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Counterclaims, Cross-Claims and Impleader in Federal Aviation Litigation

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COUNTERCLAIMS, CROSS-CLAIMS AND IMPLEADER IN FEDERAL AVIATION LITIGATION

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I. THE GENERAL PROBLEM: MULTIPLE POTENTIAL PLAINTIFFS AND DEFENDANTS

WHEN airplanes crash, difficult procedural problems often arise from the numbers of potential parties and the complexity of the applicable substantive law. Since under that law, recovery can be granted to large numbers of plaintiffs, and liability can be distributed to a variety of defendants, the procedural rights to counterclaim, cross-claim and implead third-parties have become important aspects of federal aviation litigation.

When death results the most obvious parties plaintiff are those injured by the death of the decedent, *i.e.*, the spouses, children, heirs and creditors. Whether they must sue through an estate, or special administrator or directly by themselves will ordinarily be determined by the particular state wrongful death statute under which the action is brought, and the capacity law of the forum.[1] In addition, the status of the decedent will also have bearing on the parties and the form of action. There are legal distinctions between pilots, crew members, passengers (paying or non-paying), people on the ground and military servicemen; some may leave exclusive workman's compensation remedies, while other decedents may leave life insurance or casualty insurance that may give rise to subrogation claims, or claims by defendants to make exceptions to collateral source rules.[2] If no death is involved then more ordinary

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[1] *See* Kennedy, *Federal Rule 17(b) and (c): Qualifying to Litigate in Federal Court*, 43 NOTRE DAME LAW. 273, 295-300 (1968).

[2] *See* Sedler, *Collateral Source Rule and Personal Injury Damages: The Ir-*

party problems result, which are generally associated with personal injury and property claim litigation, such as joinder or non-joinder of the subrogor and subrogee.[3]

On the opposite side of the lawsuit the obvious potential defendants, aside from individual employees, are the airline carrier (in commercial aviation accidents), the United States (because of its regulatory and air control activities), the airframe manufacturer, component parts manufacturers, airport owners, maintenance companies and in general aviation cases, the owners of the aircraft and the operator. Standing behind these potential defendants are the insurance companies, both primary and excess insurers, that may control the defense presentations even though they are not technically parties.[4]

Some of the potential parties plaintiff and defendants may occupy dual roles as a result of substantive legal relationships that can give rise to counterclaims, cross-claims and impleader. For example, a defendant airline will claim against the manufacturer either on a cross-claim or on an impleader; or plaintiff claims by beneficiaries of decedent pilots can be met with counterclaims or impleaders raising claims that place blame on the pilot.

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relevant Principle and the Functional Approach, 58 KY. L.J. 36, 161 (1969); *See generally* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965). The provision that workman's compensation is the exclusive remedy of an employee against an employer may bar a defendant, when sued by an employee from impleading his employer. *See* Kantlehenr v. United States, 279 F. Supp. 122 (E.D.N.Y. 1967).

[3] *See* Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 714-16 (1967).

[4] In states with direct action statutes such as Louisiana and Wisconsin, the action may be maintained directly against the insurance company in federal court as a matter of substantive law under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Lumberman's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1954). Under 28 U.S.C. § 1332(c) as amended in 1964, however, the insurance company's citizenship is considered to be that of the insured. *See* Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268.

In addition to statutory direct action, there is also the judicially created form of direct action under the type of attachment approved in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), which is thus available in the federal court. Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). With respect to Florida's judicial creation of a direct action remedy, see Shingelton v. Bussey, 223 So. 2d 713 (Fla. 1969); and Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970).

A. *Strategy of Plaintiffs Lawyers*

1. *With Respect to Joinder of Plaintiffs*

Conceivably one attorney may represent more than one claimant, or two or more attorneys may represent multiple claimants. In either case, the primary reasons for choosing to join plaintiffs formally in a single action are the cost savings in a single discovery and trial and the psychological impact on the triers of fact.[5] Even if the plaintiffs are not joined, however, and if the actions are filed in the same court or transferred to it,[6] then the choice not to join plaintiffs may be overridden by the court's order of consolidation under rule 42(a).[7] While joinder of plaintiffs may be rejected by individual lawyers, the possibility of bringing a class action on behalf of the plaintiffs presents a different strategical question. Of necessity, unless all class members fully intervene, the class action implies that the class representative will control the litigation and his lawyer will be entitled to proportionate compensation.[8]

Class actions have enjoyed popularity in recent times as an equitable invention "mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights."[9] Thus the class action might be desirable in aviation litigation when as many as 800 people could die in the mid-air collision of two fully loaded 747's. But the recent case of *Hobbs*

[5] The opposing considerations favoring separate trials are that when liability is thin, plaintiffs risk one binding loss, and give up the advantage of being able to sue on claims individually without binding effect, and second, forego the possibility of increased verdicts on cases brought seriatim before separate juries.

[6] *See* Note, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. 1407 Viewed In Light of Rule 42(a) and 28 U.S.C. Section 1404(a)*, 22 HASTINGS L.J. 1289 (1971).

[7] *See* United Air Lines, Inc. v. Weiner, 286 F.2d 302 (9th Cir. 1961) (denying consolidation); Comment, *Consolidation In Mass Tort Litigation*, 30 U. CHI. L. REV. 373 (1963), discussing the many procedural variations possible on consolidated trials. There are, of course, some practical differences between joinder of plaintiffs and consolidation of two separate cases, with respect to the pleadings, discovery, form of judgments, settlements and appeals, but the result can be substantially similar from the viewpoint of adjudicating the underlying controversy.

[8] 3B J. MOORE, FEDERAL PRACTICE ¶ 23.91 (1969) (hereinafter cited as "Moore"); *cf.* Dupont v. Southern Pac. Ry., 366 F.2d 193 (5th Cir. 1966) when trial judge was reversed for requiring plaintiffs in consolidated cases to appoint a "lead" counsel to conduct trial.

[9] C. WRIGHT, FEDERAL COURTS § 72 at 306 (2d ed. 1970), *quoting from* Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

v. Northeast Airlines, Inc.[10] has limited the usefulness of this procedural device as a remedy for personal injury and wrongful death. In *Hobbs* the plaintiff's decedent was one of thirty-two people killed in a crash of a Northeast Airlines plane in 1968 near Hanover, New Hampshire. The plaintiff sued Northeast Airlines and Fairchild-Hiller, the plane's manufacturer, in the Eastern District of Pennsylvania. After the defendants impleaded two manufacturers of component parts and the United States, as the party exercising control over the airport facilities, the district court refused to permit the action to be maintained as a class action under rule 23.[11] The district court first held that even if the requirements of rule 23 were met, the facts of the case made it inappropriate to concentrate all of the claims in a particular jurisdiction; each claimant might properly be regarded as having a legitimate interest in independently litigating his case. The court reasoned that since twenty-five of the thirty-two potential class members resided in New England and New York, that the defendants were Massachusetts and Maryland corporations, and that only the plaintiffs were Pennsylvania residents,

> [i]t seems highly unlikely that any eyewitnesses or even key expert witnesses would find this a convenient forum . . . [and thus] [i]t seems quite obvious that is is not the appropriate forum for the maintenance of a class action under these circumstances.[12]

This analysis forms a hurdle for the use of class actions in future airline crash litigation because it is hard to imagine an air crash in which all of the passengers are from the same place. But even if a crash involved a charter flight full of passengers from the same city, the *Hobbs* decision indicates that personal injury and wrongful death claims are the types of claims in which the interest of the individual claimants in controlling their claims outweighs the benefits of maintaining them through class action.

2. *With Respect to Joinder of Defendants*

The more conservative view of plaintiff's attorneys is that multiple defendants should not be joined unless there is a probability

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[10] 50 F.R.D. 76 (E.D. Pa. 1970).

[11] FED. R. CIV. P. 23.

[12] 50 F.R.D. 76, 80 (E.D. Pa. 1970).

of ultimate success against each of them.[13] The typical plaintiff's attorney has a checklist of advantages and disadvantages to consider in deciding whether to join multiple defendants. Some advantages are: (i) if defendants are sued separately, they each may escape liability before separate juries by blaming the other, whereas the plaintiff who has joined defendants has the advantage of res ipsa loquitur, if not as a matter of law, then as a matter of jury psychology; (ii) the jury may be inclined toward a higher award when liability can be established against two defendants; (iii) plaintiffs may take advantage of multiple theories of recovery; for example, joining a manufacturer may permit the plaintiff to add warranty theories to his negligence theory; and (iv) each defendant may develop the evidence against the other defendants.[14] Some disadvantages are: (i) multiple defendants add peremptory challenges to the jurors; (ii) there is more expense; (iii) additional defendants, such as manufacturers, may fight harder to protect their reputations; (iv) different standards of liability may confuse the jury; *e.g.*, the airlines owe a duty of highest care but the manufacturers owe a duty of only ordinary care; and (v) joining multiple parties makes early settlement difficult or impossible.[15]

In Warsaw Convention cases, the balance of considerations is different. Under that convention, unless willful misconduct can be shown, the carrier's liability is limited by the treaty.[16] Thus, to avoid liability limitations manufacturers and the United States are lead candidates for joinder; airport owners, maintenance companies and dispatching companies may be joined if it appears negligence on the part of these companies is very probable. In other types of cases, there also may be overriding reasons for joinder, as in a mid-air collision, when the owner or operator of the other aircraft is a self-evident target for liability.

In contrast to commercial aviation accidents, financial responsi-

[13] 2 L. KREINDLER, AVIATION ACCIDENT LAW § 25.01(i)(a) (1963) [hereinafter cited as 2 Kreindler]. Mr. Kreindler's view is labeled "conservative" in that he criticizes lawyers who advocate wholesale joinder of defendants in air crash cases. *See also* P.L.I., AIRCRAFT LITIGATION, 9-21 (George E. Farrell ed. 1970); *see generally* P.L.I., AIRCRAFT LITIGATION 2D (Roger A. Needham ed. 1971), P.L.I., AIRCRAFT LITIGATION 3D (L. Kreindler ed. 1972); J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES (1968).

[14] 2 KREINDLER § 25.01(i)(a).

[15] *Id.* at § 25.01(i)(b).

