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Will Boeing's Recent Move to Chicago Mean That More Commercial Airliner Crash Cases Will Be Litigated There?

by David E. Rapoport and Keith Jacobson

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One of Boeing's core businesses, its Commercial Airplane Division, is one of the world's leading airframe manufacturers. While their safety record is excellent, Boeing has historically been named as a defendant in commercial air disaster litigation, and, like other aircraft manufacturers, they are likely to be named in such cases in the future. This paper will explore how air disaster plaintiffs and their attorneys decide where to file their cases, and whether Boeing's recent move to Chicago¹ will result in more commercial air disaster cases being litigated in the "Windy City."

1. How Air Disaster Plaintiffs and Their Attorneys Decide Where to File Their Cases

Experienced air disaster lawyers representing victims pay careful attention to where they file their clients' lawsuits. Defendants often disagree with a plaintiff's initial choice of forum and are quick to argue that a plaintiff is "forum shopping." Plaintiffs' sometimes respond that defendants are guilty of "reverse forum shopping." These slogan arguments are of little help to the courts that are required to rule on motions² seeking to change the forum.

There are a variety of considerations for plaintiffs' attorneys when advising air disaster clients about their forum choices. Such advice would be easy if a court vested with jurisdiction over all necessary parties happened to be close to the plaintiff's home, the location of the accident, and the plaintiff believed that this was the court with the most generous judges, juries and law available for the case. In practice such an easy choice of forum is rarely available to air crash victims. Trade-offs are usually necessary. But mistakes resulting in a poor initial choice of forum can end up costing the plaintiff. A result that can be avoided or minimized by a thorough and careful choice of forum analysis before the lawsuit is filed.

A. Identify Potential Defendants

The first task is to identify the potential defendants. For each possible defendant the plaintiff needs to know, at a minimum, his state of residence and where the alleged wrongful conduct took place. For corporate defendants it will be necessary to determine both the corporation's state of incorporation and its principle place of business.

B. Identify Available Court Systems

The second step is to identify the available court systems. This involves applying the law of jurisdiction and venue to the facts. Filing a lawsuit on the wrong side of either of these legal mountains can be treacherous.

1. Personal Jurisdiction

Reams have been written and law professors have made careers out of the discussion about the twists and turns of applying the principles of *in personam* jurisdiction. The core standards have most recently been articulated in *Asahi v. Superior Court of California*.³ There the Supreme Court stated that personal jurisdiction comports with the principles of due process when "the defendant purposefully established 'minimum contacts' in the forum State."⁴ These minimum contacts were defined as "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁵ The Court made clear that the "mere act of placing [a] product into the stream of commerce" is insufficient to subject a product manufacturer to the personal jurisdiction of local courts where the product happens to cause injury.⁶ The Supreme Court explained that: "the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant,

the interests of the forum state, and the plaintiff's interest in obtaining relief."⁷

Since it's landmark decision in the *International Shoe*⁸ case, the outer limits of a court's power to assert *in personam* jurisdiction consistent with due process concerns have been frequently discussed by the United States Supreme Court. However, there is little doubt that the local courts of a corporate defendant's principle place of business or state of incorporation have the power to assert personal jurisdiction.⁹ From a personal jurisdiction standpoint, the defendant's home courthouses are always available.¹⁰

2. Subject Matter Jurisdiction

Once the list of potential defendants has been used to derive a list of courts that have personal jurisdiction, the evaluator must consider which of these courts also have subject matter jurisdiction. Unless an Act of Congress vests exclusive jurisdiction in the federal courts, state courts, being courts of general jurisdiction, have subject matter jurisdiction over personal injury and wrongful death cases arising out of air disaster cases. Such cases are not covered by federal common law, and the federal statutory aviation program does not preempt state tort law claims in air disaster personal injury and wrongful death cases.¹¹ The state courts have in fact adjudicated many air disaster cases historically.¹² Because the federal courts are courts of limited jurisdiction, federal jurisdiction may or may not be available in a given case, and this jurisdiction may or may not be exclusive. Some of the grounds for federal subject matter jurisdiction in air crash cases include: complete diversity of citizenship,¹³ "minimal" diversity of citizenship in cases that meet the requirements of 28 U.S.C. § 1369¹⁴ or "federal question" jurisdiction in Warsaw Convention¹⁵ and Death on the High Seas Act ("DOHSA")¹⁶ cases.

