TRIAL
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Beyond the thunder

Dealing effectively with adverse weather and its contribution to air disasters

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Although their team's play has not been memorable since the 1985 Super Bowl, any Chicago Bears fans worth their salt remember October 31, 1994. It was a night of horrific weather--freezing rain driven by 40 mph winds. Under those conditions, on the grounds of Soldier Field, the number of the greatest middle linebacker in NFL history--Dick Butkus (51)--was being retired.

Not long before that ceremony began, American Eagle Flight 4184, originating from Indianapolis, circled above Chicago, waiting for clearance to land at O'Hare Field. The commuter jet, an ATR 72 airplane, had been manufactured in Europe.

Due to the terrible weather, Flight 4184 was put in a "holding pattern" over the south side of Chicago and the northwest corner of Indiana, while planes with higher priorities for landing were approved to land. As the plane circled at 8,000 feet, freezing rain fell on and around the plane. Unbeknown to Flight 4184's crew, ice formed on the plane's wings.

At 3:59 p.m., Flight 4184 plummeted out of the sky at a rate of 500 feet per second and crashed into the ground. All 68 people aboard perished in a cornfield near Roselawn, Indiana.

Flight 4184 is but one example of a staggering number of air disasters in which weather played a part. Between 1981 and 1995, of 30,000 aircraft calamities involving U.S. registered aircraft, weather was either a "cause" or "factor" in 10,556 of them,1 in which 6,447 people lost their lives.2 Put another way, over 30 percent of the "accidents" investigated by the federal government listed weather as a contributing cause or factor.

Given that statistic, it is important for attorneys representing victims of an air disaster to know how to address and deal with the weather issues involved. These cases pose many complex, technical issues that are beyond the scope of this article. The following is a basic overview of points to remember when handling these cases.

When an air crash involving weather occurs, plaintiff lawyers must be prepared to immediately launch an investigation into other factors contributing to the disaster. Even when weather is a factor, there are always additional legal proximate causes that contribute to the injury or loss of life.

For example, if the high winds and freezing rain on October 31, 1994, were the only legal probable causes of the crash of Flight 4184, the over $100 million in compensatory damages obtained for a number of the survivors of those 68 victims would have never been awarded.3 In fact, those compensatory damages were paid because a thorough investigation by plaintiff attorneys uncovered probable and proximate causes of that crash beyond the weather.

Included among those proximate causes were the pilots' inattentiveness to the ice forming on the wings and the inadequate design and operation of the de-icing boots, which were designed, manufactured, and distributed by foreign manufacturers. In short, the pilots should never have agreed to remain at that altitude in icy conditions, and the plane should have been more efficient in ridding itself of ice buildup.

When initiating an investigation into a weather-related plane crash, it is important to be familiar with the rules governing proper flight conduct, the unique nomenclature applicable to flying, and the identity of agencies and people who are involved in the investigation.

In the United States, the Federal Aviation Administration (FAA) is charged with formulating and enforcing rules and regulations applicable to air flight. The FAA does this by issuing the Code of Federal Regulations (C.F.R.) and Advisory Circulars.

For example, parts of the C.F.R. list regulations that apply to different types of air carriers--from small planes carrying banners above football arenas to major commercial carriers.4

Specific to weather issues, the agency has issued FAA Advisory Circular 00-6A, Aviation Weather for Pilots and Flight Operation Personnel.5 This circular is mandatory reading for any attorney dealing with a weather-related crash. It gives an excellent description of all types of weather hazards a pilot must both observe and avoid.

For example, chapter 10 provides directives on how to avoid icing conditions. In concluding that chapter, the FAA provides the following directive:

Icing is where you find it. As with turbulence, icing may be local in extent and transient in character. Forecasters can identify regions in which icing is possible. However, they cannot define the precise small pockets in which it occurs. You should plan your flight to avoid those areas where icing probably will be heavier than your aircraft can handle. And you must be prepared to avoid or to escape the hazard when encountered en route.6

The circular also provides the investigating attorney with a handy reference to the nomenclature in the flying business, where use of acronyms is preferred. Pilots speak in terms of IMC, VMC, VFR, and IFR.7 To properly investigate and analyze a crash, attorneys must be familiar with these terms.

The National Transportation Safety Board (NTSB) is the federal agency charged with investigating aircraft incidents and accidents and, if possible, determining the probable cause of these events.8

When an air disaster occurs, the NTSB immediately responds with a "go team." One investigator designated as the "investigator-in-charge" determines who will lead the various areas, or groups, of investigation. When weather is suspected as a contributing factor, the investigator would designate a weather or meteorological group.

