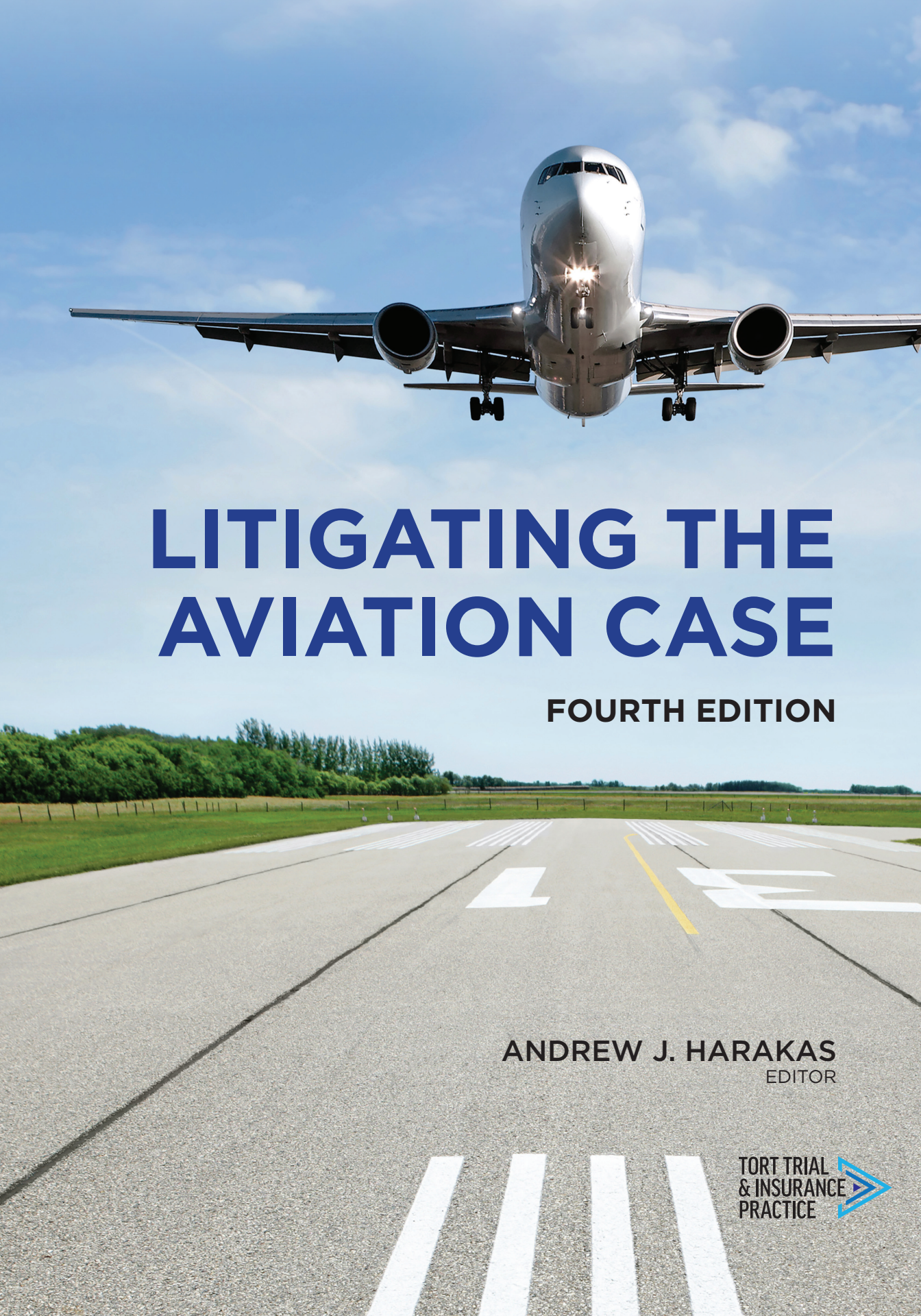

LITIGATING THE AVIATION CASE

FOURTH EDITION

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TORT TRIAL & INSURANCE PRACTICE

CHAPTER TWENTY-ONE

CHOICE OF LAW IN AVIATION ACCIDENT LITIGATION

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I. Introduction

Oh, what a tangled web we weave . . . well, it's not as bad as all that, but choice of law can certainly be a bit messy.[2] To avoid some of the muddle, recall that all choice-of-law analysis arises from the goal of resolving a conflict among competing laws—if there is no conflict (generally an outcome determinative conflict) with the law of the forum where a case is pending, then a choice-of-law analysis is not necessary and the forum court will typically apply its own law.[3] In an aviation case, however, there are quite often a number of competing laws to consider. The jurisdictions implicated generally include the place of the accident; the domiciles of the parties; the principal places of business of the parties; the place of the aircraft's design, manufacture, and assembly; the place of the alleged wrongful conduct; and perhaps the pilot training, maintenance, inspection, or testing of the aircraft or component part. The facts and claims at issue in a particular case and the court deciding the question will suggest which of these sorts of places might carry more significance in deciding the law or laws to apply, but there are plainly lots of options.

1. Significant thanks to Judith Nemsick, Holland & Knight LLP, for drafting the original of this chapter in the preceding edition from which this version is based and borrows. Thanks also to Rebecca Dircks for her effort in researching and cite checking.

2. *In re* Paris Air Crash of Mar. 3, 1974, 399 P. Supp. 732, 739 (C.D. Cal. 1975) (Hall, D.J.) (emphasis in original) (choice of law is a "veritable jungle, which if the law can be found out, leads not to a rule of action, but a reign of chaos dominated by the judge's 'informed guess' as to what 'some other state than the one in which it sits would hold its law to be.'").

