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## Aviation

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## Aviation Report

BURTON A. LANDY  
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### CURRENT LEGAL DEVELOPMENTS IN AIR TRANSPORT

#### I. THE UNITED STATES' INTERNATIONAL POLICY

Changes in United States policy in regard to international commercial aviation represent the single most significant item of legal impact during the past year. The United States trend toward deregulation which started on the domestic scene with the Airline Deregulation Act of 1978 has moved to the international arena. The close and restrictive regulation of the international air transportation system is fading against the trend toward deregulation and so-called "free market place" economics.<sup>1</sup> Three factors stand out in this regard: (1) the U.S. position in recent bi-lateral negotiations; (2) the restructuring of the International Air Transport Association; and (3) the passage of the International Air Competition Act of 1979.<sup>2</sup> It is this third item which may have the most far reaching consequences. President Carter signed the International Air Competition Act into law on February 15, 1980. Its stated purposes are to promote competition in international air transportation and to establish goals for developing United States international aviation negotiating policy.

Because of the significance to the air transport industry of the new United States policy, it is appropriate to set out *verbatim* the goals of the policy, which is now a part of section 1102 of the Federal Aviation Act.

In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States

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1. *International Air Competition Act Sent to White House by Congress*, 112, No. 6 AVIATION WEEK AND SPACE TECHNOLOGY 27 (1980).

2. Act of February 15, 1980, Pub. L. No. 96-192.

air carriers to maintain and increase their profitability, in foreign air transportation;

(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

(3) the fewest possible restrictions on charter air transportation;

(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;

(5) the elimination of operational and marketing restrictions to the greatest extent possible;

(6) the integration of domestic and international air transportation;

(7) an increase in the number of nonstop United States gateway cities;

(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;

(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation; including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and

(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.<sup>3</sup>

Several other aspects of this law should be noted. First, it contains provisions designed to streamline the ability of the United States to react to any perceived discriminatory practices against American international carriers by a foreign government. Specifically, after presidential review, the Civil Aeronautics Board (C.A.B.) can suspend or revoke permits and rates of foreign carriers whose governments place unreasonable restrictions on United States carriers. The C.A.B. can also revoke or suspend a carrier's right to serve a foreign city if the carrier has failed to provide any service to that city for 90 days. Second, approval of international air service agreements is prohibited in the event that they reduce or eliminate competition, unless such an agreement is necessary for the public benefit, or for the furtherance of United States foreign policy goals. United States

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3. *Id.*

negotiators, however, are allowed to trade the "Fly American" provision for a liberal, competitive bilateral air agreement with foreign governments.<sup>4</sup>

Finally, on the subject of international fares, the C.A.B. must establish a Standard Foreign Fare Level within 180 days after the law's enactment. The Board is in the process of determining whether the fares in effect on October 1, 1979, in twelve specific international city-pairs markets are unjust or unreasonable. The Board allowed the new Standard Foreign Fare Level (S.F.F.L.) to be set at 14.06% above the October 1, 1979 level for transatlantic fares. Latin American fares were set 11.95% above and Pacific fares 12.2% above the October level. Based upon interpretation of CCH Aviation Law Reports,

The determination as to whether the international fares were reasonable will be based on the existence of excess profits, using the Board's traditional cost-based approach. If excess profits are shown to exist in any of the 12 Latin American, Pacific, or North American markets, the Board may establish a Standard Foreign Fare Level different than the October first level.<sup>5</sup>

There is a fare flexibility provision which prohibits the C.A.B. from finding international fares unjust or unreasonable on the basis of being too high or low if they are no more than 5% above, or 50% below, a standard foreign fare level. This is comparable to the requirements of the Airline Deregulation Act of domestic air carriers. Moreover, in the event of different fare level findings the Board is without authority to force a fare rollback, but rather the carrier can maintain the existing fares until cost increases bring them into line with fare levels determined by the Board to be just and reasonable.<sup>6</sup> Other minor changes relate to sabotage operations by foreign airlines under specific emergency conditions. Another provision permits foreign-registered aircraft to operate between U.S. cities under lease to a United States air carrier (without foreign crew).

