⁵ further strengthening the conclusion that federal common law cannot solve the problems of aviation disaster litigation.

FEDERAL LEGISLATION AS A SOLUTION TO THE PROBLEMS OF
AVIATION DISASTER CASES

Previous Attempts

Since existing federal and state law does not effectively solve the problems of aviation disaster litigation, the only remaining solution is for Congress to enact federal legislation governing aviation disaster litigation. This idea is not novel and has been tried on at least three previous occasions.¹⁸⁶ The first attempt, the Holtzoff Bill,¹⁸⁷ sought to establish exclusive federal jurisdiction over any civil action arising out of the operation of any aircraft in interstate or foreign commerce.¹⁸⁸ Consolidation was to be achieved under section 1404¹⁸⁹ by allowing a district court to transfer any civil action arising out of an aviation disaster to another district for determination of all common issues of fact or law. The bill left formation of substantive law to the courts of the United States through application of federal common law.¹⁹⁰

There were two major problems with this legislation. First, it was both too broad and too narrow in its definition of aviation activity. The definition of aircraft applied not only to interstate carriers, but also to private aircraft that crossed state lines. At the same time, however, air carriers operating intrastate were not affected.¹⁹¹ Second, the Holtzoff Bill called for the formulation of a federal common law, thus incorporating all the disad-

185. *Id.*

186. The "Holtzoff Bill," S. 3305, 90th Cong., 2d Sess. (1968); the "Admiralty Bill," S. 3306, 90th Cong., 2d Sess. (1968); and the "Tydings Bill," S. 961, 91st Cong., 1st Sess. (1969). These three bills have generated the most commentary. There were, however, earlier equally unsuccessful attempts. H.R. 532, 79th Cong., 1st Sess. (1945); H.R. 4912, 79th Cong., 1st Sess. (1945); and S. 1904, 79th Cong., 2d Sess. (1946). See Note, *Uniform State Aviation Liability Legislation*, 1948 WIS. L. REV. 356, for discussion of H.R. 4912 and of a report by Edward C. Sweeny for the Civil Aeronautics Board on the feasibility of a federal aviation liability statute.

187. S. 3305, 90th Cong., 2d Sess. (1968). The bill was called the Holtzoff Bill after its drafter, Judge Alexander Holtzoff of the Washington D.C. District Court. *Aircraft Crash Litigation*, *supra* note 47, at 1057.

188. S. 3305, 90th Cong., 2d Sess. § 1 (1968).

189. *Id.* at § 2.

190. *Id.* at § 4.

191. See *Aircraft Crash Litigation*, *supra* note 47.

vantages of applying federal common law.¹⁹²

The Admiralty Bill was introduced in the same session as the Holtzoff Bill and, while more complex, was intended to accomplish the same goals.¹⁹³ It provided jurisdiction for any injury or death caused by any tortious act arising out of aviation or space activity.¹⁹⁴ Like its predecessor, consolidation was provided under section 1404. However, unlike the Holtzoff Bill, the transfer was to the district either where the largest number of cases were pending or where the first action was filed. The Admiralty Bill also differed from the Holtzoff Bill in that the normal venue provisions of section 1404 did not apply.¹⁹⁵ Thus, the transferee district was not required to be a district where the action might have been brought. The substantive law, like that of its predecessor, was to develop from federal common law; however, it was also subject to any other applicable federal statute, but not state statutes or admiralty law. This had the effect of preempting state law and removing any future claims from the admiralty courts. In these cases, the new legislation was controlling.¹⁹⁶

During the following session of Congress, the Tydings Bill¹⁹⁷ was introduced and has generated much commentary.¹⁹⁸ It differed from previous legislative proposals in providing for both exclusive and concurrent jurisdiction. The federal courts would have exclusive jurisdiction over certain enumerated aviation activities.¹⁹⁹ At the same time, concurrent jurisdiction was provided for an action arising out of ground activity or any aviation

192. The bill may also have cut into the authority of the Warsaw Convention, 49 Stat. 3000, T.S. No. 816 (Oct. 12, 1929). *Aircraft Crash Litigation*, *supra* note 47, at 1058-59. See note 102 *supra* on the Warsaw Convention.

193. S. 3306, 90th Cong., 2d Sess. § 1 (1969). The bill was patterned after the Death on the High Seas Act, notes 101-108 and accompanying text *supra*. It was a much more complex bill because the drafters attempted to fit it into existing law. *Aircraft Crash Litigation*, *supra* note 47, at 1059.

