

MEMORANDUM

CONFIDENTIAL ATTORNEY WORK PRODUCT

To: Jane Doe, Esq.
From: Lawfinders Associates, Inc.
Date: April 18, 2002
Re: Analysis of *Smith* Claim

The following summarizes the results of the research and legal analysis you requested in this matter. Our analysis focuses on the claims of Jimmy Smith, executor of the estate for Barbara Smith. Smith is one of numerous plaintiffs who filed a Complaint against Acme Aircraft, Inc. (“Acme”) in the United States District Court for the Middle District of Pennsylvania pursuant to diversity jurisdiction alleging various product liability claims arising from three separate crashes of Acme manufactured planes. Unless venue can be transferred to West Virginia or Florida, the plaintiffs will most likely avail themselves of West Virginia substantive law under Pennsylvania’s choice of law rules. Due to the uncertainty of venue and application of choice of law principles, we have compared the various claims, burden of proof, defenses, and damages recoverable under Pennsylvania, West Virginia, and Florida law. Finally, we have also analyzed successor liability and apportionment of damages among joint tortfeasors under Pennsylvania, West Virginia, and Florida law.

Part I briefly summarizes the known facts relevant to the questions of law we have researched. Part II discusses possible misjoinder of the multiple plaintiffs who allege claims arising from three separate crashes. Part III discusses choice of law principles. Parts IV, V, and VI address the plaintiffs’ various claims for strict liability, negligence, and breach of warranty under Pennsylvania, West Virginia, and Florida law. Part VII applies the law of all three states to the availability and computation of punitive damages. Part VIII discusses recovery of non-punitive damages under the wrongful death and survival statutes of Pennsylvania, West Virginia, and Florida. Part IX analyzes the admissibility of scientific evidence in Pennsylvania under *Daubert*. Part X addresses liability issues concerning Acme’s successor, i.e. successor liability and apportionment of damages. Finally, Part XI summarizes our conclusions.

I. Brief Overview of Relevant Facts

The claims asserted by the Smith plaintiffs arose from the November 6, 1996 in-flight break up and crash of a 1977 Acme TurboFlyer aircraft over and in Pennsylvania. The pilot and passengers were returning from Massachusetts to their home in West Virginia. The flight was a mercy mission so that Bernice Jones, age 8, her mother Betty Jones, and family friend Barbara Smith could attend a consultation with a cancer specialist in Boston. The Smith claim materials and Complaint contend that a defective nose cone assembly, tail assembly, and latching mechanism on the forward compartment baggage door initiated and precipitated the in-flight break up. The plaintiffs also allege that Acme failed to warn the

FAA both during and after certification of the subject aircraft that it had defects impacting its airworthiness. The plaintiffs also allege as a defense to the General Aviation Revitalization Act of 1994 (G.A.R.A.) that new replacement parts had been installed on the plane and that Acme variously concealed, covered up, and failed to disclose to the FAA the full nature and extent of the defects that allegedly caused the crash. Finally, the plaintiffs allege that Acme's outrageous conduct warrants punitive damages.

As a result of the in-flight break up, the plane plummeted approximately 10,000 feet. The body of the plane impaled itself in a tree, 40 feet above the ground. Barbara Smith ("the decedent") suffered crushing injuries to her waist during the impact. According to the autopsy report her spinal column, spinal cord, small intestine, and aorta were transected. The medical examiner concluded that her torso would have been severed in half if not for the connecting abdominal skin and subcutaneous fat. The decedent also suffered fractured ribs and sternum, deep lacerations in the back of her thighs, and chemical burns from airplane fuel on her arm, chest, and legs. According to the autopsy report, the decedent regained consciousness after the impact, uttered garbled speech, and then went limp and died. Bernice Jones was thrown from the aircraft and died as a result of multiple blunt force traumatic injuries. Betty Jones and the pilot survived the crash.

Plaintiffs provide an economist's projection of present value of the decedent's lost earnings, lost benefits, and lost household services. At the time of the crash, the decedent was a 33-year-old single mother who was raising two teenage sons and had just obtained a Qualified Nursing Assistant license. The plaintiffs' expert calculated the decedent's lost earnings based upon an average wage for a health service worker (excluding registered nurses), assuming continuous employment throughout work life expectancy and adjusting for life expectancy, work-force participation and employment rates. No adjustment was made for living expenses. The claimants' economist projected the decedent's lost earnings as between \$255,940 to \$543,463. The plaintiffs' expert also calculated the loss of household services based upon the decedent's average time of employment and non-employment at \$364,774. Finally, the plaintiffs' expert estimated the loss of decedent's benefits at between \$52,468 and \$111,410.

The decedent is survived by her two minor children and her elderly mother. In the claim forms, the decedent's mother asserts economic damages such as funeral expenses totaling over \$5,000 and non-economic losses such as the decedent's pain and suffering and fear of impending death and the decedent's surviving beneficiaries' sorrow, grief, loss of companionship, solace, and mental anguish.

II. MISJOINDER OF PARTIES

If the other plaintiffs have not yet settled their claims, Acme should file a motion challenging the joinder of numerous plaintiffs in one action against Acme. Rule 20 of the Federal Rules of Civil Procedure provide for the permissive joinder of plaintiffs where they assert a claim in respect to or arising from the same transaction, occurrence, or series of transactions, or occurrences and common questions of law or fact common to all the parties will arise in the action. Fed. R. Civil P. 20 (a). "Although this joinder provision should be construed liberally, both parts of this test must be satisfied." *Gruening v. Sucic*, 89 F.R.D. 573, 574 (E.D.Pa.1981) (citations omitted). There may be a joinder issue in this case. Although the Complaint was filed in Pennsylvania, the plaintiffs allege claims arising from three different crashes occurring in Pennsylvania, Indiana, and Utah.

The Fourth Circuit Court of Appeals has concluded that joinder of multiple plaintiffs is improper where the only shared fact is the alleged existence of a design defect. *Saval v. BL LTD*, 710 F.2d 1027 (4th Cir. 1983). In *Saval*, numerous Jaguar owners joined in an action against the manufacturer and distributor of vehicles which the owners claimed overheated and had other defective parts and design. *Id.* at 1027. While recognizing that absolute identity of all events is unnecessary, the court rejected the plaintiffs' analysis that their defective vehicles constituted the same transaction, occurrence, or series of transactions. "The cars were purchased at different times, were driven differently, and had difference service histories." *Saval*, 710 F.2d at 1031. The aircrafts involved in the Pennsylvania, Indiana, and Utah crashes also were purchased at separate times and had different service and maintenance histories. In fact, one of the three aircrafts had undergone modification prior to the crash.

Persuasive authority also exists supporting the joinder of multiple defendants in a products liability case. *See Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238 (2d Cir. 1986). In *Abraham*, the Second Circuit allowed joinder under Rule 20(a) of 75 Volkswagen owners alleging a similar design defect.

All plaintiffs now allege as the basis for their claims the purchase of a Volkswagen Rabbit with a valve stem seal made of defective material that will cause it to harden and break over time. We think that amply satisfies the requirement of a series of logically related transactions.

Abraham, 795 F.2d at 250. Likewise, the plaintiffs in this case claim that specific design defects on a Acme aircraft caused all three crashes. In *Saval*,

Regardless, even if joinder is proper under Rule 20, Acme can still move for separate trials to avoid prejudice:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ...

Fed. R. Civil P. 42(b). “District courts possess broad discretion to bifurcate issues for purposes of trial under [FRCP] 42(b).” *O’Dell v. Hercules Inc.*, 904 F.2d 1194, 1201-02 (8th Cir. 1990). “In exercising discretion, district courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion.” *Id.* In affirming lower court’s refusal to join multiple Jaguar owners as plaintiffs, the Fourth Circuit Court of Appeals recognized that “[q]uite probably, severance would have been required in order to keep straight the facts pertaining to the separate automobiles.” *See Saval*, 710 F.2d at 1031. Here, the various claims against Acme arose from three different crashes under different circumstances and in different geographical locations. Combining all three claims into one action will confuse the jury as an avalanche of evidence regarding the individual planes as well as any defenses arising from the maintenance of these planes will be admitted into evidence.

III. CONFLICT OF LAW

The plaintiffs have filed the Complaint in the United States District Court for the Middle District of Pennsylvania. Not only did the crash occur in the district, but opposing counsels’ offices are located in Pennsylvania as well. The plaintiffs are residents of West Virginia, and Acme operations, including manufacture, are concentrated in Florida. Accordingly, Pennsylvania, West Virginia, and Florida are the relevant venues for choice of law questions.

All three states apply different choice of law rules. West Virginia follows the *lex loci delecti* doctrine, which suggests that the substantive law of Pennsylvania would apply unless application of Pennsylvania law violates West Virginia public policy. *See Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 282 (W.Va. 1998); *McKinney v. Fairchild*, 199 W.Va. 718, 487 S.E.2d 913, 922 (1997). Florida has adopted the “significant relationships test” of the Restatement (Second) of Conflict of Laws, which weighs all of the relevant contacts of each state to the parties but excludes the fortuitous place of injury. *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1001 (Fla. 1980); *Stallworth v. Hospitality Rentals, Inc.*, 515 So.2d 413, 416-17 (Fla.App. 1st Dist. 1987). Pennsylvania follows a hybrid choice of law model, however, incorporating both the governmental interest analysis as well as the Restatement Second Approach. If the venue remains in Pennsylvania or is transferred to Florida, the substantive law of either Florida or West Virginia will apply as Pennsylvania has no interest in the litigation other than the in-flight breakup over Pennsylvania. If the venue is transferred to West Virginia, however, Pennsylvania substantive law will most likely apply.

