

## Chapter 2.

### CLASS ACTION IN AVIATION CASES – AMERICAN REGULATIONS AND POLISH CASE

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On November 1, 2012 a spectacular, safe and soft landing of Boeing 767 (flight PLL LOT 016 flying from Newark, New Jersey to Warsaw) took place on the grounds of the Fryderyk Chopin airport in Warsaw. It was spectacular as the plane had to land without wheels after a technical failure which had blocked the landing gear. It was safe and soft as the plane was piloted by Captain Tadeusz Wrona, an experienced pilot of the Polish airlines. None of the 220 passengers and 11 crew members was seriously injured.

As the preliminary report and the interim statements of the Polish State Commission on Aircraft Accidents Investigation reveal, minutes after takeoff from Newark, the pilot realized a hydraulic leak had occurred leading to the loss of the fluid powering the landing gear system. The leak was caused by the fracture of a hydraulic hose connecting the brakes system of the right main gear with the central hydraulic system. The pilot rightfully continued the flight and planned to use the alternate gear extension procedure for landing in Warsaw, but the system also failed to work and the gear did not extend. The investigation showed that the problem, most probably, lied in the specific circuit breaker C829 being in the “off” position. This particular breaker protected several systems in the plane, including the alternate landing gear extension system. The pilots decided to perform so called “belly landing”. Captain Wrona took the manual control about two minutes before the actual landing and rested the plane on two engines and rear portion of the fuselage.

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The evacuation was fast and caused no problems except of course the shock of the passengers who had been informed and instructed by the crew about the emergency landing and upcoming evacuation. The State Commission on Aircraft Accidents Investigation performed a test on an identical plane and confirmed that when the C829 breaker was in the “on” position the gear extension worked properly and when it was in the “off” position the extension was simply not possible. Why the break was in the “off” position is still unclear and subject to separate examination. The pilot and crew acted properly throughout the entire action and the Final Report is to be prepared by the Commission later in 2014 to confirm the specific information on the causes and circumstances of the incident<sup>2</sup>.

Captain Wrona’s landing received a wide media coverage around the world placing him next to other hero pilots such as Captain Chesley “Sully” Sullenberger who in 2009 had landed a U.S. Airways plane in the Hudson River in New York. Tadeusz Wrona was immediately called a “national hero” and awarded by the President of the Republic of Poland<sup>3</sup>.

A year later, Budzowska Fiutowski i Partnerzy (BFP), a Warsaw–Krakow law firm issued a statement informing that their lawyers together with colleagues from two other international law firms specializing in aviation accidents cases (British Stewards Law from London and U.S. Wisner Law Firm from Chicago) will represent over 90 injured passengers of the Boeing 767 piloted by captain Tadeusz

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2     Based on: *Oświadczenie Tymczasowe Państwowej Komisji Badania Wypadków Lotniczych dotyczące badania wypadku lotniczego nr 1400/2011 (Interim Statement of the State Commission on Aircraft Accidents Investigation regarding the examination of the flight accident No. 1400/2011)* done in Warsaw on 31 October 2012, pp. 3–12, <http://www.transport.gov.pl/files/0/30651/20111400OwiadczenieTymczasowe14002011B767SPLPC.pdf> (1 December 2013) *Drugie Oświadczenie Tymczasowe Państwowej Komisji Badania Wypadków Lotniczych dotyczące badania wypadku lotniczego nr 1400/2011 (Second Interim Statement of the State Commission on Aircraft Accidents Investigation regarding the examination of the flight accident No. 1400/2011)* done in Warsaw on 31 October 2013, <http://www.transport.gov.pl/files/0/30651/20111400Ilowiadczenie.pdf> (1 December 2013) and *Accident Description. Preliminary Report, SCAA1–1400/2011–EPWA–SP–LPC (rev.1)*, <http://www.transport.gov.pl/files/0/30680/20111400RWenglish.pdf> (1 December 2013).

3     See for example: CNN news: <http://edition.cnn.com/2011/11/03/travel/poland-hero-pilot/>; Daily Mail: <http://www.dailymail.co.uk/news/article-2056860/Warsaw-Boeing-767-plane-crash-Pilot-Tadeusz-Wrona-wait-fly-again.html> (1 December 2013).

