Recent Developments in Aviation Law: General

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* This article was presented at the 2010 SMU Air Law Symposium. The scope of this article is a selection of the non-carrier aviation law cases decided during the calendar year 2009 that the author believes will be of interest to practitioners in the covered areas. The case summaries provided are not exhaustive but rather are written to provide a general understanding of the more significant issues that arose in the cases.

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I. GENERAL AVIATION REVITALIZATION ACT OF 1994

The General Aviation Revitalization Act of 1994 (GARA) created an eighteen-year statute of repose protecting manufacturers of general aviation aircraft and their components from long-tail liability related to their products.\(^1\) GARA prohibits tort actions filed outside the limitations period that “aris[e] out of an accident involving a general aviation aircraft” and are “brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft.”\(^2\) For new aircraft, the statute of repose begins on the date of delivery of the aircraft or component part to its first purchaser, lessee, or person engaged in the business of selling or leasing such aircraft.\(^3\) GARA also provides a “rolling” statute of repose for tort claims concerning new replacement

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\(^2\) Id. § 2(a).

\(^3\) Id. § 2(a)(1).
parts or new components added to the aircraft that are alleged to have caused death, injury, or damage that begins "on the date of completion of the replacement or addition."\(^4\)

GARA's statute of repose does not apply, however, where: (1) "the claimant pleads with specificity the facts necessary to prove . . . that the manufacturer . . . knowingly misrepresented . . . or concealed or withheld from the Federal Aviation Administration [(FAA)], required information that is material and relevant" to the maintenance or operation of the aircraft or component part, and that such misrepresentation, concealment, or withholding caused the accident; (2) the claim is being made for a person who was a passenger for the "purposes of receiving treatment for a medical or other emergency"; (3) the injured person "was not aboard the aircraft at the time of the accident"; or (4) the action is "brought under a written warranty enforceable under law but for the operation" of GARA.\(^5\)

### A. Burton v. Twin Commander Aircraft, LLC\(^6\)

The plaintiff, the personal representative of seven individuals killed in the crash of a Twin Commander Model 690C, brought suit against Twin Commander Aircraft, LLC.\(^7\) The accident aircraft was originally delivered in 1981, and thus fell outside the eighteen-year statute of repose.\(^8\) The plaintiffs sought to come under the "rolling provision" of GARA by arguing that the "Alert Service Bulletin Upper Rudder Structural Inspection" issued by defendant Twin Commander in April 2003 was the defective "part."\(^9\)

The plaintiff primarily relied upon the Ninth Circuit's opinion in Caldwell v. Enstrom Helicopter Corp.,\(^10\) to argue that the service bulletin was a "new part" under GARA.\(^11\) In Caldwell, the court had held that a revised flight manual, which failed to specify that the last two gallons of fuel could not be used, could be considered a "new part" or a "defective system" under the Act.\(^12\)

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\(^4\) Id. § 2(a)(2).

\(^5\) Id. § 2(b).


\(^7\) Id. at 291.

\(^8\) Id. at 292.

\(^9\) Id. at 291–92.

\(^10\) 230 F.3d 1155 (9th Cir. 2000).

\(^11\) Burton, 221 P.3d at 295.

\(^12\) Caldwell, 230 F.3d at 1157–58.
The Court of Appeals of Washington, however, embraced the reasoning of the Fourth Circuit in Colgan Air, Inc. v. Raytheon Aircraft Co., that "a maintenance manual 'is not sufficiently similar to a flight manual' and is not a 'part' of the aircraft for purposes of the rolling provision under GARA." The court further found the plaintiff's claim that the bulletin was the "new part" for purposes of the statute of repose was particularly ill-suited where his theory of liability was for failure to warn of a defect in the airplane's rudder tip and rudder assembly—wholly different parts than the service bulletin.

The Burton plaintiff also argued that Twin Commander was not the manufacturer of the aircraft and thus was not entitled to the protections of GARA. The Act itself does not define "manufacturer." Defendant Twin Commander Aircraft is the current type-certificate holder for the Twin Commander Model 690C, which authorizes the defendant to manufacture the aircraft, but it has not manufactured Model 690Cs. In this respect, the court found that Twin Commander is different than other successor type-certificate holders who began manufacturing the aircraft and have been held to be successor manufacturers under GARA. Because the record was "inadequate to determine whether Twin Commander is the ‘manufacturer of the aircraft’" and because the parties had not engaged in statutory analysis, the court remanded the issue to the lower court.

Finally, the plaintiff argued that Twin Commander had "knowingly misrepresented, concealed, or withheld information concerning the structural integrity of the rudder system to the FAA" when obtaining approval to issue this service bulletin. Particularly, the plaintiff argued that the company knew, but did not disclose, that certain previous accidents were related, which would have revealed to the FAA the seriousness of the problem with the aircraft's rudder system. The Court of Appeals of

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13 507 F.3d 270, 276 (4th Cir. 2007).
14 Burton, 221 P.3d at 296.
15 Id. at 296–97.
16 Id. at 291–92.
17 Id. at 297.
18 Id. at 292.
19 Id. at 297 (contrasting Burroughs v. Precision Airmotive Corp., 93 Cal. Rptr. 2d 124 (Cal. Ct. App. 2000), and Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543 (Iowa 2002)).
20 Id. at 298.
21 Id. at 292.
22 Id. at 300.
Washington determined that company emails presented by the plaintiff to prove Twin Commander's knowledge were sufficient to create a genuine issue of fact regarding whether Twin Commander had engaged in misrepresentation or concealment.23

B. Moyer v. Teledyne Continental Motors, Inc.24

As in Burton, the Pennsylvania Superior Court in Moyer was also faced with the question of whether a service bulletin is a "new part" for purposes of the "rolling provision" of GARA.25 The engine manufacturer, Teledyne Continental Motors, had issued a service bulletin with instructions for continuing air worthiness.26 More specifically, according to the plaintiffs, the manufacturer modified its prior stance on crankcase welding in the bulletin.27

The Pennsylvania Superior Court rejected the plaintiffs' argument that the service bulletin was a "new part" for purposes of GARA, quoting the lower court's reasoning: "it was not the service bulletin that failed but the crankcase."28 Further, "given the continual issuance of service bulletins pertaining to a variety of topics, 'if the statute of repose [were] triggered every time a service bulletin was issued, the intent of GARA would be eviscerated.'"29

The plaintiffs also alleged knowing misrepresentation to or concealment from the FAA.30 They argued that because Teledyne Continental Motors wanted to get into the business of remanufactured and factory-overhauled engines, it had reversed its stance on crankcase welding without adequate testing.31 The court found that, even if taken as true, these allegations did not establish the scienter required by the statute.32

The court also addressed an interesting issue of personal jurisdiction related to defendant DivCo, Inc. DivCo was a repair shop in Oklahoma that worked on the crankshafts in the en-

23 Id. at 300.
25 Id. at 342, 343. This case arose out of the fatal crash of a Beech V36B on an island in the Delaware River. Id. at 339.
26 Id. at 343.
27 Id. at 344.
28 Id. at 344–45.
29 Id. at 344 (alteration in original).
30 Id. at 345.
31 Id.
32 Id. at 346.
gines of the accident aircraft. The company's only presence in Pennsylvania was through its website. The court noted that the standard in the Third Circuit is that "the defendant must clearly be doing business through its web site in the forum state, and the claim must relate to or arise out of use of the web site." DivCo's website allowed customers to obtain general information and to ascertain the status of their crankcases, but it could not accommodate sales or orders. The court held that this type of contact was insufficient to establish personal jurisdiction in Pennsylvania.

C. HETZER-YOUNG v. PRECISION AIRMOTIVE CORP.

The plaintiffs, representatives of the decedents in the crash of a Grumman American AA-5 in Ohio, claimed that the aircraft's carburetor and muffler had failed due to defects in these components. The respective manufacturers of the carburetor and muffler each successfully argued for summary judgment in the trial court, claiming that GARA's statute of repose barred the plaintiffs' claims.