It is unclear at this juncture if the plaintiffs will argue that Pennsylvania choice of law rules dictate application of West Virginia or Florida law. The plaintiffs have alleged certain non-economic survival damages that are available only under West Virginia law. Regardless, even if the plaintiffs fail to raise a choice of law argument, the Pennsylvania court may sua sponte invoke and apply the correct substantive law. *See e.g. Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 at n. 6 (8th Cir. 1990) (stating that “an appellate court may,

sua sponte, apply the correct rule of law to an issue properly before it even though neither party argued it at either the district or appellate level”).

A. Pennsylvania Choice of Law Rules Govern Absent a Transfer of Venue.

Because the Complaint was filed in the Middle District of Pennsylvania, Pennsylvania choice of law rules must be examined to determine which state’s substantive law is to be applied. In diversity actions, courts apply the choice of law rules of the forum state. *LeJeune v. Bliss-Salem, Inc.*, 83 F.3d 1069, 1071 (3d Cir. 1996). The Plaintiffs have invoked federal diversity jurisdiction and have filed the Complaint in the United States Court for the Middle District of Pennsylvania. Accordingly, Pennsylvania choice of law rules apply absent stipulation or dismissal and re-filing¹ in either Florida or West Virginia district court.

B. Either Florida or West Virginia Substantive Law Will Apply under Pennsylvania Choice of Law Rules, Which Combine the Government Interest Analysis and the Significant Relationship Approach of the Restatement Second.

In 1964, the Supreme Court of Pennsylvania abandoned the *lex loci delecti* rule advocated in the Restatement First and instead adopted “a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.” *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 21, 203 A.2d 796, 805 (1964). This approach combines the methodologies of a “government interest analysis” and the “significant relationship” approach of the Restatement (Second) of Conflicts. See *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978); *Giovanetti v. Johns-Manville Corp.*, 372 Pa.Super. 431, 539 A.2d 871 (Pa. Super. 1988). The paramount consideration under this analysis is “the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.” *Id.*, citing *McSwain v. McSwain*, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966). Accordingly, the substantive law of the state with the greatest interest in the litigation will apply.

In the wake of *Griffith*, the fact that the plane crash occurred in Pennsylvania is not sufficient, in of itself, to overcome the interests of West Virginia or Florida in the litigation. *Griffith*, 416 Pa. at 21, 203 A.2d at 805. In *Griffith*, a Pennsylvania domiciliary died when his plane crashed in Colorado. Under the *lex loci delecti* principal, Pennsylvania courts would apply Colorado substantive law. In utilizing the new approach, the Pennsylvania

¹A stipulation would have to be entered dismissing the case and re-filing it in West Virginia. A motion to transfer venue would not change the outcome of the choice of law analysis because Pennsylvania choice of law rules would still apply if venue was transferred to West Virginia. The United States Supreme Court has expressly held that the law of the transferor district or state, including choice of law rules, applies regardless which party makes the motion to transfer venue. See *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990).

Supreme Court concluded that Pennsylvania law would apply because Colorado did not have a significant interest to the litigation:

The state in which injury occurred, as such, has relatively little interest in the measure of damages to be recovered unless it can be said with reasonable certainty that defendant acted in reliance on that state's rule. Moreover, where the tort is unintentional, the reliance argument is almost totally untenable. This is absolutely clear in the present case; the site of the accident was purely fortuitous.

Id. at 23-24, 806-07. Under this analysis in *Griffith*, it is clear that absent some pressing interest in the instant litigation by Pennsylvania, either West Virginia or Florida substantive law would apply. The decedent resided in West Virginia as do her survivors. Acme's principal place of business is in Florida.

C. Pennsylvania Law May Apply if Pennsylvania Has a Connection with the Litigation in Addition to the Crash or if the Case is Re-Filed in a West Virginia District Court.

Should Pennsylvania law be more favorable to Acme, there are three ways that Pennsylvania substantive law may be applied in this case. First, Pennsylvania law may apply under Pennsylvania choice of law principles if Pennsylvania has contacts with the litigation in addition to the situs of the crash itself. Second, Pennsylvania law would most likely apply under West Virginia choice of law principles if the action was re-filed in a West Virginia district court. Finally, Pennsylvania substantive law will apply if no true conflict exists.

1. Pennsylvania Law Would Apply if it Has a Greater Interest in the Litigation than Does Florida or West Virginia.

The substantive law of Pennsylvania may apply if a sufficient state interest can be shown. “[T]he rights and liabilities of the parties with respect to a tort action are determined by the law of the state which has the most significant relationship to the occurrence and the parties.” *Laconis v. Burlington Co. Bridge Comm’n*, 400 Pa.Super. 483, 491, 583 A.2d 1218, 1222 (Pa.Super. 1990), *appeal den’d*, 529 Pa. A.2d 532 (1991), *cert. disp’d*, 503 U.S. 901 (1992). In *Laconis*, a Pennsylvania court determined that Pennsylvania law applied rather than the law of New Jersey, the domicile of the plaintiff, because the place of the injury and the tortious conduct occurred in Pennsylvania. *Id.* at 492. The *Laconis* court considered numerous factors including the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship between the parties is centered. *Laconis*, 400 Pa. Super. at 492, 583 A.2d at 1223. Like the Pennsylvania court, the United States District Court for the Western District of Pennsylvania has also applied the law of the state where both the tortious conduct and the injury occurred. *See Smith v. Best*, 756 F.Supp. 878, 880-81 (W.D.Pa. 1990). In *Best*, a worker developed silicosis from exposure

to silica dust while working in an Ohio foundry. Although the worker was a resident of Pennsylvania, the district court applied Ohio substantive law:

Although Pennsylvania has a valid interest in protecting its citizens, Ohio nonetheless has the stronger policy interest in having its law applied since Ohio foundries are regulated by state agencies such as the Industrial Commission of Ohio, Ohio workers' compensation laws apply to individuals working in the state, and Ohio has an interest in providing redress for injuries incurred by individuals working within its borders.

Id. at 881; *see also Gundlach v. Reinstein*, 924 F.Supp. 684, 689 at n. 6 (E.D.Pa. 1996) (applying Pennsylvania law rather than that of New Jersey where alleged conduct and injury occurred at a New York law school despite plaintiff's residency in New Jersey), *aff'd* 114 F.3d 1172 (3d Cir. 1997). In their complaint, the Plaintiffs allege that some of the "alleged negligence and/or conduct culminating in design and manufacturing defects which caused all three of these accidents also occurred in this district [Middle District of Pennsylvania]." (Complaint, ¶ 11). Apparently, the manufacture of the subject aircraft occurred in Florida, rather than in Pennsylvania. But an in-depth analysis of the pertinent facts may reveal additional contacts, relevance, or state policy sufficient to tip the choice of law analysis in favor of applying Pennsylvania substantive law rather than that of West Virginia or Florida.

2. Pennsylvania Law Would Likely Apply if the Case was Re-Filed in West Virginia.

As discussed above, West Virginia adheres to the *lex loci delecti* choice of law rule. *McKinney v. Fairchild*, 199 W.Va. 718, 487 S.E.2d 913, 922 (1997). Accordingly, West Virginia courts apply the substantive law of the place of the injury but the procedural law of West Virginia. *Id.* Here, the injury undisputedly occurred in Pennsylvania where the subject aircraft crashed and the decedent suffered her injuries. Accordingly, under *lex loci delecti* the substantive law of Pennsylvania rather than West Virginia would apply.

The West Virginia Supreme Court of Appeals recognizes an exception, however, where applying the law of the state of injury violates West Virginia public policy. *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 282 (W.Va. 1998). Generally this exception only applies if the substantive law of the other state would completely bar recovery. The fact that the substantive law of the other state is less favorable to a party is not enough to trigger the public policy exception. *See Nelson v. Allstate Indem. Co.*, 503 S.E.2d 857, 858 (W.Va. 1998); *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256, 265 (1992). Instead, the foreign law would have to be "contrary to pure morals or abstract justice" and their enforcement would have to be "of evil example and harmful to its own people." *Id.* If the exception was applicable, West Virginia substantive law would apply. A review of the substantive law that follows, however, does not indicate that application of Pennsylvania law would reach the level of "harshness" needed to trigger this exception.

3. Pennsylvania Law Would Apply in the Absence of a True Conflict.

A court may avoid determining which state has the greater interest in the application of its law if a “false conflict” exists. *LeJeune v. Bliss-Salem, Inc.*, 83 F.3d 1069, 1071 (3d Cir. 1996). A false conflict exists where “only one jurisdiction’s governmental interests would be impaired by the application of the other jurisdiction’s law.” *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 (3d Cir. 1991). Generally, courts find a false conflict in those cases where a state’s only contact with the suit is the occurrence of the tort within its borders. *Kuchinic v. McCrory*, 422 Pa. 620, 624, 222 A.2d 897 (1966) (holding that false conflict existed because Georgia had no recognizable interest in the outcome of the suit where the accident’s occurrence in Georgia was fortuitous). Accordingly, Pennsylvania law would apply where there is a “false conflict” and another state has no recognizable interest in the outcome of the litigation. Both West Virginia and Florida have recognizable interests in the outcome of the suit because it involves domiciliaries of both states.

Due to the uncertainty presented by Pennsylvania choice of law rules as well as the possibility of a stipulation or re-filing applying another state’s substantive law, an analysis of the substantive law of Pennsylvania, West Virginia, and Florida regarding the claims alleged and possible recoverable damages follows.

