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## Federal Tort Claims Act - Seventh Circuit's LeGrande Opinion Is Almost a Knockout

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**FEDERAL TORT CLAIMS ACT—SEVENTH CIRCUIT’S  
LEGRANDE OPINION IS ALMOST A KNOCKOUT**

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**I**N *LEGRANDE V. UNITED STATES*, the Seventh Circuit held that an air traffic controller employed by the Federal Aviation Administration (FAA) breached no duty to a flight attendant who was rendered unconscious during severe, in-flight turbulence when the air traffic controller chose not to provide the flight’s pilots with two Meteorological Impact Statements (MIS) and a Center Weather Advisory (CWA).<sup>1</sup> In so holding, the court protected the commercial airline pilots from having to digest a potentially debilitating amount of weather information while in flight.<sup>2</sup> However, the court erroneously rejected out of hand the plaintiff’s claim that the CWA should have been issued to Flight 2745.<sup>3</sup> Some weather forecasts and reports received by the FAA are broadcast to relevant flights for flight safety and efficiency because “[p]ilots in command of aircraft aloft need real time weather information to handle current situations on the aircraft’s route of travel.”<sup>4</sup> However, it would have been inappropriate for the air traffic controller to disseminate general air traffic MIS “planning forecast[s]”<sup>5</sup> to the pilots during flight because the generality of the information contained in MISs would have inundated the pilots with superfluous data, which would have likely caused confusion and distraction. Even still, the court should not have haphazardly dismissed at the sum-

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<sup>1</sup> *LeGrande v. United States*, 687 F.3d 800, 802 (7th Cir. 2012).

<sup>2</sup> *See id.* at 811–12.

<sup>3</sup> *See id.* at 802.

<sup>4</sup> *Id.* at 804.

<sup>5</sup> NAT’L WEATHER SERV., NAT’L OCEANIC & ATMOSPHERIC ADMIN., DEP’T OF COMMERCE, NATIONAL WEATHER SERVICE INSTRUCTION 10-803 § 7.5 (2005) [hereinafter NATIONAL WEATHER SERVICE INSTRUCTION 10-803], available at <http://www.nws.noaa.gov/directives/010/archive/pd01008003c.pdf>.

mary judgment stage any contention that the plaintiff's final flight should have received the CWA issued for a separate area.

The plaintiff was working as a flight attendant for Southwest Airlines (SWA) on February 20, 2006.<sup>6</sup> The plaintiff's plane made several trips across the Midwest that day.<sup>7</sup> The plane's second-to-last route was from Chicago to Cleveland, and the final leg was a return flight heading west from Cleveland back to Chicago, operating as Flight 2745.<sup>8</sup> Throughout the day, the FAA received two MISs and one CWA.<sup>9</sup> The first MIS, MIS 02, was issued at 2:42 p.m. and applied to altitudes between 17,000 and 27,000 feet.<sup>10</sup> MISs are "unscheduled flow control and flight operations planning forecast[s]" issued for the benefit of air traffic controllers and are valid up to twelve hours after they are released.<sup>11</sup> MIS 02 warned FAA personnel that "frequent moderate turbulence to isolated severe turbulence could develop over portions of Michigan, New York, Ohio[,] and Pennsylvania."<sup>12</sup> The second MIS, "MIS 03, was issued at 9:06 p.m. and" warned of the same turbulence over the same area but covered a higher altitude, up to 32,000 feet.<sup>13</sup> At 8:31 p.m., the FAA received a CWA, a more specific weather product that warns air crews of adverse weather covering a narrow area over a maximum two-hour time frame.<sup>14</sup> CWAs are read aloud by air traffic controllers to all pilots on a radio frequency, and controllers advise pilots to tune into radio weather reports if the CWA contains certain weather conditions.<sup>15</sup> The 8:31 p.m. CWA was issued in response to yet another type of weather product called a Pilot's Report (PIREP), which was sent by a pilot experiencing "severe turbulence at 32,000 feet in airspace *east* of Cleveland."<sup>16</sup> The meteorologist responsible for MIS 02, MIS 03, and the CWA "believed the weather system was moving east from Cleveland."<sup>17</sup> The air

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<sup>6</sup> *LeGrande*, 687 F.3d at 805.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> NATIONAL WEATHER SERVICE INSTRUCTION 10-803, *supra* note 5, § 7.5.

<sup>12</sup> *LeGrande*, 687 F.3d at 805.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 804.

<sup>16</sup> *Id.* at 805.

