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# The Multiparty, Multiforum Trial Jurisdiction Act's Impact on Major Accident Litigation

By Thomas J. McLaughlin and Adam N. Steinman

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA) significantly changes the role of federal courts in litigation arising out of major accidents. It addresses a long-standing concern that jurisdictional constraints on federal and state courts often make it impossible to consolidate various lawsuits arising from a single event. By expanding federal court jurisdiction for major accident litigation, the MMTJA facilitates the consolidation of related lawsuits before a single court and avoids the situation where litigation arising from a particular accident is scattered among state and federal forums throughout the country. This article analyzes the provisions of the MMTJA and explains how they are likely to affect the course and conduct of accident litigation.

## Summarizing the MMTJA Provisions

The MMTJA was enacted as Section 11020 of the 21st Century Department of Justice Appropriations Authorization Act.<sup>1</sup> Its final version was adopted by the House and Senate conference for the Appropriations Act, which then was approved overwhelmingly by both the House of Representatives

and the Senate,<sup>2</sup> and President Bush signed the Act into law on November 2, 2002. The MMTJA's provisions apply to accidents occurring on or after January 31, 2003.<sup>3</sup>

## Granting Federal Court Jurisdiction

The MMTJA creates a new basis of original jurisdiction for the federal district courts. Its provisions governing the exercise of this jurisdiction are codified at 28 U.S.C. § 1369. There are four principal requirements, discussed below.

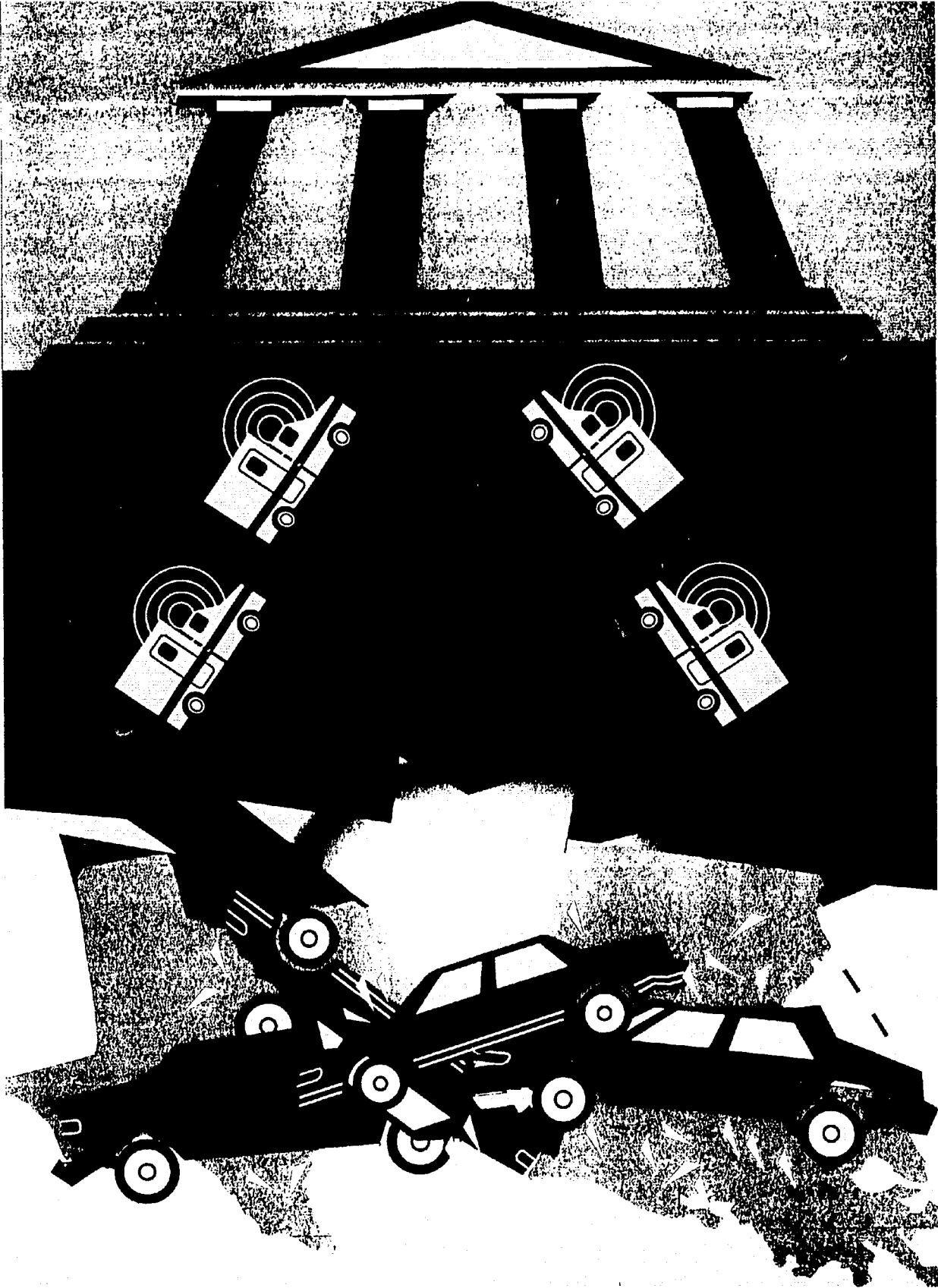
First, there must be minimal diversity between adverse parties.<sup>4</sup> This requirement is satisfied if any party is a citizen of a state and any adverse party is (1) a citizen of another state, (2) a citizen or subject of a foreign state, or (3) a foreign state as defined by the Foreign Sovereign Immunities Act.<sup>5</sup> Because Section 1369 requires only minimal diversity, MMTJA jurisdiction is significantly different from general diversity jurisdiction under 28 U.S.C. § 1332. Section 1332 has long been construed to require complete diversity, that is, that all parties must be diverse from every adverse party.<sup>6</sup> For purposes of Article III of the U.S. Constitution, however, only minimal diversity is required.<sup>7</sup> Thus, Section 1369 con-