Where the new United States approach will lead is difficult to say. Other recent United States efforts at liberalization have not met with great success. At the recent International Civil Aviation Association (I.C.A.O.) conference in Montreal, the United States' proposal to consider the total removal of capacity restrictions was defeated by a

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4. *Supra*, note 1.

5. Av. L. Rep. (CCH), No. 704, March 10, 1980.

6. *Id.*

substantial margin. Developments of the coming months will make a review of this subject more definitive at next year's conference.

## II. AIRPORTS

Problems of airport noise have also been among the more critical legal developments in the United States. Legislation was signed into law by President Carter, on February 18, 1980,<sup>7</sup> establishing new programs for dealing with airport noise. Of particular importance to foreign air carriers is the requirement that the United States Secretary of Transportation commence rule-making proceedings to require aircraft used by foreign air carriers, as well as those of United States carriers used in international operations, to comply with those standards of noise level imposed for domestic operations.

The law requires the Federal Aviation Administration (F.A.A.) to regulate the noise emission of foreign aircraft. In December, 1979 nine European countries (Belgium, Denmark, West Germany, France, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom) agreed to make their aircraft comply with I.C.A.O. Annex 16 noise standards, which are similar to F.A.A. requirements. Proposed rule-making for all foreign aircraft to comply with F.A.A. noise standards are reported to be in final stages of preparation.

The legislation requires the United States Secretary of Transportation to establish a single system for measuring noise at airports and surrounding areas; and to prepare and publish a noise exposure map and a noise compatibility program for major airports. The law would bar persons who buy property around airports to which an exposure map has been submitted from recovering damages caused by aircraft noise if such a person has "actual or constructive knowledge" of such a map, unless the operation or layout of the airport changes significantly. The information could not otherwise be used as evidence in a suit seeking damages or other relief from aircraft noise.

In terms of airport noise litigation, two recent California cases have caused concern among carriers and airport operators. Both appear to distinguish their situations from the earlier United States Supreme Court case of *City of Burbank v. Lockheed Air Terminal*.<sup>8</sup> In *Greater Westchester Homeowners Association v. City of Los Angeles*,<sup>9</sup> the California Supreme Court in December 1979 affirmed

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7. Act of February 18, 1980, Pub. L. No. 96-193.

8. 411 U.S. 524 (1973).

9. 26 Cal. 30, 86 (Cal. 1979).

a lower court ruling which permitted claims by homeowners who live near the Los Angeles International Airport against the City of Los Angeles, as airport proprietor, for mental and emotional distress caused by the noise of airport operations.

Since issues of condemnation and inverse condemnation had been fully resolved in earlier proceedings, the landowners' rights to compensation for overflights of their land which amounted to a "taking" were no longer at issue. The court distinguished the Los Angeles situation from earlier cases in the Federal Courts in which municipalities attempting to assert local police powers to control airport noise were held to be pre-empted by the Federal Aviation Act. The distinguishing characteristic in the court's opinion was that: "While thus precluding local regulation of aircraft noise under the police power, the *Burbank* court expressly refrained from imposing similar limitations on the rights and obligations of a *proprietor-landlord* to control aircraft noise levels."<sup>10</sup> The court also made a distinction between the injunctive suspension of the operation of a public airport on the basis of nuisance which would come into conflict with Federal pre-emption, and the right of the landowner to seek compensation on a nuisance theory for personal injuries.

Of particular concern is the California court's ruling on the nature of the alleged personal injuries of the plaintiffs. The court stated in its findings of facts that:

[T]he noise created by jet aircraft using the two north runways . . . interfered with person-to-person conversation in the home . . . (with) normal telephonic communication . . . to hear and enjoy television programs; that such noise caused frequent arousal from sleep, and, in some cases, interfered with the ability . . . of school age members of the families to study in their homes.<sup>11</sup>

Such a finding might well apply to the use of certain runways at nearly all utilized airports throughout the United States. Substantial recoveries on such a basis could have far reaching impact on landing fees for all air carriers. The most extreme possibility would be a homeowner sufficiently distant from the airport to avoid condemnation but sufficiently disturbed, according to the above standard, to

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10. *Id.* at 95.