3. Venue

Once courts with personal and subject matter jurisdiction over all necessary defendants are identified, the crash victim's list of remaining potential forum courts must be further evaluated to determine which of these courts have proper venue under the applicable venue statutes. Most venue statutes allow lawsuits where a defendant resides or where some part of the acts giving rise to the suit took place.¹⁷

C. Evaluate the Available Court Systems

Choosing the correct court for an air disaster case requires a multifactoral analysis that only starts with determining the probable defendants and then identifying the potentially available

courts. Many factors other than those previously discussed should come into play in this analysis. In a survey of attorneys published in 1992,¹⁸ plaintiff's attorneys reported their reasons for filing in a particular forum. In this survey, counsel reported the following as "strong" or "very strong" advantages for their client:

- perceived jury bias for their clients or against the defendant
- impact of jury composition and jury rules on damages and settlement negotiations
- qualities and qualifications of the judiciary
- legal rulings
- court rules
- attorney convenience
- expected cost and pace of litigation
- the prospect of inconveniencing the opponent¹⁹

This list provides a reasonable beginning point for understanding this part of a plaintiffs counsels decision-making process. In air disaster cases other factors are also important. For example, the chance and probable effect of a multi-district transfer for consolidated and coordinated pre-trial discovery by the Judicial Panel on Multidistrict Litigation should be considered. The possibility that the chosen court will transfer or dismiss the case in favor of an alternative forum in spite of proper jurisdiction and venue also cannot be ignored.

2. Will Boeing's Recent Move to Chicago Will Result in More Commercial Airliner Crash Cases Being Litigated in the Windy City?

To predict the probable effect, if any, of Boeing's move to Chicago on the volume of commercial air disaster cases that the City's courts will be likely to handle in the future, we will address whether it is more likely now than before Boeing's move that plaintiffs in such cases will elect to file their lawsuits in Chicago. To address this question we will utilize the analytical framework set described in Section A.

A. Will Boeing Now Be Identified as a Potential Defendant More Often?

History proves that after the crash of commercial airliners most of the victims or their families pursue claims, and many of these claims result in lawsuits. As explained earlier, when considering where to file such a case the victims or their attorneys should first identify the potential defendants.

It is obvious that Boeing's move to Chicago will have no effect on the number of air crashes that will take place in the future involving Boeing aircraft. But that fact alone does not necessarily tell the whole story. An investigation into the conduct of Boeing is probably appropriate in any case involving a crash of one of its airliners. Further, the expansion of Boeing from Aircraft manufacturing into a wider range of aircraft services including air traffic management, military systems and aerospace support, provides a much wider scope of cases that could potentially implicate Boeing.²⁰

While air disaster victims' attorneys rarely step out of line by filing frivolous cases, there is much latitude between a case that is "not frivolous", and one that is "strong." With such wide latitude, it seems likely that, at a minimum, Boeing will be considered for inclusion as a potential defendant by air disaster plaintiffs more often now that it lives in what is perceived by many to be a jurisdiction more generous than its former home in Seattle, Washington.

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B. Will Chicago's Courts Now Be Identified as "Available Court Systems" More Often?

Boeing's new corporate home comes complete with new home courts as well, the Circuit Court of Cook County, Illinois, and the United States District Court for the Northern District of Illinois, Eastern Division. While these courts surely had personal jurisdiction over Boeing before its move, venue now clearly lies in Chicago also, and in many cases Boeing will not be able to properly remove a case filed in the Circuit Court of Cook County, Illinois to the federal court.²¹ Adding to the likelihood that Chicago's courts will play and increasingly significant role in commercial air crash litigation in the future will be the effect of 28 U.S.C. Section 1404.

Section 2-101 of the Illinois Code of Civil Procedure²² provides that: "every action must be commenced (1) in the county of

residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose." The plain language of Section 2-101(1) makes it clear that the Circuit Court of Cook County, Illinois, Boeing's new "county of residence," now has venue over Boeing provided that Boeing "is joined in good faith and with probable cause for the purpose of obtaining a judgment against" it.

It is equally clear that the United States District Court for the Northern District of Illinois also now has venue over Boeing. 28 U.S.C. § 1391 provides that for actions where jurisdiction is founded on diversity of citizenship, venue is proper in "(1) a judicial district where any defendant resides, if all defendants reside in the same state. . . or (3) a judicial district in which any defendant is subject to personal jurisdiction." So, as with the state rule, Boeing's move to Chicago makes it a resident of the Northern District of Illinois and therefore venue is proper there for many suits in which Boeing is made a defendant.

Boeing will also not be able to successfully remove many cases filed in Illinois state court to the federal court based on diversity of citizenship, even when there is complete diversity. This conclusion follows from the plain language of the federal removal statute:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*²³

Another factor may also come into play that could result in more air disaster cases being litigated in Chicago. United States district court judges may use 28 U.S.C. § 1404 to transfer cases filed against Boeing in other district courts to the United States District Court for the Northern District of Illinois:

§ 1404. Change of venue (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or

hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. . . .²⁴

The application of § 1404 may result in cases being transferred to Chicago for reasons having nothing to do with the conscious decision making by air disaster victims and their attorneys.