forms to Article III's requirements for federal court jurisdiction, even though it does not require complete diversity like Section 1332.

Second, Section 1369 applies only to cases arising from a single accident where at least seventy-five people died at a discrete location.<sup>8</sup> The term "accident" includes any "sudden accident, or a natural event culminating in an accident."<sup>9</sup> An earlier version of the bill would have created federal jurisdiction if twenty-five or more people either died or incurred injuries resulting in damages exceeding \$150,000 per person.<sup>10</sup> However, in its final version, jurisdiction exists only over accidents with at least seventy-five fatalities.<sup>11</sup> This requirement does not mean that Section 1369 jurisdiction applies only to actions on behalf of persons who died in a particular accident. Federal courts would also have jurisdiction over claims by injured persons as long as there were at least seventy-five fatalities in that same accident.

Third, Section 1369 requires that one of the following three conditions must be satisfied:

1. a defendant resides in a state and a substantial part of the accident took place in another state or other location, regardless of whether that defendant is also a resident of





the state where a substantial part of the accident took place;

2. any two defendants reside in different states, regardless of whether these defendants are also residents of the same state or states; or

3. substantial parts of the accident took place in different states.<sup>11</sup>

Essentially, these requirements limit MMTJA jurisdiction to mass accident litigation that has the potential to be brought in scattered jurisdictions under circumstances that might preclude unifying the litigation in a single court.<sup>12</sup>

Depending on the details of a particular accident, the MMTJA's applicability may hinge on what constitutes a "substantial part of the accident," a phrase that the MMTJA does not specifically define. However, most major accidents will satisfy the first condition listed above, particularly where the defendant is a major corporation that is likely to reside in many states.<sup>13</sup> For a U.S. corporation sued in connection with an overseas accident, this condition will necessarily be satisfied because it applies where "a substantial part of the accident took place in another State or other location."<sup>14</sup>

Fourth, Section 1369 provides that a federal court "shall abstain

from hearing" any action where (1) the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens and (2) the claims asserted will be governed primarily by the laws of that state.<sup>15</sup> This provision requires courts to interpret several somewhat ambiguous phrases. For example, who is a "primary defendant" for purposes of the MMTJA? And what constitutes a "substantial majority of all plaintiffs"?