Wrona<sup>4</sup>. The lawsuit was filed against two subjects: Mach II Maintenance Corp. and the Boeing Company. Mach II is a certified Federal Aviation Administration Repair Station. Their licensed technicians inspected the aircraft and allowed for its takeoff from Newark. Boeing Company is a producer of the aircraft. It is a compensation lawsuit. Passengers claim for compensation based on the physical and psychological injuries caused by the emergency landing of the plane. According to the lawyers, as a result of the situation, passengers suffered and still suffer from the post-traumatic stress disorders and/or are afraid to fly. Some believed they were going to die and managed to send goodbye text messages to their families. Majority of passengers are of Polish nationality but the suit was filed in the state court in Chicago, Illinois where the Boeing Company is seated. As Floyd A. Wisner, lawyer from one of the representing law firms said: “Boeing will most likely try to switch jurisdiction to the Polish courts but I believe that the judge will uphold American jurisdiction for the case. We have had similar suits filed here and the state law of Illinois worked for us, the cases were heard by U.S. courts”<sup>5</sup>.

Why would Boeing want the Polish courts to hear and handle the case? Possibly because a class (group) action like this one would be one of the first “big” cases used under the new legal instruments introduced in Poland on 17 December 2009 by the Act on Pursuit of Claims in Group Proceedings which came into force on 19 July 2010<sup>6</sup>. Polish courts and judges have little or no experience in dealing with group actions. On the contrary, the class action culture in the United States of America have had a long and dynamic history and compensation cases in civil aviation accidents (more and less tragic ones) have been present in American legal reality for a long time. Advocate Budzowska from BFP explained in a press interview that the choice of American jurisdiction was “obvious, as the U.S. law gives better chance for a much higher compensation and

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- 4 Information on the Budzynski Fiutowski i Partnerzy law firm website: <http://en.bfp.biz/legal-aid/node/696> (1 December 2013).
  - 5 Information from the Polish Press Agency (PAP) used in: *Prawnik z USA o lądowaniu kpt. Wrony: Ludzie już pisali pożegnalne sms-y*, j.b, PAP 03.11.2012, [http://wiadomosci.gazeta.pl/wiadomosci/1,114873,12789156,Prawnik\\_z\\_USA\\_o\\_ladowaniu\\_kpt\\_\\_Wrony\\_\\_Pasazerowie.html](http://wiadomosci.gazeta.pl/wiadomosci/1,114873,12789156,Prawnik_z_USA_o_ladowaniu_kpt__Wrony__Pasazerowie.html) (1 December 2013).
  - 6 Journal of Laws No. 7, item 44.

the trial itself is more passenger-friendly, as for example no trial costs are required in advance”<sup>7</sup>.

Indeed, class actions in the United States have been used for a long time. As the Supreme Court of the United States reminds, some types of “representative actions” have existed in the USA “since the earliest days of English Law” originating in the equity, with their more recent invention known as class action<sup>8</sup>.

On federal level, in 1938 the U.S. Congress promulgated the Federal Rules of Civil Procedure (FRCP or Fed. R. Civ. P.<sup>9</sup>) including Rule 23 dedicated to the class actions. Revised in 1966 the Rule provides for a possibility of a single lawsuit for the entire group of plaintiffs. To proceed a class action in a federal court, the district court (trial court of first instance in the federal court structure in the U.S.A.) follows the requirements of Rule 23 of FRCP. According to the Rule, one or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class<sup>10</sup>. Additional requirements have to be satisfied such as: (1) separate actions would create some risks, (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief

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7 Information from the Polish Press Agency (PAP) used in: *Pozew zbiorowy po awaryjnym lądowaniu kpt. Wrony na Okęciu. Pasażerowie mogą dostać nawet po kilkaset tysięcy dolarów*, PAP 02.11.2012, [http://www.gazetaprawna.pl/artykuly/658929.pozew\\_zbiorowy\\_po\\_awaryjnym\\_ladowaniu\\_kpt\\_wrony\\_na\\_okeciu\\_pasazerowie\\_moga\\_dostac\\_nawet\\_kilkaset\\_tysiecy\\_dolarow.html](http://www.gazetaprawna.pl/artykuly/658929.pozew_zbiorowy_po_awaryjnym_ladowaniu_kpt_wrony_na_okeciu_pasazerowie_moga_dostac_nawet_kilkaset_tysiecy_dolarow.html) (1 December 2013). It is worth noting that both foreign law firms cooperating with BFP on the case are quite experienced with class action cases in aviation. The Stewarts Law started action against another Boeing accident – British Airways flight 038 where 777 Boeing crashed-landed in Heathrow in January 2008. The suit was filed in Illinois, USA. See: BBC news: [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/8368521.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/8368521.stm) (1 December 2013). The Wisner Law Firm specialized in aviation law and has a broad litigation experience in the field. See Wisner Law Firm website: <http://www.wisner-law.com/> (1 December 2013)

8 *Ortiz v. Fibreboard Corp.* 527 U.S. 815 (1999), *Califano v. Yamasaki*, 442 U.S. 682 (1979).