C. Will Air Disaster Victims' Evaluations Now More Often Lead to the Conclusion to File Their Cases in Chicago?

Air disaster victims have shown some preference for Chicago courts in the past. For example, in the litigation that arose out of the crash of United Air Lines ("UAL") Flight 232, many victims sought and obtained compensation in Chicago courts.

Flight 232 was a DC-10 aircraft that crashed at Sioux Gateway Airport in Sioux City, Iowa on a flight from Denver to Chicago. Of the 296 passengers on board, 112 were killed in the crash,²⁵ which occurred as a result of an uncontained engine failure involving the rear engine. This failure occurred as a result of a defective fan disk which contained a hard alpha inclusion. The forces were so great at the time of the failure that metal punctured the hydraulic lines of all three redundant hydraulic systems, resulting in a total loss of hydraulic fluid and concomitant loss of control over all flight control surfaces on the wings, tail and horizontal stabilizer.

More of the victims filed their lawsuits in Chicago than any other city. Most of the Chicago filed cases were filed in the state court. While there was complete diversity of citizenship in many of these cases, they were not removable because UAL was a "local" defendant. This was not true of the UAL crew member cases. As a result of workers' compensation immunity, the UAL employees could not sue UAL and most of their cases ended up in the federal court in Chicago, which is also the court that the Judicial Panel on Multidistrict Litigation selected as the transferee court.²⁶ The majority of the victims that chose not to file in Chicago, filed in the state courts in Missouri and Maryland. These were the state courts where McDonnell Douglas, manufacturer of the airframe, was incorporated and had its principle place of business, and, as a result of 28 U.S.C. § 1441, could not be removed to the federal court.

The Flight 232 case illustrates the type of decision making that has been discussed in this paper. Recalling the survey mentioned earlier, typical considerations by plaintiff's counsel reported as "strong" or "very strong" advantages for their client included:

- perceived jury bias for their clients or against the defendant

- impact of jury composition and jury rules on damages and settlement negotiations
- qualities and qualifications of the judiciary
- legal rulings
- court rules
- attorney convenience
- expected cost and pace of litigation
- the prospect of inconveniencing the opponent.

Right or wrong, it is these perceived advantages that no doubt drove the decision to file in state courts in Chicago, St. Louis and Baltimore, where the core defendants had their residences and could not remove the cases to federal court, playing prominent roles in the *Flight 232* case. Among these courts, the Circuit Court of Cook County resolved more cases than any other individual court in the nation.

D. Assuming That Air Disaster Victims' Evaluations Now More Often Lead to the Conclusion to File Their Cases in Chicago, Will Chicago Courts Agree to Hear These Cases Over Protests That the Forum is Inconvenient?

Federal and state courts in Chicago do have the power to transfer or dismiss cases based on perceived convenience factors. In the federal court this power comes from 28 U.S.C. Sec. 1404 and could result in Chicago filed cases being transferred to more convenient forums outside of Chicago. In Illinois state court, Supreme Court Rule 187 recognizes the doctrine of *forum non conveniens*.

The latest Illinois Supreme Court case interpreting and applying the doctrine is *First National Bank v. Guerine*.²⁷ In *Guerine*, a trailer broke away from its towing vehicle in DeKalb County, Illinois, crossed the center lane into oncoming traffic and then struck and killed plaintiff's decedent, a Kane County resident. DeKalb County officials investigated the case. Eyewitnesses to the occurrence were from DeKalb and DuPage counties. The trailer was owned by a Cook County resident who stored it in DeKalb County. Many of the damages witnesses, like the decedent, lived in Kane County. The autopsy was performed in Winnebago County. The plaintiff, a Kane County resident, filed suit in Cook County against the trailer owner and an Indiana company that sold him the trailer. The only connection between the case and Cook County was that one defendant resided there.

After the trial court dismissed the case under the doctrine of *forum non conveniens* and the First District upheld that decision, the Illinois Supreme Court ruled that "a trial court abuses its

discretion in granting an intrastate *forum non conveniens* motion to transfer venue where, as here, the potential trial witnesses are scattered among several counties, including the plaintiff's chosen forum, and no single county enjoys a predominant connection to the litigation."²⁸ Soon after *Guerine* was decided, the Fifth District court in southern Illinois ruled that the "scattered witness rule" discussed in *Guerine* applied to interstate as well as intrastate *forum non conveniens* cases:

We believe that the same standard ought to apply in the evaluation of an interstate *forum non conveniens* ruling where witnesses are scattered in several states and no single jurisdiction (state) enjoys a predominant connection to the litigation. We hereby adopt this standard for measuring the trial court's exercise of discretion in interstate cases.²⁹

Guerine's scattered witnesses rule seems particularly well suited for air disaster cases. Such cases almost always involve witnesses scattered throughout the United States, and sometimes the world. Given the pronouncements of the Illinois Supreme Court in *Guerine* it is more likely that cases will not be dismissed under the doctrine of *forum non conveniens*. This doubtless adds to the attractiveness of Chicago courts for plaintiffs.

