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Recent Developments in Aviation Law 2015-2016

Jonathan M. Hoffman
MB Law Group LLP, jhoffman@mblglaw.com

RECENT DEVELOPMENTS IN AVIATION LAW 2015–2016

JONATHAN M. HOFFMAN*

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* A.B., Harvard University, *magna cum laude*, 1969; J.D., University of Oregon School of Law, 1975. The author is a member of the Oregon State Bar and Alaska State Bar and is admitted to the U.S. Supreme Court and several U.S. Courts of Appeals. The author has practiced as a trial attorney with the U.S. Department of Justice (1975–1980), Martin Bischoff Templeton Langslet & Hoffman LLP (1981–2015), and MB Law Group LLP (2016–present). He has published articles on a wide range of subjects, including aviation law, product liability, constitutional law, insurance trial practice and procedure, and evidence law.

I. PERSONAL JURISDICTION

PLAINTIFFS' CHOICES OF FORUM appear to be narrowing due to the United States Supreme Court's recent decisions on personal jurisdiction. These limitations are particularly problematic for aviation litigation because so many cases involve multiple parties based in different locations. For nearly three decades, the Supreme Court struggled to produce a majority opinion setting forth clear criteria for specific personal jurisdic-

tion.[1] However, its recent decision in *Walden v. Fiore*[2] may have finally broken the stalemate. Several recent aviation cases signal the change. Meanwhile, the Court's two recent decisions on general jurisdiction[3] have nearly eliminated general jurisdiction.

Sutcliffe v. Honeywell International, Inc.[4] illustrates these phenomena. *Sutcliffe* arose from the crash of a CASA C212-CC40 twin-engine aircraft in Saskatoon, Saskatchewan. Plaintiffs, Canadian citizens, worked as crew members on the aircraft. They brought suit in Arizona against several defendants in the manufacturing chain: Honeywell—the alleged successor to the engine manufacturer, Garrett—and foreign corporations EADS Construcciones Aeronauticas S.A. (EADS CASA) and Airbus Military SL (Airbus), both alleged to be the aircraft manufacturers. The plaintiffs were not alleged to have any connection with Arizona. EADS CASA and Airbus, Spanish corporations with their principal places of business in Madrid, moved to dismiss on personal jurisdiction grounds.[5]

Plaintiffs first attempted to establish general jurisdiction, citing numerous contacts between the Spanish defendants and Arizona. However, the court noted that Arizona-related contacts of unspecified entities affiliated or related to the defendants could not justify general jurisdiction in the wake of the U.S. Supreme Court's rejection of an agency theory of general jurisdiction in *Daimler AG v. Bauman*.[6] More importantly, general jurisdiction did not exist even if all the Arizona-based contacts by any Airbus-related entity were attributed to the defendants because the proper inquiry is whether the forum is the corporation's place of incorporation or its principal place of business and whether the corporation is, in effect "at home," not whether defendants' contacts in the forum state are extensive in the aggregate.[7]

As for specific jurisdiction, the court applied the three-part test announced by the Ninth Circuit in the wake of *Fiore*:

> (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or a forum

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[1] *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2782 (2011); Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 102 (1987).

[2] 134 S. Ct. 1115, 1123 (2014).

[3] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[4] No. CV-13-01029-PHX-PGR, 2015 WL 1442773, at *1 (D. Ariz. Mar. 30, 2015).

[5] *Id.* at *1–2.

[6] *Id.* at *5 (citing *Daimler AG*, 134 S. Ct. at 759–60).

[7] *Id.*

> resident, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one [that] arises out of or relates to the nonresident defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.[8]

The court held that plaintiffs established purposeful availment with respect to EADS CASA because it "purposely availed itself of the rights and privileges of Arizona law" by purchasing the engines from Honeywell in Arizona.[9] However, the court was unpersuaded that the plaintiffs' claims arose out of those activities because "arising out of" cannot be "the simplistic and sweeping approach taken by the plaintiffs given the facts of record. The causation element requires a more direct relationship between the relevant forum contact, the mere purchase of the engines, and the actual negligence claim brought against the moving defendants."[10] Plaintiffs did not allege that purchasing the engines in Arizona was a negligent act, nor did they allege that any of the specific acts of negligence raised against defendants occurred in Arizona.[11]

The court further concluded that personal jurisdiction over these defendants would be unreasonable because it did not comport with fair play and substantial justice. Applying the seven reasonableness factors articulated in *Terracom v. Valley National Bank*,[12] the court concluded that exercising personal jurisdiction over them would offend the traditional notions of fair play and substantial justice.[13] The court also concluded that additional jurisdictional discovery was not warranted because the request for discovery would not reveal facts sufficient to constitute a basis for either general or specific personal jurisdiction. Accordingly, the court dismissed the second amended complaint as to Airbus and EADS CASA for lack of personal jurisdiction.[14]

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[8] *Id.* at *6 (citing Picot v. Weston, 780 F.3d 1206, 1211 (9th Cir. 2015)).

[9] *Id.* at *7.

[10] *Id.* at *8.

[11] *Id.* at *7–8.

[12] 49 F.3d 555 (9th Cir. 1995).

[13] *Sutcliffe*, 2015 WL 1442773, at *8–9 (citing *Terracom*, 49 F.3d at 561).

[14] *Id.* at *10.

In a similar vein, the court in *Rice Aircraft Services, Inc. v. Soars*[15] relied on *Fiore* in dismissing claims of interference with contract, interference with economic advantage, and defamation, where the conduct at issue was not "expressly aimed" at the forum state, noting that the plaintiff's injury "must be 'tethered to [the forum state] in [a] meaningful way,' and 'the plaintiff cannot be the only link between the defendant and the forum.'"[16]

The court in *Everett v. BRP-Powertrain, GmbH, & Co. KG*[17] reached the same result, rejecting jurisdiction over three of four companies in the chain of manufacture and distribution of an aircraft engine that plaintiff purchased at the Experimental Aircraft Association's Airventure Oshkosh airshow. Citing *Fiore*, the court concluded: "That the engine was re-sold in Wisconsin may have been foreseeable, but this does not demonstrate that Kodiak purposefully availed itself of the Wisconsin marketplace for purposes of *that* transaction."[18]

Another case illustrates the trend to restrict the use of general jurisdiction. In *Williams v. MD Helicopters, Inc.*,[19] plaintiff, a citizen of the United Kingdom, brought suit in Michigan for injuries sustained in the crash of an MD369E helicopter in the United Kingdom. He brought product liability claims against MD Helicopters, Inc. and Helicopter Technology Company for design defects in the tail rotor of the helicopter, which plaintiff alleged caused the crash. The court granted defendants' motion to dismiss for lack of personal jurisdiction. Because the accident occurred in the United Kingdom, plaintiff sought general jurisdiction over the defendants, but the court dismissed the complaint because there was no showing that defendants had been carrying on a continuous and systematic part of their general business within the state. Plaintiffs were unable to distinguish their claim from those in other recent cases in which general jurisdiction had been rejected, most notably *Daimler AG*.[20] However, the court denied summary judgment sought by another

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[15] No. 2:14-cv-02878-MCE-EFB, 2015 WL 8481609, at *1 (E.D. Cal. Dec. 9, 2015).

[16] *Id.* at *6–7 (quoting Walden v. Fiore, 134 S. Ct. 1115, 1122, 1125 (2014)).

[17] No. 14-C-1189, 2015 WL 5254555, at *1 (E.D. Wis. Sept. 9, 2015), *recons. denied*, No. 14-C-1189, 2016 WL 297464 (E.D. Wis. Jan. 20, 2016).

[18] *Id.* at *14 (quoting *Fiore*, 134 S. Ct. at 1121); *see also* Boyce v. Cycle Spectrum, Inc., No. 14-CV-1163, 2015 WL 8273463, at *8 (E.D.N.Y. Dec. 8, 2015); Teva Pharm. Indus. v. Ruiz, 181 So. 3d 513, 521 (Fla. Dist. Ct. App. 2015).

[19] No. 14-13787, 2015 WL 4546770, at *1 (E.D. Mich. July 28, 2015).

[20] *Id.* at *3 (citing Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014)).

defendant, Henkel Corp., which did not contest jurisdiction but claimed that it had not been properly served under Michigan law and that the statute of limitations had run.[21]

Brady v. Southwest Airlines Co.[22] illustrates the restrictive effects of the Supreme Court's recent decisions as to *both* general and specific jurisdiction. Plaintiff allegedly experienced severe turbulence and sustained brain trauma while a passenger on a Southwest Airlines flight from Ontario, California, to Las Vegas, Nevada. During the turbulence, plaintiff's seatbelt fitting allegedly "failed and separated, causing plaintiff's head to violently strike the overhead storage bin."[23] The complaint alleged that defendant Davis Aircraft Products manufactured the restraints on the aircraft. Davis moved to dismiss, challenging personal jurisdiction. The Nevada court agreed. It noted that general jurisdiction requires defendant's contacts to be "of the sort that approximate physical presence."[24] Although Southwest Airlines flies to and from Nevada, Davis had "no significant contacts with Nevada aside from outfitting Southwest airplanes with parts."[25] Plaintiff argued that Davis manufactures aircraft safety parts for large national and international customers like Southwest and Boeing. He contended that it was "'generally known' that Southwest transports passengers all over the world and thus, Davis knows that its products could travel anywhere in the country, including Nevada."[26] However, "the Supreme Court has expressly rejected the argument that placing items into the stream of commerce suffices for general jurisdiction."[27]

The court also rejected plaintiff's claim of specific jurisdiction. Citing *Fiore*, the court noted that "the plaintiff cannot be the defendant's only connection to the forum state," for it is "the defendant's conduct that must form the necessary connection with the forum state that is the basis for its jurisdiction over him."[28] Davis contended that placing products into the stream of commerce failed to provide a sufficient basis for specific juris-

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[21] *Id.* at *4–5.

[22] No. 2:14-CV-2139 JCM (NJK), 2015 WL 4074112, at *1–2 (D. Nev. July 6, 2015).

[23] *Id.* at *1.

[24] *Id.* at *2 (quoting Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

[25] *Id.*

[26] *Id.*

[27] *Id.* (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

[28] *Id.* at *3–4 (quoting Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014)).

diction, despite its knowledge of the distribution and use of its products in so many locations. Davis responded that acceptance of plaintiff's argument would subject it to personal jurisdiction anywhere its customers conducted business and that Davis could not control or anticipate where its customers would do business. The court concluded that "an out-of-state defendant can be found to have purposefully availed itself of the forum only on the basis of its own affirmative conduct directed at the forum."[29] It therefore concluded that the plaintiff had failed to identify any conduct establishing purposeful availment and dismissed the claim against Davis. The court denied leave to take additional jurisdictional discovery because the discovery sought by plaintiff related to Davis's relationship with Southwest, rather than its relationship with Nevada.[30]

In *Mullen v. Bell Helicopter Textron*,[31] defendant HLW Aviation LLC, a Georgia company, allegedly leased a Bell 206L-1 helicopter to T&M Aviation in Louisiana, which operated it under contract with the U.S. Forest Service. It crashed in the DeSoto National Forest in Mississippi, injuring the plaintiff, who was a passenger. HLW moved to dismiss for lack of personal jurisdiction. The court granted HLW's motion. Plaintiff argued that it was clearly foreseeable that the helicopter would be operated over Mississippi because it had to be flown over that state to get from Georgia to Louisiana. However, the court held that the defendant's contacts with the forum state could not be "random, fortuitous, or attenuated, or the result of the unilateral activity of another party or third person."[32] The court found jurisdiction could not be sustained under the stream-of-commerce theory because the product was no longer in the stream of commerce when it undertook the flight in which the crash occurred.[33]

Davidson v. Honeywell International Inc.[34] resolved similar issues in a different fashion. Plaintiff was a crew member aboard a Turbo Commander. While flying at 25,000 feet over the state of New York, the aircraft suddenly began emitting clouds of oil fumes and mist into the cabin. The pilot "initiated a rapid de-

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[29] *Id.* at *4 (quoting Abraham v. Agusta, S.P.A., 968 F. Supp. 1403, 1408–09 (D. Nev. 1997)).

[30] *Id.*

[31] No. 1:15CV158-LG-RHW, 2015 WL 6755384, at *1 (S.D. Miss. Nov. 4, 2015).

[32] *Id.* at *2 (alterations omitted) (quoting Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 177 (5th Cir. 2013)).

[33] *Id.* at *1, *3–5.

[34] No. 14 Civ. 3886(LGS), 2015 WL 1399891, at *1 (S.D.N.Y. Mar. 26, 2015).

scent to 8,000 feet to depressurize the aircraft" and then landed safely.[35] The complaint alleged that drops of lubrication oil leaked from the engine into the bleed air-ducting system, causing the aircraft cabin to fill with smoke and fumes, seriously injuring plaintiff. The complaint alleged that defendant Fairchild Controls manufactured the aircraft's air cycle machine (ACM), which was defective in design, manufacture, or assembly.[36]

Fairchild moved to dismiss for lack of personal jurisdiction. Fairchild was a Delaware corporation with its principal place of business in Maryland. It also manufactured the ACMs in Maryland. Plaintiff attempted to establish personal jurisdiction in reliance upon a provision of the New York Civil Practice Laws and Rules § 302 (a)(3)(ii), which authorizes jurisdiction over a nondomiciliary who "commits a tortious act without the state causing injury to person or property within the state . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[37] The court held that whatever the intended reach of the statute, the Due Process Clause limited the exercise of personal jurisdiction, and plaintiffs failed to show that their claim arose from or related to Fairchild's contacts with New York. Thus, for a New York court to exercise personal jurisdiction, defendant's "allegedly tortious act must have had some relationship to New York."[38] Merely being aware "that one's product or act may have effects in the forum state is insufficient."[39] Nor was it sufficient to show that Fairchild manufactured parts for major aircraft manufacturers such as Boeing and that it was foreseeable that a defect in such a product would have consequences during flights, including a flight over New York. However, rather than dismiss the claim outright, the court transferred the case to the Southern District of Texas under 28 U.S.C. §1404(a), where Fairchild consented to jurisdiction and venue.[40]

Carpenter v. Sikorsky Aircraft Corp.[41] arose from the crash of a Sikorsky MH-60M Black Hawk helicopter. The crash occurred in Georgia while the aircraft was on approach. The crew-member

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[35] *Id.*
[36] *Id.*
[37] *Id.* at *2 (quoting N.Y. C.P.L.R. § 302(a)(3)(ii) (McKinney 2008)).
[38] *Id.* at *3.
[39] *Id.*
[40] *Id.* at *2–4.
[41] 101 F. Supp. 3d 911 (C.D. Cal. 2015).

plaintiffs brought suit in California. They sued the Sikorsky defendants for the design and manufacture of the pitch change shaft and sued the BAE defendants[42] for the alleged defects in the seat. Both Sikorsky and BAE moved to dismiss for lack of personal jurisdiction. The court granted the motion. It held that there was no general jurisdiction over either the Sikorsky or BAE defendants because plaintiffs offered no evidence of any contact with California related to the helicopter or the crash in Georgia. Plaintiffs did not allege "that any part of the helicopter was manufactured, designed[,] or maintained in California."[43] Plaintiffs proposed to transfer the case to the Southern District of Georgia in the event the court had rejected personal jurisdiction in California. The court noted that although a federal court has the authority to transfer a case over which it lacks jurisdiction under 28 U.S.C. §§ 1404(a), 1406(a), 1631, such a transfer requires a determination that "the transferee court would have been able to exercise its jurisdiction on the date the action was misfiled" and that "the transfer serves the interest of justice."[44] In this case, plaintiffs made no showing of personal jurisdiction over the BAE and Sikorsky defendants in Georgia. Plaintiffs failed to meet the burden to demonstrate that Georgia had specific or general jurisdiction over them. Accordingly, the court also denied the request to transfer.[45]

Lothrop v. North American Air Charter, Inc.[46] arose from a crash in Massachusetts after the engine lost power and the landing gear hit electrical transmission wires during a forced landing. Plaintiffs brought actions against a number of defendants, including North American Air Charter, Inc. After a lengthy and complex procedural history, during which other defendants settled and the case was removed to federal court for the second time, North American moved to dismiss for lack of personal jurisdiction. Plaintiffs first argued that North American had waived its defense for lack of personal jurisdiction by participating in the litigation. It had participated by "filing a notice of removal, opposing remand, answering the complaint, stipulating to the dismissal of defendants, opposing Lothrop's motion

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[42] The BAE defendants are BAE Systems, Inc., BAE Systems Simula, Inc., and BAE Systems Aerospace & Defense Group, Inc. *Id.* at 916.

[43] *Id.* at 923.

[44] *Id.* at 922 (quoting Garcia de Rincon v. Dep't of Homeland Sec., 539 F.3d 1133, 1140 (9th Cir. 2008)).

[45] *Id.* at 916–18, 922–24.

[46] 95 F. Supp. 3d 90 (D. Mass. 2015).

to admit an attorney *pro hac vice*, filing the motion to strike, stipulating to a change of venue, and assenting to [another] motion . . . ."[47] Lack of personal jurisdiction was an affirmative defense in the answer.[48]

The court denied plaintiffs' motion, noting that although the litigation "ha[d] already seen the expenditure of significant judicial resources, the action [wa]s still in a preliminary posture."[49] The entire focus had been on determining the appropriate forum and the status of the claims; no action had been taken on the merits. Plaintiffs also argued that even if North American was "not subject to personal jurisdiction in Massachusetts on its own account," the court could exercise "personal jurisdiction over North American because it [wa]s the alter-ego of another company, Air Hamptons."[50] Air Hamptons operated the aircraft that crashed in Massachusetts and had flown in and out of Massachusetts over fifty times between 2007 and when the crash occurred in 2010.[51]

The court acknowledged that plaintiff had shown a "strong relationship" between the two companies but failed to demonstrate a sufficient disregard of the separate corporate forms to justify treating the two corporations as a single entity. Plaintiff established that the two companies shared employees and services, but there was no evidence showing that one corporation controlled or used the other corporation, aside from doing so for the mutual benefit of both. Although they shared the same physical space, phone number, and email addresses, there was no showing that this created any confusion in record keeping, nor that it confused other companies or individuals interacting with them. Nor was there any "evidence about the capitalization of either corporation, improper segregation of separate business records or finances, or any improper use of the corporations' funds."[52] The court found "no evidence, or even an allegation, that the corporations were used in promoting fraud," and so it rejected plaintiff's alter-ego theory.[53] Accordingly, the court

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[47] *Id.* at 97.

[48] *Id.* at 93–97.

[49] *Id.*

[50] *Id.* at 97–98.

[51] *Id.* at 98–99.

[52] *Id.* at 102.

[53] *Id.*

granted North American's motion to dismiss for lack of personal jurisdiction.[54]

JB Aviation v. R Aviation Charter Services, LLC[55] arose from defendants' purchase of a Gulfstream Model GIV. Plaintiff allegedly acted as the defendants' broker for the transaction, then as project manager for securing the Gulfstream's status as airworthy and was promised the role of chief pilot thereafter. However, defendants later informed plaintiff that they had hired two other pilots for the Gulfstream, that plaintiff would not be retained as chief pilot, and that they would not pay him for his services as project manager. Defendants, Florida residents, challenged personal jurisdiction in New York. The court upheld personal jurisdiction over one defendant based on the brokerage agreement because there were ample facts that the defendant had come to New York on multiple occasions related to this transaction. However, the court lacked jurisdiction over the other defendant, which did not come into existence until after the agreement had been executed. The court also found that it lacked jurisdiction over the claims related to the Project Management Agreement because there was no evidence that the Florida defendants negotiated in or traveled to New York for any purpose related to that contract nor that the two agreements were sufficiently related to each other. Defendants moved to transfer the action to the Southern District of Florida under either 28 U.S.C. §§ 1631 or 1404(a), but the court denied their motion.[56]

In *Broadus v. Delta Air Lines, Inc.*,[57] the plaintiff was injured while boarding a connecting flight from Atlanta, Georgia, to Florida that originated in North Carolina. She filed suit in North Carolina, her home state. Delta moved to dismiss for lack of personal jurisdiction. It conceded that it conducted business in North Carolina and that the plaintiff purchased a round trip ticket from and to North Carolina from Delta. But Delta challenged the second prong of specific jurisdiction, contending that the claim did not result from injuries arising out of or related to Delta's contacts with North Carolina because the specific events relating to the accident occurred in Atlanta. Plaintiff asserted that it would be an extreme hardship for her to litigate

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[54] *Id.* at 102–04.

[55] 143 F. Supp. 3d 37 (E.D.N.Y. 2015).

[56] *Id.* at 41–49.

