INTRODUCTION

This article provides an update on the state of the law in our overloaded, underfunded and outdated transportation system. Indeed, as the reader will discover, several of the laws themselves are obsolete. Consequently, litigants, state legislatures and the courts are frequently the instruments of change in efforts to get in line with the times. Like the congestion at any DC, New York and Boston airports, delays are commonplace, thereby underscoring the need for change.

Delayed Arrivals in Aviation Law

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I. Dependents and Accidents

Maritime law and aviation law overlap when airplanes crash beyond twelve nautical miles from the United States shore. In such instances, the Death on the High Seas Act applies. *See* 46 U.S.C. app. §761(b). In this particular case, *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999 v. Egypt Air, 462 F.Supp. 2d 360 (E.D.N.Y. 2006),* Sami Makary was a passenger on the Egypt Air Flight 990, that on Halloween 1999 crashed near Nantucket Island while enroute from Cairo to New York. Mr. Makary was a single, 28 year old business man, survived by his parents, one brother, 4 sisters and a cousin, who all resided in Egypt. The Court found that he had made substantial financial contributions to his family and awarded pecuniary and non-pecuniary damages in light of the amended DOSHA, which became effective retroactive to deaths occurring after July 16, 1996 allowing non-pecuniary damages on top of pecuniary damages. The amended statute defined non-pecuniary damages as "loss of care, comfort and companionship". The Court pointed out while this definition would include "loss of society" meaning "love, affection, care, attention, companion, comfort and protection," it would not include compensation for "grief and mental anguish." The Court relied upon the close relationship between Sami and his parents and focused on the loss of a child suffered by a parent. The Court even cited Biblical references: for example the first "love" of the Bible – that is, the first appearance of the Hebrew verb "to love" – is the love of Abraham for his son Isaac. The Court awarded the family non-pecuniary damages for loss of care, comfort and companionship in

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the total amount of $2,060,000. This included $125,000 to each of the siblings and a non-blood cousin, plus $680,000 to the mother and $630,000 to the father. Pecuniary damages, on the other hand, only totaled $547,389. The evidence was that Sami was sending approximately $2,000 per month to his parents and modest sums to the others for education expenses. This award was by Judge Frederick Block, a Senior Judge, sitting without a jury. It is currently on appeal and being watched by other plaintiffs where aviation disasters come into maritime jurisdiction.

In 1985, the Supreme Court set out to define the term "accident" as referenced in the Warsaw Convention's provision on liability for international carriers regarding injury to their passengers. *Air Fr. v. Saks*, 470 U.S. 392, 405-06 (1985). The Convention holds international carriers liable for bodily injury sustained by passengers "if the accident so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Warsaw Convention, *supra* at art. 18. The Supreme Court enunciated the standard for defining "accident" as any injury "caused by an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at 405.

The courts, therefore, have delineated between events which are unexpected or unusual and events which are merely internal to the passenger himself. For example, In *Rodriquez v. Ansett Austl.*, 383 F.3d 914, 1 (9th Cir. 2004) "the passenger suffered DVT[2] during a 12- hour flight, resulting in a pulmonary embolism, meaning that a blood clot formed during the flight and broke into smaller clots that were then lodged in her lungs." *Id.* "She alleged that her DVT was caused by an "accident" within the meaning of the Convention due to the airline's negligence, and that it engaged in willful misconduct by intentionally violating safety procedures, failing

[2]"Deep vein thrombosis ("DVT") is a condition that results when a clot of blood (thrombus) forms in a large vein, causing either partial or complete blockage of circulation," which can lead to a pulmonary embolism, a potentially life-threatening complication. Amer. Med. Assoc., Report of the Counsel on Scientific Affairs(A-04), at 1, available at http://www.ama-assn.org/ama/pub/category/15278.html (last viewed July 18, 2006).
[3] *Id.*, at 2-5.

properly to design the aircraft, and failing to advise passengers of the risks of developing DVT during long flights." *Id.* "The appellate court held that her injury was caused by her own internal reaction to the normal operation of the aircraft and was not an "accident" for purpose of art. 17 of the Convention because it was not caused by an unexpected or unusual event." *Id.* "Therefore, her claim was not cognizable under the Convention."

Similarly, in *Twardowski, et al. v. American Airlines, et al*. 535 F.3d 952 (9th Cir. 2008) several passengers filed suits against airlines for failure to warn of the risks of developing Deep Vein Thrombosis (DVT) after they suffered injuries as a result of developing DVT during long flights. The court held that an airline's failure to warn passengers about the risk of Deep Vein Thrombosis, despite requests to do so by various public agencies, does not qualify as an "event" or "accident" under Article 17 of the Warsaw Convention. The court explained that the airlines' failure to warn did not become an "event" or "accident" simply because public agencies have recommended or requested warnings. *Id.* at 960. The court further explained that generalized requests by public agencies are different from particularized requests by individual passengers for assistance such that no liability attaches to the former. *Id.* The court also held that airlines had no duty to warn passengers of risks of developing Deep Vein Thrombosis, therefore, failure to warn of the potential risks could not give rise to liability under the Warsaw Convention. In achieving this end, the court cited Article 17 and interpreted it as inferring that the "recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking [an air craft], if not allowed under the Convention, is not available at all." *Id*. at 959. (*citing El Al Israel Airlines, Ltd. V. Tseng*, 525 U.S. 155,161 (1999)). This is most likely the final nail in the coffin for claims of DVT.

Long before the infamous McDonald's coffee incident, American Airlines and its passenger got burned. For example, in *Diaz Lugo, et al. v. American Airlines, Inc.*, 686 F. Supp. 373, 374 (P.R. U.S. Dist. 1988) Norma Figueroa and her husband sued American Airlines for burns she suffered when a cup of coffee spilled on her during a flight from Puerto Rico, a U.S. territory, to the Dominican Republic. *Id.* Plaintiffs relied heavily on Puerto Rican domestic law. *Id.* Since in the pretrial order the parties agreed on the Warsaw Convention as a potential source of liability, the court proceeded to analyze the case under the convention and disregarded Puerto Rican law, because of the Conventions' exclusivity. *Id.*

