

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 09 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOLA F. MARTIN, a minor, by and through her guardian ad litem, CARRIE HECKMAN, an individual; MALCOLM D.S. MARTIN, a minor, by and through his guardian ad litem, CARRIE HECKMAN, an individual; WRYE MARTIN; CARRIE HECKMAN, individuals,

Plaintiffs,

v.

MIDWEST EXPRESS HOLDINGS, INC.; MIDWEST EXPRESS AIRLINES, INC., a/k/a MIDWEST AIRLINES; SKYWAY AIRLINES, a/k/a ASTRAL AVIATION, INC.,

Defendants-third-party-plaintiffs - Appellants,

v.

EBERHARD BRAUN; FAIRCHILD DORNIER LUFTFAHRT BETEILIGUNGS GMBH; FAIRCHILD DORNIER GMBH;

No. 07-55063

D.C. No. CV-03-04796-GAF

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**FAIRCHILD DORNIER
CORPORATION,**

Third-party-defendant -
Appellees.

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted June 6, 2008
Submission Deferred June 6, 2008
Submitted February 9, 2009
Pasadena, California

Before: **KOZINSKI**, Chief Judge, **BEA**, Circuit Judge, and **HUFF**,** District
Judge.

The limitations on liability in the purchase agreement do not bar Midwest Express' claim against Fairchild Dornier and related entities. Because Midwest is seeking indemnity for the plaintiffs' personal injury damages, not suing for breach of warranty, the warranty limitations do not apply. K & S Oil Well Serv. v. Cabot Corp., 491 S.W.2d 733, 737 (Tex. App. 1973). The clause waiving Midwest Express' right to recover consequential damages also does not bar the claim, as the clause does not specifically foreclose indemnity. Howard P. Foley Co. v. Cox, 679

** The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

S.W.2d 58, 63 (Tex. App. 1984). For reasons set forth in the accompanying opinion, Midwest Express' claim is not federally preempted.

REVERSED.