[57] 101 F. Supp. 3d 554 (M.D.N.C. 2015).

the case in Atlanta where she had no other connections and that her trip originated in North Carolina. The court concluded that "[t]he round-trip [ticket] and the departure from Greensboro were the genesis of this dispute."[58] As a result, "Delta should have anticipated that, as a common carrier promising to pick Broadus up in North Carolina and return her there, it could be haled into a court in North Carolina, the state of her initial departure and final arrival, for injuries inflicted on her during the trip," for her "injuries arose directly out of, and [we]re closely related to, Delta's connection to North Carolina."[59] Accordingly, the court denied Delta's motion to dismiss and, for similar reasons, denied its motion to transfer the action to Georgia.[60]

In *Seegar v. Anticola*,[61] plaintiffs, husband and wife, were traveling on business to Delaware. The husband's employer was a New York corporation and plaintiffs were citizens of New York. Plaintiffs sued various New York defendants in Delaware, alleging negligence in the operation, inspection, and fueling of the aircraft. The aircraft crashed in Pennsylvania, allegedly because of fuel starvation while traveling from Delaware to Buffalo, New York. The New York defendants moved to dismiss for lack of personal jurisdiction. The court denied the motion. In addition to finding personal jurisdiction under Delaware law, the court also concluded that exercise of such jurisdiction did not offend due process. The New York defendants directed the flight to and from Delaware, including a planned refueling stop in Delaware, and they allegedly conducted a negligent pre-flight inspection in Delaware. These constituted sufficient minimum contacts to support personal jurisdiction. The court also addressed the convenience of the New York defendants and plaintiffs having to travel from and to New York; Delaware's interest in the promotion and enforcement of aviation safety; and Delaware's interest in an efficient resolution of the controversy that also involved the unchallenged jurisdiction over a Delaware defendant and the likelihood of multiple lawsuits if they were not heard in one forum.[62]

Kedrowski v. Lycoming Engines[63] arose from an earlier product liability lawsuit arising from the crash of a single-engine aircraft.

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[58] *Id.* at 561 (internal quotation marks omitted).
[59] *Id.*
[60] *Id.* at 558, 560–62.
[61] No. 13-2030-LPS, 2015 WL 1149537, at *1 (D. Del. Mar. 12, 2015).
[62] *Id.* at *1–2, *5–6.
[63] No. 15-19(DSD/LIB), 2015 WL 2165798, at *1 (D. Minn. May 8, 2015).

In that lawsuit, plaintiff sued Lycoming in Minnesota state court and hired Seader, an aircraft mechanic, to investigate the crash. Seader prepared a report, opining that the aircraft's engine failed mid-flight as a result of a defect in the Lycoming fuel pump. He relied in part on test data from Aero Associates, Inc., "a North Carolina company that manufactures fuel pumps in competition with Lycoming."[64] The president of Aero, Timothy Henderson, was asked to review and comment on Seader's report, on which he "took issue with Seader's methods and disagreed with his findings."[65] Lycoming moved to exclude Seader as an expert witness and used an affidavit from Henderson in support of the motion. Though the state court denied Lycoming's motion to exclude, it did prohibit Seader from giving expert engineering opinions. An attorney for Aero wrote to Seader criticizing his report and stating that Aero had been "dragged into" the Minnesota lawsuit and incurred damages. Aero threatened to sue Seader personally if he failed to withdraw his report. The attorney wrote the letter in North Carolina, mailed it to Seader in Colorado, and copied it to Lycoming's lawyer in Minnesota.[66]

Plaintiff then sued Henderson, Aero, and Lycoming in federal court, alleging that defendants, through the letter, "substantially interfered with Mr. Seader's ability to provide expert testimony free from fear," although "Seader ha[d] not refused to testify in state court nor indicated that he [would] limit or change his testimony as a result of the letter."[67] Plaintiff alleged claims for tortious interference with contract, civil conspiracy, and intentional and negligent infliction of emotional distress. Defendants moved to dismiss. The court granted defendants' motions to dismiss for lack of personal and subject matter jurisdiction. The court found that the conduct concerning the letter, "sent on behalf of a North Carolina resident and corporation to a nonparty citizen in Colorado," was insufficient to confer personal jurisdiction in Minnesota over Aero and Henderson.[68] Neither Henderson's appearance in Minnesota by submitting an affidavit in the state action, nor Henderson or Aero's communications with Lycoming in connection with the affidavit, provided sufficient basis for personal jurisdiction. The particular dispute did

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[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at *2 (alterations omitted).

[68] *Id.* at *3.

not pertain to harm arising out of Aero and Henderson's limited participation in the Minnesota action. The dispute arose out of the letter and an alleged conspiracy to preclude Seader's testimony.[69]

The court also rejected subject matter jurisdiction because plaintiff failed to plead adequately an amount in controversy greater than $75,000. Plaintiff alleged that because of the size of the state lawsuit he would be required to obtain experts whose fees will exceed $75,000. Plaintiff also alleged that if Seader failed to testify or withdrew his report, plaintiff would have to retain a substitute expert or would likely lose the case, and either would result in damages greater than $75,000. However, since plaintiff did not allege that Seader had limited his testimony or withdrawn his report, nor that the letter reduced any pecuniary value of his testimony, plaintiff "[could not] establish the required jurisdictional amount by pointing to speculative damages based on theoretical harm."[70] Nor were conclusory allegations of severe emotional distress sufficient to establish the jurisdictional amount under a preponderance of the evidence standard. Accordingly, the complaint was dismissed.[71]

In *Lubin v. Delta Airlines, Inc.*,[72] plaintiff was a passenger on a Delta flight from Memphis, Tennessee, to Boston, Massachusetts, and was injured when walking down the stairs of the aircraft while deplaning in Boston. She sued Delta Air Lines, Comair (a subsidiary of Delta), and Pinnacle Airlines in Mississippi state court. Defendants removed the action to federal court and plaintiff amended to add the aircraft manufacturer, Bombardier, as an additional defendant. Bombardier moved to dismiss for lack of personal jurisdiction. The court granted the motion. It held that Mississippi's long arm statute did not provide a basis for jurisdiction. Although plaintiff purchased her airline ticket in Mississippi, this did not provide a basis for jurisdiction over Bombardier, which was not a party to the contract. Furthermore, because the injury occurred in Massachusetts, rather than Mississippi, the tort did not occur in Mississippi, and so the court dismissed the complaint for lack of jurisdiction.[73]

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[69] *Id.* at *1–4.

[70] *Id.* at *4.

[71] *Id.* at *4–6.

[72] No. 3:14-cv-648-CWR-FKB, 2015 WL 4611759, at *1 (S.D. Miss. July 31, 2015).

[73] *Id.* at *1–4.

II. SUBJECT MATTER JURISDICTION

In *Flylux, LLC v. Aerovias de Mexico, S.A. de C.V.*,[74] plaintiff brought suit in federal court, alleging that (1) it was engaged in the business of making travel arrangements on behalf of its client; (2) it had made thirty-three reservations for Aerovias de Mexico (AeroMexico) clients from the United States, Argentina, and Australia and paid for them; and (3) AeroMexico had cancelled the reservations without warning. Consequently, the passengers were denied seats when they showed up to the airport. Plaintiff sought damages of more than $400,000. Defendant moved to dismiss for lack of subject matter jurisdiction. The trial court granted the motion, and the Eleventh Circuit affirmed. Plaintiff did not specifically plead a contract between itself and defendant. At best, plaintiff was an agent of its clients' transactions, and for purposes of subject matter jurisdiction, each client was required to satisfy the amount-in-controversy requirement. Because no such showing was made, the court lacked jurisdiction.[75]

In *Williams v. Perez*,[76] plaintiff sought whistleblower protection under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) after United Airlines allegedly retaliated against him. He initially filed a lawsuit in federal court, but the court dismissed the lawsuit for lack of jurisdiction "because AIR 21 d[oes] not create a private right of action."[77] He then filed a complaint with the Department of Labor, but he missed the filing deadline, so the Department of Labor denied his complaint. A federal circuit court upheld the denial. Plaintiff then brought a *pro se* action against the Secretary of Labor for its handling of his claim. The court held that because of the exclusive remedial scheme in AIR 21, it did not have jurisdiction over plaintiff's claim; the court could only enforce an order by the Secretary of Labor. In this case, plaintiff was not seeking to enforce any order but rather was challenging the actions of the Department of Labor. Nor could plaintiff rely on the general judicial review provisions of the Administrative Procedure Act (APA) because AIR 21 establishes a scheme of judicial review

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[74] 618 F. App'x 574 (11th Cir. 2015).

[75] *Id.* at 576–79.

[76] 110 F. Supp. 3d 1 (D.D.C. 2015), *aff'd*, No. 15-5228, 2016 WL 520265 (D.C. Cir. Feb. 1, 2016) (citing 49 U.S.C. § 42121 (2012)).

[77] *Id.* at 2.

and the APA only applies when there is "no other adequate remedy."[78]

III. REMOVAL

A. Federal Officer Removal Under 28 U.S.C. § 1442

Lu Junhong v. Boeing Co.[79] arose from the Asiana Airlines crash of a Boeing 777 on July 6, 2013. It landed short at San Francisco International Airport after flying across the Pacific Ocean from Seoul, Korea. Plaintiff brought suit against Boeing in Illinois state court. Boeing removed the action on the basis of admiralty jurisdiction and on the basis that Boeing acted as a "federal officer" in approving the aircraft systems at issue. The trial court rejected both arguments on the basis that Boeing was not a federal officer for purposes of 28 U.S.C. § 1442 and that the tort occurred on land when the aircraft hit the sea wall, not over navigable waters. Boeing appealed under § 1442 as a putative federal officer. The Seventh Circuit rejected Boeing's contention that its delegated authority to assess and certify the airworthiness of its products gave it federal officer status for purposes of removal. The court concluded that "being regulated, even when a federal agency 'directs, supervises, and monitors a company's activities in considerable detail,'" is insufficient to transform a private firm into a person "'acting under' a federal agency."[80] The court acknowledged Boeing's argument that the Federal Aviation Administration (FAA) provides "real delegation" to aircraft manufacturers by transferring some of the FAA's inspection and certification functions, but the court concluded that this was "still a power to certify *compliance*, not a power to design the rules for airworthiness."[81] Under *Watson v. Philip Morris Companies*, rule*making*, rather than rule compliance, was the key criterion, and evidence of the FAA's delegation order was insufficient because it did not authorize Boeing to change substantive rules.[82]

However, the Seventh Circuit reversed the district court's remand order, finding that the cases were removable because the events leading to the accident comported with traditional maritime activity. Admiralty jurisdiction "has been fraught ever since

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[78] *Id.* at 1–4.
[79] 792 F.3d 805 (7th Cir. 2015).
[80] *Id.* at 809 (quoting Watson v. Philip Morris Cos., 551 U.S. 142, 145 (2007)).
[81] *Id.* at 810 (emphasis in original).
[82] *Id.* at 807–10 (citing *Watson*, 551 U.S. at 145).

Executive Jet Aviation, Inc. v. Cleveland[83] modified the former situs requirement and asked[ ] not where a wreck ended up (land or water), but whether the events leading to the accident ha[d] enough connection to maritime activity."[84] Asiana flight 214 was "a trans-ocean flight, a substitute for an ocean-going vessel," like contiguous U.S. flights to and from Alaska, Hawaii, and overseas territories are, which met the *Executive Jet* standard because such flights bore a "significant relationship to a traditional maritime activity."[85] Moreover, the court held, consistent with *Offshore Logistics, Inc. v. Tallentire*,[86] "that an accident caused by problems in airplanes *above* water should be treated, for the purpose of [the Death on the High Seas Act], the same as an accident caused *on* the water," implying that "the general admiralty jurisdiction of 28 U.S.C. § 1333(1) also includes accidents caused by problems that occur in trans-ocean commerce."[87] The Seventh Circuit pointed out that "[a]dmiralty then supplies a uniform law for case[s] that otherwise might cause choice-of-law headaches."[88] The court concluded that § 1333(1) supplies admiralty jurisdiction, so plaintiffs, like many of the crash victims, could have filed these suits directly in federal court. "If the saving-to-suitors clause allows them to stay in state court even after the 2011 amendment, they are free to waive or forfeit that right—which given the scope of § 1333(1) concerns venue rather than subject[ ]matter jurisdiction."[89]

The court reached the admiralty jurisdiction question notwithstanding plaintiff's argument that the court should have declined to consider the question at all after it determined that Boeing was not a federal officer. The sole basis on which the remand order was appealable was that the case had been removed on the basis that Boeing was acting as a federal officer pursuant to 28 U.S.C. § 1442. Once the court rejected that argument, plaintiffs argued that the court simply should have remanded the case. However, the court concluded that the language of 28 U.S.C. § 1447(d), which provides that appellate review of an order remanding the case pursuant to § 1442 "shall be reviewable by appeal or otherwise," indicates that once the

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[83] 409 U.S. 249 (1972).

[84] *Lu Junhong*, 792 F.3d at 813 (citations omitted).

[85] *Id.* at 816 (internal quotation marks omitted) (citing *Exec. Jet*, 409 U.S. 249).

[86] 477 U.S. 207 (1986).

[87] *Lu Junhong*, 792 F.3d at 816 (citing *Offshore Logistics, Inc.*, 477 U.S. 207).

[88] *Id.*

[89] *Id.* at 818.

order was reviewable, the court of appeals is authorized to take the time necessary to determine the proper forum, and the marginal delay from adding an extra issue is likely to be small.[90] The court acknowledged that some litigants might allege § 1442 frivolously as a basis for removal simply as a hook to allow appeal of a different issue. However, the court concluded that frivolous removals are sanctionable, and courts have other tools to sanction improper removals and interlocutory appeals. Accordingly, the Seventh Circuit reversed and allowed the case to proceed in federal court.[91]

Following the decision in *Lu Junhong*, the U.S. District Court for the Northern District of Illinois remanded *Brokaw v. Boeing Co.*,[92] which arose out of the crash of a National Airlines flight shortly after takeoff from Bagram Air Base in Afghanistan. The court also held that the three federal defenses raised by National were not colorable under the facts alleged: the Defense Base Act, the Political Question Doctrine, and the Combatant Activities Doctrine.[93]

In *Boyd v. Boeing Co.*,[94] plaintiff brought a mesothelioma case against Boeing and United Technologies in state court based upon alleged exposure to asbestos in the production of the F100. As it did in *Lu Junhong*, Boeing removed the action based upon 28 U.S.C. § 1442(a)(1). Here, unlike in *Lu Junhong*, the product at issue was a military aircraft.[95] Boeing submitted an affidavit showing that "the government exercised control over all aspects of the production of the F100, including what warnings were to be included on which parts."[96] As such, Boeing was not allowed to "add, delete, or modify warnings related to th[e] equipment," and "the[ ] same restrictions applied to the relevant manuals and related materials for the F100."[97] The court held that this evidence was enough "to establish that Boeing was acting under federal direction regarding actions [that] [p]laintiffs claim[ed] caused or contributed to the injuries at issue."[98] The court also concluded that, as required by

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[90] *Id.* at 810–11 (internal quotation marks omitted) (quoting 28 U.S.C. § 1447(d) (2012)).

[91] *Id.* at 810–15.

[92] No. 15 C 4727, 2015 WL 5915996, at *1 (N.D. Ill. Oct. 5, 2015).

[93] *Id.* at *11, *14, *16.

[94] No. 15-0025, 2015 WL 4371928, at *1 (E.D. La. July 14, 2015).

[95] *Id.* at *1–2; *see Lu Junhong*, 792 F.3d at 807–08.

[96] *Boyd*, 2015 WL 4371928, at *4.

[97] *Id.*

[98] *Id.*

§ 1442(a)(1), defendants had shown that they had a "colorable defense under federal law."[99] It was not necessary to prove the asserted defense, but Boeing needed only to "articulate its 'colorable' applicability to the plaintiff's claims" to justify removal.[100] Plaintiffs attempted to counter this contention by disclaiming "any cause of action or recovery for any injuries caused by exposure to asbestos dust that occurred in a federal enclave" in "any cause of action or recovery for any injuries resulting from any exposure to asbestos dust caused by any acts or omissions of a party committed at the direction of an officer of the [U.S.] government."[101] The court found this disclaimer insufficient to defeat removal, noting that "[o]ne of the most important functions of this right of removal is to allow a federal court to determine the validity of an asserted official immunity defense."[102]

B. Removal Based on Preemption

In *Crown v. PHI Air Medical, L.L.C.*,[103] plaintiff's lawsuit against an air carrier was removed to federal court based upon the assertion that the Airline Deregulation Act (ADA) preempts state law claims. The district court remanded the case, pointing out that although the ADA may provide a defense to such a claim, it does not constitute complete preemption, and therefore removal was improper. The court further ordered that because this issue was settled under the law of the circuit, plaintiff was entitled to reasonable attorney fees. However, the court reduced the attorney fees claimed by plaintiff, most notably pointing out that plaintiff failed to provide any evidence that the $135 per hour billing rate for plaintiff's counsel was reasonable and in line with the hourly rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.[104]

In *Baugh v. Delta Air Lines, Inc.*,[105] the complaint alleged that plaintiff was blind and needed assistance in boarding, that Delta failed to provide such assistance, and that plaintiff fell and in-

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[99] *Id.* at *4, *5.

[100] *Id.* at *4.

[101] *Id.* at *5.

[102] *Id.* at *6 (citing Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 397–98 (5th Cir. 1998)).

[103] No. 15-cv-10180, 2015 WL 3409010, at *1 (E.D. Mich. May 27, 2015).

[104] *Id.* at *1–4.

[105] No. 1:14-cv-2551-WSD, 2015 WL 761932, at *1 (N.D. Ga. Feb. 23, 2015).

jured herself. Delta removed the case because the claims were allegedly preempted by the Air Carrier Access Act (ACAA). Plaintiff contended that her claim had been pleaded solely on state law. The court held that when a complaint solely alleges a state law claim, the action does not become removable simply because federal law preempts that claim. Rather, removal is proper only if such a claim is subject to complete preemption. "Complete preemption is a narrow exception to the well-pleaded complaint rule and exists where the preemptive force of a federal statute is so extraordinary that it converts an ordinary state law claim into a statutory federal claim."[106] The Supreme Court and the Court of Appeals for the Eleventh Circuit "have recognized complete preemption in only three federal statutes: (1) the Labor Management Relations Act, (2) the Employee Retirement Income Security Act of 1974, and (3) the National Bank Act."[107] Complete preemption applies to those three statutes since "all three 'provide[ ] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'"[108] The court concluded that the ACAA did not afford complete preemption even though the ACAA and regulations promulgated pursuant to the statute preempted the state law standard of care. Therefore, they did not provide a basis for federal question jurisdiction either.[109]

C. Fraudulent Joinder

Boeing attempted unsuccessfully to remove an employment discrimination action in *Reynolds v. Boeing Co.*[110] Plaintiff had joined his direct supervisor as a non-diverse defendant. Boeing deposed the seventy-six-year-old plaintiff, whose testimony suggested that the supervisor's comments about his age had been sparse and benign. However, when submitting his errata sheet, plaintiff contradicted his testimony and referred generally to numerous derogatory and condescending comments, over a lengthy period of time, that caused him to feel "terrible." Plaintiff subsequently moved to remand. Boeing submitted a declaration of the supervisor, who swore he never raised the subject of

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[106] *Id.* at *4.

[107] *Id.* (alteration in original) (citing Dunlap v. G&L Holding Grp., 381 F.3d 1285, 1290 (11th Cir. 2004)).

[108] *Id.* (alteration in original) (quoting *Dunlap*, 381 F.3d at 1291).

[109] *Id.* at *2–4, *11–14.

[110] No. 2:15-cv-2846-SVW-AS, 2015 WL 4573009, at *1 (C.D. Cal. July 28, 2015).

plaintiff retiring and discussed the issue only when plaintiff brought it up. Plaintiff thereupon submitted yet another declaration, which suddenly provided specific assertions with dates and quotes. The court determined that in the context of a motion to remand, it should give plaintiff the benefit of the doubt because of the presumption against removal, which differentiated this type of potential "bamboozlement" from those when raised in response to a motion for summary judgment. The court held that the supervisor had not been fraudulently joined and remanded the case.[111]

D. Other

In *Bullar v. U.S. Specialty Insurance Co.*,[112] plaintiff was killed in a parachuting accident. A wrongful death suit was filed against the parachuting instructors and the company that employed them (Mark and Archway). The trial court granted summary judgment to plaintiff on liability and entered a $2 million judgment against defendants. Plaintiff subsequently filed a direct action against both defendants and their insurer (USSIC) under Missouri's Direct Action Statute, and defendants filed a cross claim for bad faith against the insurer. USSIC removed the direct action lawsuit to federal court; the co-defendants, Mark and Archway, moved to remand. The court granted the motion. Mark and Archway argued that they had not consented to removal. USSIC argued that Mark and Archway's consent was not necessary because they had never been properly served. However, Mark and Archway provided evidence that prior to removal, their attorney agreed to accept service on their behalf and, therefore, the court held that consent was necessary. USSIC further argued that consent was not necessary because Mark and Archway were merely "nominal defendants." The court rejected this argument because the Missouri statute required joinder of both the defendant and the insurance company and further rejected USSIC's argument that the court should realign Mark and Archway as plaintiffs in accordance with their true interests. However, based on Missouri case law, the court held that realignment was inappropriate because they were necessary party defendants to the action under the statute. Accordingly, the court remanded the case.[113]

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[111] *Id.* at *1–5.

