

**THE BATTLE OVER AIR FRANCE:
DOES THE MONTREAL CONVENTION APPLY TO
MANUFACTURER CLAIMS FOR CARRIER INDEMNITY?**

By:

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In *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, currently pending as an Multidistrict Litigation (“MDL”) action in the Northern District of California, the air carrier Air France was effectively immune to suit in the United States—until now.² All but two plaintiffs lacked jurisdiction over Air France under the controlling Montreal Convention, but Air France now finds itself defending an indemnity and contribution cross-complaint brought by certain manufacturing defendants.

Air France has responded with a motion to dismiss, arguing Montreal’s jurisdictional requirements (the so-called five fora of jurisdiction) limits not only passenger claims directly against a carrier, but any actions against a carrier—including third party suits by manufacturer-defendants.

A third party action broaching this particular issue has only been seen twice, in the Central District of California in 1999 and in the Eastern District of New York in 2004.³ With the latter citing the former, both courts held that the jurisdictional limitations of the Warsaw Convention (updated by the Montreal Convention) were inapplicable and allowed the indemnity action against the carrier to proceed. However, only one of the decisions is officially

¹ Thanks to Los Angeles summer associate Vienna Munro, University of San Diego School of Law, for her assistance in preparing this article.

² *In re Air Crash Over the Mid-Atl. on June 1, 2009*, MDL 2144, No. 10-CV-0977 CRB (N.D. Cal.).

³ *In re Air Crash at Agana, Guam, on Aug. 6, 1997*, MDL 1237, No. 98-MD-7211 (C.D. Cal. Jan. 25, 1999); *In re Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999*, 340 F.Supp.2d 240 (E.D.N.Y. 2004).

reported, the other decision was only decided at the trial court level, and ensuing case law reveals no subsequent third party indemnity claims attempted by manufacturers raising the same argument on any level. It has been generally assumed in the aviation bar that such claims would be barred by Montreal—similar to the bar on cross-claims against employers in workers’ compensation cases. It is possible defending manufacturers did not attempt such cross-complaints in the past because of common insurance, out of reticence to sue their carrier-customers, or because it was not thought to be a legally viable claim under Montreal. Or perhaps it was thought strategically unwise; a successful indemnity action would mean losing the ability to highlight an absent co-defendant in a *forum non conveniens* motion, reducing its chance of being granted.

If the court denies Air France’s motion, it will open the door to *en masse* circumvention of Montreal’s protection of carriers within the United States when jurisdiction is otherwise unavailable to foreign plaintiffs. As the pertinent legal precedent is limited, the issue is effectively one of first impression, ripe for appellate review, and a strong candidate for a grant of *certiorari* by the Supreme Court in the next few years.

That is, if the issue is considered at all. Judge Charles Breyer (brother to U.S. Supreme Court Justice Steven Breyer and who has been assigned this massive litigation by the MDL Panel) has two major motions set on his docket for argument on September 24, 2010: Air France’s Motion to Dismiss the third party claim against it, plus the defendants’ Motion to Dismiss pursuant to the doctrine of *forum non conveniens*.

Presumably, unless Judge Breyer is intent on being heard on this issue, it will become mooted by a ruling in favor of the defense on *forum non conveniens*, thus placing this issue back into its legal quagmire.

I. THE TREATY: HISTORY & CIRCUMVENTION IN SUITS AGAINST MANUFACTURERS

Before Montreal, its predecessor treaty, the Warsaw Convention, governed the liability of carriers involved in the international transportation of passengers and cargo. Created in 1929, Warsaw sought to insulate the young air carrier industry from accident liability and to facilitate its growth. To achieve its purpose, Warsaw had a two-prong agenda: (1) to establish worldwide uniform laws for claims arising out of the international carriage of passengers, baggage and cargo; and (2) to limit the liability of the carrier for such claims. In short, Warsaw created a presumption of carrier liability in aircraft accidents but, *quid pro quo*, capped that liability absent proof of certain misconduct.