3. Barron v. Ford Motor Co. of Canada, Ltd., 965 F.2d 195, 197 (7th Cir. 1992) (applying Florida law) (cautioning that "before entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states"). *See* Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 14 (2d Cir. 1996) (an actual conflict exists with respect to damages where Ohio law allowed for consideration of loss of society, but New York law did not).

Although an inherent uncertainty exists in most choice-of-law analysis given the multiple factors and interests to balance, a determination at an early stage in the litigation is often worth the effort. A potentially applicable law might limit or bar recovery of punitive damages[4] or compensatory damages[5] and lead to negotiated resolutions.[6] And, while there is no uniform choice-of-law rule for aviation or mass disaster cases, this chapter summarizes the primary choice-of-law rules for tort-based claims currently used by courts in the United States.[7]

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4. See e.g., *In re* Air Crash Near Clarence Center, New York, on February 12, 2009, 798 F. Supp. 2d 481 (W.D.N.Y. July 18, 2011) (addressing choice of law applicable to punitive damages where Virginia Code Ann. § 8.01–38.1 capped total punitive damages at $350,000, whereas New York had no cap); see also, Idaho Code § 6-1604 (capping punitive damages to greater of either $250,000 or three times compensatory damages); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (limiting punitive damages to two times the amount of economic damages plus noneconomic damages up to $750,000, or $200,000, whichever is greater); Currie v. Fitting, 375 Mich. 440, 134 N.W.2d 611 (1965) (Michigan wrongful death action does not permit recovery of punitive damages).

5. *See e.g.*, In re Air Crash Near Clarence Center, New York, on February 12, 2009, 882 F. Supp. 2d 405, 410 (W.D.NY. Mar. 26, 2012); see also, Cal. Civ. Proc. Code §§ 377.61, 377.34 (in wrongful death action, no recovery for grief or mental anguish of surviving kin; in survival action, no recovery for predeath pain and suffering of decedent); N.Y. Est. Powers & Trusts Law § 5-4.3 (McKinney 1999) (in wrongful death action, no recovery for loss of the decedent's society); Colo. Rev. Stat. § 13-21-102.5 (capping recovery of noneconomic damages in death action at $250,000); Kan. Stat. Ann. § 60-1903 (nonpecuniary damages cannot exceed $250,000).

6. *See, e.g., In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990) (resolution of choice-of-law question on punitive damages may facilitate settlement negotiations).

7. Congress enacted the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) in 2002 with aviation cases in mind. 28 U.S.C.A. § 1369(a). The MMTJA provides for removal based on minimal diversity in actions arising from accidents that result in the loss of seventy-five or more persons, but it does not specify a choice-of-law rule for such cases. See Joseph M. Creed, *Choice of Law Under the Multiparty Multiforum Trial Jurisdiction Act of 2002*, 17 REGENT U. L. REV. 157 (2004–2005). Likewise, the Class Action Fairness Act (CAFA), which can apply to mass actions brought by one hundred or more plaintiffs while providing a removal basis, does not provide a choice-of-law rule. Similarly, while Multidistrict Litigation consolidations are common in aviation cases, the transferee court generally applies the choice-of-law rules of the transferor court. *See, e.g., In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981); Rehr v. Lear Romec, No, CV-05-3516, 2007 WL 1233564, at *2 (E.D.N.Y. Apr. 26, 2007) ("transferee court must apply the choice-of-law rule that would apply in the transferor court"); *In re* Air Crash Disaster Near Monroe, Mich. on Jan. 9, 1997, 20 F. Supp, 2d 1110, 1111 (E.D. Mich. 1998); *see also,* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (transfer pursuant to 28 U.S.C. § 1404 requires application of choice-of-law rules of the transferor court), superseded by statute on other grounds. But, this can lead to confusion where there are multiple transferring courts and the jurisdictional basis varies. Diversity jurisdiction would call for the rules of the transferring state court to apply, whereas federal question might call for a federal common law approach (the Restatement) or perhaps maritime rules. *See e.g.*, Klaxon v. Stentor Elec, Mfg., 313 U.S. 487, 497 (1941) (using choice-of-law rules of the forum state when federal jurisdiction is based on diversity of citizenship), superseded by statute on other grounds. Additionally, the Supreme Court's decision in Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 581 (2013), while principally addressing a forum selection clause, may signal the Court is shifting its approach to choice-of-law questions in section 1404 transfers. *See* Andrew D. Bradt, *Atlantic Marine and Choice-of-Law Federalism*, 66 Hastings L. J. 617 (2015).

II. Choice-of-Law Rules

As noted at the outset, if a conflict among competing laws on a particular issue exists, then the choice-of-law rules become important. But, what are those rules and which ones apply?

Each state has adopted its own rules, although they generally consider similar elements, incorporating or combining pieces from the various methodologies. Aviation cases can also bring in some unique bodies of law, from admiralty to any number of foreign countries (those based on civil law can present challenging apples to oranges comparisons to common law countries). Most, though, follow some form of the Restatement's "most significant relationship" analysis set forth in the Restatement (Second) of Conflict of Laws (the Restatement). Outlier states such as California and New York incorporate a type of "government interest" or "interests analysis" that weighs the interests of the competing states in the application of their respective laws. The traditional lex loci delicti doctrine (the law of the place of the wrong controls) was originally used as a simple method to determine which law to apply. Whereas there is value in simplicity, its rigidity on its own has led to its reclassification as an influential factor in a larger analysis in most jurisdictions, but it still remains the law in several locales.