[112] No. 4:15CV822 JCH, 2015 WL 4243438, at *1 (E.D. Mo. July 13, 2015).

[113] *Id.* at *1–3.

IV. FORUM NON CONVENIENS

Lumenta v. Bell Helicopter Textron, Inc.[114] arose from a helicopter crash on Dua Saudera Mountain in Bitung, North Sulawesi, Indonesia. Plaintiff's son, an Indonesian citizen, and seven other passengers were killed in the crash. Plaintiff sued Bell, Pratt & Whitney, and United Technologies in state court in Harris County, Texas, alleging that the crash was caused by a defect in the helicopter. Bell responded by alleging that venue was improper in Harris County and moved to dismiss the case on forum non conveniens grounds, contending that the case should be litigated in Indonesia. It argued that the wreckage, investigators, fact witnesses, maintenance flight logs, and plaintiffs were all in Indonesia. Plaintiffs argued that the parties allegedly responsible for the crash and their witnesses were in the United States. The trial court dismissed the case and the Texas Court of Appeals affirmed.[115] It noted as follows:

> [I]t is undisputed that Lumenta, the plaintiff, is a citizen of the Republic of Indonesia, as was the decedent; the crash occurred in Indonesia; Indonesian officials conducted the investigation of the crash and recovered the wreckage, which remains in Indonesia; the mechanics, who maintained the helicopter, and the maintenance records, are in Indonesia; the Manado Airport employees, who tracked and communicated with the pilot of the helicopter, which crashed three minutes after take-off, are in Indonesia; and the companies that owned, chartered, maintained, and operated the helicopter, and their records, are in Indonesia.[116]

V. PREEMPTION

A. Field Preemption

The year's most significant development in federal preemption came from *Sikkelee v. Precision Airmotive Corp.*,[117] which had rattled around in the U.S. district courts for years, including several unsuccessful attempts at interlocutory appeals. The Third Circuit rejected defendant's claim of field preemption, holding that federal preemption of the field of aviation safety standards, as previously recognized by the Third Circuit in *Abdullah v.*

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[114] No. 01-14-00207-CV, 2015 WL 5076299, at *1 (Tex. App.—Houston [1st Dist.] Aug. 27, 2015, no pet.).

[115] *Id.* at *1–3, *11.

[116] *Id.* at *8.

[117] 822 F.3d 680 (3d Cir. 2016).

American Airlines,[118] did not extend to state product liability claims. It held:

> Today, we clarify the scope of *Abdullah* and hold that neither the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims. Rather, subject to traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate, aircraft products liability cases like [a]ppellant's may proceed using a state standard of care.[119]

In so doing, the court concluded that there was a presumption against preemption in field preemption claims, and it rejected the conclusions of a letter submitted to the court by the FAA that stated that the Federal Aviation Act "impliedly preempts the field of aviation safety with respect to substantive standards of safety."[120] It further stated that the preempted field "extends broadly to all aspects of aviation safety and includes product liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care."[121]

In *Estate of Becker v. Forward Technologies, Inc.*,[122] the Washington Court of Appeals upheld the dismissal of product liability, negligence, and warranty claims against a contractor who assembled an allegedly defective carburetor float, finding that the state law standards of care were preempted by the pervasive federal regulation of the design standards for aircraft fuel systems under 14 C.F.R. parts 23, 25, and 33. The court further concluded that plaintiff's "general reference to 'the Federal Aviation Regulations'" did not provide a federal standard of care for plaintiff's state law claims.[123] There was no dispute that plaintiff could pursue manufacturing defect claims against the engine manufacturer for the carburetor and the parts manufacturer approval (PMA) holder that built the carburetor and its component parts. But "a hypothetical state remedy based on an unsupported federal standard of care" did not warrant a trial as

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[118] 181 F.3d 363 (3d Cir. 1999).

[119] *Sikkelee*, 822 F.3d at 683.

[120] Brief for the Department of Transportation and the Federal Aviation Administration as Amici Curiae Supporitng Appellees at 1, *Sikkelee*, 822 F.3d 680 (No. 14-4193).

[121] *Id.* at 2.

[122] 365 P.3d 1273 (Wash. Ct. App. 2015); *see* 14 C.F.R. §§ 23.1, 25.1, 33.1 (2016).

[123] *Becker*, 365 P.3d at 1281.

to the contractor.[124] In August 2016, the Washington Supreme Court granted review.[125]

In *Ahmadi v. United Continental Holdings, Inc.*,[126] plaintiff was injured on a United Airlines flight when a fellow passenger dropped luggage on plaintiff's head while attempting to place it in the overhead bin. Plaintiff brought suit in state court, alleging negligence, *res ipsa loquitur*, negligence per se based on California Civil Code § 2100, breach of contract, and breach of implied covenant of good faith and fair dealing. United removed the action to federal court and moved for summary judgment. The court found that plaintiff's claims were subject to field preemption under the Ninth Circuit's decision in *Gilstrap v. United Airlines*.[127] The court examined each of plaintiff's allegations of negligence and, in each case, found that a pervasive federal regulation preempted the field at issue. These included the physical integrity of the overhead bins, flight attendant assistance, failure to warn, and failure to train. The court rejected plaintiff's *res ipsa loquitur* claim because plaintiff could not show that United had exclusive control over the luggage itself. The court also rejected plaintiff's claim based on California Civil Code § 2100, which provided a higher standard of care for common carriers. Since the court had found that the areas of aviation safety at issue in the case were preempted by pervasive federal regulations, the state statute could not be used to invoke negligence per se. Accordingly, the court granted defendant's motion for summary judgment.[128] Likewise, in *Spadoni v. United Airlines, Inc.*,[129] the Illinois Court of Appeals affirmed the dismissal of a delayed baggage claim based on an alleged violation of the covenant of good faith, holding that the claim was preempted by the ADA.[130]

In *Blackwell v. Panhandle Helicopter Inc.*,[131] plaintiff brought negligence claims against the owner-operator of a helicopter engaged in harvesting Christmas trees. Plaintiff became entangled in a rope used to bundle the trees for transport. He alleged he

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[124] *Id.* at 1275–81.

[125] Estate of Becker v. Forward Techs., Inc., 377 P.3d 763 (Wash. 2016).

[126] No. 1:14-cv-00264 LJO JLT, 2015 WL 4730116, at *1 (E.D. Cal. Aug. 10, 2015).

[127] 709 F.3d 995 (9th Cir. 2013).

[128] *Ahmadi*, 2015 WL 4730116, at *3, *7–9.

[129] 47 N.E.3d 1152 (Ill. App. Ct. 2015).

[130] *Id.* at 1153–54.

[131] 94 F. Supp. 3d 1205 (D. Or. 2015).

was flipped when the helicopter operator lifted the bundle of Christmas trees. Plaintiff alleged claims under common law negligence, regulations promulgated under Oregon's Occupational Safety and Health Division, and statutory negligence under Oregon's Employer Liability Law. Defendant moved to dismiss plaintiff's claims for common law negligence and under the Oregon Employer Liability Law to the extent the claims were based on state law standards of care, claiming such contentions were preempted by the Federal Aviation Act. Plaintiff conceded that the standard of care for the preempted allegations would be determined under federal law, and the court dismissed plaintiff's complaint to provide plaintiff the opportunity to revise his claims to replead the proper standard of care.[132]

The court found that seven of plaintiff's allegations of fault were preempted because they embraced "areas of aviation safety . . . pervasively regulated by the [Federal Aviation Act]."[133] These encompassed various alleged failures to follow defendant's own external load flight manual instructions for such operations and operations of the helicopter in an unsafe manner or at an unsafe speed. The court dismissed these allegations, granting leave for plaintiff "to amend his negligence claim to allege violations of the federal standard of care, if possible."[134] The court denied dismissal for "[p]laintiff's remaining allegations, [dealing] with safety procedures governing helicopter pilots and ground workers in tree harvesting."[135] These included allegations of failure to follow defendant's own safety management system manual in a variety of respects. The court found that, "[u]nlike the allegations dealing with the flight manual or safe helicopter speeds, there [wa]s no evidence of a pervasive regulatory scheme that demonstrate[d] Congress's intent to preempt the field of aviation safety implicated by safety procedures governing" coordination between "helicopter pilots and ground workers in tree harvesting."[136]

B. Foreign Sovereign Immunities Act (FSIA)

In *OBB Personenverkehr AG v. Sachs*,[137] the U.S. Supreme Court unanimously reversed an *en banc* Ninth Circuit decision inter-

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[132] *Id.* at 1207–09.
[133] *Id.* at 1211.
[134] *Id.* at 1212.
[135] *Id.*
[136] *Id.* at 1211–13.
[137] 136 S. Ct. 390 (2015).

preting the Foreign Sovereign Immunities Act (FSIA). Plaintiff, a U.S. citizen, purchased a Eurail pass in the United States. She was seriously injured in Austria while traveling on the pass, falling onto the tracks while attempting to board a train operated by the Austrian state-owned railway, OBB Personenverkehr AG (OBB). Her legs had to be amputated above the knee after OBB's moving train crushed them. She sued the railway in U.S. district court based on her purchase of the pass in the United States. Plaintiff obtained the Eurail pass over the Internet by purchasing it from The Rail Pass Experts, a Massachusetts-based travel agent. OBB moved to dismiss. Plaintiff argued that the FSIA's exception for commercial activity within the United States permitted the action to proceed, given that Eurail's agent sold the ticket to plaintiff in the United States. The trial court granted OBB's motion to dismiss, and the Ninth Circuit initially affirmed in a 2-1 decision. But the Ninth Circuit later reversed in a 7-4 en banc decision.[138]

The Supreme Court unanimously reversed, holding that the FSIA did not permit common law principles of agency to impute Rail Pass Experts' sale in the United States to OBB. Rather, the commercial activity exception to FSIA requires that "the action is based upon a commercial activity carried on in the United States by the foreign state."[139] Such a determination "first requires a court to 'identify[ ] the particular conduct on which the [plaintiff's] action is based.' "[140] By contrast, the Ninth Circuit had justified jurisdiction on the fact that the sale of the pass satisfied "one element" of each of her claims.[141] This was erroneous because the Court's prior holding was "flatly incompatible with a one-element approach."[142] Rather, the Court had "zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them."[143] Consequently, "the conduct constituting the gravamen of Sachs's suit plainly occurred abroad. All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Aus-

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[138] *Id.* at 393–94; *see* Sachs v. Republic of Austria, 737 F.3d 584, 596, 603 n.9 (9th Cir. 2013) (listing many of the foreign state-owned airlines that as of 2008 were 51–100% government-owned); Sachs v. Republic of Austria, 695 F.3d 1021, 1029 (9th Cir. 2012).

[139] *OBB*, 136 S. Ct. at 392–93 (alterations omitted) (quoting 28 U.S.C. § 1605(a)(2)).

[140] *Id.* at 395 (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993)).

[141] *Sachs*, 737 F.3d at 599.

[142] *OBB*, 136 S. Ct. at 396 (citing *Nelson*, 507 U.S. at 356).

[143] *Id.*

tria, which led to injuries suffered in Austria."[144] To hold otherwise, the Court said, would "allow plaintiffs to evade the [FSIA]'s restrictions through artful pleading."[145] The Court cited Justice Holmes's letter, stating that the "essentials" of a personal injury action will be found at the "point of contact"—"the place where the boy got his fingers pinched."[146] In this case, all such "essentials" were in Austria.[147]

In *Abdel-Karim v. EgyptAir Airlines*,[148] plaintiff flew from New York to Cairo on an EgyptAir flight but was arrested upon his arrival and charged with illegally bringing weapons into the country. He was later acquitted. He brought suit against both EgyptAir and its parent company, EgyptAir Holding Company (EHC). EHC moved to dismiss for lack of jurisdiction under the FSIA. Plaintiff argued that EHC, an instrumentality of the Egypt government, waived immunity to operate an airline in the United States and engaged in commercial activity within the United States by contracting with United Airlines. EHC's subsidiary, EgyptAir, operated a commercial airline in the United States and EHC employees were assigned to work for EgyptAir in the United States during the events at issue. The court rejected these arguments and held that plaintiff's waiver argument was premised on the assumption that EgyptAir and EHC were the same entity, but plaintiff had failed to show any basis for this assertion.[149]

As for the commercial activities exception to FSIA, the court found that although EHC had contracted with United Airlines, the action was not based upon that contract. Likewise, although EgyptAir operated a commercial airline in the United States, plaintiff failed to show that EHC and EgyptAir operated as a single entity. Finally, although two EHC employees had been tasked to work for EgyptAir at John F. Kennedy International Airport (JFK), plaintiff failed to rebut the declaration of an EHC vice president stating that when employees were assigned to work for EgyptAir, EgyptAir determined their responsibilities and paid their salaries. Therefore, the EHC employees were acting as EgyptAir employees at the time. In addition, their actions

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144 *Id.*

145 *Id.*

146 *Id.* at 397.

147 *Id.* at 392–97.

148 116 F. Supp. 3d 389 (S.D.N.Y. 2015).

149 *Id.* at 394.

were peripheral to the events at issue and did not form the basis or a foundation for plaintiff's claims.[150]

Thus, the only viable defendant in the case was EgyptAir. Plaintiff asserted a variety of common law claims against EgyptAir, but the court found these claims were preempted by the ADA and granted summary judgment on all claims except that premised on breach of contract. The court determined that "all of the plaintiff's claims relate[d] to EgyptAir's actions and procedures for handling and inspecting special items" in plaintiff's checked baggage and, "more generally, [EgyptAir's] baggage handling procedures."[151] The court determined that such claims were "indirectly" aimed at the airline's procedures for handling check luggage and, therefore, bore a direct relationship to the airline's services. Because such claims "would require the defendants to adopt heightened and qualitatively different procedures for baggage handling," they were preempted by the ADA.[152]

In *Flanagan v. Islamic Republic of Iran*,[153] the court held that relatives of the victim of a terrorist bombing of a U.S. ship in Yemen were entitled to recover from Iranian and Sudanese defendants, which were not entitled to immunity under FSIA. The case arose out of the bombing of the U.S.S. Cole on October 12, 2000, in the Port of Aden. The court found that it could "assert jurisdiction over the subject matter because money damages [we]re sought for an extra-judicial killing . . . caused by the provision of material support or resources . . . to Bin Laden and Al-Qaeda by the Sudanese and Iranian defendants, acting within the scope of their official employment."[154] Personal jurisdiction existed over the defendants, which were either foreign states or subdivisions of foreign states. Plaintiffs effected service on the Sudanese defendants through courier delivery of the summons, complaints, and attachments to the Sudanese Minister of Foreign Affairs in Khartoum, Sudan. They perfected service on the Iranian defendants by submitting summons, complaints, and notices to the Foreign Interests Section of the Embassy of Switzerland in Tehran for conveyance to the Iranian Ministry of Foreign Affairs. The defendants did not appear, but the court

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[150] *Id.* at 396, 402–04.

[151] *Id.* at 405.

[152] *Id.* at 405–06 (internal quotation marks omitted).

[153] 87 F. Supp. 3d 93 (D.D.C. 2015).

[154] *Id.* at 113.

entered default judgment against all defendants based upon evidence submitted.[155]

Aureus Asset Managers, Ltd. v. United States[156] arose from the hijacking of EgyptAir Flight 648 on November 23, 1985. It was later determined that the terrorist attack was sponsored by the government of Libya. The plaintiffs were an asset management and insurance provider to EgyptAir who sought to recover for the hull damage caused by the terrorists. After the United States "lifted Libya's sovereign immunity in 1996 for its state sponsorship of terrorism," plaintiffs filed claims for indemnification.[157] However, in 2008, the United States "restored Libya's sovereign immunity . . . , thereby terminating all pending claims against Libya, and directing the claims of U.S. nationals to be heard by the Foreign Claims Settlement Commission . . . , an independent agency within the Department of Justice."[158] However, the Commission lacked jurisdiction over plaintiffs' claims because they were not U.S. nationals.[159]

Plaintiffs sued the government, alleging a taking in violation of the Fifth Amendment, and sought compensation in the Claims Court under the Tucker Act.[160] The U.S. government moved to dismiss, but the court denied the motion. It noted that determining whether government action constitutes a Fifth Amendment taking requires the court to consider two questions: (1) "whether the claimant has identified a cognizable Fifth Amendment property interest that [was] the subject of the taking"; and (2) if so, "whether that property interest was 'taken.'"[161] The question in this case was whether a cause of action constituted a legally recognized property interest protected by the Fifth Amendment. The court rejected the government's argument that plaintiffs did not have such an interest because they did not own the aircraft hull and were not attempting to enforce the insurance contracts against Libya. The court concluded that plaintiffs' causes of action were property rights when they protected legally recognized property interests. The suit for damages "was filed to *protect* [p]laintiffs from losses sus-

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155 *Id.* at 114, 116.

156 121 Fed. Cl. 206 (2015).

157 *Id.* at 207.

158 *Id.*

159 *Id.* at 207–08.

160 Tucker Act, 28 U.S.C. § 1491.

161 *Aureus Asset Managers*, 121 Fed. Cl. at 210.

tained under their insurance contracts."[162] They did not have to own the aircraft or enforce the insurance contract to protect those interests. The court also found that plaintiffs had pleaded a plausible takings claim, for the taking occurred "when the [g]overnment terminated their legal claims and then failed to provide an alternate means of recovery."[163] The court deemed this sufficient to establish a claim.[164]

In *Mohammadi v. Islamic Republic of Iran*,[165] plaintiffs brought suit against the Islamic Republic of Iran, "seek[ing] recovery for imprisonment, torture, and extra-judicial killing they allegedly suffered at the hands of the Islamic Republic."[166] Plaintiffs claimed that Iran was subject to jurisdiction under the terrorism exception to the FSIA. However, the district court dismissed and the court of appeals affirmed. The FSIA requires not only that the foreign country was designated a state sponsor of terrorism at the time of the FSIA, but also that the claimant or victim was a "national of the United States" at that time. In this case, the acts of terrorism were alleged to have occurred between 1999 and 2006 when not one of the plaintiffs was a citizen of the United States. They alleged "that they qualified as [U.S.] nationals during that time because they 'owe[d] permanent allegiance to the United States'" and had disclaimed their loyalty to Iran following the first signs of persecution in Iran.[167] One plaintiff also alleged she had exhibited her allegiance by applying for and obtaining U.S. permanent residence status before her brother's death. However, manifestations of permanent allegiance by themselves were held legally insufficient to render a person a U.S. national. The court held that non-citizens of the United States can be considered "nationals" only under the provisions of 8 U.S.C. § 1408, which lists four categories of such persons, generally consisting of those "born in, or possessing a specified personal or parental connection with, an 'outlying possession of the United States'" (i.e., American Samoa and Swains Island).[168] Because the FSIA affords the "sole basis" for obtaining jurisdic-

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[162] *Id.* at 212 (emphasis in original).

[163] *Id.* at 214.

[164] *Id.* at 209–10, 213.

[165] 782 F.3d 9 (D.C. Cir. 2015).

[166] *Id.* at 12.

[167] *Id.* at 14.

[168] *Id.* at 14–15.

tion over a foreign state in the United States, plaintiffs' failure to satisfy the terrorism exception to the FSIA required dismissal.[169]

C. Airline Deregulation Act (ADA)

In *National Federation of the Blind v. United Airlines Inc.*,[170] plaintiffs sought a class action on behalf of blind travelers to challenge United's policy of using automatic kiosks for accessing flight information, checking in for flights, printing boarding passes, checking baggage, and selecting and upgrading seats. The kiosks "require[d] user responses to visual prompts on a computer touchscreen," making the kiosks inaccessible to blind people.[171] Plaintiffs claimed that United's refusal to accommodate blind travelers violated California's anti-discrimination laws. United moved to dismiss, contending that plaintiffs' claims were expressly preempted by the ADA and impliedly preempted by the ACAA. The Ninth Circuit held that the claims were not preempted by the ADA because under a prior Ninth Circuit decision, "Congress did not intend 'service' to refer to the 'assistance to passengers in need, or like functions.' While they may be convenient for passengers, kiosks are not 'services' in the 'public utility sense.'"[172] The court rejected United's argument that *Charas v. Trans World Airlines, Inc.* was no longer good law in light of the U.S. Supreme Court's more recent decision in *Rowe v. New Hampshire Motor Transport Ass'n*[173] and subsequent decisions of other lower courts, interpreting *Rowe* to require a broader definition of "services" than that stated in *Charas.*[174] The Ninth Circuit concluded that neither *Rowe* nor the Court's more recent decision in *Northwest, Inc. v. Ginsberg*[175] was "clearly inconsistent" with *Charas.*[176]

The court nevertheless affirmed the dismissal, based on the preemptive effect of a federal regulation promulgated pursuant

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[169] *Id.* at 13–16.