Fifteen minutes after take off, Figueroa asked the stewardess for a cup of coffee. *Id.* While the stewardess placed the cup on the tray in front of Figueroa, Figueroa was putting the tourist entry cards between her left leg and her seat's left arm. *Id.* Obviously, she didn't notice when the stewardess placed the cup of coffee on the tray. *Id.* While Figueroa was still storing her papers, the stewardess asked if she wanted cream and sugar with the coffee. *Id.* Figueroa looked at the stewardess and said yes. *Id.* Then the cup spilled on Figueroa's lap and she suffered burns in her pelvic and gluteal areas. *Id.*

The Court examined this claim under Article 17 of the Warsaw Convention:

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

The court concluded that American was liable, because an "accident", as that term has been interpreted under the convention occurred, and that "accident" caused Figueroa's injuries. *Id.* The coffee spill was an unusual or unexpected event external to Figueroa. *Id.* When a person boards a plane, she is not expecting to have a cup of coffee spilled over her

lap. *Id.* "The usual operation of an airplane does not require passengers to be spilled with hot coffee". *Id.*

As mentioned above, most courts continue to reject plaintiffs' claims for injuries sustained from the medical condition of deep vein thrombosis, which in some cases has proven to be exacerbated by air travel[3], or similar injuries resulting from alleged failures to warn on the basis they are conditions internal to the passenger and not unusual or unexpected events. *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 182 (5th Cir. 2004); *Meizen v. Midwest Express Airlines*, 701 N.W.2d 626, 631 (Wis. Ct. App. 2005). However, the Ninth Circuit, relying heavily on the Supreme Court case of *Olympic Airways v. Husain*, found the checking of plaintiff's carry-on bag once he boarded the aircraft, which was medically necessary for plaintiff's asthmatic condition, was an unusual or unexpected event giving rise to liability when plaintiff had an asthmatic attack. *Prescod v. AMR, Inc.*, 383 F.3d 861, 868 (9th Cir. 2004); *see also Olympic Airways v. Husain*, 540 U.S. 644 (2004). Although the court recognized plaintiff's own pre-existing condition was a cause for his injury, since the airline had first promised it would allow plaintiff to carry the bag onto the plane then later broke the promise by taking the bag from him, the Convention required only the unexpected occurrence be "a link in the chain of causes" to impose liability. *Prescod*, 383 F.3d at 868; *see also Saks*, 470 U.S. at 406. In light of the huge delays suffered by passengers sitting on tarmacs this past summer, this argument will certainly be tested in pending claims. Along these lines, one wonders when delays caused by mechanical issues could be presented through better maintenance programs for aircraft. These delays may be considered a link.

New York considered these delays a major problem and was the first state to pass a Passenger Bill of Rights ("PBR"). The Legislation amended New York's General Business Law

[3] *Id.*, at 2-5.

and added a new article – 14 A – entitled "Airline Passenger Rights". Under this legislation, the airline will have an obligation to provide care to passengers "whenever they have boarded an aircraft and are delayed more than three (3) hours on the aircraft prior to takeoff". Under this law carriers are required to provide "(1) electrical power for fresh air and lights, (2) waste removal service in order to service the holding tanks for on-board restrooms, and (3) adequate food, drinking water and other refreshments".

However, this law was struck down by the 2nd U.S. Circuit Court of Appeals *Air Transport Ass'n. of America, Inc. v. Andrew Cuomo* 520 F.3d 218 (2nd Cir. 2008).[4] The Court's position is that the law is preempted by two federal laws, the Airline Deregulation Act ("ADA") and the Federal Aviation Act ("FAA"). *Id.* Congress enacted the ADA in 1978, loosening its economic regulation of the airline industry after determining that "maximum reliance on competitive market forces would best further 'efficiency, innovation, and low prices' as well as variety [and] quality… of air transportation." *Id.*at 378 (alteration and omission in original) (quoting 49 U.S.C. app. § 1302(a)(4), (9) (1988)). *Id.* Congress' intention was to ensure that the States would not regulate on their own. *Id*. In fact, an express provision was included preempting the application of state deceptive business practice laws to airline fare advertisements because such regulation related to air carrier prices. *Id.* More generally, the express preemption provision prohibited states from legislation related to a price, route, or services of an air carrier.

The Court concluded that New York's law relates to the service of an air carrier, finding that service is inherent to requiring airlines to provide food, water, electricity and restrooms to

[4] At least nine other states have proposed legislation regarding lengthy ground delays.

passengers during lengthy ground delays.[5] Following Congress's intent, the Supreme Court has repeatedly emphasized the ADA's preemption provisions. *Id.*

The California Legislature was soon to follow with it's own Passenger's Bill of Rights. Assemblyman Mark Leno proposed AB No. 1943 in an attempt to amend Chapter 9 of the Public Utilities Code. The bill would have required air carriers to provide 1) electrical service that is sufficient to provide fresh air and light, 2) waste removal service for sanitation facilities, and 3) adequate food, drinking water, and other refreshments to passengers whenever passengers have boarded an aircraft and are detained for more than three hours. A. B. No. 1943 (February 13, 2008). The bill was passed by the House but was not approved by the Senate. It is unlikely that the bill will become law in light of the plight of the New York law and considering the budgetary issues confronting California.

As mentioned above, these laws are also preempted by the FAA. The FAA was enacted to create a "uniform and exclusive system of federal regulation" in the field of air safety. *Id.* "The intent to centralize air safety authority and the comprehensiveness of these regulations, have led several other circuits to conclude that Congress intended to occupy this entire field and thereby preempt state regulation of air safety." *Id.* Applying this position, the 2nd Circuit stated that if New York's view regarding the scope of its regulatory authority carried the day, another state could be free to enact a law prohibiting the service of soda on flights departing from its airport, while another could require allergen-free food options on its outbound flights, unraveling the centralized federal framework for air travel."[6]

[5] At least the EU regulation is federal, covering all EU member states. This may prompt the FAA to act also. Interestingly, in following a multi-modal trend, the Court relied upon tobacco use in a trucking case: *Rowe v. N. H. Motor Transp. Assn.*, U.S. ____, 128, S.Ct. 989, 998 (2008) in which a Maine law concerning delivery of tobacco products designed to verify age and therefore prevent underage tobacco use was struck down on pre-emption grounds.

[6] At least nine other states have proposed (see Note 1 in case).