<sup>17</sup> *Id.*

traffic controller in Cleveland did not inform “Flight 2745 of MIS 02, MIS 03, or the CWA.”<sup>18</sup>

Shortly after takeoff from Cleveland Hopkins International Airport at 9:40 p.m., a physical bump caused the pilots to instruct flight attendants to sit down, and “[w]ithin five seconds of the pilots’ order, Flight 2745 encountered severe turbulence for approximately fifteen seconds.”<sup>19</sup> The plaintiff, a flight attendant, was unable to buckle into a seat and was injured during the turbulence, rendered unconscious, and cared for by several physicians until the plane arrived in Chicago.<sup>20</sup> As a result of this encounter with turbulence, Flight 2745 broadcast its own PIREP at 9:58 p.m.<sup>21</sup>

The plaintiff filed an administrative claim with the FAA on September 20, 2007, seeking \$25 million for her injuries and alleging that the United States, through the FAA and its employees, breached duties owed to her and therefore acted negligently.<sup>22</sup> Her claim was denied.<sup>23</sup> The plaintiff then filed an action against the United States under the Federal Tort Claims Act (FTCA) in the U.S. District Court for the Northern District of Illinois, alleging that the controller negligently failed to advise the pilots of Flight 2745 of two PIREPs of turbulence near the plane’s flight path.<sup>24</sup> The plaintiff amended her complaint after it was discovered that one of the two PIREPs complained of was that sent by Flight 2745.<sup>25</sup> The plaintiff alleged that the United States failed to “‘provide the pilot of SWA Flight 2745 with . . . known, existing, pertinent pilot reports, weather reports, advisories and impact statements and forecasts’” furnished by a meteorologist to the FAA air traffic controller that relayed information about “‘severe clear air turbulence existing in and near the flight path and chosen altitude of SWA Flight 2745.’”<sup>26</sup>

Both the plaintiff and the United States filed cross-motions for summary judgment after discovery.<sup>27</sup> The plaintiff clarified her claims in the summary judgment filings, stating that MIS 02,

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<sup>18</sup> *Id.* at 806.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 807.

<sup>27</sup> *Id.*

MIS 03, and the CWA all alerted the FAA to the existence “of severe turbulence in the airspace through which [the FAA] knew Flight 2745 would be flying.”<sup>28</sup> The United States denied the existence of a duty, the breach of a duty, and that the FAA caused the plaintiff’s injuries.<sup>29</sup> The district court granted summary judgment for the United States, ruling that although “an FAA controller owes a duty of reasonable care to an aircraft, passengers, crews, and cargoes in the performance of the controller’s duties,” the controller here was not put on notice that there would be turbulence in the flight path of Flight 2745 heading west, and thus there was no duty to provide MIS 02 or MIS 03 to Flight 2745.<sup>30</sup> The plaintiff appealed and added a complaint against the meteorologist who provided the weather products to the FAA,<sup>31</sup> but that claim is outside the scope of this Note.

The Seventh Circuit, reviewing the district court’s ruling *de novo*, affirmed the grant of summary judgment in favor of the United States regarding the claim against the air traffic controller for two reasons: (1) the scope of the duty that air traffic controllers owe to persons on board in-flight aircraft does not require controllers to disseminate MISs to the pilots; and (2) the CWA at issue was not relevant to the flight path of Flight 2745.<sup>32</sup>

Before reaching this ruling, the court needed to determine what tort law applied under the FTCA.<sup>33</sup> The FTCA waives the United States’ sovereign immunity “‘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.’”<sup>34</sup> The court concluded that Ohio negligence law governed the suit because the injury occurred in Ohio airspace,<sup>35</sup> but the court also found that federal standards informed the scope of air traffic controllers’ duties.<sup>36</sup> Ordinary negligence in Ohio requires (1) the existence of a legal duty;

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *LeGrande v. United States*, 774 F. Supp. 2d 910, 920, 924–25 (N.D. Ill. 2011).

<sup>31</sup> *LeGrande*, 687 F.3d at 812.

<sup>32</sup> *Id.* at 807, 812–13.

<sup>33</sup> *Id.* at 808.

<sup>34</sup> *Id.* (quoting 28 U.S.C. § 1346(b)).

<sup>35</sup> *Id.* at 808.

<sup>36</sup> *Id.* at 809.