However, in the years following its ratification, a “hodgepodge of supplementary amendments and intercarrier agreements” redefined Warsaw liability.⁴ Seventy years after Warsaw’s signing, “the need to modernize and consolidate the Warsaw Convention and related instruments” was addressed in 1999 by its successor, the Montreal Convention.⁵ For those States which have become signatories to Montreal, it has provided the exclusive causes of action and remedies against an air carrier for passenger injury or death during international air carriage.⁶

A key development in Montreal was its removal of Warsaw’s cap on damages, essentially exposing carriers to unlimited damages liability. This was of special significance to manufacturers who have never been protected by Warsaw’s capped liability, and were thus frequently sued by plaintiffs seeking to be “made whole” by exceeding the capped recovery against the carrier. With

⁴ *Ehrlich v. American Airlines*, 360 F.3d 366, 371 n.4 (2d Cir. 2004).

⁵ Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada, May 28, 1999 (Montreal Convention), Arts. 1(1), (2); *Smith v. American Airlines*, No. 09-02903, 2009 WL 3072449, *2 (N.D. Cal. Sept. 22, 2009).

⁶ *See Carey v. United Airlines*, 255 F.3d 1044, 1051 (9th Cir. 2001).

Montreal's removal of the cap, carriers became more attractive defendants, and manufacturers were less commonly alone in defending against potentially unlimited liability, especially within American courts where juries are famously generous with damages awards.

However, Montreal only extracted one thorn in the side of defending manufacturers. While it removed Warsaw's cap on a carrier's liability, Montreal continues to limit a foreign plaintiff's jurisdiction over a carrier in American courts. Under Montreal, a passenger-plaintiff can only bring suit against a defending carrier in the five fora identified in the treaty: (1) the carrier's place of domicile; (2) the carrier's principal place of business; (3) the place of business through which the contract of carriage was made; (4) the place of destination of the carriage; or (5) the principal and permanent residence of the passenger.⁷ When the United States is not within the five fora permitting jurisdiction over carriers, it remains a common avenue for plaintiffs to avoid the Convention's jurisdictional limitations by bringing suit only against manufacturers over whom jurisdiction is available in the U.S.

II. THE BATTLE OVER AIR FRANCE

In re Air Crash Over the Mid-Atlantic presents the novel issue of manufacturing defendants seeking indemnity from a carrier otherwise immune to suit in the United States. Given that all but two of the plaintiffs are barred from jurisdiction over Air France, the question becomes whether Montreal will apply to similarly bar the manufacturers' claim for third party indemnity and contribution.

⁷ Montreal Convention, Art. 33. The Warsaw Convention provides the same first four fora. Convention for the Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw, Poland, October 12, 1929 (Warsaw Convention), Art. 28(1).

III. LEGAL PRECEDENT

In re Air Crash at Agana, Guam (Guam), and *In re Air Crash near Nantucket Island, Massachusetts on October 31, 1999 (Nantucket)* are the only federal U.S. cases to examine this issue.

A. Guam

Dealing with this issue as one of first impression, *Guam* (an unpublished decision) held that a carrier's liability to or from others based in tort or contracts is not governed by Warsaw. The *Guam* court interpreted the text of Warsaw to suggest it exclusively concerned itself with suits by passengers and shippers. In holding the identities of the parties central to the treaty's interpretation, the court concluded that the manufacturer's indemnity claim against the carrier was independent of the underlying passenger's claim, and therefore not governed by treaty.

Although *Guam* declined to apply the Convention to the indemnity claim, perhaps inconsistently it applied Warsaw's damages cap to any recovery against the carrier through indemnity. In making its determination, the court relied on a perceived misapplication of *Polec v. Northwest Airlines, Inc. (Polec)*.⁸ *Guam* read *Polec* to say that because a passenger's recovery could not exceed the liability limit of Warsaw, that limit also restricts the potential recovery of a manufacturer by indemnity.