IV. PLAINTIFFS’ STRICT LIABILITY CLAIM

Counts I and V of the Complaint allege strict liability claims against Acme. Specifically, the plaintiffs allege that numerous design defects were the proximate cause of the crash of the subject aircraft. These purported defects include defective design, development, and manufacture of the nose cone, nose cone assembly, nose compartment baggage doors, nose gear, nose gear wheel assembly, vertical fin, rudder, rudder assembly, stabilator, stabilatory assembly, autopilot and/or autopilot hardware, trim servo, and cables. The plaintiffs also allege that Acme failed to adequately test the aircraft during certification and to adequately warn both consumers and the FAA of any defects. The plaintiffs allege that the successor is also strictly liable for any damages due to the alleged defects because they failed to warn or retrofit the aircraft for any defects after becoming the Type Certificate holder in 1995. Pennsylvania, West Virginia, and Florida law all provide for strict liability claims arising from design defect and failure to warn. The elements of proof are very similar under Florida and Pennsylvania law with the exception that Pennsylvania explicitly recognizes a modification defense.

A. Pennsylvania Law Regarding Strict Liability

Pennsylvania recognizes strict liability claims arising from design defect as well as failure to warn. Application of Pennsylvania law to the facts of this case is a mixed bag: Although Pennsylvania allows proof of defect by circumstantial evidence under a malfunction theory, Pennsylvania law also explicitly recognizes a modification defense to

a defective design claim and also rejects a duty to warn of technological advances increasing product safety.

1. Claim Arising from Alleged Design Defect

In Pennsylvania, to prevail under strict liability claims, a plaintiff must demonstrate that: (1) the product was defective; (2) the defect existed when it left the hands of the defendant; and (3) the defect caused the harm. Restatement (Second) of Torts § 402A; *DeSantis v. Frick Co.*, 745 A.2d 624, 630 (Pa.Super 1999). Although a plaintiff can offer direct evidence of specific design and manufacturing defects, a plaintiff can also prove a strict liability claim by offering circumstantial evidence that the malfunction would not have occurred in the absence of a design defect:

It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction. . . . It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes.

Rogers v. Johnson & Johnson Prods., 523 Fla. 176, 181, 565 A.2d 751, 754 (1989). Although proof of a specific defect is not necessary to establish liability under a malfunction theory, a plaintiff cannot depend upon “conjecture or guesswork.” *Dansak v. Cameron Coca-Cola Bottling Co., Inc.*, 703 A.2d 489, 496 (Pa.Super. 1997), *appeal den’d*, 556 Pa. 676, 727 A.2d 131 (1998). “The mere fact that an accident happens, even in this enlightened age, does not take the injured plaintiff to the jury.” *Id.*, *citing Woodin v. J.C. Penney Co., Inc.*, 427 Pa.Super. 488, 492, 629 A.2d 974, 976 (Pa.Super. 1993), *appeal den’d*, 532 Pa. 612, 641 A.2d 312 (1994). Accordingly, the plaintiffs will have to offer proof that no superseding causes other than Acme’s alleged failure to warn and design defects existed.

To prove that the crash would not have occurred absent the alleged design defects, the plaintiffs could offer circumstantial evidence such as: (1) the malfunction of the product; (2) expert testimony as to a variety of possible causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect. *See Dansak*, 703 A.2d at 496, *citing* Litvin & McHugh, *Pennsylvania Torts: Law and Advocacy* (1996) § 9.33. Plaintiffs allege that no other probable cause for the crash exists other than the TurboFlyer’s alleged flutter problem and faulty latching device on the forward baggage compartment. The plaintiffs attempt to support these claims with an expert report and affidavit discussing similar accidents involving the TurboFlyer and evidence that the accident would not have occurred unless there was a manufacturing defect. The existence of a malfunction strict liability theory certainly benefits the plaintiffs by relieving them of the burden of offering direct evidence of the purported defective design of the TurboFlyer. Even under a malfunction theory, however, the plaintiffs must still prove by whatever evidence available

to them that the owner's modifications on the plane and any failure to properly maintain the subject aircraft were not a possible cause for the in-flight break up.

In its defense, Acme should offer whatever evidence appropriate to convince the jury that the plaintiffs have not carried their burden of proving by the preponderance of the evidence that the defect was the responsibility of the defendant. *Dansak*, 703 A.2d at 496. One such defense available to Acme is that of modification. If there has been an unforeseen and substantial modification made to the product, the manufacturer is relieved of liability for any defect present at the time the product was delivered to the purchaser as long as the modification is the superseding cause of the user's injury. *Putt v. Yates-American Mach. Co.*, 722 A.2d 217, 221 (Pa.Super 1998). This principle would appear to provide a proper basis for a defense in this action. Of course, Acme would be responsible for proving the impact the installation of a Norton 4011X fiberglass random and a King KWX-50 weather radar had upon the nose cone assembly and forward baggage compartment door.

2. Claim Arising from Duty to Warn

In addition to strict liability arising from manufacturing and design defects, Pennsylvania also recognizes a strict liability claim arising from a defendant's failure to warn. *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa.Super 1999). On claims of failure to warn, the plaintiff is afforded the presumption that he or she would have followed an adequate warning if given, and the defendant must produce evidence that such a warning would not have been heeded in order to rebut the presumption. *Id.* Here, the plaintiffs allege that numerous defects existed at the time of the sale such as problems with the tail assembly, nose cone assembly, and the latch on the FBC door and that Acme failed to warn of the defects both during and after certification.

Acme can defend themselves against these claims in two ways. First, assuming that such defects existed, Acme fulfilled its duty to warn by issuing several service bulletins. These service bulletins are the best proof that Acme complied with its duty to warn of any problems with the FBC door. Other Service bulletins were issued requiring inspections of the tail assembly of the plane. It is unknown if all service bulletins had been complied with in relation to the accident aircraft in this case.

Further, Acme did not have a post-sale duty to warn about changes in technology where the product was not defective at the time of sale:

There is no duty upon the seller of a machine faultlessly designed and manufactured, such as this... , to notify its customers after the time of sale or changes in the state of the art concerning the safe operation of such machine and advise them to install any new, updated or improved safeguards developed since the time of sale.

DeSantis v. Frick Co., 745 A.2d 624 (Pa.Super 2000). Although Acme may not have had a post-sale duty to warn about technological advances that improved the strength of the nose

cone assembly or decreased flutter problems, two problems alleged by plaintiffs' experts, any successor did have a duty to warn about defects existing at the time of the purchase from Acme.

B. West Virginia Law Regarding Strict Liability

Like Pennsylvania, West Virginia also recognizes strict liability claims arising from design and manufacturing defects and a defendant's failure to warn. West Virginia also allows plaintiffs to prove a strict liability claim by means of circumstantial evidence under a malfunction theory.

1. Claim Arising From Alleged Design Defect

A claim for strict liability in West Virginia appears to be more favorable to plaintiffs than that under Pennsylvania law. The general test for establishing a cause of action based on strict liability is "whether the involved product is defective in the sense that it is not reasonably safe for its intended use." *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 at Syllabus Point 4 (1979). The holding in *Morningstar* appears to cast a wider net of liability because the plaintiffs are not explicitly limited to proving that the defect existed at the time the aircraft left the manufacturer's hands.

As in Pennsylvania, West Virginia also recognizes a malfunction theory of negligence. According to the West Virginia Supreme Court of Appeals, a plaintiff may prove a design defect by purely circumstantial evidence showing that no other explanation existed for the malfunction:

[C]ircumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

Anderson v. Chrysler Corp., 184 W.Va. 641, 646, 403 S.E.2d 189, 194 (1991). As discussed in the above section, if the plaintiffs can convincingly rule out other causes of the crash other than a defective nose cone assembly, tail assembly, or latching mechanism on the FBC door, they may successfully recover on a strict liability claim.

2. Claim Arising From Duty to Warn

It is unclear whether West Virginia recognizes a post-sale duty to warn in strict liability cases. The leading case regarding strict liability, *Morningstar v. Black and Decker Manufacturing Co.*, fleetingly mentions a duty to warn without discussing whether it is a continuing duty. *Id.* at 888. Regardless if West Virginia recognizes an explicit post-sale duty to warn, plaintiffs may successfully argue that Acme violated its duty to report known

defects to the FAA both at the time of manufacture and when any subsequent defects are discovered. 14 C.F.R. § 21.3 (reporting of failures, malfunctions, or defects by Type Certificate holders); *see also United States v. Empresa de Viacao Aerea Rioi Grandense (Varig Airlines)*, 467 U.S. 797, 796-97 (1984) (“[T]he manufacturer is required to develop the plans and specifications and perform the inspection and tests necessary to establish that an aircraft design comports with the regulations.”). It is unclear during the limited scope of this research project if a private cause of action arises from violation of these federal regulations. Regardless, admissibility of such violation of FAA regulations can only benefit the plaintiffs before a jury.

C. Florida Law Regarding Strict Liability

Florida law regarding strict liability claims arising from design and manufacture defects is very similar to that in Pennsylvania. Florida substantive law regarding duty to warn is in line with both that of Pennsylvania and West Virginia. As to possible defenses, Florida law recognizes several.

1. Claim Arising from Alleged Design Defect

A strict liability claim under Florida law is similar to that in West Virginia and Pennsylvania. Adopted in 1976, Florida’s version of a strict liability claim provides that:

[S]trict liability should be imposed only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. The user should be protected from unreasonably dangerous products or from a product fraught with unexpected dangers. In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer’s relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user’s injuries or damages.