9 Federal Rules of Civil Procedure, 28 USC, Public Law 96–481, Public Law 97–462, Public Law 100–690, Public Law 102–198.

10 Fed. R. Civ. P. 23 (a)

is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy<sup>11</sup>.

Further provisions of Rule 23 regard the procedure itself and several other elements essential to the class action conduct such as certification order, notice to class member, judgment, class counsel, attorney fees, etc<sup>12</sup>. Federal Rules of Civil Procedure constitute the main basis for class action but in addition, other federal acts were passed by Congress with time and class action provisions may be found in other federal regulations as well<sup>13</sup>. Some essential procedural regulations also need to be taken into account when class action in air-related accidents is considered. For instance, lawyers should keep in mind that the federal law in the United States prohibits contacting victims of such accident within 45 days after its occurrence<sup>14</sup>.

Federal state system in the United States of America, results in two levels of legal systems, including legislation in procedural issues – federal law and state law system. The vertical federalism and separation of powers between the federation and states is also reflected in the court system. Each of the fifty states have their own court structure and their own state law governing several fields including areas in torts, property and contracts. Each state is free to develop and apply their procedural laws. Models of rules for civil procedure may and do vary throughout the country and may but do not have to be similar to federal solutions.

For example in California the basic provision for class action is included in the California Code of Civil Procedure (section 382)

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11 Fed. R. Civ. P. 23(b)

12 Fed. R. Civ. P. 23(c) – (h)

13 For example in 2005, Class Action Fairness Act (CAFA; Public Law 109–2, 119 Stat. 4) was adopted by Congress and signed by the President pointing to abuses of class action filings in state courts. Important consumer laws include class action provisions. See for example: Fair Debt Collection Practices Act (FDCPA; Public Law 95–109, 91 Stat. 874) or Consumer Credit Protection Act (CCPA; Public Law 90–321, 82 Stat. 146).

14 The 1996 Aviation Disaster Family Assistance Act amended in 2000 (ADFA; Public Law 106–181, § 401(a)(1), 114 Stat. 129). See also: M.S. Moller, M.E. Kerman, *The 45–Day “No–Solicitation” Rule in the Internet Age*, *The Air & Space Lawyer*, 2011, Vol. 23, No. 4, pp. 1 and 14–16.

although the term “class action” itself does not appear anywhere in the Code. Californian rules differ significantly from the federal model and provide for some specific, separate class action types<sup>15</sup>. In Illinois (where the case of captain Wrona’s flight will be heard), the Code of Civil Procedure dedicates Part 8 to Class Action and the Illinois Supreme Court has been very active in interpreting the class action laws including aviation cases<sup>16</sup>.

In fact, in every state statutory laws are supplemented by extensive case law of state courts explaining the specifics of each rule. There are, however, some states which do not provide for any class action or limit claims which may be brought as class action. In Virginia class actions are prohibited in state courts and only permitted in federal courts in the state under the federal laws that is Federal Rules of Civil Procedure<sup>17</sup>. In New York statutory law prohibits class actions in suits seeking penalties or statutory minimum damages<sup>18</sup>. The US Supreme Court has already decided (in 2010 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*<sup>19</sup>) that this provision does not preclude the federal courts to proceed with such action under FRCP and the arguments are gathered to repeal the limits<sup>20</sup>.

Parties may also choose different options for filing the class action – in state and/or federal courts. It became especially possible after the 1985 US Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*<sup>21</sup> which allowed state courts, within certain due process constraints, to adjudicate claims of non–resident class members. Suits that traditionally would be filed in federal courts (including multi–state and nation wide

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15 See: Cal. Civil Proc. Code § 382 and J.D. Larkin, *Litigating on the Fault Line: Class–Action Law in California*, CADS (Class Action & Derivative Suits) report 2010, American Bar Association, Vol. 20, No 2, pp. 4–5.

16 See: 735 ILCS 5/Art. II Pt. 8 and *Barber v. American Airlines, Inc.*, No. 110092, slip op. (Ill. Mar. 24, 2011).

17 See: D.J. Munro, *Class actions in Virginia state courts? Or is it just Bull?*, The Journal of the Virginia Trial Lawyers Association 2012, Vol. 23, No. 4, pp. 26–29.