In disputes that invoke admiralty jurisdiction, which can arise in aviation cases involving deaths occurring on the "high seas"[8] or when the injury occurs on navigable waters and the occurrence bears a significant relationship to traditional maritime activity (e.g., the trip would have been by ship before the advent of flight), maritime choice-of-law rules can apply.[9]

8. The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301, *et seq*. (where DOHSA applies, it provides the exclusive remedy for the wrongful death actions, but also reserves the applicability of foreign law); *See e.g.*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (DOHSA applied to helicopter accident while transporting workers from shore to oil drilling platforms in Gulf of Mexico); Miller v. United States, 725 F.2d 1311, 1315 (11th Cir. 1984) (DOHSA governed private plane accident that crashed into high seas while transporting passengers from Bahamas to Florida); Williams v. United States, 711 F.2d 893 (9th Cir. 1983) (DOHSA governed crash on high seas of aircraft traveling from California to Hawaii); *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 307 F. Supp. 2d 465 (E.D.N.Y. 2004) (DOHSA governed claims arising from accident on high seas near Nantucket Island during flight from New York to Egypt); *In re* Air Crash Disaster Near Peggy's Cove, Nova Scotia on Sept. 2, 1998, 210 F. Supp. 2d 570, 586 (E.D. Pa. 2002) (DOHSA applied to accident in Canadian territorial waters); *In re* Air Disaster Near Honolulu, Hawaii on Feb. 24, 1989, 792 F. Supp. 1541 (N.D. Cal. 1990) (DOHSA governed death actions of passengers who died on high seas in Pacific Ocean when cargo door flew off the aircraft).

9. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972). *See also*, Lu Junhong v. Boeing Co., 792 F.3d 805 (7th Cir. 2015) (admiralty jurisdiction present in transoceanic flight resulting in injury on land); Preston v. Frantz, 11 F.3d 357, 359 (2d Cir. 1993) (maritime nexus found because helicopter crashed while ferrying passengers from Connecticut to Nantucket Island); *Miller*, 725 F.2d at 1315 (flight between the Bahamas and Florida); Roberts v. United States, 498 F.2d 520, 523 (9th Cir. 1974) (cargo flight

Aviation accident litigation often involves international transportation, which is extensively governed by treaties such as the Warsaw Convention or the Montreal Convention.[10] These treaties do not supply a choice-of-law rule,[11] but where applicable and depending on the countries involved, the 1973 Hague Convention on the Law Applicable to Products Liability might.[12] The Foreign Sovereign Immunities Act (FSIA),[13] which typically applies to actions against parties that are majority-owned or controlled by foreign states, likewise raises unsettled questions on the appropriate choice-of-law rule.[14] When aviation accidents result in claims against the U.S. government (e.g., air traffic controllers), those claims are governed by the Federal Tort Claims Act (FTCA). The FTCA, perhaps more clearly in comparison to the foregoing, requires application of the law of the place of wrongful conduct, inclusive of that state's choice-of-law rules.[15]

These varied choice-of-law rules are discussed more fully in the following sections, but the concept of depecage is worth a quick review first as it can lead to different laws applying to discrete issues in the same case.

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from Los Angeles to Vietnam); *In re* Air Crash Off Point Magu, Calif., on Jan. 30, 2000, 145 F. Supp. 2d 1156 (N.D. Cal. 2001) (flight from Puerto Vallarta, Mexico, to San Francisco).

10. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C. § 40105 (1997) (Warsaw Convention). Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc, No. 106-45, 1999 WL 33292734 (Montreal Convention).

11. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 229–30 (1996). It remains unsettled whether the forum's choice-of-law rules should be followed or a federal common law choice-of-law rule (Restatement). *See* Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 13 (2d Cir. 1996) ("the law is unsettled when it comes to applying either a federal common law choice-of-law rule or state choice of law principles in non-diversity cases").

12. This Convention entered into force in 1977, and the text is accessible on the website of The Hague Conference on Private International Law (www.hcch.net). The United States is not a signatory, but eleven others have signed on (Belgium, Croatia, Finland, Former Yugoslav Republic of Macedonia, France, Italy, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovenia, and Spain).

13. 28 U.S.C. §§ 1330, 1602-11.

14. *Compare* Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957, 963 (2d Cir. 1991) (forum choice-of-law rules in FSIA cases best effectuates congressional intent) *with* Chiudian v. Philippine Nat'l Bank, 976 F.2d 561, 564 (9th Cir. 1992); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003–04 (9th Cir. 1987) (resorting to federal common law choice-of-law rule, i.e., Restatement analysis, as FSIA jurisdiction is specialized area of federal jurisdiction not based on diversity). *See also In re* Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (noting division among courts in FSIA cases).

15. *See* Richards v. United States, 369 U.S. 1 (1962); Srock v. United States, 462 F. Supp. 2d 812 (E.D. Mich, 2006); Clawans v. United States, 75 F. Supp. 2d 368, 371 (D.N.J. 1999). *But see*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (discussing history of FTCA and foreign law exception in context of the substantial change in the choice of law landscape since enactment).

A. DEPECAGE

Choice of law is not a one-size-fits-all proposition.[16] Depecage is a doctrine that recognizes that a choice-of-law analysis as to discrete issues in the same case might lead to different laws applying to those issues.[17] This is commonly applied to issues involved in aviation litigation due to the numerous forums, varied nationalities, and varied interests that can arise, as noted, at the outset.[18] Different laws can thus apply to different parties on liability and damages issues.[19]

B. SECOND RESTATEMENT—MOST SIGNIFICANT RELATIONSHIP

Consistent with the concept of depecage, the Restatement approach focuses on the principle that the rights and liabilities as to a particular issue are to be controlled by the jurisdiction that has the "most significant relationship to the occurrence and the parties."[20] This does not mean simply counting contacts though. The analysis consists of essentially two steps. First, as to tort-based claims for personal injury or wrongful death, the relevant starting point is section 146 (personal injury) or section 175 (wrongful death). Both of these sections provide:

> the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has

16. Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 75 (E.D.N.Y. 2000) ("in a single action different states may have different degrees of interests with respect to different operative facts and elements of a claim or defense."); *see also In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo. on Nov. 15, 1987, 720 F. Supp. at 1448 n.3 (D. Colo. 1988) ("By depecage we mean the search for the rule of law most appropriately applied within the context of a particular issue.").

