

Paths to Legal Relief in Malaysia Flight Disappearance Prove Elusive

By Amanda Bronstad, The National Law Journal

The location and cause of Malaysia Airlines Flight 370's disappearance two years ago continues to prove elusive, but that hasn't stopped plaintiffs lawyers from pursuing novel and, at times conflicting, legal theories in U.S. courts on behalf of the families of the deceased.

On June 2, a federal panel coordinated about 40 lawsuits filed in U.S. courts to District Judge Ketanji Brown Jackson of the District of Columbia. The U.S. Judicial Panel on Multidistrict Litigation selected Jackson even though she hasn't handled an MDL before, calling her "an able and experienced jurist." Jackson, who joined the federal bench in 2013, was [named as a potential candidate for the U.S. Supreme Court earlier this year](#).

Eight lawsuits were filed against Malaysia Airlines, four of which also named the airline's insurance firm. The Boeing Co., which is based in Chicago, has been named in 32 lawsuits claiming the 777 aircraft must have suffered a catastrophic defect.

The muddle of claims has led to a particularly divided front among plaintiffs lawyers suing over Flight 370, many of which argued against coordinating all the cases together in an MDL.

"There's no smoking gun in this case, and that's what's really frustrating for these families," said Justin Green, a partner at New York's Kreindler & Kreindler, who has filed a case against Malaysia Airlines. "You're not going to have an MDL where normally the plaintiffs have the same positions against the same defendants. It's going to be a complicated MDL."

Flight 370 was en route from Kuala Lumpur, Malaysia, to Beijing on March 8, 2014, when it changed course and lost all communications. The aircraft is believed to have crashed into the Indian Ocean.

Malaysia Airlines attorney Richard Walker, a member of Chicago's Kaplan, Massamillo & Andrews, moved in March to coordinate lawsuits filed in U.S. courts over Flight 370 to federal court in Illinois. In court, Malaysia Airlines has disputed some of the claims and has indicated it could move for dismissal based on the fact that, as part of the Malaysian government, it is immune from U.S. jurisdiction under the U.S. Foreign Sovereign Immunities Act.

The number of U.S. cases is substantial given that only a handful of the 227 passengers who died were U.S. citizens. Under an international treaty called the 1999 Montreal Convention, passengers from foreign countries can't sue a foreign airline in U.S. courts, which offer significantly higher damages awards than do overseas jurisdictions. But even lawyers who initially said there wouldn't be U.S. lawsuits over Flight 370, pressed with statute of limitations constraints, [have come up with ways to file in the United States](#).

One firm, Motley Rice, filed three lawsuits against Malaysia Airlines that named the airline's liability insurer, Allianz Global Corporate and Specialty, and, in one case, an Allianz executive based in the United States. The cases allege that Allianz was liable after Malaysia Airlines, which was restructured following Flight 370's disappearance, began rejecting claims brought in Malaysia based on the fact that it wasn't the same company as its former entity.

Motley Rice's Mary Schiavo, who filed the cases on behalf of the families of dozens of passengers, most from China, supported coordination in the District of Columbia. Schiavo, former U.S. Department of Transportation inspector general who practices in Mount Pleasant, South Carolina, declined to discuss the litigation beyond stating: "We were pleased by the recent JMPL transfer to D.C., for which we argued, and look forward to continuing to work these cases through the U.S. civil justice system so that our clients may one day receive the justice they deserve."

But Green said their claims against the insurer are unprecedented. "They are attempting to show that the real propertied estate of Malaysian Airlines now rests with their insurance company, which is in the U.S.," he said. "It'll certainly make law one way or the other."

Many lawyers found other provisions under the Montreal Convention to bring cases against Malaysia Airlines. Green filed his case in New York federal court on behalf of the administrator of the estate of Mei Ling Ch'ng, a passenger on Flight 370 who lived and worked in Pennsylvania but also bought her plane ticket in the United States, which under the treaty allows her estate to sue in U.S. courts.

Kevin Durkin, a partner at Chicago's Clifford Law Offices, used the same theory to file a case in federal court in Illinois on behalf of the estates of Muktesh Mukherjee and Xiaomo Bai, Canadian citizens who lived in Chicago. Durkin said the Montreal Convention allows foreign citizens to sue in U.S. courts if they have a "personal and permanent residence" in the United States.

Steven Marks of Miami's Podhurst Orseck, who has filed two cases in the District of Columbia, including one on behalf of the brother of a passenger who was a U.S. citizen, brought most of the

lawsuits against Boeing. Originally filed in Cook County, Illinois, Circuit Court, the cases allege strict products liability claims and have since been removed to Illinois federal court. Boeing's attorney, Eric Wolff, a partner at Seattle's Perkins Coie, declined to comment.

Though no defect has been identified, Marks pointed to what he called "some type of cascading problem" in the electrical system that was highlighted in a Dec. 3 report from the Australian Transport Safety Bureau, which is overseeing the search of the aircraft. But his cases also assert a basic inference: Since investigators have found no reason to believe the pilots or passengers deliberately downed Flight 370, or that maintenance problems or weather were at issue, a defect in the aircraft must have occurred, he said.

"If a product is missing or destroyed, and you can eliminate all the other explanations as to the cause, there's a presumption something went wrong with the product," he said.