The plaintiffs did not dispute that the carburetor on the accident aircraft, manufactured by Marvel-Schebler, a division of Borg Warner Corp., was installed outside of the statute of repose, but argued that the statute did not apply because, under GARA, the carburetor's manufacturer had "knowingly misrepresented" a problem with the carburetor to the FAA. The carburetor manufacturer (in the forms of product-line successor Facet Aerospace Products Co. and then later, Defendant Precision Airmotive Corp.) had disclosed to the FAA that there was a problem with the composite floats in their carburetors and recommended that they be replaced with metal floats. This

33 Id. at 348, 349.
34 Id. at 349–51.
35 Id. at 350.
36 Id. at 350–51.
37 Id. at 351.
39 Id. at 686–87.
40 Id. at 689.
41 Defendants in the lawsuit were product-line successor Precision Airmotive Corp. and the manufacturer of the engines that used the carburetor, Lycoming Engines. Id. at 687.
42 Id. at 695.
43 Id.
44 Id. at 688.
disclosure, according to the plaintiffs, included a knowing misrepresentation about the nature of the problem with the composite floats. Specifically, they claimed that the manufacturer blamed the problem with the float on the improper use of automotive fuels rather than on the real cause, an "open-cell" defect in the composite.

With regard to the muffler, the plaintiffs argued that the statute of repose did not apply at all. Although the accident aircraft's original muffler was installed outside the statute of repose, the plaintiffs alleged that it had been replaced by another muffler manufactured by Defendant Elano Corp. (which later merged with Defendant Unison Industries) within the relevant eighteen-year period.

The Ohio Court of Appeals held that the plaintiffs had raised a genuine issue of material fact concerning whether a misrepresentation regarding the floats had occurred. Likewise, the court agreed that the manufacturer had a duty to disclose the nature of the defect. Yet, the court affirmed the summary judgment for the manufacturer because the plaintiffs had failed to raise a genuine issue of fact regarding whether the alleged misrepresentation caused the accident.

The Ohio Court of Appeals reversed the grant of summary judgment with respect to the muffler manufacturer, however, concluding that an entry in the aircraft's maintenance log stating that the muffler was replaced in 1987 was sufficient to create a genuine issue of material fact even though the muffler was stamped "04-74" (the year of the aircraft's manufacture). The court clarified, though, that once the manufacturer had shown that the original muffler had been installed outside the repose period, the plaintiffs bore the burden of showing that the muffler was a replacement.

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45 Id. at 695–96.
46 Id.
47 Id. at 687.
48 Id. at 697–98.
49 Id. at 698.
50 Id. at 699.
51 Id. at 694–95.
52 Id. at 688–89.
D. Stewart v. Precision Airmotive LLC

In Stewart, the Common Pleas Court of Philadelphia addressed the same issue that the Ohio Court of Appeals faced in Hetzer-Young regarding the Marvel Schebler carburetors. The Pennsylvania trial court issued two similar opinions—one addressing defendant Lycoming Engines Division’s motion for summary judgment and the other addressing defendant Airmotive’s “substantially similar” motion.

Like the Ohio Court of Appeals, the Pennsylvania court concluded that there were sufficient issues of material fact regarding whether the defendants had made knowing misrepresentations to or concealed relevant information from the FAA to preclude summary judgment. Unlike the Ohio court, the Pennsylvania court found that the plaintiffs had presented sufficient evidence of causation to avoid summary judgment on their claims.

The decision on Precision Airmotive’s motion also addressed whether Precision Airmotive could be held liable as a “manufacturer” under GARA. According to the court, Precision Airmotive did not have successor liability for the carburetor and was not subject to GARA’s “rolling” provision. But, as the holder of the “Parts Manufacturer Approval (PMA) certificate for the Marvel Schebler carburetor product line,” it did “qualify as a manufacturer within the meaning of the knowing concealment exception.”

E. Avco Corp. v. North

Avco Corporation brought a declaratory judgment action in the U.S. District Court for the District of Vermont against the widow of a pilot who died when his aircraft, which had engines manufactured by Avco’s Lycoming Engines Division, crashed in

58 Id. at *4–5.
59 Id. at *4.
60 Id. at *5.
Vermont. Avco sought a declaration that GARA’s eighteen-year statute of repose barred any claims that the widow might have related to her husband’s death despite that she had not yet brought suit on any such claim.

The district court dismissed the claim for lack of subject matter jurisdiction, finding that the action did not present an actual case or controversy. Avco based its claim for declaratory judgment on a notice of inspection of the accident aircraft’s engines from “an attorney who specializes in aircraft accident litigation.” Avco further alleged that “the attorney or his law firm has given notice of inspection to Lycoming more than sixteen times, and in every case” the attorney filed suit following inspection. The district court held that while “[a] specific and concrete threat of litigation can establish a justiciable controversy,” the mere fact that an attorney who specializes in aviation litigation invited Lycoming to an inspection of the engines does not establish such a threat.

II. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act of 1976 (FSIA) protects foreign governments, as well as their agencies, instrumentalities, and entities qualifying as organs of the state, from suit in the United States unless one of several FSIA statutory exceptions applies. The exceptions in FSIA provide the “sole basis for obtaining jurisdiction over a foreign state.” Important exceptions include the commercial activity exception and the exception, with some limitations, for “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act.” A foreign government can also waive its immunity “explicitly or by

62 Id. at *1.
63 Id. at *2.
64 Id. at *16.
65 Id. at *2.
66 Id. at *2–3.
67 Id. at *11.
68 Id. at *11–12.
72 Id. § 1605(a)(7).
implication.”\textsuperscript{73} FSIA was amended in 2008 to make it easier for parties to collect on judgments obtained under the state-sponsored-terrorism exception.\textsuperscript{74}

A. \textit{Butler v. Sukhoi Co.}\textsuperscript{75}

The plaintiffs, the pilot injured in the crash of a Sukhoi SU-29 aircraft and his wife, had previously sued Sukhoi Design Bureau in the U.S. District Court for the Southern District of Florida for damages related to the crash, and that court had entered a default judgment in favor of the plaintiffs.\textsuperscript{76} The plaintiffs subsequently filed a second suit in the same court to enforce this judgment against Sukhoi Design Bureau and alleged successors-in-interest Sukhoi Company, United Aircraft Manufacturing Corporation, Irkut Corporation, Sukhoi Civil Aircraft, and the Russian Federation.\textsuperscript{77} In the second case, the plaintiffs alleged that the defendants “were a foreign state and/or instrumentalities or agencies of a foreign state not entitled to immunity under the FSIA.”\textsuperscript{78} The plaintiffs sought a declaration that the new defendants “were jointly and severally liable for the [default] judgment as successors in interest to and/or alter-egos of [Sukhoi Design Bureau].”\textsuperscript{79}

The defendants filed a motion to dismiss under FSIA, which the district court denied on the ground that the plaintiffs “were entitled to discovery on the ‘jurisdictional issues’” they had raised.\textsuperscript{80} Noting that a denial of sovereign immunity under FSIA is an appealable final order, the Court of Appeals for the Eleventh Circuit exercised jurisdiction over the defendants’ immediate appeal.\textsuperscript{81}

The Eleventh Circuit held that the district court did not have subject matter jurisdiction, even to allow limited jurisdictional discovery,\textsuperscript{82} as the plaintiffs had failed to meet their burden of establishing a prima facie case that their claim fell under an ex-

\textsuperscript{73} Id. § 1605(a)(1).
\textsuperscript{75} 579 F.3d 1307 (11th Cir. 2009).
\textsuperscript{76} Id. at 1309–10.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1310.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 1310–11.
\textsuperscript{81} Id. at 1311.
\textsuperscript{82} Id. at 1312.
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ception to FSIA immunity. The court stated that the plaintiffs had failed to articulate the basis for the application of any specific FSIA exception; and particularly noted that the plaintiffs’ allegations that the defendants were “alter-egos” of Sukhoi Design Bureau were insufficient to establish any exception. The court rejected the plaintiffs’ argument that they did not need to establish the applicability of an FSIA exception because they were merely seeking to enforce their prior judgment, noting instead that the second action sought “a new judgment in a separate cause of action against appellants.” Thus, the plaintiffs bore anew the burden of establishing the prima facie case of an applicable FSIA exception. Because there were no factual allegations that would fall under any FSIA exception, there was nothing to be verified by limited jurisdictional discovery. The Eleventh Circuit remanded the case with directions for immediate dismissal of the claims.

B. CERTAIN UNDERWRITERS AT LLOYDS LONDON v. LIBYA

The Libyan Claims Resolution Act (LCRA) was signed into law on August 4, 2008. The LCRA provides Libya with immunity to suits in the United States brought by plaintiffs of any nationality, overriding the exceptions to FSIA. FSIA was signed into law in conjunction with a Claims Settlement Agreement entered into by the United States and Libya. The Settlement Agreement was entered “in order to ‘terminate permanently all pending suits . . . [and] preclude any future suits’ in United States or Libyan courts arising from terrorist acts, including aircraft hijacking and hostage-taking, which occurred prior to June 30, 2006.” It created a $1.5 billion settlement fund.