[170] 813 F.3d 718 (9th Cir. 2016).

[171] *Id.* at 723.

[172] *Id.* at 726 (citations omitted) (quoting Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc)).

[173] Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008).

[174] *Nat'l Fed'n of the Blind*, 813 F.3d at 727 (citing *Rowe*, 522 U.S. 364); *see, e.g.*, Bower v. Egyptair Airlines Co., 731 F.3d 85, 94 (1st Cir. 2013); DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 n.9 (1st Cir. 2011); Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008).

[175] Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422 (2014).

[176] *Nat'l Fed'n of the Blind*, 813 F.3d at 727 (citing *Ginsberg*, 134 S. Ct. at 1433–34).

to the ACAA by the Department of Transportation (DOT) after oral argument in the case. The new regulation pervasively regulated the accessibility of airport kiosks and "inform[ed] airlines with striking precision about the attributes their accessible kiosks must have. In doing so, the new regulation speaks directly to the concerns raised by the [National Federation of the Blind]'s suit."[177] The regulation was "unmistakably pervasive in the pertinent sense, in that it exhaustively regulates the relevant attributes of accessible kiosks."[178] Furthermore, the "phase-in" time prescribed in the new regulation was closely analogous to phased-in automobile airbag regulation, which the Supreme Court held to preempt state law in *Geier v. American Honda Motor Co.*[179]

In *Xiaoyun Lu v. AirTran Airways, Inc.*,[180] the Eleventh Circuit affirmed dismissal of a passenger's complaint based on ADA preemption. Plaintiff claimed that she was injured when some fluid leaked from an air vent above her seat, that airline personnel treated her rudely, and that she subsequently endured a verbal altercation with two flight attendants who accused her of refusing to turn off her phone prior to departure, which caused her to be escorted off the plane by security personnel. The court held that plaintiff's claim of the airline personnel's alleged rudeness while executing boarding procedure was preempted by the ADA, as was her claim for breach of the implied covenant of good faith and fair dealing based on the same underlying facts. The court found that her claim that the airline wrongfully removed her from the plane was "too attenuated" from transportation itself or "services" to support preemption under the ADA, but th court nevertheless affirmed dismissal because 49 U.S.C. § 44902(b) "absolves air carriers of liability for refusal to transport to a passenger if 'the carrier decides [the passenger] is, or might be, inimical to safety.'"[181]

In *Overka v. American Airlines, Inc.*,[182] the skycaps at Boston's Logan Airport sued the airline for alleged violations of state law after the airline imposed a two dollar per bag curb-side check-in

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[177] *Id.* at 735.

[178] *Id.*

[179] *Id.* at 723, 736–37 (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 885 (2000)).

[180] 631 F. App'x 657 (11th Cir. 2015).

[181] *Id.* at 659–61 (quoting Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 12 (1st Cir. 2008)).

[182] 790 F.3d 36 (1st Cir. 2015).

fee. They claimed that the airline "failed to adequately notify customers that skycaps would not receive the proceeds from the new charge" and "that [the skycaps'] compensation 'decreased dramatically' following the introduction of the new charge" because "fewer passengers tipped skycaps on top of paying the per-bag charge."[183] The skycaps alleged that the surcharge violated the Massachusetts tips law and constituted "tortious interference with the 'implied contractual [and] advantageous relationship . . . between skycaps and [American's] customers,'" unjust enrichment, and quantum meruit.[184] The trial court dismissed plaintiffs' claims, and the First Circuit affirmed. The First Circuit cited prior precedent that "conclusively" resolved the question whether baggage handling fees related to a price, route, or service of an air carrier within the meaning of the ADA preemption clause and noted that the sole exception concerned breach of contract claims asserted against an airline under *Wolens*.[185]

The court concluded that plaintiffs' arguments with respect to common law unjust enrichment and tortious interference claims were foreclosed by the U.S. Supreme Court's recent decision in *Ginsberg*, which held that a claim of breach of the implied covenant of good faith and fair dealing was preempted. The court, therefore, upheld the district court's dismissal of the claims.[186] However, in *Valencia v. SCIS Air Security Corp.*,[187] the California Court of Appeal held that a company that performed security checks on catering equipment for airlines was subject to state labor and unfair competition laws requiring meal and rest breaks, therefore the ADA did not preempt such claims.[188]

By contrast, in *Grupp v. DHL Express (USA) Inc.*,[189] the California Court of Appeal held that the ADA preempted plaintiffs' claims that DHL violated the False Claims Act by imposing a jet fuel surcharge for deliveries even when made by ground transportation, thereby fraudulently representing routes and expenses. The trial court granted judgment on the pleadings for DHL. The California Court of Appeal affirmed, but the Califor-

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[183] *Id.* at 37.

[184] *Id.*

[185] *Id.* at 37–38 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–33 (1995)).

[186] *Id.* at 39–40 (citing Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1426 (2014)).

[187] 193 Cal. Rptr. 3d 775 (Cal. Ct. App. 2015).

[188] *Id.* at 776.

[189] 192 Cal. Rptr. 3d 538 (Cal. Ct. App. 2015).

nia Supreme Court remanded the case with directions to reconsider in light of another recent preemption decision under California's Unfair Competition Law.[190] On remand, the Court of Appeal again upheld the dismissal, finding that the claims were preempted. The court noted that Supreme Court precedent established that when the statute preempts claims relating to rates, routes, or services, it preempts state law claims even if the law is not specifically designed to affect such claims, even when the law is one of general applicability.[191]

The court acknowledged that the ADA did not apply to contract claims. However, it rejected the contention that the claims were too tenuous for preemption. To uphold the claims would "cause DHL to alter prices, routes[,] and services, i.e., it could no longer impose challenged surcharges and use ground routes for air packages. This direct impact would be significant, which is unacceptable."[192] Furthermore, the court concluded that the *People ex rel. Harris v. Pac Anchor Transportation, Inc.* decision did not compel a different result. The claim in *Pac Anchor* made no reference to the prices, routes, or services of the defendant trucking companies, nor did it refer to the transportation of property. It simply alleged unfair competition "for misclassifying drivers as independent contractors and for other alleged violations of California's labor and unemployment insurance laws."[193] The court also rejected Relator's argument that the case was "akin to an action on a contract."[194] The court noted that contract claims were not preempted under *Wolens* because such obligations are self-imposed. The purpose of preemption is to "prevent a plaintiff from obtaining something other than the benefit of its contractual bargain."[195] DHL did not specifically agree to be liable for treble damages or statutory penalties nor to be subject to claims by *qui tam* plaintiffs. Due to the boilerplate agreement's confinement to performance of services, the court found it "[could not] be read to extend to the submission of claims."[196] Therefore, claims based on laws external to DHL's

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[190] *Id.* at 541 (citing People *ex rel.* Harris v. Pac Anchor Transp., Inc., 329 P.3d 180, 183 (Cal. 2014), *cert. denied sub nom.*, PAC Anchor Transp., Inc. v. Cal. *ex rel.* Harris, 135 S. Ct. 1400 (2015)).

[191] *Id.* at 541–43 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

[192] *Id.* at 545.

[193] *Pac Anchor*, 329 P.3d at 183.

[194] *Grupp*, 192 Cal. Rptr. 3d at 549.

[195] *Id.*

[196] *Id.*

agreement to provide delivery services were outside the scope of the contract and therefore preempted.[197]

In *Gleason v. United Airlines, Inc.*,[198] the court held that the ADA preempted state law claims filed by a passenger with an alleged peanut allergy. Upon boarding, plaintiff told the crew of her condition and asked them to make an announcement. The crew did not make the announcement, and the plaintiff later began to experience symptoms of a severe peanut allergy attack and noticed a passenger four rows behind her eating peanuts. Although she took an antihistamine and used her inhaler, her condition worsened to the degree that the flight had to make an emergency landing, and she went into intensive care for two days. However, the court concluded that the claim related to a "price, route, or service of an air carrier" and that each of plaintiff's claims was based on a service the air carrier failed to provide.[199] Therefore, the court concluded that the ADA preempted the claim.[200]

In *David v. United Continental Holdings, Inc.*,[201] plaintiff brought claims on his own behalf, and potential class action claims, alleging that United employed deceptive trade practices in the way it marketed paid DirecTV and Wi-Fi services on the flight. He claimed that the airline "advertised to passengers via the TV screen to 'SWIPE NOW' to receive over 100 channels of DirecTV."[202] Moreover, according to plaintiff, "[a]t no time before or during the process of purchasing DirecTV service was [p]laintiff informed that the DirecTV service [p]laintiff purchased" would work for only about ten minutes of his four-hour flight from San Juan, Puerto Rico, to Newark, New Jersey, because the aircraft flew over the ocean.[203] United elsewhere disclosed that its Wi-Fi and satellite service was limited to the continental United States but did not disclose this to passengers aboard the aircraft. The court granted United's motion to dis-

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[197] *Id.* at 544–50.

[198] No. 2:13-cv-01064-MCE-DAD, 2015 WL 2448682, at *1 (E.D. Cal. May 19, 2015).

[199] *Id.* at *2.

[200] *Id.* at *1–2.

[201] No. 2:15-cv-01926-SDW-LDW, 2015 WL 7573204, at *1 (D.N.J. Nov. 24, 2015).

[202] *Id.*

[203] *Id.*

miss holding that Wi-Fi and DirecTV were services, so the claims were preempted under the ADA.[204]

D. Air Carrier Access Act (ACAA)

In *Segalman v. Southwest Airlines Co.*,[205] plaintiff, a disabled airline passenger, appealed the dismissal of his claims against the airline under the Americans with Disabilities Act and California statutes prohibiting disability discrimination, as well as a state law negligence claim. Plaintiff alleged that Southwest improperly handled his electronic wheelchair. Plaintiff had conceded that the Americans with Disabilities Act did not apply to airport terminals as a "place of public accommodation" governed by the statute.[206] The district court also had found plaintiff's claims under California law and common law negligence to be preempted by the federal regulations promulgated pursuant to the Air Carrier Access Act (ACAA).[207] While the case was pending, the Ninth Circuit's decision in *Gilstrap* determined that the ACAA regulations preempted any applicable state standard of care, but state remedies were available if and when airlines violate the federal standards.[208] The Ninth Circuit remanded the case for the district court to determine whether California law provided remedies for any alleged violations of federal regulations.[209]

VI. AVIATION AND TRANSPORTATION SECURITY ACT (ATSA)

Baez v. JetBlue Airways Corp.[210] addressed the scope of immunity conferred on airline personnel under the Aviation and Transportation Security Act (ATSA). ATSA, passed in the immediate aftermath of September 11, 2001, requires air carrier employees to report any suspicious activity, including "any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism" to law enforcement personnel, and it en-

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[204] *Id.* at *1–3; *see also* Crown v. PHI Air Med., L.L.C., No. 15-cv-10180, 2015 WL 3409010, at *4 (E.D. Mich. May 27, 2015) (removal based on ADA preemption rejected).

[205] 603 F. App'x 595 (9th Cir. 2015).

[206] *Id.* at 596.

[207] *Id.*

[208] Gilstrap v. United Air Lines, Inc., 709 F.3d 995, 1010 (9th Cir. 2013).

[209] *Id.* at 1008.

[210] 793 F.3d 269 (2d Cir. 2015).

sures that anyone who does make such a report "shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure."[211] In effect, it preempts state law liability whenever it applies.

Plaintiff had checked in several hours before departure but did not arrive at her departure gate at JFK until just after the airplane door had closed, and she was refused boarding. She asked about the status of her checked bag. Airline personnel told her she could reclaim it when she reached her destination on a later flight. She made a cryptic reference to the possibility of a bomb in her luggage. JetBlue's gate agent reported the incident to a supervisor. As a result of the report, plaintiff was detained, questioned, and charged with making a false bomb threat. The flight was rerouted and plaintiff's bag was inspected upon landing. No bomb was found, but security personnel did find marijuana residue. Ultimately, the bomb charge was dropped, but plaintiff pleaded guilty to misdemeanor drug charges. She sued the airline, alleging a variety of state law claims, including defamation, false arrest, and intentional infliction of emotional distress, and claiming that the gate agent had misrepresented her statements. The trial court granted summary judgment to JetBlue. On appeal, the court acknowledged the differences between various versions of events, but even construing them in the plaintiff's favor, a hypothetical question about the security risk posed by a checked bag unaccompanied by its owner, which might contain a bomb, would cause a reasonable law enforcement officer to investigate. And once the security agents followed up, the decision was theirs based upon their evaluation of the evidence at hand. The airline might have been in violation of the ATSA had it *not* reported the incident. Accordingly, the Second Circuit affirmed.[212]

VII. MONTREAL CONVENTION

A. Limitations of Actions

In *Cattaneo v. American Airlines, Inc.*,[213] plaintiff, an elderly woman, was injured during a flight when a cup of boiling water spilled on her lap. She was on a domestic leg of a trip from Los Angeles to Cozumel, Mexico. She filed suit in California state

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[211] *Id.* at 274 (quoting 49 U.S.C. § 44941(a) (2001)).

[212] *Id.* at 272–75, 277.

[213] No. 15-cv-01748-BLF, 2015 WL 5610017, at *1 (N.D. Cal. Sept. 24, 2015).

court approximately two-and-a-half years after the incident (within California's statute of limitations). American removed the action to federal court and moved to dismiss based on the Montreal Convention's two-year statute of limitations. Plaintiff argued that state law governed because the injury occurred on a purely domestic leg of the flight, but the court disagreed. It held that, under prior Ninth Circuit precedent, the Montreal Convention governs when the domestic flight is part of an agreement for international carriage. Accordingly, the claim was time-barred.[214]

In *D'engle v. City of New York*,[215] plaintiff sued American Airlines and other defendants under state law for negligence and, alternatively, under the Montreal Convention. American moved to dismiss based on the Montreal Convention's two-year statute of repose and, alternatively, based on preemption by the ADA. The court granted American's motion to dismiss. Plaintiff was a passenger on an American flight from Brussels to Kingston, Jamaica. His itinerary was comprised of three legs: Brussels to New York, New York to Miami, then Miami to Jamaica. Plaintiff was a martial artist who intended to travel with both his nunchaku and his folding knife. He had reviewed the Transportation Security Administration (TSA) prohibited items list before traveling and learned that both items could be placed in checked baggage. Before boarding in Brussels, he asked a ticketing agent whether this non-carry-on baggage would be checked straight through to Jamaica and was told, erroneously, that it would.[216]

However, upon arrival at JFK, the checked baggage was returned to him, and he was told to recheck the baggage before boarding his next flight. However, before rechecking the baggage, he had to proceed through a security check point, where a security guard inquired about the contents of the baggage. He disclosed the items and was told they would be confiscated. Before he was able to board the flight, he was arrested by two Port Authority officers and charged with possession of the nunchaku because possession of such an item is illegal in New York. While in custody he allegedly was the victim of physical abuse and claimed violations of his civil rights. He was later taken into court, pleaded guilty to a violation, and paid a small fine. His claim against American was based upon the misinfor-

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[214] *Id.* at *2–3.

[215] No. 14 Civ. 8236(GBD), 2015 WL 4476477, at *1 (S.D.N.Y. July 9, 2015).

[216] *Id.* at *1–5.

mation given before boarding in Brussels and the arrest at JFK. He alleged that he would not have packed the nunchaku in his baggage had he known it would be returned to him at some point during the trip. The court held that both claims were barred under the Montreal Convention. The Montreal Convention applied because both events took place in the course of an international flight, either on the airplane or while embarking or disembarking. He failed to file within the two-year time period prescribed under the Montreal Convention. Plaintiff claimed that the statute should be tolled because he had filed a proof of claim in the Bankruptcy Court against American in the interim. However, the court concluded that equitable tolling did not apply to the Montreal Convention's statute of repose. Alternatively, the court held that the state tort negligence claim was barred under the ADA because the activity in Brussels related to a service and the agent's errors could be categorized, at best, as providing improper service.[217]

B. Defendants Subject to Montreal Convention

Baillie v. Medaire Inc.[218] arose from a medical emergency during a British Airways flight from London to Phoenix, Arizona, when a passenger experienced what turned out to be a major heart attack. The airline had contracted with Medaire to provide medical advice in the event of in-flight medical emergencies. Plaintiff, as representative of the estate of the deceased passenger, claimed that Medaire's physicians, who were consulted by radio from the aircraft, gave erroneous and inconsistent advice, which caused the airline to continue on to Phoenix rather than make an emergency landing earlier. Plaintiff sued Medaire and the physicians who had given advice. The court agreed with plaintiff that the Montreal Convention applied to medical providers who provide services made "'in furtherance of the contract of carriage of an international flight.'"[219] Here, Medaire's contract with the airline brought its services within the ambit of the Montreal Convention. The court also rejected defendants' arguments that they were immunized from liability by reason of the Aviation Medical Assistance Act of 1998 because that statute, akin to a "Good Samaritan" law, immunized medical providers

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[217] *Id.* at *8–15.

[218] No. CV-14-00420-PHX-SMM, 2015 WL 8139397, at *1 (D. Ariz. Dec. 8, 2015).

[219] *Id.* at *2 (quoting McGasky v. Cont'l Airlines, Inc., 159 F. Supp. 2d 562, 580 (S.D. Tex. 2001)).

who acted as volunteers, not those who provided services for a fee and were not even aboard the airplane. The court denied defendants' motion to dismiss.[220]

C. Venue

In *Avalon Technologies, Inc. v. Emo-Trans, Inc.*,[221] plaintiff brought a breach of contract claim arising from a contract to ship $7.5 million in computer equipment from the United States to a company in Ireland. The entire shipment was damaged in transit and the company in Ireland refused to accept the shipment, causing the equipment manufacturer to hold the distributor liable for payment. The distributor sued the freight forwarder and the air carrier in Michigan. Defendant Emo moved to transfer, pursuant to 28 U.S.C. § 1404(a), because the invoice specifically invoked New York law and set forth an agreement to jurisdiction and venue in the federal and state courts of New York or Nassau county. Emo argued that under a recent U.S. Supreme Court decision, a forum selection clause should be upheld absent a strong showing that it should be set aside and should be ordinarily given controlling weight.[222] However, plaintiff argued, and the court agreed, that Article 33 of the Montreal Convention confirmed jurisdiction on the courts of the nation-state rather than a particular court within that nation-state. Plaintiff further argued that the forum selection clause alters the rule regarding jurisdiction under the Montreal Convention by limiting plaintiff to filing suit in the United States, whereas the Montreal Convention would give plaintiff the option of filing suit in the United States, Canada, or Ireland. Thus, plaintiff argued, the forum selection clause should be deemed null and void according to Article 49 of the Montreal Convention. The court noted that under the Montreal Convention, "an action for damages 'must be brought, *at the option of the plaintiff*,' in a State-Party as long as that nation has one of the enumerated connections to the parties."[223] The forum selection clause demonstrably altered Article 33's jurisdictional prescription by seemingly requiring plaintiff to file suit in the United States, specifically in the state of New York. Because the forum selection clause altered and restricted plaintiff's option, it was deemed void under

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[220] *Id.* at *1–3.

[221] No. 14-14731, 2015 WL 3400619, at *1 (E.D. Mich. Apr. 29, 2015).

[222] *See* Atlantic Marine Construction Co., Inc. v. U.S. Dist. Ct., 134 S. Ct. 568 (2013).

[223] *Avalon Techs.*, 2015 WL 3400619, at *6 (emphasis in original).