[16] *Id.* at § 25.02[1].

bility in general aviation accidents may often be the controlling factor in plaintiff's choice of parties since the pilot or owner may have limited resources. But even when the pilot has limited assets, he will probably be made a party unless the claim against him is barred by workman's compensation statutes[17] because other defendants will argue pilot error and attempt to place the negligence on the pilot to avoid liability. When the pilot is not the owner, then the plaintiffs will usually join the owner.[18]

In non-Warsaw Convention cases brought in state court when the plaintiff does join employees of the airline, a prime motivation of the plaintiff appears to be the prevention of federal removal jurisdiction.[19] In addition, there are other specific types of cases, *e.g.*, those that involve injuries to people on the ground from falling debris, or those that involve military crashes, in which other considerations control. While the plaintiff's attorney may wish to make his choices early, frequently important information regarding negligent conduct of other parties besides the carrier is unavailable until after the suit is filed and discovery has begun. Thus, the plaintiff's initial choices are subject to constant reconsideration during the course of the suit, but his subsequent motions to amend, join, add or drop parties and to sever or consolidate claims will be subject to the discretion of the court.[20] Of course there is an infinity of other tactical reasons why, in a given case, the plaintiff might join a party, *e.g.*, to take advantage of discovery or evidentiary rules, or to forum shop; but the above reasons are some of the major considerations.

B. *Defendant's Strategy in Responding to Parties Named by the Plaintiff*

Generally the defendants do not have as much room for tactical maneuvers as the plaintiff since the initial choice of parties rests with the plaintiff, and the defendants have little power under the

[17] *Id.* at § 29.08[1].

[18] *Id.* at § 29.09.

[19] *Id.* at § 25.01[10]. Mr. Kreindler notes the great importance of conflicts of law in air crash litigation, and points out that when the plaintiff must rely on a change in the law, he will try to remain in the state court system, because the federal courts will be reluctant to work out a change in the face of the *Erie* and *Klaxon* doctrines. *See* P.L.I., AIRCRAFT LITIGATION 3D 34, 36-39 (L. Kreindler ed., 1972).

[20] FED. R. CIV. P. 15, 19, 20, 21, 42.

federal rules to change that choice. But presumably if the plaintiff has made conscious, rational choices, the same factors that motivated the plaintiff's choices (*e.g.*, the jury, theories of recovery, adversity between the defendants) will conversely affect the defendants *i.e.*, what is good for the plaintiff is bad for the defendants. Of course, that is not always the case. For example, all parties pursuing their own mutual interest may agree to a test case.[21] Typically, however, the same factors previously listed for the plaintiffs must also be considered by the defendant from the opposite perspective.

An additional factor to be considered, not previously mentioned, is the projected impact of res judicata and collateral estoppel. In *United States v. United Air Lines, Inc.*,[22] twenty-four death claims originally had been consolidated and tried in federal district court in Southern California, resulting in a determination of negligence and liability on the part of United Air Lines. Subsequently the air carrier was held bound by this prior determination with respect to death claimants in other federal districts even though there was no mutuality of estoppel. But in another case, in which the airline did not appeal a low jury verdict finding the airline guilty of willful negligence beyond the limits of the Warsaw Convention, a subsequent court refused to bind the airline to the determination in the first case.[23] Thus, it is risky to predict the future binding impact of the judgment in a particular case, but the defendants must consider this impact in choosing to change the parties as the plaintiff has originally structured them.

1. *Defendants' Challenges to Plaintiffs' Choice of Plaintiffs*

If the plaintiffs choose to bring separate actions, the defendants may be motivated to consolidate the actions when liability is clear, both with respect to liability and damages, in the hope that a single jury might award less total damages for multiple claimants, than would multiple juries.[24] Pursuing a similar type of strategy in some

[21] *See In re* Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), *aff'd sub. nom.*, Dalehite v. United States, 346 U.S. 15 (1953).

[22] 216 F. Supp. 709, 718-25 (E.D. Wash. 1962), *aff'd sub. nom.*, United Air Lines v. Weiner, 335 F.2d 379, 404 (9th Cir. 1962).

[23] Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965).

[24] *See* United Air Lines v. Weiner, 286 F.2d 302 (9th Cir. 1961), in which the defendant United Air Lines moved for consolidation for all purposes, but the defendant United States moved for consolidation only with respect to liability. On

mass catastrophe cases, the defendants have attempted to force all the plaintiffs to share in one insurance fund through various devices in the nature of bills of peace.[25] When multiple claims arose from a bus accident, the Supreme Court rejected the liability insurer's attempt to deposit the full amount of coverage into the registry of the federal court and to interplead all claimants and enjoin them from suing elsewhere.[26] But this so-called "pie-splitting" interpleader has been successful in some lower courts.[27] Conceivably, this interpleader device might be attempted by the defendants and their insurers in a Warsaw Convention case or in a general aviation case.

The defendant has rarely been able to force the joinder of additional plaintiffs, although the substantial equivalent may be produced by successfully moving for consolidation. There is one recent admiralty case, however, in which the defendant was successful under rule 19[28] in forcing an injured party to join as an additional necessary party plaintiff when the plaintiff and the nonparty were injured in the same boat accident.[29] The court reached this novel but sensible conclusion by a combined literal and liberal reading of the new language in rule 19 describing a party "needed for just adjudication." A more familiar pattern, which might be applicable in aviation cases, occurs when the plaintiff has been compensated for his injury by workman's compensation and the defendant forces joinder of the subrogated insurance company as plaintiff under rule 17[30] as the real party in interest.[31] Here, although there may be circumstances that cast doubt on the validity of the strategy,[32] the de-

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the other hand, if the plaintiffs choose to consolidate, or bring the action as a class action, the defendants may resist the class action. *See* Hobbs v. Northeast Airlines, 50 F.R.D. 76 (E.D. Pa. 1970).

[25] *See* cross-claim by defendants for bill of peace arising from explosion of dynamite truck in Roseburg, Oregon, in British & Overseas Ins. Co., Ltd. v. Pacific Powder Co. v. Gerretson, *reported in* D. LOUISELL & G. HAZARD, JR., CASES AND MATERIALS ON PLEADING AND PROCEDURE 538-48 (1962).

[26] State Farm & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[27] Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964); Pan Am. Fire & Cas. Co. v. Adams, 188 F. Supp. 474 (E.D. La. 1960).

[28] FED. R. CIV. P. 19.

[29] Mendez v. Vatican Shrimp Co., 43 F.R.D. 294 (S.D. Tex. 1966).

[30] FED. R. CIV. P. 17.

[31] United States v. Aetna Cas. Co., 338 U.S. 366 (1949); Sunray Oil Corp. v. Allbritton, 187 F.2d 475 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951); Smallwood v. Days Transfer, Inc., 165 F. Supp. 929 (W.D. Mich. 1958).

[32] Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies*

fendant apparently wants the presence of the insurance company to prejudice the jury,[33] wants to be protected by res judicata or may want to destroy diversity jurisdiction. The subrogated insurance company can usually avoid joinder if it has been careful with its loan receipts.[34]

The defendant may use another variation to force joinder of a plaintiff by raising a counterclaim and using rule 13(h)[35] to add a new party to the counterclaim.[36] But if the counterclaim device is not available for technical reasons, the defendants may try to use rule 14[37] to implead the plaintiff.[38] For example, when sued for wrongful death of pilot, the United States was successful in impleading the pilot's estate to raise a claim based on his negligence,[39] but in an admiralty case, analogous types of claims were presented through counterclaims.[40] Joinder of plaintiffs may also be accomplished in substance by reversing roles and using the declaratory judgment. Thus there are many recent non-aviation cases in which insurance companies try to establish non-coverage by initiating declaratory judgment actions against the insured and joining the victims as parties to bind them to the judgment.[41] This strategy by the insurance company may shift the arena from state to federal

in Jury Trial Cases: An Isolated Jury Project Case Study, 6 NATURAL RESOURCES J. 269 (1966).

[33] Celanese Corp. of America v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954).

[34] Kessner, *Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation*, 39 NEB. L. REV. 452 (1960).

[35] FED. R. CIV. P. 13(h).

[36] 3 MOORE ¶ 13.39.

[37] FED. R. CIV. P. 14.

[38] United States v. Nicholas, 28 F.R.D. 8 (D. Minn. 1961); *cf.* Stahl v. Ohio River Co. v. G.M. Grain River Towing, Inc., 424 F.2d 52 (3d Cir. 1970).

[39] Black v. United States v. First National Bank of Fort Worth, 441 F.2d 741 (5th Cir. 1971). *See also* differences in cross-claim and impleader in Murray v. Haverford Hosp. Corp., 278 F. Supp. 5 (E.D. Pa. 1968).

[40] Moore-McCormick Lines, Inc. v. McMahon, 235 F.2d 142 (2d Cir. 1956) (shipowners first sued officer's widow as administratrix of estate in limitation of liability claim, and widow was allowed to counterclaim as special statutory trustee under the Jones Act, 46 U.S.C. § 688 (1970)).

[41] *Cf.* Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (in which claimant successfully used declaratory judgment against an insurance company despite the absence of an insured as a defendant). *Compare* Allstate Ins. Co. v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div., 264 F.2d 38 (6th Cir. 1959) *with* Fireman's Fund Ins. Co. v. Trobaugh, 52 F.R.D. 31 (W.D. Okla. 1971).

court, but probably cannot eliminate jury trial.[42] Aviation cases involving this strategy are scarce. But since the typical general aviation insurance policy may contain extensive exclusionary clauses,[43] there appears no reason why the declaratory judgment would not be a potent, affirmative weapon for aviation insurers.

2. *Defendant's Challenge to Plaintiff's Choice of Defendants*

When only one defendant has been sued, he is normally prohibited from imposing a joint tortfeasor defendant upon the plaintiff under rule 14 by claiming the plaintiff sued the wrong party or that the other party is solely liable to the plaintiff.[44] Therefore, the defendant will be limited to considering whether to implead a third-party defendant on the grounds that, as stated in rule 14, the third-party defendant "is or may be liable to the defendant for all or part of the claim of the plaintiff against the defendant."[45] On the other hand, if the plaintiff has joined multiple defendants, then the question for each defendant is whether to raise a cross-claim against the co-defendants on the same grounds.[46] In either case, the question is primarily a tactical one for the defendant since it is clear, at least under the rules, that the cross-claim or impleader is not compulsory and the failure to raise it in the first litigation does not preclude a subsequent suit by the defendant for indemnity or contribution.[47]

In choosing to cross-claim or to implead, the defendant must, of course, establish a valid claim for relief under the relevant state law.[48] Most probably the defendant will base this claim either upon indemnification (*i.e.*, that the other defendant is solely responsible

[42] *Cf.* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[43] 2 KREINDLER § 29.08[3].

[44] McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Sternman v. Macloskie, 37 F.R.D. 316 (E.D.S.C. 1965) (cross-claim cannot be asserted in a wrongful-death action against a non-party as a means for one joint tortfeasor to bring in another party as defendant); Non-Ferrous Metals, Inc. v. Saramar Aluminum, 25 F.R.D. 102 (N.D. Ohio 1960).

[45] FED. R. CIV. P. 14.

[46] FED. R. CIV. P. 13(g).

[47] A subsequent court, however, may apply res judicata or collateral estoppel in such a way as to have required a "compulsory" cross-claim in the first suit. Pack v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1960).