194. S. 3306, 90th Cong., 2d Sess. § 1 (1969).

195. *Id.* at § 2.

196. *Id.* at § 5. The drafters of the bill felt that the legislation had to be broad in order to regulate interstate commerce effectively. Because of criticism that the statute was overbroad, a compromise bill, S. 4089, 90th Cong., 2d Sess. (1968) was drafted. This bill limited jurisdiction to commercial activity. The compromise died when the session ended without action being taken. *Aircraft Crash Litigation*, *supra* note 47, at 1062.

197. S. 961, 91st Cong., 1st Sess. § 1 (1969).

198. The origins and purpose of the bill are explained by its drafter in Tydings, *supra* note 48. For a critical analysis of S. 961, see Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 Mo. L. Rev. 215 (1970).

199. S. 961, 91st Cong., 1st Sess. § 1 (1969).

activity not covered by the exclusive jurisdiction section.²⁰⁰ Thus, jurisdiction sections in the Tydings Bill differed from previous legislative attempts by defining specific activities giving rise to jurisdiction, thereby avoiding the criticism of being too broad.

The Tydings Bill called for a uniform body of federal law governing all civil actions arising out of aviation activity, thus preempting state law.²⁰¹ The only time state law could be considered was when the law of the decedent's domicile could be determined without inconvenience and would not thwart the purposes of the legislation. In such cases, the law of the domicile could be utilized to determine the beneficiaries in a wrongful death action.²⁰²

A major difference in this bill was the method of consolidation. In the Tydings Bill, all cases arising out of an aviation disaster were to be consolidated by the Judicial Panel on Multidistrict Litigation.²⁰³ The Panel would be authorized to transfer all actions to any district for any and all purposes.²⁰⁴ Thus, the bill had neither the venue provisions of section 1404, nor a mechanical test like that of the Admiralty Bill. Rather, the test was a flexible one of fairness and convenience. By using the Panel, the Tydings Bill also provided one body to determine which district would serve as the transferee district and thereby avoided conflicts over which district was the proper transferee district.

The bill was criticized on several grounds, some dealing with specifics of the act such as the statute of limitations.²⁰⁵ Its main problems, however, were the general provisions. For instance, the standard of liability was left to the judiciary to formulate. Because the rules of law were so uncertain, settlement would have been hampered, leading to extended litigation.²⁰⁶

200. *Id.* Such activity specifically included the flight, takeoff or landing of large aircraft (weighing more than 12,500 pounds), high-performance aircraft (jet or turbine powered jet) or public aircraft (aircraft owned by the United States for use in research and development).

201. *Id.*

202. *Id.*

203. See notes 88-95 and accompanying text *supra*.

204. S. 961, 91st Cong., 1st Sess. § 2 (1969).

205. The one year statute of limitations was criticized for being too short. Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 MO. L. REV. 215, 221-22 (1970). The contributory negligence rule was to be the rule as it existed among the majority of the states. Criticism fell in two categories: the difficulty of determining the contributory negligence law of the majority of states and the use of contributory negligence rather than comparative negligence.

206. *Id.* at 223. Later legislation similar to the Tydings Bill was introduced. H.R. 231, 96th Cong., 1st Sess. (1979). It contemplated the develop-

A New Comprehensive Act

Previous legislative proposals attempted to solve two problems of litigating aviation disaster cases: reducing the strain on the judicial system by consolidating claims and providing a federal cause of action by which all claims would be litigated under a uniform law. These proposals, however, were concerned mostly with providing jurisdiction and consolidating actions. As a result, they left the substantive body of law to be developed by the courts. Some supporters of the proposals felt that this presented no problem because federal judges often decide state law without any guiding precedent; therefore, formulating a federal common law would not present an insurmountable obstacle.²⁰⁷ Nevertheless, much conflict would arise which would have to be settled at the appellate levels, leading to increased litigation. The parties, uncertain of their liability, would seldom be willing to settle, and would be more likely to appeal.

