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# Vanished Planes

Robert M. Jarvis\*

## I. INTRODUCTION

The history of aviation is marked by aircraft that have disappeared without a trace.<sup>1</sup> Such flights leave a host of legal issues in their wake, and

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<sup>1</sup> It generally is agreed that Matías Pérez was the first person in history to vanish in flight—on June 29, 1856, he took off from Havana, Cuba, in a hot air balloon and was never seen again. Even today, when someone or something disappears, it is common for locals to invoke Pérez’s name. See Emma Álvarez-Tabío Albo, *The City in Midair, in HAVANA BEYOND THE RUINS: CULTURAL MAPPINGS AFTER 1989*, at 149, 167 (Anke Birkenmaier & Esther Whitfield eds., Eric Felipe-Barkin trans., 2011) (explaining that Pérez “is immortalized in the colloquial phrase ‘Voló como Matías Pérez’ (He flew [away] like Matías Pérez)”).

In the 159 years since Pérez’s misadventure, many other individuals have suffered the same fate, including, most famously, aviation pioneer Amelia Earhart (1937); band leader Glenn Miller (1944); and U.S. Representative Hale Boggs (1972). Likewise, certain missing planes have achieved their own notoriety, such as the U.S. Navy bombers of Flight 19 (“The Lost Patrol”) (1945); N844AA (2003) (the former American Airlines 727 that disappeared after taking off from Quatro de Fevereiro Airport in Luanda, Angola); and, of course, Malaysia Airlines’ Flight 370 (2014). Other episodes that have captured the public’s imagination include British South American Airways’ impossible run of bad luck (1947-49) (the meaning of the Star Dust’s frantic last transmission—“STENDEC”—continues to be the source of much speculation, while the loss of the Star Ariel and the Star Tiger figure prominently in “Bermuda Triangle” lore); the “Kinross Affair” (1953) (involving the disappearance of U.S. Air Force Lieutenant Felix Moncla while chasing what some believe was an alien spaceship); and “D. B. Cooper” (1971) (the never found, and still-unidentified, hijacker who jumped out of a Northwest Orient airliner with \$200,000 in ransom money). For a further discussion, see, e.g., Mellon v. Int’l Group for Historic Aircraft Recovery, No. 14-8062, 2015 WL 3389859 (10th Cir. May 27, 2015) (dismissing the plaintiff’s claim that the defendant was refusing to reveal the location of Amelia Earhart’s plane in order to not jeopardize its fundraising activities); Bolam v. McGraw-Hill, Inc., 382 N.Y.S.2d 772 (App. Div. 1976) (defamation suit brought by a woman against the publisher of a book that claimed she was Amelia Earhart); C.R. RYDER, MIDNIGHT GHOSTS: AIRCRAFT THAT DISAPPEARED AND WERE NEVER FOUND (2014); Patrick Weidinger, *Top 10 People Who Vanished in Airplanes*, LISTVERSE, Mar. 14, 2011, <http://listverse.com/2011/03/14/top-10-people-who-vanished-in-airplanes/>; *List of Aerial Disappearances*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_aerial\\_disappearances](http://en.wikipedia.org/wiki/List_of_aerial_disappearances). See also *ASN Records Over 80 Aircraft Missing Since 1948*, AVIATION SAFETY NETWORK, Mar. 18, 2014, <http://news.aviation-safety.net/2014/03/18/asn-records-over-80-aircraft-missing-since-1948/> (reporting “that at least 88 passenger, corporate, cargo, and military transport aircraft [have gone] missing without a trace since 1948”).

Not surprisingly, the foregoing incidents have inspired numerous movies (e.g., Jodie Foster’s *Flightplan* (Touchstone Pictures 2005)); novels (e.g., Stephen King’s *The Langoliers* (1990)); and television shows (e.g., *Lost* (ABC television broadcast 2004-10)). They also occasionally have provided fodder for judicial humor. See, e.g., Centurion Capital Corp. v. Guarino, 951 N.Y.S.2d 85, No. 11117/05, 2012 WL 1543286, at \*6 (N.Y.C. Civ. Ct. Apr. 30, 2012) (“The court can posit several possibilities for [counsel’s disappearance]; such as they moved their law office to Brigadoon, Scotland and they will reappear in a hundred years; or the entire firm went on a cruise in the Bermuda Triangle; or perhaps they stowed away on Amelia Earhart’s plane.”); Arzumamyants v. Fragetti, 862 N.Y.S.2d 806, No. 300078/06, 2008 WL

have generated dozens of reported U.S. cases. These decisions, which are discussed below,<sup>2</sup> can be grouped into six categories: causation; choice of law/forum; statutes of limitation; claims; judgments; and taxes.<sup>3</sup>

## II. CAUSATION

When a plane disappears, the first question always is: why?<sup>4</sup> Possible explanations include government malfeasance, military operations, criminal activity, weather, and pilot error. The doctrine of *res ipsa loquitur* also is an option.

2115277, at \*4 (N.Y.C. Civ. Ct. Apr. 17, 2008) (“Because neither party provided the court with a copy of the title report, the exact status of this property must remain a mystery, along with what happened to Amelia Earhart.”).

<sup>2</sup> Except as otherwise indicated, the facts and procedural history of each case appearing in this survey are taken from the court’s opinion.

<sup>3</sup> Omitted from this survey are cases in which a plane went missing but later was found. *See, e.g.*, *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) (wreckage located after eight years); *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) (wreckage located after one day); *In re Air Crash Disaster Over Makassar Strait, Sulawesi*, No. 09-CV-3805, 2011 WL 91037 (N.D. Ill. Jan. 11, 2011) (wreckage located after nine days); *Collins v. Big Four Paving, Inc.*, 423 P.2d 418 (N.M. 1967) (wreckage located after three months); *Sam v. Okanogan Cnty. Sheriff’s Office*, 148 P.3d 1086 (Wash. Ct. App. 2006) (wreckage located after four months); *Wells v. U.S. Life Ins. Co.*, 804 P.2d 333 (Idaho Ct. App. 1991) (wreckage located after 15 months); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782 (Fla. Dist. Ct. App. 1981) (wreckage located after several days); *Praznik v. Sport Aero, Inc.*, 355 N.E.2d 686 (Ill. App. Ct. 1976) (wreckage located after two years); *In re Reynolds’s Estate*, 180 N.Y.S.2d 456 (Sur. Ct. 1958) (wreckage located after five months). *See also* *United States v. Reed*, Nos. 88-10049-01, 88-10049-02, 1990 WL 66043 (D. Kan. Apr. 24, 1990) (missing airplane reappeared after four years, during which time it may have been used by the government to carry out illegal activities in Central America); *HMS Aviation v. Layale Enters., S.A.*, 149 S.W.3d 182 (Tex. Ct. App. 2004) (727 that disappeared from an airport in Jordan discovered five years later in Texas).

Similarly, this survey does not include cases in which human remains disappeared during a flight. *See, e.g.*, *Coughlin v. Trans World Airlines, Inc.*, 847 F.2d 1432, 1433 (9th Cir. 1988) (“Mrs. Coughlin’s baggage, which contained the cremated remains of her husband, was lost by Trans World Airlines[.]”); *Simo Noboa v. Iberia Lineas Aereas de España*, 383 F. Supp. 2d 323, 324 (D.P.R. 2005) (“MR. ALOMAR testified in his deposition that he placed the box in Compartment No. 5 of an IBERIA Boeing 747 aircraft bound to the Dominican Republic. The ashes were lost and have never been found.”).

<sup>4</sup> Seeking to capitalize on this fact, a Chicago law firm filed discovery petitions directed at Boeing and Malaysia Airlines within days of Flight 370 disappearing in March 2014. In two sharply-worded orders, the Illinois Circuit Court, per Judge Flanagan, dismissed the petitions and warned the firm it would be severely punished for any further publicity stunts. *See* *Fatt v. Boeing Co.*, No. 14-L-3555, 2014 WL 1303097 (Ill. Cir. Ct. Mar. 31, 2014), *rev’d*, No. 1-14-1108, 2014 WL 6686651 (Ill. App. Ct. Nov. 26, 2014), and *Siregar v. Boeing Co.*, No. 14-L-3408, 2014 WL 1303096 (Ill. Cir. Ct. Mar. 28, 2014). An ethics complaint, based on the *Siregar* petition and alleging a violation of the rules against frivolous pleading, subsequently was filed against one of the firm’s partners. *See* *Complaint, In the Matter of Monica E. Ribbeck, Ill. Att’y Registration & Disciplinary Comm’n* (No. 6225920) (filed July 31, 2014), <https://www.iardc.org/14PR0092CM.html>, and *Answer, In the Matter of Monica E. Ribbeck, Ill. Att’y Registration & Disciplinary Comm’n* (No. 6225920) (filed Aug. 25, 2014), <https://www.iardc.org/ANS14PR0092.pdf>. For a further discussion, see James B. Danford, Jr., Note, *An Airliner and Perhaps a Lawyer’s License Disappear: How a Lawyer’s Hasty Actions May Give Them a Long Time to Contemplate Their Decisions*, 28 GEO. J. LEGAL ETHICS 487 (2015).

### A. Government Malfeasance

In *Sullivan v. Central Intelligence Agency*,<sup>5</sup> the plaintiff filed multiple Freedom of Information Act (FOIA)<sup>6</sup> requests to learn more about her father, who disappeared in a twin-engine Beechcraft during a 1963 trip from Mexico to Honduras. According to the plaintiff, the flight's real purpose was to drop propaganda materials over Cuba.

After searching its records, the government reported it had no responsive, non-privileged documents, a claim the district court found credible after an *in camera* review. On appeal, the First Circuit, per Judge Selya, affirmed:

Although we sympathize with appellant's desire to learn the details of her father's fate, she, like all other litigants, must abide by the rules. Congress crafted the CIA Information Act to strike a balance between public disclosure and an effective intelligence apparatus. Our role is not to reassess the relative interests . . . or to yield whenever human sympathies are engaged, but simply to apply the law as Congress wrote it. Given the generality of appellant's request and the stringent standard of confidentiality contained in the Information Act, the district court appropriately granted summary judgment in the government's favor. Further, as we have explained, the freshly minted JFK Act claim provides no principled basis for a remand and, thus, no detour around the ruling below.<sup>7</sup>

In *Whitaker v. Central Intelligence Agency*,<sup>8</sup> the plaintiff similarly filed numerous FOIA requests to discover information about his father's disappearance during a 1980 DC-3 flight from Spain to Germany. According to the plaintiff, the plane may have been part of a covert government mission.<sup>9</sup>

When his requests were met with bureaucratic stonewalling, the plaintiff brought a federal lawsuit in the District of Columbia. In a lengthy opinion, Judge Kollar-Kotelly accepted the U.S. Department of Defense's explanation that it had no records, but ordered both the Central Intelligence Agency and the U.S. Department of State to recheck their files and warned them not to turn a blind eye to obviously relevant information:

Although Plaintiff's [first FOIA] request referred to his father by name

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<sup>5</sup> 992 F.2d 1249 (1st Cir. 1993).

<sup>6</sup> 5 U.S.C. § 552.

<sup>7</sup> *Sullivan*, 992 F.2d at 1256.

<sup>8</sup> 31 F. Supp. 3d 23 (D.D.C. 2014).

<sup>9</sup> The Dutch aviation photographer Ruud Leeuw has created a web page about Whitaker's claims. See Ruud Leeuw, *The Search for Douglas DC-3 ECT-025*, <http://www.ruudleeuw.com/search126.htm>.

as one of the plane's pilots, the request *also* referred specifically to a co-pilot on board the plane. The co-pilot was admittedly unnamed, but the request nevertheless identified a concrete second occupant of the plane, as opposed to merely a potential or hypothetical additional occupant . . . . Accordingly, upon learning from its search for documents related to Harold Whitaker that the co-pilot referenced in the request was Lawrence Eckmann, the State Department . . . should have followed up on the lead . . . .<sup>10</sup>

In *Valentine v. United States*,<sup>11</sup> a Beechcraft Queen Air 65-B80 went missing during a 1982 flight from Florida to the Bahamas. The pilot's wife subsequently sued the government, claiming that it was slow in starting its rescue efforts. In dismissing the lawsuit, Judge Spellman of the Southern District of Florida noted:

The Coast Guard launched its search approximately twenty-four hours after the plane went down. By that time, the occupants had either drowned from fatigue, exposure or succumbed to the dangers of the shark infested waters.

The Court finds that with such a myriad of variables present, any attempt to determine what actually happened is speculation at best. Looking at the varying testimony regarding factors such as the weather, sea conditions, shark infestation, possible injuries, time constraints, damage to the safety equipment, the possibility of a submerged crash, and a host of other possibilities, it is simply impossible for the Court to find that the government's erroneous communication to Nassau Flight Service was even a contributing factor in the ultimate fate of James Valentine, much less the proximate cause of his demise.<sup>12</sup>

In *Mooney v. United States*,<sup>13</sup> Judge Costantino of the Eastern District of New York faced facts similar to those in *Valentine* but came to a different conclusion. A Grumman airplane disappeared during a 1982 flight from New York to Massachusetts. When the administrator of the passenger's estate sued the government, it moved to dismiss. In denying the motion, Judge Costantino wrote:

The government argues that the plaintiff cannot establish that the decedent survived the plane crash, and thus cannot establish that FAA negligence was in any way the proximate cause of Raymond Mooney's

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<sup>10</sup> *Whitaker*, 31 F. Supp. 3d at 45 (emphasis in original). Five months later, the case was dismissed with prejudice when the government renewed its motion for summary judgment and Whitaker offered no opposition. See *Whitaker v. Central Intelligence Agency*, 64 F. Supp. 3d 55 (D.D.C. 2014).

<sup>11</sup> 630 F. Supp. 1126 (S.D. Fla. 1986).

<sup>12</sup> *Id.* at 1131.

<sup>13</sup> No. CV-84-4827, 1987 WL 9683 (E.D.N.Y. Apr. 9, 1987).

death. The speciousness of this argument is apparent, and further discussion of this contention would be superfluous.

The government also contends that because plaintiff cannot prove that the decedent in fact survived the crash and that but for FAA negligence would have been rescued, the plaintiff has failed to stake a claim upon which relief can be granted. The government's argument, however, fails to recognize the entirety of the plaintiff's complaint. Although the plaintiff asserts that the defendant's negligence in monitoring the flight prevented the initiation of immediate search procedures, the plaintiff also asserts that the monitoring of the aircraft was conducted in a negligent manner, thus causing or contributing to the crash itself, and therefore, the loss of the decedent's life . . . .

Plaintiff has produced expert opinions and data that point to a possibility that a timely air/sea rescue could have saved the life of the deceased.

Thus, it appears that the government's motion is at odds with the well settled rule that a complaint is not subject to dismissal unless plaintiff cannot prevail under any state of facts which might be proved in support thereof.<sup>14</sup>

#### B. Military Operations<sup>15</sup>

In *In re Hansen's Estate*,<sup>16</sup> a U.S. Army pilot made a will dated September 22, 1943, that left \$1 to his wife and the remainder of his estate to his daughter. On March 13, 1944, his bomber disappeared in heavy weather while on a mission over New Guinea. On December 28, 1944, his wife remarried. On January 27, 1946, the Army changed his status from missing in action (MIA) to presumed dead and paid his estate \$4,716.29. The trial court treated this money as community property and, after giving \$1 to the wife, split the remainder between her and the daughter.

In a detailed opinion, the California District Court of Appeal, per Presiding Justice Shinn, reversed and awarded the entire amount (less \$1) to the daughter. It also rejected the wife's argument that death had occurred on January 27, 1946:

On the appeal of Doris Toomey she contends there was no evidence to support the finding that decedent's death occurred March 13, 1944. This

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<sup>14</sup> *Id.* at \*1-2. The pilot's estate also sued the government, but was considerably less successful. See *infra* notes 98-102 and accompanying text.