[48] 3 MOORE ¶ 14.03[3], at 493 (1963). Impleader of the United States under the Federal Tort Claims Act involves special problems. United States v. Yellow Cab Co., 340 U.S. 543 (1951); *see* Eizenstat & Love, *infra* note 51.

to the defendant), upon contribution (*i.e.*, that the other defendant is proportionately responsible to the defendant) or in the alternative upon both of these theories.[49] Unfortunately, the state law on indemnification and contribution, based upon multiple theories of tort and contract, is highly complex and varies among jurisdictions.[50]

Assuming the defendant can plead a valid claim for relief for indemnification or contribution and can overcome any other procedural barriers, will the defendant choose this course of action? As a general proposition, the advantage to the defendant to implead additional defendants or to cross-claim against existing defendants seems apparent.[51] On the other hand, the defendant might forego the impleader or cross-claim in the hope the liability can be pinned on an absent party, that the award can be minimized, that the presence of the impleader or cross-claim may cause the other defendant to prove the defendant liable when the plaintiff might otherwise fail or that a subsequent suit before a different court and jury might have more potential for victory.[52]

There may also be significant contractual relationships between the defending parties, including the possibility of primary and excess insurance that will affect their preferences for formal defendants. Accordingly, the various pre-existing agreements and further settlements that allocate liability between the defendants may change the original motivation of each defendant to minimize liability by cross-claiming and impleading. Here it is difficult to appraise the strategy of the defendants in absence of disclosure of the arrangement between parties, counsel and the insurance companies, thereby establishing whether the individual defendants' real interests are mutual, antagonistic or mixed. If the money is all coming "from the same barrel anyway," there is little motivation to implead.[53]

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[49] Since FED. R. CIV. P. 8(e)(2) allows alternative pleading and FED. R. CIV. P. 18 allows joinder of claims.

[50] Discussed in section IV of the text.

[51] *See* Eizenstat & Love, *Defendant's Dilemma in Federal Employee Actions: Impleader of the United States*, 38 INS. COUNS. J. 426 (1971).

[52] *Id.*

[53] P.L.I., AIRCRAFT LITIGATION 3D 132 (L. Kreindler, ed. 1972). Another interesting factor is that even if the insurance company wants to implead another defendant, the client may refuse because it will harm his commercial relationship with the proposed defendant. *Id.*

Another factor in the same vein is the variableness of the relationship of the plaintiff to the single defendant or to multiple defendants. Settlements between them at various stages change the strategy. For example, a plaintiff and a potential defendant may unite to put the liability on another defendant.[54] Rule 14(a) theoretically protects a third-party defendant against collusion of the plaintiffs and defendant by providing that "[t]he third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim," but this grants only a modicum of protection,[55] and does not prevent it from happening.

When impleader might be unavailable to the defendant because of inability to serve process or some other limitation, the procedure of vouching in under the Uniform Commercial Code may be a possible device to be used, at least when the claim-over is based upon warranty. Section 2-607(5)(a)[56] of the Uniform Commercial Code might be used, for example, by the defendant seller of an aircraft involved in a general aviation accident when it is alleged that a breach of warranty was the proximate cause of the accident. The seller would notify the manufacturer of the pending action and give the manufacturer the opportunity to appear and defend. If the manufacturer refused to appear then the result should be res judicata

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[54] *Cf.* Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir. 1969), *cert. denied sub. nom.* Addabbo v. Curtiss-Wright Corp., 400 U.S. 829 (1970). Braniff and two passengers were joined as plaintiffs in a suit against Curtiss, the engine manufacturer and raised various claims based upon negligence, implied warranty and express warranty. It was not clear whether the plaintiffs joined initially or the cases were consolidated. Another suit by Braniff against Douglas, the plane manufacturer, was dismissed. The trial court directed a verdict for Curtiss and held the warranty claims barred by limitations. It also denied Braniff's motion to amend its complaint to add as plaintiffs the flight crew of the airplane. The Second Circuit reversed in part, and ordered the negligence count submitted to the jury. The appellate court affirmed, however, the dismissal of the warranty claims, and affirmed the trial court's refusal to allow Braniff to amend to add the flight crew on the grounds it was really a motion for intervention that should be initiated by the flight crew themselves. Subsequently, the same court held that an intervening state court decision required that Braniff's claim for implied warranty be reinstated on the grounds that the date that was to be used for limitations purposes was the date the defect was or should have been discovered rather than the date of sale. 424 F.2d 427 (2d Cir. 1970), *cert. denied*, 400 U.S. 829 (1970). But the warranty claim of the passengers was ultimately barred by the New York statute of limitations.

[55] 3 MOORE ¶ 14.13, at 592-93 (1963); 6C C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1455 at 296-302 (1971).

[56] UNIFORM COMMERCIAL CODE § 2-607(5)(a).

with respect to the manufacturer in any subsequent suit, even though there were no formal impleader.[57]

II. THE FEDERAL SYSTEM

This article has thus far considered the various potential parties, the strategies of their attorneys and the general options open to them under the procedural rules. Further limitations are placed upon these options by the jurisdictional constraints of the federal system, working in the context of the Federal Rules of Civil Procedure.

Unless the United States is sued under the Federal Tort Claims Act,[58] the federal jurisdictional basis for air crash litigation is diversity of citizenship.[59] Although federal standards, such as Federal Aviation Administration regulations, may be involved, the presence of these federal elements does not make the cases arise directly under federal law and thus under federal qustion jurisdiction.[60] Rather, the cases involved are construed to arise under state tort and contract law despite the many federal elements. Under the rule of *Strawbridge v. Curtiss*,[61] there must still be complete diversity between plaintiffs and defendants. The exception for ancillary jurisdiction, however, now generally allows cross-claims, compulsory counterclaims and third-party claims to be brought even though there is not complete diversity between parties to the additional claim.[62]

When there is diversity of citizenship, state court actions may be removed by the defendants, but none of the defendants can be a

[57] *See* Degnan & Barton, *Vouching to Quality Warranty: Case Law and Commercial Code*, 51 CALIF. L. REV. 471 (1963).

[58] 28 U.S.C. §§ 1346(b), 2671-80 (1970). *See* Richards v. United States, 369 U.S. 1 (1962).

[59] 28 U.S.C. § 1332 (1970).

[60] 28 U.S.C. § 1331 (1970). *But see* Town of East Haven v. Eastern Airlines, 282 F. Supp. 507 (D. Conn. 1968) (Federal Aviation Act of 1958 is jurisdictional base for nuisance action).

[61] 7 U.S. (3 Cranch) 267 (1806).

[62] 3 MOORE ¶ 13.15 [1] (1970) (jurisdiction of compulsory counterclaim). *Id.* ¶ 13.36 (jurisdiction of cross-claim). *Id.* ¶ 14.27 (1963) (jurisdiction of third-party claim). Venue restrictions generally have been held not to apply to counterclaims, cross-claims or third-party claims since the venue statutes are only applicable to the institution of an action. *Id.* ¶ 14.28 [2] (1963). Even when new parties are brought in by impleader independent venue need not be met since impleader is regarded as ancillary. *Id.* ¶ 14.28 [2] [3] (1963).

citizen of the state when the action is brought.[63] Although there is a split of authority regarding removal of third-party claims, the sound rule prohibits a third-party defendant from removing.[64] Similarly, neither counterclaims nor cross-claims may generally form the basis for removal.[65] Moreover, when multiple parties and claims are joined in the state court and removal of the whole case is not authorized, then individual claims may be removed only "if separate and dependent."[66] For example, in *Morrison v. Richards Aircraft Co.*,[67] the plaintiff passenger in a private plane, sued an Oklahoma defendant and defendants from three other states in an Oklahoma state court on multiple grounds. One non-Oklahoma defendant attempted to remove on the basis of a separate and independent claim. In granting the plaintiff's motion to remand, the district court relied on *American Fire and Casualty Co. v. Finn.*[68] That case held: "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under section 1441(c)."[69] In making this determination, the pleading of the plaintiff is controlling. Thus, a pleading that alleged only one personal injury for which a single relief was sought could not constitute a separate and independent claim regardless of how many defendants were allegedly liable or whatever their alleged basis of liability.[70]

Under the command of *Erie R.R. Co. v. Tompkins*,[71] the general rule is that the substantive claim for relief for contribution or indemnification in a diversity suit is based upon state law.[72] A question arises, however, when state law require claims for contribution or indemnity to be brought only after judgment against the party

[63] 28 U.S.C. § 1441(b) (1970).

[64] Holloway v. Gamble-Skogmo, Inc., 274 F. Supp. 321 (N.D. Ill. 1967); 1A MOORE ¶ 0.167 [10], at 1051-53 (1961).

[65] Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); 1A MOORE ¶ 0.167 [8], [9] at 1041, 1047 (1961).

[66] 28 U.S.C. § 1441(c) (1970).

[67] 328 F. Supp. 580 (W.D. Okla. 1971).

[68] 341 U.S. 6 (1951). *But see* Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972).

[69] 341 U.S. 6 (1951).

[70] *See* Gray v. New Mexico Military Institute, 249 F.2d 28, 32 (10th Cir. 1957).

[71] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[72] 3 MOORE ¶ 14.03 [3], at 492-94 (1963).

seeking contribution and indemnity. The rule is that a claim may be accelerated into the action in federal court as an impleader or cross-claim, even though state practice would require two suits.[73]

Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*,[74] the federal district court in diversity cases is bound to apply the conflict of law rules of the state in which it is sitting.[75] In addition, another layer of controversy is added by the provisions for venue transfer. If the statutory conditions are satisfied, *i.e.*, transfer is in the interest of justice and for the convenience of parties, the court may transfer the suit to any district or division "where it might have been brought."[76] Reconciliation of the *Klaxon* principle with the venue transfer provision results in the *Van Dusen v. Barrack*[77] rule: the transferee court is to apply the law that would have been applied by the transferor court. Thus, varying state rules in conflicts of laws such as death statute damage limitations,[78] direct action statutes,[79] statutes of limitations,[80] comparative negligence[81] and contribution and indemnity[82] must be filtered through the layers of regulating principles. As Judge Friendly stated when confronted with the question of how to apply statutes of limitations to a South Carolina

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[73] *Id.* ¶ 14.08 at 531.

[74] 313 U.S. 487 (1941).

[75] This principle puts another dimension on the already complex question of choice of law principles in aviation litigation.

[76] 28 U.S.C. § 1404(a) (1970).

[77] 376 U.S. 612 (1964).

[78] Damage limitations are generally considered substantive. *See* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968). *But see* Pearson v. Northeast Aviation, Inc., 309 F.2d 553 (2d Cir. 1962) (en banc opinion reversing panel opinion reported at 307 F.2d 131 (2d Cir. 1962)). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178, *Comments a & b* (1969).