The first case to address these issues was *Passa v. Derderian*,<sup>16</sup> a case arising from a fire at a Rhode Island nightclub in which one hundred people died.<sup>16</sup> As an initial matter, the *Passa* court addressed whether Section 1369(b) was a jurisdictional limitation, as opposed to a mandatory abstention provision. Although the statutory text provides that a court "shall abstain" if the criteria in Section 1369(b) are met, its heading reads "Limitation of jurisdiction of district courts." The court resolved this ambiguity in favor of the text itself and held that Section 1369(b) is a mandatory abstention provision rather than a limit on the court's jurisdiction.<sup>17</sup>

Interpreting the phrase "substantial majority of all plaintiffs," the *Passa* court determined that "all plaintiffs" are "all potential plaintiffs, meaning all those who have died or suffered injury as a result of the tragedy at issue."<sup>18</sup> It rejected the argument that "all plaintiffs" refers only to those parties who have filed suit to date.<sup>19</sup> Addressing the term "substantial majority," the court reasoned that since a majority is "more than 50% of the whole," a "substantial majority" must mean "a number somewhat in excess of that figure, such as two-thirds or three-fourths."<sup>20</sup> It rejected the argument that "substantial majority" should be construed to mean "virtually all."<sup>21</sup>

The court then examined which defendants qualified as "primary

defendants" for purposes of the abstention provision. It concluded that "primary defendants" were "defendants facing direct liability," as opposed to those "sued under theories of vicarious liability, or joined for purposes of indemnification or contribution."<sup>22</sup> The court rejected arguments that "primary defendants" should mean the "most culpable" defendants or those with "the 'deepest pockets.'"<sup>23</sup>

### Removing a State Court Action to Federal Court

The MMTJA's removal provisions are codified at 28 U.S.C. § 1441(e). The MMTJA amends the federal removal statute to allow removal of an action originally filed in state court if that action could have been brought initially in federal court under Section 1369.<sup>24</sup> In addition, it allows a defendant to remove a state court case to federal court if "the defendant is a party to an action which is or could have been brought, in whole or in part, under Section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter."<sup>25</sup>

Unlike a typical removal to federal court, a case removed under the MMTJA might not be fully adjudicated by a federal court. The MMTJA provides that once a federal court has made a liability determination, the court shall remand the action to a state court to determine damages, unless the federal court finds that it should retain the case to determine damages "for the convenience of the parties and witnesses and in the interest of justice."<sup>26</sup> The decision to remand a case for a determination of damages is not reviewable "by appeal or otherwise."<sup>27</sup>

The MMTJA preserves, however, a litigant's ability to appeal a

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## Section 1369 essentially limits the MMTJA jurisdiction to mass accident litigation that has the potential to be brought in scattered jurisdictions under circumstances that might preclude unifying the litigation in a single court.

federal court's liability determination to a federal appellate court before any remand to a state court takes place. It provides that a remand "shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages," and it allows a federal appeal with respect to liability during this sixty-day period.<sup>30</sup> If an appeal is filed, the remand will not be effective until the appeal has been resolved. Once the remand occurs, however, the liability determination is not reviewable.

### Other MMTJA Provisions

The jurisdictional and removal provisions of the MMTJA are likely to be the most significant in terms of the Act's impact on mass accident litigation. However, there are several other notable provisions, summarized below.

