

**CONGRESS REVISITS DEATH ON THE HIGH SEAS ACT:
GUIDING LIGHT? OR GUIDING LIABILITY?**

By:

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I. TURBULENT SEAS FOR THE AVIATION INDUSTRY:

Recently proposed legislative changes to the Death on High Seas Act (DOHSA) will create additional risk and liability exposure to Aviation insurers, placing them in uncharted waters with submerged dangers.

United States Congressional Bills reacting to the April, 2010 Deepwater Horizon drilling rig explosion in the Gulf of Mexico have currently passed in the House of Representatives and are being further considered in the Senate. In essence, these Bills seek to increase the recoverable damages available to family members and dependants for deaths resulting from accidents in international waters. These Bills are also proposing shoreline distance threshold adjustments, which can increase the jurisdictional reach of State Courts. As a result, these proposed changes present new exposures and unprecedented applications of DOHSA to Aviation accidents.

The foregoing would require a conceptual traverse table to chart the possible application and effect of these proposed Bills on the Aviation and Insurance industry's legal liabilities. However, until an actual Bill is passed amending DOHSA, true liability exposure will remain a very murky and unpredictable issue for the Aviation industry and its insurers. This article endeavors to chart DOHSA's potential changes and effects as DOHSA is rigged with these proposed Amendments.

II. DEATH ON THE HIGH SEAS ACT

The Death on the High Seas Act¹ (“DOHSA”) is Admiralty law enacted by the United States Congress in 1920 as a source of relief for spouses, children or dependants of seamen killed at sea, or “international waters”, due to negligence or wrongful conduct. DOHSA would be triggered for maritime deaths occurring beyond “one nautical league”, or three miles, from the coast of the United States. DOHSA actions would be brought by a representative of the decedent’s estate via an Admiralty claim within the U.S. Federal Court system. Conversely, maritime deaths occurring *within* three nautical miles of the U.S. shore, or within a U.S. State’s territorial waters, are not governed by DOHSA and are instead subject to that particular State’s law and courts.

For a successful recovery of damages under DOHSA, the resultant seaman’s death must be due to a “wrongful act, neglect, or default” on the part of the allegedly responsible party, such as the vessel owner or crewmember. DOHSA provides recovery of *pecuniary* losses to survivors for the decedent’s lost lifetime earnings and funeral costs against the ship’s owner or operator. At the time of its initial passage, the Act was considered progressive by granting a quantum of support to families, that would otherwise be without recourse, after the death of their principal care giver.

With the advent of commercial and general aviation across the seas, DOHSA began to be applied to aviation accidents occurring off the shores of the United States. For 80 years, deaths occurring on the high seas as a result of aviation accidents and ship accidents were treated identically under the Act. Falling 20,000 feet out of the sky would effectively be the same as falling 50 feet overboard under DOHSA.

¹ 46 U.S.C. app. §§ 761-768

III. DOHSA 2000 AMENDMENT—THE WAKE OF TWA 800

In July of 1996, TWA Flight 800 exploded and crashed shortly after takeoff, killing all 230 passengers on board. TWA 800 was a commercial flight originating from New York’s JFK Int’l Airport, when twelve minutes later, its wreckage was drifting approximately 9 miles off the coast of New York in the waters near East Moriches, Long Island. As a result of the strict three nautical mile threshold of DOHSA, families of Flight 800 passengers were limited only to recovery for pecuniary losses from the airline. No other damages were recoverable under the Act.

Public protest ensued, and the impetus of much of the debate and call for change was the presence of small children and elderly on TWA 800. Lost wages are difficult, if not impossible, to calculate for children who have never worked and for the retired elderly. Additionally, pecuniary losses were deemed to be a pitiful measure of loss for the companionship and comfort of deceased family members. In essence, the survivors were clamoring for the inclusion of recoverable *non-pecuniary* damages within DOHSA.