Undaunted, the European Union ("EU") has also taken action with EC Regulation 261/2004. This regulation covers passenger rights in extended delay cases and provides remedies for cancellations and denied boarding scenarios. In the case of delays, if the delay is longer than two hours, the airline must offer passengers "care" and if the delay is longer than five hours, reimbursement or rerouting. Care is defined as providing meals, beverages, two telephone calls, access to faxes and e-mails and hotel accommodations where necessary. Under the boarding scenario, if the flight is overbooked the airline must seek volunteers to give up their seats. If the number of available seats is insufficient, the passengers who have been denied boarding are entitled to compensation, re-routing or reimbursement of the ticket at the passenger's choice.

With regard to whether an event is unusual or unexpected, courts often leave that question to a jury's determination, as it is heavily based on a juror's factual findings as to what meets the standard. *See Magan v. Lufthansa*, 339 F.3d 158, 166 (2nd Cir. 2003). In *Magan*, the court held summary judgment for defendant airline was improper where the lower court held as a matter of law "light" or "moderate" turbulence could never be an accident for purposes of liability under the Convention. *Id*. The court insisted a jury could find under certain circumstances turbulence could be unusual or unexpected and thus constitute an accident sufficient to impose liability. *Id*.

Finally, the Convention requires with regard to any claims for psychological injury, recovery be permitted "only to the extent that they flow from bodily injuries." *See E. Airlines v. Floyd*, 499 U.S. 530, 532-33 (1991). In one case, the court denied a pregnant woman recovery for her alleged mental injury, which she claimed resulted from concern about injury to her unborn child after she fell down on a plane. *Marks v. Virgin Atl. Airways*, 2004 WL 1574637, at

*2 (S.D.N.Y. 2004). The court reasoned although plaintiff suffered physical injuries from the fall itself, she could not raise an issue of material fact her alleged mental injury, caused by concern for her unborn child, resulted from actual physical injury to herself or her child. *Id.*

However, in *Lloyd v. American Airlines, Inc.*, 118 F. Supp. 2d 916 (Kan. 2000) the Court reasoned claims for physical injury in a different way. The jury returned a verdict in favor of plaintiff of $ 6,500,000. Ana Lloyd was sitting at the back of the airplane, when flight 1420 crashed and burned on a stormy runaway on the night of June 1, 1999. *Id.* When the accident occurred, Ana was injured, both physically and mentally, in the cabin of flight 1420. *Id.* Physically, she suffered a puncture wound, and injury to her knees. *Id.* She also suffered from smoke inhalation. *Id.* Even though, her physical injuries have subsided, she does have a scar on her leg as a result of the puncture wound, and she continues to experience stiffness in her knee. *Id.*

Nonetheless, her damages are mainly psychological. *Id.* She reasonably believed that she would die in the accident, when the cabin filled with fire and smoke, and she was trapped in the back of the plane. "Her remarkable escape from the burning plane was through a relatively small hole in the wreckage, because all emergency exits were apparently jammed shut after the crash, and a wall of fire and smoke prevented her escape to the front of the plane. The plaintiff now suffers from serious, chronic PTSD and major depression." At trial, the defendant argued that plaintiff should not be allowed to recover for PTSD, because the PTSD does not flow from her physical injury. *Id.* The Supreme Court declined to decide "whether passengers can recover for mental injuries that are not accompanied by physical injuries." *Id.* Thus, the Supreme Court requires physical injury in order for an international passenger to recover. *Id.* According to undisputed testimony at trial plaintiff suffered physical injury to her knee, to the back of her leg,

smoke inhalation, and cuts and scrapes as a result of crawling through the small opening in the wreckage of the airplane to escape. *Id.*

"Federal courts have come to different conclusions regarding the nexus required between physical and psychic injuries suffered by passengers involved in airline accidents. In *In re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 (N.D.Ill. 1997), the district court noted that the Warsaw Convention itself contains no prohibition against the recovery of any particular type of damages and held that, once liability has been established, passengers may recover for all the damage they sustained in the accident, both physical and emotional." *Id.* In this case, even if Ana had not proved a connection between her physical injuries and her mental injuries, there was evidence that PTDS constitutes a physical manifestation of injury. *Id.*

Therefore, the court reasoned that this was not a case where plaintiff pinched her finger in her tray table. *Id.* In this case, there were real physical and mental damages. *Id.* Yet, any physical injury should permit a plaintiff to cross the liability threshold and access all available remedies in the Warsaw cases, in this case the plaintiff's injuries were a proximate cause of her mental injuries. *Id.* The evidence presented at trial, established that PTSD is a biological/physical as well as psychological injury. *Id.* Consequently, this court entered judgment on the jury's verdict.

Thus, it appears the courts have taken a moderate stance on the definition of an accident under the Warsaw Convention. Where a passenger has a pre-existing condition that could be exacerbated by flight travel, as long as nothing "unexpected" or "unusual" occurs during the flight, liability will not attach. However, in the event a passenger does have a pre-existing condition aggravated by an occurrence on the plane that is uncommon, liability very well could arise. The rationale for this rule is clear in that when a passenger has a pre-existing condition,

she has an obligation to take steps to avoid exacerbating the condition that may result from normal or reasonably expected air travel events. However, in cases of unusual or unexpected air travel occurrences, those that a passenger likely cannot foresee, the burden is more properly placed on the defendant air carrier to take steps to mitigate the harm. This moderate position is reinforced by the fact psychological injury, while still recoverable, is not unconditionally allowed when accompanied by physical injury so as to avoid vexatious litigation for claims of emotional harm due only to unexpectedly stressful or frightening airplane experiences.

II. Defining International Transportation under the Warsaw Convention

Article 1(2) of the Convention defines international transportation as "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transhipment, are situated either within the territories of two High Contracting Parties .... " Convention for the Unification of Certain Rules Relating to International Transportation by Air.