The logical conclusion is a new law based on previous attempts but going farther. Such a new law would be a comprehensive federal aviation tort liability statute covering major substantive points of law. These sections would include standards of liability, standing provisions, and recovery rules.²⁰⁸ As a result, the law would provide certainty to the parties while at the same time enabling the federal courts to develop a body of common law, since no statute would be able to cover every point of substantive law. A statute can, however, convey to parties what is expected of them and what will happen to them if they fail to conform. The new statute can provide a uniform foundation, giving the courts direction in the development of the new law. The parties would know the standards of conduct, and lawyers would be able to counsel clients as to liability, defenses, and the advisability of settlement. Therefore, such a comprehensive law would provide certainty in litigation and promote judicial economy by defining the standards used to determine liability.²⁰⁹

ment of a federal common law subject to other federal statutes and treaties. Also, § 1407 was utilized to reduce the amount of litigation and provide for nationwide subpoena power. See Douglas, *supra* note 40, for a discussion of this bill.

207. Douglas, *supra* note 40, at 435.

208. Other possible provisions include sections dealing with service of process (such as nationwide service of process, since aviation disaster litigation involves many parties from all across the country), a statute of limitations, types of damages, definitions, contribution and indemnity.

209. Such a law may even reduce costs to passengers. If litigation costs go down, these savings may be passed on to the consumer. Even more ben-

The threshold question is whether Congress has the power to enact a federal aviation liability statute. Traditionally, remedies under tort law have been tied to the states and their individual social policies.²¹⁰ This view of tort law has caused opposition to past legislative attempts.²¹¹ In part, the argument is based on the tenth amendment.²¹² Commercial aviation, however, is interstate in nature. More than any other mode of transportation, aviation continually crosses state lines. Furthermore, the federal government has already preempted the field of aviation and excluded state law except in tort remedies.²¹³ The large number of passengers flying by common carriers creates enough interstate commerce that Congress can base the law on its commerce power.²¹⁴

The need for uniformity in all aspects of aviation activity (including litigation) is sufficient justification for exercise of the commerce power. It seems incongruous for tort remedies in aviation to remain tied to state law, especially when the varying state laws have caused such problems. Therefore, while tort actions are traditionally part of state law, the overriding federal interest in aviation should control in passage of an aviation liability statute.

The next step is assuring access to the federal courts by providing for subject matter jurisdiction.²¹⁵ This can be accomplished in several ways. One method is creation of a federal cause of action for aviation tort liability; the parties could then base jurisdiction on 28 U.S.C. § 1231.²¹⁶ Since a controversy arising under a federal law would be involved, diversity problems

official, insurance companies do not have to assume the worst scenerio for liability as they do now.

210. *Disaster*, *supra* note 23, at 663.

211. Conklin, *supra* note 13, at 480.

212. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

213. *Disaster*, *supra* note 23, at 675.

214. U.S. CONST., art. I, § 8, cl. 3. "The Congress shall have power * * * [t]o regulate Commerce. . . ." One Supreme Court case has suggested that Congress could constitutionally base an aviation liability statute on the commerce power. In *Executive Jet, Inc. v. Cleveland, Ohio*, 409 U.S. 249, 274 (1972), the Court said: "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 adopted to the specific characteristics of air commerce."

215. *BALLENTINE'S LAW DICTIONARY* 691 (3d ed. 1969).

216. 28 U.S.C. § 1331 (1976) provides: "The district courts shall have jurisdiction in all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States."

would be eliminated.²¹⁷ Another method is to create a separate jurisdiction section specifically granting jurisdiction to the federal courts, similar to the provisions granting to district courts the power to hear cases in admiralty.²¹⁸

The best method is for Congress to create a separate jurisdictional statute covering aviation activity. One important advantage is that the statute could define exactly what cases are to be covered exclusively by the law. In past legislative attempts, the jurisdiction sections tended to be overbroad and encompass activities that were not necessary in a federal aviation liability statute.²¹⁹ An overbroad definition causes problems because it includes activities unconnected with the need for federal legislation.

One such activity is private aviation.²²⁰ Private aviation disasters involve a small number of persons and present no real strain on the judicial system because there are not enough parties to cause multidistrict litigation problems. In fact, in private aviation cases, the flexibility of modern choice of law analysis outweighs its difficulties since there are usually few factors and issues to be considered. On the other hand, aviation disaster cases involving commercial aviation should be included in the aviation tort statute. These types of accidents create most of the problems of aviation disaster litigation, *i.e.*, the strain on the judicial system caused by multidistrict litigation and the difficulties of choice of law analysis.²²¹

217. Douglas, *supra* note 40, at 432.

218. 28 U.S.C. § 1333 (1976).