18 See: N.Y. CPLR § 901(b).

19 559 U.S. 393 (2010).

20 See for example: T.A. Dickerson, L.B. Austin, *Class Actions in 2013 And Call to Repeal CPLR § 901 (b)*, New York Law Journal, 24 December 2013, <http://www.newyorklawjournal.com/PubArticleFriendlyNY.jsp?id=1202634541190&slreturn=20140006124654> (27 December 2013).

21 427 U.S. 797 (1985).

cases) can now, under some circumstances, be handled in regular state courts which added to the complexity and dynamics of the class action procedures<sup>22</sup>.

Air transportation has been developing extensively and very fast as the technical possibilities continue to become more and more advanced. Vital Boeing–Airbus competition results in new aircrafts models with more eco and econo options. Numbers in air transport grow immensely year after year as more passengers are carried in the air. Most countries around the world keep investing in the airline industry and air transport is a key component of global economy<sup>23</sup>.

Such development, however, brings about an increased risk of air–related accidents. Internationally recognized definitions and guidelines on investigation procedures for air accidents are included in the International Civil Aviation Convention<sup>24</sup> (Chicago Convention), specifically Annex 13 to the Convention. According to it, accident is defined as an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which: a) a person is fatally or seriously injured (...); b) the aircraft sustains damage or structural failure (...); c) the aircraft is missing or is completely inaccessible (...)<sup>25</sup>. All other occurrences, associated with the operation of an aircraft which affect or could affect the safety of operation are defined as incidents<sup>26</sup>.

Liability of air carriers and obligation of compensation for the victims of air accidents are covered by the Convention for the Unification of

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22 American Bar Association took efforts to prepare and recently published a survey on fifty state class action regulations. See: E.J. Cabraser, D.K. Egan, T.R. Grande, F.N. Vincent (eds.), *The Law of Class Action: Fifty–State Survey 2012–2013*, American Bar Association 2013.

23 According to the statistics of The International Air Transport Association (IATA), in 2012 airlines carried 2977 billion passengers on scheduled services and 65% of the growth in passengers numbers occurred on emerging markets. 57 million jobs were provided by the air transport globally and economic activity of the sector was calculated at 2.2 trillion USD. See: *57th Edition of the World Air Transport Statistics (WATS)*, IATA 2012, [www.iata.org/wats](http://www.iata.org/wats) (1 December 2013).

24 Convention on International Civil Aviation, signed in Chicago on 7 December 1944, ICAO Doc 7300/9.

25 Ch. 1, Annex 13 to the Convention on International Civil Aviation, International Standards and Recommended Practices – Aircraft Accident and Incident Investigation, Ninth Edition, 2001.

26 *Ibid.*

Certain Rules for International Carriage by Air<sup>27</sup> (Montreal Convention). Under its provisions, the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The compensation is calculated in “Special Drawing Rights“ (SDR) and shall not exceed 100 000 SDR<sup>28</sup> for each passenger. What is important, the carrier shall not be able to exclude or limit its liability. Only in cases where damages exceed 100 000 SDR per passenger, the air carriers may exclude its liability if it proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party<sup>29</sup>.

Both of the international acts are recognized by the United States of America. All of the federal and state laws stay in compliance with the international principles. Civil aviation is almost entirely governed by federal law passed by the U.S. Congress. The 1958 Federal Aviation Act<sup>30</sup> established the Federal Aviation Administration – an agency of the U.S. Department of Transportation responsible for the regulation and supervisions of the entire American civil aviation including routes, rates and services provided by all authorized air carriers. In addition, further acts were adopted including the 1970 Airport and Airway Development Act<sup>31</sup> or the 1978 Airline Deregulation Act<sup>32</sup>. After the September 11 attacks, Congress enacted the 2001 Aviation and Transportation Security Act<sup>33</sup> which established another federal agency – the Transportation Security Administration to provide “effective and efficient security for passenger and freight transportation in the United States“<sup>34</sup>.

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27 Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999, 2242 U.N.T.S. 309; S. Treaty Doc. No. 106–45 (2000).

28 1 SDR equals about 1.5 USD as for 8 January 2014. See: [http://www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx) (8 January 2014).

29 *Ibid*, Articles 17 and 21.