Manion v. American Airlines, Inc., 17 F. Supp. 2d 1, 14 (DC D.C. Cir. 1997) relates how the courts apply Article 1(2) of the Convention. Plaintiff arranged his honeymoon trip from Boston, Massachusetts to Shannon, Ireland with Aer Lingus an airline company. *Id.* On June 4, 1995 Plaintiff and his wife arrived at Chicago's O'Hare airport to board their plane to Boston. *Id.* Plaintiff alleged that he and his wife noticed unusual excessive noise from the engine before takeoff. *Id.* Apparently, plaintiff requested ear plugs from the stewardess, but was told that there were none available on domestic flights. *Id.* He also alleged that he tried to change seats, but there were no empty seats available. *Id.* However, the story from his deposition is different, he stated "he did not ask the flight attendant to change seats". *Id.*

Two days later, plaintiff commenced to notice a sharp ringing in his ear. *Id.* Plaintiff did not visit a doctor during his honeymoon. *Id.* Back from the honeymoon, he was diagnosed with Tinnitus: "a chronic condition which results in a continuous ringing in the ears and is symptomatic of other ear problems such as the overproduction of wax, ear infections, and acoustic tumors. The most common cause of Tinnitus is excessive exposure to loud noise on the job (musicians, carpenters) or recreation noise (shooting, loud music). Pl.'s [**4] Mem. Opp'n Summ. J. Ex. A. Dr. Feldman referred plaintiff to the University of Maryland School of Medicine, Tinnitus Clinic, where he remains a patient." *Id.*

To determine whether Article 1(2) of the Warsaw Convention governs, the court analyzed if the flight from Chicago to Boston qualifies as international transportation. *Id.* "The domestic portion of international travel qualifies as international flight if both the passenger and air carrier are reasonably aware of the international nature of the transportation. *See Stratis v. Eastern Airlines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Lemly v. Trans World Airlines, Inc.*, 807 F.2d 26, 28 (2d Cir. 1986). A passenger is bound "by the Warsaw Convention where he was aware of the international character of the flight, even though he was injured on the domestic portion of the flight ...." *Lemly*, 807 F.2d at 27; *see Stratis*, 682 F.2d 406.

Plaintiff opposed application of the Warsaw Convention and cited the language of the Convention, which states "according to the contract made by the parties". Plaintiff argued that the language is based in the parties' subjective, rather than objective intent. *Id.* In support of this claim, plaintiff stated that he made the travel arrangements from Boston to Chicago on different days. *Id.* He did not even check his bag straight to Ireland. *Id.* However, the Court disagreed with his position. "In order to determine the terms of a contract, the Court must decide the intent of the parties based on the objective evidence, rather than the "after-the-fact professed subjective

intent." *Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp.*, 41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999 (N.Y. 1977); *Fairway Ctr Corp. v. U. I. P. Corp.*, 502 F.2d 1135 (8th Cir. 1974).

The Court considered that the itinerary, which included all of plaintiff's outgoing and return flights was issued in one ticket booklet. *Id.* "The booklet contained the tickets for the Chicago to Boston flight, and for the Boston to Ireland flight, as well as return coupons for the Shannon to New York flight, and from New York to Washington, D.C." *Id.* The Court highlighted that even though plaintiff made the travel arrangements on different occasions, he purchased the tickets in one payment. *Id.* "The international nature of the flight is also substantiated by the fact that there was an insignificant time difference between the initial and subsequent flight, *In re Air Crash Disaster at Warsaw, on March 14, 1980*, 748 F.2d 94, 96 (2d Cir. 1984), and the fact that the original carrier was aware of the passenger's subsequent flight plans, *Lemly*, 807 F.2d at 28." Thereby, the Court concludes that the flight from Chicago to Boston qualifies as an international transportation and is governed by the Warsaw Convention. *Id.* Therefore, American Airlines was granted partial summary judgment on this ground. *Id.*

The Court then applied the Warsaw Convention to analyze if the injury was caused by an accident. *Id.* "Thus, the Court must now determine whether an accident caused plaintiff's alleged injury, thereby rendering defendant strictly liable for damages in the amount of $ 75,000." *Id.* To that effect, plaintiff and defendant rely on *Air France* to support their arguments. *Id.* "This case presents a similar factual scenario as in *Air France*." *Id.* Here, plaintiff alleges that the negligent operation and maintenance of the airline's engines caused his ear injury. *Id.* "However, this case is distinguishable from *Air France* because the plaintiff here has not conceded that the airline engines operated normally and plaintiff has not completed discovery as he has filed a

motion to compel." "In his Motion to Compel, plaintiff alleges that defendant has refused to produce relevant passenger and maintenance logs which could substantiate plaintiff's claims. Before this Court can determine whether as a matter of law an accident caused plaintiff's injuries, discovery must be complete. Because discovery issues are currently pending before the Court, the Court will deny defendant's motion for summary judgment without prejudice, on this issue *solely,* with leave to refile [**14] after all discovery disputes have been resolved."

III. A Hefty Problem: Tiny Planes and the Growing Waistline

A. Employment Discrimination

The Americans with Disabilities Act ("ADA") is the primary tool used by employees to combat employment discrimination. *See* Brian Bolton, *The Battle for the Armrest Reaches New Heights: The Air Carriers Access Act & The Issues Surrounding The Airlines' Policy of Requiring Obese Passengers to Purchase Additional Tickets*, 69 J. Air L. & Com. 803, 813 (2004). The ADA states "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the terms, conditions, and privileges of employment." *Id* (internal quotations omitted); *see also* American's with Disabilities Act of 1990, 42 U.S.C. § 12112 (2004). To be a "qualified individual," the individual must have a disability and "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Bolton, *supra* at 813; *see also* American's with Disabilities Act, § 12111(8). The ADA defines "disability" as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." Bolton, *supra* at 813; *see also* American's with Disabilities Act, § 12102.

Dealing with the overweight and obese[7] in the airline industry has been a growing problem, especially since Americans' waistlines have been growing as well[8]. Not surprisingly, litigation regarding this issue has begun to arise, although so far, with the exception of one case, it has not been aimed at the airlines. Fortunately for them, the airlines have generally avoided litigation with regard to this issue. Indeed, the one reported case against the airlines failed. *See Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (C.D. Cal. 1984). In *Tudyman*, the plaintiff was a flight attendant who was over the maximum weight limits United had set for its crews. *Id*. United fired the Tudyman for being overweight and he sued under the Rehabilitation Act of 1973 for discriminatory firing based on his weight. *Id*. at 741. The court found as a matter of law plaintiff was not a handicapped individual, was not substantially limited in any major life activity, and defendants did not perceive plaintiff to have a physical impairment which limited his activities in violation of the Rehabilitation Act of 1973. *Id*. at 746. It is noteworthy this case was decided before the ADA was enacted although the ADA was modeled after the Rehabilitation Act. Interestingly, although plaintiff was an overweight individual, it was due not to excess fat tissue but because he was a bodybuilder. *Id*. Thus, the court appeared to come to its conclusion in part because plaintiff undoubtedly voluntarily assumed weight beyond the limits defendants had set. *Id.* Therefore, had plaintiff been overweight due to excess fat tissue, which may or may not be assumed voluntarily, the court may have come to a different conclusion.