83 Id. at 1312–13.
84 Id.
85 Id. at 1313.
86 Id. at 1312–13.
87 Id. at 1313.
88 Id. at 1314–15. Further, according to the court of appeals, the district court failed to engage in a balancing of the need for limited jurisdictional discovery to establish an FSIA exception with the need to protect a legitimate claim to immunity from discovery. Id. at 1314.
91 Id. § 5(a) (1)(A); see also Certain Underwriters, 2010 U.S. Dist. LEXIS 1247, at *9–10.
93 Id.
94 Id.
The plaintiffs in Certain Underwriters had pending actions at the time of the LCRA which they conceded fell under the Settlement Agreement. Retroactivity was not an issue "because Congress has made clear its intent to apply the provisions of the LCRA to events prior to June 30, 2006." The plaintiffs suggested that the U.S. District Court for the District of Columbia should nonetheless "retain jurisdiction over the case until it is clear that an alternate forum can provide relief for their claims." The court rejected the request, noting that "the jurisdictional issue is dispositive."

III. FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States and authorizes suits against the federal government for money damages 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." The government may be held liable for negligence "in the same manner and to the same extent as a private individual under like circumstances."

A. DISCRETIONARY FUNCTION EXCEPTION

The FTCA includes several exceptions to its general waiver of sovereign immunity, including one commonly known as the "discretionary function exception." Under this exception, the United States retains its sovereign immunity for conduct involving the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." This exception applies to conduct "discretionary in nature," i.e., "involv[ing] an element of judgment or choice." Further, that judgment must be "of the kind that the discretionary function exception

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95 Id. at *13.
96 Id. at *12-13, n.8.
97 Id. at *13-14.
98 Id. at *14.
100 Id.
101 See id. § 2680.
102 Id. § 2680(a).
was designed to shield,” i.e. decisions that are “susceptible to policy analysis.”

1. *Supinski v. United States*

The personal representative of two passengers killed in the crash of a Cessna 182 aircraft after an aborted landing attempt at the Spirit of St. Louis Airport brought an action against the United States alleging “that the United States was negligent in issuing an airman’s certificate to the airplane’s pilot.” The pilot had received his temporary airman’s certificate twenty-two days prior to the crash; he received his endorsement to fly the Cessna 182 two days before the crash. The fatal flight was likely the pilot’s “first night-time solo in a high-performance aircraft.”

Shortly before the accident-pilot’s graduation from flight school, his primary instructor informed the school’s owner and its chief flight instructor that although the accident-pilot “was completing all required components of every lesson and was beginning to meet all standards to pass the upcoming practical test,” in comparison with her other students, she found it more difficult to get him to conform to her expectations. In particular, the accident-pilot “balked at reading the preflight checklist out loud,” and his instructor “felt that he was only doing so in order to pass the lessons.”

The instructor was told to make sure that the accident-pilot “met all the lesson standards” and to reduce her concerns to writing, which she did in an email that she sent several days later.

The accident-pilot graduated from the flight school. Although he failed his first practical test with a designated pilot-examiner, he received further training and passed the test on a second try two days later. Between these two tests, the FAA’s Principal Operations Inspector (POI) assigned to the flight school made an unannounced visit to the school. During the

104 Id. at 322, 325.
106 Id. at *1–2.
107 Id. at *2, *8.
108 Id. at *2.
109 Id. at *3.
110 Id. at *3–4.
111 Id. at *4.
112 Id. at *5.
113 Id. at *5–6, *8–9.
114 Id. at *7.
visit, the owner of the flight school showed the POI the flight instructor's email regarding her concerns about the accident-pilot's "attitude toward flying." The owner also told the POI that the owner had met with the student "to discuss his progress and to inform him of what was required of him." The plaintiffs claimed that the POI was negligent for not initiating an investigation into the student-pilot at that point.

The district court granted summary judgment for the United States on the ground that the POI's decision not to initiate an investigation into the student-pilot was a discretionary one, and thus, it falls within the discretionary function exception to the waiver of sovereign immunity contained in the FTCA. As to the first requirement of the discretionary function exception—that the challenged conduct be discretionary—the court concluded that the plaintiff had pointed to no regulation or rule that constrained the POI's discretion. Furthermore, the court concluded that "[w]hen confronted with the information in [the instructor]'s email, [the POI] was clearly called upon to exercise judgment and select among a number of choices that were available to him."

The district court also determined that the second requirement of the discretionary function exception was met: "The judgment at issue—what action to take in response to information regarding a student pilot—is also of the type that the discretionary function exception is designed to shield." This is so, the court found, because "[t]he FAA must balance the ultimate goal of air safety against the reality of finite agency resources."

2. Collins v. United States

This was one of several cases arising out of the mid-air collision of two small planes approaching Waukegan Regional Airport, a Visual Flight Rules (VFR) airport. The plaintiffs alleged that the United States was negligent for "failing to install
radar at the Waukegan airport."125 The Seventh Circuit held that the decision about what equipment to install at the airport was protected by the discretionary function exception to the United States' waiver of sovereign immunity.126 "The prioritization of demands for government money is quintessentially a discretionary function."127 It was irrelevant to the analysis that the FAA had installed the system that the plaintiffs argued should have been installed at Waukegan Regional Airport at certain other VFR airports at the request of specific members of Congress.128

The plaintiffs also alleged that the United States was liable for the negligence of the air traffic controller in Waukegan Regional Airport's tower.129 The FAA had contracted out the air traffic control services for this tower to a private company.130 The court reaffirmed a previous decision that controllers at contract towers are not employees of the United States for purposes of the FTCA.131

The Seventh Circuit also reaffirmed its minority position that the applicability of one of the FTCA's exceptions to the United States' waiver of sovereign immunity does not raise a jurisdictional issue.132


The insurers of a twin-engine aircraft that crashed in southern Georgia brought suit under the FTCA to recover for damage to the aircraft.134 They alleged that the National Weather Service had negligently failed to issue a Significant Meteorological Information (SIGMET) warning indicating that clear air turbulence (CAT) was occurring or was expected to occur.135 The United States raised the discretionary function exception to its waiver of sovereign immunity.136

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125 Id. at 835.
126 Id. at 838–40.
127 Id. at 839.
128 Id.
129 Id. at 838.
130 Id.
131 Id. (citing Alinsky v. United States, 415 F.3d 639 (7th Cir. 2005)).
132 Id. at 837.
133 562 F.3d 1297 (11th Cir. 2009).
134 Id. at 1298.
135 Id. at 1298–99.
136 Id. at 1299.
The insurers argued that issuing the SIGMET was non-discretionary, relying on a provision of the National Weather Service’s manual for meteorologists. The Eleventh Circuit held that the provision relied upon by the insurers required that a SIGMET be issued “once the meteorologists determine that severe CAT is occurring or is likely to occur. However, the underlying determination of whether severe CAT is occurring is discretionary.” Furthermore, “weather forecasts are the type of policy decisions that the discretionary function exception protects from liability . . . These policy concerns include the cost and budgetary policy considerations in forecasting and the dangers of over warning.”

B. WEATHER BRIEFINGS

1. Glorvigen v. Cirrus Design Corp.

The pilot-owner of a Cirrus SR-22 and his passenger were both killed when the aircraft crashed in Minnesota. The decedents’ trustees brought suit against Cirrus, the manufacturer of the aircraft, in Minnesota state court under theories that included failure to properly design the aircraft and failure to properly instruct the pilot-owner in its operation. Cirrus then brought a third-party action against two flight service station (FSS) specialists alleging, inter alia, negligent failure to adequately advise of weather conditions and forecasts. The United States was substituted as the third-party defendant in place of the FSS specialists, and the case was removed to federal court.