[79] Penney v. Powell, 162 Tex. 497, 347 S.W.2d 601 (1961) (Louisiana direct action statute is inapplicable in Texas).

[80] Statutes of Limitation, for conflict of law purposes, are generally considered procedural but in the case of wrongful death actions have now often been considered substantive. *See, e.g.*, Nolan v. Transocean Air Lines, 276 F.2d 280 (2d Cir. 1960), *vacated and remanded per curiam*, 365 U.S. 293 (1961); Frances v. Herrin Transp. Co., 423 S.W.2d 610 (Tex.), *rev'd* 432 S.W.2d 710 (Tex. 1968). They have also been given substantive effect by borrowing statutes, Conner v. Spencer, 304 F.2d 485 (9th Cir. 1962). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, *Comment f* and § 143, *Comments a* and *c* (1969).

[81] Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962).

[82] Gammage v. Weinberg, 355 S.W.2d 788 (Tex. Civ. App. 1962), *error ref. n.r.e.*

minor widow, who brought suit in New York federal court for the death of her husband in a California air crash:

> Our principal task, in this diversity of citizenship case, is to determine what New York Courts would think the California Courts would think on an issue about which neither has thought.[83]

When an original claim or an impleader claim can be made against the United States under the Federal Tort Claims Act, the effect of state substantive law is only partially diminished. Under the Act, the United States may be sued in the United States District Court for damages for injury caused by the tortious acts of its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[84] As general propositions, when the United States is sued under the Tort Claims Act, it has the procedural right to implead third parties.[85] In an individual case, however, when the source of the particular indemnification claim was held to be the federal common law, it was concluded that Congress had not enacted a substantive remedy.[86] Conversely, the United States may be impleaded for contribution provided the claim could have been brought against the United States in an independent suit.[87] Professor Moore persuasively argues that the substantive basis for indemnification or contribution claims by or against the United States should also be governed by uniform rules derived from the federal common law.[88] A different view, on the other hand, relies heavily upon state law to derive the substantive basis of United States' claims for indemnification or contribution.[89] Thus, when the

[83] Nolan v. Transocean Air Lines, Inc., 276 F.2d 280 (2d Cir. 1960), *vacated and remanded per curiam*, 365 U.S. 293 (1961).

[84] 28 U.S.C. § 1346(b) (1970). *See* Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1213 (1967) (describing 1966 amendments to Federal Tort Claims Act); Richard v. United States, 369 U.S. 1 (1962) (applying ren voi concept to "law of the place where the act or omission occurred" to make reference over to place of plane crash).

[85] *See* United States v. Mike Bradford & Co., 375 F.2d 765 (5th Cir. 1967).

[86] United States v. Gilman, 347 U.S. 507 (1954) (denying right of United States to implead its employees).

[87] United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[88] 3 MOORE ¶ 14.29 (1963).

[89] Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970); Kantlehner v. United States, 279 F. Supp. 122, 124-28 (E.D.N.Y. 1967).

United States is a party to air crash litigation the usual complexity of interstate conflicts problems is intensified by the choice of law provision of the Tort Claims Act and arguments that claims for indemnification on contribution by or against the United States are governed by federal common law. Similar difficulties arise when the original action is brought in state court and the defendant has been unsuccessful in its attempt to implead the United States.[90] The Supreme Court recently showed good sense in *Grubbs v. General Electric Credit Corp.*[91] In *Grubbs*, after a Texan had been sued in Texas state court and had raised a counterclaim for interpleader joining the United States, and the United States improperly removed the action to federal court, the Supreme Court nevertheless upheld a judgment between the original parties because there was diversity of citizenship. The Court effectively distinguished the case of *American Fire & Casualty Co. v. Finn*[92] and partially undercut the impact and force of the rule that a party who removes is not estopped from later asserting lack of removal jurisdiction.

A. *Cross-Claims*

A cross-claim under the Federal Rules is a claim that one party has against a "co-party."[93] It is differentiated from a counterclaim that one party has against an "opposing party."[94] Thus, there must be more than one party on the same side of the law suit to have a cross-claim.[95] To be pleaded as a cross-claim, rule 13(g) also requires that it must: (i) "arise out of the transaction or occurrence which constitutes the subject matter of the original action," or (ii) "relate to any property that is the subject matter of the original action."[96] As expected, there is no adequate definition of the phrase

[90] City of Pittsburgh v. United States, 359 F.2d 564 (3d Cir. 1966).

[91] 405 U.S. 699 (1972).

[92] 341 U.S. 6 (1951) (holding that a party who removes is not estopped from later asserting lack of removal jurisdiction).

[93] FED. R. CIV. P. 13(g).

[94] FED. R. CIV. P. 13(a)(b); 3 MOORE ¶ 13.06 (1972).

[95] W.L. Hailey & Co. v. County of Niagara, 388 F.2d 746, 748 (2d Cir. 1967) (intervenor's claim was allowed although it was not technically a cross-claim as labeled and treated in the court below); Danner v. Anskis, 256 F.2d 123 (3d Cir. 1958) (court dismissed cross-claims between non-diverse plaintiffs for lack of independent jurisdictional basis on questionable ground that a rule 13(g) cross-claim between plaintiffs is limited to cases in which it is made in response to a counterclaim by the defendant).

[96] FED. R. CIV. P. 13(g).

"arising out of the same transaction or occurrence."[97] It is generally agreed, however, that the phrase should be liberally construed because, as Professor Wright noted concerning other joinder rules, "it is more desirable to permit broad joinder at the pleading stage and order separate trials if sound judicial administration so dictates."[98] In addition, another basic procedural element of the cross-claim is that unlike the counterclaim, a cross-claim is permissive and not compulsory.[99] A strong potential for the cross-claim exists in air crash litigation because rule 13(g) states that a "cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant." That is, a party may seek contribution, or seek to impose primary liability by way of indemnification through a cross-claim.[100]

There are many other peripheral technical issues involving cross-claims, such as timing of the cross-claim and amendments raising cross-claims.[101] Suppose, for example, that either a cross-claim is asserted against a co-party for less than 10,000 dollars, or that the co-parties are citizens of the same state, then does the federal court have jurisdiction to entertain the cross-claims? In *Coastal Airlines, Inc. v. Dockery*,[102] a leased airplane was destroyed while being

[97] The cross-claim test for determining the meaning of "transaction or occurrence" is the same as the test for determining whether a counterclaim is compulsory, and is often restated as being whether there is a "logical relationship." LASA Per L'Industria del Marmo, S.P.A. v. Southern Builders Inc., 414 F.2d 143, 147 (6th Cir. 1969): "We understand it to be the purpose of rule 13 and the related rules that all such matters may be tried and determined in one action and to make it possible for the parties to avoid multiplicity of litigation. The intent of the rules is that all issues be resolved in one action, with all the parties before one court, complex though the action may be."

[98] C. WRIGHT, FEDERAL COURTS § 80, at 352 (2d ed. 1970).

[99] But novel interpretations of res judicata or collateral estoppel may have the same effect as making the cross-claim compulsory, *see* note 47 *supra*.

[100] Thomas v. Malco Ref., Inc., 214 F.2d 884 (10th Cir. 1954) (in an action against joint tortfeasors, a cross-claim under the theory of indemnity was held proper under the law of the state concerned, and a judgment in favor of the cross-claimant was affirmed when the execution was limited to the amount actually paid by cross-claimant to the plaintiff). R. LAVINE & G. HORNING, MANUAL OF FEDERAL PRACTICE 285 (1967). *Caveat* questionable decision in Washington Bldg. Realty Corp. v. Peoples Drug Stores, 161 F.2d 879 (D.C. Cir. 1947) in which the cross-claim was disallowed on grounds defendant claimed other defendant was solely responsible and therefore stated no claim against other defendant.

[101] 3 MOORE ¶ 13.34-13.39 (1972).

[102] 180 F.2d 874 (8th Cir. 1950).

operated by the lessee. Both the lessor and the lessee laid claim to the insurance proceeds as a result of an ambiguous purchase option clause in the lease. After the lessor sued the insurance company in state court and the insurance company removed the case to federal court, the insurance company then raised an interpleader claim against the lessor and lessee. The lessor cross-claimed against the lessee for rent due under the lease and demanded a figure less than the jurisdictional amount. The lessee claimed the court had no jurisdiction to hear the cross-claim. The appellate court held, however, that cross-claims under rule 13(g) are ancillary to principal claims to which they are related; therefore the district court had proper jurisdiction of the claim. The same rule would cover non-diverse cross-claimants as well as claims below the jurisdictional amount.[103] By definition, cross-claims must closely relate to the existing action; consequently, cross-claims are treated as within the ancillary jurisdiction of the court. Thus, without independent jurisdictional grounds, the dismissal of the original claim for lack of jurisdiction will also cause the cross-claim to fall with it.[104]

The preferred rule with respect to the venue of a cross-claim is that no objection can be raised if the venue of the original action was proper since venue requirements apply to the initiation of action.[105] It is still possible, however, to object successfully to a cross-claim on grounds of improper venue in certain instances when there is a jurisdictional or venue defect in the main action.[106] In *Hasburgh v. Executive Aircraft*[107] the deceased and his private pilot were killed when their light aircraft struck a power line on its final approach to the airport. The widow of the deceased brought a diversity action for wrongful death against the pilot's estate, the corporation that owned the plane, the city where the crash occurred, the operator of the local airport at the crash site and the telephone company that had installed the phone line. The suit was brought in

[103] *See* Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966) (defendants in automobile suit).

[104] Shapiro v. Gulf, Mobile and Ohio R.R., 256 F.2d 193 (7th Cir. 1958).

[105] Southwest Lime Co. v. Lindley, 12 F.R.D. 484 (W.D. Ark. 1952); C. WRIGHT, FEDERAL COURTS § 80, at 353 (2d ed. 1970).

[106] *See* Pierce v. Perlite Aggregates, Inc., 110 F. Supp. 684 (N.D. Cal. 1952) (dismissal of patent claim did not carry with it the cross-claim when the cross-claim was supported by diversity but venue of cross-claim was left open for trial of issue whether defendant was doing business in the district).

[107] 35 F.R.D. 354 (W.D. Mo. 1964).

the Western Division of the Western District of Missouri, rather than in the Central Division where the accident occurred. The corporation that owned the destroyed aircraft filed a cross-claim against the city and the telephone company; the city filed a motion to dismiss the main claim and cross-claims for lack of proper venue on the grounds that the city was not located within the division where the suit was brought. The court granted the motion for dismissal with respect to the city without prejudice by reasoning that, under Missouri law, the action was a local action, either on the theory that the res, which was the subject matter of the action, determines the proper venue, or on the theory that an action against a city is a local action that should be brought in the particular division where the city is located. While the court acknowledged that the better rule is that whether an action is local or transitory for federal venue purposes should be determined by a uniform federal rule, the court felt that the numerical weight of the decided cases held that state law and public policy of the forum is determinative of this issue. Accordingly, rather than complicating the litigation by transferring it under section 1404(c) or section 1404(b), the court dismissed the claim against the city without prejudice so that the plaintiff could re-file against the city in the Central Division of the Western District.