However, in *Polec* the U.S. court had jurisdiction over the domestic carrier under Warsaw, and so the applicability of Warsaw's jurisdictional limits to a third-party claim against a carrier was not an issue. Also, the third-party action in *Polec* was for subrogation, which is an equitable remedy raised post-judgment or post-settlement, rather than indemnification which is more likely litigated early in the case and is usually based in contract. The defendant manufacturer in *Polec* was allowed to recover the full

⁸ *Polec v. Northwest Airlines*, 86 F.3d 498 (6th Cir. 1996).

amount of its subrogation claim from the carrier, despite the liability limits of Warsaw, *only because a jury made a finding of “willful misconduct” on the part of the carrier*. The court in *Polec* noted that if the carrier had committed only ordinary negligence, the Warsaw cap would have applied to restrict the manufacturer’s subrogation recovery.

Thus, the court in *Polec* generally applied the limitations of Warsaw to a third-party claim by a manufacturer against a carrier. Although the *Guam* court relied on *Polec* in applying the limitations of Warsaw to the liability exposure of a carrier in a third-party action, the court in *Guam* expressly declined to apply the limitations of Warsaw to jurisdiction over the carrier in a third-party action.

While some have questioned the reasoning of *Guam*, others have asserted that despite its status as an unpublished decision, it stands in support of the fact that the United States (who is the party to both the treaties) believes that contribution and indemnity claims are not barred by the Warsaw/Montreal Conventions. The United States was also a party in the *Guam* litigation and argued in opposition to KAL’s motion to dismiss that “[n]othing in the Convention covers, or was intended to cover, claims between carriers and third parties such as the United States or manufacturers, whether the carriers are in the position of plaintiffs, defendants, or intervenors.”⁹

B. Nantucket

The district court in the Eastern District of New York followed the *Guam* decision in *In re Air Crash near Nantucket Island, Mass.* In following *Guam*, the Court in *Nantucket* similarly considered the identity of the parties central to the interpretation

⁹ United States’ Opposition to KAL’s Motion to Dismiss Indemnity Claims Against Korean Air for Lack of Treaty Jurisdiction at 8, *In re: Air Crash at Agana, Guam on August 6, 1997*, MDL No. 1237 (C.D. Cal.).

of the treaty in holding that the Warsaw Convention did not govern a third-party contribution and indemnity action against the airline by a defendant manufacturer, reasoning that “[t]he express purpose of the Convention was to regulate litigation between passengers and carriers.” The court held that the manufacturers’ third-party claims for contribution and indemnity against *Nantucket* were not coextensive of the passenger’s claims against the airline, but rather were based on their own separate and distinct legal and equitable relationships with the airline. In so holding, the Court cited to a U.S. Supreme Court case establishing that “indemnity liability ‘springs from an independent contractual right’ distinct from the underlying tort claim.”¹⁰ This reasoning explains the court’s decision to not apply Warsaw to a third-party claim for *contractual* indemnity, but does not necessarily provide support for *equitable* indemnity outside the Convention. It remains to be seen whether other courts will follow the *Nantucket* case where the manufacturer’s equitable claim for indemnity is not based in contract, but is arguably derivative of the underlying passenger’s claim.

C. Subsequent Cases

At least one court within the district in which *Guam* was decided has already chosen not to discuss either *Guam* or *Nantucket* when presented with the opportunity to do so, impliedly because *Guam* remains an unpublished opinion.¹¹ In *Van Schijndel v. Boeing Co. (Van Schijndel)*, the court made no mention of *Guam* and identified *Nantucket* as the only published decision addressing the issue before it: whether an American manufacturer could bring an indemnity claim against a foreign air carrier when the passenger-plaintiffs did not have United States jurisdiction over the carrier pursuant to the applicable Convention. However, the *Van*

¹⁰ *Nantucket*, 340 F.Supp.2d at 244, citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130 (1956).