Articles 33 and 49. Accordingly, the court denied the motion to transfer.[224]

D. Bodily Injury

In *Doe v. Etihad Airways P.J.S.C.*,[225] plaintiff was en route from Abu Dhabi to Chicago when she reached into the seat back pocket and her finger was stuck by a hypodermic syringe. The following day, she went to the doctor, who prescribed anti-viral drugs for thirty days. She was tested for human immunodeficiency virus (HIV) three times in the following year, and the tests ultimately determined that she had not developed HIV. She sued for emotional distress, particularly from the fear of developing HIV or hepatitis. Plaintiff conceded that her mental distress was not caused by her physical injury but by the possibility she may have been exposed to an infectious disease. The airline moved to dismiss and the court granted the motion. It held that her emotional distress claim was not recoverable under the Montreal Convention because it did not arise from a bodily injury.[226]

E. Delay

In *Lee v. AMR Corp.*,[227] plaintiff, a passenger on an international flight, sued American Airlines in state court. She had purchased a multi-legged trip including stops from Miami to Belize. However, when she attempted to obtain a boarding pass, the ticket agent denied her request on the mistaken belief that she did not have a proper Visa, and a second agent came to the same conclusion. As a result, she had to change her flight's destination to Guatemala and incurred over $5,000 in expenses. Defendant removed the case to federal court on federal question grounds, claiming the Montreal Convention governed the case entirely. The court denied plaintiff's Motion to Remand. Plaintiff argued that the Montreal Convention was inapplicable because, due to the airline's erroneous information, "she was not allowed to board. She was never transported, carried[,] or moved in any way by the [d]efendant or [its] agents."[228] Therefore, she had never been provided any "carriage" within the nor-

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[224] *Id.* at *5–7 (citing Montreal Convention, *supra* note 206, arts. 33, 49).
[225] No. 13-14358, 2015 WL 5936326, at *1 (E.D. Mich. Oct. 13, 2015).
[226] *Id.* at *1–4.
[227] No. 15-2666, 2015 WL 3797330, at *1 (E.D. Pa. June 18, 2015).
[228] *Id.* at *3.

mal meaning of the word but was denied entrance without basis. However, the court rejected her argument, noting that under Article 19 of the Montreal Convention, the carrier will be held liable for damages caused by delay in the carriage via air of passengers, baggage, or cargo. Furthermore, the term "international air carriage" has been deemed to extend beyond actual travel and includes claims in which a passenger is not permitted to board.[229]

In *Smith v. American Airlines, Inc.*,[230] plaintiff brought two claims under the Montreal Convention for delay and a third count for breach of contract. There was no dispute about the adequacy of the contract claim, but the court dismissed plaintiff's claims for passenger delay. The airline refused to check plaintiff in because an airline employee said that the ticket did not contain the complete flight itinerary. As a result, plaintiff had to procure alternative flight arrangements at additional expense. The court held that the claim for damages based on the airline's refusal to permit plaintiff to board the flight constituted nonperformance, rather than delay, and therefore did not state a claim. Absent a valid claim, the contract claim had to satisfy the requirements for diversity jurisdiction, but it could not do so because the amount in controversy was well below $75,000. Accordingly, the court dismissed the contract claim for lack of subject matter jurisdiction.[231]

F. Accident

In *Naqvi v. Turkish Airlines, Inc.*,[232] plaintiff brought a pro se discrimination claim in D.C. Superior Court. Turkish Airlines removed the action and moved to dismiss. The court held that the Montreal Convention preempts federal discrimination claims, so the plaintiff could only seek redress under Article 17. Plaintiff also had alleged a breach of contract claim, and the court held that contract claims that mirrored plaintiff's tortious theories of harm were also preempted by the Montreal Convention. Having determined that the Montreal Convention governed the claim, the court then analyzed plaintiff's allegations and concluded that he failed to state a compensable claim

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[229] *Id.* at *1–5.

[230] No. 2:15-CV-14313-ROSENBERG/LYNCH, 2015 WL 6550723, at *1 (S.D. Fla. Oct. 29, 2015).

[231] *Id.* at *1–3.

[232] 80 F. Supp. 3d 234 (D.D.C. 2015).

under Article 17 by failing to establish an "accident" or actionable bodily injury. Plaintiff claimed that the airline's failure to assign him a seat of his choice brought extreme emotional and physical distress that caused him "appetite loss and general malaise."[233] This "anxiety" was compounded by defendant's failure to follow certain safety protocols. However, the court held Article 17 precludes recovery for stand-alone mental injuries that do not directly result from the passenger's physical injury and also precludes compensation for physical manifestations of mental injuries. The court concluded that the "indignity, humiliation, and extreme stress"[234] plaintiff alleged may have adversely affected his flight experience but were not compensable harms under Article 17.[235]

In *Nguyen v. Korean Air Lines Co., Ltd.*,[236] an elderly, disabled Vietnamese passenger brought an injury claim when she fell down an escalator after deplaning in Dallas. She brought suit under the Warsaw Convention, predecessor to the Montreal Convention, alleging that the airline's failure to place her in the wheelchair she requested when booking her flight constituted an accident under Article 17. She relied primarily on the U.S. Supreme Court decision in *Olympic Airways v. Husain*,[237] which held that a flight attendant's repeated refusals to assist a passenger (who had requested help three times) constituted an accident. Plaintiff also relied on the district court reasoning in *Husain*, as well as *Blansett v. Continental Airlines, Inc.*[238] But the Fifth Circuit distinguished *Husain* and its progeny. In this case, the airline made arrangements to have a wheelchair available. It was not used because none of the airline employees could communicate with Ms. Nguyen, who spoke and understood only Vietnamese. For a flight traveling from Seoul to Dallas, the airline's failure to have a Vietnamese interpreter was consistent

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[233] *Id.* at 241.

[234] *Id.*

[235] *Id.* at 236, 240–41; *see also* Safa v. Deutsche Lufthansa Aktiengesellschaft, Inc., 621 F. App'x 82, 83 (2d Cir. 2015) (a brief, unreported decision affirming summary judgment because the airline's response to an inflight medical emergency did not constitute an "accident" under the Montreal Convention).

[236] 807 F.3d 133 (5th Cir. 2015).

[237] 540 U.S. 644, 647–48 (2004).

[238] *Nguyen*, 807 F.3d at 138 (citing Blansett v. Cont'l Airlines, Inc., 379 F.3d 177, 179 (5th Cir. 2004); Husain v. Olympic Airways, 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000), *aff'd sub nom.*, *Husain*, 540 U.S. 644 ("When a passenger boards an airplane, he or she should be able to expect that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected.")).

with accepted procedures and rules and did not constitute an accident within the meaning of the Warsaw Convention.[239]

In *Plonka v. U.S. Airways*,[240] plaintiff was injured during takeoff when his leg struck an inflight entertainment (IFE) box bolted on the floor near his feet. The court held that the injury was not an accident under the Montreal Convention. The box was installed in compliance with an FAA-approved design. The "box in front of [p]laintiff's seat was not defective or altered in any way."[241] The court concluded that plaintiff's injury "was not an 'unexpected or unusual event or happening'" because the box was part of the aircraft's approved design, and just under ninety other passengers were similarly seated.[242] The court treated the case as being akin to those in which an airline is not held liable for injuries arising from the normal arrangement and operation of aircraft seats. Citing *Husain*, the court held that it is the cause of the injury, not the occurrence of the injury, which must satisfy the definition of accident. Accordingly, the court granted U.S. Airways's motion to dismiss.[243]

G. Cargo

In *Batteries "R" Us Co. v. Fega Express Corp.*,[244] plaintiff brought a negligence claim for property damage for loss of cargo in state court. Defendant removed and then moved to dismiss, contending that the claim was completely preempted by the Montreal Convention. Defendant argued that the Montreal Convention applied and "bar[red] any suit in negligence against it . . . because [p]laintiffs[']s goods were stolen 'during the carriage by air.'"[245] Plaintiff argued that there was no evidence defendant issued an air waybill, the contract to indicate that defendant took possession, and thus "the theft did not necessarily occur 'during the carriage by air.'"[246] However, plaintiff's complaint clearly alleged that defendant had "accepted the shipment delivered to it" and "issued its paperwork transport to Brazil" when

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[239] *Id.* at 135–39.

[240] No. 13–7560, 2015 WL 6467917, at *1 (E.D. Pa. Oct. 27, 2015).

[241] *Id.* at *2.

[242] *Id.*

[243] *Id.* at *1–3 (citing *Husain*, 540 U.S. at 650).

[244] No. 15-21507-Civ-COOKE/TORRES, 2015 WL 4549497, at *1 (S.D. Fla. July 27, 2015).

[245] *Id.* at *3.

[246] *Id.*

the goods were stolen.[247] Therefore, the court dismissed the complaint.[248]

By contrast, in *Han v. FedEx Express*,[249] plaintiff sued FedEx in state court claiming property damage for a lost shipment of iPhones. He sought to ship them from Chicago to Dubai. His complaint alleged claims of negligence, negligent supervision, and breach of contract. FedEx removed the action and plaintiff moved to remand. FedEx claimed that the federal court had original jurisdiction because the Montreal Convention governed liability for international carriage of persons, baggage, or cargo. However, the court disagreed with FedEx's assertion that the Montreal Convention "took effect the moment Han tendered his shipment to FedEx for carriage," for "the [Montreal] Convention's preemptive effect on local law extends no further than the [Montreal] Convention's own substantive scope," which does not encompass a passenger before embarking.[250] Article 18 only imposes liability for damage sustained "during the carriage by air." The complaint did not allege a loss during carriage by air, but rather that FedEx lost the package without sending it by air. Plaintiff's claim was therefore based on nonperformance and fell outside the scope of the Montreal Convention. FedEx failed to show that the loss occurred during transport and, therefore, was found to have failed in its burden to establish that federal jurisdiction existed. The court remanded the case.[251]

Yoly Farmers Corp. v. Delta Air Lines, Inc.[252] arose from international shipment of fresh vegetables from the Dominican Republic to New York. Plaintiff contended that seven shipments of its fresh produce were mishandled and damaged due to negligence during their carriage. Delta contended that the plaintiff had failed to provide adequate notice within fourteen days as required by the Montreal Convention. The court dismissed some of the claims and not others, requiring minimal notice that simply indicated that the cargo was damaged. It denied defendant's motion as to claims where such minimal notice had been given

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[247] *Id.*

[248] *Id.* at *1–3.

[249] No. 15-cv-01582, 2015 WL 5163424, at *1 (N.D. Ill. Sept. 2, 2015).

[250] *Id.* at *2 (quoting El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 171–72 (1999)).

[251] *Id.* at *1–3.

[252] No. 15 Civ. 2774(BMC), 2015 WL 4546744, at *1 (E.D.N.Y. July 27, 2015).

and dismissed those claims where plaintiff failed to give any notice of damage.[253]

H. Other

In *Narkiewicz-Laine v. Aer Lingus Limited*,[254] plaintiff claimed he was injured onboard his flight when a flight attendant struck him in the head with a bag as she walked down the aisle. The incident occurred on a flight from Helsinki to Dublin. He claimed he was asleep when the incident occurred. Plaintiff believed he suffered a seizure and was taken by ambulance to a hospital in Dublin for medical treatment and flew home two days later. He complained of dizziness, vertigo, and headaches to his primary care physician. According to plaintiff's medical records, he complained of being "hit in [the] head by [a] piece of luggage [then] had a seizure."[255] However, he identified no expert witnesses, whereas defendant retained an expert neurologist who submitted a report saying that, "to a reasonable degree of medical certainty, [p]laintiff did *not* suffer a seizure . . . [or] . . . aggravate a preexisting seizure condition" from the alleged incident.[256] The neurologist opined that plaintiff instead suffered a panic attack, which was not related to any bodily injury. Aer Lingus moved for summary judgment, but the court denied the motion. It held that plaintiff would not be able to present testimony regarding seizures because he failed to provide any witness to establish that the incident caused a seizure. However, his factual testimony established a prima facie case that the blow to his head injured him and caused various physical manifestations "including vertigo, nausea, and loss of concentration, as well as medical bills."[257]

VIII. PRODUCT LIABILITY

A. Proof of Defect

In *Lewis v. Lycoming*,[258] the court denied summary judgment to Lycoming on a case arising from the crash of a Schweizer 269C helicopter, allegedly as a result of a defect in the design of

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[253] *Id.* at *1–3.

[254] No. 14 CV 50098, 2015 WL 5009766, at *1 (N.D. Ill. Aug. 21, 2015).

[255] *Id.* at *2.

[256] *Id.* (emphasis in original).

[257] *Id.* at *2; *see also* Lee v. AMR Corp., No. 15-2666, 2015 WL 3797330 (E.D. Pa. June 18, 2015) (removal based on Montreal Convention).

[258] No. 11-6475, 2015 WL 3444220, at *1 (E.D. Pa. May 29, 2015).

a fuel servo. Lycoming contended that there was no evidence that the servo was defective in design and that plaintiffs had failed to meet their burden of proof under either the consumer expectations test or the risk utility test. The standard of proof for defect in Pennsylvania has been clouded by the Pennsylvania Supreme Court's recent decision, which jettisoned the prior rule that had been in effect since 1978.[259] No one knows what Pennsylvania will do in lieu of the *Azzarello v. Black Brothers Co.* test. The court simply decided that summary judgment should rarely be granted and denied the motion.[260]

In *Schwartz v. Abex Corp.*,[261] the court attempted to predict what the Pennsylvania Supreme Court would do with respect to the "bare metal defense" in asbestos cases. The court held that, under Pennsylvania law, a manufacturer or supplier of a product "is not liable in *strict liability* for aftermarket asbestos-containing component parts that it neither manufactured nor supplied, even if used in connection with that manufacturer's (or supplier's) product."[262] However, a manufacturer or supplier could be liable in negligence for failure to warn of the asbestos hazards of such aftermarket component parts if it "(a) knew that an asbestos-containing component part of that type would be used with its product, and (b) knew at the time it placed its product in the stream of commence that there were hazards associate with asbestos."[263] However, the court held that a product manufacturer is not strictly liable for "asbestos-containing component parts," which it did not manufacture or supply, even if it knew the component parts would be used with its product.[264]

In *City of New York v. Bell Helicopter Textron, Inc.*,[265] the City of New York purchased two Bell 412 air-sea rescue helicopters. Slightly over a year later, while conducting a security patrol mission in one of the helicopters, the crew on board heard a loud "bang" and then experienced a sudden loss of power. The crew had to make an emergency landing in Jamaica Bay, which destroyed the helicopter. Pratt & Whitney, the engine manufac-

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[259] *Id.* at *2–4 (citing Tincher v. Omega Flex, Inc., 104 A.3d 328, 367, 376 (Pa. 2014); Azzarello v. Black Bros. Co., 391 A.2d 1020, 1026–27 (Pa. 1978)).

[260] *Id.* at *2–5.

[261] 106 F. Supp. 3d 626 (E.D. Pa. 2015).

[262] *Id.* at 628.

[263] *Id.*

[264] *Id.*

[265] No. 13 CV 6848(RJD)(SMG), 2015 WL 3767241, at *1 (E.D.N.Y. June 16, 2015).

turer, subsequently issued a recall notice for gearboxes installed in certain engines, including the subject engine because of a possible anomaly that causes both a fracture of the gear shaft and a resulting loss of power. The National Transportation Safety Board (NTSB) determined that the fracture of the gear shaft caused the power loss in the subject engine. The court granted Bell's motion to dismiss, noting that Bell had made no warranty of and disclaimed all liability for the Pratt engine and disclaimed all other express and implied warranties, including merchantability and fitness for a particular purpose. Bell had limited the City's remedies to repair or replacement of the helicopter's parts, specifically excluding any remedy for incidental and consequential damages, defined broadly to include damage to the helicopter. The court held that such a warranty was valid as between the City and the manufacturer and that the City's requested damages were barred by the warranty's limitations of remedies.[266]

B. Statute of Repose

In *Linfoot v. McDonnell Douglas Helicopter Co.*,[267] plaintiffs, the pilot and co-pilot of an AH-6M model helicopter, crashed during a mission southwest of Baghdad; "the subject helicopter had been 'substantially rebuilt' a number of times since it was manufactured and delivered to the Army in 1981 by [defendant's] predecessor, Hughes Helicopter."[268] Defendant moved for summary judgment based on the ten-year Tennessee statute of repose. The court had to determine whether the issue was governed by the law of Tennessee or Kentucky. Kentucky also had a statute of repose, but one that only created a presumption that the product was not defective if the injury occurred "more than five . . . years after the date of sale to the first consumer or more than eight . . . years after the date of manufacture."[269] The helicopter had been based at Fort Campbell for more than thirty years. Fort Campbell straddles the Kentucky and Tennessee border. The helicopter had been based at the Fort Campbell airfield, on the Kentucky side, since at least September 1982. Plaintiffs resided—and brought suit—in Tennessee.[270]

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[266] *Id.* at *1–3; *see also* Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 432, 439 (M.D. Penn. 2010).

[267] No. 3:09-cv-639, 2015 WL 1190171, at *1 (M.D. Tenn. Mar. 16, 2015).

[268] *Id.*

[269] *Id.* at *2, *4.

[270] *Id.* at *1, *3–4.

Applying the Second Restatement of Conflicts, the court ultimately decided that Kentucky law applied. The modifications to the helicopter after sale occurred in Kentucky, and if negligent maintenance of the helicopter or its parts occurred at all, the evidence indicating such defect or negligence occurred in Kentucky as well. The court rejected or refused to give predominance to plaintiffs' residence or the inclusion of a Tennessee statutory claim. Instead, the court concluded that the most significant factor was that the relationship between the parties was centered in Kentucky. Both plaintiffs' regiment and the Fort Campbell airfield were located on the Kentucky side of the base, and the helicopter was delivered to Kentucky and based there for more than thirty years. Furthermore, the court found no incongruity by applying Kentucky law to the claims of Tennessee residents. The relevant Tennessee policy was "to limit the number of products liability actions and thereby reduce costs associated with litigation and product liability insurance."[271] The rebuttable presumption under Kentucky law also limited such actions and the related costs and was consistent with Tennessee's policy. Furthermore, "Kentucky further[ed] an additional policy effected through its product liability laws: protecting Kentucky citizens and those injured within its boundaries."[272] Although plaintiffs were Tennessee residents, the court deemed this policy consideration relevant. Accordingly, the court denied defendant's motion for summary judgment.[273]

In *SOCAR (Societe Cameroonaise d'Assurance et de Reassurance) v. Boeing Co.*,[274] the court in New York rejected a hull subrogation claim arising from an aircraft fire in the Republic of Cameroon in 1984, choosing New York's two shorter statutes of limitations over Cameroon's thirty-year statute of repose.[275] And the Illinois Court of Appeals affirmed summary judgment obtained by Boeing in *Hutton v. Boeing Co.*[276] based on Illinois's product liability statute of repose in an incident in which the pro se passenger-plaintiff was struck by a ceiling filler panel on a twenty-one-year-old Boeing 737-300.[277]

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[271] *Id.* at *6.

[272] *Id.*

[273] *Id.* at *5–6.

[274] 144 F. Supp. 3d 391 (E.D.N.Y. 2015).

[275] *See id.* at 396–98.

[276] 2015 IL App. (1st) 142697-U (Oct. 29, 2015).

[277] *See id.*, ¶¶ 9, 57, 59.

IX. FEDERAL TORT CLAIMS ACT (FTCA)

A. Limitations of Actions

In *United States v. Wong*,[278] a 5-4 decision, the Supreme Court held that the Federal Tort Claims Act (FTCA) statute of limitations was not "jurisdictional" and that claims against the federal government could therefore be subject to "equitable tolling."[279] The statute provides that a claim "shall be forever barred" unless the administrative claim is filed within two years, and the lawsuit filed within six months of denial of the administrative claim.[280] In two separate instances, plaintiffs failed to meet the deadlines prescribed by 28 U.S.C. § 2401(b) but argued that the deadlines should be equitably tolled. In one case, plaintiff claimed that the government's concealment of key information caused plaintiff to miss the two-year deadline for filing the administrative claim; in the other, plaintiff sought to amend the complaint to add an FTCA claim, but the court failed to rule on the motion for leave to amend until after the six-month deadline for filing had expired.[281] A statute of limitations may be equitably tolled "when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline."[282] The presumption that a statute containing a limited waiver of sovereign immunity may be equitably tolled can be rebutted, but the rebuttal requires the government to show that Congress intended to forbid equitable tolling, i.e., that it intended compliance with the statute to be jurisdictional. In the case of the FTCA, the Court concluded that nothing in the text, context, or legislative history of the FTCA showed that Congress intended the statute of limitations to be jurisdictional.[283]

Following the decision in *Wong*, a number of lower courts have reconsidered prior decisions and given plaintiffs opportunities to pursue equitable tolling arguments if the argument was preserved.[284] More recently, in *Menominee Indian Tribe of Wiscon-*

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[278] 135 S. Ct. 1625 (2015) (citing 28 U.S.C. § 2401(b) (2011)).

[279] *Id.* at 1626.

[280] 28 U.S.C. § 2401(b) (2011).

[281] *Wong*, 135 S. Ct. at 1627.

[282] *Id.* at 1631 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

[283] *Id.* at 1629–32.

[284] *See, e.g.*, Mark v. N. Navajo Med. Ctr., 631 F. App'x 514, 516–17 (10th Cir. 2015); Hawver v. United States, 808 F.3d 693, 694 (6th Cir. 2015); *see also* Dominguez v. United States, 799 F.3d 151, 154 (1st Cir. 2015) (equitable tolling argu-

sin v. United States,[285] the Supreme Court made clear that a litigant is entitled to equitable tolling of a statute of limitations "only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"[286] The Court reaffirmed that this test has two "'elements,' not merely factors of indeterminate or commensurable weight."[287] The diligence prong "covers those affairs within the litigant's control; the extraordinary-circumstances prong, by contrast, is meant to cover matters outside its control."[288] Therefore, equitable tolling is allowed "only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control."[289]

B. Air Traffic Control

Turturro v. United States[290] arose from the crash of a Grumman AA-1C in which a student and instructor were performing touch-and-goes at the Northeast Philadelphia Airport. Simultaneously, an Agusta 139 helicopter was taking off on a training flight to Lancaster, Pennsylvania. Plaintiff contended that errors by the United States as air traffic controllers and the Agusta pilots caused the Grumman pilots to be "startled," fearing that they were facing a potential midair collision, and stalled the aircraft. However, the district court granted summary judgment to both defendants and the Third Circuit affirmed.[291]

The air traffic controller made a number of errors that the court found were not relevant to the cause of the crash. The court found that there was no reliable evidence that the Grumman pilots did have a startled reaction. As for the Agusta pilots, the court rejected plaintiffs' three contentions. First, they contended that the Agusta pilots should not have requested a westerly takeoff that took them toward the flow of fixed-wing traffic. But the court concluded that the Agusta pilots acted properly in requesting such a takeoff given the wind direction. Further-

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ment had been waived, but the court reached the same result based on the date-of-discovery rule).

