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2005 SMU AIR LAW SYMPOSIUM RECENT DEVELOPMENTS IN AVIATION LAW

CHRISTOPHER R. BARTH

I. AIR TRANSPORTATION SAFETY & SYSTEM STABILIZATION ACT¹

THE AIR TRANSPORTATION Safety and System Stabilization Act ("ATSSSA") sets forth two separate grounds upon which jurisdiction for September 11-related litigation is proper in the United States District Court for the Southern District for New York.² Section 408(b)(1) of the ATSSSA creates "a Federal cause of action for damages arising out of the hijacking and subsequent crashes . . . on September 11, 2001."³ Section 408(b)(3) of the ATSSSA confers "original and exclusive jurisdiction" upon the Southern District of New York "over all actions brought for any claim (including any claim for loss of property, personal injury or death) resulting from the terrorist-related aircraft crashes of September 11, 2001."⁴ Courts have continued to hold that insurance and reinsurance disputes over September 11-related losses generally do not fall within these jurisdictional grants.⁵

Notably, the Second Circuit has now addressed the issue in the context of a reinsurance dispute.⁶ Although acknowledging that the terrorist attacks of September 11 were alleged to be a

¹ The author wishes to express his gratitude to the following members of the Lord, Bissell & Brook LLP Aviation Core Group for their assistance in drafting this paper: Ann C. Taylor, Jill O'Donovan, Nigel J.D. Wright, Peter G. Daniels, Mona M. Stone and Marnie S. Bozic.

² See 49 U.S.C. § 40101, as amended by Pub. L. No. 107-71, § 201, 115 Stat. 597, 645 (2000).

³ Air Transportation Safety and Stabilization Act § 49, 29 U.S.C. § 408 (b)(1).

⁴ Id. § 408 (b)(3).

⁵ See, e.g., *Indian Chef, Inc. v. Fire and Cas. Ins. Co. of Conn.*, No. CIV.A.02-3401-DLC, 3401 (DLC), 2004 WL 420034 (S.D.N.Y. 2004) (holding that claims for business interruption insurance did not fall within ATSSSA jurisdiction).

⁶ *Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 53 (2d Cir. 2003).

“but for” cause of the contract dispute, the Second Circuit nevertheless held that this was not enough to assert jurisdiction under the ATSSSA.⁷ Noting that the ATSSSA includes an exclusive grant of jurisdiction, the Second Circuit cautioned that allowing such a “but for” approach would produce absurd results—requiring cases with attenuated, indirect links to 9/11 attacks to be heard by the United States District Court for the Southern District of New York.⁸ Rather, the court suggested that a case cannot implicate ATSSSA jurisdiction unless a claim or defense would require a court to resolve an issue of law or fact concerning the terrorist attacks.⁹ In this case, the court reasoned that even though the insurance losses at issue were caused by the September 11 terrorist attacks, those events were not relevant to resolving the dispute between the reinsurers.¹⁰ Accordingly, the Second Circuit held that there could be no jurisdiction under the ATSSSA.¹¹

Commenting on an issue raised by other courts, the Second Circuit also expressed some concern about whether the apparently broad grant of jurisdiction under section 408(b)(3) would be Constitutional.¹² It determined, however, that this question could go unanswered in light of its ruling that the claims at issue did not implicate the ATSSSA jurisdictional grants in the first instance.¹³

A different factual scenario led to a different result in *In re September 11th Liability Insurance Coverage Cases*.¹⁴ This case involved third- and fourth-party complaints filed by defendants in the September 11th liability cases seeking defense and indemnity from certain insurers.¹⁵ Although the court explicitly refused to decide whether such claims fell within the exclusive grant of jurisdiction under the ATSSSA, it held that supplemental jurisdiction was proper under 28 U.S.C. § 1367(a).¹⁶ Even so, the court did appear to justify its decision based on the ex-

⁷ *Id.* at 59-60.

⁸ *Id.* at 59.

⁹ *Id.*

¹⁰ *Id.* at 57.

¹¹ *Id.* at 59.

¹² *Id.*

¹³ See also *World Trade Ctr. Props. L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003) (refusing to address ATSSSA jurisdictional issues, including constitutionality, in light of decision upholding diversity jurisdiction).

¹⁴ 333 F. Supp. 2d 111 (S.D.N.Y. 2004).

¹⁵ *Id.* at 114-15.

¹⁶ *Id.* at 116.

clusive grant of jurisdiction under the ATSSSA.¹⁷ The court reasoned that if it were to decline jurisdiction, the dispute would be heard by a state court, without power to hear the “whole dispute.”¹⁸ This, according to the court, would contradict Congress’ desire for uniformity and expertise in dealing with September 11th cases.¹⁹

II. DEATH ON THE HIGH SEAS ACT (“DOHSA”)²⁰

The district court in the EgyptAir 990 litigation rendered two significant decisions in 2004: one regarding DOHSA and the other on forum non conveniens.²¹ In a March 9, 2004, ruling, the court analyzed the amount of non-pecuniary damages recoverable under DOHSA.²² Plaintiffs filed suit seeking non-pecuniary damages under DOHSA for the surviving children of two sets of deceased parents on the ill-fated flight.²³ Additionally, the estates of the surviving parents to one set of decedents sought recovery under DOHSA for the loss of decedents’ “care, comfort and companionship.”²⁴ The court conducted a bench trial on the issue.²⁵

After summarizing the factors relevant to its considerations, including the fact that the surviving children were “extremely close to their parents,” the court turned its attention to reaching its conclusions of law.²⁶ The court summarized the history of the recoverability of non-pecuniary damages under DOHSA, including the 1996 amendment that opened the door to such awards.²⁷

The court then turned its focus to the potential valuation of plaintiffs’ “care, comfort and companionship” claim.²⁸ The parties agreed that damages were warranted, but disagreed on the appropriate amount recoverable.²⁹ Plaintiffs asked that the

¹⁷ *Id.* at 117.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 46 App. U.S.C. §§ 761-67 (2000).

²¹ *See infra*, notes 369-73.

²² *In re Air Crash Near Nantucket Island, Mass.*, 307 F. Supp. 2d 465 (E.D.N.Y. 2004).

²³ *Id.* at 467.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 467-68.

²⁸ *Id.* at 468.

²⁹ *Id.*

court award each family \$2,500,000 for the death of each parent, together with prejudgment interest; EgyptAir offered \$75,000 for each child per parent.³⁰ In reaching a valuation, the court noted the terms “care, comfort and companionship” are “not defined in DOHSA and no other court has construed the scope of these terms.”³¹ However, the court drew an analogy to maritime law’s definition of “society” which includes “the range of mutual benefits each family member receives from the other’s continued existence, including love, affection, care, attention, companionship, comfort and protection.”³² It observed awards for loss of society varied widely.³³ However, the court found instructive the awards given in *Oldham v. Korean Airlines Co. Ltd.*,³⁴ and *In re Air Crash Near Cerritos, California*.³⁵ Both matters awarded non-economic damages of between \$100,000 and \$200,000 to the adult surviving children of deceased passenger-parents.³⁶ Taking into consideration these valuations, and after applying present value discounts, the court awarded each of the surviving children between \$180,000 and \$210,000 per parent.³⁷

III. DEEP VEIN THROMBOSIS

Deep vein thrombosis (“DVT”) is a condition in which a blood clot forms deep in the vein system of the lower legs with potentially serious implications if the clot breaks free and travels to the heart, lungs, brain or other critical organs.³⁸ Also known as “Economy Class Syndrome,” DVT is associated with long periods of inactivity during air travel.³⁹ Individuals at higher risk of developing DVT include: persons over the age of 60; smokers; the obese; persons who have been recently confined to a bed; and persons who recently received general anesthesia or estrogen therapy.⁴⁰

³⁰ *Id.* at 469.

³¹ *Id.* at 468.

³² *Id.*

³³ *Id.* at 470.

³⁴ 127 F.3d 43 (D.C. Cir. 1997).

³⁵ 982 F.2d 1271 (9th Cir. 1992).

³⁶ *Air Crash Near Nantucket Island*, 307 F. Supp. 2d at 470.

³⁷ *Id.*

³⁸ See Economy-Class Syndrome and Deep Vein Thrombosis, American Heart Association, at <http://www.americanheart.org/presenter.jhtml?identifier=3010041> (last visited Aug. 28, 2005).

³⁹ *Id.*

⁴⁰ *Id.*

Passengers who have developed DVT after air travel have sued airlines based on theories of (1) failing to warn of the risks of DVT and (2) failing to reconfigure seating to decrease the likelihood of developing DVT.⁴¹

A. DVT AND INTERNATIONAL FLIGHT

Cases involving international travel implicate the Warsaw Convention which requires that a passenger prove that (1) while embarking, disembarking, or on board; (2) they suffered an accident; and (3) the accident caused an injury.⁴² The critical question then becomes whether the development of DVT constitutes an “accident” under the Warsaw Convention.

A recent Supreme Court decision under the Warsaw Convention, while not involving DVT, is nonetheless instructive. The Supreme Court case *Olympic Airways v. Husain*,⁴³ involved the death of a passenger on board an international flight after suffering an asthma attack allegedly caused by exposure to second-hand smoke in flight. The wife of the decedent had specifically requested that the flight attendant move the decedent away from the smoking section because the decedent suffered from asthma.⁴⁴ A flight attendant refused three requests to reseat the decedent who eventually suffered an asthma attack and died.⁴⁵ The Supreme Court framed the issue before it as:

[W]hether the “accident” condition precedent to air carrier liability under the Warsaw Convention is satisfied when the carrier’s unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger’s preexisting medical condition being aggravated by exposure to a normal condition in the aircraft cabin.⁴⁶

The court ultimately decided this question in the affirmative.⁴⁷ The *Olympic Airways* court began its analysis by reaffirming the definition of “accident” for purposes of the Warsaw Convention stated in *Air France v. Saks*.⁴⁸ In *Saks*, the court defined “accident” as an “unexpected or unusual event or happen-

⁴¹ *Id.*

⁴² Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 17, Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876.

⁴³ *Olympic Airways v. Husain*, 540 U.S. 644, 646-48 (2004).

⁴⁴ *Id.* at 647.

⁴⁵ *Id.* at 647-48.

⁴⁶ *Id.* at 646.

⁴⁷ *Id.*

⁴⁸ *Id.* at 646 (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985)).

ing that is external to the passenger," and not "the passenger's own internal reaction to the usual, normal and expected operation of the aircraft."⁴⁹

The *Olympic Airways* court noted that neither party disputed the definition of "accident" as set forth in *Saks*.⁵⁰ Rather, the parties disputed which event should be the focus of the accident inquiry: the presence of the ambient cigarette smoke—which the carrier permitted—or the carrier's failure to assist the decedent.⁵¹

The court ultimately found that both were "links in the chain" of causes that led to the decedent's death.⁵² The court rejected the carrier's argument that the only pertinent injury-producing event was the "normal" presence of ambient cigarette smoke in the aircraft's cabin during an international flight.⁵³ The court noted, "[t]here are often multiple interrelated factual events that combine to cause any given injury."⁵⁴ The court held that "any one of these factual events or happenings may be a link in the chain of causes and—so long as it is unusual or unexpected—might constitute an 'accident'" under the Warsaw Convention.⁵⁵

Olympic Airways also argued that the flight attendant had merely failed to act, and that only affirmative acts could constitute an "event" or "happening" sufficient to cause an "accident" under the Warsaw Convention.⁵⁶ The *Olympic Airways* court rejected this argument.⁵⁷ Significantly, however, the court held that the relevant "accident" inquiry is not whether there was action or inaction, but whether there was "an unexpected or unusual event or happening."⁵⁸ Specifically, the court found that the unexpected and unusual rejection of explicit requests for assistance constituted an "event" or "happening."⁵⁹ Thus, although the *Olympic Airways* court rejected the carrier's position that inaction could not constitute an "accident," it did not hold that inaction, without anything more, would constitute an "acci-

⁴⁹ *Id.* at 651 (quoting *Air France*, 470 U.S. at 405-06).

⁵⁰ *Id.* at 650.

⁵¹ *Id.*

⁵² *Id.* at 653-54.

⁵³ *Id.* at 652.

⁵⁴ *Id.* at 653.

⁵⁵ *Id.*

⁵⁶ *Id.* at 654.

⁵⁷ *Id.*

⁵⁸ *Id.* at 654-55.

⁵⁹ *Id.* at 655.

dent.”⁶⁰ Rather, the necessity of an unusual or unexpected event would seem to require something more than mere inaction, for example, knowledge that action was required or inaction in the face of circumstances that would appear to require action.⁶¹

The court noted that its conclusion was consistent with the United Kingdom Court of Appeals’ decision in *Deep Vein Thrombosis and Air Travel Group Litigation*,⁶² which involved allegations of a carrier’s failure to warn of the risk of deep vein thrombosis.⁶³ The *Olympic Airways* court noted that the UK court would have agreed that the death of the *Husain* plaintiff had resulted from an “accident.”⁶⁴ In fact, the *Olympic Airways* court observed that the UK court had commented on the lower court opinions in the *Olympic Airways* case and reasoned that the flight attendant’s failure to move the decedent “[could not] properly be considered as mere inertia, or a non-event” and “formed part of a more complex incident, whereby [the decedent] was exposed to smoke in circumstances that can properly be described as unusual and unexpected.”⁶⁵ Moreover, the *Olympic Airways* court remarked that the facts of *Deep Vein Thrombosis and Air Travel Group Litigation* were substantially distinct from those at issue in *Olympic Airways*.⁶⁶

In a 2004 Warsaw decision involving DVT, the Fifth Circuit Court of Appeals in *Blansett v. Continental Airlines, Inc.*,⁶⁷ reversed the District Court’s decision in favor of the passenger, and held that the airline’s failure to give warnings to passengers on an international flight about the risk of DVT did not qualify as an “accident” under the Warsaw Convention.⁶⁸

In its decision, the Fifth Circuit commented that the Supreme Court in *Olympic Airways* “specifically left open” the question whether the failure to give warnings in a case in which there was no specific refusal to lend aid to the passenger would constitute

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² ¶ [2004] Q.B. 234; *Quantas Ltd. V. Povey*, [2003] VSCA 227, ¶ 17, 2003 WL 23000692, ¶ 17 (Dec. 23, 2003).

⁶³ *Olympic Airways*, 540 U.S. at 655 (2004).

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Deep Vein Thrombosis and Air Travel Group Litig.*, [2004] Q.B., at 254, ¶ 50).

⁶⁶ *Id.*

⁶⁷ 379 F.3d 177 (5th Cir. 2004).

⁶⁸ *Id.* at 182.

an "accident."⁶⁹ The court then considered whether the failure to provide warnings alone could constitute an "accident" under the Warsaw Convention.⁷⁰

In reaching its decision, the Fifth Circuit assumed for purposes of the appeal that a failure to warn of DVT was a departure from an "industry standard of care."⁷¹ The court, however, specifically found that even a departure from the "industry standard of care" was not in and of itself an "accident."⁷² Rather, the appropriate test was whether there was an "unexpected or unusual event."⁷³ In this respect, the Fifth Circuit held that Continental's failure to warn of DVT was not an "unexpected or unusual event" and not a qualifying "accident." Specifically, the Fifth Circuit recognized that:

Though many international carriers in 2001 included DVT warnings, it is undisputed that many did not. Moreover, Continental's battery of warnings was in accord with the policies of the Federal Aviation Administration ("FAA"), which prescribes what warnings airlines should issue to passengers.⁷⁴

The Fifth Circuit cited as instructive its decision in the non-Warsaw case of *Witty v. Delta Airlines*,⁷⁵ in which it held that the warnings reasonably required to be made by an airline were those enumerated by the FAA and no others.⁷⁶ The Fifth Circuit concluded that:

It was not an unexpected or unusual decision for Continental merely to cleave to the exclusive list of warnings required of it by the agency that has regulatory jurisdiction over its flights.⁷⁷ Ultimately, the court would not permit a jury to find that Continental's failure to warn of DVT constituted an "accident" under article 17.⁷⁸ "Continental's policy was far from unique in 2001 and was fully in accord with the expectations of the FAA. Its procedures were neither unexpected nor unusual."⁷⁹

⁶⁹ *Id.* at 180.

⁷⁰ *Id.*

⁷¹ *Id.* at 181-82.

⁷² *Id.* at 182.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 366 F.3d 380, 385 (5th Cir. 2004).