¹¹ *Van Schijndel v. Boeing Co.*, 434 F.Supp.2d 766, 780 (C.D. Cal. 2006).

Schijndel court gave no weight to *Nantucket*, noting the decision as not binding and that it was unclear how the Ninth Circuit would rule.

Five years after deciding *Nantucket*, the same judge sitting for the same court issued a seemingly contradictory holding in *Olaya v. American Airlines (Olaya)*.¹² In *Olaya*, the plaintiff sued both American Airlines and the Deriso Funeral Home for allegedly mishandling his wife's remains during international shipment. The court held Montreal exclusively governed all claims against the carrier, including Deriso's cross-claim for indemnity and contribution. However, unlike *In re Air Crash Over the Mid-Atlantic*, in *Olaya* both the plaintiff and co-defendant had treaty jurisdiction over the carrier because both were party to the waybill for international shipping. Thus, the court's reasoning that the treaty applied to the cross-claim, because it arose from the same transaction as the plaintiff's claim, cannot be applied to cross-claims where treaty jurisdiction is not established—such as that against Air France.

In sum, *Guam* and *Nantucket* remain the only cases raising the precise issue of whether the treaty should apply to a manufacturer's indemnity claim against a carrier otherwise not subject to jurisdiction under Montreal. Based on the limited precedent on this important issue, appellate review is called for in order to clarify the limitations of Montreal in this area. When and if this issue is dealt with (whether in the context of the Air France 447 litigation or sometime in the future), any decision on the issue will, by necessity, turn to an interpretation of the treaty itself, including its text, drafting history, and underlying purpose.

¹² *Olaya v. American Airlines*, No. 08-CV-4853, 2009 WL 3242116 (E.D.N.Y. Oct. 6, 2009) (not reported in F.Supp.2d (2000)).

IV. THE INTERPRETATION OF MONTREAL:
CARRIERS VS. MANUFACTURERS

Resolution of this issue will largely hinge on whether Montreal applies to any action or only to passenger claims against a carrier, taking into account whether the third party action is a derivative of the passenger's suit and the underlying goals of the treaty.¹³ The interpretation of Montreal must begin "with the text of the treaty and the context in which the written words are used."¹⁴ If unclear, the text may be interpreted in light of its history and purpose, while giving effect to the expectations, negotiations, and practical construction employed by the parties.¹⁵

If the treaty applies only to passenger claims, as a manufacturer would argue, it would not apply to limit jurisdiction over a defending manufacturer's indemnification claim against a carrier. If the treaty applies to all claims arising out of the passenger's suit for damages, as a carrier would argue, it would limit jurisdiction over the manufacturer's indemnity claim.¹⁶

A. The Battleground Articles of the Treaty

Article 1: Scope of Application: "This Convention applies to *all* international carriage of persons, baggage or cargo performed by aircraft for reward."

Article 29: Basis of Claims: "In the carriage of passengers, baggage and cargo, *any action for damages, however founded, whether under this Convention or in contract or in tort or*

¹³ The treatment of the treaty in international courts may additionally influence Montreal's interpretation in the United States; treaty interpretations by the courts of sister signatories are "entitled to considerable weight." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 176 (1999).

¹⁴ *Air France v. Saks*, 470 U.S. 392, 397 (1985).

¹⁵ *Id.* at 399.

¹⁶ As foundation to its argument, a carrier would first have to prove the passenger's lack of jurisdiction precludes it from directly suing the carrier.

otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the questions as to who are the *persons* who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

Article 33: Jurisdiction: “(1) *An action for damages* must be brought, *at the option of the plaintiff*, in the territory of one of the States Parties, either before the court of the domicile of the carrier or its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. (2) In respect of damages resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier’s aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.”

Article 37: Right of Recourse Against Third Parties: “Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a *right of recourse against any other person.*”¹⁷

¹⁷ Montreal Convention, Arts. 1, 29, 33, 37 (emphasis added).