West v. Caterpillar Tractor Co., 336 So.2d 80, 86-87 (Fla. 1976). As clarified by later opinions, the lack of a safety device may also constitute a design defect for strict liability purposes. *Hobart Corp. v. Seigle*, 600 So.2d 503 (Fla. App. 3d Dist.), *review den’d*, 606 So.2d 1165 (Fla. 1992); *Light v. Weldarc Co.*, 569 So.2d 1302 (Fla. App. 5th Dist. 1990). In sum, the test is whether or not the product was reasonably safe for its intended use as manufactured and designed when it left the plant of the manufacturer. *Clark v. Boeing Co.*, 395 So.2d 1226, 1228 (Fla. App.3d Dist. 1981). Like Pennsylvania, Florida law focuses more upon whether the product was reasonably safe at the time it was manufactured. Here, the subject airplane was manufactured in 1979.

Florida law also recognizes several defenses to a strict liability claim. Under *West*, comparative negligence is a defense in a strict liability action as long as it is not used to claim that the user failed to discover or guard against a defect. Lack of ordinary care can constitute

a defense to strict tort liability. *Id.* at 91. Such defenses may be established as to the owner of the accident aircraft but may be inapplicable to the decedent in this case – a mere passenger in the aircraft who was not responsible for providing necessary modifications and repairs.

2. Claim Arising From Duty to Warn

Florida law regarding duty to warn is in line with that of the other states. “A duty to warn arises when a product is inherently dangerous or has dangerous propensities. . . . However, there is no duty to warn of an obvious danger.” *Siemens Energy & Automation, Inc.*, 719 So.2d 312, 314 (Fla. App. 3rd Dist. 1998), *review den’d*, 733 So.2d 516 (Fla. 1999), *quoting Cohen v. GMC, Cadillac Div.*, 427 So.2d 389, 390-91 (Fla. App. 4th Dist. 1983). Acme issued several service bulletins warning of possible problems with the latching mechanism on the FBC door and the tail assembly. Determining whether defects were obvious to aircraft passengers requires a different analysis than whether or not any alleged defects were known to the owner of the aircraft either by visual inspection, flight experience, or receipt of service bulletins and Airworthiness Directives.

V. PLAINTIFFS’ NEGLIGENCE CLAIM

The plaintiffs allege in Counts II and VI that Acme and its successor was negligent.² Specifically, the plaintiffs allege that Acme violated its duty of reasonable care in the design, development, manufacture, and selection of materials for the subject aircraft. The plaintiffs also allege that Acme’s successor purchased the Title Certificate in 1995 and was negligent in failing to warn of these defects after the purchase. Although all three states recognize the traditional elements of negligence, the requirements for proving causation vary among the states. These differences in proof of causation may become important due to the allegations that the in-flight break up of the subject aircraft resulted from a series of defects including the latching mechanism on the forward baggage compartment door, the tail assembly, and nose cone assembly. The plaintiffs may have a difficult time isolating the various defects and then proving causation of the in-flight break up as it relates to the specific defect.

A. Pennsylvania Law Regarding Negligence

A negligence claim under Pennsylvania law requires the horn book elements of negligence. "To establish a cause of action in negligence, the plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the plaintiff suffered an actual loss or damage."

²Nowhere in the Complaint, do the plaintiffs allege that the defendants were negligent per se. To prove negligence per se, according to horn book law, a plaintiff must establish that he or she is of the class the statute was intended to prevent and that the violation of the statute was the proximate cause of the injury. *See e.g. deJesus v. Seaboard Coast Line R.R. Co.*, 281 So.2d 198, 201 (Fla. 1973). Arguably, the plaintiffs could have successfully alleged a claim for negligence per se in conjunction with any statutory regulations that plaintiffs allege were violated by Acme. The plaintiffs failed to make these allegations however.

Martin v. Evans, 551 Pa. 496, 711 A.2d 458, 461 (1998). It is necessary under the causation element to show both cause in fact and legal (proximate) cause:

Cause in fact or ‘but for’ causation provides that if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury. Legal or proximate causation involves a determination that the nexus between the wrongful acts (or omissions) and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable.

Summers v. Giant Food Store, Inc., 1999 Pa.Super. 314, 743 A.2d 498, 509 (Pa.Super. 1999), citing *E.J. Stewart, Inc. v. Aitken Prods., Inc.*, 607 F.Supp. 883, 889 (E.D.Pa.1985) (citations omitted). Accordingly, to successfully prove a negligence claim, the plaintiffs would need to prove both cause in fact and proximate cause.

B. West Virginia Law Regarding Negligence

In West Virginia, “[t]o be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury.” *Haddox v. Suburban Lanes, Inc.*, 176 W.Va. 744, 349 S.E.2d 910 (1986). Notwithstanding the existence of traditional duty and breach elements, West Virginia law recognizes that “[a] person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person.” *Id.* West Virginia law expressly requires a finding of cause in fact as well as foreseeability.

C. Florida Law Regarding Negligence

Florida law is more similar to that of West Virginia than that of Pennsylvania. In order to establish negligence, a plaintiff must prove: (1) the existence of a duty to protect them; (2) a breach of that duty; and (3) injury sustained as an approximate cause of the breach. *Clark v. Boeing Co.*, 395 So.2d 1226 (Fl.App.3d Dist. 1981). Under the causation element of a negligence claim, Florida courts require a two-fold showing of causation and foreseeability. *Coker v. Wal-Mart Stores, Inc.*, 642 So.2d 774, 776 (Fla.App. 1st Dist. 1994). First, Florida courts follow a “but for” causation-in-fact test: “to constitute proximate cause there must be such a natural, direct and continuance sequence between the negligence act [or omission] and the [plaintiff’s] injury that it can be reasonably said that but for the [negligent] act [or omission] the injury would not have occurred.” *Tieder v. Little*, 502 So.2d 923, 925 (Fla.App. 3d Dist. 1987), *pet. den’d*, 511 So.2d 298 (Fla. 1987), quoting *Pope v. Pinkerton-Hays Lumber Co.*, 120 So.2d 227, 230 (Fla.App. 1st Dist. 1960), *cert. den’d*, 127 So.2d 441 (Fla. 1961). A “substantial fact” exception to the “but for” test exists, however, where to concurrent causes occur and either one would have been sufficient to cause the identical effect. *Tieder*, 502 So.2d at 925-926. Second, the plaintiff must show that the accident was a reasonably foreseeable consequence of the defendant’s negligence. *Id.* at 926, citing *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So.2d 520, 522 (Fla. 1980). As discussed above,

the plaintiffs will have more difficulty proving causation in fact in relation to the alleged defects of the nose cone assembly, tail assembly, and latching mechanism on the forward baggage compartment door. Notably, the National Transportation and Safety Board only mentioned the in-flight breach of the forward baggage compartment door as the probable cause of the crash. Foreseeability of a plane crash from defective plane parts is much easier to prove than cause in fact.

VI. PLAINTIFFS' BREACH OF WARRANTY CLAIM

The plaintiffs allege in Count III that Acme breached both express and implied warranties. Treatment of breach of warranty claims in connection with product liability cases causes unique problems. Should a breach of warranty claim be characterized as a tort or a contract action? Both Pennsylvania and West Virginia have recognized the unique character of breach of warranty claims in product liability claims. Pennsylvania allows plaintiffs to bring suit under either a tort or contract theory and has rejected the privity requirement West Virginia has blurred the distinction between a tort and contract action by rejecting the privity requirement in a breach of warranty/products liability case. In comparison, Florida has expressly confined breach of warranty claims to contract actions. As the elements of a contract claim or a third-party beneficiary claim would be difficult if not impossible to prove under the facts of this case, Florida law is more favorable to Acme in regards to the plaintiffs' breach of warranty claim.

A. Pennsylvania Law Regarding Breach of Warranty

Under Pennsylvania law, claimants, such as decedent's estate, have the option of proceeding in tort or under the U.C.C. for breach of warranty claims. *See Williams v. West Penn Power Co.*, 502 Pa. 557, 467 A.2d 811 (1983). Section 2-318 of the U.C.C. provides for third-party beneficiaries of both express and implied warranties:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

UCC § 2-318. Accordingly, the plaintiffs in this case could elect to proceed under either a contract or tort action to prove breach of warranty. A breach of warranty tort action may be easier to prove under the facts of this case than that of a third-party beneficiary contract claim.

As is evident from the Pennsylvania Supreme Court's abandonment of a privity requirement in breach of warranty claims arising from a product liability action, Pennsylvania law is favorable to an expansive reading of the section 2-318 of the UCC regarding third party beneficiary claims. Although breach of warranty claims sounding in *assumpsit* required both horizontal and vertical privity, Pennsylvania courts have abandoned

both the horizontal and vertical privity requirements. *See Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 32-33, 319 A.2d 903, 907-908 (1974); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968); *Loch v. Confair*, 361 Pa. 158, 63 A.2d 24 (1949). It seems reasonable if express or implied warranties extend to any family or guest in the buyer's home that such warranties would also extend to any guests in the buyer's airplane. Under Pennsylvania law, the plaintiffs could chose to proceed under either a contract or tort theory.