In complicated aircraft litigation the plaintiff frequently may wish to amend his complaint to add or drop defendants as his strategy dictates. The situation can arise in which the plaintiff dismisses his claim against a specific defendant, but a cross-claim has been filed against that defendant by another defendant in the action. In *Greylock Airways, Inc. v. Broome County Aviation, Inc.*,[108] a mid-air collision occurred as the result of the alleged negligence of several defendants including one Holleran, an FAA employee. The plaintiffs sought to dismiss their claims against Holleran, amend their complaint against Broome County Aviation to present additional theories of liability, and to add the United States as a defendant. Several defendants, including Broome County Aviation, objected to the plaintiff's proposal and asked that Holleran be retained to respond to the cross-claims asserted against him. The court held that the dismissal of the plaintiff's claim against Holleran did not dismiss him as a third-party defendant to the cross-claims

[108] 10 Av. Cas. 17,808 (E.D.N.Y. 1968).

of the other defendants; Holleran would be continued as a party to the action in that capacity but would be dismissed as a defendant in the main action.

In addition to the plaintiff dropping defendants there exists the possibility that cross-complaints filed against one defendant will be dismissed as the result of the final determination of the merits of the main action. In a New York case resulting from the crash of an American Airlines plane into the East River,[109] cross-complaints by American Airlines against the manufacturer of the plane's altimeter were severed from the main action, and the cross-defendant's motion to dismiss was held in abeyance until judgment was rendered in the main action. When the jury's findings revealed that American's pilot was negligent in the operation of his aircraft and that the tragedy did not result from any malfunctioning of the altimeter, the motion for summary judgment dismissing the cross-complaints was granted.

B. *Impleader*

Rule 14 permits a defendant (or a plaintiff against whom a counterclaim is made) to bring in as a third-party defendant a person not a party to the principal action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant.[110] "This procedure is intended to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action thus administering complete and evenhanded justice, expeditiously and economically."[111] Third-party proceedings under rule 14 should be distinguished from cross-claims under rule 13 that permit a party to cross-claim against a person who is already a party to the action.[112] In addition, there are practical differences between the two procedures. For example, there are problems in serving process on the impleaded party.[113] Further, local rules in Pennsylvania prohibt bring an impleader after six months of the

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[109] Kemach v. American Airlines, 226 N.Y.S.2d 595 (N.Y. Sup. Ct. Kings County 1962), *rev'd on other grounds*, 229 N.Y.S.2d 721 (App. Div. 1962).

[110] FED. R. CIV. P. 14.

[111] C. WRIGHT, FEDERAL COURTS § 76 (2d ed. 1970).

[112] FED. R. CIV. P. 13.

[113] See discussion of new "bulge" service within 100 miles radius of the court in 2 MOORE ¶ 4.42 [2], [3] (1967).

initial action, but that rule is not applicable to cross-claims.[114] Impleader may also be considered to be more at the discretion of the court, as for example, when a federal court declined an employer's impleader against its employee on the ground that it was a sham to divert jury attention.[115]

Much controversy has arisen over the question of whether there is subject matter jurisdiction and venue of third-party complaints when no independent ground of federal jurisdiction exists or when venue would otherwise be improper. For instance, in *Lewis v. United Air Lines Transport Corp.*,[116] the district court held that the general venue statute applied to third-party proceedings. In *Lewis*, four actions were brought in Connecticut state court against two defendants as the result of the crash of a United Air Lines plane in Ohio. After the case had been removed on diversity, one of the defendants sought to bring in a steel manufacturer under rule 14(c), alleging that an engine cylinder was defective. The steel company argued that the third-party proceeding lacked proper venue and this view was adopted by the federal district court. That court held that a third-party proceeding was in substance an "original action" with respect to third persons within the meaning of the venue statute and not an ancillary proceeding. The third-party complaints in this case were therefore dismissed for lack of proper venue.

It is now clear, however, that *Lewis* represents a minority view. Most recently the Third Circuit considered the matter in a case that did not involve aviation litigation, but showed the extent to which federal courts will now extend ancillary jurisdiction. In *Schwab v. Erie Lackawanna R.R. Co. v. Sauers*,[117] the district court was asked

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[114] Murray v. Haverford Hosp. Corp., 278 F. Supp. 5 (E.D. Pa. 1968). *Contra*, Fogel v. United Gas Improvement Co., 32 F.R.D. 202 (E.D. Pa. 1963) which allowed circumvention of the local rule by permitting defendants to cross-claim against new parties.

[115] Goodhart v. United States Lines Co., 26 F.R.D. 163 (S.D.N.Y. 1960).

[116] 29 F. Supp. 112 (D. Conn. 1939).

[117] 438 F.2d 62 (3d Cir. 1971) *noted in* Note, *The Joinder of Claims to a Third-Party Impleader Without Independent Jurisdictional Ground—Herein Also of the Camel and His Pendent Fleas*, 37 J. AIR L. & COM. 389 (1971) and Comment, *Federal Procedure—Ancillary Jurisdiction - Third-Party Plaintiff May Assert Claim for Affirmative Relief Against Third-Party Defendant Under Rule 18(a) Without Independent Jurisdictional Grounds if Claim Arises from the Same Transaction or Occurrence as Claim for Liability-Over-Schwab v. Erie Lackawanna R.R.*, 46 N.Y.U.L. REV. 634 (1971).

to hear an additional claim that the third-party plaintiff sought to assert against the third-party defendant. The plaintiff was an employee of the Erie Railroad at the time the train collided with a truck at a private railroad crossing. He brought an action against Erie under the Federal Employer's Liability Act and against the owner of the railroad crossing for negligence. The defendants impleaded the owner of the truck, the estate of the truck driver and the lessor of the truck. In its third-party complaint, the defendant also asserted a separate "counter-claim" for damages to the train of less than the jurisdictional amount and the third-party defendants moved to dismiss because of lack of jurisdiction. The district court ruled the third-party defendants were not "opposing" parties against whom a counterclaim could be lodged, and that there was no authority in the rules for the procedure and dismissed the claim. On appeal, the Third Circuit held that a defendant who properly impleads third-parties on the grounds they are or may be liable to him for all or part of the original plaintiff's claim against him may also include a separate claim against the impleaded party, based on the same transaction, even though the claim is without independent jurisdictional basis. Since the defendant's claim was not a counterclaim or a cross-claim within the scope of rule 13, it was categorized as a separate non-compulsory claim. "Rule 14 must be read in conjunction with rule 18(a), as amended; read together these two rules give the third-party plaintiff a proper procedural route for asserting its affirmative claim for damages."[118]

Under rule 14, after the third-party has been impleaded, the plaintiff in the main action can amend his complaint to assert against the third-party defendant any claim "arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the original defendant."[119] Suppose, however, there are no independent grounds of federal jurisdiction to support the original plaintiff's claim against the third-party defendant. Then the majority rule requires, contrary to the general rule of ancillary jurisdiction that exists between the third-party plaintiff and the third-party defendant, that independent grounds of federal jurisdiction must exist for an original plaintiff to assert a claim against the

[118] Schwab v. Erie Lackawanna R.R., 438 F.2d 62, 71 (3d Cir. 1971).

[119] FED. R. CIV. P. 14.

third-party defendant.[120] This principle is supported by a recent case, *Corbi v. United States v. Trans-World Airlines*,[121] in which the litigation arose from an accident that occurred as the plaintiff's light aircraft and a TWA constellation collided on the ground while they were responding to the traffic controller's directions. The plaintiff brought suit against the United States based upon the negligence of the Pittsburgh airport controllers under the Federal Tort Claims Act. The defendant United States filed a third-party action against TWA alleging that the damage was caused by the negligent operation of the giant aircraft. TWA denied the claim and asserted that the controller was negligent and that the plaintiff was contributorily negligent. At pretrial the plaintiffs moved to amend their complaint and to add TWA as a defendant. The amendment contained a separate non-federal cause of action alleging TWA's negligence based on the common law of Pennsylvania. Although there was diversity between the plaintiff and TWA, the relief sought was less than the jurisdictional amount. The district court held that the plaintiff could not add the impleaded party as a party defendant because the jurisdictional amount was lacking with respect to his claim.

As previously mentioned,[122] when there is no independent ground for federal jurisdiction to support a claim by an original plaintiff against a third-party defendant, that claim is typically dismissed. Presumably the reverse situation would also be true; a claim by a third-party defendant against an original plaintiff not supported on independent jurisdictional grounds would fail. But the Fifth Circuit has recently sustained jurisdiction in that type of case. In *Revere Copper & Brass, Inc. v. Aetna Casualty and Surety Co.*,[123] a non-aviation case, the court of appeals held that independent grounds for federal jurisdiction were unnecessary to support a claim by the

[120] 3 MOORE ¶ 14.27 (1963).

[121] 298 F. Supp. 521 (W.D. Pa. 1969).

[122] *See* note 12 *supra*.

[123] 426 F.2d 709 (5th Cir. 1970), *noted in* Comment, *Federal Procedure—Rule 14(a)—Independent Grounds for Federal Jurisdiction Held Unnecessary to Support Counterclaim by Third-Party Defendant Against Original Plaintiff—Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 45 N.Y.U.L. REV. 1303 (1970); Comment, *A Third Party Defendant's Claim Against Plaintiff Upheld Despite Absence of Independent Jurisdictional Grounds—Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970), 1970 WASH. U.L.Q. 511; Comment, *Federal Rules of Civil Procedure—Ancillary Jurisdiction —Third Party Defendant's Counter-Claim Against Plaintiff Without an Independent Basis of Federal Jurisdiction*, 59 KY. L.J. 506 (1970).

third-party defendant against the original palintiff. The plaintiff, brought an action based on diversity alleging that the defendant, as surety for the Fuller Construction Company was liable for Fuller's breach of two construction contracts with the plaintiff. The defendant impleaded the third-party, Fuller, alleging that Fuller had agreed to indemnify the defendant for losses resulting from the surety bond. Fuller denied the allegations in the plaintiff's complaint and claimed damages against the original plaintiff under rule 14(c), asserting that the original plaintiff was liable for the breach of the construction contracts. The plaintiff moved for dismissal on the grounds that the claim asserted against it by Fuller was unsupported by an independent jurisdictional basis. The Fifth Circuit affirmed the district court's rejection of this contention on the theory that ancillary jurisdiction encompasses all claims that bear a logical relationship to the main action.[124]

It seems that the previous court in *Corbi*[125] could have used this reasoning to reach the result that no independent jurisdictional basis is needed for a plaintiff's claim against a third-party defendant. Moreover, even though allowing a plaintiff to claim against a third-party defendant irrespective of independent jurisdictional basis is objectionable in that it allows plaintiffs to avoid *Strawbridge v. Curtiss*,[126] nevertheless, current theories of minimal diversity and ancillary jurisdiction ought to sustain this approach.[127]

[124] Comment, *Federal Procedure—Rule 14(a)—Independent Grounds for Federal Jurisdiction Held Unnecessary to Support Counterclaim By Third-Party Defendent Against Original Plaintiff—Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 45 N.Y.U.L. REV. 1303 (1970). "It further explained the theory of ancillarity by reviewing the application of the doctrine to other joinder devices under the federal rules. The court found that the logical relationship requirement is satisfied when either the aggregate of operative facts underlying the main claim serves as a basis for both that complaint and the secondary claim or the plaintiff's claim activates a secondary claim in the defendant or other party which otherwise would have remained dormant. Since Fuller's [the third-party's] claim arose from the core of facts that served as the basis for Revere's [the plaintiff's] claim, the court concluded that it was within the lower court's ancillary jurisdiction."