B. The Carrier's Argument: Montreal Applies to All Claims

i. The Text: Broad to Include All Claims

In Article 1, the language “all” suggests all claims arising out of international air carriage, including third party claims, are included within the jurisdictional scope of the treaty.

Further, in Article 29, the language “any action for damages” is broadly worded and does not say any *passenger's* action for damages, leaving room for claims of third party indemnity or contribution. The language “however founded” also does not limit claims only to passengers or those bringing claims on their behalf. The subsequent self-application of the treaty to “persons” who have the right to bring suit should be meant to include non-passengers, since the drafters chose to deviate from the previously-used language of “passengers” in the same Article.

Additionally, the text of Article 29 is taken from Montreal Protocol No. 4, an amendment to the Warsaw Convention, which was drafted to expand and affirm the broad scope of Warsaw's equivalent Article 24.¹⁸

In Article 33, the language “an action for damages” is again used to encompass actions beyond only those of passengers or their representatives, in certain fora.

Finally, Article 37 only makes clear that the Convention does nothing to affect the “right” to bring third party claims. It does not question the applicability of the Convention once such claims are brought.

ii. The Drafting History: Limited Liability Intended

The minutes of the 1999 Montreal Conference reflect the drafters' intent for Article 29 to include broad bases of claims subject to limited liability under the treaty; the Chairman of the

¹⁸ See *Tseng*, 525 U.S. at 174.

Conference reflected the drafters' intent to limit liability in his comment, "Article [29] in effect put fences around how great an exposure the carrier would be liable to, by ensuring that whatever may be the nature of the action and however brought, it was subject to the conditions of the Convention."¹⁹

The Chairman later explained, "Once the Convention applied, its conditions and limits of liability were applicable."²⁰ In a case where the Montreal Convention applies and the plaintiff sues the manufacturer in a forum prohibiting suit against the carrier, the treaty must continue to apply in preventing the manufacturer's claim of indemnity against the carrier.

iii. The Underlying Claim: Derivative Jurisdiction

A third party claim necessarily arises from the same cause of action as the original, *i.e.*, the death or injury of a passenger during international air carriage: "a third party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim and is secondary or derivative hereto."²¹ Therefore, a third party indemnity action should be governed by Montreal to the same extent as its underlying action.

iv. The Treaty's Goal: Uniform Carrier Liability

The "cardinal purpose" of Montreal is to "achiev[e] uniformity of rules governing claims arising from international air transportation."²² It would fly in the face of uniformity to interpret Montreal to apply to passenger claims against a carrier, but not

¹⁹ International Civil Aviation Organization, International Conference on Air Law, Montreal, Vol. I, Minutes, May 1999, Doc. 9775-DC/2 (Montreal Minutes), p. 189.

²⁰ Montreal Minutes at 235.

²¹ *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 199-200 (9th Cir. 1988).

²² *Tseng*, 525 U.S. at 169.

third party indemnity claims against a carrier arising out of the same passenger-injury suit.

Further, under the Federal Rules of Civil Procedure, a third party defendant is entitled to all defenses available to it in the underlying plaintiff's action.²³ Applied to a case where the plaintiff has no jurisdiction over the carrier, the carrier should be able to assert the same defense of lack of jurisdiction as a third party defendant.

Finally, allowing a defending manufacturer the right to seek indemnification from a carrier in any jurisdiction would circumvent the entire purpose of the treaty by: (1) effectively bypassing its liability limits on carriers; and (2) creating inconsistent application of liability rules for claims by original plaintiffs versus claims by defendants as third party plaintiffs.

C. The Manufacturer's Argument: Montreal Applies Only to Passenger Claims

i. The Text: Limited to Passenger Claims

In Article 1, the language "carriage of persons" suggests the scope of jurisdiction is limited to only those claims arising out of contracts of air carriage. In contrast, a manufacturer's contract with a carrier is not for the carriage of persons, but for the particular product it produces, whether the aircraft itself or one of its components.