In 2000, responding to the chorus of disapproval from TWA 800 survivors, DOHSA was amended and ratified by the U.S. Congress with specific focus on *commercial* aviation accidents. Consequently, the amendment of Section 30307 of the Act extended the distance threshold of DOHSA’s applicability—for *commercial* aviation accidents—from the original three nautical miles to *twelve* nautical miles off U.S. shores. For any accident occurring within 12 nautical miles of the U.S. shoreline, State law would apply. Moreover, for the first time in U.S. history, deaths occurring as a result of a commercial aviation accident beyond 12 nautical miles would include recovery of *non-pecuniary losses*, in addition to pecuniary losses. “Non-pecuniary” losses were now, as established by DOHSA, recoverable for loss of comfort, care and companionship of the decedent. However, the Act did place a prohibition on the recovery of punitive damages, thereby curtailing plaintiff recovery for special damages of this type.

IV. DOHSA 2000—PRESENT

The Section 30307 amendment served as a concession to the public outcry lamenting the limited remedies provided by DOHSA. The amendment was, however, only a partial change for the narrow class of plaintiffs who died as a result of commercial aviation accidents. The amendment made no allowances of enhanced recovery for families of decedents who perished on ships or in *general aviation* accidents, who are still held exclusively limited to recovery for pecuniary losses. As DOHSA does not define “general” or “commercial” aviation, a void has been left for the Courts to fill.

The vast majority of case law considering DOHSA since 2000 has concerned the interpretation of what “*commercial aviation*” means under the 30307 amendment. In *Brown v. Eurocopter*² a Federal district court ruled that a helicopter, acting as an “on demand” air taxi to oil platforms, was engaged in “commercial aviation” as intended under the statute. To support its rationale, the *Brown* Court took the approach of simply considering the Black’s Law Dictionary definition of “commercial” (*any type of business or activity which is carried on for a profit*) and “Aviation” (*the operation of a heavier-than-air aircraft*) as a basis for their conclusion that the air taxi was engaged in “commercial aviation”. Also persuasive to the *Brown* Court’s decision was the pilot’s obligation to obtain a *commercial* pilot’s license to operate the flight. Such an obligation, the *Brown* Court reasoned, galvanized the “commercial” aspect of the air taxi operation to the oil platforms.

The implication of *Brown*, and other similar cases, is that “commercial” aviation—along with its attendant risks and exposures—under the DOHSA 2000 amendment, may be broader than the commercial passenger flights that prompted the amendment. Subsequent cases have alternatively considered the

² 38 F. Supp.2d 515 (S.D. Tex 1999)

U.S. Congress' meaning of "commercial" aviation to be limited to scheduled FAA Part 121 passenger flights like TWA 800. With Congressional silence on the issue, disparate Court interpretations of "commercial" aviation under DOHSA remain today.

V. REACTION TO DEEPWATER HORIZON TRAGEDY

On April 20, 2010, an explosion occurred on the Deepwater Horizon Drilling Platform operated by BP in the Gulf of Mexico. Eleven crew members were killed by the explosion, and an oil spill of cataclysmic proportions was triggered. The platform was located over three nautical miles from the shore of Louisiana. As a result of its distance from the shore, the deaths of the crew members would fall under the Act as originally specified. The families and dependants of the crew would be entitled to recover only the lost earnings of the deceased crew members and funeral expenses.

In the case of some crew members, who were without spouses or children and whose bodies could not be recovered, only a nominal recovery could be obtained. Public criticism gushed out in opposition of the perceived "harsh" and limited recoveries allowed under DOHSA—very similar to the public outrage expressed after the TWA 800 crash. Bills to amend DOHSA have since been introduced in the U.S. Congress via the House of Representatives and the Senate respectively.

On July 1, 2010 the House Bill (H.R. 5503) was passed by the Members. The Senate counterpart-bill (S. 3663) will be considered when the U.S. Senate reconvenes in September of 2010. Both the House and Senate bills represent a radical departure from the recoveries permitted by DOHSA as originally enacted, and present new issues for both commercial and general aviation.

VI. HOUSE BILL: H.R. 5503

H.R. 5503 was the first Congressional response to the inequities harped on by critics in the wake of the Deepwater

Horizon explosion. It currently establishes several changes to the Act with regard to both: deaths occurring on sea-going vessels *and* aircraft over international waters.

The first major change established by the resolution is the allowance of recovery of non-pecuniary losses for a decedent's family. Non-pecuniary losses are defined in the statute as the recovery for the loss of the decedent's "comfort, care and companionship." Additionally, the family would be entitled to recover a fair compensation of the decedant's conscious pain and suffering experienced prior to death. Both the non-pecuniary losses and pain and suffering damages are in addition to the pecuniary losses traditionally recoverable under the Act.