219. See generally Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 Mo. L. Rev. 215 (1970). For example, in the Tydings Bill, any ground activity incidental to the aviation activity could be litigated under the statute. Carried to its logical conclusion, this could include a medical malpractice claim by a plaintiff for treatment of the injuries he received from the aviation activity. *Id.* at 223. A better method would be to include any ground activity incidental to the *operation* of aviation activity. This covers incidents truly connected to an aviation disaster case such as negligence in maintenance or in the control tower. On the other hand, it avoids those incidents which are tenuously connected to the aviation disaster such as the above cited medical malpractice example.

220. Private aviation, also known as general aviation, includes all civil aviation except for flights operated by common carriers. Private aviation ranges from small propeller planes to the type of jet liners used by common carriers; activities range from corporations using jets for carrying personnel and freight to cropdusting and advertising. Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 248, 262 (1975). In 1978, there were 186,600 private aircraft flying in the United States and one out of every three travellers went by private aircraft. U.S. NEWS & WORLD REPORT, Oct. 9, 1978, at 45.

221. In private aviation, the number of passengers is usually so small that there are fewer contacts to be analyzed for choice of law purposes. Therefore, it is more likely that the state where the accident occurred would have the dominant interest in the litigation.

Congress can narrow the scope of the jurisdiction section by listing the specific events that give rise to jurisdiction.²²² By using this method, as opposed to a general definition, the statute would involve only that aviation activity which Congress determines gives rise to problems in tort litigation. Furthermore, by granting the federal courts exclusive jurisdiction over these activities, Congress could insure that there is no state involvement. Congress might also want to follow the Tydings Bill's example by providing a general clause allowing concurrent jurisdiction over all other aviation activity.²²³ This would provide a basis for federal jurisdiction in circumstances which indicate that jurisdiction over private aviation activity should be in federal rather than state court.²²⁴ Thus, Congress would provide flexibility by allowing all aviation disaster cases access to the federal courts.

Having provided for access to the federal courts, Congress would next have to determine the substantive law under the act. An aviation tort statute must balance the interests of plaintiffs, defendants, the courts, and the public at large. Otherwise, to skew the law too much toward one side would lead to immediate opposition from the other side, harming all parties. Balancing is vital in the specifics of the act because it is in these areas that the law can favor one side or the other. For instance, in setting the statute of limitations, Congress must determine the optimum time in which claims have to be filed. If the limitation is too short, the results would be harsh to plaintiffs who might not have enough time to file their claims. Conversely, if the time limitation is too long, defendants might be exposed unfairly to stale claims. While determination of the specifics of the legislation must be left to Congress, a general framework for the legis-

222. Congress has used this technique before. Under the Civil Rights Act of 1964, 28 U.S.C. §§ 2201, 2202 (1976), Congress specifically defined interstate commerce to include certain activities of the hotel and restaurant business in order to eliminate racial discrimination in those areas. The Supreme Court upheld the validity of this scheme in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

223. Concurrent jurisdiction was provided for any aviation activity not specifically falling under the section granting jurisdiction. S. 961, 91st Cong., 1st Sess. § 1373(d) (1969). The bill also provided concurrent jurisdiction with the admiralty courts over three specifically enumerated air activities: large aircraft, high performance aircraft, and public aircraft.

224. For example, assume two private aircraft, each with two passengers, collide and each of the four passengers resides in a different state. They collide in a fifth state. There are enough different states involved that leaving the parties to the jurisdiction of state courts could lead to confusion and hardship. If federal jurisdiction is available, however, the parties can enjoy the advantages that the aviation liability statute would offer, such as 28 U.S.C. § 1407 (1976).

lation can be suggested that will remove the problems of aviation disaster litigation.

Whenever new legislation is enacted, the question arises whether existing legislation dealing with the same activity has been replaced. Obviously, Congress will not want to replace laws such as the Federal Aviation Act of 1958;²²⁵ yet other laws, such as state laws governing aviation tort liability, must be replaced to insure uniformity. Congress, through a two step process, can clearly define what laws are or are not replaced. First, a general section could provide that, unless the statute expressly states otherwise, no existing law would be replaced. Second, Congress could state what specific laws would be replaced by the aviation liability statute, thereby defining the boundaries within which federal common law would develop. Otherwise, the danger exists that the aviation liability statute would be extended into areas where it does not belong.