11. *Id.* at 92.

periodically sue for damages. It is anticipated that the City of Los Angeles will petition the United States Supreme Court to review the ruling by the California Supreme Court since it marks the first time that damages have been awarded in California for emotional and mental distress in an airport noise nuisance case.

The other California case involves the local airport authority's right to regulate aircraft noise at the Burbank-Glendale-Pasadena Airport.<sup>12</sup> The specific defendant was Hughes Airwest in an action filed by the Burbank-Glendale-Pasadena Airport Authority in 1979, after Airwest began expanding its flight schedules at the airport. This same airport was the subject of the previously mentioned United States Supreme Court case of *City of Burbank v. Lockheed Air Terminal*.<sup>13</sup> At that time the airport was owned by Lockheed, and a curfew on nighttime jet operations had been imposed by the City of Burbank under its police power. The Supreme Court declared the city ordinance invalid on the grounds of federal pre-emption.

In 1979 the airport was sold to the public authority and the regulation became proprietary in nature. The California Superior Court ruled, on February 7, 1980, that the Burbank-Glendale-Pasadena Airport Authority is not pre-empted by federal law from enforcing a regulation restricting airport noise. The court noted "there is no appellate agreement on the scope of the so-called proprietor's exception to the federal pre-emption rule."<sup>14</sup> It ruled that "the federal government has acquiesced and delegated to the Authority supervision of the noise rule under the (federal grant) agreement and by virtue of the environmental act."<sup>15</sup> Airwest is appealing the ruling and the court has allowed Airwest to maintain its current flight schedule for 120 days after a final judgment is rendered.

Because both of these cases appear to represent deviations from earlier rulings they may both reach the United States Supreme Court before a final decision is rendered. The enactment of the new Noise Abatement Legislation, outlined above, may provide the Court with a new dimension in reaching its conclusion.

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12. Burbank-Glendale-Pasadena Airport Authority v. Hughes Airwest, NCC-17926-B (Cal. Super. Ct. 1980).

13. *Supra*, note 8.

14. *Supra*, note 12.

15. *Id.*

### III. SUITS BY AIRLINES AGAINST AIRCRAFT AND ENGINE MANUFACTURERS<sup>16</sup>

In a far-reaching decision of substantial importance in the field of products liability law, the United States Court of Appeals for the Ninth Circuit has held that the doctrine of strict liability in tort, under California law, is not available to a large airline in a suit against the manufacturer of an aircraft engine for a defect in the engine that caused property damage to the engine itself and to the aircraft on which it was installed.<sup>17</sup> The court concluded that the policy reasons given by the California state courts for the development of the doctrine of strict tort liability in favor of consumers did not apply where the consumer was a large commercial entity. These policy reasons were the risk distribution principle, the ability to inspect the product for defects, the difficulty in proving a negligence case against a manufacturer and the relative economic strength of the manufacturer and the consumer.

The court noted that the Supreme Court of California had not yet addressed the issue presented in the *Scandinavian Airlines* case but nevertheless went on to reach the conclusion of "the issue which that court would probably reach under the same facts."<sup>18</sup>

The court in this case held that SAS and United Aircraft were financial equals. Somewhat peculiarly, the court also held that SAS was not entitled to the benefits which supposedly poorer or less affluent consumers would have, stating: "SAS can allocate its risk of loss equally as well as United. Therefore, the societal interest in loss shifting present in (other) cases is absent here." The court also said:

Although of less significance than the risk spreading rationale, several other policies have been identified as underlying the doctrine of strict products liability in California. The consumer's difficulty in inspecting for defects has impliedly been stated as a reason for its application. *Halliday v. Greene*, 244 Cal. App.2d 482, 53 Cal. Rptr. 267 (1966). Another policy concerns the difficulty a consumer faces in trying to prove negligence. *Cronin v. JBE Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153, 1162 (1972). In *Daly*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162, the court stated:

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16. The consideration of the *Scandinavian Airlines v. United Aircraft* case in part III of this report and the *KLM v. United Technologies* case in part IV are based in part upon the presentation of George N. Tompkins, Esq., of Condon & Forsyth, at the I.S.T.A. Risk and Insurance Seminar, February 12, 1980, Salzburg, Austria.

17. *Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425 (9th Cir. 1979).

18. *Id.* at 427.

We imposed strict liability against the manufacturers and in favor of the user or consumer in order to relieve injured consumers "from *problems of proof* inherent in pursuing negligence . . . and warranty . . . remedies . . . ." [citations omitted]<sup>19</sup>

In denying relief to SAS based upon the doctrine of strict liability, the court reasoned:

Here, SAS had the expertise and personnel to inspect the engines for defects. SAS does not have the lack of technical knowledge and expertise which would burden members of the general public in proving negligence in designing or manufacturing the engines. SAS does not face problems of privity as an artificial barrier which the doctrine of strict liability seeks to avoid. Finally, the fact that United will still be liable to airline passengers for any injuries they receive as the result of defective United products will serve as a significant deterrent from manufacturing unsafe products.<sup>20</sup>

Finally, the court said:

Interpreting these four requirements as the court did in *Kaiser* leads us to the conclusion that SAS does not have a claim in strict tort liability against United. SAS, United and McDonnell Douglas dealt in a commercial setting from positions of relatively equal economic strength. The specifications of the engines were negotiated by the parties. Finally, McDonnell Douglas, United and SAS all negotiated the risk of loss for defects in the engines.

We find, therefore, that the trial judge was correct in his interpretation of California law and that the doctrine of strict liability is not available to SAS in this case.<sup>21</sup>

As to the effectiveness of the standard disclaimer clause in purchase agreements which bars suits against aircraft and engine manufacturers, there is presently pending a very important and what should become a very significant decision from the United States Court of Appeals for the Second Circuit. The appeal was argued in October, 1979 and involves litigation arising out of the Japan Air Lines (JAL) DC-8 crash at Moscow in 1972. The trial court granted summary judgment dismissing the complaint against McDonnell Douglas on the basis of the disclaimer clause in the purchase agreement between McDonnell Douglas and JAL.<sup>22</sup>

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19. *Id.* at 429.

20. *Id.*

21. *Id.*

22. *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980).

In an action recently tried against McDonnell Douglas in the Federal Court in Los Angeles, the court decided that the disclaimer clause in the McDonnell Douglas agreement had been negotiated at arms length and thus served to bar the action of the air carrier against McDonnell Douglas. The court went further, however, and held that a component manufacturer also came within the protection of the disclaimer clause in the McDonnell Douglas purchase agreement and, accordingly, dismissed the complaint as to the component manufacturer as well.<sup>23</sup>

A hull suit brought by Varig Airlines in Seattle against the Boeing Company and other parties similarly was dismissed upon the basis of the disclaimer clause in the Boeing purchase agreement.<sup>24</sup> After dismissal of Boeing, the remainder of the case was remanded to the federal trial court in Los Angeles from which it had previously been transferred.<sup>25</sup> The trial court there ruled that the disclaimer clause in the Boeing sales agreement also extended to the component manufacturer since he was a sub-contractor of Boeing who followed Boeing's instructions and orders in the manufacturing of component parts for the aircraft. The complaint as to the component manufacturer was dismissed. Both decisions presently are the subject of appeals.