17. *See* La Plante v. Am. Honda Motor Co., 27 F.3d 731, 741 (1st Cir. 1994) (explaining issue-by-issue approach to conflict of laws); *Simon*, 124 F. Supp. 2d at 75 75–76. *See also* Willis L. M. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1983). But, the concept is not expressly adopted in all jurisdictions. *See e.g.*, Walker v. Unum Life Ins. Co., 530 F. Supp. 2d 351, 354 (U.S.D.C. Maine 2008)("Maine has not explicitly endorsed the principle of depecage, under which a court applies the laws of different states to different substantive issues within a single case.").

18. *See In* Air Crash Disaster Near Chicago, 644 F.2d at 611 (adopting the concept of depecage, "the process of applying rules of different states on the basis of the precise issue involved"); *In re Air Crash Disaster Near Roselawn*, 926 F. Supp. 736, 740 ("under the doctrine of depecage, it is not uncommon for courts to apply the substantive law of several different states in resolving air crash cases"); *In re Air Crash Disaster at Stapleton*, 720 F. Supp. at 1448 n.3.

19. *See, e.g., In re* Air Crash at Belle Harbor, New York on November 12, 2001, No. MDL 1448 (RWS), 2006 WL 1288298 at *26–30 (S.D.N.Y. May 9, 2006) (applying New York law to ground victims' punitive damages claims against aircraft manufacturer, but noting that French law may apply to passenger punitive damages claims against same defendant); *In re Air Crash Disaster Near Roselawn*, No. 95 C 4593, 1997 WL 572897 (applying French law on issue of punitive damages to aircraft manufacturer and Texas law to airline); *but see*, Johnson v. Cont'l Airlines Corp., 964 F.2d 1059, 1064 (10th Cir. 1992) (improper "to fragment issues related to a common purpose or to legitimatize a smorgasbord approach which inures only to the benefit of the party picking and choosing.").

20. RESTATEMENT § 145(1).

> a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

From this starting point of a presumptively applicable law based largely on lex loci delicti concepts, the following seven guiding principles in section 6 will be considered:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied,[21]

To these guiding principles, the "most significant relationship" construct is applied to discern which of the competing states has the most significant relationship with the parties and the dispute. Section 6 only sets forth general principles for this process that are supplemented by the more specific rules found in subsequent sections. In section 145, the Restatement provides a list of the contacts and factors that the forum court should consider in choosing the applicable law:

(2) Contacts to be taken into account in applying the principles of *section 6* to determine the law applicable to an issue include:
  (a) the place where the injury occurred,
  (b) the place where the conduct causing the injury occurred,
  (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
  (d) the place where the relationship, if any, between the parties is centered.

These contacts are evaluated according to their relative importance to the particular issue.[22] As noted, in respect of personal injury and wrongful death claims, the place of injury is presumptively the law that should govern. But, this presumption can be overcome. For example, comment e to section 145 notes as to the first two contacts that "when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law."[23] In respect of the

21. Restatement § 6.

22. Restatement (Second) of Conflict of Laws § 145(2), at 414 (1971).

23. Restatement § 145 cmt. e. *See also, Pescatore*, 93 F.3d at 13 (finding Scotland, the location where bomb exploded and destroyed aircraft to be fortuitous, recognizing that "the place of the crash is often random"); Foster v. United States, 768 F.2d 1278, 1282 (11th Cir. 1985) ("place of injury is almost always fortuitous");

third contact (domicile, residence, place of incorporation, and place of business of the parties), "[w]hen the interest affected is a personal one," this factor has greater importance.[24] In addition, "[t]hese contacts are of importance in situations where injury occurs in two or more states."[25] The fourth factor (the place where the parties' relationship is centered) does not always play a role where the plaintiff and defendant have no personal or direct contact, but might be conceived for passengers and airlines as the place of ticketing. Although courts will assess these factors to resolve which forum has the most significant relationship, as noted, this should not be a mere exercise in tallying them up. Instead, the forum selected following such assessment is tested in view of the general principles in section 6.

In this respect, the court decides the degree to which the competing states' policies (to the extent they are not aligned) would be furthered by application of its rule of law and may also consider other more administrative factors, including the justified expectations of the parties, the need for uniformity and certainty, and ease in application of the appropriate law.[26] The purpose behind the competing tort laws of the involved states are important factors to consider—a state's interest in having its law applied depends upon that purpose. See Restatement (Second) of Conflict of Laws § 145, comment c, at 416 (1971) (if the purpose is to deter or punish misconduct, then the state where the conduct occurred might have the greater interest, but if the purpose is to compensate victims, the state where the injury occurred or the state of residence may have the greater interest). Nonetheless, notions of

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Saloomey v. Jeppesen & Co., 707 F.2d 671, 678 (2d Cir. 1983); Brewer v. Dodson Aviation, 447 F. Supp. 2d 1166, 1179 (W.D. Wash. 2006) (part could have failed anywhere along aircraft's route rendering deaths in Oregon fortuitous); Taylor v. Mooney Aircraft Corp., 430 F. Supp. 2d 417, 422–23 (E.D. Pa. 2006) (crash in Pennsylvania was fortuitous); *In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 781 F. Supp. 1307, 1309 (N.D. Ill. 1991) (site of emergency landing in Iowa was fortuitous for scheduled flight from Denver to Chicago); Wert v. McDonnell Douglas Corp., 634 F. Supp. 401, 404 (E.D. Mo. 1986) ("the location of . . . an airplane crash is almost always fortuitous").

24. Restatement (Second) of Conflict of Laws § 145, Comment e, at 420 (1971).

25. *Id.* at 421.