<sup>15</sup> The military's procedures for declaring an aviator who fails to return from a flight either "dead" or "presumed dead" are described in detail in *Crone v. United States*, 538 F.2d 875 (Ct. Cl.), *modified on reh'g*, 210 Ct. Cl. 748 (1976). See also *Townsend v. Carter*, 476 F. Supp. 1070 (N.D. Tex. 1979); *In re Wood's Estate*, 62 A.2d 883 (N.J. Orphans' Ct. 1946); Pamela M. Stahl, *The New Law on Department of Defense Personnel Missing as a Result of Hostile Action*, 152 MIL. L. REV. 75 (1996).

<sup>16</sup> 205 P.2d 686 (Cal. Dist. Ct. App. 1949).

contention cannot prevail . . . [T]he parties on the appeal agree that the facts are as stated in [various] communications [received from the government listing the date of death as March 13, 1944,] and they, no doubt, had the same understanding at the trial. Assuming, however, as the parties do, that this correspondence constituted the only evidence that was before the court, the finding that death occurred March 13, 1944, is, in our opinion, well supported.<sup>17</sup>

In *Finrow v. West*,<sup>18</sup> a U.S. Navy pilot disappeared during a 1944 attack on an enemy carrier task force.<sup>19</sup> Five months earlier, a court in Spokane, Washington had annulled his marriage to the plaintiff. In 1994 (*i.e.*, 50 years later), the plaintiff, claiming to be the surviving spouse of a veteran, sought government death benefits. In her application, she explained her mother-in-law had fraudulently obtained the annulment at a time when the plaintiff was pregnant and lacked the money to travel from Rhode Island to Washington to contest it.

The Veterans Administration's Board of Veterans' Appeals denied the plaintiff's request. Summarily affirming the Board's decision, the U.S. Court of Veterans Appeals, per Judge Holdaway, observed:

The appellant claims that the annulment was obtained through fraudulent action by the veteran's mother without the veteran's knowledge . . . . However, as the Board pointed out, the veteran had informed the Navy personnel department that he was indeed seeking an annulment of his marriage. It also appears that the appellant has alleged that the annulment decree was obtained in violation of the Due Process Clause in the Fifth Amendment to the U.S. Constitution. However, this Court has no jurisdiction to disturb an annulment decree issued by the State of Washington . . . . The Court holds that the Board's decision has a plausible basis in the record and must be affirmed.<sup>20</sup>

In *In re Jacobsen's Estate*,<sup>21</sup> a U.S. Navy lieutenant, his wife, and their two-year-old twins (Caryl and Craig) were passengers aboard an R7V-1 Super Constellation that disappeared during a 1954 flight that departed from Maryland.<sup>22</sup> To gain access to Caryl's only asset—a \$2,700 life insurance

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<sup>17</sup> *Id.* at 687-88.

<sup>18</sup> 16 Vet. App. 289, No. 97-1605, 1998 WL 834833 (Ct. Vet. App. Oct. 28, 1998), *appeal dismissed*, 215 F.3d 1341 (Fed. Cir. 1999).

<sup>19</sup> The court's opinion does not say where the attack took place.

<sup>20</sup> *Finrow*, 1998 WL 834833, at \*2.

<sup>21</sup> 143 N.Y.S.2d 432 (Sur. Ct. 1955).

<sup>22</sup> The court's opinion does not indicate where the plane was headed. Other sources, however, report its destination as Port Lyautey, Morocco, after a refueling stop in the Azores. *See, e.g., Accident Description*, AVIATION SAFETY NETWORK, <http://aviation-safety.net/database/record.php?id=19541030-0>.

policy—her paternal grandfather petitioned for letters of administration. In granting his request, Surrogate Moss of King’s County (Brooklyn) accepted Caryl’s naval death certificate as conclusive proof that she was dead:

The “Missing Persons Act” relates to persons within the armed forces as well as to dependents. In fact the word “dependent” is specifically defined as follows:

“(c) the term ‘dependent’ as used in this Act (sections 1001-1016 of this Appendix) includes a lawful wife [and an] unmarried child under twenty-one years of age. It includes also a dependent mother, father, or unmarried dependent stepchild or adopted child under twenty-one years of age, or such dependent as has been designated in official records, or an individual determined to be dependent by the head of the department concerned, or subordinate designated by him[.]”

Under the provisions of Section 1009, Title 50 U.S. Code Ann., as amended, the head of the department concerned, or such subordinate as he may designate, has the authority to make all determinations necessary in the administration of the Act. Such determinations are conclusive “as to death or finding of death” and “as to any essential date” of death. In the opinion of the Court, the Act permits determinations to be made in respect of dependents of persons within the armed services. Under the aforesaid definition of “dependents,” the two twin children, one of whom was Caryl Leigh Jacobsen the decedent herein, are the dependents of Lieutenant Jacobsen and any determinations with respect to them or either of them are properly within the contemplation of the Missing Persons Act as to the conclusiveness of the determination of death.<sup>23</sup>

In *Valley Forge Life Insurance Co. v. Republic National Life Insurance Co.*,<sup>24</sup> a U.S. Navy navigator disappeared in 1967 while engaged in a combat mission over Viet Nam. In 1976, the Navy changed his status from MIA to killed in action (KIA). Prior to his disappearance, he had taken out a life insurance policy with the plaintiff. It, in turn, had entered into a reinsurance agreement with the defendant that ran from 1965 to 1967. After paying on the policy, the plaintiff sought reimbursement from the defendant. Relying on the 1976 change of status, the defendant rejected the plaintiff’s demand as being outside the agreement’s coverage period.

The trial court entered summary judgment for the defendant. On appeal, the Texas Court of Civil Appeals, per Chief Justice Guittard, reversed:

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<sup>23</sup> *Jacobsen’s Estate*, 143 N.Y.S.2d at 434.

<sup>24</sup> 579 S.W.2d 271 (Tex. Civ. App. 1978).



The certificate by the Navy Department shows only that February 24, 1976, is the date on which the insured's status was changed on the department's records from "missing in action" to "presumed killed in action." In itself, the certificate does not tend logically to establish the date of death . . . .

Although the opposing evidence here may fall short of direct eye-witness testimony, we hold that it is sufficient to rebut the presumption and to raise a counter-presumption that the insured died in 1967. The circumstances of his disappearance, as established by the stipulation, provide circumstantial evidence that he died when his plane was shot down over North Viet [N]am. Proof of the perilous circumstances in which he was last seen raises a counter-presumption, which serves to overcome the presumption established by the certificate, and thus to cast on [the reinsurer] Republic the burden to produce evidence [tending to prove that he survived that peril. *See* 9 J. Wigmore, *Evidence* § 2493 (3rd ed. 1940). Since, by the terms of the stipulation, no other evidence is available, judgment should be rendered accordingly.<sup>25</sup>

In *Ward v. United States*,<sup>26</sup> a U.S. Air Force captain disappeared during a 1969 combat mission over Southeast Asia. In 1972, his wife remarried. In 1978, the government changed his status from MIA to KIA. By this time, the decedent's back pay had reached \$131,223.18, an amount claimed by both his wife and his mother.

Citing the wife's 1972 remarriage, the trial judge awarded the money to the mother. On appeal, the Court of Claims, per Judge Nichols, reversed:

[W]e reject as irrelevant the finding that third-party plaintiff was not the wife or widow of Captain Ward on June 20, 1978. Third-party plaintiff is entitled to . . . Captain Ward's pay and allowances because the deceased expressly designated her by name as the beneficiary [on his emergency paperwork] and not because of her status as his wife or widow. Captain Ward's designation is not limited by the remarriage whether subsequent or prior to the date of death. It is not necessary that a beneficiary be a dependent of the deceased here.<sup>27</sup>

In *Darr v. Carter*,<sup>28</sup> the plaintiff's husband was a U.S. Air Force captain who disappeared after his B-52 was hit by missile fire during a 1972 bombing run over North Viet Nam. In 1979, the government sought to change his classification from MIA to deceased. The plaintiff sued to enjoin the change, but the trial court dismissed her complaint as premature. On appeal, the

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<sup>25</sup> *Id.* at 277-78.

<sup>26</sup> 646 F.2d 474 (Ct. Cl. 1981).

<sup>27</sup> *Id.* at 479.

<sup>28</sup> 487 F. Supp. 526 (E.D. Ark. 1980), *aff'd*, 640 F.2d 163 (8th Cir. 1981).

Eighth Circuit, per Judge Arnold, agreed:

Our conclusion might be different if the Air Force were acting in clear excess of authority, or if the status-review procedure were unconstitutional on its face. Neither statement can be made here. Mrs. Darr does claim she was not allowed to present all the evidence she deems relevant . . . . But what this claim really amounts to, in the circumstances of this case, is an assertion that the status-review hearing should have been postponed until the Air Force produced a mass of additional documentation not shown to have any relation to the Darr case in particular. We do not hold that Mrs. Darr has no right to this information. We do hold that whether she has such a right should be decided, in the first instance, by the Status Review Board and the Secretary of the Air Force, with review in the courts only if the Secretary's final determination of Captain Darr's status is unfavorable. This is not a case where the right claimed must be judicially considered now if it is ever to be adjudicated by a court. A decent respect for the Air Force's procedures, and an awareness of the need to avoid unnecessary burdens on the courts, alike counsel that we not intervene at this stage of the proceedings.<sup>29</sup>

A short time later, a case with facts identical to *Darr* reached the Fifth Circuit. In *Lewis v. Reagan*,<sup>30</sup> the plaintiff tried to stop the government from changing her husband's classification from MIA to KIA. While serving as a colonel in the U.S. Air Force, he had disappeared during a 1965 flight over Laos. Finding that he almost certainly was a war casualty, the panel, in a *per curiam* decision, affirmed the trial court's refusal to halt the reclassification:

The Status Review Board in the present case has recommended that the status of Colonel Lewis be changed from Missing in Action to Killed in Action . . . . The case is thus in precisely the same posture as *Darr v. Carter*, 640 F.2d 163 (8th Cir. 1981) . . . . The reasoning of the court in *Darr* is persuasive, and we adopt it here.<sup>31</sup>

### C. Criminal Activity

In *National Insurance Underwriters v. Melbourne Airways and Air College, Inc.*,<sup>32</sup> a plane's owner filed an insurance claim after its plane disappeared during a flight from Florida to the Bahamas.<sup>33</sup> Believing that the owner's employee had made off with the plane, the insurer refused to pay

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<sup>29</sup> *Darr*, 640 F.2d at 166 (footnote omitted).

<sup>30</sup> 660 F.2d 124 (5th Cir. 1981).

<sup>31</sup> *Id.* at 126-27.

<sup>32</sup> 210 So. 2d 267 (Fla. Dist. Ct. App.), *cert. denied*, 219 So. 2d 703 (Fla. 1968).

<sup>33</sup> The court's opinion does not indicate when the plane went missing.

based on the policy's conversion clause. Finding instead that the loss came within the policy's criminal activity clause, the jury sided with the owner. The Florida District Court of Appeal, per Judge Hendry, agreed:

Melbourne Airways chartered the aircraft, with a pilot who was an employee of the corporation, to a third party for a trip to the Bahama Islands. It appears that the aircraft was lost while being used by the pilot and the charter passengers to drop leaflets over the island of Cuba, which was done without the knowledge or consent of the plaintiff . . . . The basis of appellant's objection is that no "theft" has occurred, by reason of the fact that the pilot was one "in lawful possession" of the aircraft within the meaning of the policy terms. In holding the opposite, we rely upon the case of *Firemans Fund Ins. Co. of San Francisco, Cal. v. Boyd*, Fla. 1950, 45 So. 2d 499. The facts of the *Boyd* case are nearly identical, the difference being that the item "stolen" was a truck. In ruling that the plaintiff therein could collect from the insurer, the Florida Supreme Court stated, at page 501: "The truck came into his (the employee) custody by virtue of his employment by plaintiff as a truck driver, and he had not that possession, nor that contractual obligation with respect to the thing bailed characteristic of a bailment."

We are of the opinion that the instruction as given comports substantially with the facts of the case and with the law as set out in the *Boyd* decision, *supra*.<sup>34</sup>

In *Gonzalez v. La Concorde Compagnie D'Assurances*,<sup>35</sup> the plaintiff's Cessna 310 vanished, with the most likely explanation being theft.<sup>36</sup> When the plaintiff put in a claim with his insurer, it declined to pay on the ground that the plaintiff was not, as stated in the policy documents, the plane's sole owner. At trial, the district court directed a verdict in favor of the plaintiff without giving the insurer a chance to defend itself. On appeal, the First Circuit, per Judge Bownes, reversed and remanded:

Appellee's counsel suggested at oral argument that the order for a directed verdict should be viewed as one granting summary judgment for plaintiff. No such motion was ever made or mentioned in the court below, and, even if we assume that it was, the fact is that only the plaintiff was given an opportunity to present evidence. Defendant had no opportunity by way of affidavit or otherwise to set forth any facts. Appellee's counsel forgot, as he obviously did at the trial, that our adversary system requires that both sides be given an opportunity to be heard. It is not the label that is important, but the principle which is

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<sup>34</sup> *Melbourne Airways*, 210 So. 2d at 268-69.

<sup>35</sup> 601 F.2d 606 (1st Cir. 1979).

<sup>36</sup> The court's opinion does not provide any other information about the plane's disappearance.

central to our whole system of jurisprudence.

While this case may ultimately prove to be, as the court below prematurely declared, “the clearest case I have ever[] heard in my life,” we must remand.<sup>37</sup>

In *Aero International, Inc. v. United States Fire Insurance Co.*,<sup>38</sup> a Cessna vanished during a 1980 flight from Haiti to Aruba. When the plane’s owner and mortgagee sought compensation, the insurer refused to pay. At trial, the plaintiffs argued the plane had been lost at sea; the defendant insisted the pilot had absconded with the aircraft. After the jury sided with the plaintiffs, the defendant unsuccessfully moved to set aside the verdict. On appeal, the Fifth Circuit, per Judge Gee, affirmed:

U.S. Fire’s final asserted basis for a directed verdict or judgment n.o.v. is that the policy excludes coverage for any loss due to conversion by one in possession of the aircraft. As evidence of conversion, U.S. Fire points to the facts that Van Oostrum had not paid Aero the August 1980 rental charge and that, prior to filing suit, Aero filed criminal charges against Van Oostrum for embezzlement by contract. However, Aero’s representative testified that the criminal charges were filed because otherwise no police investigation could proceed. The record also shows that the aircraft disappeared in August 1980, that rental payments had been made through July 1980, and that Van Oostrum had paid the first and last month’s rental payments in advance. From this evidence, the jury could reasonably conclude that the aircraft was not converted by Van Oostrum but instead was lost at sea.

The evidence in this case does not overwhelmingly support either party. Perhaps we would have drawn different inferences from some of the facts than did the jury, but that is not our task. There was enough evidence to support the verdict and the district court did not err in refusing to take the case from the jury.<sup>39</sup>

In *Beta II, Inc. v. Federal Insurance Co.*,<sup>40</sup> the plaintiff’s Piper Navajo Chieftain disappeared in 1981.<sup>41</sup> When the corporate owner of the plane filed an insurance claim, the insurer brought a declaratory judgment action in an unsuccessful attempt to avoid payment. According to the insurer, the owner’s lessee most likely stole the plane.

Subsequently, the owner sued the insurer for bad faith. The trial court granted the insurer’s motion to dismiss, but the Ohio Court of Appeals

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<sup>37</sup> *Id.* at 608-09 (footnote omitted).

<sup>38</sup> 713 F.2d 1106 (5th Cir. 1983).