⁷⁶ *Blansett*, 379 F.3d at 182; see also *infra* notes 85-91 and accompanying text discussing *Witty*.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

In another favorable decision for the airlines, *Rodriguez v. Ansett Australia Ltd.*,⁸⁰ the Ninth Circuit affirmed summary judgment in favor of the defendant airline and found that the passenger's DVT was not caused by an accident within the meaning of the Warsaw Convention.⁸¹ Specifically, the court found that the passenger had submitted neither evidence that the airline failed to comply with neither any industry standard existing at the time of the incident nor any other evidence establishing that the airline's conduct rose to the level of an unusual or unexpected event.⁸² Accordingly, the Ninth Circuit ruled that the passenger's DVT was not an accident under the Warsaw Convention and that he had failed to raise a genuine issue of material fact regarding whether the airline had departed from industry custom.⁸³

B. DVT AND DOMESTIC FLIGHT

As referenced above, in the non-Warsaw context, the Fifth Circuit Court of Appeals also addressed the DVT issue in *Witty v. Delta Airlines*.⁸⁴ In *Witty*, the DVT-stricken passenger alleged both that the airline was negligent in failing to warn passengers of the risks of DVT and for failing to provide passengers with adequate legroom.⁸⁵ The District Court denied the airline's motion to dismiss based on federal preemption, and the Fifth Circuit reversed.⁸⁶ Specifically, the Fifth Circuit found that plaintiffs must base their state claim for failure to warn passengers of air travel risks on a violation of federally mandated warnings.⁸⁷ The court determined that federal regulations did not require warnings to passengers about the risks or prevention of DVT and, therefore, the airline was not liable for failing to provide such warnings.⁸⁸

The court further rejected the passenger's claim that the airline should have provided more legroom.⁸⁹ Specifically, the court noted that: "Since requiring more legroom would necessa-

⁸⁰ 383 F.2d 914 (9th Cir. 2004).

⁸¹ *Id.*

⁸² *Id.* at 919.

⁸³ *Id.*

⁸⁴ 366 F.3d 380 (5th Cir. 2004).

⁸⁵ *Id.* at 382.

⁸⁶ *Id.* at 386.

⁸⁷ *Id.* at 385.

⁸⁸ *Id.*

⁸⁹ *Id.* at 386.

rily reduce the number of seats on the aircraft relate to prices charged by airlines, such a requirement would impose a standard relating to a price under section 41713(b)(1) and is accordingly preempted by the [Airline Deregulation Act].”⁹⁰

C. DVT MULTIDISTRICT LITIGATION (MDL)

In June 2004, the Judicial Panel on Multidistrict Litigation (the “Panel”) ordered 24 DVT cases transferred and centralized in the United States District Court for the Northern District of California.⁹¹ The Panel ruled that certain actions “rooted in complex core questions concerning whether various aspects of airline travel cause, or contribute to, the development of [DVT] in airline passengers” could be consolidated for the “convenience of the parties and witnesses and [to] promote the just and efficient conduct of the litigation.”⁹²

The transferred cases involve both Warsaw and non-Warsaw Convention cases.⁹³ The airline defendants moved to dismiss the non-Warsaw cases because the Airline Deregulation Act, in light of the Fifth Circuit’s decision in *Witty*, preempts such cases.⁹⁴

IV. FEDERAL PREEMPTION

A. AIRLINE DEREGULATION ACT OF 1978 (“ADA”)

1. *State Claims Preempted*

a. *Sawyer v. Southwest Airlines: Emotional Distress*

In *Sawyer v. Southwest Airlines*,⁹⁵ plaintiffs sued Southwest for negligent infliction of emotional distress arising from a flight attendant’s recitation of an allegedly racist nursery rhyme over the aircraft’s intercom during the boarding process.⁹⁶

The district court entered an order directing the plaintiffs to show cause why the defendant was not entitled to judgment as a matter of law, *inter alia*.⁹⁷ Southwest maintained that the ADA

⁹⁰ *Id.* at 383.

⁹¹ *In re Deep Vein Thrombosis Litigation*, No. 1606, transfer order (J.P.M.L. Jun. 22, 2004).

⁹² *Id.* at 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ No. CIV.A.01-2385-KHV, CIV.A.01-2386-KHV 2004 WL 48899 (D. Kan. Jan. 7, 2004).

⁹⁶ *Id.* at *1-2.

⁹⁷ *Id.* at *1.

preempted plaintiffs' negligence claims as they relate to boarding and seating procedures, which are "services" under the Act.⁹⁸ Plaintiffs argued preemption did not apply as the ADA (1) only preempts state law on frequency and scheduling of transportation and selection of markets and (2) does not preempt "run-of-the-mill" tort claims.⁹⁹

The court rejected plaintiffs' arguments, finding the ADA did preempt their emotional distress claims.¹⁰⁰ In reviewing the history of the Federal Aviation Act of 1958 and the ADA, the court noted that before 1978, states were allowed to regulate interstate air travel.¹⁰¹ However, with the passage of ADA in 1978, Congress clearly manifested its intent to achieve economic deregulation of the airline industry by "promoting 'maximum reliance on competitive market forces.'"¹⁰² The court found the ADA includes a "preemption provision which provides that a state 'may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.'"¹⁰³ "The purpose of preemption was to maintain uniformity and avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states."¹⁰⁴ After analyzing *Wolens* and *Morales v. Trans World Airlines, Inc.*,¹⁰⁵ the district court concluded that the plaintiffs' emotional distress claims were preempted by the ADA as they involved an airline "service" relating to the boarding process.¹⁰⁶

b. *Hallam v. Alaska Airlines, Inc.*: State Antitrust & Unfair Trade Practices

The Alaska Supreme Court, in *Hallam v. Alaska Airlines, Inc.*,¹⁰⁷ considered whether the ADA preempted the application of an Alaska state antitrust and unfair trade practices statute to an airline's policies, including the classification of tickets as refundable or non-refundable, overbooking of flights, and ticket

⁹⁸ *Id.* at *3.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *6.

¹⁰¹ *Id.* at *3.

¹⁰² *Id.* (citing *Am. Airlines v. Wolens*, 513 U.S. 219, 230 (1995)).

¹⁰³ *Id.* (quoting 49 U.S.C. § 41713 (b)(1) (2002)).

¹⁰⁴ *Id.*

¹⁰⁵ 504 U.S. 375 (1992).

¹⁰⁶ *Sawyer*, 2004 WL 48899, at *6.

¹⁰⁷ 91 P.3d 279 (Alaska 2004).

terms relating to timetables, routes, departure/arrival times and fares.¹⁰⁸ *Pro se* plaintiff sued Alaska Air alleging the airline failed to honor various terms on his plane tickets.¹⁰⁹ Plaintiff also attempted to present a class action claim for the airline's violation of Alaska's Unfair Trade Practices Act and state antitrust law.¹¹⁰ After a bench trial, the trial court ruled in the airline's favor on all counts and plaintiff appealed.¹¹¹

After considering the plaintiff's state law claims, the Alaska Supreme Court turned its attention to plaintiff's assertion that the trial court improperly denied his request to amend the complaint to reinstate his individual claims after it dismissed them along with the class claims.¹¹² The *Hallam* court upheld this determination, finding the request was properly denied as Section 41713 rendered the request "futile as the claims were clearly preempted by the federal [ADA]."¹¹³ The court noted the ADA's preemption provision is "'broadly preemptive,' reaching any state laws or enforcement actions 'having a connection with or reference to airline rates, routes, or services.'"¹¹⁴ In applying Section 41713, the court found plaintiff's claims plainly related to Alaska Air's prices, routes and services.¹¹⁵ Consequently, the ADA preempted plaintiff's antitrust claims.¹¹⁶

c. *Ruta v. Delta Air Lines, Inc.*: "Free Booze" or He Said — She Said

In *Ruta v. Delta Air Lines, Inc.*,¹¹⁷ plaintiff sued Delta for the airline's decision to remove her from her ticketed flight.¹¹⁸ Plaintiff sought recovery under theories of (1) breach of contract; (2) wrongful ejectment; (3) negligence; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; (6) violation of the Americans with Disabilities Act and (7) defamation.¹¹⁹ The parties' factual statements

¹⁰⁸ *Id.* at 282-83.

¹⁰⁹ *Id.* at 281.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 287.

¹¹³ *Id.*

¹¹⁴ *Id.* at 287-88.

¹¹⁵ *Id.* at 288.

¹¹⁶ *Id.*

¹¹⁷ 322 F. Supp. 2d 391 (S.D.N.Y. 2004).

¹¹⁸ *Id.* at 394.

¹¹⁹ *Id.*

as to what transpired differed widely.¹²⁰ Delta alleged that during the flight delay, passengers and Delta employees observed the plaintiff yelling and behaving in a disruptive manner.¹²¹ This behavior included cutting in line in front of passengers waiting at the boarding gate counter and yelling at a gate agent with “foul and shocking” language.¹²² In addition, passengers observed the plaintiff drinking alcoholic beverages in the airport before boarding the plane, and after boarding the plane she yelled, “free booze!”¹²³ Delta employees said that the plaintiff smelled of alcohol.¹²⁴ A gate agent also alleged and other passengers confirmed that the plaintiff kicked the agent’s leg as he walked down the aisle, “lifting his skin” and “leaving a red mark.”¹²⁵ The lead flight attendant told the captain of the plaintiff’s behavior.¹²⁶ The captain decided to remove the plaintiff from the flight and requested the presence of airport security to help remove the plaintiff from the flight.¹²⁷

In contrast, the plaintiff explained that she lost complete hearing in her right ear in 1975, at the age of fifteen.¹²⁸ After her ear injury, she underwent surgery in which the surgeon took half of a live nerve in her tongue to graft into a severed nerve in her face.¹²⁹ As a result, her tongue was partially paralyzed, and she now speaks with a slur and at a louder volume than most people.¹³⁰ The plaintiff also explained that she took daily doses of blood pressure, anti-depressant, and pain killer medications.¹³¹ The plaintiff said that she generally does not drink alcohol.¹³² She argued that on the day of the flight, Delta employees made an announcement that she could not hear due to her hearing loss.¹³³ She waited in line to speak with a gate agent to ask about the announcement.¹³⁴ The plaintiff claimed that the gate agent replied with something to the effect of “Who

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

the hell do you think you are?"¹³⁵ Both the plaintiff's husband and another passenger observed this exchange.¹³⁶ Another gate agent gave the plaintiff and her family meal vouchers.¹³⁷ While her family purchased food at the airport bar, the plaintiff remained at the gate.¹³⁸ One of the plaintiff's family members drank a Bloody Mary at the airport bar before returning to the gate with a soda for the plaintiff.¹³⁹ The plaintiff claimed that she did not consume any alcoholic beverages that day, nor did she have any other contact with the gate agent before boarding the plane and taking her seat.¹⁴⁰

While boarding the plane, the plaintiff gave her boarding pass to female gate agent and said, "Thank you, at least, someone is acting professionally."¹⁴¹ In addition, when the plaintiff boarded the plane, she heard another passenger say, "for all of those hours we were delayed we should have free drinks."¹⁴² The plaintiff laughingly and "unwittingly" loudly replied, "Yes, we should."¹⁴³ At this point, the gate agent told her she was intoxicated and that she had to leave the plane.¹⁴⁴ Although the plaintiff stumbled before the gate agent reached her row, a passenger said that she did not kick the gate agent.¹⁴⁵ Furthermore, the incident report did not show that the gate agent consulted with the captain.¹⁴⁶ The plaintiff left the plane when she was told she would be arrested if she did not do so.¹⁴⁷ She also requested a breathalyzer test, which Delta refused to administer.¹⁴⁸

Delta filed a motion to dismiss under Rule 12(b)(6) or, in the alternative, for summary judgment under Rule 56.¹⁴⁹ Delta's motion contended that all of plaintiff's claims were preempted by Section 41713 of the ADA or Section 44902(b) of the Federal

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 396.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 394.

Aviation Act.¹⁵⁰ The district court analyzed each section's potential preemptive effect vis-à-vis plaintiff's various claims.¹⁵¹ As an initial note, the court observed, "[a]n airline's discretion to reject a passenger must be accepted if exercised in good faith and for a rational reason."¹⁵² The court examined the captain in command's decision to remove plaintiff from the flight and determined it was not arbitrary and capricious as the captain was based his decision on the reports he received from the cabin crew and gate agent.¹⁵³

Next, the court considered each of plaintiff's theories of recovery.¹⁵⁴ In regard to the tort claims, the court applied the three-part preemption test outlined in *Rombom v. United Airlines, Inc.*,¹⁵⁵ to find all of plaintiff's state tort claims, except her defamation claim, are preempted.¹⁵⁶ "First, the Captain's decision to refuse to transport Plaintiff constitutes a 'service' under the 1978 Act. Second, the alleged emotional and physical harm suffered by Plaintiff was a direct result of the Captain's decision to have Plaintiff removed from the plane. Finally, there was nothing unreasonable about the method by which the Captain effected Plaintiff's removal from the airplane. She was not arrested, unlike the plaintiff in *Rombom*."¹⁵⁷

However, the court refused to find the defamation claim, that Delta's employees slandered plaintiff by saying she was drunk in front of the other passengers, was preempted as that claim did not involve a "service" as contemplated by Section 41713.¹⁵⁸

2. No Preemption

a. *Schumacher v. Amalgamated Leasing, Inc.*: State Whistleblower Act

In *Schumacher v. Amalgamated Leasing, Inc.*,¹⁵⁹ the plaintiff sued his former employer for violation of the Ohio Whistleblower

¹⁵⁰ *Id.* at 397. This section provides in relevant part that "an air carrier . . . [is permitted] to refuse to transport a person or property the carrier decides is, or might be, inimical to safety." *Id.* (quoting 49 U.S.C. § 44902(b)).

¹⁵¹ See generally *id.*

¹⁵² *Id.* at 397.

¹⁵³ *Id.* at 398.

¹⁵⁴ *Id.*

¹⁵⁵ 867 F. Supp. 214 (S.D.N.Y. 1994).

¹⁵⁶ *Ruta*, 322 F. Supp. 2d at 400.

¹⁵⁷ *Id.* at 400-01 (internal citation omitted).

¹⁵⁸ *Id.* at 403. Also, noted the discussion on the *Witty* case involving federal preemption of DVT claims.

¹⁵⁹ 806 N.E.2d 189 (Ohio Ct. App. 2004).

Act. Plaintiff alleged that defendant terminated him after he reported to the FAA that the defendant's Director of Operations "had consumed alcohol and piloted chartered airplanes with a prohibited concentration of alcohol in his body."¹⁶⁰ Defendant filed a motion to dismiss, which asserted the complaint "failed to assert a claim upon which relief could be granted [and the] court lacked jurisdiction because federal law preempted the state law claims."¹⁶¹ The trial court granted defendant's motion and plaintiff appealed.¹⁶²

On appeal, the Ohio Third Appellate District considered the general issue of federal preemption before turning its analysis to 49 U.S.C. §§ 41713 and 42121(a)(1).¹⁶³ The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century added section 42121 to the Federal Aviation Act.¹⁶⁴ This section created the Whistleblower Protection Program, which prohibited the firing or disciplining of airline or aviation contractor employees in response to the employee's reporting of any Federal Aviation Act violations.¹⁶⁵ Plaintiff maintained that his claim under the Ohio Whistleblower Act was not related to a price, route, or service of an airline carrier so that section 41713 was inapplicable to his claim.¹⁶⁶ Defendant maintained plaintiff's claim was preempted by virtue of the passage of section 42121(a)(1).¹⁶⁷

The court found that plaintiff's claims under the Ohio statute were not preempted by the ADA, as the state statute did not relate to a "service" of an airline carrier.¹⁶⁸ The court looked to the decision in *Branche v. Airtran Airways, Inc.*,¹⁶⁹ to support its finding. The *Branche* decision held that a mechanic's reporting to the FAA of Airtran's violation of regulations pertaining to maintenance procedures was not preempted under Section 41713.¹⁷⁰ Relying on *Branche*, the court noted that the plaintiff's actions in the instant matter had no impact on defendant's ser-

¹⁶⁰ *Id.* at 190.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 194-97.

¹⁶⁴ *Id.* at 192.

¹⁶⁵ *Id.* at 192-93.

¹⁶⁶ *Id.* at 193.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 197.

¹⁶⁹ 342 F.3d 1248 (11th Cir. 2003).

¹⁷⁰ *Schumacher*, 806 N.E.2d at 194.

vices.¹⁷¹ Accordingly, the court held plaintiff's claims under the Ohio statute fell outside the preemptive effect of section 41713.¹⁷²

b. *Hoagland v. Town of Clear Lake*: Ordinance Regulating Backyard Heliport Not Preempted by ADA.

In one of the more interesting fact patterns in this area, the U.S. District Court for the Northern District of Indiana considered whether the ADA preempted a local municipality's efforts to regulate the operation of a resident's backyard heliport. In *Hoagland v. Town of Clear Lake*,¹⁷³ the plaintiff and town had a long running dispute over plaintiff's operation of a heliport from his backyard. "The history of ill will and litigiousness between the parties is considerable: [plaintiff] has served multiple Notices of Tort Claims on Clear Lake (some demanding as much as \$200,000,000), the parties have slugged it out twice in Indiana state court, and [plaintiff] has now alleged several violations of his constitutional rights in federal court."¹⁷⁴

At one point, plaintiff even posted on his property a home-made 'No Trespass' sign warning Clear Lake officials that "This land is privately owned by an American national, with sovereign rights of God the Creator," and making the startling claim that "Violations of the owners Private Christian, or property rights . . . shall be assessed a civil penalty of one million dollars in U.S. Dollars for each violation," as well as "up to ten years in prison."¹⁷⁵

As noted in the court's opinion, the federal court action centers on, of all things, [plaintiff] Hoagland's preferred method of commuting to work. Hoagland routinely pilots a helicopter between his home in Clear Lake and his business in Fort Wayne, Indiana, roughly sixty-one miles away. To that end, his Clear Lake property includes a heliport, hangar, and two helicopter landing pads. Over the years, Clear Lake made several attempts to limit Hoagland's use of these amenities, and Hoagland has fought them at every step. The feud has now spilled over into federal court, with Hoagland bringing a flurry of federal constitu-

¹⁷¹ *Id.* at 196.