[285] 135 S. Ct. 750 (2016).

[286] *Id.* at 755 (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).

[287] *Id.* at 756 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[288] *Id.*

[289] *Id.* (emphasis in original).

[290] 629 F. App'x 313 (3d Cir. 2015).

[291] *Id.* at 321, 325.

more, the court decided that the Airman's Information Manual instruction that helicopter pilots should "avoid the flow of fixed-wing aircraft" did not apply to larger, faster helicopters where the pilots are departing from a field with air traffic control services.[292] Second, plaintiffs argued that the Agusta pilots should have clarified that they planned to go to the northwest when they requested a departure in a westerly direction. However, the crash occurred before they even had a chance to turn to the north, so the purported ambiguity was immaterial. Third, plaintiffs contended that the Agusta pilots were negligent for failing to respond to a direction from the air traffic controller to "make right traffic."[293] The court rejected this argument because plaintiffs offered no evidence that a single missed call constituted a lack of situational awareness; the mere failure to respond to one callout, without more, could not amount to negligence. Nor did the Agusta pilots' "collective conduct" constitute negligence for "bringing them too close to the Grumman."[294] There was no evidence the two aircraft were ever closer than 1,000 feet, and the two aircraft got only fifty feet closer to each other between the time when the controller delivered the direction to make right traffic and when the Grumman pilots lost control. Accordingly, the Third Circuit affirmed the grant of summary judgment.[295]

C. Federal Employees

In *Vanderklok v. United States*,[296] plaintiff brought suit under the FTCA, claiming a TSA baggage screener violated plaintiff's constitutional rights during an altercation at the Philadelphia International Airport. The altercation began when the TSA screener saw a heart monitoring watch and some Power Bars in his carry-on bag and asked plaintiff to submit to additional screening because he thought these items "looked like the components of an explosive device."[297] The altercation led to plaintiff's arrest. The court granted the government's motion to dismiss, however. The FTCA excludes most claims based on intentional torts but carves out "acts or omissions of investigative or law enforcement officers of the United States . . . ."[298] The

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[292] *Id.* at 321–22.
[293] *Id.* at 322.
[294] *Id.* at 323.
[295] *Id.* at 321–23, 325.
[296] 142 F. Supp. 3d 356 (E.D. Pa. 2015).
[297] *Id.* at 358 (internal quotation marks omitted).
[298] *Id.* at 360 (citing 28 U.S.C. § 2680(h) (2006)).

court held, consistently with a number of other courts, that although TSA screeners are federal employees, they are not "officers" of the United States. Therefore, the exception permitting lawsuits based on the intentional misconduct of federal officers did not apply and the claims were dismissed.[299]

D. Federal Employees Compensation Act (FECA)

In *Krogen v. United States*,[300] plaintiff was working as an unpaid U.S. Forest Service volunteer on a wildlife restoration project at Sequoia National Park. He was engaged in an operation in which he wore a vest attached to a hoist on a helicopter. The connection broke, and he fell forty feet to the ground. Plaintiff sued the United States. The government moved to dismiss because the Federal Employees Compensation Act (FECA) preempts all other claims and remedies against the government. Plaintiff argued that FECA was inapplicable because he was externally sponsored. The court disagreed, finding FECA applicable, but stayed the action in the event that the FTCA statute of limitations ran and the Department of Labor later found that FECA did not apply.[301]

X. CLASS ACTIONS

In *Volodarskiy v. Delta Air Lines, Inc.*,[302] various air travelers sued Delta for compensation on their own behalf and a nationwide class of persons inconvenienced "when their flights from airports located in the European Union [(EU)] were delayed for more than three hours or cancelled on short notice."[303] They filed suit under the Class Action Fairness Act. Their claim was based on a consumer protection regulation promulgated by the European Parliament, which set forth "standardized compensation rates . . . for cancellations and long delays of flights" from airports located in member states.[304] Delta argued that the regulation could not be enforced outside the EU. The district court held that it could not enforce the regulation and dismissed the case. The Seventh Circuit affirmed. The regulation requires each member state to designate a national administra-

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[299] *Id.* at 357–63.

[300] No. 1:14-cv-1266-LJO-MJS, 2015 WL 5095836, at *1 (E.D. Cal. Aug. 28, 2015).

[301] *Id.* at *2, *5.

[302] 784 F.3d 349 (7th Cir. 2015).

[303] *Id.* at 349–50.

[304] *Id.* at 350.

tive body to handle enforcement responsibilities. The regulation did not have a forum limitation clause, but it did not clearly empower courts in non-member countries to enforce it. Rather, it appeared to contemplate that passenger claims would be handled by administrative bodies and courts in member states. The court concluded that asking the U.S. court to "wade into an area of EU law that is fraught with uncertainty risks offending principles of international comity."[305] This is especially so where there is no domestic analog to the remedy. Accordingly, the court upheld the district court's dismissal of the action.[306]

In *Berkson v. Gogo LLC*,[307] Judge Weinstein gave preliminary approval of a class action settlement of a claim based on the purchase of Wi-Fi service connections on airline flights. Gogo sold such service for ten dollars per day, or a monthly pass for forty dollars. However, it allegedly did not notify customers of continuing new charges if the customer failed to cancel the service.[308]

The parties' proposed settlement gave users who had purchased monthly services "promo codes" that afforded limited free use of Gogo's service on future flights. The named plaintiffs would receive up to $5,000 each, and plaintiff's class counsel was to receive up to $750,000. The court noted that "coupon class settlements" were generally disfavored by Congress, other courts, and commentators. The principal component of this proposed settlement did "have the flavor and scent of coupons."[309] Judge Weinstein "suggested" that the administrator of the settlement attempt to set up a market for the promo codes, enabling them to convert them to a cash equivalent. The court also held that the plaintiffs' attorney fees would be determined at a reasonableness hearing.[310]

In *Rambarran v. Dynamic Airways, LLC*,[311] the court denied a class action certification in a Montreal Convention Article 19 flight delay case. The named plaintiffs alleged they purchased roundtrip tickets for a Christmas flight from New York to Guyana and that the airline unreasonably delayed this and other New York to Guyana flights in violation of Article 19. They

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[305] *Id.* at 356.
[306] *Id.* at 350, 352–53, 356–57.
[307] 147 F. Supp. 3d 123 (E.D.N.Y. 2015).
[308] *Id.* at 126–27.
[309] *Id.* at 133.
[310] *Id.* at 126–28, 133–34.
[311] No. 14-cv-10138 (KBF), 2015 WL 4523222, at *1 (S.D.N.Y. July 27, 2015).

sought to certify two classes of passengers who experienced delays on New York to Guyana flights operated by Dynamic. The court denied the motion primarily because of failure to establish typicality and predominance. Plaintiffs tried to avoid the adverse decision by filing what the court described as an "eleventh-hour, 59th-minute motion to compel discovery" for the purpose of putting together the requisite factual record in response to defendant's opposition.[312]

The court also denied certification for the "unusual" reason that plaintiffs failed to satisfy the adequacy requirement for class certification. Its proposed class counsel was found to have lacked the qualifications to litigate such a case as the class action. He "used an incorrect legal standard on the motion, failed to recognize plaintiffs' burden and that this burden [wa]s distinct from and unrelated to any burden under the Montreal Convention"; he "failed to assemble the minimal factual record necessary" to show that the Rule 23 requirements were satisfied; and he "failed to assemble from his own clients necessary factual materials or to timely file a motion to compel discovery or seek an extension of the class certification briefing schedule based on the need to obtain additional evidence."[313] Nor was his effort to serve as class counsel helped by the undisputed facts presented by the airline: that the plaintiff verbally threatened the gate agents in a loud and abusive manner and stated, "I'm a big time U.S. lawyer and we're going to sue the hell out of Dynamic and make sure they never fly to this country again."[314] His outburst caused "such chaos that the Port Authority Police were called."[315] Worse yet, the airline's submission showed that the named plaintiff had been disbarred in New York for mismanagement of client escrow funds, and he had even pleaded guilty to concealing a person from arrest, a felony.[316]

XI. INSURANCE

A. Compulsory Insurance Doctrine

In *Northwest Airlines, Inc. v. Professional Aircraft Line Service*[317] (PALS), Northwest had previously taken a default judgment

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[312] *Id.*
[313] *Id.*
[314] *Id.* at *3.
[315] *Id.*
[316] *Id.* at *1–3.
[317] 776 F.3d 575 (8th Cir. 2015).

against the defendant, a company that, under contract, serviced Northwest's aircraft at McCarran Airport in Las Vegas. PALS had five million dollars in liability insurance, as required by the local government in Nevada. Northwest brought suit against PALS, which failed to notify its insurer. Northwest thereupon took a default judgment. The insurer subsequently filed a declaratory judgment action, alleging it had no duty to provide coverage because of PALS's failure to cooperate or provide notice of the judgment. The trial court granted summary judgment against the insurer, and the Eighth Circuit affirmed. It applied the compulsory insurance doctrine, holding that the insurer could not rely on defenses it would otherwise have against the insured, such as failure to cooperate or provide notice, where the licensing authority requires insurance for the public's protection. The court acknowledged that the doctrine was ordinarily applied in cases arising from mandatory automobile liability insurance, but the court held that the same reasons supported its application here.[318]

B. Ripeness of Declaratory Judgment Action

In *Quest Aviation, Inc. v. NationAir Insurance Agencies, Inc.*,[319] plaintiff Quest had been sued in state court for three wrongful death claims, alleging negligence as a charter operator. Quest had purchased an aviation policy with a three million dollar per occurrence policy limit and a general liability policy with a twenty million dollar per occurrence limit. The wrongful death claims sought in excess of three million dollars. Quest brought a declaratory judgment proceeding against the broker who procured the insurance policies, alleging that Quest did not understand that the general liability policy contained an aviation exclusion and that it would have acted differently had it known. Defendant broker moved to dismiss, asserting that the action was not ripe because it was purely hypothetical whether plaintiff would even be liable for more than its three million dollar limit of its aviation policy. The court disagreed, holding that such an action was ripe because Quest faced a "legitimate risk" of an excess award. The court rejected the insurer's contention that Quest had failed to show an actual injury because it was presently being defended and had not been held liable for an excess judgment, but the court held that in a declaratory judgment

[318] *Id.* at 576–77, 582.

[319] No. 1:14-CV-01025-RAL, 2015 WL 1622031, at *1 (D.S.D. Apr. 10, 2015).

proceeding, it was sufficient to show the risk of excess liability. It also held that a declaratory judgment proceeding was appropriate when the ongoing state proceeding was not a parallel action, raised different issues, and served a useful purpose.[320]

C. Life Insurance

In *Williams v. National Union Fire Insurance Co. of Pittsburgh*,[321] plaintiff's husband died as a result of a pulmonary embolism brought about by deep vein thrombosis (DVT) during twenty-eight hours of international flights. The widow sought recovery under a life insurance policy purchased by her husband's employer, under which he was eligible for a one million dollar accidental death benefit if injured while traveling by air. The trial court granted summary judgment to the insurer on the basis that the death did not result from an "accident . . . external to the body" as required by the policy.[322]

On appeal, plaintiff argued that the term "accident" was ambiguous and that the "external to the body" requirement was satisfied because the death resulted from circumstances that originated outside his body. However, the Ninth Circuit concluded that the policy endorsement "d[id] not turn on whether 'unexpected or unintended *harm* arose from an external cause during passenger air travel' . . . but on whether there were external, *harm-causing circumstances* that were themselves unexpected and unintended."[323] The decedent was not "prevented from moving around the planes, drinking fluids, or taking other measures to minimize the risk of DVT," and "[t]here was no reported intervention by airline personnel that could have affected [his] physical well-being."[324] Therefore, the court concluded no "person of average intelligence and experience" would find that he died "as a direct result of an unintended, unanticipated *accident that is external to the body*."[325] Moreover, the court concluded that, as "popularly understood," an accident is an "unexpected occurrence separate from the harm that results

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[320] *Id.* at *1–7.

[321] 792 F.3d 1136 (9th Cir. 2015).

[322] *Id.* at 1137.

[323] *Id.* at 1141 (citations omitted).

[324] *Id.*

[325] *Id.*

from it."[326] Accordingly, the court affirmed the trial court's grant of summary judgment to the insurer.[327]

In *Florida Tube Corp. v. MetLife Insurance Co. of Connecticut*,[328] the Eleventh Circuit affirmed a grant of summary judgment to MetLife on the ground that the plaintiff had failed to provide satisfactory evidence of death. The beneficiaries claimed that the insured took off in his airplane from the Dominican Republic, going to his family's home in Puerto Rico, but never completed the flight. Neither the wreckage nor the body was found. The pilot's son obtained a death certificate from the Dominican Republic, which wrongly listed the date of death as five days before the date he took off. The son later filed a death claim form that also incorrectly listed the date of death. Due to concerns about the authenticity of the second death certificate, the Dominican Republic officials formed a commission to investigate and report on its accuracy and later declared the death certificate "full of irregularities."[329] MetLife initiated its own investigation and failed to find any evidence of location or status. The NTSB report described the alleged accident in unclear terms and did not name the pilot, stating only that the airplane "presumably collided with coastal water," and "[t]he pilot . . . [is] presumed decesased [sic]; the airplane is presumed destroyed."[330] MetLife concluded there was insufficient evidence of his death. The court held that the beneficiaries had failed to provide sufficient evidence to satisfy the unambiguous requirements of the policy, which required "a copy of a certified decree of a court of a competent jurisdiction as to the finding of death; a written statement by a medical doctor who attended the deceased; *or any other proof satisfactory to us*."[331] Thus, it was within MetLife's discretion to decide that the circumstantial evidence of his death was unsatisfactory.[332]

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[326] *Id.* (citing Rodriguez v. Ansett Austl. Ltd., 383 F.3d 914, 919 (9th Cir. 2004) (holding that the death of an airline passenger as a result of DVT was not accidental under Article 17 of the Warsaw Convention)).

[327] *Id.* at 1139–42.

[328] 603 F. App'x 904 (11th Cir. 2015).

[329] *Id.* at 906.

[330] *Id.* (alterations in original).

[331] *Id.* at 907 (emphasis in original).

[332] *Id.* at 906–08.

XII. PUNITIVE DAMAGES

In *Johnson v. United States*,[333] a criminal case with potential implications for civil punitive damages claims, the Supreme Court held that the imposition of an increased criminal sentence under the Armed Career Criminal Act residual clause violated the Due Process Clause of the Fifth Amendment.[334] The Court noted that the Due Process Clause protects against deprivations of life, liberty, or property "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes . . . or so standardless that it invites arbitrary enforcement."[335] A handful of cases so far have extended it to civil claims.[336] The Court noted that "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'"[337] These principles apply both to statutes "defining elements of crimes" and to "statutes fixing sentences."[338] The statute requires a "categorical approach" to determine whether a particular criminal statute involves burglary, arson, or extortion, involves the use of explosives, or "otherwise involves conduct that presents a serious potential risk of physical injury to another."[339] Under the categorical approach, the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'"[340] The Court concluded that the residual clause was unconstitutionally vague: first, it left "grave uncertainty about how to estimate the risk posed by a crime. It tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements."[341] For example, witness tampering might involve offering a bribe or making violent threats to a witness. Second, the residual clause left uncertainty as to the amount of risk required for a crime to con-

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[333] 135 S. Ct. 2551 (2015).

[334] *Id.* at 2555.

[335] *Id.* at 2556.

[336] *See* Dimaya v. Lynch, 803 F.3d 1110, 1113 (9th Cir. 2015); Mosley v. City of Wickliffe, No. 1:14-CV-934, 2015 WL 9304733, at *3 (N.D. Ohio Dec. 21, 2015).

[337] *Johnson*, 135 S. Ct. at 2556–57 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

[338] *Id.* at 2557 (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)).

[339] *Id.* (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)).

[340] *Id.* (citing Begay v. United States, 553 U.S. 137, 141 (2008)).

[341] *Id.*

stitute a violent felony and forced courts to interpret "serious potential risk" in light of hypothetical circumstances surrounding the four enumerated crimes.[342] Even though there are some circumstances in which criminal violations of such laws clearly fall within the statute, the court noted that its prior holdings contradict the theory that this is sufficient to render a vague provision constitutional: "[f]or instance, we have deemed a law prohibiting grocers from charging an 'unjust or unreasonable rate' void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable."[343] The Court further noted that, generally, "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'"[344] However, the residual clause "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime."[345] The "elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," and this inquiry thereby offers "significantly less predictability than one '[t]hat deals with the actual, not . . . imaginary[,] condition other than the facts.'"[346]

XIII. AIRPORTS AND NUISANCE

City of Dallas v. Delta Airlines, Inc.,[347] involved "musical chairs" over the limited number of gates at Love Field Airport in Dallas, Texas, giving rise to disputes between Southwest, Delta, and American concerning the City's daunting task of allocating gates with regard to (1) the constraints of a unique federal law restricting interstate flights to and from Love Field; (2) lease agreements with the airlines; (3) vague contractual obligations in a "five party agreement" between the City of Dallas, the City of Fort Worth (collectively, DFW), the DFW Airport Board, Southwest, and American; and (4) the absence of the airlines'

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[342] *Id.* at 2558.

[343] *Id.* at 2561 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921)).

[344] *Id.* (alteration in original) (quoting Nash v. United States, 229 U.S. 373, 377 (1913)).

[345] *Id.*

[346] *Id.* (quoting Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223 (1914)).

[347] No. 3:15-CV-2069-K, 2016 WL 98604, at *1–3 (N.D. Tex. Jan. 8, 2016).

"exclusive use" of gates. Instead, it provided for "preferential" use of certain gates, without defining what that meant. Delta sought "accommodation" to permit it to use gates; the other airlines refused. The DOT told the City that it should accommodate Delta, but the City was unable to obtain voluntary accommodation from the airlines and asked the court to decide. The court granted Delta temporary injunctive relief, finding that the threatened injury to Delta by being removed from the airport would include damage to reputation, name, brand, goodwill, and monetary harm, and it would constitute a disservice to the public. By contrast, the court found that Southwest was unlikely to succeed on the merits and could not show irreparable harm. Even though Southwest had paid $120 million to sublease the two gates at issue, that did not convert its "preferential use" into "exclusive use," and the monetary loss did not cause irreparable harm.[348]

In *Lewis v. Bell Helicopter Textron, Inc.*,[349] plaintiffs brought nuisance claims against Bell, seeking damages, a temporary injunction, and a permanent injunction. Plaintiffs alleged private nuisance, based upon the flight path used by Bell in operating its helicopter training academy at a private helicopter pad. Plaintiffs lived approximately a half-mile from the helicopter pad. They alleged that Bell's training staff began to adopt a flight path persistently to the east of plaintiffs' western fence line and in very close proximity to their home, typically beginning at 7:30 a.m. and continuing unceasingly until at least 8:00 p.m., sometimes as late as 11:30 p.m. The training schedule and flight path resulted in flights coming near the home approximately every five minutes, depending on how many were in the air at any given time.[350]

Bell contended that the claims were preempted "because the United States government 'has exclusive sovereignty of airspace in the United States.'"[351] The trial court denied plaintiffs' request for a temporary injunction and subsequently granted summary judgment for Bell. The Texas Court of Appeals affirmed, finding that the claim for injunctive relief was preempted. The Federal Aviation Act declares that the government of the United States "has exclusive sovereignty of airspace of the United

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[348] *Id.* at *1–3, *6, *14.

[349] No. 02-14-00065-CV, 2015 WL 3542887, at *1 (Tex. App.—Fort Worth Aug. 6, 2015, pet. denied).