Although *Tudyman* is the only case that has dealt with allegations of employment discrimination by the airlines for being overweight, other cases concerning obesity discrimination have held obesity alone is not a disability. *See Hazeldine v. Beverage Media*, 954

[7] The E.E.O.C. has maintained a person is morbidly obese if their weight is twice that of their optimal weight or more than 100 pounds over their optimal weight. *See E.E.O.C. v. Tx. Bus Lines*, 923 F.Supp. 965, 968 n. 1 (S.D. Tex. 1996).

[8] The percentage of the overweight adult population is nearly 66%, nearly 33% considered obese. *See* Weight Contol Information Network, http://win.niddk.nih.gov/statistics/index.htm (last visited July 24, 2006).

F.Supp. 697, 705-06 (S.D.N.Y. 1997) (despite evidence plaintiff's obesity affected her ability to engage in everyday activities, it was not a disability as a matter of law since her performance of these activities was not substantially limited); *see also Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F.Supp 1082, 1092 (S.D. Iowa 1997) (granting employer summary judgment despite its denying plaintiff's promotion for weight inconsistent with the "corporate image," since obesity alone is generally not a disability within the meaning of the ADA); *Coleman v. Ga. Power Co.*, 81 F.Supp.2d 1365, 1371 (N.D. Ga. 2000) (granting defendant summary judgment on an ADA obesity-based discrimination claim because there was no evidence plaintiff's obesity was a physiological disorder, substantially limited plaintiff in any major life activity, or defendant regarded plaintiff as being substantially limited in any major life activity); *but see Cruz v. Barnhart*, 2006 WL 1228581 at *9 (S.D.N.Y 2006) (agreeing obesity alone is not a disability but requiring a Social Security evaluation to include an assessment of whether the obesity alone or in combination with another ailment significantly limits a person's physical or mental ability to do basic work activities).

By way of contrast, in 1996 the E.E.O.C filed suit on behalf of a woman who was denied employment as a bus driver because she was morbidly obese. *E.E.O.C. v. Tx. Bus Lines*, 923 F.Supp 965, 967-68 (S.D. Tex 1996). The employer alleged one reason for denying the application was because plaintiff would not be able to handle emergency situations and would thereby put passengers in danger. *Id*. at 979. The court found the employer's argument incorrect and unpersuasive and held the applicant was perceived as having a disability when she could have performed the tasks the job required without substantial limitation. *Id.* Moreover, the court rejected defendant's reliance on the pre-employment medical evaluation for denying the

applicant since the evaluation standards were "wholly inconsistent" with the Department of Transportations regulations. *Id*. at 980.

The overwhelming majority of court decisions on employment discrimination for the obese and overweight find against the plaintiffs. The rationales for these holdings appear to be largely based on the idea obesity is not a physiological disorder, rather it is more of a voluntarily assumed condition. Further, obesity alone does not appear to *substantially* limit a person's ability to perform most job tasks, thereby making them handicapped, even though he or she may be somewhat limited. However, although *Tx. Bus Lines* rejected defendants' assertion an obese bus driver would not be able to perform her job tasks and as such would pose a danger to passengers in the event of an emergency, the courts may be more willing to accept this argument regarding potential airplane emergencies, especially post-911. Accordingly, although the employee in such plane emergencies might be considered handicapped, courts may be willing to find for the airlines where the disability is shown to be job-related and consistent with the business activity and such performance cannot be accomplished by reasonable accommodations. *See* Americans with Disabilities Act, § 12112.

B. Passenger Discrimination and Other Passenger Issues

In addition to the ADA is the Air Carriers Access Act ("ACAA"), which prohibits discrimination not in the employment context, like the ADA, but discrimination against passengers in air travel. Bolton, *supra* at 813; *see also* Air Carriers Access Act, 49 U.S.C. § 41705 (2004). Despite their differing applications, the ACAA prohibits discrimination in the provision of air transportation by air carriers using the same grounds applied by the ADA. *Id*. Thus, in the context of the ADA, many courts have stated because the standards under both acts

are generally the same, the construction of one statute is instructive in the construction of the other. Bolton, *supra* at 828; *see also e.g. Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997).

Turning then to the passengers themselves, the problem that arises most often are seating difficulties with regard to oversized passengers. Although some airlines have chosen to provide the obese passenger with a free seat, many airlines, asserting financial difficulties as their reason, have chosen to require obese passengers taking up more than one seat to purchase an additional ticket.[9] Bolton, *supra* at 833. Many have questioned this practice, defining it is as discriminatory and plainly "mean-spirited." *Id*. at 803. However, following the September 11th terrorist attacks, the nine major airlines[10] posted a collective $7.2 billion dollar loss, Southwest being the only airline to post a profit. *Id*. at 805-06. In fact in 2001, Southwest attributed its entire profit to just six seats per flight. *Id*. at 808. Currently, high fuel costs have caused massive losses for air carriers (cite). Thus, in the event a plane is full, providing an obese passenger with two seats would result in another passenger being bumped and the airline having to compensate that individual for the fare. *Id*. Consequently, providing a free seat to an obese passenger, or worse, making the seats larger thereby reducing the overall number of seats would have a significant negative financial effect on the airlines, especially for those that fail to post a profit. *See id*.

Aside from the financial impact, there is the effect on the other passengers on the plane. For example, on a two-hour Delta Airlines flight from New Orleans to Cincinnati, passenger Philip Shafer was forced to sit next to an obese man who could not fit into his seat with the armrest down. The man consequently spilled into Mr. Shaffer's seat leaving him only a portion

[9] As of 2004, Southwest Airlines, Continental Airlines, Northwest Airlines, and American Airlines require purchasing an additional ticket whereas Delta Airlines and United Airlines have no such policy. Bolton, *supra* at 833.

[10] Southwest, Airlines, Continental Airlines, Alaska Air Group, America West, Northwest Airlines, Delta Air Lines, American Airlines, US Airways, and United Airlines.

of the seat he purchased. *Id* at 809. Shafer eventually sued Delta Airlines under a breach of contract claim for failing to provide him with a full seat and reasonable comfort. *Id.* In another case, a 63 year-old woman was forced to share a seat with an obese passenger on a flight from London to Los Angeles. *Id.* The woman settled for $20,000 with Virgin Atlantic for injuries resulting from the lack of accommodations, the injuries including a blood clot, torn leg muscles and sciatica. *Id*. at 810. Although suing an airline for failure to accommodate may be an extreme remedy, it is certainly not fair to a passenger for an airline to require that passenger to sit in only a portion of an already small seat for which they likely paid a lot of money.