The resolution also allows for a greater class of family members—including siblings and parents—to bring suit, while simultaneously dispensing with the added procedural step of having suit brought through an estate representative. Significantly, the resolution completely strikes the TWA 800 year 2000 amendment from DOHSA (section 30307) addressing recovery for "commercial" aviation accidents. Though not expressly specified in the Act, the removal of this section will most likely cause "commercial" and "general" aviation accidents to be treated *identically* because of its silence on a distinction.

H.R. 5503 details that the twelve nautical mile threshold established by the 2000 amendments will no longer be applicable. Instead, DOHSA will apply for deaths occurring on the "high seas" *three* nautical miles off the shore of the United States for both "general" and "commercial" aviation accidents. The other seismic change in this Bill is that with the removal of the year 2000 amendment, the language precluding punitive damages is no longer in the Act, creating uncertain treatment of special damages under DOHSA.

Repercussion of H.R. 5503

To give an example of what these changes can mean for both commercial and general aviation accidents, it is best to examine a hypothetical. A general aviation craft is being flown to Florida for delivery to its purchaser. Due to mechanical failure during the flight, the aircraft crashes *four* nautical miles off the coast of Florida. Under DOHSA—as it currently exists—the pilot’s spouse or estate representative’s only avenue for recovery would be suit under DOHSA. This suit would have to be brought in Federal court, and recovery would be limited to the pilot’s lost lifetime earnings and funeral costs. Had the crash occurred within *three* nautical miles of the Florida shore, then the family of the pilot would be entitled to bring a wrongful death claim in State court while applying Florida liability and damages recovery schemes. A wrongful death claim could potentially, depending on the state’s law, entitle the family to lost earnings, funeral expenses, pain & suffering damages, and punitive damages.

Under DOHSA as amended by H.R. 5503, the pilot’s representative or spouse would be able to recover the lost earnings and funeral expenses granted originally under DOHSA, *in addition to* damages for the pilot’s pre-death conscious pain and suffering and loss of comfort, care, and companionship. There is also the potential, though not expressly granted by the amendment, that punitive damages may be pursued. The amendment would have no effect on the ability of the pilot’s family to bring a State law claim if the death occurs within three nautical miles of the shore.

Under DOHSA, as amended by H.R. 5503, the seemingly arbitrary 12 nautical mile threshold for commercial aviation would be irrelevant to the situation. As long as the crash occurred more than three nautical miles off of the shore, DOHSA would automatically apply. A conceivably positive aspect of the amendment is that, for commercial crashes, the previous 12 nautical mile threshold is reduced to three nautical miles, limiting the area in which state law would apply.

VII. SENATE BILL: S. 3663

The Senate bill currently drafted, but not yet voted upon, offers potentially different changes to DOHSA with somewhat different repercussions. Several Congressional Bills have been introduced into the Senate before, and after, the passing of H.R. 5503. Currently, S. 3663 the CLEAN ENERGY JOBS AND OIL COMPANY ACCOUNTABILITY ACT of 2010 is the latest and most supported bill in the Senate to amend DOHSA. The Bill, as the title denotes, is a holistic response to the Deepwater Horizon explosion and subsequent months-long spill of oil into the Gulf of Mexico. Section 504 of the Bill, appropriately titled “Amendments to the Death on the High Seas Act”, is the relevant portion of the Bill.

Section 504 proposes several changes to DOHSA. First, similar to the changes in H.R. 5503, S. 3663 proposes to provide recovery for non-pecuniary losses (loss of decedent’s comfort, care, and companionship) and compensation for the decedent’s conscious pain and suffering prior to death. These recoveries are in addition to the pecuniary (lost earnings and funeral expenses) losses, which have always been recoverable under DOHSA. Secondly the Act specifically addresses DOHSA’s application to “general” and “commercial aviation”. S. 3663 amends section 30307 of DOHSA (the 2000 amendment) by adding “*and general aviation*” after each appearance of “commercial aviation” in the section, thus eliminating any distinction between the two terms. Third the Act prohibits legal action under section 30307 of DOHSA except as an action in Admiralty in a Federal court.