26. *See, e.g., In re* Air Crash Near Cali, Colombia on Dec. 20, 1995, No. 96 MD-1125, 1997 U.S. Dist. LEXIS 14143 (S.D. Fla. Aug. 18, 1997) (need for uniformity, certainty, and ease of application of law favored global application of Florida law to wrongful death actions commenced in Florida as Colombian law was difficult to determine and Florida's generous wrongful death laws furthered deterrence and ensured adequate compensation), *aff'd in part, vacated in part, and remanded sub nom.* Cortes v. Am. Airlines, Inc., 177 F.3d 1272 (affirming, with respect to a single decedent, choice-of-law decision without addressing ruling as to other decedents), *reh'g en banc denied*, 193 F.3d 525 (11th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *In re* Air Disaster Near Detroit, Mich, on Aug. 16, 1987, 750 F. Supp. 793, 803 (E.D. Mich. 1989) (applying California product liability law to aircraft manufacturer conducting substantial business in California would not upset "justified expectations" of the parties). *But see*, Townsend v. Sears, 227 Ill. 2d 147, 169–70 (Ill. 2007) (in a personal injury tort case, "[a] detailed analysis of all seven of the section 6 general principles is unnecessary," rather court should concentrate on subsections (b) the relevant policies of the forum, (c) the relevant policies of the other interested state and the relative interests of that state in the determination of the particular issue, and (e) the basic policies underlying the particular field of law).

considering pro-consumer or pro-business laws as entitled to more deference than the other are misplaced: "tort rules which limit liability are entitled to the same consideration when determining choice-of-law issues as rules that impose liability."[27]

As should be apparent, while a Second Restatement analysis appears somewhat structured on the surface, in application it provides significant flexibility to accommodate complex fact patterns and multiple competing interests—both the benefit and the burden of choice of law.

C. LEX LOCI DELICTI

In relative contrast to the flexibility of the Second Restatement analysis is the rigid doctrine it replaced—lex loci delicti. This doctrine found itself memorialized in section 378 of the First Restatement, where it is simply stated that "[t]he law of the place of wrong determines whether a person has sustained a legal injury."[28] In this analysis, the law of the place of the wrong governs all substantive issues, unless it would violate the public policy of the forum state. Determining the place of the wrong is generally achieved by identifying the forum where the last act required to complete the tort occurred, in other words, the place where the injury occurred.[29] The rigidity of the lex loci rule is intended to bring consistency and predictability to choice-of-law questions, but it has since been abandoned in most jurisdictions.[30] Nonetheless, the doctrine continues to be applied by some states in air disaster cases.[31]

27. Malena v. Marriott International, Inc., 264 Neb. 759, 769, 651 N.W.2d 850, 858 (2002).

28. *See also Sosa*, 542 U.S. at 707, n.3 (2004) *citing* Restatement (Second) of Conflict of Laws 412 (1969) ("The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the 'place of wrong.' This was described . . . as 'the state where the last event necessary to make an actor liable for an alleged tort takes place.' Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred.").

29. *Id.*; *see also,* Emory v. McDonnell Douglas Corp., 148 F.3d 347, 350 (4th Cir. 1998); *Clawans*, 75 F. Supp. 2d at 371–72 (in airplane accident cases, courts following lex loci have held that "the appropriate state law is the law of the situs of the crash").

30. *See, e.g., Sosa*, 542 U.S. at 751.

31. *See, e.g., In re* Air Crash at Dubrovnik, Croatia, on Apr. 3, 1996, No. 3: 96 CV 1194, 2000 WL 840057 (D. Conn. Apr. 10, 2000) (under Alabama, Maryland, and Virginia's choice-of-law rule of lex loci delicti, the law of Croatia governs strict product liability and assessment of damages on a "joint and several" basis); *In re Air Crash Disaster Near Roselawn*, 948 F. Supp. 747 (under North Carolina's lex loci rule, Indiana law governed compensatory damages issue). *See also* Bauer v. United States, No. 00 C 8075, 2002 WL 31018079, at *4 (N.D. Ill. Sept. 4, 2002) (noting that Indiana remains a lex loci state although it has adopted some flexibility for dealing with unique cases where the place of the tort bears little connection to the legal action). States that follow a lex loci choice-of-law rule include, for example, Alabama, Georgia, Kansas, Maryland, North Carolina, and Virginia.

D. MODIFIED SECOND RESTATEMENT APPROACHES

Though the Second Restatement provides plenty of flexibility and thus uncertainty, some states have taken the methodology and put their own further variations and combinations into the analysis.

The courts in Pennsylvania, for example, have "developed a choice-of-law approach that combines the contacts analysis of the Restatement Second with the governmental interest analysis."[32] The approach consists of two parts: first, the interests of the competing states are compared to determine whether the conflict is true or false; second, if the conflict is true, the interests of the both states are compared and the law of the state with more significant interest applied.[33] This added consideration of true or false conflicts can lead to curious reasoning, but in general "a false conflict exists when application of one law would advance that law's policies while non-application of the other law would not detract from that state's policies."[34]

Massachusetts performs a "functional" approach in which courts "determine the choice-of-law question by assessing various choice influencing considerations" including "the interests of the parties, the States involved, and the interstate system as a whole."[35]

And, Rhode Island somewhat similarly performs a "choice-influencing" analysis, in which courts will "look at the particular case facts and determine therefrom the rights and liabilities of the parties 'in accordance with the law of the state that bears the most significant relationship to the event and the parties.' "[36] In so doing, the court will consider the factors in section 145 of the Second Restatement noted earlier and test the resulting choice against the "choice-influencing" considerations

32. Taylor v. Mooney Aircraft Corp., 430 F. Supp. 2d 417, 421–22 (2006) *citing* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991) (describing Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964)).