Decisions dealing with employment discrimination under the ADA are instructive as to how to interpret travel discrimination under the ACAA. *See id*. at 828. Under the ADA, modification of a position to accommodate the needs of the disabled employee, creating a job vacancy for a disabled employee, or promoting the disabled employee to a job better suited to his handicap are not reasonable accommodations that are required to be performed by the employer. *See id*. at 828-30. Even assuming, arguendo, an obese individual is disabled, thus, a qualified individual under the ACAA, modifying the seats on an airplane to make them larger, bumping another passenger to a different flight, or offering an upgraded seat such as first-class for no additional cost, are all likely unreasonable remedies when compared to the above ADA accommodations, hence, not required. *Id*. Moreover, the Code of Federal Regulations specifically states "[c]arriers are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased" for persons with disabilities, likely because that would be an unreasonable accommodation. Code of Federal Regulations, 14 C.F.R. § 382.38 (outlining who is considered disabled and the accommodations that must be made for them). However, even if one or all of these accommodations were

adjudicated as reasonable, given the financial difficulties of the airlines and the fact so few seats account for an airlines' profit margin, making these accommodations could constitute an undue hardship, which is an additional basis under the ADA to avoid having to accommodate. *Id*. at 830-31. Nevertheless, under the ADA, the courts have continued to express the view obesity alone is not a disability, thus, the same is likely in the context of the ACAA. *See e.g. Fredregill*, 992 F.Supp. at 1092 (for proposition that obesity alone is not a disability).

The solution to this problem poses difficult hurdles but a fair compromise can be achieved. In fact, Southwest Airlines' policy appears to be the most accommodating for both sides. *Id*. at 831-34. The policy does require obese passengers to purchase an additional seat if they do in fact take up more than the seat they have purchased. *Id*. at 831. This is determined by allowing the passenger to pre-board the aircraft and sit in a seat, he or she having to buy an additional ticket at child's fare price if they cannot fit into the seat with the armrest(s) down. *Id*. 831-32. Although this practice may sound embarrassing to the passenger, every person has the ability to purchase the ticket beforehand, paying the same price as the seat initially purchased. *Id*. at 831-32. Moreover, in the event the plane is not full, Southwest refunds the purchase price of the ticket and further always gives passengers the option of switching to a less crowded flight, at no additional fee, to ensure the refund will be provided. *Id*. at 832-33. Finally, the practice is applied indiscriminately to anyone who may require an additional seat, including, for example, infants occupying more than one seat due to a restraining device or a person desiring to carry an oversized bag onto the plane. *Id*. at 831. Thus, with careful as well as thoughtful consideration of the issue, both the airlines' and oversized passengers' needs may be reasonably accommodated.

As a result of high fuel prices and the cutback in the number of flights by carriers, passengers being "bumped" from flights due to overbooking on the part of the airlines is becoming more common. "Bumping" occurs when more passengers appear to board a flight than the number of seats available, because the airline sold more tickets than the aircraft's seating capacity. *Stone v. Continental Airlines*, 804 N.Y.S.2d. 652, 654 (2005). To address this problem Congress passed a federal regulation which provides for compensation for those passengers inconvenienced due to being "bumped." *See* 14 C.F.R. § 250. Under 14 C.F.R. § 250.5, a "bumped" passenger is entitled to compensation of $400 per passenger or a lower amount computed "at a rate of 200% of the sum of the value of the passenger's remaining flight coupons up to the passenger's next stopover, or if none, to the passenger's final destination." This rule only applies if the passenger is actually "bumped" due to overbooking. 14 C.F.R. § 250.6.

In *Stone v. Continental Airlines*, 804 N.Y.S.2d. 652 (2005) Plaintiff, a partner at a law firm, booked two tickets so that he and his daughter could take a holiday ski trip. They were "bumped" from the flight and unable to be accommodated with an alternative flight so the airline refunded the costs of the two tickets. *Id.* at 654. Plaintiff filed suit seeking damages for his out of pocket expenses and deprivation of the use of the contents of his luggage, as well as damages under New York's consumer protection statutes and punitive damages. *Id.*

The court held that federal law preempts a claim for punitive damages by a prospective passenger who was "bumped" from a scheduled flight and that the airline's actions were permitted by statute and regulation. The court also held that a showing of violation of a public right was necessary to support punitive damages. However, the court awarded damages for the plaintiff's monetary loss as well as deprivation of the use of the contents of his luggage. The

court explained that while the award of punitive damages is preempted by federal statute, a "bumped passenger is entitled to contract damages upon showing 1) a ticket purchase, 2) involuntary denial of boarding within the meaning of federal regulations, 3) non-acceptance of an airline's offer of compensation, and 4) damages. *Id.* at 656.

With the enactment of the Federal Aviation Act, 49 U.S.C.A. § 44902(b), Congress gave airline carriers broad discretion to refuse to transport a passenger on the ground that transporting the passenger is, or would be, "inimical to safety." In *Cerquiera v. American Airlines, Inc.*, 520 F.3d 1, 15 (1st Cir. 2008), the court held that an airline could not be held liable for refusing to transport a passenger whom it believes might be inimical to the safety of its passengers unless the decision was arbitrary and capricious. This case involved three passengers who were refused transport after their behavior caused the captain of the air carrier to believe that they were a possible threat to the safety of other passengers. *Id.* at 5-6. Factors considered by the captain were 1) the three men were seated next to each other 2) near the emergency exit, 3) and they were laughing and making suspicious comments. The captain also pointed out that the plaintiff was hostile toward one of the flight attendants prior to boarding, had made an odd comment during boarding, and spent an unusually long period of time in the restroom. Both flight attendants and passengers were uncomfortable with the behavior of plaintiff and the two men seated next to him. This all led the captain to ask the three passengers to disembark the plane for further questioning by appropriate authorities. *Id.* at 7. Subsequently, the men were not allowed to board the flight and it departed without them. *Id.*

Plaintiff filed suit against the air carrier alleging that he was intentionally discriminated against by the airline due to his perceived race (he had olive skin and dark hair). *Id.* at 5. The court found no evidence of discrimination on the part of the captain of the aircraft or other airline

employees and found that removal of the three men was reasonable under the circumstances. The court explained that the decision to refuse transport under the FAA is restricted to the information actually known by the decision-maker at the time the decision was made, not what the decision-maker reasonably should have known. *Id.* at 15. Therefore, the captain had no duty to inquire into information received from other sources or to conduct a thorough investigation and was entitled to accept at face value the representations made to him by other air carrier employees, including the flight attendants. *Id.* The First Circuit Court of Appeals vacated that judgment of the federal district court which awarded Plaintiff $130,000 in compensatory damages and $270,000 in punitive damages. *Id.* at 4.