In Article 29, the language "any action for damages, however founded" is preceded by the context, "In the carriage of passengers, baggage and cargo." This does not include the context in which a manufacturer and carrier incur legal obligations and liability; a manufacturer does not provide or receive carriage of passengers, baggage or cargo from a carrier. Therefore, the basis of

²³ Fed. R. Civ. Pro. 14(a).

a manufacturer's third party indemnity claim should not be limited or governed by Article 29.

Further, Article 29's language "however founded, whether under this Convention or in contract or in tort or otherwise" is meant to "accommodate all of the multifarious bases on which a claim might be founded in different countries, whether under code law or common law, whether under contract or tort, *etc.*, and to include all bases on which a claim seeking relief for an injury might be founded in any one country."²⁴ This particular language does not encompass claims against third parties by non-passengers.

The subsequent application of the treaty to "persons" is not meant to include *any* entity, but merely passengers and those suing on their behalf, in order to not prevent claims by a decedent's family or estate. That the drafting history does *not* use the word "entities" in defining applicable parties indicates a conscious exclusion of corporations from the scope of jurisdictional limits.

In Article 33, the language "at the option of the plaintiff" makes explicit that the causes of action and permissible jurisdictions outlined in the treaty contemplate its application only to passenger-plaintiffs, and not indemnity claims by defending manufacturers. Further, the five fora outlined in Article 33 affirm the application of the treaty to passenger claims alone; the fora are defined by either: (1) the passenger's itinerary, location of ticket purchase, residence; or (2) the carrier's place of business of domicile. None of the fora contemplate a jurisdiction defined by a third party claim involving a non-passenger party.

In addition, the fora are time-sensitive because they are determined based on whether the accident occurs in-flight. While a passenger's contractual relationship for air carriage is necessarily short in time, a manufacturer's contract with a carrier can be

²⁴ *Hussel v. Swiss Air Transp. Co.*, 388 F.Supp. 1238, 1245 (S.D.N.Y. 1975).

formed decades before the accident triggering the suit, or even before the signing of the treaty.

Finally, Article 37 directly addresses the issue of third party claims; it guarantees the Convention will not “prejudice” third party liability. Applying the Convention to limit a manufacturer’s ability to recover from a carrier as a third party when manufacturers are not contemplated or benefitted by the Convention would be exactly such a prejudice prohibited by the Article.

ii. The Drafting History: Only Passenger Claims Contemplated

At the convention, the drafters made no reference to third parties and stressed that “the new Convention should be based on the principle of balancing the interests of consumers and air carriers.”²⁵ When the Chairman commented, “Article [29] in effect put fences around how great an exposure the carrier would be liable to,” he meant not only do fences protect the carrier from unlimited liability, but they also define those whose recovery is limited—in this case the “persons” of the passengers and those suing on their behalf.²⁶ In his next sentence the Chairman further commented, “The more delicate issues as to the person who had the right to bring the action were not really governed as such by the Convention, but were left to national law, subject only to the provision that one remained within the limits set by the Convention and conditions subject to which the claims may be brought.”²⁷ Thus the concern discussed by the drafters was whether to leave open the definition of who may sue on the passenger’s behalf, not whether a third party action would be governed by the treaty.

²⁵ Montreal Minutes at 236.

²⁶ *Id.* at 189.

²⁷ *Id.* at 189-90.

When the Chairman later explained, “Once the Convention applied, its conditions and limits of liability were applicable,” he was again responding to issues involving passengers, not third party indemnity claims.²⁸ Indeed, the Chairman was replying to a concern that the Convention might be construed to cover instances of non-fulfillment of a contract of carriage, denied boarding, or refunds.²⁹ No mention was made of manufacturers or any party other than in the capacity of a passenger. Thus to apply Montreal to indemnity claims of manufacturers would be an expansion of the treaty beyond its intended scope.

iii. The Underlying Claim: No Derivative Jurisdiction

While an indemnity action is always factually derivative, conditioned on the precedent of the plaintiff’s suit, it does not follow that the indemnity is legally derivative. Though a plaintiff’s cause of action against a manufacturer may be a tort for injury or death, the manufacturer’s indemnity claim against a carrier is often based in contract; thus the indemnification is for a different underlying cause of action not subject to any of the same limitations as the original claim.