<sup>39</sup> *Id.* at 1111 (footnote omitted).

<sup>40</sup> No. C-830779, 1984 WL 6951 (Ohio Ct. App. Aug. 15, 1984).

<sup>41</sup> The court’s opinion does not provide any further details about the disappearance.

reversed in a *per curiam* opinion. In addition to finding that subject matter jurisdiction existed and the declaratory judgment action did not bar the present suit, it held that H. Thomas McHenry, the owner's sole shareholder, could seek individual damages:

In the first assignment of error, appellants contend that the trial court erred in granting appellee's motion to dismiss with respect to McHenry. We agree. Appellee alleges that McHenry fails to state a claim for relief because he is not a real party in interest. Appellee contends that because Beta (not McHenry) is the named insured on the contract, any action by McHenry must be brought as a shareholder, merely enforcing a right or obligation to the corporation. Appellee's logic is faulty, however, because McHenry was personally liable on the promissory note to General Electric [the plane's mortgagee] and was thus personally damaged by the alleged refusal to act in good faith. When the insurance claim was not paid, Beta was unable to meet its obligation on the note to General Electric and General Electric obtained a judgment against Beta and McHenry for \$258,523.26 plus interest. McHenry directly suffered the consequences of appellee's refusal to pay the insurance claim, and he is a real party in interest.<sup>42</sup>

In *Royal Insurance Co. v. Ideal Mutual Insurance Co.*,<sup>43</sup> a Piper Navajo disappeared in 1981 while it was being transported from Pennsylvania to Tennessee, where a potential buyer was scheduled to see it. After paying the claim, the reinsurer sued the insurer, arguing that no coverage existed under the reinsurance agreement. In entering judgment for the insurer, Judge McGlynn of the Eastern District of Pennsylvania concluded the pilot most likely had diverted the plane:

Royal argues that a finding of conversion is precluded because there is no proof that [the pilot] Vincent intentionally exercised wrongful dominion or control over the Navajo given the pattern of prior dealings between Vincent and [the plane's owner] Hortman, and there was no evidence of continued usage after the plane was lost. This argument is without merit. The fact that Vincent had rented the aircraft from Hortman on prior occasions and he had always returned the aircraft on these occasions does not establish that Vincent had permission to fly the Navajo to Miami in the situation at hand. It is undisputed that there was no discussion between Mrs. Hortman and Vincent regarding the use of the aircraft for any purpose other than the flight demonstration in Tennessee, and that there was no charge to Vincent or remuneration to

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<sup>42</sup> *Id.* at \*2.

<sup>43</sup> 649 F. Supp. 130 (E.D. Pa.), *aff'd mem.*, 806 F.2d 254 (3d Cir. 1986).

Hortman in connection with the flight. (J.S.F. 23, 24).

Moreover, the fact that neither Vincent nor the Navajo has ever been located and that it is uncertain whether the plane was destroyed or Vincent continued to use it after its disappearance does not preclude a finding of conversion, because the conversion occurred simply by virtue of the fact that the aircraft was taken to Miami without the owner's consent and never returned to the owner, thus depriving Hortman of its possessory rights in the plane. Even if Vincent intended to take the plane to Tennessee after he left Miami and it was somehow lost en route, a conversion has been made out because his use of the plane was inconsistent with the purpose for which he was given the aircraft.<sup>44</sup>

In *United States v. Orozco*,<sup>45</sup> numerous individuals were charged with drug-related offenses. Denying their suppression motions, Judge Irving of the Southern District of California relied in part on a phone call about a missing airplane:

On September 18, 1984, [co-defendant Michael] Sullivan used his business phone to call Carlos [last name unknown]. Sullivan told Carlos that he was attempting to raise money and was looking for someone "who wanted to make a quick return on their dollar or get a part of what I am trying to bring in." Carlos told Sullivan that he could not participate at this time and Sullivan asked if Carlos knew anyone who might like to participate. Carlos responded that the "four ones I knew were on that airplane that's gone." Carlos said the four guys that took off in the missing airplane had 1.5 million [dollars] which was lost. The FBI investigated this missing airplane and on September 20, 1984, Customs Special Agent Steve Trent advised [FBI Special] Agent [Charles] Walker that a confidential informant informed the Air Support Unit of Customs about a leased airplane which disappeared on August 29, 1984. The plane was leased from Palomar Airport on August 20, 1984 by four individuals, one of whom was Charles Eric Jenkins, a furloughed Western Airlines pilot. The individuals who leased this airplane filed a flight plan from San Diego to Houston, Texas, to Orlando, Florida and a possible stop in Canada. According to the FAA, the plane never made it to Houston. It has not been heard from since. The confidential source told Customs that the four individuals who leased the airplane were observed loading the airplane with food and money and that they were overheard saying their true destination was Mexico.<sup>46</sup>

In *Rollins Burdick Hunter of New York, Inc. v. Euroclassics Limited*,

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<sup>44</sup> *Ideal Mut.*, 649 F. Supp. at 137-38.

<sup>45</sup> 630 F. Supp. 1418 (S.D. Cal. 1986).

<sup>46</sup> *Id.* at 1470-71.

*Inc.*,<sup>47</sup> a twin-engine plane disappeared while in the Caribbean.<sup>48</sup> When the plane's corporate owner filed an insurance claim, the insurer refused to pay on the ground that the policy's geographical limits had been breached. As a result, the owner sued the insurer for wrongfully denying the claim and the broker for procuring the wrong type of insurance. The trial court found for the insurer and against the broker.

During discovery, the broker was stymied in its attempt to get answers from Jack Kartee, the owner's president, who asserted the Fifth Amendment during his deposition. Subsequently, while testifying under a grant of immunity in an unrelated federal criminal case, Kartee admitted he had used the plane to smuggle drugs. As a result, the Florida District Court of Appeal, in an opinion by Judge Nesbitt, ordered a new trial:

It is clear that the trial court's denial of [broker] RBH's motion was harmful error. On appeal, RBH relies primarily on its assertion that Kartee's representation made at the time of application, that the plane would be used solely for pleasure trips, was a material misrepresentation which would have voided the policy. RBH claims, and the evidence supports the contention, that both RBH and [the insurer] Federal would have refused to contract with Kartee had he told them that he had been using the plane and planned to use it in the future for drug smuggling. Consequently, regardless of RBH's alleged negligence, [the plane's owner] Euroclassics would not have been entitled to insurance coverage because of Kartee's misrepresentation. This affirmative defense is valid and would have exonerated RBH of liability if proven at trial.<sup>49</sup>

#### D. Weather

In *Stewart v. Rogers*,<sup>50</sup> a Beech Bonanza disappeared during a 1953 flight from Florida to North Carolina. The trial judge ruled that weather was to blame. On appeal, the North Carolina Supreme Court, per Chief Justice Denny, agreed:

We hold that the evidence was sufficient to have supported a finding that Worth Stewart died soon after he left Jacksonville, Florida, on 26 February 1953, at approximately 11:40 a.m. He flew a small plane into weather conditions constituting a hazard to a pilot of his experience flying a plane equipped as his was; his intended path of flight would have carried him along the coast line for a considerable distance, at a time when the wind was of such velocity and direction as to blow him

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<sup>47</sup> 502 So. 2d 959 (Fla. Dist. Ct. App. 1987).

<sup>48</sup> The court's opinion does not provide the date of the plane's disappearance.

<sup>49</sup> *Id.* at 962.

<sup>50</sup> 133 S.E.2d 155 (N.C. 1963).

out to sea; and it has been determined that he did not land at or communicate with any airport within the flying range of his plane. The search for him was thorough and exhaustive. From these facts, the trial judge found that Worth Stewart was dead on 30 May 1956, over three years after his disappearance.<sup>51</sup>

#### E. Pilot Error

In *Solomon v. Warren*,<sup>52</sup> a Cessna 337 Super Skymaster disappeared during a 1971 flight from Curacao to Barbados. After a bench trial, the district judge placed the blame on the pilot rather than the plane's design. In affirming, the Fifth Circuit, per Judge Simpson, explained:

On appeal the appellants contend that the appellee did not establish by a preponderance of the evidence that Paul Warren was negligent in the planning of the trip and in the operation of the aircraft on July 23, 1971, and that Warren's negligence proximately caused the Levins' deaths. The argument goes that even when viewed in a light most favorable to the appellee, the evidence at trial shows that there are two equally acceptable theories of the cause of the fatal crash: (1) the negligence of Warren and (2) the defect in the main fuel tank venting system in this model of aircraft. The appellants assert therefore that the appellee did not carry his burden of proof and that the district court erred in finding that Warren's negligence was a proximate cause of the loss of the aircraft and the deaths of the Levins.

This argument misconceives our appellate function . . . [W]here the conclusions of the trial judge may reasonably be inferred from the record as a whole those conclusions will not be set aside on appeal, even though "conflicting inferences of equal reasonableness may be drawn from . . . the same body of evidence." Here, after careful scrutiny of the record, . . . we find sufficient evidentiary support for that court's conclusions as to liability.<sup>53</sup>

In *Fleischman v. Department of Transportation, National Transportation Safety Board*,<sup>54</sup> a Cessna 210 made a "gear-up" landing during a 1986 flight that began and ended at an airport in Nevada. When the National Transportation Safety Board (NTSB) investigated the incident, the plane's owner admitted he had been at the controls. Later, however, he claimed that one of his passengers, a man named "George," had been piloting

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<sup>51</sup> *Id.* at 158-59.

<sup>52</sup> 540 F.2d 777 (5th Cir.), *reh'g denied*, 545 F.2d 1298 (5th Cir. 1976), *cert. dismissed sub nom.* Warren v. Serody, 434 U.S. 801 (1977).

<sup>53</sup> *Solomon*, 540 F.2d at 784 (footnote omitted).

<sup>54</sup> 927 F.2d 609, No. 89-70367, 1991 WL 26487 (9th Cir. Mar. 1, 1991).



the airplane and had vanished immediately *after* the flight. Rejecting this story, the NTSB suspended the owner's license for 40 days. On appeal, the Ninth Circuit, in a memorandum opinion, affirmed:

At the hearing Mr. Fleischman denied telling Inspector Morgan that he was [the] pilot-in-command when the plane was landed improperly. He testified that he had taken the plane out that day to show it to a potential purchaser, and that the potential purchaser, "George," had been flying the plane during the relevant flight. Fleischman testified that he could not recall George's last name; that George had an accent; that George was accompanied by a "friend that ran around with him all the time" whose name he could not recall at all; that George had been seen frequently around the airport for two years prior to the incident but never again afterwards; and that he did not know whether George or his friend had valid private pilot certificates, but that he had seen George fly many times. Mr. Fleischman also testified that he had been unable to locate George and did not know anyone else who knew him . . . .

The petitioner contends that there is not substantial evidence in the record to support the ALJ's and Board's finding that he was the pilot-in-command at the time of the gear-up landing. The petitioner was the owner of the plane and the only passenger in the aircraft known to be the holder of a pilot's license. In addition, the ALJ found credible Inspector Morgan's testimony that Mr. Fleischman admitted being the pilot-in-command of the flight when the inspector first questioned him following the landing. The inspector's credibility was bolstered by his detailed account of Mr. Fleischman's initial explanation of why he had forgotten to lower the landing gear. At the same time, Mr. Fleischman offered the highly implausible story that he turned the controls of his plane over to a man whose last name he did not know, whom he did not know to have a pilot's license, and who has since vanished without a trace despite having frequented the airport prior to the incident. The ALJ, who had the opportunity to observe both witnesses' demeanor, believed the inspector and found Mr. Fleischman's version of the facts incredible. This circuit has recognized that the factual findings of the ALJ who heard the testimony and observed the demeanor of the witnesses should be accorded great deference.<sup>55</sup>

#### F. *Res Ipsa Loquitur*

Where it is impossible to say what caused a plane to disappear, both litigants and courts have relied on the doctrine of *res ipsa loquitur*.<sup>56</sup>

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<sup>55</sup> *Id.* at \*1, \*6 (footnote omitted).

<sup>56</sup> See generally Theresa Ludwig Kruk, Annotation, *Res Ipsa Loquitur in Aviation Accidents*, 25

In *Haasman v. Pacific Alaska Air Express, Inc.*,<sup>57</sup> a plane disappeared during a 1948 flight from Alaska to Washington. Unable to pinpoint the reason, the plaintiffs relied on *res ipsa loquitur*. The defendant objected to the doctrine's use but was rebuffed by Judge Folta of the District of Alaska:

The plaintiffs, as personal representatives, seek to recover damages for the death of their decedents who were passengers on defendant's airplane on a flight from Yakutat, Alaska, to Seattle, Washington, on November 4, 1948. The plane was last heard from in the vicinity of Sitka. No icing or storm conditions prevailed along this route at the time of this flight. No trace of the plane, its cargo or passengers has ever been found. The plaintiffs by appropriate allegations rely on the doctrine of *res ipsa loquitur* . . . .

The question presented, therefore, is whether the doctrine of *res ipsa loquitur* applies where the plane disappears during flight without a trace. The defendant's contention that the doctrine is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the

A.L.R. 4th 1237 (1983 & Supp. 2015). Interestingly, Illustration 3 to comment e ("Permissible conclusions") of § 328D of the RESTATEMENT (SECOND) OF TORTS (1965) provided:

A is a passenger in the airplane of B Company, a common carrier. In good flying weather the plane disappears, and no trace of it is ever found. There is no other evidence. Various explanations are possible, including mechanical failure which could not have been prevented by reasonable care, and bombs planted on the plane. It may, however, be inferred by the jury that the most probable explanation is some negligence on the part of B Company.

While § 17 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010) preserves the use of *res ipsa loquitur* in missing plane cases, its comment d ("Evidence about other possible causes") rejects Illustration 3:

The extent to which the plaintiff is required to offer evidence ruling out alternative explanations for the accident is an issue to which the Restatement Second of Torts provides an ambivalent response. In black letter, it states that *res ipsa* does not apply unless "other responsible causes" for the accident "are sufficiently eliminated by the evidence." See Restatement Second, Torts § 328D(1)(b). Yet . . . the Restatement indicates that *res ipsa* applies when a plane disappears in good weather, even if the plaintiff introduces no evidence disproving mechanical failure or sabotage. See Illustration 3. . . .

The tension between the Second Restatement's black letter and the Second Restatement's Illustrations are resolved in this Comment. Everything [now] depends on how strong the inference is of defendant negligence before evidence is introduced that diminishes the likelihood of any alternative causes. To present the matter quantitatively, if a type of accident is caused by defendant negligence 70 percent of the time, the plaintiff's *res ipsa* case can proceed even without evidence from the plaintiff negating any of the remaining causes. But for another type of accident, defendant negligence may be implicated only 45 percent of the time; two other causes are 30 percent and 25 percent possibilities. In such cases the plaintiff must offer evidence negating at least one of these causes in order to render the *res ipsa* claim acceptable.

For a criticism of this new approach, see Daniel J. Pylmana, Note, *Res Ipsa Loquitur in the Restatement (Third) of Torts: Liability Based Upon Naked Statistics Rather Than Real Evidence*, 84 CHI.-KENT L. REV. 907 (2010).

<sup>57</sup> 100 F. Supp. 1 (D. Alaska 1951).

plaintiffs.

The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant is stated in 65 C.J.S., Negligence, § 220(5), page 1000 and 38 Am.Juris. 995, Section 299. An examination of the authorities cited in support of the rule however, discloses that it is applied to cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff—not to cases in which there is an equality of ignorance as in the instant case. Since inability, because of a lack of knowledge, to show specific acts of negligence is a prerequisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's *Res Ipsa Loquitur*, is to supply a fact, i.e. defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar . . . .

I am of the opinion that the doctrine of *res ipsa loquitur* is applicable and that the motion to dismiss should be denied . . . . Judgment may accordingly be entered for the plaintiffs.<sup>58</sup>

In *Dugas v. National Aircraft Corp.*,<sup>59</sup> a small plane disappeared during a 1965 flight from the Bahamas to Puerto Rico. Lawsuits were brought

<sup>58</sup> *Id.* at 1-2. In *Des Marais v. Thomas*, 147 N.Y.S.2d 223 (Sup. Ct. 1955), *aff'd mem.*, 153 N.Y.S.2d 532 (App. Div.), *appeal and reargument denied*, 153 N.Y.S.2d 567 (App. Div. 1956), a separate lawsuit brought by the plane's owner against his insurer was dismissed due to the owner's failure to comply with the policy's conditions:

It is not disputed that the first pilot on this fatal trip was neither of the two named pilots "approved by [the insurer] D. K. MacDonald and Company." Plaintiff's answer to the notice to admit, and the opposing affidavit herein, state that the first pilot actually had all the requisite qualifications stated in Endorsement No. 4 (this is not disputed by defendant) and "if a specific request had been made there would have been no valid basis for refusal by MacDonald." It is thus conceded that his name was not even submitted to MacDonald.

It is also not disputed that the co-pilot on this trip held only a student pilot certificate and did not possess the certificate or ratings required under the policy. Plaintiff's answer and affidavit merely claim that he "exhibited" to plaintiff "what appeared on its face to be a valid pilot's airman certificate with proper ratings" and had previously been employed as a full co-pilot by other air carriers.

It is clear that in both respects there was a failure to comply with stated conditions of the policy . . . .

My conclusion is that plaintiff has by his own neglect prevented a recovery under this policy.

*Des Marais*, 147 N.Y.S.2d at 225-26.

<sup>59</sup> 310 F. Supp. 21 (E.D. Pa. 1970), *vacated and remanded on other grounds*, 438 F.2d 1386 (3d Cir. 1971).

against the pilot's estate and the company that owned the plane. In the absence of any firm proof as to why the plane disappeared, Judge Higginbotham of the Eastern District of Pennsylvania concluded:

The plaintiffs' evidence establishes liability on the part of Theodore M. Hart's estate. Since it was admitted that the airplane disappeared over the high seas, the doctrine of *res ipsa loquitur* permits an inference of negligence in this case. *Blument[h]al v. United States of America*, 306 F.2d 16 (3d Cir. 1962). Without an explanation of how the airplane crashed, I would hold that the negligence of the pilot, Theodore H. Hart, caused the accident. Since the ordinary rules of negligence apply to this suit, the plaintiffs' evidence convincingly shows that Mr. Hart's negligence proximately caused the death of both young girls. The compelling inference from plaintiffs' evidence is that the airplane crashed in adverse weather conditions for which the airplane was not properly equipped and for which the pilot was not properly trained. Mr. Hart had ample opportunity to appraise himself of the seriousness of the weather conditions for his small airplane, and he failed to do so. Furthermore, he was warned about the weather conditions before he attempted to fly from South Caicos to San Juan, Puerto Rico. His blatant disregard of these warnings demonstrates a flagrant breach of his duty to use reasonable care to protect his passengers. Such dereliction of duty caused the death of his daughter and her companion.

Plaintiffs have failed to meet their burden of proof to establish liability against National Aircraft Corporation. There is no evidence that Mr. Hart was acting as National Aircraft Corporation's agent or servant when the accident occurred. All of the evidence indicates that Mr. Hart had used the plane for a personal winter vacation trip. Plaintiffs' counsel conceded in oral argument before this Court that he had failed to establish liability against National Aircraft Corporation on the theory of respondeat superior or on any other ground.<sup>60</sup>

### III. CHOICE OF LAW/FORUM

Missing plane cases often require courts to make difficult choice of law or choice of forum determinations.

In *Choy v. Pan-American Airways Co.*,<sup>61</sup> the plaintiff's brother was a passenger aboard the *Hawaii Clipper*, a Martin M-130 seaplane that disappeared in 1938 during a flight from Guam to the Philippines.<sup>62</sup>

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<sup>60</sup> *Dugas*, 310 F. Supp. at 26.

<sup>61</sup> 1941 A.M.C. 483 (S.D.N.Y. 1941).

<sup>62</sup> Although the court's opinion does not mention the *Hawaii Clipper* by name, we know from other sources that Watson Choy was one of the plane's passengers and that Frank Choy was his brother.

Uncertain which law governed his claim, the plaintiff brought five separate causes of action under, respectively, federal admiralty law; Nevada state law (Pan American's place of incorporation); New York state law; international aviation law; and Filipino law. In a pre-trial opinion, Judge Clancy of the Southern District of New York dismissed the second, third, and fourth causes of action but put off choosing between the first and fifth causes of action:

We conclude that the Death on the High Seas Act vests a right in this plaintiff to recover here and that that right may be asserted in this common law action.

We can see no support for any claim plaintiff makes under the Nevada or New York statutes for neither can ever apply. The law of the place of wrong covers the right of action for wrongful death. *Restatement of Conflict of Laws*, sec. 391; *Hunter vs. Derby Foods, Inc.* (1940), 110 F.(2d) 970 (2CCA). The Federal Act governs exclusively. *Middleton vs. Luckenbach*, 1934 A. M. C. 649, 70 F.(2d) 326 (2CCA).

Nor do we think the claim under the Warsaw Convention should be insisted upon. There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Article 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received.

Whether or not the Philippine law will determine the defendant's liability rests upon a question of fact which only a trial can resolve.<sup>63</sup> *Wyman v. Pan American Airways, Inc.*<sup>64</sup> involved a different *Hawaii Clipper* passenger. Without discussing *Choy*, Justice Schreiber of the New York Supreme Court held that the ticket supplied the answer to the choice of law question:

The rights of the parties are fixed by the rules for "International Air Transportation" established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934, 49 Statutes at Large, Part 2, p. 3000,

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*See, e.g., Clipper Victim's Kin Sues for \$52,718*, OAKLAND TRIB., July 4, 1940, at 4.

<sup>63</sup> *Choy*, 1941 A.M.C. at 487. Shortly after Judge Clancy's decision, the parties settled for \$4,000. It then was revealed that Watson Choy had been on a secret mission to deliver a large sum of cash to the Nationalist Chinese government. This money had been raised from Chinese-Americans and had been entrusted to Choy in his capacity as president of the Chinese War Relief Committee. *See \$250,000 Mystery of Chinese Closed*, N.Y. TIMES, Aug. 29, 1941, at 7.

<sup>64</sup> 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd mem.*, 48 N.Y.S.2d 459 (App. Div.), *appeal denied*, 49 N.Y.S.2d 271 (App. Div.), *aff'd mem.*, 59 N.E.2d 785 (N.Y. 1944), *cert. denied*, 324 U.S. 882 (1945).

which thus becomes part of the law of the land . . . . The said rules were made a condition of the ticket herein . . . .<sup>65</sup>

In *Fornaris v. American Surety Co. of New York*,<sup>66</sup> a Cessna 182 disappeared in 1957 while traveling from the U.S. Virgin Islands to Puerto Rico. It was agreed by all that the plane must have crashed somewhere between the two islands. This assumption, however, raised the question of whether the law of the Virgin Islands, the law of Puerto Rico, or the law of the United States was applicable.

The defendants (the airplane's corporate owner and its insurer) argued the law of the Virgin Islands, which capped damages at \$10,000, should be used. Siding with the plaintiffs, the trial court opted for the law of Puerto Rico, which did not contain a cap, and ordered the defendants to pay \$255,000.

On appeal, the Puerto Rico Supreme Court, in an opinion by Justice Lord, affirmed. After first deciding that that case was not controlled by federal law (because the casualty almost certainly occurred in territorial waters), Justice Lord explained that under the "center-of-gravity test" Puerto Rico's interests outweighed those of the Virgin Islands:

From the above analysis it will be clear that Puerto Rico, and not St. Thomas, has the dominant contacts in this case . . . . The plane, the corporation that owns it, the four deceased passengers and their successors (here plaintiffs) were or are, as the case may be, of Puerto Rico. To them Puerto Rico owes the protection of its laws and its public policy. The crash site is a completely fortuitous factor and the fate of the parties in a rational system of law should not be left to the mercy of such a capricious factor. We therefore adopt the doctrine of the key contacts which we find is more realistic and fair and apply the law of Puerto Rico.<sup>67</sup>

Three different choice of law/forum decisions owe their existence to Flight 739, a chartered Lockheed L-1049H that disappeared in 1962 while transporting 93 U.S. soldiers from California to Viet Nam.<sup>68</sup>

In *Pardonnet v. Flying Tiger, Inc.*,<sup>69</sup> the administrator of one of the soldiers' estates sued the airline in federal court in Illinois. After entering a

<sup>65</sup> *Wyman*, 43 N.Y.S.2d at 422.

<sup>66</sup> 93 D.P.R. 29, No. R-63-296, 1966 WL 16541 (P.R. Jan. 24, 1966).

<sup>67</sup> *Id.* at \*10 (author's trans.).

<sup>68</sup> The families currently are campaigning to have the soldiers' names added to the Viet Nam memorial in Washington, D.C. See Matthew M. Burke, *Listing on Vietnam Wall Sought for Troops Killed in 1962 Plane Crash*, STARS AND STRIPES, July 24, 2013, <http://www.stripes.com/news/listing-on-vietnam-wall-sought-for-troops-killed-in-1962-plane-crash-1.231996>.

<sup>69</sup> 233 F. Supp. 683 (N.D. Ill. 1964).

special appearance, the airline moved to have the case transferred to California. In support of its motion, it argued that the action was governed by the Warsaw Convention and, as such, suit had to be brought in one of the four forums specified by Article 28(1) of the treaty: the airline's domicile (Delaware), the airline's principal place of business (California), the location where the ticket was issued (California), or the intended destination (Viet Nam).<sup>70</sup> In denying this request, Judge Decker of the Northern District of Illinois wrote:

In conclusion, assuming only for the purposes of respondent's exception to the jurisdiction of this Court, that the Warsaw Convention does apply to this case, Article 28(1) determines only which nations can hear the case, but not which court within an appropriate nation. Article 28(2), by leaving questions of procedure to the court to which the case is submitted, would determine which court within an appropriate nation may hear a case. Under the domestic jurisdiction and venue statutes of the United States, the libel in personam in the case at bar is properly filed in the Northern District of Illinois, and this Court properly has jurisdiction and venue of the subject matter and parties.<sup>71</sup>

In *Warren v. Flying Tiger Line, Inc.*,<sup>72</sup> the administrators of four other passenger estates sued the airline in California. The district court, noting the soldiers had been issued tickets incorporating the Warsaw Convention, held the airline was entitled to limit its liability. On appeal, the Ninth Circuit, per Judge Hamley, agreed the treaty was applicable but ruled the airline was not entitled to limitation:

Under the facts of the case before us, the passenger tickets were delivered at the foot of the ramp just as the servicemen boarded the plane. None of the passengers were afforded a reasonable opportunity of even reading the ticket, much less obtaining additional insurance, before they were accepted by boarding the plane. The passengers were thereby deprived of a right which was intended to be afforded them [under the treaty] as a concomitant to the carrier's right to limit its liability.<sup>73</sup>

Lastly, in *Flying Tiger Lines, Inc. v. Landy*,<sup>74</sup> the pilot's family was

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<sup>70</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 28 § 1, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11. For a further discussion, see Note, *Article 28 of the Warsaw Convention: A Suggested Analysis*, 50 MINN. L. REV. 697 (1966).

<sup>71</sup> *Pardonnnet*, 233 F. Supp. at 688.

<sup>72</sup> 234 F. Supp. 223 (S.D. Cal. 1964), *rev'd*, 352 F.2d 494 (9th Cir. 1965).

<sup>73</sup> *Warren*, 352 F.2d at 498.

<sup>74</sup> 250 F. Supp. 282 (N.D. Cal. 1965), *aff'd in part and rev'd in part*, 370 F.2d 46 (9th Cir. 1966).



awarded death benefits under California's workers' compensation statute<sup>75</sup> at a rate of \$70 per week for 250 weeks, or \$17,500. After agreeing to, and receiving, a lump sum payment of \$16,819.91, the family sought death benefits under the federal Defense Base Act (DBA).<sup>76</sup> A deputy commissioner granted the family \$68.25 a week for as long as they met the DBA's age and dependency requirements and gave the airline a credit for what it already had paid. When the airline sued the deputy commissioner to set aside his award, the district court dismissed the lawsuit. On appeal, the Ninth Circuit, per Judge Ely, held the airline should have received a credit of \$17,500 rather than \$16,819.91 but otherwise affirmed:

Although the record on this appeal does not contain a transcript of the entire proceedings before the California Industrial Accident Commission, the referee's award is before us. It does not include a specific finding that the federal Defense Base Act is inapplicable, and the appellants concede in their briefs that the issue of federal jurisdiction was never raised before the state body . . . .

There is more weight to appellants' contention that the applicants, by seeking and recovering benefits under the state act, made a binding election of remedies . . . . But the coverage provisions of the Defense Base Act clearly evidence the intent that the act shall afford the sole remedy for injuries or death suffered by employees in the course of employments which fall within its scope . . . . [Thus,] the Deputy Commissioner had jurisdiction to render the disputed award . . . .<sup>77</sup>

In *Kelley v. Central National Bank of Richmond*,<sup>78</sup> a Piper aircraft disappeared during a 1969 flight from Florida to Virginia. The passenger's estate sued the pilot's estate in federal court on the basis of admiralty jurisdiction.<sup>79</sup> The pilot's estate objected because there was no proof the plane had ended up in the ocean.

After considering the matter, Judge Lewis of the Eastern District of Virginia held that admiralty jurisdiction existed because wreckage from what *might* have been the plane was briefly spotted off the coast:

The missing aircraft was last reported to be some ten miles SSE of Vero Beach en route to Richmond, Virginia.

A member of a [civil air patrol] search crew spotted submerged objects about twenty-four hundred yards off shore east of Melbourne Beach in about forty feet of water. This observer thought the submerged objects

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<sup>75</sup> Cal. Labor Code §§ 3200-6208.

<sup>76</sup> 42 U.S.C. §§ 1651-1654.

<sup>77</sup> *Landy*, 370 F.2d at 51-52 (footnote omitted).

<sup>78</sup> 345 F. Supp. 737 (E.D. Va. 1972).

<sup>79</sup> 28 U.S.C. § 1333.



were parts of the missing airplane they were then looking for—He described what he saw in some detail—The searching aircraft circled the spot for some time and radioed for a Coast Guard vessel to come to the scene.

The cutter did not reach the scene until the next morning—The divers could not enter the water due to the presence of sharks—A marker buoy was placed on the spot and arrangements were made for a Navy diving team to embark with the cutter on Sunday.

High winds causing sixteen-foot seas washed the marker buoy away—preventing the cutter from sending divers down until the following Thursday—by then the submerged objects could not be found.

No other aircraft was reported missing in the area in question. It does not follow from the fact that the submerged objects were never recovered that they were not there.

The Court concludes from the evidence presented that the objects seen beneath the surface of the ocean off Melbourne Beach in the navigable waters of Florida were the remains of the aircraft in question.<sup>80</sup>

In *American Home Assurance Co. v. United States*,<sup>81</sup> a 1972 flight disappeared between New Jersey and New York. The plaintiff argued that federal court jurisdiction existed under both the Federal Torts Claim Act (FTCA)<sup>82</sup> and the Suits in Admiralty Act.<sup>83</sup> In disagreeing with the latter contention, Judge Muir of the Middle District of Pennsylvania wrote:

The Government does not contest our jurisdiction under the Federal Tort Claims Act. However, it has filed a motion to dismiss with respect to our alleged jurisdiction under the Suits in Admiralty Act.