B. West Virginia Law Regarding Breach of Warranty

Like Pennsylvania, West Virginia has also abolished any privity requirement for a breach of warranty claim arising from a products liability case. *See Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22, 32, 268 S.E.2d 296, 304 (1980), *citing Dawson v. Canteen Corp.*, 158 W.Va. 516 (1975). Instead, the West Virginia courts have recognized that "...in the field of product liability, the concepts of strict liability in tort and breach of implied warranty of fitness are parallel doctrines." *Hill*, 165 W.Va. at 32, 268 S.E.d2d at 304. "By acknowledging the congruent nature of the two remedies, the problem which some courts have had in determining which theory the case rests upon is avoided." *Id.* Accordingly, the West Virginia courts have instead recognized breach of warranty claims as part and parcel of strict liability claims.

Accordingly, plaintiffs can rely upon circumstantial evidence to prove breach of warranty as well as strict liability claims. "A breach of warranty may be proved by circumstantial evidence as well as direct evidence, but the jury must not be left to guess the cause of the alleged breach." *Payne v. Valley Motor Sales, Inc.*, 146 W. Va. 1063, 124 S.E.2d 622 at Syllabus Point 2 (1962), *modified on other grounds, Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975). Under West Virginia law, the plaintiffs may also recover for breach of warranty in addition to strict liability and negligence.

C. Florida Law Regarding Breach of Warranty

Unlike both Pennsylvania and West Virginia, Florida courts have confined breach of warranty claims to "an action in contract" requiring "contractual privity between the plaintiff and the defendant as an essential element of the action." *Affiliates for Evaluation and Therapy, Inc.*, 500 So.2d 688, 692 (Fl.App.3d Dist. 1987), *citing West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976) (affirming dismissal of breach of implied warranty claim against computer manufacturer where user failed to allege contractual privity). The plaintiffs may be able to still prove privity by means of a third-party beneficiary claim. But due to the privity requirement, Florida law is the least favorable to plaintiffs' breach of warranty claim.

VII. PLAINTIFFS' OUTRAGEOUS CONDUCT/ PUNITIVE DAMAGES CLAIM

In their complaint, Plaintiffs allege in Count IV that Acme engaged in outrageous conduct justifying the award of punitive damages. Specifically, the plaintiffs contend that

Acme knew of the defects in the subject aircraft and of other similar defects in TurboFlyer planes and that the continued use of the subject aircraft would result in failure and cause death or serious injury. The applicability and calculation of punitive damages is sure to be an issue at trial as the plaintiffs have requested a jury trial that potentially could result in large punitive damages. Pennsylvania, West Virginia, and Florida have different guidelines for both calculating and determining the excessiveness of punitive damages. Notably, punitive damages are not recoverable in wrongful death actions under Pennsylvania law. As far as determining excessiveness of punitive damages, unlike Pennsylvania courts, West Virginia and Florida courts will reduce punitive damages that exceed a 5 to 1 or even a 3 to 1 ratio to compensatory damages absent special circumstances.

A. Pennsylvania Law Regarding Punitive Damages

The most favorable aspect of Pennsylvania law regarding punitive damages is the confinement of punitive damages to product liability and survival actions. Pennsylvania law does not allow punitive damages to be recovered in wrongful death actions. Accordingly, if Pennsylvania substantive law applied, the plaintiffs would not be able to obtain punitive damages as a result of sympathy garnered by evidence regarding damages suffered by the decedent's orphaned sons and elderly mother.

1. Threshold Proof Necessary for Recovery of Punitive Damages

Under Pennsylvania law, punitive damages are not available under wrongful death causes of action but are recoverable in product liability and survival actions. *Gray v. H.C. Duke & Sons, Inc.*, 387 Pa.Super. 95, 563 A.2d 1201 (Pa.Super. 1989); *Harvey v. Hassinger*, 315 Pa.Super. 97, 461 A.2d 814, 815-16 (Pa.Super. 1983). To obtain punitive damages, plaintiff must establish a high standard of outrageous conduct which is "malicious, wanton, reckless, willful or oppressive." *Gray*, 387 P.A.Super. at 106, 563 A.2d at 1206. The Pennsylvania Supreme Court adheres to the Restatement (Second) of Torts which states that punitive damages are only available where the defendant's conduct is "outrageous, because of defendant's evil motive or his reckless indifference to the rights of others." *Lindsay v. Kvortek*, 865 F.Supp. 264, 267-68 (W.D.Penn. 1994) (citations omitted). The defendant must be aware of the extreme risk and yet act in conscious disregard or indifference to it. *Id.* Proving outrageous conduct in this case would require evidence that Acme was aware of the actual defects and the resulting danger, yet still concealed the defects.

2. Review of Excessiveness of Punitive Damages Award

Although Pennsylvania has a high standard of threshold proof in establishing outrageous conduct warranting punitive damages, Pennsylvania allows the factfinder a large amount of leeway in the amount of punitive damages that are awarded. In determining the excessiveness of punitive damages, the Superior Court held that "the relevance of actual or potential damages to punitive damages is tenuous as such an award is not intended to compensate, but to punish and deter." *Shiner v. Moriarty*, 706 A.2d 1228, 1242 (Pa.Super. 1998), *appeal den'd*, 556 Pa. 711, 729 A.2d 1130 (1998). In *Shiner*, the Superior Court

upheld punitive damages 8.3 times as large as punitive damages, commenting that the United States Supreme Court has upheld awards of punitive damages ten or even fifty times the award of compensatory damages. This precedent makes it unlikely that a large punitive damages award would be reduced under Pennsylvania law.

B. West Virginia Law Regarding Punitive Damages

Unlike Pennsylvania, West Virginia allows recovery of punitive damages in wrongful death actions. *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539, 545 (1981). Accordingly, application of West Virginia law could result in a larger punitive damages award arising from evidence that the decedent's orphaned sons and elderly mother have suffered damages as a result of the decedent's death.

1. Threshold Proof Necessary for Recovery of Punitive Damages

West Virginia has established specific guidelines for ascertaining both the applicability and amount of punitive damages:

1. punitive damages must bear a reasonable relationship to the likely and actual harm resulting from defendant's conduct;
2. the jury should consider the reprehensibility of the defendant's conduct including whether the defendant attempted to conceal or cover up his actions or the harm caused by them;
3. punitive damages should exceed any profit resulting from the wrongful conduct;
4. punitive damages should bear a reasonable relationship to compensatory damages; and
5. the financial position of the defendant is relevant.

Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897, 999-900 (1991). If the jury were to conclude that Acme had knowledge of the defects and failed to warn consumers and the FAA of these defects, a West Virginia jury will most likely award the plaintiffs large punitive damages in excess of the one million dollars requested in compensatory damages. Not only did the decedent suffer numerous injuries, regain consciousness before dying, and leave behind two orphaned children, but the jury may also consider the financial position of the Acme defendants as well as any profits earned as a result of Acme's decision not to remedy the alleged defects on the TurboFlyer.

2. Review of Excessiveness of Punitive Damages Award

Although the court stated that punitive damages should exceed any profit resulting from the misconduct, the court also stated that even in those cases where the plaintiff acted with no intent to cause harm but with extreme negligence or wanton disregard the upper limits of punitive damages should be a 5 to 1 ratio with compensatory damages. *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678, 686 (1997), *cert. den'd*, 522 U.S. 1093 (1998). If the award of compensatory damages is large, however, a ratio of 5 to 1 is likely to be excessive. *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870, 889 n. 12 (1992), *aff'd*, 509 U.S. 443 (1993). The court hoped to rein in punitive damages in order to avoid a chilling effect on research and development especially where aviation corporations such as Piper, Cessna, and Beech were concerned. *Garnes*, 413 S.E.2d at 902. This 5 to 1 ratio of punitive damage to compensatory damages would limit the plaintiff's recovery of punitive damages absent evidence that Acme intended to cause harm by its actions.

C. **Florida Substantive Law Regarding Outrageous Conduct**

As in West Virginia, punitive damages also are available in wrongful death and product liability cases under Florida law. *Martin v. United Security Services, Inc.*, 314 So.2d 765, 771 (Fla. 1975). Also as in West Virginia, Florida strictly limits large punitive awards when reviewing the excessiveness of a punitive damages award.

1. Threshold Proof Required for Recovery of Punitive Damages

The standard for proving punitive damages in Florida is similar to that required in the other states. “[A] legal basis for punitive damages exists where torts are committed in an outrageous manner or with fraud, malice, wantonness or oppression.” *Aero Int’l Corp. v. Florida Nat’l Bank of Miami*, 437 So.2d 156, 158 (Fla.App. 3d Dist. 1983), *pet. den’d*, 449 So.2d 264 (Fla. 1984), *quoting Wackenhut Corp. v. Canty*, 359 So.2d 430, 435 (Fla. 1978). A claimant may only recover punitive damages if a jury can legitimately conclude based upon direct or circumstantial evidence that a defendant acted with wantonness, malice, deliberation, gross negligence, or utter disregard for the law. *Schief v. Live Supply, Inc.*, 431 So.2d 602, 603 (Fla.App. 4th Dist. 1983), *pet. den’d*, 440 So.2d 352 (Fla. 1983), *citing Winn and Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214, 222-23 (1936). A review of West Virginia, Pennsylvania, and Florida law really does not reveal a material difference in the type of evidence required to justify punitive damages.

2. Review of Excessiveness of Punitive Damages Award

As in West Virginia, Florida law limits the range of punitive damages awarded. The Florida legislature has imposed a presumptive 3 to 1 ratio of punitive to compensatory damages. Punitive awards in excess of this ratio are presumed excessive unless the plaintiff can establish by clear and convincing evidence that the circumstances of the case warrant the punitive damages award. Fl. St. 768.73. Absent special circumstances, such a presumptive

ratio will limit punitive damages to 3 million or less in light of the requested 1 million in compensatory damages.