[125] 10 Av. Cas. 17,808 (E.D.N.Y. 1968). When the United States is a defendant under the Federal Tort Claims Act, pendent jurisdiction ought also support claims against other parties defendant. Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970).

[126] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Note, *The Joinder of Claims to a Third-Party Impleader Without Independent Jurisdictional Ground —Herein Also of the Camel and His Pendent Fleas*, 37 J. AIR L. & COM. 389 (1971).

[127] *Cf.* The view that, contrary to the present rule, ancillary jurisdiction should be extended to cover permissive counterclaims. Green, *Federal Jurisdiction Over*

III. CONTRIBUTION AND INDEMNITY

A. *In General*

The basic distinction between contribution and indemnity is that contribution distributes the loss among the tortfeasors by requiring each to pay his proportionate share while indemnity shifts the entire loss from one tortfeasor, who has been compelled to pay it, to another, who bears it instead.[128] As Prosser observes the two terms are often confused, and there are many cases in which indemnity has been allowed under the name of "contribution."[129] The common law rule prohibited contribution between those who are regarded as joint tortfeasors. At last count, however, nine states have adopted contribution by judicial decision, and twenty-three states, including Texas, have a statute providing for contribution.[130] But the statutes are not uniform and have been subjected to much amendment. It is significant that even the most recent Uniform Contribution Among Joint Tortfeasors Act[131] takes no position on the power of a single defendant to force joinder of another defendant or to implead him.[132]

In some states, for example New York, the common law rule has been modified to the extent that joint tortfeasors in *pari delicto* have a right to contribution among themselves, but only to the extent that the plaintiff has chosen to join them in the original action.[133] In still other states, a joint tortfeasor, who has been cast in judgment, may sue the other joint tortfeasor for contribution, usually after he has paid the judgment.[134] Thus the various rules of state law concerning the circumstances under which a defendant may implead a person who may be a joint tortfeasor causes difficulties in the uniform application of federal rule 14.

In theory the operative effect of rule 14 cannot alter a party's

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Counterclaims, 48 N.W.U.L. REV. 271 (1953); *see* concurring opinion of Judge Friendly in United States v. Heyward-Robinson Co., 430 F.2d 1077, at 1088-89 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

[128] W. PROSSER, LAW OF TORTS § 51, at 310 (4th ed. 1971).

[129] *Id.*

[130] *Id.* § 50 at 306.

[131] *Id.* § 50 at 307 n.63.

[132] *See* note 128 *supra.* § 50, at 307, n.63.

[133] 3 MOORE ¶ 14.11, at 571 (1963). *But see* Author's Note following n.198, *infra.*

[134] *Id.*

substantive right, or lack of right, to contribution. But "if there is a substantive right to indemnity or contribution, the procedure for its enforcement is rule 14."[135] While there is a dissenting view to the contrary,[136] it is clear that rules 13(g) and 14 can accelerate the claim, even though under state law the two claims would have to be brought in two suits seriatim.[137] When the federal court does allow acceleration, to satisfy requirements under a state's contribution law that the party has actually paid more than his pro rata share of a judgment, the federal court can enter a conditional judgment on behalf of the one defendant against the third-party defendant.[138]

Indemnification law, as noted earlier,[139] operates independently of contribution law and is based upon the conceptual theory that the entire loss is shifted from one defendant who is technically liable, to another defendant who rightfully should bear the loss. Thus, it is generally agreed that there may be indemnity in favor of one who has been held responsible on the basis of negligence imputed to him from another, as when an employer is vicariously liable for the tort of his employee.[140] Further, to be entitled to indemnity, the defendant need not be totally free of fault. Accordingly, it is generally agreed that there may be indemnity in favor of one who was only under a secondary duty when another was primarily responsible.[141] For instance, a landowner held liable for injuries caused by the negligence of his independent contractor is entitled to indemnity from the contractor.[142] Thus, one who has been guilty of only passive negligence may have the right to indemnity from the active wrongdoer.

The active-passive test for determining whether indemnity is proper among joint tortfeasors has been considerably developed by

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[135] *Id.*

[136] D'onofrio Constr. Co. v. Recon Co., 255 F.2d 904 at 911 (1st Cir. 1958). This dissent cites no authority other than the general *Erie* principles of *Ragan* and *York*.

[137] Dennler v. Dodge Transfer Corp., 201 F. Supp. 431, 440, n.4 (D. Conn. 1962); *see* Brown v. Cranston, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); *Annot.*, 148 A.L.R. 1178.

[138] Smith v. Whitmore, 270 F.2d 741 (3d Cir. 1959).

[139] *See* note 128 *supra*.

[140] W. PROSSER, LAW OF TORTS § 51, at 311 (4th ed. 1971).

[141] 3 MOORE ¶ 14.03 [3], at 492 (1963).

[142] City of Amarillo v. Stockton, 158 Tex. 275, 310 S.W.2d 737 (1958).

New York courts.[143] Of course the problem with the test is that it is very difficult to determine what is active and what is passive:

> The decisions turn on a disparity in culpability between the parties, with the more negligent party being held liable over to the less negligent. This disparity would seem to be a mixed question of law and fact. The judge must ultimately determine whether the difference in culpability is such as to merit recovery, but it is the responsibility of the judge to determine whether the nature of the parties' actions justifies turning the matter over to the jury.[144]

Take, for example, two federal court cases both applying New York law under the Federal Tort Claims Act. In an action arising from a taxi collision with a mail truck, the passenger sued the taxi and the United States. The district court denied the United States' attempt to cross-claim against the taxi on the grounds New York does not allow indemnity to an actively negligent tortfeasor.[145] On the other hand, when a plaintiff sued the United States and a doctor for medical malpractice the United States could cross-claim for indemnity against the doctor.[146]

Under New York law, in *Sebo v. United Air Lines, Inc.*,[147] the plaintiff sued United Air Lines and Douglas Aircraft Corp., the plane's manufacturer, for damages resulting from the crash of the United Air Lines plane in which the plaintiff's decedent was killed. Prior to the crash the plane had been recalled by Douglas to make modifications and correct certain defects. United Air Lines filed a cross-claim under rule 13(g) against Douglas alleging that the defective and hazardous conditions that caused the crash existed through the fault and negligence of Douglas in failing to correct the defects before releasing it to United Air Lines for service. Douglas moved to strike the cross-claim but the court denied the motion holding that under New York substantive law, if one of the parties is only secondarily liable, he may cross-claim against the primarily

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[143] *See* Note, *Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782 (1960); *see also* Feirich, *Third Party Practice*, 1967 ILL. L.F. 236. *But see* Author's Note following n.198, *infra.*

[144] Note, *Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782, 787 (1960).

[145] Suarez v. United States, 186 F. Supp. 43 (S.D.N.Y. 1960).

[146] Sutherland v. United States, 23 F.R.D. 664 (E.D.N.Y. 1959).

[147] 10 F.R.D. 327 (S.D.N.Y. 1950).

liable defendant for indemnity against any amount the first defendant may have to pay.

B. *The Law in Texas*

Claims for indemnity in Texas are still generally based on the common law. But the state does have a contribution statute[148] that provides for contribution against a joint tortfeasor when these elements are met: (i) there is a common liability on the part of the negligent tortfeasors,[149] (ii) there is a compulsory discharge of this common liability accruing when a judgment is rendered,[150] and (iii) one party bears an unequal portion of the common burden.[151] Article 2212 does not apply when the right of indemnity, or recovery by and between defendants exists under common law.[152] Texas no longer uses the active-passive test employed by many states to determine whether contribution or indemnity is the proper remedy. Rather, the proper test to be used to make this distinction is as follows:

> When plaintiff's injuries are caused by the negligence of both tortfeasors, but one tortfeasor also breaches a duty to the other, then the tortfeasor who breaches no similar duty is entitled to indemnity. On the other hand, indemnification is not available if there are joint tortfeasors who are in *pari delicto* and neither breaches a duty toward the other; then contribution would be appropriate.[153]

This Texas law of contribution and indemnity was recently applied by a federal court in an aviation case.[154] Two passengers and a pilot were flying southwest from Texarkana to San Antonio. The pilot held a visual rating but no instrument rating. As the plane passed over Longview, Texas, the pilot received a weather report that there were storms in the Austin area and as the plane neared Waco the pilot requested further weather information. Waco contacted Austin and was told that there was a solid east-west weather front

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[148] TEX. REV. CIV. STAT. ANN. art. 2212 (1917).

[149] 13 TEX. JUR. 2D, *Contribution* § 12 (1960).

[150] Brown & Root, Inc. v. United States, 198 F.2d 138, 142 (5th Cir. 1952).

[151] Dallas Ry. & Terminal Co. v. Harmon, 200 S.W.2d 854, 855 (Tex. Civ. App. 1947) *error ref.*

[152] Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449 (1941).

[153] Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949); Radoff, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 329 (1965).