30 Federal Aviation Act (FAA; Pub. Law No. 85–726, 72 Stat. 737).

31 Airport and Airway Development Act (AADA; Public Law 91–258, 84 Stat. 1770).

32 Airport Deregulation Act (ADA; Public Law 95–504, 92 Stat. 1705).

33 Aviation and Transportation Security Act (ATSA; Public Law 107–71, 115 Stat. 597).

34 [www.tsa.gov](http://www.tsa.gov) (8 January 2014).



States may enact their own state aviation laws only if they are consistent with federal regulations. In Illinois, the state air transportation rules are adopted in the Illinois Aeronautics Act<sup>35</sup> and several other acts dealing with aircrafts and airports issues<sup>36</sup>.

It should be strongly emphasized that both state and federal laws on class action and civil aviation regulations should be read and understood along with the courts' decisions interpreting particular provisions. For class actions in air-related accidents case law provides some very important guidelines and has co-governed the field for many years. A tragic crash of Pan American World Airways Flight 759 in 1982 in Louisiana<sup>37</sup> resulted in some essential decisions for the future cases regarding airplane crashes. Plaintiffs from different jurisdictions filed 125 suits in state and federal courts around the country. State decisions established binding guidelines for state laws and future cases but the federal rulings established principles for all state and federal future cases concerning similar issues. Courts individually decided whether circumstances for class action occurred or the cases should be heard separately or as consolidated ones<sup>38</sup>.

Obviously aircraft accidents are not the only basis for class actions related to aviation. Some American law firms specialize in all kinds of compensation, insurance, airlines' services issues. One of the big cases (with final compensation settled over \$400 million in flight coupons and \$50 million in cash for attorneys fees and administrative costs) regarded allegation of price fixing conspiracy between nine American

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35 Illinois Aeronautics Act (620 ILCS 5/).

36 For example: Aircraft Landing and Taking Off Restrictions Act (Ill. Comp. Stat. 1992, Ch. 620, § 15/) or Airport Authorities Act (Ill. Comp. Stat. 1992, Ch. 70, § 5/).

37 Total of 153 people were killed including 145 on board and 8 on the ground. For details see: *Aircraft Accident Report, Pan American World Airways, Inc., Clipper 759, Boeing 727-235, N4737, New Orleans International Airport Kenner, Louisiana, July 9, 1982*, National Transportation Safety Board, Washington D. C. 20594. <http://www.airdisaster.com/reports/ntsb/AAR83-02.pdf> (8 January 2014).

38 *Marks Lii v. Pan American World Airways Inc* (785 F2d 539) concerned compensation sums for the loss of parents (including division into the loss of love and affection, loss of the services and support and loss of inheritance). In *Air Crash Disaster Near New Orleans, LA. On July 9, 1982*, *In re* (821 F.2d 1147 (5th Cir. 1982) the federal court ruled in consolidated cases that the suit was brought properly in the United States (plaintiffs were foreign citizens who sought recompense for their injuries in a Louisiana federal court. Pan American World Airways, Inc. invoked the doctrine of *forum non conveniens*, insisting that the plaintiffs' home country of Uruguay is the proper forum for the resolution of plaintiffs' claims).

airlines. The sums seemed high but it turned out that coupons were restricted in terms of dates, excluded one-way flights, etc.<sup>39</sup>

The case of the PLL LOT 016 flight from New Jersey to Warsaw will most likely be resolved based on American law. It will probably take at least couple of years until the final decision is issued<sup>40</sup>. In cases of this kind, settlement agreements come naturally and often shorten a long trial road. It all depends on the feelings of those injured and skills of the lawyers representing them in the case. The case of flight PPL LOT 016 will certainly constitute an interesting case for future experience for the Polish courts and lawyers. It may also teach a lesson of pre-trial settlement culture widely used in the United States. If “sold” well by media, it may also become an interesting story for all the airline consumers flying each day in and out Poland using thousands of air routes and taking some risk with every flight.

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39 *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991). See also: T.A. Dickerson, B. V. Mechmann, *Consumer class actions and coupon settlements: are consumers being shorthchanged?* Advancing Consumer Interest 2000, Vol. 12, No. 2, <http://www.classactionlitigation.com/library/dcoupon.html#ENT1> (8 January 2014).

40 In case of the crash of the Pan American Flight 759, the suits were stuck in courts for years, as the plaintiffs and respondents most of the times used all possible ways of appeal. See for example: *Anatomy of a Crash. Families of Pan American disaster victims still await compensation*, Editor's Note, The Evening News, Newburgh–Beacon, N.Y., Sunday, 15 September 1985, p. 9A.