New York Law Journal

Aviation Law

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12-21-2004

In mass disaster air crash litigations it is not uncommon that the deceased passengers will have been domiciled in different states or countries and left surviving relatives throughout the country or world. It is also not uncommon these days — given the complexity within families — that surviving relatives will hire separate counsel who in turn file separate wrongful death suits for the same decedent in different courts throughout the United States.

In diversity or federal question aviation cases, the air carrier will remove any cases filed in state courts to federal district courts and from there defendants move for and obtain consolidation and transfer, for pretrial purposes, to one federal district court under 28 USC §1407, the Multidistrict Litigation (MDL) Statute.

At this point, the defendants and court face a multiplicity of wrongful death actions brought by different plaintiffs, but for the same decedent. Aside from the usual complicated legal issues of choice of law, establishing liability and ascertaining the quantum of damages, the existence of a multiplicity of suits for the same decedent makes a settlement virtually impossible and raises the issue of who is the "real party in interest" for purposes of Rule 17(a) of the Federal Rules of Civil Procedure. Put otherwise, which plaintiff has the right to prosecute and settle a case and how is that determined in a multi-district litigation context?

A New York Hypothetical Case

To provide a factual context to this discussion, let us assume the following hypothetical facts: a crash in New York results in the death of a New Yorker, survived by a widow, who has been appointed administrator of the estate and files suit in New York federal district court, and survived by an adult child from a prior marriage, who files suit in Texas state court, where the defendant airline is domiciled, and whose action is removed to Texas Federal District Court, then transferred under 28 USC §1407 to New York federal district court and consolidated with all other pending actions arising from the crash. The defendant will not settle with either plaintiff and challenges each plaintiff's right to bring suit.

Rule 17(a) provides in pertinent part as follows:

[E]very action shall be prosecuted in the name of the real party in interest. An executor, administrator . . . may sue in that person's own name without joining the party for whose benefit the action is brought; . . .

The Rule 17(a) "real party in interest" requirement is meant to ensure that an action is brought by the person who actually possesses the right to enforce the claim under the applicable substantive law and has a significant interest in the litigation.[1] It protects defendants against the threat of a subsequent suit by the party actually entitled to relief or from the harassment of a suit by persons without the power to make decisions concerning the prosecution, compromise and settlement of a case.[2] Rule 17(a) essentially ensures that a judgment or a compromise order in a wrongful death case will have proper res judicata effect against any future plaintiffs. It prevents multiplicity of suits and promotes finality.

Rule 17(a) is often confused with, but is quite distinct from, its Rule 17(b) cousin, "capacity to sue," which raises the question of whether the plaintiff has general competence to sue, that is, is plaintiff free from any general disability such as infancy, insanity or other legal incompetency, or, if suing in a representative capacity, such as executor or estate administrator, does plaintiff actually possess the title in which he or she sues.[3] Capacity to sue therefore speaks to the plaintiff's personal competence to be a plaintiff in an action, while the real party in interest rule speaks to whether the plaintiff is the person authorized by the applicable substantive law to enforce the specific right sued upon.

Rule 17(a) and Applicable Substantive Law

Rule 17(a) requires that the court identify the real party in interest by reference to the applicable substantive law. In a federal question case, the applicable substantive law is, naturally, federal law. In a diversity jurisdiction case, which is the jurisdictional basis for many aviation cases in federal courts, the applicable governing substantive law is state law, more specifically, the law of the forum in accordance with the rule of *Erie R. Co. v. Tompkins*.[4] While the question of who may sue is a federal procedural issue governed by Rule 17(a), its resolution in a diversity case depends upon the underlying applicable state substantive law, without regard to the state's local procedural rules on who may sue.[5] To make matters more interesting, the state substantive law that the federal court must apply to determine real party in interest is the whole law of the forum state, including its choice of law rules.[6] An MDL transferee court has the further burden of determining the Rule 17(a) real party in interest issue by reference to the whole law of the state in which the transferor court sits, including that state's choice of law rules.[7]

Getting back to our hypothetical facts, we have in one action an adult child of the deceased who sued the Texas airline Dec. 17, 2004 in Texas hoping for application of Texas wrongful death law, which allows suit by a decedent's heir in his individual capacity,

and in a second action we have the widow who filed an action in New York in her capacity as administrator of the estate. There is now a dispute among the two plaintiffs as to who is the real party in interest with the legal authority to prosecute, settle and compromise the case. In theory, the MDL court could rule that New York law applies under the New York choice of law test to the New York filed case and that Texas law applies to the Texas filed case, based on application of Texas' most significant relationship choice of law test. There is the theoretical possibility of inconsistent rulings on which substantive law applies and no solution to who is the real party in interest, jeopardizing any chance to settle the case, unless both plaintiffs can somehow agree to settle and apportion the settlement under a blended version of both laws.