[350] *Id.*

[351] *Id.*

States."[352] It further empowers the administrator of the FAA "to develop plans 'for the use of navigable airspace'" and to assign "the use of the airspace necessary to ensure the safety of aircraft *and* the efficient use of airspace," as well to "prescribe air traffic regulations on the flight of the aircraft."[353] Bell provided evidence that the training flights took place in Class D airspace and pointed out that "the federal government has set up regulations to govern flight in that space. The[ ] regulations and statutory provisions indicate[d] that the federal government ha[d] exclusive sovereignty over assigning the use of United States airspace" to use that airspace efficiently, as well as to protect individuals and properties on the ground.[354] The court cited *City of Burbank v. Lockheed Air Terminal Inc.*[355] for the proposition that federal law preempts local attempts to use flight path regulation to address aircraft noise. Therefore, a trial court order enjoining a particular flight in that airspace would be regulating in the field occupied exclusively by the federal government.[356]

The court also rejected plaintiffs' argument that federal field preemption did not apply because the flights at issue were purely intrastate, noting that under *Burbank*, when the federal government regulates flight paths, no state government may also do so. Plaintiffs argued that Bell was free to change its flight paths because it had done so in the past to accommodate plaintiffs' complaints and that therefore injunctive relief did not necessarily impinge upon federal sovereignty. The court disagreed, noting that "whether a new flight path is *possible* is not relevant" in deciding whether the trial court may grant injunctive relief.[357] Rather, "the question is whether, as a remedy for nuisance, a Texas court has the authority to *compel* the new flight path through the application of state law. The answer to that question is no."[358] However, the court held that Bell had failed to establish that plaintiffs' claim for monetary damages was also preempted. The fact that the court could not order Bell to follow a particular path for its training flights because it lacked authority to control what happens in Class D airspace did not necessarily prevent plaintiffs from recovering damages for Bell's

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[352] *Id.* at *6.
[353] *Id.*
[354] *Id.*
[355] 411 U.S. 624 (1973).
[356] *Id.* (citing *City of Burbank*, 411 U.S. at 625–26).
[357] *Id.*
[358] *Id.*

flights, to the extent those flights created a nuisance. Accordingly, the court reversed as to plaintiffs' claim for monetary damages until and unless Bell carried its burden to establish that the nuisance damages claim was also preempted.[359]

In *Anne Arundel County v. Bell*,[360] the county adopted a comprehensive zoning plan. Two districts in the county included the majority of the property in the vicinity of Baltimore-Washington International Thurgood Marshall Airport, as well as all the property in the county along the Baltimore-Washington Parkway corridor. The comprehensive zoning plan altered the previous zoning classifications of 264 of 59,045 parcels or lots. Property owners and community organizations challenged the county's actions. The Maryland Court of Appeals held that the landowners did not have standing to challenge the comprehensive plan because adoption of the plan was a legislative rather than an adjudicative action. Nor did the landowners have taxpayer standing, which is limited to claims of illegal or ultra vires actions by governmental entities.[361]

In *Friends of the East Hampton Airport, Inc. v. Town Of East Hampton*,[362] airport users challenged the validity of local regulations that established curfews for the airport and additional restrictions on "noisy aircraft," prohibiting noisy aircraft from using the airport more than twice per week from May through September. Plaintiffs claimed that these local regulations were preempted by the Airport and Airway Improvement Act of 1982 (AAIA) and the Airport Noise and Capacity Act of 1990 (ANCA).[363] In 2005, following previous litigation after the Town's acceptance of an FAA Airport Improvement grant, the FAA settled with the Committee to Stop Airport Expansion and agreed not to enforce ANCA noise and access restrictions unless the Town wished to remain eligible for future grants of federal funding. The court acknowledged federal preemption "over the regulation of aircraft and airspace, subject to a more 'limited role for local airport proprietors in regulating noise levels at their airports.'"[364] This "'proprietor exception' . . . permits a

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[359] *Id.* at *2, *6–9, *11.

[360] 113 A.3d 639 (Md. 2015).

[361] *Id.* at 643–44, 667.

[362] 152 F. Supp. 3d 90 (E.D.N.Y. 2015).

[363] *Id.* at 96–97 (citing 49 U.S.C. §§ 47101–47131 (Supp. 2013); 49 U.S.C. §§ 47521–47533 (Supp. 2013)).

[364] *Id.* at 108 (quoting Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81, 88 (2d Cir. 1998)).

local municipality, acting in its proprietary capacity, as opposed to its police power, to adopt 'reasonable, nonarbitrary and nondiscriminatory regulations of noise and other environmental concerns at the local level.' "[365] The court found that the plaintiffs did not specifically allege that the local curfew laws were unreasonable or arbitrary and that plaintiffs failed to demonstrate that the curfews posed any safety risk. However, it found that the "One-Trip Rule" was drastic and that there was no indication that a less restrictive measure would alleviate the noise concern. Accordingly, the court issued a preliminary injunction against the One-Trip Rule but denied it as to the curfew rules.[366]

In re Flyboy Aviation Properties, LLC[367] arose from an escalating dispute between neighboring property owners. Plaintiff was the owner of the Mathis Airport; defendant was a permissive user of one of the hangars at the airport. Through a series of events, they became hostile and sued each other for trespass, nuisance, and more for the various slings and arrows they inflicted upon each other. The bankruptcy judge found that each of them had committed trespass, awarded nominal damages, and allowed defendant an unsecured bankruptcy claim of $600.[368]

In *Pofolk Aviation Hawaii, Inc. v. Department of Transportation for State*,[369] the Hawaii Supreme Court upheld the authority of the state Department of Transportation Airport Division to impose landing fees, rejecting a tour operator's contention that a state statute limited the discretion of the state agency to impose such fees.[370]

In *DBT Yuma, L.L.C. v. Yuma County Airport Authority*,[371] the Arizona Supreme Court rejected plaintiff's attempt to render Yuma County vicariously responsible for the breach of an airport sublease by the Yuma County Airport Authority. Plaintiff relied on a state statute that made a nonprofit corporation (lessee) a "body politic and corporate," claiming that this made it an agent or instrumentality of the County and, thus, rendered the County responsible for the Authority's breach of the sub-

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[365] *Id.* (internal quotation marks omitted) (quoting British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75, 84 (2d Cir. 1977)).

[366] *Id.* at 104–05, 109–10.

[367] 525 B.R. 510 (Bankr. N.D. Ga. 2015).

[368] *Id.* at 517–23, 530–31.

[369] 354 P.3d 436 (Haw. 2015).

[370] *Id.* at 437.

[371] 361 P.3d 379 (Ariz. 2015).

lease.[372] The court rejected the argument, holding that statutory designations such as those used in the statute did not make the Authority an agent of the County.[373]

XIV. CIVIL PROCEDURE

A. *Twiqbal*

In *Cheramie v. Panther Helicopters Inc.*,[374] plaintiff was injured in a helicopter crash in the Gulf of Mexico. Defendant operated the helicopter to transport employees of an oil and gas company to an offshore oil platform. As a preliminary matter, the court determined that the federal maritime law applied to the claim because the sinking of an aircraft in navigable waters was the type of incident that poses more than a fanciful risk to commercial shipping. Furthermore, the crash occurred in the Gulf of Mexico, which constituted navigable waters. The court ruled that the complaint failed to allege when or how the engine manufactured by defendant became defective. Because of the failure to allege an essential element in this product liability claim, the court dismissed the claim with leave to amend.[375]

B. Discovery

Tyer v. Southwest Airlines, Co.[376] arose from a discovery dispute over post-accident photos of the plaintiff. Plaintiff, a disabled veteran and retired police officer, alleged she sustained a serious back injury as the result of a fall during boarding. Southwest requested production of all post-accident photos of plaintiff. The court agreed, noting that "[w]here a plaintiff alleges that a defendant has caused her personal injuries, she places her physical condition at issue."[377] Therefore, post-injury photos of plaintiff were relevant and discoverable. However, the court also held that plaintiff was not required to produce other photos that did not depict plaintiff. It also held that if there were any responsive photos that depict any "intimate or other highly sensitive matter," plaintiff could withhold them provided she produce a log

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[372] *Id.* at 380 (citing A.R.S. §§ 24-8424(A)(1), (3) (2011)).
[373] *Id.* at 380–83.
[374] No. 14-1597, 2015 WL 693221, at *1 (E.D. La. Feb. 18, 2015).
[375] *Id.* at *1–4.
[376] No. 14-CV-62899-BLOOM/VALLE, 2015 WL 4537250, at *1 (S.D. Fla. July 27, 2015).
[377] *Id.* at *2.

listing the photos and detailing the specific reason why they are being withheld.[378]

C. Post-Trial Motions

In *Bouret-Echevarría v. Caribbean Aviation Maintenance Corp.*,[379] plaintiffs brought a wrongful death product liability action against Robinson Helicopter Company and a negligent maintenance claim against Caribbean Aviation Maintenance Corp. Defendants obtained a defense verdict at trial. Plaintiffs contended that prior to jury deliberations, plaintiff's counsel "received a confidential settlement offer of $3.5 million, comprised of $3 million from one defendant and $500,000 from another defendant."[380] Defendants each disputed aspects of this assertion. However, sixteen months after the trial, plaintiff filed a motion under Federal Rule of Civil Procedure 60(b)(6), seeking an evidentiary hearing to assess an allegation that suggested that the jury decided against plaintiff because the jury was aware that she had rejected a $3.5 million settlement offer. Plaintiff's affidavit stated that her attorney told her that one of the expert witnesses used by plaintiff had been informed by an employer of one of the jurors that the jury decided against plaintiff because they were aware that she rejected the $3.5 million settlement offer. The trial court denied the motion without holding an evidentiary hearing. It concluded this evidence was too tenuous to justify such a hearing because the affidavits were insufficient "to push [p]laintiff's claims beyond the daunting threshold required by Rule 60(b)," and that if the rule were otherwise, the court would potentially be "required in any civil case to grant an evidentiary hearing" based on mere rumors and regardless of how much time had passed since judgment.[381]

The First Circuit reversed, concluding that the motion was timely, that the trial court should have assumed the truth of the allegations for purposes of deciding whether to hold an evidentiary hearing, and that such allegations required such a hearing. The court noted that motions brought under Rule 60(b)(6) were subject to a "reasonable" time limit depending upon the circumstances of the case. It held that the trial court erred by measuring the delay from entry of the judgment rather than

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[378] *Id.* at *1–2.
[379] 784 F.3d 37 (1st Cir. 2015).
[380] *Id.* at 40.
[381] *Id.* at 40–41.

from the time that appellants first learned of the allegations of jury misconduct (less than four months before filing the motion). The four-month period was a reasonable delay after being put on notice of the potential claim. It also held that if the jury was aware of and based its decision on knowledge of a confidential settlement offer, that decision would violate due process. The First Circuit remanded, ordering the trial court to hold a hearing.[382]

XV. EVIDENCE

A. Other Incidents

In *Wells v. Robinson Helicopter Co., Inc.*,[383] plaintiff brought a product liability suit against Robinson for manufacturing a defective product that caused harm. Robinson moved to exclude all evidence of other accidents because they involved different circumstances, models, ages of helicopters, and pilot skill levels. However, the court held that most of the other accidents were sufficiently similar to be admissible. The court noted that under Fifth Circuit law, evidence of similar accidents occurring under substantially similar conditions and involving substantially similar components may be probative of defective design. It explained that such evidence can also be relevant to defendant's notice, the magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, the strength of the product, the standard of care, and causation. The court also noted that the "'substantially similar' standard is lowered to 'reasonable similarity' when other accidents are introduced to show that the defendant was on notice of the defect when it sold the product to the plaintiff."[384] Further, any differences in the circumstances surrounding the occurrences "go merely to the weight to be given the evidence."[385] However, the court deferred ruling on evidence of accidents in Northern Ireland and Alaska, concluding that although the product and the allegedly defective part weighed in favor of inclusion, the occupancy and weight of these helicopters at the time of the accidents might constitute conditions sufficiently distinct as to

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[382] *Id.* at 43–45, 49–50.

[383] Nos. 3:12-CV-564-CWR-FKB, 3:12-CV-613-CWR-FKB, 2015 WL 4066303, at *1 (S.D. Miss. July 2, 2015).

[384] *Id.* (citing Jackson v. Ford Motor Co., 988 F.2d 573, 580 (5th Cir. 1993)).

[385] *Id.* (quoting Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1083 (5th Cir. 1986)).

warrant their exclusion and reserved admissibility determinations for trial.[386]

B. Experts

Dudley Flying Service, Inc. v. AG Air Maintenance Services, Inc.[387] arose out of an engine failure of a Pratt & Whitney engine on plaintiff's "cropduster" airplane, allegedly from the fracture of a turbine blade that led to secondary fractures of other blades. Defendant maintained the aircraft. Plaintiff claimed that defendant failed to perform inspections that Pratt recommended be conducted every 200 hours after 4,000 hours of operation, and the engine had over 4,900 hours at the time of the incident. Plaintiff brought a challenge of the admissibility of the testimony of defendant's metallurgist, who claimed that fatigue cracks propagate in such a short period of time that they are unlikely to be discovered during prior inspections. Plaintiff contended that the opinion of defendant's metallurgist was premised on an erroneous assumption—that each revolution of the turbine constituted one cycle of the engine. The court characterized this as challenging "only the math in the fatigue crack propagation calculation"[388] and held that plaintiff had not made a sufficient showing of unreliability to make the testimony inadmissible.[389]

In a subsequent opinion, the court rejected plaintiff's attempt to call one of defendant's experts during plaintiff's case-in-chief to examine him as a hostile witness, concluding that exceptional circumstances did not exist to justify calling the opponent's expert.[390]

In *Lewis v. Lycoming*,[391] plaintiffs brought wrongful death claims against Lycoming arising out of a helicopter crash in England. Defendants moved to exclude the testimony of two engine experts designated by plaintiffs, who planned to testify at trial that a defectively designed or manufactured fuel servo caused the helicopter crash. They opined that the servo suffered from a leak that caused an overly rich fuel-air mixture to be sent to the engine, which caused a loss of engine power. The court

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386 *Id.* at *1–2.

387 No. 3:13-cv-00156-KGB, 2015 WL 1564960, at *1 (E.D. Ark. Apr. 8, 2015).

388 *Id.* at *6.

389 *Id.* at *3–6.

390 Dudley Flying Serv., Inc. v. Ag Air Maint. Servs., Inc., No. 3:13-cv-00156-KGB, 2015 WL 1757886, at *6 (E.D. Ark. Apr. 17, 2015).

391 No. 11-6475, 2015 WL 3444088, at *1 (E.D. Pa. May 29, 2015).

denied defendants' motion, concluding that the testing on which they based their opinions was sufficiently reliable for purposes of admissibility. The experts "conducted or reviewed several tests of the subject fuel servo and an exemplar servo . . . [and] further reviewed a [computed tomography] scan of the subject fuel servo."[392] Defendants contended the testing was not reliable because it was conducted "some three years after the accident and was inconsistent with the findings of a post-accident investigation conducted in England," but the defendants could not "identify [any] flaws in the methodologies used."[393] Defendant also contended that the experts failed to identify any single cause for the purported fuel leak and that the experts decided not to perform the additional testing required to draw such a precise conclusion because it would risk harm to the fuel servo's parts. The court held that these objections were insufficient to exclude the evidence.[394]

In a related opinion discussed in Part VIII.A., the court granted Lycoming's motion to strike supplemental affidavits of two of plaintiff's experts, which plaintiff had submitted three months after the deadline for expert disclosures.[395] Plaintiffs contended that the affidavits merely expounded on the previously provided opinions of the experts. However, the court noted that the experts had not previously offered any conclusions as to when an alternative servo design was available and held that new or contradictory opinions are not proper subject matter for supplemental disclosures. Accordingly, the court granted Lycoming's motion to strike.[396] Federal courts increasingly are sanctioning parties who fail to make timely expert disclosures as required under Federal Rule of Civil Procedure 26(a)(2)(A); Federal Rule of Civil Procedure 37(c)(1) requires exclusion of such evidence unless the failure was substantially justified or is harmless.[397]

Birtciel v. XL Specialty Insurance[398] was a coverage lawsuit, arising when decedent's breathing tube became dislodged in the

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[392] *Id.* at *3.

[393] *Id.*

[394] *Id.* at *1–3.

[395] Lewis v. Lycoming, No. 11-6475, 2015 WL 3444220, at *5 (E.D. Pa. May 29, 2015).

[396] *Id.* at *4–5.

[397] *See, e.g.*, Maryea v. Dowaliby, No. 13-cv-318-LM, 2015 WL 7756005, at *1 (D.N.H. Dec. 1, 2015); Rusha v. Edelman, No. 13-13644, 2015 WL 5275126, at *6 (E.D. Mich. Sept. 9, 2015).

[398] No. 2:13-cv-02511 JWS, 2015 WL 518812, at *1 (D. Ariz. Feb. 9, 2015).

course of being transported in a JetArizona air ambulance. JetArizona ceased doing business shortly after Bertciel's death, so no one forwarded the summons and complaint to XL Specialty, the insurer of JetArizona, and plaintiff had taken a default against one of JetArizona's employees. XL Specialty then denied coverage on the basis that the claim did not allege claims arising out of the ownership, maintenance, or use of the aircraft. Plaintiff thereupon obtained a default judgment of $4 million against XL Specialty's insured, JetArizona. In the coverage litigation, XL Specialty moved to exclude the testimony of plaintiff's expert witness, a doctor who opined on the fault of a co-defendant cause of death in the prior action, on the ground that his proposed testimony in the coverage action was contrary to the positions he had taken in the prior case. The court concluded that the testimony was not inconsistent. The prior testimony "ruled in" one set of circumstances that led to the death, but had not "ruled out" the events at issue in the coverage action.[399]

C. NTSB Reports

Helicopters, Inc. v. NTSB[400] arose out of a helicopter crash in Seattle in which the petitioner operated the helicopter. Helicopters, Inc. took issue with some omissions from the NTSB's factual report and wrote to the NTSB requesting it to rescind the factual report and refrain from releasing the report until Helicopters, Inc. corrected the errors. The NTSB replied that the factual report was only one part of the investigation and that it would later issue a final accident report that would contain all of the relevant facts and a detailed analysis, as well as the probable cause of the accident. On appeal, the court held that the NTSB's denial of a petition to reopen an investigation did not constitute a reviewable final "order," as required by 49 U.S.C. §1153(a), because it did not create any legal repercussions for the petitioner. The court agreed with the NTSB that to determine if the NTSB had published an "inaccurate" report would require the court to review the accuracy of the report before the NTSB itself had the opportunity to decide whether to change it. Nor could the court presume that the NTSB's final report would fail to correct any inaccuracies, so petitioner's claim of harm was speculative.[401]

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[399] *Id.* at *1–4.
[400] 803 F.3d 844 (7th Cir. 2015).
[401] *Id.* at 844–46.

In *Paulsboro Derailment Cases*,[402] plaintiffs submitted portions of the NTSB Accident Report as part of the opposition to defendants' motion for summary judgment. Defendants moved to strike the NTSB report excerpts included in plaintiffs' opposition. The court cited the plain language of the statute and regulations—that no part of the accident report can be admitted into evidence—as meaning what it says. It rejected plaintiff's argument that the factual portions of the NTSB report should nevertheless be admissible. The court therefore ordered plaintiffs to refile their opposition papers without reference to the NTSB report.[403]

However, in *Seegar v. Anticola*,[404] the court distinguished between "a report of the [NTSB]," which is defined in 49 C.F.R. § 835.2 as "the report containing the [NTSB]'s determinations, including a probable cause of an accident, issued either as a narrative report or in a computer format ('briefs' of accidents)," and factual accident reports, "which are 'report[s] containing the results of the investigator's investigation of the accident.'"[405] Factual accident reports "are not 'report[s] of the [NTSB]' and are admissible."[406] The court held that the statute excludes evidence of the former but not the latter. Accordingly, the court permitted plaintiffs' use of the pilot-operator accident report but not the pages containing the NTSB probable cause report and the NTSB's brief of the accident.[407]

D. Judicial Notice

A decision in the Seventh Circuit raised important questions concerning the kinds of evidence courts can consider outside the record. In *Rowe v. Gibson*,[408] a non-aviation civil rights case, plaintiff was a prisoner in the Indiana state prison system who had been diagnosed with reflux. The prison doctor recommended Zantac, to be taken twice a day with meals. This worked for about a year, and plaintiff was permitted to keep the Zantac in his cell. But, without explanation, he was told he could not keep the pills and they could only be administered at 9:30 a.m.

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[402] No. 13-784 (RBK/KMW), 2015 WL 4138950, at *1 (D.N.J. July 9, 2015).

[403] *Id.* at *1–2.

[404] Nos. 13-2030-LPS, 13-2031-LPS, 2015 WL 1149537, at *1 (D. Del. Mar. 12, 2015).

[405] *Id.* at *3.

[406] *Id.*

[407] *Id.*

[408] 798 F.3d 622 (7th Cir. 2015).

and 9:30 p.m., even though his meals were at 4 a.m. and 4 p.m. Plaintiff claimed that the prison's unjustified change to his regimen violated his rights under the Eighth Amendment. The trial court granted summary judgment to the defendant but the Seventh Circuit reversed. Judge Posner's decision cited numerous sources of medical information obtained from, and citing to, the Internet.[409] This triggered a concurrence by one judge, who said that the same result could be reached without looking beyond the record of the case.[410] It also triggered a strong dissent from Judge Hamilton.[411] Together, the three opinions provide important and differing views of the court's willingness to take judicial notice of such information in an era of vast quantities of information readily available from the Internet.