33. *Id.*

34. *Id.* at 422 (supporting a conclusion of a false conflict by finding fortuity in the accident location permits ignorance of the competing interest in the first place as opposed to detraction of the public policy); more clearly perhaps is *Lacey*, 932 F.2d at 188 (as to Pennsylvania resident manufacturer of parts involved in crash in British Columbia injuring Australian resident and sued in Pennsylvania, "Applying Pennsylvania law of strict liability would further Pennsylvania's interest in deterring the manufacture of defective products and in shifting the costs of injuries onto producers, but would not impair British Columbia's interest in fostering industry within its borders. Conversely, applying British Columbia's negligence standard would not serve British Columbia's interest, but would harm Pennsylvania's interest.").

35. Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 668, 393 Mass. 622, 631–32 (1985); *see also In re* Air Crash Disaster at Washington, D.C. on Jan, 13, 1982, 559 F. Supp. 333, 341 (D.D.C. 1983) (applying Massachusetts law).

36. Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997) *citing* Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1351 (R.I. 1986) and further noting "[t]hat approach has sometimes been referred to as a rule of 'choice-influencing considerations.'" *See* Robert A. Leflar, *Choice–Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 282 (1966).

of: "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law."[37]

As is perhaps clear, the variations in analysis stems from courts attempting to provide greater flexibility to that of the traditional lex loci delicti approach. The relative merit of the different approaches is perhaps inherently influenced by one's view as to how much discretion a court should be given on what is a question of law.

E. OTHER METHODS—INTEREST ANALYSIS, SUFFICIENT CONTACTS

As noted at the outset, in addition to the variations on the Restatement approach, there are a few notable outlier jurisdictions that perform a more distinctly different, but no more predictable, choice-of-law analysis. California looks to comparative impairment of government interests; New York to an interest analysis based on the nature of the issue in dispute; and lastly Kentucky, perhaps more straightforwardly, looks to see if there are "enough contacts" with its state sufficient to allow it to apply its own law.

1. California

California's "comparative impairment approach" to choice-of-law questions has been described as follows:

> The forum will apply its own rule of decision unless a party litigant . . . demonstrate[s] that the [law of a foreign state] will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it.[38]

This analysis results in a three-step process. First, the court examines the substantive laws of the competing jurisdictions to see if their respective laws differ. If it determines that the laws differ, the court will decide whether a "true conflict" exists by determining whether each jurisdiction has an interest in having its law apply. If only one of the competing jurisdictions has a legitimate interest in the application of its law, then there is a "false conflict" and the law of the only interested jurisdiction applies.[39] If more than one jurisdiction has a legitimate interest in the

37. *See also* Gartner v. State Farm Mut. Auto. Ins. Co., No. 00-1053, 2000 WL 1634787 (R.I. Super. Ct. Oct. 3, 2000); other states following the Leflar approach include Wisconsin (*see* Hunker v. Royal Indemnity Co., 204 N.W.2d 897, 902 (Wis. 1973)) and Arkansas (*see In re* Air Crash at Little Rock, Ark., on June 1, 1999, 125 F. Supp. 2d 357, 363–64 (E.D. Ark. 2000)).

38. Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 670, 114 Cal. Rptr. 106 (1974).

39. *See e.g.*, DeAguilar v. Boeing Co., 47 F.3d 1404, 1415 (5th Cir. 1995) (Mexico had no interest in application of its law to determine who can bring a cause of action or bind estate in a Texas wrongful death case.).

application of its law, then the court applies the law of the state whose interest would be more impaired if its law were not applied.[40]

2. New York

A decision arising out the 2009 crash of Continental Connection Flight 3407 in Clarence Center, New York, illustrates the choice-of-law rules in use in New York.[41] In this case, consistent with the aforementioned doctrine of *depecage*, the court was addressing the availability of punitive damages to individual claims originally filed in different jurisdictions, including New York. After having summarized the history of choice-of-law analysis in New York, the court concluded, "the predominant conflict-of-laws analysis for New York tort cases became the present-day 'interest analysis,' which gives 'controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'"[42] Explaining this "interest analysis" further, the court surmised that "when conduct-regulating laws are in conflict, *lex loci delicti* remains the general default: '[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.'"[43] The court contrasted conduct-regulating laws (such as liability standards), which it considered to encompass punitive damages, with loss-allocating laws (those that address issues after occurrence of the wrong), such as those dealing with compensatory damages. When loss-allocating laws are at issue, the New York courts then apply the three *Neumeier* rules to the choice-of-law question.[44]

The first *Neumeier* rule provides that if the plaintiff and defendant share the same domicile, then that domicile's law will be applicable.[45] The second *Neumeier* rule provides that the law of the state in which the accident occurred will apply if one of the parties is domiciled in that state.[46] The third *Neumeier* rule applies if

40. *See* Abogados v. AT&T, Inc., 223 F.3d 932, 934–36 (9th Cir. 2000) (detailing California's three-part "government interest" analysis).

41. *In re* Air Crash Near Clarence Center, New York, on February 12, 2009, 798 F. Supp. 2d 481 (W.D.N.Y. July 18, 2011); *see also*, *Id.*, 882 F. Supp. 2d 405, 410 (W.D.N.Y. March 26, 2012) (applying New York's interest analysis to the application of competing workers compensation laws and finding "[w]hen workers' compensation law is in conflict, New York generally applies the law of the state where workers' compensation benefits are paid, because that state has the greater interest in having its law applied on that issue.").

42. *Id.*, 798 F. Supp. 2d at 487.

43. *Id.* (internal citation omitted).

44. *Id.* at n.5 *citing* Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454, 457–58 (1972).

45. *See e.g.*, Padula v. Lilarn Properties Corp., 84 N.Y.2d 519 (1994).