- The MMTJA allows any person with a claim arising from an accident that gives rise to MMTJA jurisdiction to intervene as a party plaintiff "even if that person could not have brought an action in a district court as an original matter."<sup>31</sup>
- The MMTJA requires a district court hearing a case under Section 1369 to "promptly notify" the judicial panel on multidistrict litigation (JPML).<sup>32</sup> This is designed to ensure that cases arising from a particular accident may be consolidated for multidistrict litigation (MDL) pretrial proceedings under 28 U.S.C. § 1407.
- The MMTJA amends the general venue statute, 28 U.S.C. § 1391. For any civil action based on Section 1369, venue is appropriate in any district where any defendant resides or where a substantial part of the accident took place.<sup>33</sup>
- The MMTJA expressly pro-

vides that it shall not "restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum."<sup>34</sup> Thus, the MMTJA preserves a federal court's authority to transfer an action to another federal court under 28 U.S.C. § 1404 or to dismiss an action on the ground of forum non conveniens.

- Where federal jurisdiction is based "in whole or in part" on the MMTJA, process may be served "at any place within the United States, or anywhere outside the United States if otherwise permitted by law."<sup>35</sup>
- Where federal jurisdiction is based "in whole or in part" on the MMTJA, a subpoena may, "if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law."<sup>36</sup>

### The MMTJA and *Lexecon*

In *Lexecon v. Milberg Weiss*,<sup>37</sup> the U.S. Supreme Court held that an MDL transferee court lacked the authority to transfer cases to itself under 28 U.S.C. § 1404 for a trial on the merits.<sup>38</sup> The *Lexecon* decision thus eliminated a common technique for consolidating litigation arising out of related or common events for trial, as opposed to just pretrial proceedings.

An early version of the MMTJA would have legislatively overruled *Lexecon* by expressly authorizing an MDL transferee court to transfer cases to itself for trial. This version would have

amended 28 U.S.C. § 1407 to provide that "any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses."<sup>39</sup> However, this provision was not included in the MMTJA as it was ultimately enacted.<sup>40</sup>

### Applying the MMTJA

To better understand the impact of the MMTJA, it is helpful to explore how it is likely to affect cases arising from a major accident, depending on where those cases are filed in the first place. Whether a case is initially filed in state or federal court is particularly important. Since most major accident litigation is eventually subject to consolidated MDL pretrial proceedings, it is also significant whether a case is filed in the federal district that is ultimately designated as the MDL transferee court by the judicial panel on multidistrict litigation (JPML). Thus, it is useful to distinguish four categories of cases.

1. If a case is initially filed in the federal court that is also the Section 1407 MDL transferee court, that court may properly adjudicate the case in its entirety, from pretrial proceedings through to a final merits determination on liability and damages.

2. If a case is initially filed in a federal court other than the Section 1407 MDL court, it will likely be transferred by the JPML to the MDL court for pretrial proceedings. Because the MMTJA did not overrule *Lexecon*, the MDL

transferee court will not have the authority to transfer such a case to itself for trial. Thus, once pretrial proceedings have concluded, the JPML will remand the case to the MDL transferor court where the case was originally filed.

3. If a case is initially filed in a state court located in the same federal district as the MDL transferee court, any defendant may remove the case to that federal court under the MMTJA's removal provision. The MDL transferee court may then adjudicate the case through a final determination on liability. Once liability is determined, the court may be required to remand the case to state court for the damages determination, unless the federal court exercises its authority to retain the case "for the convenience of the parties and witnesses and in the interest of justice."<sup>41</sup> If the court decides to remand the case to state court regarding damages, the parties will have an opportunity to appeal the liability determination to a federal appellate court before the remand occurs.

4. If a case is initially filed in a state court located in a different federal district than the MDL transferee court, a defendant may remove the case to the federal district court whose jurisdiction encompasses the state court where the case was filed. Once the case reaches federal court, the JPML will likely transfer the case to the MDL transferee court for pretrial proceedings only. Under *Lexecon*, the MDL court lacks the authority to transfer these cases to itself for trial. Thus, following pretrial proceedings, the JPML will remand the case to the MDL transferor court—the court to which the case was initially removed. Once the MDL transferor court has determined liability, it may be required to remand the case to state court for the damages determination, unless it exercises its authority to retain the case for the parties' and witnesses' convenience or in the interest of justice. If the federal court decides

to remand a case after determining liability, the parties will have an opportunity to appeal the liability finding to a federal appellate court before the remand occurs.