It is critical that plaintiff lawyers analyze all records and reports of the meteorological group. All NTSB investigation documents are placed in the public docket and are available to anyone. In addition, attorneys should attend the NTSB "sunshine hearing" dealing with their clients' disaster and then obtain the agency's final written report.

The NTSB's investigations into air disasters are of varying lengths and degrees of detail. For example, after its investigation into the crash of Flight 4184, the agency issued a 600-page report.9 By contrast, after the August 1990 helicopter crash that claimed the lives of rock star Stevie Ray Vaughan and several of his band members, the NTSB issued a one-paragraph narrative report describing the helicopter's crash into a hill during foggy conditions. The agency then made the following finding as to its probable cause:

The National Transportation Safety Board determines that the probable cause(s) of this accident was: Improper planning/decision by the pilot, and his failure to attain adequate altitude before flying over rising terrain at night. Factors related to the accident were: darkness, fog, haze, rising terrain, and the lack of visual cues that were available to the pilot.10

Plaintiff attorneys must monitor and evaluate the NTSB's investigation into their clients' crash. However, exclusive reliance on the NTSB's work product will likely prove to be a serious mistake. After all, the agency's job is to find the probable cause or causes of an air disaster. That job is distinct from the plaintiff attorney's--uncovering and explaining all possible legal proximate causes of the catastrophe.

Using the NTSB's factual findings can be a great timesaving tool during trial preparation, however. Most cases addressing the issue hold that the agency's factual findings are admissible in subsequent civil suits.11 But the majority appellate view seems equally clear: The board's probable cause findings are not admissible.12

Therefore, plaintiff attorneys must be prepared to supplement the NTSB's investigation. This can be done by assembling a team of experts uniquely qualified to deal with the weather issues involved.

These experts should include a skilled air crash investigator who has experience with the NTSB and knows the equipment involved in the crash. This investigator should prove helpful in procuring additional experts specialized in other areas pertinent to the case. Examples of these experts include meteorologists, aeronautical engineers, and cockpit voice recorder speech pathologists. A skilled team of experts like this will assist in such important tasks as:

reviewing and interpreting the NTSB's findings;

identifying potential defendants;

determining the proximate (not just probable) causes of the disaster beyond the obvious conclusion that weather was one cause;

providing technical support once the lawsuit is filed; and

helping prepare for defendant experts' depositions.

Attorneys who thoroughly investigate to supplement whatever the federal government provides will be able to identify beyond the thunder clouds, fog, or ice those viable and legally responsible defendants.

Once the expert investigative team identifies potential defendants, a critical legal analysis must be undertaken to decide where to file suit.

Determining the identity and status of proper defendants is the starting point for selecting a forum. For example, in a crash where weather played a significant role, it may evolve that air traffic controllers' conduct constituted a proximate cause of

the crash. Air traffic control is a function carried out by the FAA. Therefore, jurisdiction over that defendant is exclusively in federal court.13

Likewise, if a foreign government has been identified as a potential defendant, under the Foreign Sovereign Immunities Act, that defendant may only be sued in a federal district court, and the plaintiff's right to a jury trial against the defendant is extinguished.14

In air disasters involving commercial airlines, there are usually many potential jurisdictions to consider. Locations can range from the obvious situs of the crash to the plaintiff's home forum.

Obviously, plaintiff attorneys should be familiar with the advantages and disadvantages of their clients' home forum. It is also crucial to determine the legal and practical advantages and disadvantages of other potential forums.

In mass air disasters, which occur in commercial aircraft, it is now common for a multidistrict litigation (MDL) forum to be mandated. MDL procedures are uniquely federal creations.15 If a case involves an MDL, attorneys should avoid the knee-jerk reaction of only filing a cause of action at the MDL forum situs.

If an MDL is formed and the case is in federal court, it is certain to be transferred to the MDL situs for pre-trial proceedings. However, the Supreme Court recently made clear in Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach that under the MDL statute, a case must be transferred back to the forum in which it was filed at the end of all pre-trial procedures.16

In Lexecon, the Court has guaranteed that even in an MDL situation, attorneys and their clients are entitled to a choice of forum--the location of their original filing--for trial purposes.

A critical element of prefiling research is to analyze the choice of law doctrines applied by any potential forum. Knowing the substantive law that may apply to a cause of action in each of these forums is paramount. This is especially true given the continuing onslaught of tort "reform" legislation being introduced in various states.

For example, Cook County, Illinois, has traditionally served as an excellent forum to advocate victims' rights in air disaster cases. This has been true since the crash of American Flight 191 in 1979, and this forum has also hosted lawsuits arising out of the crash of United Airlines Flight 232 in Sioux City, Iowa, in 1989, and the USAir Flight 427 disaster.