46. *See e.g.*, Dorsey v. Yantambwe, 276 A.D.2d 108, 111, 715 N.Y.S.2d 566 (2000) (addressing vicarious liability in wrongful death action) ("The second *Neumeier* rule addresses 'true' conflicts, where the parties are domiciled in different States with conflicting loss-distribution rules and the accident occurs in a State in

the subject accident does not occur in a state where a party is domiciled, in which case, "[n]ormally, the applicable rule of decision will be that of the State where the accident occurred, but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."[47] In short, the third rule allows the court to apply a law other than that of the place of the accident if that place has no real interest in the issue, such that the purpose of the other law can be advanced without impairing the interest of the place of the accident.[48]

3. Kentucky

The United States District Court for the Eastern District of Kentucky evaluated the competing state damages laws in a suit brought by the families of three passengers who died in the crash of Comair Flight 5191 in Kentucky.[49] One passenger was a New York resident, one a Kentucky citizen, and one a citizen of New Mexico. The claim arising from the New York resident was originally filed in New York and transferred to Kentucky pursuant to 28 U.S.C. § 1404[50] prompting the court to apply New York's choice-of-law rules as to this passenger, in particular, the second *Neumeier* rule resulting in the application of Kentucky law. As to the other two passengers, the court also determined Kentucky law to apply, but pursuant to an analysis using Kentucky's choice-of-law rules. The court explained that "[i]n tort cases, Kentucky does not apply the most significant relationship test. 'The conflicts question should not be determined on the basis of a weighing of interests . . . but simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law.'"[51] The court further noted the general principal at play in Kentucky is that "when the accident is in Kentucky and the forum court sits in Kentucky, it 'should' apply Kentucky law."[52] Such expressly stated consideration is a prime

which a party is domiciled.") quoting Cooney v. Osgood Machinery, 81 N.Y.2d 66 (1993) (internal quotation omitted); *see also*, Caruolo v. John Crane, Inc., 226 F.3d 46, 58 (2d Cir. 2000) (applying second Neumeier rule where plaintiff was domiciled in same forum as accident location regardless of domicile of defendant).

47. *Neumeier*, 31 N.Y.2d at 128, 335 N.Y.S.2d at 70.

48. *See, e.g.*, Schultz v. Boy Scouts of America, 65 N.Y.2d 189, 201 (1985); *see also*, *Pescatore*, 97 F.3d at 14–15 (court applied law of decedent and plaintiffs' domicile to compensatory damages because Scotland, the place of the accident, was fortuitous).

49. *In re* Air Crash at Lexington, Kentucky, August 27, 2006, No. 5:06-CV-316, 2008 WL 631238 (E.D. Ky. Mar. 5, 2008).

50. *See infra* section II.G.

51. *In re Air Crash at Lexington*, 2008 WL 631238, *2 *citing* Adam v. J.B. Hunt Transport, Inc., 130 F.3d 219, 230 (6th Cir. 1997); Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972) ("[I]f there are significant contacts—not necessarily the most significant contact—with Kentucky, the Kentucky law should be applied.").

52. *Id*. at *7 (internal quotation omitted) *citing Adam*, 130 F.3d at 231.

example of the less-expressed desire of most courts faced with close questions to err on the side of applying their own law with which they are most familiar.

F. CHOICE OF LAW IN ADMIRALTY CASES

Aviation cases subject to admiralty jurisdiction touch on traditional maritime activities. These cases reveal that choice-of-law issues related to ships sailing the high seas are not dissimilar to those of aircraft traversing the same territory through the air. The maritime law applied in such cases has a somewhat unique set of choice-of-law rules commonly referred to as the *Lauritzen* factors.[53] These factors consist of (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of the foreign forum; and (7) the law of the forum, as well as, "the shipowner's base of operations."[54] These factors plainly utilize maritime terms, but courts have readily found comparable descriptions in the commercial aviation context. The first factor indicates some flexibility, but courts tend to treat this to mean the accident location akin to the lex loci delicti formulation of the location that completes the tort.[55] The law of the flag of a seagoing vessel is comparable to the state of registration for the aircraft. Of note is the heavy reliance in admiralty cases on the law of the flag, which is considered the dominate factor outweighing the others.[56] The third factor, more attuned to claims of injury by seaman, can relate to the country of residence of the flight crew or the country issuing their registration. The allegiance of the shipowner is taken to mean the country issuing the aircraft operating certificate of the operator, which as reflected in the added consideration of the owner's "base of operations" can often be different forums. The fifth factor in cases involving claims of passengers has been interpreted to be the place of ticketing.[57] The sixth and seventh factors indicated the high incidence of international disputes

53. Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970) (adding "the shipowner's base of operations" to the list of factors).

54. *Id*. See also, *In re* Air Crash Over the Taiwan Straits on May 25, 2002, 331 F. Supp. 2d 1176, 1182–83 (C.D. Cal. 2004); Gambra v. International Lease Finance Corporation, 377 F. Supp. 2d 810, 826–27 (C.D. Cal. 2005).

55. *In re* Air Crash Disaster Near Bombay, India on Jan. 1, 1978, 531 F. Supp. 1175, 1189 (W.D. Wash. 1982).

56. See, *Taiwan Straits*, 331 F. Supp. 2d at 1209 ("Even if some of the *Lauritzen* factors implicated United States law, moreover, the fact that the law of the flag points to Taiwan is likely dispositive.").

57. *Id.*; *see also Bombay*, 531 F. Supp. at 1190 ("Although this factor has no literal application to air passenger transportation, an analogy can be made to the place where the passengers purchased their airline tickets.").

in admiralty proceedings and reflect the concurrent forum non conveniens context in which choice-of-law issues often arise in aviation cases.[58]

In cases where admiralty jurisdiction is present by virtue of the Death on the High Seas Act,[59] the applicable choice-of-law rules are a bit unclear. There is some question as to whether a choice-of-law analysis should precede a determination that DOHSA applies, follow such a determination, or be a combination of both.[60] In view of this unsettled question, courts have assessed both the maritime formulation seen in the *Lauritzen* factors discussed earlier and the federal common law (most significant relationship) harmonizing the results from both.[61]

G. OTHER CONSIDERATIONS

Aviation cases often result in scattered litigation in different forums resulting in transfers pursuant to 28 U.S.C. § 1404 and consolidations before the United States Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407.