VIII. NON-PUNITIVE DAMAGES

In their Complaint, the plaintiffs request damages under both wrongful death and survival statutes of whatever state's law may apply. Without allocating the non-punitive damages requested, the plaintiffs allege that they are entitled to loss of the decedent's income, the decedent's fear of impending death and pain and suffering, burial expenses, and the decedent's beneficiaries' grief, sorrow, loss of companionship, solace, mental anguish, loss of comfort and guidance, loss of earnings capacity, loss of life's pleasures, loss of services, conscious pain and suffering, and loss of advice and counsel. An analysis of the potential recovery for non-punitive damages under West Virginia, Pennsylvania, and Florida law indicates that some of the requested relief is not recoverable. Both Pennsylvania and Florida law is comparable on the type of damages recoverable under their wrongful death and survival statutes. In comparison, West Virginia law is much more favorable to the plaintiffs as it allows a broader range of recovery for the decedent's beneficiaries' emotional injury under its wrongful death statute.

A. Pennsylvania Law Regarding Non-Punitive Damages.

Despite the plaintiffs' failure to allocate their alleged damages to the proper wrongful death or survival statute, under Pennsylvania law, "wrongful death and survival claims are two distinct claims compensating two distinct classes of plaintiffs for two distinct types of losses." *Kiser v. Schulte*, 538 Pa. 219, 228, 643 A.2d 1, 5 (1994); *accord, Baumgart v. Keen Bldg. Prods. Corp.*, 430 Pa.Super. 162, 166, 633 A.2d 1189, 1191 (Pa.Super. 1993), *aff'd*, 542 Pa. 194, 676 A.2d 238 (1995). The survival statute benefits the decedent's estate, while the wrongful death statute benefits the decedent's beneficiaries. Under no circumstances are plaintiffs permitted double recovery under the wrongful death and survival statutes. *Kiser*, 648 A.2d at 4. Under the Pennsylvania wrongful death statute, unlike that of West Virginia, the decedent's beneficiaries do not recover damages for their emotional injuries.

1. Wrongful Death Damages

The decedent's spouse, children, or parents may bring a wrongful death claim in order to receive compensation for the pecuniary loss they sustained as a result of the decedent's death. 42 Pa.C.S. § 8301; *Baumgart*, 538 Pa. at 225, 643 A.2d at 4. These damages include the present value of the services the deceased would have rendered to the family, had she lived, as well as funeral and medical expenses. *Id.*, citing *Burkett v. George*, 118 Pa.Comm. 543, 546, 545 A.2d 985, 987 (1988). The Pennsylvania wrongful death statute does not allow the plaintiffs recovery for emotional injury suffered by the decedent's children and mother.

a. *Recovery for loss of decedent's earnings and household services*

The plaintiffs estimate their pecuniary loss under both the survival and wrongful death claims as totaling between \$850,000 and in excess of \$1,000,000. Under the Pennsylvania wrongful death statute, pecuniary loss is sometimes described as the present value of services the deceased would have rendered to the survivor had she or he lived, and other times as the present value of financial contributions the survivor could reasonably expect to have received from the decedent. *Kiser v. Schultz*, 538 Pa. 219, 643 A.2d 1, 4 (1994); *Baumgart v. Keene Bldg. Products Corp.*, 430 Pa. Super 162, 633 A.2d 1189, 1191 (Pa.Super. 1993), *aff'd*, 542 Pa. 194, 666 A.2d 238 (1995). The plaintiff's expert estimates the loss of household services as \$364,774 and the decedent's loss in earnings as \$255,940 and \$543,463. (Claim Form, Exhibit 2, p. 8). It is unclear how much of these losses that the decedent's sons and mother would have received from the decedent if she had not been involved in the crash.

b. *Recovery for funeral expenses*

In addition to loss of household services and earnings, the decedent's survivors are also entitled to reimbursement for funeral expenses. The Pennsylvania wrongful death statute expressly provides for the recovery of funeral costs. Pa. St. 42 Pa. C.S.A. § 8301. According to the plaintiff's claim forms, the decedent's funeral expenses totaled \$5,729.96. (Claim Form, Exhibit 4).

2. Survival Damages

Under a survival claim, the administrator of the decedent's estate can recover the loss to the decedent's estate resulting from the tort. 42 Pa.C.S. § 8302; *Kiser*, 538 Pa. at 225. The measure of damages awarded in a survival action include the decedent's pain and suffering, the loss of gross earning power from the date of injury until death, and the loss of the decedent's earning power, less personal maintenance expenses, from the time of death through his or her estimated working life span. *Id.*, citing *Slaseman v. Meyers*, 309 Pa.Super. 537, 541, 455 A.2d 1213, 1215 (Pa.Super 1983). Courts may rely upon actuarial tables such as that offered in the plaintiffs' affidavit attached to Acme's claim forms.

a. *Recovery for decedent's pain and suffering*

Pennsylvania law provides for pain and suffering damages from the time of injury until the time of death. *Nye v. Commonwealth Dept. of Transp.*, 331 P.Super. 209, 480 A.2d 318, 321 (Pa.Super. 1984). In this case, there is some evidence that the decedent was conscious following the crash. It is unclear how much time passed before the decedent was pronounced dead at the scene or if the decedent was aware of and suffered pain from her injuries. Such injuries may be proven by testimony of EMS technicians, rescue crews, or the survivors of the crash. Defense experts may also establish that any pain and suffering was limited by paralysis resulting from the severing of the decedent's spinal cord. Regardless, a large damages award for the decedent's pain and suffering is possible. The decedent suffered numerous fatal and non-fatal injuries. Discussing the lack of pain and suffering due to the severing of the decedent's spinal cord may lead to jury alienation and even larger damages.

The plaintiffs also claim that the decedent's estate is entitled to recovery for the decedent's pre-impact fright. The Pennsylvania Supreme Court has not ruled on whether a claim is supportable for pre-impact fright. The Pennsylvania Superior Court and the Eastern District Court of Pennsylvania have declined to allow such damages in the absence of evidence that the emotional distress manifested in physical injury. *See Nye*, 48 A.2d at 321-22; *Stecyk v. Bell Helicopter Textron*, 1998 WL 744087 at 8-11 (E.D.Pa. 1998). Contrary to the underlying reasoning in *Nye*, the Pennsylvania Supreme Court concluded in 1979 that physical manifestation was not necessary to prove psychic injury in light of modern scientific advances. *See Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672, 679 (1979). Consequently, it is uncertain if pre-impact fright damages are permissible if adequate evidence is offered showing such fright. In this case, testimony by the survivors regarding the decedent's fear as the plane plummeted 10,000 feet may be adequate to show pre-impact fright warranting additional pain and suffering damages.

b. *Recovery for loss of decedent's earnings.*

Under Pennsylvania law, the decedent's estate may recover the present value of estimated lifetime earning minus maintenance expenses. *Kiser*, 648 A.2d at 4. In its claim forms, the plaintiff's expert estimates the decedent's lost earning capacity as between \$255,940 and \$543,463 and the loss of benefits as \$52,468 to \$11,410. (Claim Forms, Exhibit 2, p. 8). The expert does not estimate the amount of maintenance expenses that would be deducted from the range of lost earning power.

B. West Virginia Law Regarding Non-Punitive Damages

West Virginia law regarding non-punitive damages is the most favorable to the plaintiffs. The West Virginia wrongful death statute permits recovery for mental pain and suffering of survivors, loss of services, medical and funeral costs, sorrow, loss of society, and reasonably expected loss of income of decedent regardless of minority or lack of dependency by survivors. W.Va.Code 55-7-6[c]; *Rice v. Ryder*, 184 W.Va. 255, 259, 400 S.E.2d 263, 267

(1990). Filing suit in Pennsylvania was the only way the plaintiffs could take advantage of West Virginia law. If the parties had originally filed in West Virginia, West Virginia's adherence to *lex loci delecti* would have resulted in the application of Pennsylvania substantive law. On the flip side, the West Virginia's wrongful death statute only allows recovery of the decedent's pain and suffering from her non-fatal injuries.

1. Recovery for Loss of Earnings

West Virginia, like Pennsylvania law, allows recovery of the decedent's loss earnings. Parents and siblings need not demonstrate dependence on decedent to recover such damages. *Rice*, 184 W.Va. at 255. Unlike Pennsylvania law, however, West Virginia law does not decrease the award for lost income by the amount of living expenses the decedent would have incurred during his or her lifetime. *Wehner v. Weinstein*, 191 W.Va. 149, 160, 444 S.E.2d 27, 30, 38 (1994) (refusing to construe "loss of income of the decedent" to net income). In proving the amount of lost damages, plaintiffs are required to offer proof of average life expectancy, average work life expectancy, and that the projections are reduced to present value. *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W.Va. 624, 499 S.E.2d 846, 848 (1997). The plaintiffs may present several statistical estimates based upon differing life scenarios, and the jury is free to adopt any amount within the projected range. *Id.* The expert in this case filed an affidavit estimating a range of lost income based upon average life expectancy and work expectancy. The affidavit also includes an estimated amount of lost services as well. In addition, evidence may be offered regarding the emotional suffering of the decedent's two orphaned children and elderly mother.

2. Recovery for Funeral Expenses

The West Virginia wrongful death statute expressly authorizes a jury to award compensation for funeral expenses. *See* W.Va. Code 55-7-6(1)(c)(1)(D). The plaintiffs have attached affidavits to the claim forms indicating over \$5,000 in compensable funeral expenses.