The aviation liability statute should replace varying state laws that now govern aviation disaster litigation. Congress can accomplish this by declaring all state laws inapplicable to the litigation of aviation disasters within the exclusive jurisdictional provisions of the statute.²²⁶ This would provide much of the uniformity needed in litigating aviation disasters. Uniformity, however, also requires replacement of some federal laws, such as admiralty tort law,²²⁷ including the Death on the High Seas Act,²²⁸ and the Federal Tort Claims Act.²²⁹ A major problem of the Federal Tort Claims Act in aviation disaster cases is its choice of law rule.²³⁰ The Act relies on state choice of law rules and thus fails to provide the uniformity that federal law usually does. Instead, the Act incorporates the problem of uncertainty that results from modern choice of law analysis. If the Federal Tort Claims Act is amended so that the provisions of the aviation liability statute control, the choice of law problems will be eliminated because all cases will be decided under a uniform law.²³¹

225. 49 U.S.C. §§ 1301-1542 (1976).

226. The Tydings Bill, S. 961, 91st Cong., 1st Sess. (1969) declared that there is a uniform body of federal law "exclusive of any other law."

227. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); notes 109-115 and accompanying text *supra*. Because of the small number of aviation disaster cases that fall within admiralty jurisdiction, it makes sense to remove all these cases and place them under the proposed act's coverage so that all aviation disasters are litigated under the same law.

228. 46 U.S.C. §§ 761-767 (1976).

229. 49 U.S.C. §§ 1301-1542 (1976).

230. See notes 16-52 and accompanying text *supra*.

231. Congress may want to keep other aspects of the Federal Tort Claims Act intact. For instances, Congress may still want to use the administrative

Next, Congress must insure uniformity by developing the appropriate standard of liability. A standard of liability will create both greater certainty for the parties and a starting point for developing federal law. Yet, the need to develop a federal common law will not be as critical because the parties will be able to determine their liability with reasonable certainty. From these standards, the parties can prepare for trial and negotiate settlements.

In past legislative attempts, if Congress defined standards at all, only one standard was developed. Generally, the choice was between either a negligence standard or an absolute liability standard.²³² In conformity with modern tort law, however, different standards of liability should be used for different forms of conduct,²³³ depending on the culpability involved. The negligent defendant should not be held to the same standard as one guilty of reckless misconduct; neither should be held to the strict liability standard of product manufacturers.²³⁴ Fairness requires that Congress provide liability standards which vary with the claim involved.²³⁵

waiting period. See note 134 *supra*. Congress can continue to provide that aviation disasters fall within the Act's provisions, but amend the act so that its choice of law rule does not apply to any claim to which the aviation liability statute applies. Thus, if an aviation disaster falls within the exclusive jurisdiction of the aviation liability statute, the substantive law would be governed by the aviation liability statute but all other aspects would be governed by the Federal Tort Claims Act.

232. Comment, *Uniform State Aviation Liability Legislation*, 1948 WIS. L. REV. 356, 363.

233. Prosser divides tort law into three standards of liability: intent of the defendant to interfere with the plaintiff's interests, negligence, and strict liability. PROSSER, HANDBOOK OF THE LAW OF TORTS 26-7 (4th ed. 1971). For an intentional or negligent tort action, there must be an invasion of some right or breach of, or failure to perform, some duty. 74 AM. JUR. 2d *Torts* § 12 (1974). However, there is also a strict liability standard under which "the defendant is held liable in the absence of any intent which the law finds wrongful, or any negligence, very often for reasons of policy." PROSSER, HANDBOOK OF THE LAW OF TORTS 27 (4th ed. 1971).

234. Reckless misconduct imports knowledge that injury is likely to spring from the act whereas mere negligence involves breach of duty. 74 AM. JUR. 2d *Torts* § 22 (1974). In strict liability, however, social policy requires the defendant to make good the harm to others which results from a desirable industrial activity that contains a strong possibility of causing harm to others. *Id.* at § 14.

235. An alternative to using standards of liability exists: a law that allows recovery regardless of fault. Under such a "no-fault" scheme, the defendant is liable for any injury that occurs as a result of aviation activity, but the plaintiff's recovery is limited to a maximum amount set by law. This is the type of scheme used under the Warsaw Convention. See note 102 *supra*.