¹⁷² *Id.* at 197. For similar matters resulting in the same result, see *Nokes v. Aspen Aviation, Inc.*, 104 P.3d 247 (Col. Ct. App. 2004); *Pohl v. Southeast Airlines, Inc.*, 880 So. 2d 766 (Fla. Dist. Ct. App. 2004).

¹⁷³ 344 F. Supp. 2d 1150 (N.D. Ind. 2004).

¹⁷⁴ *Id.* at 1152.

¹⁷⁵ *Id.*

tional and state-law claims, both for damages and for invalidation of certain Clear Lake ordinances.¹⁷⁶

"On May 8, 2000, Clear Lake began the process of amending Ordinance 84, the master-zoning ordinance, to cover aircraft landing areas."¹⁷⁷ "After many months of discussion by the Town Council and the Plan Commission, Clear Lake adopted Ordinance 268 . . . [which] designates an '[a]ircraft landing strip, pad, or space' as a 'special use' requiring special permission of the Zoning Board of Appeals."¹⁷⁸ "It also provides that any preexisting unapproved aircraft landing area must be discontinued within five years of the ordinance's passage or upon transfer of the subject property (whichever comes first), subject to one exception which is not relevant to this discussion."¹⁷⁹

"In August 2001, Hoagland applied to the Federal Aviation Administration for a 'Public Use Designation' for his heliport."¹⁸⁰ "According to Hoagland, Clear Lake falsely told the Administration that a court order prohibited public use of the heliport, and the Administration denied his application as a result."¹⁸¹

Hoagland filed the federal action in 2003. The parties filed cross motions for summary judgment on various issues, arguing, *inter alia*, that the ADA preempted Ordinance 268.¹⁸² In finding no federal preemption, the district court focused on the effect of the ordinance. The court found that the ordinance focused on the regulation of land use rather than the price, route, or service of plaintiff's helicopter operations.¹⁸³ "[The ordinances] amend this master plan by limiting or banning the use of land as an 'aircraft landing strip, pad, or space.' In other words, the Ordinances regulate how Hoagland uses his land, not how he operates his helicopter; any effect they might have on Hoagland's prices, routes, or service is tangential."¹⁸⁴ The court concluded that section 41713 did not expressly preempt land use ordinances such as the one at issue in this case.¹⁸⁵

¹⁷⁶ *Id.* at 1152-53.

¹⁷⁷ *Id.* at 1154.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1154-55.

¹⁸³ *Id.* at 1156.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

The court then addressed plaintiff's field preemption claims. On this point, Hoagland cited to various decisions regarding noise ordinances, including *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*,¹⁸⁶ to support the argument that land use regulations that impact on aviation are preempted by virtue of the pervasive federal regulation of the aviation industry.¹⁸⁷ The court rejected the *Burbank* line of cases as involving too broad an interpretation of the Federal Aviation Act.¹⁸⁸ Instead, the court relied on *Gustafson v. City of Lake Angelus*,¹⁸⁹ and similar decisions to hold that "federal preemption of the airspace under the [Federal Aviation] Act does not limit the right of local governments to designate and regulate aircraft landing areas."¹⁹⁰

c. *Levy v. Delta Airlines, Inc.*: Refusal to Board Claim Not Preempted

In *Levy v. Delta Airlines, Inc.*,¹⁹¹ plaintiffs alleged they purchased tickets from Delta for a family trip to Nice, France. "It is alleged that [the father] asked an agent of Delta what papers were needed for a flight to France, and that, upon hearing that Levy was bringing a three-month-old son born in the United States, the Delta agent said that only a birth certificate or other proof of birth would be needed."¹⁹²

"The Levys arrived at the Delta check-in counter on April 17, 2001.¹⁹³ A Delta supervisor . . . refused to allow the infant son, Jacques, on the plane because he did not have a passport, or any other official documentation for travel to France.¹⁹⁴ It was necessary for the family to reschedule their trip for the next day, in order to allow them to obtain proper documentation for Jacques."¹⁹⁵ Plaintiffs assert that the plane was overbooked, not Jacques's lack of a passport, which was the reason for not allowing Jacques to travel.¹⁹⁶

¹⁸⁶ 979 F.2d 1338 (9th Cir. 1992).

¹⁸⁷ *Hoagland*, 344 F. Supp. 2d at 1156-57.

¹⁸⁸ *Id.* at 1157-58.

¹⁸⁹ 76 F.3d 778 (6th Cir. 1996).

¹⁹⁰ *Hoagland*, 344 F. Supp. 2d at 1158 (citing *Gustafson*, 76 F.3d at 790).

¹⁹¹ CIV.A.02-4777(TPG), 2004 WL 2222149 (S.D.N.Y. Sept. 30, 2004).

¹⁹² *Id.* at *1.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

Delta asserted that it provided the ticket insert to each Delta ticketed passenger in and about April 2000.¹⁹⁷ "The ticket insert included a 'Notice of Incorporated Terms,' which stated: "[f]oreign air transportation is governed by applicable tariffs on file with the U.S. and other governments, which tariffs are herein incorporated by law and made part of the contract of carriage."¹⁹⁸

During April 2000, Delta had in effect Tariff Rule 45, which provided:

(B) PASSPORTS AND VISAS

(1) EACH PASSENGER DESIRING TRANSPORTATION ACROSS ANY INTERNATIONAL BOUNDARY WILL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY TRAVEL DOCUMENTS AND FOR COMPLYING WITH ALL GOVERNMENT TRAVEL REQUESTS.

...

(D) GOVERNMENT REGULATION

NO LIABILITY SHALL ATTACH TO CARRIER IF CARRIER IN GOOD FAITH DETERMINES THAT WHAT IT UNDERSTANDS TO BE APPLICABLE LAW, GOVERNMENT REGULATION, DEMAND, ORDER OR REQUIREMENT, REQUIRES THAT IT REFUSE AND IT DOES REFUSE TO CARRY A PASSENGER.¹⁹⁹

"After refusing to transport the Levys on April 17, Delta agreed to put them on the flight to Nice the following evening, if they obtained the proper travel documents for Jacques."²⁰⁰ Plaintiffs arrived at the airport on April 18, 2000, apparently with a lawful travel document for Jacques.²⁰¹ "However, according to the Levys, Delta did not have seats for them on the Delta plane, but referred the Levys to the Air France ticket counter, where they were left to fend for themselves."²⁰² In contrast, Delta's records reflect that it booked the Levys on Delta flight number 82 on April 18.²⁰³ In addition, Delta maintained that "difficulties in seating the Levys on April 18 resulted from complying with a regulation requiring infants to have access to oxygen masks."²⁰⁴ Because the airplane only provided for one

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at *1.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

additional oxygen mask for an infant per row of seats Delta could not seat both Levy infants in the same row.²⁰⁵

Plaintiffs sued Delta for their travel difficulties. "The allegations of wrongdoing against Delta relating to the above matters are the basis of Count One of the complaint, claiming negligence, and Count Two, claiming breach of contract."²⁰⁶

The district court analyzed whether the ADA preempted plaintiffs' claims. Citing to the U.S. Supreme Court decision in *Wolens*, the court stated that "[t]he Supreme Court has held that the ADA does not preempt state-law based adjudication of routine breach-of-contract claims, so long as courts confine themselves to enforcing the parties' bargain."²⁰⁷ Finding that the plaintiffs were attempting to enforce a private agreement with Delta, the court held the ADA did not preempt the breach of contract claim.²⁰⁸ Turning to the tort claims, the court found in a similar fashion those claims were not preempted, as they did not relate to an issue regarding price, route, or service of an airline.²⁰⁹

d. *Alshrafi v. American Airlines, Inc.*: Claims for Racial Discrimination and Intentional Infliction of Emotional Distress

In *Alshrafi v. American Airlines, Inc.*,²¹⁰ plaintiff sued American and the captain who refused to permit him to board a flight from Boston to Los Angeles. Plaintiff, who is an Arab-American and a Muslim, contended the refusal was motivated by unlawful discrimination while the pilot counters the decision was based on legitimate security purposes.²¹¹ American removed plaintiff's state court action to federal court based on diversity jurisdiction and, alternatively, on federal question jurisdiction as the resolution of plaintiff's claims depends upon a resolution of the Federal Aviation Act, 49 U.S.C. section 44902 and the ADA, section 41713.²¹² American moved for summary judgment shortly thereafter contending plaintiff's state tort law claims were pre-

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *3 (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995)).

²⁰⁸ *Id.* at *4.

²⁰⁹ *Id.* at *5.

²¹⁰ 321 F. Supp. 2d 150 (D. Mass. 2004).

²¹¹ *Id.* at 152.

²¹² *Id.* at 153-54.

empted under section 41713 as the refusal to board is a decision regarding airline "service."²¹³

After analyzing the jurisdictional aspects of the removed case, the district court turned its attention to the issue of preemption. The court focused its analysis on whether the state claims for discrimination and intentional infliction of emotional distress related to airline rates, routes or services and, if so, whether their relationship is too tenuous, remote or peripheral to warrant preemption.²¹⁴ Citing to *Wolens* and *Morales*, the court explored the various decisions that interpreted the word "services" as used in section 41713, noting the divergence the meaning applied.²¹⁵ The court adopted the reasoning from *Doricent v. American Airlines, Inc.*,²¹⁶ to find no preemption. The court concluded that "racial and religious [discrimination] and the intentional infliction of emotional distress bear [no] relation to the legitimate preservation of airline security" under Section 44902(b) and are thus not preempted by the ADA.²¹⁷

B. FEDERAL AVIATION ACT OF 1958

1. *Hughes v. Crist: Preemption Claims Unclear for Drunken Pilots*

As an update to the *Hughes v. 11th Judicial Circuit of Florida*,²¹⁸ a case reported in 2003, the Eleventh Circuit ruled in July 2004 that the district court should have refrained from deciding whether federal aviation law preempted state criminal charges against two America West pilots who attempted takeoff while under the influence of alcohol.²¹⁹ While the district court had ruled in favor of both pilots, the U.S. Court of Appeals for the Eleventh Circuit ruled that the preemption claims were not "facially conclusive."²²⁰

Officials smelled alcohol on pilots Christopher Hughes and Thomas Cloyd on July 1, 2002, before they entered the cockpit on an America West flight.²²¹ Prior to takeoff, ground control ordered the pilots to taxi back to the gate; they subsequently

²¹³ *Id.* at 156.

²¹⁴ *Id.* at 156-59.

²¹⁵ *Id.* at 157-58; see *supra* notes 105, 108.

²¹⁶ *Doricent v. Am. Airlines, Inc.*, No. CIV. A.91-120844, 1993 WL 437670 (D. Mass. Oct. 19, 1993).

²¹⁷ *Alshrafi*, 321 F. Supp. 2d at 162.

²¹⁸ 274 F. Supp. 2d 1334 (S.D. Fla. 2003).

²¹⁹ *Hughes v. Crist*, 377 F.3d 1258, 1260 (11th Cir. 2004).

²²⁰ *Id.* at 1260-61.

²²¹ *Id.* at 1260.

failed breathalyzer tests.²²² The police charged Hughes and Cloyd “with operating an aircraft while intoxicated, operating a vehicle while intoxicated, and culpable negligence under Florida state law.”²²³ Before their criminal trial in Florida state court, the court denied their motions to dismiss based on federal preemption.²²⁴ Upon petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida, the court quashed the state criminal proceedings and enjoined the state of Florida from taking any further action in the matter.²²⁵ On appeal, the Eleventh Circuit considered field preemption and express preemption in reaching its decision.

The Eleventh Circuit noted that “while Congress and the [Federal Aviation Administration] have enacted [a number of] statutes and regulations . . . governing pilot qualifications and safety, field preemption is based on the inference that the entire field has been occupied, leaving no room for state supplementation.”²²⁶ The appellate court reasoned:

There are indications in congressional statutes and in the FAA’s regulations that it was contemplated that state statutes would operate affecting the precise conduct at issue in this case. Therefore, we cannot say it is facially conclusive that appellees are entitled to the inference that there was no room left for state supplementation of the relevant field.²²⁷

Accordingly, the appellate court determined that for that reason, the district court should have abstained from hearing the pilots’ claims.²²⁸

While the district court had concluded that “express preemption of the relevant Florida criminal statutes was readily apparent” and would provide sufficient basis for the district court to hear the pilots’ claims despite the appellate court’s ruling on field preemption, the Eleventh Circuit observed that the challenged Florida statutes did not necessarily cover the same subject matter as the federal regulations at issue.²²⁹ The appellate court also recognized that the regulations contemplate that “state law enforcement officers will investigate suspected viola-

²²² *Id.* at 1260-61.

²²³ *Id.* at 1261.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 1271.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 1273.

tions of state and local laws sanctioning airline crew members acting under the influence of alcohol or while having 0.04% by weight or more of alcohol in the blood.”²³⁰ The panel concluded that there is an obvious tension between the regulations and the position of the pilots.²³¹

2. *Shupert v. Continental Airlines Inc. : Injury by Falling Crutch*

A New York Federal Judge held in April 2004 that a Continental Airlines Inc. passenger struck in the neck and back by a metal crutch that fell from an overhead compartment may recover damages from the carrier and ruled that federal aviation law does not preempt the plaintiff’s action.²³² After a Continental flight landed at Orlando International Airport in Florida, a crutch belonging to another passenger fell from an overhead bin hitting the plaintiff on the back and neck and injuring her.²³³ In her suit filed in the U.S. District Court for the Southern District of New York, plaintiff alleged that Continental Airlines’ negligence was the proximate cause of her injuries.²³⁴

In its motion for summary judgment, Continental argued that the plaintiff’s claim was barred by the Federal Aviation Act of 1958 (“FAA”), amended by the Airline Deregulation Act (“ADA”).²³⁵ Continental maintained that the implied preemptive effect of the FAA is independent from the express provisions of the ADA.²³⁶ Citing *Abdullah v. American Airlines Inc.*,²³⁷ the U.S. District Court denied Continental’s motion. Judge Lawrence McKenna opined,

Consistent with *Abdullah* . . . the plaintiff may still seek state remedies for her injuries. Indeed, in addition to its saving clause, which specifically mentions remedies, [the Federal Aviation Act] contains provisions expressly requiring an air carrier to maintain liability insurance to cover claims for ‘bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft.’²³⁸

²³⁰ *Id.*

²³¹ *Id.*

²³² *Shupert v. Cont’l Airlines Inc.*, No. CIV.A.00-2743-LMM, 2004 WL 784859, *1, *6 (S.D.N.Y. Apr. 12, 2004).

²³³ *Id.* at *1.

²³⁴ *Id.*

²³⁵ *Id.* at *4.

²³⁶ *Id.*

²³⁷ 181 F.3d 363, 368-71 (3d Cir. 1999).

²³⁸ *Shupert*, 2004 WL 784859, at *6.

Judge McKenna explained that, “[a]s a result, the [c]ourt’s holding of federal preemption does not prevent the possibility that Shupert may recover a state damage remedy.”²³⁹

Judge McKenna further noted that Continental is not protected from liability as a matter of law by the delay after the fellow passenger opened the overhead bin, and without regard to who was involved in the incident (i.e., passenger or crew).²⁴⁰ Continental’s alleged failure to supervise passengers as they removed baggage from the compartments may be found to be in violation of the federal safety standard, the court ruled.²⁴¹ “Because the flight crew knew that the crutches—potentially unwieldy items—were in the overhead bin, and because it is reasonably foreseeable that passengers will unsafely grab for items overhead, Shupert’s allegations and evidence raise an issue of fact appropriate for consideration by a jury.”²⁴²

3. *Bonano v. East Caribbean Airline Corp.: No Private Right of Action*

The court in *Bonano v. East Caribbean Airline Corp.*,²⁴³ decided a putative class action suit that was brought by an airline ticket passenger against a charter airline, an airport and others, alleging that (1) chartered flights were canceled without giving the purchasers notice and without refunding their money; (2) that the airline did not maintain a separate account for each charter flight; and (3) that it failed to have a bond approved and accepted by the ICC, all in violation of the FAA and its charter regulations. The First Circuit affirmed the district court’s dismissal of the action, holding that neither the FAA nor its implementing regulations created an implied private right of action.²⁴⁴

4. *Williams v. Midwest Express Airlines, Inc.: No Basis for Removal Jurisdiction*

A federal judge for the U.S. District Court for the Eastern District of Wisconsin held in April 2004 that a federal district court

²³⁹ *Id.*

²⁴⁰ *Id.* at *8.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ 365 F.3d 81 (1st Cir. 2004) (ruling that FAA could coexist with state damage remedies without undoing the federal regulatory scheme, such that plaintiffs could potentially recover under state remedies).