While in theory this potential exists for conflicting rulings when there is a multiplicity of suits relating to the same decedent, but in different fora, each having its own choice of law rule, the reality, fortunately, is that most choice of law rules lend themselves to a uniform ruling on what substantive law applies, such that a court can identify the real party in interest — the plaintiff with the right to prosecute, settle and compromise, or try the case — as well as the applicable wrongful death elements of recovery.

The 1994 Roselawn Disaster

A case in point is the decision on choice of law arising from the 1994 air disaster near Roselawn, Ind., which involved a crash and deaths in Indiana, claims brought against a foreign manufacturer pursuant to the Federal Foreign Sovereign Immunities Act, claims brought against American Airlines (both under domestic tickets and international Warsaw Convention tickets), decedents from numerous states and foreign countries, and suits filed in a multitude of fora, all transferred to and/or consolidated for pretrial purposes in Illinois federal court.

In some actions, the district court was obliged to apply the Restatement's most significant relationship choice of law test; in others the relevant choice of law test was governmental interest analysis; and one state, North Carolina, followed the lex loci choice of law rule. Under both of the interest analysis tests, the court chose the domicile law of each decedent as the relevant substantive wrongful death law applicable to both of the defendants. Only for the cases filed in North Carolina did the court have to apply Indiana law, as the site of the crash, due to North Carolina's lex loci choice of law rule.[8]

The point to underscore is that where reasonable under today's flexible choice of law rules — and it is often feasible and reasonable — an MDL court applying the various choice of law tests of the various transferor courts will often choose the same standard of law to govern compensatory damages in all cases in one air crash, and that law typically will be the place of death or the place of domicile of the decedent. Where the crash occurs in decedent's home state, the existence of both place of death and domicile of the decedent in one jurisdiction weighs very heavily in favor of that law applying, regardless of where suit is brought and the applicable choice of law test of the forum.

Applying this analysis to our hypothetical facts should result in the following: The court will apply New York's governmental interest analysis test in the New York-filed case and, under the *Roselawn* authority discussed above, could rule that New York law should apply to the widow's case because decedent was domiciled in New York and the accident occurred there.

N.Y.'s Wrongful Death Statute

It is settled beyond any doubt that under the New York wrongful death statute the right to prosecute, settle and compromise the wrongful death claim lies exclusively with the personal representative of the estate, who brings the suit in his or her representative capacity as statutory trustee for all of the statutory beneficiaries. The administrator can seek an order of compromise even against the wishes of decedent's children.[9]

The same New York MDL transferee court, applying Texas' most significant relationship choice of law test to the Texas action filed by decedent's adult child from his first marriage can also conclude, under the authority of the same *Roselawn* decision, that the Texas choice of law test also warrants application of New York wrongful death law because decedent was domiciled in and died in New York.

That being the case, the Texas plaintiff, the adult child of the decedent, is not the Rule 17(a) real party in interest, because he is not the estate administrator. Under Rule 17(a) the court should dismiss the Texas action, except that, in theory, the court can allow a reasonable time for substitution of the real party in interest, which substitution would relate back to time of commencement of the action.

In the hypothetical given, however, there would be no need for substitution because the real party in interest, the estate administrator, has already filed suit in New York. The Texas action should therefore be dismissed with prejudice. Indeed, federal courts have not hesitated to dismiss under Rule 17(a) when the applicable law requires that a wrongful death action be brought by the personal representative of the estate, and the plaintiff had sufficient time to have one appointed and substituted as plaintiff, but failed to do so.[10]

Permissive Intervention

There are, no doubt, cases in which an estate personal representative may be in conflict with a statutory beneficiary. The solution, however, is not to file a separate action, which only interferes with the proper prosecution of the case and invites a Rule 17(a) motion to dismiss. Rather, the statutory beneficiary could seek Rule 24(b) permissive intervention to ensure his or participation in the litigation and/or an opportunity to be heard at a hearing on apportionment of wrongful death damages.[11] Alternatively, in an extreme case, the statutory beneficiary could even have a cause of action against the personal representative for breach of fiduciary duty.[12] In either instance, however, the real party in interest will be able to prosecute his or her case.