The various cases on appeal involving Boeing and Douglas disclaimer clauses involve the following issues: (1) whether the disclaimer clause bars a claim in strict tort liability; (2) whether the disclaimer clause bars liability for negligence occurring after delivery of the aircraft, such as failure to warn of and take corrective measures with respect to a dangerous condition which becomes apparent to the manufacturer after delivery; (3) whether the disclaimer clause is voided where the aircraft does not meet the Detail Specifications set forth in the purchase agreement in a relevant particular; (4) whether the disclaimer clause bars negligence and strict tort liability claims where the limited remedy of the warranty in the purchase agreement fails in its essential purpose in view of the manufacturer's failure to repair, replace or correct defects known to the manufacturer within the warranty period but unknown to the airline; (5) whether the disclaimer clause bars claims based upon negligent misrepresentations in the Detail Specifications for the aircraft; and (6) whether the standard

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23. *Airlift International, Inc. v. McDonnell Douglas Corp.*, No. CV76-3401 (C.D. Cal. 1979).

24. *S.A. Empresa de Viacas Aerea Rio Grandense (Varig Airlines) v. Boeing Co.*, No. 76-169M (W.D. Wash. January 14, 1977).

25. *Id.* Decision After Retransfer, No. 76-0187 (C.D. Cal. February 8, 1979).

disclaimer clause insofar as it may seek to bar claims based upon strict liability in tort is contrary to the public policy of the manufacturer's state of domicile. It should be noted that some or all of these issues will become moot if the SAS decision is followed in other jurisdictions.

#### IV. CARRIER INSURANCE CLAIMS

In a suit by K.L.M. Royal Dutch Airlines (KLM) against the United Technologies Corporation,<sup>26</sup> the United States Court of Appeals for the Second Circuit ruled that the carrier had a valid "loss of use" claim apart from a claim for the physical damage to the aircraft. Moreover, proof of actual financial loss was not required since the recovery is based upon loss of the right to use the aircraft, not the level of proof which might have been realized.

The court stated:

It is his prerogative, as an incident of ownership, to gamble on the use being productive. It is no answer then to say to the victim of the tort: since you have failed to prove that you would have made a net profit from use of the damaged property, you may take nothing. For it is the right to use that marks the value.<sup>27</sup>

The case involved substantial damage to an aircraft, under a ten year lease to KLM, as the result of engine failure which caused the aircraft to be out of service for 42 days. Repair costs had been resolved in negotiation so that the only issue before the court was loss of use. The court held that rental value may provide a measure of loss of use damages even though a substitute vehicle had not actually been hired as was the situation in the KLM case. This ruling may have far reaching impact upon aircraft out of service through provable fault of the manufacturer.

#### V. WARSAW CONVENTION CASES

##### A. Passenger Cases

Several Warsaw cases of interest have been reported during the past year. Perhaps the most interesting case was not American but rather Canadian. In *Ludecke v. Canadian Pacific Airlines, Ltd.*,<sup>28</sup> the

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26. *Koninklijke Luchtvaart Maatschaapij (K.L.M. Royal Dutch Airlines) v. United Technologies Corp.*, 610 F.2d 1052 (2d Cir. 1979).

27. *Id.* at 1056.

28. 15 Av. Cas. ¶ 17,687 (CCH) (Can. S. Ct. 1979).

Supreme Court of Canada chose not to follow the long line of United States cases which have construed article 3(2) of the Convention to require not only delivery of the ticket, but of one which, in accordance with article 3(1), contains in legible form a statement that the carriage is subject to the rules relating to liability established by the Convention. The United States cases have considered that delivery of a ticket not meeting such conditions amounts to no delivery, and therefore the provisions of article 3(2), depriving the carrier of the benefit of the limitation where a passenger is accepted without a ticket, would apply.

The Canadian court pointed out that in most jurisdictions outside of the United States the view is that: "Article 3 fails to provide any sanction for its breach except in a case where a passenger has been accepted with no ticket. Therefore a ticket bearing an illegible statement or no statement at all would not result in a loss of the limitation to the carrier." The court went on to hold that an air ticket bearing an illegible statement concerning the applicability of the Warsaw Convention and its liability limitation would not result in a loss of the limitation to the air carrier in a death claim. The court did rule, however, that in baggage claims by carriers the Convention requires that passengers receive a legible notice of the Convention and its terms for an air carrier to avail itself of the Convention's protection.