3. Recovery for Pain and Suffering of the Decedent's Survivors

Unlike Pennsylvania, the West Virginia wrongful death statute expressly allows recovery for a survivor's emotional injuries:

(c) (1) The verdict of the jury shall include, but may not be limited to damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.

W.Va.Code 55-7-6(1)(c)(1)(A). This expansive language includes recovery not only for the decedent's children and mother to recover damages for the loss of their mother and daughter but also to recover damages for the grief process itself.

4. Recovery for the Decedent's Pain and Suffering.

Unlike Pennsylvania law, the West Virginia wrongful death statute only allows recovery for the decedent's pain and suffering from the decedent's non-fatal injuries prior to death. *Estate of Helmick by Fox v. Martin*, 188 W. Va. 559, 425 S.E.2d 235, 239 (1992). There is evidence in this case that the decedent survived the impact of the plane, regained consciousness, and suffered from numerous nonfatal injuries such as fractured ribs, chemical burns, contusions, and lacerations. Although the decedent was partially paralyzed as a result of her severed spinal cord, she may have suffered some pain from some of her non-fatal fractures, cuts, and burns. These damages are compensable.

C. Florida Law Regarding Non-Punitive Damages

Florida's survival and wrongful death statutes provides for similar recovery as that provided for in the West Virginia wrongful death statute, including compensation for a decedent's pain and suffering from non-fatal injuries and recovery for a survivor's emotional injury.

1. Recovery for the Decedent's Pain and Suffering.

As in West Virginia, Florida's survival statute is inapplicable where death is caused by the injuries at issue. Fl. St. 768.20; *Smith v. Lusk*, 356 So.2d 1309, 1310-11 (Fla.App. 2d Dist. 1978). Accordingly, there is no recovery for the conscious pain and suffering of decedents where the pain results from the injuries that cause death. *Wajcik v. United Services Auto. Ass'n*, 347 So.2d 1051, 1052 (Fla. App. 4th Dist. 1977). Here, the decedent suffered nonfatal injuries in addition to her fatal injuries such as chemical burns, cuts, and fractured ribs. Theoretically, there should be recovery for pain caused by the nonfatal wounds. One must keep in mind that the decedent's spinal cord was severed at her waist and the extent of decedent's paralysis should be considered when determining the extent of her pain prior to death. There is additional evidence that the decedent survived impact and regained consciousness prior to her death, although it is unclear the length of time that she was conscious.

2. Recovery for Pain and Suffering of the Decedent's Survivors.

Florida's wrongful death statute does allow for certain "survivors" including children and parents to recover for their own mental pain and suffering. Fl. St. 768.21. "Survivor" is defined to include the decedent's parent and children, whether or not dependent on the decedent. Fl.St. 768.18[1]. This mental pain and suffering is not the same as grief, but is established primarily by the testimony of fact witnesses. There is no objective standard for such damage and no expert testimony is needed. *Angrand v. Key*, 657 So.2d 1146, 1149 (Fla. 1995); *Hawk v. Seaboard Sys. R.R., Inc.*, 547 So.2d 669, 671-72 (Fla.App. 2d Dist. 1989), *review dismissed*, 549 So.2d 1014 (Fla. 1989). A Florida appellate court has upheld mental pain and suffering awards of as much as \$1,000,000 for each parent. *Hawk*, 547 So.2d at 672. Damages are proven through fact rather than expert witnesses and no objective criteria has

been established. *Id.* at 671-72; *Angrand v. Key*, 657 So.2d 1146, 1149 (Fla. 1995). Here, the decedent's mother and two minor sons could receive damages for their mental suffering and pain. The decedent was a single mother and her death orphaned two teen-aged sons.

3. Recovery for the Decedent's Lost Earnings and Household Services

In addition, each survivor can recover the present value of lost support and services. Fl.St. 768.21[1]. In the case of a minor child, recovery for lost services is limited to the services the parent would have received before the child reached the age of majority, though no such limitation applies for the parent's mental pain and suffering. *Roberts v. Holloway*, 581 So.2d 619, 620 (Fla.App. 4th Dist. 1991). In some cases, the estate can recover loss of prospective net accumulations. Fl.St. 768.21[6]; *Weimer v. Wolf*, 641 So.2d 480, 481 (Fla.App. 2d Dist. 1994); *Vildbill v. Johnson*, 492 So.2d 1047, 1049-50 (Fla. 1986). Here, the decedent's minor sons were aged 15 and 13 at the time the Complaint was filed. Although the plaintiffs' expert calculated loss household services, he did not indicate the amount of these damages that would be allocated to the years before the decedent's two sons reached majority.

IX. APPLICATION OF DAUBERT IN THE THIRD CIRCUIT.

Whether the Middle District will act as a gatekeeper under *Daubert* is very important to the plaintiffs' claims of defective design, failure to warn, and causation. In interpreting the admissibility of expert witness testimony under Federal Rule of Evidence 702, the United States Supreme Court held that expert testimony must be based on a reliable and scientifically valid methodology that fits the facts of the case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993). In determining whether expert testimony is admissible, a district court should consider the following factors: whether (1) the proposed witness is qualified as an expert; (2) the expert employs a reliable reasoning or methodology; and (3) the reasoning or methodology is relevant. *Id.* at 592-93. The test is flexible and should focus on reasoning and methods, not conclusions. *See Daubert*, 509 U.S. at 594-95. In *Daubert*, the Supreme Court suggested four guideposts in determining the reliability of scientific evidence: (1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community. *Id.* at 593-94.

The Third Circuit has added additional factors to those suggested by the *Daubert* court: (1) the existence and maintenance of standards controlling the technique's operation; (2) the relationship of the technique to methods which have been established to be reliable; (3) the expert witness's qualifications; and (4) the non-judicial uses to which the method has been put. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 742 n. 8 (3d Cir. 1994). According to the Third Circuit, if there are "good grounds" for the expert's conclusion it should be admitted, even if the judge believes there are better grounds for some alternative conclusion and there are some flaws in the scientist's methods. *Heller v. Shaw Indus.*, 167

F.3d 146, 152 (3d Cir. 1999). In addition, “a district court must examine the expert’s conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used.” *Id.*

In *Heller*, the Third Circuit concluded that the district court erroneously excluded expert testimony that a carpet manufactured by the defendant emitted environmental toxins harming the plaintiff. *Heller*, 167 F.3d at 154. The district court held the doctor’s testimony to be defective because he failed to cite research supporting his conclusion. But the Third Circuit concluded that the doctor’s thorough differential diagnosis and the strong temporal relationship between the installation of the carpet and the plaintiff’s injury created a sufficiently valid methodology supporting the reliability of the doctor’s conclusion. *Id.*

The Eastern District of Pennsylvania has been fairly permissive in allowing scientific testimony from dubious sources. *See Zemaitatis v. Innovasive Devices, Inc.*, 90 F.Supp.2d 631 (E.D.Pa. 2000). In *Zemaitatis*, the appellate court affirmed the district court’s admission of testimony by Dr. Batterman that the defendant’s suture anchor system was defectively designed because it was loaded from the front rather than the back and that this defect caused the plaintiff’s injury. The Eastern District acknowledged that Dr. Batterman was a “jack-of-all-trades expert,” but concluded that the court was satisfied he had sufficient qualifications to testify regarding negligent design and causation. *Id.* at *1. As reflected by the holding in *Zemaitatis*, the district court has great discretion in determining the reliability of scientific evidence.

Here, Acme may be able to challenge the admissibility of the plaintiffs’ evidence on *Daubert* grounds. The plaintiffs have attached expert reports and affidavits to their claim forms purporting to show that the Seneca II was defectively designed and that these defects were the proximate cause of the crash. The Plaintiffs’ experts exhaustively list their qualifications and experience. It is uncertain whether the plaintiffs’ experts will be able to show a scientific basis for their conclusions. Although the National Transportation Safety Board has issued a report concluding that there was a strong likelihood that the forward baggage door opening in flight and impacted the powered propeller initiating the flight breakup. The NTSB report does not mention that a flutter problem contributed to the accident.

X. SPECIFIC ISSUES REGARDING LIABILITY OF ACME’S SUCCESSOR

The plaintiffs have brought the current action against both Acme and its successor. Assuming that the plaintiffs successfully present their claims to a jury, the plaintiffs will argue that Acme’s successor is liable for a portion of the damages as a joint tortfeasor. The plaintiffs may also assert that Acme’s successor is not only liable for its own purported negligence but is also liable for the Acme’s negligence as well. An analysis proportionate liability and potential successor liability follows:

A. Division of Liability and Damages of Acme and Its Successor

The plaintiffs allege that the in-flight break up of the subject aircraft was caused by both Acme's defective design and manufacture as well as by both Acme and its successor's failure to warn of the defects. Should the plaintiffs succeed on their claims before a jury trial, issues regarding division of damages between Acme and its successor will invariably arise. Under Pennsylvania law, damages arising from a strict liability claim would be allocated on a pro rata basis. All damages arising from a negligence claim in Pennsylvania would be allocated on a percentage of fault basis. Likewise, damages obtained under Florida and West Virginia substantive law would probably be allocated on a comparative fault basis.

1. Division Under Pennsylvania Law

Under Pennsylvania law, any liability would be allocated on either a pro rata or percentage of fault basis depending on whether the damages are recovered under a strict liability or negligence theory. Where joint tortfeasors are both strictly liable damages are apportioned on a "pro rata" basis. *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454, 462 (1992). In a negligence claim, damages would be allocated according to the percentage of causal fault attributable to the conduct of each. *Remy v. Michael D's Carpet Outlets*, 391 Pa.Super. 436, 571 A.2d 446, 451 (Pa.Super.1990), *aff'd*, 536 Pa. 1, 637 A.2d 603 (1993).