Disposition of this motion is completely controlled by the Supreme Court's decision in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). That case held that the mere fact that an alleged wrong takes place or has its effect on or over navigable waters is not by itself sufficient to turn an aviation tort case into a "maritime tort." Rather, for such a case to be cognizable in admiralty, the alleged wrong must bear a significant relationship to "traditional maritime activity" . . . .

Combining the Supreme Court's limited view of admiralty jurisdiction in aviation tort cases with a conclusion that no "traditional maritime activity" has been demonstrated here, this Court holds that the instant suit is not cognizable under the Suits in Admiralty Act. Consequently,

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<sup>80</sup> *Kelley*, 345 F. Supp. at 739-40.

<sup>81</sup> 389 F. Supp. 657 (M.D. Pa. 1975).

<sup>82</sup> 28 U.S.C. § 1346(b).

<sup>83</sup> 46 U.S.C. §§ 741-752 (now codified as 46 U.S.C. §§ 30901-30918).

the Defendant's motion to dismiss with respect to jurisdiction under 46 U.S.C. § 741 et seq. will be granted.<sup>84</sup>

In *Bazor v. Grasso Production Management, Inc.*,<sup>85</sup> a helicopter ferrying workers between oilrigs in the Gulf of Mexico disappeared during a 2005 flight. The ex-wife of one of the workers, acting on behalf of his children, sued numerous parties.<sup>86</sup> Although all sides agreed that the helicopter must have crashed, there was sharp disagreement regarding the exact location, which would determine whether Louisiana state law or federal admiralty law applied.

In an effort to resolve this critical issue, Magistrate Judge Shushan permitted the plaintiffs to take extensive discovery:

Industrial Helicopters urges that the pilots do not possess information relevant to the parties' claims and defenses. This is disputed by the plaintiffs. For example, they contend that the helicopter went down further than twelve miles from shore while Industrial Helicopters will urge the helicopter went down within the twelve mile limit. Plaintiffs contend that, if the helicopter went down beyond the twelve mile limit, they may recover non-pecuniary damages . . . .

The circumstances of the action are unusual. The helicopter, its pilot and the two men on the platform were lost without a trace. Industrial Helicopters' search and rescue efforts are relevant to the plaintiffs' claims. Six or seven of the pilots may have participated in those efforts and possess information on those efforts. There is no basis to depose the pilots who did not participate in the search and rescue efforts and, to the extent these pilots possess information on subjects like company procedures, [their] testimony is redundant and cumulative.

The depositions of eight pilots were noticed. Industrial Helicopters shall produce those pilots who participated in the search and rescue efforts. Its motion to quash is granted as to any of the eight pilots that did not participate in the search and rescue efforts.<sup>87</sup>

#### IV. STATUTES OF LIMITATION

To be timely, death actions must be filed within the applicable statute of limitations (SOL). But when does the SOL begin to run in a missing plane case? There are at least five possibilities: 1) the flight's departure date; 2) the

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<sup>84</sup> *American Home*, 389 F. Supp. at 658.

<sup>85</sup> 2007 WL 1560303 (E.D. May 25, 2007).

<sup>86</sup> Among the defendants was the owner of the rig from which the helicopter had departed. In an earlier decision, its motion to be let out of the lawsuit had been denied as premature. *See Bazor ex rel. Lantier v. Grasso Prod. Mgt., Inc.*, 2007 WL 625846 (E.D. La. Feb. 23, 2007).

<sup>87</sup> *Bazor*, 2007 WL 1560303, at \*1-2.

flight's scheduled arrival date; 3) when it first becomes obvious that something has gone wrong; 4) when rescue efforts are called off; and 5) the day a specific participant is declared legally dead. Depending on the circumstances, the time between these events can be very short or quite long.<sup>88</sup>

In *Storey v. Garrett Corp.*,<sup>89</sup> a DC-4 disappeared on March 28, 1964, en route from Hawaii to California. By March 24, 1966, the estates of three of the passengers had filed lawsuits against the plane's operator. On January 16, 1967, these actions were consolidated before Judge Hawk of the Central District of California.

Thereafter, the plaintiffs, asserting that a recent U.S. Supreme Court decision<sup>90</sup> had abolished the "exclusive remedy provision" of the DBA, sought to add Facilities Management Corporation (FMC), the passengers' employer, as an additional defendant. In upholding FMC's objection based on the expiration of the two-year SOL applicable to maritime torts,<sup>91</sup> Judge Hawk wrote:

On March 28, 1966, the two-year period of limitation following the occurrence upon which these libels are based, expired. 46 U.S.C. § 763. Since that date, any claim these plaintiffs may have against FMC, and their remedy thereon, has been barred as a matter of law. It was not until almost 14 months after this bar had been raised that the Supreme Court handed down its decision in the *Jackson* case. Whatever the meaning of that decision, it cannot reasonably be held to have revived a cause of action which had been extinguished by lapse of the statute of limitations prior to the date of its entry . . . .

Plaintiffs seek to avoid the effect of the foregoing rule by reliance on the "relation back" doctrine of Rule 15(c) of the Federal Rules of Civil Procedure. Such reliance cannot be justified. It has long been recognized that the "relation back" doctrine does not enable a plaintiff to join entirely new parties as defendants after the statute of limitations has run.<sup>92</sup>

In *Carman v. Prudential Insurance Co. of America*,<sup>93</sup> a pilot of a small airplane disappeared during a 1970 flight.<sup>94</sup> In 1971, when his wife sought to

<sup>88</sup> For an early treatment of this problem, see Note, *Presumption—Evidence of Death—Doctrine of Specific Peril—Disappearances After Airplane Crashes*, 9 AIR L. REV. 79 (1938).

<sup>89</sup> 43 F.R.D. 301 (C.D. Cal. 1967).

<sup>90</sup> *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967).

<sup>91</sup> 46 U.S.C. § 763(a) (now codified as 46 U.S.C. § 30106). As explained *infra* text accompanying note 105, the SOL for maritime torts was increased to three years in 1980.

<sup>92</sup> *Storey*, 43 F.R.D. at 303-04.

<sup>93</sup> 748 P.2d 743 (Alaska 1988).

<sup>94</sup> The court's opinion provides no further information about the plane or the flight.

collect on his life insurance policy, his insurer informed her that she had to wait until he had been missing for seven years. In 1985, an Alaska probate court declared the pilot dead and fixed his date of death as 1975. The wife then applied again to the insurer for payment but was told her claim was time-barred. The trial court agreed. On appeal, the Alaska Supreme Court, per Chief Justice Rabinowitz, affirmed:

The statute of limitations for actions on contracts is six years. AS 09.10.050(1). The probate master concluded that Mr. Carman was presumed to have died on or about August 7, 1975, five years from the date of his disappearance. Thus, because Mrs. Carman did not file her complaint until April 8, 1985, the statute of limitations had run and her claim was untimely. No injustice results from enforcement of the limitations period here, particularly since Mrs. Carman has offered no excuse for waiting until 1985 to make her claim despite being informed by Prudential that she could do so in 1977.<sup>95</sup>

In *Scharwenka v. Cryogenics Management, Inc.*,<sup>96</sup> a pilot disappeared while flying his employer's Cessna 310J from New Jersey to Massachusetts. The trip took place on September 9, 1972; on April 12, 1973, a Massachusetts probate court declared the pilot dead.

On February 25, 1975, the pilot's widow and infant son filed for New Jersey workers' compensation benefits. Measuring the state's two-year SOL from the time of the plane's disappearance, the employer opposed their claims. The New Jersey Division of Workers' Compensation agreed with the employer, as did Judge Conford of the New Jersey Superior Court's Appellate Division:

Although petitioner has not overtly contended that the discovery rule . . . justifies giving her relief in this situation, she seems impliedly to so aver in arguing that the "acquisition of the enforceable right" did not in this case occur until entry of the Probate Court decree. That contention lacks cogency. The time of procurement of the decree was purely adventitious. It could have been delayed indefinitely. The statutory criterion of the time of the accident cannot be displaced by the vagaries of the occasion selected by decedent's next of kin to procure an

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<sup>95</sup> *Id.* at 745. Justice Matthews, believing the claim was timely, dissented:

Mrs. Carman would be presumed to have made a demand at the expiration of the six-year limitations period which began when death was presumed, August 7, 1975. Thus, the date of the presumed demand would be August 7, 1981. That demand would be deemed immediately refused and the statute of limitations would begin to run from August 7, 1981. Since the present action was brought on August 7, 1985, it would not be barred.

*Id.* at 746.

<sup>96</sup> 394 A.2d 137 (N.J. Super. Ct. App. Div. 1978).

adjudication of death for entirely disparate purposes.

Furthermore, assuming, but not deciding, that the discovery rule is at all applicable . . . the facts at hand would not bespeak relief for petitioner. As already indicated, petitioner either knew or reasonably should have known, well before a date two years prior to the filing of her claim, the existence of facts equatable with a compensation cause of action for accidental death . . . .

Petitioner [also] argues that the limitation period should be tolled as to her infant son until majority . . . . To the extent that we understand the contention, we find it without merit. Tort actions, death actions, and workers' compensation proceedings, are sufficiently distinctive in purpose, function and effect to rationally warrant legislative differentiation in respect of limitation provisions, including the incidence of tolling *vel non*.<sup>97</sup>

In *Weiss v. United States*,<sup>98</sup> a Grumman airplane disappeared during a July 12, 1982, flight from New York to Massachusetts.<sup>99</sup> On July 30, 1986, the pilot's executor filed a lawsuit under the FTCA.<sup>100</sup> Based on the FTCA's two-year SOL,<sup>101</sup> the government moved to dismiss. In response, the executor argued the SOL did not begin to run until December 18, 1985, the date on which a New York surrogate's court declared the pilot legally dead. After considering matters, Judge Constantino of the Eastern District of New York found the suit time-barred:

[W]hen coupled with painstaking efforts to find the plane, the conclusion must be reached that the plane was in fact the victim of some unfortunate catastrophe. In view of this fact, this court must . . . assume that the decedent met with his death on July 12, 1982.

Since the claim for wrongful death arose on July 12, 1982 . . . the last possible date which the plaintiff could have brought this action would have been July 12, 1984. Plaintiff failed to give any reasons to the court for his delay in presenting his petition before the Surrogate's Court. Although the court is aware that the period of limitation may seem arbitrary, the court has no authority to extend or narrow the period of limitations . . . . The statute of limitations of the F.T.C.A. is a valid defense to this action and therefore this court grants defendant's

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<sup>97</sup> *Id.* at 139-40.

<sup>98</sup> No. CV-86-3548, 1987 WL 15267 (E.D.N.Y. July 15, 1987).

<sup>99</sup> This is the same flight that gave rise to *Mooney*. See *supra* notes 13-14 and accompanying text.

<sup>100</sup> According to the complaint, "the decedent's death was caused by the negligence of Air Traffic Controllers who are employees of the Federal Aviation Administration (F.A.A.)." *Weiss*, 1987 WL 15267, at \*1.

<sup>101</sup> 28 U.S.C. § 2401(b).

12(b)(1) motion to dismiss for lack of subject matter jurisdiction.<sup>102</sup>

In *Phillips v. Heine*,<sup>103</sup> the plaintiff's son disappeared on March 21, 1987, during a flight in a Piper Cherokee from Malta to Italy.<sup>104</sup> On February 26, 1990, a California state court declared him legally dead. On December 12, 1990, the plaintiff filed a federal lawsuit against the pilot's conservator in the District of Columbia. The defendant successfully moved for dismissal due to the three-year SOL for maritime tort actions. On appeal, the District of Columbia Circuit, per Judge Williams, affirmed:

In this case, the date of death was indisputably on or about March 21, 1987, the date upon which the plane disappeared; hence the cause of action accrued, and the statute of limitations began to run, on that date. In the absence of some congressional intent to the contrary, federal statutes of limitation are subject to the doctrine of equitable tolling, which shelters the plaintiff from the statute of limitations in cases where strict application would be inequitable . . . . Appellant invokes the doctrine, saying that the statute should have been tolled to account for the delay until a conservator had been appointed for the pilot and Brian Phillips had been declared legally dead.

We assume for the purposes of this case that the absence of a conservator for the pilot and of a declaration of death for plaintiff's decedent were circumstances justifying tolling. We also assume that the time appellant spent until February 26, 1990, the date upon which the California court declared Brian Phillips dead, was reasonable in order to establish his death. It does not follow, however, that appellant was entitled to three years from that date to bring the action . . . .

Here the justifications for delay, viewed in the light most favorable to plaintiff, ended no later than the California court's certificate of February 26, 1990. The statute, without any tolling, did not expire until March 21, 1990. As nothing had prevented plaintiff from gathering information in the preceding years, and more than three weeks remained, we question whether there was any need to extend the statute at all. But plaintiff's reasonable needs surely did not require extending the time the full nine and one-half months that passed before he filed suit on December 12, 1990. We note that the prior version of the statute, 46 U.S.C. app. § 763 (repealed Pub. L. No. 96-382, Oct. 6, 1980), provided for explicit tolling, but extended the period for only 90 days after the end of the tolling event. When Congress extended the statutory period from two years to three and deleted any reference to tolling, we

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<sup>102</sup> *Weiss*, 1987 WL 15267, at \*2.

<sup>103</sup> 984 F.2d 489 (D.C. Cir.), *cert. denied*, 510 U.S. 905 (1993).

<sup>104</sup> *Mynatt v. Heine*, Civ. a. No. 89-0748(OG), 1991 WL 45734, at \*1 (D.D.C. Mar. 21, 1991).

doubt it meant to allow plaintiffs more than 90 days from correction of the tolling event, at least in the absence of some extraordinary factor that would make so long an extension reasonable.<sup>105</sup>

In *Hopper v. Dependable Life Insurance Co.*,<sup>106</sup> a crop duster disappeared during a February 1980 flight from Florida to Colombia.<sup>107</sup> In September 1988, a probate court found that the presumptive date of death was February 6, 1980. Following this ruling, the wife sued to collect on her husband's life insurance policy. The underwriter moved to have the case dismissed as untimely, arguing that it should have been brought by February 1985. The trial court agreed but the appeals court reversed. In its view, the statute of limitations did not begin to run until the husband had been missing for the entire statutory period, which in Florida is five years. As a result, the wife had until February 1990 to sue:

Since Mrs. Hopper brought her action within five years of the accrual of her cause of action, the statute of limitations did not bar the action. Accordingly, the trial court erred in finding that the cause of action was barred because of the date of death selected by the probate judge.<sup>108</sup>

## V. CLAIMS

When the occupants of a plane go missing, a host of relational rights are implicated. Depending on what is at stake, the resulting claims-wrangling may be limited to family members or include such third parties as the government, unions, and insurance companies.

### A. Intra-Family Matters

#### 1. Spouses

In *Chiaromonte v. Chiaromonte*,<sup>109</sup> a couple's 1978 divorce decree required the ex-husband to pay \$100 a week in alimony and child support. After he disappeared on a 1980 flight from the Bahamas to Florida, his ex-wife sought an order requiring him to keep paying her (so as to be able to attach his assets). In ruling that no further payments were due, Justice Spatt of the New York Supreme Court explained:

In general, a provision in a judgment in a matrimonial action for alimony does not survive the death of the husband; and upon the husband's death,

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<sup>105</sup> *Phillips*, 984 F.2d at 491-92 (footnote omitted).

<sup>106</sup> 615 So. 2d 263 (Fla. Dist. Ct. App. 1993).

<sup>107</sup> The court provides no further information about the flight.

<sup>108</sup> *Id.* at 264.