In re Air Crash at Lexington, Kentucky, August 27, 2006, 2008 WL 170528, involved the runaway crash of Comair Flight 5191. The court addressed the issue of whether Congressional intent or the self critical analysis privilege precluded disclosure of Defendant, Comair's, Aviation Safety Action Program Reports ("ASAP") for the purpose of litigation. These reports were a part of a voluntary program initiated by the Federal Aviation Administration (FAA), whereby airline employees were encouraged to report safety-related incidents to an Event Review Committee. *Id*. If a report was the only source of information regarding an incident the FAA was to take no action. The FAA was limited to administrative action consisting of a letter of correction or warning notice if the report was not the only source. The report could not be used by the company for disciplinary action, although corrective action may have been required. In short, ASAP reports were a vehicle whereby employees, participating air carriers, and repair station certificate holders could identify and report safety issues to management and to the FAA for resolution, without the reports being used for legal or disciplinary actions. *Id.*

Defendant, Comair, requested a protective order against disclosure of any ASAP reports, claiming that disclosure would contradict the intent of Congress and the FAA, as evidenced by 49 U.S.C. § 40123, and also that the reports were privileged under the self-critical analysis privilege. *Id.* at 2. The court reasoned that the plain language used by Congress and the FAA revealed that the protection given to ASAP reports was limited, and that the language simply precluded government from disclosing the information pursuant to Freedom of Information Act (FOIA) requests. The court explained that "disclosure in litigation was obviously contemplated, as the FAA agreed to produce reports pursuant to a court order." *Id* at 7. In regard to the self critical analysis privilege, the court explained that there was no such privilege in Kentucky law. *Id.* at 8. The court held that disclosure of the ASAP reports would not contradict the intent of Congress and the FAA and that the reports were not privileged. The court denied defendant's motion for a protective order to prevent discovery of pilot and employee safety reports. *Id.* at 10. This ruling may have an impact in other modes of transportation.

IV. Lost in Transportation: Loss or Damage to Cargo

A. The Carrier Requirement

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly referred to as the Warsaw Convention ("Convention"), "establishes a uniform set of rules for the determination of airline liability in the transportation of passengers, baggage, and cargo." Jeffery C. Long, *The Warsaw Convention Liability Scheme: What It Covers, Attempts to Waive It and Why the Waivers Should Not Be Enforced Until the Airlines Are Financially Stable*, 69 J. Air. L. & Com. 65, 67 (2004). The Convention, in establishing this universal standard, "has undergone multiple alterations since its inception in 1929 to adapt to changes in the international airline industry." *Id., supra* at 65.

With regard to cargo, a carrier's liability for damages sustained to any checked baggage or goods is limited to 250 francs per kilogram unless the *consignor* has made an alternative declaration of value at delivery. Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 18, 22, Oct. 12, 1929, 49 Stat. 3000 (1934). However, for a defendant to be able to limit its liability, it must qualify as a "carrier" under the Convention. *See Zima Corp. v. Pazinski*, 493 F.Supp 268, 273 (D.C.N.Y. 1980). Alternatively, it will be considered merely a freight forwarder and as such will not be able to limit its liability. *Id* (requiring a plaintiff to prove negligence to recover). Factors to be considered in determining whether a party acted only as a forwarder or as a forwarder-carrier include: the way the party's obligation is expressed in documents pertaining to the agreement, although a party's self-description is not always controlling; history of dealings between the parties; issuance of a bill of lading, although the fact a party issues a document entitled "bill of lading" is not in itself determinative; and how the party made its profit. *Id*. Essentially, contracting for the delivery of goods to their final destination instead of merely arranging for their transportation subjects a defendant to strict limited liability under the Convention. *Id*. at 274.

In this vein, little has changed since *Zima* devised the standard for carrier determination. For example, in *Royal Ins. Co v. Fountain Techs., Inc.* the court found Kamino International Transport was a common carrier because not only did it refer to itself as such but it also actually shipped the goods through their complete journey, from origin *to* final destination, charging one flat fee for their services and the shipping. 984 F.Supp 724, 730 (S.D.N.Y 1997) (applying the facts to the standard outlined in *Zima*). This rule works well since it uses the Convention rules when an entity is more than just tacitly involved in shipping the goods thereby avoiding applying the limitations to everyone who is in some way connected with the cargo shipment.

B. Damage During the Air Carriage

In addition to the carrier requirement, the Convention liability limitations apply only if the occurrence in question "took place during the carriage by air." Warsaw Convention, *supra* at art. 18. However, although liability does not extend to damage that does not occur in the air, there appears to be a rebuttable presumption subject to contrary proof, if damage occurs during performance of the contract for carriage by air (i.e. during *loading*, delivery or transshipment), any damage is presumed to have occurred in the air. *Sompo Japan Ins. Co v. Nippon Cargo Airlines Co*., 2004 WL 2931282, at *6 (N.D. Ill. 2004). This presumption appears to be applied in one case in which the court imposed liability on the carrier because it could not produce any evidence the damage occurred after it performed the air carriage contract. *Id*. The court focused on the carrier's possession and control of the damaged goods in determining the damage occurred during performance of the contract. *Id*. Since there was no evidence to support a contrary finding defendant carrier had possession of goods when the damage occurred, and as such was still performing on the contract, the Convention rules applied. *Id*. Thus, even though the damage could certainly have occurred on the ground, the Convention limitations nevertheless applied because the damage was presumed to have occurred in the air and there was no evidence to rebut the presumption. *See id*.