²⁴⁴ *Id.* at 86.

lacked federal question jurisdiction to rule on state law claims alleging that a Midwest Express Airlines, Inc. had unjustifiably excluded two passengers from a flight.²⁴⁵ On an August 2001 flight from Milwaukee to New York City, members of the band, the O'Jays, alleged that the defendant falsely accused the plaintiffs of staring at a flight attendant, after which she asked them to leave the aircraft and had the sheriff's deputies meet plaintiffs at the gate.²⁴⁶ Defendants argued that the plaintiffs' state law claims were removable because the Federal Aviation Act ("FAA") and/or the Airline Deregulation Act completely preempted them.²⁴⁷ District Judge Adelman ruled, however, that the FAA, which prohibits air carriers from unreasonably discriminating against passengers, does not contain a cause of action encompassing plaintiffs' claims; thus, the statutes were not completely preemptive.²⁴⁸ He further ruled that although the passengers' right to relief appeared to hinge on whether the carrier violated a federal statute that allows carriers to refuse transportation for safety reasons, the statute provided no federal remedy.²⁴⁹ Accordingly, the presence of a claimed violation of the statute as an element of a state cause of action does not confer federal question jurisdiction.²⁵⁰ Last, Judge Adelman determined that the carrier failed to argue that the federal statutes imply a private cause of action and removal of the action to federal court was improper.²⁵¹

V. FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA) generally permits claims against the United States for damages:

²⁴⁵ *Williams v. Midwest Express Airlines, Inc.*, 315 F. Supp. 2d 975, 981 (E.D. Wis. 2004).

²⁴⁶ *Id.* at 977.

²⁴⁷ *Id.* at 979.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 980.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 980-81. (Determining that removal based on diversity jurisdiction was proper). However, on June 9, 2004, the court subsequently held plaintiffs' state law tort claims for emotional distress were preempted under section 41713. *Williams v. Midwest Express Airlines, Inc.*, 321 F. Supp. 2d 993, 996 (E.D. Wis. 2004). After analyzing the U.S. Supreme Court decisions in *Morales* and *Wolens*, and also the Seventh Circuit's decision in *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), the court concluded the tort claims were preempted as they were based on Midwest's refusal to transport the plaintiffs, which "clearly relate to airline services." *Id.* at 995-96.

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²⁵²

The FTCA, while broadly waiving sovereign immunity as to the United States, contains several exceptions to this waiver.²⁵³

The Seventh Circuit held in February 2004, that the United States government was not liable under the FTCA for damages arising from the deaths of three passengers aboard a small aircraft which crashed in Indiana after experiencing icing conditions.²⁵⁴ Specifically, the court found that the Air Traffic Control Service had no duty to restrain the pilot from taking off in hazardous weather conditions and that the pilot's negligence was the proximate cause of the crash.²⁵⁵

In this case, the decedents were traveling from Louisville, Kentucky, to Aurora, Illinois, in March 1998.²⁵⁶ The aircraft encountered icing conditions en route and the pilot attempted an emergency landing at an airport in New Lebanon, Indiana.²⁵⁷ Prior to departure, the pilot informed the Louisville Flight Service Station of his intended destination.²⁵⁸ The weather briefer provided a weather advisory (AIRMET) that warned of occasional "moderate rain or mixed icing" along the pilot's flight path to Aurora.²⁵⁹ Additionally, the weather briefer informed the pilot that a surface observation along the flight path indicated "light snow and mist and a surface temperature of 2 degrees Celsius."²⁶⁰ The pilot also received surface observations for the Aurora airport which indicated surface temperatures of 2 degrees Celsius and winds at 18 knots with gusts to 26 knots.²⁶¹ The pilot further received pilot reports (PIREPs) of actual weather conditions, three of which reported icing conditions in Louisville and LaFayette, Indiana.²⁶²

²⁵² 28 U.S.C. § 1346(b)(1) (2002).

²⁵³ 28 U.S.C. § 2680 (2002).

²⁵⁴ *Spurgin-Dienst v. United States*, 359 F.3d 451, 455 (7th Cir. 2004).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 453.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 453-54.

After take-off, the pilot requested icing reports for the Evansville, Indiana area.²⁶³ The responding controller advised that there were none in the last two hours.²⁶⁴ This information was incorrect.²⁶⁵ The pilot then requested icing reports for the Terre Haute, Indiana control area.²⁶⁶ The responding controller advised that there had not been any for several hours but did convey earlier reports of icing.²⁶⁷

Shortly thereafter, the pilot reported that the aircraft had accumulated ice and requested permission to land at Terre Haute.²⁶⁸ Nine minutes later, however, the pilot reported losing airspeed and requested a closer airport.²⁶⁹ The controller directed the pilot to an airport five miles ahead and advised of two approaches: VOR-Alpha (circling) or NDB (straight in).²⁷⁰ The pilot chose the VOR-Alpha approach and the controller attempted to lead the pilot to the airport.²⁷¹ The aircraft crashed five miles from the airport.²⁷²

The Seventh Circuit began its analysis by noting that the District Court identified the correct inquiry under the FTCA and Indiana law. Specifically, that the plaintiff must show “by the preponderance of the evidence that some act or omission on the part of the flight service briefer, or a traffic controller was a proximate cause of the icing and/or the inability of [the pilot] to land the plane safely.”²⁷³

Based on the evidence in the record, the court found that “[the] Air Traffic Control Service had no duty to restrain [the pilot] from taking off in hazardous weather” and that the “[district] court’s conclusion that the [pilot’s] decision to fly into known icing conditions was the proximate cause of the crash and that nothing government agents on the ground did or did not do was amply supported by the [evidence].”²⁷⁴

The court acknowledged, however, that the “FAA personnel committed errors” including “failing to provide [the pilot with]

²⁶³ *Id.* at 454.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 455.

²⁷⁴ *Id.*

the Area Forecast and the Meteorological Impact Statement which contained information regarding icing conditions.”²⁷⁵ Additionally, the court noted that the Evansville controller incorrectly informed the pilot that there had not been any PIREPs of icing for two hours.²⁷⁶ However, the court found that the district court’s conclusion that this information would not have led the pilot to change course was not clearly erroneous.²⁷⁷ The court further found that it was reasonable for the district court to find that the pilot, due to icing on the plane, could not have made the VOR approach to the target airport such that nothing the Terre Haute controller did or did not do contributed to the accident.²⁷⁸

Another FTCA case decided in 2004, *Whittington v. United States*,²⁷⁹ involved a claim by the children of a deceased pilot against the United States alleging negligence under Georgia law where the decedent allegedly relied upon FAA-published erroneous information regarding a runway length. The court dismissed the plaintiff’s lawsuit for lack of subject matter jurisdiction after the district court determined that the plaintiff’s allegations regarding the FAA’s dissemination of wrongful information were insufficient to establish jurisdiction.²⁸⁰ Rather, the district court noted, that the Airport and Airway Improvement Act of 1982 (AAIA) governs the federal funding of private airports.²⁸¹ The Sixth Circuit noted that, “[f]or purposes of FTCA liability, the AAIA does not create a cause of action nor does it confer a duty on the FAA to ensure the safety of airports receiving federal funds.”²⁸²

In a separate FTCA decision, the Northern District of Illinois handed down its findings of facts and conclusions of law in the matter captioned *Alinsky v. United States* arising from the mid-air collision of two aircraft over the Chicago lakefront in July 1997.²⁸³ At a bench trial in January 2004, the court heard evidence on issues relating to:

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 456.

²⁷⁹ *Whittington v. United States*, 99 Fed. Appx. 56 (6th Cir. 2004).

²⁸⁰ *Id.* at *3.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ No. CIV.A.98-6189, CIV.A.99-1738, CIV.A.99-2447, CIV.A.99-2883, 2004 WL 1588273 (N.D. Ill. July 16, 2004).

1) Whether . . . the Manager for the Hub that included Chicago's Meig's Tower properly administered a "practical test" to Midway Tower Supervisor Doreen Adams before Ms. Adams certified the independent contractor's air traffic controllers at Meigs Tower[;] and

2) [W]hether the FAA unreasonably delayed in responding to the contractor's request for a contract modification to pay for permanently increased staffing at Meigs Tower, and whether this allegedly unreasonable delay caused Midwest Air Traffic Control Services not to be in compliance with the AA order that involves "Controller-in-Charge" training.²⁸⁴

The court issued detailed findings of fact. Specifically, the court found that there was no FAA order governing staffing levels for contract towers and that such decisions are within the discretion of the Contract Tower Program Office.²⁸⁵ Additionally, the court found that the FAA acted reasonably in considering a non-emergency request to modify the tower contract and had complete discretion in the staffing matter.²⁸⁶ Finally, the court found that the FAA never prevented Midwest Air Traffic Control Services from training its controllers as required by contract.²⁸⁷

Accordingly, the court concluded that the United States "committed no tort against the Plaintiffs under the [FTCA and that] the United States has a valid defense that its alleged negligent oversight falls within the discretionary function exception to the FTCA."²⁸⁸

VI. FOREIGN SOVEREIGN IMMUNITIES ACT

A. *DOLE FOOD COMPANY V. PATRICKSON*: NO TIERING OF INTERESTS

On April 22, 2003, the United States Supreme Court issued an opinion styled *Dole Food Company v. Patrickson*, which has implications with respect to litigation against foreign air carriers and foreign aircraft manufacturers in the United States.²⁸⁹ In effect, many of these air carriers and aircraft manufacturers could previously invoke certain rights and privileges that the Foreign Sovereign Immunities Act ("FSIA") affords to foreign states.

²⁸⁴ *Id.* at *1.

²⁸⁵ *Id.* at *5.

²⁸⁶ *Id.* at *3.

²⁸⁷ *Id.* at *6.

²⁸⁸ *Id.*

²⁸⁹ 538 U.S. 468 (2003).

However, in its opinion, the Supreme Court resolved the split decisions of appellate courts in favor of a narrow definition that found that a subsidiary of an “instrumentality” is not entitled to the protections of FSIA.²⁹⁰

The FSIA, codified in 28 U.S.C. § 1602 *et seq.*, is the only statute that provides jurisdiction over foreign states and their instrumentalities respecting litigation in the United States.²⁹¹ Under FSIA, a foreign state is generally granted immunity unless it waives such immunity or engages in commercial activities.²⁹² In such instance, the foreign sovereign may remove an action to federal court, which the court would try without a jury.²⁹³ The FSIA defines a “foreign state” as:

(a) A “foreign state” . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . .²⁹⁴

Prior to *Dole*, a majority of courts interpreted the definition of foreign state broadly to include corporations where the majority state ownership was indirect. For example, in *In re Air Crash Disaster Near Roselawn, Indiana*, the Seventh Circuit held that a foreign aircraft manufacturer indirectly owned by the French and Italian governments was entitled to have its case heard in federal court as it was an “agency or instrumentality” under the FSIA.²⁹⁵ Avions de Transport Regional (“ATR”) was a joint enterprise between the French and Italian governments. Two foreign corporations, SNIA and Alenia, owned ATR.²⁹⁶ Through a tiered structure of companies, the French and Italian governments indirectly owned approximately 75% of ATR.²⁹⁷ The court reasoned that the French and Italian governments exercised control over ATR through their ownership of the shareholding

²⁹⁰ *Id.* at 473.

²⁹¹ 28 U.S.C. § 1602 (2002).

²⁹² *Id.*

²⁹³ *See* 28 U.S.C. § 1441(d) (2002).

²⁹⁴ 28 U.S.C. § 1603 (2002).

²⁹⁵ 96 F.3d 932, 935 (7th Cir. 1996).

²⁹⁶ *Id.* at 935-36.

²⁹⁷ *Id.* at 936.

companies.²⁹⁸ The court held that the act intended a broad definition of foreign state and that it included a tiered ownership such as ATR.²⁹⁹ In so holding, it rejected decisions by the Ninth Circuit that held that the FSIA required a direct ownership interest by a foreign state.³⁰⁰

Until *Dole*, the Ninth Circuit's analysis was the minority opinion with respect to the definition of "agency or instrumentality of a foreign state" in the FSIA. The underlying matter involved claims by workers against the Dole Food Company alleging injury from exposure to a pesticide manufactured by two companies referred to as the Dead Sea Companies.³⁰¹ The Dead Sea Companies removed the action to federal court on the basis that they were instrumentalities of Israel.³⁰² The Ninth Circuit affirmed the lower court's opinion that held that because Israel did not directly own the Dead Sea Companies, they were not subject to the FSIA and removal was improper.³⁰³

The United States Supreme Court granted certiorari, and on appeal upheld the Ninth Circuit's opinion finding that indirect subsidiaries are not instrumentalities under the FSIA.³⁰⁴ The *Dole* court reasoned that corporations and its shareholders are distinct entities and that distinctions in corporate structure were important.³⁰⁵ The court did not find any indication that Congress intended a departure from general corporate law in this matter.³⁰⁶ Further, the *Dole* court refused to read "other ownership interest" to include a state's interest through the ownership of shares in a subsidiary or parent corporation.³⁰⁷ It found a more reasonable interpretation to be an ownership interest other than stock, which provided flexibility for ownership forms in foreign countries that depart from conventional corporate structures.³⁰⁸ Therefore, the court found that a corporation is only an instrumentality of a state under the FSIA "if the foreign state . . . itself owns a majority of the corporation's shares."³⁰⁹

²⁹⁸ *Id.* at 938.

²⁹⁹ *Id.* at 941.

³⁰⁰ *See, e.g.,* *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

³⁰¹ *Dole*, 538 U.S. at 468.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 468-69.

³⁰⁶ *Id.* at 469.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 468.

While the court admitted that certain rare instances may allow a court to pierce the veil between the corporation and its shareholders, it did not find any reason to do so in the case at issue.³¹⁰ The court further identified that the state's ownership interest is to be determined when the litigation commences, not when the conduct occurs.³¹¹

B. APPLICATION OF *DOLE* TO AVIATION MATTERS

1. *Wong v. The Boeing Company: China Airlines Not a Foreign Sovereign*

In the context of aviation matters, this decision would seemingly increase the number of foreign air carriers and foreign aircraft manufacturers that would have their cases heard in state, rather than federal courts. However, pursuant to the Multiparty, Multiforum Jurisdiction Act, original federal jurisdiction exists for litigation that arises out of a single accident in which at least 75 persons lost their lives and where minimal diversity exists for accidents on or after November 2, 2002.³¹² Therefore, while the trial will be to a jury and not the judge, many foreign air carriers and foreign manufacturers will be able to have their cases heard in federal court.

Nevertheless, for matters arising from an event prior to November 2, 2002, the *Dole* precedent may result in state court adjudication. In *Wong v. Boeing Company*,³¹³ third-party defendant, China Airlines Ltd., removed the litigation pending in state court to the U.S. District Court for the Northern District of Illinois based on the *Roselawn* decision in the Seventh Circuit. The Republic of China owns the China Aviation Development Foundation which owns 70% of China Airlines.³¹⁴ Plaintiff, Wong, filed a motion to remand the matter back to Cook County (Illinois) Circuit Court.³¹⁵ After briefing the motion but before the district court rendered a decision, the Supreme Court handed down the *Dole* decision.³¹⁶ After the parties submitted additional briefing to address *Dole*, the district court remanded the litiga-

³¹⁰ *Id.* at 469.

³¹¹ *Id.*

³¹² 28 U.S.C. § 1369(a) (2002).

³¹³ No. CIV.A.02-7865, 2003 WL 22078379 (N.D. Ill. Sept. 8, 2003) (unreported decision).

³¹⁴ *Id.* at *1.

³¹⁵ *Id.*

³¹⁶ *Id.* at *3.

tion to state court.³¹⁷ The court found that China Airlines was not directly owned by the Republic of China (Taiwan).³¹⁸ There being no other grounds upon which to premise jurisdiction, the court remanded the case back to state court.³¹⁹

2. Coyle v. P.T. Garuda Indonesia: *Garuda a Foreign Sovereign*

*Coyle v. P.T. Garuda Indonesia*³²⁰ examined different issues relating to federal jurisdiction under FSIA. This matter arose from litigation filed in federal district court by representatives of Oregon residents who died in the Garuda Flight 152 accident on September 26, 1997 in Indonesia.³²¹ The Indonesian government wholly owns Garuda, rendering Garuda an "instrumentality" under FSIA.³²² The issues focused on whether two exceptions to the FSIA would allow the action to proceed which included: (1) whether Garuda waived its immunity; and (2) whether FSIA considered the flight a "commercial activity."³²³ The lower court found that jurisdiction was proper as the flight was part of the decedents' international travel under Article 1(3) of the Warsaw Convention and that a provision in Garuda's U.S. operating permit acted as a waiver of any claim to immunity for the incident.³²⁴ On the air carrier's appeal, the Ninth Circuit reversed the holding that the flight was a domestic side trip and thus not governed by the Warsaw Convention or subject to any immunity in the U.S. operating permit.³²⁵ The court also held that as it found the flight to be a domestic side trip, it did not meet 28 U.S.C. § 1605(a)(2), requiring that the foreign state's commercial activity cause a direct effect in the United States.³²⁶

³¹⁷ *Id.*

³¹⁸ *Id.* at *7.