### Major Implications of the MMTJA

Let us now look at the MMTJA's impact on three recurring issues in major accident litigation, namely, the availability of federal court jurisdiction, the ability of an MDL transferee court to conduct trials in transferred cases, and the bifurcation of liability and damages determinations.

#### Removing Traditional Obstacles to Federal Jurisdiction

The MMTJA is not subject to some of the strict jurisdictional requirements that apply to general diversity jurisdiction, which had been the primary source of federal jurisdiction in accident litigation. The elements of general diversity jurisdiction had enabled plaintiffs in major accident litigation to employ various pleading and filing techniques to keep their cases in state court and thereby preclude consolidation for pretrial proceedings in the federal MDL court. For example, a plaintiff could name tangential defendants, such as individual employees of corporate defendants or remote suppliers or contractors, who were citizens of the same state as the plaintiff. Because general diversity jurisdiction requires complete diversity of citizenship, the presence of a single nondiverse defendant would prevent federal jurisdiction. MMTJA jurisdiction, on the other hand, requires only minimal diversity. Nondiverse defendants do not preclude MMTJA jurisdiction as long as at least one defendant is a citizen of a different state than a plaintiff and the other elements of MMTJA jurisdiction are met.

Another technique by which a plaintiff could keep his or her case in state court was to name a tan-

gential defendant who is a citizen of the particular state forum. The general removal statute precludes diversity removal if any defendants are citizens of the forum state.<sup>42</sup> The MMTJA's removal provisions, however, contain no such restriction. Accordingly, the presence of defendants who are citizens of the state where the suit is filed would not preclude MMTJA removal.

Although conventional wisdom holds that plaintiffs perceive state courts as more advantageous than federal courts, many plaintiffs in mass accident cases want to be in federal court, particularly where large numbers of related cases have been consolidated before one federal court by the JPML for pretrial proceedings. Before the MMTJA, however, the complete diversity requirement for general diversity jurisdiction could prevent certain plaintiffs from suing in federal court. Plaintiffs who were citizens of the same state as a key defendant—such as an airline involved in an aircraft accident—had no basis for obtaining federal jurisdiction and therefore no way to be involved in federal MDL proceedings. Because the MMTJA requires only minimal diversity between adverse parties, this obstacle no longer exists for most mass accident cases.

#### Allowing MDL Transferee Courts to Conduct Trials

Because the MMTJA left in place the Supreme Court's *Lexecon* decision, it has not provided a complete solution to the problem of scattered litigation arising from mass accidents. The MDL transferee court may handle only pretrial proceedings, after which individual cases must be remanded to the transferor courts for trial on the merits. It may not, under *Lexecon*, transfer cases to itself for trial.

However, there remain ways to work within this system to consolidate cases in the MDL transferee court for trial or, at the least, to



minimize the problems stemming from scattered litigation. First, the federal court where a case is initially filed (or to which a state court case is removed) could transfer the case to the MDL transferee court under 28 U.S.C. § 1404, either before the JPML transfers the case or after the JPML's remand. Second, the parties to a case could reach a mutual agreement by which a case is refiled in the MDL transferee court. Third, the parties could agree to be bound (as to liability) by the results of the MDL transferee court's trial of a case that was filed or removed there initially.

In addition, even with *Lexecon*, the MDL transferee court may still resolve important liability questions during the course of pretrial proceedings. Thus, it may be possible to have many legal issues uniformly decided by the MDL court even if individual trials are ultimately conducted elsewhere. This may ameliorate some of the problems arising from scattered litigation in mass accident litigation.

### The Effects of Bifurcating Liability and Damages Determinations

For cases removed from state court under the MMTJA, the act creates interesting strategic considerations regarding the bifurcation of liability and damages determinations. Traditionally, plaintiffs in mass accident litigation have favored trying liability and damages issues in a single trial before one jury. Defendants, on the other hand, have typically favored bifurcating liability and damages into separate trials. In addition, plaintiffs traditionally favor state court juries, while defendants traditionally favor federal court juries.

