

# Client Bulletin

July 2009

## Drawing a Line in the Sea: The Separate Starting Lines Under the Death on the High Seas Act for Commercial and Non-Commercial Aviation Accidents

The Death on the High Seas Act (“DOHSA”) is the exclusive remedy for deaths occurring at sea. It preempts state law actions and typically provides plaintiffs with a less generous recovery than would be provided under any state’s wrongful death statute. In 2000, Congress amended DOHSA by extending the starting line of DOHSA’s application from three to twelve nautical miles for commercial aviation accidents, and presumably left intact the statute’s original three nautical mile starting line for all non-commercial aviation accidents.

In a recent case involving the deaths of four U.S. Navy service members after their military helicopter crashed during a training exercise 9.5 nautical miles off the shore of California, Judge Stephen Wilson of the U.S. District Court for the Central District of California held that DOHSA applies to non-commercial aviation accidents occurring beyond three nautical miles from the shores of the United States. *See Helman v. Alcoa Global Fasteners Inc., et al.*, No. 09-1353 (C.D. Cal. June 16, 2009). *Helman* is the first case since the 2000 DOHSA amendment to hold that DOHSA’s starting line for non-commercial aviation accidents is indeed three (and not twelve) nautical miles from shore.

Congress enacted DOHSA in 1920 to provide a uniform wrongful death remedy for the family members of any U.S. citizen who died on the “high seas” because no remedy had clearly existed before. The statute when enacted provided a cause of action when “the death of an individual is caused by wrongful act, neglect, or default” and occurred “on the high seas beyond 3 nautical miles from the shore of the United States . . .” 46 U.S.C. § 30302. Presently,

DOHSA has a three-year statute of limitations, prohibits punitive damages, and except for commercial aviation accidents,<sup>1</sup> does not allow recovery for non-pecuniary damages (e.g., loss of care, comfort or companionship).

Congress amended DOHSA in 2000 over concerns that the family members of the victims of TWA Flight 800, which exploded in midair and crashed eight nautical miles off the coast of Long Island in 1996, would be adversely affected by DOHSA’s recovery limits. Congress sought to exclude Flight TWA 800 from DOHSA’s reach by expanding DOHSA’s starting line for commercial aviation accidents from three to twelve nautical miles. While the amendment to DOHSA was working its way through Congress, the TWA 800 plaintiffs convinced a Second Circuit Court of Appeals panel that the term “high seas” in DOHSA was ambiguous. *See In re Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d 200 (2d Cir. 2000) (“*TWA Flight 800*”). There, as in *Helman*, the issue depended on whether DOHSA defined “high seas” as beyond three nautical miles or whether “high seas” referred to waters beyond the U.S. territorial waters.

The Second Circuit in *TWA Flight 800* explained that in 1793 Secretary of State Thomas Jefferson placed the boundary between U.S. territorial waters and international waters at three nautical miles (or one marine league) from the shore of any state. The reasoning believed to be behind Jefferson’s three nautical mile determination was that three miles represented the outer range of a canon shot at the time. This territorial sea distance persisted until 1988 when President Ronald Reagan issued a Presidential Proclamation extending U.S. territorial waters to twelve nautical miles for national security purposes. The Second Circuit agreed with the TWA Flight 800 plaintiffs that the term “high seas” in DOSHA referred to the international waters beyond U.S. territorial waters, which by Presidential Proclamation, began at twelve nautical miles from shore. Therefore, it concluded that DOHSA did not apply to TWA

Flight 800 which had crashed only eight nautical miles from shore.

The ruling in *TWA Flight 800*, that DOHSA's starting line was twelve nautical miles for all accidents at sea, was issued only five days before the 2000 DOHSA amendment was signed into law, extending DOHSA's starting line to twelve nautical miles for *commercial* aviation accidents. Under the amendment, the three mile starting line for *non-commercial* aviation accidents was left in place. As Judge Wilson observed in *Helman*, "[m]embers of Congress must have been surprised when the decision in the TWA Flight 800 Case came down . . . holding that the boundary had been twelve nautical miles all along, and no amendment was ever needed in the first place." Judge Wilson stated that it was "quite clear" that prior to the *TWA Flight 800* decision, members of Congress believed that DOHSA applied to all accidents beyond three nautical miles from the shore, or else they would not have amended the statute.

The plaintiffs in *Helman* argued that Judge Wilson should adopt the Second Circuit's holding in *TWA Flight 800* that the twelve mile starting line applies to all aviation accidents at sea, not just commercial aviation accidents. However, Judge Wilson was not bound to apply Second Circuit law. Instead, in deciding that DOHSA applies to non-commercial aviation accidents occurring more than three nautical miles from shore, Judge Wilson found Second Circuit Judge Sonia Sotomayor's (President Barack Obama's nominee for the U.S. Supreme Court) dissent in *TWA Flight 800* "especially persuasive." In her dissent, Judge Sotomayor asserted that the majority, "[i]n an understandable desire to provide the relatives . . . of the 213 victims of the TWA Flight 800 crash with a 'more generous' recovery," failed "to give proper effect" to DOHSA's language, legislative history and abundance of case law, which supports the "inexorable conclusion that DOHSA applies to all deaths occurring" beyond three nautical miles from the shore. Accordingly, Judge Wilson held that DOHSA applied in *Helman* because the non-commercial military helicopter crashed 9.5 nautical miles from shore – well beyond three nautical miles.

The *Helman* plaintiffs are appealing the decision to the Ninth Circuit Court of Appeals. If the Ninth Circuit upholds the decision in *Helman*, it will be binding law only on U.S. district courts

in California, Oregon, Washington, Nevada, Idaho, Arizona, Montana, Alaska, Hawaii and the U.S. territories of Guam and the Northern Mariana Islands. However, the decision could be highly persuasive to other U.S. district courts needing to determine DOHSA's starting line.



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<sup>1</sup> Prior to the 2000 Congressional amendment, DOHSA did not allow recovery for non-pecuniary damages for any type of aviation accident on the high seas.