³¹⁹ *Id.*

³²⁰ 363 F.3d 979 (9th Cir. 2004).

³²¹ *Id.* at 982-83.

³²² *Id.* at 982, n.2.

³²³ *Id.* at 984, 993.

³²⁴ *Id.* at 984.

³²⁵ *Id.* at 991-92.

³²⁶ *Id.* at 993-94.

VII. FORUM NON CONVENIENS

A. *ZERMENO V. McDONNELL DOUGLAS CORP.*

In *Zermeno v. McDonnell Douglas Corp.*,³²⁷ a federal judge in Texas rejected a request to vacate her prior order dismissing the action on forum non conveniens grounds and ruled that four family members killed in Mexico when an Aeromexico plane struck their house may not proceed with a lawsuit in the United States. In February 2003, U.S. District Judge Lee H. Rosenthal of the Southern District of Texas had dismissed the action on forum non conveniens grounds.³²⁸ Zermeno's wife and three of his children died when an Aeromexico flight ran off the runway in Mexico and struck the home of Julio Jasso Zermeno on October 6, 2000.³²⁹ Zermeno filed suit in Texas state court against McDonnell Douglas and Boeing, several other corporate defendants, and Aeromexico.³³⁰ Defendants removed the case to federal court, and Zermeno moved to remand; the defendants countered with a motion to dismiss on grounds of forum non conveniens.³³¹ The judge considered the following factors in granting the defendants' motion: none of the conduct causing the injury occurred in Texas; the accident occurred in Mexico; Aeromexico maintained the aircraft in Mexico; relevant witnesses and documents were in Mexico; and the aircraft was neither designed nor manufactured in Texas.³³² According to Judge Rosenthal, "the differences between American and Mexican substantive and procedural law were not so great as to deprive the plaintiffs of any remedy in a Mexican court."³³³

After dismissal, plaintiffs obtained documents from the FAA showing its inspection of the aircraft and argued that U.S. law would, accordingly, apply and that the court should allow the case to go forward in the United States.³³⁴ The District Court found that the FAA records were not "new evidence" within the meaning of Federal Rule of Civil Procedure 60(b).³³⁵ Moreover, the evidence would not have affected the outcome of the court's analysis because there were significant connections between the

³²⁷ No. Civ.A.H-02-2862, 2004 WL 1146192 (S.D. Tex. May 10, 2004).

³²⁸ *Id.* at *1.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at *1-2.

³³³ *Id.* at *2.

³³⁴ *Id.* at *3.

³³⁵ *Id.* at *4, n.1.

case and the foreign forum that made dismissal under the forum non conveniens doctrine appropriate.³³⁶

B. *ANDERSON V. DASSAULT AVIATION*

In *Anderson v. Dassault Aviation*,³³⁷ the Eighth Circuit held that Dassault, the French business jet manufacturer, had sufficient contacts with Arkansas to support the assertion of personal jurisdiction over it in a products liability action. Anderson was hurt when the company jet experienced a series of pitch oscillations descending into a Michigan airport.³³⁸ Dassault sold the plane, which it manufactured in France, to its U.S. subsidiary, Dassault Falcon Jet Corp.³³⁹ Falcon Jet, headquartered in New Jersey, operates a facility in Arkansas, where it services aircraft according to customers' specifications such as Amway.³⁴⁰ The U.S. District Court for the Western District of Michigan *had* dismissed the case against Dassault for lack of personal jurisdiction, finding that Anderson failed to show that Dassault had sufficient contacts in Michigan to fall under the state's long-arm statute.³⁴¹ Anderson then filed suit against Dassault in the Eastern District of Arkansas, with the same result.³⁴² On appeal, the Eighth Circuit overturned the lower court's decision, finding that the majority of jets sold worldwide by Dassault fly in and out of Arkansas for consumer specifications at the Falcon Jet facility, and the manufacturer's annual report listed Arkansas as the largest production site.³⁴³ The court ruled that this was "not a situation in which Dassault Aviation simply placed the jet at issue 'into the stream of commerce' which fortuitously swept it into Arkansas."³⁴⁴

Dassault filed a petition for certiorari from this ruling.³⁴⁵ Anderson argued in opposition to U.S. Supreme Court petition that Dassault is subject to jurisdiction in the United States based

³³⁶ *Id.* at *5.

³³⁷ 361 F.3d 449 (8th Cir. 2004).

³³⁸ *Id.* at 450.

³³⁹ *Id.* at 451.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 453.

³⁴⁴ *Id.* at 454.

³⁴⁵ Petition for Writ of Certiorari, *Dassault Aviation v. Anderson*, 2004 WL 1857087 (No. 04-222) [hereinafter *Petition for Writ*].

on the activities of its wholly owned U.S. subsidiary.³⁴⁶ In its Supreme Court Petition, Dassault argued that this case would serve as an “ideal vehicle for addressing the substantial confusion in the lower courts.”³⁴⁷ The first question centered on the proper legal standard governing when the forum contacts of one corporation may be attributed or imputed to an affiliated corporation (here, a parent company).³⁴⁸ Dassault insisted that the Eighth Circuit was “especially in need of correction.”³⁴⁹ Anderson responded that the Eighth Circuit “properly found that petitioner through its own actions had purposefully directed its products to the United States, and specifically to Arkansas, where most Falcon jets are completed, through the distribution system that the petitioner itself established in this country.”³⁵⁰ Well-settled law supports the conclusion that the defendant purposefully availed itself of the privilege of doing business in the Arkansas forum.³⁵¹

C. *IN RE AIR CRASH AT TAIPEI, TAIWAN*

The *In re Air Crash at Taipei, Taiwan*,³⁵² litigation arose from the Singapore Airlines Flight SQ006 crash on departure from the Chiang Kai-Shek Airport to Los Angeles, California on October 31, 2000. Boeing moved for reconsideration of the district court’s prior refusal to dismiss the case on forum non conveniens grounds.³⁵³ The court agreed with Boeing and dismissed 13 cases where Article 28 of the Warsaw Convention did not provide a basis for U.S. jurisdiction.³⁵⁴

The court noted that Singapore Airlines had conceded liability and, accordingly, the court could not simultaneously try the claims against Singapore and Boeing because to do so would risk prejudice to both.³⁵⁵ The court also rejected plaintiffs’ argument “that [the] surviving heirs would want piecemeal settle-

³⁴⁶ Brief for Respondent, *Dassault Aviation v. Anderson*, 2004 WL 2363743 (No. 04-222) [hereinafter Brief for Respondent].

³⁴⁷ *Id.* at *2.

³⁴⁸ *Id.*

³⁴⁹ Petition for Writ of Certiorari, *supra* note 345, at *4.

³⁵⁰ Brief for Respondent, *supra* note 346, at *3.

³⁵¹ *Id.*

³⁵² No. CIV.A.01-1394 GAF (RCX), 2004 WL 1234131 (C.D. Cal. Feb. 6, 2004).

³⁵³ *Id.* at *1.

³⁵⁴ *Id.* at *2.

³⁵⁵ *Id.* at *1, *3.

ments to ensure that all wrongdoers have made peace with the plaintiffs."³⁵⁶

The court distinguished these facts from the TWA 800 and Silk Air disasters, in which the court noted that they presented serious airworthiness questions and that Canada, Singapore and Taiwan were adequate for litigating the claims at issue, due to private and public interest factors.³⁵⁷

D. *SUN V. SINGAPORE AIRLINES LTD.*

In March 2004, the Cook County Circuit Court dismissed the wrongful-death and personal-injury actions stemming from the October 2000 crash of a Singapore Airlines jet at Taipei, Taiwan based on forum non conveniens grounds.³⁵⁸ The plaintiffs filed claims of wrongful death, personal injury, and loss of consortium based on negligence and strict product liability.³⁵⁹ Defendant moved to dismiss, submitting that it would consent to the jurisdiction of the Taiwan courts; treat as tolled any statute of limitations under Taiwan law for any plaintiff within six months of the forum non conveniens dismissal; make evidence available for trial in Taiwan; and pay any damages subject to the right of appeal.³⁶⁰

The court found "that the statutes and laws governing a Taiwan court will provide a sufficient alternative forum convenient to all parties."³⁶¹ While the plaintiffs argued that the high cost of litigation in Taiwan warranted maintaining the matter in a U.S. court, the judge said this factor does not render a forum inadequate, "especially since the evidence here indicates that Taiwan has procedural and substantive laws governing Plaintiffs' cause of action from which they may seek a remedy."³⁶² The court further found that the private and public interest factors strongly favored dismissal, observing that since all plaintiffs were residents of Taiwan, and SIA is a Singapore corporation, the court found "no convenience to maintain this cause of action in the United States, much less Cook County, Illinois, for

³⁵⁶ *Id.* at *3.

³⁵⁷ *Id.* at *5-6.

³⁵⁸ *Sun v. Sing. Airlines, Ltd.*, No. CIV.A.02-L-13640, 2004 WL 601953, at *1 (Ill. Cir. Ct. Mar. 19, 2004).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at *1.

³⁶¹ *Id.* at *8.

³⁶² *Id.*

either Plaintiffs or SIA.”³⁶³ The plaintiffs argued that because Boeing, the manufacturer of the plane, headquartered in Chicago, the Illinois court was the proper forum.³⁶⁴ However, the court did not agree because it found that Boeing had not been served and that evidence on the design and performance of the plane was in Seattle.³⁶⁵ Finally, the judge found that, “[w]hile aviation safety may be of universal concern, the facts and circumstances surrounding this particular litigation, is not.”³⁶⁶ The court found that: (1) SIA, a foreign corporation, owned the subject aircraft; (2) this matter did not involve American plaintiffs; and (3) “the accident from which this litigation arose occurred in Taiwan.”³⁶⁷ “Thus, Cook County residents had minimal interest, if any at all, in resolving this litigation.”³⁶⁸ As such, the [court found] that burdening Cook County residents . . . with the duty of resolving a matter with no nexus to the accident aircraft is inequitable.”³⁶⁹

E. *IN RE AIR CRASH OVER THE TAIWAN STRAIT ON
MAY 25, 2002*

A California federal judge ruled in July 2004 that Taiwan was a suitable alternative forum for wrongful-death cases arising from a May 2002 crash and that, because the defendants had stipulated to liability if the court dismissed the cases, the private and public interest factors favored dismissal.³⁷⁰ The dismissal from the U.S. court came with a number of conditions imposed on the defendants, China Airlines Ltd. and The Boeing Co.³⁷¹ All 225 persons aboard the China Air Flight CI-611, a Boeing 747-200 aircraft, en route from Taipei, Taiwan, to Hong Kong, died.³⁷² Approximately 35,000 feet over the Pacific Ocean, roughly midway between the Chinese mainland and Taiwan, the plane suffered an unknown structural failure, broke apart and crashed into the sea.³⁷³ Heirs of 124 victims filed suit in the U.S.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *In re Air Crash over the Taiwan Strait on May 25, 2002*, 331 F. Supp. 2d 1176 (C.D. Cal. 2004).

³⁷¹ *Id.*

³⁷² *Id.* at 1179.

³⁷³ *Id.*

District Court for the Central District of California against Boeing and China Airlines.³⁷⁴ "Both defendants moved to dismiss all but three of the actions on forum non conveniens grounds."³⁷⁵ In her ruling, U.S. District Judge Margaret M. Morrow ruled that the courts of Taiwan would provide an adequate remedy.³⁷⁶ The court found that Taiwan courts had jurisdiction over defendants, and that plaintiffs' claims are cognizable even though plaintiffs would not be able to rely on a strict products liability theory in Taiwan.³⁷⁷ The court further found that arguments regarding the availability of contingency fee contracts and material discovery as well as concern about filing fees did not warrant a finding that Taiwan's procedural safeguards were inadequate.³⁷⁸

Citing Boeing and China Airlines' earlier agreement to compensate fully the plaintiffs in the country of their decedents' domicile if the court dismissed the claims on forum non conveniens grounds, Judge Morrow said the court need not decide whether it could require the plaintiffs to accept the stipulation to liability.³⁷⁹ "Should the court determine that dismissal is appropriate and condition dismissal on defendants' tendering of the proffered stipulation," Judge Morrow found that the, "plaintiffs are free to argue to the Taiwanese court that they should not be required to accept the stipulation."³⁸⁰ Judge Morrow concluded that the private interest factors, including "ease of access to proof and the amenability of witnesses to compulsory process . . . all weigh in favor of a finding that Taiwan is the more convenient forum."³⁸¹ She further determined that the public interest factor of court congestion "is either neutral or weighs slightly in favor of trial of the cases in Taiwan."³⁸² Likewise, the court found that the "localization of the controversy, preliminary choice of law analysis, and the burden on potential jurors all weigh heavily in favor of Taiwan."³⁸³ While the fact that two plaintiffs brought cases under Article 28 of the Warsaw Convention weighed slightly in favor of the U.S. forum, the

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1186.

³⁷⁷ *Id.* at 1185.

³⁷⁸ *Id.* at 1187.

³⁷⁹ *Id.* at 1192.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 1201.

³⁸² *Id.* at 1212.

³⁸³ *Id.*

judge concluded that on balance, the public interest factors strongly favored dismissal.³⁸⁴ Plaintiffs are appealing the court's decision.

The dismissal leaves open the possibility of U.S. domiciled plaintiffs refiling in the United States. The court conditioned the dismissal, however, on defendants: (1) not contesting liability for compensatory damages; (2) submitting to jurisdiction in the alternative jurisdiction; (3) waiving any applicable statute of limitations for 180 days from the date of the order; (4) waiving any limitation on compensatory damages for those cases governed by Article 28 of the Warsaw Convention that stayed in the court; (5) providing access to evidence; (6) paying for costs of translation from English to Mandarin Chinese as necessary; and (7) allowing refiling if the defendants failed to comply with conditions one through six or if other alternative courts declined to take jurisdiction.³⁸⁵

F. *PORTILLO V. ROBINSON HELICOPTER CO.*

In June 2004, the California Supreme Court denied the petition of Robinson Helicopter Co. to review a ruling that a crash case belongs in the U.S. courts and not in El Salvador, where the accident occurred and the plaintiffs reside.³⁸⁶ Plaintiffs, Salvadoran citizens and the personal representatives of the estates of two brothers who died in a helicopter crash in El Salvador, brought an action in California against the California manufacturers of the helicopter, alleging that the crash occurred due to the failure of a main rotor blade.³⁸⁷

The plaintiffs submitted that the evidence supporting the claims was located in the U.S. and that expert witnesses on helicopter design, manufacturing and other technical issues were U.S. citizens testifying and referring to documents in English.³⁸⁸ Defendant moved the trial court to dismiss or stay the action on forum non conveniens grounds.³⁸⁹ In support of the motion, defendant noted that although the aircraft was manufactured in California, the case should be tried in El Salvador for many reasons: the accident occurred there; all aspects of the flight were

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 1213.

³⁸⁶ *Estate of Portillo v. Robinson Helicopter Co.*, No. CIV.A.B168057, 2004 WL 530745, at *1 (Cal. Ct. App. Mar. 18, 2004).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

subject to Salvadoran air regulations; the decedents were citizens and residents of El Salvador; nearly all potential co-defendants were citizens and organizations of El Salvador; and nearly all witnesses resided in that country.³⁹⁰ The California Appellate Court found that El Salvador did not provide a suitable alternative forum.³⁹¹ However, because there was no evidence that the defendant would be subject to personal jurisdiction in El Salvador, there was no indication that the action in El Salvador would not be barred by the statute of limitations, and further, documents were submitted indicating that there were no rules in El Salvador's judicial system to determine the rights of decedents' relatives.³⁹²

G. *IN RE AIRCRASH NEAR NANTUCKET ISLAND, MASSACHUSETTS ON OCTOBER 31, 1999*

In *In re Aircrash Near Nantucket Island, Massachusetts on October 31, 1999*, a federal judge in New York denied EgyptAir's motion to dismiss the claims of Egyptian and Canadian domiciliaries stemming from a 1999 crash off Nantucket Island based on forum non conveniens grounds.³⁹³ EgyptAir Flight 990, a Boeing 767 en route from New York to Cairo, Egypt, went down on October 31, 1999, approximately 65 miles off the Nantucket coast.³⁹⁴ All persons on board the plane were killed.³⁹⁵ The airline argued that the suits did not belong in the U.S. court based on evidence it presented that Egyptian and Canadian courts would have jurisdiction over the manufacturers.³⁹⁶ The court drew an "adverse inference" as to the credibility and qualifications of EgyptAir's expert on Egyptian law, but held that it would nevertheless have denied EgyptAir's motion, finding that EgyptAir had failed to meet its burden of showing Egypt or Canada were appropriate *fora*.³⁹⁷

³⁹⁰ *Id.*

³⁹¹ *Id.* at *3.