[154] Gill v. United States, 429 F.2d 1072 (5th Cir. 1970).

and that the plane should put down in Waco to let the front pass. Waco, however, radioed to the pilot that there were "numerous cells." This terminology is generally understood to mean that there is not a solid line and that a plane can fly through the bad weather. Thus, the pilot had an inaccurate conception of the weather situation. Consequently, the plane was caught in a severe thunderstorm and crashed as it attempted to make an instrument landing. After the pilot's estate settled with the estates of the two passengers for 120,000 dollars, the passengers then sued the United States; the United States impleaded the pilot's estate as a third-party defendant claiming contribution. The issue for the trial judge, sitting without a jury, was basically one of negligence and causation—who was at fault and caused the crash. The district court found that the government's air controller in Waco negligently gave inaccurate, incomplete and reasonably misleading weather information. Consequently, the plane was exposed to weather that had been improperly described and located; this negligence was the proximate cause of the crash. The trial judge found 842,815 dollars damages and entered judgment against the United States but made no specific finding of negligence by the pilot. The appellate court therefore reversed and remanded for further findings so that Texas law of contribution could be applied. Under Texas law,[155] when the nonjoinder of a joint tortfeasor (the pilot) results from a settlement with that tortfeasor with a covenant not to sue (beween the pilot and the two passengers), the plaintiff is limited to recovery of a damage judgment against the remaining tortfeasor (the United States) of either one-half of the total damages found by the trier of fact (one-half of 842,815 dollars or 421,407.50 dollars), or the difference between the settlement figure and the amount of the verdict (842,815 dollars minus 120,000 dollars or 722,815 dollars), whichever is smaller. Thus, if the pilot was found to be a joint tortfeasor and if a covenant not to sue was involved, the settlement with his estate by the plaintiffs would entitle the government to reduce the total judgment against it by one-half pursuant to the Texas rule. If the pilot were found not to be a joint tortfeasor on remand, then the

[155] Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964), *noted in* Note, 18 BAY L. REV. 532 (1966); Casenote, 3 HOUST. L. REV. 141 (1965); Note, *Settlement With One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of the Damages*, 19 SW. L.J. 650 (1965); and Recent Decision, 8 S. TEX. L.J. (1966).

government would at least be entitled to a credit for the 120,000 dollars previously paid by the pilot's estate to the plaintiffs.

C. *Other Recent Aviation Cases Applying State Substantive Law*

Since there is much variation between the substantive law of indemnity and contribution among the different states,[156] it is only possible to explore recent federal court aviation cases applying various provisions of state substantive law. In *Black v. United States v. First National Bank of Fort Worth*,[157] the pilot, Black, left Baton Rouge for Fort Worth in his private aircraft without having filed a flight plan or having sought a weather briefing. While still over Louisiana, he contacted a flight service station that advised him where to set his altimeter but did not inquire into his course or destination. Thus, he was not advised that most of the area into which he was heading was engulfed with a severe thunderstorm. Consequently, the plane crashed in the storm. The pilot's wife sued the government under the Federal Tort Claims Act because of the negligence of the flight station operator for failing to inquire with respect to the course or destination of the plane or advising the pilot of the severe storm. The government filed a third-party complaint against the pilot's estate, and the pilot's estate filed a cross-claim against the government. The plaintiff was awarded judgment in the district court against the government for 250,000 dollars and then awarded contribution over against the pilot's estate for one-half of the judgment on the finding that the accident was caused by the concurrent negligence of the pilot and the weather station.[158] The Fifth Circuit reversed, holding that government's negligence "had so far spent itself as to be too small for the law's notice, and was so completely superseded by that of the pilot that it was no longer a material element contributing to the tragic results that ensued."[159]

Since the substantive right to indemnification may depend upon active - passive distinctions, the plaintiff's original pleading may control the subsequent ability of the defendant to implead someone else. In *Schipper v. Lockheed Aircraft Corp.*,[160] the plaintiff crew

[156] W. PROSSER, LAW OF TORTS § 50, at 308 (4th ed. 1971).

[157] 441 F.2d 741 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971).

[158] 303 F. Supp. 1249 (N.D. Tex. 1969).

[159] 441 F.2d 741 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971).

[160] 278 F. Supp. 743 (S.D.N.Y. 1968).

member brought suit against Lockheed Aircraft Corp., the manufacturer, for injuries suffered when the taxiing aircraft collapsed on the ground and was destroyed by fire. Lockheed Aircraft then impleaded Eastern Airlines, who sought to dismiss the third-party complaint on a motion for judgment on the pleadings. The plaintiff's allegation that the aircraft manufacturer's negligence in the design and manufacture of the plane caused the collapse and failure of the landing gear constituted a charge that the manufacturer was actively negligent. Eastern's motion for judgment on the pleadings was granted because under New York substantive law there is no right of indemnity when the original defendant is charged solely with active negligence.[161]

In *Ingham v. Eastern Air Lines, Inc.*,[162] the plaintiff's decedent was killed when the aircraft crashed while attempting to land at Idlewild International Airport in New York City. At the time of the crash there was a swirling ground fog that impaired the clear visibility of the runway. The plaintiff brought separate actions against Eastern and the government. Each defendant filed third-party claims against the other for indemnity. The two actions were selected as test cases from the number of those filed to determine the issues of liability and the right to indemnity. The Second Circuit affirmed the district court's finding that the crash was a result of the concurrent negligence of the Eastern Airlines' pilot and air traffic controller, and consequently there could be no indemnity from one defendant against the other based on the substantive law of New York.

In *United Air Lines, Inc. v. Wiener*,[163] there was a mid-air collision between a United States Air Force aircraft and a United Air Lines DC-7, killing forty-nine people near Las Vegas, Nevada on April 21, 1958. At the time of the disaster, the Air Force jet was on a training mission executing diving maneuvers for simulated combat. Thirty-one lawsuits arose from the disaster, and their appeals were consolidated in this case. United Air Lines was a defendant in all thirty-one actions, and the United States was a co-defendant in the twenty-two non-government employee cases. In the twenty-two non-

[161] *Id.* at 745 *citing* Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 430, 174 N.E.2d 516, 518, 214 N.Y.S.2d 428, 431 (1961).

[162] 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

[163] 335 F.2d 379 (9th Cir.), *cert. dis.*, 379 U.S. 951 (1964).

government employee cases, the United States sought contribution from United Air Lines; United Air Lines sought indemnity from the government in all thirty-one cases. Twenty-four of the suits were filed in the Southern District of California where they were tried together on a consolidated basis. The claims between United Air Lines and the government on the issues of contribution and indemnity were tried to the court, which denied indemnity to United Air Lines in all twenty-four cases. In the other seven cases filed in Nevada, United Air Lines was also denied indemnity. United Air Lines appealed all of the cases and the Ninth Circuit reversed on the indemnity issue in the non-government employee cases. While the pilots of both planes were found to be negligent, the different character and degree of their negligence warranted indemnity in favor of United Air Lines in the twenty-two non-government employee cases. In the nine cases involving government employees, however, United's claim for indemnity was denied because, under section 7(b) of the Federal Employee's Compensation Act,[164] there was no underlying liability on the part of the government to the employee and therefore no basis for indemnity.[165]

In *Kantlehenr v. United States v. Boeing Co.*,[166] the original action arose from the crash of a Pan American 707 on December 8, 1963, near Elkston, Maryland. At the time of the crash decedent was the plane's flight engineer. His widow sued the United States under the Federal Tort Claims Act for failing to provide the aircraft with proper weather information. The government filed third-party claims for contribution or indemnity against the manufacturer (Boeing) and the airline (Pan American); both third-party defendants moved to dismiss. The district court granted Pan American's motion, both with respect to contribution and indemnity, but granted Boeing's motion only with respect to indemnity. The claim against Pan American for contribution was dismissed on the ground that under either New York or Maryland law, the employee's exclusive remedy was workmen's compensation and precluded the impleader of the employer.[167] Both claims for indemnity against Pan American and Boeing were dismissed upon a finding that under the

[164] 5 U.S.C. § 8116(c) (1970).

[165] 335 F.2d 379, 402 (9th Cir.), *cert. dis.*, 379 U.S. 951 (1964).

[166] 279 F. Supp. 122 (E.D.N.Y. 1967).

[167] *Id.* at 128.

law of either state, the alleged conduct of the government amounted to active negligence, and that there was no "factual disparity" between the third-party defendants that would lead to an unjust or unbalanced judgment if it were found that the tortfeasors were in *pari delicto* and indemnity were not allowed.[168] The court, without explanation, however, found that factual issues still remained with respect to the contribution claim against Boeing and accordingly refused summary judgment at that stage.[169]

Finally, in *Maryland v. Capital Airlines, Inc.*,[170] multiple plaintiffs sued the airline and the manufacturer in the Southern District of New York for damages resulting from passengers' deaths caused by a 1959 air crash near Chase, Maryland. Vickers, the manufacturer, filed cross-claims seeking indemnity and contribution against Capital Airlines, and in actions in which Capital had already settled with plaintiffs Vickers filed third-party complaints against Capital. Capital then completed settlement with all plaintiffs and Capital's motions to dismiss Vickers' cross-claims and third-party complaints were granted. With respect to the indemnity claim, both New York and Maryland law precluded an alleged active tortfeasor (Vickers) from claiming indemnity.[171] With respect to contribution, New York law applied under the New York center of gravity theory. Since Capital had been dismissed as a defendant, the court concluded that the lawsuit was the same as if Vickers had been sued as sole defendant and that under these circumstances no right of contribution existed under New York law.

IV. MULTIDISTRICT LITIGATION

The operation of state substantive and federal procedural rules with respect to contribution, indemnity, cross-claims and impleader is tested most severely in multidistrict litigation. In *Allegheny Airlines, Inc. v. LeMay*,[172] a private aircraft flew into the tail of an Allegheny jet as it approached a landing in Indianapolis. Some seventy suits were filed in various district courts across the country. The Judicial Panel on Multidistrict Litigation transferred all of the

[168] *Id.* at 128-29.

[169] *Id.* at 129.

[170] 280 F. Supp. 648 (S.D.N.Y. 1964).

[171] *Id.* at 650.

[172] 448 F.2d 1341 (7th Cir.), *cert. denied*, 404 U.S. 1001 (1971).

cases to the Southern District of Indiana for pretrial discovery proceedings. At this point, Allegheny filed a third-party complaint under rule 14 against the pilot's administrator. The administrator's motion to dismiss the third-party complaint was granted; the district court then denied Allegheny's motions for entry of a partial final judgment under rule 54(b), or for certification of the question for immediate appeal under section 1292(b).[173] Twenty-six notices of appeal were consolidated by the Seventh Circuit to get the question before that court, and then the administrator moved to dismiss the appeals. The Seventh Circuit in part dismissed the appeals and in part affirmed, thus indirectly upholding the district court's dismissal of the third-party complaints. The main grounds were that had the administrator been impleaded, he would have had to defend in twenty-six suits in eight different jurisdictions; unless a judgment were first rendered against Allegheny, his defense in those actions might turn out to be unnecessary.

V. FUTURE PROSPECTS

After ten years in the making, the American Law Institute has proposed a comprehensive bill to provide for the division of jurisdiction between state and federal courts.[174] Since this bill would substantially overhaul Title 28 of the United States Code, many aspects of air crash litigation in the federal courts would be affected. But some features are prominent. The bill would reduce diversity jurisdiction by an estimated 11,000 cases.[175] This reduction would be accomplished by providing that original or removal diversity jurisdiction cannot be invoked by in-state citizens, nor by businesses that maintain a "local establishment," nor by "commuters."[176] Another section of the statute provides that citizenship of decedents and wards would be determinative for diversity purposes,[177] rather than the citizenship of the executor, administrator or guardian. Never-

[173] 28 U.S.C. § 1292(b) (1970).