When a case is removed from state court under the MMTJA, the federal court must conduct the trial on liability, but it has the option to remand the case to state court to

determine damages. Federal court, therefore, is the only forum where liability and damages may be tried together. From a plaintiff's standpoint, pursuing a joint trial on liability and damages requires the plaintiff to forgo having damages decided by what is perceived to be a more favorable state court forum. Likewise, if a plaintiff wants to have damages decided in state court, the plaintiff can do so only at the price of having bifurcated proceedings on liability and damages and incurring what may be a substantial delay while the liability issue is appealed to a federal appellate court.

From a defendant's perspective, retaining a federal forum for the damages determination carries with it the risk that the federal court will decide to try liability and damages together in one proceeding. At the same time, if a case is remanded to state court for damages, liability and damages will be tried separately, but the defendant will find itself in what it may perceive to be a less favorable state court forum.

The strategic considerations

surrounding these questions may encourage plaintiffs and defendants to reach agreements on how trials arising from a particular accident should proceed. For example, plaintiffs may agree to consent to a federal court trial on damages if defendants agree to consent to a joint trial on liability and damages. How litigants will choose to address these matters in reality, of course, remains to be seen.

### Conclusion

The MMTJA greatly enhances the role of federal courts in mass accident litigation. In combination with the MDL provisions in 28 U.S.C. § 1407, the MMTJA facilitates the ability to consolidate cases arising from a single accident, at least for pretrial proceedings. Although it does not prevent the possibility that individual trials will ultimately occur in disparate federal and state courts, the MMTJA is nonetheless a step forward in resolving the costly and at times frustrating difficulties that arise when dozens (if not hundreds) of actions arising from a single accident are brought in scattered forums throughout the country. ■



### MISSED APPROACH TO DEATH *A Missed Approach Aborted, and Where It Leads* ANDREW J. DILK

The aviation public is fascinated by accidents such as American 570, TWA, Egypt Air, and now the Columbia shuttle disaster, as well as the hundreds of private airplane accidents throughout the United States annually, including the paros of the John F. Kennedy Jr. flight. This audience includes those who take commercial and private flights, those involved in aviation transportation, pilots, air traffic controllers, lawyers, law and aviation students, who will be captured by the events leading to the crash of a private airplane while one of the pilots attempted an instrument approach to a small city airport, after receiving a clearance to land from the FAA's nearby Boston radar facility. Exposed is the trial of the tragedy, its investigation, and the litigation before an intransigent and imperious federal judge in Boston. Adding to the intensity is the allegation of government intimidation of an expert, and the provoking air traffic control testimony of a former National Transportation Safety Board investigator hired by the parties suing the U.S., whose testimony contradicts the very radar data utilized by him in his earlier official NTSB accident report.

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## Notes

1. Pub. L. No. 107-273 (Nov. 2, 2002).

2. The vote in the House of Representatives was 400 to 4. The Senate vote was 93 to 5.

3. Pub. L. No. 107-273, § 11020(c) ("The amendments . . . shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act.").

4. 28 U.S.C. § 1369(a).

5. *Id.* § 1369(c)(1) (citing *id.* § 1603(a) with respect to the definition of a foreign state). For purposes of this provision, a state is defined to include the District of Columbia, Puerto Rico, and any territory or possession of the United States. *Id.* § 1369(c)(5). A corporation is deemed to be a citizen of any state (or foreign state) in which it either is incorporated or has its principal place of business. *Id.* § 1369(c)(2).

6. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574; 580 n.2 (1999) (citing *Srawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

7. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480; 492 n.18 (1983) (citing *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523; 530 (1967)).

8. 28 U.S.C. § 1369(a).

9. *Id.* § 1369(c)(4). The full definition of the term "accident" is "a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons." *Id.* Including this last phrase in the definition is redundant because Section 1369 jurisdiction

applies only to civil actions arising "from a single accident, where at least 75 natural persons have died in the accident at a discrete location." *Id.* § 1369(a).