(2) that the defendant breach the duty; and (3) that the breach proximately cause an injury.<sup>37</sup>

The court concluded that the plaintiff failed to cite any federal regulation, directive, or authority requiring air traffic controllers to broadcast MISs to pilots.<sup>38</sup> The court cited an FAA job order in effect at the time of the injury that stated which weather products a controller should broadcast to pilots as a Hazardous Inflight Weather Advisory Service (HIWAS).<sup>39</sup> This job order provided that “[c]ontrollers shall advise pilots of hazardous weather that may impact operations within 150 [nautical miles] of their sector or area of jurisdiction. Hazardous weather information contained in HIWAS broadcasts includes” CWAs.<sup>40</sup> The court stated that controllers do not “broadcast detailed in-flight weather advisories”; instead, they merely read “limited information on a General Information Strip to inform pilots that an advisory has been published” and advise the pilots to tune in to a different frequency for more information.<sup>41</sup> Notably, that frequency never broadcasts the contents of MISs because they are irrelevant to pilots during flight.<sup>42</sup> Also, the court mentioned that the definition of “Hazardous Weather Information” contained in the FAA Pilot/Controller Glossary includes information from various products, including CWAs, but MISs are missing from that list.<sup>43</sup>

It is important to note that meteorologists provide MISs to FAA personnel “responsible for making flow control-type decisions” that detail “weather conditions expected to adversely impact air traffic flow.”<sup>44</sup> The court explained that “[a]n MIS is designed as a broad prediction; it is valid for up to twelve hours and can cover a wide geographic area.”<sup>45</sup> MIS 02 and MIS 03 both covered wide airspace above parts of Michigan, New York, Ohio, and Pennsylvania.<sup>46</sup> CWAs, in contrast, are not “flight planning product[s] because of [their] short lead time and du-

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<sup>37</sup> *Id.* at 808 (quoting *Wallace v. Ohio Dep’t of Commerce*, 773 N.E.2d 1018, 1025–26 (Ohio 2002)).

<sup>38</sup> *Id.* at 810.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting FAA, U.S. Dept. of Transp., Order No. 7110.65P § 2-6-2 (Feb. 19, 2004)).

<sup>41</sup> *Id.* at 810–11.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 811.

<sup>44</sup> NATIONAL WEATHER SERVICE INSTRUCTION 10-803, *supra* note 5, § 7.5.

<sup>45</sup> *LeGrande*, 687 F.3d at 804.

<sup>46</sup> *Id.* at 811–12.

ration.”<sup>47</sup> They are prepared by meteorologists as a warning for “air crews to anticipate and avoid adverse weather conditions in the en route and terminal environments.”<sup>48</sup> Here, the court decided that both MIS 02 and MIS 03 covered far too much time and airspace to be relevant to the pilots of Flight 2745, especially given the facts that MISs are general forecasts and that these particular forecasts described moderate turbulence with only isolated severe turbulence.<sup>49</sup> According to the court, this meant the FAA air traffic controller had no duty to disseminate the MIS 02 and MIS 03 weather forecasts to any flights.<sup>50</sup> In addition, the air traffic controller had no duty to disseminate to Flight 2745 the CWA issued by the meteorologist at 8:31 p.m. because it did not cover airspace relevant to that flight.<sup>51</sup>

The Seventh Circuit’s holding should be partitioned by the two types of weather products the court analyzed in making its decision.<sup>52</sup> Because MISs and CWAs are entirely different products with entirely different applications and purposes, the court treated them as such when analyzing the proper standard of care owed by an FAA air traffic controller.<sup>53</sup> The court expended considerable energy dissecting the applicable duties of controllers regarding MISs, yet the court apparently had little energy left to analyze the applicability of CWAs to the duty of an air traffic controller to provide weather information to pilots.<sup>54</sup> The court correctly determined that the controller had no duty to pass any information gleaned from the MISs because they are not intended for the benefit of pilots and might even cloud a pilot’s decision making due to the large amount of information that pilots already face in flight.<sup>55</sup> However, the court incorrectly decided that the air traffic controller had no duty to relay the information contained in the CWA issued at 8:31 p.m. to the pilots of Flight 2745. Additionally, the court failed to even address any argument that the CWA applied to Flight 2745.<sup>56</sup>

Regarding MIS 02 and MIS 03, the court correctly decided that MISs simply are not the type of weather product that should

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<sup>47</sup> NATIONAL WEATHER SERVICE INSTRUCTION 10-803, *supra* note 5, § 7.6.

<sup>48</sup> *Id.*

<sup>49</sup> *LeGrande*, 687 F.3d at 812.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 803–04.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 808–11.

<sup>55</sup> *See id.* at 812.