³⁹² *Id.* at *2-3.

³⁹³ *In re Air Crash Near Nantucket Island, Mass. on Oct. 31, 1999*, No. MDL-1344, 2004 WL 1824385 (E.D.N.Y. Aug. 16, 2004).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at *6-7.

³⁹⁷ *Id.* at *6, 8.

H. *McCafferty v. Raytheon, Inc.*

The case of *McCafferty v. Raytheon, Inc.* involved a denial of defendants' motions to dismiss based on forum non conveniens.³⁹⁸ The court held that, although the crash occurred in Indonesia, plaintiffs premised their theory of recovery on the manufacture and sale of the allegedly defective aircraft and engine, which occurred in the U.S.³⁹⁹

I. *LIE v. BOEING CO.*

The court in *Lie v. Boeing Co.*⁴⁰⁰ granted Garuda's FNC motion as to the claims asserted by The Boeing Company and CFM International. This action arose out of a January 16, 2002 emergency landing in the Bengawan Solo River, Indonesia.⁴⁰¹ Plaintiff filed the action originally in Illinois state court.⁴⁰² Defendants removed the case to federal court after they added Garuda as a third-party defendant.⁴⁰³ Defendants/third-party plaintiffs asserted in their removal petition that Garuda was a foreign instrumentality under the Foreign Sovereign Immunities Act.⁴⁰⁴ The Federal District Court remanded the plaintiffs' claims and retained only the third party claims against Garuda, which it then dismissed.⁴⁰⁵

J. *VAN SCHIJNDEL v. BOEING CO.*

The estate of Johannes Van Schijndel, killed in the 2000 crash of a Singapore Airlines jet in Taiwan, argued in a Ninth Circuit brief that claims against Boeing and Goodrich Corp. involving safety and evacuation equipment should not have been dismissed on forum non conveniens grounds.⁴⁰⁶ The airplane, en route from Taiwan to Los Angeles on October 31, 2000, hit construction equipment and burst into flames while taking off on the wrong runway.⁴⁰⁷ The U.S. District Court for the Central

³⁹⁸ *McCafferty v. Raytheon, Inc.*, No. CIV.A.03-6729, CIV.A.03-6730, CIV.A.03-6731, 2004 WL 1858080, at *1 (E.D. Pa. Aug. 19, 2004).

³⁹⁹ *Id.* at *3.

⁴⁰⁰ No. CIV.A.04-C2460, 2004 WL 1462451, at *2 (N.D. Ill. Jun. 29, 2004).

⁴⁰¹ *Id.* at *1.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at *2.

⁴⁰⁶ Brief for Appellant, *Van Schijndel v. Boeing Co.* (9th Cir. Sept. 14, 2004) (No. 04-55787).

⁴⁰⁷ *Id.*

District of California, on reconsideration, granted Boeing and Goodrich's motion to dismiss on February 6, 2004, finding that the admission of liability by Singapore Airlines in an unrelated group of cases mandated the reversal.⁴⁰⁸

On appeal to the U.S. Court of Appeals for the Ninth Circuit, plaintiffs contended that Boeing and Goodrich never initiated any third-party action against Singapore Airlines and no such actions had been instituted against Boeing and Goodrich.⁴⁰⁹ The plaintiffs argued:

The basic reason is that the actions in the case at bar, while having the crash as a catalyst, are purely and simply actions dealing with separate and distinct issues arising from a basic proposition — if the fuel containment systems, fire protection systems, doors and emergency evacuation slides designed and produced in America by Boeing and Goodrich did not malfunction Johannes Van Schijndel would have survived the crash.⁴¹⁰

The plaintiffs also argued that the district court abused its discretion in finding that Singapore Airlines' admission required reversal of its prior opinion and submitted that the trial judge's original ruling was correct in that the balance of public and private factors "did not tilt strongly in favor of Singapore as the forum for the trial of this American product liability case."⁴¹¹ The brief declared that the court based its reversal of this position on "hypothetical assumptions that cannot provide support for a sound forum non conveniens determination."⁴¹² The plaintiffs further maintained that the district court mischaracterized their product liability claims against Boeing and Goodrich as ones concerning the ability of an aircraft to resist the striking of construction equipment on the runway, the broad hypothetical assumption that plaintiffs will receive full compensation in their case against Singapore Airlines from the Singapore courts which would extinguish the right to seek any more compensation from Boeing and Goodrich, and that the issues to be tried in this case are wholly different from those air crashes where "planes fall from the sky."⁴¹³

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

VIII. GENERAL AVIATION REVITALIZATION ACT

The General Aviation Revitalization Act of 1994 ("GARA"),⁴¹⁴ is a tort reform measure that imposes an eighteen-year statute of repose for general aviation aircraft and new components that replace original components therein.⁴¹⁵ The statute contains an explicit exception, commonly referred to as the "knowing misrepresentation or concealment or withholding" exception, rendering the statute of repose inapplicable where the defendant knowingly misrepresents to, or conceals from, the Federal Aviation Administration ("FAA") required information that is material and relevant to the operation of the aircraft or system thereof and causally related to the harm claimant suffered.⁴¹⁶ Case law over the past year examined the applicability of the "knowing misrepresentation or concealment or withholding" exception, illustrated that the statute of repose may not apply to supplemental instructions or manuals issued after the original manufacture, and refined the analysis as to GARA's "new part" provision.⁴¹⁷

*Robinson v. Hartzell Propeller Inc.*⁴¹⁸ involved a claim against a manufacturer and maintenance provider of a propeller, wherein plaintiffs alleged negligent design and maintenance of the propeller, strict liability, and fraud. With regard to their fraud claim, plaintiffs alleged that defendant Hartzell, the propeller's manufacturer, knew of the propeller's design defects and misrepresented the engine/propeller vibration problems and their resulting failures to the FAA, thereby falling within the "knowing misrepresentation or concealment or withholding" exception and rendering the statute of repose inapplicable.⁴¹⁹ Although the propeller was manufactured and installed by Hartzell in 1974, plaintiffs argued that under GARA's "new part" provision the repose period either began in 1984 when Hartzell issued an overhaul manual or in 1989 when the propeller was actually overhauled.⁴²⁰

In a lengthy decision, the United States District Court for the District of Pennsylvania concluded that plaintiffs had submitted

⁴¹⁴ General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (reprinted in notes for 49 U.S.C. § 40101).

⁴¹⁵ *Id.* § 2(a).

⁴¹⁶ *Id.* § 2(b)(1).

⁴¹⁷ *Id.* § 2(a)(2).

⁴¹⁸ 326 F. Supp. 2d 631, 635 (E.D. Pa. 2004).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

sufficient evidence to create genuine issues of material fact and thereby survive summary judgment with respect to whether Hartzell made material misrepresentations to the FAA that were causally related to plaintiffs' injuries.⁴²¹ Specifically, plaintiffs offered expert testimony, letters Hartzell sent to the FAA, and Hartzell's own accident reports in support of their argument that Hartzell blamed other factors instead of disclosing the true cause, the propeller/engine vibration problem, to the FAA.⁴²² Therefore, the court held that plaintiffs established sufficient evidence to satisfy each element of GARA's § 2(b)(1) "knowing misrepresentation or concealment or withholding" exception.⁴²³ However, the court held that plaintiffs' experts could not testify on the subjective intent of the Hartzell employees in making the subject representations to the FAA because intent is not the proper subject for expert testimony under Federal Rule of Evidence 702.⁴²⁴ Finally, reasoning that GARA's statute of repose cannot be avoided by recasting a claim based on negligent component design as a negligence claim based on a maintenance manual's failure to warn, the court rejected plaintiffs' arguments that the 1984 overhaul manual was causally related to the accident and therefore that its issuance restarted the GARA clock.⁴²⁵

In the unpublished decision *Hinkle v. Cessna Aircraft Company*,⁴²⁶ the Michigan Court of Appeals upheld the summary judgment dismissal of the fuel pump manufacturer and the engine manufacturer but reversed the lower court's dismissal of the airplane manufacturer. *Hinkle* involved the failure of the subject aircraft's right engine driven fuel pump, which was manufactured in 1972, more than eighteen years prior to the 1995 accident.⁴²⁷ Plaintiff argued that, since the fuel pump is an integral part of the engine, a failure of the fuel pump is tantamount to failure of the engine itself and the court should hold the engine's manufacturer liable for the failure of the component part.⁴²⁸ The court rejected this argument on the basis that

⁴²¹ *Id.* at 652.

⁴²² *Id.* at 655.

⁴²³ *Id.* at 654.

⁴²⁴ *Id.* at 648.

⁴²⁵ *Id.* at 661-62.

⁴²⁶ No. CIV.A.247099, 2004 Mich. App. LEXIS 2894, at *12 (Mich. Ct. App. Oct. 28, 2004) (per curiam).

⁴²⁷ *Id.* at *2.

⁴²⁸ *Id.* at *22.

adopting plaintiff's reasoning would effectively permit the plaintiff to circumvent the GARA statute of repose by allowing plaintiff to bring suit against any manufacturer of a part when a subpart that is the actual cause of the accident was replaced or added to the original part, even if the original part was over eighteen years of age.⁴²⁹ The court emphasized that the proper focus is on the component that actually causes the crash, not the larger part that encompasses many smaller components, one of which was the allegedly deficient part.⁴³⁰

The court also rejected plaintiff's argument that the GARA statute of repose should not apply to the engine or the fuel pump manufacturers because the fuel pump was overhauled less than two years prior to the crash, thus "rolling" the GARA statute.⁴³¹ The court stated that the plain language of the statute dictates that GARA's eighteen year period of repose is only rolled if a "new" part replaces an old part or is added to the aircraft and if the "new" part is alleged to have caused the accident.⁴³² The mere "overhaul" of a part does not render it "new" for purposes of GARA.⁴³³

However, the Michigan Court of Appeals reversed the lower court's dismissal of the aircraft manufacturer finding that plaintiff satisfied the elements of GARA's "knowing misrepresentation or concealment or withholding" exception.⁴³⁴ The court found that the plaintiff produced sufficient evidence that the manufacturer had submitted certification test results to the FAA that contained knowing misrepresentations as to the aircraft's ability to fly safely with one inoperable engine.⁴³⁵ Furthermore, the court found that the evidence showed that defendant's misrepresentations directly related to the cause of the accident because the allegedly misrepresented data was included in the plane's pilot's operating handbook, upon which the pilot had relied for performance expectations.⁴³⁶

Finally, the Michigan Court of Appeals affirmed the lower court's denial of plaintiff's motion to vacate the dismissal of the aircraft manufacturer on the basis that plaintiff's decedent alleg-

⁴²⁹ *Id.* at *23.

⁴³⁰ *Id.* at *23-24.

⁴³¹ *Id.* at *25-26.

⁴³² *Id.* at *27.

⁴³³ *Id.* at *29.

⁴³⁴ *Id.* at *38.

⁴³⁵ *Id.* at *35.

⁴³⁶ *Id.* at *37.

edly utilized a 1985 supplemental manual which, plaintiff argued, constituted a “part” of the aircraft for purposes of GARA.⁴³⁷ Stating that although in certain circumstances an aircraft manual may constitute a “part” for purposes of the statute, the court held that the plaintiff did not demonstrate that the supplemental manual was a “part” of the particular aircraft at issue and likewise failed to allege a specific causal connection between the crash and the allegedly false or inadequate warnings contained in the supplemental manual.⁴³⁸

In *Bell Helicopter Textron, Inc. v. Heliquwest International, Ltd.*,⁴³⁹ the Tenth Circuit upheld the district court’s dismissal of appellant manufacturer’s declaratory judgment action against appellees: a helicopter’s owner, a New Mexico corporation, and its lessee, a Washington company that was using the helicopter at the time of the crash in Utah. The district court granted the owner’s motion to dismiss for lack of personal jurisdiction and declined to exercise jurisdiction over the manufacturer’s declaratory judgment action, which concerned the applicability of GARA to the accident.⁴⁴⁰ In upholding the lower court’s rulings, the Tenth Circuit noted that the requested declaratory judgment would not settle the controversy arising from the crash.⁴⁴¹ The court also found that the manufacturer failed to make a *prima facie* showing of personal jurisdiction because the owner did not have any direct contacts with Utah and the parties executed the lease in Canada to a Washington company.⁴⁴²

IX. INSURANCE COVERAGE

A. *ALBERTO-CULVER CO. V. AON CORP.*

On May 13, 2004, the First District of the Illinois Appellate Court considered the application of “commercial aviation” exclusion in an aviation liability insurance policy.⁴⁴³ In *Alberto-Culver Company v. Aon Corporation*, the matter involved an aircraft accident involving a Gulfstream G-IV aircraft (G-IV) privately owned by Alberto-Culver Company and being utilized by various Aon entities.⁴⁴⁴ Aon and Alberto each maintained a flight de-

⁴³⁷ *Id.* at *43.

⁴³⁸ *Id.* at *43-44.

⁴³⁹ 385 F.3d 1291, 1294 (10th Cir. 2004).

⁴⁴⁰ *Id.* at 1294, 1298-99.

⁴⁴¹ *Id.* at 1299.

⁴⁴² *Id.* at 1298-99.

⁴⁴³ *Alberto-Culver Co. v. Aon Corp.*, 812 N.E.2d 369 (Ill. App. Ct. 2004).

⁴⁴⁴ *Id.* at 372.

partment at Palwaukee, and each operated their own G-IV, a twin-engine jet that requires a two-pilot crew.⁴⁴⁵ The instant flight was conducted pursuant to an Interchange Agreement which permitted Aon and Alberto to utilize each other's G-IV when needed.⁴⁴⁶ Paragraph Six of the Interchange Agreement provided that Aon Aviation and Alberto agreed to:

(1) 'hold harmless and indemnify the other from loss, expense, damages, claims, or suits which they might suffer as a result of any act or omission of the other party'; (2) maintain operational control of their own G-IV during use by the other party; and (3) 'have, and keep in effect' an aircraft insurance policy with a minimum \$150 million value to provide coverage when piloting each other's airplanes.⁴⁴⁷

The plane crashed on October 30, 1996, upon takeoff at Palwaukee Municipal Airport, killing all four persons aboard.⁴⁴⁸

The dispute implicated insurance coverage issued by Associated Aviation Underwriters (AAU), Alberto's insurers, and United States Aviation Underwriters ("USAU"), the insurers of Aon.⁴⁴⁹ AAU sought, *inter alia*, a judicial declaration that Aon was not insured under the aircraft insurance policy AAU issued to Alberto.⁴⁵⁰ USAU intervened and successfully moved for cross-summary judgment against AAU and Alberto.⁴⁵¹ The circuit court found that Aon was entitled to coverage under Alberto's policy with AAU, and that AAU had a duty to defend and indemnify Aon because the court deemed AAU's policy primary coverage, and it found USAU's coverage excess to the AAU policy.⁴⁵² Alberto appealed.⁴⁵³

Importantly, neither the USAU policy nor the AAU policy made reference to the Interchange Agreement between Alberto and Aon, nor was any evidence produced by Alberto or Aon requesting that their respective insurance companies make the Interchange Agreement a part of their respective policies of insurance by rider, endorsement or otherwise.⁴⁵⁴ Under the In-

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* (quoting paragraph six of the Interchange Agreement).

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 373.

⁴⁵⁰ *Id.* at 374.

⁴⁵¹ *Id.* at 374-75.

⁴⁵² *Id.* at 375.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 373.

terchange Agreement, both parties agreed to maintain "operational control" of their own aircraft during use by the other party.⁴⁵⁵ The Interchange Agreement does not define "operational control," but refers to the Federal Aviation Administration for an explanation of this term.⁴⁵⁶

Alberto was the named insured on the AAU policy.⁴⁵⁷ The AAU policy defined an "Insured" as:

(a) any person while using the aircraft with the permission of the Named Insured provided the actual use is within the scope of such permission, and (b) any other person, or organization, but only with respect to his or its liability because of acts or omissions of the Named Insured or of an Insured under (a) above, provided, however, that the insurance afforded under subsections 2(a) and (b) above does not apply to: (i) any person or organization or agent or employee thereof (other than employees of the Named Insured) engaged in *** the operation of *** any flying service, or aircraft or piloting service, with respect to any occurrence arising out of such activity (Exclusion (i)).⁴⁵⁸

The AAU policy did not define the phrase "flying service or aircraft or piloting service."⁴⁵⁹ The AAU policy also set forth, in General Condition Four, a provision of "Other Insurance" which avers,

[e]xcept with respect to insurance specifically purchased by [Alberto] to apply in excess of this policy, if there is other insurance in [Alberto's] name or otherwise, against loss, liability or expense covered by this policy, [AAU] shall not be liable *** for a greater portion of such loss *** than the applicable limit of [AAU's] liability bears to the total applicable [l]imit of [l]iability of all valid and collectible insurance against such loss, liability or expense."⁴⁶⁰

The AAU policy additionally provided Alberto with liability coverage for its use of non-owned aircraft.⁴⁶¹ That part of the policy contained its own condition of "Other Insurance," under which AAU's non-owned coverage was to be in excess of any other insurance available to Alberto, either as "an [i]nsured

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* (quoting the AAU general policy definitions).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 374.