However, on March 9, 1995, serious tort "reform" legislation became effective in Illinois that rendered it one of the least desirable forums for this kind of case. Fortunately, on December 18, 1997, the state supreme court struck down the legislation and returned Illinois to a forum sensitive to and aware of victims' rights.17

Depending on where suit is filed, the case may be governed by one law or by the laws of several jurisdictions. The former occurs when a case is filed in one of the few jurisdictions that apply the concept of lex loci delicti. Under this simplistic doctrine, the plaintiff is automatically bound by the law of the forum where the case is filed.18

In contrast to that doctrine, a growing majority of states apply the choice of law concept of dépeçage when dealing with air disaster cases.19 Under dépeçage, the trial court makes individual choice of law determinations issue by issue. This concept evolves from, and is part of, a Restatement (Second) of Conflicts of Law provision:

[The] local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Section 6 to the occurrence and the parties, in which event the local law of the other state will be applied.20

The restatement approach was applied in the often-cited cases involving the air disasters of Flight 191 in Chicago and Flight 232 near Sioux City, Iowa.21

The trial court's decision in the Sioux City litigation exemplifies how specific, time-consuming, and divided choice of law determinations can become under the dépeçage theory. The decision only addressed the issue of which states' punitive damages laws would be applied. The court ultimately applied five different choices of law analyses to three defendants, which resulted in three different states' laws being applied to the three separate defendants.

This choice of law quagmire may serve as a worthy replacement for Abbott & Costello's "who's on first" routine.

Legal rainbow

History and statistics prove that adverse weather is involved in a significant number of air disasters. Examining the details of those disasters will also show that weather is never their sole proximate cause. Plaintiff attorneys in these cases must focus on looking through and beyond the fog, sleet, or clouds involved to find other viable and legal proximate causes for the disaster.

A thorough factual investigation and legal analysis--and a quick lesson in weather and aviation terminology--will help the plaintiff attorney ensure a successful trial strategy.

Notes

1. Analysis and Data Div., National Transportation Safety Board, R. E.-50, (202) 314-6550.

2. Id.

3. Terry Wilson & John Schmeltzer, Indiana Air Crash Suit Ends in Accord, CHI. TRIB., Sept. 23, 1997, at 1.

4. 14 C.F.R. pts. 91, 121, and 135 (1998).

5. AVIATION WEATHER FOR PILOTS AND FLIGHT OPERATION PERSONNEL, AC-00-6A, FEDERAL AVIATION ADMINISTRATION & DEPARTMENT OF COMMERCE, DEPARTMENT OF TRANSPORTATION, rev. 1975.

6. Id. at 102.

7. See DEPARTMENT OF TRANSPORTATION, AERONAUTICAL INFORMATION MANUAL, (AIM) 1997.

8. 49 U.S.C. app. 1901-1903 (a)(1)(e) (1994).

9. NATIONAL TRANSPORTATION SAFETY BOARD AIRCRAFT ACCIDENT REPORT--IN FLIGHT ICING ENCOUNTER AND LOSS OF CONTROL SIMMONS AIRLINES D.B.A. AMERICAN EAGLE FLIGHT 4184 AVIONS DE TRANSPORT REGIONAL (ATR) MODEL 72-212, Vols. I and II.

10. NATIONAL TRANSPORTATION SAFETY BOARD, REPORT OF FINDINGS AND PROBABLE CAUSE, No. 2123.

11. See, e.g., Curry v. Chevron, U.S.A., 779 F.2d 272, 274 (5th Cir. 1985).

12. See, e.g., id.

13. 28 U.S.C. 1346 (1994).

14. 28 U.S.C. 1602-1611, 1441(d) (1994).

15. 28 U.S.C. 1407 (1994).

16. 118 S. Ct. 956, 964 (1998).

17. Best v. Taylor Mach. Works, 689 N.E. 2d 1057 (Ill. 1997).

18. See Braxton v. ANCO Elec., Inc., 409 S.E. 2d 914 (N.C. 1991).

19. See, e.g., In re Air Crash at Sioux City, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990), later proceeding, 131 F.R.D. 127 (N.D. Ill. 1990), 2d partial summary judgment granted in part and denied in part, 1991 U.S. Dist. LEXIS 18643 (N.D. Ill. Dec. 20, 1991).

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS 146 (1971).

21. In re Air Crash Disaster Near Chicago, 644 F.2d 594, 611 (7th Cir. 1981); In re Air Crash at Sioux City, 734 F. Supp. 1425.

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