[174] S. 1876, 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 1876].

[175] *Hearings on S. 1876 Before the Subcomm. on Improvements In Judicial Machinery of the Comm. on the Judiciary on The Federal Court Jurisdiction Act of 1971*, 92d Cong., 1st Sess., pt. 1 at 156, 766 (1971) [hereinafter cited as *Hearings S. 1876*].

[176] S. 1876 § 1302(a), (b), and (c).

[177] S. 1876 § 1301(b)(4).

theless, the bill does not move solely in the direction of reducing diversity jurisdiction.

Chapter 160, entitled "Necessary Parties Dispersed In Different Jurisdictions," represents an expansion of diversity jurisdiction by providing jurisdiction based upon minimal diversity and authorizing nation-wide service of process in "any civil action in which several defendants who are necessary for just adjudication of the plaintiff's claim are not all amendable to process of any one territorial jurisdiction." It is interesting to speculate whether this section and its related sections would apply to cover the *Allegheny Airlines v. LeMay* case, previously discussed,[178] in which after a multidistrict transfer to Indiana for pretrial, impleader of the light plane operator was denied on grounds he would not have been subject to service in the transferor forum. It is also important to note that under this "dispersed necessary parties" jurisdiction:

> (c) Whenever [s]tate law supplies the rule of decision on an issue, the district court may make its own determination as to which state rule of decision is applicable.[179]

Since choice of law rules are so important in air crash cases, this proposed change to the rule in *Klaxton Co. v. Stentor Electric Mfg. Co.*[180] would dramatically change the strategy of forum selection.[181] The ALI proposals reducing diversity jurisdiction have run into considerable opposition,[182] as could be expected. There as yet appears to be little formal resistance, however, to the expanded dispersed parties and federal choice of law provisions,[183] which might well be enacted.

There have been other legislative proposals more specifically directed toward federal aircrash litigation. In 1969 Senator Joseph Tydings introduced a bill entitled "A Bill to Improve the Judicial Machinery by Providing for Federal Jurisdiction and a Body of Uniform Federal Law for Cases Arising Out of Aviation and Space

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[178] *See* note 172 *supra.*

[179] S. 1876 § 2374(c).

[180] 313 U.S. 487 (1941).

[181] *See Hearings S. 1876* at 323-40 (testimony of Professor David F. Cavers) and *supra* note 175 (statements of Mr. Kreindler).

[182] *Hearings S. 1876* at 179-307.

[183] Ch. 160 of S. 1876.

Activities."[184] This bill would confer exclusive, original jurisdiction upon federal district courts to hear all claims arising out of airline crash disasters when there is involved: (i) a common air carrier; (ii) an aircraft that carries more than ten persons; (iii) the death or injury of more than five persons; or (iv) any outer space activity. The statute of limitations would be one year. The bill contains liberal venue and nation-wide service of process provisions, which seemingly would allow the plaintiff to commence his action and join all parties in almost any district court having some relationship to the parties' accident.[185] Further, the bill would expressly permit the Judicial Panel on Multidistrict Litigation to transfer the case to any district that it considers the most convenient, not only for pretrial, but also for trial on the merits. The proposed legislation would confer a right of action for damage to property, for personal injury and for wrongful death arising from the air crash. The test for liability would be left to formulation by the courts and would be exclusive of the state law that would normally be applied, with the specific exception of "local law." The bill defines "local law" as domestic relations, inheritance and things of this nature. The defense of contributory negligence would be permitted and contribution between joint tortfeasors would be required on a percentage basis to be determined by the jury in relation to each defendant's degree of liability. The bill provokes two prime areas of concern. First, the one year statute of limitations may be too short. The supporting rationale is that one year will force the process of filing, transferring and consolidating all of the lawsuits in a reasonably short time to clear the court docket. An opposing argument is that there is a need to provide more time for the respective federal administrative agencies to conduct their investigations of the case so that plaintiff's lawyers can know whom to sue. Second, there is considerable controversy surrounding the grant of power to the federal courts to fashion its own law with respect to the substantive rules of liability under which the cases will be tried. The *Erie* sentiment still runs strong against giving the federal judiciary a free hand to make its own law. More practically, the litigating lawyers may prefer the

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[184] S. 961, 91st Cong., 1st Sess. (1969).

[185] Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 MISSOURI L. REV. 215, 220 (1969).

familiar chaos of state law, than to take a chance on the unpredictable future of federal uniformity.

In the absence of legislation, some take the view it is still appropriate for the federal courts to fashion federal common law out of the federal elements present in air crash litigation. Writing in a recent issue of this JOURNAL,[186] Professor Craig notes that the lack of uniform standard of recovery under state wrongful death statutes has spawned numerous problems unique to the aviation and shipping industries. Although both industries deal almost exclusively in interstate and foreign commerce, Congress has refused to enact federal wrongful death legislation that would control situations interfering with a state's interest in the application of its own law. In cases involving the admiralty jurisdiction, for example, state wrongful death law, utilized to grant relief otherwise not available, has often provided more restrictive remedies than would be the case under the maritime law, thus retarding the effective application of federal standards. The Supreme Court, however, has recently eliminated part of the confusion by holding that an unseaworthiness remedy for wrongful death in state waters exists under the general maritime law.[187] Drawing a parallel of air and sea commerce, his article proposes an analysis based on the broad policies of maritime recovery for wrongful death and suggests that the same arguments are available to the federal courts for the creation of a federal common law of aviation.

As with the law covering domestic flights, the law of international flights is under constant pressure for change. A proposed treaty[188] would make absolute the limit of 100,000 dollars liability per passenger recoverable against carrier. That is, the treaty would eliminate exception to limitation of liability under the Warsaw Convention for willful misconduct. Apart from the serious objections to limitations of liability[189] there are other problems with this approach. For example, even though carrier was at fault, its liability would not be based on fault, and the plane manufacturer, in addition, might be made liable for substantial excess damages. It would

[186] Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3 (1971).

[187] Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970).

[188] *See* Kennelly, *A Novel Rule of Liability: Its Implications*, 37 J. AIR L. & COM. 343 (1971).

[189] *Id.*

thus increase the pressure for plaintiffs to join other defendants to obtain full measures of recovery.

VI. CONCLUSION

One goal of substantive law in air crash litigation should be to attain the best safety, and the fairest compensation to victims and allocation of cost to the industry. The tort system theoretically satisfies these goals by seeking out the cause of the air crash, by assigning liability and by individualizing the actual damages to the survivors.[190] On the other hand, partial critics of air crash law see it operating in an unreal world by attempting to assign "legal cause," when often there is no one cause, but rather, the complex failure of a safety system.[191] Concurrently, in another field, critics of automobile tort litigation prefer no-fault insurance schemes over the erratic outcomes and the cost of processing claims through lawyers and the courts. Thus, in respect to air crash litigation, the general trend should not be too hard to forecast. The people concerned with safety and those who favor no-fault will expand their horizons beyond automobile litigation into all areas of product liability, including air crash law. Crude past proposals to limit liability of the airlines will now crossbreed with emerging no-fault concepts to produce some very interesting future mutations.

In the time lag before radical change in the substantive law, the federal court system will have to be content with molecular progress within its framework. The goals of the federal procedural system are a complex mixture of pursuing efficiency, justice and division of power. *Erie* emphasizes the grant of power to the states over substantive matters and the prevention of inequitable administration of justice through forum shopping.[192] At the same time, the Federal Rules of Civil Procedure try to secure the just, speedy and inexpensive determination of every matter.[193] At present, air accident litigation is handled fundamentally no differently from any other diversity litigation in the federal courts.[194] That is, the same trouble-

[190] Discussion, *Air Safety Symposium*, 34 J. AIR L. & COM. 330, at 379-85 (1968).

[191] *Id.*

[192] Hanna v. Plumer, 380 U.S. 537 (1965).

[193] FED. R. CIV. P. 1.

[194] Air crash cases, however, are probably more susceptible to multi-district transfer under 28 U.S.C. § 1407 (1970).

some rules that have arisen from simpler litigation with respect to subject matter jurisdiction, service of process, venue, removal, choice of law, parties, counterclaims, cross-claims, impleader, contribution and indemnity, are made to do the job.[195]

As posed before, the state substantive law of liability, contribution and indemnity should produce a rational process of imposing accountability for the sake of safety, compensation, and allocation of risk. Measured against this standard, the system of federal air crash litigation seems at first blush to fall short since national predictability becomes lost in a maze of maneuvering for favorable state law. On second look, however, it is possible that the lawyer experts, who are constantly probing the experimental laboratories of state law, manage to work out good results within the broad perimeters of variable state law.[196] That is to say, uniformity, like consistency, is the hobgoblin of small minds. In this context, if the Tydings Bill proposal to give the federal judges power to make substantive law is a good proposal,[197] it is not only for the reason that it will replace chaos with order, but also for the reason that the federal judges will produce a substantive law that on balance will produce better safety, compensation and risk allocation than the erratic performance of state law. Whether the federal judges would produce "better law," however, can only be answered by ideology. With respect to contribution and indemnity, it is difficult to document this thesis except by pointing to those federal diversity suits in which outdated state law concepts stunt the growth of the best sub-

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[195] The American Law Institute proposals for expanding diversity jurisdiction in cases of dispersed necessary parties is probably a move in the right direction. *See* notes 174-84 *supra.*

[196] This assumes, however, that all clients are represented equally by talented masters of the complex system. Consider, for example, not only the technological expertise necessary, but also the legal expertise shown in PLI, AIRCRAFT LITIGATION 3D (L. Kreindler, ed. 1972).

[197] Setting to one side the constitutional and policy problems raised by recognizing lawmaking power in the federal courts, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) and Craig, note 186 *supra.* The lesser included proposal of the American Law Institute to allow the federal courts power to fashion federal common law choice of law rules under this view is a proposal moving in the right direction, note 195 *supra.*

stantive law operating within the most efficient and just procedural system.[198]

[198] *E.g.*, New York contribution and indemnification law is open to the criticism that by relying on active-passive pleading distinctions it allows plaintiffs excessive power to preclude impleader, *see* notes 143-46, *supra*.

AUTHOR'S NOTE: After this article was in print, further research revealed that on March 22, 1972 the New York Court of Appeals, in Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, abandoned the active-passive test and adopted the apportionment rule as the basis for impleader. This is a good decision and an excellent opinion explaining why apportionment will better accomplish the goals of tort law. If federal common law should come to govern the area of indemnification and contribution in aviation litigation, this opinion could serve as a model for a federal common law rule.

Class Actions