Under Pennsylvania law, strict liability and negligence may be premised upon failure to warn in addition to manufacturing and design defects. *Walton*, 610 A.2d at 459-60. If Acme and its successor are held jointly and severally liable, they will be allocated either a pro-rata share or proportion of the damages depending upon the basis for recovery.

2. Division Under West Virginia Law

It is unclear how West Virginia courts would apportion damages among Acme and its successor. West Virginia law provides for the affirmative defense of comparative negligence and comparative causation allowing for the apportionment of damages between both the plaintiff and multiple defendants. *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879, 885 (1979). The West Virginia Supreme Court has stated that comparative negligence principles apply equally to strict liability cases and that the term "comparative causation" should be used as a result. *Reager v. Anderson*, 179 W.Va. 691, 371 S.E.2d 619, 625 n. 1 (1988). Based upon the holdings of these cases, it is likely that damages would be apportioned between Acme and its successor in accordance with their respective degree of fault.

3. Division Under Florida Law

A Florida comparative fault statute provides for the division of damages amongst both plaintiffs and defendants. F.S.A. § 768.81. The statute expressly applies to both negligence and strict liability claims. F.S.A. §768.81 (4)(a). Under Florida statute, joint tortfeasors will be held either jointly and severally liable or the damages will be apportioned according to their respective fault based upon the percentage of liability and amount of damages. Accordingly, division of damages between Acme and its successor would have to be ascertained post-verdict based upon these factors.

B. Successor Liability

It is unclear if the plaintiffs will attempt to obtain damages from Acme's successor under a successor liability theory. Although the plaintiffs allege that Acme's successor purchased the Title Certificate to the subject aircraft in 1995, the plaintiffs also allege that the successor had an independent duty to warn of defects. Although Pennsylvania recognizes a product line exception to the general rule that successors are not liable and West Virginia recognizes a variation of this exception, Acme's successor will probably not face liability due to its separate identify from Acme.

1. Pennsylvania Law Regarding Successor Liability

Under Pennsylvania law, the purchaser of corporate assets generally is not liable for the debts or liabilities of the corporation purchased unless the product line exception applies:

[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation . . . and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

Keselyak v. Reach All, Inc., 443 Pa.Super. 71, 660 A.2d 1350, 1353 (Pa.Super. 1995) (citations omitted). The exception applies even if the successor makes changes in the product line to cure the defect in question prior to the accident but then fails to retrofit earlier-produced units of the same line. *Mendrella v. Weaver Corp.*, 703 A.2d 480, 484 (Pa.Super. 1997). This exception only applies, however, when acquisition of the predecessor's assets virtually destroys the plaintiff's remedies against the original manufacturer. *Id.* at 1353-54. Here, the purchase agreement specifically established to provide recovery for those injured by Acme's actions. Moreover, under the terms of the purchase agreement, Acme has obligations in the event of funding shortfalls.

2. West Virginia Law Regarding Successor Liability

As in Pennsylvania, purchasers are usually not held liable for the debts and liabilities of the corporation whose assets they purchased except in very limited exceptions. *See Jordan v. Ravenswood Aluminum Corp.*, 193 W.Va. 192, 455 S.E.2d 561, 564 (1995). These exceptions include: (1) if there was an express or implied assumption of liability; (2) if the transaction was fraudulent or some element of the transaction was not made in good faith; (3) if the transaction was a consolidation or merger; or (4) if the successor corporation is a mere continuation or reincarnation of the predecessor. *Id.* at 563; *accord Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557, 558 (1992); *In re State Public Bldg. Asbestos Litig.*, 193 W.Va. 119, 454 S.E.2d 413, 424 (1994), *cert. den'd*, 515 U.S. 1160 (1995).

The fourth continuation exception only applies where there is “a common identity of directors and stockholders” and “only one corporation at the completion of the transfer.” *Jordan*, 455 S.E.2d at 564. The decisions in *Davis* and *in Re State Public Bldg.* may arguably allow a broader continuation exception where “a corporation acquires or merges with a company manufacturing a product that is known to create serious health hazards, and the successor corporation continues to produce the same product in the same manner, it may be found liable for punitive damages for liabilities incurred by the predecessor....” *Davis*, 420 S.E.2d at 564. If this exception was applicable to the facts of this case, Acme’s successor would be responsible for punitive damages arising from Acme’s conduct.

3. Florida Law Regarding Successor Liability

In Florida, successor liability is not imposed upon a purchaser of corporate assets unless: (1) the successor expressly or impliedly assumes the obligations of the predecessor; (2) the transaction is a de facto merger; (3) the successor is a mere continuation of the predecessor; or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor. *See Redman v. Cobb Int’l, Inc.*, 23 F.Supp.2d 1372, 1374 (M.D.Fla. 1998), *aff’d*, 208 F.3d 1009 (11th Cir. 2000). This rule applies equally to product liability and negligence cases. *Id.* None of these exceptions appear to apply to the facts of this case. Accordingly, Acme’s successor would only be liable under Florida law for those acts attributable to its own conduct.

XI. CONCLUSION

If the suit proceeds in the United States District Court for the Middle District of Pennsylvania, either Florida or West Virginia substantive law will apply under Pennsylvania choice of law rules. This can only be avoided if the suit is re-filed rather than transferred because the transferor’s choice of law rules apply regardless of which party filed the Motion to Transfer Venue.

It is unclear which state’s substantive law is the most favorable to the plaintiffs. The plaintiffs have specifically invoked West Virginia law in their Complaint. In regard to damages, West Virginia law is more favorable to the plaintiffs. There are numerous differences between the substantive law of the states on damages issues:

Punitive Damages - Pennsylvania law does not allow recovery of punitives in wrongful death action.

Pennsylvania law is very permissive in regards to excessive punitive awards. West Virginia law generally allows a 5 to 1 ration to compensatory damages. Florida law applies a presumptive 3 to 1 ratio.

Non-Punitive Damages Pennsylvania law requires the reduction of maintenance expenses from loss of earnings.

Pennsylvania law allows recovery for pain and suffering for all injuries from time of injury to time of death. Florida and West Virginia limit recovery for pain and suffering to non-fatal injuries only.

West Virginia law allows survivors to recover for mental pain and suffering as well as for the grieving process itself. Florida and Pennsylvania law is not so expansive.

Although a more detailed analysis is necessary of the claims under the proper state's substantive law, preliminary research has shown that Florida would be most favorable to Acme concerning the plaintiffs' breach of warranty claim and successor liability. Florida law is the most favorable as it confines such a claim to a contract action and requires a showing of privity. Florida also provides the narrowest recovery under a successor liability theory as it does not allow for a product line exception as does Pennsylvania and, to a limited extent, West Virginia.

No matter which state's substantive law is applied, the facts of this case create a strong likelihood of jury sympathy. The decedent was a 33-year-old single mother. She was struggling to raise two teenage sons and had just completed her nursing assistant license. After plummeting approximately 10,000 feet from the air, she was crushed to death. Her spinal cord, spinal column, and vital organs were transacted. She would have been chopped in half if not for her abdominal skin and fat. The decedent regained consciousness after the crash, and despite her paralysis, most likely suffered pain as a result of her nonfatal fractures and burns. Her untimely death has left her orphaned sons and elderly mother to fend for themselves.

An additional concern is that of Acme's successor's liability if the plaintiffs are allowed to pursue their claims against it. The plaintiffs contend that Acme's successor breached its duty to warn after it purchased the Type Certificate in 1995. If the plaintiffs prove this claim, Acme's successor will be responsible for damages arising from this misconduct on a comparative fault basis. The plaintiffs may also allege that Acme's successor is responsible under a successor liability theory. Generally, a party who purchases corporate assets is not responsible for the corporation's liabilities and debts. Certain exceptions apply however in all three states. Most worrisome is the product line exception that is recognized in Pennsylvania and to a certain extent in West Virginia. Under this exception, Acme's successor could be exposed to unlimited punitive damages stemming from Acme's conduct.

Before reaching the jury, however, the plaintiffs will have to prove their claims. To do so, the plaintiffs will have to show that the alleged defects in the nose cone, tail assembly, and the latching mechanism in the forward baggage compartment either independently or collectively call the in-flight breakup of the subject aircraft. The plaintiffs will have to

convince the jury that there were no other causes for the crash other than design or manufacturing defects. There is evidence that modifications were added to the subject aircraft and that the owner did not comply with certain Airworthiness Directives. Not only can Acme offer its own evidence refuting its liability, but Acme can also attack the admissibility of the plaintiffs' evidence on *Daubert* grounds.

Final Analysis:

In addition to challenging the joinder of the various plaintiffs under one cause of action filed in the District Court for the Middle District of Pennsylvania, Acme should avoid application of West Virginia law by negotiating a stipulation applying Pennsylvania or Florida law due to West Virginia's broad recognition of survivor damages. In the absence of such a stipulation, Acme should press the plaintiffs to refile in Florida federal court, which will most likely apply Florida substantive law. Regardless of venue and applicable substantive law, the defendants should pursue threshold defenses such as *Daubert* challenges, modification defense, and motions to dismiss claims for those elements of damages that are not recoverable in order to either limit damages or to prevent consideration by a jury. If all these efforts fail and the case goes to trial under West Virginia substantive law, serious consideration must be given to vigorous pursuit of settlement because of potential exposure to the Acme.