CHAPTER TEN

LITIGATION MANAGEMENT

A. INTRODUCTION

The materials in this chapter assume that litigation is necessary to attain the strategic goals of full compensation for the plaintiff or total defense for the defendant and list the tactical maneuvers that will be necessary to achieve these goals.

After an aviation disaster, a number of investigations may be anticipated, most important being that of the National Transportation Safety Board (NTSB). The investigation is not supposed to be an adversarial proceeding; rather its purpose is to discover the cause of the crash and recommend any changes in rules or procedures. It is the first opportunity for potential defendants (the airline and manufacturers) to explain theories of non-liability because of their obvious status as parties to the inquiry. Testimony of factual witnesses may be necessary in subsequent litigation, but it may be unavailable because of federal prohibitions. See pp. 856–858.

Potential plaintiffs may have been put in contact with aviation specialty law firms that must consider where to bring litigation, assuming that the cause of the crash can be assigned to the airline or manufacturer or to a government agency. Analysis of the proper forum must always consider the choice of law problems, most importantly whether the Montreal Convention was involved. The absence of Montreal plaintiffs and presence of domestic transport plaintiffs will greatly complicate the choice of law issues.

Where there have been many deaths and injuries, it can be anticipated that litigation will be commenced in many different federal and state courts, but Congress has now provided a single federal forum if there were 75 or more deaths in the crash or if there were 100 claims with total exceeding five million dollars. It must be noted at this point that previously class action treatment under FRCP 23 was not available in aviation disaster cases.

Before the new federal forum was created, plaintiffs desiring the application of state law in state courts for non-Warsaw tickets would rush to bring suit against defendants who were residents of the state where trial was sought, or had the principal place of business there, in order to forestall removal to the federal court because of diversity, since the federal court sitting in diversity cases must apply the existing state law even though that state law is overdue for change that only
the state Supreme Court can make. Another obvious consequence of multiple litigations around the country will be the reference of the cases to the Multidistrict Litigation Panel to designate a single forum for pre-trial discovery—often in Washington, D.C., New York, Illinois, California or Washington state.

Much of the discoverable material from defendants will already have been produced for the NTSB; nevertheless, there may be disputes between the parties concerning additional discovery, with parties attempting to speed up or slow down the process. Experts will be consulted by both sides, awaiting the reports of the NTSB on the Probable Cause of the crash and the factual findings, opinions and recommendations. Formal hearings during discovery may require the formation of a Committee of Plaintiffs’ Attorneys to obviate witness cross-examination by several hundred plaintiffs’ lawyers. Disagreement among plaintiffs’ lawyers is not unknown concerning the theories of liability and the supporting proof, leading to delays in the discovery process. Disagreement among defense lawyers is less likely because of overriding insurance considerations, but it is not unknown.

The discussion to this point has dealt with the plaintiffs’ passenger interest against the defendant carrier and manufacturers, but there may be litigation by the carrier against the manufacturers as well as contribution and indemnity issues. These complexities raise the question of the effectiveness of the jury as trier of fact for all parts of the litigation and the question whether there should be bifurcation with a trial on liability and a second trial on damages if there is a finding of liability.


A review of the preparation of litigation with emphasis on defense may be found in DESMOND BARRY (ED.), LITIGATING THE AVIATION CASE: FROM PRE-TRIAL TO CLOSING ARGUMENT (2007).

B. FORA AVAILABLE IN THE UNITED STATES

1. The Federal Multiparty, Multiforum Trial Jurisdiction Act (MMTJA)

In 2002 Congress greatly expanded federal court jurisdiction in disaster cases, thereby permitting consolidation of litigation from many states and federal districts into a single federal court (Pub. L. No. 107–273, Nov. 2, 2002, codified in 28 U.S.C. § 1369). The legislation was in response to Lexecon v Milberg (523 U.S. 26 (1998)) in which the Supreme Court required the return for trial to originating courts of cases assigned to a single federal court for discovery by the Multidistrict Judicial Panel. The 2002 legislation had been almost surreptitiously appended to the Appropriations Act for the Justice Department. It applies to accidents occurring on or after January 31, 2003.