The Eighth Circuit affirmed the lower court’s grant of summary judgment for the United States on the grounds that neither specialist had acted negligently and likewise affirmed the remand to state court. According to the Eighth Circuit,

137 Id. at 1298–99.
138 Id. at 1300. According to the court, “distinguishing between moderate and severe air turbulence, requires subjective evaluation by the meteorologist. The meteorologist must weigh a number of factors and a range of available data.” Id. This exercise of “judgment satisfies the first part of the discretionary function test.” Id.
139 Id.
140 581 F.3d 737 (8th Cir. 2009).
141 Id. at 739.
142 Id.
143 Id.
144 Id.
145 Id.
the applicable articulation of the FSS specialist's duty was the following: "FSS specialists have a duty to provide pilots with an accurate and complete summary of the relevant weather information." The court further pointed out, however, that this duty does not mean that a specialist "need[s] to recite verbatim the contents of every weather report before him." Indeed "a verbatim recitation would likely overwhelm a pilot with information, thereby confusing rather than clarifying the prevailing weather conditions" and "would make FSS specialists superfluous, since the rote recitation of weather reporting information could probably be accomplished more effectively through the use of a computer or automated phone system." Rather, the court explained, the duty "means that the specialist must provide a complete synthesis or summary of the relevant weather information. Inevitably, therefore, some information will be left out. However, as a synthesis, it must be 'accurate and complete' with regards to the information that would appropriately be included in a summary report."

The court concluded that the FSS station specialist that the pilot called fulfilled his duty to convey an Airmen's Meteorological Information (AIRMET) calling for "[o]ccasional ceiling below a thousand feet/visibility below 3 miles" when he conveyed that there was "an AIRMET for the area warning of 'the potential for some [instrument flight rule (IFR) conditions].'" The court explained: "Every VFR pilot should be familiar with the VFR cutoffs, and it would be gratuitous and counter-productive to demand that FSS specialists reiterate those cutoffs during every VFR weather briefing."

The court also concluded that the FSS specialist's use of the phrase "potential for" adequately conveyed the forecast for "occasional" IFR conditions. As the court noted, "occasional" is defined by the FAA as "a greater than 50% probability of a phenomenon occurring, but for less than 1/2 the forecast period."

146 Id. at 743.
147 Id. at 744.
148 Id.
149 Id.
150 Id. at 744–45.
151 Id. at 744.
152 Id. at 745.
153 Id.
of IFR conditions for less than half the time between 2:45 a.m. and 9:00 a.m. over the area covered by the AIRMET.”

Similarly, the FSS specialist met his duty when he conveyed the forecast for the airport of origination to include “‘occasional lower stratus [clouds] and possible light snow’ through 6:00 a.m.” The FSS specialist was not required to convey specific ceilings listed in an Area Forecast which covered several states, “given that the forecast did not predict ceiling levels below 1,000 feet.”

The pilot also sought an “abbreviated briefing” from a second FSS specialist. The court concluded that the following standards applied to an abbreviated briefing:

An abbreviated briefing intended to update a prior briefing should be focused, “to the extent possible, [on] appreciable changes in the meteorological and aeronautical conditions since the previous briefing.” If the pilot requests specific information only, the specialist must provide that information, and in addition must “inform the pilot of the existence of any adverse conditions,” “reported or forecast.”

In this case, the pilot sought an update briefing, the current conditions at the destination airport, and any pilot reports. The court concluded that:

[The FSS specialist] was required to inform [the pilot] of any significant changes in forecast or current conditions that arose since his last briefing, to describe the current conditions [at the destination airport], to inform [the pilot] of any relevant pilot reports, and to describe any adverse conditions that were present or forecast [along the proposed route] or reported in any pilot reports.

Judged by this standard, the court found that the briefing met, and exceeded, the requirements.

Finally, the court held that neither FSS specialist had a duty to provide a “Visual Flight Not Recommended” (VNR) warning. The court declined to determine when, if ever, a specialist pro-

\[\text{references}\]
viding an abbreviated briefing might be required to provide a VNR warning.\textsuperscript{163}

Affirming the district court’s remand of the case to state court, the Eighth Circuit concluded that the district court had not abused its discretion in remanding the remaining claims.\textsuperscript{164} In particular, it noted that while the district court had the discretion to exercise supplemental jurisdiction over a case after the dismissal of all federal claims, “[w]here, as here, resolution of the remaining claims depends solely on a determination of state law, the Court should decline to exercise jurisdiction.”\textsuperscript{165} Further, the district court had not yet addressed any of the state law claims during the time that it had jurisdiction over the case.\textsuperscript{166}

After remand to the state court, a jury found the pilot 25\% at fault for the crash, Cirrus Design Corp. 37.5\% at fault, and University of North Dakota Aerospace Foundation (which intervened as a defendant once the case was remanded) 37.5\% at fault.\textsuperscript{167} It awarded $7.4 million to the trustees for the passenger and $12 million to the trustees for the pilot.\textsuperscript{168}

C. NEGLIGENCE

1. Wojciechowicz v. United States\textsuperscript{169}

The case arose out of the crash of a Cessna Conquest into high terrain near the El Yunque mountain peak in the Caribbean National Forest in Puerto Rico during a VFR flight.\textsuperscript{170} The pilot and four passengers were killed.\textsuperscript{171} The survivors of the decedents, the owner of the aircraft, and the aircraft’s insurer sued the United States, alleging that the United States’ air traffic

\textsuperscript{163} Id.
\textsuperscript{164} Id. at 749.
\textsuperscript{165} Id. (quoting Farris v. Exotic Rubber & Plastics of Minn., Inc., 165 F. Supp. 2d 916, 919 (D. Minn. 2001)).
\textsuperscript{166} Id. at 749.
\textsuperscript{168} Id.
\textsuperscript{169} 582 F.3d 57 (1st Cir. 2009).
\textsuperscript{170} Id. at 61.
\textsuperscript{171} Id.
controller had acted negligently.\textsuperscript{172} The First Circuit affirmed the district court's judgment for the United States.\textsuperscript{175}

The appellants conceded that the pilot had been negligent.\textsuperscript{174} They maintained, however, that the air traffic controller was also at fault for "fail[ing] to separate the flight from El Yunque peak by at least three miles, which they claim is required by \textsuperscript{paragraph 5-5-9 of the [Air Traffic Control Manual].} The aircraft had last appeared on radar 4.7 miles from El Yunque peak.\textsuperscript{176} The district court determined that paragraph 5-5-9 did not apply to VFR flights but only to IFR flights, and that even if it did apply to VFR flights, the controller did not violate that provision because the last radar hit appeared well before the three-miles mentioned in paragraph 5-5-9.\textsuperscript{177}

The Court of Appeals for the First Circuit reiterated that the law in the First Circuit is that the [Air Traffic Control Manual] is not a statute or a regulation but an internal FAA guideline issued to FAA controllers, which governs their conduct. As such, under our case law the [Air Traffic Control Manual] is merely an indication of the standard of care. Further, we treat "substantial" failures to adhere to the [Air Traffic Control Manual] guidelines as "persuasive as an indication of a lack of due care."\textsuperscript{178} The court "reject[ed] the argument . . . that any violation [of the Air Traffic Control Manual] would be negligence per se."\textsuperscript{179}

The Court of Appeals for the First Circuit did not decide whether paragraph 5-5-9 of the Air Traffic Control Manual applies to VFR flights.\textsuperscript{180} Instead, it found no clear error in the district court's conclusion that "a reasonable controller, given the facts of this case, would not have separated the flight at (or before) 4.7 miles," the last point at which the control had contact with the aircraft, even assuming that the three-mile separation requirement applied to VFR aircraft.\textsuperscript{181} This was so "because it was more reasonable for the controller at that point

\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 63.
\textsuperscript{175} Id. at 63–64 (discussing the FAA Air Traffic Control Manual, FAA Order 7110.65M).
\textsuperscript{176} Id. at 63.
\textsuperscript{177} Id. at 65.
\textsuperscript{178} Id. at 64 (citation omitted).
\textsuperscript{179} Id. at 68.
\textsuperscript{180} Id. at 66.
\textsuperscript{181} Id. at 69.
to rely on the VFR pilot, who, the controller could assume, was complying with his duties to see and avoid terrain and obstacles and to maintain VFR-minimum visibility." The appellate court added that "[t]here is no serious contention that the pilot did not know where El Yunque was. In contrast, [the controller] did not then know the plane's course or altitude or whether it was approaching or turning away from the obstruction, El Yunque."

The appellate court also found no clear error in the district court's determinations that there was no causal connection between the alleged separation failure and the crash and that the accident was not foreseeable to the controller. The court supportably found the cause of the crash was not that the flight came closer than three miles to the radar tower on El Yunque or that it was flying in high terrain, but that the pilot flew into a cloud in violation of FAA regulations. Further, it was not foreseeable to the air traffic controller that a VFR pilot would "fly[ ] into a cloud while traversing rugged, rising terrain at low altitude and high speed."