Indemnity liability instead “springs from an independent contractual right” distinct from the underlying tort claim.³⁰ “A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to [the] plaintiff.”³¹

iv. The Treaty’s Goal: Inapplicable to Manufacturers

The goals of Montreal do not apply to parties other than passengers and carriers. While attempting to protect the fledgling

²⁸ *Id.* at 235.

²⁹ *Id.*

³⁰ *Ryan Stevedoring Co.*, 350 U.S. at 130; *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99 (2nd Cir. 1991).

³¹ Restatement (Third) of Torts: Apportionment of Liability § 22(b) (2000).

aviation industry at the turn of the century, Warsaw, and later Montreal, struck a balance of costs and benefits to the passenger and the carrier. This bargain neither contemplated nor held any legal or financial benefit for manufacturers, and thus the treaty should not be applied to the legal relationship between manufacturers and carriers.

Further, a manufacturer is not party to the contract between a passenger and a carrier invoking the application of Montreal, formed by the purchase of the passenger's ticket. Application of the treaty to a manufacturer's indemnity claim against a carrier denigrates the bargain struck in contractual negotiations between the carrier and manufacturer, denies expectations, and undermines the ability to rely on contractual commitments.

Finally, the international decision to immunize an industry from a certain class of plaintiffs does not entirely immunize it from litigation. It would be unjust to force potential sole liability on a manufacturer by application of a treaty to which the manufacturer was not a contemplated or contracting party.

V. CONCLUSION

Montreal began a shift away from protecting carriers in the 21st century, first with a lower standard of negligence and, second, with the addition of the fifth forum. It could follow that courts will continue the shift by refusing to apply Montreal to indemnity claims against carriers, making them liable to manufacturers who were likely not contemplated by the treaty's authors.

On the other hand, courts could instead recognize that *not* applying the Convention essentially defeats its underlying purpose; allowing a third party indemnity claim would create indirect jurisdiction over a carrier otherwise unavailable to plaintiffs under the treaty. Accordingly, courts of this persuasion would apply the Convention to prohibit the indemnity claim,

conjuring a second tier of carrier protection not contained in the text of the treaty or in the contractual negotiations between the carrier and a manufacturer.

Either outcome may have advantages and disadvantages for defending manufacturers. If Montreal applies to a third-party action for indemnification, the manufacturer will have to deal with the disadvantage of seeking contribution from the carrier in a foreign jurisdiction, and having its recovery limited by Montreal's liability caps. However, in this scenario the manufacturer will benefit from a stronger argument in favor of *forum non conveniens* based on the lack of U.S. jurisdiction over a necessary defendant. If the treaty does not apply, the manufacturer would have a greater chance of jointly sharing damages with the carrier, but would have a weaker *forum non conveniens* argument since jurisdiction over the foreign carrier would exist in the U.S. Until the issue is resolved, carriers will continue to be indirectly protected from indemnity claims by the doctrine of *forum non conveniens* as manufacturers are forced to think twice about seeking indemnification before being heard on a *forum non conveniens* motion.

This is an issue of importance in the aviation community that must be considered, analyzed and dealt with by the federal appellate courts, if not the U.S. Supreme Court. Whether the end result was correct or not, being left with the unpublished *Guam* decision and the limited holding of *Nantucket* leaves aviation legal practitioners and their clients in a state of unnecessary flux.

While it is possible that Judge Breyer will never get to decide this issue as it may become mooted by *forum non conveniens*, the importance of the issue, as well as the divergence of opinions, have been raised to the forefront in this high profile air disaster.