However, these types of schemes, for example the Warsaw Convention, tend to be very unpopular because the recovery limitation is so low. See Loggans, *Personal Injury Damages in International Aviation Litigation: the Plaintiff's Perspective*, 13 J. MAR. L. REV. 541 (1980). In addition, be-

In addition to providing for uniformity, Congress should provide for reduction of the strain on the judicial system. The best solution would be consolidation through section 1407,²³⁶ but removing the shortcomings of that section by providing for transfer for all purposes instead of just for pretrial purposes. This way, all aspects of the litigation can be consolidated without regard to venue provisions. Also, one judicial entity decides which district will serve as the transferee court. Therefore, expanded use of the Judicial Panel on Multidistrict Litigation will insure judicial economy by ending needless duplication of work and providing one entity to determine the proper transferee court.

Thus, under the proposed framework, the aviation tort liability statute can solve the existing problems of litigating aviation disasters. The strain on the judicial system is reduced through expanded use of the Judicial Panel on Multidistrict Litigation. The conflicting results and uncertainty caused by varying state and federal laws are removed by providing a uniform law. Choice of law problems are also eliminated by the creation of a uniform law. This uniformity is insured by defining the standards of liability to be used in litigating aviation disasters. Thus, the parties can determine the extent of their liability and the courts have a starting point to develop federal common law. Once Congress has set the standards of liability, it can deal with other specifics of the legislation such as the statute of limitations or the proper beneficiaries in a wrongful death action.²³⁷

cause no fault schemes tend to be so controversial, such a scheme in a federal statute is unlikely to pass Congress. Comment, *Uniform State Aviation Liability Legislation*, 1948 WIS. L. REV. 356, 370.

236. 28 U.S.C. § 1407 (1977). Another possible solution for consolidation would be a class action provision. However, unless FED. R. CIV. P. 23 is amended, either by the aviation liability statute or separately, class actions cannot be used to reduce the strain of multidistrict litigation. See Annot., 28 A.L.R. Fed. 719 (1976).

237. Congress must balance the interests of both sides in the area of punitive damages. Plaintiffs will want punitive damages included in cases where the defendant was guilty of reckless or willful misconduct and knew that some danger existed which could cause harm. In such cases, punitive damages are warranted, not as compensation, but as a deterrent to future misconduct. In effect, the plaintiff acts as a private attorney general in punishing the conduct of the defendant.

On the other hand, defendants would want punitive damages to be excluded, fearing unlimited liability. It is possible that a jury would award an amount that could bankrupt a corporation. In addition, in an aviation disaster, with so many plaintiffs requesting punitive damages, the total recovery of all plaintiffs could financially ruin a defendant.

Should Congress decide that punitive damages belong in the aviation liability statute, there is a method which could balance both sides' interests and accomplish the goal of punitive damages. All plaintiffs who request punitive damages would belong to a special class and if they were awarded, a

CONCLUSION

A survey of existing statutes, case law, and commentary shows that, in all areas but tort litigation, the federal government has exclusive control over aviation activity.²³⁸ Conflicting state tort laws and modern conflict of laws analysis cause an insurmountable problem in aviation disaster litigation. Furthermore, with the large number of claims arising out of aviation disasters, an excessive burden is placed on the courts.

Existing solutions do not provide relief for the problems of aviation disaster litigation. The Judicial Panel on Multidistrict Litigation does not go far enough because of its limited application. Other solutions such as admiralty jurisdiction involve too small a number of cases to be of any use in solving aviation disaster problems. Still other solutions such as federal common law create as many problems as they solve.

Given the state of aviation activity today, it is in the interests of all parties and the courts to urge the enactment of a comprehensive federal aviation liability act. Previous attempts did not work because they created their own problems or incorporated existing problems. By enacting a comprehensive statute, Congress can insure certainty in litigation, yet provide room for courts to maneuver and develop new law. In addition, the act will save time and avoid needless duplication of effort by providing for consolidation of claims for all purposes. Naturally, in the interest of fairness, the comprehensive act must balance the interests of plaintiffs, defendants, the courts, and public policy at large.

Unfortunately lawyers try to solve problems by adding to existing mechanisms.²³⁹ While this method works to a degree, there are times when something new has to be utilized. Aviation disaster litigation is one such area in the law today. The time has come for a comprehensive federal aviation liability statute.

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lump sum award could be distributed evenly among all class members. This method still provides a deterrent to willful misconduct but at the same time prevents multiple recoveries deterring the same conduct and financial ruin of the defendant. See Kreindler, *Punitive Damages in Aviation Litigation—An Essay*, 8 CUM. L. REV. 607, 615-16 (1978) for further discussion.

238. See notes 72-73 and accompanying text *supra*.

239. Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 CH. B. REC. 248, 267-68 (1975).