The appellate court similarly affirmed the district court's conclusion that the air traffic controller breached no duty to provide a proximity to terrain warning under paragraph 2-1-6 of the Air Traffic Control Manual. The analysis of whether a controller has a duty "to issue a safety alert turns on the information available to the controller." In this case, the controller "only had information on the flight's altitude above sea level; he had no information about the elevation of the surrounding terrain, the aircraft's altitude over the ground, or its proximity to any terrain or obstacles (aside from its distance from the tower on El Yunque) . . . . A VFR pilot flying in a sparsely populated area may fly close to the ground and below the altitude of surrounding terrain, so long as minimum visibility is maintained."

The appellants also advanced the theory that the San Juan Combined Enroute and Radar Approach Control Facility

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182 Id.
183 Id.
184 Id.
185 Id. at 70.
186 Id. (quoting Wojciechowicz v. United States, 576 F. Supp. 2d 241, 277 (D.P.R. 2008)).
187 Id.
188 Id.
189 Id. (citing FAA General Operating and Flight Rules, 14 C.F.R. §§ 91.119(c), 91.155(a) (2009)).
(CERAP) "failed to train and test [the controller] on significant terrain areas and obstructions as required by a curriculum contained in the FAA's Air Traffic Technical Training Order."\textsuperscript{190} With such training, they maintained, the controller "would have issued a safety alert to [the pilot], and this alert would have resulted in avoidance of the crash."\textsuperscript{191}

The First Circuit likewise found no clear error in the district court's findings related to the adequacy of the controller's training, even presuming FAA training guidelines required training other than what had been provided.\textsuperscript{192} The district court accepted the controller's testimony that he was familiar with the location of El Yunque top and the surrounding mountains.\textsuperscript{193} The training discussed in the FAA training order would not change "the fact that [the controller] only knew the aircraft's elevation above sea level rather than its elevation above the ground" due to the lack of terrain information on his scope, "and the fact that he had no reason not to presume that [the pilot] was complying with VFR flight procedures."\textsuperscript{194}

2. **Kelley v. United States\textsuperscript{195}**

This case arose out of the crash of a Cessna 72R airplane at a small, private airport in Prince George's County, Maryland.\textsuperscript{196} The aircraft crashed during its second approach at the uncontrolled airport.\textsuperscript{197} After being unable to land on this second approach, the aircraft performed a circling maneuver to try to land from the opposite direction.\textsuperscript{198} When it failed to land on this pass as well, the aircraft began to climb and bank left, at which time it crashed.\textsuperscript{199} The two pilots were killed and were not parties to the action.\textsuperscript{200}

\textsuperscript{190} Id. at 64.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 65. The district court also found no violation of FAA Order 3120.4J, an FAA operating manual that "sets forth a national curriculum for training controllers." Id. The court of appeals did not reach this issue, affirming on other grounds. Id. at 71 n.16.
\textsuperscript{193} Id. at 71.
\textsuperscript{194} Id. (citing Wojciechowicz v. United States, 576 F. Supp. 2d 241, 259–60 (D.P.R. 2008)).
\textsuperscript{196} Id. at *1–2.
\textsuperscript{197} Id. at *19.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at *2.
The plaintiffs, a passenger who sustained serious injury in the crash and her husband, alleged air traffic controller negligence. Specifically, they alleged that the air traffic controller:

1. Failed to provide [the flight] with available weather reports from Andrews Air Force Base;
2. Failed to suggest that [the flight] hold or divert to another airport rather than attempt a landing at Freeway;
3. Failed to advise [the flight] when it deviated from its assigned altitude;
4. Failed to maintain radio communication with [the flight] during its second approach;
5. Failed to issue a safety alert during [the flight]'s second approach; and
6. Failed to instruct [the flight] to follow missed approach procedures following the second missed approach.

The U.S. District Court for the Eastern District of Virginia granted the United States' motion for summary judgment.

The court rejected the plaintiffs' contention that the air traffic controller had a duty to provide weather information from an airport that was neither the flight's destination nor along the flight's route, absent a request from the pilot. The court further concluded that failure to provide such weather information was not a proximate cause of the crash. The court noted that the weather at Andrews Air Force Base did not materially differ from the weather provided by the air traffic controller or from the weather that the pilot himself observed on his first approach at the destination airport. The testimony of the plaintiffs' expert finding a causal link between the failure to provide the weather and the crash did not create a genuine issue of material fact. The court noted: "While expert opinions may often satisfy a non-moving party's obligation to raise a triable issue of

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201 Id.
202 Id. at *25.
203 Id. at *3.
204 Id. at *31.
205 Id. at *37–38.
206 Id. at *32. As the aircraft began its first approach, the air traffic controller relayed that weather at nearby-DCA had decreased to 1.5 miles with broken cloud ceilings at 600 AGL. Id. at *29. After his first attempted approach, the pilot "reported visibility of 1 mile, broken clouds between 600 and 700 MSL (432-532 AGL) and some additional scattered clouds." Id. at *30.
207 Id. at *36–37.
fact, a speculative theory of causation, even though endorsed by
an expert, does not."\textsuperscript{208}

Similarly, the court found, as a matter of law, that the controller
had no duty to suggest that the flight divert or enter a holding
pattern.\textsuperscript{209} Noting that the "[d]etermination that existing
weather/visibility is adequate for approach landing is the re-
sponsibility of the pilot/aircraft operator,"\textsuperscript{210} the court stated:

There is no evidence in the record that suggests that [the pilot]
thought he was at risk or that he had inadequate weather infor-
mation for the purposes of deciding whether to land, divert or
hold. There is also no evidence that [the pilot] ever suggested to
[the controller] that he had any doubts about whether he should
attempt the second missed approach or that weather conditions
were too severe for landing.\textsuperscript{211}

The court likewise rejected the plaintiffs' theory that the con-
troller should have issued notifications to the pilot of brief alti-
tude deviations earlier in the flight.\textsuperscript{212} Any such failure\textsuperscript{213} was
not a proximate cause of the accident.\textsuperscript{214}

The court also rejected the plaintiffs' theories that the con-
troller should have maintained the flight on the air traffic con-
trol frequency during and after the second approach rather
than transferring it to the local common traffic advisory fre-
quency, and should have then issued safety alerts and instruc-
tions during the second approach.\textsuperscript{215} Relying on the
Aeronautical Information Manual, the court characterized the
transfer to the common traffic advisory frequency as "neces-

\textsuperscript{208} Id. at *35.
\textsuperscript{209} Id. at *40.
\textsuperscript{210} Id. at *39 (quoting FAA Order 7110.65R, ¶ 4-7-8).
\textsuperscript{211} Id. at *39-40.
\textsuperscript{212} Id. at *42-43.
\textsuperscript{213} Id. at *42. The court determined that the controller had no duty to provide
notifications of altitude deviations of less than 300 feet. Id. Whether the controller
had a duty to notify the flight of "brief deviations of 300 feet or greater de-
deps on a variety of considerations, including whether a reasonable air
controller should have observed those deviations." Id. The court did not resolve
the question for purposes of summary judgment. Id. at *42-43.
\textsuperscript{214} Id. at *43-44. The court rejected the plaintiffs' theory that the aircraft's
altimeter might have malfunctioned and that that malfunction might have been
brought to the pilot's attention through a notification of altitude deviation. The
court noted that the stipulated facts showed that the air traffic controller had
issued altimeter readings to the flight several times and that the flight had pro-
perly established its altitude on both approaches. Id.
\textsuperscript{215} Id. at *49, *51.
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sary,"216 noting that “[p]ilots are instructed to switch to the common frequency as soon as practicable when approaching a non-towered airport for a variety of reasons related to public safety.”217 Given this, the court could not “credit as a matter of law the opinions of Plaintiffs’ expert that [the air traffic controller] had a duty to ignore these regulations and maintain [the flight] on the ATC frequency during the second missed approach.”218

Since the air traffic controller had properly transferred the flight to the common traffic advisory frequency, there could be no duty to issue safety alerts or instructions during the second approach.219 “Radar service had . . . been properly and automatically terminated” well before the aircraft approached terrain; the “controllers no longer had the ability to issue any alerts” since the aircraft was no longer on ATC frequency; and “there was nothing necessarily improper about [the flight]’s descent [toward the runway] that should have prompted air controllers to issue a safety alert even had they maintained their ability to do so.”220 The plaintiffs’ theory that the air traffic controllers had a duty to instruct the pilot to follow proper missed-approach procedures221 failed for the same reason: the air traffic controller no longer had the ability to instruct the flight.222 Also, “there was nothing foreseeable about [the pilot’s] actions after the second missed approach.”223