⁴⁶¹ *Id.*

under a policy applicable to the non-owned aircraft or otherwise.”⁴⁶²

Similarly, Aon held non-owned aircraft coverage by obtaining an endorsement to its policy with USAU, which states: “[y]our business needs may require you [to] rent, borrow, or use aircraft you don’t own.”⁴⁶³ For this reason, we’ve developed this endorsement to expand your liability coverage and your medical coverage to apply while you’re using aircraft you don’t own.” The USAU policy’s non-owned coverage endorsement also contains an “other insurance” clause that asserts: “[t]his endorsement provides you with excess insurance. This means that if you have other insurance covering a loss that’s also covered by this endorsement, we’ll pay claims only when all other valid and collectible insurance covering the loss has been exhausted. Of course, this restriction does not apply to any insurance you purchased in excess of this endorsement.”⁴⁶⁴

After the crash, Aon Aviation notified AAU of the accident, seeking coverage under the AAU policy issued to Alberto.⁴⁶⁵ Alberto and its insurers (collectively AAU/Alberto) filed a complaint for an insurance coverage declaration on January 17, 1997, seeking, *inter alia*, a judgment that Aon Aviation was not an insured under the AAU policy issued to Alberto.⁴⁶⁶ On May 2, 2001, USAU, moved to intervene in the action, which the circuit court allowed on July 5, 2001.⁴⁶⁷

On November 1, 2001, AAU/Alberto filed its fourth amended complaint in which it sought (1) subrogation from Aon Aviation for reimbursement of funds AAU paid to Alberto for the destruction of its aircraft; and a declaratory judgment that (2) Aon Corporation was not a permissive user entitled to coverage, (3) Aon Aviation was engaged in the operation of a flight service thereby precluding coverage, and (4) Aon Aviation waived coverage under the AAU policy pursuant to the Interchange Agreement.⁴⁶⁸

On March 25, 2002, USAU moved for summary judgment on all three claims against AAU/Alberto and on AAU/Alberto’s

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 374.

⁴⁶⁸ *Id.* at 375.

claim regarding the operation of flight service.⁴⁶⁹ After a hearing on August 2, 2002, the circuit court ruled that the question of whether Aon Aviation was engaged in a flight service operation did not foreclose coverage under the AAU policy, and that AAU had a duty to defend, and to indemnify Aon Aviation since AAU's policy was the primary coverage and USAU's policy was in excess.⁴⁷⁰

In seeking to exclude Aon Aviation from coverage under the AAU policy, AAU/Alberto primarily contended that Aon Aviation waived its right to coverage by virtue of its assent to and execution of the Interchange Agreement.⁴⁷¹ However, the court found that the Interchange Agreement only had "tangential relevance" to the appeal.⁴⁷² Instead, the court held that the coverage dispute turned on the construction of the AAU policy without regard to the Interchange Agreement.⁴⁷³

The policy language at issue is located in Exclusion (i) of AAU's policy, which denies coverage to "any person or organization *** engaged in *** the operation of any *** flight service, or aircraft or piloting service."⁴⁷⁴ AAU/Alberto concedes that Aon Aviation was using the aircraft with permission, but asserts, "permissive user status is not equivalent to insured status."⁴⁷⁵ It maintains that at the time of the accident, Aon Aviation was operating such a service, thus triggering the application of Exclusion (i).⁴⁷⁶

USAU/Aon Aviation counter that the court must construe "service" to exclude only those entities engaged in "commercial" aircraft operations, not in-house aircraft transportation.⁴⁷⁷ It claims this reading is buttressed by the juxtaposition of "flight service" amidst "other, purely commercial activities," including the "operation of any airport, hangar, [or] flying school," where no disjunctive language sets apart the activities.⁴⁷⁸ It argues further that the exclusion conflicts with the stated purpose of the

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 376.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 378.

⁴⁷⁸ *Id.*

AAU policy, which covers Alberto's aircraft for "[a]ll operations of the Named Insured."⁴⁷⁹

Affording the words their plain, ordinary, and popular meaning, exclusion (i) is clear and unambiguous in the context of USAU/Aon Aviation's specific challenge – which the activities described must be "commercial" to trigger the exclusion. "Service" need not connote monetary exchange, and is defined more aptly as "a duty or labor to be rendered by one person to another," or the "performance of labor for benefit of another, or at another's command."⁴⁸⁰ The circuit court's grant of summary judgment was unwarranted and, where no material issue of fact remained, the appellate court reversed the circuit court's ruling.⁴⁸¹ The AAU policy excluded Aon Aviation from coverage as a matter of law.⁴⁸²

The appellate court also determined the USAU non-owned aircraft coverage was primary to the AAU policy based on the policy endorsement for non-owned aircraft, which stated primary coverage is subject to "all other valid and collectible insurance covering the loss [must be] exhausted."⁴⁸³

B. *POTTER V. U.S. SPECIALTY INSURANCE CO.*:
MEANING OF "LOGGED" HOURS

Recently, the Arizona Court of Appeals considered the meaning of "logged hours" in the context of an aviation insurance policy. In *Potter v. U.S. Specialty Ins. Co.*, USSIC denied coverage for losses associated with the crash of an aircraft.⁴⁸⁴ Potter sued USSIC seeking declaratory relief and damages.⁴⁸⁵ USSIC counterclaimed for declaratory relief, alleging that there was no coverage for the crash because the pilot had not "logged" the minimum flight hours required for coverage under the policy.⁴⁸⁶ The parties filed cross-motions for summary judgment, and the trial court granted USSIC's motion.⁴⁸⁷ Potter appealed.⁴⁸⁸

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 379 (quoting BLACK'S LAW DICTIONARY 1368 (6th ed. 1990)).

⁴⁸¹ *Id.* at 380.

⁴⁸² *Id.*

⁴⁸³ *Id.* at 381-82.

⁴⁸⁴ 98 P.3d 557 (Ariz. Ct. App. 2004).

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

The policy provided that the aircraft was insured against certain losses when either Melvin Potter piloted it or the aircraft was piloted by a commercially certified pilot who had a minimum of 3,000 "logged pilot hours," 1,500 of which had been "logged in multi-engine aircraft," and one hundred of which had been "logged in the same make and model" as the aircraft covered.⁴⁸⁹ Mitchell Schier was piloting the aircraft when it crashed.⁴⁹⁰ All died in the crash.⁴⁹¹ Schier had been a licensed pilot since May 1984 and acquired his commercial license with single and multiengine ratings in 1986.⁴⁹² Thereafter, he flew charter flights in both single and multiengine aircraft.⁴⁹³ He received a flight instructor's certificate in February 1986 and worked as a flight instructor since August 2000.⁴⁹⁴ In response to interrogatories, Potter stated that "[Schier] had told Mel Potter that he had logged well over one thousand five hundred hours of multi-engine flight time . . . [and] had certainly logged over fifty hours in a [Cessna 414] and, indeed, much more than that."⁴⁹⁵ But the single logbook found in Schier's effects documented only 236 pilot hours, all of which had been flown in single engine aircraft within approximately a two-month period in 2001.⁴⁹⁶

Although USSIC conceded at the trial court and on appeal that Schier actually had flown more than was reflected in the logbook, the trial court granted summary judgment based on its conclusion that the term "logged" as used in the policy, which did not define the term, meant "hours actually flown and reliably recorded in a flight time log."⁴⁹⁷ Potter argued that the court should interpret the term "logged" to mean hours flown but not necessarily recorded and that the trial court erred in granting USSIC's motion for summary judgment because there was a question of fact as to how many hours Schier had flown as a pilot in the applicable categories of aircraft.⁴⁹⁸

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 558-59.

⁴⁹⁸ *Id.* at 559.

The court rejected plaintiff's proffered interpretation of "logged hours" and found the term to be unambiguous.⁴⁹⁹ It also looked to other jurisdictions that considered this issue and noted those decisions had uniformly determined that the word "logged" in a pilot warranty provision of an insurance contract meant hours actually and reliably recorded in a log book.⁵⁰⁰ The court also found that this definition was consistent with the intent of the clause and industry common knowledge.⁵⁰¹ Therefore, the court affirmed the grant of summary judgment.⁵⁰²

X. 9/11 LITIGATION

The following is a summary of the September 11th liability litigation and property damage litigation highlights.

A. LIABILITY LITIGATION

The liability litigation arising out of the September 11 terrorist attacks has produced a number of decisions, the most significant of which may be the denial of defendants' motion to dismiss certain claims based on the lack of duty.⁵⁰³ In their motion, the airlines and security companies argued that they owed no duty to the ground victims under the applicable New York law because the events of September 11 were completely unexpected and to impose such a duty would be tantamount to a duty running from these defendants to the public-at-large.⁵⁰⁴ Additionally, the defendants argued that even if a duty of care existed under New York law, the federal laws under which the defendants operated prescribed the class of persons protected under the anti-hijacking program—namely the passengers and crew of the aircraft.⁵⁰⁵

In rejecting these arguments, the court reasoned that the plaintiffs and society in general reasonably expected that the activities of these defendants to prevent hijackings were for the protection of the passengers, crew, and individuals on the ground.⁵⁰⁶ Further, the court found that the cap on the liability, and the amount of available insurance, made the likelihood of

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 560.

⁵⁰³ *In re Sept. 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003).

⁵⁰⁴ *Id.* at 288-89.

⁵⁰⁵ *Id.* at 289.

⁵⁰⁶ *Id.* at 292.

unlimited or insurer-like liability impossible in this instance.⁵⁰⁷ The court went on to adopt the primary argument of the plaintiffs: the defendants were in the best position to provide protection against hijackings and imposing on them a duty in this regard best allocated the risks to victims in the aircraft and on the ground.⁵⁰⁸ The court also rejected defendants' arguments that federal law limited the scope of defendants' duty to passengers and crew on the basis that the federal aviation regulations did not specifically exclude ground victims.⁵⁰⁹

The court then analyzed whether or not the use of the aircraft by terrorists to cause the destruction that took place on 11 September 2001 was foreseeable.⁵¹⁰ The court noted that issues of foreseeability are generally fact-based and not appropriately decided by a motion to dismiss, unless the harm was so unforeseeable that the aviation defendants would prevail even when regarding the issue in the light most favorable to the plaintiffs.⁵¹¹ Under this constraint, the court found that aircraft accidents could be a foreseeable hazard of negligent screening and boarding activities.⁵¹² The court went on to find that while an organized terrorist hijacking with the purpose of maximum destruction and headlines had not occurred previously, the aviation defendants could reasonably foresee that personal injury and property damage could occur from hijackers taking control of an aircraft.⁵¹³

In reaching its conclusion on the existence of a duty, the court was careful to qualify its decision as a preliminary one, stating: "I hold at this stage of the litigation, on the pleadings and before any discovery has taken place, that the injuries suffered by the ground victims arose from risks that were within the scope of the duty undertaken by the aviation defendants."⁵¹⁴

The court's latter opinion echoed the preliminary nature of this ruling denying leave for interlocutory appeal of its decision on the existence of a duty.⁵¹⁵ While acknowledging the defendants' argument that the case presented novel and difficult issues,

⁵⁰⁷ *Id.* at 293.

⁵⁰⁸ *Id.* at 296.

⁵⁰⁹ *Id.* at 298.

⁵¹⁰ *Id.* at 295.

⁵¹¹ *Id.* at 295-96.

⁵¹² *Id.* at 296.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 296-97.

⁵¹⁵ *In re* Sept. 11 Litigation, No. CIV.A.21MC-917(AKH), 2003 WL 22251325, at *1 (S.D.N.Y. Oct. 1, 2003).

the court ruled that, the uncertainty surrounding the legal duties owed by the defendants was a reason to deny an interlocutory appeal.⁵¹⁶ According to the court, the complex balancing of interests better positioned it to establish and define the legal duties when there is a fully developed factual record.⁵¹⁷ In making this point, the court noted that several of the cases cited by the defendants were decided based on the evidence.⁵¹⁸ In other words, the court held that while the existence of a duty is a question of law, answering this question requires an analysis of the individual facts of a case.⁵¹⁹ Consequently, the court stated that defendants would be able to re-present their arguments in later proceedings, but indicated that they should wait until the close of discovery when the factual record was complete.⁵²⁰

B. FIRST PARTY PROPERTY INSURER COVERAGE LITIGATION

In *World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, the Second Circuit affirmed a lower court's decision that the New York terrorist attacks were one occurrence under certain policies insuring the World Trade Center complex.⁵²¹ The policies defined an "occurrence" to mean:

all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.⁵²²

Construing this language, the court held that a reasonable fact finder was bound to conclude that the two aircraft crashes in the New York terrorist attacks were, at least, "a series of similar causes."⁵²³

XI. WARSAW CONVENTION / MONTREAL AGREEMENT

In November 2003, the Montreal Agreement 1999 came into effect as an international treaty. The United States signed the

⁵¹⁶ *Id.* at *3.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at *4.

⁵¹⁹ *Id.* at *5.

⁵²⁰ *Id.*

⁵²¹ 345 F.3d 154, 159 (2d Cir. 2003).

⁵²² *Id.* at 160.

⁵²³ *Id.* at 180.

Montreal Agreement 1999⁵²⁴ which superceded and updated the previous Warsaw Convention⁵²⁵ (as amended by the Hague Protocol of 1955) which itself had been subject to various amendments.

The purpose of the Montreal Agreement 1999 was to provide a single, uniform international convention to govern the liability of air carriers with respect to passenger and cargo claims arising out of the international carriage of passengers and goods by air.

The Montreal Agreement 1999 uses many of the same concepts and phrases as the Warsaw Convention and, consequently, much of the existing Warsaw Convention case law remains relevant. There are important differences not least of which is that the Montreal Agreement 1999 clarifies the position with regard to the exclusivity of that Convention for passenger claims, as well as spelling out, in express terms, the exclusion of punitive and non-compensatory damages. The Montreal Agreement 1999 also incorporates an earlier protocol [Montreal Additional Protocol No. 4] that provides an absolute limit of 17 Special Drawing Rights per kilogram in respect of cargo claims.

However, the most significant development is the incorporation of the so-called "Fifth Jurisdiction," which extends the four jurisdictions set out in Article 28 of the Warsaw Convention to include as the "Fifth Jurisdiction," the domicile of the passenger. While the wording of the new Article 33 of the Montreal Agreement 1999 is only intended to provide jurisdiction to passengers in their country of domicile when the carrier operates services either directly or indirectly to the country of the passenger's domicile, it is likely that there will be disputes on the interpretation of this clause.

A. APPLICABILITY OF CONVENTIONS

In order to assess whether or not a claim falls within the ambit of either the Warsaw Convention or the Montreal Agreement 1999, it is important to look at the contract of carriage. For example, a flight between New York and London, returning to New York, is clearly international carriage, although it is impor-

⁵²⁴ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Montreal, May 28, 1999, at <http://www.lawbiz.ch/spahni/airlaw/warsaw/montreal.html> [hereinafter Montreal Agreement 1999].

⁵²⁵ Warsaw Convention, as amended at the Hague 1955 and by Protocol No. 4 of Montreal 1975, International Air Transport Association, at <http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/legal/file/warsaw.pdf> [hereinafter Warsaw Convention].

tant to remember that the destination is New York, as opposed to London. The importance of the contract of carriage remains, as a significant number of countries have not ratified the Montreal Agreement 1999. It is always important to check that the contract of carriage is between states which have ratified the Montreal Agreement 1999 before concluding whether or not the Montreal Agreement 1999 applies, or alternatively the Warsaw Convention, or indeed some alternative treaty or legislation.

B. CASE SUMMARIES

As there have not been any decided cases in the U.S. directly on a point of difference between the Warsaw Convention and the Montreal Agreement 1999, I set out below case law on the Warsaw Convention.

1. *When an Omission May Constitute an "Accident" Under Article 17*

As noted, above, the Supreme Court decision of *Olympic Airways v. Husain* considered the issue of whether the flight crew's failure to reseat an asthmatic passenger (who had asked on a number of occasions to be resealed) away from a smoking area on board an Olympic Airways flight constituted an "accident" pursuant to Article 17 of the Warsaw Convention.⁵²⁶

The Supreme Court held that Olympic Airways failed to fully develop their argument that the failure to move in the circumstances of the case were neither "unusual or unexpected," and consequently concluded that the circumstances did constitute something "unusual or unexpected," one of the key factors in determining whether or not there was an accident.⁵²⁷

Similarly, in *Blansett v. Continental Airlines, Inc.*, the airline's failure to warn a passenger about the risks of developing DVT within an aircraft cabin did not constitute an unusual or unexpected event.⁵²⁸ The court was able to distinguish *Olympic Airways* on the basis that the flight crew had not taken any positive steps.⁵²⁹ The Court of Appeals explained that the situation in *Olympic Airways* was "markedly" different to that in *Blansett v. Continental*, as *Olympic Airways* involved an unreasonable denial of a request to be moved to an empty seat by a passenger exper-

⁵²⁶ See *supra* notes 45-50 and accompanying text.