Conclusion

Boeing's move to Chicago has brought added prestige to the city. It has also brought to Chicago the probability that Chicago courts will become a more prominent forum for litigation of aviation disaster cases. This is due to the availability of personal jurisdiction over Boeing and the establishment of venue in Chicago. But more importantly, it is due to the perception that Chicago juries are more favorable to plaintiffs. The federal law of removal and the Illinois discussions of *forum non conveniens* also increase the probability that a case filed in Chicago will stay in Chicago. The combination of these factors leads to a conclusion that Boeing's move to Chicago is sure to increase the prominence of Chicago in air disaster litigation.

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Endnotes

¹ "[O]ur new World Headquarters, in the heart of Chicago, one of the world's great cities, is a metaphor for how this company has changed. It is not an every day event to move the headquarters of a company as big, long-established and as well-known as Boeing." The Boeing Company 2001 Annual Report, p. 4.

² Such motions can take many forms. Examples include motions to quash service of process, motions to dismiss for lack of personal jurisdiction, motions to dismiss for lack of proper statutory venue, motions to transfer pursuant to 28 U.S.C. § 1404, motions to dismiss or transfer under the doctrine of *forum non conveniens*, notices of removal from state to federal court and motions to remand improvidently removed cases.

³ *Asahi v. Superior Court of California*, 480 U.S. 102 (1987).

⁴ *Id.* at 108-109 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

⁵ *Id.*

⁶ *Id.* at 112.

⁷ *Id.* at 113.

⁸ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁹ See *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (holding that actual presence in the state, no matter how fleeting, was sufficient to confer jurisdiction on that state's courts).

¹⁰ See *Id.* at 618 ("As *International Shoe* suggests, the defendant's litigation-related 'minimum contacts' may take the place of physical presence as a basis for jurisdiction.") (emphasis added).

¹¹ See *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001) (finding that the Federal Aviation Act did not preempt state law claims involving aviation torts).

¹² See, e.g., *McCusker v. Curtis Wright Flying Service, Inc.*, 269 Ill. App. 502 (1933); *Coan v. Cessna Aircraft*, 53 Ill. 2d 526 (1973); *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157 (1982); *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 128 F.R.D. 131 (J.P.M.L. 1989); *Griffith v. Mitsubishi Aircraft Int'l, Inc.*, 136 Ill. 2d 101 (1990); *Anderson v. Alberto-Culver USA, Inc.*, 2003 Ill. App. LEXIS 273 (March 6, 2003).

¹³ 28 U.S.C. § 1332 (2002).

¹⁴ 28 U.S.C. § 1369 (2002) creates a new, special source of jurisdiction applicable to some aircraft crash cases. Section 1369 gives the federal district courts original jurisdiction over all cases arising from a single accident where more than 75 people die at a discrete location, there is "minimal diversity" and any defendant's residence and the situs of a substantial portion of the accident are in different states, or any two defendants are residents of different states, or substantial parts of the accident occurred in different states. Minimal diversity is defined as "if any party is a citizen of a state and any adverse party is a citizen of another state."

¹⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934).

¹⁶ Death on the High Seas by Wrongful Act, 46 U.S.C. app. § 761 *et seq.* (2002).

¹⁷ See, e.g., 28 U.S.C. § 1391 (defining venue for federal cases); 735 ILCS 5/2-204 (defining venue in Illinois).

¹⁸ See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 395-6 n.118 (1992).

¹⁹ *Id.* at 400.

²⁰ See generally, The Boeing Company, 2001 Annual Report.

²¹ See 28 U.S.C. § 1391 and discussion *infra*.

²² 735 ILCS 5/2-101 (West 2000).

²³ 28 U.S.C. § 1441(b) (emphasis added).

²⁴ 28 USCS § 1404 (2002).

²⁵ *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 734 F. Supp. 1425, 1426 (D.C. Ill. 1990).

²⁶ *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 128 F.R.D. 131 (J.P.M.L. 1989).

²⁷ 198 Ill. 2d 511, 764 N.E.2d 54 (2002).

²⁸ *Id.* at 526.

²⁹ *Gridley v. State Farm Mutual Automobile Ins. Co.*, 329 Ill. App. 3d. 422, 428 (5th Dist. 2002).

[The next page is 22,221.]