XVI. ADMINISTRATIVE LAW

In *Flytenow, Inc. v. FAA*,[412] the D.C. Court of Appeals upheld the FAA's interpretive ruling that a web-based service, through which private recreational pilots could share expenses with passengers who were also members of the organization, was acting as a common carrier, and therefore, pilots of such aircraft would be required to hold commercial certificates. Flytenow "facilitates connections between pilots and 'general aviation enthusiasts' who pay a share of the flight's expenses in exchange for passage on a route predetermined by the pilot."[413] The court examined the regulatory structure, the distinctions between private and common carriage, and the differing standards between recreational and commercial operations. The FAA "treats flight-sharing services as 'common carriage.' Under the FAA's definition of 'common carriage,' flight-sharing services meet the compensation element of the common[ ]carriage definition because expense sharing *is* compensation."[414] Flytenow also contended that the FAA's interpretation was a "significant deviation" from the past and could not be effective until and unless the FAA promulgated new rules under formal rule-making procedures. However, the court noted that the Supreme Court had recently

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[409] *Id.* at 623–32.
[410] *Id.* at 635 (Rovner, J., concurring).
[411] *Id.* at 635–44 (Hamilton, J., dissenting).
[412] 808 F.3d 882 (D.C. Cir. 2015).
[413] *Id.* at 885.
[414] *Id.* at 888 (emphasis in original).

abrogated the circuit's earlier decision on which Flytenow's argument was based.[415]

The plaintiff in *Ege v. U.S. Department of Homeland Security*[416] was a pilot for Emirates Airlines. He sought review of an order of the TSA that prohibited him from "flying to, from, or over the United States."[417] He claimed that TSA's prohibition was based on his alleged inclusion on the No Fly List and sought either removal from that list or a meaningful opportunity to be heard. He sued both the TSA and the Department of Homeland Security (DHS).[418]

Ege experienced travel issues in 2009 and submitted an online inquiry to DHS's Traveler Redress Inquiry Program, the administrative review system for those who claim to have been improperly or unfairly delayed or prohibited from boarding an aircraft. TSA reviewed the inquiry and said that any appropriate changes or corrections had been made. However, Ege's problems while traveling persisted, so he contacted TSA again. Subsequently TSA sent him another letter stating it had conducted a review of any applicable records and consultations with other federal agencies as appropriate and determined no changes were warranted and also informed him he could appeal. He filed an appeal, but the TSA issued its final order upholding the initial agency decision and indicated he could seek review by a U.S. Court of Appeals under 49 U.S.C. § 46110.[419]

Ege petitioned the court for review under that statute, which provides jurisdiction to review orders issued by the DHS, TSA, and FAA. However, the court *sua sponte* asked the parties to submit supplemental briefs addressing whether the court had jurisdiction. Both parties submitted briefing saying that the court had jurisdiction to decide his claim under § 46110. However, the court concluded it did not have Article III jurisdiction. It concluded that his injury must have been "fairly traceable to the challenged action[s] of the [TSA or DHS], and not the result of the independent action of some third party not before the court" and that "it must be likely, as opposed to merely speculative, that [his] injury will be redressed by a favorable deci-

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[415] *Id.* at 885–89 (citing Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) (abrogating Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997))).

[416] 784 F.3d 791 (D.C. Cir. 2015).

[417] *Id.* at 793.

[418] *Id.* at 792–93.

[419] *Id.*

sion."[420] The court noted that the sole entity with the authority to remove names from the No Fly List is the Terrorist Screening Center (TSC) administered by the FBI. Therefore, the court concluded that the injury could not fairly be traced to the challenged action of the TSA or DHS, the agencies before the court. Thus, there was no standing to adjudicate the claim.[421]

Huerta v. Ducote[422] arose from an FAA enforcement action. Ducote held an airline transport pilot certificate. However, he co-piloted a passenger-carrying flight on a Cessna S550 from Mississippi to the Bahamas on June 6, 2010. On June 10, 2010, he co-piloted the same plane from the Bahamas to Florida and back to Mississippi, again carrying passengers. He accurately documented the flights to the Bahamas in his personal flight log. However, when an FAA investigator requested Ducote's flight record, any indication of the Bahamas flights disappeared. Instead, there was a falsified record stating that he had piloted a domestic flight between two airports in Mississippi, flights for which he was qualified. Nearly two years later, the FAA issued an emergency order of revocation of his certificate for falsifying his flight log and for piloting a passenger-carrying flight between the Bahamas and Florida in an aircraft for which he was not qualified. At the hearing, he admitted these facts, but the administrative law judge denied the FAA Administrator's claim of intentional falsification for the Bahamian flight on June 10, 2010. The judge reasoned that the written flight record prepared for the FAA was not a "material" filing and, therefore, was not sufficient grounds for an intentional falsification charge because, even if he had intentionally falsified it, the log book was not a document required to be maintained. Moreover, even though Ducote admitted the violation, the judge dismissed the unauthorized flight charge on the basis that the count had become "stale" upon dismissal of the intentional falsification counts.[423]

On appeal, the NTSB affirmed on alternative grounds. It ruled that the falsified log was a material submission that would disqualify a pilot, but it upheld the dismissal because the Administrator had not shown intentional falsification, concluding that

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[420] *Id.* at 794–95 (alterations in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[421] *Id.* at 793–95; *see* Latif v. Holder, 686 F.3d 1122, 1128 (9th Cir. 2012); Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1257 (9th Cir. 2008).

[422] 792 F.3d 144 (D.C. Cir 2015).

[423] *Id.* at 147–50.

the judge's findings so indicated. The NTSB also affirmed dismissal of the operational violation on the basis that the Administrator failed to plead the violation with sufficient specificity as to the seriousness of the alleged violation. The NTSB concluded that the exception to the "stale complaint rule" only applied when the complaint "specifically pleads facts concerning a violation that unequivocally indicates a lack of qualification[,] and the complaint must legitimately demonstrate, not merely allege, that a lack of qualification exists."[424]

The D.C. Circuit overruled the NTSB and allowed the Administrator's Petition for Review. On the appeal, the Aircraft Owners and Pilots Association (AOPA) appeared as an amicus and argued that the court lacked jurisdiction because the Administrator lacked statutory standing. Standing was lacking because the Administrator erroneously concluded that the NTSB's application of the stale complaint rule met the statutorily-required "significant adverse impact" and that "judicial concurrence in that judgment was a jurisdictional prerequisite."[425] The appellate court rejected the AOPA's contention that the Administrator's determination was jurisdictional. Finally, the court held that the nature of the inquiry at issue "defie[d] jurisdictional treatment."[426] The text of the statute confers to the Administrator, not a court, the power to decide what impact an NTSB order will have on carrying out the Administrator's duties under the Federal Aviation Act.[427]

Reaching the merits, the court held that the NTSB was in error on both counts. First, the NTSB erred in placing the heightened pleading standard on the Administrator, which departed severely from the regulatory text and precedent and "was accompanied only by the most superficial [NTSB] analysis."[428] The stale complaint rule is enforced at the start of an administrative proceeding through a motion to dismiss. Nothing requires the Administrator to "demonstrate" anything at the pleading stage, assuming the truth of the allegations rather than to require the court unequivocal establishment. Second, the NTSB's dismissal of the charge that Ducote falsified his flight logs was based upon an adverse credibility determination that the NTSB erroneously thought the judge had made. The record was clear that no such

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[424] *Id.* at 150 (alterations omitted) (internal quotation marks omitted).
[425] *Id.* at 150–51.
[426] *Id.* at 152.
[427] *Id.* at 150–51, 156–57.
[428] *Id.* at 153.

credibility judgment had been made. To the contrary, the false factual content of the record Ducote submitted to the FAA was never in dispute, and the judge had made no such credibility finding.[429]

In *Joshi v. NTSB*,[430] the father of a pilot who died in an aircraft accident sought to challenge the probable cause findings of the NTSB. He hired an engineering firm to reconstruct the accident and petitioned the NTSB to reconsider its probable cause report. The NTSB determined that the engineer's methodologies were flawed, the conclusions were not supported by the evidence, and any witness statements submitted on behalf of the father were consistent with the NTSB's initial report; it therefore denied the Petition for Reconsideration. On appeal, the D.C. Circuit concluded there was no final agency action for it to review because NTSB reports and denial for reconsideration lacked the necessary "determinate consequences." NTSB investigations are used to determine what measures would best prevent similar accidents in the future, so they are not subject to the APA and are not performed to determine the rights or liabilities of any person. Moreover, the reports themselves may not be admitted or used for any other purpose in civil litigation. Consequently, there are no legal consequences of the NTSB's factual report or probable cause determinations. The petitioner argued that the reports can result in reputational harm, financial harm, emotional harm, and informational harm. However, the court responded saying that even if this were true, these are "practical consequences, not legal harms that can transform the [NTSB report] into a final agency order," thereby triggering jurisdiction.[431] Accordingly, the court dismissed the petition for lack of jurisdiction.[432]

XVII. RES JUDICATA

In *Medina-Padilla v. Piedmont Aviation Services, Inc.*,[433] plaintiff initially brought a direct action against U.S. Aviation Underwriters, Inc. and U.S. Aircraft Insurance Group, seeking to recover for breaches of passenger and charter agreements by an insured who subsequently went bankrupt. The court dismissed those

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[429] *Id.* at 153–56.

[430] 791 F.3d 8 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 994 (Jan. 25, 2016).

[431] *Id.* at 11–12.

[432] *Id.* at 9–13.

[433] No. 14-1048 (DRD), 2015 WL 1033918, at *1 (D.P.R. Mar. 10, 2015), *aff'd*, 815 F.3d 83 (1st Cir. 2016).

claims, holding that the insurance policy covered only tort liability and not contract claims. Plaintiffs then filed a new action, alleging a tort based on the same underlying acts, but the court again dismissed the claim based on res judicata. The court followed a "transactional" approach to res judicata and concluded that the claims were barred because they arose from the same transaction as those in the action that had previously been dismissed.[434]

XVIII. CONFLICT OF LAWS

Manufacturers Collection Co., LLC v. Precision Airmotive, LLC[435] arose in the aftermath of a Pennsylvania product liability lawsuit in which a Piper Cherokee single-engine aircraft "crashed shortly after takeoff from an airport in Ohio, where it had stopped to refuel."[436] The aircraft was traveling from Wisconsin to Pennsylvania. Four of the five occupants, including the pilot, were killed, and the surviving occupant suffered severe injuries. Plaintiffs brought a product liability action against Lycoming Engines, an operating division of AVCO Corporation, in Pennsylvania. A jury rendered a special verdict, finding "that AVCO had knowingly misrepresented, concealed, or withheld required information from the [FAA] that [was] causally related to the harm [p]laintiffs suffered; that AVCO was negligent, and that such negligence was a factual cause of the accident; and that AVCO had engaged in conduct that was malicious, wanton, willful[,] or oppressive, or show[ed] reckless indifference to the interests of others[.]"[437] It also found that the carburetor in the accident was defective, which was a factual cause of the crash. However, the carburetor manufacturer was not a party in the action. The jury awarded the plaintiffs $88,700,000 in damages, of which $24,700,000 were compensatory damages and the remainder were punitive damages. AVCO's insurers subsequently settled with the plaintiffs and assigned the rights of recovery from the settlement to AVCO. AVCO then assigned those rights to Manufacturers Collection Company, LLC (MCC), a Texas-based company formed solely for the purpose of filing an indemnity lawsuit against Precision in Texas.[438]

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[434] *Id.* at *2, *5–6.

[435] No. 3:12-CV-0853-L, 2015 WL 3456620, at *1 (N.D. Tex. June 1, 2015).

[436] *Id.*

[437] *Id.* at *2 (internal quotation marks omitted).

[438] *Id.* at *1–2.

MCC sued Precision for indemnity, alleging that Precision, as the manufacturer of the defective carburetor, owed a duty to indemnify AVCO for the amounts incurred to plaintiffs in the previous action. Precision, in turn, sought indemnity for the costs incurred in defending the previous lawsuit. The key question concerned whether the indemnity claim was controlled by Pennsylvania or Texas law. The court determined that there was an actual conflict between the indemnity laws of the two states. Whereas Pennsylvania required a party seeking indemnity to be "without active fault on its own part," Texas permitted a manufacturer to be held "liable to the seller [of a product] regardless of how the injury action is resolved."[439]

The court determined that Pennsylvania law applied because all but one of the plaintiffs resided in Pennsylvania. The underlying lawsuit was filed there, and the costs for which MCC sought indemnification were incurred in Pennsylvania. In addition, AVCO was headquartered in Pennsylvania and was alleged to have manufactured the engine in that state. Although plaintiff MCC was a Texas entity, the court concluded that the post hoc formation of a Texas limited liability company was a "manufactured contact" entitled to little if any weight and that Texas had no actual interest in the dispute.[440]

Applying Pennsylvania law, the court concluded that the jury's findings—that AVCO knowingly misrepresented, concealed, or withheld required information that caused the accident, that it had engaged in malicious, wanton, and willful conduct, and that it was 100% at fault—precluded indemnity. The court cited a Pennsylvania case suggesting that a finding of punitive damages should preclude a subsequent indemnity action as a matter of law. In any event, the jury's special verdict established that AVCO had not merely been vicariously liable. Likewise, the court rejected Precision's third-party statutory indemnification claim against AVCO because Precision did not sustain a loss in a product liability action and was not even a party to the underlying product liability action.[441]

In *Bell Helicopter Textron, Inc. v. Arteaga*,[442] plaintiffs sued Bell in Delaware, Bell's state of incorporation, for damages arising from a crash in Mexico. The helicopter was owned and operated

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[439] *Id.* at *8.

[440] *Id.* at *9–10.

[441] *Id.* at *2–4, *8–10, *12–14.

[442] 113 A.3d 1045 (Del. 2015).

by a Mexican company. All of the decedents were Mexican citizens and their relatives bringing suit were Mexican citizens as well. The helicopter had been operated solely within Mexico for more than thirty years when it crashed. Plaintiffs alleged that the crash was caused by a defective strap fitting that was installed in the helicopter in Mexico in 2009. Both the helicopter and the strap fitting were designed and manufactured in Texas, where Bell is headquartered. After the trial court denied Bell's motion for forum non conveniens dismissal, Bell moved to apply Mexican law to the plaintiffs' remedies. Simultaneously, plaintiffs moved to apply the law of Texas to liability and damages. Notably, neither party requested the application of Delaware law.[443]

The trial court found that Texas law should apply because it was the location where the allegedly defective part was designed and manufactured. The Delaware Supreme Court reversed. The majority opinion noted that "[w]hen plaintiffs choose not to sue in the place where they were injured or where they live, or even in the jurisdiction whose law they contend applies, but instead a jurisdiction with no connection to the litigation, [Delaware] trial courts should be extremely cautious not to intrude on the legitimate interests of other sovereign states."[444] It held that Delaware had "no public policy interest" in the case except "to avoid contributing to forum shopping and enmeshing itself in unrelated litigation."[445] Although the Second Restatement provides a rebuttable presumption that the law of the place of the injury should govern personal injury litigation, the trial court found that the place of the crash was fortuitous and thus considered it insignificant that the crash occurred in Mexico. The Supreme Court disagreed. Although location of an aircraft accident can often be fortuitous, plaintiffs "cannot claim that the alleged injuries occurred fortuitously in their home countries."[446] "[A]ll the victims were Mexican citizens, traveling from one Mexican state to another with jobs in Mexico,"[447] and rode in a helicopter that had been operating in Mexico since 1979, to take a trip that was supposed to begin and end in Mexico.

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[443] *Id.* at 1047–48.

[444] *Id.* at 1051–52.

[445] *Id.* at 1052.

[446] *Id.* (internal quotation marks omitted).

[447] *Id.* at 1054.

Therefore, there was nothing fortuitous about the location of the crash and the place where they lived and worked.[448]

XIX. BREACH OF CONTRACT

In *Coulier v. United Airlines, Inc.*,[449] plaintiff attempted to take advantage of United's "Low Fare Guarantee" that guaranteed "[w]hen it comes to finding the lowest United[ ] fare online, we guarantee you will find it on united.com."[450] Based on the Low Fare Guarantee, plaintiff assumed that cheaper tickets were not available for any of the tickets he purchased. He purchased three one-way tickets from united.com. He later discovered that if there were an insufficient number of tickets available in the lowest fare class for purchase of a group of tickets, the fare for each ticket would be increased to the next available fare category, and the lower fare category would vanish from united.com and all other websites selling United tickets. He contended that he "purchased the tickets on united.com as required by the Low Price Guarantee" but was "unable to prove that there was a lower published price online because, contemporaneously with selling a given ticket at the next-highest fare category when . . . the ticket is sold in a group, United replaces the allotment of lower fares with more expensive fares, resulting in the elimination of any available lower fares."[451] This rendered it "impossible for him to locate the less expensive fares after he completed his purchase[,] and it was impossible for any United representative to find the lower fares on a publicly accessible Internet site."[452] He filed the lawsuit on behalf of himself and similarly situated individuals. He alleged that United "breached the contract by failing to provide the lowest price per ticket when tickets were purchased as a group."[453]

United moved to dismiss, arguing that plaintiff did not satisfy the terms and conditions of the Low Fare Guarantee, which required him to "find a fare on a different website for the exact same travel itinerary that is at least [ten dollars] less than the fare he paid on united.com and file a claim with United by mid-

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[448] *Id.* at 1048–52, 1054, 1060; *see also* Linfoot v. McDonnell Douglas Helicopter Co., No. 3:09-cv-639, 2015 WL 1190171, at *5 (M.D. Tenn. Mar. 16, 2015).

[449] 110 F. Supp. 3d 730 (S.D. Tex. 2015).

[450] *Id.* at 731.

[451] *Id.* at 733.

[452] *Id.* (citations omitted).

[453] *Id.*

night on the date of purchase."[454] Plaintiff claimed he was excused from performing the terms and conditions because United made it impossible by eliminating the lower fares the moment he purchased tickets. However, the court agreed with United's contention that the Low Fare Guarantee is simply an offer for a unilateral contract. It was not a warranty for any purchase of any ticket on United but an offer relating to purchases made specifically on united.com. This offer could be accepted only by purchasing a ticket on united.com; finding a retail price online for the same flight, itinerary, and cabin that is ten dollars lower or more than the fare purchased on the same day; and calling the United Customer Contact Center Office and filing a claim. Plaintiff admittedly did not take these steps and, therefore, did not fulfill the conditions of the contract. United also contended that plaintiff's claim was preempted by the ADA, but the court did not reach that issue because it found that the claim was barred under contract law.[455]

In *Opper v. Delta Air Lines, Inc.*,[456] the court treated Delta's "Best Fare Guarantee" as a warranty, which required the ticket purchaser to find a lower fare on another website for the exact same itinerary. Plaintiff did not provide any basis for comparison. Plaintiff's interpretation of the warranty was erroneous because it viewed the warranty as making a claim about what kinds of fares would be available. In reality, the warranty only made a comparative claim that fares for Delta flights would be lowest on Delta's website.[457]

XX. FALSE CLAIMS ACT

In *United States ex rel. Gage v. Davis S.R. Aviation, LLC*,[458] Gage brought a *qui tam* action alleging that defendants were part of a scheme to defraud the government by supplying non-conforming aircraft parts to Orion, which installed the parts on aircraft as Northrup's contractor, in violation of contractual or regulatory requirements. Despite several orders from the trial court to amend the complaint to plead the claims with specificity, the court finally dismissed Gage's third amended complaint for failure to state a claim with adequate particularity and re-

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[454] *Id.*

[455] *Id.* at 731–33, 736, 738 n.3.

[456] No. 14-C-962, 2015 WL 94193, at *1 (E.D. Wis. Jan. 7, 2015), *cert. denied*, 136 S. Ct. 984 (2016).

[457] *Id.* at *2.

[458] 623 F. App'x 622 (5th Cir. 2015).

fused to give Gage any additional opportunities to cure the deficiencies. Gage did not specifically allege that "defendants expressly certified that parts sold to the government complied with any statute, regulation, or contractual provision."[459] Rather, he alleged the defendants, by selling parts to and requesting reimbursement from the government, implied that the parts complied with certain contractual or regulatory provisions and thereby impliedly certified their fitness. However, the Fifth Circuit affirmed the trial court's dismissal. It concluded that even if the false certification theory applied, Gage did not plead with sufficient particularity the necessary "who, what, when, where, and how" of a false claim,[460] and deferred deciding whether such a claim, if properly pled, would be cognizable under the False Claims Act.[461]

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[459] *Id.* at 625.
[460] *Id.* at 625.
[461] *Id.* at 623–25.