As was recently noted *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, in which the court was required to determine the availability of punitive damages, "[a] federal court exercising diversity jurisdiction in multidistrict litigation transferred to it under 28 U.S.C. § 1407 must apply the choice-of-law rules of the states in which the individual actions were commenced."[62] This is naturally easier said than done: "[i]ndividual actions in this case were filed in five states: Connecticut, Florida, New Jersey, New York, and Pennsylvania. Defendants are not domiciled in any of these states."[63] Domiciles of the parties included Delaware, Tennessee, and Virginia. To simplify the analysis, the court considered that Connecticut, Florida, New Jersey, and Pennsylvania shared similar enough choice-of-law rules based on the Second Restatement such that they were all considered together. The outlier, New York, was addressed separately. As is often the case, the

58. *Id.*; *see also Gambra*, 377 F. Supp. 2d 810 (C.D. Cal. 2005).

59. *See* DOSHA, *supra* note 7.

60. *See*, *Taiwan Straits*, 331 F. Supp. 2d at 1208 (discussing order of analysis).

61. *Gambra*, 377 F. Supp. 2d at 827, n.17, *citing Taiwan Straits*, 331 F. Supp. 2d 1208–11.

62. *See In re* Air Crash Near Clarence Center, New York, on February 12, 2009, 798 F. Supp. 2d 481, 486–87 *citing* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 501, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987); Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981) ("the choice-of-law rules to be used are those choice-of-law rules of the states where the actions were originally filed"); *In re* Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106, 1108 (D. Mass. 1975); O'Rourke v. E. Air Lines, Inc., 730 F.2d 842, 847 (2d Cir.1984), *abrogated on other grounds by* Salve Regina Coll. v. Russell, 499 U.S. 225, 230, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991).

63. *In re Air Crash Near Clarence Center*, 798 F. Supp. 2d at 87.

court was able to reconcile the choice-of-law approaches and determine New York law would apply under either approach.[64]

In transferred cases under section 1404, the starting point for choice-of-law analysis is traditionally that of the transferor court.[65] But, there are exceptions.[66] Where the transferor court did not have personal jurisdiction, the transferee court can apply its own choice-of-law rules. In the case of *National Union Fire Insurance Company v. American Eurocopter Corp.*,[67] the district court in Hawaii to which the initial action filed in state court was removed, determined it lacked personal jurisdiction over the defendant and thereafter transferred the case to the district court in Texas which then used its own choice-of-law rules (the Restatement) to determine the applicable law was that of Texas (which it determined had an outcome determinative rule against contribution for out-of-court settlements). The U.S. Court of Appeals for the Fifth Circuit commented that "[t]he Texas district court would have applied Hawaii, rather than Texas, choice-of-law rules if the transfer had been based on convenience, rather than the lack of personal jurisdiction."[68] Nonetheless, the recent U.S. Supreme Court decision in a nonaviation case, *Atlantic Marine Construction Co. v. U.S. District Court*,[69] though principally addressing a forum selection clause, has been interpreted by some to signal the court might be shifting its approach on choice-of-law questions in section 1404 transfers.[70] Thus, it does not appear there is any looming likelihood that predicting the outcome of a choice-of-law analysis will become a more straightforward endeavor.

64. The parties also agreed two individual actions were governed by the Warsaw or Montreal Conventions and resulted in a finding that punitive damages were not available under either of these treaties. *In re Air Crash Near Clarence Center*, 798 F. Supp. 2d at 494 *citing Pescatore*, 97 F.3d at 14 (Warsaw Convention); Ginsberg v. Am. Airlines, No. 09 Civ. 3226(LTS)(KNF), 2010 WL 3958843, at *3 (S.D.N.Y. Sept. 27, 2010) (Montreal Convention).

65. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (transfer pursuant to 28 U.S.C. § 1404 requires application of choice-of-law rules of the transferor court), superseded by statute on other grounds.

66. *See e.g.*, Intertex, Inc. v. Dri-Eaz Products, Inc., No. C13-165-RSM), 2013 WL 2635028 (W.D. Wash., June 11, 2013) (*Van Dusen* applies in convenience transfers; but, it should not be mechanically applied when transferee court already decided substantive issues); Jaeger v. Howmedica Osteonics Corp., No. 15-CV-00163-HSG, 2016 WL 520985 (N.D. Cal, Feb. 10, 2016) (*Van Dusen* only applies when venue and personal jurisdiction were proper in transferor court); Lanfear v. Home Depot, Inc., 536 F.3d 1217 (11th Cir. 2008) (*Van Dusen* only applies in diversity case).

67. 697 F.3d 405 (5th Cir. 2012).

68. National Union Fire Insurance Company v. American Eurocopter Corp., 697 F.3d 405, 407–08 (5th Cir. 2012) *citing* Ellis v. Great Sw. Corp., 646 F.2d 1099, 1110–11 (5th Cir.1981); Tel–Phonic Servs., Inc. v. TBS Int'l., Inc., 975 F.2d 1134, 1141 (5th Cir. 1992).

69. 134 S. Ct. 568, 581 (2013).

70. *See* Andrew D. Bradt, *Atlantic Marine and Choice-of-Law Federalism*, 66 Hastings L. J. 617 (2015).

III. Conclusion

Choice-of-law decisions and the varying rules and approaches used to reach those decisions in aviation disaster cases illustrate the inherent complexity involved in such decisions. But, the impact of a choice-of-law ruling on the positions of the parties is clear. Selection of a particular law can end cases, cut off liability or significantly alter damages calculations. As such, an early and continuing assessment of potentially applicable laws and choice-of-law rules of competing forums will plainly remain an important part of litigating the aviation case.