D. STATUTE OF LIMITATIONS

1. Hertz v. United States224

The plaintiff, the widow of a pilot who died in the crash of an amateur-built experimental airplane, filed an administrative claim with the FAA more than two years after the accident.225 The district court dismissed the plaintiff’s subsequent lawsuit be-

216 Id. at *46.
217 Id. at *45.
218 Id. at *48.
219 Id. at *51–52.
220 Id. at *51–52.
221 Id. at *52–53. Rather than execute the missed-approach procedure following the second approach, the pilot circled and attempted to land from the opposite direction. Id. at *19.
222 Id. at *53.
223 Id.
224 560 F.3d 616 (6th Cir. 2009).
225 Id. at 617–18.
cause her claim had not been submitted in writing to the appropriate federal agency within the two-year time period prescribed by 28 U.S.C. § 2401(b).226 The plaintiff argued that her claim was timely because her two-year time period should run not from the date of the accident but from when, about a month later, she "telephoned the NTSB's Investigator-in-Charge, who told her that 'the NTSB believed that the cause of the accident was related to air traffic controller negligence.'"227

The Sixth Circuit reaffirmed that 28 U.S.C. § 2401(b) is an inquiry-notice rule.228 Thus, a plaintiff need not "discover[ ] the existence of a claim" in order for the clock to begin running, but needs only be put on notice to conduct further inquiry.229 The court rejected the plaintiff's analogy to medical malpractice cases "in which the plaintiff has little reason to suspect anything other than natural causes for his injury . . . . Plane crashes by their nature typically involve negligence somewhere in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim."230

IV. FEDERAL AVIATION ACT OF 1958—MANUFACTURER LIABILITY

A. Hart v. Boeing Co.231

The plaintiffs in Hart were passengers who were injured when Continental Airlines Flight 1404 veered off the runway at Denver International Airport on December 20, 2008.232 They brought suit in the U.S. District Court for the District of Colorado, contending that defendant Boeing's 757's "directional control mechanisms [were] designed in such a way that make it difficult for pilots in a high crosswind situation to maintain runway heading during takeoff."233 Boeing argued that the Federal Aviation Act preempted the plaintiffs' claims.234 The alleged preemption at issue was implied field preemption.235

226 Id. at 618.
227 Id. at 617, 619.
228 Id. at 618 (citing United States v. Kubrick, 444 U.S. 111, 120 (1979)).
229 Id.
230 Id. at 619.
232 Id. at *5.
233 Id.
234 Id. at *5–6.
235 Id. at *11–12.
As the district court noted, the rule in the Tenth Circuit—found in Cleveland v. Piper Aircraft Corp.—is that the Federal Aviation Act does not impliedly preempt “a state law claim for negligence in the design of an aircraft.” Boeing argued that the Tenth Circuit’s precedent in Cleveland had been undermined by the Supreme Court’s more recent decision in Geier v. American Honda Motor Co. More specifically, in Cleveland, the Tenth Circuit had relied on the presence of the Federal Aviation Act’s savings clause and the presence of an express preemption provision governing rates and routes but not aircraft safety. In Geier, the Supreme Court stated that “the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.”

The district court in Hart concluded that this language in Geier applied to conflict preemption—not implied field preemption. Although the court acknowledged that some language in another Tenth Circuit decision, Choate v. Champion Home Builders Co., suggested that Geier’s reasoning might apply to implied field preemption as well, it ultimately concluded that it was bound to follow the Tenth Circuit’s rule finding no field preemption of state law claims for negligence in the design of an aircraft. In parting, the district court observed: “[T]he Tenth Circuit appears to be an outlier in this area of the law, and other federal circuits courts have taken an arguably more nuanced approach to the issue of implied preemption under the FAA.”

V. COMBAT ACTIVITIES EXCEPTION APPLIED TO GOVERNMENT CONTRACTORS

A. Getz v. Boeing Co.

This case arose out of the crash of a U.S. Army Chinook helicopter in Afghanistan in 2007. The plaintiffs, survivors of the crash and the heirs of those killed in the crash, brought suit in
The U.S. District Court for the Northern District of California against The Boeing Company, Honeywell International, Inc., and Goodrich Pump & Engine Control Systems, Inc., companies which designed, manufactured, and tested the accident helicopter.247

The defendants argued that they had immunity from suit as government contractors manufacturing military equipment, based on the Ninth Circuit case Koohi v. United States.248 Koohi held that the combat activities exception to the FTCA also preempted the common law tort claim against the private-party weapons manufacturer defendant in that case.249 The Getz court, however, disagreed that Koohi stands for a broad proposition of government contractor immunity for military equipment.250

Rather, the district court distinguished Koohi because it turned on “whether the purposes of tort law would be furthered by requiring weapons manufacturers to extend a duty of care to ‘enemy forces or persons associated with those forces.’”251 Getz, however, concerned “extending the duty of care to United States servicemen, the people the helicopter was designed to protect. The lack of a duty of care owed to enemies in war does not apply to our own military personnel.”252 Accordingly, the court rejected the defendants’ claim of immunity under the combat activities exception.253

VI. DEATH ON THE HIGH SEAS ACT

The Death on the High Seas Act (DOHSA) provides a statutory basis for the recovery of damages for wrongful death, including “loss of care, comfort, and companionship” of the deceased where the death occurs “on the high seas 3 nautical miles from the shore of the United States.”254 DOHSA was amended in 2000 to make it inapplicable to commercial aviation accidents “occurring on the high seas 12 nautical miles or less

247 Id. at *4–5.
248 976 F.2d 1328 (9th Cir. 1992); Getz, 2009 U.S. Dist. LEXIS 18815, at *15.
249 Getz, 2009 U.S. Dist. LEXIS 18815, at *13–14; see also Koohi, 976 F.2d at 1336–37.
251 Id.
252 Id.
253 Id. at *19.
from the shore of the United States,” thus leaving state law to apply to such accidents. The 2000 amendments also provided for recovery of nonpecuniary damages—which are not recoverable under the main provisions of the DOHSA—for deaths resulting from “commercial aviation accident[s] occurring on the high seas beyond 12 nautical miles from the shore of the United States.” Punitive damages remain unavailable under DOHSA.

A. Eberli v. Cirrus Design Corp.

In Eberli, the U.S. District Court for the Southern District of Florida addressed the meaning of the phrase “commercial aviation accident” in the 2000 amendments to the DOHSA. The decedent pilot had been contracted to fly a new Cirrus SR 20 to its purchaser, a Cirrus customer located in Thailand. The aircraft crashed into the Atlantic Ocean near Greenland.

The plaintiff filed a motion for summary judgment on the issue of whether the 2000 “commercial aviation accident” amendments to DOHSA applied to the crash, such that she could recover for nonpecuniary damages. The plaintiff argued that since ferrying the aircraft to the customer was “part of a commercial activity carried out for profit and related to commerce,” it met the meaning of “commercial aviation accident” within the amendment. The defendants maintained that a commercial aviation accident is “an accident that occurs during the transportation of passengers or cargo for commercial purposes.”

Finding the statutory term “commercial aviation accident” ambiguous, the court turned to extrinsic material to determine its meaning. The court looked primarily to 49 U.S.C. § 40125 of the transportation code which defines “commercial purposes” of the transportation code which defines “commercial purposes”

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256 46 U.S.C. § 30308(a) (“This chapter does not affect the law of a State regulating the right to recover for death.”).
257 Id. § 30307(b) (emphasis added).
258 Id.
260 Id. at 1372–73.
261 Id. at 1371.
262 Id.
263 Id.; see 46 U.S.C. § 30307(b).
264 Eberli, 615 F. Supp. 2d at 1372.
265 Id. at 1373.
266 Id.
as "the transportation of persons or property for compensation or hire." The court also considered the legislative history of the 2000 DOHSA amendments, specifically noting that the provisions were "enacted in the aftermath of a number of international air disasters and the lawsuits arising out of such disasters, in which the families of the victims were denied loss of society damages under DOHSA." The court also found relevant that the accident aircraft had Operating Limitations prohibiting it "from being operated to carry passengers or property for compensation or hire." Based on these factors, the court concluded that the crash at issue was not a "commercial aviation accident," and therefore, the provisions of DOHSA governing "commercial aviation accidents" did not apply to the plaintiff's claims.