10. See H.R. 860, 107th Cong. (2001).

11. Interestingly, the term "injury" is still defined in the definitions section. 28 U.S.C. § 1369(c)(3), even though the term is irrelevant for purposes of determining whether jurisdiction exists under the version of Section 1369 that ultimately passed.

12. *Id.* § 1369(a)(1)-(3).

13. See Thomas D. Rowe, Jr. & Kennerh D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 27-28, 49-50 (1986).

14. A corporation is deemed to be a resident of any state in which it is either incorporated, licensed to do business, or doing business. 28 U.S.C. § 1369(c)(2).

15. *Id.* § 1369(n)(1) (emphasis added).

16. *Id.* § 1369(b).

17. 308 F. Supp. 2d 43 (D.R.I. 2004).

18. *Id.* at 46.

19. *Id.* at 58. Although the court acknowledged that "this debate may seem purely academic," it noted that this issue may impact the parties' burden of proof with respect to the elements of Section 1369(b), as well as whether the court would be obliged to revisit Section 1369(b)'s requirements during later stages of the litigation. *Id.* at 55-56.

20. *Id.* at 60.

21. *Id.* at 59.

22. *Id.* at 61.

23. *Id.*

24. *Id.* at 62.

25. *Id.* at 61.

26. 28 U.S.C. § 1441(e)(1)(A). The MMTJA was used to remove litigation arising from the Flash Airlines crash that occurred on January 3, 2004. In that crash, 148 people, mostly of French or Egyptian citizenship, were killed. The first U.S. case arising from the crash, brought on behalf of one member of the crew, was originally filed in state court. The defendants removed the case to federal court on the basis of the MMTJA. We believe that this is the first use of the MMTJA in major aviation accident litigation.

27. *Id.* § 1441(c)(1)(B).

28. *Id.* § 1441(c)(2).

29. *Id.* § 1441(c)(4).

30. *Id.* § 1441(c)(3).

31. *Id.* § 1369(d).

32. *Id.* § 1369(e).

33. *Id.* § 1391(g).

34. *Id.* § 1441(e)(6).

35. *Id.* § 1697.

36. *Id.* § 1785.

37. 523 U.S. 26 (1998).

38. *Id.* at 40.

39. H.R. 860, 107th Cong. (1999).

40. On March 24, 2004, the House of Representatives passed H.R. 1768, 108th Cong., known as the Multidistrict Litigation Restoratorian Act of 2004. Like the earlier version of the MMTJA, this Act would legislatively overrule *Lexecon* and allow the MDL transferee court to transfer cases to itself for trial. On March 25, 2004, H.R. 1768 was received by the Senate and referred to the Judiciary Committee.

41. 28 U.S.C. § 1441(c)(2).

42. *Id.* § 1441(b).



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# Attorney-Client Privilege in Civil Litigation

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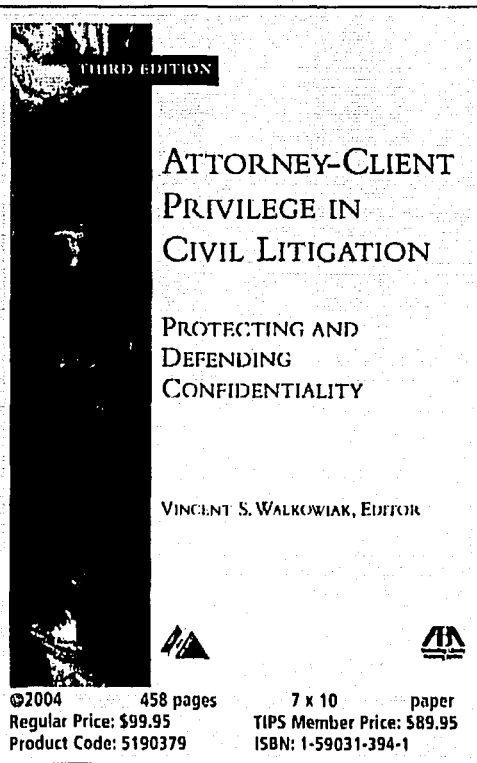
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