The practical result of the Senate amendment is that “commercial” aviation and “general” aviation would be treated *identically* under DOHSA. Further, both types of aviation accidents would be subject to the 12 nautical mile threshold created by section 30307 of DOHSA. As a result of the corresponding changes to the Act, family members and dependants of anyone who dies in an aviation accident more than 12 nautical miles off the shore of

the United States could receive pecuniary losses, non-pecuniary losses, and damages for the decedent's pain and suffering.

Notably, the portion of section 30307 which prohibits recovery of punitive damages has been left unchanged; therefore, punitive damages could not be recovered in an action under DOHSA. Any aviation accident occurring *within* 12 nautical miles of the US shore would be subject to State law in a State court, where punitive damages are typically recoverable.

VIII. BOTTOM LINE

It appears inevitable that the Death on High Seas Act will be amended in some form within the upcoming months. It remains unclear how these changes will be embodied and what impact they will have on the aviation, legal, and insurance industry until actual passage by both House and Senate with Presidential approval.

H.R. 5503 has already been passed by the House of Representatives and presents several issues regarding "general" and "commercial" aviation accidents. This amended Act would impose the smallest distance threshold for application of DOHSA (3 nautical miles) for both "commercial" and "general aviation", potentially limiting the number of cases likely to reach State court. For numerous factors, State court provides a greater recovery potential for plaintiffs, part of which is due to the inclusion of punitive damages. Adding greater uncertainty of the application of the Act, H.R. 5503 does not explicitly prohibit the recovery of punitive damages under DOHSA for aviation accidents, regardless of distance threshold. If signed into law, it can be expected that future plaintiffs will surely argue for punitive damages since the Act will cease to preclude special damages.

Senate Bill 3663 also contains varied aspects, whose ultimate impact is difficult to determine. At least on an interpretative level, the uniform treatment of "commercial" and "general" aviation may alleviate any confusion Courts may have had over the last 10 years when considering DOHSA and aviation

activities. However, as a consequence of this democratization of aviation activities, the Senate-proposed Act extends DOHSA's threshold of 12 nautical miles to *all* aircraft—including formerly excluded “general” aviation; thereby expanding the area where costly State law wrongful death claims can be brought. Comfort may be taken in the fact that currently, S. 3663 maintains the prohibition on punitive damages for aviation accidents under DOHSA.

IX. FUTURE?

Determinations of potential impact are intensely fact-based and difficult to predict, especially in an area where caselaw and statutory interpretation have a decades-old reign over an infrequently modified Act. The Deepwater Horizon event in the Gulf of Mexico has put liability predictions for aviation liability under a new DOHSA into a tailspin.

What is abundantly clear is that the House Bill and Senate-proposed Bill contain differences in each that, despite tension between the two, undoubtedly extends the liability-penumbra for aviation operators, manufacturers and insurers under DOHSA. The new general schemes of the U.S. Congress amendments to DOHSA can be distinguished as follows:

- HOUSE Bill H.R. 5503—
 1. Adds *non-pecuniary* (i.e., “pain & suffering”) damages to the existing recoverable pecuniary damages;
 2. Reduces “high seas” range from 12 nautical miles to 3 nautical miles;
 3. Silent on punitive damages; and
 4. “Aviation” is an undefined term without “commercial” or “general” classifications.

- SENATE-proposed Bill S. 3663—
 1. Adds *non-pecuniary* (i.e., “pain & suffering”) damages to the existing recoverable pecuniary damages;
 2. Maintains “high seas” range at 12 nautical miles;
 3. Preserves ban on punitive damages; and
 4. “Commercial aviation” joined by the word “and” to “general aviation”.

One will note that both Bills are unified by points “1” and “4”, thereby automatically increasing liability exposure under both Bills. The addition of *non-pecuniary* damages, with the nullification of distinction between “commercial” and “general” aviation” extends the liability and recoverable-damages shadow originally cast by DOHSA.

Point “3” on punitive damages will be the crucial element that can greatly amplify plaintiff recovery and establish how extensively the black cloud of damages will span. All parties will be keenly interested in what direction point “3” will take as it navigates the legislative currents of Washington D.C.

As legislation and politics meet, waters will be muddied, and the foregoing amendments will evolve into hybrids of one another, or more distinct Bills. Notwithstanding such uncertainty, aviation operators, manufacturers, and insurers will have inclement conditions to deal with in regard to increased liability and exposure under both House and Senate proposals and their amendments to DOHSA.