C. Cargo Air Waybill Requirements

"An air waybill is a written document describing the shipping arrangement between the air carrier and the shipper." *Tai Ping Ins. Co, v. Nw. Airlines*, 94 F.*3d* 29, 31 (2nd Cir. 1996). Specifically, Article 8 of the Convention lists certain essential information[11] that must be

[11] "The air consignment note shall contain the following particulars: (a) the place and date of its execution; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the consignor; (e) the name

included in an air waybill or Article 9 will strip the limited liability protection from the air carrier. *See Tai Ping Ins. Co.*, 94 F.3d at 31; *see also* Warsaw Convention, *supra* at art. 8,9. Although some circuits have taken a liberal approach with regard to the specific requirements of Article 8, the overwhelming trend appears to favor a strict application of the provision. *See Intercargo Ins. Co. v. China Airlines*, 208 F.3d 64, 67-68 (2nd Cir. 2000) (holding the failure of the air waybill to include the final destination information meant the air carrier's liability would not be limited); *see also Republic Nat'l Bank v. Delta Airlines*, 263 F.3d 42, 45 (2nd Cir. 2001) (holding failure to properly mark the air waybill with the "place of execution" meant liability would not limited); s*ee also Federal Ins. Co. v. Yusen Air & Sea Serv.*, 232 F.3d 312, 314 (2nd Cir. 2000) (refusing to limit liability because an agreed stopping place was not reflected on the waybill); *see also Tai Ping Ins. Co.*, 94 F.3d at 33 (holding failure to include the correct flight number prevented incorporation by reference of airline published timetables and liability would not be limited); *see also Fireman's Fund Ins. Co. v. Panalpina, Inc.*, 2001 WL 969032 at *7 (N.D. Ill. 2001); *see also Running Bear Farms, Inc. v. Expeditors Int'l of Wash., Inc.*, 2001 WL 102515 at *8-9 (S.D. Ohio 2001); *see also Nissan Fire and Marine Ins. Co. v. BAX Global Inc.*, 2006 WL 1305217, at *4 (N.D. Cal. 2006).

Articles 8 and 9 are especially important with regard to flight stops because the waybill information provides the shipper with notice of the places their cargo will stop and the jurisdictions in which a suit could potentially be brought. *See Running Bear Farms, Inc.*, 2001

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and address of the first carrier; (f) the name and address of the consignee, if the case so requires; (g) the nature of the goods; (h) the number of the packages, the method of packing and the particular marks or numbers upon them; (i) the weight, the quantity and the volume or dimensions of the goods; (j) the apparent condition of the goods and of the packing; (k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it; (l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred; (m) the amount of the value declared in accordance with Article 22 (2); (n) the number of parts of the air consignment note; (o) the documents handed to the carrier to accompany the air consignment note; (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon; (q) a statement that the carriage is subject to the rules relating to liability established by this Convention." Warsaw Convention, *supra* at art. 8.

WL 102515 at *8; s*ee also Republic Nat'l Bank*, 263 F.3d at 45. Therefore, air carriers should take the steps necessary to ensure all the relevant and required information is on the waybill to ensure they receive the limited liability protection afforded under the Convention.

D. Who Can Sue

In regard to standing, the Convention really only addresses who may sue and who may be sued in the case of successive carriages, the consignor being able to sue only the first carrier and the consignee the last. Warsaw Convention, *supra* at art. 30. "However, outside the context of successive carriage, the Convention does not discuss which parties have standing for cases of damage to cargo." *Commercial Union Ins. Comp. V. Alitalia Airlines*, 347 F.3d 448, 459 (2nd Cir. 2003). In fact, there has been some contention as to whether third parties may also sue under the Convention. *See id*. In *Alitalia Airlines*, the insurance company for the plaintiff shipper sued the defendant carrier for damage to plaintiff's cargo. *Id*. at 456. The defendant objected to the insurance company's standing to sue since it was neither a consignor nor a consignee. *Id*. The court rejected defendant's argument and cited Article 15 of the Convention as authority for the proposition "that any legal relationships third parties possess vis-à-vis consignees and consignors under local law are not altered by those portions of the Warsaw Convention that define consignees/ors' rights." *Id*. at 460; *see also* Warsaw Convention, *supra* at art. 15. Thus, subrogation interests and other legal assignments do not appear to be affected by the Convention standing requirements.

E. Damages

The Convention's limitation on liability applies a monetary amount to each kilogram of cargo. Warsaw Convention, *supra* at art. 22. However, there has been some contention as to whether this applies only to the portion of the cargo actually damaged or to the entirety of the

cargo. *See Motorola, Inc. v. Fireman's Fund Ins. Co.*, 308 F.3d 995, 999 (9th Cir. 2002). In Motorola, only a small portion of a shipment of cellular phones was physically damaged in transport but the plaintiff wanted to calculate the damages based on the entire weight of the shipment, arguing the damaged portion of the shipment affected the value and usability of the entire shipment. *Id*. The court agreed, holding "when a portion of a shipment is damaged in transit, the liability limitation under the Convention is based on the weight only of the damaged portion; but when the damaged portion affects the value and usability of other parts of the shipment, the liability limitation is based on the weight of all affected items in the shipment." *Id*. at 1001 (terming it the "affected weight standard").

However, the trend appears to favor contracting in the air waybill the amount of damages available and, more importantly, how to calculate them. *See Central Ins. Co. v. China Airlines*, 2004 WL 742916, at * 5 (N.D.Cal. 2004). In *Central*, the plaintiff attempted to use the affected weight standard to argue although only a portion of the cargo was damaged, the damage affected the entire shipment, thus, damages should be assessed from the entire weight of the shipment. *Id*. The court disagreed and instead enforced the terms of the air waybill, which upon a plain meaning interpretation applied liability only to those goods actually damaged. *Id*. at 6. Thus, it is wise for parties shipping goods via air to include not only a fixed or readily ascertainable damage amount on the waybill in the event of damage or loss but also to include a clear means by which to determine against which goods damages will be applied.

CONCLUSION

While the holding in *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999* is generous when compared to the restrictive limits of Warsaw, creative advocacy is going to persist and, at times, prevail until treaties like Warsaw are adjusted to become in line

with current economics. This is also true in the context of international cargo shipments. Warsaw needs a formula to keep it current. With regard to the definition of an accident under Warsaw, the courts appear to be adopting a fair and balanced approach. Further, the approach used by Southwest with obese passengers appears to be most fair. The delays predominately caused by an overloaded and outdated air transportation system in the U.S. is harming air carriers on their balance sheets as they are burning expensive fuel during delays. It has caused at least 10 states to attempt regulations that add further cost to weakened group of carriers. The Second Circuit properly struck down NY's law. The FAA should act in order to stem the tide of attempted additional costly state regulations.