<sup>109</sup> 435 N.Y.S.2d 523 (Sup. Ct. 1981).

the obligation for support and maintenance ceases and may not be enforced. *Wilson v. Hinman*, 182 N.Y. 408, 75 N.E. 236 (1905); *Rosenberg v. Rosenberg*, 42 A.D.2d 590, 345 N.Y.S.2d 73 (2d Dept. 1973); *Enos v. Enos*, 41 A.D.2d 642, 340 N.Y.S.2d 783 (2d Dept. 1973).<sup>110</sup>

In *In re Estate of Pringle*,<sup>111</sup> a pilot disappeared during a 1996 flight from the U.S. Virgin Islands to Dominica. After he was declared dead, his ex-wife, insisting their 1980 divorce was a sham, sought a share of his estate. In rejecting her claim, Judge Steele of the U.S. Virgin Islands Territorial Court wrote:

Even if the Petitioner's allegations of deception were accepted as true, the Court would still find that she was barred from receiving a distributive share of the Decedent's Estate pursuant to 15 V.I.C. § 87(2) . . . . [T]he Petitioner voluntarily chose to appear in the divorce action. In fact, the Dominican Republic divorce was obtained by utilizing a procedure where both parties mutually consented to the action. The mere presence of the Petitioner at the Consul General's office is a sufficient act in furtherance of the divorce. More damaging is the testimony elicited from the Petitioner herself. She admitted to lying to the Office of the Consulate General in order to obtain the divorce. It is abundantly clear to the Court that such an affirmative act was conducted to assist in the procurement of the divorce. No matter which party initiated the proceedings, each played an active role in the procurement. An absence of participation from either party would have frustrated the Dominican Republic action. As such, the Court holds that both the Petitioner and the Decedent procured the divorce decree. The fact that neither individual was physically present in the Dominican Republic is of no consequence.<sup>112</sup>

## 2. Children

In *In re Walsh's Estate*,<sup>113</sup> a couple disappeared during a 1948 flight over the jungles of British Guiana. They left behind two sons: Michael, a three-year-old who had been living with them in British Guiana, and George, a five-year-old who they had placed in a Texas institution because of his disabilities. In accordance with the husband's will, Michael went to live with his paternal grandmother in California. George, on the other hand, remained institutionalized.

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<sup>110</sup> *Id.* at 525.

<sup>111</sup> 2000 WL 1349231 (V.I. Terr. Ct. July 25, 2000).

<sup>112</sup> *Id.* at \*6.

<sup>113</sup> 223 P.2d 322 (Cal. Dist. Ct. App. 1950).



Subsequently, the boys' maternal grandmother sought to be named their guardian. After the trial court dismissed her petition regarding George for lack of jurisdiction, it granted her petition regarding Michael. When the paternal grandmother appealed, the California District Court of Appeal affirmed:

We may not reject the findings of the trial court and substitute contrary findings. There is evidence that would have supported contrary findings. That the trier of fact rejected that evidence does not impeach the soundness of his conclusions. We do not have the opportunity of seeing and hearing the parties and the witnesses or of applying any of the tests by which the propriety of appointing one or the other of the parties may be determined. Appellant "has failed to establish any greater grievance here than she might in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the opposite party. Such a choice between two permissible views of the weight of the evidence is not error." *Riesenberg v. Riesenberg*, 97 Cal.App.2d 714, 218 P.2d 577, 578.<sup>114</sup>

## B. Extra-Family Matters

### 1. Social Security Benefits

Social Security benefits are available after a person has not been seen or heard from for seven years.<sup>115</sup> In *Autrey v. Harris*,<sup>116</sup> the plaintiff's ex-husband disappeared in 1969 while piloting a small plane from Kansas to Nevada. In 1970, the plaintiff applied for surviving child benefits but was turned down by the Social Security Administration (SSA) on the ground her request was premature. In 1976, she reapplied and was turned down again, this time because the SSA felt her ex-husband's disappearance was not "unexplained." The district court upheld the SSA's decision in a one-page order. On appeal, the Fifth Circuit reversed in a *per curiam* opinion:

The administrative law judge [accepted the government's contention that the ex-husband simply ran away based on]: (1) Fisher's failure to file federal income tax returns in 1967, 1968 and 1969; (2) a suggestion that he was trying to avoid child support payments; and (3) several random comments by the [plaintiff] and her children that there may have been minor family difficulties.

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<sup>114</sup> *Id.* at 326.

<sup>115</sup> 20 C.F.R. § 404.721(b). This period can be shortened as the facts dictate. *See id.* ("[W]e will use as the person's date of death either the date he or she left home, the date ending the 7 year period, or some other date depending upon what the evidence shows is the most likely date of death.")

<sup>116</sup> 639 F.2d 1233 (5th Cir. 1981).

Plainly, these are not sufficient to satisfy the Secretary's rebuttal burden, and are not enough to justify a conclusion that Fisher engineered a phony disappearance in order to change his identity. The burden of the Secretary requires more than mere conjecture as to possible explanations . . . . Here, the Secretary did no more than present facts which hardly support a somewhat bizarre and certainly speculative conclusion. The judgment of the district court must be reversed, and remanded with directions to enter a contrary judgment in favor of the appellant.<sup>117</sup>

In *Brewster on Behalf of Keller v. Sullivan*,<sup>118</sup> the Eighth Circuit faced facts similar to those in *Autrey*. In 1980, the plaintiff's husband was supposed to fly his employer's DC-3 from San Antonio, Texas, where it had been undergoing modifications, back to California. Instead, after purchasing 800 gallons of fuel, the plane took off from Waco, Texas, and was never seen again.

The plaintiff soon learned that the police had her husband under investigation for drug smuggling and a stolen company credit card had been used to pay for the 800 gallons of fuel. She also discovered that during the two weeks before he disappeared, her husband had been seen in Waco with another man.

A search of the husband's locker at work yielded a grenade as well as a birth certificate and a driver's license with fake names. According to witnesses, on several occasions the husband had talked about wanting "to chuck it all and move to Costa Rica."

A confidential informant then reported the plane had crashed while en route to Barranquilla, Colombia. When contacted, the U.S. consulate confirmed that a DC-3 with two bodies had gone down near the town. Although the plaintiff forwarded her husband's dental records, a positive match could not be made.

In 1981 and again in 1984, the SSA denied the plaintiff's request for benefits for the couple's two children. In 1987, she applied a third time. After granting this application, the SSA reopened the file and reversed itself, a decision upheld by the district court. On appeal, the Eighth Circuit, per Senior Circuit Judge Henley, reversed:

In this case, the Secretary argues that he has rebutted the presumption of death by providing "facts" that explain Keller's "disappearance in a manner consistent with continued life." The Secretary notes that Keller was under investigation for drug smuggling and had stolen an airplane

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<sup>117</sup> *Id.* at 1235 (footnote omitted).

<sup>118</sup> 972 F.2d 898 (8th Cir. 1992).

and credit card. He also notes that a grenade and fictitious identification were found in Keller's possessions in California and further notes Keller's statements expressing a desire to live in Costa Rica.

We disagree that these "facts" are sufficient to rebut the presumption that Keller is dead. As Brewster points out, the record reveals no evidence that Keller was aware of the drug investigation or had taken other fictitious identification to Texas. Nor does the record indicate that criminal charges had ever been filed in connection with the alleged theft of the airplane and credit card . . . .

We also believe little weight should be given to Keller's statements that he wanted to "chuck it all and move to Costa Rica." See *Autrey v. Harris*, 639 F.2d at 1235 (failure to file income tax returns coupled with random comments regarding marital difficulties insufficient to overcome presumption). Moreover, we find the Secretary's scenario which has Keller blowing up the airplane with two occupants in order to engineer "a phony disappearance . . . a somewhat bizarre and certainly speculative conclusion." See *id.*

Our review of the applicable caselaw provides further support for our conclusion that in this case the Secretary has failed to rebut the presumption of death. See *Wages v. Schweiker*, 659 F.2d 59 (5th Cir.1981) (wage earner's disappearance after receiving spousal support order and withdrawal of funds from bank account insufficient to rebut presumption); *Johnson v. Califano*, 607 F.2d [1178,] at 1178 [(6th Cir.1979)] (evidence of wage earner's severe marital and career difficulties insufficient to rebut presumption); *Edwards v. Califano*, 619 F.2d [865,] at 865 [(10th Cir.1980)] (evidence that wage earner was alive four years after abandoning family insufficient); *Secretary v. Meza*, 368 F.2d [389,] at 389 [(9th Cir.1966)] (evidence suggesting that wage earner was attempting to avoid child support payments insufficient).

We note there are cases in which courts have found that the Secretary had produced sufficient evidence to rebut a presumption of death, see, e.g., *Mando v. Secretary*, 737 F.2d [278,] at 280 [(2d Cir.1984)] (husband disappeared one week before sentencing on gun conviction, after telling his wife "that he might go away for a long time"); *Brown v. Heckler*, 723 F.2d 1135, 1137-38 (3d Cir.1983) (husband disappeared and later wrote wife that he was leaving country and had changed his name and identification), but we find them distinguishable.

We further note that in this case, unlike many unexplained disappearances, we believe there is strong circumstantial evidence that Keller is dead. A DC-3 airplane with two bodies, which were burned beyond recognition, had crashed near Barranquilla, South America, which was where a confidential informant had advised the police the

airplane could be found and corroborates the information Brewster had heard and reported in May 1980.

Accordingly, the judgment is reversed and the case is remanded to the district court with instructions to remand to the Secretary for an award of children's benefits.<sup>119</sup>

In *Perez-Sordo v. Heckler*,<sup>120</sup> the plaintiff's husband disappeared in 1978 while piloting an Aerocommander from Liberia, Costa Rica, to San Jose, Costa Rica. In 1979, she sought survivors' benefits on behalf of herself and her children. The SSA twice denied her claim for lack of sufficient proof. When the plaintiff took the SSA to court, Magistrate Judge Shapiro concluded the SSA's decision should be reversed:

In the instant case, a thorough review of the record establishes that substantial evidence of death exists and there is no substantial evidence upon which the Secretary can base a finding that the wage earner is not dead. The probate court heard evidence, made extensive findings, and determined that plaintiff had died. The insurance companies paid out large sums of money in reliance upon Perez-Sordo's death. The wives of the lost men [Perez-Sordo and co-pilot Roberto Hernandez] conducted their own investigation, and both testified to their conversations and findings. These were corroborated by documentation in the file[,] which established that Perez-Sordo had been hired to fly the plane, had taken off, had issued a distress, and had never returned. Both wives stated that there was simply no reason for either man to disappear. Each had had no marital or financial problems. No one has ever seen either man since. It appears to this Court to be most unnatural for Alberto Perez-Sordo to have completely abandoned not only his wife but his three children. Similarly for the other occupant of the plane, Roberto Hernandez, as to his daughter and two step-sons and two children by a prior marriage (T. 340). The only evidence which even hints at the continued survival of the men is the FAA note regarding possible CIA involvement. Though Social Security took this message in a phone contact, there is no follow-up at all on it, nor is there any mention by anyone else of such involvement. The wives also reported a mysterious call, but the caller stated that the men were returning which they never did. This can hardly be said to constitute "substantial evidence . . . ."

Alberto Perez-Sordo was expected back for the Christmas holidays and had asked his wife, Maggie Perez-Sordo, to wait for his arrival to put up

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<sup>119</sup> *Id.* at 902-04 (footnotes omitted). Believing the case should have been remanded for further proceedings before the SSA, Judge Hansen dissented. *See id.* at 904.

<sup>120</sup> No. 82-1134-CIV-CA, 1984 WL 145983 (S.D. Fla. July 13, 1984).

their Christmas tree; also, Mrs. Perez-Sordo had given her husband a list of gifts to purchase in San Jose, Costa Rica . . . . The absence of the wage earner cannot be deemed to be considered unexplained. A plane flew off into the wild blue yonder. There is no evidence to show that it returned. The occupants never returned and have not been heard from. They were lost in the depths of the sea. For all these reasons, the decision of the Secretary must be reversed as unsupported by “substantial evidence.” See *Simpson v. Schweiker*, 691 F.2d 966, 970-71 (11th Cir.1982).<sup>121</sup>

In *Duthu v. Sullivan*,<sup>122</sup> the plaintiff’s ex-husband disappeared during a 1979 flight to Venezuela.<sup>123</sup> In 1980, she contacted her local SSA office and inquired about applying for benefits. On that occasion, as well as several subsequent ones, she was told that without proof of her ex-husband’s death she would have to wait seven years. In actuality, the SSA’s regulations on this point are quite flexible,<sup>124</sup> a fact the plaintiff eventually learned on her own. Accordingly, in 1985 she submitted written applications on behalf of James and Kelly, the couple’s two children.

The SSA ruled that James was eligible for benefits but only from 1985 onwards. As for Kelly, it determined she had “aged out” and therefore was not entitled to any benefits. After these decisions were upheld by the SSA’s Appeals Council, the plaintiff took the government to court but lost. On appeal, the Fifth Circuit, per Judge Gee, affirmed:

We cannot escape the fact, however, that Mrs. Duthu did not file a written application for benefits until December 1985. Although her failure to file the application is explained by the SSA employees’ erroneous statements to the effect that filing would be futile and a waste of time, there is no contention here that the SSA actually refused a specific request to make a written application, which conduct might have constituted the sort of affirmative misconduct required for assertion of the doctrine of estoppel. As sympathetic as we are to Mrs. Duthu’s position, we find that the blunders of the SSA employees . . . were simply not of the character to overcome the well-established rule . . . that a government employee’s misinformation and ineptitude will not estop the government from requiring a written application for benefits.<sup>125</sup>

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<sup>121</sup> *Id.* at \*4. The district court subsequently accepted Judge Shapiro’s recommendation. See *id.* at \*1.

<sup>122</sup> 886 F.2d 97 (5th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

<sup>123</sup> The court’s opinion does not indicate the trip’s starting point.

<sup>124</sup> See *supra* note 115 and accompanying text.

<sup>125</sup> *Duthu*, 886 F.2d at 100.

In *McKee v. Sullivan*,<sup>126</sup> the plaintiff's husband and a friend flew from Georgia to Florida to go fishing. On January 14, 1985, while returning home, their Cessna disappeared off the coast of Jacksonville. A week-long search turned up no trace of either the plane or the men. An NTSB report regarding the loss referred to the plane as "presumed destroyed" and the occupants as "presumed dead."

On January 24, 1986, the plaintiff filed a petition for a declaration of death in a Georgia probate court. On August 7, 1986, she was granted letters of administration. On August 13, 1986, she applied for survivors' benefits for herself and her children.

The SSA denied the applications on the basis that there was no proof that the plaintiff's husband was dead. After this decision was upheld by the SSA's Appeals Council and the district court, the plaintiff appealed to the Eleventh Circuit, which reversed in an opinion by Judge Anderson:

20 C.F.R. § 404.720(c) provides:

(c) *Other evidence of death.* If you cannot obtain the preferred evidence of a person's death, you will be asked to explain why and to give us other convincing evidence such as: the signed statements of two or more people with personal knowledge of the death, giving the place, date, and cause of death.

Directing our attention to the example provided, the Secretary argues that this regulation requires direct evidence of death. Mrs. McKee argues that the example does not foreclose the consideration of other evidence such as the probate court decision and the NTSB report.

From a reading of the plain language of the regulation, we conclude that the district court and the ALJ erred in not considering the probate court decision and the NTSB report. We agree with Mrs. McKee that the example provided in the regulation is merely illustrative and does not preclude the consideration of other evidence. The plain meaning of the term "other convincing evidence" includes any available evidence, either direct or circumstantial . . . . The Secretary's argument that the regulation only provides for direct evidence does violence to both the plain meaning of the regulation and to common sense.<sup>127</sup>

## 2. Pension Payments

In *Estate of Kowalski v. Iron Workers Local No. 25 Pension Fund*,<sup>128</sup> a retired steelworker disappeared in 1999 while flying his private plane from Iron County, Michigan to Oakland County, Michigan. In 2000, his family

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<sup>126</sup> 903 F.2d 1436 (11th Cir. 1990).