The United States District Court for the Central District of California in 1978 made the somewhat novel decision in *In Re Air Crash in Bali, Indonesia*<sup>29</sup> to the effect that the California wrongful death statute, which has no limitation on the amount recoverable, was available to the survivors of passengers killed in an international flight and they were not bound, as were the decedents, by the treaty provisions as supplemented by the Montreal Agreement. A New York state court in *Lowe v. Trans World Airlines Inc. (TWA)*<sup>30</sup> rejected this contention in regard to similar allegations by the legal representatives of three passengers who were killed on a TWA flight which crashed en route from Tel Aviv to New York.

In *Metz v. KLM Royal Dutch Airlines*<sup>31</sup> the United States District Court for the District of Massachusetts in a November 1979 ruling made an interesting distinction between an "accident" within the meaning of article 17 of the Warsaw Convention and a heart attack

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29. 462 F. Supp. 1114 (C.D. Cal. 1978).

30. 15 Av. Cas. ¶ 17,810 (CCH) (N.Y. Sup. Ct. 1979).

31. 15 Av. Cas. ¶ 17,843 (CCH) (D. Mass. 1979).

suffered by a passenger on an international flight. The court first cited *Benjamins v. British European Airways*<sup>32</sup> wherein the United States Court of Appeals for the Second Circuit (New York) overruled its previous position and found that article 17 created a substantive right of action for recovery under the Convention, thereby avoiding the need for showing jurisdiction founded in variable local law. The court went on to find that the *Benjamins* holding does not necessarily prevent the application of local causes of action outside the Convention; it simply indicates the source of substantive rights and liabilities arising under the Convention. This ruling, in effect, allows the plaintiff to proceed under any alternative local law theories which might be available. Counsel for KLM advised the authors by telephone recently that the case has not yet gone to trial on this issue.

### B. *Baggage and Cargo Cases*

The failure to warn a passenger of the possibility of theft of jewelry from checked baggage does not constitute willful misconduct under article 25 of the Warsaw Convention. To establish willful misconduct, the plaintiff passenger would be required to show that the carrier: (1) was aware that there was jewelry in the baggage; (2) knew that there was a danger that the jewelry would be stolen; and (3) intentionally failed to warn the passenger that this danger of theft would probably result in the loss of the jewelry. Inspection of baggage made by government employees cannot be imputed to the airline as to knowledge of presence of jewelry.<sup>33</sup>

For a passenger to establish willful misconduct for the theft of jewelry from checked baggage, the carrier must first be shown to have been aware of the existence of the jewelry in the baggage at the time the carrier assumed responsibility for it. In *Danzigev v. Compagnie Nationale Air France*<sup>34</sup> the damages were computed upon the basis on an assumed weight of one pound for the missing jewelry, there being no evidence as to actual weight. Significantly, the court awarded judgment for \$9.07, the limit applicable to the weight of the lost jewelry as contrasted with the weight of the checked baggage as a whole.

A settlement by an air carrier with a plaintiff for the applicable limits of liability (cargo case) precludes any claim for contribution or

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32. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1016 (1979).

33. *Olshen v. El Al Israel Airlines*, 15 Av. Cas. ¶ 17,463 (CCH) (E.D.N.Y. 1979).

34. No. 77 Civ. 1335-CSH (S.D.N.Y. June 22, 1979).

indemnity against the air carrier by a co-defendant who may be held liable to the plaintiff. Payment of the full extent of the carrier's possible liability under the Warsaw Convention bars any further contribution, whether direct or indirect, which would serve to exceed the limit of liability.<sup>35</sup>

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35. *Swiss Bank Corporation v. First National City Bank*, 15 Av. Cas. ¶ 17,631 (1979).