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## Compensating The Families Of Air France Flight 447

*Law360, New York (June 05, 2009)* -- How will the families of Air France Flight 447 be compensated for their loss? Does it matter whether the crash turns out to have been caused by a product defect, pilot error, a bolt of lightning or even terrorism? What if the cause of the crash is never determined? And can any of the families sue in the United States?

### **Compensation from the Airline**

Because the flight was international, a treaty known as the Montreal Convention governs all of the families' claims against Air France are governed by an international treaty known as the Montreal Convention.

Under the convention, as long as the crash was caused by an "accident," the airline is automatically liable, at least to a point. "Accident" is defined broadly and includes any unusual or unexpected event, from a bolt of lightning to pilot error to a terrorist attack.

The Montreal Convention imposes liability on an airline in two tiers. Essentially, the first tier provides "automatic" compensation. It deals with claims up to 100,000 Special Drawing Rights, which is an international monetary standard currently equal to about \$155,000. The airline has no defense to claims up to this amount.

Further, within 15 days of determining the identities of the persons entitled to compensation, the airline must pay each passenger's family \$25,000 to cover the family's "immediate economic needs." The payment is an advance against the airline's ultimate obligation.

The convention's second tier deals with that portion of any claim exceeding the \$155,000 limit. An airline can avoid liability for portions of claims over the limit only by proving it was "not negligent or otherwise at fault."

Normally, of course, the burden of proof rests with the claimant. The convention switches the burden around, placing it on the defendant airline. And the language of the convention seems to require the airline to prove that it was not negligent at all. As a practical matter, then, to avoid liability the airline must prove a negative.

For example, if the crash was caused by a component failure, to avoid liability the airline would have to prove that the pilot's handling of the failure was free from negligence; that none of the mechanics who inspected the component could have spotted the defect; and that the airline's inspection cycles were frequent enough.

In fact, there is an infinite number of ways for the airline's theoretical negligence to creep into the picture, all of which the airline must disprove. That burden is next to impossible to meet.

As a result, Air France would likely be liable to the families even if it was determined that the aircraft was brought down by a terrorist, just as Pan Am was liable to the families of those lost in the terrorist bombing of Flight 103.

In short, Air France will likely be liable for full damages. Air France's liability will likely arise regardless of whether the cause of the crash is determined to be weather, mechanical failure or terrorist attack, or even if the exact cause is never determined at all.

What damages can the passengers recover? Lost income? Loss of care, comfort and support? Grief? The Montreal Convention leaves entirely to local law the proper measure of damages.

Of course, the law of many countries severely restricts or even forbids compensation in wrongful death cases. U.S. law is almost always the most favorable for a family.

But the families can sue here only when the convention allows them to. In this case, the convention allows a particular family to sue Air France in the United States only if:

- 1) The United States was the ultimate destination on the passenger's itinerary;
- 2) The passenger's ticket was issued in the United States; or
- 3) The passenger's "principal and permanent residence" was in the United States.

The first two grounds won't generally be matters in controversy — the passenger's ticket and other travel documents will either allow suit in the U.S. or they won't. The third ground, however, might well be hotly contested in at least some cases.

For example, two Flight 447 passengers were U.S. citizens who were living in Brazil. Was the U.S. still their permanent residence? Did they intend to return? If so, when? These details may need to be litigated.

## Compensation from the Manufacturers

Suppose that the crash was caused by a failure of the aircraft's weather radar or perhaps a defective electrical system that left the pilots unable to control the aircraft in rough weather. The families might then have a products liability claim against a manufacturer.

Given the relief afforded under the Montreal Convention, however, there is little reason for them to bother pursuing a products liability claim. Unless, of course, a products claim provides an avenue to U.S. courts that a family would otherwise not have.

Though the Airbus is manufactured in Europe, many of the components, including the weather radar and much of the aircraft's electrical system, are manufactured in the United States. The families could sue the responsible manufacturers here, without regard to the Montreal Convention, just as any foreign plaintiff can sue in the U.S. after being injured by a U.S. manufacturer's product.

The first obstacle to proceeding in the U.S. on a products liability claim is the doctrine of forum non conveniens. The doctrine allows a U.S. court to decline jurisdiction and transfer a case to a foreign country if it decides that, all things considered, the foreign court would be more convenient for all involved.

In the case of Flight 447, the responsible U.S. manufacturers may be hard-pressed to argue that it would be more convenient for them to litigate in a foreign country rather than here, in their own "back yard." Their engineers, their engineering documents and test data are undoubtedly located in the U.S.

Further, if and when important pieces of the wreckage are recovered, that evidence can be shipped here as easily as it can be shipped to, for example, courts in either France or Brazil. Finally, there are no eyewitnesses to the accident who would be inconvenienced by traveling here from foreign jurisdictions to testify.

Finally, U.S. defendants frequently argue that a crash occurring outside the U.S. should be litigated in a foreign country because the judge or jury will want to view the crash site and the foreign courthouse will be closer to the scene. That's certainly not the case here; there's nothing at the crash site for anyone to see.

The next obstacle to pursuing a products defect claim may be lack of evidence. It's unclear how much evidence will ultimately be retrieved from the crash site. For purposes of Montreal Convention claims, any lack of physical evidence is the airline's problem, not the families'.

But the burden of proof on an aviation products liability case rests with the claimant, just as in any other products liability case. And just as in any products case, the lack of physical evidence usually works in favor of the manufacturer and against the victims.

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