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Endnotes:

1. Va. Elec. & Pow. Co. v. Westinghouse Elec. Corp., 485 F2d 78, 83 (4th Cir. 1973); Stegman v. Horton Homes, 843 FSupp 707, 708 (M.D. Ga. 1994); Hanna Mining Co. v. Minn. Power & LT. Co., 573 FSupp 1395, 1397 (D. Minn. 1983), aff'd, 739 F2d 1368 (8th Cir. 1984); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 FSupp 64 (D. S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981).

2. Id.

3. DeFranco v. United States, 18 FRD 156, 159 (S.D. Cal. 1955).

4. Erie R. Co. v. Tompkins, 304 US 64 (1938). See also Va. Elec. & Pow. Co., supra, n.1, 485 F2d at 83; Campus Sweater & Sportswear Co., supra, n.1, 515 F.Supp. at 81.

Note that for cases governed by the Warsaw Convention, the Supreme Court, in Zicherman v. Korean Air Lines, 516 US 217 (1996), held that the treaty creates the cause of action against the airline for wrongful death of a passenger, but the elements of damages are determined by the domestic law selected by the forum court according to its choice of law rules. Most federal courts have since treated Warsaw Convention cases as they do diversity cases when it comes to determining the applicable substantive law on wrongful death damages and who may sue. See, e.g., Pescatore v. Pan American World Airways, 97 F3d 1 (2d Cir. 1996); but see, Bickel v. Korean Air Lines Co., Ltd., 83 F3d 127 (6th Cir. 1996) (applying federal choice of law test).

5. Beascoechea v. Sverdrup & Parcel & Assoc. Inc., 486 FSupp 169, 173 (E.D. Pa. 1980); Story v. Pioneer Housing Systems, Inc., 191 FRD 653, 654 (M.D. Ala. 2000); Industrial Dev. Bd. of City of Prattville v. Brown & Root, Inc., 99 FRD 58, 59-60 (M.D. Ala. 1983) (state procedural rule does not govern in federal diversity case; it only governs who may sue in state court).

6. Martin v. Morgan Drive Away, Inc., 665 F2d 598, 604-05 (5th Cir. 1982); Naghiu v. Inter- Continental Hotels Group, Inc., 165 FRD 413, 419-20 (D. Del. 1996); Bouchard v. King, 870 FSupp 269, 272-3 (D. Minn. 1994); United States Fidelity & Guaranty Co., 200 FSupp 563, 571 (N.D.Ala. 1961). See also, Klaxon v. Stentor Elec. Mfg. Co., 313 US 487, 496 (1941) (federal court sitting in diversity must apply whole law of forum state, including its choice of law rules, as any other ruling would do violence to the Tompkins decision).

7. Van Dusen v. Barrack, 376 US 612, 639 (1964).

8. In re Air Crash Disaster Near Roselawn, Ind., Oct. 31, 1994, 948 FSupp 747 (E.D. Ill. 1996).

9. See, e.g., Cruz v. Korean Air Lines Co., Ltd., 838 FSupp 843 (SDNY 1993). The court held that whether New York or the federal Death on the High Seas Act applied, the exclusive right to sue for wrongful death belongs to the personal representative of the estate, who alone can prosecute and authorize a settlement. The children cannot maintain their own cause of action or undo the personal representative's decision to settle. See also, Beascoechea, supra, n.5, 486 FSupp at 173.

10. See, e.g., Consul General of the Republic of Indonesia v. Bill's Rentals, Inc., 330 F3d 1041, 1047 (8th Cir. 2003) (Consul General of Indonesia was aware for 18 months of the objection concerning real party in interest, but did not act to have himself or another person appointed as personal representative and substituted as plaintiff; the wrongful death actions were dismissed with prejudice); Paris v. Braden, 234 F2d 40, 41 (D.C. Cir. 1956) (trial court did not err in dismissing complaint or denying decedent's children additional time to seek appointment of a personal representative and have that person substituted as plaintiff.).

11. See Alcabasa v. Korean Air Lines Co., Ltd., 62 F3d 404 (D.C. Cir. 1995); Calton v. Lexington, 811 F2d 919 (5th Cir. 1987); Smith v. Clark Sherwood Oil Field Contractors, 457 F2d 1339 (5th Cir. 1972).

12. Id.