<sup>127</sup> *Id.* at 1438-39 (emphasis in original; footnote omitted).

<sup>128</sup> No. 07-11014, 2008 WL 375208 (E.D. Mich. Feb. 12, 2008).

sought to have him declared legally dead, but the Iron County probate court deemed the request premature. In 2005, the family submitted a new petition, which was granted and fixed the date of death as February 9, 2005.

Upon his retirement in 1993, the decedent had begun collecting a union pension. After he disappeared, this money stopped. As a result, in 2005 the family requested 62 months of back checks. When the union refused to pay, the family took it to court. Magistrate Judge Whalen of the Eastern District of Michigan concluded the suit should be dismissed:

Given the rebuttable statutory presumption and the non-conclusive nature of the death certificate, the question is whether the Fund had rational grounds to find that Mr. Kowalski's death occurred not on February 9, 2005, but on or about November 12, 1999, when his plane disappeared . . . .

In the present case, there is clear evidence that well before February 9, 2005, Mr. Kowalski encountered a specific peril that might reasonably be expected to have caused his death. His plane took off on November 12, 1999, and was never heard from again. It did not land in Oakland County, his intended destination. As the probate judge noted, this is circumstantial evidence of a fatal accident. Moreover, Mr. Kowalski's family—the personal representatives of the estate, and presumably rational people—believed that he was dead, since they sought permission to open an estate in early 2000.

Under the “arbitrary and capricious” standard of review, the Fund need only “articulat[e] a rational connection between the facts found and the choice made.” *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989). It did so when it denied the benefits claimed by Mr. Kowalski's estate. Furthermore, contrary to the Plaintiff's argument, the final denial (AR 1-3) clearly considered and took into account the 2005 Probate Court opinion, and articulated a rational and legally correct reason for rejecting it.<sup>129</sup>

### 3. Insurance Proceeds

In *Barringer v. Prudential Insurance Co. of America*,<sup>130</sup> a soldier disappeared in 1943 while flying from Puerto Rico to Trinidad in an Army C-47. When his wife sought to collect on his life insurance policy, the insurer argued the policy's “aviation rider” had been triggered. Under this provision, if the insured died while riding in an airplane the payout would be reduced from the policy's face value to its net reserve.

In an attempt to avoid the clause, the wife insisted there was no proof

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<sup>129</sup> *Id.* at \*3-4. The district court accepted Judge Whalen's recommendation. *See id.* at \*1.

<sup>130</sup> 62 F. Supp. 286 (E.D. Pa. 1945), *aff'd mem.*, 153 F.2d 224 (3d Cir. 1946).



the insured had died while riding in an airplane. Judge Kilpatrick of the Eastern District of Pennsylvania made short work of this argument:

Various more or less fantastic explanations of disappearance of plane and passengers might be suggested but, with practically no land on the direct route to Trinidad, I do not see how there could be much doubt in the mind of any reasonable person that it came down in the sea. At any rate it is not necessary to preclude all other possibilities.

If the plane fell into the sea then, again, the reasonable, probable and almost necessary conclusion, from the nature of the accident, is that the insured's death resulted from riding in an airplane. Again, there are possible theories which might account for his death otherwise as, for example, gunfire from a German submarine, but they are remote. Certainly, if it be taken as established that, having been riding in an airplane which fell into the sea and was lost with all on board, the insured is dead, it seems to me that it is not only permissible but reasonable and logical to conclude that he met his death as a result of riding in the airplane.<sup>131</sup>

The flight in *Barringer* also gave rise to *Smith v. Massachusetts Mutual Life Insurance Co.*<sup>132</sup> This time, the airman's wife sought to avoid the aviation rider by keeping his two policies in force until he could be declared legally dead on the basis of prolonged absence (as opposed to perishing in an airplane). In permitting this strategy (and thereby reversing the trial court), the Fifth Circuit, per Judge Sibley, observed:

The appellee puts forward, as the reasons why it should be given a declaratory judgment now, that Mrs. Smith is tendering the indebtedness against the policies and if the tender is accepted the reserves will automatically carry the premiums till February, 1950, more than seven years from the insured's death (meaning his disappearance), and if said payment is accepted, or if any premiums are accepted, it will likely estop it to claim the aircraft provision, to its irreparable damage. By amendment it was further alleged that appellee might lose its evidence or its witnesses might disappear. None of these fears are weighty. Surely the acceptance without conditions of a debt due on the policy would not prejudice the Company. It is entitled to this payment in any event. It need not accept premiums if it fears an estoppel therefrom. None are now offered or need be till after the seven years. The policies will simply be in suspense, as life policies normally are till death is established. The trial has demonstrated that the Company has no evidence save the War

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<sup>131</sup> *Barringer*, 62 F. Supp. at 288.

<sup>132</sup> 167 F.2d 990 (5th Cir.), *reh'g denied*, 167 F.2d 992 (5th Cir.), *cert. denied*, 335 U.S. 830 (1948).



Department records, and no oral testimony of importance. This testimony is now preserved by this trial should these witnesses die. On Mrs. Smith's side, she may acquire important evidence. Her husband is not yet known to be dead nor so presumed by any law binding on her. She may learn that her husband, if dead, did not die by reason of the airplane trip, but survived it and died from other causes. She ought not to be hurried into a *res judicata* now, when it is known she cannot answer the circumstances which do indicate death from riding in an airplane, but not at all conclusively. We are of opinion that on a just balance of inconveniences there is no need now for a declaratory judgment, and that the complaint should be dismissed without prejudice, at the cost of appellee.<sup>133</sup>

*Barringer* was distinguished in *Boye v. United States Life Insurance Co.*<sup>134</sup> The insured's B-17 disappeared during a 1944 bombing run from England to Germany. When the beneficiaries of his life insurance policy sought to collect, the insurer invoked the aviation rider. The trial court found for the insurer, but the District of Columbia Circuit, per Judge Edgerton, reversed:

The exclusion clause in [this] suit is headed "Aviation Exclusion." If Lieutenant Boye's death resulted directly or indirectly from gunfire, as the District Court thought and we think it probably did, we think it resulted from a risk of war that the policy did not exclude and not from a risk of aviation that the policy did exclude. We think the case is much the same as if the policy had excluded death "due to operating or riding in an automobile" and the insured had been killed by gunfire while driving an army car.

In *Knouse v. Equitable Life Ins. Co. of Iowa*, 163 Kan. 213, 181 P.2d 310, 311, on which appellee relies, . . . the insured was not killed by gunfire but by jumping from a bomber whose gasoline supply had run out during a mission. Recovery on the policy was of course denied. In *Barringer v. Prudential Ins. Co., D.C.*, 62 F.Supp. 286, affirmed 3 Cir., 153 F.2d 224, the exclusion clause was like the one before us but the event was rather like the one in the *Knouse* case. An army airplane carrying the insured disappeared between Puerto Rico and Trinidad. The court duly [in]ferred that it fell into the sea, and accordingly denied recovery. The court said in effect that it would have allowed recovery if there had been reason to believe that an enemy submarine had shot the

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<sup>133</sup> *Smith*, 167 F.2d at 991-92. Several years later, the insurance company filed a new declaratory action and lost again. See *Massachusetts Mut. Life Ins. Co. v. Smith*, 193 F.2d 511 (5th Cir. 1951), *reh'g denied*, 194 F.2d 1006 (5th Cir.), *cert. denied*, 344 U.S. 823 (1952).

<sup>134</sup> 168 F.2d 570 (D.C. Cir.), *cert. denied*, 335 U.S. 828 (1948).

plane down.<sup>135</sup>

In *Heikes v. New York Life Insurance Co.*,<sup>136</sup> a U.S. Navy pilot disappeared during a 1943 training flight off the coast of Florida. Two years earlier, he had taken out a \$2,500 life insurance policy with the defendant that included a double indemnity provision. When his wife submitted a claim, the insurer refused to pay due to the policy's aviation rider and war risk clause. Alleging mistake and fraud, the wife sued the insurer but the trial court dismissed her complaint. On appeal, the Eighth Circuit, per Judge Sanborn, affirmed:

The plaintiff in the instant case, we think, has completely failed to prove that the insured made a different contract than that which was expressed in the policy.

The inaccurate statement made by the agent of the insurer, more than a year after the policy was issued, to the effect that its coverage was subject to no restrictions, is, in our opinion, of no help to the plaintiff. There was no evidence that the insured was actually misled by this statement, and, since he was charged with knowledge of the terms of his policy, he could not reasonabl[y] be held to have been deceived. The agent was probably referring to the policy as a straight life policy and did not have in mind its double indemnity feature. The only effect that the misstatement of the agent could possibly have had was to induce the insured to keep the policy in force until the time of his death. Had the insured failed to do so, the plaintiff could have recovered nothing from the insurer.<sup>137</sup>

In *Wadsworth v. New York Life Insurance Co.*,<sup>138</sup> a U.S. Air Force pilot stationed in Japan disappeared during a 1951 combat mission. Several months earlier, while on bereavement leave in the United States, he had filled out an application for a general life insurance policy. When his wife sought to collect, the insurer told her that it had declined the application and instead made a counter-offer that would have added an aviation rider and a war exclusion clause to the policy. In the resulting lawsuit, the trial judge found for the insurer but the Michigan Supreme Court, per Justice Edwards, vacated the judgment and remanded for a new trial:

Reviewing the record of this case, we can think of few circumstances in life where the unvarnished truth and prompt decision were more clearly called for than in the solicitation and processing of Captain

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<sup>135</sup> *Boye*, 168 F.2d at 570-71.

<sup>136</sup> 171 F.2d 460 (8th Cir. 1948).

<sup>137</sup> *Id.* at 463.

<sup>138</sup> 84 N.W.2d 513 (Mich. 1957).

Wadsworth's application for life insurance. Sympathy for his widow should not occasion court imposition of a life insurance contract which is not justified by the actions of the parties themselves. But neither should judicial recoil from sentiment occasion our forgetting that Michigan law imposes on life insurance companies twin duties of use of language which is clear and understandable to laymen and reasonable promptness in acceptance or rejection of the risk . . . .<sup>139</sup>

In *Fidelity and Casualty Co. of New York v. Commander*,<sup>140</sup> a plane made a forced water landing during a July 8, 1953, trip from Boston, Massachusetts to Provincetown, Massachusetts. The plaintiff's husband, who was a passenger aboard the flight, disappeared in the mishap and was never seen again. On September 1, 1953, the plaintiff, having traveled from the couple's home in Virginia to Provincetown, where she conducted her own search and concluded her husband most likely died from drowning, sought to collect on an insurance policy he had brought from an airport vending machine. Insisting it had not received timely notice of the accident, the insurer declined to pay. The trial court rejected this defense. On appeal, the Fourth Circuit, per Judge Dobie, affirmed:

It is quite clear that notice of the accident was not given within the specific 20 days set out both in the Virginia Statute and in the policy, extended to conform with this Statute. The question then arises whether notice was given, under the provisions of the policy and the Virginia Statute, as soon after the accident as was "reasonably possible."

The District Judge stated: "I have found as a fact that, under the circumstances, the notice was given as soon as was reasonably possible." This finding of fact we can overturn only if we hold that it is clearly erroneous. We cannot so hold. The circumstances of this case, set out in detail earlier in this opinion, make up a peculiar and distinctive pattern. Under that pattern, we must sustain this factual finding of the District Court.<sup>141</sup>

In *Griffith v. Continental Casualty Co.*,<sup>142</sup> the insured, a Delta Air Lines pilot, disappeared in 1975 while flying his personal Beechcraft from Texas to Florida. When his father sought to collect on his Delta group life insurance policy, the request was rejected. Citing the policy's "air coverage" clause, the insurer argued it was not liable because, at the time of his disappearance, the insured had been neither an airplane passenger nor working as a Delta flight

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<sup>139</sup> *Id.* at 519-20. Justice Sharpe, believing the insurer had properly rejected the application, dissented. *See id.* at 520.

<sup>140</sup> 135 F. Supp. 59 (W.D. Va. 1955), *aff'd*, 231 F.2d 347 (4th Cir. 1956).

<sup>141</sup> *Commander*, 231 F.2d at 352-53.

<sup>142</sup> 506 F. Supp. 1332 (N.D. Tex. 1981).

crew member.

Although the plaintiff conceded the second point, he insisted that a “pilot,” *a fortiori*, also is a “passenger.” Judge Sanders of the Northern District of Texas found otherwise:

Plaintiff contends that if Griffith did indeed die while riding in an aircraft, his death was covered under Part VIII, the “Air Coverage” provision. Under this provision, the insured was covered while “riding as a passenger in any aircraft properly licensed to carry passengers and while Insured Employee is operating or performing duties as a crew member of any aircraft owned, leased or operated by [Delta] . . . .” Plaintiff asserts that the coverage afforded in the first instance in this provision encompasses Griffith’s death; to this end he espouses an interpretation of the phrase, “riding as a passenger” which includes a pilot within its scope . . . .

The facts clearly indicate and the Court finds that Lee R. Griffith was piloting his plane when it left the Dallas airport. Consequently, the Court concludes that he was not riding as a passenger at the time of his disappearance, and that his disappearance was not covered within the “Air Coverage” provision of the policy. It follows that Exclusion (5) in Part IX applies and that Plaintiff is not entitled to recover on the policy.<sup>143</sup>

In *Severson v. Severson’s Estate*,<sup>144</sup> a physician and his wife disappeared in 1978 while the wife was flying the couple in their personal plane from Homer, Alaska to Anchorage, Alaska. The husband’s estate subsequently sued the wife’s estate for wrongful death. When it later attempted to add the wife’s insurer as a defendant, the insurer objected on the ground that Alaskan law bars direct action suits against liability insurers. The Alaska Supreme Court, per Justice Burke, agreed:

We are aware of only two states which allow a direct cause of action against a tortfeasor’s insurer, Louisiana and Wisconsin. In those states, however, such actions are expressly authorized by statute . . . . Elsewhere, the common law rule of no direct liability prevails. Dean Prosser explains that rule as follows:

Since, in its inception, liability insurance was intended solely for the benefit and protection of the insured, which is to say the tortfeasor, it followed that the injured plaintiff, who was not a party to the contract, had at common law no direct remedy against the insurance company.

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<sup>143</sup> *Id.* at 1336-37.

<sup>144</sup> 627 P.2d 649 (Alaska 1981).

Prosser on Torts, § 82 at 544 (4th ed. 1971).

Despite petitioner's argument, we are not persuaded that we should recognize a direct cause of action against the insurer in the case at bar. AS 01.10.010 provides: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state." As noted, the common law on this subject is clear and overwhelmingly contrary to the rule urged by petitioner.<sup>145</sup>

In *Compass Insurance Co. v. Palm Beach Lakes Aircraft, Inc.*,<sup>146</sup> a corporate-owned plane disappeared in 1978. In a sworn statement before trial, one of the company's officers claimed he accidentally crashed the plane into the ocean. Shortly after making this statement, the officer disappeared.

The trial judge rejected the officer's story but found that coverage existed under the plane's insurance policy. On appeal, the Florida District Court of Appeal, per Judge Beranek, agreed with the trial judge's first conclusion but not his second:

At a non-jury trial, the trial judge announced that he did not believe the evidence that the plane had been crashed into the ocean. This evidence was severely impeached and indeed plaintiff concedes it was perfectly proper for the trial court to disbelieve it. Notwithstanding rejection of the plaintiff's evidence regarding a crash, the court apparently concluded there was coverage because the plane had in fact disappeared . . . .