<sup>56</sup> *See id.* at 805.

be issued to pilots. Pilots need accurate real-time data—not general weather forecasts that last hours and cover thousands of feet of airspace spanning several states.<sup>57</sup> MIS 02 and MIS 03 merely forecasted that “moderate turbulence to isolated severe turbulence could develop” over a 15,000-foot span of airspace across portions of four states.<sup>58</sup> The court correctly established that MISs, as described by FAA job orders, are meant only to inform air traffic controllers of upcoming weather.<sup>59</sup> It is illogical that a pilot, worried about the lives of passengers and crew, would want or even need to know that moderate turbulence *could* come into play at *some* time over a twelve-hour period. The information would cause confusion and inundate pilots with information, diverting their attention from more immediate and concrete dangers. The court in *LeGrande* hit this issue on the head, refusing to extend the scope of the controller’s duty to disseminate weather information to also require disclosure of MISs.<sup>60</sup>

However, the court does not deserve wholehearted praise. In focusing its main attack on the plaintiff’s claim that information from MIS 02 and MIS 03 should have been communicated to the pilot of Flight 2745, the court hardly confronted the issue of whether the controller should have communicated information from the CWA to Flight 2745.<sup>61</sup> The court merely stated in concluding its analysis of the controller’s duties that “air traffic controllers [had no] duty to broadcast the CWA to Flight 2745; it was limited to airspace that Flight 2745 would not traverse on its path from Cleveland to Chicago.”<sup>62</sup> The meteorologist responsible for the CWA issued it to the FAA because of a PIREP sent by an aircraft reporting “severe turbulence” at 32,000 feet.<sup>63</sup> Several other PIREPs were sent by pilots prior to the CWA, though none were directly in Flight 2745’s path.<sup>64</sup> These PIREPs included one reporting severe turbulence at 6:18 p.m. over Windsor, Ontario; one reporting the same at 6:45 p.m. over Boiler VHF Omnidirectional Radio Range; and one reporting moderate to

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<sup>57</sup> *See id.* at 811–12.

<sup>58</sup> *Id.* at 805.

<sup>59</sup> *See id.* at 811.

<sup>60</sup> *See id.* at 812.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* at 805.

<sup>64</sup> *LeGrande v. United States*, 774 F. Supp. 2d 910, 916–17 (N.D. Ill. 2011).



severe turbulence at 8:10 p.m. over Portland, Indiana.<sup>65</sup> Though these PIREPs did not cover areas in Flight 2745's direct path and though the meteorologist responsible for the CWA and MISs believed the weather system was moving east,<sup>66</sup> the fact that the MISs covered a large area around the Cleveland Airport should have given pause to the court in determining that no fact issue existed as to whether the CWA should have been issued to Flight 2745.

Despite the *de novo* standard of review applicable here, the court nonetheless paid lip service to construing inferences in favor of the plaintiff when considering the United States' summary judgment motion.<sup>67</sup> The point of the CWA was to warn relevant flights of a hazard, but the court improperly rejected the claim that the CWA should have been issued to Flight 2745, simply stating that the CWA was not pertinent to Flight 2745.<sup>68</sup> Yet Flight 2745's pilot received a pre-flight packet containing weather information such as PIREPs describing turbulence.<sup>69</sup> One private meteorologist had predicted turbulence at 20,000 to 26,000 feet.<sup>70</sup> These facts should have informed the court's analysis, but the court merely stated that the CWA was not relevant because it did not cover airspace directly in the path of Flight 2745.<sup>71</sup> The court should have spent more time analyzing Ms. LeGrande's claim regarding the CWA.

The Seventh Circuit in *LeGrande* properly circumscribed the scope of the duty that air traffic controllers owe to pilots, crews, and passengers regarding MISs, but it improperly decided that there was no fact issue about whether the CWA should have been issued to Flight 2745. Pilots can now rest assured that their cockpits are protected from unwieldy weather forecasts.<sup>72</sup> But passengers and crews of commercial airliners should be wary of alleging that an air traffic controller failed to provide pilots with just the type of weather information intended for their in-flight safety. The Seventh Circuit may answer these claims with conclusory determinations.

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<sup>65</sup> *Id.*

<sup>66</sup> *LeGrande*, 687 F.3d at 805.

<sup>67</sup> *See id.* at 807 (citing *Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 359 (7th Cir. 2011), for the rule that a court should construe inferences against the moving party).

<sup>68</sup> *See id.* at 812.

<sup>69</sup> *Id.* at 805–06.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 812.

<sup>72</sup> *See id.*