B. **Helman v. Alcoa Global Fasteners Inc.**

The U.S. District Court for the Central District of California was faced in *Helman* with determining "what distance from shore DOHSA becomes applicable" to the crash of a military helicopter off the California coast. The court rejected the approach taken by the Second Circuit in *In re Air Crash Off Long Island, New York, on July 17, 1996*, which found that DOHSA became applicable where U.S. territorial waters ended (at the time, twelve miles from shore). Instead, the U.S. District Court for the Central District of California endorsed the position taken by then-Judge Sotomayor in her dissent in *In re Air Crash Off Long Island*. It held that, except in the case of a commercial aviation accident, DOHSA applies to all deaths occurring beyond a marine league (three nautical miles) from the shore of any state.

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267 Id.
268 Id. at 1374.
269 Id. at 1371, 1373.
270 Id. at 1373–74.
272 Id. at *3.
275 Id. at *6–7, *11.
276 Id. at *14–15.
The manufacturers of a Pilatus PC-12/45 single-engine turboprop and its engines appealed a jury verdict from the U.S. District Court for the District of Colorado finding them 49% at fault for the aircraft’s crash into the Sea of Okhotsk during an evaluation and demonstration flight.\(^{278}\) The plaintiffs were deemed 51% at fault by the jury.\(^{279}\) The Tenth Circuit upheld the lower court’s decision not to apply admiralty law because “the activity of flying for the purpose of aircraft evaluation and demonstration bears no relationship to a traditional maritime activity.”\(^{280}\)

The Tenth Circuit, however, overturned the jury verdict on several grounds, the primary of which was the failure to apply Idaho’s modified comparative fault statute—which “disallows recovery in product liability actions if the plaintiff bears greater responsibility for the injury than the defendants”—instead of Colorado’s comparative fault statute.\(^{281}\)

The Tenth Circuit reviewed the district court’s application of Colorado choice of law rules—the most significant relationship test from the Restatement (Second) of Conflict of Laws.\(^{282}\) In this case, several of the common contacts used to determine which jurisdiction has the most significant relationship to an aviation accident had no application.\(^{283}\) “The accident occurred over international waters and the airplane was manufactured and designed in Canada and Switzerland, so neither the place of the accident nor the conduct of the Defendants favors one state over the other.”\(^{284}\) The court then turned to the conduct of the plaintiffs: “The trip was arranged and conducted by an Idaho company. The plane and pilot were based in Idaho.”\(^{285}\)

\(^{277}\) 582 F.3d 1131 (10th Cir. 2009).
\(^{278}\) Id. at 1136.
\(^{279}\) Id. at 1138.
\(^{280}\) Id. at 1136.
\(^{281}\) Id. at 1136, 1143 (citing Restatement (Second) of Conflict of Laws § 145(1) (1971)).
\(^{282}\) Id. at 1143.
\(^{283}\) Id. at 1141.
\(^{284}\) Id. at 1144.
\(^{285}\) Id.
rado's contacts, on the other hand, were limited and not related to the accident.\textsuperscript{286}

The appellate court also rejected the argument that "justified expectations" favored application of Colorado law since the case had been primarily litigated up until trial under Colorado law.\textsuperscript{287} It explained that this "primarily refers to the expectations of parties in their pre-litigation conduct, and this principle is of little or no importance in the field of torts."\textsuperscript{288} Likewise, the court rejected the argument that the defendants had waived their right to application of Idaho law based on their failure to amend an interrogatory directed toward what law the defendants contended applied.\textsuperscript{289} Notification of their intent in the pretrial order was deemed sufficient.\textsuperscript{290}

The Tenth Circuit also determined that the district court abused its discretion in admitting evidence of other, dissimilar in-flight shutdowns of engines in Pilatus airplanes.\textsuperscript{291} The appellate court applied a "substantial similarity" test to determine whether other incidents may be admitted as evidence in a product liability case.\textsuperscript{292} It found that "none of the other incidents involved any of the causes" alleged by the plaintiffs to have caused the crash in the instant case.\textsuperscript{293}

It was also error, according to the appellate court, for the district court to allow experts to testify about the meaning of a "straightforward" Federal Aviation Regulation, 14 C.F.R. § 23.903(e)(3).\textsuperscript{294}

\section*{B. Johnson v. Avco Corp.\textsuperscript{295}}

In this case, the U.S. District Court for the Eastern District of Missouri applied Missouri choice-of-law rules—the most significant relationship test from the Restatement (Second) of Conflict of Laws—to determine the law that applied to a wrongful

\textsuperscript{286} Id. The aircraft had been purchased by the plaintiffs from a Colorado owner, and the purchase agreement stated that Colorado law would apply to that contract. Id.

\textsuperscript{287} Id.

\textsuperscript{288} Id.

\textsuperscript{289} Id. at 1145.

\textsuperscript{290} Id.

\textsuperscript{291} Id. at 1147.

\textsuperscript{292} Id. at 1147-48.

\textsuperscript{293} Id. at 1149.

\textsuperscript{294} Id. at 1150-51.

death action arising from the fatal crash of a small airplane in Indiana.\textsuperscript{296}

The manufacturer defendants argued that the law of the place of the injury, Indiana, should apply in this action.\textsuperscript{297} The plaintiffs, who alleged defective design and maintenance of the accident aircraft’s engines, claimed that Missouri law should apply since some of the defendants’ alleged misconduct took place there.\textsuperscript{298} Other alleged misconduct occurred in Pennsylvania and Colorado.\textsuperscript{299} The Second Restatement calls for the application of the law of the state of injury “unless some other state has a more significant relationship” under the principles enumerated in the Restatement.\textsuperscript{300}

The court performed separate analysis to determine what law should apply to the issues of liability, compensatory damages, and punitive damages.\textsuperscript{301} Since the injury and the alleged misconduct took place in different states, the court considered which state had the greatest interest in regulating the misconduct for purposes of determining the law applicable to liability issues.\textsuperscript{302} While the court acknowledged that all four jurisdictions had some interest in regulating the conduct at issue, Indiana had the greatest interest, especially since the decedents were Indiana residents.\textsuperscript{303}

Indiana law applied to issues of compensatory damage because “the state of the injured plaintiff’s residence has the greatest interest in applying its law to ensure the plaintiff is compensated for his injuries.”\textsuperscript{304} The court recognized that the proper choice of law analysis for determining which state’s punitive damages law should apply was a question of first impression in the Eighth Circuit.\textsuperscript{305} The court considered all of the interested states’ policies toward punitive damages.\textsuperscript{306} Every state but Missouri prohibited the recovery of such damages.\textsuperscript{307} Thus, the

\textsuperscript{296} Id. at *6–7.
\textsuperscript{297} Id. at *4.
\textsuperscript{298} Id.
\textsuperscript{299} Id. at *10.
\textsuperscript{300} Id. at *8 (citing \textsc{Restatement (Second) of Conflict of Laws} § 175 (1971)).
\textsuperscript{301} Id. at *12–23.
\textsuperscript{302} Id. at *14–16.
\textsuperscript{303} Id. at *15.
\textsuperscript{304} Id. at *16.
\textsuperscript{305} Id. at *17–18.
\textsuperscript{306} Id. at *22.
\textsuperscript{307} Id.
court found Missouri and the other states to be in absolute conflict regarding application of punitive damages.\textsuperscript{308} In this circumstance, the court stated that no state had a greater interest in applying its law to the issue of punitive damages.\textsuperscript{309} Thus, the court returned to application of the law of the place of injury.\textsuperscript{310}

VIII. FORUM NON CONVENIENS

A. \textit{Vivas v. Boeing Co.}\textsuperscript{311}

Survivors and representatives of decedents killed in a crash near Pucalpa, Peru brought suit in Illinois state court against Boeing, which manufactured the aircraft, and United Technologies Corporation, which manufactured the aircraft’s engine.\textsuperscript{312} The defendants brought a forum non conveniens motion for dismissal in favor of an action in Peru.\textsuperscript{313} The trial court denied the motion, and the appellate court affirmed.\textsuperscript{314}

The court summarized that: “all of the evidence relevant to the design, manufacture and assembly of the aircraft and its engines is in the United States” and “a significant portion of the evidence regarding the crash is also in the United States, as a result of the participation of the American defendants and American authorities in the investigation of the crash by the Peruvian government,” but “a significant portion of the crash evidence is likely to be still in Peru.”\textsuperscript{315}