⁵²⁷ See *supra* notes 59-64 and accompanying text.

⁵²⁸ See *supra* notes 67-68 and accompanying text.

⁵²⁹ See *supra* notes 69-74.

ienencing an allergic reaction.⁵³⁰ The court went on to rule specifically that failure to warn of DVT risk, even in contravention of industry standards, is not an accident under the Warsaw Convention.⁵³¹ This decision was, therefore, a rejection of the lower district court's analysis, which had held that an accident occurred if there had been unreasonable departure from industry standards. The court did, however, comment that certain departures from industry standards could constitute an accident, but that there was no blanket rule that this would always be the case.⁵³²

The approach that DVT does not constitute an accident pursuant to the Warsaw Convention was adopted in *Rodriguez v. Ansett Australia Ltd.*,⁵³³ which effectively adopted the reasoning of an earlier case, *Louie v. British Airways Ltd.*⁵³⁴ Courts have cited to *Louie* as authority for the proposition that it is possible for a court to find the carrier liable for a failure to respond to an in-flight medical emergency, but that failure to warn passengers of the risks of developing DVT (not arising out of a medical emergency) does not constitute an accident.⁵³⁵

2. *Post-Traumatic Stress Disorder and Other Psychological Injury Claims*

In *Eastern Airlines v. Floyd*, the Supreme Court held that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."⁵³⁶ This left open the important issue of whether psychological injuries constitute bodily injury and therefore whether they are a recoverable head of damages or alternatively whether the Warsaw Convention excludes this head of damage. The courts have consistently upheld the proposition that psychological injuries are recoverable only to the extent that they result from a bodily injury. There has to be a causative link between the psychological injury and the physical injury which "caused it."

In *Ehrlich v. American Airlines, Inc.*, the Ehrlichs were in an aircraft accident in which their aircraft overshot the runway and

⁵³⁰ *Id.*

⁵³¹ *Blansett*, 379 F.3d at 182.

⁵³² *Id.*

⁵³³ 383 F.3d 914, 919 (9th Cir. 2004).

⁵³⁴ No. CIV.A-A01-0329, 2003 WL 22769110 (D. Ala. Nov. 13, 2003).

⁵³⁵ *Id.* at *5.

⁵³⁶ 499 U.S. 530, 552 (1991).

crashed into a retaining wall, preventing the aircraft from plunging into a river below.⁵³⁷ Ms. Ehrlich suffered physical injuries, including injury to her neck, back, shoulder, hips and knees.⁵³⁸ Mr. Ehrlich suffered knee injuries.⁵³⁹

The Ehrlichs further claimed that they sustained mental injury.⁵⁴⁰ Unusually, the Ehrlichs did not offer any evidence to demonstrate a causal connection between their mental and physical injuries.⁵⁴¹ As a result, the court dismissed their claim for psychological injuries, leaving the physical injury claims.⁵⁴² On appeal, the Second Circuit upheld the grant of partial summary judgment.⁵⁴³

In *Marks v. Virgin Atlantic Airways*, Mrs. Marks, who was pregnant at the time, tripped and fell in the aisle of a Virgin Atlantic Airways aircraft.⁵⁴⁴ Mrs. Marks claimed that there was a bag protruding into the aisle and that because of the fall, she injured her leg, arm, hip, back and “tummy.”⁵⁴⁵ Doctors in the U.S. and U.K. subsequently examined Mrs. Marks and her unborn child.⁵⁴⁶ These doctors advised Mrs. Marks that the child was healthy and uninjured.⁵⁴⁷

Mrs. Marks sought damages, *inter alia*, for mental injuries based on fear of injury to her unborn child.⁵⁴⁸ There is some discussion in the case concerning the extent of the injuries which Mrs. Marks suffered, however, she only offered evidence that she hurt her “tummy” to support her psychological harm claim.⁵⁴⁹ Again, it appears that the passenger failed to provide any evidence to substantiate her allegation that she suffered a stomach injury and that such injury caused the psychological injury for which she was claiming damages.

In *Bobian v. Czech Airlines*,⁵⁵⁰ a number of passengers brought a claim against Czech Airlines after a turbulence incident. The

⁵³⁷ 360 F.3d 366, 367 (2d Cir. 2004).

⁵³⁸ *Id.* at 368.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 369.

⁵⁴² *Id.*

⁵⁴³ *Id.* at 401.

⁵⁴⁴ No. CIV.A04-0251(SAS), 2004 WL 1574637, at *1 (S.D.N.Y. July 14, 2004).

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at *2.

⁵⁵⁰ No. CIV.A.03-1262, 2004 WL 628864, at *1 (3d Cir. Mar. 26, 2004).

plaintiffs claimed their injuries were physically based “in the neurochemical and neuropsychological reactions in critical brain areas dedicated to emotional control and regulation.”⁵⁵¹ The court rejected the claims and took the view that the plaintiffs’ position would effectively abolish the Warsaw Convention requirement that there has to be a “palpable and conspicuous physical injury.”⁵⁵² None of the plaintiffs brought forward any persuasive evidence that their alleged injuries caused any physical change to their brains.

3. *Injury Arising Out of Disinfectant*

The *In re UAL Corp.*⁵⁵³ matter came before the U.S. Bankruptcy Court in relation to a class action for \$6 billion brought by Richard Derrazio and Sharon Derrazio, and others against United Airlines. The class action sought damages for personal injuries suffered due to the disinfection of United Airlines aircraft that flew into Australia and New Zealand.⁵⁵⁴ The bankruptcy court rejected the passengers’ assertions that their claim arose from an “accident” under the Warsaw Convention.⁵⁵⁵ In an attempt to circumvent the problems of demonstrating that the spraying was unusual or unexpected (United routinely sprays all flights into these countries), the passengers argued that the unusual event was UAL’s failure to warn.⁵⁵⁶ The court rejected this argument, and because the Convention was the passengers’ exclusive remedy, the court disallowed their claim.⁵⁵⁷

4. *Seizure of a Bag Can Constitute an Accident*

The case of *Prescod v. American Airlines*⁵⁵⁸ relates to the circumstances that arose prior to the passenger’s flight. The passenger’s daughter advised a departure agent that the plaintiff’s carry-on bag contained a breathing apparatus and related medication.⁵⁵⁹ American Airlines checked the bag and subsequently lost it for 2 days before arriving at the passenger’s destination.⁵⁶⁰ The airline’s representatives had previously advised that they

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ 310 B.R. 373, 375 (Bankr. N.D. Ill. 2004).

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.* at 385.

⁵⁵⁷ *Id.* at 387.

⁵⁵⁸ 381 F.3d 861, 863 (9th Cir. 2004).

⁵⁵⁹ *Id.* at 863-64.

⁵⁶⁰ *Id.* at 864.

would not take the equipment.⁵⁶¹ The passenger was subsequently hospitalized and died.⁵⁶²

The court held that the carrier's failure to comply with a health-based request to ensure that the bag traveled with the passenger constituted an unusual or unexpected event.⁵⁶³ Using the same reasoning as in *Olympic Airways*, the court found that the removal of the bag, in light of the carrier's knowledge of the passenger's need for it, as well as the various promises made by the carrier that it would not take the bag, constituted something which was "unusual or unexpected."⁵⁶⁴

5. *Punitive Damages Under the Warsaw System*

In *Razi v. China Airlines*,⁵⁶⁵ the court held that the Convention provided an exclusive remedy for passengers and that punitive damages are not available in cases of death or personal injury under the Warsaw Convention, thereby following *El Al Israel Airlines v. Tseng*. This claim arose out of "excessively dangerous hot tea."⁵⁶⁶

6. *Loss of Enjoyment of Vacation*

In *Lee v. American Airlines*,⁵⁶⁷ Mr. Lee sought compensation for damages arising out of a flight delay, and in particular for inconvenience and loss of a "refreshing, memorable vacation." The court granted American Airlines partial judgment on the basis that the damages sought constituted an attempt to recover for psychological injury as no economic loss had occurred.⁵⁶⁸ On appeal, the Fifth Circuit affirmed the grant of summary judgment in favor of the carrier.⁵⁶⁹

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 865.

⁵⁶³ *Id.* at 868.

⁵⁶⁴ *Id.*

⁵⁶⁵ No. CIV.A.03008169DDPMCX, 2004 WL 1001083, at *3 (C.D. Cal. Apr. 15, 2004).

⁵⁶⁶ *Id.* at *3.

⁵⁶⁷ 355 F.3d 386, 387 (5th Cir. 2004).

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

7. *Adverse Reaction to Proper Medical Treatment Is Not an Accident*

In the case of *Horvath v. Deutsche Lufthansa AG*,⁵⁷⁰ the passenger suffered an allergic reaction to a meal served on board. A fellow passenger who was also on board, and who was a qualified physician, provided assistance and administered medication to the passenger.⁵⁷¹ Unfortunately, the medication aggravated the passenger's condition.⁵⁷² The plaintiff conceded that the treatment and medication provided was proper by medical standards.⁵⁷³

The subsequent claim and court proceedings were therefore rejected on the basis that such proper medical intervention did not constitute an accident, notwithstanding that the medication aggravated the passenger's condition.⁵⁷⁴ The parties contested at trial the facts surrounding the service of the meal.⁵⁷⁵

8. *Embarkation/Disembarkation*

The Warsaw Convention only applies to accidents to passengers which occur during the course of embarkation or disembarkation or, alternatively, during the course of carriage by air. As a result, any accident or injury which occurs before or after a passenger embarks or disembarks an aircraft is subject to an alternative legal regime. This can be significant particularly when the alternative legal regime provides for a longer limitations period and/or the prospects of recovering damages without the restrictions traditionally associated with the Warsaw Convention.

In the case of *Fazio v. Northwest Airlines*,⁵⁷⁶ two disabled passengers sustained injuries on an airport terminal escalator. In this case, the plaintiffs were seeking to establish that the accident did not occur during the course of disembarkation because they had failed to issue proceedings within the two-year limitation period provided for in Article 29 of the Warsaw Convention.⁵⁷⁷ The court held that the premise of this claim related to disembarkation.

⁵⁷⁰ No. CIV.A.02-3269(PKC), 2004 WL 486976 (S.D.N.Y. Mar. 12, 2004).

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Id.* at *2.

⁵⁷⁴ *Id.* at *3.

⁵⁷⁵ *Id.* at *1.

⁵⁷⁶ No. CIV.A.1:03-CV-808, 2004 WL 1001234, at *1 (W.D. Mich. Mar. 15, 2004).

⁵⁷⁷ *Id.* at *2.

barkation and that, consequently, the claim was time-barred pursuant to Article 29 of the Warsaw Convention.⁵⁷⁸

9. *Jurisdiction*

Article 28 provides four jurisdictions in which a plaintiff can sue based on an accident governed by the Warsaw Convention.⁵⁷⁹ These are: the carrier's domicile, its principal place of business, the place through which the passenger purchased her tickets, and the destination of the flight. Furthermore, it is important to bear in mind that the destination is the ultimate destination as defined by the contract of carriage.

In *In re Air Crash Near Nantucket Island, Mass.*,⁵⁸⁰ the court held that it lacked subject matter jurisdiction to hear the actions brought against an Egyptian air carrier on behalf of Egyptian passengers who were killed on an international flight because the U.S. did not meet the four Warsaw Convention jurisdictional requirements.

The amendments to Article 28 in the Montreal Agreement 1999 provide jurisdiction within the U.S. for U.S. domiciled passengers if the carrier operates to or from the U.S. directly or through a commercial agreement with another carrier.⁵⁸¹ It is typical that a passenger's domicile is also the passenger's destination. Consequently, although an important extension, the so-called "fifth jurisdiction" contained within the Montreal Agreement 1999 may not be as significant as first thought, however, much will depend upon the way in which the courts interpret the domicile requirements set out in the Montreal Agreement 1999 and the nature of the airline's operation and commercial relationships.

⁵⁷⁸ There is a long line of cases going back to *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), which provide that there is no absolute test in respect of what constitutes embarkation or disembarkation. Rather, the courts should apply a tripartite test and consider factors such as the activity of the passenger at the time of the accident; the extent to which the airline was exercising control over the passenger at the time of the injury; and the physical location of the accident.

⁵⁷⁹ Warsaw Convention, *supra* note 525.

⁵⁸⁰ See *In re Air Crash Near Nantucket Island, Mass.*, 307 F. Supp. 2d 465 (E.D.N.Y. 2004).

⁵⁸¹ Montreal Agreement 1999, *supra* note 524.

10. *Parties to the Warsaw Convention*

In *Central Ins. Co., Ltd. v. China Airlines Ltd.*,⁵⁸² the court considered whether the Warsaw Convention applied to carriage between the U.S. and Taiwan. The status of Taiwan as a High Contracting Party to the Warsaw Convention has been the subject of previous lawsuits. However, the court followed the majority view that Taiwan is not a party to the Warsaw Convention, and consequently, the Warsaw Convention did not apply to this claim.⁵⁸³

11. *Travel Agent Is Not a Carrier*

*Vaughn v. American Automobile Association, Inc.*⁵⁸⁴ involved the novel issue of whether a travel agent is a "carrier" under the Convention. The court held that the travel agency that issued the passengers tickets in this case was not a carrier and, consequently, was unable to take advantage of the two-year limitation period under Article 29.⁵⁸⁵

12. *Notification of Claim: Cargo Cases*

*Watkins Syndicate v. Tampa Airlines*⁵⁸⁶ involved a claim arising out of damage to an international shipment of garment fabric. A dispute arose about whether written notice of claim had been given within the fourteen-day notice period provided for under the Warsaw Convention.

The carrier claimed that they did not receive formal, written notification of the claim and that the notice of damage marked on a copy of the pick-up form was insufficient written notice for the purpose of the Warsaw Convention.⁵⁸⁷ However, the court denied the carrier's motion for summary judgment as there were issues of fact remaining in respect of the adequacy of the notice and the existence of fraud, which was also alleged.⁵⁸⁸

⁵⁸² No. CIV.A.-02-5075-MJJ, 2004 WL 742916, at *3 (N.D. Cal. Mar. 24, 2004).

⁵⁸³ *Id.*

⁵⁸⁴ 326 F. Supp. 2d 195, 197 (D. Mass. 2004).

⁵⁸⁵ *Id.* at 198.

⁵⁸⁶ No. CIV.A.03-5937 (MBM), 2004 WL 2290501 (S.D.N.Y. Oct. 8, 2004).

⁵⁸⁷ *Id.* at 3.

⁵⁸⁸ *Id.* at 5.

13. *Only the Air Carrier Can "Take Advantage" of the Provisions of the Warsaw Convention—Cargo*

In *In re Certain Interested Underwriters at Lloyd's v. Barridoff Galleries*,⁵⁸⁹ the consignee's insurers brought an action against the shippers of a painting. However, the district court held that none of the defendants qualified for treatment as air carriers within the meaning of the Warsaw Convention.⁵⁹⁰ The shipper's only contracted air carriage identified the carrier on the air way bill.⁵⁹¹ As the air carrier identified on the air way bill was not a party to the action, the defendants did not have the ability to pursue an action under the Warsaw Convention.⁵⁹²

14. *Preemption of State Law Claims*

In *Hanson v. Delta Airlines*,⁵⁹³ the plaintiff sued Delta under Illinois state law for wrongful imprisonment, malicious prosecution, and intentional infliction of emotional distress. Plaintiff's action arose out of her arrest after personnel at the international flight ticket counter reported to the police that they overheard plaintiff utter the word "bomb."⁵⁹⁴ Defendant adduced no evidence to show plaintiff made this utterance.⁵⁹⁵ Delta moved to dismiss under Rule 12(b)(6), asserting, *inter alia*, that plaintiff's state law claims were preempted by the Warsaw Convention.⁵⁹⁶ The District Court for the Northern District of Illinois found there was no evidence to support the application of Warsaw, as Delta had not proven that plaintiff was in the course of boarding when she was arrested.⁵⁹⁷ Consequently, the court held that the Warsaw Convention did not preclude her claims.⁵⁹⁸

⁵⁸⁹ No. CIV.A.03-191-P-S, 2004 WL 1877806, at *1 (D. Me. Aug. 20, 2004).

⁵⁹⁰ *Id.* at *6.

⁵⁹¹ *Id.*

⁵⁹² *Id.*

⁵⁹³ No. CIV.A.02-C7651, 2004 WL 524686, at *1 (N.D. Ill. Mar. 17, 2004).

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at *2.

⁵⁹⁷ *Id.* at *7.

⁵⁹⁸ *Id.*