We reverse. The [policy] . . . applied to the aircraft while in motion. In the instant case, there was absolutely no proof which was accepted by the trial court that anything happened to the aircraft while in motion . . . . Here, at best, plaintiff proved that the whereabouts of the plane were unknown. In the absence of proof of takeoff or that the plane was in motion, plaintiff simply failed to prove a risk within the coverage . . . .<sup>147</sup>

The holding in *Compass* was relied on in *Congleton v. National Union Fire Insurance Co.*<sup>148</sup> In 1980, a couple's plane disappeared from a Tennessee airport. The insurer, suspecting fraud, disclaimed coverage. When the couple sued, the insurer successfully moved for summary judgment. On appeal, the California Court of Appeal, per Associate Justice Arguelles, affirmed:

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<sup>145</sup> *Id.* at 651 (footnote and citation omitted).

<sup>146</sup> 399 So. 2d 517 (Fla. Dist. Ct. App. 1981).

<sup>147</sup> *Id.* at 518 (citations omitted).

<sup>148</sup> 234 Cal. Rptr. 218 (Ct. App. 1987).

Unable to show that a theft actually occurred—or even that someone wrongfully took possession—appellants essentially urge an interpretation of “disappearance” that is synonymous with a mere inability to locate the aircraft. Such an interpretation would be in clear derogation of an express policy definition of “disappearance,” a term used in an insuring clause rather than in an exclusionary clause. Additionally, in a similar case, where an insuring clause in an aviation policy purported to cover “All Risks While In Motion” and contained language similar to that in appellants’ policy here, the court held that, “In the absence of proof of takeoff or that the plane was in motion, plaintiff simply failed to prove a risk within the coverage stated above . . . .” (*Compass Ins. Co. v. Palm Beach Lakes, etc.* (Fla. App. 1981) 399 So. 2d 517, 518.) Application of this interpretation is particularly compelling here because the aircraft was reported missing within a few weeks after the policy was procured, and appellants apparently made no showing of what efforts, if any, they undertook on their own to investigate the facts and circumstances surrounding the mysterious disappearance of a plane they had recently purchased for almost a quarter of a million dollars and immediately leased and then subleased to people already under investigation for both drug smuggling and similar mysterious disappearances of other aircraft . . . . Appellants’ immediate submission of their claim to respondents under these circumstances could be said to reasonably raise respondents’ eyebrows in considering the claim.

Accordingly, we find that appellants’ failure to sustain their burden of producing evidence of their aircraft’s “disappearance” so as to invoke coverage under the policy entitled respondents reasonably to deny coverage under the circumstances presented here.<sup>149</sup>

In *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*,<sup>150</sup> the plaintiff leased one of its planes to the defendant. When it disappeared, possibly as a result of theft, the plaintiff filed a claim with its insurer.<sup>151</sup> After collecting \$600,000, the plaintiff, contending that its losses totaled \$1.25 million, sued the defendant for the remaining \$650,000. The defendant moved to dismiss on the ground the plaintiff lacked standing. The trial judge granted the motion, but the North Carolina Court of Appeals, in an opinion by Judge Greene, reversed and remanded:

Plaintiff’s status as partial assignor and a real party in interest turns on the disputed factual extent of plaintiff’s entire loss, which includes those

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<sup>149</sup> *Id.* at 223-24.

<sup>150</sup> 362 S.E.2d 812 (N.C. Ct. App. 1987).

<sup>151</sup> The court’s opinion provides no further details about the plane’s disappearance.

losses neither covered by nor compensated under plaintiff's insurance contract with Insurer. Therefore, we reverse the trial court's summary judgment dismissing plaintiff's claims for lack of a real party in interest and remand the case for further proceedings not inconsistent with this opinion.<sup>152</sup>

In *Benjamin v. AIG Insurance Co. of Puerto Rico*,<sup>153</sup> an Esso employee disappeared in 1994 while piloting an airplane.<sup>154</sup> After his minor son collected nearly \$74,000 in group life insurance proceeds, the child's court-appointed guardian sued Esso and its insurance company, claiming that an additional \$26,000 was due. The trial court dismissed on the basis that the suit was preempted by the Employee Retirement Income Security Act of 1974 (ERISA).<sup>155</sup> On appeal, the guardian for the first time argued that ERISA was inapplicable. Finding that the issue had been waived, the Virgin Islands Supreme Court, per Associate Justice Cabret, affirmed the trial court:

Benjamin begins her Appellant's brief with three arguments: (1) that the Superior Court's order granting the motion to dismiss based on the affirmative defense of preemption was improper, because affirmative defenses cannot be the basis of a grant of a motion for judgment on the pleadings; (2) that Esso is not the kind of entity that can raise an ERISA defense; and (3) that the claims in the complaint are not the kind of claims preempted by ERISA. However, Benjamin never raised these arguments to the Superior Court in her opposition to the motion to dismiss, or in any subsequent filings, and, in fact, raises them for the first time on appeal. Generally, we consider all arguments made for the first time on appeal in civil cases as waived unless the party offering the argument presents exceptional circumstances . . . . Benjamin has not presented us with any exceptional circumstances to warrant deviation from this general rule for any of her first three arguments. Therefore, we consider these arguments waived and do not reach their merits.

As her fourth argument, Benjamin argues that the Superior Court impermissibly determined that the life insurance documents attached to the complaint made up an ERISA plan . . . . We note that, unlike all three

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<sup>152</sup> *Id.* at 822. Although he concurred in the result, Judge Phillips did not join the majority because he felt the record was sufficiently complete:

[N]o further findings are necessary because the materials before the court clearly establish that plaintiff assigned to its insurance company only that part of its indivisible claim that the insurance company paid for, and thus plaintiff is still a necessary party to the action and the insurance company can be joined at the motion of either party.

*Id.* at 823.

<sup>153</sup> 56 V.I. 558, S. Ct. Civ. No. 2010-0025, 2012 WL 1353527 (V.I. Apr. 12, 2012).

<sup>154</sup> The court's opinion provides no further details about the flight.

<sup>155</sup> 29 U.S.C. §§ 1001-1461.

of the previous arguments, Benjamin made a similar argument to the Superior Court . . . . However, while the error may have been correctly preserved for consideration before this Court, Benjamin failed to bring up this argument in her original appellate brief, and instead waited until the reply brief to raise this issue. When an argument is raised for the first time on appeal in a reply brief, that argument is deemed waived because the appellee will not get an opportunity to respond to the argument . . . .<sup>156</sup>

## VI. JUDGMENTS

If a missing flight results in a judgment for one litigant, may others rely on it? In *Ayala v. Airborne Transport, Inc.*,<sup>157</sup> a case involving a twin-motor plane that disappeared during a 1948 trip from Puerto Rico to Florida, a panel of New York State appellate judges answered “no”:

The issues in both cases may be identical. However, before the judgment in the first case will operate as an estoppel in the second case, the plaintiffs must also establish that this action is “between the same parties or their privies,” *Rudd v. Cornell*, 171 N.Y. 114, 127, 63 N.E. 823, 827. Of course, plaintiffs in this case were not parties and took no part in [the] action [brought by Mulligan, the Public Administrator, on behalf of a passenger named Perez]. Also, if the verdict in the latter case had been in favor of the defendant, the present plaintiffs, not having had an opportunity to be heard, would not have been bound by the consequent judgment. The plaintiffs therefore cannot establish mutuality of estoppel, nor is there any showing of privity, derivative or dependent liability . . . .

The present plaintiffs[, who represent four other passengers], by dint of the fact that they were once linked as co-plaintiffs in the same complaint with the Public Administrator, have tried to weave some ambiguous web of unity with him. A reading of the complaint, however, discloses that there is no privity, nor any relationship akin to privity, among the five original plaintiffs. Furthermore, the order of severance provided not only that the severed actions be tried separately, but that “judgment may be entered in the severed cause of action and the causes of action remaining herein separately and independently of each other \* \* \*.”<sup>158</sup>

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<sup>156</sup> *Benjamin*, 2012 WL 1353527, at \*4.

<sup>157</sup> 124 N.Y.S.2d 561 (App. Div. 1953).

<sup>158</sup> *Id.* at 562-63. The *Ayala* plaintiffs were seeking to use *Mulligan v. Airborne Transport, Inc.*, 113 N.E.2d 148 (N.Y. 1953). The facts in *Mulligan*, which, of course, also are the facts in *Ayala*, are reported at 305 N.Y. 743 (1953).



In *Brown v. Estate of Jonz*,<sup>159</sup> a plane disappeared during a 1972 flight from Anchorage, Alaska to Juneau, Alaska. The passenger's wife, on behalf of herself, the couple's biological daughter, and her three children from a previous marriage, sued the pilot's estate. Because the trial court instructed the jury that the passenger's stepchildren were excluded from recovery, only the wife and daughter were awarded damages. When the wife appealed this instruction, the Alaska Supreme Court, per Justice Burke, affirmed:

Appellant in this case made no objection relating to the exclusion of the McDaniel children, although the trial court asked, in reference to Instruction 35, "Do you have any objection to that instruction?" Appellant originally submitted sixteen proposed instructions and later submitted two "supplemental proposed jury instructions," but none of these instructions dealt with the issue appellant seeks to raise in this appeal . . . .

In addition to asking explicitly whether appellant had objections to the instructions, the trial court had previously invited appellant to brief the issue of whether stepchildren could recover under the [Alaska] Wrongful Death Act. Appellant submitted no brief to the trial court in response to that request. The trial court might therefore have concluded that appellant had abandoned the issue . . . .

Although appellant made no objection at trial, we could still consider her contention, if the instruction given constituted plain error . . . . Because of the lack of precision in the language of the Wrongful Death Act, AS 09.55.580, the status of stepchildren as potential beneficiaries is not clear, but we do not find that the superior court's ruling excluding the McDaniel children from recovery was plainly erroneous, and therefore we do not review the court's instruction on this issue.<sup>160</sup>

If any money is paid to a missing person's estate, is it available to his or her creditors? In *Matter of Estate of Pushruk*,<sup>161</sup> the Alaska Supreme Court, per Chief Justice Boochever, said "yes" in a case arising from a 1975 flight.<sup>162</sup>

Having established that Mrs. Mogg [the missing passenger's mother and sole heir] is not entitled to recover as a statutory beneficiary, we

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<sup>159</sup> 591 P.2d 532 (Alaska 1979).

<sup>160</sup> *Id.* at 534-35 (internal citations omitted). Chief Justice Boochever, believing the statute clearly included stepchildren, dissented. *See id.* at 536.

<sup>161</sup> 562 P.2d 329 (Alaska 1977).

<sup>162</sup> The court's opinion contains only one sentence regarding the trip: "Donney Pushruk was a passenger in a Channel Flying, Inc. airplane which disappeared during a flight on January 13, 1975." *Id.* at 330. Other sources, however, reveal that the plane was a DeHavilland DHC-2 air taxi that went missing while flying from Tenakee, Alaska to Juneau, Alaska with a pilot and four passengers. *See, e.g.*, NATIONAL TRANSPORTATION SAFETY BOARD, *Jan 1975 Aviation Accidents*, [http://www.nts.gov/\\_layouts/ntsb.aviation/brief.aspx?ev\\_id=46534&key=0](http://www.nts.gov/_layouts/ntsb.aviation/brief.aspx?ev_id=46534&key=0) (under the first entry for "Monday, January 13, 1975").

conclude that according to the statute, the proceeds of the wrongful death action pass directly into the [passenger's] estate. We therefore proceed to consider the question of the rights of creditors in this context. Since AS 09.55.580 provides that recovery on behalf of the estate shall be "administered as other personal property of the deceased", this issue must be resolved as a problem of ordinary estate administration.

Personal property of the deceased is clearly subject to the valid claims of creditors. AS 13.16.460 *et seq.* provide detailed and explicit procedures for presentation, allowance and payment of claims against the estate. Nothing in the chapter exempts estates consisting in whole or in part of a wrongful death recovery.

The estate suggests that if the proceeds of a wrongful death action are subject to the claims of creditors in cases where there are no statutory beneficiaries, then "any person, including the State of Alaska and creditors of the deceased person, could institute a wrongful death action on behalf of the deceased person." Under the statute, however, only the personal representative may institute an action. It is true that under some circumstances the action might benefit only the estate's creditors, but we do not find this result necessarily inconsistent with the legislative scheme.<sup>163</sup>

## VII. TAXES

Just as the taxman plagues the living and the dead, so he afflicts the presumed dead.

In *In re Thornburg's Estate*,<sup>164</sup> a U.S. Navy pilot, flying a Vega Ventura bomber, disappeared in 1944 while on combat patrol in the Philippines. Six months later, his father died. Six months after the father's death, the Navy changed the son's status from MIA to deceased.

When the father's will was probated, the county court, concluding that the father had died first, assessed \$324.51 in state inheritance taxes. In so holding, it rejected the state treasurer's argument that the son had died first and that his widow (the father's daughter-in-law) was the actual legatee and owed an additional \$5,416.79 in taxes.

On appeal, the Oregon Supreme Court, per Chief Justice Lusk, reversed:

[T]he question here is whether the arbitrary presumptive date of death, fixed by Congress and found by the Navy Department, must give way to facts which to a reasonable mind establish with convincing force an actual earlier date of death. Conceding to the Department's finding the full force to which it is entitled, we think its *prima facie* effect has been

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<sup>163</sup> *Pushruk*, 562 P.2d at 332-33 (internal citations omitted).

<sup>164</sup> 208 P.2d 349 (Or. 1949).

overcome.<sup>165</sup>

In *Harrison v. Commissioner*,<sup>166</sup> a couple boarded their private plane in 1993 for a trip from Utah to California but never arrived. Both of their wills presumed survival by the other spouse and transferred to the survivor a life estate. The executor valued each life estate on the basis of actuarial tables and claimed a credit of \$16,457 for each spouse. The Internal Revenue Service disallowed these calculations on the ground that the life estates had no value. When the executor appealed, Judge Nims of the Tax Court upheld the government's position:

[A]n underlying rationale for deeming valueless life estates transferred upon simultaneous deaths is that a willing buyer with knowledge of all relevant facts would pay nothing for the interest. Here such a buyer would be aware either of an airplane crash and consequent near simultaneous deaths or, at minimum, of some misfortune that left one or both spouses stranded in an area apparently so remote that not even a possible crash site was found for many months. In both scenarios, we believe that a buyer so informed would have realized the high probability that any survival would be brief and, accordingly, would have declined to pay anything for the life estates at issue.

Moreover, the record before us reflects probate orders and death registrations presuming identical April 1, 1994, dates of death and finding it "more probable than not" that the Harrisons died as a result of an aircraft crash en route to their destination. In [the] absence of any evidence that might suggest a period of survival by either spouse, we find it incongruous to accept the presumed April 1 dates of death for all other estate tax purposes while at the same time rejecting the rationale underlying such presumptions.<sup>167</sup>

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<sup>165</sup> *Id.* at 355.

<sup>166</sup> 115 T.C. 161 (2000).

<sup>167</sup> *Id.* at 171-72.

## VIII. CONCLUSION

As the foregoing makes clear, many of the legal issues that can arise when a plane goes missing already have received judicial consideration. Some, however, are still waiting for their day in court. Among the most intriguing is what happens if a pilot or a passenger, having been declared dead, later is discovered to be alive.<sup>168</sup>

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<sup>168</sup> This possibility, of course, provides the plot for the movie *Cast Away* (Twentieth Century Fox 2000), which stars Tom Hanks as a FedEx employee who returns home four years after a plane crash to find that his wife has remarried. The film is a modern retelling of Lord Tennyson's well-known poem *Enoch Arden* (1864), which concerns a mariner who suffers a similar fate. Some jurisdictions have enacted so-called *Enoch Arden* laws to protect the remarried spouse from bigamy charges. See *Brewster*, 972 F.2d at 902 n.4.