In reviewing the factors relevant to the forum non conveniens analysis and the district court’s balancing of those factors, the Appellate Court of Illinois made several interesting observations. The court generally focused on the convenience and interests of litigation in the United States (rather than in Illinois specifically) versus litigation in Peru. For example, when assessing the availability of evidence relevant to the design, manufacture, and assembly of the aircraft, the court weighed the availability of evidence in the United States, rather than specifically in Illinois.\textsuperscript{316} Similarly, in analyzing which jurisdiction had the greater interest in the litigation, it compared the interests of

\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id. at *22–23.
\textsuperscript{311} 911 N.E.2d 1057 (Ill. App. Ct. 2009).
\textsuperscript{312} Id. at 1059.
\textsuperscript{313} Id.
\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{316} Id. at 1069.
the United States (noting only that “Illinois’s interest in these cases is not unrelated to the interest of the United States as a whole”) with the interests of Peru. Specifically, the court stated:

[Product liability actions are not “localized” cases; they are cases “with international implications.” Americans, no less than Peruvians, have a specific interest in the safety of the Boeing Model 737 aircraft which fly in our skies. While Peru certainly has an interest in protecting the people who travel in its skies and in determining damages for people injured or killed on its flights, defendants Boeing and UTC are American corporations, and Americans have an interest in ensuring the safety of the products that its corporations build and ship throughout the world, particularly when one of those corporations has its world headquarters here.

The court also emphasized that when reviewing convenience, the defendants must show that the chosen forum is inconvenient to them—not to the plaintiffs. The court discounted the location of documentary evidence “in the modern age of email, internet, telefax, copying machines and world-wide delivery services.”

Finally, the court questioned the motives of the defendants in seeking the forum non conveniens transfer:

While the defendants have had the opportunity to participate in the initial investigation, and collect evidence and record findings, plaintiffs now have to play catch-up. When defendants, by the account of their own engineers and employees, had apparently full and immediate access to evidence in the foreign forum, it seems disingenuous for them now to argue that they would lack access to evidence if litigation proceeded here. Defendants already had possession and control of the design evidence. It is also disingenuous for defendants to claim now that the United States has little interest in this tragedy, as they are well aware of the American authorities and corporations that dominated the accident investigation.

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317 Id. at 1071–72.
318 Id. at 1071.
319 Id. at 1069.
320 Id. at 1070.
321 Id. at 1072.
B. King v. Cessna Aircraft Co.\textsuperscript{322}

The Eleventh Circuit addressed the proper forum for lawsuits against Cessna Aircraft Co. arising out the 2001 Milan airport disaster.\textsuperscript{325} Plaintiff King brought suit as personal representative of a U.S. citizen in the U.S. District Court for the Southern District of Florida.\textsuperscript{324} After that, sixty-nine European plaintiffs brought suit in the same court, and the cases were consolidated.\textsuperscript{325} The Eleventh Circuit reviewed the forum non conveniens dismissal of the claims of the European plaintiffs.\textsuperscript{326} The Court of Appeals emphasized that its review was for "clear abuse of discretion" and that it would be improper for it to substitute its own judgment for that of the district court.\textsuperscript{327}

The court proceeded to review the district court's findings with a light touch. The district court properly determined that "Italy [was] an available forum because Cessna [was] willing to submit to jurisdiction and [was] amenable to process there."\textsuperscript{328} The court reviewed the district court's weighing of private factors, which the lower court had found to be "in or near equipoise."\textsuperscript{329} The European plaintiffs specifically challenged the court's analysis that a foreign plaintiff's choice of forum is entitled to less deference than a domestic plaintiff's choice.\textsuperscript{330} They pointed out that the majority of them were from countries with treaties that accorded them with "no less favorable" access to U.S. courts than a U.S. citizen is entitled to.\textsuperscript{331} The Eleventh Circuit rejected this argument, stating that the analysis is ultimately about the convenience of the parties, not about citizenship per se.\textsuperscript{332} The court compared the lesser deference afforded to non-citizens to that which would be afforded to U.S. citizens living abroad, noting that it could assume both were not choosing the U.S. forum for convenience.\textsuperscript{333} The appellate

\textsuperscript{322} 562 F.3d 1374 (11th Cir. 2009).
\textsuperscript{323} Id. at 1377.
\textsuperscript{324} Id. at 1378.
\textsuperscript{325} Id.
\textsuperscript{326} Id. at 1377.
\textsuperscript{327} Id. at 1381.
\textsuperscript{328} Id. at 1382.
\textsuperscript{329} Id. at 1382-84.
\textsuperscript{330} Id. at 1382.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at 1383.
\textsuperscript{333} Id.
court likewise endorsed the district court's analysis of public interest factors.\textsuperscript{354}

The Eleventh Circuit modified the district court's dismissal order to require that Cessna submit to jurisdiction, to waive the statute of limitations, and to provide that any of the consolidated cases might be reinstated should the Italian courts refuse jurisdiction.\textsuperscript{355}

C. \textit{Melgares v. Sikorsky Aircraft Corp.}\textsuperscript{336}

The U.S. District Court for the District of Connecticut dismissed on forum non conveniens grounds a consolidated product liability action arising out of the crash of a Sikorsky S-16N helicopter into the Atlantic Ocean near Spain on July 8, 2006.\textsuperscript{337}

All of the plaintiffs in the action and all of the decedents they represented were Spanish citizens.\textsuperscript{338} The defendants—the manufacturer of the helicopter, Sikorsky Aircraft Corp., and its parent corporation, United Technologies Corporation—were U.S. corporations, and the helicopter was manufactured in Connecticut.\textsuperscript{339}

Assessing the deference to give to the plaintiff's choice of forum, the district court focused on the inconvenience of the District of Connecticut for the plaintiffs, stating:

[T]his court is bound by the Second Circuit's instruction that, "when [a] foreign plaintiff chooses a United States forum, a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries." Consequently, this court recognizes that the plaintiffs likely have a pecuniary interest in having this dispute adjudicated in the United States, and this interest was likely a factor in their decision to bring suit in the District of Connecticut.\textsuperscript{340}

As a result, the plaintiffs were entitled to less deference in their choice of forum.\textsuperscript{341}

\textsuperscript{354} \textit{Id.} at 1384.

\textsuperscript{355} \textit{Id.}

\textsuperscript{356} 613 F. Supp. 2d 231 (D. Conn. 2009).

\textsuperscript{357} \textit{Id.} at 235.

\textsuperscript{358} \textit{Id.} at 241.

\textsuperscript{359} \textit{Id.} at 235, 237.

\textsuperscript{360} \textit{Id.} at 242–45 (citing Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 155 (2d Cir. 2005)).

\textsuperscript{341} \textit{Id.}
Examining the private factors at play, the court was principally concerned that the entities responsible for maintaining the helicopter—which the defendants asserted were responsible for the crash—were not amenable to process in the United States. The defendants, on the other hand, had unequivocally submitted to jurisdiction in Spain. The court considered that the defendants had “already produced thousands of pages related to the S-61N” and that “these documents were produced on compact disc which can be transported to Spain quite easily.” The court likewise concluded that the public interest factors favored litigation in Spain primarily because it concluded that Spain had a greater interest in the litigation and because Spanish law would likely apply in the case.

D. *Fredriksson v. Sikorsky Aircraft Corp.*

Sikorsky Aircraft Corp. was successful in another forum non conveniens motion in the District of Connecticut in *Fredriksson.* This case arose out of the crash of a Finland-based Sikorsky S-76C+ helicopter into Estonian territorial waters. The plaintiffs, as well as their decedents, were citizens of the Republic of Finland. The defendants were U.S. corporations, based in either Connecticut or California.

Like *Melgares*, this case also included issues related to the helicopter’s maintenance, this time in Finland. Further, although the accident occurred in the territorial waters of Estonia and the defendant’s alleged negligence occurred in the United States, the court concluded that it was likely that the law of Finland would apply to the case, focusing on the alleged negligence of the helicopter’s maintainers, among other factors. In an analysis ultimately quite similar to that conducted in *Melgares*, the court granted the defendants forum non conveniens motion.

542 Id. at 247.
543 Id.
544 Id. at 246.
545 Id. at 249, 251–52.
547 Id. at *3.
548 Id. at *2, *6.
549 Id. at *10.
550 Id. at *10–11.
551 Id. at *22; *see supra Part VII.C.
552 Id. at *59–62.
553 Id. at *63–66.